Federal Court  Cour fédérale

Date: 20160608

Docket: T-1772-15

Citation: 2016 FC 639

Ottawa, Ontario, June 8, 2016

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

MOHAMMAD KAMRAN

Respondent

JUDGMENT AND REASONS

I. Background

[1] This is an application for judicial review of a decision, dated September 15, 2015, wherein a Citizenship Judge approved the Respondent's citizenship application.

[2] The Respondent, Mohammad Kamran (age 44), is a citizen of Pakistan. He is married and his wife was co-applicant to his citizenship application. Together, they have three children,

including one born in Canada. Upon his arrival to Canada on August 9, 2006, the Respondent became a permanent resident of Canada under the Federal Skilled Workers Program.

[3] On May 20, 2011, the Respondent applied for citizenship; thus, the relevant period is from May 20, 2007 to May 20, 2011. During that period, he declared 345 days of absences and 1,115 days of presence in Canada in his application and in the Residence Questionnaire.

[4] In a decision dated September 15, 2015, the Citizenship Judge, in applying the quantitative test of *Re Pourghasemi*, [1993] FCJ No 232, 62 FTR 122 [*Pourghasemi*], held that on a balance of probabilities, the citizenship applicant "demonstrated that he resided in Canada for the number of days he claimed to reside in Canada and has therefore met the residence requirement under s. 5(1)(c) of the *Act*" (Decision, at para 21).

[5] In the File Preparation and Analysis Template [FPAT], dated August 6, 2015, the Citizenship Officer raised several concerns:

- Lack of strong active indicators demonstrating involvement in Canada and most of the supporting evidence is passive rather than active;
- Undeclared USA stamps or re-entry stamps missing in the passports;
- Difficulty to establish physical presence in Canada during the entire relevant period – specifically for two undeclared absences: i) July 13, 2008 to November 28, 2008; and ii) December 7, 2009 to November 10, 2010;
- The Respondent was not in Canada before the relevant period; and, he was absent for the first 187 days of the relevant period;

- There are gaps in the utility bills and the bank accounts are joint, thus, it is difficult to determine if it is the Respondent or his wife who made the transactions.

[6] The Citizenship Judge listed some of the concerns raised by the Citizenship Officer in the FPAT and was satisfied, upon hearing the Respondent on September 11, 2015, that the Respondent was credible and provided sufficient evidence to support and confirm the absences declared by the Respondent in his application and in the Residence Questionnaire.

II. Issues

[7] The Applicant submits that the following issues should be considered by the Court:

1. Did the Citizenship Judge err by failing to count the number of days the Respondent was physically present in Canada during the relevant period?
2. Did the Citizenship Judge unreasonably consider the absence beginning with December 7, 2009 to November 10, 2010?

III. Analysis

[8] The parties to this application agree the impugned decision must be reviewed under the standard of reasonableness (*Labioui v Canada (Citizenship and Immigration)*, 2016 FC 391 at para 2 [*Labioui*]; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[9] In considering whether the Respondent met the residence requirement under subsection 5(1) of the *Citizenship Act*, the Citizenship Judge relied on the quantitative test of *Pourghasemi*.

The *Pourghasemi* test involves the strict counting of days wherein a citizenship applicant is actually physically present in Canada during the relevant period of time (*Canada (Citizenship and Immigration) v Muttalib*, 2015 FC 1152 at para 24).

[10] The Applicant submits that the Citizenship Judge erred by failing to calculate the actual number of days that the Respondent was physically present in Canada. Specifically, the Applicant referred to paragraph 14 of the Decision, wherein the Citizenship Judge stated that he was confident that the Respondent spent most of his time in Canada during the timespan from December 7, 2009 to November 10, 2010.

> There is also concern for a potential trip started on Dec. 7, 2009 and potentially ending on Nov. 10, 2010. Again, according to the new documentation now part of the file, there are consistent activities in Canada during this time frame. I am confident that the applicant has spent most of this time in Canada. [Emphasis added.]
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> (Decision at para 14)

[11] One has to remember that the burden is on a citizenship applicant to establish, with clear and compelling evidence, the number of days of residence in Canada (*Atwani v Canada (Citizenship and Immigration)*, 2011 FC 1354 at para 12). In the present case, as the Citizenship Judge relied on the strict physical presence test of *Pourghasemi* to reach the conclusion that the Respondent met the residence requirement of subsection 5(1) of the *Citizenship Act*; how could the Citizenship Judge have been satisfied in respect of the physical presence test in the case of the Respondent when the Respondent had, according to the evidence, a potential absence that spanned the period from December 7, 2009 to November 10, 2010? A need exists for the purpose of calculation of the physical presence test to have the evidence examined anew by the same Citizenship Judge, if still sitting, to give even brief reasons in respect of the calculation of the

days implicated. In *Pourghasemi*, Justice Muldoon was of the opinion that a strict physical presence in Canada for three years was required in order to ensure that citizenship applicants had "Canadianized" themselves:

> So those who would throw in their lot with Canadians by becoming citizens must first throw in their lot with Canadians by residing among Canadians, in Canada, during three of the preceding four years, in order to Canadianize themselves. It is not something one can do while abroad, for Canadian life and society exist only in Canada and nowhere else.
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> (*Pourghasemi*, above at para 6)

[12] As the Respondent declared having been physically present in Canada for only 20 days above the threshold of 1,095 days during the relevant period, it is material that the Citizenship Judge engage in a calculation of how many days the Respondent was absent from Canada. This conclusion is in line with the one of Justice Luc Martineau in *Labioui*, above at paras 17-18:

> [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.
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> [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).

[13] As a *de novo* examination of the record is warranted, the Court will not give its assessment of the evidence of the two large volumes of evidence except to say that the evidence does not, in conclusion, demonstrate, even with the Respondent's affidavit, a reasonable explanation for a physical presence of the eleven months and three day period in question. The Court specifies that despite the abundant evidence, it is wholly unclear as to the period under scrutiny in respect of the presence in Canada of the Respondent, himself, personally, not that of his family members with which there is no controversy on the matter of presence. The Court cannot discern despite the voluminous evidence whether the Respondent was actually in Canada during the eleven months and three days in question.

IV. Conclusion

[14] Consequently, the application for judicial review is granted and the matter is referred to the same Citizenship Judge, if still sitting, to examine the entire evidence (not only evidence which is pointed out uniquely by a Citizenship Officer as was mentioned in the file).

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be granted and the matter be referred to the same Citizenship Judge, if still sitting, to examine the entire evidence (not only evidence which is pointed out uniquely by a Citizenship Officer as was mentioned in the file). There is no serious question of general importance to be certified.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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