Federal Court  Cour fédérale

Date: 20141006

Docket: T-282-14

Citation: 2014 FC 947

Ottawa, Ontario, October 6, 2014

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

HABIBRAHMAN SAFI

Respondent

JUDGMENT AND REASONS

[1] This is an appeal under subsection 14(5) of the *Citizenship Act*, RSC 1985, C-29 [the Act] and section 21 of the *Federal Courts Act*, RSC 1985, c F-7 of the decision of a Citizenship Judge dated November 22, 2013 that approved the Respondent's Citizenship Application under subsection 5(1) of the Act.

[2] For the reasons that follow, the application for judicial review is allowed and the respondent's Citizenship Application should be re-considered by a different Citizenship Judge.

[3] As a preliminary issue, the affidavit of Stephanie Miller submitted by the applicant was filed with the Court and provided to the respondent beyond the time limits prescribed by the *Federal Courts Rules*. The applicant agrees to withdraw the affidavit and as a result, the affidavit and the documents attached to it have not been considered.

Background

[4] Mr Safi arrived in Canada on September 13, 2006 and became a permanent resident on that same date. He applied for citizenship on April 9, 2010. His Application for Citizenship states, among other things, that he is a citizen of Afghanistan, that he has resided at an address in North York since September 2009, and that he has been unemployed for that period. The Application includes the form used to calculate the number of days of residence in Canada pursuant to the Act. Mr Safi lists three absences from Canada; two visits to the Ukraine for 24 and 30 days and one visit to Afghanistan for 54 days for a total of 108 days of absence. The calculation then indicates that there were 1305 days between his date of arrival in Canada and his Application and then deducts 108 days of absence, leaving 1197 days of residence in Canada in the relevant period. Mr Safi signed the Citizenship Application attesting that all the information was true, correct and complete.

[5] Mr Safi also submitted a Residence Questionnaire, dated April 18, 2011. In response to Question 4, which asks "Do you work, study or live in any country other than Canada?" Mr Safi marked the Yes box and indicated "Ukraine". He also indicated that he had resided at the same address in North York since September 2006, his wife in Canada was his only family member, and in response to Question 9 regarding work and education history, that he was a student at

Hardington LINC [Language Instruction Newcomers to Canada] from October 2006 to October 2009 and at Yorkdale Adult Learning Centre from November 2009 to September 2011.

[6] In response to Question 11, Mr Safi lists six absences from Canada; four visits to the Ukraine of 27, 17, 30 and 18 days, one visit to China of 16 days and one visit to Afghanistan of 52 days. These absences total 160 days outside of Canada.

[7] In response to Question 12 which asks "When you were outside Canada, where did you stay?", Mr Safi provides an address in Odessa, Ukraine which he rented from August 1998 to September 2006.

[8] Mr Safi signed the Residence Questionnaire attesting that the information in the form and in the supporting documents was true, correct and complete.

[9] A Citizenship Officer prepared a short assessment and requested that a hearing before a Citizenship Judge be held to determine the Application. At the hearing held on October 16, 2013, Mr Safi consented to disclosure of his history of recorded entries into Canada from the Canadian Border Service Agency [CBSA]. This information, referred to as an Integrated Customs and Enforcement System [ICES] report, was provided to the Citizenship Judge.

[10] The ICES document provided by CBSA shows Mr Safi's arrivals in Canada on the following dates: September 13, 2006 (his landing in Canada), November 27, 2006, March 30, 2007, July 3, 2007, November 23, 2007, September 14, 2008 and September 8, 2009.

[11] The Citizenship Application, Residency Questionnaire and other documents, including Mr Safi's timetable for three classes at Yorkdale Adult Learning Centre, a letter confirming that he had registered for the Hardington LINC program, a letter from his landlord indicating he had resided at the North York address since September 2006, a Canada Revenue Agency notice of assessment for 2010 and his Afghan passport were provided to the Citizenship Judge.

The Decision under Appeal

[12] The Citizenship Judge approved Mr Safi's Application for Citizenship on November 22, 2013. The Decision is set out in the required form, "Notice to the Minister of the Decision of the Citizenship Judge". The "reasons" section of that form indicates the following in handwriting:

> *interviewed applicant & examined docs.*
>
> *- ~~officer error in calculating the relative material period~~ It is correct*
>
> *- requested ICES to confirm app & RQ -. looks okay - will make decision once ICES reviewed.*
>
> *ICES reviewed - matches as stated*
>
> *- no income but travels?*

The Issues

[13] The applicant challenges both the reasonableness of the decision to approve Mr Safi's Application for Citizenship, given the concerns raised in the documents on the record, and the adequacy of the reasons provided by the Citizenship Judge. The applicant acknowledges, however, that the adequacy of reasons is not a stand alone ground to allow judicial review.

[14] The issue is whether the decision is reasonable; this includes whether the evidence on the record supports the decision of the Citizenship Judge and whether the reasons of the Judge are adequate to allow the Court to understand why the Citizenship Judge reached the decision and to determine whether the decision is within the range of acceptable outcomes (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 [*Newfoundland Nurses*].

Standard of Review

[15] Although this is an appeal from a decision of a Citizenship Judge and not a judicial review, the jurisprudence has established that the administrative law principles governing the standard of review apply: see *Canada (Minister of Citizenship and Immigration) v Rahman*, 2013 FC 1274, [2013] FCJ No 1394 [*Rahman*], *Canada (Minister of Citizenship and Immigration) v Lee*, 2013 FC 270, [2013] FCJ No 311 [*Lee*] etc.

[16] The parties agree that the standard of reasonableness applies to the Citizenship Judge's determination of the Application as that determination involves questions of fact and law. The role of the Court is, therefore, to determine whether the decision "falls within 'a range of possible, acceptable outcomes which are defensible in respect of the facts and law' (*Dunsmuir*, at para 47). There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome.": (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1

SCR 339 at para 59, citing *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*]).

[17] As noted, the inadequacy of the reasons is not a stand alone ground to allow an application for judicial review. In *Newfoundland Nurses*, the Supreme Court of Canada elaborated on the requirements of *Dunsmuir*, noting at paras 14-16 that the decision-maker is not required to set out every reason, argument or all the details in the reasons. Nor is the decision-maker required to make an explicit finding on each element that leads to the final conclusion. The reasons are to "be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes" (para 14). In addition, where necessary, courts may look to the record "for the purpose of assessing the reasonableness of the outcome" (para 15). The Court summed up their guidance in para 16:

> 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.

[18] On the other hand, a Court is not expected to look to the record to fill in gaps to the extent that it rewrites the reasons. As noted by Justice Rennie in *Pathmanathan v Canada (Minister of Citizenship and Immigration)*, 2013 FC 353, [2013] FCJ No 370 [*Pathmanathan*] at para 28:

> [28] *Newfoundland Nurses* does not authorize a court to rewrite the decision which was based on erroneous reasoning. The reviewing court may look to the record in assessing whether a decision is reasonable and a reviewing court may fill in gaps or inferences reasonably arising and supported by the record. *Newfoundland Nurses* is a case about the standard of review. It is not an invitation to the supervising court to re-cast the reasons given, to change the factual foundation on which it is based, or to

> speculate as to what the outcome would have been had the decision-maker properly assessed the evidence.

The Applicant's Position

[19] The applicant submits that the Citizenship Judge's residency assessment is unreasonable because there was insufficient evidence on the record to support the decision. The applicant argues that, overall, there is no information in the reasons or on the record to explain how the Citizenship Judge concluded that Mr Safi met the residency requirements based on the Judge's review of the passport documents; his brief notations do not reveal anything.

[20] The applicant notes that a person applying for citizenship has the onus to establish that all requirements for citizenship have been met, including that they were physically present. Mr Safi must, therefore, establish his physical presence in Canada for 1095 days between September 13, 2006 and April 9, 2010. There were discrepancies in Mr Safi's documents, including the reported days of absences (108 or 160 days), and the Citizenship Judge's handwritten marks on the record do not reveal whether he considered the discrepancies or simply calculated the days and found it to still be adequate regardless of the discrepancies.

[21] The discrepancies in Mr Safi's absences from Canada included the dates, the countries visited, and the number of trips. The ICES report only confirms his arrivals to Canada and does not indicate the dates of his departures from Canada. The only document that would verify Mr Safi's absences from Canada is his Afghan passport. That passport raises several important concerns: some of the stamps on the passport are in other languages; some of the stamps are illegible; and, some of the stamps do not indicate the country where the stamp was issued. There

is no information to suggest that the judge knew the languages used for the various country stamps. The applicant submits that these concerns make it impossible to know whether Mr Safi's travel to and/or from other countries occurred during the relevant period. The applicant highlights the stamps from India which indicate that Mr Safi departed India on some date in September 2009, but his arrival date in India cannot be deciphered. Moreover, Mr Safi did not list India as a country that he visited.

[22] The applicant also notes that Mr Safi only declared four visits to the Ukraine on his Application and Residency Questionnaire for the relevant period, yet there are as many as 24 stamps on Mr Safi's passport apparently from Ukraine. These stamps are not sufficiently clear to determine the dates of arrival and departure in the Ukraine.

[23] The applicant also highlights that the name on Mr Safi's Afghan passport differs from the name on his Chinese Visa which indicates H Abduihashim. There is no indication on the record that any explanation for this discrepancy was provided to the Citizenship Judge.

[24] In addition, the applicant submits that the other discrepancies between Mr Safi's Application and Residency Questionnaire, particularly his response that he was a citizen of no other country and his response that he lived in the Ukraine, are of concern because there was little objective evidence of his ties to Canada. His registration at Yorkdale Adult Learning Centre and Hardington LINC, do not indicate whether he attended or completed the courses. In addition, he was unemployed throughout the period, yet he traveled abroad.

[25] The applicant argues that these circumstances are different from those in *Lee* where there were only passive indicia of residency in dispute. In this case, the passport information provides objective evidence of entering and exiting other countries and raises concerns that remain unresolved.

[26] The applicant argues that these circumstances are more analogous to those in *Rahman*. In *Rahman*, as in this case, the declared absences were consistent with the ICES report. However, the Court found that the Citizenship Judge erred in failing to consider a second passport which made it impossible to determine where the applicant had traveled in the relevant period.

[27] The applicant also relies on *Canada (Minister of Citizenship and Immigration) v Raphaël*, 2012 FC 1039, [2012] FCJ No 1121 [*Raphaël*] where the Court found that gaps in the evidence had not been analyzed, making it impossible to understand the reasoning. In this case, there are no gaps per se, but there is a lack of clarity in the evidence which the Citizenship Judge did not probe and did not resolve.

[28] The applicant further submits that the reasons of the Citizenship Judge are not adequate and do not permit the Court to determine the reasonableness of the decision. (*Canada (Minister of Citizenship and Immigration) v Jeizan*, 2010 FC 323, [2010] FCJ No 373, [*Jeizan*], *Newfoundland Nurses*).

[29] The applicant notes that adequate reasons are essential because the Minister is required to grant citizenship once the Citizenship Judge approves the Application. (*Canada (Minister of Citizenship and Immigration) v Mahmoud*, 2009 FC 57, [2009] FCJ No 91 [*Mahmoud*]). In

addition, subsection 14(2) of the Act imposes an obligation on a Citizenship Judge to provide the Minister with the reason for approving or not approving an Application. The reasons provided in this case do not meet that requirement.

[30] Although the ICES report and Residency Questionnaire are not inconsistent with respect to the dates of Mr Safi's arrivals to Canada, the simple matching of these dates is not enough to explain or justify the finding that he met the residency requirement. The applicant submits that the evidence on the record is unclear and that the Citizenship Judge should have explained how he resolved the lack of clarity and reached the conclusion that he did.

[31] The applicant argues that the marks and notations that the arrival dates in the ICES report match the dates noted on the Residency Questionnaire shows that the Citizenship Judge failed to grasp the concerns about the evidence that were raised on the record. The Citizenship Judge does not acknowledge the discrepancies, the fact that Mr Safi did not state he had traveled to India, the many stamps on his passport from Ukraine, the illegibility of other stamps or the Chinese Visa issued in another name.

[32] The applicant acknowledges that the record may be considered as part of and to support the reasons and that the Citizenship Judge made some marks and notations on the documents, including on the copies of pages of the passport showing the stamps, but argues that these marks and notations cannot be considered reasons. The notations suggest that the Citizenship Judge made some assumptions, which are not supported by sufficient evidence.

[33] The applicant also points out that the Citizenship Judge noted in the reasons box of the form, "no income but travels" but he did not indicate whether he had satisfied himself about this apparent concern.

The Respondent's position

[34] The respondent submits that the Citizenship Judge applied the physical presence in Canada test and was satisfied that Mr Safi was present in Canada the required number of days. As noted in *Canada (Citizenship and Immigration) v Hannoush*, 2012 FC 945, [2012] FCJ No 1040 [*Hannoush*], where it is clear that the applicant for citizenship has established 1095 days in the four year period, it is not necessary to consider other tests or for the judge to indicate exactly what test he was applying.

[35] The discrepancy between the Citizenship Application and the Residency Questionnaire indicating absences of 108 and 160 days is immaterial because Mr Safi clearly satisfied the physical presence test. Similarly, the applicant's arguments that there was little evidence of his ties to Canada in terms of employment and education are immaterial to the physical presence test.

[36] The respondent argues that the decision is reasonable and the reasons of the Citizenship Judge are completely adequate. The reasons read alongside the record show that the Judge scrutinized the passport stamps and verified and reconciled the declared absences with the ICES report.

[37] The respondent notes that a hearing was held. The reasons indicate that the Citizenship Judge intended to review the ICES report once provided and that he did so. The handwritten notations on the documents included in the record, particularly the passport documents and the ICES report, show that the discrepancies were considered and the Citizenship Judge found that the data was consistent and was satisfied that Mr Safi had spent more than 1095 days in Canada. The respondent suggest that the Citizenship Judge's deletion of the notation, "officer error in calculating the relative material period" followed by "it is correct" shows that the discrepancy was immaterial to affect Mr Safi's eligibility.

[38] The respondent submits that the Citizenship Judge was entitled to place significant weight on the ICES document as reliable evidence of Mr Safi's arrivals in Canada. The respondent argues that the present facts are analogous to those in *Lee* where the Court found that the ICES report was the main basis for the decision, that the weight attached to the report by the Judge was within the Judge's discretion and that reviewing courts are not to reweigh the evidence that was before the decision-maker (paras 38 and 48).

[39] The respondent argues that the applicant simply does not agree with the decision and now seeks a reweighing of the evidence, which is not the role of the Court on appeal.

The decision is not reasonable

[40] It is obvious that the Citizenship Judge was applying the physical presence test [*Hannoush*] and need not have specifically stated that this was the test applied. However, the Citizenship Judge's mathematical calculation based on a comparison of the ICES report and Mr Safi's Application for Citizenship and Residency Questionnaire is not sufficient to justify the

conclusion that Mr Safi had met the requirements. The ICES report only provides the dates of his arrivals into Canada and does not confirm the period of time that he may have been out of the country.

[41] The lack of evidence about Mr Safi's ties to Canada is not relevant because the Citizenship Judge applied a quantitative assessment of physical presence and not a qualitative assessment of residency.

[42] Some of the discrepancies in the evidence noted by the applicant are not important. For example, Mr Safi's response that he lived in the Ukraine from 1998 to 2006 is likely based on a simple misunderstanding of a confusing question and is not an inconsistency given that the dates precede his arrival in Canada. Similarly, Mr Safi's response that he is a citizen of no other country when he had previously indicated he was a citizen of Afghanistan is not an inconsistency given the use of the term "no other country".

[43] The evidence on the record which is problematic and requires more careful scrutiny is that relating to his travels outside Canada, when and where he traveled and for how long. Although the respondent argues that the Citizenship Judge "scoured" the entries and satisfied himself that the evidence supported the days of residence in Canada, I do not agree that the record supports the assertion that there was any such careful analysis.

[44] The Citizenship Judge's remarks and notations suggest that he did the calculation of days based on the ICES report. While the respondent asserts that the Judge placed significant weight on the ICES report and that the Court should not reweigh the evidence, it is not clear whether the

Citizenship Judge in fact did place more weight on the ICES report, unlike *Lee* where the Citizenship Judge stated that he did. In the present case, had the Citizenship Judge indicated that he weighed the ICES report more heavily than the other information on the record, the Court could possibly conclude that the Citizenship Judge considered the discrepancies – including the many illegible passport stamps, Mr Safi's failure to declare that he had traveled to India, and the Chinese Visa issued in another name – and was still satisfied that Mr Safi met the residency requirement. However, this is not what the reasons reveal. As noted below, the reasons are inadequate and reveal little to assist the Court.

[45] In the present case, even if it is surmised or assumed that the Citizenship Judge placed more weight on the ICES report, he did so while ignoring or misunderstanding other evidence on the record which should have alerted him to probe further.

[46] With respect to the adequacy of the reasons, although this is not a stand alone ground for judicial review, the remarks in the reasons box of the Notice to the Minister of the Decision cannot really be considered reasons at all.

[47] Although the Notice to the Minister of the Decision appears to contemplate short reasons, there should be a summary or at least a mention of the relevant considerations and an indication of what, if any, evidence has been given more weight, an explanation of why other evidence has been rejected or an explanation how that evidence has been understood. The Act requires that the Citizenship Judge provide reasons and not merely reminders to check documents and indications in the form of check marks that this has been done. As noted by

Justice Hughes in *Mahmoud* at para 6, reasons are essential because once approved, the Minister is required to grant citizenship:

> [6] Thus, unless there is an appeal, the approval or refusal by a citizenship judge, is a final matter as to the applicant's Canadian citizenship. The Minister has no further function to perform or other remedy other than an appeal. Therefore the provision of reasons by the citizenship judge assumes a special significance. The reasons should be sufficiently clear and detailed so as to demonstrate to the Minister that all relevant facts have been considered and weighed appropriately and that the correct legal tests have been applied.

[48] The Minister needs to be able to assess whether the decision should be appealed, as does the applicant where the Application is refused, and the Court needs to be able to determine whether any appeals should be granted.

[49] As noted in *Jeizan* by Justice de Montigny at para 17:

> [17] Reasons for decisions are adequate when they are clear, precise and intelligible and when they state why the decision was reached. Adequate reasons show a grasp of the issues raised by the evidence, allow the individual to understand why the decision was made and allow the reviewing court to assess the validity of the decision: see *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] S.C.J. No. 23 at para. 46; *Mehterian v. Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 545 (F.C.A.); *VIA Rail Canada Inc. v. National Transportation Agency*, [2001] 2 F.C. 25 (F.C.A.), [2001] 2 F.C. 25 (C.A.), at para. 22; *Arastu*, above, at paras. 35-36.

[50] In the present case, the Citizenship Judge's remarks are more in the nature of "notes to self" about the follow-up needed and do not reveal any reasoning.

[51] I have considered the guidance of *Newfoundland Nurses* and have looked to the record to supplement and support the outcome. The notations do not reveal whether the Citizenship Judge critically examined the discrepancies in the documents and the passport stamps or actually had the ability to determine the dates of the stamps, the country that issued them, or the language in which these were stamped. This type of reliance on the record to supplement the decision goes well beyond what was contemplated in *Newfoundland Nurses* and requires the Court to speculate about whether the Citizenship Judge was aware of and considered the problems with the evidence. The Court cannot rewrite the decision to provide reasons which simply are not there (*Pathmanathan*).

[52] The reasons in *Lee* which Justice Strickland noted were brief were far more revealing than the reasons in this case. In *Lee* it was clear that the Citizenship Judge relied primarily on the ICES report. At para 12, the Court sets out the reasons at issue:

> [12] […] The "reasons" section of that form is completed as follows:
>
> > After very careful consideration of all of the documentary evidence along with the verbal evidence presented at the hearing, I am satisfied that [the] applicant, on the balance of probabilities, meets the requirements of 5 (1)(c) [of the *Citizenship Act*]. I based my decision mostly on the strength of the ICES report that shows no entries into Canada during [the] review period.

[53] Justice Strickland referred to the guidance of *Newfoundland Nurses*, noting at para 49:

> [49] Although the Citizenship Judge's reasons could certainly have been more detailed, that alone is not a sufficient basis to allow the appeal. Rather, the question is whether his reasons allow this Court to understand why he made the Decision and permit a determination of whether his conclusion falls within the range of acceptable outcomes.

[54] Justice Strickland added at para 51, that "in this case the existence of justification of the decision-making process is relatively limited […]", but concluded that the decision was reasonable.

[55] In the present case, the reasons are far briefer than those in *Lee*, and the existence of justification for the decision-making process is far more limited; rather, it is impossible to determine whether the decision meets the *Dunsmuir* standard.

[56] The remarks set out in the space for reasons in this case leave me in a similar position as Justice Boivin (as he then was) in *Raphaël,* as I am not able to understand the Citizenship Judge's reasons or the relevant factors that led him to be satisfied that Mr Safi met the residency test. As Justice Boivin noted at para 28:

> [28] It is not up to this Court to reassess the evidence submitted by the respondent. That being the case, the Court can only note that several gaps in the evidence do not seem to have been considered or analyzed by the citizenship judge (*Canada (Citizenship and Immigration) v Abou-Zahra*, 2010 FC 1073, [2010] FCJ No 1326; *Canada (Citizenship and Immigration) v Al-Showaiter*, 2012 FC 12, [2012] FCJ No 7). Contrary to the respondent's argument, the Court is unable to understand the citizenship judge's reasoning on the mere reading of the reasons and notes and comprehend what were the relevant factors or documents that convinced him that the respondent met the residence tests (*Saad v Canada (Citizenship and Immigration)*, 2013 FC 570, [2013] FCJ No 590). In fact, the respondent is in effect asking this Court to surmise the citizenship judge's reasoning. The respondent did not convince this Court that the citizenship judge's decision falls within a range of possible, acceptable outcomes in respect of the facts and law.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The appeal is allowed and Mr Safi's Application for Citizenship should be re-determined.

2. No costs are ordered.

"Catherine M. Kane"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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