

Federal Court



Cour fédérale

Date: 20160127

Docket: T-1300-15

Citation: 2016 FC 97

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, January 27, 2016

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

applicant

and

MAHER BACCOUCHE

respondent

JUDGMENT AND REASONS FOR JUDGMENT

I. Introduction

[1] The Minister of Citizenship and Immigration (the Minister), as permitted under section 22.1 of the *Citizenship Act*, RSC (1985), c. C-29 (the Act), is appealing a decision by a citizenship judge, dated July 8, 2015, to allow the respondent's citizenship application.

II. Context

[1] The respondent is a citizen of Tunisia. He entered Canada on March 24, 2006 and received permanent resident status on February 3, 2009. He filed a citizenship application on April 16, 2011.

[2] As stipulated in section 5 of the Act when he made his application, in order for his application to be accepted, the respondent must show, among other things, that he lived in Canada for at least three of the four years (or 1095 days) before the application, with the understanding that each day lived in Canada before he received permanent resident status, specifically, the period from April 16, 2007 to February 3, 2009, would only count for a half day.

[3] The citizenship judge was satisfied that during the four-year period relevant to the citizenship application, specifically the period from April 16, 2007 to April 16, 2011 (the relevant period), the respondent was physically present in Canada for 1098 days, three days more than the 1095-day threshold prescribed by the Act, and that he therefore fulfilled the residency requirement. The judge was therefore satisfied:

- i. That the respondent was finally able to produce a copy of a valid passport from the relevant period;
- ii. That he was able to count on his then-spouse for financial support during his periods of unemployment during the relevant period;
- iii. That his unreported work for Air Canada, and his likewise unreported absences related to that work, would not adversely affect his success with his citizenship application; and

- iv. That there was enough “active presence evidence” on file to show that he lived in Canada during the relevant period.

[4] The Minister considers the citizenship judge’s decision to be unreasonable for essentially two reasons.

[5] Given that in this Court’s jurisprudence, of the three tests available to citizenship judges to evaluate whether a citizenship applicant fulfils the residency requirement, the citizenship judge seems to have opted for the physical presence test, without expressly stating this, the Minister maintains that the judge can only make the decision she made based on clear and convincing evidence. However, the evidence that supposedly establishes the respondent’s physical presence for the first half of the relevant period, from April 2007 to August 2009, is almost non-existent and the judge could not remedy this on the basis of the respondent’s explanations during his interview without, at the very least, explaining in her decision to what extent this significant evidentiary gap had been addressed. According to the Minister, the judge should have been more vigilant and alert in this regard, given the respondent’s unreported absences, which, the judge admits, “raised doubts about the authenticity of the respondent’s absences.”

[6] The Minister also argues that the citizenship judge was negligent in applying the physical presence test, when she considered the respondent’s “Canadianization” journey, and then included in her analysis considerations that were not relevant to this test. The Minister concludes that the judge’s decision was irreconcilably flawed.

III. Issue and standard of review

[7] The issue in this case is whether the citizenship judge, by concluding that Mr. Baccouche fulfilled the residency requirement, made an error that would justify judicial intervention under section 18.1 of the *Federal Courts Act*.

[8] It is well established that the standard of review applicable to the decision made by the Minister is the standard of reasonableness, as defined in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9 [*Dunsmuir*]; See also: *Saad v. Canada (Citizenship and Immigration)*, 2013 FC 570, at paragraph 18, 433 FTR 174; *Canada (Citizenship and Immigration) v. Baron*, 2011 FC 480, at paragraph 9, 388 FTR 261; *Canada (Citizenship and Immigration) v. Diallo*, 2012 FC 1537 at paragraph 13, 424 FTR 156; *Huang v. Canada (Citizenship and Immigration)*, 2013 FC 576, at paragraphs 24 to 26; *Canada (Citizenship and Immigration) v. Bayani*, 2015 FC 670, at paragraph 17).

[9] Based on this standard of review, the Court must ensure that the judge's decision meets the test of clarity, precision and intelligibility and that it is supported by acceptable evidence that can be justified in fact and in law (*Dunsmuir*, previously cited at paragraph 47).

IV. Analysis

[10] It is well established that the person applying for citizenship bears the onus of proving that the conditions set out in the Act, specifically, with regard to residence, have been met (*El Falah v. Canada (Citizenship and Immigration)*, 2009 FC 736, at paragraph 21 [*El Falah*];

Dachan v. Canada (Citizenship and Immigration), 2010 FC 538, at paragraph 22). Clear and convincing evidence is required (*Atwani v. Canada (Citizenship and Immigration)*, 2011 FC 1354, at paragraph 12). Canadian citizenship is a privilege that should not be granted lightly (*Canada (Citizenship and Immigration) v. Elzubair*, 2010 FC 298, at paragraphs 19 to 21; *Canada (Citizenship and Immigration) v. El Bousserghini*, 2012 FC 88, at paragraph 19, 408 FTR 9; *Canada (Citizenship and Immigration) v. Dhaliwal*, 2008 FC 797, at paragraph 26; *Abbas v. Canada (Citizenship and Immigration)*, 2011 FC 145, at paragraph 8).

[11] When the citizenship judge chooses the physical presence test to determine whether the residency requirement has been met, more evidence is required than simply claiming to have been physically present in Canada. As Mr. Justice Yves de Montigny, now a Federal Court of Appeal Judge, said in the *El Falah* case that has been cited under similar circumstances, the citizenship judge cannot rely on the applicant's claims alone. He must also "verify the applicant's actual presence in Canada during the periods when the applicant claims that he was not outside the country" to avoid "blindly accepting the submissions made to him as to the number of days of absence from or presence in Canada." (*El Falah*, at paragraph 21). As Montigny J. stated, if, as is the case here, one relies on a strict counting of days during which the applicant must be present in Canada, it follows that the citizenship judge "can and must ensure that the applicant was actually on Canadian soil during the period when he claims to have been" (*El Falah*, at paragraph 21).

[12] In this case, the citizenship judge recognized that the "active presence evidence" provided by the respondent "was more applicable to the period from 2009 to 2011 than to the

period from 2007 to 2009.” According to the Court file, the only evidence of his physical presence in the country that the respondent produced is contained in the following documents:

- i. The history of entries into the country from the Canada Border Services Agency, which shows a single entry into the country in July 2008;
- ii. A statement from the Laurentian Bank covering only the period from May 1 to 31, 2007;
- iii. A confirmation of medical insurance for the period from October 26 to November 4, 2007;
- iv. Copies of pages from passport Z788349, indicating that this passport was delivered in Montreal on August 22, 2008; and
- v. Copies of pages from passport Z039970, showing an entry into the country on May 22, 2007, a departure on June 19, 2008, and an entry on July 21, 2008.

[13] I agree with the Minister that these documents are clearly insufficient to reasonably support the respondent’s claims to have been physically present in Canada during the first half of the relevant period. As the Minister noted, there is practically no trace of the respondent in Canada, aside from the few dates contained in these pieces of evidence.

[14] With such scant evidence of presence, at least as concerns the first half of the relevant period, which is a significant period of time, the citizenship judge cannot, without usurping the Minister’s duties, blindly rely on the submissions made to her by the respondent as to the number of days of absence from or presence in Canada. In my opinion, under the circumstances, she should have insisted on more solid evidence of actual presence or, at least, explained how the explanations provided by the respondent addressed the lack of evidence of his active presence for the period from April 2007 to August 2009, without referring only to the respondent’s

credibility. The respondent bears the burden of proving his physical presence in the country with “clear and convincing” evidence.

[15] In *Canada (Citizenship and Immigration) v. Jeizan*, 2010 FC 323, 386 FTR 1 [*Jeizan*], the Court points out that a decision is sufficiently motivated when the reasons are clear, accurate and intelligible, and when it indicates understanding of the points raised by the evidence and indicates why the decision was rendered (*Jeizan*, at paragraph 17; see also: *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 SCR 761, at paragraph 46; *Mehterian v. Canada (Minister of Employment and Immigration)*, [1992] FCJ No. 545 (FCA); *VIA Rail Canada Inc v. Canada (National Transportation Agency)*, [2001] 2 FC 25 (FCA), at paragraph 22).

[16] With all due respect, this aspect is lacking because the decision in question does not intelligibly and clearly explain how and to what extent the clearly insufficient nature of the evidence provided by the respondent for the period from April 2007 to August 2009 was satisfactorily addressed by the respondent’s explanations during his interview with the citizenship judge.

[17] The respondent, who is representing himself, claims he submitted to the citizenship judge additional pieces of evidence in connection with the period from April 2007 to August 2009, that he showed this evidence to the Minister when the application for judicial review was filed, and that he even tried, unsuccessfully, to submit this evidence to the Court’s file in the few weeks before the judicial review hearing.

[18] The respondent is, undoubtedly, acting in good faith. However, I do not have this additional evidence in front of me, nor does the decision being reviewed mention it. Other than his written submissions, the respondent has not added anything to the file other than a motion for extension of time to produce his written appearance. This was his attempt to provide additional pieces of evidence, but his efforts were unsuccessful. In any case, the Certified Tribunal Record in the Court file contains nothing else relating to the period from April 2007 to August 2009, other than the documents I referred to in paragraph 13 of these reasons for judgment. The situation is certainly aggravating for the respondent, who believes he should be granted Canadian citizenship, but I cannot resolve this without ignoring the most basic principles governing the Minister's actions in this case.

[19] Moreover, I also share the Minister's concern that the citizenship judge supported her decision by taking into consideration the respondent's "Canadianization" journey, which is more related to the two qualitative tests for reviewing the residency criteria than to the physical presence test. The judge stated the following:

The respondent spoke frankly about the differences he appreciated between Canadian democracy and Tunisian "dictatorship." He said, "In Canada, you are not a number." He made particular mention of his relief at being able to interact with the police in Canada without fear of corruption. He said that, since arriving in Canada, he has made it a point of honour to contest each of his traffic violations, in order to participate in the municipal Court's democratic process, and he proudly stated that he has sometimes been able to get himself acquitted by using his knowledge of engineering. I find that this testimony convincingly illustrates the respondent's "Canadianization" journey since his arrival here nine years ago.

[20] This passage shows that the citizenship judge confirmed her decision that the respondent had been physically present in Canada during the minimum period required by section 5 of the Act by considering a non-relevant factor. At the same time, this shows that she did not properly understand and apply the residency test she claimed to have applied at the very end of her reasons for judgment, which is effective physical presence. Furthermore, I note that the example of the respondent's "*Canadianization*" efforts offered by the Judge relates to events that occurred after the relevant period. All this supports intervention by the Court.

[21] The Minister's application for judicial review is allowed. In accordance with paragraph 14(1) of the Act, the application will be returned to the Minister or, if necessary, to another citizenship judge for re-evaluation, with the understanding that the respondent will have the right to provide new evidence for this evaluation.

[22] No question is certified.

JUDGMENT

THE COURT RULES that:

1. The application for judicial review is allowed;
2. The decision rendered by Citizenship Judge Marie Senécal-Tremblay on July 8, 2015 approving the respondent's citizenship application is overturned and the matter will be referred back to the Minister, or another citizenship judge, if necessary, for a new examination of the application.
3. The respondent has the right to produce new evidence for this review;
4. There is no question to be certified
5. Without costs

“René LeBlanc”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1300-15

STYLE OF CAUSE: THE MINISTER OF CITIZENSHIP AND
IMMIGRATION v. MAHER BACCOUCHE

PLACE OF HEARING: MONTRÉAL, QUEBEC

DATE OF HEARING: JANUARY 20, 2016

**JUDGMENT AND REASONS
FOR JUDGMENT** LEBLANC J.

DATE OF REASONS: JANUARY 27, 2016

Appearances:

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