Federal Court Cour fédérale

**Date: 20180716**

**Docket: T-188-17**

**Citation: 2018 FC 739**

**Ottawa, Ontario, July 16, 2018**

**PRESENT: The Honourable Madam Justice Elliott**

**BETWEEN:**

**AHMED FARAZ MOHAMMAD ASLAM**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. Overview

[1] The Applicant seeks, pursuant to sections 22.1(1) and 22.2 of the *Citizenship Act*, RSC 1985, c C-29 [*Citizenship Act*], judicial review of a decision made by a citizenship judge [Judge] in which the Applicant's application for citizenship was denied on the basis that he did not meet the residence requirement.

[2] The Applicant was denied citizenship because the Judge found that on the balance of probabilities the Applicant did not meet the residence requirement set out in paragraph 5(1)(c) of the *Citizenship Act* which at the relevant time stated that:

| **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; |
| … | … |
| (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 the date of his or her application, accumulated at least three years of residence in Canada calculated in the following manner: | 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 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; |

[3] For the reasons that follow, this application for judicial review is granted. It was procedurally unfair to determine the application by making negative credibility findings against

the Applicant based on the possibility that he had an undisclosed travel document without first providing him an opportunity to address that concern.

## II. **Background Facts**

[4] Although born in Pakistan, the Applicant is a naturalized citizen of Kenya who travels on a Kenyan passport.

[5] The Applicant became a permanent resident of Canada on September 20, 2004. He filed an application for citizenship on February 22, 2012. The relevant period for determining his residence was from February 22, 2008 to February 22, 2012. During that period of time it was necessary that he be resident in Canada for at least 1095 days. According to his evidence his days of residence by physical presence totalled 1101 days, which is six more than the minimum requirement.

[6] The Applicant declared absences totalling 359 days, in five different periods of absence, during the relevant period:

- February 22, 2008 – February 27, 2008: 5 days;
- June 16, 2008 – August 12, 2008: 57 days;
- December 22, 2008 – December 29, 2008: 7 days;
- March 30, 2010 – November 6, 2010: 221 days;
- December 16, 2010 – February 23, 2011: 69 days.

[7] The Integrated Customs Enforcement System [ICES] report, which is maintained by the Government of Canada, confirmed that the Applicant returned to Canada on February 27, 2008, August 12, 2008, December 29, 2008, November 6, 2010 and February 23, 2011. These are the

same dates which were reported by the Applicant. It should be noted that ICES reports only track entry to Canada; they do not record exits from Canada.

[8] The Applicant supported his application for citizenship with the two Kenyan passports he possessed during the relevant period. He also filed numerous credit card and bank statements, as well as OHIP records and various other documents.

[9] A Citizenship Officer [Officer] conducted a review of the Applicant's application and prepared a File Preparation and Analysis Template dated April 26, 2015 [FPAT]. The FPAT resulted in the referral of the application to a citizenship judge. The Officer identified two primary concerns: (1) the Applicant's business did not require him to be in Canada and, (2) as he was born in Pakistan, the Applicant might have a second, undeclared, passport.

[10] With respect to the possibility of an undeclared passport, the comments in the FPAT are that the Officer was unable to verify all the absences of the Applicant because there was one United Kingdom entry stamp missing and there was one undeclared Canadian re-entry stamp. This is disputed by the Applicant who says the date of the stamp was mis-read. The Officer also noted that the Applicant provided "only" his Kenyan passports within the relevant period, adding that "it was unknown whether the applicant also possesses a passport from his country of birth, Pakistan".

[11] With respect to the Applicant's business, it was said that there was no evidence to show the applicant was physically present in Canada while he was running his own company. Nor was it clear whether the business activities were conducted by the Applicant.

[12] After outlining the nature of these concerns the Officer concluded by saying "I am referring this file to a Citizenship Judge for a Residence Hearing to address the significant credibility concerns."

[13] As a result of the FPAT, a request for certain types of additional evidence was sent to the Applicant in response to which he provided: colour photocopies of every page in his passports covering the relevant period; his apartment rental agreement, renewals and receipts for payment from the landlord; his telephone bills; a letter from an accounting firm verifying his income and affirming that he was self-employed; his notices of assessment from CRA for 2008-2012; and personal documentation such as his marriage certificate, entry stamps for his wife and the renewal of her visitor record. The file also contains a vehicle purchase agreement for the new vehicle the Applicant purchased in 2009.

## III. **Decision under review**

[14] The decision under review is dated December 21, 2016 [Decision].

[15] The Judge began by noting that the Minister's delegate had referred the case to the Judge because of credibility reasons in that the Applicant may have had more absences than he declared. After noting that the Applicant bears the burden of proving he met the residence requirements of the *Citizenship Act*, the Judge indicated that he would be applying the strict physical presence test as set out in *Pourghasemi (Re)*,[1993] FCJ No 232 (QL); 62 FTR 122 (TD).

[16] The Judge noted that the Applicant had provided two passports which covered the entire relevant period and that he had declared 1101 days of physical presence in Canada with either

359 (in the citizenship application) or 360 days (in the Residence Questionnaire) of absence. The Judge observed that the ICES report showed the Applicant entered Canada five times during the relevant period.

[17] To determine the number of days of physical presence in Canada the Judge first examined the number of days of declared absences. He began by examining the number of declared absences. The Judge was satisfied after comparing the trips declared in the application form with those declared in the Residence Questionnaire that the Applicant had declared five trips during the relevant period.

[18] The Judge then turned to an examination of the departure and return dates of the declared absences. He noted the entry to Canada dates shown on the ICES report corresponded to the declared dates and accepted that those five return dates were verified.

[19] Looking at the Applicant's passports, the Judge found that the Applicant entered the United Kingdom (UK) on June 16, 2008 and again on December 22, 2008. The passports also indicated that the Applicant entered the United Arab Emirates (UAE) on March 30, 2010 and entered Switzerland on December 24, 2010.

[20] The Judge said that he would conduct a detailed review of the Applicant's travel as there were concerns that the Applicant could have another travel document given the pattern of his travel and the absence of supporting evidence. As the return dates had been accepted the focus of the analysis turned to the Applicant's departure dates. The second and third periods of the five periods of absence were identified and briefly examined by the Judge.

A. *The period June 16, 2008 – August 12, 2008*

[21] During this period of time the Applicant left Canada for the UK, Switzerland and the UAE. The Judge was concerned that there were only three entry stamps for the UK: June 16, June 29 and August 6, 2008 and there were no entry stamps for either Switzerland or the UAE. The Judge determined that "[i]t would have been logical to have seen passport stamps to document his travels in between these entries into the UK."

B. *The period December 22, 2008 – December 29, 2008*

[22] Similarly, the Judge found entry stamps showing the Applicant had entered the UK on December 22 and December 28, 2008 but, although the Applicant declared that he had travelled to the UAE on business during that period, there were no UAE entry or exit stamps present in the passport.

C. *Conclusion that entry and exit stamps required corroboration by other evidence*

[23] Having identified what he considered to be anomalies with those two periods of absences, the Judge said he would approach the passport entry and exit stamps with caution. He would not rely on them unless they were corroborated by other documentary evidence. The Judge therefore examined all five periods of absence on that basis.

[24] In seeking corroboration, the Judge reviewed the Applicant's OHIP records and credit card statements.

(1) OHIP records

[25] The Judge noted that the OHIP records showed the Applicant had twenty-three medical appointments during the relevant period but the first appointment was December 31, 2008 and

the last one was February 11, 2010. The first appointment was ten months after the start of the relevant period and the last appointment was before two of the departure dates. As a result, the Judge found that the OHIP records could not confirm the departure dates for the relevant period of the application.

(2) Credit cards

[26] The Judge then examined the credit card records of the Applicant but found they raised a number of concerns. In particular, with respect to the period from June 16, 2008 to August 12, 2008 he noted there was a charge by British Airways on June 11, 2008 which appeared to have been made in Canada. A purchase with LOT Polish Airlines on June 12, 2008 however was made in British pounds indicating to the judge that it was made in the UK. There were also three cash advances made on the credit card during the period of absence each of which was made in Canadian dollars.

[27] The conclusion drawn by the Judge was that there was evidence of Canadian transactions on the Applicant's credit card at the time when he had declared he was absent from Canada. The Judge concluded that "I will approach the use of these statements as proof of presence in Canada with caution."

[28] That caution was employed to determine that although there was a passport stamp showing entry to the UK on June 16, 2008, the credit card statements did not provide support for it. The statements showed a purchase was made in the UK on June 12 and cash advances were drawn in Canada during three other dates on which the Applicant declared he was absent.

[29] The Judge concluded that the Applicant did not establish on a balance of probabilities the date upon which he left Canada for the claimed absence of June 16, 2008 – August 12, 2008.

[30] Regarding the December 22, 2008 to December 29, 2008 period, the Judge noted that the applicant claimed he left Canada on December 22, 2008. An entry stamp showed that he entered the UK the same day whereas usually flights to the UK from Canada were overnight. There were also two credit card transactions on December 22, 2008 showing activity that day in Canada.

[31] The Judge found it was not realistic to expect that the Applicant "executed the transactions on his credit card and then left Canada to arrive in the UK on the same day." He concluded that he was unable to establish when the Applicant left Canada for that period of absence.

[32] For the absence in 2010, the Judge accepted the dates as declared by the Applicant but as the Applicant arrived in the UAE on March 30, 2010, as shown by the passport entry stamp, the Judge adjusted the date of departure from Canada to be one day earlier making it March 29, 2010.

[33] The final analysis by the Judge looked at whether the Applicant left Canada on December 16, 2010, as claimed. The Applicant's passport contained a stamp showing he entered Switzerland on December 24, 2010. The Judge would not rely on that as evidence of the Applicant's departure from Canada because he had typically travelled through the UK. In addition, the last 2010 transaction on the Applicant's credit card was December 15, 2010 so the Judge found the statement did not support whether the Applicant was in Canada or Europe during the period December 16, 2010 – December 23, 2010.

[34] The Judge found the other evidence submitted by the Applicant was passive in nature and did not assist him to determine the Applicant's days of presence in Canada.

## IV. **Issue and standard of review**

[35] The standard of review of a decision by a Citizenship Judge is reasonableness: *Johar v Canada (Citizenship and Immigration)*, 2009 FC 1015 at para 17, 83 Imm LR (3d) 299. In this application for judicial review however the determinative issue is the question of whether or not the Decision was arrived at in a manner that was procedurally fair to the Applicant. If it was not, then the question would, as mentioned above, be one of whether the Decision was reasonable.

[36] Matters of procedural fairness involve an examination of whether or not the process employed by the decision-maker in arriving at a determination on the merits breached natural justice. Here the salient questions are - did the Applicant know the case he had to meet and did he have an opportunity to respond?

[37] A good summary of the nature and content of the standard of procedural fairness which is required in the decision-making process involving a citizenship application can be found in *El-Husseini v Canada (Citizenship and Immigration)*, 2015 FC 116, 475 FTR 30 [*El-Husseini*] where Mr. Justice Locke reviewed the jurisprudence from this Court. Justice Locke captured the following principles at paragraphs 19 – 22, with respect to the level of procedural fairness in the determination of a citizenship application:

- "the citizenship judge is not obliged to provide an applicant with a running commentary about the adequacy of his documentation" (at para 19);
- however, "[t]he more important the decision and the greater the impact on the persons affected, the more stringent the procedural protections mandated" (at para 19);

- "a fairly high standard of procedural must be applied in the decision-making process with respect to a citizenship application" because "the nature of the decision clearly resembles an adjudication" (at para 20);

- "the interview with the Citizenship Judge is 'clearly intended to provide the candidate the opportunity to answer or, at the very least, address the concerns which gave rise to the request for an interview in the first place'" (at para 21);

- "when an applicant is deprived of the opportunity to address those concerns, a denial of natural justice occurs" (at para 21);

- "[t]he onus in citizenship applications is on the applicant, but the onus is not on the applicant to anticipate every concern that a citizenship judge might have with the evidence submitted" (at para 22);

- if, "[t]here is nothing in the application or documentation provided that is directly contradictory [then], absent questioning from the Citizenship Judge, the applicant would have no way of knowing what the areas of concern were" and for this reason fairness requires that the concerns of the Citizenship Judge be put to the applicant so that the applicant would have the opportunity to know the case to be met and to respond to it (at para 22).

  (emphasis and internal citations omitted)

## V. **Analysis**

### A. *Insufficient evidence or credibility concerns?*

[38] The Applicant says the Judge made several negative credibility findings which were never put to the Applicant for response. After receiving and reviewing the Certified Tribunal Record (CTR), the Applicant points out that the question of whether he possessed and was withholding another travel document was raised in the FPAT and so it was known to the Judge long before interviewing the Applicant.

[39] The Respondent says the documentation submitted by the Applicant was simply insufficient to establish his physical presence in Canada. Therefore, the issue before the Judge was not credibility but rather sufficiency of the evidence. For example, the fact that other family

members are linked to the Applicant's credit card diminishes the reliability of those documents in proving the Applicant's presence in Canada.

[40] At the beginning of the Decision, in paragraph four, the Judge indicates that "[t]he Minister's delegate referred the case for credibility reasons." Later, in paragraph 18 of the Decision the Judge writes:

> Normally, this analysis would not include a detailed review of the Applicant's travel within a longer period of absence from Canada. However, the pattern of travel and the absence of evidence raised concerns on whether the Applicant could have another travel document besides the passports he had presented for review.

[41] Both these statements indicate, in the words of the Judge, that he had credibility concerns about the application. It is not disputed that credibility concerns were not put to the Applicant.

[42] As stated however, the dispute is whether the Decision turns on credibility or sufficiency of evidence. In *Ferguson v Canada (Citizenship and Immigration)* 2008 FC 1067, 74 Imm LR (3d) 306 [*Ferguson*], Mr. Justice Zinn discussed the credibility of evidence in the context of whether an oral hearing was required for a pre-removal risk assessment. Justice Zinn cautioned that "the Court must look beyond the express wording of the officer's decision to determine whether, in fact, the applicant's credibility was in issue": see para 16.

[43] Looking at the words in the Decision the Judge accepted that the two passports provided by the Applicant covered the entire relevant period and, as substantiated by the ICES report, he entered Canada five times during that period. His focus was on the dates of departure and whether there was evidence of undeclared trips.

[44] The Judge indicated that there was a pattern of travel and absence of evidence which raised concerns as to whether there could be another travel document in addition to the passports. He then looked at the passports and found that during the period June 16, 2008 to August 12, 2008 there were no entry stamps into Switzerland, nor the UAE, although the Applicant indicated he had travelled to both countries during that absence. In addition, although there were three entry stamps into the UK during this period of absence, there is no indication in the passport as to where he went after the first two of those entries. The Judge concluded that was a problem and "[i]t would have been logical to have seen passport stamps to document his travels in between his entries into the UK."

[45] It appears that the Judge was looking for entry stamps to the UAE and Switzerland. The exit from Canada and return to Canada were verified by a UK entry stamp on June 16, 2008 and a Canadian entry stamp on August 12, 2008. The only possible reason that the Judge would want to see stamps to document travel from the UK to other countries for the intervening period would be a credibility concern that the Applicant had not produced all of his passports with his application for citizenship. Had there been additional passports the concern would have been that the Applicant could have used the alleged alternate passport for entry stamps to other countries ahead of his declared absences and then used the Kenyan Passports on the dates he wished to furnish Canadian authorities with in his application.

[46] For the period December 22, 2008 to December 28, 2008 the Judge noted an entry stamp into the UK for each of those dates. However, although the Applicant said he travelled to the UAE during that time, resulting in the two UK entrance stamps, there were no entry or exit stamps to the UAE.

[47] After making those two related observations, the Judge said that "[a]s a result, I will approach the use of passport entry or exit stamps as proof of departure from Canada with caution and will not rely on them unless the passport evidence is corroborated by other documentary evidence."

[48] In my view, that is a clear credibility finding that the passports provided do not tell the whole story because the Applicant has withheld another travel document. A sufficiency of evidence finding would have been that without other documentation, or evidence, the dates on which the Applicant entered the UAE or Switzerland could not be determined because the passport did not contain any stamps from those countries.

[49] Having reviewed the Decision at some length, and considering the credibility findings could and should have been raised during the interview as they were known by the Judge in advance, I come to the same conclusion as was stated by Mr. Justice Manson in *Abdou v Canada (Citizenship and Immigration)*, 2014 FC 500, 455 FTR 214:

> [26] The Judge's decision in this appeal hinged on a negative credibility finding, based on the discrepancy in the absences declared by the Applicant. As in *Johar*, the Judge did not raise this discrepancy with the Applicant. Given the necessary procedural fairness afforded to applicants in citizenship applications and the centrality of this issue to the Applicant's claim, I find that there was a breach of procedural fairness.

B. *The Applicant's affidavit*

[50] If the Judge had put his credibility concerns to the Applicant would the Applicant have been able to address them?

[51] The Applicant filed an affidavit as part of this application for judicial review. Much of the content of the affidavit is not generally admissible in this matter as it was not before the Judge. What the affidavit does show, and which is admissible, is that had the Judge raised the various concerns he expressed in the Decision with the Applicant the Applicant would have been able to provide answers and explanations that may have satisfied the Judge.

[52] For example, to answer the Judge's concern that there were no entry stamps for Switzerland or the UAE during the June 16, 2008 to August 12, 2008 absence period the Applicant's evidence was that Switzerland did not join the Schengen area of the European Union until December 12, 2008. The Applicant further states that prior to that time because the he was a Permanent Resident of Canada he did not require a visa to enter or exit Switzerland so stamps would not have been placed on his passport.

[53] With respect to the lack of stamps from the UAE, the Applicant explains that the UAE also tracks entries and exits electronically. After receiving the Decision and seeing the Judge's concern the Applicant obtained and attached to his affidavit the UAE government Entry/Exit Report showing the various dates he entered or left UAE which correspond to his declared dates that were of concern.

[54] These examples illustrate the importance of providing an applicant the opportunity to address credibility concerns in citizenship applications.

## VI. **Conclusion**

[55] The Judge interviewed the Applicant but did not put to him the central question of whether he held a secondary travel document.

[56] The Judge was well aware of that concern at the time of the Applicant's interview as it had been flagged in the FPAT. By not raising it with the Applicant at the time of his interview, the Judge deprived the Applicant from knowing the case he had to meet. The Applicant did not receive the opportunity to address the unspoken concerns regarding a possible second travel document.

[57] Mr. Justice Pelletier when he sat as a Justice of this Court highlighted the purpose and importance of the interview with the citizenship judge:

> [8] . . . the legislation provides for an interview to be held when there is a question about the acceptability of the candidate's application for citizenship. It is clearly intended to provide the candidate the opportunity to answer or, at the very least, address the concerns which gave rise to the request for an interview in the first place. When candidates are deprived of that opportunity, they are deprived of a right specifically provided for in the legislation. This is a contrary to law and would, in any event, be a denial of natural justice.
>
> [9] . . . The purpose of granting an interview is to allow candidates to address the decision-maker's concerns. It is the loss of the opportunity to address the concerns which is of concern to the Court.
>
> *Stine v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 1264 (QL); 173 FTR 298 (TD).

[58] The Applicant has shown that he may have addressed the concerns of the Judge if he had been given the opportunity.

[59] As the process was procedurally unfair to the Applicant the Decision must be set aside and the matter returned for redetermination by another Citizenship Judge. As part of the redetermination, the Applicant shall be permitted to file the Affidavit, including exhibits, which

he submitted in this application for judicial review in addition to any other documents which he may be permitted to file in the course of the redetermination of a citizenship application.

[60] There is no serious question of general importance for certification in this matter.

**JUDGMENT IN T-188-17**

**THIS COURT'S JUDGMENT is that:**

1. This application is allowed and the matter is returned for redetermination on the basis set out in the penultimate paragraph of these reasons.

2. There is no serious question of general importance for certification.

"E. Susan Elliott"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-188-17 |
| **STYLE OF CAUSE:** | AHMED FARAZ MOHAMMAD ASLAM v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | JULY 26, 2017 |
| **JUDGMENT AND REASONS:** | ELLIOTT J. |
| **DATED:** | JULY 16, 2018 |

**APPEARANCES:**

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| Aleksandra Lipska | FOR THE RESPONDENT |

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