

Federal Court



Cour fédérale

Date: 20161124

Docket: T-1302-15

Citation: 2016 FC 1301

Ottawa, Ontario, November 24, 2016

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Applicant

and

TERRENCE FRANCIS MENEZES

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant, the Minister of Citizenship and Immigration [the Minister], challenges a decision of a Citizenship Judge, Angelo Perschilli [the Citizenship Judge], dated July 6, 2015, that awarded Terrence Francis Menezes [Mr. Menezes] Canadian citizenship under paragraph 5(1)(c) of the *Citizenship Act*, RSC 1985, c C-29 [the Act].

[2] This is a difficult case as the application for citizenship was brought over six years ago, on August 3, 2010. The relevant period for determining residency dates back over ten years between August 3, 2006 and August 3, 2010 [relevant period]. The decision is unreasonable and I therefore grant the application by the Minister and send it back to be re-determined by a different citizenship officer.

II. Background

[3] Briefly, the facts are that Mr. Menezes is a citizen of India and arrived in Canada on June 14, 2004, becoming a permanent resident on the same day.

[4] Mr. Menezes' subsequent citizenship application was not clear whether he met the statutorily required minimum days of residency so he was asked to complete a residency questionnaire. A discrepancy of declared absences between his residency questionnaire and his citizenship application, along with discrepancies of employment and personal finances, concerned the citizenship officer reviewing Mr. Menezes file. As a result, the citizenship officer referred the matter to a hearing before a Citizenship Judge.

[5] The Citizenship Judge heard Mr. Menezes' application on June 29, 2015 (almost five years after Mr. Menezes' initial application). Mr. Menezes had to prove at least 1,095 days of residency in Canada during the relevant period.

[6] The Citizenship Judge acknowledged the concerns of the citizenship officer and asked Mr. Menezes to provide further documentation. Mr. Menezes produced MasterCard statements from October 2008 to the end of the relevant period. He also produced CIBC credit card statements from August 2009, and Rogers bills for service at his residence from 2009 onwards. Mr. Menezes explained that neither CIBC nor Rogers could produce statements further back than those provided.

[7] The Citizenship Judge reviewed the stamps in Mr. Menezes passport and found that Mr. Menezes had made a mistake in his residency questionnaire. Mr. Menezes claimed a total of 357 declared days of absence from Canada during the relevant period and as a result claimed 1,103 days of presence in Canada.

[8] The Citizenship Judge then used the *Pourghasemi* legal test (*Re: Pourghasemi*, [1993] FCJ No 232 [*Pourghasemi*]) for residency and found that Mr. Menezes satisfied the requirements under paragraph 5(1)(c) of the Act. The Citizenship Judge approved Mr. Menezes' application for citizenship.

III. Issue

[9] The question I must decide is whether the Citizenship Judge reasonably concluded that Mr. Menezes satisfied the residency requirement for Canadian citizenship?

IV. Standard of Review

[10] The standard of review applicable to the judicial review of citizenship determinations is reasonableness. The question of whether an individual has met the residency requirements of the Act is a question of mixed fact and law also reviewable on the reasonableness standard (*Canada (Minister of Citizenship and Immigration) v Rahman*, 2013 FC 1274 at para 13, citing *Saad v Canada (Minister of Citizenship and Immigration)*, 2013 FC 570 at para 18).

V. Analysis

[11] The onus of establishing residency lies with the citizenship applicant, in this case, Mr. Menezes (*Falah v Canada (Minister of Citizenship and Immigration)*, 2009 FC 736 at para 21).

[12] A decision-maker such as a citizenship judge is deemed to have considered all the evidence on the record (*Canada (Minister of Citizenship and Immigration) v Samaroo*, 2016 FC 689 at para 30).

[13] Crampton CJ. stated in *Huang v Canada (Minister of Citizenship and Immigration)*, 2013 FC 576 at paragraphs 21-25, that a citizenship judge may still use any one of three established tests for citizenship.

[14] The three legal tests from which the citizenship judge must pick are described by Justice

Danièle Tremblay-Lamer in *Mizani v Canada (Minister of Citizenship and Immigration)*, 2007

FC 698 at paragraph 10:

[10] This Court’s interpretation of “residence” can be grouped into three categories. The first views it as actual, physical presence in Canada for a total of three years, calculated on the basis of a strict counting of days (*Pourghasemi (Re)*, [1993] F.C.J. No. 232 (QL) (T.D.)). A less stringent reading of the residence requirement recognizes that a person can be resident in Canada, even while temporarily absent, so long as he or she maintains a strong attachment to Canada (*Antonios E. Papadogiorgakis (Re)*, [1978] 2 F.C. 208 (T.D.)). A third interpretation, similar to the second, defines residence as the place where one “regularly, normally or customarily lives” or has “centralized his or her mode of existence” (*Koo (Re)*, 1992 CanLII 2417 (FC), 1992 CanLII 2417 (F.C.), [1993] 1 F.C. 286 (T.D.) at para. 10).

[15] Unlike *Pourghasemi, Re: Papadogiorgakis*, [1978] 2 FC 208 and *Re: Koo*, [1993] 1 FC 286, conduct qualitative assessments of whether the applicant has “centralized their mode of living” in Canada.

[16] The Minister argues that the Citizenship Judge’s conclusion is unreasonable based on incorrect findings of fact and a lack of objective evidence to corroborate Mr. Menezes’ application. To bolster this position, the Minister points to the following conflicting factual findings in the Citizenship Judge’s reasons:

- Mr. Menezes stated that he was in Bahrain between December 2009 and January 2010. However, the credit card statements submitted in support of his application indicate Mr. Menezes was in Bahrain during different dates and that Mr. Menezes had in fact travelled to the United States during that time;

- The Citizenship Judge makes a factual error with respect to a one day trip to the United States on December 12, 2009, which is not supported by any evidence;
- The Citizenship Judge contradicts himself both stating that Mr. Menezes was not present in Canada at the start of the relevant period (August 3, 2006) and also stating that Mr. Menezes returned to Canada on August 2, 2006;
- The Citizenship Judge acknowledged a residence permit for Bahrain outside the relevant period and incorrectly dated it as September 29, 2001, when it was actually granted on September 29, 2011;
- Mr. Menezes had no explanation for a re-entry stamp noted in the ICES report for re-entry from the United States on December 16, 2009;
- Multiple discrepancies with respect to Mr. Menezes employment history and income reported to the Canada Revenue Agency are simply ignored by the Citizenship Judge.

[17] The Minister submits that the Citizenship Judge failed to hold Mr. Menezes to his evidentiary burden. Furthermore, when there is a gap in the evidence, a Citizenship Judge must assess its significance in a meaningful way. As a result of all of the above, the Minister says that the Citizenship Judge misapprehended the facts and evidence before him and failed to produce adequate reasons for the granting of citizenship (*Canada (Citizenship and Immigration) v Raphaël*, 2012 FC 1039 at para 28).

[18] Mr. Menezes argues that the Minister is asking the Court to reweigh the evidence before the Citizenship Judge and substitute its own conclusion (which it is prohibited from doing)

(*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]; *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 113 at para 99).

[19] Furthermore, Mr. Menezes reminds the Court that inadequacy of reasons is not a standalone ground of appeal (*Canada (Minister of Citizenship and Immigration) v Habibrahman Safi*, 2014 FC 947 at para 17).

[20] Mr. Menezes' counsel provided excellent explanations for the gaps in evidence noted by the citizenship officer but these were not found in the reasons of the Citizenship Judge or in the Certified Tribunal Record [CTR]. The problem on these facts is in order to determine if the decision is reasonable, it must be discernible from the reasons, or the Citizenship Judge's notes (which we do not have in the CTR) or in the CTR itself. There are no dots for me to connect on this record.

[21] The *Pourghasemi* test is a quantitative test, relying on number of days of residence which must add to a minimum of 1,095 over the relevant period. There is absolutely no analysis of how Mr. Menezes meets the strict legal test in *Pourghasemi*. This makes it extremely difficult to see how the Citizenship Judge's decision was reasonable.

[22] As pointed out by the Minister, at one point the Citizenship Judge states that the relevant period is from August 3, 2006 to August 3, 2010 and that "[Mr. Menezes] relevant period starts while the applicant is outside Canada." However, further on in the decision, the Citizenship Judge says "since [Mr. Menezes'] return to Canada on 2nd of August 2006". Not only are these

two statements incompatible, it leaves in question whether the Citizenship Judge correctly calculated the number of days of absence. Further to this point, Mr. Menezes himself lists his home address in his Application for Citizenship as Bahrain between August of 2006 and May of 2007. He lists a corresponding absence for a work contract in Bahrain between August 2, 2006 and June 10, 2007. I can't tell from the reasons which, if any, of these periods were used to calculate Mr. Menezes time in Canada.

[23] Another problem, as pointed out by the Minister, is the Citizenship Judge erroneously describing relevant passport stamps: "Another declared re-entry stamp on 12 Dec. 2009 is a one day trip to USA, as ICES confirms." According to the Minister, there is no undeclared stamp or ICES entry for Mr. Menezes on December 12, 2009.

[24] A typographical error would normally be of little consequence but adds to the confusion here: "The first residence permit for the applicant from UAE was issued on 29 Sept. 2001" when in fact the correct date is September 29, 2011.

[25] At no point does the Citizenship Judge make a finding of fact of how many days Mr. Menezes was actually found to be in Canada, nor does he say how *Pourghasemi* applies to this case.

[26] I cannot understand from the Citizenship Judge's reasons, nor from the record and reasons together, why the Citizenship Judge made the decision he did (*Newfoundland and*

Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board), 2011 SCC 62 at paras 16-17).

[27] Reasonableness requires that the decision exhibit justification, transparency and intelligibility within the decision making process (*Dunsmuir*, above; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12). For the reasons described above, the Citizenship Judge's decision lacks transparency and intelligibility and is therefore unreasonable.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for Judicial review is granted;
2. The matter is sent back for redetermination;
3. No Costs are ordered.

"Glennys L. McVeigh"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1302-15

STYLE OF CAUSE: MINISTER OF CITIZENSHIP AND IMMIGRATION v
TERENCE FRANCIS MENEZES

PLACE OF HEARING: TORONTO, ONTARIO

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APPEARANCES:

Catherine Vasilaros

FOR THE APPLICANT

Wennie Lee

FOR THE RESPONDENT

SOLICITORS OF RECORD:

William F. Pentney
Deputy Attorney General of Canada
Toronto, Ontario

FOR THE APPLICANT

LEE & COMPANY
Toronto, Ontario

FOR THE RESPONDENT