Federal Court Cour fédérale

Date: 20191204

Docket: T-558-19

Citation: 2019 FC 1556

Ottawa, Ontario, December 4, 2019

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

MAJD KHATTAB

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant seeks judicial review of a decision dated March 5, 2019 [the Decision] by a citizenship officer [the Officer], denying her Canadian citizenship application. The Officer found the Applicant did not have adequate knowledge of an official language of Canada under paragraph 5(1)(d) of the *Citizenship Act*, RSC 1985, c C-29 [Act].

[2] As explained in more detail below, this application is dismissed, because I find the Decision is reasonable and the Applicant was not deprived of procedural fairness in the process leading to the Decision.

II. **Background**

[3] The Applicant, Majd Khattab, is a citizen of Jordan and, together with her husband and children, became a Canadian permanent resident [PR] on August 3, 2012. The family settled in Fredericton, New Brunswick. The Applicant's husband returned to Jordan to maintain his dental practice and lost his PR status, as he was unable to satisfy his PR residency requirement.

[4] In May 2017, the Applicant's husband suffered a cardiac arrest when she was in Jordan on vacation. She decided to remain in Jordan and care for her husband, who continues to be in poor health. The Applicant applied for Canadian citizenship in October 2017 and has travelled back and forth to Canada to complete the citizenship process.

[5] As part of her citizenship application, the Applicant submitted a completion certificate for the Language Instruction for Newcomers to Canada [LINC] program with an overall result of Canadian Language Benchmark 6 [CLB 6]. On November 21, 2018, she completed a citizenship test in English and without the assistance of an interpreter, receiving a successful score of 16/20. That same day, she was interviewed by two citizenship officers. At the end of the interview, one of the officers mentioned that the Applicant might be referred to a hearing.

[6] On November 23, 2018, the Applicant received a physical presence questionnaire to complete. She retained counsel to complete the questionnaire on her behalf. On January 15, 2019, her counsel submitted the questionnaire, including again as evidence of her language ability the documentation confirming her participation in the LINC program and her result of CLB 6. The Decision confirms Ms. Khattab met the physical presence requirement through this questionnaire. That requirement is not in issue.

[7] On February 1, 2019, the Applicant received a document entitled "Notice to Appear – Interview with a Citizenship Officer," asking her to attend an interview on February 21, 2019 [the Notice]. The Applicant discussed the Notice with her lawyer, and they decided together that the Applicant should attend the February 2019 interview on her own, without counsel. She attended on February 21, 2019 and was interviewed by two officers, including the Officer whose Decision is the subject of this judicial review.

III. **Decision under Review**

[8] The Decision, contained in a letter dated March 5, 2019, refers to the Applicant appearing before the Officer for a hearing, conducted in English, in respect of her citizenship application. The Officer states that, during the hearing, she asked questions to determine if the Applicant met the language criteria for citizenship and determined the Applicant did not demonstrate she has competence in basic communication in an official language. Citing section 14 of the *Citizenship Regulations*, SOR/93-246, the Officer came to this conclusion because the Applicant was not able to "[t]ake part in short, routine conversations about everyday topics" or "[u]se vocabulary that is adequate for routine oral communication."

[9] The Decision concludes that, despite the evidence provided with her application as to the Applicant's knowledge of English, she had not demonstrated she has adequate knowledge. The Officer therefore refused the Applicant's citizenship application for failure to meet the requirements under subsection 5(1) of the Act.

IV. **Issues and Standard of Review**

[10] The Applicant articulates the following issues for the Court's determination:

A. Did the Officer err by forming her decision without regard to the objective evidence of the Applicant's language skills included in her application for Canadian citizenship and physical presence questionnaire?

B. Did the Officer breach procedural fairness by inviting the Applicant to a "Citizenship Interview" on February 1, 2019, only to treat it as a Citizenship Hearing wherein she failed to consider any special circumstances pursuant to section 5(3) of the Act?

[11] The parties agree, and I concur, that the first issue is governed by the standard of reasonableness, and the second issue by the standard of correctness.

V. **Analysis**

A. ***Did the Officer err by forming her decision without regard to the objective evidence of the Applicant's language skills included in her application for Canadian citizenship and physical presence questionnaire?***

[12] The Applicant takes the position that the Decision is unreasonable, because it is outside the range of possible, acceptable outcomes based on the evidence that was before the Officer. In support of that position, the Applicant relies on her the success in the LINC program, her score of 16/20 on the written citizenship test, and affidavit evidence she has filed in this proceeding, explaining her recollections of the November 2018 and February 2019 interviews.

[13] The most recent affidavit sworn by the Applicant includes her response to notes prepared by the officers who conducted the two interviews, those notes having been provided to the Applicant as part of the Certified Tribunal Record [CTR]. Specifically, the Applicant explains her recollection of both interviews. In relation to the February 2019 interview, for which the notes in the CTR are more extensive, the Applicant states where her recollection differs from what is set out in the notes. She states the notes are not full and complete representations of what she was asked, or what she answered. The Applicant sets out her recollections of her responses to the Officer's questions.

[14] The Applicant argues the materials in the CTR do not indicate whether the Officer's notes are a *verbatim* account of the Applicant's responses or a shorthand version of same. She also observes the Respondent has elected neither to file affidavit evidence from the Officer to contradict the Applicant's evidence, nor to cross-examine the Applicant. The Applicant therefore

submits her evidence is essentially uncontested and ought to be afforded significant weight in this proceeding.

[15] In response, the Respondent submits it would be unusual, and constitute an inappropriate effort to bolster the record, if the Respondent were to submit an affidavit from the Officer of the sort the Applicant argues is lacking. The Respondent relies upon a "best practices" document contained in the CTR, which instructs citizenship officers to write an applicant's answer on the answer sheets provided following the question pages. The Respondent also argues the notes contain entries, such as "and also big parking, good parking," which do not represent an intuitive form of shorthand, but rather are consistent with an effort to capture *verbatim* responses.

[16] I find the Respondent's arguments on this evidentiary point compelling. Moreover, the Applicant's affidavit represents an effort to recall the February 2019 interview some eight months after it occurred, while the Officer's notes represent a contemporaneous record. Recognizing the notes are not an exact transcript of the interview, I nevertheless afford them significant weight and afford less weight to the Applicant's recollections.

[17] I therefore turn to the Applicant's argument that the Decision represents an unreasonable outcome, taking into account the overall evidence before the Officer surrounding the Applicant's English language abilities. This evidence includes her success on the written citizenship test and in the LINC program. I find this documentary evidence does not undermine the Officer's assessment of the Applicant's oral language abilities.

[18] First, the written test results do not undermine the reasonableness of the Decision, as they do not speak to the Applicant's oral language abilities.

[19] Second, with respect to the LINC program, the Applicant notes from the website of Immigration, Refugees and Citizenship Canada [IRCC] that IRCC endorses a result of CLB 4 or higher as the minimum language competency to obtain citizenship. The Applicant also refers to the descriptions on the LINC website of the listening and speaking ability profiles that must be demonstrated to obtain a CLB 6 result, as the Applicant did. She argues these profiles are inconsistent with the Officer's conclusions as to the shortcomings in her ability.

[20] In my view, the LINC results also do not undermine the reasonableness of the Decision. I appreciate those results are indicative of a level of ability superior to the level found by the Officer. However, I agree with the Respondent's submission that a LINC test does not represent a proxy for an in-person assessment. The record indicates the test results relate to a program delivered between September 2015 and April 2016, i.e. concluding close to three years before the February 2019 interview with the Officer. The Decision notes the Officer considered the evidence provided with the Applicant's application, which would include these results. However, the Officer reached her conclusion as to the Applicant's inability to communicate in English based principally on her answers to the questions asked on February 21, 2019. I do not find this reasoning to be outside the range of acceptable outcomes.

[21] The Applicant also argues that the record of the February 2019 interview does not support the Officer's conclusion and that, appreciating the subjectivity associated with evaluating

oral language skills, the Officer has not explained why the Applicant's answers were inadequate. While the Decision itself does not provide much explanation of the Officer's conclusion, her contemporaneous observations indicate that the Applicant had very little to say for each question and that her sentences were very short and often not full sentences. Taking into account the Officer's notes on the Applicant's responses, the Officer's characterization of the responses is within the reasonable range. In my view, this characterization represents an explanation for the Officer's overall conclusions that the Applicant was unable to take part in short, routine conversations about everyday topics and was unable to use vocabulary that is adequate for routine oral communication.

[22] Finally, I have considered the Applicant's submissions surrounding the Officer's scoring of the eight individual questions, which the CTR indicates were posed at the February 2019 interview. The Applicant observes she scored 0/1 for each of the first six questions and 1/1 for each of the last two questions. She submits this inconsistency is unexplained and undermines the reasonableness of the Decision.

[23] On this point, I agree with the Respondent's submission that these results are consistent with the Officer's notes, to the effect that the Applicant improved a little with extra questions but overall could not form complete sentences. The Officer took into account that the Applicant's oral performance improved in the final two questions, but she nevertheless concluded the overall performance was insufficient to meet the language requirement.

[24] Having considered the Applicant's arguments related to the reasonableness of the Decision, I find no basis for the Court to intervene.

B. ***Did the Officer breach procedural fairness by inviting the Applicant to a "Citizenship Interview" on February 1, 2019, only to treat it as a Citizenship Hearing wherein she failed to consider any special circumstances pursuant to section 5(3) of the Act?***

[25] As a first point related to the parties' procedural fairness arguments, I note they disagree on the level of procedural fairness to which the Applicant was entitled in the circumstances of the present case. Relying on *Qureshi v Canada (Citizenship and Immigration)*, 2009 FC 1081 [*Qureshi*] at paragraph 23 (citing *Sadykbaeva v Canada (Citizenship and Immigration)*, 2008 FC 1018 [*Sadykbaeva*]), the Applicant takes the position that a high degree of procedural fairness was required.

[26] In *Sadykbaeva* at paragraphs 14-16, Justice de Montigny considered the factors prescribed by *Baker v Canada (Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*] in concluding a fairly high standard of procedural fairness must inform the decision-making process in a citizenship application. While recognizing that decisions to deny citizenship applications are not final (they may be appealed to the Federal Court), and citizenship judges are bestowed with broad discretion, Justice de Montigny based his conclusion on the nature of the decision, resembling an adjudication, and the importance of the decision to the individual affected.

[27] The Applicant also relies heavily on the *Baker* factor related to the importance of the decision to the individual affected. She emphasizes she would not currently satisfy the

requirement for physical presence in Canada, because she was forced to return to Jordan to care for her husband following his cardiac arrest in 2017. Therefore, the option simply to apply again for citizenship is not open to her at this time. Moreover, because the citizenship application of her youngest child, a minor, is tethered to her application, his interests are also affected by the Decision.

[28] In contrast, the Respondent relies on the more recent decision in *Fazail v Canada (Citizenship and Immigration)*, 2016 FC 111 at paragraphs 42-46, in which Justice Kane concluded the duty of fairness owed to applicants by citizenship judges is at the lower end of the spectrum. In an effort to distinguish *Qureshi* and *Sadykbaeva*, the Respondent notes that those cases both involved decisions by citizenship judges, which the Respondent submits represents a more adversarial process than the process before a citizenship officer in the case at hand.

[29] In my view, neither party has particularly reconciled the apparently divergent jurisprudence on this point. While noting the Respondent's argument that the Applicant's particular circumstances relate to only one of the *Baker* factors, I find compelling the Applicant's argument as to the importance of the Decision to her and her family. However, it is unnecessary for me to reach a definitive conclusion on the precise level of procedural fairness arising in the particular circumstances of this case, as my decision does not turn on such a determination. Even accepting that the Officer was obliged to afford the Applicant a high degree of procedural fairness, for the reasons explained below, I find no breach of this obligation.

[30] The Applicant's procedural fairness argument turns significantly on the Notice she received in advance of the February 2019 interview with the Officer. She notes the Notice took the form of a letter with the subject line "Notice to Appear - Interview with a Citizenship Officer." The Applicant contrasts this language with that of the Decision, in which the Officer referred to the February 21, 2019 event as a "hearing."

[31] The Applicant submits that, had she received notice about a hearing as opposed to an interview, she likely would have provided more detailed responses to the Officer's questions, or spoken at greater length, in order to demonstrate her capacity to speak English. She also notes that, while the Notice includes four "checkboxes" for purposes of identifying reasons for the interview (including "determining if you have adequate knowledge of English or French"), none of the boxes were checked.

[32] The Applicant further argues that, had she been aware she would be attending a hearing, she would have exercised procedural rights including arranging for her counsel to attend the hearing, preparing more comprehensively for the rigours of an adjudicative hearing, and filing written submissions setting out her position. This argument relates to the possibility of making submissions through counsel for special relief under s 5(3) of the Act, which affords the Minister the discretion, having reviewed a person's particular circumstances, to waive on compassionate grounds the language requirements of s 5(1)(d) of the Act.

[33] I agree with the Respondent's position that the Applicant's focus on the terms "interview" and "hearing" is an exercise in semantics. What matters is the substance of the

Notice and whether, even with a higher obligation for procedural fairness, it provided the Applicant with sufficient notice of the assessment to be conducted on February 21, 2019 and the potential consequences of that assessment. In that respect, the Respondent notes the Notice states that, notwithstanding indicated reasons for the interview, the citizenship officer may also ask questions to determine whether the applicant meets any of the other requirements for citizenship. The Notice also states that, based on the information collected at the interview, the potential outcomes include the citizenship officer making a final decision on the application.

[34] In response, the Applicant argues that, in the absence of a check in one of the four topic boxes, the Respondent cannot rely on what the Applicant submits is less clear language in the Notice, related to the possibility of the Officer asking questions related to all citizenship requirements. I find little merit to this submission, as the language on which the Respondent relies is unambiguous. Also, the Notice is a mere two pages, and the Applicant's evidence is that she consulted her counsel before deciding to attend the interview on her own. I cannot conclude the Applicant was deprived of notice she could be asked questions at the interview to assess her English language ability.

[35] I also find little merit to the Applicant's arguments arising from her attendance at the interview without her counsel. She submits the Notice makes no mention of a right to have counsel present at the interview. However, as noted above, the Notice stated the potential outcomes of the interview, and the Applicant consulted her counsel on the Notice before attending. There is no evidence the Applicant was prevented or discouraged from attending the

interview with counsel. Rather, she made the decision, in consultation with her counsel, to attend on her own.

[36] It is also clear the Applicant's counsel could not have assisted her in demonstrating her English language abilities. Rather, the Applicant's position is that her counsel could have assisted her through advancing submissions in support of a waiver under s 5(3) of the Act. However, as Justice Mactavish explained in *Gill v Canada (Citizenship and Immigration)*, 2014 FC 916 [*Gill*] at paragraph 21, the possibility of a waiver of the language requirements is spelled out in the Act and, as an applicant is deemed to have knowledge of the law, no specific notice of these provisions is required.

[37] The Applicant argues *Gill* is distinguishable, because Mr. Gill was clearly advised he was being summoned to a hearing, the purpose of which included determining whether he had adequate knowledge of either English or French. In my view, this argument does not assist the Applicant, given the statement in the Notice to the effect that the citizenship officer may ask the Applicant questions to determine whether she meets any of the requirements for citizenship.

[38] I therefore find no breach of procedural fairness as alleged by the Applicant.

[39] Having found no reviewable error in the Decision, this application for judicial review must be dismissed. Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT IN T-558-19

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

No question is certified for appeal.

"Richard F. Southcott"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-558-19
STYLE OF CAUSE:	MAJD KHATTAB V THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HALIFAX, NOVA SCOTIA
DATE OF HEARING:	NOVEMBER 4, 2019
JUDGMENT AND REASONS	SOUTHCOTT, J.
DATED:	DECEMBER 4, 2019

APPEARANCES:

Grace Allen Justin Adams	FOR THE APPLICANT
Heidi Collicut	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Blois Nickerson & Ryerson LLP Halifax, Nova Scotia	FOR THE APPLICANT
Attorney General of Canada Halifax, Nova Scotia	FOR THE RESPONDENT