Federal Court  Cour fédérale

Date: 20160422

Docket: T-1321-15

Citation: 2016 FC 463

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, April 22, 2016

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

AEIN MORADI-ZIRKOHI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

Introduction

[1] The applicant is seeking judicial review, pursuant to subsection 22.1(1) of the *Citizenship Act*, R.S.C., 1985, chapter C-29 (the Act), for a decision rendered by a citizenship judge on July 8, 2015 rejecting his citizenship application on the ground that he had not demonstrated that

he met the residence requirement set out in paragraph 5(1)(c) of the Act, which stipulates that the applicant must have resided in Canada for at least three of the four years immediately before the date of his or her application.

Background

[2] The applicant is an Iranian citizen. He arrived in Canada as a permanent resident on March 23, 2006. He submitted a Canadian citizenship application on November 10, 2011 in which he declared that he had been physically present in Canada for a total of 1,111 days during the four years immediately before the date of his application.

[3] On June 20, 2013, the applicant completed a residence questionnaire at the request of Citizenship and Immigration Canada. His file was then sent to the citizenship judge for adjudication. His interview was scheduled for June 4, 2015.

[4] On July 8, 2015, his application was rejected. The judge was not satisfied that the applicant had established, on a balance of probabilities, that he had been physically present in Canada for the minimum number of days required under paragraph 5(1)(c) of the Act. She deemed there to be insufficient evidence of actual presence in Canada for the periods the applicant claimed to have stayed in the country in the four years immediately before the date of his application.

[5] The citizenship judge specifically noted the following:

a) That although the applicant provided proof of registration at Concordia University for the fall 2007 semester, no academic transcript was provided;

b) That although the applicant claims to have worked as a member of the board of directors and as a shareholder of companies owned by his father and registered in Canada from January 2008 to August 2010, this does not establish his physical presence in Canada;

c) That the applicant claimed to have earned no income in 2007, 2008 and 2011, and to have earned an income of $29,160 in 2009 and $5,000 in 2010;

d) That the remaining documentation provided by the applicant to support his application was insufficient to demonstrate his physical presence in Canada;

e) That passports are simply not considered irrefutable evidence because of the many subterfuges that can be used to circumvent stamping, hence the need for additional evidence; and

f) That the testimony provided by the applicant during his interview did not further demonstrate that he had resided in Canada during the period under review for his citizenship application.

[6] The applicant claims that the citizenship judge's decision was strewn with unreasonable conclusions of fact, notably concerning the information about his time at Concordia University, and considerations for his passport and his record of entries into Canada. He also claims that the citizenship judge was biased against him, notably because of her remarks about the fact that he comes from an affluent family and that he therefore does not need to work to meet his needs. The applicant also reproaches the citizenship judge for being swayed by extrinsic evidence—namely his father's immigration file—and for not taking into account the favourable decision made by an immigration officer in July 2011 to renew his permanent resident card.

Analysis

[7] When presented with an application for judicial review of a decision rendered by a citizenship judge, the Court must review the decision according to the standard of reasonableness as defined in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*].

[8] According to this standard of review, it is not up to the Court to review the evidence in the record and substitute its own conclusions for those of the citizenship judge in matters of evaluating the residence requirement, which is a mixed question of law and fact. The Court must accord deference to the conclusions drawn by the citizenship judge, given her level of knowledge and experience in these matters (*Paez v. Canada (Minister of Citizenship and Immigration),* 2008 FC 204, at paragraph 12 [*Paez*]). The Court's role is therefore limited to intervening only if the contested decision does not show the existence of justification, transparency and intelligibility or if the conclusion does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir*, above at paragraph 47).

[9] If the appeal raises issues of procedural fairness, the standard of correctness applies (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, at paragraph 43, [2009] 1 SCR 339).

[10] According to the case law of the Court, the citizenship judge has three options to determine whether a citizenship applicant meets the residence requirement. The judge may apply (i) the test set out in *Re Pourghasemi*, [1993] FCJ No. 232, 62 FTR 122 (FC) [*Re Pourghasemi*],

whereby residency is determined based on a strict calculation of the number of days the applicant was actually in Canada, which must be at least 1,095 days of residency during the four years immediately before the date of the application; (ii) the test set out in *Re Papadogiorgakis*, [1978] 2 FC 208 (FC), which is more flexible and recognizes that a person may reside in Canada even if he or she is temporarily absent so long as he or she maintains solid ties with Canada; or (iii) the test set out in *Re Koo*, [1993] 1 FC 286 (FC), which defines residence as the place where a person "regularly, normally or customarily lives" and the place where he has "centralized his existence," and which includes a non-exhaustive list of six factors to be taken into consideration in the analysis (*Paez*, above at paragraph 13).

[11] Judges are expected, under penalty of having their decision overturned, to specifically identify the test they have decided to use and to base their analysis on the requirements of that test. In this case, the citizenship judge decided on and applied the test of physical presence in Canada set out in *Re Pourghasemi*. She cannot be faulted for that.

[12] Were the conclusions she drew from the related evidence, however, unreasonable, as the applicant claims? I do not believe so. I fully agree with the comments made by Justice Yves de Montigny, now a Federal Court of Appeal judge, in *El Falah v. Canada (Citizenship and Immigration)*, 2009 FC 736 [*El Falah*], to the effect that in applying the test set out in *Re Pourghasemi*, the citizenship judge cannot rely on the applicant's claims alone and blindly accept the submissions made to him as to the number of days of absence from or presence in Canada. The judge must also verify the applicant's physical presence in Canada during the

periods when the applicant claims that he was in the country (*El Falah*, at paragraph 21). More specifically, I agree with the following passage from Justice de Montigny's decision in that case:

> [21] . . . . If one relies on a strict counting of days during which the applicant must be present in Canada, it follows that the Judge can and must ensure that the applicant was actually on Canadian soil during the period when he claims to have been. One need only point out that it is the applicant who bears the burden of proving that he meets the conditions set out in the Act, and in particular the residence requirements [citations omitted].

[13] The citizenship judge in this case was abiding by this. It is worth mentioning that according to the test established in *Re Pourghasemi*, prospective Canadian citizenship applicants have to [TRANSLATION] "throw in their lot with Canadians by residing among Canadians, in Canada, during three of the preceding four years, in order to Canadianize themselves" *(Re Pourghasemi*, at paragraph 6), that is to say [TRANSLATION] "by 'rubbing elbows' with Canadians in shopping malls, corner stores, libraries, concert halls, auto repair shops, pubs, cabarets, elevators, churches, synagogues, mosques and temples—in a word wherever one can meet and converse with Canadians—during the prescribed three years" in such a way that allows them to [TRANSLATION] "observe Canadian society for all its virtues, decadence, values, dangers and freedoms, just as it is" (*Re Pourghasemi*, at paragraph 3). This language is full of imagery, but does convey the full meaning and importance of the concept of physical presence in Canada. Ultimately, the citizenship applicant bears the burden of proving this (*El Fihri v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1106, at paragraph 12*; Saqer v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1392, at paragraphs 20-21; *El Falah* at paragraph 21).

[14] In her analysis, the citizenship judge took account of the documentary evidence submitted by the applicant but deemed it insufficient to demonstrate the applicant's physical presence in Canada during the minimum period required by paragraph 5(1)(c) of the Act. I am not convinced that in doing so, she made an error in her consideration of the evidence.

[15] As the citizenship judge noted, that documentation mainly consisted of passive evidence of residency in Canada (permanent resident card, applicant's brother's Canadian citizenship, health card, driver's licence, purchase of Canadian properties, Canadian corporation income tax returns, tax returns, letter from a financial institution indicating that the applicant has a bank account with them, document from that same financial institution attesting to the replacement of a credit card in the applicant's name, student card from McGill University and proof of enrollment at Concordia University, handwritten doctor's note indicating that the applicant has been his patient since 2007, and a few receipts for some consumer goods, some of which were dated before November 10, 2007, the beginning of the reference period for the purposes of paragraph 5(1)(c) of the Act).

[16] As for what could have been indicators of active or physical presence in Canada, the citizenship judge mentioned the lack of an academic transcript. Even though this only relates to a small portion of the reference period, this observation was pertinent and clearly not unreasonable under the circumstances. There are also no bank or credit card statements, which could easily have indicated physical presence. I find that omission to be significant, especially in a context where the applicant says that he did not have to work to make a living, which suggests a certain kind of lifestyle.

[17] As for the applicant's passport, the stamps inside of which confirm his periods of absence as declared in his citizenship application, the citizenship judge did not ignore it, as the applicant claims, but she did not give it as much weight as he would have liked. When she noted that the passport is simply not considered irrefutable evidence because of subterfuges often used to circumvent stamping, the citizenship judge was only being consistent with the Court's judgments in *Haddah v. Canada (Citizenship and Immigration)*, 2014 FC 977, 465 FTR 248 [*Haddah*]. In *Haddah*, it is notably established that Canada does not systematically stamp passports and does not control departures from the country. As a result, although it is relevant in analyzing the residence requirement, the information contained in a passport does not irrefutably attest to a person's presence in Canada (*Haddah*, at paragraphs 26-28). In light of all of the evidence on record, in my opinion the citizenship judge was at full liberty to draw the conclusions that she did on this aspect.

[18] The citizenship judge was not obliged, as the applicant claims, to take account of his history of entering Canada with the Canada Border Services Agency (*Haddah*, at paragraph 29).

[19] The applicant also criticizes the citizenship judge for not giving due consideration to his testimony during the interview. Once again, the citizenship judge was at full liberty not to blindly accept the submissions made to her as to the number of days of absence from or presence in Canada, and to ensure, through tangible proof, that the applicant was actually on Canadian soil during the period in which he claims to have been (*El Falah*, above). The judge's decision could have been more explicit on this matter, but I am nevertheless satisfied, once again in light of all the evidence on record, that nothing justifies Court intervention in this matter. As the Supreme Court of Canada reiterated in the case of *Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 [*Newfoundland and Labrador Nurses' Union*], the Court must be careful to avoid substituting its own reasons, but may look to the record for the purpose of assessing the reasonableness of the outcome arrived at by the decision maker (*Newfoundland and Labrador Nurses' Union*, at paragraph 15). In this case, the record can be reviewed for that purpose.

[20] I also agree with the respondent's statement that there is no indication in the decision under review that the citizenship judge relied on extrinsic evidence, including the applicant's father's immigration file, to justify her conclusions. This claim made by the applicant is nothing but sheer speculation. As for the claim that the citizenship judge did not take into consideration the immigration officer's tally of the days the applicant was present in Canada, which he took when the applicant's permanent resident card was renewed, I find that the citizenship judge was not bound by that tally. At the risk of not exercising her own jurisdiction, she had to conduct her own review and make her own decision based on both the evidence that the applicant had to provide to support his citizenship application and on the assessment requirements set out in the

Act. The Act and the *Immigration and Refugee Protection Act*, SC 2001, c. 27, are two separate pieces of legislation, each with their own purposes and decision-making bodies.

[21] Finally, I cannot support the applicant's allegations of bias. As the respondent stressed, these kinds of allegations cannot rest on mere suspicion, sheer conjecture, insinuations or mere impressions of an applicant or his counsel. As the Federal Court of Appeal reiterated in the case of Arthur v. Canada (Attorney General), 2001 FCA 223, ACWS (3d) 240 [*Arthur*], an allegation of bias must be supported by material evidence demonstrating conduct that derogates from the standard (*Arthur*, at paragraph 8). No such evidence was submitted by the applicant in this case.

[22] Furthermore, this argument is late coming, given that it was not raised at the earliest opportunity, namely before the citizenship judge (*Fletcher v. Canada (Citizenship and Immigration)*, 2008 FC 909, at paragraph 17; *Shahein v. Canada (Citizenship and Immigration)*, 2015 FC 987, at paragraph 24). That in and of itself is sufficient to disregard this claim. I would like to add that I find the importance of raising these kinds of concerns at the earliest opportunity particularly significant in a situation like this one where the interview, which is conducted in front of the citizenship judge, is an informal, non-litigious procedure that is normally not transcribed. Evaluating allegations this serious on the sole basis of the applicant's memory, which is often biased because the citizenship application was rejected and was recorded in an affidavit sworn several months after the fact, does not seem to me to be the best way to deal with this kind of issue.

[23] The applicant's application will therefore be dismissed.

ORDER

THE COURT ORDERS that the application for judicial review be dismissed without costs.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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