Federal Court  Cour fédérale

Date: 20180814

Docket: T-128-18

Citation: 2018 FC 833

Montréal, Quebec, August 14, 2018

PRESENT: The Honourable Mr. Justice Lafrenière

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

NIVIN MOHAMED N. ABD EL HADY

Respondent

JUDGMENT AND REASONS

[1] The Applicant, the Minister of Citizenship and Immigration [Minister], applies for judicial review to challenge the decision of the Citizenship Judge Renata Brum [Citizenship Judge] dated December 19, 2017 [Decision] approving the application of the Respondent, Mrs. Nivin Mohamed N. Abd El Hady, for Canadian citizenship.

[2] The application is granted for the following reasons.

I. Overview of the Facts

[3] The Respondent is an Egyptian national who arrived in Canada with her husband and daughter and were all landed as permanent residents on December 30, 2009. She applied for Canadian citizenship on May 7, 2015, independently from her family members. The relevant period for the purpose of paragraph 5(1)(c) of the *Citizenship Act*, RSC 1985, c C-29 was the period from May 7, 2011 to May 7, 2015.

[4] The Respondent's application for citizenship was referred to a Citizenship Judge for a residence hearing in light of discrepancies in the documentation provided by the Respondent and declarations she made during two interviews. In particular, a concern was raised that the Respondent may not have been in Canada from the beginning of the relevant period to August 18, 2012.

[5] The Citizenship Judge conducted a citizenship hearing by way of videoconference on December 18, 2017. She chose to adopt the analytical approach used by the Honourable Mr. Justice Francis Muldoon in *Re Pourghasemi*, [1993] FCJ No 232 (QL) (TD) [*Pourghasemi*]. The quantitative residency test set out in *Pourghasemi* requires that an applicant for citizenship have 1,095 days of actual physical presence in Canada in the relevant four-year period.

[6] The Respondent declared 11 absences from Canada, or 330 days, which the Citizenship Judge found left her with a notional presence in Canada for 1,130 days during the relevant period from May 7, 2011 to May 7, 2015. Four of the claimed absences were declared to have taken

place before August 18, 2012. The Citizenship Judge found that all of the declared absences were verifiable by passport stamps, Egyptian and United Arab Emirati Records of Movement [ROM], Integrated Customs Enforcement Report [ICES] data, and other evidence, and that these documents were internally coherent and accorded with other written and *viva voce* evidence.

[7] At paragraph 32 of her reasons for the Decision, the Citizenship Judge noted the weakness in the Respondent's evidence regarding the period from May 2011 to September 2012. In her citizenship application, the Respondent declared having lived in London, Ontario, from May 7, 2011 to September 16, 2012, but did not provide any documents establishing that she was physically present in Canada during this period. The Citizenship Judge stated that, notwithstanding the absence of domicile evidence for the said period, the Respondent's testimony regarding this part of the relevant period "was persuasive in its detail". She declined to draw a negative inference from the absence of domicile evidence and approved the Respondent's application for citizenship.

II. Analysis

[8] This case turns on the Citizenship Judge's analysis of the period from May 7, 2011 to August 18, 2012, during which time the Respondent claims she made four trips outside of Canada.

[9] The parties agree that a finding of the Citizenship Judge on whether the Respondent met the requirements of paragraph 5(1)(c) of the *Citizenship Act* is a question of mixed facts and law

and is reviewable on a standard of reasonableness: *Canada (Citizenship and Immigration) v Baccouche*, 2016 FC 97.

[10] The Supreme Court of Canada concluded in *Dunsmuir v New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9, at paras 47-50, that reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process and with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law. Considerable deference is owed to citizenship judges findings of fact, as they have access to the original documents and an opportunity to discuss the relevant facts with the applicant: *Hao v Canada (Citizenship and Immigration)*, 2011 FC 46.

[11] I have carefully reviewed the decision of the Citizenship Judge and am unable to determine from her reasons or the record before her how she reasonably could have concluded that the Respondent was physically present in Canada during the 16 month period from May 7, 2011 to August 18, 2012, excluding the 4 claimed absences. While the Respondent was able to provide records of movement from Egypt and the United Arab Emirates for the declared trips during this period, there was no evidence, other than the Respondent's assertions, that the trips actually originated in Canada.

[12] As explained by Mr. Justice Yves de Montigny in *El Falah v Canada (Citizenship and Immigration)*, 2009 FC 736, in applying the *Pourghasemi* test, a citizenship judge cannot rely on an applicant's claims alone. The citizenship judge must also verify the applicant's actual

presence in Canada during the periods when the applicant claims that he or she was not outside the country. As stated by Justice de Montigny at para 21:

> If one relies on a strict counting of days during which the applicant must be present in Canada, it follows that the Judge can and must ensure that the applicant was actually on Canadian soil during the period when he claims to have been.

[13] It is a well-known fact that Canadian authorities do not monitor exits from Canada. Passports and records of movement therefore cannot solely be relied on to establish physical presence in Canada. Moreover, a record of movement issued from a foreign country establishes an entry and an exit from that country alone. It does not prove that the travel preceding the entry originated from Canada.

[14] The Citizenship Judge states at paragraph 32 of the Decision that the Respondent's "evidence of travel is strong and difficult to refute for this period". While that may be, it begs the question as to how the Citizenship Judge could have concluded, in the absence of any corroborating evidence, that the four claimed trips originated from Canada, particularly since there are no Canadian stamps in the Respondent's passport on May 27, 2011, September 27, 2011, February 26, 2012, and April 18, 2012, and those dates are not recorded in the Integrated Customs Enforcement System ICES traveller history report issued by the Canada Border Services Agency. It is well established that the person applying for citizenship bears the onus of proving that the conditions set out in the *Citizenship Act* have been met.

[15] The Citizenship Judge goes on to state that she did "not draw a negative inference from the absence of domicile evidence in this period". She simply brushes away the dearth of evidence

of physical presence in Canada for almost half of the relevant period and focusses instead on periods of absence from Canada.

[16] The Respondent was required to establish with clear and convincing evidence that she satisfied the physical presence test: *Atwani v Canada (Citizenship and Immigration)*, 2011 FC 1354, at para 12. The mere fact that the Respondent was found to be credible in other aspects of her application did not relieve the Respondent from the requirement to prove her case.

[17] The Citizenship Judge may very well have been able to verify the length of the four declared trips from May 2011 to September 2012 by some other means; however, no basis for such a finding has been provided in the Decision. In the circumstances, I find that the Decision is not justified, transparent or intelligible with respect to the Citizenship Judge's analysis concerning the actual physical presence in Canada of the Respondent before August 2012, nor is it defensible in respect of the facts and the law. The Decision accordingly cannot stand.

[18] I therefore propose to allow the application for judicial review, set aside the Decision, and remit the matter back for redetermination by a different citizenship judge.

JUDGMENT in T-128-18

THIS COURT'S JUDGMENT is that:

1. The application is granted.

2. The decision of the Citizenship Judge dated December 19, 2017 is quashed and set aside.

3. The matter is remitted for redetermination by a different citizenship judge.

« Roger R. Lafrenière »
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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