Federal Court  Cour fédérale

Date: 20151008

Docket: T-239-15

Citation: 2015 FC 1147

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, October 8, 2015

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

SOULAIMA TALEB

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application pursuant to section 22.1 of the *Citizenship Act*, RSC, 1985, c C-29 (Act) for judicial review of the decision of a citizenship judge dated January 20, 2015, denying the citizenship application of Soulaima Taleb.

II. Facts

[2] The applicant, Soulaima Taleb, is a citizen of Lebanon and she obtained permanent residence in Canada on January 6, 2007.

[3] On July 20, 2010, the applicant filed an application for Canadian citizenship with the Department of Citizenship and Immigration. In her citizenship application, the applicant had to demonstrate that she had resided in Canada for at least three of the four years preceding her citizenship application. The period examined was from July 20, 2006, to July 20, 2010.

[4] In support of her application, the applicant submitted several pieces of evidence demonstrating her presence in Canada, namely passports from the Republic of Lebanon, leases, utility bills, proof of medical visits, bank and credit card statements, transcripts and a diploma, income tax statements, letters of confirmation of employment and contracts of employment, and letters of recommendation. In addition to her citizenship application, the applicant completed a residence questionnaire and participated in, on November 17, 2014, an interview before a citizenship judge. Following the interview, the citizenship judge denied the applicant's citizenship application. This is the decision under review.

III. Impugned decision

[5] In her decision dated January 20, 2015, the citizenship judge denied the applicant's citizenship application, finding that on a balance of probabilities, it did not meet the residence requirement as set out in paragraph 5(1)(*c*) of the Act.

[6] The citizenship judge found that there were a number of deficiencies in the evidence of the applicant's stay in Canada, in particular, regarding her leases, employment, credit card statements and the dates on which she left Canada. Furthermore, the citizenship judge was not satisfied with the justifications provided by the applicant with respect to some of the irregularities in the citizenship application and in the residence questionnaire.

[7] Finding that the applicant's evidence and testimony contained contradictory elements raising issues of credibility, the citizenship judge did not proceed with performing the test set forth in *Pourghasemi (Re)*, [1993] FCJ 232 (*Pourghasemi*).

IV. Issues

[8] The Court finds that the application gives rise to the following issues:

(1) Did the citizenship judge breach her duty of procedural fairness by not allowing the applicant to address the citizenship judge's concerns in the interview?

(2) Did the citizenship judge err in her application of paragraph 5(1)(*c*) of the Act?

V. Statutory provisions

[9] The following statutory provision of the Act applies:

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 :
…	[…]
(*c*) is a permanent resident within the meaning of	*c*) est un résident permanent au sens du paragraphe 2(1) de la

subsection 2(1) of the Immigration and Refugee Protection Act, has, subject to the regulations, no unfulfilled conditions under that Act relating to his or her status as a permanent resident and has, since becoming a permanent resident,	Loi sur l'immigration et la protection des réfugiés, a, sous réserve des règlements, satisfait à toute condition rattachée à son statut de résident permanent en vertu de cette loi et, après être devenue résident permanent :
(i) been physically present in Canada for at least 1,460 days during the six years immediately before the date of his or her application,	(i) a été effectivement présent au Canada pendant au moins mille quatre cent soixante jours au cours des six ans qui ont précédé la date de sa demande,
(ii) been physically present in Canada for at least 183 days during each of four calendar years that are fully or partially within the six years immediately before the date of his or her application, and	(ii) a été effectivement présent au Canada pendant au moins cent quatre-vingt-trois jours par année civile au cours de quatre des années complètement ou partiellement comprises dans les six ans qui ont précédé la date de sa demande,

VI. Position of the parties

[10] The applicant contends that the citizenship judge breached her duty of procedural fairness because she did not raise all of her concerns in the interview. The applicant maintains that a fairly high standard of procedural fairness must be applied in the decision-making process with respect to a citizenship application (*El-Husseini v Canada (Minister of Citizenship and Immigration)*, 2015 FC 116 at paras 19 to 22 (*El-Husseini*)). The citizenship judge's failure to ask questions at the hearing, not giving the applicant the opportunity to provide explanations, was a breach of procedural fairness (*Tanveer v Canada (Minister of Citizenship and Immigration)*, 2010 FC 565 (*Tanveer*)).

[11] Furthermore, the applicant argues that in the citizenship judge's decision, the citizenship judge mentioned deficiencies, yet the evidence that was submitted addressed those questions. Nevertheless, even if the evidence in the record did not address those deficiencies, the citizenship judge should have questioned the applicant on the deficiencies in the interview. Finally, the applicant submits that the citizenship judge does not justify her finding that the evidence in the record [TRANSLATION] "does not demonstrate residence in a reasonable or sufficient manner".

[12] Regarding the second issue, that is, the application of paragraph 5(1)(*c*) of the Act, the applicant argues that even though the citizenship judge stated that she adopted the quantitative test, regarding the applicant's physical presence in Canada (*Pourghasemi*, above), the citizenship judge did not count the number of days the applicant spent in Canada even though she had the required evidence for the test. Furthermore, the citizenship judge did not explain why she could not perform the test or why she was not satisfied with the evidence submitted that would have made it possible to do so. The applicant points out that a citizenship judge is required to count the days of presence in Canada (*Hussein v Canada (Minister of Citizenship and Immigration)*, 2015 FC 88). Finally, the applicant contends that the citizenship judge did not explain why she was not satisfied with the applicant's proof of residence during the reference period.

[13] The respondent argues, with respect to the first issue, that there was no breach of procedural fairness, stating that the applicant is merely attempting to reverse the burden of proof on the citizenship judge while the burden of proof rests with the applicant to establish her residence in Canada during the reference period in a clear and convincing manner. Thus, it was

up to the applicant to explain why there were some irregularities in the evidence that she had submitted.

[14] With respect to the second issue, that is, the assessment of paragraph 5(1)(*c*) of the Act, the respondent argues that the citizenship judge's decision was reasonable. The respondent notes that it was up to the applicant to establish her residence based on clear and convincing evidence (*Knezevic v Canada (Minister of Citizenship and Immigration)*, 2014 FC 181 (*Knezevic*)), on a balance of probabilities (*Dachan v Canada (Minister of Citizenship and Immigration)*, 2010 FC 538 at para 22; *Chen v Canada (Minister of Citizenship and Immigration)*, 2008 FC 763 at para 18), which she apparently did not do. Noting that a Citizenship and Immigration Canada officer calculated that the applicant was physically present in Canada during the relevant period for 1,098 days, the respondent argues that there is a lack of objective evidence for a period of approximately 30 days. Given that the applicant had to demonstrate 1,095 days of physical presence and that there is a lack of objective evidence to establish the applicant's physical presence for 30 days in Canada, it is possible that she failed to satisfy the physical presence test. The role of the citizenship judge was to ensure that the applicant was actually on Canadian soil for 1,095 days, on a balance of probabilities, during the reference period (*El Falah v Canada (Minister of Citizenship and Immigration)*, 2009 FC 736 at paras 20-21).

[15] In short, according to the respondent, finding that the evidence lacked cogency, namely regarding proof of employment, place of residence and the finances of the applicant, it was reasonable for the citizenship judge to find that the applicant had not met the test of 1,095 days set out in paragraph 5(1)(*c*) of the Act.

VII. Standard of review

[16] On the one hand, questions of procedural fairness are to be reviewed on a standard of correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Mission Institute v Khela*, 2014 SCC 24 at para 79; *Indran v Canada (Minister of Citizenship and Immigration)*, 2015 FC 412). On the other hand, decisions of a citizenship judge as to whether the applicant has met the residence requirements are questions of fact and law to be reviewed on the standard of reasonableness (*El-Husseini*, above; *Ukaobasi v Canada (Minister of Citizenship and Immigration)*, 2015 FC 561; *Sallam v Canada (Minister of Citizenship and Immigration)*, 2015 FC 427).

VIII. Analysis

[17] In one respect, the duty of procedural fairness requires the citizenship judge to discuss any concerns she has with the applicant to give her the opportunity to provide an explanation (*Tanveer*, above at para 19; *El-Husseini*, above).

[18] In another respect, it is the applicant's duty to make her case; and if there is a lack of objective evidence, it is up to the applicant to explain that to be able to demonstrate in a clear and convincing manner that she satisfies the physical presence test (*Knezevic*, above at paras 13-14). In *Abbas v Canada (Minister of Citizenship and Immigration)*, 2011 FC 145 at para 8, Justice Donald J. Rennie could not have more clearly noted the burden on the applicant:

> [E]ach applicant for citizenship bears the onus of establishing sufficient credible evidence on which an assessment of residency

> can be based, whether it is quantitative (*Re Pourghasemi*) or qualitative (*Koo*).

[19] In her affidavit, the applicant notes several inconsistencies that were raised in the citizenship judge's decision and states that the citizenship judge did not question her to that effect and did not even, at the very least, raise those inconsistencies. No other evidence in the record contradicts that statement; the citizenship judge also does not specify the content of the interview in her decision. A citizenship judge's failure to record the questions asked and the answers given was also discussed in *Tanveer*, above:

> [19] There is no indication in the record or the decision of questions asked and answers given. If the Citizenship Judge had questions of the sort discussed, then she ought to have raised those with the applicant at the interview and recorded the responses. As it is, it is impossible to determine what purpose the Citizenship Judge thought was served by the interview. . . . The onus in citizenship applications is on the applicant, but the onus is not on the applicant to anticipate every concern that a citizenship judge might have with the evidence submitted. [Emphasis added.]
>
> (*Tanveer*, above at para 19)

[20] The citizenship judge's findings could have been different if she had been informed of the applicant's explanations regarding the concerns she had. Note that the citizenship judge could have obtained explanations if she had raised her concerns with the applicant in the interview.

[21] In short, even though the burden of proof rests with the applicant to demonstrate her physical presence in Canada in a clear and convincing manner, the fairly high standard of procedural fairness in citizenship matters required the citizenship judge to question the applicant with respect to any concerns she had. Because the evidence in the record does not contradict the

applicant's statements that she was not questioned on a number of the citizenship judge's concerns at the interview, the Court therefore allows the judicial review.

IX. Conclusion

[22] The Court finds that the citizenship judge's decision was not reasonable. As a result, the application for judicial review is allowed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed and the matter is referred back to a different citizenship judge for reconsideration. There is no question of importance to be certified.

"Michel M.J. Shore"
Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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