Federal Court  Cour fédérale

Date: 20170130

Docket: T-893-16

Citation: 2017 FC 117

Ottawa, Ontario, January 30, 2017

PRESENT: THE CHIEF JUSTICE

BETWEEN:

MAZIN HELMY AL-OBEIDI

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Mr. Al-Obeidi, is a citizen of Iraq. He applied for citizenship in Canada after having been granted refugee protection and landing here as a permanent resident.

[2] At the time he applied for citizenship, there were three different tests that could be applied to the assessment of his application. These are generally known as the "centralized mode of living" test, the *Koo* test and the "physical presence" test. The latter test focused on whether the

applicant was physically present in Canada for a minimum of three years (1,095 days) during the four years immediately prior to the date of the application, whereas the other two tests were much more qualitative in nature (*Huang v Canada (Minister of Citizenship and Immigration)*, 2013 FC 576, at paras 37–41 [*Huang*]).

[3] In his submissions in support of his application, Mr. Al-Obeidi requested that it be assessed pursuant to the physical presence test. That request was granted by a citizenship judge [the Citizenship Judge], whose decision in this regard attracts deference (*Huang*, above, at para 25) and is in any event not challenged in this proceeding. The Citizenship Judge's focus was upon whether Mr. Al-Obeidi had accumulated 1,095 days of residence in Canada during the period from March 6, 2008, to March 6, 2012 [the Relevant Period].

[4] Ultimately, the Citizenship Judge rejected Mr. Al-Obeidi's application, after finding that it was "impossible to determine how many days the Applicant was actually present in Canada during the relevant period." Based on that finding, the Citizenship Judge concluded that Mr. Al-Obeidi had failed to discharge his burden to demonstrate that he had been physically present in Canada for at least 1,095 days during the Relevant Period.

[5] Mr. Al-Obeidi submits that the decision [the Decision] to reject his application for citizenship should be set aside on the following two grounds:

- the Citizenship Judge made an unreasonable finding that may have been determinative of the outcome, by concluding that a pay receipt that he submitted

dated March 31, 2011, was proof that he was absent from Canada prior to that date; and

- the Citizenship Judge committed a reviewable error of law by excluding his days of travel from and back to Canada in calculating the number of days when he was physically present in Canada.

[6] For the reasons that follow, this application for judicial review will be dismissed.

I. **Relevant Legislation**

[7] The relevant legislation for the purposes of this application is paragraph 5 (1)(c) of the *Citizenship Act*, RSC, 1985 c C-29 [the Act], as it stood at the time that Mr. Al-Obeidi's application for citizenship was made. At that time, that provision was worded as follows:

Citizenship Act, RSC, 1985 c C-29	*Loi sur la citoyenneté*, LRC (1985), ch C-29
Grant of citizenship	*Attribution de la citoyenneté*
5 (1) The Minister shall grant citizenship to any person who	5 (1) Le ministre attribue la citoyenneté à toute personne qui, à la fois :
(a) makes application for citizenship;	*a)* en fait la demande;
(b) is eighteen years of age or over;	*b)* est âgée d'au moins dix-huit ans;
(c) is a permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act, and has, within the four years immediately preceding	*c)* est un résident permanent au sens du paragraphe 2(1) de la Loi sur l'immigration et la protection des réfugiés et a, dans les quatre ans qui ont précédé la date de sa

the date of his or her application, accumulated at least three years of residence in Canada calculated in the following manner:	demande, résidé au Canada pendant au moins trois ans en tout, la durée de sa résidence étant calculée de la manière suivante :
(i) for every day during which the person was resident in Canada before his lawful admission to Canada for permanent residence the person shall be deemed to have accumulated one-half of a day of residence, and	(i) un demi-jour pour chaque jour de résidence au Canada avant son 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;
(d) has an adequate knowledge of one of the official languages of Canada;	*d)* a une connaissance suffisante de l'une des langues officielles du Canada;
(e) has an adequate knowledge of Canada and of the responsibilities and privileges of citizenship; and	*e)* a une connaissance suffisante du Canada et des responsabilités et avantages conférés par la citoyenneté;
(f) is not under a removal order and is not the subject of a declaration by the Governor in Council made pursuant to section 20.	*f)* n'est pas sous le coup d'une mesure de renvoi et n'est pas visée par une déclaration du gouverneur en conseil faite en application de l'article 20.

II. **Standard of Review**

[8] The parties maintain that the two issues raised by Mr. Al-Obeidi are reviewable on a standard of reasonableness. In conducting a review on that standard, the Court must assess

whether the Decision falls "within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law" (*Dunsmuir v New Brunswick*, 2008 SCC 9, at para 47).

[9] I am satisfied that the reasonableness standard applies to the first issue raised by Mr. Al-Obeidi because that issue turns largely on questions of fact (*Dunsmuir*, above, at paras 51–54; *Canada (Citizenship and Immigration) v Purvis*, 2015 FC 368, at para 22).

[10] The second issue raised by Mr. Al-Obeidi concerns a question of statutory interpretation of the Citizenship Judge's "home statute" or a statute closely connected her functions. The reasonableness standard of review is presumed to apply in that context, unless the jurisprudence has already settled the applicable standard, and such jurisprudence is not inconsistent with recent developments in the common law principles of judicial review (*Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47, at para 22 [*Edmonton City*]; *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, at paras 48–50).

[11] In my view, the preponderance of the jurisprudence supports the application of a reasonableness standard of review to a citizenship judge's interpretation of section 5 of the Act (*Huang*, above, at paras 13–25). However, that support may not have reached the level of consensus required to definitively settle the matter. Accordingly, I will assume that it is necessary to move to the second stage of the analysis, at which there is merely a presumption that citizenship judges' interpretations of section 5 of the Act are reviewable on a standard of reasonableness.

[12] That presumption can be displaced in two circumstances. The first is where the question of statutory interpretation at issue falls into one of the four recognized categories to which the correctness standard of review applies. Those categories are: constitutional questions, questions of law that are of central importance to the legal system as a whole and that are outside of the adjudicator's expertise, questions regarding the jurisdictional lines between two or more competing specialized tribunals, and the exceptional category of true questions of jurisdiction (*Wilson v Atomic Energy of Canada Ltd*, 2016 SCC 29, at paras 38–40, 70-71; *Canadian National Railway Co v Canada (Attorney General)*, 2014 SCC 40, at para 55).

[13] In my view, the interpretation of section 5 of the Act, and in particular the words "every day during which the person was resident in Canada" that appear in subparagraph 5(1)(c)(ii), does not give rise to an issue that falls within any of the four categories mentioned immediately above. In short, the interpretation of those words does not give rise to a constitutional question, to one of the two types of jurisdictional questions described above, or to one of the "rare" and "exceptional" questions that are of central importance to the law (*Commission scolaire de Laval v Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8, at para 34; *McLean v British Columbia (Securities Commission)*, 2013 SCC 67, at para 26 [*McLean*]). On the contrary, the interpretation of those words concerns "a nuts-and-bolts question of statutory interpretation confined to a particular context" (*McLean*, above, at para 28).

[14] The second circumstance in which the presumption of reasonableness can be rebutted is where the context indicates that the legislature intended the standard of review to be correctness (*McLean*, above, at para 22). In *Kinsel v Canada (Citizenship and Immigration)*, 2014 FCA 126,

at paras 27–34 and 82 [*Kinsel*], and *Canada (Citizenship and Immigration) v Kandola*, 2014 FCA 85, at paras 42–45 [*Kandola*], which concerned interpretations by ministerial delegates of subsections 3(3) and 3(1) of the Act, respectively, the Federal Court of Appeal [FCA] applied this approach in finding that the presumption in favour of the reasonableness standard had been displaced. In finding that a correctness standard of review applied, the FCA observed that the presumption in favour of a reasonableness standard could be "quickly rebutted" (*Kinsel*, above, at paras 28–30; *Kandola*, above at para 42). In determining that the presumption had in fact been rebutted in each of those cases, the FCA relied on the following factors:

- the absence of a privative clause;
- the question at hand was a pure question of statutory construction embodying no discretionary element; and
- "[t]he absence of anything in the structure or scheme of the Act suggestive of the notion that deference should be accorded to the delegate on the question he or she had to decide" (*Kinsel*, above, at paras 28–30; *Kandola*, above at para 44, emphasis added).

[15] However, with respect to section 5 of the Act, the previous unrestricted right of appeal to this Court under subsection 14(5) was recently replaced with a right to judicial review, but only with leave of this Court (subsection 22.1(1)). Pursuant to subsection 22.1(2), this Court must dispose of applications for judicial review without delay, in a summary way. In addition, an appeal to the FCA may only be made if, in rendering judgment, a judge of this Court certifies that a serious question of general importance is involved and states the question. In my view,

these changes to the Act reflect an intention by Parliament to accord greater deference than was previously the case to determinations made by citizenship judges under section 5 of the Act. Of course, deference may not be appropriate in respect of all issues that may be subject to judicial review. Nevertheless, the fact that greater deference has been accorded to a significant range of decisions by citizenship judges is a relevant factor to consider in a contextual analysis.

[16] The Supreme Court has now clarified that such deference may be warranted even in respect of a question of statutory interpretation that raises a serious question of general importance (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, at para 44).

[17] In addition, in *Mouvement Laïc Québécois v Saguenay (City)*, 2015 SCC 16 at para 46, the Supreme Court appeared to strengthen the presumption in favour of reasonableness in respect of questions of statutory interpretation, when it observed that the presumption can be rebutted "where a contextual analysis reveals that the legislature clearly intended not to protect the tribunal's jurisdiction in relation to certain matters" (emphasis added). This suggests that the presumption remains intact unless a clear intent not to accord deference is present.

[18] Moreover, more recently, in *Edmonton City*, the Supreme Court appeared to discourage the use of the contextual approach in this area, on the basis that it "can generate uncertainty and endless litigation concerning the standard of review" (*Edmonton City*, above, at para 35).

[19] It is also relevant to note that in *Canada (Citizenship and Immigration) v Young*, 2016 FCA 183, at para 4, the FCA held that a visa officer's interpretation of section 5.1 of the

Act was reviewable on a standard of reasonableness. In this regard, the FCA simply observed: "As this is an application for judicial review of an administrative decision, the standard of review is reasonableness, as set out in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 [*Dunsmuir*], subject to certain exceptions, none of which apply here."

[20] Based on the foregoing, I consider that the standard of review applicable to this Court's review of the Citizenship Judge's interpretation of the words "for every day during which the person was resident in Canada after his lawful admission to Canada for permanent residence," as they appear in subparagraph 5(1)(c)(ii) of the Act, is reasonableness. However, nothing turns on this, as my disposition of the first issue raised by Mr. Al-Obeidi renders unnecessary this Court's consideration of the statutory interpretation issue that he has raised.

III. **Analysis**

A. *Did the Citizenship Judge make an unreasonable finding in respect of Mr. Al-Obeidi's pay receipt dated March 31, 2011?*

[21] Mr. Al-Obeidi submits that the Citizenship Judge made an unreasonable finding that may have been determinative of the outcome of his application, by concluding that his pay receipt dated March 31, 2011 was proof that he was absent from Canada for a 27-day period between March 4, 2011 and March 31, 2011.

[22] I disagree.

[23] The finding made by the Citizenship Judge on this point was in her treatment of the relevant facts, before she commenced her analysis. Those relevant facts included several departures from Canada by Mr. Al-Obeidi during the Relevant Period.

[24] In that section of the Decision, the Citizenship Judge observed that Mr. Al-Obeidi had acknowledged that there was no entry in his Integrated Customs Enforcement System [ICES] Traveller History – Traveller Passage Report to corroborate his position that he returned to Canada from a trip abroad on March 4, 2011. However, she noted that he had submitted pay receipts which showed his physical presence in Canada starting on March 31, 2011. From these facts, she deduced that Mr. Al-Obeidi would have been outside Canada for the 27-day period between March 4, 2011, and March 31, 2011.

[25] The Citizenship Judge erred in making that observation, because Mr. Al-Obeidi's pay receipt dated March 31, 2011, indicated that he had worked 89 hours in respect of the pay period "03/31/2011." Based on other pay receipts in the Certified Tribunal Record [CTR], it appears as though Mr. Al-Obeidi was paid every two weeks, although it is possible that he may sometimes have been paid only on a monthly basis. It is difficult to draw any conclusions on this point, because the pay records provided by Mr. Al-Obeidi were incomplete. In any event, it would appear that Mr. Al-Obeidi worked 89 hours at some point prior to March 31, 2011. Therefore, the Citizenship Judge clearly erred in stating that his pay receipts showed his physical presence in Canada starting only on March 31, 2011.

[26] However, that error was not material, because the pay receipt dated March 31, 2011 did not establish precisely when during the month of March 2011 Mr. Al-Obeidi returned to Canada and began to work the 89 hours in question. His pay receipt dated April 15, 2011 reflected that he had worked 86 hours during the two-week period April 1, 2011, to April 15, 2011. So, it was entirely possible that Mr. Al-Obeidi had worked the 89 hours for which he was paid in March of that year, in a similar two-week period, namely, March 16, 2011, to March 31, 2011. The problem is that it is not possible to determine precisely when Mr. Al-Obeidi began to work again following his return to Canada in that month.

[27] More importantly, it was not possible to determine, based on the pay receipt in question, when Mr. Al-Obeidi returned to Canada. His pay receipt dated March 31, 2011, simply reflects that he began to work prior to that date. He may very well have only worked for the two-week period between March 16, 2011, and March 31, 2011.

[28] Even if the Citizenship Judge had given him credit for those 17 days, there would still have been a 10 or 11-day gap between March 4, 2011, and March 15, 2011 that was not accounted for by his pay receipts. That gap alone would be fatal to Mr. Al-Obeidi's application, because he claimed to have been present in Canada for only 1,098 days during the Relevant Period (namely, 1,460 less 362 days of absences: CTR, at p. 267).

[29] Mr. Al-Obeidi further submitted that it was unreasonable for the Citizenship Judge to have failed to find that an exit stamp in his passport confirming his departure from Iraq on March 3, 2011, corroborated his position that he entered Canada the following day.

[30] I disagree. It was reasonably open to the Citizenship Judge to have refrained from making such a finding, because Mr. Al-Obeidi could well have travelled to another country on that date, and remained there for a period of time, prior to travelling to Canada later that month.

[31] Mr. Al-Obeidi also asserted that his booking reservation corroborated his position. However, once again, it was reasonably open to the Citizenship Judge to disregard that document, as it did not demonstrate that Mr. Al-Obeidi actually travelled on that day. Indeed, another booking reservation provided by Mr. Al-Obeidi in respect of one of his other returns to Canada was inaccurate, as proactively acknowledged by Mr. Al-Obeidi when he submitted that documentation in support of his application (CTR, p. 75).

[32] In summary, it was not unreasonable for the Citizenship Judge to find that the pay receipt dated March 31, 2011, the exit stamp at Baghdad International Airport dated March 3, 2011, and the booking reservation did not individually or collectively demonstrate that Mr. Al-Obeidi had entered into Canada on March 4, 2011, as he claimed. That conclusion was well within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

[33] It was Mr. Al-Obeidi's burden to provide better proof in support of that claim, yet he failed to do so. I acknowledge that his passport had been seized by the Canada Border Services Agency, and that some of the stamps in the copy of that passport that he received were not legible. However, during the hearing of this application, Mr. Al-Obeidi's counsel acknowledged that there was no stamp demonstrating an entry into Canada on March 4, 2011, and he proceeded to note that neither he nor Mr. Al-Obeidi were able to explain why that was so, or why there was

no entry record in his ICES Traveller's Report. Counsel simply noted that Mr. Al-Obeidi does not know what happened on that day. In these circumstances, it was reasonably open for the Citizenship Judge to find that Mr. Al-Obeidi had not met his burden of demonstrating that he had returned to Canada on March 4, 2011, and that therefore he had accumulated at least 1,095 days of residence in Canada during the Relevant Period.

B. *Did the Citizenship Judge commit a reviewable error of law by excluding Mr. Al-Obeidi's days of travel from and back to Canada in calculating the number of days that he was physically present in Canada?*

[34] Mr. Al-Obeidi submitted that the Citizenship Judge erred by excluding the five days when he departed Canada as well as the five days when he re-entered the country during the Relevant Period, when she calculated the total number of days that he was physically present in Canada during that period of time. He maintains that, had he been given credit for each of those ten days, he would have established that he had been a resident in Canada for 1,098 days during the Relevant Period, i.e., three more than the minimum 1,095 required.

[35] It is not necessary to address the Citizenship Judge's treatment of this issue because it had no impact on the ultimate conclusion that she reached.

[36] That conclusion was that it was "impossible to determine how many days the Applicant was actually present in Canada during the relevant period." Based on that conclusion, she held that Mr. Al-Obeidi had failed to discharge his burden to demonstrate that he had been physically present in Canada for at least 1,095 days during the Relevant Period.

[37] The Citizenship Judge's conclusion on this point was based primarily on her finding that the duration of his absences from Canada could not be determined from the materials that Mr. Al-Obeidi had provided in support of his application for citizenship. In turn, that finding was based on the fact that the dates of two of his departures from Canada and one of his returns to this country (i.e., the one in March 2011) could not be verified by travel documents or boarding passes (CTR, at pp. 24 and 27).

[38] Accordingly, even if the Citizenship Judge had given Mr. Al-Obeidi full credit for each of the days when he departed from Canada and each of the days when he returned to this country during the Relevant Period, that would not have affected her ultimate conclusion that the number of days when he was actually present in Canada during the Relevant Period could not be determined from the documentation that he provided in support of his application for citizenship. This is because the number of days in respect of which there was uncertainty far exceeded the three days by which he claimed to exceed the 1,095-day minimum. This is readily apparent from the discussion at paragraph 28 above, pertaining to the uncertainty with respect to the date of Mr. Al-Obeidi's return to Canada in March 2011 alone.

IV. **Conclusion**

[39] It was not unreasonable for the Citizenship Judge to find that Mr. Al-Obeidi's pay receipt dated March 31, 2011, the exit stamp at Baghdad International Airport dated March 3, 2011, and the booking reservation pertaining to that trip did not individually or collectively demonstrate that Mr. Al-Obeidi had entered into Canada on March 4, 2011,

as he claimed. That conclusion was well within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

[40] It was also not unreasonable for the Citizenship Judge to conclude that the duration of Mr. Al-Obeidi's absences from Canada could not be determined from the documentation that he had provided in support of his application for citizenship.

[41] Given that conclusion, it is not necessary to address the issue that Mr. Al-Obeidi has raised with respect to the proper interpretation of subparagraph 5(1)(c)(ii) of the Act, as it relates to days of departure and re-entry into Canada. This is because even if Mr. Al-Obeidi had been given credit for each of those days, he would only have exceeded the minimum 1,095 days required by three days, which is much fewer than the number of days in respect of which the Citizenship Judge reasonably concluded that uncertainty existed.

[42] Therefore, this application will be dismissed.

[43] At the end of the hearing in this proceeding, Mr. Al-Obeidi proposed a question for certification in relation to the statutory interpretation issue that he raised. However, given that nothing turns on the question that Mr. Al-Obeidi has proposed, it would not be appropriate to certify such a question.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application is dismissed.

2. There is no question for certification.

"Paul S. Crampton"
Chief Justice

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-893-16
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