

Date: 20080910

Docket: T-1830-07

Citation: 2008 FC 1018

Ottawa, Ontario, September 10, 2008

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

INDIRA SADYKBAEVA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an appeal brought pursuant to subsection 14(5) of the *Citizenship Act*, R.S.C. 1985, c. C-29 (*Citizenship Act*) and section 21 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, of the decision of Citizenship Judge Agnes Potts dated August 22, 2007. The Citizenship Judge concluded that the applicant did not have an adequate knowledge of Canada and of the responsibilities and privileges of Canadian citizenship, as required by paragraph 5(1)(e) of the *Citizenship Act*. The applicant seeks to set aside that decision and to refer this matter back to a different citizenship judge for reconsideration.

I. Background

[2] The applicant is a thirty-six year old citizen of Kyrgyzstan who was admitted to Canada with her son and husband as a permanent resident on July 26, 2001.

[3] In December 2005, the applicant submitted her application for Canadian citizenship, although she had accumulated only 944 days of residence within the four years preceding her application. Despite her absences from Canada, due in part to her husband's frequent business trips overseas and visits to her parents in Kyrgyzstan, the applicant felt that she and her family had made Canada their home.

[4] In February of 2006, the applicant received two letters indicating that both her application and her son's application had been received by the Case Processing Centre in Sydney and they were being reviewed. The material part of that letter reads as follows:

It will take approximately 12-15 months from the date of this letter to complete your application(s). This is the routine processing time. Some applications may take longer. If you are a person who is required to write the test, we suggest you use this time to prepare for the citizenship test.

To become a Canadian citizen, persons aged 18 to 54 years must meet language and knowledge requirements. You must know enough English or French to carry on a simple conversation. You must know enough about Canada's history, geography and government, and the rights and responsibilities of citizenship to pass a test. The written test will take about 30 minutes to complete. All of the questions on the citizenship test are about the information in the enclosed book, *A Look at Canada*.

[5] In July of 2006, Citizenship and Immigration Canada (CIC) sent the applicant a letter indicating that she was required to complete a “residence questionnaire”, which would “assist the citizenship judge in determining whether [she met] the residence requirement of the *Citizenship Act*”.

[6] In July of 2007, the applicant was given notice to appear at a hearing with a citizenship judge. This letter provides the applicant with the date of the interview and the name of the Citizenship Judge who will conduct the interview. The opening paragraph of that letter states:

The Citizenship Judge needs more information to make a decision about your citizenship application and you must appear for a hearing. At this hearing, the Judge will determine whether you meet all the requirements for citizenship and you may be asked questions to determine if you have an adequate knowledge of English or French and an adequate knowledge of Canada.

[7] The applicant attended the interview on August 14, 2007. After questioning the applicant on her absences from Canada and on her current activities within Canada, the Citizenship Judge proceeded to an oral examination about the applicant’s knowledge of Canada and of the responsibilities related to citizenship. The applicant, who was expecting that she would be given the opportunity to write the citizenship test at a later date, explained to the Citizenship Judge that she was unprepared and too nervous to undergo an oral citizenship test. The Citizenship Judge nevertheless administered the test and read aloud the questions.

[8] By letter dated August 22, 2007, the applicant received notice of the Citizenship Judge’s negative decision on her citizenship application. In her decision, the Citizenship Judge denied the

application, not on the basis of the residency requirement, but due to poor performance on the oral citizenship test. The material part of Citizenship Judge Potts is as follows:

I found, at that time, that you did not have an adequate knowledge of Canada and of the responsibilities and privileges of citizenship. Subsection 5(1)(e) of the *Citizenship Act* provides that an applicant for citizenship must have an adequate knowledge of Canada and of the responsibilities and privileges of Canadian citizenship in order to qualify for citizenship. At the hearing, you did not have adequate knowledge of the geography, the history, the levels of government, the political structure of government, the voting procedures for a federal election, or the responsibilities of citizenship.

According to Section 15 of the Citizenship Regulations, which prescribes the criteria for determining whether or not an applicant has an adequate knowledge of Canada and of the responsibilities and privileges of citizenship, you must be able to correctly answer questions prepared by the Minister based on the information contained in self-instructional material approved by the Minister and presented to applicants for the grant of citizenship.

[9] The applicant submitted two arguments in support of her application for judicial review of that decision. First, she argued that the Citizenship Judge gave her inadequate notice of the test, therefore breaching her right to procedural fairness. Second, she asserts that she had a legitimate expectation that the CIC Policy and Program manuals would be applied in a fair and consistent manner, and she would either be given the opportunity to demonstrate her knowledge of Canada through the provision of a written citizenship test, or to receive proper notice that the oral test was her only opportunity to prove this requirement.

II. Analysis

A. *Statutory framework*

[10] Paragraph 5(1)(e) of the *Citizenship Act* provides that an applicant for citizenship must have an adequate knowledge of Canada and of the responsibilities and privileges of Canadian citizenship in order to qualify for citizenship. The *Citizenship Act*, however, does not specify what constitutes “adequate knowledge of Canada and of the responsibilities and privileges of citizenship”; this is left to section 15 of the *Citizenship Regulations*, 1993, SOR/93-246 (*Regulations*), which prescribes the following:

15. The criteria for determining whether a person has an adequate knowledge of Canada and of the responsibilities and privileges of citizenship are that, based on questions prepared by the Minister, the person has a general understanding of

- (a) the right to vote in federal, provincial and municipal elections and the right to run for elected office;
- (b) enumerating and voting procedures related to elections; and
- (c) one of the following topics, to be included at random in the questions prepared by the Minister, namely,
 - (i) the chief characteristics of Canadian social and cultural history,

15. Une personne possède une connaissance suffisante du Canada et des responsabilités et privilèges attachés à la citoyenneté si, à l’aide de questions rédigées par le ministre, elle comprend de façon générale, à la fois :

- a) le droit de vote aux élections fédérales, provinciales et municipales et le droit de se porter candidat à une charge électorale;
- b) les formalités liées au recensement électoral et au vote;
- c) l’un des sujets suivants, choisi au hasard parmi des questions rédigées par le ministre :
 - (i) les principales caractéristiques de l’histoire sociale et culturelle du Canada,

(ii) the chief characteristics of Canadian political history,	(ii) les principales caractéristiques de l'histoire politique du Canada,
(iii) the chief characteristics of Canadian physical and political geography, or	(iii) les principales caractéristiques de la géographie physique et politique du Canada,
(iv) the responsibilities and privileges of citizenship, other than those referred to in paragraphs (a) and (b).	(iv) les responsabilités et privilèges attachés à la citoyenneté autres que ceux visés aux alinéas a) et b).

[11] As can be seen from these provisions, there is nothing in the *Citizenship Act* or in the *Regulations* directing how the assessment of an applicant's knowledge is to be performed. Rather, one must turn to the publicly available CIC "Policy and Program Manuals" applicable to section 5 of the *Citizenship Act* for assistance in understanding the procedure employed by CIC in its assessment of an applicant's adequate knowledge of Canada. I shall come back to this policy shortly.

B. Standard of review

[12] There is no dispute between the parties as to the applicable standard of review. As this application only raises issues of procedural fairness, the pragmatic and functional analysis does not apply. As the Federal Court of Appeal found in *Sketchley v. Canada (AG)*, 2005 FCA 404, [2006] 3 F.C.R. 392, those issues are always reviewed as questions of law and call for the application of the correctness standard.

C. *Inadequate notice*

[13] The applicant argues that her procedural fairness rights were breached because she did not receive proper notice of the oral citizenship test. In response, the Minister argues that neither the *Citizenship Act* nor the *Regulations* require that a written test be given for all applicants. In any event, the letter convoking the applicant for an interview indicated that the applicant “may be asked questions” to determine her knowledge of Canada.

[14] There is no question that a duty of procedural fairness applies to the decision to grant or deny citizenship. But that begs the question. As Justice L’Heureux-Dubé wrote in *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, [1990] S.C.J. No. 26 (QL) at p. 682, “the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case”. She subsequently developed a list of factors to be taken into consideration in determining what procedural rights the duty of fairness requires in a given set of circumstances: see *Baker v. Canada (MCI)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 at paras. 22(ff) (*Baker*). These are the nature of the decision, the statutory scheme, the importance of the decision to the individual affected, the legitimate expectations of the individual, and the choice of procedures.

[15] Applying these criteria to the case at hand, I am of the view that a fairly high standard of procedural fairness must inform the decision-making process followed in a citizenship application. I am mindful of the fact that decisions to deny citizenship applications are not final and may be appealed to the Federal Court pursuant to section 14(5) of the *Citizenship Act*, and that the

discretion bestowed on Citizenship Judges is quite broad and affords them a wide margin of appreciation to decide on proper information gathering procedures.

[16] That being said, the nature of the decision clearly resembles an adjudication. It is based on facts concerning an individual, which are assessed in light of reasonably objective criteria, and the outcome applies only to the individual party. Moreover, the decision to grant or deny citizenship is obviously of great importance to the applicant as it affects her rights, privileges and responsibilities in this country, as well as those of her son. Finally, the applicant had an expectation that a certain procedure would be followed with respect to the assessment of her knowledge of Canada. While the Supreme Court stressed in *Baker* that legitimate expectations can not create substantive rights, it did emphasize that they could inform the content of the duty of fairness owed to an individual.

[17] As previously mentioned, the CIC letter acknowledging receipt of her citizenship application of February 27, 2006, stated not only that persons aged 18 to 54 years must meet language and knowledge requirements, but also that “[T]he written test will take about 30 minutes to complete. All of the questions on the test are about the information in the enclosed book, *A Look at Canada*. A CIC office will inform you of the date, time and place of your test”. Since the written test was the only form of evaluation mentioned in the letter, it clearly gave rise to the expectation that the applicant would be tested in that way.

[18] Such an expectation was clearly legitimate, especially in light of the publicly available CIC “Policy and Program Manuals” applicable to section 5 of the *Citizenship Act*. While not binding,

these policy manuals are clearly meant to offer some assistance in understanding the procedure employed by CIC. The CP4 Manual explains:

5.3. Applicants between 18 and 54 years of age write the test

All applicants 18 to 54 years of age applying for citizenship must write the citizenship test. An applicant who fails the written test must pass an oral interview with a citizenship judge on the knowledge and language requirements.

5.7 Notifying applicants

Send each applicant for a grant of citizenship a Notice to Appear - To Write a Citizenship Test [CIT 0023E], by regular mail, at least 14 days before the test date.

(...)

Include in notice

Include the following information in the notice to appear about the test:

- the date and time of the test;
- the place of the test;
- that the test will be a written test;
- the identification and supporting documents the applicant must bring to the test.

5.3. Les demandeurs âgés de 18 à 54 ans font l'examen

Toute personne âgée de 18 à 54 ans qui présente une demande de citoyenneté doit subir l'examen écrit de citoyenneté. Si un demandeur échoue à l'examen écrit, il doit avoir une entrevue personnelle avec un juge de la citoyenneté qui évaluera ses aptitudes linguistiques et ses connaissances.

5.7. Procédure pour aviser les demandeurs

Il faut envoyer à chaque personne qui fait une demande de citoyenneté un Avis de convocation – Examen de citoyenneté [CIT 0023F], par courrier ordinaire, au moins 14 jours avant la date de l'examen.

Renseignements à fournir dans l'avis

L'avis de convocation à l'examen doit contenir les renseignements suivants :

- la date et l'heure de l'examen;
- le lieu de l'examen;
- indication que l'examen se fait par écrit;
- les pièces d'identité

[19] It is true, as the respondent submits, that the notice to appear at a hearing with a Citizenship Judge sent to the applicant in July of 2007 did mention that she “may” be asked questions to determine if she had an adequate knowledge of Canada. But was that sufficient to displace her legitimate expectation that she would be tested in writing? I do not believe so. Not only was this notice vague and written in a permissive language, but it did not clearly and explicitly state that, contrary to information provided in earlier correspondence and the Policy Manual, she would only be tested orally.

[20] Indeed, the CP2 Manual, “Decision-Making”, explains the purpose behind these hearings with a Citizenship Judge:

3.10. When interview necessary

As a general rule, citizenship judges should interview applicants who:

- fail the written citizenship test;
- are caught cheating on the written citizenship test;
- have a criminal, immigration or residence issue that must be resolved.

3.10. Circonstances dans lesquelles une entrevue avec le juge est nécessaire

En règle générale, un demandeur doit avoir une entrevue avec le juge de la citoyenneté dans les circonstances suivantes :

- le demandeur échoue à l'examen écrit de citoyenneté ;
- le demandeur est pris à tricher à l'examen écrit de citoyenneté ;
- la demande comporte une question judiciaire, d'immigration ou de résidence qui doit être résolue.

[21] The CP4 Manual confirms this practice, indicating:

6.3. Purpose

The oral interview for applicants who fail the written test assesses the applicant's ability to communicate in English or French, and the applicant's knowledge of Canada and the responsibilities and privileges of citizenship.

6.5. Interview is new test

The oral interview is a new test of the applicant's language and knowledge capabilities. Keep the applicant's failed written test in his or her file.

6.3. Objet

Si un demandeur échoue à l'examen écrit, il doit avoir une entrevue orale qui sert à évaluer sa capacité de communiquer en français ou en anglais et sa connaissance du Canada et des responsabilités et privilèges rattachés à la citoyenneté.

6.5. L'entrevue est un autre examen

L'entrevue personnelle est un autre examen des aptitudes linguistiques et des connaissances du demandeur. Conservez dans le dossier du demandeur l'examen écrit auquel il a échoué.

[22] The applicant had not written and failed her citizenship test prior to being called in for an interview to determine her residency in Canada. Further, she has provided undisputed affidavits of the applicant (based on information from friends and acquaintances) and of her counsel (based on her practice as an immigration lawyer and on the Policy Manuals published by CIC) to the effect that written citizenship tests are the standard procedure. Therefore, the applicant could reasonably have been under the impression that she would not be questioned orally on her knowledge of Canada at the August 2007 interview. In light of all the circumstances, the permissive language employed in the notice letter of July 2007 was not sufficient to put her on notice that she would not have the benefit of a written exam but would only be tested orally.

[23] On the basis of the factors developed in *Baker* to determine the content of procedural fairness in a given set of circumstances, and taking into particular consideration the legitimate expectations of the applicant, I am of the view that she was entitled to proper notice that she would not go through a written exam but would only be given one opportunity to demonstrate orally that she had an adequate knowledge of Canada. Had her notice letter of July 2007 been more explicit, and/or had the language employed been mandatory, she might have known that CIC was not allowing her the opportunity to write a citizenship test and she might have prepared accordingly.

[24] This finding is consistent with the decision recently reached by my colleague Justice Danièle Tremblay-Lamer in *Santos v. Canada (MCI)*, 2008 FC 205, 164 A.C.W.S. (3d) 744. In that case, the applicant had successfully taken a written test to determine whether she met the minimum language and knowledge requirements. When she appeared before the Citizenship Judge for a hearing of her application for Canadian citizenship, she was given an oral test to assess her knowledge of Canada. Her application for citizenship was eventually denied as the Judge found that the applicant had not fulfilled the knowledge requirement.

[25] After having gone through the five factors set out in *Baker*, Justice Tremblay-Lamer came to the conclusion that fairness requires, at minimum, that applicants be re-tested solely where there is a valid reason to do so and where adequate notice of the impending second test has been given. In light of the fact that the applicant had successfully passed the written test, she had reasonable grounds to believe that the subject of the interview would be her absences from Canada. Not only were there no valid reasons to re-test the applicant, but the notice of interview indicating that some

knowledge questions may be asked was found to be too vague and not specific enough to signal what amounted to a re-test. While this case is factually different from the case at bar, the issue of procedural fairness raised in both situations is very similar and thus the logic of Justice Tremblay-Lamer's decision equally applicable here. See also *Hussain v. Canada (MCI)*, [1999] F.C.J. No. 1130 (QL).

[26] I am aware of the decision rendered by this Court in *El Fihri v. Canada (MCI)*, 2005 FC 1106, 147 A.C.W.S. (3d) 745 (*El Fihri*), where it was held that the applicant could not claim that she should have received a written examination and that the Judge should not have asked her the questions verbally. In reaching that decision, the Court relied on the fact that nothing in the *Citizenship Act* or in the *Regulations* prescribed a written test, and that a notice to appear similar to the one received by Ms. Sadykbaeva in July of 2007 provided sufficient notice. I am further aware that the primary issue, there as here, was the assessment of the residence requirement. However, there is no reference in that decision to the Policy Manuals issued by CIC, and there is no indication that they were filed as part of the record. Indeed, this case seems to have focused on the merit and on the substantive issues more than on procedural fairness. This is borne out by the fact that the Court applied a standard of reasonableness simpliciter to determine that the Citizenship Judge had made no error in his analysis or in his application of the *Citizenship Act*. It is therefore with these caveats that I respectfully beg to disagree with that ruling.

[27] This is not to say that CIC cannot change its policy on the provision of citizenship tests. Since the *Citizenship Act* and its *Regulations* are silent as to how an applicant is to be assessed with

respect to his or her knowledge of Canada, the respondent could modify its process and decide to give all or some applicants only one opportunity to demonstrate, orally or in writing, their knowledge of Canada. Should CIC decide to move in that direction, however, this modification should be reflected in the Policy and Program Manuals which govern the process by which applicants apply for Canadian citizenship. If CIC intends to rely on the manuals as they are published on its website, adequate notice of this change in policy should be given to all applicants who may be affected.

[28] Having come to that conclusion, it is not necessary to deal with the second argument put forward by the applicant. As indicated by the Supreme Court of Canada in *Baker*, the doctrine of legitimate expectations does not have an independent life of its own in Canada but is rather subsumed under the doctrine of fairness or natural justice. As I have already decided that the applicant had a legitimate expectation which, in turn, affected the content of the duty of fairness that was owed to her, I need say no more on this subject.

[29] For these reasons, the appeal is granted. As a result, the decision of the Citizenship Judge Agnes Potts dated August 22, 2007, refusing to approve the applicant's application for Canadian citizenship, is set aside. The matter is returned to a different Citizenship Judge to be decided in accordance with these reasons, as soon as practicable.

ORDER

THIS COURT ORDERS that the appeal is granted. The decision of the Citizenship Judge Agnes Potts dated August 22, 2007, refusing to approve the applicant's application for Canadian citizenship, is set aside. The matter is returned to a different Citizenship Judge to be decided in accordance with these reasons, as soon as practicable.

"Yves de Montigny"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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STYLE OF CAUSE: Indira Sadykbaeva
v.
MCI

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: May 28, 2008

**REASONS FOR JUDGMENT
AND JUDGMENT BY:** J. de Montigny

DATED: September 10, 2008

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