Federal Court  Cour fédérale

**Date: 20180103**

**Docket: T-888-17**

**Citation: 2018 FC 3**

**Ottawa, Ontario, January 3, 2018**

**PRESENT: The Honourable Madam Justice Strickland**

**BETWEEN:**

**KARIM HUSSAM FARGHAL**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP & IMMIGRATION**

**Respondent**

## JUDGMENT AND REASONS

[1] The Applicant seeks judicial review of the decision of a Citizenship Judge which denied the Applicant's citizenship application on the basis that he did not meet the requirements of s 5(1)(c) of the *Citizenship Act*, RSC 1985, c C-29 ("*Citizenship Act*"). For the reasons that follow, this application is dismissed.

**Background**

[2] The Applicant is a citizen of Egypt. He became a permanent resident of Canada on August 20, 2004 and applied to become a Canadian citizen on January 10, 2013. Accordingly, the relevant period for his required physical presence in Canada was January 10, 2009 to January 10, 2013. A citizenship judge denied his application by a decision dated April 11, 2016. The Applicant sought judicial review of that decision but subsequently withdrew the application upon agreement that the matter would be remitted for redetermination by a different citizenship judge. The redetermination was heard on April 4, 2017 by Citizenship Judge Myriam Taschereau ("Citizenship Judge") who, by her decision dated May 10, 2017, dismissed the application for citizenship because the Applicant failed to establish 1095 days of residence in Canada during the relevant period.

**Decision Under Review**

[3] The Citizenship Judge referenced s 5(1)(c) of the *Citizenship Act* and chose the *Pourghasemi* analytical framework which requires that an applicant be physically present in Canada for 1095 days during the relevant period (*Re: Pourghasemi*, [1993] FCJ No 232 ("*Pourghasemi*")). She stated the Applicant did not initially file all of his passports and that the documents he submitted raised numerous contradictions that called into question his credibility.

[4] The Citizenship Judge reviewed the Applicant's passports, the first of which was valid from January 19, 2003 to January 18, 2010 ("Passport No. 1"), a second passport issued in Montreal on July 15, 2009, while the Applicant was in Kuwait, which was valid until

July 14, 2016 (“Passport No. 2”), and a third passport valid from August 26, 2009 to August 25, 2016 (“Passport No. 3”), which had not been submitted with the initial application, but was sent during the process.

[5] As to the other documents submitted by the Applicant, the Applicant claimed that he took English courses from September 28 to December 18, 2009, as well as attended an occupational safety workshop in January and February 2010. The Citizenship Judge referenced a letter from Immigrant Settlement and Integration Services (“ISIS”) confirming the Applicant received services on four occasions in 2009, but stated that there was no trace of the English courses or services received between November 1, 2009 and February 2010. The Citizenship Judge found the Applicant’s employment at SNC Lavalin between February 24, 2010 and January 10, 2013 was corroborated by pay deposits and other documents.

[6] Regarding bank records covering August 31, 2009 to January 10, 2013, these showed a few purchases and withdrawals but also long intervals without any in-person transactions, despite the Applicant claiming to be in Canada during this time. The Citizenship Judge found nearly a year and two months without any in-person activity in the account, excluding periods when the Applicant declared being abroad. Similarly, the Applicant’s Royal Bank of Canada Visa records from May 23, 2012 to January 4, 2013, showed few purchases in Canada between May 24 and October 3, 2012 and from December 5, 2012 to January 4, 2013.

[7] The Citizenship Judge also reviewed a medical claim history from Nova Scotia covering the period from January 1, 2009 to February 1, 2013 which confirmed three doctor visits during

that period, on September 16 and 23, 2009 and November 23, 2009. After the hearing, the Applicant submitted a document establishing three other medical visits on November 2, 2009, December 1, 2009, and January 7, 2010. However, the Citizenship Judge stated this document did not contain any details regarding the identity of the patient, only the name and address of the recipient of the document. Other documents corroborated the Applicant's presence in Canada on October 18, 2011 and December 4, 2012.

[8] The Citizenship Judge found, when adding together all of the documentation, that there were two periods of 35 and 46 days of absence not covered by the evidence, totalling 81 days. As such, the Applicant did not establish being in Canada from December 2, 2009 to January 6, 2010 and from January 8 to February 23, 2010 ("Disputed Period"). Adding these undeclared absences to the 330 declared days amounted to 411 days of absence from Canada. This meant the Applicant was only present for 1049 days, short of the 1095 required days.

[9] The Citizenship Judge added that the Applicant gave unconvincing testimony by refusing to answer certain questions and providing vague and inconsistent explanations. Further, the Applicant eluded certain topics by attempting to explain how things should normally work at Immigration, Refugees and Citizenship Canada, all in an arrogant and totally uncalled-for manner. While a number of the contradictory statements occurred outside the relevant period, these misrepresentations greatly undermined the Applicant's credibility. Considering that passports do not alone constitute irrefutable proof of presence in Canada, the documents raised a number of contradictions, two long periods were not covered by any evidence, and the Applicant had very little credibility, the Citizenship Judge concluded that the Applicant did not meet the

s 5(1)(c) residence requirement because he had not discharged his burden of proof. Therefore, the application for citizenship was not approved.

**Issues and Standard of Review**

[10] The Applicant raises the following issues:

(1) Did the Citizenship Judge err in law by misrepresenting and/or failing to properly consider the totality of the evidence before her?

(2) Did the Citizenship Judge err in law by failing to provide adequate reasons?

(3) Did the Citizenship Judge breach the duty of procedural fairness and natural justice in the manner in which she dealt with the Applicant's file and by relying on extrinsic evidence and/or failing to disclose or raise residency concerns with the Applicant?

[11] The Respondent submits that the only issue is whether the Applicant identified a reviewable error on the part of the Citizenship Judge.

[12] In my view, the determinative issue is the reasonableness of Citizenship Judge's decision, which must be viewed in the context of her negative credibility findings. The standard of review of reasonableness applies to a citizenship judge's determination of whether the s 5(1)(c) residence requirement had been met (*Shabuddin v Canada (Citizenship and Immigration)*, 2017 FC 428 at para 7; *Zhou v Canada (Citizenship and Immigration)*, 2013 FC 19 at para 13; *Saad v Canada (Citizenship and Immigration)*, 2013 FC 570 at para 18), which findings attract deference (*Al-Askari v Canada (Citizenship and Immigration)*, 2015 FC 623 at para 18 ("*Al-Askari*"); *El Falah v Canada (Citizenship and Immigration)*, 2009 FC 736 at para 14) as do a citizenship judge's credibility findings (*Canada (Citizenship and Immigration) v Gouza*, 2015

FC 1322 at para 17; *Martinez-Caro v Canada (Citizenship and Immigration)*, 2011 FC 640 at para 46 ("*Martinez-Caro*")).

[13] Correctness governs issues of procedural fairness and under this standard no deference is owed to the decision-maker (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Miji v Canada (Citizenship and Immigration)*, 2016 FC 1324 at para 12; *Balta v Canada (Citizenship and Immigration)*, 2011 FC 1509 at para 6; *Canada (Citizenship and Immigration) v Abdulghafoor*, 2015 FC 1020 at para 17 ("*Abdulghafoor*").

**Analysis**

[14] In summary, the Applicant submits the Citizenship Judge erred in finding that the Applicant did not provide any evidence of his physical presence during the Disputed Period. He claims he provided extensive direct and circumstantial evidence of this but the Citizenship Judge failed to engage with and ignored that evidence. His three passports contain stamps consistent with his application, residence questionnaire, boarding passes, Canada Border Services Agency Integrated Customs Enforcement Systems report ("ICES"), and other documents that also corroborate he did not use the passports interchangeably. However, the Citizenship Judge failed to consider the passport stamps either as stand-alone evidence or in conjunction with other corroborating evidence and to conduct any comparative analysis. She erred by failing to consider the evidence in its totality and instead focused excessively on the Applicant's physical presence in Canada outside the relevant period, his family's 'story', and other considerations relating to a qualitative rather than quantitative citizenship test. She also made incorrect, contradictory and arbitrary credibility findings, all of which were unrelated to the issue of

physical presence in Canada during the relevant period. Further, she breached procedural fairness by failing to advise the Applicant of her concerns regarding his supporting documentation and inquiring into periods outside the relevant period.

[15] I would first point out that the Citizenship Judge was satisfied that the Applicant established his presence in Canada during the relevant period with the exception of the 81 days of the Disputed Period. In the result, this left him 46 days short of the required 1075 days.

[16] I agree with the Applicant that the Citizenship Judge erred when she found that there was no trace of the English courses or services provided between November 1, 2009 and February 2010, which falls within the Disputed Period. While the ISIS certificate of completion for the English for Engineers dated December 18, 2009 does not, in and of itself, establish the Applicant's attendance in Canada, the record that was before the Citizenship Judge also contained the ISIS student assessment for the Applicant with respect to English for Engineers, September 29 - December 18, 2009, which included his attendance at 95%. The Citizenship Judge's reasons fail to acknowledge or analyze the assessment form when assessing the Applicant's residency during the Disputed Period. This was an error, being an erroneous finding of fact made without regard to the evidence, as it was relevant evidence that directly contradicted her finding that there was "no trace of the English courses or services between November 1, 2009 and February 2010" (*Cepeda-Gutierrez v Canada (Citizenship and Immigration)*, 1998 CanLII 8667 at para 17 (FC)).

[17] The Respondent concedes that the Citizenship Judge erred in her factual finding that there was no evidence to establish that the Applicant was physically present in Canada during the English for Engineers course, but submits that as this accounts for only 17 of the disputed days, still leaving the Applicant 29 days short of the required 1095 and, therefore, the error does not render the decision unreasonable.

[18] In my view, to address this, the Citizenship Judge's decision must be reviewed alongside the record as a whole to determine if the outcome is reasonable. Moreover, the Citizenship Judge's treatment of the remaining evidence must be assessed in light of her credibility findings, which attract significant deference (*Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 at para 4 (FCA) ("*Aguebor*"); *Canada (Citizenship and Immigration) v Vijayan*, 2015 FC 289 at para 64).

[19] In that regard, the Citizenship Judge acknowledged that the Applicant also claimed he had taken occupational health and safety workshops at ISIS in January and February, 2010. The supporting documents found in the record were a CAPSC Safety Services Nova Scotia document certifying that the Applicant completed "Occupational Health and Safety Committee", which document is dated February 10, 2010 and a St. John Ambulance document, issued on January 12, 2010, certifying that the Applicant had completed a course in WHMIS. However, the date, or the date of issuance, of these certificates does not establish when or where either course was given, its length, or whether the Applicant attended in person or completed the course online. Thus, these documents did not establish his presence in Canada during the Disputed Period. Therefore, the Citizenship Judge's failure to further address them is not fatal.

[20] As to the Applicant's assertion that the Citizenship Judge did not raise this or other concerns about the evidence with him during the hearing, the Citizenship Judge was not obligated to provide a running commentary on the sufficiency of his evidence (*Zheng v Canada (Citizenship and Immigration)*, 2007 FC 1311 at para 14 ("*Zheng*")). The onus was on the Applicant to provide documentation that supported his presence in Canada during the relevant period and, as this was a redetermination, he was aware that credibility was a concern. I would also note that although the Applicant claims that, had he been asked, he could have provided further documentation supporting his citizenship application, in his affidavit filed in support of his application for judicial review he did not include any further documentation indicating when the courses were held or confirming that he attended them in person.

[21] The Applicant also claims that he met personally with a Halifax Regional Municipality ("HRM") representative on January 21, 2010, to collect a compensation cheque for the injuries he sustained as a result of an incident that incurred on a bus in 2009, but that the Citizenship Judge ignored his statements concerning this meeting, even though the Applicant indicated he could provide email correspondence confirming the in-person meeting.

[22] The record contains an invoice of Emergency Health Services ("EHS") for ambulance services rendered on November 2, 2009, a Hakim Optical invoice for glasses dated November 3, 2009, as well as an email dated December 16, 2009 from a HRM claims assistant, risk and insurance, indicating that that HRM had made the request for payment of the EHS invoice to its account department, which would be paid directly to EHS, and for a cheque in the full amount of the cost of the Applicant's glasses which would be sent out to him as soon as it

was completed. The Applicant asserts that a bank statement found in the record confirms the deposit of the cheque in the amount of $609.00 on January 21, 2010.

[23] In an affidavit made in support of this application for judicial review, the Applicant included a series of emails between himself and the HRM claims assistant. However, this documentation was not in the record before the Citizenship Judge and, as a general rule, the evidentiary record before a reviewing Court on judicial review is restricted to the evidentiary record that was before the decision-maker (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 19-20; *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at paras 23-28), there are limited exceptions to the general rule, including the consideration of new evidence for the purpose of establishing a breach of procedural fairness not apparent from the record. In any event, the emails fail to clearly establish a personal meeting between the claims assistant and the Applicant during the Disputed Period. Further, the referenced bank record indicates not a deposit, but a branch to branch transfer of $609.00.

[24] Similarly, the correspondence with SNC Lavalin concerning attendance at a job interview is found in an affidavit of the Applicant made in support of this application for judicial review, but was not before the Citizenship Judge and, again, does not clearly establish that the Applicant attended the interview in person.

[25] The Applicant also asserts that, on the basis that a Nova Scotia Health Authority document identified him only as its recipient, rather than the patient, the Citizenship Judge

assigned no weight to the document which confirmed three medical visits by the Applicant on November 2, 2009, December 1, 2009, and January 7, 2010, the latter being during the Disputed Period. I note that the referenced document would appear to refer to a printout entitled "NS Health (Central Zone) Visit History" and while the Citizenship Judge qualified this document, she also appears to have accepted it as establishing the Applicant's presence in Canada on January 7, 2010, as there is no other evidence placing him in Canada on that date.

[26] As to the Applicant's view that the Citizenship Judge failed to consider his passport stamps, alone or in conjunction with other evidence, the Citizenship Judge reviewed the Applicant's three passports, noting that the Applicant did not initially file all of his passports. Further, that Passport No. 1 was declared lost by the Applicant and then found in 2016 (the evidence in the record is that it was found in 2009) but that even though the passport was valid from January 19, 2003 to January 18, 2010, it did not show any entry into Canada prior to May 1, 2009. Therefore, this did not corroborate the Applicant's evidence at the hearing that he stayed in Canada a few times between September 3, 2004 and his return in 2009. The Citizenship Judge did not find that a review of Passports No. 2 or No. 3 disclosed any entries that contradicted the Applicant's declared travel during the relevant period or otherwise or that he used Passports No. 1 and No. 2 interchangeably. While the Applicant argues that the Citizenship Judge failed to consider his passport stamps either alone or together with other evidence, other than the contradiction concerning Passport No. 1, she did not find any discrepancies in his declared entries into Canada and entries and exits to Kuwait. Put otherwise, she accepted his passport stamps but found that alone they were not irrefutable proof of presence in Canada during the Disputed Period. The Applicant does not submit that any of the

corroborating documents he references, such as the ICES report, place him in Canada during the Disputed Period. In my view, no error arises from the Citizenship Judge's treatment of the passports and related evidence.

[27] The Applicant also asserts that he submitted the lease agreement bearing his name and a letter from the landlord confirming the family's residence at the 36 Abbey Road apartment at the first hearing and with the residency questionnaire, but that the Citizenship Judge incorrectly found he had failed to do so. I note that the File Preparation and Analysis Template ("FPAT") prepared by an immigration officer on January 8, 2016 indicates that a rental application dated August 24, 2004 and signed by the Applicant's father, as well as a copy of the tenant's ledger confirming rent payments from September 1, 2004 to July 8, 2013 for the apartment at Abbey Road had been provided and that the Applicant had declared his father was paying the rent. The FPAT also states that the Applicant had not provided evidence of the "renewal of the rent" or "notice of renewal", only the rental application. The Residence Questionnaire required the Applicant to provide documents covering the relevant period including "Rental/Lease agreements with proof of rental payment".

[28] While a copy of the Rental Application from Universal Property Management for the subject apartment in the name of Hussam Eldin Mohammad Farghal, the Applicant's father, as well as a Tenant Ledger of Universal Property management for the apartment in Eldin Farghal's name showing rental payments from September 1, 2004 to July 8, 2013, are found in the record, no copy of the lease is found there. A copy is found in an exhibit to an affidavit filed by the Applicant in support of this application for judicial review.

[29] Accordingly, I cannot conclude that the Citizenship Judge erred in her conclusion that a copy of the lease had not been provided. The Citizenship Judge also stated that the documentation submitted raised numerous contradictions that called into question the Applicant's credibility. In that regard she referenced the absence of a lease and went on to state "[A]ccording to the information collected in CIC's unique and integrated system (GCMS), it appears, however, that this address was also used by other citizenship applicants during the same time frame".

[30] This does not establish a contradiction in the documentation submitted by the Applicant. And, if the Citizenship Judge was basing an adverse credibility finding on information available only to her, then she should have raised this with the Applicant at the interview and provided him with an opportunity to respond (*Irani v Canada (Citizenship and Immigration)*, 2013 FC 1273 at para 17). However, she identified other contradictions and concerns in support of her adverse credibility finding, including: the Applicant's Halifax address as stated in his initial application and his residency questionnaire; in his residency questionnaire he declared that his father lived in Canada and Egypt during the relevant period but, in fact, his father had lost his permanent resident status, and at the hearing the Applicant admitted that his father had been working in Kuwait since the 1970's; the Applicant had also initially refused to state where he had resided between September 2004 and September 2009, then claimed he had lived in Kuwait for about one year and, when faced with his LinkedIn profile, admittted that he had lived and worked in Kuwait as an engineer from April 2004 to December 2009; and, at the hearing he stated that he stayed in Canada a few times between September 3, 2004 and his return in 2009 but

Passport No. 1 did not show any entry prior to May 1, 2009. The Citizenship Judge also found his testimony to be evasive and vague.

[31] There is no doubt that the onus lies with the Applicant to produce sufficient evidence of meeting the residence requirements under the *Citizenship Act* (*Abbas v Canada (Citizenship and Immigration)*, 2011 FC 145 at para 8; *Zheng* at para 14). It is also settled law that significant deference is owed to credibility findings of decision-makers (*Canada (Citizenship and Immigration) v Abidi*, 2017 FC 821 at para 40; *Aguebor* at para 4) such as citizenship judges (*Martinez-Caro* at para 46). The Citizenship Judge was also free to assess the evidence in light of the Applicant's credibility as a whole (*Al-Askari* at para 22; *Ozlenir v Canada (Citizenship and Immigration)*, 2016 FC 457 at para 37).

[32] I agree with the Applicant that many of the Citizenship Judge's factual observations seem to focus on the fact that the Applicant lived and worked in Kuwait as an engineer over many years, other than during his declared returns to Canada, which is not relevant to a *Pourghasemi* analysis. However, in her conclusion, the Citizenship Judge gave four reasons, taken together, for finding that the Applicant had not met the residency requirement. First, she considered that passports do not constitute on their own irrefutable proof of presence in Canada which finding is supported by the jurisprudence (*Haddad v Canada (Citizenship and Immigration)*, 2014 FC 977 at para 27; *Moradi-Zirkohi v Canada (Citizenship and Immigration)*, 2016 FC 463 at para 17). She also cites a number of contradictions raised by the documents, which she identified in her reasons. While she erred in finding that the Disputed Period was not covered by any evidence, the overlooked evidence accounted for only 17 days of that period. Finally, she attributed very

little weight to the Applicant's testimony. This meant that while it was open to her to have accepted that the evidence was sufficient, on a balance of probabilities, to establish that the Applicant met the residency requirements, she was not obliged to do so based on the lack of evidence pertaining to the Applicant's physical presence in Canada during the Disputed Period and her negative credibility findings.

[33] In the result, and read in whole, while the reasons are far from perfect they are adequate (*Abdulghafoor* at para 31; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16) and I am not persuaded that the decision falls outside the range of reasonable outcomes or that there was a breach of procedural fairness.

**JUDGMENT IN T-888-17**

**THIS COURT'S JUDGMENT is that**

1. The application for judicial review is dismissed;

2. No question of general importance is proposed by the parties and none arises; and

3. There will be no order as to costs.

"Cecily Y. Strickland"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | T-888-17 |
| **STYLE OF CAUSE:** | KARIM HUSSAM FARGHAL v THE MINISTER OF CITIZENSHIP & IMMIGRATION |
| **PLACE OF HEARING:** | HALIFAX, NOVA SCOTIA |
| **DATE OF HEARING:** | DECEMBER 13, 2017 |
| **JUDGMENT AND REASONS:** | STRICKLAND J. |
| **DATED:** | JANUARY 3, 2018 |

**APPEARANCES:**

| | |
|---|---|
| Mirsada Stasevic | FOR THE APPLICANT |
| Sarah Drodge | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Mirsada Stasevic<br>Barrister and Solicitor<br>Halifax, Nova Scotia | FOR THE APPLICANT |
| Attorney General of Canada<br>Halifax, Nova Scotia | FOR THE RESPONDENT |