Federal Court  Cour fédérale

Date: 20120329

Docket: T-795-11

Citation: 2012 FC 372

Ottawa, Ontario, March 29, 2012

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

GHOLAMALI NAVIDI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an appeal of the decision of a Citizenship Judge under subsection 14(5) of the *Citizenship Act*, RSC 1985, c C-29 (the Act). Gholamali Navidi contests the denial of his citizenship application in a letter dated April 19, 2011 based on a failure to disclose multiple trips that affected his credibility and declarations. His appeal was heard at the same time as that of his wife, Manijeh Kohestani (Court File T-796-11).

[2] For the following reasons, this appeal is dismissed.

I. Facts

[3] The Applicant came to Canada as a landed immigrant from Iran under the Federal Investors Program. His wife accompanied him. On May 5, 2005, he was granted permanent residence.

[4] On March 23, 2009, he applied for Canadian citizenship. The relevant residency period was from May 5, 2005 to March 23, 2009. He declared a total of 117 days of absences from Canada for a claimed physical presence of 1,300 days.

[5] On September 13, 2010, he appeared before a Citizenship Judge. Since the documents submitted to that date had not assisted in proving physical presence, he was given the opportunity to provide additional information in support of his claim, including ICES Traveller History and Banking Records.

[6] On October 6, 2010, the Citizenship Judge received a package containing the requested documents.

II. Citizenship Determination

[7] In summarizing the evidence presented by the Applicant, the Citizenship Judge referred to the package of additional documents. While it contained both requested documents, neither assisted the Applicant in establishing his physical presence.

[8] The ICES Traveller History for March 1, 2005 to present revealed multiple undeclared travel dates in the period under review. The Citizenship Judge stated that "[t]he failure to declare all these trips on both application for citizenship, and Residence Questionnaire has done irreparable harm to your credibility and hence, your declarations."

[9] The banking information related to a joint account he held with his sister, Ms Pouran Navidi. As a consequence, the records did not identify the person activating the account or performing the transactions to prove physical presence.

[10] The Citizenship Judge therefore concluded:

> After a thorough review of the provided documentation, and in light of your failure to disclose multiple trips (absences) during the period under review, which corresponds with the several long periods of inactivity on your Ministry of Health and Long Term Care Payment Summary, your claim of 117 days of total absences from Canada is not accurate, nor could your other claims be proven and substantiated.
>
> Therefore, on the balance of probabilities, I am not convinced you have the necessary 1, 095 days of physical presence and I am not satisfied you meet the residence requirements under paragraph 5(1)(c) Residence of the Act.

III. Issues

[11] The issues raised by the Applicant can be addressed as follows:

(a) Did the Citizenship Judge err in finding that the Applicant did not meet the residency requirement under subsection 5(1)(c) of the Act?

(b) Was the Applicant denied procedural fairness or natural justice?

IV. Standard of Review

[12] A Citizenship Judge's determination as to residency is reviewable on a standard of reasonableness (*Pourzand v Canada (Minister of Citizenship and Immigration)*, 2008 FC 395, [2008] FCJ no 485 at para 19). This Court should only intervene where the decision fails to demonstrate "the existence of justification, transparency and intelligibility" and does not fall "within a range of possible, acceptable outcomes" (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

[13] Issues of procedural fairness and natural justice require the correctness standard (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 43).

V. Analysis

A. *Residency Requirement*

[14] The Applicant's principal argument is that the Citizenship Judge failed to properly apply the residency test to the facts as prescribed in *Canada (Minister of Citizenship and Immigration) v Takla*, 2009 FC 1120, [2009] FCJ no 1371. As will become clear, there is no relevance to that argument in the case at bar.

[15] Subsection 5(1)(c) of the Act establishes the residency requirement. Citizenship will be granted where, according to the prescribed formula, an applicant "within the four years immediately preceding the date of his or her application, accumulated at least three years of residence in Canada."

[16] The term "residence" has been interpreted in various ways. Justice Francis Muldoon favoured a strict physical presence test in *Re Pourghasemi* (1993), 62 FTR 122, 19 Imm LR (2d) 259. By contrast, Justice Barbara Reed established a series of six qualitative factors to determine where an applicant "regularly, normally or customarily lives" in *Re Koo* (1992), 59 FTR 27, [1993] 1 FC 286.

[17] This Court continues to engage in some debate as to whether one test is more appropriate. Most recently, while Justice Robert Mainville in the decision in *Takla*, as raised by the Applicant above, endorsed the qualitative approach in *Re Koo*; Justice Donald Rennie argued that the strict

physical presence approach in *Re Pourgahsemi* was more reflective of legislative intent in *Martinez-Caro v Canada (Minister of Citizenship and Immigration)*, 2011 FC 640, [2011] FCJ no 881.

[18] As stressed in *Lam v Canada (Minister of Citizenship and Immigration)* (1999), 164 FTR 177, [1999] FCJ no 410, however, it remains open to citizenship judges to adopt either test.

[19] In my view, Parliament's intention was to require the physical presence of an applicant in the period set out in the statute. The Court has over the years added various different tests or nuances. The Applicant is asking the Court to adopt the attempt by Justice Mainville in *Takla*, above to consolidate these various tests as the sole test for compliance with subsection 5(1)(c).

[20] However, despite the laudable goal of having one uniform test for citizenship it would be illogical in my view to prevent a citizenship judge from utilizing the test most clearly intended by Parliament in order to achieve this goal. Thus, where a citizenship judge utilizes the physical presence test and finds that an applicant has failed to prove the actual days required to establish physical presence in Canada, there is no need, in my view, for the citizenship judge to do anything more.

[21] Moreover, although the Applicant provided numerous submissions in this regard, the test for residency was not the critical factor in this Citizenship Judge's decision. As the Respondent maintains, the Applicant would not have met either the quantitative or qualitative tests since the Citizenship Judge found his evidence was not credible due to a failure to disclose several absences.

[22] The importance of establishing credible evidence of residency was expressly addressed by Justice Rennie in *Abbas v Canada (Minister of Citizenship and Immigration)*, 2011 FC 145, [2011] FCJ no 167 where he stated:

> [8] Irrespective of which test is applied, each applicant for citizenship bears the onus of establishing sufficient credible evidence on which an assessment of residency can be based, whether it is quantitative (*Re Pourghasemi*) or qualitative (*Koo*). In this regard, the citizenship judge must make findings of fact - findings which this Court will only disturb if unreasonable.
>
> [...]
>
> [13] Moreover, as noted earlier, regardless of which test is actually applied by a citizenship judge, there must be a sufficient factual foundation to warrant the application of a test in the first place. In my opinion, had the Citizenship Judge applied *Takla*, the outcome in Mr. Abbas' case would have been no different than the outcome presented by applying *Re Pourghasemi*. There were simply too many unexplained discrepancies with respect to residency in his application. These would not have simply evaporated under the qualitative analysis espoused in *Koo* and *Takla*. Inconsistent or unclear evidence of residency will not gain a greater life or strength under the qualitative *Koo* test.

[23] Referring to this reasoning in *Atwani v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1354, [2011] FCJ no 1656, Justice Judith Snider found it was appropriate for a citizenship judge to conclude that an applicant had not met the burden of establishing physical presence when issues arose as to undeclared days of absence from Canada. She stated:

> [16] On the facts of the case, the Applicant would have failed either test for residency – be it a *Re Koo* or *Re Pourghasemi* test. How can an assessment of residence be conducted when an accurate number of days of residence cannot be established?
>
> [17] […] The importance of citizenship and the application of common sense dictate that a person seeking citizenship in Canada must come with a credible record of his time spent in Canada. Thus,

> any starting point for a residency analysis – whether under *Re Koo* or *Re Pourghasemi* – must be the total number of days of physical presence, supported by credible evidence.

[24] The findings in *Abbas* and *Atwani*, above are directly applicable in this instance. The Applicant's evidence as to travel indicated several additional absences from Canada and cast doubt on his application more broadly. A negative finding of credibility can extend to all relevant evidence (see *Sheikh v Canada (Minister of Employment and Immigration)* (1990), 11 Imm LR (2d) 81, [1990] FCJ no 604 (FCA)).

[25] The Applicant has suggested that the Citizenship Judge erred in failing to consider the evidence as a whole, namely that even if the three undeclared absences were taken into account he would still have met the required number of days of residence. He also points to entries from his Ministry of Health Summary.

[26] I am unwilling to accept, however, that the Citizenship Judge's conclusion was unreasonable given the concerns raised by evidence of further absences. On more than one occasion the Applicant made declarations as to the accuracy of the evidence he was putting forward of physical presence. He cannot expect these declarations to be treated lightly.

[27] The Citizenship Judge was therefore justified in his conclusion that this additional evidence had done "irreparable harm" to the Applicant's credibility. The Applicant was under an obligation to provide credible information as to his residency which necessarily implies that it is complete, accurate, reliable and relevant.

[28] I am similarly unconvinced by the Applicant's argument that the Citizenship Judge failed to articulate sufficient reasons for the decision. The Applicant claims that the Citizenship Judge merely listed the evidence without providing analysis based on *Lai v Canada (Minister of Citizenship and Immigration)* (2000), 188 FTR 113, [2000] FCJ no 1361 at paras 11-12). He also insists that grounds exist for review because he is unclear how his application was assessed. He relies on *Canada (Minister of Citizenship and Immigration) v Salim*, 2010 FC 975, [2010] FCJ no 1219.

[29] These cases are not applicable to the decision made regarding the Applicant. Although he begins with a numbered summary of the relevant evidence, the Citizenship Judge proceeds to analyze that evidence and explain the reasons for his conclusion. The Applicant merely disagrees with that conclusion.

[30] I see no justification for intervening in the Citizenship Judge's decision where it is perfectly clear to the Applicant in the reasons provided that his application was not approved given serious credibility concerns arising from undeclared absences.

B. *Procedural Fairness*

[31] The Applicant further contends that he was not given an opportunity to respond to the negative credibility finding. He has tried to include additional information explaining why he did not disclose the additional absences in an affidavit referring to stress and confusion associated with the illness of his sister. He claims that the Citizenship Judge failed to give him the benefit of the

doubt. Alternatively, he suggests his consultant failed to advise him to obtain ICES Traveller History and if he had been so advised he would have disclosed the trips.

[32] There is no merit to these arguments. As the Respondent makes clear, the Applicant was given a hearing before the Citizenship Judge. He had not presented sufficient evidence to establish residency and was provided with the opportunity to submit additional evidence. The Citizenship Judge thereafter made negative credibility findings that I consider reasonable in light of the evidence ultimately before him. There is no requirement to further give the Applicant the benefit of the doubt.

[33] Moreover, I am not permitted to evaluate the Applicant's subsequent explanations for his failure to disclose the absences. This appeal proceeds solely on the record before the Citizenship Judge (see *Lama v Canada (Minister of Citizenship and Immigration)*, 2005 FC 461, [2005] FCJ no 577 at para 21). I also note that the Applicant confirmed on two occasions the accuracy of the information put forward.

[34] As a consequence, the Applicant has not demonstrated any breaches of natural justice or procedural fairness.

VI. Conclusion

[35] The Citizenship Judge reasonably determined that the Applicant had not provided credible evidence. This warranted the denial of his application. In addition, there was no breach of procedural fairness or natural justice in the circumstances.

[36] Accordingly, this appeal is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that this appeal is dismissed.

" D. G. Near "

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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