Federal Court  Cour fédérale

Date: 20160122

Docket: T-858-15

Citation: 2016 FC 71

Ottawa, Ontario, January 22, 2016

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

SALAH ELDIN MAR KHADRA

Respondent

JUDGMENT AND REASONS

[1] This is a judicial review, brought by the Minister of Citizenship and Immigration, of the decision of a Citizenship Judge [the Judge] dated April 27, 2015 wherein it was held that the Respondent met the residency requirements for Canadian citizenship as set out in the *Citizenship Act*, RSC 1985, c-29 [Act].

[2] For the reasons that follow, this application is allowed.

I. Background

[3] The Respondent holds a travel document issued by the Egyptian Government for Palestinian refugees. He is a mechanical engineer and came to work in Canada as a skilled worker, entering Canada and receiving permanent residency on October 12, 2006. He has been continuously employed in Canada since March 2008.

[4] On August 1, 2011, the Respondent applied for Canadian citizenship. To meet the residence requirement in section 5(1)(c) of the Act, he was required to prove that he resided in Canada for at least 1095 days in the four years prior to his application, from August 1, 2007 to July 31, 2011 [the Relevant Period].

[5] On his citizenship application, the Respondent declared he had 134 days of absences from Canada and was physically present for 1326 days during the Relevant Period. He listed 8 absences. Due to credibility concerns, he was required to complete a Residence Questionnaire [RQ], in which he identified the absences from Canada that he had previously declared, as well as others. The Respondent also provided his consent for the release of his travel history in the form of a report as prepared by the Canada Border Services Agency known as the Integrated Customs Enforcement System [ICES] report. He provided a translation of only one of the two passports applicable to the Relevant Period.

[6] After reviewing the RQ, passports and ICES report, the reviewing agent amended the total number of absences, resulting in 159 days of absence and 1298 days of physical presence in

Canada. While this did not result in a shortfall in the required number of days of residence in Canada, various credibility concerns including the absence of a translation for one of his passports, the discrepancies in his stated absences from Canada, and missing information on his RQ resulted in the Respondent's application being referred to a hearing before the Judge.

II. Impugned Decision

[7] In the decision, the Judge referred to the fact that the Respondent had an undeclared absence to Saudi Arabia, was missing information on his RQ, and had not provided a translation for one of his two passports. He did provide additional travel details in advance of the hearing, and he provided the passport itself at the hearing, but he did not provide a translation. In addition, the Respondent indicated that he could not remember exactly some of the days that he crossed the Canada/US border.

[8] The Judge considered the January 2010 trip to Saudi Arabia, which the reviewing agent indicated had not been declared, and found that the Respondent had declared on his RQ a trip between December 19, 2009 and January 5, 2010. This was consistent with the return date in the ICES report.

[9] To address other inconsistencies with travel or arrival dates, the Respondent presented credit card records for duty-free border purchases as well as Canadian purchases before and after these. He also provided comments on the departure and return dates represented by those trips and a detailed explanation of the dates in question. The Judge found his testimony to be forthright and, in the absence of a translation of his passport, she relied on the history of travel

entrances to Canada as contained in the ICES report to support his stated travel and accepted the Respondent's explanation that he traveled on the dates provided in his original documentation and as amended in his subsequent submission. The Judge referred to the calculation of the absence performed by the reviewing agent based on this documentation and noted that there was no suggestion of a shortfall.

[10] The Judge also found that the RQ and testimony at the hearing addressed concerns regarding information on his family members missing from his original application. Although the address history on his RQ was incomplete and showed several addresses, including an address which was used by seven other people as a residence over a 6 week period in 2007 and 2008, the Respondent provided further details about his residences at the hearing, and the Judge found his explanation to be clear and complete.

[11] While the Respondent had not provided a transcript of his studies at university, and a period of unemployment from August 2007 to March 2008 was referenced in his application but not his RQ, the Judge found that his testimony on educational and employment issues satisfied any credibility concerns.

[12] The Judge similarly found that the Respondent's explanations had resolved credibility concerns involving his banking information and the absence of taxation notices of assessment. Regarding his passive documentation for the period of August 2007 to March 2008, the Judge accepted the Respondent's description of his activities in the early stages of his Relevant Period

as looking for work and found that his documentation together with his ICES history of entrances into Canada supported his submissions.

[13] The Judge referred to the residency test prescribed in *Pourghasemi, Re* (1993), 62 FTR 122 [*Pourghasemi*] and found on a balance of probabilities that the Respondent had demonstrated that he resided in Canada for the number of days he claimed to reside in Canada and therefore met the residence requirement under section 5(1)(c) of the Act.

III. Issues and Standard of Review

[14] The Applicant's position is that the Judge erred in misapplying the physical presence test prescribed by *Pourghasemi* and ignored evidence regarding the Respondent's physical presence in Canada during the Relevant Period.

[15] The Applicant submits that a Judge's determination as to whether a person meets the residency requirement in the Act is a question of mixed fact and law which is reviewable under the reasonableness standard. I concur that this is the applicable standard of review (see *El-Khader v Canada (Minister of Citizenship & Immigration)*, 2011 FC 328 at paras 8-10), and I consider the issue in this application to be whether the Judge's decision was reasonable.

IV. Submissions of the Parties

A. *The Applicant's Position*

[16] The Applicant's position is that the Judge did not verify the number of days that the Respondent was present in Canada or compare the Respondent's explanations to the evidence.

[17] First, the Applicant notes that the Respondent declared having two passports during the Relevant Period and was asked on at least two separate occasions to provide a certified translation of his passports. He did not provided a translation for the second passport, but the Judge did not inquire into why this translation was not produced, instead relying on the history of travel entrances to Canada as contained in the ICES report. The Applicant submits that this document has inherent limitations including no dates of exit from Canada.

[18] The Applicant notes in particular that the unverified passport was the one that was valid during the time of the Respondent's unemployment from August 2007 to March 2008. The Applicant also refers to the passport containing stamps, corresponding to this portion of the Relevant Period, which show entry to and exit from Egypt for which the Respondent had not declared an absence from Canada, and neither this passport nor the ICES report indicates entry to Canada in 2007. The Applicant argues that it is not enough to rely on the Respondent's claims of presence in Canada. His actual presence during the period that he claims to have been in the country must be verified, especially for 2007. The Applicants submits that the Judge's reliance on bank statements was unreasonable, in the absence of other documentation provided to prove the Respondent's physical presence in Canada from August 2007 to March 2008.

[19] On other issues related to the Respondent's credibility, the Applicant submits that the Judge unreasonably relied on promotional material published for theatrical productions in which the Respondent claimed to have participated during the Relevant Period, as it was dated outside the Relevant Period. The Judge also unreasonably relied upon the Respondent's explanation of his address history without supporting documentation, particularly given the evidence that other unrelated individuals lived at his address at the same time.

[20] Finally, the Applicant submits that the Judge did not address the fact that the Respondent did not declare any travel to the US and related absences on his citizenship application or his RQ. During the hearing, the Respondent presented credit card statements showing border purchases. However, the Respondent's passports do not contain entry stamps for the United States or an entry visa, a point which was not addressed by the Judge.

[21] Overall, the Applicant's position is that that the Respondent had provided minimal evidence to substantiate his physical presence in Canada and that the Judge's reasons fail to demonstrate how she resolved the gaps in the evidence. The Applicant relies on *Canada (Minister of Citizenship and Immigration) v Diallo*, 2012 FC 1537 [*Diallo*] as an analogous case.

B. *Respondent's Position*

[22] The Respondent states in his written representations that his employment history can be verified by the documents submitted to support his application, including his T-4s, bank account statements, and a verification of employment letter and business cards issued by his employers detailing his various positions at their companies.

[23] He also reiterates his commitment to integrating into Canadian culture, including his passion for theatre and classes he took at Seneca College. The Respondent states that he decided to volunteer some of his time to give back to Canada including potentially joining the Navy Reserves and volunteering with a centre that assists children with special needs.

[24] At the hearing of this application, the Respondent, who is self-represented, emphasized his commitment to living in Canada and becoming a Canadian citizen.

V. Analysis

[25] The Court does not doubt the commitment expressed by the Respondent at the hearing. However, this application for judicial review must be allowed, as I agree with the Applicant that there is insufficient evidence to support the Judge's conclusion that the Applicant had demonstrated he resided in Canada for the required number of days.

[26] The Applicant's arguments focus in large measure upon the fact that the Applicant did not, despite requests, submit a translated copy of the passport that covered the portion of the Relevant Period, between August 1, 2007 and March 28, 2008, when the Respondent was not yet employed such that his presence in Canada could not be confirmed through his employment. Neither the Judge's decision nor the record before her provides any explanation why the translated passport was not provided. The Judge states that, in the absence of this document, she relied on the history of travel entrances to Canada (which I understand to refer to the ICES report), to support the Respondent's stated travel and returns to Canada. However, the Applicant points out the inherent limitations in the ICES report, in that it does not capture dates of

departure from Canada and, as evidenced by the fact that the first entry is in October of 2008, does not necessarily capture all the Respondent's entries to Canada.

[27] The Applicant also notes the Judge's reliance on passive documentation for the period August 2007 to March 2008, when the Respondent describe his activities as looking for work. The Applicant points out that the banking records for this time frame capture only two periods of about a week each, showing debit card purchases or automatic teller withdrawals in Canada. I agree with the Applicant that the reliance on this evidence does not intelligibly support the conclusion that the Respondent was in Canada throughout the August 2007 to March 2008 time frame.

[28] The Applicant's concerns about the time frame covered by the untranslated passport are not restricted to the August 2007 to March 2008 time frame, as that passport covers the period ending on March 7, 2010. However, the August 2007 to March 2008 time frame alone is long enough to be significant, as it represents 240 days, which is more than the excess of 203 days represented by the 1298 days of presence in Canada calculated by the reviewing agent based on the Respondent's submissions. Even allowing for the approximately two weeks of Canadian transactions shown by the banking record, the question whether the required number of days had been achieved could turn on the extent to which the Respondent was present in Canada throughout the remainder of this 240 day period.

[29] The Applicant's argument referred to inconsistency between the Judge's conclusions and stamps in the untranslated passport indicating entries to and exits from Egypt in October 2007

and February 2008. However, as these submissions were based on translations of these stamps prepared by the Applicant, which translations were not before either the Judge or the Court, I do not take this argument into account in reaching my decision. Rather, my decision is based on the fact that no explanation was given for the failure to provide the translated passport that would provide the required information and the limitations in the evidence that the Judge relies on instead, making her decision in my view unreasonable.

[30] The Applicant relies on the decision in *Diallo* as an applicable precedent. In that case, the respondent failed to provide a passport covering nine months of the relevant period. The analysis of Justice Boivin at paragraphs 15 to 21 of this decision is germane:

> [15] Central to this case is the diplomatic passport, the existence of which the respondent does not deny. The only evidence on record of this document's existence is in the notes of an immigration officer (Tribunal Record, pages 23-24). The respondent states in her affidavit that she submitted only those passports and travel documents that she and her daughters had used since they became permanent residents (Respondent's Record, Affidavit of Djenabou Hope Diallo, page3). She also states that the diplomatic passport dates back to before they became permanent residents (Respondent's Record, Affidavit of Djenabou Hope Diallo, page5), and in her memorandum before this Court, she briefly alludes to having lost this document (Respondent's Record, Respondent's Memorandum of Fact and Law, page10 at paragraph5).
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> [16] The Court must point out that the citizenship judge did not mention, discuss or analyze this particular point. Indeed, the citizenship judge makes no mention whatsoever of the absence of the diplomatic passport in her notes to file attached to her decision as reasons. The Court must consider whether it was reasonable for the citizenship judge to decide that the respondent met the requirements of the Act despite the absence of that document covering a period of nine (9) months.
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> [17] The respondent refers to *Canada (Minister of Citizenship and Immigration) v El Bousserghini*, 2012 FC 88 at paragraph 19, [2012] FCJ no106 (QL) [*El Bousserghini*], in support of her

argument that submitting the diplomatic passport should not be an issue here. More specifically, in *El Bousserghini*, the respondents had been required to turn in their old passports to the Moroccan government, and they had explained this fact to the citizenship judge. The Court stated the following at paragraph 19:

> [19] Regarding the first point, in my opinion the Minister imposes an excessive burden on the respondents. In civil cases, the applicable standard of proof is the balance of probabilities. Although citizenship is a privilege, the Act does not require corroboration. It is the responsibility of the original decision-maker, taking the context into consideration, to determine the extent and nature of the evidence required (*Mizani v Canada (Minister of Citizenship and Immigration*); *Abbott Estate v Toronto Transportation Commission; Lévesque v Comeau*). I agree that it would be extremely unusual and perhaps reckless, to rely on the testimony of an individual to establish his residency, with no supporting documentation. I also agree that passports are the best evidence, as long as they have been stamped at each point of entry. Whether it was a failure to produce a document or a failure to call a witness who could corroborate the facts in the citizenship application, the decision-maker could come to an adverse finding. No questions were raised regarding the respondents' explanation that they had to turn in their passports to the Moroccan government to obtain new ones. Although it would have been preferable for them to have kept a copy of these passports, the respondents cannot be punished for not doing so considering the judge was convinced they were physically present in Canada.
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> [citations omitted; emphasis added]

[18] In *El Bousserghini*, as in the present case, there was other evidence supporting the respondents' physical presence in Canada, for example, bank statements proving the use of automated teller cards.

[19] However, the present case can be distinguished from *El Bousserghini*. Indeed, in the case at bar, and unlike in *El Bousserghini*, the respondent has not provided any explanations or evidence confirming her reasons for not submitting this diplomatic

> passport to the citizenship judge—or to the citizenship officer who initially assessed her file. The respondent states that she did not use the passport, but the evidence on record does not allow this Court to find that an event or a decision of another authority—as was the case with the respondents in *El Boussergh*ini—prevented her from submitting the diplomatic passport. If the respondent's passport is in her possession and if her arguments are justified as pleaded, it would appear that filing the diplomatic passport would only confirm the respondent's allegations and dispel any remaining doubts—including those of the applicant—regarding the dates on which the respondent entered and left Canada.
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> [20] Although the respondent made much of the additional evidence on record to establish her presence in Canada during this period of nine (9) months, the Court is of the opinion that this is insufficient to prove that she was indeed present in Canada every day during that period. By contrast, a photocopy of the missing diplomatic passport could have established this fact. Moreover, the Court has noticed that there is no banking documentation or evidence of credit card use for the respondent in the month of December 2007. The Court also notes the respondent's reluctance to provide details concerning her husband's employment, in addition to her failure to provide the diplomatic passport.
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> [21] The Court acknowledges that the respondent only has to prove her physical presence on a balance of probabilities, and that the decision of the citizenship judge is reviewable on a standard of reasonableness. However, in the present case, given the importance of the number of days the respondent was physically present in Canada in determining eligibility for citizenship, the Court finds that it was unreasonable for the citizenship judge to grant the respondent's application without asking her to produce this crucial document, particularly after the existence of the diplomatic passport was explicitly reported to her by the citizenship officer who referred the file to her and since the call-in notice required the respondent to bring with her, among other things, all of the passports (valid or expired) in her possession.

[31] I note that, unlike in *Diallo*, the Judge in the case at hand did refer to the absence of the translated passport. However, in my view the *Diallo* analysis still applies in making it unreasonable for the Judge to have granted the Respondent's application without asking him to produce this evidence. The decision in *El Boussergh*ini is distinguishable, as it was in *Diallo*,

because it involved an explanation for the relevant passport not being available. As in *Diallo*, the Judge's reasons in the case at hand do not refer to any explanation having been provided by the Respondent as to why the translated passport was not provided.

[32] Neither party proposed a question of general importance for certification for appeal, and neither party requested costs.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is for judicial review is allowed, without costs, and the matter is referred to a different decision-maker for re-determination. No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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