

Federal Court



Cour fédérale

Date: 20160421

Docket: T-1724-15

Citation: 2016 FC 457

Ottawa, Ontario, April 21, 2016

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

ALI TAHSIN OZLENIR

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review pursuant to section 22.1 of the *Citizenship Act* RCS 1985, c C-29 [the Act] of a decision dated September 15, 2015 by Citizenship Judge Andrea Paine [the Citizenship Judge], refusing the Applicant, Mr. Ozlenir's, citizenship application in accordance with paragraph 5(1)(c) of the Act.

[2] The Applicant is seeking an order to have the decision set aside and his application referred to a different citizenship judge for redetermination.

[3] The Court has changed the style of cause *ex proprio motu* to concord with the file materials (*Foseco International Ltd. v Bimac Canada*, (1980) 51 CPR (2d) 51 (FC TD) at para 1) as it appears the Applicant's name was misspelled in the initial style of cause as "Tashin" instead of "Tahsin."

[4] For the reasons that follow, the application for judicial review is dismissed.

I. Background

[5] The Applicant, a citizen of Turkey, entered Canada on January 27, 2007 with his wife and two sons aged 13 and 16. On January 28, 2007, the family obtained Canadian permanent residency based upon the Applicant being accepted under the investor class.

[6] On August 18, 2011, the Applicant filed a Canadian citizenship application. The application's relevant period pursuant to paragraph 5(1)(c) of the Act is from August 18, 2007 to August 18, 2011.

[7] On March 18, 2013, Citizenship and Immigration Canada [CIC] sent the Applicant a residence questionnaire that he was to complete and return with supporting documents.

[8] On August 21, 2014, the Applicant wrote a citizenship test and met with a citizenship officer.

[9] On March 20, 2015, a Citizenship Judge reviewed the Applicant's file and requested additional documentation prior to scheduling a hearing. On April 8, 2015, a letter was sent to the Applicant in this regard.

[10] On May 11, 2015, the Applicant's additional documents were received by CIC.

[11] On May 14, 2015, the Applicant's travel history (ICES report) was received by CIC and it listed three entries into Canada during the relevant period in support of his claim that he had been absent 177 days during the relevant period.

[12] On July 7, 2015, the Applicant was sent a notice to appear for a hearing which took place on July 20, 2015, at which point the Applicant was provided with an opportunity to submit supplementary documents. The documents, which included joint TD bank statements, were received on August 4, 2015.

[13] The Applicant's citizenship application was denied on September 3, 2015 and the decision was sent to the Applicant on September 15, 2015.

II. Impugned Decision

[14] The Citizenship Judge applied the strict residency legal test established in *Re Pourghasemi*, [1993] FCJ No 232 [*Pourghasemi*] and concluded that the Applicant did not meet the residence requirement pursuant to paragraph 5(1)(c) of the Act. In dismissing the application, the Citizenship Judge found that the Applicant failed to provide sufficient evidence to discharge his burden on a balance of probabilities that he met the residency requirement of the Act, which included concerns that “[t]he Applicant’s credibility can be questioned” based on a number of problems outlined in the reasons.

III. Legislative Framework

[15] The following provisions of the Act are applicable in these proceedings:

<p>5 (1) The Minister shall grant citizenship to any person who</p> <p>[...]</p> <p>(c) is a permanent resident within the meaning of subsection 2(1) of the <i>Immigration and Refugee Protection Act</i>, 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:</p> <p>(i) for every day during which the person was resident in Canada before his</p>	<p>5 (1) Le ministre attribue la citoyenneté à toute personne qui, à la fois :</p> <p>[...]</p> <p>c) est un résident permanent au sens du paragraphe 2(1) de la <i>Loi sur l’immigration et la protection des réfugiés</i> 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 :</p> <p>(i) un demi-jour pour chaque jour de résidence au Canada avant son</p>
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lawful admission to Canada for permanent residence the person shall be deemed to have accumulated one-half of a day of residence, and

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;

IV. Issues

[16] This application raises the following issues:

- A. Was the Citizenship Judge's decision based on irrelevant factors involving evidence falling outside the relevant time period as to render it unreasonable?
- B. Did the Citizenship Judge apply the appropriate burden of proof with respect to her statements on credibility?

V. Standard of Review

[17] It is established that the standard of review applicable to a Citizenship Judge's determination as to whether an applicant has fulfilled the residency requirement of the Act is reviewable on a standard of reasonableness: *Saad v Canada (Minister of Citizenship and Immigration)*, 2013 FC 570, para 18; *Haddad v Canada (Minister of Citizenship and Immigration)*, 2014 FC 977, paras 18-19.

[18] The issue of the misapplication of the proper burden of proof to determine an adverse finding of credibility is reviewable upon a standard of correctness: *Sellathurai v Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 255, para 109.

VI. Analysis

[19] The Applicant submits that the Citizenship Judge's decision should be set aside for two reasons: firstly, that the decision was based on irrelevant factors involving evidence falling outside the relevant time period; and secondly, that she applied an inappropriate burden of proof with respect to her credibility findings. I find that neither argument is sustainable for the reasons that follow.

A. *Was the Citizenship Judge's decision based on irrelevant factors involving evidence falling outside the relevant time period as to render it unreasonable?*

[20] The gravamen of the Citizenship Judge's decision was her inability to determine whether the Applicant complied with the residency requirements when applying the strict residency test set by Justice Muldoon in *Pourghasemi*. The Citizenship Judge was unable to determine the applicable days because of the inadequacies in the Applicant's evidence, compounded by her concerns about his credibility.

[21] The Citizenship Judge raised numerous issues in the Applicant's evidence. These include confusion about the children's residence and schooling in Canada, inconsistencies in his residence questionnaire, the reliability of his passport evidence and that concerning his

employment and salary earned in Canada. The Citizenship Judge also noted the absence of any evidence demonstrating active daily living by the family in Canada.

[22] With respect to his children, the Citizenship Judge noted that despite their arriving in Canada in January 2007 at the ages of 13 and 16 as permanent residents, the application contained no information on them. The residence questionnaire listed his wife as the only family member. In particular, there was no evidence that they attended school or were involved in any activities in Canada. When questioned why the youngest 13 year old did not attend school when obliged to as a Canadian permanent resident, he answered that he was informed by friends that this was not required after the age of 14. When asked what they did if not attending school, the Applicant only replied that they did “the daily things” without elaborating.

[23] The Citizenship Judge also concluded that the information contained in the Applicant’s Turkish passport was not reliable. The passport had many stamps superimposed on one another with the result that many of them could not be read. Several other pages also had illegible stamps. When questioned about the lack of stamps in his passport for regular travels he alleged he took commencing after the relevant period, he testified that agents did not always stamp passports when entering Turkey. I consider these latter questions to be acceptable in terms of testing the reliability of the information contained in his passports, upon which the Applicant relied, and to which the Citizenship Judge makes reference in her conclusions at paragraph 35 of the reasons.

[24] In terms of being employed in Canada, the Applicant claimed that he worked as an international consultant at the Chambre et Conseil Turco-Canadiens [the Chambre] and earned \$38,000 a year as shown on his tax assessments. This evidence was not supported by other documentation attesting to his work with the Chambre. He also claimed there were six other employees at the Chambre, but was not aware that the Chambre was a registered not-for-profit enterprise, or that it was said to have no salaried employees in Quebec, where he resided.

[25] He also testified that the bulk of his salary of around \$300,000 per year came from other companies registered in his name. He was shown as the owner of several companies in Turkey. He claimed he did not pay any income tax in Turkey during the relevant time period. This gave rise to questions about claiming foreign income on his Canadian income tax statements, which he stated was unnecessary because Turkey had an understanding with Canada. He later claimed that he lived on his savings and did not draw dividends during the period in question. None of this testimony was corroborated.

[26] Otherwise, the Applicant provided no objective evidence demonstrating he and his family's active daily living while Canadian permanent residents. There was no evidence in the form of joint bank statements, credit cards or other documents that demonstrated the receipt and expenditure of funds incurred and expended in daily living activities in Canada over the four year period. The bank statements provided referred only to expenditures of a passive nature such as on-line payments and deposit transfers of money, without any indication of the source of funds.

[27] On the basis of this evidence, I find that the Citizenship Judge's reasons describing the deficiencies in the Applicant's evidence support her conclusion that he failed to demonstrate on a balance of probabilities that he was residing in Canada for the required number of days during the relevant period, such that the decision cannot be said to be unreasonable.

[28] With respect to the complaint that the Citizenship Judge made a reviewable error by her consideration of evidence outside of the applicable time period arising from her questions, I find that such references were relevant insofar as they were intended to consider the weight to be accorded to the Applicant's evidence. These questions pertained to the reliability of his evidence based on his passports, his family's living circumstances with respect to the activities of his children both before and after the relevant time period, and his use of a power of attorney to purchase his Canadian residence prior to the commencement of the four year period.

[29] With respect to the power of attorney issue, the Citizenship Judge found that there were inconsistencies between his residence questionnaire and his passport as to whether he was residing in Canada during the period after arriving in the country, but before the commencement of the relevant period. The Citizenship Judge also concluded that his answer to her question as to why he used a power of attorney to close the transaction of the purchase of his Canadian residence before the relevant period was similarly questionable when he replied that it was the way business was conducted in Turkey. She preferred the more reasonable answer that recourse to a power of attorney to close the transaction was obviously necessary when his passport indicated that he was out of the country at the time.

[30] Although this evidence concerns events outside of the relevant time period, in matters of credibility, a Citizenship Judge is not confined to questions concerning events during the relevant residency period, but may follow-up any areas of concern that arise from the documents on file, or answers provided by the Applicant to relevant questions.

[31] I also distinguish the cases cited by the Applicant, such as *Raad v Canada (Minister of Citizenship and Immigration)*, 2011 FC 256 [*Raad*] and *Deldelian v Canada (Minister of Citizenship and Immigration)*, 2014 FC 854 [*Deldelian*]. In these matters, the citizenship judges' consideration of events outside the relevant period was one factor in their being set aside. However, the essence of those decisions related to the lack of intelligibility of the reasons.

[32] For instance in *Raad*, with respect to events outside the relevant period, the Court concluded at paragraph 62 that "I have to admit that it is not clear to me what factual findings the Citizenship Judge is making here." Similarly, in *Deldelian*, citing Justice O'Keefe in *Shakoor v Canada (Minister of Citizenship and Immigration)*, 2005 FC 776, the Court concluded the following at paragraph 13: "[f]rom a perusal of the reasons, it cannot be determined whether the citizenship judge was referring to the extensive absences from Canada after February 14, 2003, the date of the applicant's application, or just the absences prior to the date of his application."

[33] I do not recognize these cases as standing for the proposition that a citizenship judge cannot pursue inconsistencies or other credibility issues relating to evidence outside of the relevant residency period, so long as the questions are relevant to the issues before the decision-maker. Relevant questions would include, for example, questions that test the reliability of

passport evidence relied upon by the applicant, or that arise from documents attested to by the applicant that are problematic in the judge's mind, even though outside the residency period.

[34] So long as the reasons allow the applicant to understand that the credibility findings affect the weight of the evidence on residency with respect to the residency period, or cause it to be rejected altogether, as opposed to causing confusion as to what days are being counted as days of residency. I therefore find that the cases cited by the Applicant are inapplicable.

[35] Given that the Citizenship Judge in this matter made no attempt to determine the actual days of residency, but generally found the weight insufficient to reliably establish residency, there is no issue of the misapplication of the evidence to days falling within or outside the relevant period.

B. *Did the Citizenship Judge apply the appropriate burden of proof with respect to her statements on credibility?*

[36] I also reject the Applicant's second submission that the Citizenship Judge made a reviewable error in her conclusory statement that "[t]he Applicant's credibility can be questioned," as setting too low a legal threshold in determining that the Applicant was not a credible witness.

[37] Credibility concerns are not limited to findings that a witness intentionally misled a decision-maker, which generally leads to a rejection of all of the witness' evidence and thereby is a ground to dismiss the case. Credibility relates to the believability of the witness for many

reasons and may apply to different aspects of the case such as the reliability of a certain item of evidence. Credibility shortcomings, in addition to not telling the truth, may also pertain to “opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, [which] combine to produce what is called credibility”: *Faryna v Chorny*, [1952] 2 DLR 354 at para 9 (Ont. C.A.), citing *Raymond v Bosanquet*, [1919] 50 DLR 560 at 566. The effect of credibility failures may be to diminish the weight attributed to the specific evidence being considered by the decision-maker, without necessarily concluding that the witness is not to be believed at all.

[38] The thrust of the decision was the failure of the Applicant’s evidence on the balance of probabilities to “reasonably show, [or] suffice to establish residence in the Applicant’s case.” While the statement “questioning” the Applicant’s credibility is somewhat ambiguous, credibility problems were documented in the reasons and I am satisfied that her remarks were in reference to the weight attributable to specific elements of his evidence. As an example, I have already referred to the unreliability of the passport evidence, based in part upon evidence found in the passport outside of the residency period.

[39] I conclude that the Citizenship Judge, in referring to credibility concerns, was stating that inconsistencies in the Applicant’s evidence undermined its weight in many respects, but without going so far as to declare the Applicant not credible as a ground to dismiss the application. No issue therefor, arises in respect of the legal standard applied to the credibility of his statements relied upon to diminish the weight attributable to that evidence.

VII. Conclusion

[40] In conclusion, I find that the Citizenship Judge made no reviewable error with respect to her remarks on credibility, and that the decision falls within a range of reasonable outcomes and is justified, intelligible and transparent based on the facts and law, such that the application for judicial review must be dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"Peter Annis"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1724-15

STYLE OF CAUSE: ALI TAHSIN OZLENIR v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

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JUDGMENT AND REASONS: ANNIS J.

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