Federal Court Cour fédérale

Date: 20160530

Docket: T-1560-15

Citation: 2016 FC 594

Ottawa, Ontario, May 30, 2016

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

REDA SHAFEAK GHAZY BEDEIR AND AMAL AL-LEITHY

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicants in this case are husband and wife. They sought together to become Canadian citizens. By decisions dated June 5 and June 24, 2015 a Citizenship Judge (the Judge) dismissed their application. They now seek judicial review of the Judge's decisions pursuant to section 22.1 of the *Citizenship Act*, RSC, 1985, c C-29.

I. Facts

[2] The basic facts of this case are simple. On September 28, 2009, the applicants applied for citizenship. They are citizens of Egypt and they entered Canada on August 12, 1998 as permanent residents. As of the date of their application for citizenship, the law required that both applicants be present in Canada for a total of 3 years in the preceding 4 years.

[3] The only issue before the Judge was whether the applicants had each been present in this country for 1095 days out of the preceding 1460 days, the period running from September 28, 2005 to September 28, 2009.

[4] Although the counting of days during which someone is present in Canada ought to be a simple exercise, such was not the case apparently in this case.

[5] As for Mr. Bedeir, he declared having been absent from this country for 335 days out of 1460 days. His wife, Mrs. Al-Leithy, declared an absence of 364 days. She stated that she was out of the country for 364 days, from September 28, 2005 to September 27, 2006 and that she never set foot outside of Canada for the following 3 years. Both applicants submitted various documentation in support of their contention that they had been present in Canada for the required period of time.

II. Procedural Issue

[6] The situation became murky when counsel for the Minister submitted a "further memorandum of argument" on April 14, 2016. Given that a judicial review application under the *Citizenship Act* requires the granting of leave in order to launch a judicial review, the applicants had their application completed by November 2015. The Minister responded to the leave application on January 11, 2016, with the applicants filing their reply memorandum of fact and law a few days later, on January 20, 2016. Leave was granted on February 10.

[7] Unbeknownst to counsel for the Minister was the fact that counsel for the applicants had included in the applicants' record material that was not in the tribunal certified record in spite of the fact that it runs for close to 1000 pages. According to the Order of this Court granting the leave application, the tribunal's record was due on March 2, 2016, obviously after the record on which leave was granted had been fully considered by a judge of this Court. In other words, this Court considered the leave application, according to the Crown, on the basis of a record that may have included materials not before the Judge.

[8] That gave the impetus to counsel for the Minister to seek to have a large number of pages from the applicants' record struck as not being part of the tribunal record on the basis of which the decision ought to have been made by the Judge. A judicial review application being for the purpose of controlling the legality of the decision made by an administrative tribunal, only the record on which a decision was made can be before the reviewing court (*Teti v Canada (Attorney General)*, 2016 FCA 82). Only in exceptional circumstances, one of which is when limited

evidence going beyond the record before the decision-maker is needed to resolve issues of procedural fairness or jurisdiction, will there be admission of new evidence not before the tribunal (for a discussion of the exceptions, see *Bernard v Canada (Revenue Agency)*, 2015 FCA 263).

[9] According to counsel for the Minister, a large number of pages in the applicants' record ran afoul of the well-known rule. Close to 130 pages out of 180 pages of exhibits to affidavits filed by the applicants should have been ruled inadmissible according to the Minister.

[10] On the morning of the hearing before this Court, close to one month after the April 14 further memorandum of fact and law of counsel for the Minister, counsel for the applicants, without any notice, sought to table drop his own memorandum of arguments, together with more affidavits by the applicants.

[11] These affidavits seek to do two things. First, they contend that all of the pages in the applicants' record, except a relatively small number, that are listed by counsel for the Minister in her April memorandum of fact and law were provided after the hearing to the Judge, at her invitation during the January 16, 2015 hearing before her. Accordingly, if I understand the argument, they are part of the record in front of the Judge and they are admissible. Only 12 pages out of the 130 pages that the Crown claims are disqualified would in fact be inadmissible, as conceded by the applicants.

[12] Second, the applicants wanted to introduce into evidence at this stage what appear to be handwritten notes. The affidavits disclose that the said pages would have resulted from an access to information request. That is all. No indication is given as to what these pages are about, who their author may be or what is the purpose in producing these pages. Accordingly, the Court ruled that these handwritten notes are not admissible.

[13] The presentation of affidavits, together with what counsel for the applicants called "applicant's [sic] further memorandum of argument," was inappropriate without following the rules. Rules do not exist for the sake of having rules: they allow for an orderly disposition of issues. They also help ensure that there is fairness for all those involved in the judicial process, as they allow for the proper testing of the evidence.

[14] Here, the fact that rules were not followed created at least two issues. One is that we do not know whether or not the record, as supplemented by the applicants with the addition of material at the invitation of the Judge, was in fact actually provided and was before the Judge. The other is that there is simply no opportunity to test the evidence when someone seeks to introduce new evidence during a judicial review application. Not only rules allow the proper hearing of cases, but they avoid the inconvenience of adjournments. The applicants in this case came from the Middle East for the hearing. An adjournment of proceedings that started in 2009 is to be avoided. This is made even more problematic when it takes an inordinate amount of time to sort out what should have been done in an orderly manner, but was not. One counsel was taken by surprise while the other appeared incapable to explain adequately the context of the record he was presenting.

[15] Having considered the materials claimed by the Crown to be inadmissible, the Court chose to proceed on the merits of the judicial review on the basis of the applicants' record only, without the 12 pages that were never forwarded to the Judge. Therefore the affidavits table dropped on May 16 were not admitted into evidence. The concession made by the applicants that 12 pages in their applicants' record were in fact not transmitted to the Judge was recorded and the applicants' record was to be expunged accordingly. In my view, it would be for counsel to argue about the probative value of the information conveyed by the pages that may have been part of the record (around 120 pages). On a cursory examination of that material, it was less than clear that they carried any more weight than what was before the Judge at the hearing. They appeared to constitute surplusage. However, it would be for the parties to argue how significant these may be. As we shall see, they had no impact on the decision taken by this Court.

III. Analysis

[16] The applicants bring to the Court arguments on their judicial review application. It must be that only two arguments can be considered by this Court in view of the fact that these judicial review applications are authorized by a judge of this Court on the basis of the argument put forward in the initial memorandum of fact and law. The jurisdiction of the Court is derived from the leave application which was granted (*Mahabir v Canada (Minister of Employment and Immigration)* (1991), [1992] 1 FC 133 (CA)). Indeed, rule 70 of the *Federal Courts Rules* requires that the memorandum of fact and law contain a statement of the points in issue and a concise statement of submissions. As found again recently by the Federal Court of Appeal in *Bridgen v Correctional Service of Canada*, 2014 FCA 237, 465 NR 73, only what is in a party's

memorandum can be advanced in oral argument. That is especially so in matters where leave is granted.

Procedural Fairness

[17] One of these two arguments relates to an alleged violation of procedural fairness. The argument boils down to 3 paragraphs in the memorandum of fact and law for one proposition. Finding support in *Stine v Canada (Minister of Citizenship and Immigration)*, [1999] 173 FTR 298, the applicants contend that the Judge had to provide them an opportunity to answer and address concerns. This is certainly not a new proposition as has been part of our law for a very long time that one has the right to be heard and participate. However, as stated in Judicial Review of Administrative Action in Canada of Brown and Evans (Carswell, loose leaves) "…the precise procedural content of any "hearing" will depend upon the particular statutory and administrative contexts in which it arises." (#10.0200).

[18] For a reason that is not explained, the applicants claim that they were not given enough of an opportunity to provide their explanation. The memorandum of fact and law does not offer any argument or articulation of the facts that could support such broad proposition. The affidavits of the applicants do not offer any more information, stating only that "my wife and myself were not given the opportunity at hearing to explain and provide all the evidence that we felt should have been considered in connection with the proof of our physical presence in Canada" (par. 5 affidavit of Reda Bedeir). Actually, if it is true that the Judge invited the applicants to forward documentation after the hearing of January 2015, which evidently the applicants did not have

with them at the hearing itself, they would have been heard at the hearing and would have supplemented the record after their appearance before the Judge.

[19] At any rate, the lack of precision and the complete lack of evidence doom the argument. This record does not support the contention that procedural fairness was violated. The standard of review of correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79, [2014] 1 SCR 502) does not assist the applicants where the facts are non-existent. The onus is on the applicants to present a case. It was their burden to satisfy this Court with the evidence that supports the argument of violation of a principle of procedural fairness. That evidence was clearly lacking to the point of being non-existent and the argument was generic. There is a need to argue how the hearing could have been deficient. That was not done.

Reasonableness

[20] The second argument is of course that the decision reached by the Judge was not reasonable. That standard of review is one that is deferential towards the decision-maker. It does not suffice that the reviewing Judge would have taken a different view of the matter. The now famous paragraph 47 of *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 provides guidance:

> 47 Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the

> process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[21] This Court must therefore search for "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and the outcomes." I am looking for the justification, the transparency and the intelligibility. The standard of reasonableness is concerned with the process by which a decision is reached, but also with the substance of the decision. In this case, the Court has found the decision to be wanting. In fact, I do not know how the decisions were reached after reading the reasons many times.

[22] I am of course conscious of the binding pronouncement of the Supreme Court of Canada in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SC C 62, [2011] 3 SCR 708 [*Newfoundland and Labrador Nurses' Union*]. *Dunsmuir* does not stand for the proposition that the adequacy of reasons is enough to quash a decision. However, there must be enough to determine if the decision is reasonable. The test appears to be the following:

> 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.
>
> (para 16)

[23] In my estimation, the two decisions under review fail that test. Fundamentally, the Judge goes rather quickly about some of the facts advanced by the applicants to support their

application for citizenship on the basis of their physical presence in Canada for the appropriate number of days. The reader does not know whether she accepted those facts, discounted them or rejected them. They are merely listed. If there are gaps in the evidence that support presence in Canada, the applicants are not told. For instance, in the decision about Mrs. Al-Leithy, the Judge notes that she has disclosed one absence for a total of 364 days, from September 28, 2005 to September 27, 2006. But the Judge then, pointedly, states that there are no exit or entry stamps in her translated passport to support her residence calculation in her “Application”. The Judge goes on to state that the ICES Traveller History shows “No data available” with respect to Mrs. Al-Leithy. Shouldn’t that favour the applicant in her contention that she did not leave the country? No analysis or comment is offered at this stage.

[24] The Judge did not even say a word about the Residence Questionnaire filed in the case of Mrs. Al-Leithy which records two entries in the box about absences from Canada that would have put the applicant in Saudi Arabia and Egypt in November and December 2008 (CTR p. 50), thus putting her above the maximum number of days of absence from Canada. These entries seemed to have been crossed out. One would have expected comments with respect to those entries if they played a role in the decision made.

[25] The decision in the case of Mr. Bedeir is even more devoid of details.

[26] The two decisions then proceed to the Analysis portion which, in fact, is found in one paragraph. Having concluded that the burden is on the applicants who must establish the number of days of presence in Canada, on the standard of balance of probabilities using clear and

compelling evidence (*Fadwi Atwani v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1354) – which no one contests – the Judge confirms that the test used in the circumstances of this case is that in *re Pourghasemi*, (1993) 19 Imm. L.R. (2d) 259, 62 FTR 122. Again, no one disputes that the Judge could rely on that test which conforms to the text of the Act in requiring presence in Canada for 1095 days over a period of 4 years (other tests have been used: *re Koo*, [1993] 1 CF 286 (CF 1re inst); *re Papadogiorgakis*, [1978] 2 FC 208); the view taken by the jurisprudence of this Court has been that it is the prerogative of the Citizenship Judge to use one of the three).

[27] The Judge then appears to find that the lack of stamps in the passports would be positive proof that the applicants would, or could, have been outside of the country without having disclosed their departure. That is the conclusion one reaches since the Judge refers to the lack of stamps to justify her decision to deny citizenship. One is hard pressed to understand how a lack of stamps showing exits and entries could be held against Mrs. Al-Leithy where her argument is that she did not leave or enter Canada during the 3 year-period following her return to Canada on September 27, 2006. On the contrary, the lack of stamps on the passport would tend to be confirmatory that the applicants did not travel outside of Canada. At least, they could not be the source of an inference that the applicants have been out of the country. Without more, the Judge proceeds to conclude that "the Applicant did not establish credible or clear and compelling evidence to determine how many days she (he) was actually present in Canada during the relevant period." There is nothing else. If the evidence of presence in Canada submitted by the applicants is insufficient, we do not know why. That is not reasonable.

[28] There is in my view no justification or transparency or intelligibility. The reasoning leading to an outcome that is within a range of possible acceptable outcomes is missing. There is no way, other than by substituting the Court's view of the evidence, to know whether the decision is one of the acceptable, possible outcomes. The Judge did not say anything about how she reached her decision other than declaring boldly that the evidence is not clear or compelling. The problem is compounded because the Judge seems to consider that the lack of stamps in passports showing entries and exits for the time period under consideration would tend to show that there were entries and exits. Evidently, one should not expect stamps where the contention is that there were no exits and entries. If a different inference is to be drawn, it must be spelled out to make this intelligible. Thus, not only do we have decisions that do not meet the test in *Newfoundland and Labrador Nurses' Union* because the reasons do not permit the reviewing court to understand the decision, but the only argument put forth lacks reasonableness. This cannot be an adequate justification. The decision is closer to arbitrariness than reasonableness because of the lack of justification.

[29] I should not be taken to suggest that these two applicants are entitled to citizenship on account of their success on the judicial review of the decisions rendered by the Citizenship Judge. Judicial review does not address the merits of a case. The applicants have attempted before this Court to show a picture through a mosaic, bits and pieces of information from which a picture should emerge. It will be for another Citizenship Judge to examine the evidence and decide if the mosaic is telling the story or if there are holes, perhaps gaping holes. This judicial review application, although successful, did not reach any conclusion about the presence, or lack thereof, of the applicants in Canada during the period required by the *Citizenship Act*.

[30] Given (1) the fact that the applicants' record was wrongly constituted of documents that fell in many different categories, without the applicants giving any indication of the various types of documents, some of which are clearly inadmissible, (2) the fact that the Rules of this Court were largely dispensed with by the applicants, thus creating confusion that required half of one day to sort it out and (3) the fact that the new evidence presented after the citizenship hearing, but before a decision was issued, came to light the morning of the hearing in this Court without any notice given to anyone, it is to be expected that the respondent would consider that the outcome of this case constitutes an undeserved windfall.

[31] However, it seems to me that the rule of law commands that a decision that is not reasonable has to be quashed so that the matter can be re-examined. As Lord Bingham wrote in his The Rule of Law (Allen Lane; 1st Ed. (4 Feb. 2010)):

> Dicey was adamantly opposed to the conferment of discretionary decision-making powers on officials. This, he believed, opened the door to arbitrariness, which is the antithesis of the rule of law. (p.48)

The point is not that there should not be discretion. It is rather that the exercise of discretion must be reasonable so that it cannot be seen as being arbitrary.

> What matters is that decisions should be based on stated criteria and that they should be amenable to legal challenge, although a challenge is unlikely to success if the decision was one legally and reasonably open to the decision-maker. (p. 50)

[32] There is also a practical angle. The ordinary man in the eyes of the law should be able to challenge a decision: for that to be possible there must be an understanding of the reasons for the decision in order to challenge its reasonableness. It is not that the decision must be perfect, with

an examination of every little argument and a fulsome review of all the jurisprudence. But there must be enough to understand why those decisions were made.

[33] The lack of reasons allowing for an understanding of why these decisions were made may have been a contributing factor in the confusion that surrounded this case.

[34] From the time the application was made in September 2009 to the time the case was heard, close to 5 and a half years had gone by (January 2015). Six more months were necessary to issue decisions that are merely a recital of some of the evidence presented. The applicants swear that the Citizenship Judge allowed them to supplement the record following the hearing, yet they argue that there is no trace that the evidence was received and considered. Ultimately, they challenged the decisions without the benefit of reasons allowing for an understanding of why the decisions were made. It is not overly surprising that the attempt at challenging was rather scattered. It is not so much that the goalposts were moving as it was difficult to see where they were in the fog of litigation. In the circumstances of this case, the safer course of action is to return the matter for a new determination.

[35] As a result, the judicial review application is granted and the matter must be the subject of a new determination by a different Citizenship Judge. There is no question to be certified. Neither party sought costs and none are awarded.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted. No question is certified. No costs are awarded.

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Louay Alghoul	FOR THE APPLICANTS
Aliyah Rahaman	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Louay Alghoul Alghoul & Associates Law Firm Winnipeg, Manitoba	FOR THE APPLICANTS
William F. Pentney Deputy Attorney General of Canada Winnipeg, Manitoba	FOR THE RESPONDENT