Federal Court  Cour fédérale

Date: 20170224

Dockets: T-1366-16
T-1368-16
T-1369-16
T-1370-16

Citation: 2017 FC 233

Ottawa, Ontario, February 24, 2017

PRESENT: The Honourable Mr. Justice Martineau

Docket: T-1366-16

BETWEEN:

MAROWAN ASHOUR M ZALOUK

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Docket: T-1368-16

AND BETWEEN:

HALA ASHOUR M ZALOUK

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Docket: T-1369-16

AND BETWEEN:

ASHOUR M ELMERGHANI ZALOUK

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Docket: T-1370-16

AND BETWEEN:

NAIMA MILOUD, SHAREF

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicants, who are natives from Libya, question the legality and/or reasonableness of the decisions rendered in July 2016 by the Minister's Delegate [ministerial decisions],

rejecting the applications for citizenship filed by Mr. Ashour Zalouk [main applicant] on his behalf and of his wife, Mrs. Naima Miloud Sharef, as well as Mr. Marwan Zalouk, Ms. Hala Zalouk, their two adult children [collectively referred as the co-applicants]. It has been ordered that all cases be united under the same application for judicial review and that file T-1366-16 be considered as the main file. The result of the co-applicants' applications should follow the result of the main application.

[2] The ministerial decisions not to grant Canadian citizenship under section 5 of the *Citizenship Act*, RSC 1985, c C-29 [Act] are based on the fact that the applicants are subject to a prohibition under section 22 of the Act, here the prohibition for misrepresentation mentioned in paragraph 22(1)(e.1) of the Act. Simply put, the Citizenship Supervisor who reviewed the matter found that the applicants misrepresented a material fact in relation to their citizenship applications. As a result, the applicants were informed that a five-year prohibition, starting at the date of the refusal letters, was imposed to the applicants, during which time any subsequent application for citizenship shall be refused, pursuant to paragraph 22(1)(e.2) of the Act.

[3] The applicants do not challenge the fact that the impugned decisions have been rendered under the purported authority of section 22 of the Act. The main issue is whether the rejection of the citizenship applications is a reasonable outcome, and whether the five-year prohibition should be allowed to stand. As submitted by the respondent, the Court should review these applications according to the reasonableness standard given that this issue is a mixed question of fact and law (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] SCJ No 9 at para 47).

[4] The facts are not really in dispute. The whole family arrived in Canada on July 23, 2007, under the permanent resident status (the main applicant in the investor category). They established themselves in Montreal where they rented an apartment. Following their arrival in Canada, the applicants explain that the parents actively searched for a school to enrol their children. However, due to their difficulties to speak French, they were apparently unable to find a suitable school. The family decided to leave Canada on September 26, 2007, returning to Tunis. Almost a year later, the applicants returned to Canada, after finding a private school in Montreal that could accommodate the children. The main applicant returned to Canada on April 26, 2008, while his wife and children joined him later on during the year. Apart from the year spent in Tunis between 2007 and 2008, the main applicant made few short visits to visit his family, as he provided special care for his sick mother.

[5] In 2011, the main applicant filed a citizenship application for himself and on behalf of his wife and two children. The relevant period of four years for the calculation of the 1095 days of Canadian residency begins on July 23, 2007 and ends on July 23, 2011. While filing the declaration, the main applicant failed to declare the 9 months or so passed by the family in Tunis, and only declared 123 days of absence for him, 87 days of absence for his wife, 94 days for Marwan, and 87 days of absence for Hala. The long period of absence in Tunis (and also elsewhere, in Lybia and Morocco) was not mentioned by the applicants.

[6] A Citizenship Supervisor reviewed the evidence in support of the applications and found that the applicants were indeed absent for a longer period than declared by the main applicant. More precisely, the Citizenship Supervisor found that the main applicant was absent for 452

days, Mrs. Sharef for 456 days, Marwan for 447 days, and Hala for 456 days. On February 18, 2016, the Citizenship Supervisor sent a letter to each applicant, highlighting those discrepancies and giving them a chance to explain why they had failed to fully declare all their absences from Canada [fairness letter]. In response, the main applicant provided a colour copy of each of the applicants' passports, claiming that numerous customs stamps were unclear and/or were placed on top of each other, in order to confirm their physical presence. Having considered their explanations, another Citizenship Supervisor came to the conclusion that the applicants had misrepresented their days of absence from Canada and the Minister's delegate rejected their applications for citizenship, and pronounced the five year prohibition described earlier.

[7] Essentially, the applicants recognize that they were not physically present 1095 days during the relevant period, but submit that the five year prohibition is unjust because they have made an honest mistake regarding their long absence from Canada. In response, the respondent points out that the applicants do not challenge the findings of fact made by the Citizenship Supervisor that they failed or neglected to declare in their citizenship applications that they have been absent from Canada for nearly one whole year during the relevant period. This constitutes a material misrepresentation (or omission) of relevant information.

[8] This application for judicial review is without merit. As explained below, the applicants have not been able to point out any reviewable error committed by the Citizenship Supervisor or the Minister's delegate. The Court basically endorses the reasoning for dismissal exposed by the respondent.

[9] The applicants merely reassert before this Court the earlier allegations made to the Citizenship Supervisor. They always acted in good faith when they filled out their applications and had no wilful intention to mislead the authorities. They admit having neglected to mention the period they went back to Tunisia, but explained this withholding of relevant information concerning their days of absence from Canada by the fact that the applications were all completed by the main applicant alone, without any help. As such, many elements confused the main applicant like the unclear customs stamps which are often placed on top of each other. Furthermore, there were important sources of stress that were affecting him, especially with the civil war raging in his native country, Libya. Indeed, one of his nephews was kidnapped and imprisoned by Kaddafi's dictatorship Forces. The main applicant was also extremely worried for his niece who was now forced to take care of her young children alone since the murder of her husband by Kaddafi's Forces. Despite the high pressure generated by the troubling news from his family, the main applicant tried to complete all the citizenship applications to the best of his knowledge. The five year prohibition thus constitutes an unjust punishment.

[10] In the applicant's memorandum, the applicants refer by analogy to revocation of citizenship cases and underline that subsection 10(1) of the Act penalizes the act of misrepresentation only when it is committed intentionally. The burden of proof therefore rests on the Minister to demonstrate, on the balance of probabilities, that they intentionally mislead Citizenship and Immigration Canada [CIC] by making false representations or knowingly concealing material circumstances. The applicants also underline that, after receiving the fairness letter in February 2016, they produced a colour photocopy of their passports to confirm their physical presence in Canada during the relevant period. The applicants argue that they were

under the impression that, in the event of any error on their part, an Immigration Officer would examine the applications and request corrections, if needed.

[11] The arguments made by the applicants are rejected. Pursuant to paragraph 22(1)(e.1) of the Act, a person shall not be granted citizenship under subsection 5(1) of the Act if the person directly or indirectly misrepresents or withholds material circumstances relating to a relevant matter. Indeed, there is no obligation for the Citizenship Supervisor or the Minister's Delegate to search for proof of an element of deliberate or intentional misrepresentation (*Canada (Citizenship and Immigration) v Vijayan*, 2015 FC 289, [2015] FCJ No 263 at paras 74-76.). Both intentional and inadvertent misrepresentations give rise to concerns regarding the reliability of the applicants' information. No parallel can be drawn between subsection 10(1) and paragraph 22(1)(e.1) of the Act, which refer respectively to two different and unrelated situations, the first relating to the rejection of a citizenship application and the second to the revocation of current citizenship in case of misrepresentation. While subsection 10(1) of the Act explicitly requires the proof of false representation or fraud or intentional concealing of material circumstances in their original citizenship application, paragraph 22(1)(e.1) does not refer to an intentional element, but focuses on the consequences of the misrepresentation or the withholding of material circumstances, which induces or could induce an error in the administration of the Act. This was precisely the case here.

[12] I agree with the respondent that the impugned decision is reasonable and that the applicants have failed to demonstrate any reviewable error which could justify any intervention from this Court. The Citizenship Supervisor allowed the applicants full opportunity to respond to

his concerns about possible misrepresentations concerning their declared days of absences from Canada in the course of the applications and to submit all relevant evidence that refuted the allegations of misrepresentation. The impugned decisions were sufficiently justified and explicitly referred to the fairness letter and all applicable legal provisions of the Act. The misrepresentation was material. For example, the Residence Calculator forms not only misrepresent the actual number of days of physical presence in Canada but the total days of absences from Canada. While the Citizenship Supervisor did not have any obligation to return the applications for citizenship, nothing prevented the applicants from withdrawing their applications and from submitting fresh new applications at a later date, if they so wished. Moreover, it is apparent in this case that the applicants did not fulfill the requirement provided under paragraph 5(1)(c) of the Act since they did not account for the minimum of 1095 days of presence in Canada during the relevant period: the actual presence for the main applicant being 1008 days; 1004 for his wife; 1013 for Marwan; and 1004 for Hala.

[13] As a matter of fact, the applicants now admit, in their submissions, to not having met the residency requirement, as they stated that they "almost completed" the three year period when they filed their applications. The applicants bear the burden of proving their presence in Canada with trustworthy evidence (*Shaikh v Canada (Citizenship and Immigration)*, 2010 FC 1254, [2010] FCJ No 1564 at paras 31-34-37). As such, in the presence of clear and material misrepresentations, an officer of CIC is entitled to reject their citizenship applications, pursuant to section 22 of the Act. Overall, the impugned finding of material misrepresentation is supported by the evidence on record, and, as a consequence, the rejection of the application of citizenship is warranted by section 22 of the Act.

[14] With regards to the five year prohibition, it is not a discretionary decision. It flows from the operation of the Act itself and only applies to a future citizenship application. Pursuant to paragraph 22(1)(e.2) of the Act, a person shall not be granted citizenship under subsection 5(1) of the Act if, during the five years immediately before the person's application, the person was prohibited from being granted citizenship under paragraph 22(1)(e.1) of the Act. Accordingly, the five-year prohibition shall start at the date of the decisions taken under paragraph 22(1)(e.1) of the Act in July 2016 by the Minister's Delegate in this case.

[15] The applicants' applications for judicial review are dismissed. No question of general importance is certified by the Court.

JUDGMENT

THIS COURT'S JUDGMENT is that the applicants' consolidated applications for judicial review are dismissed. No question is certified.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1366-16
STYLE OF CAUSE:	MAROWAN ASHOUR M ZALOUK v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
AND DOCKET:	T-1368-16
STYLE OF CAUSE:	HALA ASHOUR M ZALOUK v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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AND DOCKET:	T-1370-16
STYLE OF CAUSE:	NAIMA MILOUD, SHAREF v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	FEBRUARY 15, 2017
JUDGMENT AND REASONS:	MARTINEAU J.
DATED:	FEBRUARY 24, 2017

APPEARANCES:

Me Fareed Halabi	FOR THE APPLICANTS
Me Daniel Latulippe	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Me Fareed Halabi Avocat - Lawyer Saint-Laurent, Quebec	FOR THE APPLICANTS
William F. Pentney Sous-procureur général du Canada Montréal (Québec)	FOR THE RESPONDENT