

Federal Court



Cour fédérale

Date: 20160408

Docket: T-1295-15

Citation: 2016 FC 391

Ottawa, Ontario, April 8, 2016

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

NAJLAA LABIOUI

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of the decision of a Citizenship Judge of Citizenship and Immigration Canada, rendered on June 30, 2015, whereby the Citizenship Judge concluded that the applicant did not meet the residency requirement under paragraph 5(1)(c) of the *Citizenship Act*, RSC 1985, c C-29 [Act]. Therefore, the application for citizenship was refused.

[2] It is not challenged that the burden of proof rested on the applicant to demonstrate that she satisfied the residency requirement (*El Fihri v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1106 at para 10 and *Saqer v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1392 at para 20). In determining whether the applicant had met the residency requirement under paragraph 5(1)(c) of the Act, the Citizenship Judge chose the approach adopted by Justice Muldoon in *Pourghasemi, Re*, [1993] FCJ No 232 [*Pourghasemi*], in which it is necessary for an individual to establish that he or she has been present in Canada during 1,095 days of the pertinent 4 year period preceding the application for citizenship. The parties also agree that the impugned decision is reviewable on a standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]; *Saad v Canada (Citizenship and Immigration)*, 2013 FC 570 at para 18; *Haddad v Canada (Citizenship and Immigration)*, 2014 FC 977 at para 18).

[3] The applicant is a citizen of Morocco, and since arriving in Canada, she has travelled frequently to visit family there. She became a permanent resident of Canada on March 22, 2001. The reference period for her citizenship application is March 31, 2007 to March 31, 2011 [reference period]. The applicant claimed that during the reference period, she studied at Université du Québec à Montréal [UQAM], and started her own travel agency business, Marina Travel Inc. The applicant also claimed to have left the country eight times on visits to Morocco and the United States. In her citizenship application, the applicant stated that she was present in Canada for 1,352 days and absent for 108 days of the reference period, whereas in her residence questionnaire, she stated that she had been present in Canada for 1,292 days and absent for 168.

[4] The reasons provided by the Citizenship Judge to support her conclusion that the applicant failed to establish the 1,095 day physical presence requirement can be summarized as follows:

- (a) The applicant omitted to declare in her initial application that she had taken a 50 day trip to Morocco. In examining the applicant's passport, the Citizenship Judge also discovered an undeclared entry into Morocco, as well as an undeclared entry into Canada during the reference period. When questioned about these discrepancies during the hearing, the applicant stated that she had made a mistake and did not know why she had omitted to mention these trips.
- (b) According to the record obtained from the Canada Border Services Agency, four of the returns declared by the applicant were not recorded. The applicant explained that on two of these trips, she had traveled to the United States by car, and as a result, her passport had not been stamped. As for the other two trips, the applicant stated that even if the stamps indicating a return to Canada were missing, the passport nonetheless contained the exit stamps from Morocco. Nevertheless, on reviewing the passport again, the Citizenship Judge stated that she could not find any exit stamps for the dates in question.
- (c) The applicant's transcript from UQAM, which was submitted after the hearing, indicated that she had either dropped or failed all her courses during the winter 2007 term, and did not include an indication of cumulative credit earned, suggesting that the applicant had not actually attended UQAM during the reference period. Furthermore, while the applicant had provided the certificate of incorporation for Marina Voyage Inc., as well as proof of the payment of certain bills related to the company covering the period from June 2007 to February 2009, nothing was provided for the period from February 2009 to June 2010. In addition, the applicant had not indicated any activity during the 10-month period from June 2010 to March 31, 2011. During the hearing, the applicant stated that the business had not functioned well, and that this experience, coupled with the fact that she had been keeping bad company, had resulted in a period of depression.
- (d) Certain bank statements did not indicate any transactions, while numerous statements were missing. Withdrawals and purchases appeared in the applicant's bank accounts, despite the fact that she had claimed to be

travelling outside the country. The applicant explained that it was normal that certain bank statements did not indicate any transactions since this corresponded to the periods she was out of Canada.

- (e) The Citizenship Judge also noted that the applicant had resided in Morocco for extended periods – up to eight consecutive months – following her citizenship application. As a result, the Citizenship Judge doubted the credibility of the applicant’s testimony, and concluded that on the balance of probabilities, the applicant had not met the physical presence test enunciated in *Pourghasemi*.

[5] The applicant submits that she provided ample evidence to demonstrate that she was physically present in Canada for the required period of time, and that the Citizenship Judge’s decision is vague, inadequate and lacking in rational justification. The applicant submits that the Citizenship Judge made several errors of fact, which cumulatively render her conclusion unreasonable. I will not set out in these reasons all the errors invoked in the applicant’s memorandum or in the oral submissions of the applicant’s counsel. The following errors are submitted by the applicant’s learned counsel to be determinative.

[6] In particular, the applicant submits that a detailed analysis of her passport demonstrates that all the trips she declared were duly stamped by the authorities in her passport, except for one Canadian entry stamp when returning from the United States at a land border. Additionally, the only trip not found was the one that she declared from April 1, 2008 to April 8, 2008 to Morocco. However, the applicant explained to the Citizenship Judge that this declaration had been a mistake and that she had actually been in Canada during that period. The applicant also provided personal and business banking statements for this period, and even if it were computed, this period would not have affected the residency requirement.

[7] The applicant also submits that a detailed examination of the entry and exit stamps in her passport for the period between March 2007 and March 2011 clarify the matter of her presence in Canada. She notes the following:

- Trip to USA: 2007-06-30 (USA entry stamp at page 16 of passport) to 2007-07-02 (Canada entry stamp at page 19 of passport);
- Trip to Morocco: 2007-08-11 (Morocco entry stamp at page 45 of passport) to 2007-09-05 (Morocco exit stamp at page 46 of passport);
- Trip to USA: 2008-03-13 (USA entry stamp at page 15 of passport) to 2008-03-20 (no return stamp);
- Trip to USA: 2008-03-29 (USA entry stamp at page 17 of passport) to 2008-04-01 (Canada entry stamp at page 24 of passport);
- Trip to Morocco: 2008-12-13 (Morocco entry stamp at page 46 of passport) to 2008-12-25 (Morocco exit stamp at page 45 of passport and Canada entry stamp at page 14 of passport);
- Trip to Morocco: 2009-07-07 (Morocco entry stamp at page 47 of passport) to 2009-07-26 (Morocco exit stamp at page 45 of passport and Canada entry stamp at page 18 of passport);
- Trip to Morocco: 2010-03-03 (Morocco entry stamp at page 44 of passport) to 2010-04-08 (Morocco exit stamp at page 44 of passport and Canada entry stamp at page 14 of passport);
- Trip to Morocco: 2010-07-18 (Morocco entry stamp at page 44 of passport) to 2010-10-18 (Morocco exit stamp at page 44 of passport and Canada entry stamp at page 32 of passport).

[8] The applicant submits that the only true discrepancy is the last trip, for which she clearly provided an explanation – namely, that she had recopied an old form and forgot to add her last trip because it had occurred after she had filled out the initial form. The Citizenship Judge failed to mention this explanation. Indeed, the applicant argues that the Citizenship Judge’s reasons

regarding any so-called discrepancies are vague and unclear, and do not permit the applicant to understand exactly which discrepancies she is referring to.

[9] Moreover, the applicant maintains that she did in fact provide bank and visa statements related to her business and personal accounts, in addition to medical records, for the period from March 2007 to March 2011 in order to demonstrate her day-to-day activities. Nevertheless, the Citizenship Judge erroneously stated that the applicant only provided company bills until February 2009, that she declared no business activity after June 2010, that many statements show no transactions, and that transactions exist for periods during which the applicant claimed to be on vacation. The applicant asserts that in fact, the only months in which there were no transactions were the months that she was outside Canada, except for the period from April 1, 2008 to April 8, 2008 (when the applicant mistakenly stated she was outside Canada, as already mentioned). Rather, the applicant notes that her bank statements demonstrate almost daily activity during the periods in which she declared that she was in the country. While these documents are “passive indicia”, the fact that they corroborate one another and corroborate her declared absences, in addition to the fact that the Citizenship Judge failed to refer specifically to any so-called discrepancies, renders the decision unreasonable.

[10] Finally, the applicant submits that the Citizenship Judge considered her stays outside the relevant reference period of March 31, 2007 to March 31, 2011, noting that the Citizenship Judge stated: “depuis sa demande de citoyenneté, elle réside au Maroc pour de très longues périodes allant jusqu’à 8 mois consécutifs”. The applicant submits that such consideration constitutes a

reviewable error (*Deldelian v Canada (Citizenship and Immigration)*, 2014 FC 854 at para 13; *Shakoor v Canada (Minister of Citizenship and Immigration)*, 2005 FC 776 at paras 39-40).

[11] On the other hand, the respondent states that in the present application, the applicant is asking the Court to reweigh the evidence that was before the Citizenship Judge. The respondent reviews a number of contradictions in the evidence provided by the applicant regarding her physical presence in Canada during the reference period. To summarize:

- In her application, the applicant stated that she was absent from Canada for 108 days, whereas on her residency questionnaire she stated that she was absent for 168 days.
- There was a discrepancy with respect to a stamp in her passport indicating that she entered Canada on April 1, 2008, contradicting her statement that she had entered Morocco on the same date. The applicant was unable to explain this contradiction to the Citizenship Judge.
- The applicant was not able to explain why entry stamps to Canada were missing in her passport, taking into account the trips she declared in her application. While the applicant alleged that there were exit stamps from Morocco on those dates, the stamps actually suggest that the applicant was out of the country for almost 8 months, which would mean that the applicant had only been present in Canada for 1,068 days, rather than the 1,095 days required.
- In her application for citizenship, the applicant failed to declare a trip to Morocco for 50 days in 2010. Later, in her citizenship questionnaire she stated that her trip occurred from August 18, 2010 to October 18, 2010. However, in the applicant's passport there was an entry stamp to Morocco on July 18, 2010, rather than August 18. The applicant's explanation was that she had made a mistake.
- The applicant declared that she had studied at UQAM from 2005 to 2007. In examining the applicant's transcripts, the Citizenship Judge noted that the winter 2007 term showed that all courses had been failed or abandoned, with no credit earned by the applicant. The Citizenship Judge therefore reasonably inferred that the applicant did not attend university during the reference period.

- With respect to the applicant's company, which the applicant claims to have operated from June 2007 to June 2010, the Citizenship Judge noted that the applicant had declared no income in her 2008 tax return form, that she declared an income of \$8,000 in 2009, and that she had declared no income in 2010. There were also no bills relating to the company for the period from February 2009 to June 2010, and no activity with respect to the company from June 2010 to March 2011.
- With respect to the applicant's bank statements, the Citizenship Judge found no transactions for several months during the relevant period. The Citizenship Judge also noted that some statements were missing and that, although the applicant was travelling outside Canada, some statements showed withdrawals and purchases in the applicant's account. The Citizenship Judge concluded that the evidence was not reliable and the applicant not credible.

[12] The respondent submits that in light of the incomplete, inconsistent and unclear nature of the evidence provided by the applicant regarding her physical presence in Canada, the Citizenship Judge's conclusion that she had failed to meet the residency requirement was reasonable. For example, the issue with the applicant's entry stamp on April 1, 2008 raises serious concerns about the applicant's whereabouts between August 11, 2007 and April 1, 2008, as it is the only entry stamp into Canada following her departure from the country on August 11, 2007.

[13] The respondent maintains that the Citizenship Judge made an extensive analysis of the applicant's documents, and that these documents did not, in and of themselves, demonstrate the applicant's physical presence in Canada. In light of the accumulation of serious problems regarding the applicant's residency, the Citizenship Judge therefore concluded that she was unable to determine whether or not the applicant had met the requirements under paragraph 5(1)(c) of the Act. The insufficiency of evidence and the applicant's lack of credibility

were at the core of the Citizenship Judge's ruling (*Atwani v Canada (Citizenship and Immigration)*, 2011 FC 1354 at para 17 [*Atwani*]).

[14] Finally, the respondent submits that it is clear from the reasons that the Citizenship Judge correctly considered the relevant reference period. The reasons provided by the Citizenship Judge may not be perfect, but they are still adequate. While there are a few errors of fact, overall, these errors are not determinative.

[15] The present application shall be allowed by the Court.

[16] It is not disputed that the Citizenship Judge was free to apply the *Pourghasemi* physical presence test (*Canada (Citizenship and Immigration) v Purvis*, 2015 FC 368 at para 26). Under this test, the applicant was required to establish that she was present in Canada for 1,095 days out of the last four years. Furthermore, the burden was on the applicant – and not the Citizenship Judge – to establish, with clear and compelling evidence, the number of days of residence (*Atwani* at para 12). Nevertheless, I do not believe that the decision of the Citizenship Judge falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir* at para 47).

[17] Having adopted the *Pourghasemi* test to evaluate the applicant's application, the Citizenship Judge failed to engage in any counting of days, despite the fact that the number of days during which the applicant was absent from Canada was determinative of the outcome of the citizenship application (*Hussein v Canada (Citizenship and Immigration)*, 2015 FC 88 at

paras 16-18 [*Hussein*]). While the Citizenship Judge mentions a discrepancy in the number of days of absence declared by the applicant in her citizenship application and her residence questionnaire (paragraphs 5 and 7), and correctly states the 1,095 day requirement (paragraph 15), she does not engage in a calculation of how many days the applicant would have been present in Canada, nor in the calculation of whether any discrepancies in the evidence would have placed the applicant below the 1,095 day threshold.

[18] In light of this omission on the part of the Citizenship Judge, the only way to understand the reasons as to the number of days during which the applicant was absent from Canada would be to conduct a *de novo* examination of the record (*Korolove v Canada (Citizenship and Immigration)*, 2013 FC 370 at para 47 [*Korolove*]; *Hussein* at para 18). As a result, the decision does not meet the requirements for transparency, justification and intelligibility set out in *Dunsmuir* (*Hussein* at para 18). Indeed, a reviewing court cannot fill in the gaps to the extent that it is essentially rewriting a decision to provide reasons that were not there (*Canada (Citizenship and Immigration) v Matar*, 2015 FC 669 at para 29), nor is it the Court's role to demonstrate by its own calculations the reasonableness of the Citizenship Judge's decision (*Korolove* at para 40). While it was open to the Citizenship Judge to draw negative inferences regarding the credibility of the applicant's testimony and to determine that she had not established her physical presence in the country for the required number of days on the basis of the documentary evidence, it is impossible to assess the reasonableness of these conclusions in light of the evidence on record and in the absence of more precise reasons.

[19] But there are other reasons to intervene as I accept that, cumulatively, the errors made by the Citizenship Judge render her conclusion unreasonable. I will not repeat these, as I endorse the general arguments of applicant's counsel, which I have already summarized above. The Citizenship Judge also seemed to attach great importance to the fact that since her application for citizenship, the applicant had spent long periods of time in Morocco, up to eight consecutive months at a time. This statement is not supported by reference to any specific dates, passport stamps, or other documents. Having reviewed the file, I would also note that the personal bank statements submitted by the applicant show significant account activity in Canada during this period. Nevertheless, the Citizenship Judge did not refer to this evidence, which corroborates the applicant's testimony. This constitutes a further reason to ensure that the Citizenship Judge who redetermines the matter gives proper consideration to these documents.

CONCLUSION

[20] For the foregoing reasons, the judicial review is granted. The impugned decision is set aside and the matter is sent back for redetermination by another Citizenship Judge.

JUDGMENT

THIS COURT'S JUDGMENT is that the Court allows the judicial review application.

The decision made on June 30, 2015 is set aside and the matter is referred back for redetermination by another Citizenship Judge.

"Luc Martineau"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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