Federal Court  Cour fédérale

Date: 20120731

Docket: T-312-12

Citation: 2012 FC 945

Ottawa, Ontario, July 31, 2012

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

MURAD Y. HANNOUSH

Respondent

REASONS FOR ORDER AND ORDER

[1] Mr. Hannoush would like nothing more than to be a Canadian citizen. However, the citizenship agent who vetted his application was concerned that he had not resided in Canada for at least three of the four years immediately preceding his application, as required by the *Citizenship Act*. After interviewing him, she referred the matter to a citizenship judge.

[2] In accordance with section 14 of the *Citizenship Act*, the citizenship judge was required to determine whether or not Mr. Hannoush met the requirements of the Act, and regulations; approve

or not approve the application; notify the Minister "and provide the Minister with the reasons therefore".

[3] The citizenship judge simply said:

> I am satisfied that the applicant has met the requirements for residence as per 5(1)(c) of the Act.

[4] The Minister has appealed that decision. He submits that the citizenship judge did not give any reasons, as required by law, did not identify which of the three residency tests approved by this Court she relied upon and, in any event, the decision was unreasonable.

DECISION

[5] I am forced to the conclusion, somewhat reluctantly, that the Minister's appeal is well-founded. The applicant shall be referred back to another citizenship judge for reconsideration *de novo*.

DISCUSSION

[6] As a general proposition, it is not always necessary for a decision maker to provide reasons. A reviewing court is not to quash a decision if it is supportable on the evidence (*R v Sheppard*, 2002 SCC 26, [2002] 1 SCR 869). As the Supreme Court of Canada recently held in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3

SCR 708, inadequacy of reasons is not a stand-alone basis for quashing a decision. The Court added at paragraph 22:

> It is true that the breach of a duty of procedural fairness is an error in law. Where there are no reasons in circumstances where they are required, there is nothing to review. But where, as here, there *are* reasons, there is no such breach. Any challenge to the reasoning/result of the decision should therefore be made within the reasonableness analysis.
>
> [My emphasis.]

[7] In this case, reasons were required by statute. What the citizenship judge did was determine that Mr. Hannoush met the residency requirements. Her stated conclusion, in the "reasons" box in the Notice to the Minister, *i.e.* "I am satisfied that the applicant has met the requirements for residence as per 5(1)(c) of the Act." is not a reason at all. It is the decision.

[8] When reasons are required, they must, in the context of the record, show why the judge decided as she did (*SRI Homes Inc v Her Majesty the Queen*, 2012 FCA 208).

[9] This deals with the Minister's first point of appeal. His second point is that the citizenship judge failed to identify which of three acceptable residency tests she applied. Section 5(1)(c) of the Act requires the applicant to be present for at least three of the four years immediately prior to the application. Mr. Hannoush's submission is that he was present throughout the entire time frame not having left Canada once.

[10] Briefly speaking, the three residency tests are as follows. In *Pourghasemi (Re)* (1993), 19 Imm LR (2d) 259, [1993] FCJ No 232 (QL), Mr. Justice Muldoon held that it was necessary for an

applicant to be physically present in Canada for 1,095 days during the relevant four-year period. In *Re Papadogiorgakis,* [1978] 2 FC 208, [1978] FCJ No 31 (QL), Associate Chief Justice Thurlow held that even though an applicant might not be physically present for 1,095 days, there could be situations in which the applicant has a Canadian place of abode to a sufficient extent even though during the material period he or she may be away part of the time. The third test is that of Madam Justice Reed in *Koo (Re),* [1992] 59 FTR 27, [1992] FJC No 1107 (QL). She concluded that the test was whether it could be said that Canada was the place where the applicant regularly, normally or customarily lives, or in other words, whether the applicant had centralized his or her mode of existence here.

[11] There are decisions of this Court in which it is said that the citizenship judge must identify the test applied (*Canada (Minister of Citizenship and Immigration) v Al-Showaiter*, 2012 FC 12, *Canada (Minister of Citizenship and Immigration) v Behbahani*, 2007 FC 795).

[12] In *Al-Showaiter*, above, Mr. Justice Near stated at paragraph 30:

> […] However, even where it can be inferred that the physical presence in Canada test (which generally, in my view, is the test most in line with the legislation) is being used, citizenship judges must state that this is the case. […]

[13] However, basing myself on the decision of the Supreme Court in *Newfoundland Nurses*, above, and the very recent decision of the Federal Court of Appeal in *SRI Homes*, above, if the record shows that the applicant claims to have been present here at least 1,095 days, and no analysis has been done along the lines of the applicant's heart being here although his body was elsewhere, it is reasonable to infer that the physical presence test, the most stringent one, was applied. It has been

held on a number of occasions that once it is established that an applicant has been here for 1,095 days, it is not necessary to consider the other tests (*Canada (Minister of Citizenship and Immigration) v Elzubair*, 2010 FC 298, [2010] FCJ No 330; *Canada (Minister of Citizenship and Immigration v Salim*, 2010 FC 975, [2010] FCJ No 1219 (QL) and *Imran v Canada (Minister of Citizenship and Immigration)*, 2012 FC 756).

[14] As to the Minister's third point, which is that in any event the decision was unreasonable, I am not prepared to so find. The citizenship agent was concerned because during the first years of the four-year period in question, the indicia of physical presence in Canada were somewhat passive. There was a gap during which he had not renewed his American passport.

[15] It may well have been open to the citizenship judge to assuage the citizenship agent's concerns by pointing out that Mr. Hannoush had no need to review his American passport if he remained in Canada at all times, and by referring to various leases for the apartment he shared with his wife, to a letter regarding volunteer work, medical examinations, census letters, renewal of temporary residency, the permanent resident status card, a letter from his church indicating that he was a parishioner going back to 2001, and so on. On the other hand, there was a great deal of material in the record which fell outside the four-year time frame in question, which was from March 2005 to March 2009. I mention this because the Minister asks that the decision simply be quashed, and not referred back to another citizenship judge. Based on the record, I am not prepared to find that the decision was unreasonable, and should be quashed without further recourse. The basis of my decision is that no reasons were given, contrary to the requirements of section 14 of the *Citizenship Act*

COSTS

[16] The Minister agrees that it is unfortunate that Mr. Hannoush got caught up in this situation because of the lack of reasons given by the citizenship judge. No costs were sought, and certainly none shall be awarded.

THE FUTURE

[17] As Mr. Hannoush explained at the hearing before me, during his first years in Canada he only had a temporary residence permit and so was unable to work. Once he obtained his permanent residence permit, he did work. Had he realized the situation he would find himself in, he might have simply waited another year or so before applying, as his employment records would be proof positive of his presence here.

[18] It seems to me that Mr. Hannoush has two options. He can pursue his application based on a four-year residence ending in March 2009, and bolster the record with more specific information from his wife, his church, his landlord, his neighbours, and others who can attest he was here, such as he has now submitted. Alternatively, he might simply file a fresh application based on a four-year residency ending in August 2012. Although the decision is ultimately Mr. Hannoush's, I would expect citizenship officials to do the right thing by him, to inform him which would be the quicker route, and to expedite his application no matter which route he chooses.

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that

1. The appeal of the Minister of Citizenship and Immigration is allowed.

2. The application for citizenship is referred back to another citizenship judge for re-determination *de novo*.

3. The whole without costs.

"Sean Harrington"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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Murad Y. Hannoush	FOR THE RESPONDENT (ON HIS OWN BEHALF)

SOLICITORS OF RECORD:

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None	FOR THE RESPONDENT