

Federal Court



Cour fédérale

Date: 20180424

Docket: T-1465-17

Citation: 2018 FC 440

Ottawa, Ontario, April 24, 2018

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

DIEU DONNE DAMEAUX HACK-POLAY

Applicant

and

**THE MINISTER OF CITIZENSHIP
& IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] This application for judicial review is brought by Dieu Donne Dameaux Hack-Polay in connection with a decision to treat his application for Canadian citizenship as abandoned. The factual basis for the impugned decision was Mr. Hack-Polay's failure on two occasions to attend scheduled appointments to write a citizenship test.

[2] Mr. Hack-Polay contends that the decision-maker – a citizenship officer in Fredericton – made two reviewable errors in dismissing his citizenship application. He maintains that the decision is legally untenable because it failed to state with certainty that his citizenship application was deemed abandoned. Instead, the decision-maker, using the future tense, stated only that “your application will be treated as abandoned” [emphasis added] without then affording him the opportunity to make up for his attendance lapse.

[3] Mr. Hack-Polay also argues that the decision was made unfairly and unreasonably because it ignored “facts of fundamental importance” and, in particular, failed to account for his efforts to keep in touch with Citizenship and Immigration Canada [CIC]. This argument is addressed in his Reply Memorandum in the following way:

The Minister’s case rests solely on one piece of allegation (that I failed to attend the citizenship test without providing a reason). This allegation is vehemently denied by me the applicant. The evidence provided by the respondent and myself supports the fact that I provided all relevant information and contacted CIC on a number of occasions to get a different date for the test, which they failed to respond to.

[4] There is no legal merit to Mr. Hack-Polay’s criticism of the language of the decision letter. Although it is written in the future tense, no reasonable person would fail to understand its import.

[5] When read in its full context, the decision is unambiguous. The statement that the application “will be treated as abandoned” is qualified by the following language: “Citizenship and Immigration Canada (CIC) has not heard any response from you, therefore, a citizenship

official has declared that you have not provided a reasonable explanation and will treat your application as abandoned”.

[6] The letter also confirms that no further action would be taken on the application, the fee would be refunded, and the children’s applications “have been refused”. In the face of these statements, Mr. Hack-Polay could not reasonably claim to have been confused about the finality of the decision. Indeed, when he later wrote to the CIC requesting that the matter be reconsidered, he acknowledged that his application had been “deemed abandoned”.

[7] Mr. Hack-Polay’s argument also appears to be based on the idea that he was somehow misled, and thereby prejudiced, by a lack of clarity in the decision letter. This is essentially an argument that the decision letter created a reasonable expectation that the decision was not final and could, therefore, be revisited. The fundamental problem with this argument is that Mr. Hack-Polay has failed to identify any prejudicial reliance on his part arising from such an expectation. Indeed, he requested a reconsideration of the decision and it, too, was refused.

[8] Mr. Hack-Polay’s concern about the language of the decision appears to fall within the following admonition of the Federal Court of Appeal in *Lesanu v Canada*, [1993] FCJ No 962 (FCA), ACWS (3d) 305:

2 This Court has repeated on many occasions that the reasons given by the Refugee Division in support of its conclusion in a particular case neither could nor should be subject to "microscopic" or even merely rigorous analysis. Clumsiness of language or expression is often understandable, and no consequence must be given to it, provided that on reading the decision as a whole it can be seen that the members of the Board did not go astray in terms of their role or the manner in which it

should be carried out. It is this reservation which, in our view, must be applied here.

[9] I am not persuaded that the language of the decision letter was ambiguous or misleading. Even if it was, Mr. Hack-Polay suffered no resulting prejudice.

[10] Mr. Hack-Polay complains, as well, that the decision-maker acted unfairly and unreasonably in declaring his citizenship application abandoned in the face of his numerous intervening inquiries to the CIC. He contends that his failure to attend his second scheduled testing appointment should have been assessed in the context of all of his attempts to communicate with the department. Those several acknowledged inquiries, he says, demanded meaningful responses – responses he claims he never received. In order to understand this argument, it is necessary to consider what led up to the abandonment decision.

[11] Mr. Hack-Polay entered Canada as a permanent resident on August 10, 2010. On September 3, 2016, he applied for Canadian citizenship and on November 4, 2016, he was sent a “Notice to Appear”. That Notice directed him to appear at the CIC’s office in Fredericton on November 23, 2016 to write a citizenship test. He was also informed that a failure to attend or to contact CIC within 30 days of the scheduled appointment would trigger a Final Notice to Attend and potentially lead to a deemed abandonment of the application. Mr. Hack-Polay was advised to write to the CIC if he was unable to attend.

[12] Mr. Hack-Polay failed to appear for the scheduled testing appointment on November 23, 2016. It was not until February 17, 2016 that he contacted the CIC to request a new date for testing. His explanation for the missed appointment was that he was “away for work reasons”.

[13] On May 18, 2017, Mr. Hack-Polay was sent a Final Notice to Appear for a testing appointment on June 8, 2017. That Notice contained the following warning:

You are receiving this notice because our records indicate that we have previously invited you to write your citizenship test about your knowledge of Canada and of the responsibilities and privileges of citizenship, which you did not attend, or our records indicate that you have not contacted Immigration, Refugees and Citizenship Canada (IRCC) to provide an explanation for not appearing to write your citizenship test, as was requested in the previous invitation. This is your **final** notice with a new date and time to appear for a test.

All applicants who were 14-64 years of age when they signed their applications are required to demonstrate adequate knowledge of Canada and knowledge of English or French.

If you cannot attend this test, or if the information above regarding your file is incorrect, please contact Immigration, Refugees and Citizenship Canada (IRCC) within thirty (30) days of the date of this appointment. Contact information can be found at the bottom of this letter. It is important to be aware that the Citizenship Act contains provisions that treat your application as abandoned if you do not contact IRCC with a reasonable explanation for not attending a test. These provisions are explained further at the bottom of this notice. It is therefore very important that you contact the Department if you cannot attend.

...

IMPORTANT NOTE:

Pursuant to paragraph 13.2(1)(a)(ii) of the *Citizenship Act*, if you do not appear for your test at the date, time and place scheduled, you must contact Immigration, Refugees and Citizenship Canada (IRCC) within thirty (30) days of the date of your appointment and provide a reasonable explanation for not attending your appointment. You may contact IRCC in writing at the mailing

address found on this notice. If you do not contact IRCC or if your reason is not acceptable, your application will be declared abandoned, and your file will be closed, with no further action being taken on your case. The \$100 Right of Citizenship fee will be refunded. Once your file has been closed, and you are still interested in becoming a Canadian citizen, you will need to submit a new application with new documents and fees.

[14] Once again, Mr. Hack-Polay failed to either appear for the scheduled testing appointment or provide an explanation for that failure within the stipulated period of 30 days. On July 24, 2017, he was notified in writing that his application for citizenship “will be treated as abandoned”.

[15] One month later, Mr. Hack-Polay wrote to the CIC asking for a reconsideration of its abandonment decision. That request was based on his previous communications with the CIC which, he said, were indicative of a continuing intention to pursue his application. He also noted his frequent overseas absences for work which he said had “clashed with the initial date you set”. No explanation was given for his failure to attend in response to the Final Notice to Appear. His reconsideration request was rejected on September 14, 2017.

[16] Notwithstanding Mr. Hack-Polay’s several efforts to communicate with the CIC, the problem that remains for him is his failure to make contact after he received a Final Notice to Appear on May 18, 2017. That letter informed him that he was required to attend for testing on June 8, 2017 and that a failure to attend or to provide a reasonable explanation for not attending would lead to a declaration of abandonment. When Mr. Hack-Polay failed to appear for the scheduled test and neglected to contact the CIC with an explanation, an abandonment decision was rendered on July 24, 2017.

[17] It was not until August 24, 2017 that Mr. Hack-Polay wrote to the CIC seeking to reopen his application. In that letter he referred to his several efforts to communicate by telephone and web form including a request for a new test date after his failure to attend the first scheduled testing appointment. His letter also erroneously asserted that he had “received no communication from the CIC to offer me an alternative date for the citizenship test”. In fact, he was given an alternative test date along with a clear warning about the consequences of failing to attend. Nowhere in Mr. Hack-Polay’s letter of August 24, 2017 did he suggest that his failure to respond to the Final Notice to Appear was because of a travel conflict – although that was the reason he offered for failing to attend the initial appointment.

[18] Mr. Hack-Polay asserted in oral argument that he did not see the Final Notice to Appear before his June 8, 2017 appointment came and went. However, I have no evidence of that fact and the evidence I do have suggests otherwise. If Mr. Hack-Polay was only belatedly aware of the Final Notice to Appear, one would have expected him to say so at the first available opportunity. Instead, he advised the CIC that he had never been offered an alternative test date. Even his written representations to the Court fail to state with certainty that he did not see the Final Notice to Appear before June 8, 2017.

[19] In the absence of sworn evidence and corroboration that Mr. Hack-Polay was away from Canada and failed to see the Final Notice to Appear before the scheduled test date, I have no factual basis to accept this explanation as valid and proven. Even if Mr. Hack-Polay was away from Canada and unaware of the Final Notice to Appear, the legal consequences for that lapse do not rest with the CIC. When a party to a matter as important as this fails to make alternative

arrangements to review or forward expected correspondence, the consequences lie with the recipient and not the sender.

[20] Notwithstanding the complexity of Mr. Hack-Polay's argument, this is a very simple issue. It turns on his failure to respond in a timely way to the CIC's Final Notice to Appear. He simply failed to appear as required and then neglected to provide an explanation before his application was declared abandoned.

[21] It is certainly the case that Mr. Hack-Polay was in touch with the CIC from time-to-time, including an after-the-fact explanation for his failure to attend the first scheduled testing appointment. His request at that time for a new testing date was favourably received and he was offered a second testing appointment for June 8, 2017. It is of no consequence that he was not offered scheduling options because it was clearly communicated to him that he could object in writing if the second offered date was inconvenient. Nevertheless, he failed to object or to appear and he has not offered a plausible and verified explanation for those lapses.

[22] The responsibility for what occurred here rests solely with Mr. Hack-Polay. Having regard to the clear warnings provided, it was not unfair or unreasonable for the CIC to treat his application as abandoned in the face of his failure to appear or to provide a timely explanation for not appearing as stipulated in the Final Notice to Appear.

[23] For the foregoing reasons, this application is dismissed.

[24] I would add that I have considerable sympathy for Mr. Hack-Polay. He appears to have made a substantial contribution to the community and to the local economy. Regrettably, his impressive educational qualifications have not led to suitable Canadian employment. As a result, he has been forced to work abroad to support his family in New Brunswick. He appears to be fully committed to obtaining his Canadian citizenship and one can only hope that he will find suitable local employment to satisfy the residency requirements going forward.

[25] No question for certification was proposed and no issue of general importance arises on this record.

JUDGMENT IN T-1465-17

THIS COURT'S JUDGMENT is that the application is dismissed.

"R.L. Barnes"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1465-17

STYLE OF CAUSE: DIEU DONNE DAMEAUX HACK-POLAY v THE
MINISTER OF CITIZENSHIP & IMMIGRATION

PLACE OF HEARING: FREDERICTON, NB

DATE OF HEARING: MARCH 12, 2018

JUDGMENT AND REASONS: BARNES J.

DATED: APRIL 24, 2018

APPEARANCES:

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(ON HIS OWN BEHALF)

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