Federal Court Cour fédérale

Date: 20160216

Docket: T-1268-15

Citation: 2016 FC 207

Toronto, Ontario, February 16, 2016

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

JINSHENG ZHAO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Canadian citizenship is a privilege. The onus falls on an applicant to establish having met the requirements of the *Citizenship Act*, RSC 1985, c C-29 [Act] in order to be granted citizenship (*Canada (Minister of Citizenship and Immigration) v Pereira*, 2014 FC 574 at para 21 [*Pereira*]). In the present case, the Applicant did not meet the requirements.

[2] In *Baig v Canada (Minister of Citizenship and Immigration)*, 2012 FC 858 as stated by Justice Donald J. Rennie:

> [14] It is axiomatic that the onus rests on the applicant to establish on a balance of probabilities that he or she meets the residency requirements for citizenship. The thrust of the applicant's argument is that the Judge, having given the applicant a further opportunity to produce documents, was obligated to advise the applicant of his specific concerns as to the evidence of residency presented by the applicant. I do not agree. In essence, the applicant seeks to shift the evidentiary burden back to the Judge, whereas it rest[s] squarely with the applicant.

II. Background

[3] The Applicant, Jinsheng Zhao (age 44), is a permanent resident in Canada and a citizen of China.

[4] The Applicant first arrived in Canada in August 2004 with a student visa, and, became a permanent resident on February 10, 2011. On August 20, 2014, the Applicant submitted his citizenship application and it was received by Citizenship and Immigration Canada [CIC] on August 25, 2014. The Applicant alleges that he was physically present in Canada from February 10, 2011 until he applied for Canadian citizenship on August 20, 2014 [Reference Period].

[5] On February 26, 2015, the Applicant was interviewed by a Citizenship Officer; and, upon the interview, he was requested to submit additional documents to corroborate his presence in Canada during the Reference Period. Specifically, he was asked to provide the following

documents, failing to do so within thirty days without a reasonable explanation, his application would be deemed abandoned:

- Any passports and/or travel documents, valid or expired, that were valid during the Reference Period;
- Rental agreements, leases or mortgage documents;
- Employment records for all jobs held during the Reference Period;
- Original transcripts for all educational institutions attended during the Reference Period;
- Notice of assessment from the Canada Revenue Agency for the tax years [illegible];
- Provincial/Territorial personal health claim summary;
- Credit card statements; and,
- Banking information.

(See CIC Records, at pp 39-40)

[6] On February 27, 2015, the Applicant made a Personal Information Request to the Canada Border Services Agency for an Integrated Customs Enforcement System Traveller History Report [ICES Report]; which was sent to him on March 29, 2015.

[7] On April 6, 2015, the Applicant submitted to CIC the ICES Report, which indicates that he did not re-enter Canada during the Reference Period; as well as his passports, which do not appear to bear exit or entry stamps from during the Reference Period. The Applicant refused to submit any further documents, arguing that “demanding that I complete the *residence*

questionnaire and submit all the additional documents is excessive, oppressive, vexatious and, therefore, patently illegal (if not discriminatory)" (CIC Records, at p 7).

[8] On May 15, 2015, CIC sent a final reminder to the Applicant to provide all the required documents; and, if the Applicant fails to do so within thirty days from the date of the letter, without valid explanation, his citizenship application will be treated as abandoned, his file will be closed, and, no further action will be taken with regard to his case.

[9] On May 19, 2015, the Applicant sent a letter to CIC wherein he stated that his citizenship application was complete, as he was of the opinion that he provided sufficient documents to establish his effective presence in Canada during the Reference Period; and, consequently, refused to submit the additional documents requested by the Citizenship officer.

[10] On June 29, 2015, the Applicant filed a *mandamus* application against the Respondent (T-1076-15). His application for leave was rejected by Justice Anne L. Mactavish on October 7, 2015.

[11] On July 10, 2015, the Respondent sent a letter to the Applicant informing him that his application for Canadian citizenship was now treated as abandoned.

III. Notice of Constitution Question

[12] The Applicant submits that sections 13.2 and 23.1 of the Act are not constitutionally valid.

[13] In accordance with section 57 of the *Federal Courts Act*, RSC 1985, c F-7 [FCA], where a party is contesting the constitutional validity, applicability or operability of an Act of Parliament, a party must serve a notice to the Attorney General of Canada and the attorney general of each province ten days before the constitutional question is to be argued:

Constitutional questions	**Questions constitutionnelles**
57 (1) If the constitutional validity, applicability or operability of an Act of Parliament or of the legislature of a province, or of regulations made under such an Act, is in question before the Federal Court of Appeal or the Federal Court or a federal board, commission or other tribunal, other than a service tribunal within the meaning of the National Defence Act, the Act or regulation shall not be judged to be invalid, inapplicable or inoperable unless notice has been served on the Attorney General of Canada and the attorney general of each province in accordance with subsection (2).	**57** (1) Les lois fédérales ou provinciales ou leurs textes d'application, dont la validité, l'applicabilité ou l'effet, sur le plan constitutionnel, est en cause devant la Cour d'appel fédérale ou la Cour fédérale ou un office fédéral, sauf s'il s'agit d'un tribunal militaire au sens de la Loi sur la défense nationale, ne peuvent être déclarés invalides, inapplicables ou sans effet, à moins que le procureur général du Canada et ceux des provinces n'aient été avisés conformément au paragraphe (2).
Time of notice	**Formule et délai de l'avis**
(2) The notice must be served at least 10 days before the day on which the constitutional question is to be argued, unless the Federal Court of Appeal or the Federal Court or the federal board, commission or other tribunal, as the case may be, orders otherwise.	(2) L'avis est, sauf ordonnance contraire de la Cour d'appel fédérale ou de la Cour fédérale ou de l'office fédéral en cause, signifié au moins dix jours avant la date à laquelle la question constitutionnelle qui en fait l'objet doit être débattue.

Federal Courts Rules, SOR/98-106 [FCR]:

Notice of constitutional question	**Avis d'une question constitutionnelle**
A notice of a constitutional question referred to in section 57 of the Act shall be in Form 69.	L'avis d'une question constitutionnelle visé à l'article 57 de la Loi est rédigé selon la formule 69.

[14] The purpose of section 57 of the FCA is to ensure that this Court has "a full evidentiary record before invalidating legislation and that governments are given the fullest opportunity to support the validity of legislation: see *Eaton*, at para. 48" (*Guindon v Canada*, 2015 SCC 41 at para 19). Absence of consent by the Attorney General, or *de facto* notice, such notice is mandatory and cannot be waived by the Court were a party alleged the constitutional validity, applicability or operability of an Act of Parliament (*Tran v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FC 600 at para 5; *Ishaq v Canada (Minister of Citizenship and Immigration)*, 2015 FC 156 at para 12; *Eaton v Brant County Board of Education*, [1997] 1 SCR 241).

[15] In the present case the Applicant did not submit the required notice, as prescribed by section 57 of the FCA and section 69 of the FCR, neither did the attorney generals consent or received *de facto* notice by the Applicant contesting the constitutional validity, applicability or operability of sections 13.2 or 23.1 of the Act. While it is true that the Applicant stated, in his letter to CIC dated April 6, 2015, that the request by the Citizenship Officer for additional documents is "excessive, oppressive, vexatious and, therefore, patently illegal (if not discriminatory" (CIC Records, p 7); the Court does not find this to be *de facto* notice. The Court reads this statement as an assertion by the Applicant that the Citizenship Officer's decision to request additional documentation was unreasonable; therefore, illegal as it was a breach of his

power. Such statement could not be read as meaning that the Applicant was *de facto* giving a notice to the attorney general that he was challenging the constitutional validity, applicability or operability of sections 13.2 or 23.1 of the Act.

IV. Issues

[16] Given the foregoing, the Court considers that the only issues central to this application for judicial review are the following:

1. Did the CIC's decision to treat the Applicant's citizenship application as abandoned unreasonable?
2. Did CIC fail to provide sufficient reasons in its decision?

V. Legislation

Abandonment of application	**Abandon de la demande**
13.2 (1) The Minister may treat an application as abandoned	**13.2** (1) Le ministre peut considérer une demande comme abandonnée dans les cas suivants :
(*a*) if the applicant fails, without reasonable excuse, when required by the Minister under section 23.1,	*a*) le demandeur omet, sans excuse légitime, alors que le ministre l'exige au titre de l'article 23.1 :
(i) in the case where the Minister requires additional information or evidence without requiring an appearance, to provide the additional information or evidence by the date specified, or	(i) de fournir, au plus tard à la date précisée, les renseignements ou les éléments de preuve supplémentaires, lorsqu'il n'est pas tenu de comparaître pour les présenter,
(ii) in the case where the Minister requires an appearance for the purpose of providing additional	(ii) de comparaître aux moment et lieu — ou au moment et par le moyen — fixés, ou de fournir les

information or evidence, to appear at the time and at the place — or at the time and by the means — specified or to provide the additional information or evidence at his or her appearance; or

renseignements ou les éléments de preuve supplémentaires lors de sa comparution, lorsqu'il est tenu de comparaître pour les présenter;

(*b*) in the case of an applicant who must take the oath of citizenship to become a citizen, if the applicant fails, without reasonable excuse, to appear and take the oath at the time and at the place — or at the time and by the means — specified in an invitation from the Minister.

b) le demandeur omet, sans excuse légitime, de se présenter aux moment et lieu — ou au moment et par le moyen — fixés et de prêter le serment alors qu'il a été invité à le faire par le ministre et qu'il est tenu de le faire pour avoir la qualité de citoyen.

Effect of abandonment

(2) If the Minister treats an application as abandoned, no further action is to be taken with respect to it.

Effet de l'abandon

(2) Il n'est donné suite à aucune demande considérée comme abandonnée par le ministre.

[…]

…

Additional information, evidence or appearance

23.1 The Minister may require an applicant to provide any additional information or evidence relevant to his or her application, specifying the date by which it is required. For that purpose, the Minister may require the applicant to appear in person or by any means of telecommunication to be examined before the Minister or before a citizenship judge, specifying the time and the place — or the time and the means — for the appearance.

Autres renseignements, éléments de preuve et comparution

23.1 Le ministre peut exiger que le demandeur fournisse des renseignements ou des éléments de preuve supplémentaires se rapportant à la demande et préciser la date limite pour le faire. Il peut exiger à cette fin que le demandeur comparaisse — devant lui ou devant le juge de la citoyenneté pour être interrogé — soit en personne et aux moment et lieu qu'il fixe, soit par le moyen de télécommunication et au moment qu'il fixe.

VI. Parties Submissions

[17] The Applicant submits that the Minister erred by requesting additional information or evidence subsequently to his interview with the Citizenship Officer, as he allege having submitted sufficient evidence – namely his passport and the ICES Report – demonstrating that he was effectively present in Canada during the Reference Period. Secondly, the Applicant submits that the Minister's decision fails to meet the requirement for cogent and intelligible reasons; thus, the Minister breached procedural fairness.

[18] On the contrary, the Respondent submits that the Minister was in its right to request additional information and corroborating documents in order to assist the decision-maker in determining whether an applicant meets the residency requirement. The Applicant was clearly given notice more than once that if he did not provide the requested documents, his citizenship application would be treated as abandoned; yet, the Applicant refused to submit the requested documents. Therefore, the Minister's decision to treat the Applicant's citizenship application as abandoned was reasonable. The Applicant has not demonstrated improper conduct by the Minister; as a result, the Minister did not err in its decision to treat the Applicant's citizenship application as abandoned.

VII. Standard of Review

[19] The standard of review of reasonableness applies to the determination of the Minister that the citizenship application was abandoned; and, as to whether the Minister provided adequate

reasons (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, [2011] 3 SCR 708, 2011 SCC 62 at para 16 [*Newfoundland and Labrador Nurses*]).

VIII. Analysis

A. *Additional documentation*

[20] Canadian citizenship is a privilege. The onus falls on an applicant to establish having met the requirements of the Act in order to be granted citizenship (*Pereira*, above at para 21). Conversely, if an applicant meets the requirements of the Act, he or she must be granted citizenship (*Saad v Canada (Minister of Citizenship and Immigration)*, 2013 FC 570 at para 21 [*Saad*]; *Martinez-Caro v Canada (Minister of Citizenship and Immigration)*, 2011 FC 640). The responsibility of determining the extent and nature of evidence to put forth by an applicant, in order to determine if the applicant meets the residency requirement of the Act, falls under the original citizenship decision-maker. Although an applicant does not have to corroborate with evidence his testimony, "it would be extremely unusual and perhaps reckless, to rely on the testimony of an individual to establish his residency, with no supporting documentation" (*Canada (Minister of Citizenship and Immigration) v El Bousserghini*, 2012 FC 88 at para 19 [*El Bousserghini*]). In the present case, given the context, the Citizenship Officer asked the Applicant to submit additional documents in support of his residency application. The Applicant refused to provide the requested documents; preferring instead to submit his passports and the ICES Report, which, in his opinion, sufficiently demonstrate that he met the requirements of the Act.

[21] It is true that passports may be used as evidence to corroborate the effective presence in Canada of an applicant (*Saad*, above at para 26); but, it cannot be said that they constitute irrefutable proof of a person's presence in Canada (*Ballout v Canada (Minister of Citizenship and Immigration)*, 2014 FC 978 at para 25). An ICES Report may also be found to be supportive evidence (*Canada (Minister of Citizenship and Immigration) v Lee*, 2013 FC 270 at para 50 [*Lee*]); however, an ICES Report is not, in and of itself, sufficient to establish residency (*Lee*, above at para 38).

[22] Given that this Court has held that neither passports nor ICES Report are irrefutable proofs of presence in Canada; and, given the fact that there is a gap in the Applicant's passports, it was reasonable for the Officer to request additional documents. Furthermore, the patent refusal by the Applicant to submit additional documents may have reasonably raised the concerns of the Citizenship Officer:

> [23] Further, the Judge was entitled to draw a negative inference from the applicant's failure to produce his expired passport, which would have been pivotal to supporting his residency application as this passport covered the entirety of the period relevant to the application. I agree with my colleague Justice Eleanor Dawson in *Bains v. Canada (Minister of Citizenship and Immigration)*, [2001] 1 F.C. 284, [2000] F.C.J. No. 1264 (T.D.) (QL) at paragraph 38 that:
>
> > Where a party fails to bring before a tribunal evidence which is within the party's ability to adduce, an inference may be drawn that the evidence not adduced would have been unfavourable to the party.
>
> (*Mizani v Canada (Minister of Citizenship and Immigration)*, 2007 FC 698 at para 23)

[23] As the Canadian citizenship is a privilege that ought not to be granted lightly, it was reasonable for the Minister to request additional documentation that were reasonably necessary, based on the context of this application.

B. *Adequacy of reasons*

[24] Paragraph 13.1(*a*) of the Act, which grants explicit authority for the Minister to treat an application as abandoned, if an applicant fails to provide, without reasonable excuse, additional information or evidence by a specified date, which in this instance came into force on August 1, 2014. The Applicant submitted his citizenship application on August 20, 2014; thus, the Applicant falls under this prohibition.

[25] In interpreting section 13.2 of the Act, the Court must apply Driedger's "modern principal" of statutory interpretation:

> [21] Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
>> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para 21)

[26] Based on the ordinary and grammatical sense of the words, as well as the context, the object of the Act and the intention of Parliament, the Court reads section 13.2 of the Act as meaning that an applicant has an obligation to provide reasonably requested documents, pursuant to section 23.1 of the Act, unless an applicant provides a reasonable excuse as to why he or she is unable to provide the requested documentation. The Court does not read section 13.2 of the Act as allowing an applicant to refuse to submit reasonably requested documentation simply because an applicant does not consider it as such.

[27] In the present case, the Applicant did not provide an excuse as to why he could not provide the requested documents; rather, he provided an excuse as to why he believes that he should not have to submit any further documents and ordered the Minister to grant him Canadian citizenship. The Applicant wrongly believed that his passports and the ICES Report were sufficient evidence to demonstrate that he fulfilled the requirements of the Act.

[28] In its decision, the Minister held that the Applicant did not provide an excuse as to why he could not provide the requested documents. This statement is accurate; as it is clearly given that the Minister's reasons allow the Court to understand how and why the Minister reached the decision; and, it allows the Court to determine whether the Minister's conclusions are within the range of acceptable outcomes (see *Newfoundland and Labrador Nurses*, above at para 16), the Court finds the Minister's decision is reasonable.

IX. Conclusion

[29] Consequently, the application for judicial review is to be dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be dismissed.

There is no serious question of general importance to be certified.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1268-15
STYLE OF CAUSE:	JINSHENG ZHAO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 15, 2016
JUDGMENT AND REASONS:	SHORE J.
DATED:	FEBRUARY 16, 2016

APPEARANCES:

Gregory James	FOR THE APPLICANT
Nicole Rahaman	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Gregory James Barrister & Solicitor Mississauga, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT