Cour fédérale  Federal Court

Date: 20120123

Dockets: T-1961-10
T-1960-10

Citation: 2012 FC 88

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, January 23, 2012

PRESENT: The Honourable Mr. Justice Harrington

Docket: T-1961-10

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

MOUNTASSIR EL BOUSSERGHINI

Respondent

Docket: T-1960-10

AND BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

ZAKIA KRANFOULI

Respondent

REASONS FOR JUDGMENTS AND JUDGMENTS

[1] The fundamental issue in these appeals is whether the decision of the Citizenship Judge, finding Mr. El Bousserghini and his wife, Ms. Kranfouli, met the residency requirements under subsection 5(1) of the *Citizenship Act*, is reasonable. Under paragraph 5(1)(*c*) of the Act, citizenship is granted to a permanent resident who, within the four years immediately preceding the date of his or her application, accumulated at least three years of residence in Canada.

[2] The issue not before me, directly at least, and that is definitely more important, is whether permanent residents must continue to comply with their residency obligation—namely, whether they must be present in Canada for at least 730 days per five-year period—while their citizenship application is being processed; here, it is a period of more than four years.

[3] The case unfolded as follows.

THE FACTS

[4] Mr. El Bousserghini and Ms. Kranfouli, and their children, all citizens of Morocco, arrived in Canada in July 2003; they became permanent residents that same day. They filed their citizenship applications on January 9, 2008, and claimed to have met all the conditions of section 5 of the *Citizenship Act*, including the residency conditions. Under the Act, a permanent resident must reside in Canada for at least three of the four years preceding the date of his or her application. Although

this Court does not uniformly interpret the concept of residency as found in the Act, the respondents claim to have been physically present in Canada for more than three years during the four years in question. However, citizenship authorities have some concerns about this. A little over a year later, in April 2009, the respondents were to complete a questionnaire, and were called to an interview with a citizenship officer. They were to produce their passports for the period under review, and their tax returns, bank statements, utility bills and other passive indicia showing their physical presence in Canada. Although they submitted a considerable number of documents, each produced a Moroccan passport that covered only part of the four years. According to them, they had to turn in their old passports, which were about to expire, to the Moroccan government to get new ones, and they did not make photocopies before turning them in. This explanation was not questioned, but the Minister claims that they showed negligence by not keeping any copies of their passports.

[5] At any rate, in August 2009, the citizenship officer referred their applications to a Citizenship Judge.

[6] Interviews with Mr. El Bousserghini and Ms. Kranfouli and Citizenship Judge Duguay were held on September 28, 2010. There is no transcript of the hearing but the judge was satisfied that the respondents met the conditions set out in the Act, and so advised the Minister that day. In particular, he was convinced that each was physically present in Canada for more than 1,095 days over four years, from January 9, 2004, to January 8, 2008.

[7] The Minister is appealing from these decisions. In this case, it must be determined whether the Citizenship Judge's decision is reasonable and understandable within the meaning of *Dunsmuir v New-Brunswick*, 2008 SCC 9, [2008] 1 SCR 190.

[8] By order of the Acting Chief Justice dated November 28, 2011, the appeals were set down for hearing January 9, 2012.

REPORT UNDER SECTION 44 IRPA

[9] In the meantime, on December 28, 2011, an immigration officer advised the Minister that Mr. El Bousserghini and Ms. Kranfouli were inadmissible under section 44 of the *Immigration and Refugee Protection Act* [IRPA]. According to the officer, the respondents did not comply with section 41 IRPA because they had not respected the conditions of section 28 IRPA. The provisions of this section are relevant in the present case because they require the permanent resident to be physically present in Canada for at least 730 days during a five-year period. Having considered the report to be valid, the Minister's representative made a removal order that same day. The respondents have 30 days to appeal from this removal order before the Immigration Appeal Division [IAD], a time limit that has not yet expired.

[10] Here, the importance of the report comes from the fact that one of the conditions for obtaining Canadian Citizenship by naturalization is that the individual must not be under a removal order (*Citizenship Act*, para 5(1)(*f*)). As a result, on January 6, 2012, the Minister filed a written motion to suspend the hearing *sine die*. The Minister claims that the appeals are now moot, although

he will not discontinue them. In his opinion, if the appeals are allowed and the files are sent to another Citizenship Judge, that judge will not be able to approve them because of the removal order issued against the respondents. On the other hand, if the appeals are dismissed, the citizenship judge cannot grant citizenship. The Citizenship Judge can only approve a citizenship application by indicating that the conditions of the Act have been met at a particular time. Again, the Minister could not grant citizenship to the respondents because there is a removal order against them.

[11] Under the *Federal Courts Rules*, a notice of application must be served and filed at least two days before the hearing date. Saturdays and Sundays are not included in these days. Nonetheless, counsel for the respondents replied in writing the same day, January 6, 2012. Essentially, the respondents claim that the lock-in date for their citizenship applications is when they were filed with Citizenship and Immigration Canada. I informed the parties that I would hear the motion immediately prior to the actual hearing of the appeals. I dismissed the motion to adjourn because I was not convinced the appeals had become moot. Even if they were, the appeals, in my opinion, should be heard because there is certainly a "live controversy" between the parties (*Borowski v Canada (Attorney General*), [1989] 1 SCR 342, [1989] SCJ No 14 (QL).

[12] I will elaborate further on these reasons.

DECISION OF THE CITIZENSHIP JUDGE

[13] In his notice to the Minister dated September 28, 2010, the Citizenship Judge indicated that the respondents were not subject to a removal order, which is true. When he reviewed the residency

conditions, he only considered the four-year period ending on January 8, 2008. This is the only period of time the judge was to review (*Salaff v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1320, [2007] FCJ No 690 (QL)).

[14] The Citizenship Judge was assured that during this period, Mr. Bousserghini was physically present in Canada for 1,119 days, and Ms. Kranfouli for 1,138 days. Both were accurate about the dates they were absent from Canada, and provided clear reasons for their absences. Aside from a week-long trip to Cuba, the respondents returned to their country of origin, Morocco, for various reasons such as to care for a sick relative, attend to the education of one of their children, and for business.

[15] Citizenship Judge Duguay found that, on a balance of probabilities, both were physically present in Canada for more than 1,095 days over the 1,460 days immediately preceding January 9, 2008.

[16] The judge did indeed note that the respondents had to hand in their old passports to the Moroccan government. He did not simply rely on their testimony during his analysis, but also considered various passive indicia, including details about their real estate, bank statements, the children's school attendance records and utility bills. He met with the couple, and clearly found them to be credible. The judge gave his notice to the Minister as a questionnaire issued by Citizenship and Immigration Canada; this questionnaire is useful for determining how the judge proceeded. The judge states the following on the questionnaire:

> [TRANSLATION]
> In determining whether the applicant has demonstrated that Canada is the country in which he has centralized his mode of existence, I have considered those questions posed by Justice Reed in rendering the decision *Re Koo* (1992) 19 Imm. L.R. (2d) 1, 59 F.T.R. 27 [1993] 1 F.C. 286, (T.D.).

[17] However, in *Re Koo*, the applicant was not physically present in Canada for 1,095 days. Although it is possible to analyze the residency conditions in light of *Re Koo*, this analysis is unnecessary when the applicant is present in Canada for 1,095 days (*Canada (Minister of Citizenship and Immigration) v Elzubair*, 2010 FC 298, [2010] FCJ No 330 (QL); *Canada (Minister of Citizenship and Immigration) v Salim*, 2010 FC 975, [2010] FCJ No 1219 (QL)). As a result, the opinion of the citizenship judge regarding "the quality of his connection with Canada" is *obiter dictum*.

[18] The Minister clearly notes that the respondents' credibility is not questioned. He merely claims that the evidence is insufficient to determine residency, a burden that is on the respondents. Moreover, it is suggested that the citizenship judge's reasons are inadequately expressed.

[19] Regarding the first point, in my opinion the Minister imposes an excessive burden on the respondents. In civil cases, the applicable standard of proof is the balance of probabilities (*F.H. v McDougall*, 2008 SCC 53, [2008] 3 SCR 41). Although citizenship is a privilege, the Act does not require corroboration. It is the responsibility of the original decision-maker, taking the context into consideration, to determine the extent and nature of the evidence required (*Mizani v Canada (Minister of Citizenship and Immigration)*, 2007 FC 698, [2007] FCJ No 947 (QL); *Abbott Estate v Toronto Transportation Commission*, [1935] SCR 671, 44 CRC 90; *Lévesque v Comeau*, [1970]

SCR 1010, 16 DLR (3d) 425). I agree that it would be extremely unusual and perhaps reckless, to rely on the testimony of an individual to establish his residency, with no supporting documentation. I also agree that passports are the best evidence, as long as they have been stamped at each point of entry. Whether it was a failure to produce a document or a failure to call a witness who could corroborate the facts in the citizenship application, the decision-maker could come to an adverse finding. No questions were raised regarding the respondents' explanation that they had to turn in their passports to the Moroccan government to obtain new ones. Although it would have been preferable for them to have kept a copy of these passports, the respondents cannot be punished for not doing so considering the judge was convinced they were physically present in Canada.

[20] *McDougall, supra*, was a civil case regarding sexual assault in an Indian residential school, more than 30 years earlier. Contradictions were noted in the applicant's testimony, which was neither denied nor corroborated by the respondent. In its judgment, the Supreme Court affirmed the trial judge's decision in favour of the applicant. At paragraph 40, Justice Rothstein, for the Court, stated that context is all important and a judge should not be unmindful of inherent probabilities or improbabilities of the alleged facts or the seriousness of the allegations. Citizenship Judge Duguay rendered his decision on the respondents' credibility in light of the overall evidence.

[21] Regarding the second point raised by the Minister, it is of note that findings of fact can only be set aside if it is established that the trial judge made a palpable and overriding error (*Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235). The distinction between this standard of review and reasonableness, in the context of a judicial review, is purely semantic.

[22] As Justice Iacobucci stated in *Canada (Director of Investigation and Research, Competition Act) v Southam Inc*, [1997] 1 SCR 748, [1996] SCJ No 116 (QL), at page 778:

> The standard of reasonableness *simpliciter* is also closely akin to the standard that this Court has said should be applied in reviewing findings of fact by trial judges. In *Stein v. "Kathy K" (The Ship)*, [1976] 2 S.C.R. 802, at p. 806, Ritchie J. described the standard in the following terms:
>
> > . . . the accepted approach of a court of appeal is to test the findings [of fact] made at trial on the basis of whether or not they were clearly wrong rather than whether they accorded with that court's view of the balance of probability. [Emphasis added.]

[23] *Kathy K*, cited in *Southam*, also supports the position that a court considering a judicial review will not set aside the decision of a lower court on a question of fact when the judge has had the opportunity to see witnesses and observe their behaviour, unless it can be determined that an overriding error was made. In the present case, there is no evidence of this.

[24] The Minister claims that the analysis of the indicators of residence was inadequate. The evidence shows that the respondents lived in their residence in Montréal, filed income tax returns, and used their bank cards extensively. The bank statements show, among others, expenses at the movies, purchases in many clothing stores and meals at restaurants. I do not believe it is necessary for the citizenship judge to discuss these passive indicia in great detail. His decision is clearly transparent and reasonable within the meaning of *Dunsmuir, supra*, as explained at paragraph 47:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a

> review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[25] Moreover, it is possible that the lower courts are overly strict by requiring decision-makers to provide their reasons, chapter and verse. Recently, in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] SCJ No 62 (QL), the Supreme Court was reluctant to find that alleged deficiencies or flaws in the reasons fall under the category of a breach of the duty or procedural fairness and that they are subject to a correctness review. At paragraph 16, Justice Abella, for the Court, stated:

> Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

[26] As a result, in my opinion, there is no reason to intervene in the citizenship judge's decision that the respondent's met the residency conditions under paragraph 5(1)(*c*) of the *Citizenship Act*, as of January 9, 2008.

RETURN TO THE REPORT UNDER SECTION 44 IRPA

[27] I share the Minister's opinion that, on one hand, Mr. El Bousserghini and Ms. Kranfouli cannot receive a favourable recommendation if I allow the appeals and refer the cases back to another citizenship judge because they are currently subject to a removal order. On the other hand, if I dismiss the appeals, the respondent's fate remains unsure since their permanent resident status is questioned—an issue that is not mine to decide. According to the case law, the Minister is not required to grant citizenship if he discovers a false declaration after the citizenship judge has submitted his report, despite the restrictive wording of section 5 of the Act (*Khalil v Canada (Secretary of State)*, [1999] 4 FC 661, [1999] FCJ No 1093 (QL) (FCA)). In this case, the citizenship judge is sure there was no false declaration, and there is no reason for this Court to intervene. Adjourning the hearing of these appeals, to allow the IAD to hear the appeal from the removal order, would prevent the respondents from presenting this Court's decision in the case at bar to the IAD. In my opinion, this Court's decision is an important factor the IAD should consider in the appeal.

[28] There are two elements in the report under section 44 IRPA that I find are of concern. First, if the facts in the report are accurate, it is possible that the respondents, and other people in similar situations, only remain in Canada for the minimum amount of time to meet the conditions of the Act, and then submit their citizenship applications on the way to the airport, to almost never set foot in the country again.

[29] Second, the report makes no mention of the citizenship judge's decision found in the citizenship files, in which he advises the Minister that the respondents met the residency conditions.

In Mr. El Bousserghini's case, the immigration officer reviewed the period of June 22, 2008, to October 26, 2011. Relying on the passport, the officer found that he was physically present in Canada for 51 days, including the day of his interview with the citizenship judge on September 28, 2010. Although this period is less than five years, even if Mr. El Bousserghini had been present in the country for all the remaining days, he would not have reached the 730 days required by the IRPA—assuming, of course, that the information the immigration officer relied on is accurate.

[30] As for Ms. Kranfouli, the report only covers the period of February 14, 2009, to October 26, 2011. According to the immigration officer, Ms. Kranfouli was physically present in Canada for 33 days as of February 2009. However, it is obvious that there is no information in her citizenship file about the period of time between the filing of her application on January 9, 2008, and February 13, 2009. This period must be taken into consideration when the officer considers the five years preceding October 26, 2011.

JUDGMENT

FOR THE FOREGOING REASONS;

THE COURT ORDERS that:

1. In docket T-1961-10, the Minister's appeal from the decision to accept the citizenship application of Mountassir El Bousserghini, rendered on September 28, 2010, by citizenship judge Gilles H. Duguay, is dismissed.
2. In docket T-1960-10, the Minister's appeal from the decision to accept the citizenship application of Zakia Kranfouli, rendered on September 28, 2010, by citizenship judge Gilles H. Duguay, is dismissed.
3. Without costs.

"Sean Harrington"
Judge

Certified true translation
Elizabeth Tan

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1961-10
STYLE OF CAUSE:	MCI v EL BOUSSERGHINI
AND DOCKET:	T-1960-10
STYLE OF CAUSE:	MCI v KRANFOULI
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	JANUARY 9, 2012
REASONS FOR JUDGMENTS AND JUDGMENTS:	HARRINGTON J.
DATED:	JANUARY 23, 2012

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