Date: 20070704

Docket: T-1780-06

Citation: 2007 FC 697

Vancouver, British Columbia, July 4, 2007

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

DR. MOHAMMED FARROKHYAR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an appeal under subsection 14(5) of the *Citizenship Act*, R.S.C. 1985, c. C-29 (the Act) and section 21 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 from the decision of a Citizenship Judge, dated September 8, 2006, wherein she denied the applicant's application for citizenship on the basis that he failed to establish residency pursuant to paragraph 5(1)(*c*) of the Act.

[2] Dr. Mohammed Farrokhyar (the applicant) is a citizen of Iran, born in 1949. He was landed as a permanent resident of Canada on April 17, 2002, submitted an application for citizenship on

October 11, 2005, and attended a citizenship test on January 17, 2006. On the application form, he indicated that he was outside of Canada for a total of 136 days in the relevant period, for the purpose of visiting his infirm mother in Iran.

[3] At the time of the hearing, the applicant was over 55 years. Thus, the only issue to be decided was whether the applicant had met the residency requirement of 1095 days in Canada as specified in the *Citizenship Act*.

[4] In her decision, the Judge noted that the applicant provided only his current passport, covering only six weeks of the relevant period under consideration, and provided no concrete explanation of the whereabouts of his expired passport. In lieu of the missing passport, the applicant submitted a variety of other documents in support of his application. After reviewing the applicant's file, the Judge concluded that there was insufficient evidence to prove his physical presence in Canada during the relevant period. She consequently denied his application for citizenship, not being convinced that he "has 1095 days in Canada as required by the *Citizenship Act*."

[5] The applicant's main argument is that on January 17, 2006, he showed an officer of Citizenship and Immigration Canada (the CIC officer) his current and expired Iranian passports, the latter containing date stamps showing entry and exit from Iran, corresponding to the entry and exit dates to Canada stated in his application. He alleges that this officer informed him that he did not need to keep his expired passport, and that he subsequently destroyed it.

Analysis

[6] It is well established that correctness is the appropriate standard of review for pure questions of law. Thus, this Court must first determine whether the Citizenship Judge selected the correct legal test in making the contested residency determination.

[7] The remainder of the decision, involving the application of facts to the law of residency, is clearly a matter of mixed fact and law. I also note that while there is no privative clause, citizenship judges acquire a certain expertise in residency cases such as the present one (*Farshchi v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 487**,** [2007] F.C.J. No. 674 (QL) at para. 8). As I previously stated in *Canada (M.C.I.) v. Fu*, [2004] F.C.J. No. 88 (QL), at paragraph 7, I am convinced that a pragmatic and functional analysis reveals that the appropriate standard of review is reasonableness *simpliciter*. In arriving at this conclusion, I also rely on considerable jurisprudence of this Court (for example, see: *Farshchi*, above; *Tulupnikov v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1439, [2006] F.C.J. No. 1807 (QL) at para. 11; *Tshimanga v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1579, [2005] F.C.J. No. 1940 (QL)).

[8] The legal criteria for citizenship are set out in subsection 5(1) of the Act (see annex for the relevant statutory provision). Among other things, it requires an applicant to have accumulated three years of residence in Canada during the previous four years. Though the term "residence" is undefined in the Act itself, it has been interpreted in various ways by this Court (*Canada (Minister of Citizenship and Immigration) v. Nandre*, 2003 FCT 650, [2003] F.C.J. No. 841 (QL) at para. 6).

[9] 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)*, [1993] 1 F.C. 286 (T.D.) at para. 10).

[10] I essentially agree with Justice James O'Reilly in *Nandre*, above, at paragraph 11 that the first test is a test of physical presence, while the other two tests involve a more qualitative assessment:

> Clearly, the Act can be interpreted two ways, one requiring physical presence in Canada for three years out of four, and another requiring less than that so long as the applicant's connection to Canada is strong. The first is a physical test and the second is a qualitative test.

[11] It has also been recognized that any of these three tests may be applied by a Citizenship Judge in making a citizenship determination (*Lam v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 410 (T.D.) (QL)). For instance, in *Hsu v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 579, [2001] F.C.J. No. 862 (QL), Justice Elizabeth Heneghan at paragraph 4 concludes that any of the three tests may be applied:

> The case law on citizenship appeals has clearly established that there are three legal tests which are available to determine whether an applicant has established residence within the requirements of the Citizenship Act (...) a Citizenship Judge may adopt either the strict

> count of days, consideration of the quality of residence or, analysis of the centralization of an applicant's mode of existence in this country.
>
> [citations omitted]

[12] While a Citizenship Judge may choose to rely on any one of the three tests, it is not open to him or her to "blend" the tests (*Tulupnikov*, above**,** at para. 16).

[13] The applicant submits that the Judge erred in failing to identify which of the three tests she relied on and further, in blending the “physical presence” test with elements of the other two tests. I disagree.

[14] In my view, it is clear that the Citizenship Judge correctly applied the “physical presence” test: she makes several express references to the “1095 day residency requirement”; focuses her analysis of the evidence on whether or not it established the applicant’s presence “in” Canada, during the relevant period and also considers the number of days he was “out” of the country. These assessments were clearly made in view of calculating the total number of days that the applicant could demonstrably be proven to have been “in” Canada. Following her line of inquiry, it is evident that the Judge’s assessment was confined to a quantitative analysis.

[15] Given the centrality of proving physical presence in Canada, the Judge placed significant emphasis on the missing passport, and focused her review of the documentation submitted by the applicant solely on evidence that he was present in Canada during the relevant period. Reviewing the Judge’s decision, it is equally obvious to me that she equates “physical presence” in Canada

with “residence” in Canada throughout her decision. I find no qualitative analysis in her decision which suggests to me that she blended the various tests. I am satisfied that she correctly selected and applied the quantitative, “physical presence” test in the present matter.

[16] The applicant further submits that the Judge erred by ignoring evidence, failing to make an express finding on how much time he had actually spent in Canada and, in drawing a negative inference from his failure to produce his expired passport.

[17] In this matter, the onus was on the applicant to provide sufficient evidence to demonstrate that he met residency requirements of the Act (*Rizvi v. Canada (Minister of Citizenship and Immigration*), 2005 FC 1641, [2005] F.C.J. No. 2029 (QL) at para. 21). Therefore, according to the “physical presence” test he was required to demonstrate at least 1095 days in Canada in the relevant period, failing which, his application would be rejected.

[18] In the present case, the Judge was not able to confirm the applicant’s assertions regarding the number of days he was present in Canada, given the inadequacy of his evidence. Consequently, she could not logically make a determination of the exact number of days he spent in Canada, and cannot be faulted for her failure to do so.

[19] The applicant alleges that the “Grant Checklist for Officers” dated February 2, 2006 (Grant Checklist) confirms his allegation that he had shown his expired passport (corroborating his version of dates) to a CIC officer on January 17, 2006. This evidence was ignored by the Judge. Further, he

alleges that he destroyed his expired passport, in reliance on the officer's advice that it would not be necessary to his application. In the circumstances, the Judge was not entitled to draw a negative inference from his failure to produce his expired passport, covering most of the period relevant to his residency application.

[20] First, I find that the applicant's allegation regarding the officer's advice is unsupported by the evidence:

- while there is a handwritten reference "had old passport @ exam" in the "Residency Questions Form Notes" there is no indication that the date stamps in the missing expired passport corresponded to the applicant's version of dates in his citizenship application form;
- the Judge's notation of February 10, 2006, does not corroborate, but rather conflicts with the applicant's version of events, as it only states "hearing not necessary if docs okay", it does not suggest that all necessary documents actually were shown;
- there is no record of the CIC officer advising the applicant that the expired passport would no longer be necessary.

[21] I also find it significant that subsequent letters to the applicant clearly and specifically requested all passports (current and expired).

[22] In my view, the applicant has not demonstrated, on a balance of probabilities, that he even raised the issue of his reliance on the officer's advice with the Judge. She stated in her reasons that when she queried the applicant about his previous passport, he stated that he no longer had his

passport. He could not provide a concrete explanation of his whereabouts. Nowhere is it mentioned that he destroyed the passport on advice of the Citizenship Officer.

[23] The Judge was entitled to draw a negative inference from the applicant's failure to produce his expired passport, which would have been pivotal to supporting his residency application. I agree with my colleague Justice Eleanor Dawson in *Bains v. Canada (Minister of Citizenship and Immigration)*, [2001] 1 F.C. 284, [2000] F.C.J. No. 1264 (T.D.) (QL) at paragraph 38 that:

> Where a party fails to bring before a tribunal evidence which is within the party's ability to adduce, an inference may be drawn that the evidence not adduced would have been unfavourable to the party.
>
> [citations omitted]

[24] After reviewing the evidence and the Judge's reasons for her decision, I am satisfied that the judge correctly applied the law, considered and weighed all of the evidence and that her decision is reasonable.

[25] For these reasons, this application for judicial review is dismissed.

JUDGMENT

The application for judicial review is dismissed.

"Danièle Tremblay-Lamer"
Judge

ANNEX A

Citizenship Act, R.S.C. 1985, c. C-29

5. (1) The Minister shall grant citizenship to any person who

(...)

(*c*) is a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*, and has, within the four years immediately preceding the date of his or her application, accumulated at least three years of residence in Canada calculated in the following manner:

(i)

for every day during which the person was resident in Canada before his lawful admission to Canada for permanent residence the person shall be deemed to have accumulated one-half of a day of residence, and

(ii)

for every day during which the person was resident in Canada after his lawful admission to Canada for permanent residence the person shall be deemed to have accumulated one day of residence;

* *

5.

Le ministre attribue la citoyenneté à toute personne qui, à la fois :

[...]

c) est un résident permanent au sens du paragraphe 2(1) de la *Loi sur l'immigration et la protection des réfugiés* et a, dans les quatre ans qui ont précédé la date de sa demande, résidé au Canada pendant au moins trois ans en tout, la durée de sa résidence étant calculée de la manière suivante :

(i)

un demi-jour pour chaque jour de résidence au Canada avant son admission à titre de résident permanent,

(ii)

un jour pour chaque jour de résidence au Canada après son admission à titre de résident permanent;

FEDERAL COURT

SOLICITORS OF RECORD

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