Federal Court  Cour fédérale

Date: 20090729

Docket: T-1365-08

Citation: 2009 FC 777

Ottawa, Ontario, July 29, 2009

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

FABIO STURABOTTI

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an appeal brought by the Applicant under section 21 of the *Federal Court Act,* R.S., 1985, c. F-7 (Federal Act), subsection 14(5) of the *Citizenship Act,* R.S., 1985, c. C-29 (Act) and Rule 300(c) of the *Federal Court Rules,* SOR/98-106 (Rules) of the decision of a Citizenship Judge (Judge), dated July 3, 2008 (Decision), approving the Respondent's application for Canadian Citizenship.

BACKGROUND

[2] The Respondent is a 33-year-old citizen of Italy who first came to live in Canada in August 1999. His intended occupation is as a pilot.

[3] On April 25, 2000, the Respondent was landed in Canada and, at that time, was married to Jennifer Croce, who sponsored his application for permanent residence. By the time he filed his citizenship application in 2006, the Respondent was divorced.

[4] The Respondent's relevant 4-year period preceding his citizenship application date is July 15, 2002 to July 15, 2006. He has the following reported absences from Canada:

20/12/05 to 15/07/06	Chiavari, Italy	Education-Upgrade Courses	208
03/11/03 to 21/05/04	Chiavari, Italy	Education-Upgrade Courses	171
01/03/03 to 30/04/03	Chiavari, Italy	Vacation	60
15/07/02 to 31/07/02	Chiavari, Italy	Vacation	17

[5] Even though he was already a permanent resident, the Respondent applied for a visa (temporary resident permit) to re-enter Canada, which was issued to him on December 16, 2003. The Respondent needed the visa to travel back to Canada on May 21, 2004 because he had not obtained his Permanent Resident card prior to the established December 2003 deadline. The Respondent's Permanent Resident Card would have been issued to him in April of 2004, which

means he could not have picked it up until after his return from Italy on May 21, 2004. Permanent Residence cards are now required by commercial carriers for travel since December 31, 2003.

[6] On July 15, 2006, the Respondent signed an amended version of his citizenship application in Chiavari, Italy and it was received by the CIC Cases Processing Centre in Sydney on August 1, 2006. His original application was returned because it was “stale-dated” (received more than 90 days after it was signed/dated).

[7] On December 12, 2006, the Respondent’s citizenship application was referred to a Citizenship Judge for a hearing.

[8] On January 24, 2008, the Respondent was served with his “Final Notice to Appear” (on February 18, 2008). However, on February 12, 2008, jurisdiction over the application was transferred to a different Judge and on June 18, 2008, the Respondent appeared before Judge Allaire for his hearing and provided an attestation.

[9] The Respondent, since his arrival in Canada, has been renting a room out of a church house for $250-300 per month. He indicated that he does not own any property in Canada. His social ties to Canada are his involvement as a volunteer pastor’s helper at the church where he resides.

[10] The Respondent has no relatives in Canada and his parents and brother reside in Italy. With the exception of one year of employment at the Island Air Flight School, the Respondent has either

been unemployed or in training since his arrival in Canada. He was also unemployed before becoming a permanent resident. There are no school letters or records or income tax forms for the Respondent in the Certified Tribunal Record.

[11] The Respondent submitted four bank statements from Canada Trust which show balances between $1000 and $2058.

[12] From November 3, 2003 until July 15, 2006, the Respondent completed his revised citizenship application which indicated he was absent from Canada for a total of 379 days, while he was “upgrading” his courses. The Respondent indicated that he was taking an airline pilot type-rating course and line training through an Italian type-rating training organization named Ocean Airlines, because, due to his low flight time and the particular structure of the pilot job, he was not able to find an organization in Canada.

[13] During the Respondent’s absences, his driver’s licence and provincial health card expired.

[14] The Applicant notes that the Citizenship Judge made an error in his calculation and that the shortfall of the Respondent was 91 days as opposed to the 95 days noted by the Judge in his Decision.

DECISION UNDER REVIEW

[15] The Judge noted that the Respondent was short 95 days of the required 1095. However, the Judge found that the absences were due to the Respondent's attending school to upgrade his qualifications and granted his citizenship application.

ISSUES

[16] The Applicant submits the following issues for review on this application:

a. Did the Judge err in approving the Respondent's citizenship application despite his falling short of the residency requirement set out in paragraph 5(1)(*c*) of the Act? In particular, the Applicant takes the position that the Decision was not reasonable because the Judge:

i. Failed to clearly identify and apply an appropriate test with respect to the residency requirement;

ii. Failed to provide adequate reasons in light of the record before him;

iii. Ignored a pattern of absences and other factors that were relevant in assessing the quality of the Respondent's connection to Canada; and

iv. Abdicated his jurisdiction to assess the evidence before him regarding whether the Respondent had established and maintained residency.

STATUTORY PROVISIONS

[17] The following provisions of the Act are applicable to this application:

Grant of citizenship	**Attribution de la citoyenneté**
5. (1) The Minister shall grant citizenship to any person who	**5.** (1) Le ministre attribue la citoyenneté à toute personne qui, à la fois :
(*a*) makes application for citizenship;	*a*) en fait la demande;
(*b*) is eighteen years of age or over;	*b*) est âgée d'au moins dix-huit ans;
(*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:	*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) 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	(i) un demi-jour pour chaque jour de résidence au Canada avant son admission à titre de résident permanent,
(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;	(ii) un jour pour chaque jour de résidence au Canada après son admission à titre de résident permanent;

(*d*) has an adequate knowledge of one of the official languages of Canada;	*d*) a une connaissance suffisante de l'une des langues officielles du Canada;
(*e*) has an adequate knowledge of Canada and of the responsibilities and privileges of citizenship; and	*e*) a une connaissance suffisante du Canada et des responsabilités et avantages conférés par la citoyenneté;
(*f*) is not under a removal order and is not the subject of a declaration by the Governor in Council made pursuant to section 20.	*f*) n'est pas sous le coup d'une mesure de renvoi et n'est pas visée par une déclaration du gouverneur en conseil faite en application de l'article 20.

[18] The following provisions of the Rules are applicable to this application:

Application	Application
300. This Part applies to	**300.** La présente partie s'applique:
(*a*) applications for judicial review of administrative action, including applications under section 18.1 or 28 of the Act, unless the Court directs under subsection 18.4(2) of the Act that the application be treated and proceeded with as an action;	*a*) aux demandes de contrôle judiciaire de mesures administratives, y compris les demandes présentées en vertu des articles 18.1 ou 28 de la Loi, à moins que la Cour n'ordonne, en vertu du paragraphe 18.4(2) de la Loi, de les instruire comme des actions;
(*b*) proceedings required or permitted by or under an Act of Parliament to be brought by application, motion, originating notice of motion, originating summons or petition or to be determined in a summary way, other than applications under subsection 33(1) of the *Marine Liability Act*;	*b*) aux instances engagées sous le régime d'une loi fédérale ou d'un texte d'application de celle-ci qui en prévoit ou en autorise l'introduction par voie de demande, de requête, d'avis de requête introductif d'instance, d'assignation introductive d'instance ou de pétition, ou le règlement par procédure sommaire, à l'exception des

	demandes faites en vertu du paragraphe 33(1) de la *Loi sur la responsabilité en matière maritime*;
(*c*) appeals under subsection 14(5) of the *Citizenship Act*;	*c*) aux appels interjetés en vertu du paragraphe 14(5) de la *Loi sur la citoyenneté*;
(*d*) appeals under section 56 of the *Trade-marks Act*;	*d*) aux appels interjetés en vertu de l'article 56 de la *Loi sur les marques de commerce*;
(*e*) references from a tribunal under rule 320;	*e*) aux renvois d'un office fédéral en vertu de la règle 320;
(*f*) requests under the Commercial Arbitration Code brought pursuant to subsection 324(1);	*f*) aux demandes présentées en vertu du Code d'arbitrage commercial qui sont visées au paragraphe 324(1);
(*g*) proceedings transferred to the Court under subsection 3(3) or 5(3) of the *Divorce Act*; and	*g*) aux actions renvoyées à la Cour en vertu des paragraphes 3(3) ou 5(3) de la *Loi sur le divorce*;
(*h*) applications for registration, recognition or enforcement of a foreign judgment brought under rules 327 to 334.	*h*) aux demandes pour l'enregistrement, la reconnaissance ou l'exécution d'un jugement étranger visées aux règles 327 à 334.

STANDARD OF REVIEW

[19] The Applicant submits that the question of whether a person has met the residency requirements under the Act is a question of mixed law and fact, so that the appropriate standard of review is reasonableness: *Dunsmuir v. New Brunswick* 2008 SCC 9 at paragraphs 44, 47, 48 and 53; *Canada (Minister of Citizenship and Immigration) v. Mueller* 2005 FC 227 at paragraph 4; *Canada*

(Minister of Citizenship and Immigration) v. Wall 2005 FC 110 at paragraph 21; *Zeng v. Canada (Minister of Citizenship and Immigration)* 2004 FC 1752 at paragraph 7-10; *Chen v. Canada (Minister of Citizenship and Immigration)* 2004 FC 1693 at paragraph 5l *Rasaei v. Canada (Minister of Citizenship and Immigration)* 2004 FC 1688 at paragraph 4 and *Gunnarsson v. Canada (Minister of Citizenship and Immigration)* 2004 FC 1592 at paragraphs 18-22.

[20] The Court in *Haj-Kamali v. Canada (Minister of Citizenship and Immigration)* 2007 FC 102 (*Haj-Kamali*) provided the following guidance at paragraphs 7-8:

> **7** Both parties accept that the standard of review for pure factual findings of the Citizenship Court (e.g. the duration of Mr. Haj-Kamali's absences from Canada) is patent unreasonableness. This is in accordance with a number of authorities from this Court and I would specifically adopt the analysis by Justice Richard Mosley in *Huang v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1078, 2005 FC 861, where he held in paragraph 10:
>
> > [10] However, for purely factual findings the respondent submits the standard should be patent unreasonableness. The Citizenship Judge as the finder of fact has access to the original documents and an opportunity to discuss the relevant facts with the applicant. On citizenship appeals, this Court is a Court of appeal and should not disturb the findings unless they are patently unreasonable or demonstrate palpable and overriding error: Housen v. Nikolaisen, [2002] 2 S.C.R. 235.
>
> **8** The application of the facts to the law concerning residency under the Act is, of course, a matter of mixed fact and law for which the standard of review is reasonableness *simpliciter*. Here I adopt the analysis of Justice Mosley in *Zeng v. Canada (Minister of Citizenship and Immigration)* [2004] F.C.J. No. 2134, 2004 FC 1752 where he held at paragraphs 9 and 10…

[21] In *Dunsmuir*, the Supreme Court of Canada recognized that, although the reasonableness *simpliciter* and patent unreasonableness standards are theoretically different, "the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review": *Dunsmuir* at paragraph 44. Consequently, the Supreme Court of Canada held that the two reasonableness standards should be collapsed into a single form of "reasonableness" review.

[22] The Supreme Court of Canada in *Dunsmuir* also held that the standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[23] Thus, in light of the Supreme Court of Canada's decision in *Dunsmuir* and the previous jurisprudence of this Court, I find the standard of review applicable to these issues to be reasonableness, with the exception of the procedural fairness issue and the questions of law and jurisdiction. When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir* at paragraph 47. Put another way, the Court should only intervene if the Decision was unreasonable in the sense that it

falls outside the “range of possible, acceptable outcomes which are defensible in respect of the facts and law.”

[24] Questions of law and jurisdiction must be considered on a standard of correctness: *Buschau v. Canada (Attorney General)* 2008 FC 1023 at paragraph 45.

[25] The issue raised concerning the adequacy of reasons is a question of procedural fairness and natural justice reviewable on a standard of correctness: *Andryanov v. Canada (Minister of Citizenship and Immigration)* 2007 FC 186 at paragraph 15; *Jang v. Canada (Minister of Citizenship and Immigration)* 2004 FC 486 at paragraph 9 and *Adu v. Canada (Minister of Citizenship and Immigration)* 2005 FC 565 at paragraph 9.

ARGUMENTS

The Applicant

[26] The Applicant submits that the Judge committed a reviewable error in failing to identify which test, if any, he used to determine whether the Respondent met the residency requirement for citizenship. Blending different tests together is also a reviewable error. See: *Gao v. Canada (Minister of Citizenship and Immigration)* 2003 FCT 605 at paragraph 23; *Hsu v. Canada (Minister of Citizenship and Immigration)* 2001 FCT 579 at paragraphs 4 to 7 and *Lam v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 410 (F.C.T.D.).

[27] The Applicant states that the Judge's reasons and analysis in respect of establishing/maintaining residence are wholly inadequate. The reasons given do not sufficiently explain on what grounds the application was approved, or why the Judge decided as he did. The Applicant relies upon *Lai v. Canada (Minister of Citizenship and Immigration),* [2000] F.C.J. No. 1361 (F.C.T.D.) at paragraphs 9 to 12, where the Federal Court held that it was not enough for the Judge to merely list the evidence considered. The Applicant notes that the Judge in this case did not even list the evidence considered and this calls into question whether the Respondent had truly established/maintained residence in Canada, no matter which test was applied. See: *Eltom v. Canada (Minister of Citizenship and Immigration)* 2005 FC 1555 at paragraphs 28 to 33 and *Abdollahi-Ghane v. Canada (Attorney General),* [2004] F.C.J. No. 930 (F.C.) at paragraphs 29 to 33.

[28] The Applicant points out that the Judge's reasons for approving the Respondent's application, despite his shortfall in the number of days required, consist of only two handwritten lines. There are no other notes or analysis from the Judge. The Judge did not refer to anything except the Respondent's assertion that he had been upgrading his skills. The Applicant finds this questionable, as there was absolutely no evidence to substantiate such a claim, other than the Respondent's handwritten notes in the Residence Questionnaire. There was also nothing to establish that his training was not available in Canada, or that it was not available through Ocean Airlines, or that the Respondent was even registered with Ocean Airlines.

[29] The Applicant submits that the Judge completely abdicated his jurisdiction to assess the evidence with respect to the residence requirement. The Decision fails to deal with material elements of the evidence, or the lack thereof, that may have resulted in the application not being approved.

[30] The Applicant reminds the Court that the onus is on a citizenship applicant to establish with credible evidence that they meet the residence requirement of the Act. In fact, the Residence Questionnaire completed by the Respondent provides clear instructions as to the type of evidence/documentation that he was expected to submit in support of his application. Applicants are specifically told to provide "documentary evidence in support of your statements." See: *Zheng v. Canada (Minister of Citizenship and Immigration)* 2007 FC 1311; *Paez v. Canada (Minister of Citizenship and Immigration)* 2008 FC 204; *Kong (Re)*, [1999] F.C.J. No. 665 (F.C.T.D.) and *Koo (Re)*, [1993] 1 F.C. 286 (F.C.T.D.).

[31] The Applicant says it is clear that the Respondent has not met his onus in this case. Even if this was all the information he could provide, the evidence suggests that his ties to Canada are weak. Therefore, it was unreasonable for the Judge to approve the Respondent's application. The Applicant notes that it would have been reasonable for the Judge to inquire about and mention the visas and passport stamps relating to the People's Republic of China (PRC) and Hong Kong, given that the Respondent does not specifically refer to business or study there. A March 13, 2006 entry and March 18, 2006 exit on page 31 of the Respondent's passport indicates he traveled as a staff member or crew to the PRC/Hong Kong during a time when he reports he

was in Italy upgrading his skills. The Applicant alleges that this raises the possibility of material omission or misrepresentation by the Respondent. The Citizenship Judge should have specifically dealt with this aspect of the record, and his failure to do so constitutes a reviewable error.

[32] The Applicant cites and relies upon *Canada (Minister of Citizenship and Immigration) v. Dhaliwal* 2008 FC 797 (F.C.T.D.) at paragraph 26:

> **26** I agree with the Applicant that there is without a doubt a clear message within the *Act* of Parliament's intention to discourage misrepresentation. The privilege of acquiring Canadian citizenship is just that: a privilege. One must be truthful in their application for such a privilege. Moreover, misrepresentation by an applicant for citizenship puts into question their credibility and has the potential to impact the weight given to their evidence submitted in support of their application. Given the Citizenship Judge's dependency on the Respondent's written and oral evidence and the lack of documentary evidence, the Citizenship Judge erred in failing to discuss this factor. The failure to explain how the Respondent's misrepresentation impacted the decision renders the Citizenship Judge's decision unreasonable. He also failed to assess the Respondent's credibility especially considering the misrepresentation made by him. This decision is unreasonable.

Respondent

[33] The Respondent has not filed any written submissions on this application and no one appeared at the hearing on his behalf.

ANALYSIS

[34] The Respondent has filed no written submissions in this matter and no one appeared on his behalf at the hearing in Toronto on July 7, 2009.

[35] I have reviewed the Decision and the Applicant's submissions. I agree with the Applicant's submissions on reviewable error.

[36] I have also reviewed the record and the materials submitted by the Respondent in his citizenship application. It is clear to me that, whichever formulation of the residency test is used in this case, the evidentiary base cannot support a finding that the Respondent meets the residency requirement in paragraph 5(1)(*c*) of the *Citizenship Act*. Consequently, I see no point in returning this matter for reconsideration by a different judge.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The appeal is granted. The Decision of the citizenship judge is quashed and the application for citizenship is refused.

"James Russell"
Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT FILE NO.:	T-1365-08
STYLE OF CAUSE:	***THE MINISTER OF CITIZENSHIP AND IMMIGRATION***
	v.
	FABIO STURABOTTI
PLACE OF HEARING:	Toronto, ON
DATE OF HEARING:	July 7, 2009
REASONS FOR JUDGMENT:	RUSSELL J.
DATED:	July 29, 2009

WRITTEN REPRESENTATIONS BY:

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