Federal Court  Cour fédérale

Date: 20160913

Docket: T-248-16

Citation: 2016 FC 1038

Toronto, Ontario, September 13, 2016

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

CARMEN EZZAT GHALY EBIED

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review pursuant to subsection 14(3) of the *Citizenship Act*, RSC 1985, c C-29 [the Act], of a decision of Citizenship Judge Marie Senécal-Tremblay (the Judge), dated November 20, 2015, denying the applicant's application for Canadian citizenship under paragraph 5(1)(c) of the Act.

II. Facts

[2] The applicant, Carmen Ezzat Ghaly Ebied, was born in Cairo, Egypt, in 1983. Sponsored by her husband, she arrived in Canada on June 21, 2008, and became a Permanent Resident of Canada on December 23, 2008. She filed her original application for citizenship on February 13, 2012. As this application was incomplete (apparently because it was missing a Residence Calculator form), it was returned to the applicant. She completed the application by resubmitting it with the missing form, but without re-signing or re-dating it. The completed application was received on March 5, 2012.

[3] In her application for citizenship, the applicant declared 12 trips during the relevant period (running from June 21, 2008 to February 13, 2012), representing 151 days of absence from Canada. Her Residence Calculator form indicated a physical presence in Canada for 1089 days during the relevant period, representing a shortfall of six days from the required 1095 days.

[4] The applicant filled out two Residence Questionnaires (sent on July 29, 2013, and on March 3, 2015), but neither addressed her shortfall with respect to days spent in Canada during the relevant period. This prompted an interview with a Citizenship Officer. Further to her interview, the applicant was referred to a hearing before the Judge.

III. Impugned Decision

[5] The applicant's citizenship hearing took place on September 21, 2015. The Judge identified the relevant period as running between June 21, 2008 and February 13, 2012, and

examined the evidence of the applicant's physical presence in Canada during that time, pursuant to s 5(1)(c) of the Act.

[6] The Judge first constructed and reviewed a chart listing minor inconsistencies between the applicant's absences as indicated in her application, her questionnaire, her passport stamps, and her Integrated Customs Enforcement System report. The applicant submitted additional evidence after the hearing to clarify these inconsistencies, which the Judge accepted as factual. After reviewing all of the available evidence, the Judge concluded that the applicant had been absent from Canada for 152 days during the relevant period, indicating a shortfall of seven days. The applicant did not address this shortfall before the Judge at her hearing.

[7] The Judge subsequently considered the evidence available with respect to the applicant's employment and studies in Canada. In relation to the applicant's studies, the Judge noted that the applicant had taken French courses when she arrived in Canada, as demonstrated by a certificate confirming the completion of 100 hours of lessons between August and September 2008. Other evidence with respect to further studies, namely a form seeking admission into another French course, was found to be of low probative value.

[8] In relation to the applicant's employment history, the Judge noted that the applicant stated in her questionnaire that she worked at her husband's weight loss clinic from April 26, 2009 to September 14, 2011. However, since the applicant's son was born on May 30, 2009, the Judge noted that the applicant had been absent on maternity leave for the majority of that period. The Judge also noted the applicant's employment at Aer Rienta Duty Free at Pierre Elliott

Trudeau International Airport. In her questionnaire, the applicant stated that she had worked at the airport for 16 months, between March 2012 and July 2013, but her record of employment indicated that she had only worked there for five months, again as a result of taking maternity leave. The Judge further noted that the applicant had not worked since that date.

[9] In relation to the applicant's income, the Judge reviewed the Notices of Assessment submitted by the applicant from the Canada Revenue Agency, as well as the information provided with regards to the applicant's husband's income, who she stated supported her. The Judge noted that there was an inconsistency between the applicant's modest declared family income and her lifestyle, which included the purchase of a home and extensive travel. The Judge examined the applicant's submitted bank statements in order to resolve this inconsistency, finding that the applicant appeared to have sources of significant income other than those she had reported.

[10] The Judge finally considered evidence with respect to the applicant's social ties to Canada, reviewing documents submitted by the applicant including some that detailed events falling outside the relevant time period. In particular, the Judge noted that the applicant had submitted proof of birth and vaccination booklets for her two sons which provided indirect evidence of the applicant's presence in Canada at the time of their births. The Judge also noted the applicant's own medical records which document over twenty medical visits in Ontario.

[11] Having reviewed the available evidence, the Judge exercised her discretion to apply the test established by Justice Muldoon in *Re Pourghasemi* (1993), 62 FTR 122, [1993] FCJ No 232

(QL) (TD), known as the strict physical presence test. As the Judge found that the applicant had not been in Canada for the required number of days, she refused to approve the applicant's application for Canadian citizenship.

IV. Issues

[12] The issues are as follows:

1. Did the Judge err with regard to the period of reference for the applicant's physical presence in Canada?
2. Was the decision of the Judge unintelligible or made in a perverse and capricious manner?
3. Did the Judge (or the respondent) err in failing to consider s 5(4) of the Act?

V. Standard of Review

[13] The parties correctly agree that for issues 1 and 2 above, the appropriate standard of review is reasonableness (*Afkari v Canada (Citizenship and Immigration)*, 2016 FC 421, at para 12). The applicant submits that the appropriate standard of review for issue 3 is correctness; while the exercise of discretion conveyed at s 5(4) of the Act is normally reviewed on a reasonableness standard (*Zahra v Canada (Citizenship and Immigration)*, 2009 FC 444, at para 9). The applicant submits that a question of procedural fairness has been raised since the Judge failed even to consider any such exercise of discretion. The appropriate standard of review on a question of procedural fairness is correctness (*Mansur v Canada (Citizenship and Immigration)*, 2014 FC 1035, at para 21).

VI. Analysis

A. *Period of reference*

[14] The applicant does not dispute the Judge's counting of days. Rather, she disputes the end date of the relevant period (also referred to as the reference period). She argues that March 5, 2012, the date she resubmitted her application with the Residence Calculator form, should have been used as the end date of the relevant period.

[15] Because the respondent does not dispute that an error on this issue by the Judge could have been determinative, I accept that this issue could be determinative.

[16] The applicant argues that a citizenship application should be considered to be dated on the date the application is accepted as complete. Since the application was not complete when it was originally filed, it should be considered to be dated on March 5, 2012, regardless of the fact that it bore a signature and date from February 13, 2012.

[17] The respondent notes that the February 13, 2012 end date for the relevant period is based not just on the date given on the application submitted by the applicant, but also the Residence Calculator form she provided on March 5, 2012. In addition to these indications by the applicant herself, the respondent cites the Guidelines from Citizenship and Immigration Canada (the CIC Guidelines) indicating that an application is considered to be "locked-in" on the date that it was originally signed and dated, not the date it is determined to be complete and accepted for processing.

[18] The respondent also points out that it is not inconceivable that an applicant may wish to proceed with an application for citizenship despite a shortfall in the number of days of physical presence. An applicant might hope that a citizenship judge would apply a legal test that considers factors other than physical presence in Canada (though this would be up to the discretion of the citizenship judge).

[19] Based on the arguments of the parties, I am not persuaded that the Judge acted unreasonably in determining that the date of the application (the lock-in date), and hence the end date of the reference period, was the original filing date and not the date the completed application was resubmitted. The Judge's analysis on this point is clear and based on the CIC Guidelines as well as the applicant's own submissions. I am not persuaded otherwise by the jurisprudence cited by the applicant on this issue.

[20] The applicant also proposed that, in the event that I do not agree with her on the determination of the lock-in date for her citizenship application, I certify a serious question of general importance to permit her to appeal my decision. The respondent opposes certification.

[21] Though I am satisfied that this issue could be determinative, I am not persuaded to certify a question. In my view, this issue is very fact-specific (the dispute over the date resulting from the applicant's error) and does not constitute a serious question of general importance.

B. *Whether the decision was unintelligible or made in a perverse and capricious manner*

[22] The applicant raises a number of points under this issue.

[23] The applicant notes some confusion by the Judge surrounding the two Residence Questionnaires that were completed by the applicant and sent on July 29, 2013, and on March 3, 2015. Specifically, it was the first Residence Questionnaire, not the second, which stated in the Declaration section "31 August 2013, signed at Cairo, Egypt". Also, it was the second Residence Questionnaire, not the first, whose declaration was signed in Montreal on March 28, and further, it was signed in 2015, not 2008. The applicant argues that this demonstrates a lack of care in the Judge's decision.

[24] The reason I am not persuaded to give much weight to this argument is that the Judge's care in drafting her decision was not determinative in this case. There is no dispute that, if the reference period was not in error (and I have found it was not), then the applicant did not have enough days of physical presence in Canada during that period to satisfy the requirements of the Act under the test that the Judge was entitled to apply. The Judge's care in discussing the two Residence Questionnaires does not change that.

[25] The same is true of the applicant's arguments that the Judge (i) improperly considered events that occurred outside the reference period; (ii) erroneously summarized the applicant's work history; (iii) improperly considered an inconsistency between the applicant's declared family income and her lifestyle; and (iv) wrongly determined that giving birth in Canada represents merely indirect evidence of physical presence in Canada. None of these can alter the fact that the applicant simply failed to establish the required number of days of physical presence in Canada.

[26] The fact that the applicant was only six or seven days short of the required number of days also does not alter the fact that the requirements of the Act were not met. I note also that this shortfall was repeatedly drawn to the applicant's attention before the Judge made her decision.

[27] In my view, the Judge's decision was neither unintelligible nor made in a perverse or capricious manner.

C. *Subsection 5(4) of the Act*

[28] The applicant's argument on this issue seems to have evolved. In her memorandum of argument, the applicant criticized the Judge for failing to consider whether discretion should be exercised under s 5(4) of the Act to grant the applicant citizenship despite her failing to meet the normal requirements therefor. In her supplementary memorandum of argument, the applicant added that, due to recent amendments to the Act, it may be the respondent (the Minister), not the Judge, who was responsible for considering the exercise of discretion under s 5(4) of the Act. Finally, in her counsel's oral representations, she answered her query from her supplementary memorandum of argument (taking the position that it was indeed the respondent's responsibility to have considered the exercise of discretion under s 5(4) of the Act) and asserted that there would be a problem with the decision to refuse the applicant citizenship even if the Judge had considered the exercise of discretion.

[29] As indicated above, the applicant asserts that this issue should be reviewed on a standard of correctness because it concerns a question of procedural fairness, namely the failure even to

consider the exercise of discretion under s 5(4) of the Act. Accordingly, I need address this issue only if I am satisfied that there was indeed a failure to consider the exercise of discretion.

[30] This brings me to the Notice to the Minister of the Decision of the Citizenship Judge which was signed by the Judge on November 20, 2015. In that notice, the Judge clearly indicated that she was not referring the matter for consideration under s 5(4) of the Act. Putting aside for the moment the question of whether the discretion was the Judge's to exercise or the respondent's, the Judge clearly considered s 5(4). It is not surprising that the Judge's decision is silent on this issue since the applicant made no submission on the issue that required comment: see *Huynh v Canada (Citizenship and Immigration)*, 2003 FC 1431 at para 5; *Al-Kaisi v Canada (Citizenship and Immigration)*, 2014 FC 724 at para 27.

[31] The applicant argues that recent amendments to the Act leave certain backlog citizenship applications, like that of the applicant here, in a no-man's land in which neither the citizenship judge nor the respondent is responsible for considering the exercise of discretion under s 5(4) of the Act. The applicant argues that this creates a nonsense that can only be resolved if the respondent is responsible for considering the exercise of discretion. The applicant also argues that the respondent did not exercise that discretion.

[32] I do not agree with the applicant's position on this issue for a couple of reasons.

[33] Firstly, I agree with the respondent that it was never in a citizenship judge's power to make the exercise of discretion. Rather, the citizenship judge was required to consider whether or

not to recommend an exercise of discretion by the respondent or by the Governor in Council. The obligation on a citizenship judge to make this consideration was removed, but nothing prevents a citizenship judge now from making a recommendation anyway. I disagree with the applicant that a lacuna exists in the law.

[34] Secondly, I am not satisfied that there has been any failure to exercise discretion here. As indicated, the Judge in her Notice to the Minister communicated her refusal to refer the applicant's application for consideration under s 5(4) of the Act. In light of this, as well as the absence of any submissions by the applicant under s 5(4) of the Act, it is not surprising that the Minister was silent on this issue. I see no reason that the jurisprudence cited in paragraph 30 above excusing a citizenship judge's silence would not apply equally to the respondent's silence.

[35] The applicant proposes that I certify a question as to whether the failure of the respondent to consider s 5(4) of the *Citizenship Act* before denying a citizenship application (in the context of backlog applications like the applicant's) is equivalent to a fettering of discretion. In my view, it would be inappropriate to certify such a question because I have concluded that there was no failure to consider s 5(4).

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The present application is dismissed.

2. There is no serious question of general importance to certify.

"George R. Locke"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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