Federal Court Cour fédérale

Date: 20160620

Docket: T-1462-15

Citation: 2016 FC 688

Ottawa, Ontario, June 20, 2016

PRESENT: The Honourable Mr. Justice Gascon

BETWEEN:

LALLY, JOGINDER SINGH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Mr. Joginder Singh Lally, is a citizen of India and used to be a long-haul truck driver. He came to Canada in July 2001 and became a permanent resident in July 2006. He applied for Canadian citizenship on September 12, 2008.

[2] After reviewing Mr. Lally's application, his residence questionnaire and other documents, the citizenship officer identified some concerns with Mr. Lally's file due to the lack of evidence supporting his physical presence in Canada during the relevant period of reference and to his multiple absences from the country. The matter was thus referred to a citizenship judge [the Judge], who held a hearing with Mr. Lally where she questioned him and discussed the issues of concern regarding his residence in Canada. The Judge was not satisfied that Mr. Lally met the residency requirements to become a citizen of Canada as she could not determine how many days Mr. Lally had been effectively present in Canada during the period of reference. She therefore dismissed Mr. Lally's application for citizenship.

[3] Mr. Lally has applied for a judicial review of this decision. He claims that the Judge erred in refusing to grant him citizenship and in finding him not credible. In response, the Minister of Citizenship and Immigration [the Minister] submits that the Judge's decision is reasonable and amply supported by the evidence on the record.

[4] The only issue to be determined is whether the Judge's conclusion that Mr. Lally did not meet the citizenship requirements is reasonable.

[5] For the reasons that follow, Mr. Lally's application for judicial review is dismissed. I am not convinced that the Judge's decision falls outside the range of acceptable and possible outcomes, or that there are any grounds sufficient to justify this Court's intervention. I also find that the reasons for the decision adequately explain how the Judge found that Mr. Lally had not

met the residency requirements under paragraph 5(1)(c) of the *Citizenship Act*, SRC 1985, c C-29 [the Act].

II. Background

A. *The Judge's decision*

[6] In her decision dated July 8, 2015, the Judge relied on the physical residency requirement under paragraph 5(1)(c) of the Act, as outlined in *Pourghasemi (Re)* (1993), 62 FTR 122 (FCTD) [*Pourghasemi*]. Pursuant to that paragraph (as it read at the time Mr. Lally submitted his citizenship application), the Minister shall grant citizenship to any person who, within the relevant four-year or 1,460-day period of reference, has accumulated at least three years (or 1,095 days) of residence in Canada.

[7] After summarizing the procedural steps leading to her decision, including her review of the residence questionnaire and documents submitted by Mr. Lally and Mr. Lally's appearance at a hearing before her, the Judge found that the evidence provided by Mr. Lally was incomplete and not credible. More specifically, the Judge singled out the following contradictions in Mr. Lally's evidence:

- Mr. Lally self-reported 1,119 days of presence with no absences but declared four incomplete absences in his residence questionnaire;
- Mr. Lally's passport bore four entry stamps to the United States, but no corresponding re-entries stamps into Canada;

- Mr. Lally declared only 778 days of presence in Canada in his initial application, which amounted to just slightly over two years;

- Mr. Lally submitted evidence regarding two different addresses of residence in Canada, one in Brampton, Ontario since August 2006, and one in Montreal, Quebec since January 2007. Mr. Lally could not state how long he had lived in either place and changed his answer many times at the hearing. He notably contradicted himself on the duration of his residency in Brampton, mentioning three years, then four years and finally "maybe seven years;"

- Mr. Lally only submitted 12 driver's logs for the entire four-year period of reference, all related to 2008, the last year of the period. Mr. Lally explained this limited amount of evidence by stating that his belongings had been stolen, but he did not provide a police report to that effect.

[8] The Judge noted that Mr. Lally's declared days of absence in both his initial application and his residence questionnaire were impossible to follow, and that Mr. Lally could not explain why he had left certain parts of the questionnaire blank. The Judge also found that Mr. Lally's lack of due diligence in providing accurate information undermined his credibility.

[9] The Judge concluded that "it was impossible to determine, on a balance of probabilities, how many days [Mr. Lally] was actually present in Canada, because there is insufficient evidence of his continued physical presence during the periods that he claims to have been in Canada." The Judge thus determined that Mr. Lally had not met the residency requirements on the basis of the *Pourghasemi* test.

B. ***The standard of review***

[10] It is well established that the standard of review applicable to the decisions made by a citizenship judge is reasonableness (*Canada (Citizenship and Immigration) v Baccouche*, 2016 FC 97 at para 9; *Canada (Citizenship and Immigration) v Bayani*, 2015 FC 670 [*Bayani*] at para 17; *Huang v Canada (Citizenship and Immigration)*, 2013 FC 576 [*Huang*] at para 26).

[11] Based on this standard of review, the Court must ensure that a citizenship judge's decision meets the test of clarity, precision and intelligibility and that it is supported by acceptable evidence that can be justified in fact and in law. The standard of reasonableness not only commands that the decision at issue falls within a range of possible, acceptable outcomes defensible in respect of the facts and law, but it also requires the existence of justification, transparency and intelligibility within the decision-making process (*Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at para 47).

[12] It is also trite law that the person applying for citizenship bears the onus of proving that the conditions set out in the Act with regard to residence have been met (*El Falah v Canada (Citizenship and Immigration)*, 2009 FC 736 [*El Falah*] at para 21). A citizenship judge cannot solely rely on the applicant's claims in that regard, especially in the face of contradictory evidence (*El Falah* at para 21). Clear and compelling evidence is required to support an application (*Atwani v Canada (Citizenship and Immigration)*, 2011 FC 1354 at para 12). This is so because Canadian citizenship is a privilege that should not be granted lightly (*Canada (Citizenship and Immigration) v Pereira*, 2014 FC 574 at para 21). This requirement applies

irrespective of which residency test is applied by the citizenship judge, whether it is quantitative or qualitative (*Abbas v Canada (Citizenship and Immigration)*, 2011 FC 145 at para 8).

III. Analysis

[13] Mr. Lally submits the Judge misapprehended the evidence and misapplied the *Pourghasemi* test. He claims that the Judge did not properly understand the nature of his work as a long-haul driver. Mr. Lally contends that it was a reviewable error for the Judge to conclude that he did not need to be in Canada to earn a living when the evidence demonstrates that he was a transporter of goods across Canada on behalf of an Ontario-based company, with occasional trips to the United States. Mr. Lally claims that this characterization of his work is supported by the stamps in his passport and travel logs.

[14] Mr. Lally further pleads that, if he had been a frequent visitor to the United States, his passport would have been stamped more than four times. The absence of return stamps is also to be expected, because the Canadian border authorities rarely stamp the passport of returning citizens and permanent residents. Mr. Lally also argues that the Judge had the obligation to consult the Integrated Customs Enforcement System [ICES] report to confirm Mr. Lally's presence in Canada but failed to do so. Moreover, his travel logs show that he never spent more than twenty-four hours in the United States, consistent with the nature of his work. Mr. Lally finally states that the Judge erred in failing to take into account his obvious explanation that he kept two apartments at the same time, again due to the nature of his work.

[15] I disagree with Mr. Lally's position and arguments.

[16] I instead find that the Judge did not err in concluding that Mr. Lally failed to discharge his burden of demonstrating that he met the residency requirements set out in the Act. The evidence he presented was incomplete, contradictory and not credible. The Judge had to rely on that evidence to determine if Mr. Lally had met his burden of proof, and it was within her purview to assess and weigh the evidence as she did. The Judge's decision clearly falls within the range of possible, acceptable outcomes.

[17] The Act does not define the term "residence." For quite some time, there has therefore been an ongoing debate within this Court as to what the term and paragraph 5(1)(c) of the Act exactly mean. Competing jurisprudential schools have emerged from that debate with the result that three different tests are available to citizenship judges in assessing the residency requirement in any given case (*Canada (Citizenship and Immigration) v Patmore*, 2015 FC 699 at para 13; *Huang* at paras 17-18; *Sinanan v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1347 at paras 6-8).

[18] The first test involves a strict counting of days of physical presence in Canada, which must total at least 1,095 days in the four years preceding the application. This test is often referred to as the quantitative test or the *Pourghasemi* test. The second test assesses the quality of the applicant's attachment to Canada and recognizes that a person can be resident in Canada, even while temporarily absent, if that person's mode of living is centralized in Canada and reflects an intention to establish a permanent home in the country. This less stringent test is generally known as the *Papadogiorgakis* test (*Re Papadogiorgakis*, [1978] 2 FC 208). Finally, the third test builds on the second one by defining residence as the place where one has

centralized his or her mode of living. It is described in the jurisprudence as the *Koo* test (*Re Koo*, [1993] 1 FC 286). The last two tests are often referred to as the qualitative tests (*Huang* at para 17).

[19] The dominant view in this Court's jurisprudence is that citizenship judges are entitled to choose which test they desire to use among these three tests and that they cannot be faulted for choosing one over the other (*Canada (Citizenship and Immigration) v Lin*, 2016 FC 58 at para 12; *Bayani* at para 24; *Pourzand v Canada (Minister of Citizenship and Immigration)*, 2008 FC 395 at para 16; *Xu v Canada (Minister of Citizenship and Immigration)*, 2005 FC 700 at para 16). The Court should therefore not intervene unless the chosen test was applied in an unreasonable manner (*Canada (Minister of Citizenship and Immigration) v Demurova*, 2015 FC 872 at para 20). While they can choose between the three tests, citizenship judges must however at least indicate which residency test was used and why the test was met or not. Failure to do so is a reviewable error (*Bayani* at para 30; *Canada (Citizenship and Immigration v Jeizan*, 2010 FC 323 [*Jeizan*] at para 18). A citizenship judge's decision will be sufficiently motivated when the reasons are clear, accurate and intelligible, and when it reflects an understanding of the points raised by the evidence and indicates why the decision was rendered (*Lake v Canada (Minister of Justice)*, 2008 SCC 23 at para 46; *VIA Rail Canada Inc v Canada (National Transportation Agency)*, [2001] 2 FC 25 (FCA) at para 22; *Jeizan* at para 17).

[20] In this case, the Judge clearly chose the quantitative test set out in *Pourghasemi*, involving a strict counting of Mr. Lally's days of presence in Canada. I do not agree with Mr. Lally that the Judge failed to properly count his days of presence and absence in Canada. This

case does not involve a fact pattern similar to *Hussein v Canada (Minister of Citizenship and Immigration)*, 2015 FC 88 [*Hussein*] at para 16, relied on by Mr. Lally in his submissions. In *Hussein*, Mr. Justice Leblanc found that the citizenship judge had accepted, as a starting point, the number of days of physical presence claimed by the applicant, which exceeded the 1,095-day threshold. This is not the situation here. In this case, the Judge attempted to count the number of days of presence and absence claimed by Mr. Lally but could not figure it out. She intelligibly explained, in my view, how the various inconsistencies and incompleteness in Mr. Lally's evidence made it impossible for her to compute the days of physical presence of Mr. Lally in Canada, and why Mr. Lally did not meet the quantitative test. Her decision had the required attributes of justification, transparency and intelligibility.

[21] I am satisfied that the reasons for the decision indicate which residency test was used by the Judge and why that test was not met (*Hussein* at para 16). In her decision, the Judge states that Mr. Lally self-reported 1,119 days of presence with no absences or shortfall, but then notes that his residence questionnaire instead referred to four absences while Mr. Lally's declared days of presence shrunk to a mere 778 days in his initial application. I also observe that the record contains no evidence whatsoever of Mr. Lally's presence in Canada for the first part of the period of reference.

[22] An actual presence in Canada is required to meet the residency requirement, and it was Mr. Lally's onus to show that (*El Falah* at para 21). If the actual presence is not demonstrated, Canadian citizenship cannot be granted. Contrary to what was argued by Mr. Lally, the fact that it was impossible for the Judge to determine the days of his actual presence in Canada was

precisely the factual finding which justified and supported the Judge's conclusion that, on a balance of probabilities, Mr. Lally had not met the residency requirements under the Act.

[23] As stated in *Pourghasemi*, the underlying objective of the citizenship provisions of the Act is to insure that everyone who is granted Canadian citizenship has become "Canadianized." In that decision, Mr. Justice Muldoon illustrated this goal in colorful language, referring to instances of "rubbing elbows" with Canadians in "shopping malls, corner stores, libraries, concert halls, auto repair shops, pubs, cabarets, elevators, churches, synagogues, mosques and temples" (*Pourghasemi* at para 3). In essence, it reflects the need for an applicant to establish and prove a concrete and effective presence in Canada. This is what, in the Judge's assessment, Mr. Lally failed to do.

[24] I am not persuaded that the Judge misapprehended any portion of the evidence. Weighing and assessing the evidence is the citizenship judge's purview, and the Court owes significant deference to such findings. The record supports the Judge's finding that Mr. Lally provided vague testimony with regards to his addresses, and that evidence as to his actual presence in Canada was sparse. I agree with the Minister that the documents provided by Mr. Lally were clearly insufficient to reasonably support his claims to have been physically present in Canada during the relevant period of reference. There is practically no trace of Mr. Lally in Canada, aside from the few periods covered by the limited pieces of evidence he provided.

[25] In addition, I underline that credibility findings of citizenship judges deserve much deference because they are better situated to "make the factual determination as to whether the

threshold question of the existence of 'a residence' has been established" (*Martinez-Caro v Canada (Minister of Citizenship and Immigration)*, 2011 FC 640 at para 46).

[26] With the scant evidence of presence provided by Mr. Lally, the Judge could not blindly rely on the submissions made by Mr. Lally as to his number of days of absence from or presence in Canada. I acknowledge that there may be a point beyond which the exercise of discretion on the part of the citizenship judge could be held to be unreasonable. This point was however not reached in the present case as Mr. Lally's weak and unconceivable explanation on his absences was insufficient to support the granting of citizenship.

[27] Regarding the sufficiency of the Judge's reasons, I stated in *Canada (Minister of Citizenship and Immigration) v Abdulghafoor*, 2015 FC 1020 at paras 30-36 that the law relating to the sufficiency of reasons in administrative decision-making has evolved substantially since *Dunsmuir*, both with respect to the degree of scrutiny to which fact-based decisions (such as the decision at issue in this case) should be subjected, and in relation to the sufficiency of reasons as a stand-alone ground for judicial review. A decision-maker is not required to refer to each and every detail supporting his or her conclusion. It is sufficient if the reasons permit the Court to understand why the decision was made and to determine whether the conclusion falls within the range of possible, acceptable outcomes. Reasonableness, not perfection, is the standard. This Court should defer to a citizenship judge's weighing of the evidence and credibility determinations, as long as the Court is able to understand why the decision was made. This is precisely the case here.

IV. Conclusion

[28] For the reasons set forth above, Mr. Lally's application for judicial review is dismissed. The Judge's refusal of Mr. Lally's citizenship application represented a reasonable outcome based on the law and the evidence. On a standard of reasonableness, it suffices if the decision subject to judicial review falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law, and is justified, transparent and intelligible. The Judge addressed all concerns that were raised by the citizenship officer in her decision and she provided adequate reasons.

[29] Neither party has proposed a question of general importance to certify. I agree there is none.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed, without costs;

2. No question of general importance is certified.

"Denis Gascon"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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