

Federal Court



Cour fédérale

Date: 20091204

Docket: T-628-09

Citation: 2009 FC 1244

Ottawa, Ontario, December 4, 2009

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

THI NHU NGUYEN

Applicant

and

**MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, Thi Nhu Nguyen, appeals the July 14, 2008 decision of a Citizenship Judge pursuant to s.14(5)(b) of the *Citizenship Act*, R.S.C. 1985, c. C-29. The Citizenship Judge denied her application for citizenship because of insufficient documentation to establish she had been resident in Canada for the required three years during the four years preceding her application.

I. Background

[2] Thi Nhu Nguyen was born in Vietnam. She moved to Canada in 1993 and she applied for citizenship on July 12, 2007. She attended a citizenship hearing before Judge Philip Gaynor on May

21, 2008. The record of her hearing as set out in the Notice to the Minister of the Decision of the Citizenship Judge (“Notice to the Minister”) on May 21, 2008 indicates that Ms. Nguyen satisfied all requirements for citizenship except the residence requirement in paragraph 5(1)(c) of the *Act*.

[3] In her application Ms. Nguyen stated she was in Canada all 1460 days of the relevant four year period for citizenship; that is to say, she claims no absences from Canada during that time. At her citizenship hearing on May 21, the Citizenship Judge requested documentary evidence supporting the claim she never left Canada. Here the stories diverge.

[4] Ms. Nguyen says the Citizenship Judge asked to see her passport and her record of landing. She says she rushed home to retrieve the documents, returned that same day, and met again with the Citizenship Judge to show him the requested documents. She says he examined them and she believed he was satisfied with her evidence. He did not make any copies nor did she leave copies of the documents with the citizenship registry.

[5] On July 14, 2009 the Citizenship Judge recorded that Ms. Nguyen had not complied with the documentation request and he was thus unable to determine her residency in Canada. For that reason he denied Ms. Nguyen’s application for citizenship.

II. Decision under Appeal

[6] The Notice to the Minister is a form with two parts.

[7] The first portion of the Notice to the Minister records the dates of landing and filing for citizenship. It also records whether the applicant has satisfied the requirements of citizenship and is not disqualified from a grant of citizenship. The Notice to the Minister in this case indicates Ms. Nguyen satisfied all requirements except the residency requirement. Ms. Nguyen attested the foregoing by signing the Notice at the conclusion of the citizenship hearing.

[8] The second portion of the Notice to the Minister form records the Citizenship Judge's decision and provides for brief reasons. On July 14, 2008, the Citizenship Judge wrote in the Notice:

The applicant appeared before me on 21st May re-hearing. At that time I asked the applicant for supporting documents. The applicant was given 30 days to comply with any request. As of July 9th/08 the applicant has not complied. I am unable to determine her residency in Canada during the relevant period. Because of above reason I am unable to approve the [sic] applicants application for citizenship.

[9] In his February 23, 2009 letter advising Ms. Nguyen of his decision, the Citizenship Judge stated:

- (1) You became a landed immigrant of Canada on June 01, 1993.
- (2) You applied for Canadian citizenship on July 12, 2007.
- (3) The relevant four year period, to establish residence in your case, is from July 12, 2007 to July 12, 2003, for a total of 1,460.
- (4) You claimed "0" absences from Canada, during the relevant period.

[10] The Citizenship Judge then identified the issue as whether Ms. Nguyen had accumulated at least three years (1,095 days) of residence within the four years immediately preceding the date of her application for citizenship.

[11] The Citizenship Judge decided:

In the relevant period, you accumulated 1,460 days. You declared “0” absences from Canada, on your application form.

As a consequence, in order to verify your claim, you were given at the hearing a list of supporting documentation, to submit within thirty (30) days. This information was to be returned to our office on or before June 21, 2008. as of July 09, 2008, the information was not received. (emphasis added)

...

Regrettably, you have neither complied with, nor offered an explanation for your non-compliance to a lawful requirement. As a result, I have reached the conclusion there is a reasonable doubt regarding your statements of absence from Canada as well as presence in Canada.

III. Analysis

[12] In support of her appeal, Ms. Nguyen filed an affidavit which recounted her version of the request for documentation, her obtaining the documents requested, her subsequent meeting with the Citizenship Judge and his review of her documents. Her affidavit appends the following documents:

- a. Passport no. DQ0010920 issued by Embassy of Vietnam on January 25, 1999 which expired on January 24, 2004
- b. Letter dated April 3, 2009 from the Embassy of Vietnam confirming that she did not apply for a new passport until January 29, 2008
- c. New Passport no. N11075158 issued January 25, 2009 with expiry date of January 29, 2018
- d. Record of Landing on June 1, 1993

[13] At the appeal hearing, Ms. Nguyen also provided an additional document, the Request for Supporting Documentation (“Request”), dated May 21, 2008. This document states in part:

RE: REQUEST FOR SUPPORTING DOCUMENTATION

In order to assess your residence, I am requesting from you the following documentation.

This additional documentation should be mailed directly to Nancy Afonso, at the above address, within 10 days of this notice, no later than May 30th/08.
(emphasis in original)

Please note that failure to comply with this request may result in a non-approval of your application for Canadian citizenship.

COPY OF LANDING PASSPORT ALL PAGES
COPY OF LANDING PAPER IMMIGR** (intelligible lettering in original)

This Request was dated May 21, 2008 and signed by both the applicant and the Citizenship Judge. It is not contained in the Record before this Court but counsel for Ms. Nguyen and the Respondent agree it should be part of the Record. Given this agreement and the fact the Request was signed by both Ms. Nguyen and the Citizenship Judge, I will consider this Request document.

[14] Clearly the letter dated April 3, 2009 from the Embassy of Vietnam and the Passport no. N11075158 issued January 25, 2009 are documents that were issued after May 21, 2008 and could not have been shown to the Citizenship Judge that day. The only evidence that may be considered on appeal is the evidence that was before the Citizenship Judge. *Zhao v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 1923 at para. 35. Since the foregoing documents were not before the Citizenship Judge, I will disregard them.

[15] On the other hand, Ms. Nguyen's 1999 passport issued by the Government of Vietnam and her Record of Landing on June 1, 1993 could have been the documents she declares she showed the Citizenship Judge after the citizenship hearing.

[16] The Respondent submits the Appellant's case lacks an "air of reality". To establish this, the Minister asks this court to assume what are the day to day practices, physical layouts, protocols and procedures of its offices. There is no evidence to support any finding as to what procedures a citizenship judge uses to discharge his duties under the Act and nothing to tell the Court how efficient the administrative procedures are. In the absence of such evidence I do not consider Ms. Nguyen's account lacks an "air of reality".

[17] The Respondent also argues the document handling procedures of the citizenship registry are to be presumed to be complete and regular. The Respondent refers to the affidavit of Ms. Ann Lai, Manager of the Citizenship CIC office in Scarborough which states that the Global Case Management System, Citizenship and Immigration Canada's operating system used for processing citizenship applications, state the documents requested had not been received as of July 9, 2009.

Standard of Proof

[18] Justice Rothstein wrote in *F.H. v. McDougall*, 2008 SCC 53 at paragraph 40: "Like the House of Lords, I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities."

[19] Ms. Nguyen bears the burden of proving her case on the balance of probabilities. Her affidavit together with the two acceptable appendices, the 1999 passport and the Record of Landing, present that she attended and showed the documents requested to the Citizenship Judge on May 21, 2008. She was not cross-examined on her affidavit and it stands unchallenged.

[20] The Respondent submits the Record and the Citizenship Judge's decision establish the requested documents were not provided.

[21] When considering the essence of the balance of probabilities, Lord Denning wrote in *Miller v. Minister of Pension*, [1947] 2 All E.R. 372, at 374 (K.B.): "If the evidence is such that the tribunal can say: 'we think it more probable than not', the burden is discharged, but if the probabilities are equal, than it is not."

[22] At this point the two factual positions are equal and opposite. If so, Ms. Nguyen's appeal would fail. In my view, the balance is changed by the inclusion of the Request for Supporting Documentation as part of the Record. The Request has the effect of enhancing Ms. Nguyen's credibility and undermining the Respondent's position.

[23] The Request required Ms. Nguyen to provide a copy of her landing record and landing passport with all pages. Importantly, the Request corresponds to Ms. Nguyen's account of events in regards to time and specific documents requested. The Request was the same day as that of the citizenship hearing. It specified Landing Passport with "all pages" and Landing Record.

[24] Ms. Nguyen submits the significance of the request for her passport is that even if a visit to another country might not be noted on a passport, return to Canada would be recorded in the passport. The passport with all its pages blank therefore could be a document that may confirm her assertion of zero absences from Canada.

[25] The fact that the Request, an important step in the documentary process, is missing from the official record is indicative that the Record is not always complete and regular. The Request should have been on the Record but it was not.

[26] I find Ms. Nguyen has proven her version of events on the civil standard of a balance of probabilities. She retrieved her documents and returned to show them to the Citizenship Judge. The error was that she did not file copies; she thought presenting the documents for viewing was sufficient. Nevertheless she complied with the Request in a substantive manner. Her appeal therefore succeeds.

Remedies

[27] I turn now to the question of a remedy. Ms. Nguyen seeks in part as remedies:

- a. An Order granting the applicant the Canadian Citizenship
- b. A Declaration that the applicant meets all the requirements of the Citizenship Act and the Regulations.

[28] The Respondent submits the Court may not grant citizenship for several reasons. First, the Federal Courts jurisdiction to issue final remedies against federal boards, commissions and tribunals is mentioned in sections 18(1) and 18.3(3) of the *Federal Court Act* R.S.C. 1985, c. F-7 (the “FCA”) and these remedies do not include the granting of citizenship. Second, the review of decisions of citizenship judges by way of an “appeal” does not change the remedies the Federal Court may grant under section 18.1 FCA. Citizenship appeals are not trials *de novo*. *Canada (Minister of Citizenship*

and Immigration) v. *Tovbin*, (2000) FCJ No. 527 at para. 43 (“*Tovbin*”). Third, the Federal Court’s equitable jurisdiction may not be used to expand the remedies granted under the *FCA*.

[29] Notwithstanding the Respondent’s well reasoned argument, the Federal Court’s jurisdiction for hearing appeals, emanates from section 14(5) of the *Citizenship Act*. Further, while section 21 of the *Federal Courts Act* confers on the Federal Court exclusive jurisdiction, it does not alter the source or nature of the right of appeal under the *Citizenship Act*.

[30] In *Canada (Minister of Citizenship and Immigration) v. Chiu*, [1999] F.C.J. No. 896 Justice Pinard wrote in the context of an appeal by the Minister:

... an appeal under subsection 14(5) of the *Citizenship Act* is no longer an appeal *de novo*, but *it remains an appeal which, by virtue of the Rules, is dealt with procedurally the same way an application for judicial review is dealt with. Such an appeal, therefore, is not an application for judicial review within the meaning of section 18.1 of the Federal Court Act.* Accordingly, this Court is not limited by subsection 18.1(3) of that Act and may simply quash a decision of a Citizenship judge if, like in the present case, it does not meet the applicable test of correctness.

[31] An appeal is a review of a decision by a superior court to test the soundness of the decision and it may involve reconsideration of the decision in question. Dukelow *Dictionary of Canadian Law* (3d) 2004. An appeal may include a traditional appeal based on the record below or a trial *de novo* which essentially envisages a new trial on existing or new evidence. *Tovbin* makes it clear citizenship appeals exclude trials *de novo*. However, the *FCA* does not amend the *Citizenship Act* to convert an appeal into a judicial review. Remedies in a citizenship appeal may involve dismissing

the appeal, giving the award that should have been given or ordering a new hearing. In appropriate circumstances, a grant of citizenship may result of the Federal Court appeal hearing.

[32] Nevertheless, the Respondent's arguments in respect of remedies have merit. The Citizenship Court is not as formal as a court. In citizenship cases the highest appellate court is the Federal Court. Upon a decision of the highest appellate court *res judicata* would normally mean the end of an applicant's options. In contrast, applicants for citizenship are free to re-apply anytime.

[33] The Citizenship hearing is a less formal process as discussed in *Canada (The Minister of Citizenship and Immigration) v. Mahmoud*, 2009 FC 57 at para. 4 and as evidenced by Ms. Nguyen's affidavit. The documentation is assessed by a citizenship judge in light of the outcome of the citizenship hearing and his or her specialized knowledge. The record before the Federal Court does not constitute the entire record since the hearing itself is more in the nature of an interview than a court hearing. The quality of the evidence on the Record necessarily impacts on the remedies available.

[34] Ms. Nguyen insists the passport she provided covers the period 1999 to 2004. There is no evidence concerning Immigration procedure recording re-entry dates into Canada in passports. Nor is there any admissible evidence concerning her assertion that she did not have a valid Vietnamese passport between years 2004 to 2009 and therefore could not travel out of Canada during that

period. The Citizenship Judge, with his specialized knowledge and benefit of the hearing may assess the evidence before him. I am not in a position to do so.

V. Conclusion

[35] Since the Notice to the Minister records that Ms. Nguyen satisfied all the requirements for citizenship except documentation establishing the required residency, I consider the appropriate remedy is to set aside the Citizenship Judge's decision denying citizenship and refer the matter back to the same Citizenship Judge with respect to the residency question alone.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The decision of the Citizenship Judge denying citizenship is set aside.
2. The matter is referred back to the same Citizenship Judge for reconsideration of in regard to residency only; if the Citizenship Judge is not available, another citizenship judge may hear the matter.
3. Ms. Nguyen must file her residency documentation with the citizenship registry, together with any additional documentation she chooses or may be required of her.
4. I make no award of costs.

“Leonard S. Mandamin”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-628-08

STYLE OF CAUSE: THI NGUYEN and MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: NOVEMBER 25, 2009

**REASONS FOR JUDGMENT
AND JUDGMENT:** MANDAMIN, J.

DATED: DECEMBER 4, 2009

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