Federal Court  Cour fédérale

Date: 20150122

Docket: T-255-14

Citation: 2015 FC 88

Ottawa, Ontario, January 22, 2015

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

HAIFFA A A ALI ABDEL HUSSEIN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an appeal under subsection 14(5) of the *Citizenship Act*, RSC 1985, c C-29 (the Act) (Now section 22 as amended by the *Strengthening Canadian Citizenship Act*, SC 2014, c 22) and section 21 of the *Federal Courts Act*, RSC 1985, c F-7, of a decision of a Citizenship Judge dated November 20, 2013, rejecting the Applicant's application for Canadian citizenship.

[2] For the reasons that follow, the appeal is granted.

I. Background

[3] The Applicant (Ms Hussein) is a citizen of Jordan who came to Canada in August 2001 and became a permanent resident on December 21, 2007 following a positive determination of her claim for refugee protection under the *Immigration and Refugee Protection Act*, SC 2001, c 27. She applied for Canadian Citizenship on November 1, 2010 and reported having been physically present in Canada for the whole four year period immediately preceding the filing of the application (the Reference Period), except for a total of 154 days where she stated having been travelling outside Canada amounting to 1099 days of physical presence in Canada.

[4] In the course of the processing of her citizenship application, Ms Hussein was required to complete and provide a Residence Questionnaire in which she declared five additional day trips to the USA, three of which occurred during the Reference Period.

[5] A hearing before the Citizenship Judge was held on August 1, 2013 at which time Ms Hussein was asked to provide further supporting documentation covering the entire Reference Period. In response to that request Ms Hussein submitted her tax Returns for the years 2007 to 2010, her TD Visa account statement, her HSBC MasterCard account statement, her bank account statement, her mobile phone account, her home and car insurance, her Ontario Health Insurance Plan (OHIP) personal claim history along with her Jordanian passport and Canadian Travel Document including the visa transactions for her declared trips to the United Arab Emirates and the Integrated Customs Enforcement System report (ICES).

[6] In a decision issued November 20, 2013, the Citizenship Judge rejected Ms Hussein's citizenship application as he was not satisfied that Ms Hussein met the residence requirement under subsection 5(1)(c) of the Act based on a strict counting of days. The Citizenship Judge found that Ms Hussein had failed to declare a certain number of absences in both her initial application and the Residence Questionnaire. These absences consisted mainly of four entries to the USA on particular dates during the Reference Period but without any declared return dates. Additionally, the Citizenship Judge noted the existence of two visas, one for the USA and one for Turkey, for which no absences or trips had been declared by Ms Hussein. Furthermore, there was no passport documentation provided for the first nine months of the Reference Period.

[7] The Citizenship Judge, when analyzing the supporting documentation submitted by Ms Hussein, found that it lacked consistency and that it was therefore impossible for him to determine, on a balance of probabilities, how many days Ms Hussein had been physically present in Canada.

II. Issue and Standard of Review

[8] The sole issue to be resolved in this case is whether the impugned decision warrants intervention by this Court.

[9] Ms Hussein claims that the Citizenship Judge did not appropriately apply the residency test by failing to consider the evidence before him and did not provide adequate and sufficient reasons in support of his decision.

[10] Both parties agree that the standard of review for citizenship appeals is reasonableness. Indeed, "[i]t is generally accepted in the case law that a citizenship judge's application of evidence to a specific test for residency under paragraph 5(1)(c) of the Act raises questions of mixed fact and law and is thus reviewable on a standard of reasonableness" (*Saad v Canada (Minister of Citizenship and Immigration)*, 2013 FC 570, 433 FTR 174, at para 18, and see also *Canada (Minister of Citizenship and Immigration) v Rahman*, 2013 FC 1274 at para 13; *Balta v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1509, 403 FTR 134 at para 5; *Canada (Minister of Citizenship and Immigration) v Baron*, 2011 FC 480, 388 FTR 261 at para 9; *Canada (Minister of Citizenship and Immigration) v Diallo*, 2012 FC 1537, 424 FTR 156 at para 13; *Huang v Canada (Minister of Citizenship and Immigration)* 2013 FC 576 at paras 24 to 26).

III. Analysis

[11] Subsection 5(1)(c) of the Act provides for the residency requirement which citizenship applicants need to meet in order to be successful. It reads as follows:

5. (1) The Minister shall grant citizenship to any person who	5. (1) Le ministre attribue la citoyenneté à toute personne qui, à la fois :
(a) makes application for citizenship;	a) en fait la demande;
(b) is eighteen years of age or over;	b) est âgée d'au moins dix-huit ans;

(c) is a permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act, and has, within the four years immediately preceding the date of his or her application, accumulated at least three years of residence in Canada calculated in the following manner:	c) est un résident permanent au sens du paragraphe 2(1) de la Loi sur l'immigration et la protection des réfugiés et a, dans les quatre ans qui ont précédé la date de sa demande, résidé au Canada pendant au moins trois ans en tout, la durée de sa résidence étant calculée de la manière suivante :
(i) for every day during which the person was resident in Canada before his lawful admission to Canada for permanent residence the person shall be deemed to have accumulated one-half of a day of residence, and	(i) un demi-jour pour chaque jour de résidence au Canada avant son admission à titre de résident permanent,
(ii) for every day during which the person was resident in Canada after his lawful admission to Canada for permanent residence the person shall be deemed to have accumulated one day of residence;	(ii) un jour pour chaque jour de résidence au Canada après son admission à titre de résident permanent;
[…]	[…]

[12] According to this Court's jurisprudence, three different tests are available to Citizenship Judges in assessing the residency requirement in any given case (*Sinanan v Canada (Minister of Citizenship and Immigration)* 2011 FC 1347 at paras 6 to 8; *Huang v Canada (Minister of Citizenship and Immigration)*, 2013 FC 576, at paras 17 and 18).

[13] One of these three tests involves the strict counting of days of physical presence in Canada which must total at least 1095 days in the four years preceding the application. It is often referred to as the quantitative test or the *Pourghasemi* test (*Pourghasemi (Re) (FCTD)* [1993] 62 FTR 122, [1993] FCJ No 232 (QL)).

[14] As indicated above, this is the test the Citizenship judge chose to apply in the present case. The Citizenship Judge found two problems with Ms Hussein's citizenship application that made it, "impossible for (him) to determine, on balance of probabilities, how many days the Applicant was physically present in Canada": (1) there was a certain number of undeclared absences from Canada during the Reference Period; and (2) there was a lack of consistency in the documentation submitted by Ms Hussein to support her claim of physical presence in Canada, including the absence of passport documentation for the first nine months of the Reference Period.

[15] I find that the Citizenship Judge's decision is problematic in a number of respects.

[16] First, the Citizenship Judge did not engage in any counting of days as required with the *Pourghasemi* test. When reviewing the decision, it is clear that the Citizenship Judge accepted, as a starting point, the number of 1099 days of physical presence in Canada. However, there is no further mention of the number of days that would ensue from the filing of Ms Hussein's Residence Questionnaire and the further days of absence. There is also no mention of the number of days Ms Hussein would have been in Canada in total while this is at the crux of the

test chosen and used by the Citizenship Judge. As this Court stated in *Jeizan v Canada (Minister of Citizenship and Immigration)*, 2010 FC 323, 386 FTR 1, at para 18:

> At the very least, the reasons for a Citizenship Judge's decision should indicate which residency test was used and why that test was or was not met: see *Canada (Minister of Citizenship and Immigration) v Behbahani*, 2007 FC 795, at paras 3-4; *Eltom v Canada (Minister of Citizenship and Immigration*), 2005 FC 1555, at para 32; *Gao v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 605, [2003] F.C.J. No. 790 at para 22; *Gao v Canada (Minister of Citizenship and Immigration)*, 2008 FC 736, at para. 13. (Emphasis added)

[17] In particular, the Citizenship Judge did not explain how the so-called inconsistencies in the evidence submitted by Ms Hussein made it "impossible" for him to proceed with that calculation.

[18] The Respondent argues that the Citizenship Judge simply could not proceed with the counting of days due to the pattern of the absences of unknown duration. I disagree. If anything, it is unclear in the decision if that was the case. Eligible residency days and the number of days during which Ms Hussein was absent from Canada are determinative in the outcome of Ms Hussein's Citizenship application. Indeed, when the only way to understand the Citizenship Judge's reasons regarding those respective numbers is to conduct a *de novo* examination of the record, the decision is not likely to meet the requirements for transparency, justification and intelligibility set out in *Dunsmuir*, above (*Korolove v Canada (Minister of Citizenship and Immigration)*, 2013 FC 370, 430 FTR 283, at para 47).

[19] This leads to the second concern I have with the Citizenship Judge's decision and which is related to Ms Hussein's undeclared absences from Canada. The evidence on record shows that

the Citizenship Judge asked Ms Hussein questions in order to understand the visas for the United Kingdom and for Turkey as well as the trips to the USA and that Ms Hussein provides reasonable explanations regarding these issues. According to her affidavit, she explained to the Citizenship Judge that her trips to the USA were day-trips for vacation or doctor's appointments. As for the three month Turkish visa, Ms Hussein explained that it was never used as she was planning to use it to visit her husband but that they decided instead to meet in the United Kingdom, hence the existence of a United Kingdom visa. The non-use of the Turkish visa was confirmed by her passport evidence and her Canadian Travel Document which reveals no immigration stamps, either entry or exit, to Turkey. At no point in his decision does the Citizenship Judge refer to that evidence or make a finding that these undeclared absences reduced the number of days of physical presence in Canada below the required threshold of 1095 days.

[20] Another concern with the Citizenship Judge's decision is his treatment of the extensive supporting documentary evidence submitted by Ms Hussein which he found to be lacking in consistency. In fact, there is, again, no explanation as to how and why the Citizenship Judge was dissatisfied with that evidence. No analysis of the documentation is provided and no attempt to reconcile the so-called inconsistencies is made, whereas the said documentation covers the entire Reference Period.

[21] The Citizenship Judge's finding as to the lack of consistency of the supporting documentation submitted by Ms Hussein is nothing more than a bald statement. As this was

central to the Citizenship Judge's decision, I am at a loss as to why he came to such conclusion given the record that was before him.

[22] As for the absence of passport documentation for the first nine months of the Reference Period, Ms Hussein explained that this was due to her status as a refugee claimant. Indeed, her refugee status was conferred to her by way of a positive decision on April 4, 2007 and she applied for a Jordanian passport on July 8, 2007. She could not, however, return to Jordan to get the passport. In addition, she provided her credit card account, showing purchases in Canada during that period. Again, no reference to this evidence is found in the Citizenship Judge's decision.

[23] As a result, I find the Citizenship Judge's decision to be unreasonable as it was based on an erroneous finding of fact that was made without regard for the material that was before him.

[24] I also find that this decision is reviewable on the ground that the reasons are not adequate. The principles governing the adequacy of reasons reviewed under the standard of reasonableness require this Court to inquire into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. According to those principles, 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 parties to understand why the decision was made and allow the reviewing court to assess the validity of the decision (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190; *Newfoundland and Labrador Nurses' Union v Newfoundland and*

Labrador (Treasury Board), 2011 SCC 62, [2011] 3 SCR 708, at para 16; *Jeizan*, above, at para 17 and see also *Lake v Canada (Minister of Justice),* 2008 SCC 23, [2008] 1 SCR 761 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 FC 25 (F.C.A.), at para. 22; *Canada (Minister of Citizenship and Immigration) v Arastu*, 2008 FC 1222, at paras. 35-36).

[25] Here, the Citizenship Judge failed to provide adequate reasons explaining why and how the supporting documentation submitted by Ms Hussein was insufficient to determine her residency days; and why and how her undeclared absences impacted on the 1095 day threshold of physical presence. I find that the reasoning path of the Citizenship Judge was inadequate and unintelligible in a way that led to a result outside the range of possible and acceptable outcomes defensible in respect of the facts and law.

[26] I agree therefore with Ms Hussein that there are substantive problems with the reasons of the impugned decision rendering it unintelligible and therefore preventing this Court from understanding why the Citizenship Judge rejected her application for citizenship.

[27] Ms Hussein's appeal is therefore granted. Given the amendments to the Act which came into force on August 1, 2014 and which modified the manner in which applications for citizenship are to be determined by placing the adjudication of such applications within the ambit of the Respondent, the matter will be sent back for a re-determination to the "decision-maker",

rather than to a citizenship judge, as it is to be re-determined, pursuant to section 35 of the Act, in accordance with the Act, as it now reads.

JUDGMENT

THIS COURT'S JUDGMENT is that the appeal is granted and the matter is sent back to the decision-maker for re-determination.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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