Federal Court  Cour fédérale

Date: 20150430

Docket: T-1357-14

Citation: 2015 FC 561

Ottawa, Ontario, April 30, 2015

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

GERALD IKERIONWU UKAOBASI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Gerald Ikerionwu Ukaobasi (the Applicant) has brought an appeal under s 14(5) of the *Citizenship Act*, RSC 1985, c C-29 (the Act) of a decision of a Citizenship Judge to deny his application for Canadian citizenship on the ground that he did not meet the requirements of s 5(1)(c) of the Act. The Citizenship Judge concluded that the Applicant had failed to demonstrate that he was resident in Canada for at least three of the four years preceding his application.

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

II. Background

[3] The Applicant is a citizen of Nigeria. He came to Canada in 2004 and was found to be a Convention refugee in 2005. He became a permanent resident on June 22, 2006.

[4] On March 9, 2009 the Applicant applied for Canadian citizenship. In his application, he declared 39 days of absence from Canada between March 9, 2005 and March 9, 2009, the four years preceding his application (the relevant period).

[5] The Applicant attended a hearing before the Citizenship Judge on March 18, 2014, during which he was asked questions about his residency in Canada during the relevant period. The Citizenship Judge requested that he provide supporting documentation to establish his residency between June 2006 and September 2007, and imposed a deadline of April 1, 2014.

[6] On March 25, 2014 the Applicant sent a letter to the Citizenship Judge enclosing bank statements and a church donation tax receipt. He also advised the Citizenship Judge that he had requested records pertaining to his credit card, but they had not yet arrived. He said that he would forward them upon receipt.

[7] The Citizenship Judge rendered a decision on the Applicant's citizenship application on April 8, 2014. She denied the application on the ground that the Applicant did not meet the residency requirements of s 5(1)(c) of the Act. The Citizenship Judge noted that she was

applying the strict test established by Mr. Justice Muldoon in *Re Pourghasemi*, [1993] FCJ No 232, 62 FTR 122.

[8] The Citizenship Judge accepted that the additional documentation provided by the Applicant established his presence in Canada from October 6, 2006 to September 2007. However, she found that he had not provided any documentation to demonstrate "living activity" in Canada for the 106 day period between June 22, 2006 and October 6, 2006.

[9] The Citizenship Judge also expressed doubts about the credibility of the Applicant's claims of physical presence in Canada during the relevant period, and noted several inconsistencies in his testimony. For example, the Applicant had returned to Nigeria on two occasions despite having been granted refugee status in Canada based on his fear of persecution in that country. The Applicant claimed to fear persecution due to his status as a gay man, yet on one of his return visits to Nigeria he had married a woman. He stated at the hearing that a representative had assisted him in filling out his application, but he then rescinded this statement in his letter of March 25, 2014 and said that he had completed the forms himself.

[10] Based on her concerns regarding the Applicant's credibility, the Citizenship Judge found that, in the absence of further documentation, the Applicant could establish no more than 1,080 days of physical presence in Canada during the relevant period. The Applicant had declared an absence of 39 days, and there were a further 106 days for which there was no evidence of living activity in Canada. The Citizenship Judge therefore found that the Applicant was 15 days short of the legal requirement stipulated by s 5(1)(c) of the Act.

III. Issues

[11] The Applicant raises the following issues:

A. Was the Applicant denied procedural fairness?

B. Did the Citizenship Judge err by blending the different tests for residency?

C. Was the Citizenship Judge's decision reasonable?

IV. Standard of Review

[12] Questions of procedural fairness are reviewable by this Court against a standard of correctness (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Mission Institution v Khela*, 2014 SCC 24 at para 79). However, the content of the duty of procedural fairness is flexible and may differ depending on the context (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 21-28; *Khela* at para 89).

[13] While a Citizenship Judge is free to choose which residency test to adopt, a blending of tests is an error of law and is reviewable against a standard of correctness (*Arif v Canada (Minister of Citizenship and Immigration)*, 2009 FC 824 at para 16; *Hsu v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 579 at para 7).

[14] A Citizenship Judge's determination of whether the residency requirement has been met is a question of mixed fact and law, and is reviewable against a standard of reasonableness

(*Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 47-48, 51; *Kohestani v Canada (Minister of Citizenship and Immigration)*, 2012 FC 373 at para 12; *Idahosa v Canada (Minister of Citizenship and Immigration)*, 2013 FC 739 at para 9; *Arif* at para 15).

V. Analysis

A. *Was the Applicant denied procedural fairness?*

[15] The Applicant argues that the Citizenship Judge breached her duty of procedural fairness by failing to give him sufficient time to provide documentary evidence to establish his physical presence in Canada. He says that two weeks were insufficient, given that the documents extended over a period of seven years and were in the power and control of third parties.

[16] The Respondent says that the Citizenship Judge was under no obligation to grant an extension of time and the Applicant was given a reasonable opportunity to provide further documentation to establish his physical presence in Canada (*Hawa v Canada (Minister of Citizenship and Immigration)*, 2010 FC 271 at para 6). Even if a further extension of time had been granted, this would not have assisted the Applicant because the credit card statements that he provided in his affidavit did not address the period at issue.

[17] I agree with the Respondent. The credit card statements attached to the Applicant's affidavit do not list any transactions during the period between June 22 and October 6, 2006. Accordingly, even if the Citizenship Judge had granted the Applicant additional time to produce

the supporting documentation, this would not have affected the ultimate decision (*Sarker v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1168 at paras 16-18).

[18] Accordingly, the appeal cannot be allowed on the ground of procedural fairness.

B. *Did the Citizenship Judge err by blending the different tests for residency?*

[19] The Applicant argues that the Citizenship Judge erred in law by blending the different tests for residency, specifically the strict quantitative test that requires an applicant to be physically present for 1,095 days and the more flexible qualitative test that considers the extent of an applicant's connection to Canada.

[20] I disagree. The Citizenship Judge clearly stated that she was applying the *Pourghasemi* test. There is nothing in the decision to suggest that she blended the strict requirement of 1,095 days of physical residency with the more flexible tests found in *Re: Koo*, [1993] 1 FC 286 (TD) and *Re Papadogiorgakis*, [1978] 2 FC 208 (TD). The reasons were entirely focused on whether the Applicant had established 1,095 days of physical presence in Canada, not the degree to which he had centralized his mode of living in Canada or whether he regularly, normally or customarily lives here.

C. *Was the Citizenship Judge's decision reasonable?*

[21] The Applicant argues that the Citizenship Judge erred in determining that he did not meet the residency requirements of the Act, as it is not clear from her brief reasons why she found the

documentary evidence to be insufficient – particularly if she was applying the more flexible test of residency. However, the Citizenship Judge explicitly stated that she was applying the *Pourghasemi* test, which requires 1,095 days of physical presence. The Citizenship Judge's decision clearly explains why the evidence presented by the Applicant was insufficient to meet this test.

[22] The Citizenship Judge's decision was therefore reasonable. The onus was on the Applicant to establish sufficient credible evidence of his residency (*Abbas v Canada (Minister of Citizenship and Immigration)*, 2011 FC 145 at para 8). As the Applicant did not provide documentation to establish his physical presence in Canada from June 22 to October 6, 2006, the Citizenship Judge reasonably found that the Applicant could demonstrate no more than 1,080 days of physical presence in Canada during the relevant period.

[23] While the Applicant claimed in his application that he was in fact present in Canada during the period at issue, a negative credibility finding may extend to all relevant evidence (*Kohestani* at para 24). Given the Citizenship Judge's well-founded concerns regarding the Applicant's credibility, her conclusion that the Applicant had failed to meet the requirements of s 5(1)(c) of the Act was reasonable.

[24] The Applicant's appeal is therefore dismissed.

VI. Costs

[25] The Respondent seeks costs on a solicitor-client basis. Costs are rarely awarded in citizenship appeals (*Chen v Canada (Citizenship and Immigration)*, 2008 FC 763 at para 23; *McIlroy v Canada (Minister of Citizenship and Immigration)*, 2010 FC 685 at para 34).

[26] Solicitor-client costs are awarded only in exceptional circumstances, for example when a party has displayed reprehensible, scandalous or outrageous conduct, or when the public interest justifies such an award (*Mackin v New Brunswick*, [2002] 1 SCR 405 at para 86). It is not appropriate to seek solicitor-client costs merely because the opposing party's case is weak or unfounded (*Luis Vuitton Malletier SA v Yang*, 2008 FC 45 at para 25). There are no exceptional circumstances here that would justify an award of costs on a solicitor-client basis.

[27] A review of the Applicant's financial documentation submitted in support of his citizenship application indicates that he is a man of modest means. I decline to make an award of costs in this case.

JUDGMENT

THIS COURT'S JUDGMENT is that the appeal is dismissed. No costs are awarded.

"Simon Fothergill"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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