Federal Court  Cour fédérale

Date: 20150226

Docket: T-1322-14

Citation: 2015 FC 245

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, February 26, 2015

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

MAHMOUD RIAD SAAD

Respondent

JUDGMENT AND REASONS

[1] This is an appeal pursuant to section 14(5) of the *Citizenship Act*, RSC, 1985, c C-29 (the Act) of a decision by a citizenship judge, dated March 31, 2014, granting Canadian citizenship to the respondent, Mahmoud Riad Saad.

[2] This is the second time this matter is before me. On May 29, 2013, I allowed the respondent's appeal and set aside the decision by a different citizenship judge denying him Canadian citizenship (*Saad v Canada (Minister of Citizenship and Immigration*), 2013 FC 570 [*Saad-1*]).

[3] The applicant essentially argues the judge's lack of reasons and the unreasonableness of his decision, in light of the concerns listed by the immigration officer regarding the proof of residency submitted by the respondent. Paragraph 5(1)(*c*) of the Act requires a citizenship applicant to have, within the four years immediately preceding the date of his or her application, accumulated at least three years of residence in Canada.

[4] For the reasons that follow, this appeal is allowed.

I. Relevant facts

[5] The respondent, a citizen of Lebanon, entered Canada on December 20, 2001, and became a permanent resident on January 19, 2007. On February 23, 2012, his citizenship application was refused on the grounds that he did not fulfill the residency requirement set out in paragraph 5(1)(*c*) of the Act.

[6] On May 29, 2013, I allowed his appeal and referred the matter back to a different citizenship judge for redetermination. Here are a few excerpts from my decision in *Saad-1*:

> [19] For the reasons that follow, I am of the opinion that this Court must intervene, as the citizenship judge could not apply two distinct tests to determine whether the applicant met the residency

requirement set out in paragraph 5(1)(*c*) of the Act. If physical presence in Canada can be proved for the prescribed minimum number of days during the reference period, there is no need to present qualitative evidence to show the applicant's degree of integration into Canadian society or to justify the applicant's absences (*Canada (Minister of Citizenship and Immigration) v Talka*, 2009 FC 1120; *Canada (Minister of Citizenship and Immigration) v Salim*, 2010 FC 975; *Canada (Minister of Citizenship and Immigration) v Elzubair*, 2010 FC 298). Since this conclusion alone disposes of the applicant's appeal, there is no need for me to address the second issue.

. . .

[21] As I recently stated in *Ghosh v Canada (Minister of Citizenship and Immigration)*, [2013] F.C.J. No. 313, I am of the opinion that residence in Canada within the meaning of the Act requires proof of physical presence in Canada, especially since subsection 5(1) of the Act gives the Minister little discretion in the matter. The Minister must grant an applicant citizenship if he or she meets the requirements set out in the Act (see also *Martinez-Caro v Canada (Minister of Citizenship and Immigration)*, 2011 FC 640).

[22] I also share the opinion that the citizenship judge must indicate the residency test used and explain why he or she decided that the requirements were or were not met (*Canada (Minister of Citizenship and Immigration) v Behbahani*, 2007 FC 795;*Al-Showaiter*).

. . .

[25] Regarding physical presence in Canada, it bears noting that the applicant reported an absence of 44 days, which his passport confirms. In his written submissions, the respondent submits that the citizenship judge chose and applied the *Koo* test, which indicates that the applicant has not proved a physical presence in Canada. At the hearing before this Court, the respondent submitted that it is possible that the applicant visited other countries during the reference period, such as the United States, and that his passport was not stamped when leaving or re-entering Canada. This is highly speculative, and it would have been relatively easy for the respondent to verify with the Canada Border Services Agency whether the applicant's entries and exits during the reference period matched those appearing in his passport. No such verification was done.

> [26] The evidence considered by the citizenship judge does not tend to contradict the applicant's physical presence in Canada, but it does cast doubt on how he spent his time here and on the fact that he allegedly reported all of his income for the period concerned. The citizenship judge did not explain why the applicant's passport was not persuasive evidence of his physical presence in Canada, and she could not use elements of one or more of the other residency tests to reject that evidence, just as she could not submit the evidence to two tests at the same time.

[7] A new citizenship officer was seized with the matter, and she reiterated the concerns raised during the first analysis of the case, which led to the negative decision of the first judge, and she submitted her report to the second judge.

[8] On January 24, 2014, the respondent received a notice of hearing.

[9] On February 7, 2014, the respondent gave consent to the Canada Border Services Agency (CBSA) to disclose the details of his history of entries into Canada to Citizenship and Immigration Canada (CIC) in order to assist CIC in determining his citizenship eligibility.

[10] On March 31, 2014, the respondent's application was approved by a second citizenship judge.

II. Impugned decision

[11] The reasons for that decision are handwritten on the back of the form entitled "Minister's Opinion," under the heading "Note to File." I reproduce them in full:

> [I]nterviewed applicant & examined documents 07 Jul(sic) 2014.

> [A]pplicant entered Canada 20 Dec 2001. Landed 19 January 2007. Filed for C.C.20 April 2009. The relative material period is 19 Jan. 2007 - 20 Apr. 2009 plus ½ day for everyday between 26 April 2005 - 17 January 2007 = 1141 days
> [A]bsences declared 44 days.
> [P]hysical presence 1097 days. The Act requires 1095 day. Applicant complies.
> [N]ote: the absences in the passports corresponds(sic) with application and info stated.
> [T]he ICES report supports the statements made by the applicant at the hearing. Madam Justice Gagné states:
>
> > par 21 - must grant if meets res. physical presence.
> >
> > par 25 - verification – ICES - has now been done matches within the relative material period.
> >
> > par 26 - although we do not know "how the applicant spent his time" the Act only requests 1095 days with the relevant mat. period".
> >
> > - The applicant complies with 5(1)*c*) of the Act.

III. Issue and standard of review

[12] This appeal raises the following issue:

– Did the second judge commit a reviewable error by granting the respondent Canadian citizenship?

[13] Since the adequacy of reasons is no longer a freestanding ground for judicial review, the standard of review applicable to this Court's review of that issue is reasonableness (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62; *Canada (Minister of Citizenship and Immigration*) *v Raphaël*, 2012 FC 1039, at paragraph 15 [*Raphaël*]; *Canada (Minister of Citizenship and Immigration v Abou-Zahra*), 2010 FC 1073, at paragraph 16; (*Canada (Minister of Citizenship and Immigration) v Al-Showaiter*)

[*Al-Showaiter*], 2012 FC 12, at paragraph 13; *Pourzand v Canada (Minister of Citizenship and Immigration)*, **2**008 FC 395, at paragraph 19).

IV. Analysis

[14] The applicant argues that the citizenship judge failed to provide adequate reasons for his decision as it is impossible to understand why the chosen residency test *was or was not met* (*Canada (Minister of Citizenship and Immigration) v Jeizan*, 2010 FC 323 [*Jeizan*], at paragraphs 15 to 18; *Al-Showaiter*, above, at paragraph 21). The applicant adds that the decision does not result from an analysis of the respondent's situation and that while the test chosen by the judge is clear (actual, physical presence in Canada for a total of three years), the evidence before him is clearly insufficient to demonstrate such physical presence and there is nothing in the reasons that would allow an understanding of how the judge addressed the insufficiency of the evidence.

[15] These deficiencies are listed in the citizenship officer's note recommending a hearing. The applicant submits that the concerns and deficiencies raised were certainly relevant to the credibility of the respondent and he contends that the judge erred by not addressing them.

[16] According to the applicant, *Seiffert v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1072, at paragraphs 8 to 11, confirms that a citizenship appeal can be granted, as in this case, for failure to provide a proper analysis of the evidence. The applicant also relies on the decision of this Court in *Raphael*, above, at paragraphs 22, 24, 26 and 28.

[17] As for the respondent, he submits that the evidence was held to be admissible and convincing. The citizenship judge had before him physical evidence establishing the respondent's physical presence, which suggests that the decision made is well-substantiated and reasoned.

[18] With respect, I share the applicant's opinion that the reasons and analysis of the second citizenship judge are inadequate. The judge was required to indicate which residency test was used, which he did, but he was also required to explain why the requirements were met, which he did not do. Relying on paragraph 25 of my decision in *Saad 1*, he merely made a vague reference to one piece of evidence, the report by the Canada Border Services Agency (CBSA), without taking into account and analyzing all of the evidence.

[19] First, the citizenship officer's notes read as follows [emphasis added]:

> . . .
>
> On banking statements, we see frequent withdrawals from the client's account towards Variété Plus Mo from December 2007 to February 2009. These amounts are almost exclusively without pennies (for example: $ 100.00, $60.00,…). Therefore, they are probably not bill amounts of things the client bought in the store. These withdrawals fall during the period that the client claimed to have been working there but do not cover the entire period (he claimed to have started working there in April 2007). In addition, it does not appear that a certain amount is deposited in the client's account as a pay check from Variété Plus Mo. It should also be noted that client claimed to have always lived at 328 Mont-Royal for the entire reference period for citizenship, which is right beside Variété plus(sic) Mo., and no such transactions appeared before or after the period of December 2007 to February 2009. Verifications are required with client regarding these withdrawals and where his pay checks are deposited.
>
> Revenues declared for Income Tax for 2008 and 2009 are almost identical. Yet, client worked for Variété Plus for the entire year of

> 2008 and in 2009 only claimed to have been working for his own business: IT Media Plus.
>
> -**No document** was provided regarding the client's own businesses(sic): IT Media Plus.

[20] These elements must be analyzed having regard to the chosen citizenship test, which was not clearly done by the first citizenship judge and not even addressed by the second citizenship judge. The issue is not the quality of the respondent's integration into Canadian society, but rather whether the evidence presented supports a finding that he was physically in Canada during the relevant period.

[21] The judge also failed to consider the citizenship officer's comments when she issued the following cautions about the reliability of CBSA reports and the information in the passport itself:

> . . .
>
> - Note: CBSA report has limitations. Even if the client would have provided a record from CBSA, the exits of Canada are NOT recorded by CBSA. In addition, the entries are only indicated in the report if a travel document (passport or permanent resident card) has been scanned. Travel documents are not systematically scanned at Canada's points of entry. Finally, we can't rely on the passport only since many countries do not stamp the passport when travellers enter and exit a country but rather stamp travel cards for example. This is the case for Lebanon. Also, clients may have more than one passport valid at the same time.

[22] Again, the citizenship judge was required to consider that information, which was at the heart of the matter before him. I adopt the words of Justice de Montigny in *Jeizan*, at paragraph 17 [emphasis added]:

> 17 Reasons for decisions are adequate when they are clear, precise and intelligible and when they state why the decision was reached. Adequate reasons show a grasp of the issues raised by the evidence, allow the individual to understand why the decision was made and allow the reviewing court to assess the validity of the decision. . . .

[23] It is clear that the reasons for the impugned decision were not adequate and that they did not show a grasp by the judge of the issues raised by the evidence and its weaknesses.

[24] However, since it is not up to this Court to weigh and reassess the evidence submitted (*Raphaël*, above, at paragraph 28), this appeal will be allowed.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that:

1. The applicant's appeal is allowed, without costs;

2. The matter is referred back to a different citizenship judge for redetermination.

"Jocelyne Gagné"
Judge

Certified true translation
Daniela Guglietta, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1322-14
STYLE OF CAUSE:	THE MINISTER OF IMMIGRATION AND CITIZENSHIP v MAHMOUD RIAD SAAD
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	FEBRUARY 16, 2015
JUDGMENT AND REASONS:	GAGNÉ J.
DATED:	FEBRUARY 26, 2015

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