

Federal Court



Cour fédérale

**Date: 20090721**

**Docket: T-1542-08**

**Citation: 2009 FC 736**

**Ottawa, Ontario, July 21, 2009**

**PRESENT: The Honourable Mr. Justice de Montigny**

**BETWEEN:**

**HASSANE EL FALAH**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR ORDER AND ORDER**

[1] The applicant is appealing under subsection 14(5) of the *Citizenship Act* (R.S. 1985, c. C-29) from the decision of Citizenship Judge George Springate, dated September 9, 2008, denying his application for citizenship. In support of his appeal, the applicant argues essentially that the Citizenship Judge erred by incorrectly computing his days of absence from Canada during the

reference period prescribed by law and not taking into account the corrections made by the applicant to his citizenship application form.

[2] Having carefully examined the record that was before the Citizenship Judge and the written and oral submissions of the two parties, I have come to the conclusion that this application for judicial review must be dismissed. My reasons are set out in the paragraphs that follow.

## **FACTS**

[3] The applicant is a citizen of Morocco. He arrived in Canada with his wife and three daughters on July 23, 1999. He obtained permanent resident status on July 1, 2000. His wife and his three daughters were granted Canadian citizenship in December 2005.

[4] On August 20, 2004, the applicant filed an application for citizenship in which he reported that he had been outside Canada for 391 days during the four years preceding the application, namely from August 20, 2000 to August 20, 2004.

[5] On February 27, 2006, the applicant met with a citizenship officer. He stated that he had been working abroad since the end of 2003 and was asked to fill out a questionnaire on residence. Mr. El Falah filled out the questionnaire and sent it to the Department of Citizenship and Immigration on March 2, 2006.

[6] A number of documents were attached to the questionnaire: an explanatory letter in which the applicant stated that he had been absent from Canada for 351 days during the period in question; various documents concerning the applicant's wife and children; and other documents more directly connected with his situation (copy of his passport, termination of employment documents from 2000 in Dubai, documents describing his attempts to find work in Canada), the couple's assets and liabilities (mortgage deed, wills, municipal and school tax accounts, automobile insurance, electricity and telephone bills) and financial transactions (bank account, credit card statements, investments).

[7] On July 18, 2006, a Department officer referred the applicant's file to a Citizenship Judge because the officer was not satisfied that the documents submitted showed a significant presence in Canada during the reference period. On July 10, 2008, the applicant was summoned to an interview with the Citizenship Judge, which was held on July 30, 2008. On August 1, 2008, the Citizenship Judge denied the applicant's citizenship application.

### **IMPUGNED DECISION**

[8] In the letter he sent Mr. El Falah on September 9, 2009, the Citizenship Judge informed him that he was not satisfied with the evidence submitted to establish the applicant's residence in Canada and concluded that he therefore did not meet the requirements of paragraph 5(1)(c) of the *Citizenship Act*.

[9] However, the reasons for his decision are set out more explicitly in the notice of the decision that the Citizenship Judge sent the Minister on July 30, 2009 (Court Record, pp. 9-11).

[10] After identifying the relevant period as running from August 20, 2000 to August 20, 2004, the Judge notes that the applicant discloses that he was outside Canada for 391 days during that period. It is therefore clear that the applicant does not meet the strict criterion of mandatory physical presence for 1095 days during the period in issue, as the applicant himself admits.

[11] Moreover, the Judge indicates that after examining the documents provided by the applicant, he is not satisfied on a balance of probabilities that the applicant was actually physically present in Canada during the number of days alleged. He then lists several reasons leading him to doubt the presence of Mr. El Falah in Canada:

- The information provided by the applicant regarding his absences from Canada was not clear: in the initial application he reported 357 days of absence, and following an amendment, he reported a total of 364 days of absence in the residence questionnaire. Then, after combining the two lists of absences from Canada, the absences admitted totalled 391 days;
- Although the applicant claimed to have returned to Canada 10 times, the Judge was able to count only 5 Canadian stamps in his passport;
- In his residence questionnaire, the applicant gave “H. E. Falah Corporation” as his occupation for the period of May 2002; yet he provided no incorporation document, annual report or bank statement in connection with that corporation;

- The applicant's only community involvement was his position as a soccer coach in the summer of 2002, which was not substantiated by any document;
- The applicant submitted TD Canada Trust bank statements that covered only seven months out of the four-year period;
- The credit card transaction statements covered very short time periods: December 29, 2001 to January 4, 2002 for American Express; December 26, 2002 to January 13, 2003 for TD Visa; November 19, 2001 to January 13, 2002, December 18, 2002 to January 4, 2003 and August 19, 2003 to September 26, 2003 for MBNA Canada;
- Although the applicant alleges that he began his job in Kuwait in November 2003, it appears from the documents submitted that he left Canada on September 21, 2003 for that job, which he still held at the time of the decision.

[12] Given the evidence and the onus on the applicant to show that he met the residence requirements set out in paragraph 5(1)(c) of the *Citizenship Act*, the Judge therefore concluded, on a balance of probabilities, that Mr. El Falah was not physically present in Canada even during the 1069 days when he claimed to have been. It should be noted that the Judge says that he gave the applicant the opportunity to complete his file with new evidence during the hearing, an offer which the applicant declined.

## ISSUE

[13] The only issue in this application for judicial review is whether the Citizenship Judge erred in denying Mr. El Falah's application for citizenship on the ground that he failed to meet the requirements of paragraph 5(1)(c) of the *Citizenship Act*.

## ANALYSIS

[14] It is now settled law that the standard of review applicable to the decisions of Citizenship Judges is that of reasonableness: see, for example, *Zhang v. Canada (Citizenship and Immigration)*, 2008 FC 483; *Chen v. Canada (Citizenship and Immigration)*, 2007 FC 1140. Whether dealing with questions of mixed fact and law, as when applying one of the jurisprudential tests of the concept of residency to the particular facts of the case, or purely factual questions, as when computing days of absence, *Dunsmuir v. New Brunswick* (2008 SCC 9) instructs us that the reviewing court should show deference and resist substituting its own view for that of the Citizenship Judge. To the extent that the impugned decision is intelligible and justified and can be considered a defensible outcome in respect of the facts and the law, it should not be set aside on judicial review: *Paez v. Canada (Citizenship and Immigration)*, 2008 FC 204.

[15] The applicant essentially faults the Citizenship Judge for not taking into account his residence questionnaire, in which he reported 351 days of absence, and for instead relying solely on

his citizenship application form, in which he incorrectly reported 391 days of absence. The applicant argues that this total of 391 days was clearly the result of a calculation error, which his application makes plain on its very face. Thus, he reported 160 days of absence for the period from February 20, 2004 to July 9, 2004, whereas that period actually corresponds to 140 days.

[16] There is indeed a great deal of confusion in the applicant's record having regard to his absences from Canada. In his initial citizenship application, it appears that the applicant did in fact make an error in computing his days of absence. Nevertheless, it is difficult to conclude that this was solely a calculation error, since the periods of absence entered in his residence questionnaire do not match those he had reported in his citizenship application. In the latter, for instance, he had reported that he had been out of the country from October 7, 2003 to January 23, 2004, and from February 20, 2004 to July 9, 2004, whereas the periods indicated in his residence questionnaire were from November 7, 2003 to February 20, 2004, and from March 4, 2004 to July 9, 2004. Clearly, these are more than mere calculation errors.

[17] The Citizenship Judge himself seems to have had difficulty determining with precision the number of days of absence reported by the applicant. In his notice to the Minister, the Judge counted a total of 10 absences for a total of 391 days, without really explaining how he arrived at that result. Yet even by combining the absences reported in the citizenship application with those in the residence questionnaire, I was unable to arrive at that result or anything close to it. The Citizenship Judge also refers to the number of days of absence reported by the applicant in his citizenship



application and in his residence questionnaire; but there again, the figures do not match those found in the forms as filled out by the applicant.

[18] These discrepancies do not strike me as fatal, however, and probably reflect the confusion caused by the different versions provided by the applicant as to his absences from the country. The Judge ultimately denied the application for citizenship by relying not so much on the fact that the applicant had not accumulated the number of days required under paragraph 5(1)(c) of the *Citizenship Act*, but by stressing the fact that the applicant had not succeeded in demonstrating that he was actually in Canada during the periods when he had not reported being absent. Consequently, the exact number of days on which the applicant reported being outside the country is relatively unimportant; he also had to show that he was actually in Canada during the periods he claimed.

[19] Paragraph 5(1)(c) of the *Citizenship Act* reads as follows:

**Grant of citizenship**

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

(a) ...

(b) ...

(c) is a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*, and has, within

**Attribution de la citoyenneté**

**5. (1)** Le ministre attribue la citoyenneté à toute personne qui, à la fois :

a) ...

b) ...

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

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;

...

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;

...

[20] However, this Court has consistently held that the Citizenship Judge can apply any of three tests to interpret the concept of residence: see, for example, *Mizani v. Canada (Citizenship and Immigration)*, 2007 FC 698. One of those tests consists in determining whether an applicant has been actually, physically present in Canada for a total of three years, calculated on the basis of a strict counting of days: *Re Pourghasemi*, [1993] F.C.J. No. 232. That is the approach taken by the Citizenship Judge in this case.

[21] In applying this test, the Judge cannot rely on the applicant's claims alone. He must also verify the applicant's actual presence in Canada during the periods when the applicant claims that he was not outside the country. Accepting the applicant's argument that the Judge erred by failing to accept the statements made by the applicant in his residence questionnaire would amount to saying that the Judge must blindly accept the submissions made to him as to the number of days of absence from or presence in Canada. That is not my understanding of the approach taken in *Re Pourghasemi*. 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. One need only point out that it is the applicant who bears the burden of proving that he meets the conditions set out in the Act, and in particular the residence requirements: *El Fihri v. Canada (Citizenship and Immigration)*, 2005 FC 1106; *Sager v. Canada (Citizenship and Immigration)*, 2005 FC 1392. In this case, the different versions given by the applicant could only lead the Judge to show prudence and to require proof of his physical presence in Canada.

[22] In his analysis, the Judge examined the documents submitted by the applicant, which however did not satisfy him that the applicant had actually been physically present in Canada during the various periods as alleged. I have not been convinced that the Judge committed an error in assessing the evidence.

[23] Thus, the documents concerning the applicant's wife and children proved nothing with regard to the applicant's presence in Canada. As for the documents concerning bank transactions,

they covered only extremely short periods of time. Lastly, the Judge had reason to be astonished at the applicant's claim that he had set up a corporation, when he adduced no document in support of that claim, not even an income tax document.

[24] In the absence of convincing evidence, the Judge could legitimately doubt the applicant's physical presence in Canada during the period in issue. All the more so since the Judge says that he gave the applicant the opportunity to submit new documents during the interview, an offer which the applicant turned down.

[25] Given the evidence in the record, I therefore find that the Citizenship Judge did not err and could reasonably conclude that the applicant did not meet the residence requirements under paragraph 5(1)(c) of the *Citizenship Act*. I understand the applicant's disappointment, but he has not satisfied me that the decision of Judge Springate did not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law in this case. The appeal must therefore be dismissed.

**ORDER**

**THE COURT ORDERS** that the appeal from the decision of the Citizenship Judge be dismissed, without costs.

“Yves de Montigny”

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Judge

Certified true translation  
Brian McCordick, Translator