Federal Court  Cour fédérale

Date: 20120528

Docket: T-1255-11

Citation: 2012 FC 646

Ottawa, Ontario, May 28, 2012

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

NACHHATTAR KAUR KALKAT

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an appeal under subsection 14(5) of the *Citizenship Act*, RSC 1985, c C-29 [the Act] contesting a citizenship judge's decision to deny the applicant Canadian citizenship.

[2] As the tribunal's record contained important redactions in order to protect the linguistic test and answers administered by the citizenship judge (pursuant to rules 317 and 318(2) of the *Federal Courts Rules*, SOR/98-106), the Court requested that counsel for the respondent ensure that these redactions did not contain any notes taken by the judge which could prove relevant and should form part of the record. Counsel undertook to verify the redactions and report back to the Court, a task

which has now been completed. The review of the redactions revealed a reference made by the judge to the fact that the applicant did not have sufficient schooling in her country and that she could not learn new languages since her arrival. The review also revealed important information related to the issue of procedural fairness that will be included in the record and commented on further later in these reasons.

I. Facts and Decision Under Appeal

[3] Ms. Nachhattar Kaur Kalkat [the applicant] is a 51 year-old citizen of India who arrived in Canada in 2005. She became a permanent resident on February 3, 2007 and applied for Canadian citizenship on May 20, 2009.

[4] In a letter dated August 10, 2010, Ms. Kalkat received a notice to appear to complete a citizenship test to evaluate her knowledge of Canada, of the responsibilities and privileges of citizenship, and of one of Canada's official languages.

[5] In a letter dated August 30, 2010, Ms. Kalkat's lawyer – Ms. Gamliel – requested that Citizenship and Immigration Canada [CIC] postpone the test. She indicated that Ms. Kalkat was unable to learn the required information to pass the test because of learning disabilities and asked for a "Request for Medical Opinion" form in order to proceed with a waiver request.

[6] Receiving no response to the request, Ms. Kalkat took the citizenship test on September 7, 2010 and, unable to understand any of the questions, failed it. The citizenship agent wrote: "Madame ne comprend pas et me dit: "No English – No French." Madame comprend aucune de mes questions et ne peut y répondre -- même pour les instructions" (Respondent's Record at 64). The agent then submitted the citizenship review to a citizenship judge.

[7] CIC acknowledged receipt of Ms. Gamliel's request of August 30th on September 15, 2010, sending her a copy of the "Request for Medical Opinion." Then in a letter dated October 7, 2010, Ms. Kalkat received a notice to appear before a citizenship judge on October 26, 2010.

[8] On October 20, 2010, Ms. Gamliel sent CIC a medical opinion from a Dr. Colavincenzo and requested that the interview scheduled for October 26, 2010 be cancelled. Although CIC did not cancel the interview, Ms. Kalkat decided not to attend. The following day, CIC acknowledged receipt of the medical opinion and confirmed that it would be included in Ms. Kalkat's file.

[9] On February 2, 2011, CIC sent Ms. Kalkat a final notice to appear before a citizenship judge on March 8, 2011. In response, Ms. Gamliel sent a letter dated February 17, 2011 to CIC manager Bonilla arguing that the medical opinion had been completely ignored, asking for her intervention in the file, and indicating that if the hearing was maintained, Ms. Gamliel would accompany her client to the hearing.

[10] On that same day, CIC informed Ms. Gamliel by telephone that Ms. Kalkat was still required to attend the hearing and that the judge would "[…] détermine s'il fera ou non une recommendation de dispense au Ministre" (Respondent's Record at 31).

[11] Ms. Kalkat appeared before citizenship judge Gilles Duguay [the citizenship judge or judge] on March 8, 2011, accompanied by Ms. Gamliel and Ms. Kaur, the latter acting as Ms. Kalkat's interpreter.

[12] In her affidavit, Ms. Kalkat provides the following account of what occurred during the interview (Applicant's affidavit from para 20):

20. Citizenship judge Gilles Dugay started the hearing by telling me that *"somebody who does not speak English or French will never be a Canadian"*; [...]

22. Mrs. Gamliel tried to intervene but was not allowed to do so;

23. She started to take notes of everything that was said;

24. Citizenship judge Gilles Dugay, then, stated that: *"Tomorrow, I will grant citizenship to 800 people who all speak French or English; they all passed the test! Your lawyer has written to us that you cannot be able to learn about our country and language. Unfortunately, we receive this argument from hundreds and thousands of people"*;

25. He further explained that for my request of waiver to be considered, I would have to prove that I am intellectually disabled and cannot have a bank account and cannot sign anything;

26. As he read the medical opinion, he concluded that it does not state any complete intellectual disability but only states that back in India I did not receive much Education, that I have trouble to learn and have a grade 2 level in my mother tongue;

27. He then smiled at me and stated that many other people have trouble learning; some work harder at learning and some don't and I should have learnt with the help of my husband and children;

28. When Mrs. Gamliel intervened to mention that I was a widow before I even came to Canada, his answer was that he did not care;

29. He showed [the medical opinion] and stated that this was just *"an opinion of a person not as a Doctor because doctors are not linguistic experts"*;

30. Pausing he looked at all of us and said: *"I am a judge and I apply the law, my first wife was Russian and my second wife was Romanian; they came as immigrants and learned"*;

31. I am not sure why but he also showed us pictures of his daughter married to the son of ex-prime minister Paul Martin;

32. He went on explaining that I was not mentally deficient and that this meant that he had to treat me normally;

> 33. Throughout this long monologue translated by Mrs. Kaur and noted by Mrs. Gamliel, I remained silent, unable to understand what it all meant;
>
> 34. He, then, asked everyone in the room to leave except me in order to have me pass a verbal Citizenship test;
>
> 35. After the test which I could only have failed completely because I did not understand a word he said to me, he asked Mrs. Kaur and Mrs. Gamliel to enter the room again;
>
> 36. He stated to me that if he renders a negative *judgment* and I am not satisfied, I can go to the *Federal Court of Appeal* and get an *audition*;
>
> 37. At this point, my lawyer tried to intervene and the Citizenship judge became very angry at her: he advised her that she could continue to take all the notes she was taking and could only intervene at the end of the hearing;
>
> 38. He smiled at me and said that I had done better at the test with him then [*sic*] at the written test because I had scored 5/20!
>
> 39. When this was translated to me I looked at him very puzzled given the fact that I had given him no answer whatsoever;
>
> 40. When he announced the end of the hearing, my lawyer asked to speak but he denied her request because it was already 4:45 pm.

[13] By comparison, the citizenship judge provides the following account of the interview in a "Notice to the Minister of the Decision of the Citizenship Judge" (Trial Record [TR] at 11-12):

> The applicant failed both the language and the knowledge tests. The papers are on file. I authorized an interprete [illegible] the start, who refused to sign the required form, on the advi [illegible] a lawyer, [illegible] Gamliel. Because the applicant did not meet the requirements of 5(1), I cannot authorize or approve her demand for citizenship from Canada.
>
> I did spend some time with the applicant and her interpreter to explain that the medical report, signed by Dr. Colavincenzo, a family doctor, was clear about the fact "that this lady is not mentally deficient." I thereby explained that it was my duty to ask her to pass both the language and the knowledge test, as foreseen by the law. Her lawyer then intervened to declare that her client could be granted

> Canadian citizenship without having to pass those tests. I told the lawyer to observe the audition, without interrupting the proceedings to offer her own conclusion. I told her that I had 60 days to make/take my decision, that she was entitled to have her own opinion, but that I had to do my job and to proceed.

[14] In his decision dated June 1, 2011, the citizenship judge confirmed that Ms. Kalkat's application was not approved as she had not met the knowledge requirements set out in paragraphs 5(1)(*d*) and 5(1)(*e*) of the Act and that no recommendation for a waiver pursuant to subsections 5(3) or 5(4) of the Act would be made:

Citizenship Act, RSC 1985, c C-29	*Loi sur la citoyenneté*, LRC 1985, ch C-29
Grant of citizenship	Attribution de la citoyenneté
5. (1) The Minister shall grant citizenship to any person who	5. (1) Le ministre attribue la citoyenneté à toute personne qui, à la fois :
[...]	[…]
(*d*) has an adequate knowledge of one of the official languages of Canada;	*d*) a une connaissance suffisante de l'une des langues officielles du Canada;
(*e*) has an adequate knowledge of Canada and of the responsibilities and privileges of citizenship; [...]	*e*) a une connaissance suffisante du Canada et des responsabilités et avantages conférés par la citoyenneté; […]
[...]	[...]
Waiver by Minister on compassionate grounds	Dispenses
5. (3) The Minister may, in his discretion, waive on compassionate grounds,	5. (3) Pour des raisons d'ordre humanitaire, le ministre a le pouvoir discrétionnaire d'exempter :

(*a*) in the case of any person, the requirements of paragraph (1)(*d*) or (*e*);	*a*) dans tous les cas, des conditions prévues aux alinéas (1)*d*) ou *e*);
(*b*) in the case of a minor, the requirement respecting age set out in paragraph (1)(*b*), the requirement respecting length of residence in Canada set out in paragraph (1)(*c*) or the requirement to take the oath of citizenship; and	b) dans le cas d'un mineur, des conditions relatives soit à l'âge ou à la durée de résidence au Canada respectivement énoncées aux alinéas (1)*b*) et *c*), soit à la prestation du serment de citoyenneté;
(*c*) in the case of any person who is prevented from understanding the significance of taking the oath of citizenship by reason of a mental disability, the requirement to take the oath.	c) dans le cas d'une personne incapable de saisir la portée du serment de citoyenneté en raison d'une déficience mentale, de l'exigence de prêter ce serment.
Special cases	Cas particuliers
5. (4) In order to alleviate cases of special and unusual hardship or to reward services of an exceptional value to Canada, and notwithstanding any other provision of this Act, the Governor in Council may, in his discretion, direct the Minister to grant citizenship to any person and, where such a direction is made, the Minister shall forthwith grant citizenship to the person named in the direction.	5. (4) Afin de remédier à une situation particulière et inhabituelle de détresse ou de récompenser des services exceptionnels rendus au Canada, le gouverneur en conseil a le pouvoir discrétionnaire, malgré les autres dispositions de la présente loi, d'ordonner au ministre d'attribuer la citoyenneté à toute personne qu'il désigne; le ministre procède alors sans délai à l'attribution.

[15] As mentioned, Ms. Kalkat had submitted a medical opinion. In it, Dr. Colavincenzo indicated that in his opinion, while Ms. Kalkat was able to appreciate the significance of the oath of citizenship and the consequences of acquiring Canadian citizenship, she was unable to meet the

requirements set out in paragraphs 5(1)(*d*) and 5(1)(*e*) of the Act. Dr. Colavincenzo describes Ms. Kalkat's situation as follows (TR at 45):

> The major problem concerning the lady is that she has little scolarity in India. She finished only 2nd elementary school. Hence her education and learning method and capacity is significantly limited. She has difficulty in her own language to read or write adequately. Consequently, she is not capable of learning any other language like English or French.
>
> This lady is not mentally deficient or depressed. For the reasons mentioned above she is not capable of acquiring sufficient knowledge about issues or subject matter that is foreign to her.

[16] In his June 1, 2011 decision, the citizenship judge addresses Dr. Colavincenzo's medical opinion and the possibility of waiving the knowledge requirements (TR at 10):

> Pursuant to subsection 15(1) of the *Citizenship Act*, I have considered whether or not to make a recommendation for an exercise of discretion under subsections 5(3) or 5(4) of the Act. Subsection 5(3) of the Act confers discretion to the Minister to, among other things, waive on compassionate grounds the requirements you failed to meet. As to subsection 5(4) of the Act, it empowers the Governor in Council to direct the Minister to grant citizenship to any person in cases of special and unusual hardship or to reward services of an exceptional value to Canada.
>
> I examined at the hearing whether there were any circumstances that could justify such a recommendation. I have decided not to make a recommendation for a waiver to the Minister.
>
> In the Request for a medical opinion, provided by Doctor Vincenzo Colavincenzo, signed on October 19, 2010, and whom you were visiting for the first time, Dr. Colavincenzo explains the difficulty experienced by you, Mrs. N. Kalkat, to master your own language and also the English language: "She is not capable of acquiring sufficient knowledge about issues or subject matter that is foreign to her." However, during the hearing, I observed that you seem to understand all my questions and that you were able to converse fluently with your interpretor [*sic*].

> Doctor Colavincenzo explains that you can appreciate the significance of the oath of Citizenship and of appreciating the consequences of acquiring Canadian Citizenship.
>
> Doctor Colavincenzo finally declares: "The lady is not mentally deficient or depressed."
>
> I share this opinion, since I was able to observe you and to assess your ability to understand your situation and to converse with me through the services of the interpreter authorized to assist you.
>
> I therefore believe that with the help of family members, friends, or community groups, you could be able to comply with the requirements of the *Citizenship Act* with respect to language and knowledge.

[17] As outlined at the beginning of these reasons, while reviewing the redactions made to the tribunal's record, counsel for the respondent identified documentation which postdates the decision dated March 8, 2011, but that was not included pursuant to CIC's policy manual. Counsel for the applicant has objected to the filing of these documents. The bias issue was not specifically raised by the applicant in her written submissions, but if it had been, these documents certainly would have been important. This new information is relevant to the issue of an alleged breach of the principles of natural justice and the allegation of bias. In fairness to all concerned, it will be included as part of the record. The pertinent information is as follows:

1. A letter from counsel for the applicant to, among others, the judge, dated April 6, 2011, which raises a complaint about the way the hearing was conducted. In essence, it relates in less detail the content of the affidavit of the applicant filed in this proceeding and includes additional information.

2. A letter dated April 18, 2011 from the senior citizenship judge addressed to the judge, in which he is asked to comment on the complaint.

3. A handwritten response from the judge dated April 28, 2011, in which he responds to the allegations made against him pertaining to his presiding over the applicant's hearing. It presents the hearing in a somewhat different light:

   - The presiding judge states that counsel for the applicant had the opportunity to express her opinion and to make observations, that he respected her opinion, but had to continue with the hearing to administer the tests, and that it was his discretion to make a recommendation to the Minister to waive the requirements.

   - The judge writes that counsel for the applicant interrupted him repeatedly to say that her client did not need to pass the tests and that a waiver should be granted.

   - Regarding the allegation that the judge did not care that the applicant's husband was murdered (described differently in the affidavit), the citizenship judge states that this is pure invention.

   - The judge indicates that when he heard the applicant was a widow, his response was that the question to be answered was whether she had the capacity to learn or not.

   - The citizenship judge specifies that he never said that he would render a negative decision, but rather that he explained that he would render a decision within 60 days.

   - According to the judge, the chronology of the hearing does not accurately reflect reality and that counsel's interventions were much longer and that he did not speak

as long as it was alleged (65 minutes). He adds that counsel at no time informed him that she would be filing submissions.

- Regarding the allegation that he had said nobody will obtain citizenship unless they speak English or French, the citizenship judge explains that all he did was explain one of the requirements of the Act.

II. Parties' Positions

[18] The applicant argues that it was unreasonable for the citizenship judge to prefer his judgment of Ms. Kalkat's ability to learn over that of Dr. Colavincenzo. She also criticizes the citizenship judge's evaluation of Ms. Kalkat's abilities given her very limited knowledge of even her own mother tongue, Punjabi, in which she is unable to read and write beyond recognizing and writing her own name. The applicant highlights that this Court has in the past referred a matter back for reconsideration when in similar circumstance, in considering the exercise of the discretion as to whether to recommend a waiver of the knowledge requirements, the Court found that relevant factors had not been taken into account or medical evidence had been misapprehended (*Khat (Re)* (1991), 49 FTR 252, [1991] FCJ 949 and *Hassan v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 755, [2002] FCJ 1049).

[19] The applicant also reiterates the Federal Court of Appeal's statement that when a claimant swears the truth of certain allegations, a presumption exists that those allegations are true unless there is a reason to doubt their truthfulness (*Pedro Enrique Juarez Maldonado v Minister of Employment and Immigration*, [1980] 2 FC 302 at para 5). In such circumstances, the applicant contends that while the citizenship judge is not compelled to make a recommendation for a waiver

based on the medical opinion submitted, he must nevertheless assess the evidence, which the applicant resumes as follows (Applicant's Memorandum of Facts and Arguments at paras 50-53):

> 50. […] [A] person whose level of education is grade 2 primary school, who can hardly read/write in her mother tongue and whose life has mainly been as a farmer's housewife, cannot be expected to "make more efforts" or "study harder" to successfully learn English/French and/or retain the necessary information on the three founders of Canada, which province is the leading producer of oil or even come to the knowledge that the Charter of Rights is an important component of our Constitution;
>
> 51. It is common knowledge that learning disabilities cannot be corrected after adulthood and this is what the medical opinion that the Citizenship judge dismissed reported;
>
> 52. There is no reason to doubt [the] truthfulness of the Applicant's disability to learn a new language in this case;
>
> 53. Therefore, it was not open to Mr. Gilles Duguay to base his decision on nothing but a personal assessment of the Applicant's ability to learn and understand a new language as well as his [wives'] experiences of immigrating to Canada and learning ("They came as immigrants and learned."), while completely disregarding Doctor Vincenzo Colavincenzo's medical opinion.

[20] The applicant further alleges that her right to procedural fairness, as set out by the Supreme Court of Canada in *Cardinal v Kent Institution*, [1985] 2 SCR 643, was not respected when the citizenship judge denied Ms. Gamliel's requests to intervene and present observations. During her oral submissions, counsel for the applicant argued explicitly for the first time that the citizenship judge, as a result of his comments made during the hearing, displayed a closed mind and biased attitude. Counsel for the respondent objected on the basis that this was a new argument not dealt with in her written submissions. Following a discussion, it was decided that the objection had some basis and that some of the facts contained in the motion records indicated this issue had been implicitly raised, but that counsel for the respondent would be given time to submit further

submissions and counsel for the applicant could then submit a reply. In this reply, aside from objecting to the filing of new information (which has already been addressed in these reasons), counsel for the applicant submitted that the new notes written by the citizenship judge concerning the applicant's lack of schooling and inability to learn a new language should have been included originally. I agree. In addition, counsel again dealt with the allegations of bias and the issue of costs.

[21] For its part, counsel for the Minister submits that the onus was on the applicant to demonstrate that the citizenship judge should have exercised his discretion to recommend a waiver (*Maharatnam v Canada (Minister of Citizenship and Immigration)* (2000), 96 ACWS (3d) 198, [2000] FCJ 405). The Minister also takes the view that the medical opinion did not prove the facts that it stated and that before any weight is given to it, the citizenship judge must believe the facts it is based on (*R v Abbey*, [1982] 2 SCR 24). The Minister argues that the citizenship judge considered the medical opinion, but that he was entitled not to give it a high probative value since it did not prove the facts that it was based on and that it lacked important information: Dr. Colavincenzo is not a specialist in language and learning disabilities; this was his first meeting with Ms. Kalkat and he did not know her medical history; there is no trace of the basis and reasoning on which Dr. Colavincenzo drew his conclusions; and Dr. Colavincenzo does not speak Punjabi and could not evaluate her knowledge of that language.

[22] With regard to the procedural fairness issue, the Minister argues that the right to a counsel during an administrative proceeding is not absolute and depends on the circumstances. Since evaluating the applicant's knowledge of Canada and the official languages is not legal or a complex question, Ms. Gamliel's observations and interventions "were not necessary and were only interrupting the interview" (Respondent's memorandum of fact and law at para 40). Thus on the one hand the Minister argues that the applicant did not meet her onus of convincing the citizenship

judge that a waiver should be recommended, while on the other hand the Minister argues that Ms. Gamliel's attempts to meet this onus were unnecessary and interruptive. In the additional submissions, counsel for the respondent submitted that there was no convincing evidence that the citizenship judge had shown bias or a close-minded attitude. The applicant's affidavit was the only evidence to support such an allegation and counsel argued that this evidence was insufficient to reverse the presumption of impartiality.

III. Issues and Standard of Review

[23] The following issues were raised before this Court:

1. Did the citizenship judge fail to make his decision in accordance with the principles of procedural fairness?

2. While evaluating whether to recommend a waiver of the knowledge and language requirements, did the citizenship judge reasonably consider the evidence before him?

[24] A citizenship judge's weighing of evidence and decision of whether to make a recommendation for waiver on compassionate grounds are questions of fact and subject to review under the reasonableness standard, which calls for deference, while issues of procedural fairness are reviewable on a standard of correctness and no deference is shown (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 47, 51, and 54, [2008] 1 SCR 190 and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 42-46, [2009] 1 SCR 339).

IV. Analysis

A. *Did the citizenship judge fail to make his decision in accordance with the principles of procedural fairness?*

(1) The Legal Concept of Judicial Impartiality

[25] In order to show, reflect, and radiate public confidence, it is of utmost importance that our legal system ensures that its decision makers perform their duties free of bias, prejudice, or any perception of it. It is fundamental that any decision rendered call for respect and confidence and that the parties and the public must know and feel that justice has been served without bias or outside influence.

[26] In *Wewaykum Indian Band v Canada*, 2003 SCC 45, [2003] 2 SCR 259, the Supreme Court of Canada stated at para 58 that "[t]he essence of impartiality lies in the requirement of the judge to approach the case to be adjudicated with an open mind." and at para 59, quotes with approval the Canadian Judicial Council's *Ethical Principles for Judges* (1998), at 30: "[i]mpartiality is the fundamental qualification of a judge and the core attribute of the judiciary."

[27] As noted in the same decision, again at para 59, impartiality is a presumption that carries considerable weight. This fundamental component of our judicial system is otherwise not easy to prove and this is why our Canadian courts have developed through the years the concept of apprehension of bias.

[28] In *Committee for Justice and Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369 at 394, Justice de Grandpré described apprehension of bias as follows:

> […] the apprehension of bias must be a reasonable one held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the

> words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically--and having thought the matter through--conclude. Would he think that it is [more] likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly."

[29] Since there is a strong presumption of judicial impartiality, in order to find an apprehension of bias there must be serious grounds on which to base such a finding. This is why in the same decision, at 395, Justice de Grandpré makes it clear that "[t]he grounds for this apprehension must, however, be substantial and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience."

[30] This delicate exercise is in essence a fact finding search for a true account of the events that occurred and a determination of the view a reasonable and right minded person would hold in such a situation. Were the events such that this person, viewing them realistically and practically, could conclude that it is more likely than not that the citizenship judge, whether consciously or unconsciously, would not decide fairly?

[31] If the answer is affirmative and the judge's words or conduct have shown an apprehension of bias, then the judge has exceeded his or her jurisdiction. Such a conclusion tints the proceedings and the interests of justice call for a new hearing.

(2) The Legal Concept and the Facts of the Case

[32] Complicating matters, there is no transcript of the hearing. The applicant's affidavit filed with this Court reflects in reality the views of her counsel and what the latter perceived since the applicant was unable to understand the verbal exchanges at the hearing except through an unofficial interpreter. In addition, following the review of the tribunal's record conducted by counsel for the minister, we have the point of view of the citizenship judge through his response to the complaint

filed against him by the applicant's counsel. However, as observed earlier, the events described in the affidavit are more extensive than those found in the complaint and so the judge's response does not address all allegations. This is not an ideal situation for an appellate judge to find him or herself in and a delicate assessment of the facts must be conducted in order to be fair to all parties concerned. Finally, I am mindful that the burden of proof is on the applicant to show that there was an actual bias or an apprehension of bias.

[33] The events, as described by the applicant in her affidavit, portray a hearing where the judge played an active role. Playing an active role in citizenship court hearings is not forbidden. On the contrary, the citizenship judge must inform the applicant of the requirements of the Act, the procedure to be followed, the tests to be applied, and the options to consider at the time of the decision. This calls for an exchange between the applicant and the judge. In general, lawyers are not always present, but they do appear occasionally. As the tribunal's record shows, counsel for the applicant had to provide her Barreau du Québec card for photocopying and identification purposes. In such cases, counsels for the applicant are there to represent the interest of their client as is normally the role of counsel before any other court or tribunal.

[34] The exchanges between the judge and counsel appear to have been substantial in this case, direct, and conducted with an air of contention. Comments were made, at a minimum the appearance of opinions were expressed, and counsel for the applicant intervened either often (in the judge's view) or rarely (in counsel's opinion) because the judge did not permit it.

[35] As the evidence indicates, three issues related to the principles of natural justice, bias or apprehension of bias, and the role of counsel must be addressed. A further concern related to the same issues is the question of the appropriate test to be applied to assess the recommendation for a

waiver of requirements to the Minister. In the judge's opinion, this test appeared to be whether or not the applicant had a mental incapacity sufficient to justify such a recommendation. The application of such a test may indicate a close-minded attitude to the remedy sought by the applicant.

[36] The evidence shows that the applicant could not meet the requirements of the Act because of her lack of education and inability to learn languages, including Punjabi, her first language. In such circumstances, the citizenship judge's principal task was to consider whether there was, based on the evidence, sufficient circumstances to consider whether or not to recommend to the Minister an exercise of discretion under section 5(3) or 5(4) of the Act. In order to complete this task, the citizenship judge had to administer the necessary tests pursuant to section 5 of the Act and then assess the circumstances and determine whether or not a recommendation for a waiver of the requirements of the Act could be made.

[37] Therefore, the determinative issue to be canvassed is whether or not the citizenship judge, in commenting as he did during the hearing, had the necessary open mind to assess objectively whether or not a recommendation for an exercise of discretion pursuant to subsections 5(3) and 5(4) of the Act could be made. These discretionary remedies can be granted if there are justifiable circumstances that could waive the legislative requirements (ss 5(3)) or if there is evidence of special or unusual hardship or to reward services of an exceptional value to Canada (ss 5(4)).

[38] The evidence on file reveals that the citizenship judge made the following comments during the hearing:

- Somebody who does not speak English or French will never be Canadian.

- Tomorrow, I will grant citizenship to 800 people who all speak French or English; they all passed the test! Your lawyer has written to us that you cannot be able to learn about our country and language. Unfortunately, we receive this argument from hundreds and thousands of people.

- The medical opinion on record was just an opinion of a person not as a doctor because doctors are not linguistic experts.

- I am a judge and I apply the law, my first wife was Russian and my second wife was Romanian; they came as immigrants and learned.

- During the hearing, I observed that you seem to understand all my questions and that you were able to converse fluently with your interpreter.

- Many other people have trouble learning; some work harder at learning and some don't and you should have learnt with the help of your husband and children.

- If a negative decision is rendered, you can go to the Federal Court of Appeal and get an audition.

During the hearing, the citizenship judge also showed pictures of his daughter, married to the son of former Prime Minister Paul Martin.

[39] When counsel for the applicant tried to intervene, she was refused. The citizenship judge, faced with interventions from counsel, had to explain what his obligations were under the Act when presiding over such a hearing. As it appears from the record, the citizenship judge wrote a handwritten comment on the back of the Notice to the Minister of the Decision of the Citizenship Judge which made it clear that he did not want counsel for the applicant to intervene:

> Her lawyer then intervened to declare that her client could be granted Canadian citizenship without having to pass these tests. I told the lawyer to observe the audition, without interrupting the proceeding to offer her own conclusion. I told her that I had 60 days to make/take my decision, that she was entitled to have her own opinion, but that I had to do my job and to proceed. [Emphasis added.]

[40] The citizenship judge, in refusing to recommend to the Minister a waiver of the requirements, found that the applicant was able during the hearing to understand the questions and that she was able to converse with the interpreter. In addition, she understood the situation she was in. In order to come to that conclusion, the citizenship judge explained according to the affidavit that the test to be applied was whether or not the applicant could prove that she is intellectually disabled and cannot have a bank account and cannot sign anything. His reading of the medical opinion was that it did not state "complete intellectual disability" and that she was therefore mentally capable and no recommendation would be made to the Minister.

[41] While it is well known that a citizenship judge's decision to make a waiver recommendation to the Minister on the basis of special circumstances is highly discretionary, it does not relieve the judge from his duty to act with absolute objectivity, without any indication of bias or close-mindedness to the relief sought.

[42] Some of the language used during the hearing by the citizenship judge creates an impression of an individual that has no intention of objectively considering whether to make a recommendation to waive the requirements of the Act. Based on the applicant's affidavit, the judge believed that nobody would become a Canadian citizen if they were unable to speak one of the two official languages unless they had a complete intellectual disability. As mentioned, his ex-wives' personal experiences showed that it was possible to learn another language and so the applicant could learn another language.

[43] In that context, even if the decision remains highly discretionary, how can the decision maker appear to assess the facts of the case with an open mind? The citizenship judge, by expressing himself in such a way, exhibited an attitude of having already come to the conclusion

that he would not recommend a waiver to the Minister based on special circumstances. More is expected of citizenship judges in such cases. It is of utmost importance that, prior to taking any decision in relation to citizenship matters, judges do not exhibit orally or otherwise an attitude which demonstrates they will not objectively assess the facts of the case. Sadly, this is precisely the impression given by the judge in this case.

[44] While this does not necessarily confirm partiality, it certainly gives a reasonable and right minded person the impression that the waiver requirements recommendation would not be dealt with fairly. After all, the objective of considering whether to recommend a waiver of requirements is to see if there are any special circumstances that could warrant such a recommendation. In order to assess this possibility, a judge has to analyze the personal circumstances at play before deciding.

[45] In the present case, the citizenship judge made it clear that no citizenship will be granted unless the applicant spoke one of Canada's official languages, as his ex-wives were able to do. By expressing such a statement, the citizenship judge was giving the impression that a recommendation for a waiver of the requirements would not be made. Sadly, this can only appear to an informed person to be a clear indication of at least an apprehension of bias. In addition, although not determinative of the bias issue or its apprehension, the personal references made to his ex-wives and his daughter's marriage do not represent the proper conduct of a judge when presiding over a hearing. It is after all an unwritten code of conduct that judges should not personalize their judicial role.

[46] Furthermore, other concerns raised by the evidence are also in themselves determinative of the appeal. The judge's refusal to hear counsel for the applicant is directly related to issue of procedural fairness. Due to her inability to express herself in one of the official languages of

Canada, the applicant was represented by counsel. In effect, counsel was her mouth and ears during the hearing in addition to the unofficial interpreter by her side.

[47] It is true that the right to counsel is not absolute in administrative proceedings and that it depends on the circumstances of each case. However, as seen earlier, the facts of this case made it clear that the possible recommendation of the waiver of requirements was the determinative issue to be addressed by the judge. The applicant understood that and took the means to be adequately represented. Counsel sought to properly explain the applicant's position prior to any determination being made on the issue, but does not appear to have been afforded the opportunity to do so. In addition, the test of mental disability put forward by the judge in considering whether to recommend a waiver of the requirements was surely worthy of debate with counsel. This was certainly an important subject matter that should have been addressed before any decision was made.

[48] The citizenship judge however refused the intervention of counsel since, as he wrote (TR at 12): "[…] she was entitled to have her own opinion, but […] I had to do my job and to proceed." By refusing at least in part some of the interventions of counsel, if only to hear the applicant's point of view on the waiver issue, the citizenship judge breached a principle of natural justice. The right to representation was fundamental to the applicant in this situation and that right was not respected. This was a sufficient error in itself to grant the appeal of the citizenship judge. For all these reasons, the appeal of the citizenship judge is granted and it will not be necessary to deal with the second issue raised before this Court.

[49] Counsel for the applicant asked the Court if an oral amendment could be made so as to claim costs. Counsel for the respondent objected on the basis that it was not claimed in the initial written submission. Having reviewed the facts of this case, the submissions of counsel on this

matter, and having read the supplementary submissions and found in favour of the applicant, I authorize the amendment and conclude that costs are to be in favour of the applicant.

JUDGMENT

THEREFORE, THIS COURT ORDERS AND ADJUGES that the appeal of the citizenship judge's decision is granted. This citizenship application is to be assigned to another citizenship judge. Costs are in favour of the applicant.

"Simon Noël"

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Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Patricia Gamliel	FOR THE APPLICANT
Denisa Chrastinova	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Gamliel Law Firm Montreal, Quebec	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT