Federal Court Cour fédérale

Date: 20170727

Docket: T-2186-16

Citation: 2017 FC 732

[ENGLISH TRANSLATION]

Ottawa, Ontario, July 27, 2017

PRESENT: The Honourable Mr. Justice Gascon

BETWEEN:

REDOUANE HABA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Redouane Haba, has dual Algerian and French citizenship and became a permanent resident of Canada in February 2009. He initially came to Canada to get his children settled so they could attend university. On May 22, 2014, he applied for Canadian citizenship.

[2] After reviewing Mr. Haba’s application, his residence questionnaire and other documentation, the citizenship officer identified a number of concerns in Mr. Haba’s file. Consequently, the case was referred to a citizenship judge, who held a hearing with Mr. Haba, during which she questioned him and addressed the concerns regarding his absences and the duration of his residence in Canada. In a decision made on November 21, 2016, the citizenship judge dismissed Mr. Haba’s application on the grounds that he had failed to satisfy the minimum residency requirements in Canada.

[3] Mr. Haba is now applying to the Court for judicial review of that decision. Mr. Haba submits that the citizenship judge made three errors in refusing to grant him citizenship: first, she failed to determine whether he had established a residence in Canada before analyzing the quantitative residency test; second, she erred in finding that he was not credible; and, third, she breached his right to procedural fairness. In response, the Minister of Citizenship and Immigration submits that the judge’s decision is reasonable in all respects and that there was no breach of the rules of procedural fairness.

[4] The only issues to be decided are whether the citizenship judge erred by failing to conduct a two-stage analysis in determining Mr. Haba’s eligibility and whether there was a breach of the rules of procedural fairness in the handling of his case. There is no need to address the third error raised by Mr. Haba with respect to the credibility issues since, during the hearing before this Court, counsel for Mr. Haba stated that he will not pursue his remedy in this regard.

[5] For the reasons that follow, Mr. Haba's application for judicial review is dismissed. I am not satisfied that the citizenship judge's decision does not fall within a range of possible, acceptable outcomes in the circumstances or that there are grounds for the Court to intervene. Rather, I find that the citizenship judge satisfied all aspects of the analysis that she was required to conduct to determine whether Mr. Haba had complied with the residency requirements set out in paragraph 5(1)(c) of the *Citizenship Act*, RSC, 1985, c C-29 [Act]. Furthermore, I see no indication suggesting that Mr. Haba's right to be heard or his right to a fair and impartial hearing were breached.

II. Background

A. *Decision*

[6] At the time of Mr. Haba's application, paragraph 5(1)(c) of the Act stipulated that Canadian citizenship could be granted only if the applicant had resided in Canada for at least three years or 1,095 days in the four years or 1,460 days preceding the application. Mr. Haba's reference period was therefore from May 22, 2010, to May 22, 2014.

[7] The citizenship judge first indicated in her decision that she was applying the analytical approach of a strict calculation as set out in *Pourghasemi (Re)*, [1993] FCJ No. 232 [*Pourghasemi*], whereby a prospective citizen must establish that they have been physically present in Canada for at least 1,095 days during the reference period to satisfy the residency requirement.

[8] In his initial citizenship application, Mr. Haba reported that he had been absent for 336 days, for a physical presence of 1,124 days in Canada during the reference period. Following a meeting with the citizenship officer, Mr. Haba sent a residence questionnaire to correct certain miscalculations and subsequently arrived at a total of 347 days absent and 1,113 days physically present. Noting that Mr. Haba had made miscalculations in his initial application, the citizenship judge began by recalculating the days of absence and cross-referencing the dates against the stamps in Mr. Haba's passports. Next, by adding the trips that had subsequently been included in the residence questionnaire and verifying them against Mr. Haba's passports, Mr. Haba's physical presence in Canada dropped to 1,075 days, which is below the minimum required for the quantitative residency test.

[9] The citizenship judge also noted that a number of entry stamps into various countries did not appear in Mr. Haba's passports, which made it impossible to verify the length of certain trips. She also pointed out that, because Mr. Haba had a French passport and France did not stamp its citizens' passports, it was impossible to verify the length of his trips to that country. Furthermore, the citizenship judge found Mr. Haba's testimony not to be credible, given the many contradictions and the fact that the passports seemed to show that some of his trips were longer than he had reported.

[10] As a result, the citizenship judge found that, on a balance of probabilities, Mr. Haba did not satisfy the quantitative residency test and did not meet the residency requirement to become a Canadian citizen.

B. *Standard of review*

[11] It is well established that the standard of review that applies to decisions made by citizenship judges as to whether the residency requirement has been satisfied and regarding the appropriate test for that purpose is that of reasonableness (*Canada (Citizenship and Immigration) v. Samaroo*, 2016 FC 689 [*Samaroo*] at paragraph 12; *Lally v. Canada (Citizenship and Immigration)*, 2016 FC 688 at paragraphs 3–4 [*Lally*]; *Canada (Citizenship and Immigration) v. Baccouche*, 2016 FC 97 [*Baccouche*] at paragraph 9; *Huang v. Canada (Citizenship and Immigration)*, 2013 FC 576 [*Huang*] at paragraph 26).

[12] Where the standard of reasonableness applies, the Court must show deference and refrain from substituting its own opinion for that of the decision-maker, provided that the decision is justified, transparent and intelligible, and that it falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v. New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at paragraph 47). The reasons for a decision are considered to be reasonable "if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paragraph 16).

[13] Issues of procedural fairness, however, must be reviewed according to the correctness standard (*Mission Institution v. Khela*, 2014 SCC 24 at paragraph 79; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at paragraph 43; *Huang* at paragraph 11). Where the correctness standard applies, no deference is required, and the Court must conduct its own

analysis and substitute its decision for that of the decision-maker if it disagrees (*Dunsmuir* at paragraph 50). In fact, the question then is whether the process followed by the decision-maker was fair (*Majdalani v. Canada (Citizenship and Immigration)*, 2015 FC 294 at paragraph 15).

III. Analysis

A. *The citizenship judge did not err in applying the residency test*

[14] First, Mr. Haba argues that the citizenship judge erred by failing to conduct a two-stage analysis in determining whether he was eligible for Canadian resident status. Relying in particular on the decision in *Afkari v. Canada (Citizenship and Immigration)*, 2016 FC 421 [*Afkari*], Mr. Haba submits that the citizenship judge should have conducted a two-stage analysis and first determined whether he had established a residence in Canada before verifying whether he had satisfied the minimum number of days required.

[15] I disagree with Mr. Haba and am rather of the opinion that, in proceeding as she did, the citizenship judge made no errors warranting the Court's intervention.

[16] Subsection 5(1) of the Act is the cornerstone of the process for becoming a Canadian citizen. Before the most recent amendments to the Act came into force (subsequent to Mr. Haba's application), it was sufficient to "reside" in Canada for at least three out of four years, or 1,095 days, to be eligible for citizenship. Since the Act did not define the term "residence," the Court has been debating for some time what this term and paragraph 5(1)(c) of the Act actually mean. Three schools of jurisprudence emerged from that debate, and citizenship

judges therefore have three avenues for evaluating whether the residency requirements have been met in any given case (*Lally* at paragraph 17; *Boland v. Canada (Citizenship and Immigration)*, 2015 FC 376 [*Boland*] at paragraphs 13–16; *Huang* at paragraph 41). The jurisprudence recognizes that citizenship judges may choose to apply the test they consider to be appropriate and that using one test over another is insufficient to render their decision unreasonable (*Samaroo* at paragraph 21; *Lally* at paragraph 19; *Boland* at paragraph 17). Citizenship judges must simply specify which test they intend to use and why that test has or has not been satisfied (*Samaroo* at paragraph 21; *Canada (Citizenship and Immigration) v. Jeizan*, 2010 FC 323 at paragraph 18).

[17] Citizenship judges may therefore choose to apply either: (i) the test set out in *Pourghasemi*, whereby residency is determined based on a strict calculation of the number of days the applicant was actually in Canada (which must be at least 1,095 days of physical presence in the country in the four years preceding the application); (ii) the test set out in *Papadogiorgakis (Re)*, [1978] 2 FC 208, which is more flexible and recognizes that a person may have resided in Canada even if he or she was temporarily absent, so long as he or she maintained solid ties with Canada and a lifestyle that reflected an intention to settle permanently in the country; or (iii) the test set out in *Koo (Re)*, [1993] 1 FC 286, which defines residence as the place where a person "regularly, normally or customarily lives" and the place where he has "centralized his existence." The latter two tests are often described as qualitative tests (*Huang* at paragraph 17), as opposed to the quantitative test in *Pourghasemi*.

[18] The citizenship judge was therefore required to specify which test she had chosen and conduct her analysis of Mr. Haba's application based on the criteria of that test or see her decision overturned. There is no doubt in this case that the citizenship judge chose the physical presence test from *Pourghasemi* and that she did indeed apply this quantitative test. In her decision, the citizenship judge specifically mentions this and clearly notes, with supporting calculations, why Mr. Haba failed to satisfy that test. In this regard, she cannot be criticized.

[19] That said, I do recognize, as Mr. Haba argues, that it is well established that the analysis under paragraph 5(1)(c) requires a two-stage test: it must first be determined whether the applicant has established a residence in Canada and, second, whether that residency has been maintained for the required duration, based on the residency test chosen (*Samaroo* at paragraph 23; *Afkari* at paragraph 17; *Al Tayeb v. Canada (Citizenship and Immigration)*, 2012 FC 333 [*Al Tayeb*] at paragraph 14). It should also be noted that there is, however, disagreement in the jurisprudence of this Court as to whether this two-stage inquiry is required in cases where the physical presence test for residency is being applied, rather than one of the two qualitative tests (*Elderaidy v. Canada (Citizenship and Immigration)*, 2016 FC 560 [*Elderaidy*] at paragraph 22). I do not need to resolve that issue here, and I am prepared to accept, for the purposes of this case, that the two-stage approach may be used for the analysis that a citizenship judge must conduct, even when the quantitative test from *Pourghasemi* is being applied (*Afkari* at paragraph 17; *Al Tayeb* at paragraph 14).

[20] Nevertheless, that does not mean that the two-stage test boils down to a rigid framework that imposes a strict approach that must be followed in analyzing citizenship applications. On the

contrary, the jurisprudence qualifies its application in two ways, particularly when residency is analyzed on the basis of the quantitative test. First, it is now well established that the first stage of the test (namely the threshold determination of whether the applicant has established a residence in Canada) does not have to be addressed explicitly and may be dealt with implicitly by citizenship judges (*Samaroo* at paragraph 25; *Afkari* at paragraph 22; *Canada (Citizenship and Immigration) v. Lee*, 2016 FC 67 at paragraphs 22–23; *Boland* at paragraph 22; *Canada (Citizenship and Immigration) v. Guettouche*, 2011 FC 574 at paragraphs 14–16). However, it is clear to me from the reasons for decision that, in Mr. Haba's case, the citizenship judge implicitly recognized that Mr. Haba had in fact established his residence in Canada. Implicit recognition means recognition that can be inferred from the reasons for decision, and I find that to be the case here.

[21] The facts in this case are reminiscent of *Boland*, in which Justice de Montigny found that if a citizenship judge proceeded to the analysis of the number of days of residency, it was implicitly recognized that the threshold question had been answered in the affirmative: "it must be presumed that the Citizenship Judge was prepared to accept that the Applicant had established residence on the day of landing, otherwise there would have been no reason to determine whether the Applicant's residency satisfied the statutorily prescribed number of days" (*Boland* at paragraph 22). In the case at hand, even though no explicit indication appears in the decision, it logically follows that the citizenship judge had implicitly decided that Mr. Haba satisfied the first stage.

[22] In particular, this factor makes it possible to differentiate *Afkari* and *Al Tayeb*, decisions on which Mr. Haba centres his argument on his first ground for judicial review.

[23] The second nuance that emerges from the jurisprudence is also closely related to the quantitative residency test. It can be summarized as follows: the need for an in-depth and explicit analysis of the first part of the two-stage test becomes irrelevant when the physical presence test is applied and when, as is the case here, the applicant has simply failed to demonstrate the required number of days of residence. In fact, once a strict calculation of days is made, and once it has been found that an applicant has failed to meet the minimum residency requirements, further analysis of preliminary establishment of residency becomes futile (*Elderaidy* at paragraph 22). I reiterate that the first stage of the test for establishing residency in Canada is an initial threshold that, once satisfied, makes it possible to proceed to the second stage, which consists of deciding whether the applicant's residency satisfies the total number of days required by the Act. If the applicant does not satisfy the first stage, there is no need to proceed to the second. Conversely, if applicants fail the second stage, then the question of whether they satisfied the first stage becomes entirely moot.

[24] Consequently, once the citizenship judge found that Mr. Haba did not meet the requirements of the second stage, whether or not he had established residence in Canada could therefore have no impact on the outcome of his citizenship application, since Mr. Haba simply did not spend enough time in Canada to satisfy the quantitative residency requirement. In these circumstances, the fact that the citizenship judge did not render a clear and explicit conclusion on

the first stage of the test cannot be sufficient to make the decision unreasonable and warrant this Court's intervention, because it could not have changed the outcome of the decision in any way.

[25] I acknowledge that the citizenship judge did not specifically divide her analysis into stages, which might have made it easier to follow the application of the approach and the residency test that she had chosen. From Mr. Haba's point of view, it would have been desirable for the citizenship judge to explain her reasoning in more detail. However, I find that it is possible and reasonable to infer, from a reading of the record in conjunction with the reasons for decision, that the judge implicitly found that Mr. Haba had established his residence in Canada prior to the relevant reference period. In the circumstances, I can easily understand the basis of the panel's decision and determine that the citizenship judge's finding is unquestionably within the range of possible, acceptable outcomes which are defensible in respect of the facts and law. There is therefore no reason for the Court to intervene.

B. *There is no breach of procedural fairness*

[26] Second, Mr. Haba submits that the citizenship judge breached his right to procedural fairness and breached the principles of fundamental justice. He argues that a high standard of procedural fairness must be applied to the decision-making process, and that such a standard was not met. More specifically, Mr. Haba argues that the citizenship judge did not give him sufficient opportunity to respond to the questions and that she failed to consider his explanations, particularly with respect to the entry stamps for several countries that made it impossible to verify certain travel dates.

[27] I do not share Mr. Haba's opinion on this second ground for judicial review.

[28] The duty to act fairly does not concern the merit or the content of a decision, but rather, the process followed. This duty has two components: the right to a fair and impartial hearing before an independent panel and the right to be heard (*Therrien (Re)*, 2001 SCC 35 at paragraph 82). The nature and scope of the duty of procedural fairness can vary depending on the attributes of the administrative tribunal and its enabling statute, but in every case, its requirements refer to the procedure and not to the substantive rights determined by the tribunal. The principle of procedural fairness protects individuals and allows the Court to intervene if needed, when a decision does not respect a person's right to a fair and equitable proceeding.

[29] Mr. Haba's written submissions on this issue of procedural fairness caused some confusion. While the Minister understood them to be a ground citing bias by the citizenship judge, Mr. Haba specified during the hearing before this Court that he was in fact complaining that his right to be heard had been violated. In any event, with respect to either aspect of procedural fairness, I find that the citizenship judge's decision not to pursue Mr. Haba's citizenship application does not breach either component of procedural fairness. There is no indication in this case that the decision-maker was biased or that Mr. Haba was unable to be heard, nor is there any suspicion that he was treated unfairly.

[30] I acknowledge that, if the allegations Mr. Haba makes in his affidavit sworn in support of his application for judicial review were true, they would indeed be troubling. He describes [TRANSLATION] "an extremely aggressive and disrespectful approach" towards him, that the

citizenship judge [TRANSLATION] “did not let him answer the questions and gave [him] the impression that she had already decided the outcome of [his] application” and that he was allegedly prevented from clarifying certain points, such as explaining his arrival in the country and his search for employment. However, based on the citizenship judge’s interview notes (which are included in the decision), it appears that the hearing before the judge in no way unfolded as Mr. Haba’s negative impression would make it seem. Far from it.

[31] In a compelling, meticulous and highly effective exercise at the hearing before this Court, counsel for the Minister ably dissected the citizenship judge’s interview notes and deconstructed Mr. Haba’s patchwork allegations. She very convincingly showed that the judge had systematically given Mr. Haba the chance to be heard and that the grievances that Mr. Haba is raising today are unfounded and are more the result of a distortion of reality. The citizenship judge’s interview notes are full of examples demonstrating that she had actually taken the time to analyze Mr. Haba’s file thoroughly despite his repeated attempts to sidestep certain questions and his failure to answer some of them. If, solely from reading Mr. Haba’s affidavit, doubts could have arisen as to whether his right to a full and complete hearing had been respected, an analysis of the record and interview notes is sufficient to dispel them quickly.

[32] Ultimately, when the record is read as a whole, I am satisfied that there is no reason to believe that the citizenship judge breached the principles of procedural fairness. Mr. Haba had the opportunity to respond and explain himself, whether regarding his incorrect residency calculations, the stamps in his passport or his assertions that the countries that he visited in Europe did not automatically stamp passports. Mr. Haba was given a proper hearing, and the

judge gave him a chance to answer all her questions; the interruptions that Mr. Haba complains about are much more indicative of the citizenship judge's interest in obtaining all the necessary information than an attempt to muzzle Mr. Haba.

[33] In short, Mr. Haba's submissions that the citizenship judge allegedly did not allow him to respond to her questions are not corroborated in any way by the evidence in the record (*Zarandi v. Canada (Citizenship and Immigration)*, 2015 FC 1036 [*Zarandi*] at paragraph 35; *Zhou v. Canada (Citizenship and Immigration)*, 2013 FC 313 at paragraph 35). Quite the contrary. The judge's handwritten notes instead indicate that Mr. Haba lied to her or changed the subject when she asked him certain questions.

[34] I would add that the duty of procedural fairness owed to applicants by citizenship judges is at the lower end of the spectrum: the individual affected must know the case he or she has to meet and have an opportunity to respond (*Charband v. Canada (Citizenship and Immigration)*, 2016 FC 919 at paragraph 22; *Fazail v. Canada (Citizenship and Immigration)*, 2016 FC 111 at paragraph 46). The purpose of the interview with a citizenship judge is to give the applicant the opportunity to respond to the concerns that gave rise to the interview, or at least to discuss them, and applicants must not be deprived of that right (*Taleb v. Canada (Citizenship and Immigration)*, 2015 FC 1147 at paragraph 17; *Johar v. Canada (Citizenship and Immigration)*, 2009 FC 1015 [*Johar*] at paragraph 41). Consequently, citizenship judges must raise their concerns during the interview to give applicants the chance to respond to them (*Johar* at paragraphs 43–44). It is clear that this is exactly what the citizenship judge did in Mr. Haba's case.

[35] With respect to Mr. Haba's allegations that the citizenship judge appeared to be biased, they, too, do not stand up to analysis. The test for determining whether actual bias or a reasonable apprehension of bias exists in relation to a particular decision-maker is well known: "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude" (*Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 SCR 369 at page 394). The question that this Court must answer is therefore whether an informed person, viewing Mr. Haba's case thoroughly, realistically and practically, could find that the citizenship judge was biased (*Zarandi* at paragraph 33; *Shahein v. Canada (Citizenship and Immigration)*, 2015 FC 987 [*Shahein*] at paragraph 19).

[36] As the Minister points out, these kinds of allegations cannot rest on mere suspicion, pure conjecture, insinuations or even mere impressions of an applicant or his counsel. Rather, allegations of bias must be supported by material evidence demonstrating conduct that derogates from the standard (*Arthur v. Canada (Attorney General)*, 2001 FCA 223 at paragraph 8).
Mr. Haba submitted no evidence of this nature. An allegation of bias is serious, and this Court's threshold for making such a finding is high (*Shahein* at paragraph 21). Indeed, "an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice" (*R. v. S. (R.D.)*, [1997] 3 SCR 484 at paragraph 113). In Mr. Haba's case, I simply see no indication of bias in the citizenship judge's behaviour or remarks.

[37] Thus, despite the laudable efforts made by Mr. Haba and his counsel to find a procedural fairness issue in the citizenship judge’s decision, no such issues exist. No matter how many different ways I look at it, I fail to see how this case raises an issue of procedural fairness.

[38] Lastly, I note that the allegations that the citizenship judge lacked impartiality by preventing Mr. Haba from answering the questions should have been raised in a timely manner and not after his citizenship application had been denied (*Moradi-Zirkohi v. Canada (Citizenship and Immigration)*, 2016 FC 463 [*Moradi-Zirkohi*] at paragraph 21). As was the case in *Moradi-Zirkohi*, Mr. Haba’s argument is late coming, given that it was not raised before the citizenship judge. That, in and of itself, is sufficient to reject his argument.

[39] The major disconnect that appears between the actual unfolding of the hearing and Mr. Haba’s negative recollection of it described in his affidavit is a reminder of the importance of raising these kinds of concerns at the earliest opportunity (*Shahein* at paragraph 24). As Justice Leblanc aptly stated in *Moradi-Zirkohi*, this is “particularly significant in a situation like this one where the interview, which is conducted in front of the citizenship judge, is an informal, non-litigious procedure that is normally not transcribed. Evaluating allegations this serious on the sole basis of the applicant’s memory, which is often biased because the citizenship application was rejected and was recorded in an affidavit sworn several months after the fact, does not seem to me to be the best way to deal with this kind of issue” (*Moradi-Zirkohi* at paragraph 22).

IV. <u>Conclusion</u>

[40] For the foregoing reasons, Mr. Haba's application for judicial review is dismissed. The refusal of Mr. Haba's citizenship application is a reasonable outcome under the Act and based on the evidence. According to the standard of reasonableness, the decision under judicial review must only be justified, transparent and intelligible and fall within a range of possible, acceptable outcomes, which are defensible in respect of the facts and law. That is the case here. Furthermore, in every regard, the citizenship judge satisfied all the requirements of procedural fairness in dealing with Mr. Haba's application. Therefore, the citizenship judge's decision is not vitiated by any error that would warrant the Court's intervention.

[41] None of the parties raised any question of general importance to be certified. I agree that there is none in this case.

JUDGMENT in T-2186-16

THE COURT ORDERS that:

1. The application for judicial review is dismissed, without costs;

2. No serious question of general importance is certified.

"Denis Gascon"
Judge

Certified true translation
This 22nd day of January 2020

Lionbridge

FEDERAL COURT

SOLICITORS OF RECORD

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