Federal Court  Cour fédérale

Date: 20140909

Docket: T-84-14

Citation: 2014 FC 854

Ottawa, Ontario, September 9, 2014

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

KEVORK DELDELIAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an appeal by Mr. Deldelian of a decision of a Citizenship Judge who denied his application for citizenship on the grounds that he did not meet the residency requirement. Section 5(1)*(c)*of the *Citizenship Act* in force at the relevant time required a permanent resident to have accumulated at least three years of residence in Canada within the four years immediately preceding the date of the application, which in this case was 7 March 2010. Mr. Deldelian

certainly cut it close. He claimed he was physically present in Canada for 1,096 days during that four-year period, i.e. three years plus one day.

[2] Citizenship judges, and this Court, have wrestled for many years with the meaning of "residence" within the *Citizenship Act*. Some judges have used a physical presence test while others have taken a more nuanced approach. In *Re Papadogiorgakis*, [1978] 2 FC 208 (TD), Associate Chief Justice Thurlow, as he then was, held that if a person was established here he did not cease to be a resident when he leaves for a temporary purpose. In *Re Koo*, [1993] 1 FC 286, Madam Justice Reed said the test was whether Canada was the place where the applicant "regularly, normally or customarily lives". However, in *Re Pourghasemi*, (1993), 62 FTR 122, Mr. Justice Muldoon applied a strict physical presence test.

[3] Our jurisprudence developed such that an appeal would not be granted if the Citizenship Judge selected and reasonably applied any one of these tests. Fortunately, Parliament has finally resolved this dilemma with the passage of the *Strengthening of the Canadian Citizenship Act*, SC 2014, c 22. The test is now physical presence of 1,460 days over the six-year period preceding the application, with at least 183 days of physical presence in each of the four last calendar years.

[4] In this case, the Citizenship Judge applied the strict physical presence test and was not persuaded that Mr. Deldelian was here the required number of days. Without doubt, the burden fell upon him (*Chen v Canada (Citizenship and Immigration)*, 2008 FC 763).

[5] It cannot be said that the record clearly shows that Mr. Deldelian was absent for at least 2 days of the 1,096 days he claimed to be present here. The Citizenship Judge simply did not believe him, and set out several reasons why. Counsel for Mr. Deldelian submits that some of the judge's statements are clearly wrong, that she failed to focus on the four years which were in issue, and that some of her doubts were perverse and capricious.

[6] He has persuaded me that that is indeed the case. The appeal shall be granted and the matter referred back to another Citizenship Judge.

I. The decision under appeal

[7] The judge formed the view that Mr. Deldelian was a scofflaw. Consequently, she did not give him any benefit of the doubt whatsoever.

[8] The first issue relates to Employment Insurance. After he was declared redundant from his job in Montréal, Mr. Deldelian applied for EI benefits. He was approved on 28 July 2009 which benefits expired in mid-September that year. In the citizenship forms he was required to fill in, he declared that he was absent from the country four times during this overall timeframe. The first two absences were before he was approved. The third absence, which was to meet a prospective employer, not to actually work, was on the day he was approved. The fourth absence occurred after his benefits had expired in mid-September 2009.

[9] The Citizenship Judge concluded that one could not leave the country and also claim EI benefits. She was also most concerned with the fact that Mr. Deldelian did not provide a

satisfactory explanation as to why he departed from Canada the very day he submitted his citizenship application. This concern was irrelevant, as the four years in question ended the day before. Had the Citizenship Judge been dealing with the Act, as amended by the *Strengthening of the Canadian Citizenship Act*, this would have been a relevant consideration as one of the requirements is that the applicant intends to continue to reside in Canada.

[10] Another issue raised is that there were two entries in the government datasheets that had not been listed by Mr. Deldelian in his application. These entries combined with stamps in his passport evidence two day trips. The forms he was required to fill in are somewhat confusing in that although he was called upon to list all trips out of the country, day trips do not count for the purpose of calculating the number of days one is out of the country.

[11] Further, although there were various bank transactions which Mr. Deldelian claimed evidenced that he was in Canada, the Citizenship Judge would not accept these bank records as evidence because the account was operated jointly by Mr. Deldelian and his wife, and did not establish that he was in Canada. On the other hand, they did not establish that he was outside the country.

[12] One troubling point relates to his LinkedIn profile which showed him as the General Manager of a hotel in Doha, Qatar, from 2009 to 2011. Although the Citizenship Judge accepted that the entry was incorrect as it was in obvious contradiction to his other claim that he was a hotel consultant in Montréal from October 2009 to March 2010, she did not accept his explanation as to why the entry was incorrect. His explanation was that he had made the entry in

the expectation that he would obtain a job in Qatar. However, as a Jordanian, he encountered difficulties in obtaining a work permit. The LinkedIn entry is also somewhat suspect because there are medical records showing that he was in Montréal at least part of that time.

[13] If the Citizenship Judge had limited her analysis to the four years immediately preceding Mr. Deldelian's application, it would have been necessary for me to determine whether her decision was sufficiently reasonable to withstand review in accordance with *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, particularly at paragraph 47. However, in addition to raising an issue with respect to his departure from Canada on the day he filed his application, she dealt with his son's schooling the year following, and the exact role of his wife in his business following his citizenship application. It is not at all clear that the Citizenship Judge limited herself to the four years in issue. Indeed, she considered events which took place after he applied for citizenship. As stated by Mr. Justice O'Keefe in *Shakoor v Canada (Minister of Citizenship and Immigration)*, 2005 FC 776, at paragraphs 39 and 40:

> [39] From a perusal of the reasons, it cannot be determined whether the citizenship judge was referring to the extensive absences from Canada after February 14, 2003, the date of the applicant's application, or just the absences prior to the date of his application. I cannot tell whether the citizenship judge took into account the absences after the date of the application in arriving at a conclusion on the applicant's application. If she did, it would constitute a reviewable error.
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> [40] Accordingly, the appeal of the citizenship judge's decision must be allowed, as there is a live issue as to the actual number of days the applicant was absent from Canada. I will refer the matter back to a different citizenship judge for redetermination.

See also *Zamzam v Canada (Citizenship and Immigration)*, 2009 FC 959.

[14] The appeal shall be granted.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The appeal from a decision of the Citizenship Judge, dated 27 August 2013, is granted.

2. The application is referred back to another Citizenship Judge for redetermination.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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