

Federal Court



Cour fédérale

Date: 20160720

Docket: T-252-16

Citation: 2016 FC 842

Ottawa, Ontario, July 20, 2016

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

MOHAMMAD FOTROS

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Mohammad Fotros appeals the decision of a citizenship judge to refuse his application for Canadian citizenship. For the reasons that follow, I find that the citizenship judge reasonably concluded that Mr. Fotros did not establish his residence under s 5(1)(c) of the *Citizenship Act*, RSC 1985, c C-29 [Act]. The citizenship judge's conclusions were justified and intelligible, and

did not fall outside the range of possible, acceptable outcomes. Nor was there a breach of procedural fairness. The application for judicial review is therefore dismissed.

II. Background

[2] Mr. Fotros is 62 years old and a citizen of the Islamic Republic of Iran. He arrived in Canada on July 24, 2007, and became a permanent resident under the now discontinued economic investor program. He was accompanied by his wife, son and daughter. Mr. Fotros applied for Canadian citizenship on March 20, 2012.

[3] At the time of Mr. Fotros' application for citizenship, s 5(1)(c) of the Act, which has since been amended, provided that the Minister of Citizenship and Immigration [Minister] shall grant citizenship to any person who is a permanent resident and who has, within the four years immediately preceding the date of the application, accumulated at least three years of residence in Canada.

[4] The citizenship judge identified the relevant period for establishing Mr. Fotros' residence in Canada as March 20, 2008 to March 20, 2012 [the relevant period]. Under the test for residence chosen by the citizenship judge, Mr. Fotros was required to demonstrate that he was physically present in Canada for a total of 1,095 days during the relevant period.

[5] In his initial application for citizenship, Mr. Fotros declared that he had travelled to Iran on four occasions, resulting in 355 days of absence from Canada.

[6] On July 4, 2013, Mr. Fotros was sent a Residence Questionnaire. He completed and returned the questionnaire to Citizenship and Immigration Canada on August 1, 2013, together with supporting documentation.

[7] On January 21, 2014, Mr. Fotros attended an interview with a citizenship officer. The officer identified several credibility concerns arising from his evidence, and referred him to a hearing before a citizenship judge. Mr. Fotros appeared before the citizenship judge on September 23, 2015. Following the hearing, the citizenship judge permitted Mr. Fotros to submit additional evidence to establish his residence.

III. Decision under Review

[8] On January 12, 2016, the citizenship judge found that Mr. Fotros had not discharged his burden of proving, on a balance of probabilities, that he met the residence requirement of s 5(1)(c) of the Act. The citizenship judge chose to assess residence pursuant to the test set out in *Re Pourghasemi*, [1993] FCJ No 232, 62 FTR 122 (Fed TD) [*Pourghasemi*]. This quantitative test requires a citizenship judge to engage in “a strict counting of days of physical presence in Canada” (*Afkari v Canada (Minister of Citizenship and Immigration)*, 2016 FC 421 at para 28).

[9] The citizenship judge noted that Mr. Fotros indicated he was absent from Canada for a total of 355 days, suggesting that he was physically present in Canada for 1,105 days, *i.e.*, ten days over the minimum prescribed under the Act. However, the citizenship judge found numerous inconsistencies in Mr. Fotros’ evidence, which cast doubt on his credibility and reliability.

[10] First, the citizenship judge noted that Mr. Fotros' residence questionnaire and citizenship application indicated that his wife, son and daughter were living and working in Canada during the relevant period. In his interview with the citizenship officer, Mr. Fotros stated that his wife was a housewife and painter, his daughter was a doctor at McGill University, and his son worked at a company in Montreal. However, before the citizenship judge, Mr. Fotros acknowledged that during the relevant period, his wife had lost permanent residence status due to her extended absences from Canada, his daughter was working in the United States, and his son was completing military service in Iran.

[11] When confronted with these inconsistencies, Mr. Fotros said that he may not have understood the questions, and that his daughter had helped him to complete the forms. The citizenship judge found this explanation to be unsatisfactory because Mr. Fotros did not indicate on the forms that another person had helped him to complete them, despite the requirement that he do so. The citizenship judge concluded that Mr. Fotros' testimony respecting the whereabouts of his immediate family was confusing and misleading.

[12] Second, the citizenship judge identified a discrepancy between the dates of Mr. Fotros' declared absences from Canada. In his application, Mr. Fotros stated that he had left Canada on September 4, 2007. On his questionnaire, the date indicated was September 2, 2007. The citizenship judge also noted an error in the residential addresses provided by Mr. Fotros for the relevant period. Although the citizenship judge acknowledged that a difference of two days in the date of departure was minor, and the difference in addresses was a typographical error, she

found the inconsistencies to be indicative of “a lack of attention to the many aspects that are closely examined in an application for citizenship”.

[13] Third, the citizenship judge found that much of the evidence of Mr. Fotros’ vocational training in Canada fell outside the relevant period, and did not confirm his attendance at the courses. With respect to his employment, the citizenship judge noted that Mr. Fotros’ tax assessments indicated low levels of declared income during the relevant period, and his bank statements showed little activity. The medical evidence provided could establish physical presence in Canada on only eight specific dates.

[14] The citizenship judge concluded that she was unable to determine the exact number of days that Mr. Fotros was physically present in Canada, as required under the *Pourghasemi* test. She therefore denied his application for Canadian citizenship.

IV. Issues

[15] This application for judicial review raises the following issues:

- A. Was the citizenship judge’s determination that Mr. Fotros had failed to meet the residence requirement under the Act reasonable?
- B. Was Mr. Fotros denied procedural fairness?

V. Analysis

[16] A citizenship judge’s determination of whether the residence requirement under the Act has been met is a question of mixed fact and law, and is reviewable by this Court against the

standard of reasonableness (*Kohestani v Canada (Minister of Citizenship and Immigration)*, 2012 FC 373 at para 12; *Idahosa v Canada (Minister of Citizenship and Immigration)*, 2013 FC 739 at para 9). Questions of procedural fairness are reviewable against the standard of correctness (*Badulescu v Canada (Minister of Citizenship and Immigration)*, 2016 FC 616 at para 10; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43).

A. *Was the citizenship judge's determination that Mr. Fotros had failed to meet the residence requirement under the Act reasonable?*

[17] Canadian citizenship is a privilege and is not to be granted lightly. The onus is on applicants to establish, on a balance of probabilities, through sufficient, consistent and credible evidence, that they meet the statutory requirements of citizenship (*Canada (Minister of Citizenship and Immigration) v Bayani*, 2015 FC 670 at para 40; *Abbas v Canada (Minister of Citizenship and Immigration)*, 2011 FC 145 at para 8).

[18] The citizenship judge found that she was unable to determine the number of days that Mr. Fotros was physically present in Canada during the relevant period due to the insufficiency of his evidence, compounded by her concerns about his credibility. The citizenship judge applied the strict quantitative test for residence found in *Pourghasemi*. Mr. Fotros does not take issue with the citizenship judge's choice of the test for residence.

[19] Mr. Fotros says that the citizenship judge was unduly influenced by her negative credibility findings, particularly those that arose from the inconsistent information he provided regarding his family's whereabouts. He argues that this was a peripheral issue that was irrelevant

to an assessment of whether he was physically present in Canada for the requisite number of days.

[20] If an applicant is found not to be credible, a citizenship judge may attribute less weight to the evidence under consideration; where there appears to have been an intention to mislead, the decision-maker may have sufficient reason to dismiss the case altogether (*Ozlenir v Canada (Minister of Citizenship and Immigration)*, 2016 FC 457 at paras 30 and 37). A citizenship judge's assessment of an applicant's credibility is entitled to significant deference (*Martinez-Caro v Canada (Minister of Citizenship and Immigration)*, 2011 FC 640 at para 46).

[21] Mr. Fotros relies on Justice Boswell's decision in *Dhaliwal v Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 FC 157 at paras 85 and 86 [*Dhaliwal*] for the proposition that an adverse credibility finding will be sufficient to dispose of a claim only if there is no independent and credible documentary evidence that is capable of supporting it:

[85] In [*Sellan v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 381], the Court of Appeal said (at paragraph 3) that "where the Board makes a general finding that the claimant lacks credibility, that determination is sufficient to dispose of the claim unless there is independent and credible documentary evidence in the record capable of supporting a positive disposition of the claim." The Respondent argues that cases decided about refugee protection claims should not be equated "willy-nilly" to the present situation.

[86] The Respondent's attempt to distinguish *Sellan* is misguided. *Sellan* does not create some special legal rule for refugee claims. Rather, it is simple logic; unreliable evidence for a claim does not negate independent evidence for the same claim, and a proposition is not proven false merely because some of the evidence advanced to support that claim could not alone prove that it is true. Put less formally, distrusting the panicked yelps of the boy who cried wolf

does not let one ignore security camera footage of a wolf chasing him. This principle is not derived from any special considerations for refugee protection; it applies to any truth-seeking process.

[22] Mr. Fotros candidly acknowledges that there may have been valid reasons for the citizenship judge to doubt his credibility, although he notes that he answered truthfully when asked by the citizenship judge about the actual whereabouts of his family. Nevertheless, he maintains that there was independent and credible documentary evidence in the record that was sufficient to establish his physical presence in Canada for at least 1,095 days during the relevant period.

[23] The independent and credible documentary evidence relied upon by Mr. Fotros consisted of: (a) the border control stamps in his Iranian passport, coupled with a report generated from the Canada Border Services Agency's Integrated Customs Enforcement System [ICES]; (b) letters confirming his enrollment in, and successful completion of, numerous vocational courses; (c) letters confirming his volunteerism; and (d) credit card bills confirming purchases in Canada during the relevant period. He says that other documentary evidence, such as bank statements, receipts and residential leases, provided additional corroborating evidence of his physical presence in Canada.

[24] The Respondent says that none of the documentary evidence, viewed separately or together, is comparable to the "security camera footage" of Justice Boswell's example in *Dhaliwal*.

[25] In the File Preparation and Analysis Template provided to the citizenship judge, the citizenship officer noted that Mr. Fotros' travel history, as confirmed by the ICES Report, was consistent with his declared absences. Moreover, the citizenship judge acknowledged that, based on his declared absences, Mr. Fotros was "in principle" physically present in Canada for 1,105 days. It therefore appears that the citizenship judge accepted Mr. Fotros' documentary evidence regarding his absences from Canada, including the stamps in his passport, but found this to be insufficient to demonstrate the days that he was physically present in Canada.

[26] This Court has found that Canadian border officials do not routinely stamp passports, and that a passport does not irrefutably confirm a person's physical presence in Canada (*Ballout v Canada (Minister of Citizenship and Immigration)*, 2014 FC 978 at para 25; *Tanveer v Canada (Minister of Citizenship and Immigration)*, 2010 FC 565 at para 11). While it would have been preferable for the citizenship judge to mention Mr. Fotros' passport stamps in her decision, she reasonably found that the remaining documentation was insufficient to prove his physical presence in Canada for the necessary number of days.

[27] Mr. Fotros submitted rental leases, income tax statements, banking and credit card statements, mortgage documents, documents pertaining to the purchase of a car, letters from friends and family, letters attesting to his volunteer activities, and confirmation of eight medical appointments. The citizenship judge found that the bank statements did not show significant activity during the relevant period, and the medical appointments could confirm Mr. Fotros' presence in Canada on only eight specific dates. The citizenship judge noted that Mr. Fotros was

unable to provide details of the daily management of the hair salon that he owned, and concluded that the evidence was consistent with his being an owner/investor, rather than a daily manager.

[28] The citizenship judge found that there was insufficient information regarding Mr. Fotros' attendance at vocational courses to establish his presence in Canada. This Court has recognized that there is a difference between proof of enrollment in educational courses and an applicant's actual attendance (*Canada (Minister of Citizenship and Immigration) v Qarri*, 2016 FC 113 at para 45). While I have some sympathy for Mr. Fotros' assertion that it is not possible to successfully complete a vocational course without attendance, it is not the role of this Court to re-weigh the evidence on judicial review (*Canada (Minister of Citizenship and Immigration) v Anderson*, 2010 FC 748 at para 26).

[29] The Minister acknowledges that Mr. Fotros' credit card statements confirm numerous purchases within Canada during the relevant period. However, Mr. Fotros did not attempt to demonstrate before this Court that the credit card statements were the equivalent of the "security camera footage" of Justice Boswell's example in *Dhaliwal*. I agree with the Minister that the remaining documentary evidence presented by Mr. Fotros to establish his residence was inconclusive or, in the words of the citizenship judge, "passive".

[30] The citizenship judge acknowledged that inconsistencies in Mr. Fotros' residential addresses and dates of travel were minor. The only conclusion she appears to have drawn from these inconsistencies was that Mr. Fotros showed a lack of attention to detail. While Mr. Fotros

offered plausible explanations for these minor inconsistencies to the Court, this is not sufficient to warrant this Court's intervention.

B. *Was Mr. Fotros denied procedural fairness?*

[31] Mr. Fotros says that he is entitled to a “fairly high standard of procedural fairness” in his citizenship application (citing *El-Husseini v Canada (Minister of Citizenship and Immigration)*, 2015 FC 116 at para 20). This may be contrasted with Justice Kane's observation in *Fazail v Canada (Minister of Citizenship and Immigration)*, 2016 FC 111 at paragraph 46 [*Fazail*] that the duty of procedural fairness owed to applicants by citizenship judges is at the lower end of the spectrum. Citizenship decisions may be appealed to this Court with leave pursuant to s 22.1(1) of the Act, and an applicant may bring another application for citizenship following a refusal (*Fazail* at para 42). Mr. Fotros' counsel acknowledged that a further application for citizenship was a potential option.

[32] Even at the lower end of the spectrum, an applicant must know the case to be met and be given an opportunity to respond (*Fazail* at para 46). Mr. Fotros says that the citizenship judge failed to notify him of any concerns regarding his physical presence in Canada, particularly those arising from his attendance at vocational courses. He says that he should have been informed of these concerns, either during or after the hearing, to ensure that he knew the case to be met and to have an opportunity to provide further information regarding his attendance.

[33] In my view, Mr. Fotros was given sufficient notice at the hearing that his credibility was at issue, and that he would have to provide sufficient evidence to establish his residence. The

citizenship judge identified many of her concerns regarding his evidence at the hearing.

Furthermore, the citizenship judge gave Mr. Fotros an opportunity to submit further evidence in support of his application following the hearing.

[34] As Justice Rennie observed in *Baig v Canada (Minister of Citizenship and Immigration)*, 2012 FC 858 at paragraph 14:

It is axiomatic that the onus rests on the applicant to establish on a balance of probabilities that he or she meets the residency requirements for citizenship. The thrust of the applicant's argument is that the Judge, having given the applicant a further opportunity to produce documents, was obligated to advise the applicant of his specific concerns as to the evidence of residency presented by the applicant. I do not agree. In essence, the applicant seeks to shift the evidentiary burden back to the Judge, whereas it rests squarely with the applicant.

[35] I am therefore satisfied that Mr. Fotros was given a reasonable opportunity to establish his residence under the Act, and was not denied procedural fairness.

VI. Conclusion

[36] The citizenship judge reasonably concluded that Mr. Fotros did not establish his residence under the Act. Her conclusions were justified and intelligible, and did not fall outside the range of possible, acceptable outcomes. Nor was there a breach of procedural fairness. The application for judicial review is therefore dismissed.

[37] Neither party proposed that a question be certified for appeal, and none arises in this case.

JUDGMENT

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

No question is certified for appeal.

"Simon Fothergill"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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