Federal Court  Cour fédérale

Date: 20151215

Docket: T-1020-15

Citation: 2015 FC 1389

Ottawa, Ontario, December 15, 2015

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

MOHAMMAD WASEF ABU-TALEB

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Mr. Abu-Taleb must wonder what it takes to become a Canadian citizen. His application was dismissed by a citizenship judge on the basis that he did not meet the residency requirement applicable at the time, three years, or 1,095 days, in the four years immediately preceding his application. He was granted leave to have that decision judicially reviewed. I found the decision to be unreasonable, granted judicial review, and referred the matter back to another citizenship

judge for redetermination. My decision is reported *Abu-Taleb v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1193.

[2] On redetermination, the second citizenship judge was again not satisfied that he was present in Canada for 1,095 days during the four years in issue. Again, Mr. Abu-Taleb was granted leave to have that decision judicially reviewed. By chance, the matter came before me. I shall again be granting judicial review and sending it back to another decision-maker for redetermination, hopefully for the last time.

[3] There are two reasons why this application for judicial review shall be granted. The first is that the citizenship judge failed to deal with the reasons why the matter was sent back for redetermination in the first place. Indeed, it is not even clear that she read my decision. The second is that even if this were the initial decision, I find it unreasonable.

I. The Facts

[4] Mr. Abu-Taleb was sponsored by his wife who is a Canadian citizen. He was landed as a permanent resident on 28 December 2006 and applied for citizenship on 1 September 2010, 1,342 days later.

[5] He declared absences of 143 days giving him a physical presence in Canada of 1,199 days, 104 days above the minimum residency requirement. Both citizenship judges followed the physical residency test set by Mr. Justice Muldoon in *Re Pourghasemi*, [1993] FCJ No 232 (QL), as they were entitled to do.

[6] There were two reasons why the first decision was sent back for redetermination. The first judge considered it most significant that Mr. Abu-Taleb, who is of Palestinian origin, and who held a Jordanian passport, had no current passport from 28 January 2008 to 24 March 2009. As I pointed out in my first decision, he was under no obligation to have a current passport. If he was in Canada without a passport for all intents and purposes, he would be unable to leave. However, if he was outside the country during that time, he would not be able to get back in.

[7] The second reason was that the first citizenship judge also referred to credit card transactions which suggested to her that Mr. Abu-Taleb was out of the country. However, his testimony was that the credit card transactions were for online purchases, and considering that he had received a police ticket the day before a transaction, and had purchased something in Canada the day after, coupled with Canadian government records of entry, it was impossible for him to have been outside Canada in order to purchase something in the Netherlands.

[8] What is most disconcerting are the "Notes for re-determination" sent by a citizenship agent to the second citizenship judge:

> Following a Federal Court's decision on December 10, 2014, this matter has to be referred to another decision maker.
>
> Please refer to the FPAT written by the agent on February 28, 2014 and the reasons for decision from the citizenship judge dated May 15, 2014 for an analysis of the document provided by the applicant.
>
> In addition, here are some concerns that should be noted:

There followed two pages of further concerns.

[9] The notes written by the agent to the first citizenship judge on 28 February 2014 are in the file, as are the reasons for the decision by the first citizenship judge. However, my decision is not there. No reference is made to the reasons why the matter was referred back.

[10] Counsel for the Minister submits that it should be inferred that the citizenship judge read my decision because she refers to me by name in her set of reasons, and because she, unlike the first citizenship judge, did not deal with credit card transactions as being an indication that Mr. Abu-Taleb was out of the country.

[11] Counsel for the Minister was unable to say whether or not, as a matter of practice, the decision of a Federal Court judge referring a citizenship matter back for redetermination should form part of the record. One can easily obtain the name of the judge without reading the decision. One need simply refer to the recorded entries on the Federal Court website.

II. The Second Citizenship Judge's Reasoning

[12] There were three steps in the citizenship judge's reasoning. While each step is possible, the end result is not reasonable. The first step was that there may be gaps in the recorded entries each time a person enters Canada. The second is that Mr. Abu-Taleb claims to have had no passport from 28 January 2008 until 24 March 2009. He may have had another passport or travel document, which may have allowed him leave Canada and return here, again assuming government entry records were inaccurate. This led the citizenship judge to the third step, which was an analysis of his activity in Canada. He was not active enough and did not have sufficient corroboration to establish that he was here for at least 1,095 days.

[13] The first step is a Canadian government document, ICES, which stands for Integrated Customs and Enforcement System. It is supposed to record all entries into Canada, but does not record exits. The ICES Report, which was prepared 10 March 2014, shows Mr. Abu-Taleb entered Canada at Dorval Airport 16 July, and again on 20 November 2007. If this document to be believed, it appears to corroborate Mr. Abu-Taleb's testimony that he never left Canada after November. On the other hand, he could have left Canada 21 November 2007 and not returned until after 10 March 2014.

[14] The ICES is not perfect. It is possible that some entries were not recorded, but how many? On the other hand, there is proof positive that Mr. Abu-Taleb was physically present in Canada on certain days between 20 November 2007 and 1 September 2010, the date he applied for citizenship.

[15] The second step, which followed the decision of the first citizenship judge, was a fixation with the fact that Mr. Abu-Taleb declared that he did not have a passport from 28 January 2008 to 24 March 2009. He explained his difficulties obtaining a Jordanian passport. He proffered three Jordanian passports. The first was valid from 27 February 2006 to 26 February 2007, the second from 28 January 2007 to 27 January 2008 and the third from 25 March 2009 to 24 March 2011.

[16] Two preliminary remarks should be made. One was that his preliminary resident status in the United Arab Emirates had been cancelled in 2007, so that reference in the Jordanian passport

to an address in the UAE is inaccurate. The other is that she thought there were certain visa stamps in his passports. The Minister concedes she erred on that point.

[17] The citizenship judge stated at paragraph 23:

> I can find no notation in this third passport that indicates it was the successor to the previous one on file, which would have proved that there were no other travel documents in between. I therefore do not have evidence before me that allow me to determine that no other passport was available to the Applicant during the portion of his RP when he claimed that he had no valid travel papers.

[18] However, there is no indication in the second passport that it is a successor to the first.

[19] Given that the citizenship judge accepts that Mr. Abu-Taleb was in Canada at least some of the days when he claims to have no passport, she must have had been of the view that he was coming and going. For instance, she acknowledges that he was here 16 March 2009, 2 April 2009, 17 April 2009 and 2 May 2009. She also acknowledges a dental visit in December 2009, his son's birth in 2010 and a visit to an optician also in 2010.

[20] Mr. Abu-Taleb says he did not leave Canada at all after November 2007. How many times does the citizenship judge think he was outside Canada? One has to tote up at least three. If the ICES reports are so unreliable, then they should be scrapped. Another peculiarity, which should have worked in Mr. Abu-Taleb's favour, is that he had said that he had left Canada on 1 November 2007. However, the citizenship judge was not satisfied that he left that day, but rather on 8 November 2007. This would mean that Mr. Abu-Taleb was in Canada seven days more than he had declared. The departure was for a trip to the United Arab Emirates. The citizenship judge said at paragraph 25:

> In addition to the missing entry stamp, there is also no exit stamp from the UAE on the date the Applicant claimed he left. The UAE is a country with a reputation of being vigilant about recording entries and exist, and, indeed, there are stamps to corroborate his earlier declared travel there. The fact that his passport lacks proof of either entry to the UAE or exit on the dates he cleared-or on any date on the occasion of this declared trip-raises questions about his claim that he had no other travel papers.

[21] The conclusion to draw is that the UAE is vigilant and Canada with its ICES records is not.

[22] This brought the citizenship judge to the third step in her analysis, which was evidence of active physical presence in Canada. Under the physical presence test, there was no obligation on Mr. Abu-Taleb's part to be active at all. He could have been a hermit, sitting in his room for 1,095 days. There is no obligation to provide corroborating evidence. However, the burden was upon him to establish on the balance of probabilities that he was physically present in Canada for a sufficient period of time. This is primarily a function of credibility. I can only conclude that the citizenship judge did not properly grasp the meaning of the balance of probabilities. For instance, the evidence shows that Mr. Abu-Taleb took a course at Concordia University in Montréal. The citizenship judge said it was possible that this was an online course. Mr. Abu-Taleb said it was not. Why did the citizenship judge not believe him, notwithstanding that she said she had formed a favourable impression of him? He was not called upon to provide a letter from Concordia confirming his evidence.

[23] Another factor which worked in Mr. Abu-Taleb's favour is that he had registered and taken a French course which showed in the documents he provided, but which he had not listed.

[24] In determining that Mr. Abu-Taleb had not, on the balance of probabilities, met the residence requirement under s 5(1)(*c*) of the *Citizenship Act*, as it then was, the citizenship judge quoted Madam Justice Snider in *Fadi Atwani v Canada (Citizenship and Immigration)*, as follows:

> In *Fadi Atwani*… - The Honourable Madam Justice Snider reiterated this point:
>
> (12) …The burden is on the Applicant-not on the Citizenship Judge- to establish with a clear and compelling evidence, the number of days of residence.

However, she should have quoted all of paragraph 12, as well as paragraphs 13 and 14, of Madam Justice Snider's decision, which read:

> [12] The Applicant submits that the Citizenship Judge erred by failing to make a specific determination of how many days the Applicant was actually physically present in Canada. In the absence of such a determination, the Applicant argues, the Judge cannot reasonably have concluded that the residency requirement of s. 5(1)(c) was not met. This argument, in my view, is fatally flawed. The burden is on the Applicant – not on the Citizenship Judge – to establish, with clear and compelling evidence, the number of days of residence. In this case, the Applicant failed to provide consistent and credible evidence with respect to his absences from Canada.
>
> [13] As recently stated by Justice Rennie in *Abbas v Canada (Minister of Citizenship and Immigration)*, 2011 FC 145 at para 8, [2011] FCJ No 167:
>
> > Irrespective of which test is applied, each applicant for citizenship bears the onus of establishing sufficient credible evidence on which an assessment of residency can be based, whether it is quantitative (*Re Pourghasemi*) or qualitative (*Koo*).
>
> [14] On the facts before her, the Citizenship Judge's determination that the Applicant had failed to establish the number of days he was physically present in Canada was not unreasonable.

[25] "Clear and compelling evidence" is the term used by Mr. Justice Rothstein in *F.H. v McDougall*, 2008 SCC 53, [2008] 3 SCR 41. That case stands for the proposition that unless a statute provides otherwise, all civil cases are decided on the balance of probabilities. Clear and compelling evidence certainly does not mean overwhelming evidence as there were huge gaps and inconsistencies in F.H.'s testimony in a sexual assault case which had occurred some 31 years earlier. Nevertheless, he was believed and found credible. There was no specific finding that Mr. Abu-Taleb was not credible. The notes to the citizenship judge are replete with reasons not to believe him, including a ludicrous examination of Hydro bills to suggest that he was not in his apartment at certain times.

III. Costs

[26] I am not prepared to grant the costs Mr. Abu-Taleb seeks. Costs in these matters are an exception. The citizenship judge may or may not have read my original decision. If she did, or did not, the Minister cannot be blamed.

[27] However, I shall direct that the new decision maker, who shall redetermine this matter, be given copy of both my decisions, the original one and this current one, and must acknowledge having considered them in his or her decision.

IV. Certified Question

[28] There is no serious question of general importance to certify. Indeed, neither party proposed a certified question. Mr. Abu-Taleb may well be entitled to citizenship under the

Citizenship Act, as amended, which now requires four years of physical presence in the six years immediately preceding the application, including six months in each of the last four years, coupled with an abiding intention to remain here. However, as counsel said, he has become very stubborn and believes he has been wronged. Stubbornness costs money, but I do agree that he has been wronged.

JUDGMENT

IN ACCORDANCE WITH THESE REASONS;

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The decision of the citizenship judge is quashed. Mr. Abu-Taleb's application for citizenship is referred back to another officer for redetermination *de novo*.

3. That officer must be provided with both my decision reported at 2014 FC 1193, and the one reported under this citation and must acknowledge in his or her decision that they have been considered.

4. There is no serious question of general importance to certify.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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