Federal Court  Cour fédérale

Date: 20150129

Docket: T-346-14

Citation: 2015 FC 116

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, January 29, 2015

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

MOHAMAD EL-HUSSEINI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review pursuant to subsection 14(3) of the *Citizenship Act*, RSC 1985, c C-29 (the Act), of a decision of the Citizenship Judge (the Judge), dated December 18, 2013, denying the applicant's application for Canadian citizenship under paragraph 5(1)(*c*) of the Act.

I. Facts

[2] The applicant is a Lebanese citizen and has been a permanent resident of Canada since May 15, 2007.

[3] On July 31, 2010, the applicant applied for Canadian citizenship. In his citizenship application, the applicant declared that he had accumulated a physical presence in Canada of 1,106 days from May 15, 2007, to July 31, 2010.

[4] From January 2008 to April 2010, the applicant took vocational training at Collège Champlain and Cégep Marie-Victorin.

[5] In a letter dated November 17, 2011, Citizenship and Immigration Canada (CIC) informed the applicant that certain documents and information were required to support his application, specifically a residency questionnaire and travel documents regarding his entries into and exits from Canada, establishing his professional and social ties to Canada. That letter also informed the applicant of the necessity of providing [TRANSLATION] "any document" that he thought would establish the quality of his attachment to Canada. On December 1, 2011, the applicant sent to CIC the completed residency questionnaire and documents establishing the quality of his attachment to Canada.

[6] In a letter dated September 26, 2012, counsel for the applicant enquired about the status of the applicant's citizenship application, given the delay in processing the application. Counsel for the applicant mentioned in that letter that he was hired by the applicant [TRANSLATION] "to find out what the problem was in order to devise possible solutions." As there was no response from CIC, counsel for the applicant resent the same letter that was received by CIC on

November 21, 2012. After the letter was sent, but before it was received by CIC, counsel for the applicant contacted CIC by e-mail on November 5, 2012, in the hope of obtaining information about the status of the applicant's file. In his affidavit, the applicant submits that CIC did not reply to either his counsel's letters or e-mail, a submission that the respondent does not dispute.

[7] A notice to appear for an interview with a citizenship judge dated November 21, 2013, was sent to the applicant. The notice to appear informed the applicant of the need to bring [TRANSLATION] "all original documents supporting his citizenship application".

[8] On December 4, 2013, in accordance with the notice to appear, the Judge met the applicant at an interview. The applicant contends that he brought a file folder full of documents proving his physical presence in Canada from May 17, 2007, to July 31, 2010.

[9] The applicant submits that the Judge did not ask him for any additional document or piece of evidence during the interview (other than his marks from Collège Champlain), although the Judge mentions in the reasons for her decision that the applicant [TRANSLATION] "stated that he does not have active documents testifying to his presence in Canada before January 2008." The versions of the applicant and the respondent seem contradictory with respect to whether the Judge allegedly did or did not inform the applicant that he could submit the documents he brought to the interview in support of his application and his presence in Canada before January 2008.

[10] On December 18, 2013, the Judge denied the applicant's application for Canadian citizenship.

II. Decision

[11] The Judge's decision is based on the fact that the applicant allegedly did not prove, on a balance of probabilities, that he was physically present in Canada for a minimum of 1095 days from May 15, 2007, to July 31, 2010, as required under paragraph 5(1)(*c*) of the Act. What was particularly troubling for the Judge was the lack of evidence from the applicant to support his physical presence in Canada between May 7, 2007, and January 2008.

[12] Indeed, the Judge determined that the documentation filed by the applicant did not make it possible to establish the length of the absence that the applicant declared from October 13, 2007, to October 23, 2007, since no entry stamp for Lebanon dated October 13, 2007, appeared on the applicant's passport. The Judge noted that the passport is not [TRANSLATION] "conclusive evidence" of presence in Canada [TRANSLATION] "given the possible deceptions" for avoiding stamps through the use of passes for simplified border crossings and the "pink card" by some Lebanese. The Judge noted that the applicant admitted to using the "pink card" two or three times.

[13] The reasons for decision indicate that the applicant told the Judge during the interview that from May 7, 2007, to January 2008 he was looking for work, but the applicant did not provide any evidence to support his claim.

III. Issues

[14] There are two issues:

1. Did the Judge breach her duty of procedural fairness?

2. Did the Judge err in denying the applicant's citizenship application on the ground that he failed to meet the requirements of paragraph 5(1)(*c*) of the Act?

[15] Based on my analysis of the first issue, it is not necessary for me to analyze the second issue.

IV. Relevant Law

Citizenship Act, RSC 1985, c C-29	***Loi sur la citoyenneté, LRC 1985, c C-29***
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	(ii) un jour pour chaque jour de résidence au Canada après son admission à titre de

for permanent residence the person shall be deemed to have accumulated one day of residence;	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.

V. Analysis

A. *Standard of Review*

[16] In *Dunsmuir v New Brunswick*, 2008 SCC 9, the Supreme Court of Canada held at paragraph 57 that a standard of review analysis is not necessary if "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question."

[17] An analysis on the reasonableness standard must be made to determine whether the Judge erred in rejecting the applicant's citizenship application on the basis that it did not meet the requirement of the number of days of physical presence in Canada within the meaning of paragraph 5(1)(*c*) of the Act (*Canada (Citizenship and Immigration) v Bani-Ahmad*, 2014 FC 898, at para 10; *Ghahremani v Canada (Citizenship and Immigration)*, 2009 FC 411, at para 19).

[18] However, the standard of correctness must apply to determine whether the Judge breached her duty of procedural fairness (*Canada (Citizenship and Immigration) v Khosa*,

2009 SCC 12, at para 43; *Fan v Canada (Citizenship and Immigration*), 2013 FC 789, at para 23).

B. *Did the Judge breach procedural fairness?*

[19] Although it is correctly settled in the case law that the citizenship judge "is not obligated to provide an applicant with a running commentary about the adequacy of his documentation" and "[t]he onus is on the applicant to establish residence" (*Zheng v Canada (Citizenship and Immigration)*, 2007 FC 1311, at para 14), we should also keep in mind that principles that the Supreme Court of Canada set out in *Baker v Canada (Citizenship and Immigration)*, [1999] 2 RCS 817 (*Baker*) regarding the duty of procedural fairness in order to come to a proper decision in this case. In *Baker*, Justice L'Heureux-Dubé recalled that "the concept of procedural fairness is eminently variable" and all of the circumstances must be considered in order to determine the content of the duty of procedural fairness (*Baker*, at para 21, citing *Knight v Indian Head School Division No 19*, [1990] 1 RCS 653, at 682). Justice L'Heureux-Dubé also wrote in *Baker* at paragraph 25:

> The more important the decision and the greater the impact on the persons affected, the more stringent the procedural protections mandated. Moreover, Justice Dickson (later Chief Justice) stated this in *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105, at p 1113...

[20] More recently, rulings of our Court confirmed that a fairly high standard of procedural fairness must be applied in the decision-making process with respect to a citizenship application. In *Sadykbaeva v Canada (Citizenship and Immigration)*, 2008 FC 1018, Justice De Montigny states at paras 15-16:

> [15] Applying these criteria to the case at hand, I am of the view that a fairly high standard of procedural fairness must inform the decision-making process followed in a citizenship application. I am mindful of the fact that decisions to deny citizenship applications are not final and may be appealed to the Federal Court pursuant to section 14(5) of the *Citizenship Act*, and that the discretion bestowed on Citizenship Judges is quite broad and affords them a wide margin of appreciation to decide on proper information gathering procedures.
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> [16] That being said, the nature of the decision clearly resembles an adjudication. It is based on facts concerning an individual, which are assessed in light of reasonably objective criteria, and the outcome applies only to the individual party. Moreover, the decision to grant or deny citizenship is obviously of great importance to the applicant as it affects her rights, privileges and responsibilities in this country, as well as those of her son. Finally, the applicant had an expectation that a certain procedure would be followed with respect to the assessment of her knowledge of Canada. While the Supreme Court stressed in *Baker* that legitimate expectations can not create substantive rights, it did emphasize that they could inform the content of the duty of fairness owed to an individual.
>
> [Emphasis added]

[21] Moreover, "it is well established that an interview with the Citizenship Judge is 'clearly intended to provide the candidate the opportunity to answer or, at the very least, address the concerns which gave rise to the request for an interview in the first place', and when an appellant is deprived of the opportunity to address those concerns, a denial of natural justice occurs" [Emphasis added] (*Johar v Canada (Citizenship and Immigration)*, 2009 FC 1015 (*Johar*), at para 41).

[22] In *Tanveer v Canada (Citizenship and Immigration)*, 2010 FC 565, Justice Zinn states at para 19:

> As it is, it is impossible to determine what purpose the Citizenship Judge thought was served by the interview. The applicant has filed

> an affidavit in which she offers explanations for most if not all of the concerns expressed by the Citizenship Judge in her reasons. The respondent pointed out repeatedly that this was information that was not before the Citizenship Judge – implying that this Court should ignore it. While it is true that the affidavit was not before the Citizenship Judge that begs the question of why the relevant information contained within the affidavit was not before her. It would have been before her if the Citizenship Judge had asked the applicant questions directed to the areas that concerned her. There is nothing in the application or documentation provided that is directly contradictory and thus, absent questioning from the Citizenship Judge, the applicant would have no way of knowing what the areas of concern were. Fairness, in these circumstances, required that the Citizenship Judge put her concerns to the applicant so that the applicant would have the opportunity to know the case she had to meet. The onus in citizenship applications is on the applicant, but the onus is not on the applicant to anticipate every concern that a citizenship judge might have with the evidence submitted.
>
> [Emphasis added]

[23] In this case, the accounts submitted by the applicant and the respondent regarding whether the Judge gave the applicant the chance to submit additional evidence during the interview seem to be contradictory. However, what is objectively verifiable is that the applicant submitted to this Court an affidavit in which he replies to all of the Judge's concerns with supporting documentation. I acknowledge that this evidence was not before the Judge and thus it is not relevant in determining the reasonableness of the decision. Nonetheless, this evidence shows that the applicant would have been able to address the Judge's concerns if he had been informed of those concerns.

[24] In this case, the Judge's main concern was about the applicant's physical presence from May 7, 2007, to January 2008. The applicant submits that he was absent from Canada from October 13, 2007, to October 23, 2007 (10 days). As mentioned above, the Judge determined that

the evidence submitted did not enable her to confirm that the applicant had indeed left Canada on October 13, 2007.

[25] The applicant provided the Judge with the following evidence regarding his physical presence in Canada from May 7, 2007, to January 2008:

1. A solemn affirmation from his landlord that he has been living in Montréal, QC, since May 15, 2007;
2. A second solemn affirmation from the same landlord confirming the applicant's rental of a unit in Montréal, QC, from May 15, 2007, to July 31, 2009;
3. A third solemn affirmation from the same landlord confirming the applicant's rental of a unit in Montréal, QC, from May 15, 2007, to July 31, 2010;
4. A copy of his passport;
5. His income tax return for 2007;
6. A copy of his driver's licence indicating that it was issued on November 16, 2007;
7. His testimony during the interview with the Judge explaining the steps and approaches taken to find work in Canada from May 15, 2007, to January 2008;
8. His permanent residency card dated May 28, 2007; and
9. A letter from the Régie de l'assurance maladie du Québec dated July 23, 2007, confirming the applicant's registration in the public insurance plan as of August 1, 2007.

[26] The following supplementary evidence seems to demonstrate that the applicant complied with paragraph 5(1)(*c*) of the Act, specifically, seems to confirm his statements regarding the date he left for Lebanon, October 13, 2007:

1. A list of his entries and exits from Lebanon issued by the Sûreté générale [public safety branch] of the Lebanese Ministry of the Interior for the period from 2007 to 2010. That document indicates that the applicant entered Lebanon on October 15, 2007, and left Lebanon on October 23, 2007, which aligns with his claim that he was absent from Canada from October 13, 2007, to October 23, 2007.

   Furthermore, the document supports in every detail the applicant's description of his entries and exits provided in the residency questionnaire.
2. The boarding passes for the applicant's trip to Lebanon from October 13, 2007, to October 23, 2007.

[27] Moreover, the applicant, through his counsel, sought to respond to CIC's concerns before his interview in order to comply with the Act and verify the status of his application. However, the applicant's uncontradicted affidavit reveals that he received no reply from CIC about the status of his application. I would also note that the applicant claims in his affidavit that his interview with the Judge lasted about twenty minutes and that she said nothing about her concerns regarding his declared absence from October 13, 2007, to October 23, 2007 (see: *Johar*, at para 42, regarding the length of the interview).

[28] With respect to the apparent contradiction between the statement in the Judge's decision that the applicant said at the interview that he did not have active documents to prove his presence in Canada before January 2008, and the applicant's statement that the Judge never asked for such documents, I believe that there was a misunderstanding between the Judge and the applicant on this point. In my opinion, it would be unfair to punish the applicant for an error in communication.

[29] The applicant is not one who, by pure negligence, would not have provided the documents required to prove the length of his physical presence in Canada in support of his citizenship application. The applicant provided the documents that he thought were required to CIC and the Judge. To make sure that he was complying with the Act, he tried to contact CIC many times to inquire about the status of his file.

[30] Since the applicant received no information about CIC's concerns about the length of his physical presence in Canada, despite the actions of his counsel in this regard, I am of the view that this application for judicial review should be allowed. Natural justice requires that decision-makers demonstrate a certain level of transparency, which was not the case here.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This appeal is allowed and the applicant's application for citizenship is remitted to another citizenship judge for a fresh determination.

2. The applicant is awarded costs fixed at $800, inclusive of fees, disbursements and taxes.

"George R. Locke"
Judge

Certified true translation
Monica F. Chamberlain, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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