

Federal Court



Cour fédérale

**Date: 20160726**

**Docket: T-1765-15**

**Citation: 2016 FC 779**

**St. John's, Newfoundland and Labrador, July 26, 2016**

**PRESENT: The Honourable Madam Justice Heneghan**

**BETWEEN:**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Applicant**

**and**

**OLEKSANDR PAKHARENKO**

**Respondent**

**AMENDED JUDGMENT AND REASONS**

**I. INTRODUCTION**

[1] The Minister of Citizenship and Immigration (the “Applicant Minister”) seeks judicial review of the decision of Citizenship Judge Angelo Persichilli (the “Citizenship Judge”), dated September 23, 2015, approving the citizenship application of Mr. Oleksandr Pakharencenko (the “Respondent”) pursuant to subsection 5(1) of the *Citizenship Act*, R.S.C., 1985, c. C-29 (the “Act”).

## II. EVIDENCE

[2] The evidence in this proceeding consists of the Certified Tribunal Record and certain affidavits as follows:

- the affidavit of Patricia D'Agnostino, Citizenship Officer, sworn on November 10, 2015 filed on behalf of the Applicant Minister;
- the affidavit of the Respondent, sworn on December 16, 2015;
- the affidavit of Oleksandr Korolyov, sworn December 15, 2015, filed on behalf of the Respondent;
- the affidavit of Olha Kachmar, legal assistant for the Respondent's Counsel, sworn December 18, 2013; and
- the further affidavit of Olha Kachmar, sworn on February 29, 2016.

## III. BACKGROUND

[3] The following facts are taken from the evidence filed in this application for judicial review.

[4] The Respondent is a citizen of Ukraine. He became a permanent resident of Canada on July 5, 2003 and entered Canada on the same day.

[5] When he was unable to find work in Canada, the Respondent returned to Ukraine in December 2003. He remained there until November 2006.

[6] The Respondent came back to Canada on November 26, 2006 where he lived rent free in the home of a family friend.

[7] The Respondent did not work in Canada from November 2006 to July 2013, when he was employed as a sales consultant. Between November 2006 and July 2013 while not employed, he held some business meetings on behalf of his family company, the Ukrainian Association “Plastics”, in Canada. He claimed to receive financial support from his family in Ukraine as well as from funds in his Ukrainian bank account and income from real estate he owns in Ukraine.

[8] The Respondent submitted an application for Canadian citizenship on August 16, 2011. The relevant four year period for the purposes of assessing residency under paragraph 5(1)(c) of the Act is August 16, 2007 to August 16, 2011 (the “relevant period”).

[9] In his application, the Respondent indicated he had not spent any time outside of Canada during the relevant period, that is August 16, 2007 to August 16, 2011.

[10] On November 8, 2012, the Respondent completed a Residence Questionnaire as part of his citizenship application. In this questionnaire, he said that he was unemployed in Canada but was involved in a family business, owned real estate in Ukraine, and that he filed income tax returns in Ukraine every year of the relevant period. The Respondent also said he did not have any absences from Canada during the relevant period.

[11] On January 22, 2013, the Respondent submitted an Integrated Customs Enforcement System Traveller History Report (“ICES Report”), issued by the Canadian Border Services Agency dated December 18, 2012, to Citizenship and Immigration Canada. This report showed the Respondent entered Canada from the United States on September 10, 2007 at the Peace Bridge in Fort Erie, Ontario using his Permanent Resident Card. In his affidavit filed in this proceeding, the Respondent deposed that he provided his passport to American border officials.

[12] A copy of one of the Respondent’s passports, found in the Certified Tribunal Record, contains a note dated October 31, 2014, which says “OSRP previous ppt kept by govt per FRC notes”. This copy of the passport shows an expiry date in December 2021.

[13] By letter dated October 31, 2014, a Citizenship Officer requested additional documentary evidence to support the Respondent’s residency in Canada, specifically Notices of Assessment from the Canada Revenue Agency and a provincial personal health claim summary for the relevant period. The Officer also asked for explanations as to how the Respondent supports himself, details about his living arrangements and further explanation regarding his trip to the United States.

[14] The Respondent replied by letter dated November 2, 2014 and included the following documents:

- Notices of Assessment for the tax years 2007 to 2011;
- a letter from the Expobank dated May 6, 2009 which shows a balance of EUR 70,000;

- TD Bank account statements covering the periods August 31, 2008 to November 30, 2008, May 31, 2011 to June 30, 2011, July 31, 2011 to August 31, 2011;
- a copy of his driver's licence issued August 23, 2011;
- a copy of his permanent resident card;
- a copy of a photo dated August 20, 2011;
- letters from individuals confirming his residence in Canada; and
- a letter from CIC dated March 5, 2014 stating the Respondent complied with the residency requirements under section 28 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

[15] The Respondent did not include a provincial health claim summary ("OHIP report") because he said he did not receive any medical services during the relevant period. However, he included a doctor's note dated August 1, 2013 about results from an allergy test. The test was done outside the relevant period. The note was also dated outside the relevant period.

[16] The Respondent explained he used the money in his Ukrainian bank account to support himself in Canada. He also said that he lived with his father's friend for the relevant period rent-free.

[17] The Respondent further explained that the ICES report shows that he returned to Canada on September 10, 2007, contrary to the position stated in the October 31, 2014 letter from the Citizenship Officer. He said this was a two day trip, without giving details.

[18] The ICES report shows that the Respondent entered Canada at the Peace Bridge in Fort Erie, Ontario.

[19] On December 17, 2014, a Citizenship Officer completed a file preparation and analysis template. That Officer recorded concerns that during the relevant period the Respondent declared no income in Canada, did not produce an original passport, and did not pay rent. The Officer also was concerned that the Respondent did not request an OHIP report.

[20] The Officer noted that there were photocopies of two Ukrainian passports on file. The first, issued on June 13, 1998, expired on June 13, 2008. The second showed an issuance date of December 12, 2011 and an expiry date of December 11, 2021. The Officer observed that a note on file indicated that the passport expiring in June 2008 was “kept” by the government.

[21] It is not clear from the Citizenship Officer’s December 17, 2014 report which government held the Respondent’s passport.

[22] The Respondent filed a certificate from the Senior Inspector of the Minister of Internal Affairs of Ukraine, dated September 18, 2015. The certificate provides that the Respondent wrote to the Ministry of Internal Affairs of Ukraine on November 28, 2011 about the loss of his passport that was issued on June 13, 1998.

[23] A hearing was held before the Citizenship Judge on September 22, 2015.

#### IV. DECISION UNDER REVIEW

[24] The Citizenship Judge found the relevant four year period to be August 16, 2007 to August 16, 2011. He identified the issue before him as whether the Respondent met the

residency requirement under paragraph 5(1)(c) of the Act. He found that the Respondent's passport covered all four years of the relevant period. He said the passport and ICES report did not raise questions about the Respondent's statements.

[25] The Citizenship Judge considered the Respondent's evidence about his life in Canada.

[26] The Citizenship Judge found that, contrary to the notes in the Respondent's file, the passport with the original expiry date of June 2008 was valid past the end of the relevant period because it was extended to November 2016. The Citizenship Judge concluded that that passport was lost in Kiev, Ukraine, and not repossessed by the government.

[27] The Citizenship Judge referred to the Citizenship Officer's concerns over lack of sufficient documentation to establish physical residence in Canada. He found that most of these concerns were addressed at the hearing. The Citizenship Judge concluded that he was left with no argument to dispute the Respondent's statement about the numbers of days he was physically present in Canada.

[28] The Citizenship Judge referred to the residency test set out in *Re Pourghasemi* (1993), 19 Imm. L.R. (2d) 259 (F.C.T.D.). He found that, on a balance of probabilities, the Respondent had shown that he had resided in Canada for the number of days claimed. Accordingly, he found that the Respondent met the residency requirements pursuant to paragraph 5(1)(c) of the Act.

## V. SUBMISSIONS

A. *The Applicant Minister's Submissions*

[29] The Applicant Minister submits that the role of a Citizenship Judge is to address deficiencies in the evidence relating to the sufficiency of an applicant's residency in Canada during the relevant period. He argues that, while the hearing is not an adversarial proceeding, a Citizenship Judge is required to analyze documents to determine the veracity of the residency claim.

[30] The Applicant Minister says that the onus is on the Respondent to provide objective evidence to demonstrate he satisfies the residency requirement, relying on the decisions in *Vega v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1079 at paragraph 13 and *Canada (Minister of Citizenship and Immigration) v. Diallo* (2012), 424 F.T.R. 156 at paragraph 21.

[31] The Applicant Minister, relying on the decision in *Canada (Minister of Citizenship and Immigration) v. Raphaël* (2012), 417 F.T.R. 177 at paragraph 24, argues that the Citizenship Judge erred by failing to explain how he resolved the gaps in the evidence. He submits that the assessment of the evidence by the Citizenship Judge is not transparent and fails to meet the standard of reasonableness.

[32] The Applicant Minister also argues that the Citizenship Judge erred by accepting the Respondent's claim that he only left Canada for two days during the relevant period, despite the paucity of objective evidence of residency. He argues that the Citizenship Judge failed to recognize that not all entries into Canada are recorded in the ICES report and that report alone is



insufficient to establish residency; see the decisions in *Zhao v. Minister of Citizenship and Immigration*, 2016 FC 207 and *Abu-Taleb v. Minister of Citizenship and Immigration*, 2015 FC 1389.

[33] The Applicant Minister further submits that the Citizenship Judge erred in determining that the Respondent's passport covered all four years of the relevant period. Only a photocopy of the passport issued June 13, 1998 is on file. He argues that there was no way to ascertain when that copy was made nor is it possible to assess the Respondent's movements during the relevant period.

[34] The Applicant Minister argues that the copy of the Respondent's passport on file contains no visa or entry stamp confirming his trip to the United States in 2007. He submits that Ukrainian citizens must obtain a visa to enter the United States. He argues that the Citizenship Judge erred by failing to consider this missing document.

[35] The Applicant Minister also submits that the Citizenship Judge failed to explain why he accepted the Respondent's story that the passport was lost rather than repossessed.

[36] Finally, the Applicant Minister submits that the Citizenship Judge erred in finding that the Respondent met the residency requirement in the absence of evidence of employment, rent or health services used in the relevant period and very limited evidence of Canadian banking activities. He argues that there is no evidence as to how the Respondent accessed his Ukrainian bank account to support himself in Canada.

B. *The Respondent's Submissions*

[37] The Respondent submits that the Citizenship Judge's decision is reasonable.

[38] He argues that there was no evidence before the Citizenship Judge that visitor visas are required for Ukrainian passport holders to enter the United States and that he should not be faulted for not having an entry stamp in his passport as he has no control over border officers.

[39] The Respondent further submits that this issue was not raised before the Citizenship Judge.

[40] The Respondent argues the decision of the Citizenship Judge was supported by a tenable explanation and there is no evidence before the Citizenship Judge to contradict his conclusion.

VI. DISCUSSION

[41] Paragraph 5(1)(c) of the Act, as it existed on the date the Respondent submitted his application for Canadian citizenship, provides as follows:

5. (1) The Minister shall grant citizenship to any person who:

(c) is a permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act, and has, within the four years immediately preceding the date of his or her

5.(1) Le ministre attribue la citoyenneté à toute personne qui, à la fois :

c) est un résident permanent au sens du paragraphe 2(1) de la Loi sur l'immigration et la protection des réfugiés et a, dans les quatre ans qui ont précédé la date de sa demande, résidé au Canada pendant au

application, accumulated at least three years of residence in Canada calculated in the following manner:

(i) for every day during which the person was resident in Canada before his lawful admission to Canada for permanent residence the person shall be deemed to have accumulated one-half of a day of residence, and

(ii) for every day during which the person was resident in Canada after his lawful admission to Canada for permanent residence the person shall be deemed to have accumulated one day of residence;

moins trois ans en tout, la durée de sa résidence étant calculée de la manière suivante :

(i) un demi-jour pour chaque jour de résidence au Canada avant son admission à titre de résident permanent,

(ii) un jour pour chaque jour de résidence au Canada après son admission à titre de résident permanent;

[42] The question of whether an applicant has met the residency requirements under the Act is a question of mixed fact and law, reviewable on the standard of reasonableness; see the decisions in *Huang v. Canada (Minister of Citizenship and Immigration)* (2013), 22 Imm. L.R. (4th) 180 (F.C.) at paragraphs 26-27, and *Canada (Minister of Citizenship and Immigration) v. Abdallah* (2012), 417 F.T.R. 13 (F.C.) at paragraph 8.

[43] The reasonableness standard requires that the decision be justifiable, transparent, intelligible, and fall within a range of possible, acceptable outcomes; see the decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paragraph 47.

[44] Reasons for a decision meet the standard of reasonableness when they are clear, precise and intelligible, and when they state why the decision was reached; see *Dunsmuir*, *supra*.

[45] In its decision in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 S.C.R. 708 at paragraph 15, the Supreme Court of Canada said the following:

In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show “respect for the decision-making process of adjudicative bodies with regard to both the facts and the law” (*Dunsmuir*, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.

[46] I agree with the Applicant Minister that the decision is unreasonable because it is not transparent. The decision does not address the inadequacy of the evidence nor does the record support the Citizenship Judge’s conclusion.

[47] Neither is the decision justifiable or intelligible since it does not allow a reviewing court to determine how the Citizenship Judge was satisfied that residency was established despite the lack of independent documentary evidence.

[48] There is no evidence in the record to substantiate the Respondent’s statement that he only travelled outside Canada for two days in 2007. There is also no evidence to establish the Respondent received financial support from his parents in Ukraine or when his passport’s validity was extended from June 2008 to November 2016.

[49] I agree with the Applicant Minister that the Citizenship Judge failed to explain why he preferred the evidence of the Respondent about his lost passport over the notes on file which state that the passport was held by the government.

[50] Considering the evidence in the Certified Tribunal Record which was before the Citizenship Judge, I am satisfied that the decision fails to meet the relevant standard of review. The Citizenship Judge made numerous errors as identified above, which warrant judicial intervention.

[51] In the result, this application for judicial review is allowed and the matter is remitted to a different decision maker for redetermination. There is no question for certification arising.

[52] The Applicant Minister does not seek costs in this application for judicial review. Pursuant to my discretion under Rule 400 of the *Federal Courts Rules*, SOR/98-106, I make no order as to costs.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** this application for judicial review is allowed and the matter is remitted to a different decision maker for redetermination. Pursuant to my discretion under Rule 400 of the *Federal Courts Rules*, SOR/98-106, there is no order as to costs. There is no question for certification arising.

"E. Heneghan"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1765-15

**STYLE OF CAUSE:** THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION V OLEKSANDRE PAKHARENKO

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** APRIL 14, 2016

**JUDGMENT AND REASONS:** HENEGHAN J.

**DATED:** JULY 13, 2016

**AMENDED:** JULY, 26, 2016

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