

Federal Court



Cour fédérale

Date: 20130327

Docket: T-1238-12

Citation: 2013 FC 313

Ottawa, Ontario, March 27, 2013

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

WEI ZHOU

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an appeal by Wei Zhou (Applicant), brought pursuant to subsection 14(5) of the *Citizenship Act*, RSC 1985, c C-29 (the Act), of the decision of a citizenship judge denying her application for citizenship. The denial was based on the Applicant's failure to achieve the required passing grade on the citizenship test and, thereby, to demonstrate that she has adequate knowledge of Canada and of the responsibilities and privileges of citizenship as required by subsection 5(1)(e) of the Act. The present appeal is brought in accordance with section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 and Rule 300(c) of the *Federal Courts Rules*, SOR/98-106 (the Rules).

Background

[2] In 1999 the Applicant came to Canada as a student. She became a permanent resident on October 17, 2003 and in 2010 submitted a citizenship application, which was received by the Respondent on July 9, 2010. By way of a notice dated September 14, 2011, the Applicant was directed to write a citizenship test on September 29, 2011. She advised the Respondent that she was unable to attend as she would be away from Canada from June 28, 2011 to March 2012. She was then directed to appear on December 28, 2011 at a hearing before a citizenship judge.

[3] The Applicant attended as directed and a citizenship test was administered by Citizenship Judge George Khouri (Citizenship Judge). By letter dated April 26, 2012, the Applicant was notified by the Citizenship Judge that her application was not approved because she had not demonstrated, through her responses to questions prepared by the Minister, the requisite level of knowledge per subsection 5(1)(e) of the Act. More specifically, the Applicant had answered only thirteen out of twenty questions correctly, obtaining a score of 65%, and thereby failing to obtain the required passing grade of 75% (the Decision).

[4] The Applicant appealed and, in support of her application for judicial review of the Decision, filed an affidavit wherein she stated that that she had correctly answered all of the test questions and that the Citizenship Judge had made statements during the interview which, she argued in her application, gave rise to a reasonable apprehension of bias.

The Impugned Decision

[5] In his Decision, the Citizenship Judge advised the Applicant that he was providing her with notice of his decision in accordance with subsection 14(3) of the Act. He set out the legislative requirements that were relevant to her application and the Decision and explained that subsection 5(1)(e) requires an applicant for citizenship to have an adequate knowledge of Canada and of the responsibilities and privileges of citizenship. Further, the Citizenship Judge indicated that pursuant to subsection 15(1) of the *Citizenship Regulations*, SOR/93-246 a person is considered to have adequate knowledge of Canada if they demonstrate, based on their responses to questions prepared by the Minister, that they know the national symbols of Canada and have a general knowledge of specified subjects, and, pursuant to subsection 15(2) of the *Citizenship Regulations*, if they similarly demonstrate an adequate knowledge of the responsibilities and privileges of citizenship.

[6] The Citizenship Judge concluded by stating:

The citizenship test questions on knowledge of Canada and of the rights and responsibilities of citizenship are based on information provided in the study guide, *Discover Canada: The Rights and Responsibilities of Citizenship*. The citizenship test consists of 20 questions and the pass mark is of 75% (15 questions answered correctly out of 20 questions).

At the hearing, I asked you questions based on questions prepared by the Minister to determine if you met the requirement of paragraph 5(1)(e) of the Act and you obtained 13 out of 20 resulting in a score of 65%. You were unable to answer correctly to questions related to the following topics:

- voting procedures and how to register yourself as a voter;
- Canada's history;
- Canada's geography; and
- the responsibilities and privileges of citizenship

For those reasons, you do not meet the requirements of paragraph 5(1)(e) of the *Citizenship Act* in order to be granted Canadian citizenship.

[...]

Issues and Standard of Review

[7] The Applicant submits that there are three issues; the Respondent adds a fourth:

- i. Did the Citizenship Judge err in law and lose jurisdiction to refuse the citizenship application because he failed to render his Decision within 60 days as required by subsection 14(1) of the Act?
- ii. Did the Citizenship Judge err by failing to provide adequate reasons for his Decision?
- iii. Was the Citizenship Judge biased?
- iv. Did the Citizenship Judge err in finding that the Applicant had failed to obtain the minimum pass mark on the citizenship test and thereby failed to satisfy subsection 5(1)(e) of the Act?

[8] Given the guidance of the Supreme Court of Canada in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 14, that the reasons offered for a decision are to be assessed along with the outcome of that decision to determine whether the decision as a whole is reasonable, “adequacy of reasons” is no longer a stand-alone ground for challenging a decision. As such, I find that the second and fourth issues should be considered together and would rephrase the issues as follows:

- i. Did the Citizenship Judge err in law and lose jurisdiction to refuse the citizenship application because he failed to render his Decision within 60 days as required by subsection 14(1) of the Act?
- ii. Was the Citizenship Judge’s finding that the Applicant had failed to obtain the minimum pass mark on the citizenship test and thereby failed to satisfy subsection 5(1)(e) of the Act reasonable?

- iii. Has the Applicant satisfied the burden of establishing that there was a reasonable apprehension of bias on the part of the Citizenship Judge?

[9] The Supreme Court of Canada has held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is well settled by past jurisprudence, the reviewing court may adopt that standard of review (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 57 [*Dunsmuir*]).

[10] It is well-established that a citizenship judge's finding that an applicant failed a citizenship test is to be measured against a standard of reasonableness (*Desai v Canada (Minister of Citizenship and Immigration)*, 2013 FC 194 at para 7; *Zhou v Canada (Minister of Citizenship and Immigration)*, 2013 FC 19 at para 13; *El-Kashef v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1151 at para 10).

[11] When reviewing a decision on the reasonableness standard, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (see *Dunsmuir*, above, at para 47 and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59 [*Khosa*]).

[12] In contrast, no such deference is owed to an administrative decision-maker on issues of procedural fairness (*Khosa*, above, at para 43; *Raad v Canada (Minister of Citizenship and Immigration)*, 2011 FC 256 at para 23). Thus, the question of whether the Citizenship Judge was biased will be assessed on the standard of correctness.

[13] For the reasons set out below, the standard of review applicable to the jurisdictional issue need not be addressed.

Analysis

i) *Loss of Jurisdiction*

[14] In her written submissions the Applicant argued that the Citizenship Judge had lost jurisdiction to decide on her citizenship application because he had not rendered the Decision within sixty days as required by subsection 14(1) of the Act. However, at the hearing before this Court, the Applicant conceded that this was solely an issue of costs, and not one of jurisdiction or procedural fairness.

ii) *The Reasonableness of the Citizenship Judge's Decision*

[15] Prior to assessing the reasonableness of the Decision, I will first set out what properly forms part of the record before me. This requires background regarding a confidentiality issue and a ruling on the appropriateness of content in a proffered affidavit.

[16] First, in terms of the confidentiality issue, the specific questions that the Citizenship Judge determined were answered incorrectly by the Applicant were not disclosed in his reasons nor was the citizenship test that had been administered provided as a part of the certified tribunal record (CTR). The CTR was provided to the parties and filed with the Federal Court Registry by way of a covering letter dated July 10, 2012 from Ms. Anna Del Medico, Citizenship Counsellor, Citizenship and Immigration Canada (CIC). In that letter, Ms. Del Medico specifically noted that pages 06, 07

and 08 of the record had been omitted in their entirety as they contained the Applicant's responses to the citizenship test. Pursuant to Rule 318(2), CIC objected to the release of that information on the grounds that its disclosure would jeopardise the integrity of the test.

[17] Rule 317 states that a party may request that it be provided with material relevant to an application that is in the possession of a tribunal whose decision is the subject of the application. This can be done as a part of its notice of application as was the case in this matter. Rule 318(2) states that where the tribunal objects to a Rule 317 request it shall inform all parties of the reason for the objection.

[18] Although CIC objected to the disclosure of the citizenship test when the CTR was produced, on September 7, 2012 the Respondent brought a motion seeking a confidentiality order concerning the citizenship test. This would permit the filing of a sealed and confidential copy of the test and review of the test, in accordance with the terms of the confidentiality order, by counsel and the parties. The Applicant opposed that motion.

[19] By order dated October 2, 2012 Prothonotary Milczynski indicated that she was satisfied that it was in the public interest to maintain the confidentiality of the information sought to be sealed so as to ensure the integrity of the citizenship testing process. She ordered CIC to file the pages not included in the original CTR (the citizenship test) with the Court to be sealed and treated as confidential pursuant to Rule 152. Upon the filing of written undertakings of counsel in accordance with Rule 152(2)(b), the solicitors of record and the parties would be permitted to access the sealed pages, referred to as the Confidential CTR Material.

[20] The confidential citizenship test was duly filed with the Court on October 5, 2012 and the solicitor for the Respondent subsequently filed the required written undertaking. The solicitor for the Applicant did not file an undertaking. At the time of the hearing before this Court neither counsel for the Applicant nor the Applicant had reviewed the subject citizenship test.

[21] The Applicant argues that she disagrees with the Order of the Prothonotary that it is a matter of public interest to maintain as confidential the citizenship test questions and asserts that there is no authority or direction provided by the Minister to do so. However, what is before me is the appeal of the Citizenship Judge's Decision, not an appeal of the Prothonotary's Order, with which I agree in any case.

[22] On September 13, 2012 the Applicant brought a motion challenging an affidavit of Ms. Del Medico, dated August 15, 2012. That affidavit was filed by the Respondent as a part of its record. Attached as Exhibit "A" to the affidavit was the July 10, 2012 letter from Ms. Del Medico providing the parties with the CTR. The Applicant sought to have paragraphs 3, 4, 5, 6 and 7 of the affidavit struck out pursuant to Rule 81 as she alleged that those paragraphs were not made within the affiant's personal knowledge. By Order dated October 2, 2012 Prothonotary Milczynski dismissed the motion on the basis that the issue should be addressed by the Judge hearing the appeal on its merits.

[23] Before this Court, the Applicant asserted that the affidavit was inadmissible as it was intended to bolster the record and the reasons of the Citizenship Judge. Further, the Applicant

argues that because the CTR, including the citizenship test, are exhibits to the affidavit they too are inadmissible and do not comprise a part of the record that can be reviewed by this Court in this appeal. In short, the Applicant contends that there is no admissible evidence as to the outcome of the citizenship test other than the unchallenged affidavit of the Applicant stating that she correctly answered all of the test questions.

[24] The affidavit reads as follows:

I, Anna Del Medico, Citizenship Officer, Citizenship and Immigration Canada, Scarborough Citizenship, SWEAR THAT:

1. I am employed with the Government of Canada at the local office of Citizenship and Immigration Canada (“CIC”) in Scarborough. I am Citizenship Officer and responsible for responding to requests for documents in possession of our office. As such, I have knowledge of the matters thereafter deposed.
2. The Applicant is appealing the decision of Citizenship Judge George Khouri. On his notice of application the applicant requested that CIC Scarborough Citizenship office at 200 Town Centre Court, Suite 370 Scarborough ON M1P 4X8 send to the parties and the Registry of the Federal Court a certified copy of the Citizenship Judge’s complete file relating to the Applicant’s citizenship application.
3. As a Citizenship Officer, it is my responsibility to prepare the true copies of documents requested by the Applicant. I reviewed the citizenship file and prepared a true copy of this file. I sent the letter dated July 10, 2012 and addressed to the Registry, Federal Court of Canada, certifying the record. I also sent the certified true copy of the record with the letter to the parties and the Court.
4. Attached as Exhibit “A” is a true copy of the certified tribunal record previously sent to the parties and the Court.
5. When I put together the Certified Tribunal Record and filed the documents with the Federal Court registry on July 7, 2012, I redacted the list of questions used and annotated by Citizenship Judge George Khouri in assessing the Applicant’s knowledge of Canada pursuant to section 318(2) of the Federal Court Rules.

6. In order to ensure fair treatment to all applicants and to ensure the integrity of the citizenship testing process is not compromised, Citizenship and Immigration Canada never discloses the copies of the tests, including the questions and answers.
7. I have reviewed the notes from the oral examination of the applicant's knowledge of Canada and the responsibilities and privileges of Canadian citizenship on her file and I can attest that Ms. Zhou correctly responded to 13 questions out of 20. As a result, she obtained a score of 13 out of 20 (65%) and failed the test. Specifically, Ms. Zhou failed to correctly answer questions 1, 2, 7, 11, 14, 16 and 18. I have further reviewed Ms. Zhou's answers and confirm that her answers to questions 1, 2, 7, 11, 14, 16 and 18 are incorrect.

[...]

[25] Paragraphs 1 to 5 of the affidavit are factual and are matters of which Ms. Del Medico would have personal knowledge as a result of her stated position and the responsibilities that go along with that position. Those paragraphs attest to the compiling and certification of a true copy of the CTR and are admissible as is Exhibit "A". This includes the citizenship test which was originally identified as forming a part of, but redacted from, the CTR and which was subsequently provided as the Confidential CTR in accordance with the confidentiality order. As to paragraphs 6 and 7 of the affidavit and Exhibits "B" and "C", these attestations are evidentiary in nature and could be interpreted as intended to support the Respondent's position. Further, the exhibits do not comprise a part of the tribunal record. As such, I afford paragraphs 6 and 7 and Exhibits "B" and "C" no weight (*Sellathurai v Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 255 at paras 45-47; *Qin v Canada (Minister of Citizenship and Immigration)*, 2013 FC 147 at paras 17-18).

[26] I now turn to the substance of the Decision. Simply put, there is no evidence on the record before me that the Citizenship Judge erred in his Decision or, more precisely, in his assessment of the Applicant's knowledge under subsection 5(1)(e) of the Act. Indeed, the record clearly confirms his conclusion.

[27] In this regard, the Confidential CTR is comprised of the three pages which were redacted from the CTR, being a document entitled Canadian Citizenship Test - Oral Hearing, a standard document. In the Client Name section is entered by hand "Zhou Wei", in the File Number section is entered by hand 3981286, and, in the Date section is stamped Dec 28, 2011. Questions numbered one to twenty are set out. Under each question is listed the correct answer (or answers if more than one is acceptable). The test is annotated by hand to indicate which questions were answered correctly and which were answered incorrectly. Where a correct answer was given by the Applicant this is underlined by hand and a check mark placed by the question. Where an incorrect answer was given an "X" is placed by the question and the incorrect answer given by the Applicant is recorded by hand. Seven questions are marked as answered incorrectly and thirteen are marked as answered correctly. In one case the recorded answer is "I can't remember, I'm sorry" and in another it is "no answer". The test is signed by the Citizenship Judge.

[28] The CTR also contains a copy of the Notice to the Minister of the Decision of the Citizenship Judge dated December 28, 2011. This was prepared and signed by the Citizenship Judge and confirms that all of the citizenship requirements, including residency, had been met by the Applicant with the exception of subsection 5(1)(e). In the reasons set out in that document the Citizenship Judge wrote that "The Applicant has not complied with paragraph 5(1)(e) (knowledge)

as per attached assessment, correctly answered 13/20, 65% on “The Knowledge of Canada”, when the minimum requirement is 15/20 – 75%.”

[29] Not having taken the opportunity to review the answers noted, the Applicant has offered no specific challenges to the Decision, other than her general claim to have answered all of the questions correctly. This is contradicted by the tribunal record. Based on that record, the Citizenship Judge’s Decision was justifiable, transparent and intelligible and the only possible outcome.

[30] At the hearing, the Applicant also submitted that it was unfair that she was required to have an interview before a citizenship judge and have a citizenship test given orally. She submits that because she was unavailable to write the test when it was originally scheduled that it should simply have been rescheduled. She claims that due to a clerical error of the Respondent, she was required to appear before the Citizenship Judge and that had it been otherwise she would have passed the test. The Applicant did not refer me to any regulation, policy or directive indicating that if an applicant cannot attend a scheduled written citizenship test then the applicant is entitled to a second scheduled written test rather than being directed to attend before a citizenship judge. In my view the Applicant’s argument cannot succeed in the absence of a supporting legislative or other basis.

iii) *Bias*

[31] In her affidavit the Applicant states:

9. The Judge made me feel nervous right away by the tone of his voice.

10. He said to me ‘Do you know you don’t live in Canada for a long time, but you still take advantage of the benefits and welfare. It is not fair to Canadian.’

[...]

16. As I got up to leave after the interview the judge said to me
‘I think you better tell your other friends if they don’t live in Canada for the long term, do not apply for citizenship. It is not fair to Canadians.’

[...]

[32] The Applicant submits that these comments meet the test for a reasonable apprehension of bias as set out in the dissenting opinion of Justice de Grandpré in *Committee for Justice and Liberty et al v National Energy Board et al*, [1978] 1 SCR 369 at 394, being “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 [the decision maker], whether consciously or unconsciously, would not decide fairly.” The Applicant further submits that because this evidence has not been challenged or contradicted, the appeal must succeed.

[33] The Respondent submits that it is presumed that administrative tribunals act fairly and without bias and that allegations of bias and misconduct are serious and should not be taken lightly. The Respondent further submits that the threshold for the finding of bias is very high and has not been met in this case (*Committee for Justice and Liberty et al v National Energy Board et al; R v S (RD)*, [1997] 3 SCR 484; *Tchiegang v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 249). The Respondent points to the decision of the Federal Court of Appeal in *Es-Sayyid v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FCA 59, in which the

Court cautioned against unsubstantiated allegations of bias against the Court and public officials given the harm caused to the administration of justice. The Respondent notes that there are credibility concerns with the Applicant, as she asserted in her Affidavit that she answered all of the citizenship test questions correctly when the record shows that this is not true, and submits that her claims of bias lack credible basis.

[34] In *Lin v Canada (Minister of Citizenship and Immigration)*, 2010 FC 108 at para 23, Justice Zinn canvassed the presumption that allegations are true, unless there is reason to doubt their truthfulness:

[23] “[W]hen an applicant swears to the truth of certain allegations, this creates a presumption that those allegations are true unless there be reason to doubt their truthfulness”: *Maldonado v. Canada (Minister of Employment and Immigration)*, [1980] 2 F.C. 302 at 305 (C.A.). “The ‘presumption’ that a claimant’s sworn testimony is true is always rebuttable, and, in appropriate circumstances, may be rebutted by the failure of the documentary evidence to mention what one would normally expect it to mention” [emphasis added]: *Adu v. Canada (Minister of Employment and Immigration)*, [1995] F.C.J. No. 114 (F.C.A.) (QL) at para. 1. [...]

[35] In this case, the Applicant’s affidavit evidence was not challenged by the Respondent by way of cross examination or by the filing of an affidavit by the Citizenship Judge denying the allegation of bias. However, there is reason to doubt the truthfulness of the allegations contained in the Applicant’s affidavit. As is argued by the Respondent, the Applicant’s claim to have answered all of the questions on the Citizenship exam correctly is not borne out by the record. Further, given that the record indicates she failed to answer two of the questions, she cannot reasonably claim to have mistakenly stated that she correctly answered every question nor does she make such a claim. Rather, she contends that the citizenship test is inadmissible, she has declined to review the test

when it was made available by way of the confidentiality order and relies on her unchallenged affidavit as evidence that she did correctly answer all of the questions. This undermines the Applicant's credibility.

[36] The Respondent also argues that the Applicant did not raise the issue of bias until after the Decision was rendered. However, I give less weight to this fact as it could reasonably be attributed to reluctance to risk alienating the decision-maker while a decision was outstanding and a positive outcome was anticipated.

[37] Given the uncertainty attached to the Applicant's credibility, and the fact that her statements are the only evidence on record regarding bias, I find that the Applicant has failed to meet the high threshold for establishing a reasonable apprehension of bias.

Costs

[38] As to costs, the Applicant refers to *Yan v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1153 at para 38. There a decision of a citizenship judge was delayed, without reason, for fifteen months rather than being issued within sixty days as required by subsection 14(1) of the *Citizenship Act*. Costs were awarded because it was held that a failure to comply with a directory requirement should not be sanctioned. Here the delay was of approximately sixty days. While this is not condoned or sanctioned, in the circumstances of this case as a whole I am not prepared to award costs to the Applicant.

JUDGMENT

THIS COURT'S JUDGMENT is that the appeal is dismissed and there shall be no order as to costs.

“Cecily Y. Strickland”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1238-12
STYLE OF CAUSE: ZHOU v MCI

PLACE OF HEARING: Toronto
DATE OF HEARING: February 26, 2013
**REASONS FOR JUDGMENT
AND JUDGMENT BY:** STRICKLAND J.
DATED: March 27, 2013

APPEARANCES:

Sheldon Robins FOR THE APPLICANT
Tamrat Gebeyehu FOR THE RESPONDENT

SOLICITORS OF RECORD:

Sheldon Robins FOR THE APPLICANT
Barrister & Solicitor
Thornhill, Ontario

William F. Pentney FOR THE RESPONDENT
Deputy Attorney General of Canada
Toronto, Ontario