

Federal Court



Cour fédérale

Date: 20140526

Docket: T-1638-13

Citation: 2014 FC 500

Ottawa, Ontario, May 26, 2014

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

HATEM SALAMA RE ABDOU

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an appeal of the decision of Wojciech Sniegowski, a Citizenship Judge with the Citizenship Commission, Immigration Canada [the Judge], pursuant to subsection 14(5) of the *Citizenship Act*, RSC 1985, c C-29 [the Act]. The Judge denied the Applicant's application for Canadian citizenship by deciding that he did not meet the residency requirement as defined in 5(1)(c) of the Act.

I. Issues

[2] The issues are:

- A. Was the Judge's decision reasonable in finding that the Applicant did not meet the residency requirement in 5(1)(c) of the Act?
- B. Did the Judge breach the duty of procedural fairness?

II. Standard of Review

[3] The issues involving the assessment of evidence and of mixed fact and law are reviewable on the standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9, at para 47-48 51, 53-54, 57, 62, 64; *Singh v Canada (Minister of Citizenship and Immigration)*, 2008 FC 408 at para 10).

[4] The issue of procedural fairness is reviewable on the standard of correctness (*Dunsmuir*, at paras 57, 79; *Navidi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 372, at para 13 [*Navidi*]).

III. Background

[5] The Applicant is a stateless individual who was born in Kuwait. He arrived in Canada on June 7, 2003, and became a Permanent Resident of Canada on that date. He made an application for Canadian citizenship on August 8, 2008. For purposes of the residency requirement in 5(1)(c)

of the Act, the Relevant Period at issue is August 8, 2004, to August 8, 2008 [the Relevant Period].

[6] In his original application for citizenship, the Applicant listed three absences from Canada totalling 354 days. This includes a 320 day absence to Kuwait from 2004-2005. However, in his follow-up Residency Questionnaire, the Applicant listed only 34 days of absence, omitting the 320 day absence to Kuwait listed in his original application.

[7] In support of his application, the Applicant submitted numerous documents, including:

- Records with the Ontario Ministry of Health;
- Notices of Assessment for 2003-2006, 2008;
- Gas receipts;
- Report cards for his children in Ontario schools;
- Incorporation documents for 6612237 Canada Limited, a corporation for which the Applicant is an Officer and Director;
- Banking records showing numerous wire transfers beginning in March, 2006;
- Documentation pertaining to the removal of conditions that were imposed on him as a Permanent Resident;
- Copies of two passports belonging to the Applicant. One is valid from September 15, 2002, to October 2, 2004, and contains a Kuwaiti residence permit valid from September 24, 2001, to September 9, 2004. The other is valid from May 5, 2009, to

May 4, 2014, and contains a Kuwaiti residence permit valid from May 20, 2009, to July 3, 2010;

- A Citizen's Report from the Hamilton Police Service, which notes that his passport was not recovered after a stolen vehicle was returned to the Applicant, on or around October 3, 2007; and
- Documents regarding financial and real estate dealings.

[8] The Applicant did not submit a passport which covered the period from September 10, 2004, to May 4, 2009.

[9] The Applicant had an interview before the Judge on April 18, 2013.

[10] The Judge evaluated whether the Applicant met the residency requirement in 5(1)(c) of the Act in accordance with the test from (*Re Pourghasemi*, [1993] FCJ No 232 (TD) [*Pourghasemi*]). In so doing, the Judge was not satisfied that the Applicant had proven that he was physically present in Canada for 1,095 days during the relevant period.

[11] The Judge noted credibility concerns regarding the discrepancy between the absences listed on his original application (354 days) and his residence questionnaire (34 days). Additionally, without a passport submitted that was valid for the bulk of the Relevant Period, his absences were not verifiable.

[12] The Judge found that the banking records submitted to prove the sale of construction equipment were more consistent with money transfers aimed at supporting family in Canada. This is supported by the fact that on his Residence Questionnaire, the Applicant claimed he sold his construction company in 2004.

[13] Further, the Judge found that the lack of any reported income in 2003 and 2004 does not support his contention that he lived in Canada during the Relevant Period.

[14] Based on the information submitted, the Judge was not satisfied that he had met the test from *Pourghasemi (Atwani v Canada (Minister of Citizenship and Immigration))*, 2011 FC 1354, at paras 12, 18).

IV. Analysis

A. *Was the Judge's decision reasonable?*

[15] The Applicant makes limited submissions on the reasonableness of the Judge's decision. His arguments amount to a claim that the Judge failed to properly consider the evidence of the Applicant's Ministry of Health records, gas receipts, and documentation pertaining to the removal of conditions imposed on him as a Permanent Resident.

[16] While the Judge did not cite all the evidence mentioned by the Respondent, as a whole the Judge's decision was reasonable. There was a significant discrepancy between the absences declared in the Applicant's original application and his Residence Questionnaire. The lack of a

passport to verify these absences leaves the Applicant without clear or convincing evidence of his physical presence in Canada during the Relevant Period. In addition, it was reasonable of the Judge to find that the money transfers were more consistent with supporting family in Canada than of the gradual selling of construction equipment, given that the Applicant claimed he sold his construction equipment in 2004.

[17] The Applicant's arguments amount to assertions that the Judge failed to appropriately consider the evidence. This is not sufficient to show that the Judge's decision was unreasonable.

B. Did the Judge breach the duty of procedural fairness?

[18] The Applicant notes that section 1.10 of the *Citizenship Policy Manual* [the Manual] suggests that a high degree of procedural fairness may be required of a citizenship judge due to the nature of the rights at issue. At sections 1.12 and 1.19 of the Manual, the content of this duty is described as including the right to be heard and that it may be unfair for a citizenship judge to base a decision on information that the applicant has not had an opportunity to comment on.

[19] The Applicant argues that he was never given an opportunity to address a number of the Judge's concerns. First, the Judge did not question him about the discrepancy in the absences declared in his citizenship application and his Residence Questionnaire. Second, the Judge did not give the Applicant an opportunity to explain why he was unable to submit a passport to corroborate his stated absences. Third, the Judge drew a negative inference from the Applicant's history of money transfers, without giving the Applicant an opportunity to explain how these transfers reflect Kuwaiti business practices.

[20] As these findings were central to the Judge's decision, the Applicant argues that he ought to have been given an opportunity to respond to them.

[21] At paras 8 and 10-12 of his affidavit, the Applicant describes a number of issues that were not raised by the Judge in his interview:

8. At the outset of the interview, the citizenship judge flatly told me he did not want to see any documents that I had in my possession. The citizenship judge was mainly focussed on questioning me about the money I brought to Canada by means of selling heavy construction equipment in Kuwait...

10...I was never questioned by the citizenship judge at my interview concerning the discrepancy which I was in a position to explain and satisfy the citizenship judge as to why and how the discrepancy came about.

11...the citizenship judge did not provide me with an opportunity to address his concerns concerning the missing passport and if he had allowed me the opportunity to address his concerns, I would have been able to provide evidence concerning my trips during the years 2004 and 2009 outside Canada.

12...I was not questioned by the citizenship judge concerning any medical problems that my family members had during the time I was in Canada and if he had done so, I would have been in a position to show the citizenship judge that I had to be in Canada for approximately one year when my daughter, Tala lost an eye due to an accident which occurred in or about October 2006.

[22] This summary is supported by the notes of the interview provided by the Judge at pages 30-32 of the Certified Tribunal Record. These notes primarily relate to the money the Applicant brought into Canada, the alleged sale of heavy construction equipment by the Applicant, and some background information.

[23] A fair reading of the Applicant's affidavit and the Judge's notes shows that the Judge did not focus his questioning on the discrepancy in the absences declared, the lost passport, or the other documentary evidence submitted.

[24] The content of the procedural fairness required of a Judge in the context of a citizenship interview was described in *Johar v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1015, at para 41 [*Johar*]:

The Citizenship Judge is not obligated to provide an appellant with an opportunity to file additional material. The process cannot become a running commentary on the adequacy of the appellant's evidence (*Zheng v. Canada (MCI)*, 2007 FC 1311, 163 A.C.W.S. (3d) 120, per Justice Simpson at para. 14). However, it is well established that an 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", and when an appellant is deprived of the opportunity to address those concerns, a denial of natural justice occurs (*Stine v. Canada (MCI)*, [1999] F.C.J. No. 1264 (QL), 173 F.T.R. 298, per Justice Pelletier at para. 8; *Tshimanga v. Canada (MCI)*, 2005 FC 1579, 151 A.C.W.S. (3d) 18, per Deputy Justice Rouleau at para. 17-19).

At issue in *Johar* was a lost passport and credibility concerns relating to that loss, similar to this case.

[25] The Respondent cites *Navidi* in support of its position. In *Navidi*, the applicant's travel history included a number of undeclared absences. The judge held that this undermined the applicant's credibility and none of the other evidence submitted by the applicant was sufficient to show that 5(1)(c) of the Act was satisfied. The applicant claimed that he had not been afforded due procedural fairness as he was not given an opportunity to respond to the negative credibility

finding in his interview. However, in *Navidi*, the judge did request additional submissions of the applicant (*Navidi*, at para 31).

[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.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Applicant's appeal is allowed and his application is referred back to another Citizenship Judge for re-determination.

"Michael D. Manson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1638-13

STYLE OF CAUSE: HATEM SALAMA RE ABDOU v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: MAY 21, 2014

**REASONS FOR JUDGMENT
AND JUDGMENT:** MANSON J.

DATED: MAY 26, 2014

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