

Federal Court



Cour fédérale

Date: 20160722

Docket: T-122-16

Citation: 2016 FC 861

Ottawa, Ontario, July 22, 2016

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

MAHER EL-KHAIRY

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application for judicial review of a decision made by a Citizenship Judge [CJ] dated November 30, 2015 [Decision], which refused the Applicant's application for Canadian citizenship on the ground that the Applicant did not satisfy the requirements under s 5(1) of the *Citizenship Act*, RSC 1985, c C-29 [*Citizenship Act*].

II. BACKGROUND

[2] The Applicant is a citizen of Jordan. On June 9, 2009 he entered Canada through Montreal, Quebec and was granted permanent resident status as a skilled worker.

[3] Prior to coming to Canada, the Applicant was employed as a commercial airline pilot for a number of airlines, including Jordan Aviation in Jordan and Anikay Air in Kyrgyzstan.

[4] The Applicant has no immediate family in Canada other than his separated spouse who is also a permanent resident.

[5] On July 5, 2012, the Applicant applied for Canadian citizenship. The relevant four-year period for his application is, therefore, June 9, 2009 to July 7, 2012 [relevant period]. The Applicant declared 1100 days of physical presence and 21 days of absence from Canada during the relevant period.

[6] The Applicant had two Jordanian passports which on their face appeared to be valid during the relevant period. The first, numbered I867670, was issued on October 6, 2005 and had an expiry date of October 5, 2010. The second was numbered K281573 and was valid from May 3, 2009 to May 2, 2014. The Applicant indicated that the I867670 passport was cancelled upon the issuance of the K281573 passport and therefore could not be used for travel after May 3, 2009. The I867670 passport is marked "CANCELLED" but lacks any specific indication of precisely when that cancellation took effect.

[7] The Citizenship Judge had some concerns regarding whether the Applicant had met the residency requirements of the *Citizenship Act* and the Applicant was sent a Residence Questionnaire on December 30, 2013. On January 29, 2014, the Applicant provided the completed Residence Questionnaire along with supporting documents.

[8] In July 2015, the Applicant received another request for information, including any passports and/or travel documents, invalid or expired, that were valid between 2009-06-09 and 2012-07-05. The July request specified that all passport stamps must be translated, including any entries that fall outside of the requested period. In response to the July request, the Applicant's counsel requested additional time to obtain "colour copies and translations" for the I867670 passport. Such translations were never provided.

[9] On November 30, 2015, the Applicant appeared before the CJ.

III. DECISION UNDER REVIEW

[10] In a Decision dated November 30, 2015, the CJ, not satisfied that the Applicant had been physically present in Canada for the amount of time required under the *Citizenship Act* at the time of the Applicant's application (three years or 1095 days), refused the Applicant's application for Canadian citizenship.

[11] The CJ noted several discrepancies in the Applicant's application documentation, specifically in the employment details in his original citizenship application and his Residence Questionnaire. At the hearing, the Applicant admitted that he had made a mistake by not

declaring in his original application his periods of unemployment, as well as foreign income gained from working for Jordan Aviation from June 9, 2009 to August 1, 2009.

[12] The CJ applied Justice Muldoon's interpretation of s 5(1)(c) of the *Citizenship Act* in *Pourghasemi, Re*, [1993] FCJ No 232, finding that it was necessary for a potential citizen to establish that he or she has been physically present in Canada for at least 1095 days during the relevant four-year period based on a strict counting of days.

[13] The CJ found that because the Applicant did not submit translations of the stamps in his I867670 passport, his absences from Canada could not be determined so that it was impossible to conclude how many days the Applicant was actually present in Canada during the relevant period.

IV. ISSUE

[14] The issue to be determined in this proceeding is whether the CJ's Decision was unreasonable.

V. STANDARD OF REVIEW

[15] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of

review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[16] The parties agree, and I concur, that review of a decision involving whether a person has met the residency requirement for a grant of Canadian citizenship is determined using the standard of reasonableness: *Canada (Citizenship and Immigration) v Bayani*, 2015 FC 670 at paras 20-22 [*Bayani*]; *Haddad v Canada (Citizenship and Immigration)*, 2014 FC 977 at para 18.

[17] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with “the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.” See *Dunsmuir*, above, at para 47, and *Khosa v Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12 at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the “range of possible, acceptable outcomes which are defensible in respect of the facts and law.”

VI. STATUTORY PROVISIONS

[18] The following provisions of the *Citizenship Act*, as they existed on the date the Applicant submitted his application for Canada citizenship, are relevant in this proceeding:

Grant of citizenship

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

(a) makes application for citizenship;

(b) is eighteen years of age or over;

(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 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;

...

Attribution de la citoyenneté

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

a) en fait la demande;

b) est âgée d'au moins dix-huit ans;

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 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;

...

VII. ARGUMENTS

A. *Applicant*

[19] The Applicant says that the CJ did not mention the evidence that clearly showed that the I867670 passport had been cancelled upon issuance of the K281573 passport. There were obvious holes punched through several pages including the cover and “CANCELLED” stamps on numerous pages including the photo identification page. Because the I867670 passport was not valid for any of the relevant qualifying period, the K281573 passport is the only valid passport during the entire qualifying period for determining residence for citizenship.

[20] The Applicant says that he was not asked prior to his hearing before the CJ on November 30, 2015 to provide translations of passport stamps in the cancelled I867670 passport. Rather, he had been requested to provide passports valid from the date of landing, which were provided and required no translation. In fact, the first request for a copy of his passport was at the Citizenship Test and Document Verification date on November 5, 2013 at which time the Applicant presented the I867670 passport and the K281573 passport (which he used at his landing) and was advised by a citizenship officer that the only passport of interest was the K281573 passport.

[21] The CJ stated a belief that the evidence clearly suggests that the Applicant was in Canada for less than 1095 days, but there is no evidence, passive or otherwise, that the Applicant was outside of Canada on any day other than the 21 days he declared on his application. This was

therefore an erroneous finding as it was not demonstrated with any clear or accurate reasons what facts and evidence were considered to come to this conclusion.

[22] The Applicant says that the only period of time that could have been of some concern to the CJ was the remaining period from the date of the Applicant's landing to what would have been the expiry date of the I867670 passport (October 5, 2010) had it not been cancelled on May 3, 2009. However, the clear evidence shows that the I867670 passport had been cancelled before the Applicant was landed and before his residency period started. The trip during this potential time of concern was one trip to the United States from June 30, 2009 to July 11, 2009. This was listed on the Applicant's application and both the entry and exit to the United States are recorded in the K281573 passport. There was also evidence of physical presence in Canada during the time of landing and October 5, 2010, including Transport Canada test results and medical examinations.

[23] As regards some of the other smaller concerns that the CJ mentioned, the Applicant asserts that the CJ made erroneous findings of fact regarding his employment, his studies and taxes paid, and failed to explain how they were relevant to the Decision. The evidence provided by the Applicant was consistent, credible and sufficient to reach the conclusion that he had spent the required amount of time in Canada to qualify for a grant of Canadian citizenship.

[24] The Respondent has misconstrued the notices sent to the Applicant regarding his passports and documentation. The December 30, 2013 request, being the Residency Questionnaire, states only that "All information and supporting documents pertaining to this

section must be provided from your arrival date in Canada to present ... Passports (include color photocopies of all pages, including blank pages, of all passport and/or travel documents (valid and canceled) used by you since you first arrived in Canada.” The July 2015 request asked for supplemental evidence and stated:

You must provide the required documents within 30 days from the date of this notice. The documents you provide should cover the period from 2009-06-09 to 2012-07-05, unless otherwise specified below. Any passports and/or travel documents, invalid or expired, that were valid between 2009-06-09 and 2012-07-05. Note: All passport stamps and entries, including visas and permits, must be translated into English or French. This includes any entries that fall outside of the period stated above.

The Applicant says that neither request can be read to suggest that the Applicant was required to provide passports and/or translations of stamps for a passport that was not valid or used for travel after the date of landing. The expired passport was never requested, and yet the application was denied on the basis that the Applicant did not provide requested translations thereof.

[25] The CJ never suggested, as the Respondent does, that the I867670 passport might have been cancelled at some time after the date of the Applicant’s landing or that at some point the Applicant held two passports concurrently. The date of cancellation of the I867670 passport was not part of the Decision, and no mention of the cancellation stamps or holes in the passport was ever made. The Respondent cannot now supplement the CJ’s reasons by suggesting that the date of cancellation was unclear.

B. *Respondent*

[26] The Respondent submits that it was reasonable for the CJ to find that the Applicant's failure to provide translations for all of his passport stamps was a critical defect in his application, particularly given that the Applicant had only declared 1100 days of presence in Canada — just five days over the statutory threshold of 1095.

[27] The Applicant bears the burden of satisfying the CJ that he was in Canada during the relevant period: *Abdelhamid v Canada (Citizenship and Immigration)*, 2015 FC 1223 at para 13; *Bayani*, above, at para 40. It is not sufficient for a citizenship applicant to rely on an absence of evidence that he or she was not in Canada during the relevant time period: *Canada (Citizenship and Immigration) v Rahman*, 2013 FC 1274 at para 51 [*Rahman*].

[28] The I867670 passport, with its unspecified date of cancellation, was set to expire on October 5, 2010, sixteen months after the Applicant's arrival in Canada and contained a significant number of untranslated stamps. It is not unheard of for individuals to hold two valid passports at the same time (see *Rahman*, above) and, without the stamp translations, the CJ was unable to be certain that the I867670 passport was not used for travel at any point during the relevant period.

[29] The Respondent says that the fact that the Applicant provided the I867670 passport in response to the questionnaire indicates that he understands its relevance. Furthermore, the questionnaire specified that all passport stamps must be translated and the Applicant nonetheless

provided it without translations. This instruction was repeated in the request for further documentation sent to the Applicant in July 2015. Following the receipt of this notice, the Applicant's counsel requested additional time to obtain "colour copies and translations," representing that the translations would be provided and forestalling the possibility of additional inquiries, such as a request for documentation to confirm the date the I867670 passport was cancelled.

VIII. ANALYSIS

[30] The essence of the Decision is contained in paragraph 21:

Because the Applicant had chosen not to submit the translations of his expired passport #I867670, his absences from Canada are undetermined. Given the foregoing, it is impossible to determine how many days the Applicant was actually present in Canada during the relevant period so it must be concluded that the Applicant has failed to discharge the burden of proof concerning his presence in Canada for at least 1095 days during this time. To the contrary, I believe that the evidence clearly suggests that the Applicant was in Canada for less than 1095 days during the relevant period.

[31] Both parties agree that the Decision turns on the Applicant's failure to provide translations for the stamps on his I867670 passport.

[32] The Respondent takes the position that whether or not the I867670 passport has any relevance (the Applicant says it had been cancelled before the relevant period began on June 9, 2009) is not the issue because, although that passport was marked "CANCELLED," it was not clear on what date it had been cancelled, and the Applicant may have had two passports that pertain to the relevant four-year period.

[33] I agree with the Applicant that none of the formal requests required him to provide passports or translations of stamps for a passport that was not valid or used for travel after the date of landing on June 9, 2009. However, the Applicant did provide a copy of the I867670 passport with his Residence Questionnaire, and his counsel requested additional time to obtain colour copies and translations for the I867670 passport in response to the July 2015 request.

Hence, the Respondent argues as follows:

26. Capt. El-Khairy has not explained why, if neither the December 30, 2013 nor the July 10, 2015 requests required him to provide his first passport, he requested additional time to provide the “colour copies and translations.” If Capt. El-Khairy had already provided what was required, his counsel could have stated this in response to the July, 2015 request, at least. Instead, his counsel provided, “...he will be able to access them [his first passport, and others] and obtain colour copies and translations immediately upon his return to Canada in the coming days.” Indeed, by indicating that the translations would be provided, Capt. El-Khairy forestalled the possibility of additional inquiries, such as a request for documentation to confirm the date his first passport was cancelled.

[34] The Applicant answers this argument as follows:

7. The respondent does not suggest, nor did the Citizenship Judge suggest that landing passport K281573 contain [*sic*] any stamps that could not be read in English or French.

8. Whether or not the Applicant perceived these notices to include a requirement that he provide translations of canceled passport I 867670 is entirely irrelevant. What is relevant is that the canceled passport was never requested and yet the citizenship application was denied on the basis that the Applicant did not provide requested translations thereof. The Applicant did not fail to provide any requested document. He compiled and provided the documents requested.

9. The Respondent states that:

“Capt. El-Khairy had two passports which on their face appeared to have been valid during the same time period at issue.”

10. This is not an accurate statement of the facts. The only evidence is that passport I 867670 appeared to be canceled with the word "CANCELLED" in several places and holds [sic] punched through several pages. The landing passport K281573 was clearly issued on 3 May 2009 which was prior to the date the Applicant landed in Canada[.]

11. The Citizenship Judge never suggested to the Applicant that the passport was canceled later than 3 May 2009 when his new passport was issued and did not give the Applicant an opportunity to address the date of cancellation if it was of concern. The Decision suggests that the Citizenship Judge it [sic] simply did not notice it had been canceled and therefore unreasonably treated the canceled passport as relevant to the residency analysis.

12. The Respondent is now arguing that passport I 867670 might have been canceled at some time after the date of landing and therefore translations of stamps in that passport might be relevant to determination of the citizenship application.

13. However, the Citizenship Judge in her Decision never suggested that passport I 867670 was canceled at some time after the issuance of the landing passport K281573. The date of cancellation of passport I867670 was not part of the decision of the Citizenship Judge.

14. In fact, the Citizenship Judge seems to be totally oblivious to the fact that the passport was canceled. She never makes any mention of the cancellation stamps or holes in the passport which were plainly visible if she had properly looked at it.

15. The Respondent cannot now supplement the Citizenship Judge's reasons by suggesting that the date of cancellation was unclear and could have been sometime after 3 May 2009 when, in fact, the date of cancellation did not form any part of the Citizenship Judge's reasons.

16. The Applicant did establish the date of cancellation of canceled passport I 867670 by providing evidence that his landing passport K287670 [sic] replaced his canceled passport and was issued on 3 May 2009.

17. The Citizenship Judge never suggested in her reasons that the Applicant had two valid passports at the same time. If there was a concern that the Applicant had two passports valid simultaneously, this should have been addressed in the reasons and

the Respondent's argument cannot now be relied upon to add to or support the decision of the Citizenship Judge.

[35] It seems to me that if the Applicant submits a cancelled passport and/or his counsel requests more time to provide translations, then this is an indication to the CJ that the Applicant does regard the I867670 passport as relevant; otherwise the Applicant's counsel would have explained the situation in a follow-up letter instead of just leaving the issue dangling.

[36] The Applicant now says that he did establish the cancellation date of the I867670 passport by providing evidence that his landing passport K281573 replaced his cancelled passport and it was issued on May 3, 2009. I think this is a fair point that the CJ appears to have missed, perhaps because the Applicant had submitted his old passport and requested additional time to submit translations for his old passport, thus suggesting that it could be relevant. So there appears to have been errors on both sides that led to confusion about the relevance of the I867670 passport.

[37] However, if I go back to the Decision, the reason given for a negative decision, in paragraph 21 was that, because the Applicant had chosen not to submit the translation of his cancelled I867670 passport, his absences from Canada are undetermined. This is clearly an error. The CJ was told that the Applicant's landing passport K281573 was issued on May 3, 2009, before the relevant period began. There were no credibility findings, so the CJ appears to have overlooked this crucial fact. In addition, there is simply no evidence to support the CJ's bare and unexplained allegation that "[t]o the contrary, I believe that the evidence clearly suggests that the Appellant was in Canada for less than 1095 days during the relevant period."

[38] The Respondent makes the point that the Applicant's oral testimony before the CJ to the effect that the I867670 passport had been cancelled was not sufficient because the CJ may well have needed documentation to support what is a legal issue. Before the Court, the Applicant's evidence is:

I told the Citizenship Judge that passport I867670 (Ex. C) was canceled upon issuance of my new passport K281573 (Ex. B) and showed her the cancelled stamps and holes in the passport.

[39] It is, of course, a matter for the CJ to decide what evidence she requires to satisfy the 1095 days in Canada during the relevant period.

[40] There was no evidence before the CJ, and there is none before me, to suggest that the Applicant was incorrect in his assertion or that there was no legal basis for it. It was clear that the I867670 passport had been cancelled when the K281573 passport was issued. If the CJ had any concerns about the effective date of that cancellation (and bearing in mind that the I867670 passport had also been rendered physically unusable), there is no way that the Applicant could have known that the CJ did not accept his evidence on cancellation and wanted further written confirmation or a legal opinion. Had this been the case, the Applicant could obviously have provided the same. So there is a procedural fairness issue here as well. A reasonable interpretation of the three requests for information is that they did not require the Applicant to submit the I867670 passport because it was not pertinent to the relevant period. However, the real problem is that it is just not possible to tell from the Decision whether the CJ wanted further confirmation that the I867670 passport had been cancelled, or whether the CJ failed to realize that it had been cancelled and was not a document that said anything about the relevant period.

[41] I agree with the Respondent that it is for the CJ to decide what evidence he or she needs, but there is no clear indication here of whether the CJ was alive to the Applicant's oral evidence that the I867670 passport had been cancelled when the K281573 passport was issued, and the physical evidence of cancellation of the I867670 passport itself. The CJ fails to explain why translations are required for an "expired passport" that, on the evidence before her, had expired before the relevant period began.

[42] Respondent's counsel has explained why this could have been the case, but the Court has no way of knowing if the CJ wanted further written evidence of cancellation or whether she overlooked the evidence provided that the I867670 passport had been cancelled on May 3, 2009, which was before the Applicant was landed and before the relevant residency period commenced.

[43] On these facts, then, I think the Decision lacks the transparency required to make it intelligible, and is unreasonable for that reason.

[44] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted, without costs;
2. This matter will be returned to the Minister for reconsideration. The Minister shall either grant the Applicant citizenship or refer the matter to a citizenship judge for reconsideration, in accordance with these reasons; and
3. There is no question for certification.

“James Russell”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-122-16

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