Federal Court Cour fédérale

Date: 20131219

Docket: T-642-13

Citation: 2013 FC 1273

Ottawa, Ontario, December 19, 2013

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

SHAKER IRANI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an appeal pursuant to subsection 14(5) of the *Citizenship Act*, RSC 1985, c C-29 [*Act*], of a decision of Citizenship Judge Wong, dated February 18, 2013, refusing Mr. Irani's application for Canadian citizenship on the basis that he did not meet the residency requirement in paragraph 5(1)(c) of the *Act*.

[2] Mr. Irani is a citizen of Iran. He moved to Canada on July 20, 2004, and was granted permanent resident status on June 24, 2006, after being sponsored by his wife. He applied for

Canadian citizenship on August 7, 2009; this makes the "relevant period" for calculating physical presence in Canada, August 7, 2005 to August 7, 2009.

[3] Mr. Irani submits that factual errors led the Judge to believe that he misrepresented facts, and coupled with a failure to put his concerns to Mr. Irani, led the Judge to apply the physical presence test rather than the qualitative test set out in *Koo (Re)*, [1993] 1 FC 286, [1992] FCJ No 1107 [*Koo*].

Evidence of Absences from Canada

[4] In his citizenship application, Mr. Irani declared two trips outside Canada for a total absence of 305 days - leaving him 995 days of physical presence in Canada - 100 days short of the statutory minimum of 1,095 days.

[5] In the Residence Questionnaire he was later asked to provide, Mr. Irani declared four trips outside Canada for a total absence of 378 days - leaving him 922 days of physical presence in Canada - 173 days short of the statutory minimum of 1,095 days.

[6] The Judge interviewed Mr. Irani and concluded, based on the documentation and the interview that he was not satisfied "on a balance of probabilities, that the declarations on either the original declaration or Residence Questionnaire accurately reflects the number of days you were, in fact, physically present in Canada." He found that Mr. Irani was not forthcoming as to his absences from Canada.

[7] The Judge stated that Mr. Irani's "failure to declare absences from Canada, when the contrary is shown on your passport and other documents such as credit card statements during the relevant period cast significant doubt on the veracity of your application which has not been dispelled by documentary evidence." He observes that in *Canada (Minister of Citizenship and Immigration) v Dhaliwal*, 2008 FC 797, "misrepresentation by an applicant for citizenship puts into question their credibility and has the potential to impact the weight given to their evidence." The Judge then states: "In the circumstances, I find that it is appropriate to hold you strictly to the test articulated by Mr. Justice Muldoon and I find that you have been unable to demonstrate, on a balance of probabilities, that you were physically present in Canada for at least 1,095 [days] during the relevant period."

[8] In this appeal, Mr. Irani now admits that according to the stamps in his passport he was actually outside Canada 160 days before he became a permanent resident and 456 days since he became a permanent resident. Pursuant to paragraph 5(1)(c)(ii) of the *Act*, a person gets credit for only one-half day of residence for each full day of residence prior to being granted permanent resident status. According to the Respondent, with this admission of absences, Mr. Irani was physically present in Canada only 764.5 days and was thus 330.5 days short of the minimum under the *Act*.

Issues

[9] Mr. Irani submits that he was denied procedural fairness because the Judge failed to put to him, and ask him to explain the additional absences the Judge (apparently mistakenly) found. He

also says that the errors led the Judge to impose the "punitive" strict count test, rather than the more permissive *Koo* test.

Analysis

[10] I agree with Mr. Irani that the Judge erred in his interpretation of the dates of the stamps in his passport. The Judge interpreted an entry stamp to Amsterdam which read "06.04.07" as an entry on April 6, 2007, but then re-read the same stamp as another entry on June 4, 2007. The Judge similarly interpreted an exit stamp from Amsterdam which read "09.04.07" as an exit on September 4, 2007, when in fact, Mr. Irani had left Amsterdam on April 9, 2007.

[11] The Judge suspected that in October 2006, Mr. Irani was in the United States but had not disclosed this trip in his application. The Judge noted that on one of Mr. Irani's credit card statements, there was a charge on October 16, 2006 from a restaurant in Dallas, Texas. Mr. Irani explained in his affidavit filed in this appeal that his friend owned the restaurant, had borrowed money from him, and the easiest way to pay Mr. Irani back was to charge his credit card. Mr. Irani says that he was not actually physically present at the restaurant to incur the charge. I am prepared to give Mr. Irani the benefit of the doubt.

[12] Finally, the Judge was concerned about the declaration in Mr. Irani's expired Iranian passport that his residence was in the United States. Mr. Irani may well have been able to provide an explanation to address the Judge's concerns, had the Judge put his concern to Mr. Irani.

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[13] Nonetheless, although the Judge may have erred in his calculation of the days of absence, Mr. Irani now admits that he misrepresented his absences in both the initial application and in the Residence Questionnaire. On the evidence of Mr. Irani, he misrepresented his days present in Canada at least twice - although he says they were innocent and not deliberate attempts to mislead. Accordingly, the Judge's observation that he "found it challenging to determine the exact number of days you were physically present during the relevant period because of your undeclared absences in your passport" is apt, even though he referenced absences other than those Mr. Irani now acknowledges.

[14] It was the misrepresentation by Mr. Irani that led the Judge to use the strict count test, as he was entitled to do. In such circumstances, the facts before the Judge were identical to those in *Dhaliwal* which he cited for the proposition that misrepresentation goes to weight of the evidence and credibility. In any event, "a citizenship judge does not have to justify her choice of test" (*Idahosa v Canada (Citizenship and Immigration)*, 2013 FC 739, para 14). A Citizenship Judge only needs to apply the test consistently. Further, I agree with Justice Crampton's observation in *Huang v Canada (Minister of Citizenship and Immigration)*, 2013 FC 576, that "it is particularly appropriate that deference be accorded to a citizenship judge's decision to apply any of the three tests that have a long and rich heritage in this Court's jurisprudence" given the divided state of the jurisprudence on this issue (para 25, emphasis added).

[15] I can find no reversible error in the Judge applying the strict count test in these circumstances.

[16] Further, on Mr. Irani's current accounting of the number of days spent in Canada, he actually has a greater shortfall than what the Judge had estimated.

[17] To summarize, I find that the Judge erred by not putting to Mr. Irani, his concerns regarding Mr. Irani's passport stamps, the credit card entry, and the country of residence declaration in his Iranian passport. Having not been made aware of these concerns, Mr. Irani was not given an opportunity to disabuse the Judge of those concerns. However, despite these errors, at the end of the day, they were errors that were not material because Mr. Irani has now admitted that his previous two calculations in his citizenship application and his Residence Questionnaire were inaccurate and, by his own admission and his present account of his absences in this application, is still short of the statutorily required number of days. Therefore, in my view, the breaches of procedural fairness would not have resulted in a different decision being rendered by the Judge.

[18] This appeal is dismissed. The Respondent is entitled to its costs which I fix at the sum agreed upon by the parties - $2,000.00.

JUDGMENT

THIS COURT'S JUDGMENT is that this appeal is dismissed and the Respondent is awarded its costs, fixed at $2,000.00.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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