

Federal Court



Cour fédérale

Date: 20151123

Dockets: T-157-15, T-158-15

Citation: 2015 FC 1152

Ottawa, Ontario, November 23, 2015

PRESENT: The Honourable Mr. Justice Gleeson

Docket: T-157-15

BETWEEN:

THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

Applicant

and

KHALID L. ABDUL MUTTALIB

Respondent

Docket: T-158-15

BETWEEN:

THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

Applicant

and

DENA N. MAJEED

Respondent

AMENDED JUDGMENT AND REASONS

[1] These are applications for judicial review by the Minister of Citizenship and Immigration [the applicant] pursuant to section 22.1 to of the *Citizenship Act*, RSC 1985, c C-29 [the Act], from the decisions of a citizenship judge [the Judge] dated January 14, 2015, finding that the respondents met the residency requirement under paragraph 5(1)(c) of the Act, and approving their applications for Canadian citizenship.

[2] On February 18, 2015, upon the applicant's *ex parte* motion in writing, this Court ordered that the applicant may dispense with the requirement for personal service of the Application for Leave for Judicial Review and authorized service by courier to the respondents' last known home address.

[3] The respondents have not filed a Notice of Appearance and did not appear for the hearing of this matter.

[4] For the reasons that follow, the applications are allowed.

I. Background

[5] The respondents, Khalid L. Abdul Muttalib and Dena N. Majeed are a married couple and citizens of Iraq. They entered Canada and received permanent residence status on March 13, 2005. On October 28, 2008 they applied for Canadian citizenship. The relevant period for

calculating their residence in Canada for the purposes of paragraph 5(1)(c) of the Act was March 13, 2005 – October 28, 2008.

[6] The respondents' applications were referred for a hearing with a citizenship judge based on credibility concerns raised by the citizenship officer reviewing the respondents' applications and supporting documentation.

II. Decision

[7] In two separate decisions dated January 14, 2015 the Judge granted the respondents' applications.

A. *Mr. Muttalib*

[8] The respondent Mr. Muttalib declared 44 days of absence during the relevant period and 1280 days of presence for a total of 1324 days, exceeding the 1095 days presence threshold required by the Act.

[9] The Judge notes that Mr. Muttalib had presented a translation of all foreign stamps in his passport and details Mr. Muttalib's explanation of his work history in Canada. The Judge noted the concerns raised by the citizenship officer: (1) the lack of a passport to cover the period from September 19, 2006 to January 17, 2008; (2) unreturned and incomplete residence questionnaires [RQs]; (3) an inaccurate telephone listing; and (4) the absence of Notices of Assessments indicating income for 2005 and 2006.

[10] The Judge addressed each of the concerns: (1) the respondent stated that he did not have a valid passport for the period September 19, 2006 to January 17, 2008 because he had no need to travel, the Judge accepted this explanation noting that his presence in Canada was substantiated by Notices of Assessment and a history of medical claims provided post hearing; (2) the Judge noted that the respondents' explanation of never having received an actual RQ was inconsistent with the documentary record, however the Judge holds this was evidence of absent mindedness as opposed to a desire to mislead; (3) The Judge notes that the inaccurate telephone listing did not raise doubts as to credibility, holding that the listing was an error that is hard to correct; and (4) the Judge notes that the respondent provided, post hearing, Notices of Assessment that were consistent with the work history he provided to the Judge during the hearing.

[11] On this basis, and applying the physical presence test for residency as set out by Justice Muldoon in *Pourghasemi, (Re)*, [1993] FCJ No 232 at paras 4 and 6, 19 Imm LR (2d) 259 (TD) [*Pourghasemi*], the Judge concludes that Mr. Muttalib had demonstrated on a balance of probabilities that he had met the residence requirement under the Act.

B. *Ms. Majeed*

[12] The respondent Ms. Majeed declared 24 days of absence during the relevant period and 1300 days of presence for a total of 1324 days.

[13] The Judge undertook a similar analysis with respect to Ms Majeed. In this case the citizenship officer noted: (1) unreturned and unfilled RQs; (2) an inaccurately listed absence where the respondent declared a departure from Canada on April 9, 2005 whereas her passport

showed entry into Saudi Arabia on April 1, 2005; (3) the lack of any exit stamps from Canada or Saudi Arabia; and (4) The lack of Notices of Assessment for the years 2005, 2006 and 2008.

[14] The Judge found that Ms Majeed had relied on her husband to complete the details of the application and while she did not have an explanation for the unreturned RQs, the Judge was satisfied that her husband's explanations did not raise doubts as to credibility. With respect to the inaccurate absence from Canada the Judge accepted that this was simply an error and that the deduction of the additional eight days did not bring the respondent under the 1095 days of required residence in Canada. The Judge was satisfied with the explanations and additional documentation provided post hearing by both the respondent and her husband.

[15] Applying *Pourghasemi*, the Judge found on a balance of probabilities that the Ms. Majeed had also met the residence requirements under the Act.

III. Applicant's Position

[16] It is the position of the applicant that the threshold residency requirement was not established with credible evidence. The evidence before the Judge left too many unanswered questions with respect to the issue of residency. The applicant further argues that the Judge failed to adequately engage with the evidence and that the decisions lack sufficient justification and transparency as a result.

[17] The applicant argues that much of the evidence of residence was passive and did not substantiate the respondents' claim of residency in Canada. In this regard, the applicant points to

the respondents' failure to provide a completed RQ and to provide a traveller history report from the Canada Border Services Agency.

[18] In addition, the applicant points to Mr. Muttalib's low income during the relevant period, income which the applicant submits would not appear to allow him to support his wife and ultimately two children. Despite the low income levels the applicant notes that the respondents purchased a condominium during this period. The applicant further argues that the Judge failed to address bank statements and medical records. The applicant argues that the bank statements demonstrate gaps in regular usage and that health records demonstrate an absence of health care for Ms. Majeed until the last eight weeks of her pregnancy in June, 2006.

[19] The applicant argues that while the Judge states that all foreign stamps in Mr. Muttalib's passport had been translated, this is incorrect. The applicant submits that visas, observations and some stamps were not in fact translated. The applicant further notes that the Judge failed to address the absence of re-entry stamps into Canada in either of the respondent's passports or a renewal stamp in Mr. Muttalib's passport. The renewal stamp indicates the passport was renewed in September 2006 in Iraq with a revised expiry date of 7/3/2009. The applicant argues this contradicts Mr. Muttalib's statement that he did not have a valid passport during this period because he had no need to travel.

IV. Respondents' Position

[20] As stated above the respondents did not file a Notice of Appearance or submissions, and did not appear at the hearing.

V. Issues

[21] The applicant has identified a single issue:

1. Whether the Citizenship Judge's finding that the respondents had met the residency requirement under paragraph 5(1)(c) of the *Citizenship Act* was unreasonable.

VI. Standard of Review

[22] The applicant submits that the standard of review of the Judge's findings that the respondents satisfied the residency requirement under the Act engages questions of fact and mixed fact and law to be reviewed on a standard of reasonableness (*El Falah v Canada (Minister of Citizenship and Immigration)*, 2009 FC 736 at para 14, 183 ACWS (3d) 916; *Farag v Canada (Minister of Citizenship and Immigration)*, 2013 FC 783 at paras 24-26). I agree.

VII. Analysis

[23] I concur with the applicant's position, the Judge erred in failing to engage with the evidence and as a result failed to identify and address evidence that contradicted the conclusions reached. The failure to do so has not allowed the Court to understand why the decision was made.

[24] In considering the question of residency, the Judge adopted and relied on the residency test in *Pourghasemi*. This test involves the strict counting of days of physical presence in Canada and requires that an applicant demonstrate 1095 days of actual presence in Canada during the

four years preceding the application for citizenship (*Canada (Minister of Citizenship and Immigration) v Bayani*, 2015 FC 670 at para 20 [*Bayani*]). When relying on the physical presence test to satisfy the residency requirement documentation evidencing exits from Canada and re-entries are important as they form the documentary basis for calculating days of presence (*Bayani* at para 40).

[25] In this case passports were provided but not all pages of Mr. Muttalib's were translated and neither document reflected re-entries to Canada to coincide with the respondents' reported absences. The Judge is of the mistaken belief that "The Applicant presented translation of all foreign stamps in his passport". In addition, neither of the respondents provided a travel history report, despite having been requested to do so. The Judge does not acknowledge or address these obvious gaps in the respondents' travel history. Further, the Judge fails to recognize, and as a result does not address, the inconsistent evidence relating to whether or not Mr. Muttalib was in possession of a valid passport between September 19, 2006 and January 17, 2008. Each of these matters is potentially of direct relevance to assessing whether or not the respondents have met their onus of establishing, on a balance of probabilities, that they have satisfied the residency requirement established in the Act and are potentially contradictory of the conclusion reached (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 at paras 15, 17, 157 FTR 35 (TD)).

[26] The evidentiary gaps in the respondents' travel history take on additional import when considering the respondent's corroborative evidence of residency. The medical records evidence indicates Ms. Majeed received no publicly insured obstetrics care until late in her pregnancy.

Banking and credit card activity demonstrates limited or no usage for periods of time and Mr. Muttalib's reported income does not appear to be sufficient to support his family and finance a condominium. Again these circumstances are potentially contradictory of the conclusion reached, but not addressed by the Judge.

[27] Of course it is well-established that the validity of a decision will not be impugned on a reasonableness analysis for not addressing all arguments and details a reviewing judge might have preferred the decision-maker had addressed. However, the reasons must be such that they allow the reviewing court to understand why the decision was made and determine if it falls within the range of acceptable outcomes (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, [2011] 3 SCR 708 at para 16). The comments of my colleague Justice Danièle Tremblay-Lamer in *Canada (Minister of Citizenship and Immigration) v Matar*, 2015 FC 669 at para 31 apply here:

[31] Had the Citizenship Judge indicated that he weighed certain evidence more heavily than other evidence, the Court could possibly have concluded that he considered the discrepancies (*Safi* at para 44). However, I am unable to understand the Citizenship Judge's reasoning and to understand which factors and evidence led him to be satisfied that the respondent had been in Canada for the requisite number of days. As argued by the respondent, there are possible explanations for the discrepancies in the evidence raised by the applicant. Without acknowledgement of these discrepancies in the reasons, it is impossible to know whether the Citizenship Judge was aware of them and considered the evidence critically in this regard. As such, the reasons reveal little to assist the Court in assessing the reasonableness of the outcome.

[28] In summary, after reviewing the decisions within the context of the record, I am unable to understand why the decisions were made or determine if they fall within the range of acceptable outcomes.

[29] For these reasons the application is allowed. The applicant did not identify a question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the applications for judicial review are granted and the matters are remitted back to another decision-maker for redetermination. No question is certified.

"Patrick Gleeson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKETS: T-157-15 AND T-158-15

STYLE OF CAUSE: T-157-15, THE MINISTER OF CITIZENSHIP AND IMMIGRATION v KHALID L. ABDUL MUTTALIB
T-158-15, THE MINISTER OF CITIZENSHIP AND IMMIGRATION v DENA N. MAJEED

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: SEPTEMBER 28, 2015

JUDGMENT AND REASONS: GLEESON J.

DATED: OCTOBER 8, 2015

AMENDED: NOVEMBER 23, 2015

APPEARANCES:

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FOR THE APPLICANT

NO APPEARANCE

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FOR THE APPLICANT

NO SOLICITOR OF RECORD

FOR THE RESPONDENTS