Federal Court  Cour fédérale

Date: 20100517

Docket: T-1972-09

Citation: 2010 FC 538

Ottawa, Ontario, May 17, 2010

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

SOMIA DACHAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant filed the present appeal pursuant to subsection 14(5) of the *Citizenship Act*, R.S.C. 1985, c. C-29 (the Act) with regard to a decision rendered by a citizenship judge on November 13, 2009, denying her application for citizenship.

[2] The applicant appeals this decision on the grounds that the citizenship judge failed to provide adequate reasons and that the citizenship judge made erroneous and unreasonable findings of fact. For the reasons that follow, the appeal is dismissed.

[3] The applicant left Syria and landed in Canada with her husband and two minor children on January 12, 2002. That same day she was granted permanent resident status as a member of the investor class. On December 12, 2005, approximately four years later, the applicant and her children applied for citizenship.

[4] By letter dated November 13, 2009, the applicant was informed that, despite having been requested to submit additional documentation, she did not submit satisfactory documentation to establish that she had been residing in Canada for a minimum of three years within the four years immediately preceding her application, as required by the Act. Accordingly, her application was denied.

[5] Paragraph 5(1)(c) of the Act sets out the residence requirements that must be met before citizenship will be granted in Canada:

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 :
…	…
(*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	*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

following manner:	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;
…	…

[6] At the time the applicant applied for citizenship (December 12, 2005), she had been a permanent resident for 1429 days. Broken down into days, paragraph 5(1)(c) of the Act requires the applicant to have resided in Canada for a minimum of 1095 days in the preceding four years from the date of her citizenship application (the relevant period). On her application, the applicant indicated that she had been absent from Canada on seven different occasions during the relevant period, which amounted to an absence from Canada for approximately 324 days. Upon review by a citizenship officer, a mathematical error was discovered and it is now accepted that the information provided by the applicant in her citizenship application suggests that she was away from Canada for a total of 332 days, which means that she was physically present in Canada for 1097 days, that is, two days above the minimum requirement.

[7] During her interview with a citizenship officer on November 2, 2006, the applicant was unable to provide the passport she used from the time she landed in Canada (January 12, 2002) to February 2004. According to the applicant, this passport, along with those of her children, was stolen in February 2004.

[8] At the request of the citizenship officer, the applicant submitted the following supplemental documentation to establish her presence in Canada: a residence questionnaire; a letter from her employer confirming that she had been employed at a grocery store during the period between March 2003 and April 2006; deeds to the various properties she owns in the Montreal area; her Notice of Assessments for 2003 and 2005; her children's report cards from 2002 to 2006; bank account and credit card statements; home phone, cell phone, utility and internet bills; an employment contract from a live-in-caregiver the applicant had hired in 2005; a copy of her passport and those of her children, issued June 7, 2004; a police report indicating that her previous passport was stolen; and finally, a partial photocopy of the stolen passport.

[9] Given that the officer was unable to confirm her travels during the first two years of her stay in Canada, the applicant's file was referred to a citizenship judge, who held a hearing on August 17, 2009, and determined that did not meet the residence criteria as provided by paragraph 5(1)(c) of the Act.

ANALYSIS

A. Procedural Fairness

[10] It should be noted that the applicant's counsel neglected to argue this issue at the hearing. In her written submissions, however, the applicant submits that Citizenship and Immigration Canada (CIC) failed to provide her with reasons since the citizenship judge's notes to the Minister of Citizenship and Immigration (the Minister) were never given to her despite the fact that her lawyer requested them by fax on November 24, 2009. According to the applicant, even if the notes to the Minister are considered reasons for the citizenship judge's decision, neither them nor the letter dated November 13, 2009, constitute sufficient reasons to satisfy the duty of procedural fairness.

[11] The letter sent to the applicant stated little more than the documentation the applicant provided failed to establish her presence in Canada for the statutorily mandated minimum time. According to the notes written to the Minister, however, the citizenship judge concluded that on a balance of probabilities the applicant had not demonstrated that she was in Canada for 1095 days during the relevant period because:

1. her passport contained stamps during the relevant period that were not listed by the applicant in her application form;
2. the children's report cards indicated that they missed a total of 52 days in the first two terms of the 2003-2004 and 2004-2005 school years, which is a longer absence than noted by the applicant during the same periods;

3. while the applicant filed a letter from her employer at a grocery store stating that she worked from April 2003 to 2006, she failed to file any pay stubs in support of this contention;
4. the Notice of Assessments with regard to the applicant's tax returns do not correspond to each year the applicant claims to have been in Canada
5. there were a number of transactions on the applicant's bank statements for purchases from a pharmacy in Canada during the period in which the applicant admits to being overseas; and
6. on the new passports issued to the applicant and her children on June 7, 2004, there is a note on page 8 providing that as of June 7, 2004, the applicant and her children are duly registered with the Syrian consulate in compliance with the regulation which provides that each Syrian living abroad for longer than three months must register at the Syrian consulate in the country they reside.

[12] *VIA Rail Canada Inc. v. National Transportation Agency*, [2001] 2 F.C. 25 at paragraph 21-22 provides that for reasons to be sufficient they must set out: the decision-maker's findings of fact; the principal evidence upon which the findings are based; the decision-maker's reasoning process, the major points in issue; and the main relevant factors. After reviewing the notes to the Minister, it is clear that they meet this standard.

[13] While I believe the applicant correctly argues that the notes to the Minister cannot form part of the reasons since they were never provided to her, I believe this error may be overlooked since it

had no material effect on the decision or the applicant's resolve to appeal it (*Nagulesan v. Canada (Minister of Citizenship and Immigration)*, 2004 CF 1382 at paragraph 17). Furthermore, given the conclusion that the notes to the Minister constitute adequate reasons and the fact that the applicant is now well aware of these reasons, this is not a sound basis upon which to return the decision.

B. The Citizenship Judge's Decision

[14] Where the Court is asked to review a citizenship judge's determination of whether an applicant meets the residence requirements stipulated in the Act, the Court is essentially reviewing a question of mixed fact and law; the Court looks to the citizenship judge's application of the legal test to the facts. As such, the appropriate standard of review is that of reasonableness (*Chowdhury v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 709 at paragraphs 24-28; *Canada (Minister of Citizenship and Immigration) v. Zhou*, 2008 FC 939 at paragraph 7).

[15] The standard of reasonableness is concerned with the justification, transparency and intelligibility of the decision in addition to whether the decision falls within the range of possible outcomes having regard to the facts and the law (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at paragraph 47).

[16] There is no definition of "residence" in the Act and the existing jurisprudence provides for three distinct general tests, two contextual tests and one strict one, which if properly applied by the citizenship judge, would be accepted by this Court (*Lam v. Canada (Minister of Citizenship and*

Immigration) (1999), 164 F.T.R. 177, [1999] F.C.J. No. 410 at paragraph 14 (F.C.T.D.) (QL) and *So v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 733 at paragraph 29)).

[17] A detailed explanation of the contextual tests can be found in *Re Papadogiorgakis*, [1978] 2 F.C. 208 at paragraphs 15 and 16 (F.C.T.D.) and *Koo (Re)*, [1993] 1 F.C. 286 (T.D.). The strict test flows from the decision in *Pourghasemi (Re)* (1993), 62 F.T.R.122, [1993] F.C.J. No. 232 (F.C.T.D.) (QL) and provides that a person resides in the location where they are physically present. Therefore, for the purposes of paragraph 5(1)(c) of the Act, an applicant for citizenship must establish that he or she was physically present in Canada for a minimum of three years or 1095 days out of the four years immediately preceding their application for citizenship. If an applicant is short by any amount of time, the residence requirements of the Act are not met and the applicant is not entitled to citizenship.

[18] In the case at bar, it is clear from the citizenship judge's notes to the Minister that this was the test applied. Not only does the citizenship judge cite the *Pourghasemi* decision, but according to the notes submitted by the citizenship judge to the Minister, he was not convinced on a balance of probabilities, after considering the applicant's testimony and documentary evidence, that the applicant had been physically present in Canada for a total of 1095 days.

[19] The three test approach has been the subject of much critique. Recently, this Court in *Canada (Minister of Citizenship and Immigration) v. Takla*, 2009 FC 1120 (*Takla*), which was endorsed in *Canada (Minister of Citizenship and Immigration) v. Elzubair*, 2010 FC 298 at

paragraph 13, argued in favor of one consolidated, contextual approach to be used when determining residence. In the case at bar, neither the applicant nor the respondent contend that a contextual approach should have been adopted. As a result, it is not necessary to consider whether this new approach should be applied. The Court will look only to whether the citizenship judge was reasonable in his conclusion that on a balance of probabilities the applicant did not establish her presence in Canada for a minimum of 1095 days.

[20] The essence of the applicant's argument that the decision is unreasonable is twofold: first, in rejecting her application on the facts, the applicant asserts that the citizenship judge required her to establish her presence in Canada on a standard more stringent than a balance of probabilities, and second, the citizenship judge erred since he himself acknowledged on the form to the Minister that the applicant had been in Canada for a total of 1097 days. According to the applicant, either he erred in law by requiring her to establish her presence in Canada for a longer period of time than required by the Act or the citizenship judge erred in fact by failing to correctly note the number of days the applicant was physically present in Canada.

[21] With regard to the second point, it is clear that the notation on the form to the Minister was referring to the number of days the applicant alleges to have been present in Canada; it is not a reflection of any finding of fact made by the citizenship judge. This figure comes from the information provided by the applicant on her application for citizenship. While there is a discrepancy of eight days between the citizenship judge's figure on the form to the Minister and the applicant's figure on her application for citizenship, as noted above, this is simply the result of a

mathematical miscalculation on the part of the applicant with regard to her trip to Syria between June and August 2004. The applicant's allegation that the citizenship judge erred in this respect must therefore be dismissed.

[22] Lastly, it is trite law that the burden is on the applicant to establish her presence in Canada (*Chen v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 763 at paragraph 18). Neither party contests that the applicant is required to establish on a balance of probabilities that she was physically present in Canada for 1095 days during the relevant period. Having regard to the facts, the applicant contends, however, that she met her burden by providing direct and uncontradicted evidence which established her presence in Canada. The applicant submits that the information she provided when she filled out the application form and her oral testimony during the hearing on August 17, 2009 should have been enough. Without evidence to the contrary, the applicant argues that she should be presumed to be telling the truth and that any conclusion to the contrary is purely speculation.

[23] There is simply no evidence that the applicant was held to a more stringent standard than required by law. As noted by the respondent, the best evidence of a person's absence from the country is their passport. In the case at bar, the applicant was only able to supply a partial photocopy of the passport she used for two out of the four years preceding her application for citizenship. Given that the missing pages could have demonstrated additional absences from Canada, the citizenship judge acted reasonably in requesting the applicant to supplement her application with further documentation that could establish her physical presence in Canada. Having reviewed the

additional documents, I cannot find that the citizenship judge acted unreasonably in coming to his conclusion.

[24] While the documents submitted are proof of the applicant's life in Canada, they do not establish that she was physically present for the minimum mandated time. As noted by the citizenship judge, the documents are somewhat incomplete: her children's report cards demonstrate even more absences than what have been claimed by the applicant, she does not have a tax form from every year she has been in Canada and the evidence of her employment does not establish her physical presence in the country during the period in question. Furthermore, and determinative of the present appeal, the citizenship judge correctly notes a discrepancy between the stamps contained within the applicant's passports and the dates she claims to have been absent from Canada. Most notably, the applicant is missing an entry stamp in her current passport from her trip to London and Syria from which she allegedly returned in January 2005. The next entry stamp is from September 2005, some nine months later, which given the fact that the applicant contends having met the residence requirement by only two days, would put her well below the minimum mandated time required by the Act.

[25] With the foregoing in mind I cannot find that the citizenship judge acted unreasonably in finding as he did. It should be noted that the outcome of the present appeal does not prohibit the applicant from reapplying for citizenship at any future date when she believes she has met the requirements of the Act.

[26] The appeal is dismissed without costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the appeal is dismissed without costs.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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