Federal Court  Cour fédérale

Date: 20160202

Docket: T-760-15

Citation: 2016 FC 113

Ottawa, Ontario, February 2, 2016

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

VIRON QARRI

Respondent

JUDGMENT AND REASONS

[1] The applicant, the Minister of Citizenship and Immigration, appeals the decision of a Citizenship Judge dated April 21, 2015 which found that, on a balance of probabilities, the respondent, Mr. Qarri, met the residence requirement under paragraph 5(1)(c) of the *Citizenship Act*, RSC, 1985, c C-29, as amended [the Act], which governed his application at the relevant time.

[2] For the reasons that follow, I find that the decision is unreasonable as it is not supported by the evidence before the Citizenship Judge.

I. Background

[3] Mr. Qarri, who is the respondent in these proceedings, arrived in Canada from Albania and became a permanent resident on December 3, 2004. He first applied for Canadian citizenship on November 15, 2008. This application was rejected by a Citizenship Judge on July 14, 2010, on the basis that Mr. Qarri did not provide sufficient evidence of his physical presence in Canada during the relevant period.

[4] Mr. Qarri applied for citizenship again on August 16, 2010. In his application for citizenship, he declared 1,310 days of presence and 150 days of absence in the relevant period.

[5] A Citizenship Officer [the Officer] prepared a File Preparation and Analysis Template [FPAT] on December 18, 2014. The Officer notes that the relevant four-year period for Mr. Qarri's physical presence in Canada is August 16, 2006 to August 16, 2010. The Officer also notes that Mr. Qarri's landing passport was reportedly stolen in 2007 and that an untranslated police report dated in 2009 was provided after the fact. With respect to his more recent passport, the Officer notes that two of his trips to Albania and his trip to Cuba could not be verified because there were no entry dates stamped on the passport from Albania or Cuba, although there were exit stamps, Canadian entry stamps and an Integrated Customs Enforcement System [ICES] report confirming his entry into Canada. The Officer notes that Cuba is not consistent in stamping passports, but does not comment on the practice in Albania.

[6] The Officer notes the discrepancies in the respondent's declared address in his application, Residence Questionnaire [RQ], his previous application and the other evidence and points out that, in addition, no address was provided for the period from August 2006 to October 2006.

[7] The Officer also notes that most of the evidence regarding the respondent's education in Canada is passive, as it only shows registration, not attendance. Similarly, the Officer notes that his children were enrolled in schools in Canada as of September 2007.

[8] The Officer reviewed the respondent's employment noting that he stated he was employed from April 2007 to July 2007, but no employer, city or country is indicated on the application. The RQ notes an employer in Toronto. No employment documents were submitted to verify this employment. The respondent was unemployed from July 2007 to June 2010. There is evidence of income from social assistance.

[9] The Officer reviewed the respondent's bank and credit card statements noting that the statements do not cover the entire relevant period and that there are several lengthy periods where there were no transactions verifiable as made in Canada.

[10] The Officer also notes that the respondent's medical records showed five medical visits during the relevant period, with several lengthy gaps.

[11] The Officer comments more generally that the respondent had provided mostly passive indicators of his residence. Based on her review of the evidence, the Officer concludes that there is insufficient evidence to verify the respondent's residence in Canada.

II. The Decision

[12] The Citizenship Judge's decision begins with his finding that Mr. Qarri meets the residency requirement on a balance of probabilities. The Citizenship Judge then notes that the citizenship application was referred for a hearing due to the credibility concerns raised by the Officer who reviewed the application, RQ and other documents. The Citizenship Judge refers to the relevant period and the steps in the application process, notes the declared absences, states that the issue is whether Mr. Qarri meets the residency requirement under paragraph 5(1)(c), sets out that provision, and recites the facts.

[13] In the "Analysis" part of the decision, the Citizenship Judge cites the Officer's concerns: the unverifiable absences related to the respondent's stolen passport and missing stamps in his current passport; that school attendance for the children can only be inferred from an index card showing enrollment; that the banking records contain significant gaps; and, the lack of documents showing his active presence in Canada.

[14] The Citizenship Judge notes that the respondent had a valid passport used for his trips abroad after March 15, 2007 and finds that the lack of entry stamps is not a strong indication of undeclared absences, but is rather a "reflection of activity by the border patrol officials." The

Citizenship Judge also finds that the fact Mr. Qarri declared more absences than is reflected in his passport suggests that he is credible, but does not identify these absences.

[15] With respect to the incomplete record of bank statements, the Citizenship Judge finds that the statements presented show regular payments of social assistance and typical withdrawals for those with modest means.

[16] The Citizenship Judge notes that the respondent demonstrated that his younger daughter was enrolled in junior kindergarten in 2007 and senior kindergarten in 2008 and 2009.

[17] The Citizenship Judge acknowledges that the respondent did not present many documents showing his active presence in Canada, but finds that an indication could be found in his history of medical visits, noting that Mr. Qarri "who is a young healthy man did not go to the doctor on many occasions, but combined with other evidence such as lack of evidence of extensive travel in his passports, the attendance of his younger daughter in school since 2007, some evidence of collecting social assistance as well as his explanation provided during the hearing make it probable that he was residing in Canada during the time he declared."

[18] In conclusion, the Citizenship Judge notes the residency test established in *Re Pourghasemi*, [1993] FCJ No 232 (QL), 62 FTR 122 (FCTD) [*Pourghasemi*], and finds that, on a balance of probabilities, Mr. Qarri has demonstrated that he resided in Canada for the number of days he claimed and that he meets the residency requirements.

III. The Issues

[19] The issue is whether the decision is reasonable; this includes whether the evidence on the record supports the decision of the Citizenship Judge and whether the decision is within the range of acceptable outcomes.

IV. The Standard of Review

[20] Although this is an appeal from a decision of a Citizenship Judge and not a judicial review, the jurisprudence has established that the administrative law principles governing the standard of review apply: *Canada (Minister of Citizenship and Immigration) v Rahman*, 2013 FC 1274 at paras 11-14, [2013] FCJ No 1394 (QL); *Canada (Minister of Citizenship and Immigration) v Lee*, 2013 FC 270 at paras 15-17, [2013] FCJ No 311 (QL).

[21] The parties agree that the standard of reasonableness applies to the Citizenship Judge's determination of the application, which involves questions of fact and law.

[22] The role of the Court is, therefore, to determine whether the decision "falls within 'a range of possible, acceptable outcomes which are defensible in respect of the facts and law' (*Dunsmuir*, at para. 47). There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome." (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59,

[2009] 1 SCR 339, citing *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*]).

[23] The parties also agree that the inadequacy of the reasons is not an independent ground to allow an application for judicial review. *In Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 [*Newfoundland Nurses*], the Supreme Court of Canada elaborated on the requirements of *Dunsmuir*, noting at paras 14-16 that the decision maker is not required to set out every reason, argument or all the details in the reasons. Nor is the decision maker required to make an explicit finding on each element that leads to the final conclusion. The reasons are to "be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes" (at para 14). In addition, where necessary, courts may look to the record "for the purpose of assessing the reasonableness of the outcome" (at para 15). The key principle is summed up at para 16 that "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, the *Dunsmuir* criteria are met."

[24] However, a Court is not expected to search the record to fill in gaps to the extent that it rewrites the reasons. As noted by Justice Rennie in *Pathmanathan v Canada (Minister of Citizenship and Immigration)*, 2013 FC 353 at para 28, [2013] FCJ No 370 (QL) [*Pathmanathan*]:

> [28] […] *Newfoundland Nurses* is a case about the standard of review. It is not an invitation to the supervising court to re-cast the reasons given, to change the factual foundation on which it is

> based, or to speculate as to what the outcome would have been had the decision-maker properly assessed the evidence.

V. The Applicant's Submissions

[25] The applicant submits that the Citizenship Judge's decision is unreasonable; the Judge ignored relevant evidence, misunderstood other evidence and made erroneous findings of fact which are not supported by the evidence.

[26] The applicant argues that the determinative finding - that the respondent had demonstrated on a balance of probabilities that he resided in Canada for the number of days he claimed to reside, which was 1,310 days - is not supported by the evidence. In particular, there is no evidence of the respondent's presence from August 16, 2006 to March 30, 2007. If the Judge had properly considered this unaccounted period, which the applicant submits is 246 days, the Judge could not find that the respondent was present for the days he claimed (the exact number of days between August 16, 2006 and March 30, 2007 is 226 days).

[27] The applicant argues that had this gap been taken into account, it is not possible to speculate whether the Judge would have found that the respondent met the residence requirement. The ignorance of the evidence, or the lack of evidence, calls into question whether the Citizenship Judge adequately considered and scrutinised the other indicators of the respondent's presence, most of which were passive. Although he claimed to be present for 1,310 days in the relevant period and the deduction of 246 days (or 226 days) would still suggest that he was present for more than the 1,095 days required, this Court cannot re-write the reasons.

[28] The applicant notes that the Citizenship Judge failed to address the lack of evidence to verify the respondent's declared absences and their duration. For example, the Citizenship Judge noted that the lack of entry stamps to Albania reflects the activity of border patrol officials, particularly because exit stamps were provided. The Officer identified that border stamps were an issue in Cuba, but did not identify this as an issue in Albania. There was no evidence regarding the activities of border patrol officials in Albania upon which the Citizenship Judge could make this finding. The Officer also noted that the respondent had been asked to provide a record of movement from the Albanian authorities but did not do so.

[29] The applicant also argues that the Citizenship Judge erred by relying on passive indicators of presence and failing to address the concerns with the few active indicators. The applicant notes that the first entry in the ICES report for the respondent was in March 2007, that the health records show no visits between August 2006 and April 2007, that there were no school or bank records for the respondent for the period before March 2007, that there was no evidence of the respondent's employment in Canada before March 2007, that there was no evidence that the respondent's children were in school prior to September 2007 and that there was evidence that the respondent's older daughter was in school abroad prior to September 2007.

[30] The Citizenship Judge failed to explain why the receipt of social assistance by the respondent or the enrollment of his daughter in school verified the *respondent's* physical presence in Canada and failed to address the discrepancies regarding the respondent's address in Canada, including the lack of any evidence for a period of time.

[31] Although the Citizenship Judge referred to the respondent's explanation at the hearing, the notes of the hearing do not provide any additional information and the respondent has not submitted any affidavit to indicate the explanation given and its purpose.

[32] The applicant also points to the Citizenship Judge's illogical statement that the respondent's lack of medical visits supports his residency when coupled with other evidence, all of which is passive and the subject of other concerns.

VI. The Respondent's Submissions

[33] The respondent submits that the decision falls within the range of acceptable outcomes and the Court cannot re-weigh the evidence.

[34] The issue before the Citizenship Judge was Mr. Qarri's credibility. The RQ and application were attested to be true and there is no reason to doubt their truthfulness. The Citizenship Judge assessed the respondent's credibility in person and was best placed to determine whether his answers to the Judge's questions addressed the concerns. This is the purpose of the hearing before the Citizenship Judge and why the case was referred for a hearing. The Citizenship Judge heard the respondent's answers to questions and accepted them as credible. The reasons explain why the Judge found the respondent met the residency requirement.

[35] The respondent notes that deference is owed to the Citizenship Judge, particularly in cases such as this one where there is no transcript and points to *Canada (Minister of Citizenship*

and Immigration) v Suleiman, 2015 FC 891, [2015] FCJ No 932 (QL), where Justice Gascon noted at para 20:

> [20] […] In particular, the credibility findings of citizenship judges deserve such deference because they are better situated to "make the factual determination as to whether the threshold question of the existence of a residence has been established" (*Martinez-Caro v Canada (Minister of Citizenship and Immigration)*, 2011 FC 640 at para 46).

[36] The Citizenship Judge considered all of the evidence before him and is not required to list in detail each document considered.

[37] The respondent acknowledges that some of the indicators of his physical presence were passive, but notes that the applicant has not pointed to any jurisprudence which establishes that passive indicators should be given less weight. In addition, the Citizenship Judge was satisfied, based on the cumulative evidence, that the respondent resided in Canada for the required number of days.

[38] With respect to the alleged gap, the respondent acknowledges that it would have been preferable for the Citizenship Judge to identify the August 16, 2006 to March 30, 2007 period and then find that the respondent still met the residency requirement, but there is no evidence that the Judge misunderstood or ignored this evidence. The Citizenship Judge accurately noted the relevant four year period which includes the August 16, 2006 to March 30, 2007 period.

[39] The respondent also points out that he declared 150 days of absence, which includes a 38 day trip to Albania from February 2, 2007 to March 30, 2007; therefore, the gap in question is not 246 days as alleged by the applicant (or 226 days) but a shorter period.

[40] The respondent adds that even if the alleged 246 day gap or the shorter period is deducted, he still has established more than 1,095 days of presence as required to meet the physical presence test in accordance with paragraph 5(1)(c). The respondent points to the decision in *Canada (Minister of Citizenship and Immigration) v Khan*, 2015 FC 1102 at para 26, [2015] FCJ No 1130 (QL), where Justice Locke found that even if the days in question were deducted, the respondent still exceeded the required days of physical presence and the error did not change the calculation. In addition, at para 37, Justice Locke noted that the Citizenship Judge relied on the respondent's testimony to address the insufficiency of the evidence of his physical presence.

VII. The Decision is not Reasonable

[41] Although the Citizenship Judge stated in his decision that the hearing was held due to the credibility concerns of the Officer, this understates the role of the Citizenship Judge, which is to fully determine if the person who has applied for citizenship meets the requirements of the Act.

[42] I acknowledge that deference is owed to the credibility findings made by Citizenship Judges who have heard from the individual first hand and who have experience determining whether the residency requirements have been met; however, this does not mean that their

findings are immune from review or that credibility findings with respect to some evidence can address gaps in other critical evidence.

[43] The Citizenship Judge's finding that the respondent had established on a balance of probabilities that he resided in Canada for the number of days he claimed to reside is not justified by the evidence; there is no evidence of the respondent's presence in Canada from August 16, 2006 to March 30, 2007. The Judge appears to have overlooked this gap, although it was clearly highlighted in the FPAT. The declared absence of 38 days from February 2007 to March 2007, when the respondent travelled to Albania, does not explain why there was no evidence that he was in Canada prior to that trip.

[44] It is not possible to speculate and to determine if the Citizenship Judge would have reached the same finding if this significant gap had been considered, particularly given that most of the other evidence of physical presence was passive and that there were other erroneous and illogical findings.

[45] The Citizenship Judge's findings appear to bolster passive evidence with other passive evidence. For example, the finding that the respondent's physical presence is indicated in the history of his medical visits, which showed few visits with large gaps in between, including between August 2006 and April 2007, is illogical. The comment that a healthy man need not attend the doctor is valid; however, the respondent's non-attendance at the doctor for whatever reason cannot establish his physical presence in Canada. Nor can the evidence cited by the Citizenship Judge of his receipt of social assistance or his daughter's enrollment at school, which

the Judge then refers to as attendance at school, without any such evidence, be indicators of the respondent's physical presence.

[46] There was no evidence before the Citizenship Judge to support the finding that the lack of an entry stamp in Albania reflects the activity of border patrol officers. The record also does not reveal what declared absences the Judge was referring to when he stated that the respondent declared absences not reflected by the stamps in his passport: all of the declared absences except those highlighted by the Officer appear to be verifiable in his passport.

[47] The respondent's evidence is presumed to be truthful, however, his RQ and application contained inconsistencies which were flagged in the FPAT and which were not scrutinized by the Citizenship Judge. Although the Citizenship Judge referred to the respondent's "explanation", there is no evidence of what that explanation was or what lack of evidence or inconsistency it addressed.

[48] In the present case, although the Citizenship Judge cites some of the issues raised by the Officer, the decision does not show that the Citizenship Judge grasped all the issues which were highlighted in the FPAT. The Citizenship Judge relied primarily on passive indicators, which in some circumstances could establish residency, but the erroneous finding that the respondent was physically present during a period when there was no evidence, passive or otherwise, of such presence, is fatal. That determinative finding is not supported by the evidence.

[49] I am mindful of the guidance of *Newfoundland Nurses* and have considered the record to supplement and support the outcome; however, the record does not reveal how the Citizenship Judge assessed the discrepancies in the documents nor does it provide other evidence that would support the findings of physical presence in the gap period.

[50] As noted in *Pathmanathan* at para 28, the Court cannot recast the reasons "to change the factual foundation on which it is based, or to speculate as to what the outcome would have been had the decision maker properly assessed the evidence" [emphasis added].

[51] The decision does not meet the *Dunsmuir* standard of reasonableness. As a result, the respondent's application for citizenship must be returned to the decision maker for re-determination.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. The application for citizenship shall be returned to the decision maker for redetermination.

"Catherine M. Kane"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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