Federal Court  Cour fédérale

Date: 20170426

Docket: T-1794-15

Citation: 2017 FC 398

Ottawa, Ontario, April 26, 2017

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

MAHA EL MOATASI ASHMAWY

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is one of three citizenship appeals heard one after the other concerning family members (mother, daughter, and son), all of whom are citizens of Egypt. The facts of each case are slightly different but the legal arguments are virtually identical. The central issue in each case is the reasonableness of the Citizenship Judges' decisions, which were issued by the same

Citizenship Judge in the cases of Ms. Ashmawy (the mother) and Ms. Mahrous (the daughter). This judicial review concerns the decision of Ms. Ashmawy [Decision].

II. Facts

[2] By virtue of the Court's interpretation, the *Citizenship Act*, RSC 1985, c C-29, in force at the time of the Decision under appeal, gave a citizenship judge a choice of three tests by which the judge could determine "residence" under s 5(1)(c) of the *Citizenship Act*.

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 :
…	[…]
(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	**(ii)** un jour pour chaque jour de résidence au Canada après son admission à titre de

lawful admission to Canada for permanent residence the person shall be deemed to have accumulated one day of residence;	résident permanent;

[3] Ms. Ashmawy claimed that the relevant period [Relevant Period] for calculating her entitlement to citizenship was January 7, 2006 to April 29, 2009 and that she was physically present in Canada for 92 days more than the minimum number of 1,095 days required.

[4] The issues identified for consideration by the Citizenship Judge were:

- the Respondent's travel history could not be confirmed due to the absence of stamps in her passport;
- her Egyptian passport listed a residential address in Cairo;
- the Respondent returned to Canada one week before her citizenship test;
- the $1,000 rent claimed on the family residence was incongruous for a two storey, four bedroom, 3.5 bath, 2-car garage in the Toronto area;
- the Respondent's address had been used by a number of unrelated families as their residence for the purposes of their citizenship applications;
- there was evidence that the Respondent had lived in some other Toronto location while claiming permanent residence at the above-mentioned location;
- there were property tax documents from 2007 to 2009 addressed to the Respondent's spouse at an undeclared address;
- the Respondent submitted evidence of being rejected for a PhD program in 2006 but provided no other documents with respect to continuing her education;

- the Respondent made no OHIP claims during the Relevant Period;
- her bank records showed significant gaps and limited Canadian activity; and,
- supporting documents were minimal and limited to passive indicators of residency insufficient to confirm residency.

[5] The Respondent attended a hearing before the Citizenship Judge but there are no recordings, transcripts, or notes of the hearing.

[6] The Citizenship Judge found that the Respondent met the residence requirement calculated under the test in *Re Pourghasemi*, 62 FTR 122, 39 ACWS (3d) 251, [1993] FCJ No 232 (TD): the straight calculation of days of physical presence in Canada, without considering matters such as centralized mode of living.

[7] The Decision under review contained a number of bullet point paragraphs, some of which stated the matter of concern without any conclusion and others which included some comment or conclusory statement.

The Citizenship Judge concluded that he could not "…find solid elements to doubt the credibility of the applicant, and the required days of physical presence in Canada as required by the Act".

III. Analysis

[8] There are three issues to be considered, although the Applicant raised some preliminary comments (addressed later) which seemed to suggest that costs were in issue. The three important issues are:

1. Did the Citizenship Judge err in law?
2. Was the Decision reasonable?
3. Should the material submitted by the Respondent in this judicial review which was not before the Citizenship Judge be struck?

A. *Standard of Review*

[9] It has been well settled that the standard of review with respect to whether the residency requirement has been met is reasonableness (see *Canada (Citizenship and Immigration) v Muttalib*, 2015 FC 1152 at para 22).

[10] Although the matter was not raised by either party and therefore will not form the basis of my decision, there was no consideration (in this case or in the other two related cases) of whether the Respondent was "resident" in Canada as distinct from "present" in Canada. Section 5 of the *Citizenship Act* is framed in terms of "residence" and "resident" which does not necessarily equate to "presence" or "present".

B. *Further Evidence*

[11] The Respondent filed affidavit evidence as part of her response to the Applicant. It is clear that the evidence was designed to bolster the Record and to address the Applicant's argument that the Decision was inadequate.

[12] It is trite law that a party cannot supplement the Record on judicial review except in limited circumstances such as to establish a breach of procedural fairness not apparent on the "face of the record". That is not the case here.

[13] The evidence submitted is at least a tacit admission that the Decision is deficient. The additional evidence was designed to supplement and bolster the inadequate reasons.

[14] As ruled orally, this evidence is struck and forms no part of the basis for this judicial review.

C. *Errors of Law*

[15] In *Zhao v Canada (Citizenship and Immigration)*, 2016 FC 207, Justice Shore provided a useful overview of the law:

> [20] Canadian citizenship is a privilege. The onus falls on an applicant to establish having met the requirements of the Act in order to be granted citizenship (*Pereira*, above at para 21). Conversely, if an applicant meets the requirements of the Act, he or she must be granted citizenship (*Saad v Canada (Minister of Citizenship and Immigration)*, 2013 FC 570 at para 21 [*Saad*]; *Martinez-Caro v Canada (Minister of Citizenship and*

> *Immigration)*, 2011 FC 640). The responsibility of determining the extent and nature of evidence to put forth by an applicant, in order to determine if the applicant meets the residency requirement of the Act, falls under the original citizenship decision-maker. Although an applicant does not have to corroborate with evidence his testimony, "it would be extremely unusual and perhaps reckless, to rely on the testimony of an individual to establish his residency, with no supporting documentation" (*Canada (Minister of Citizenship and Immigration) v El Boussergh*ini, 2012 FC 88 at para 19 [*El Boussergh*ini]). …

[16] Since *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708, the "adequacy of reasons" goes to the reasonableness of a decision and is not a stand-alone basis for review. However, the Court in that case made clear that the reasons must allow a reviewing court to understand why the tribunal made its decision.

[17] In that regard, the reviewing court is, as Justice Kane noted, not to look at the record to fill in the gaps to in effect rewrite the reasons (*Canada (Minister of Citizenship and Immigration) v Safi*, 2014 FC 947 at para 18, 465 FTR 98).

[18] The Applicant has raised one alleged error of law and a number of examples of findings (or the absence of findings) which make the Decision unreasonable. However, the two issues are intertwined in this case.

[19] It was argued that the Citizenship Judge reversed the onus on an applicant to prove residence, as shown by the quote in paragraph 7 of these reasons. If that is so, it is a legal error;

however, it is difficult to tell in this case whether it was an error in legal perspective or just a matter of phrasing.

[20] Taken alone, I could not find that the Citizenship Judge meant to articulate a new standard. However, given the paucity of reasons and the gaps in the matters canvassed, I must conclude that it is unclear and hence an error in the articulation of the legal burden.

D. *Reasonableness*

[21] With the respect due to the trier of fact, I cannot be satisfied that this Decision is reasonable as articulated in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190. It may be that the Citizenship Judge was satisfied with what he heard in evidence on key points, but this is not clear because in many instances the Citizenship Judge stated the issue but made no conclusion. In many instances the Citizenship Judge did not address issues which had clearly been identified.

[22] Among the gaps in the Decision are the following:

- the short-term leasing of accommodation in Toronto, when already renting a house, is not explained and the situation became even more opaque when the Respondent attempted to provide an explanation using inadmissible evidence;
- the failure to address four months covered by the period of back and forth to Egypt during the Relevant Period;
- the absence of explanation for an Egyptian passport which contained an address in Cairo; and,

- the explanation of lack of financial activity as a cultural matter. It turns out that Ms. Ashmawy's husband gave evidence, but that evidence was never put to the Respondent.

[23] As it is impossible to square the Record with the Citizenship Judge's reasons, this Decision is unreasonable. While there may be explanations for the issues raised, these were not articulated in the Decision.

IV. Conclusion

[24] This judicial review is granted and the decision of the Citizenship Judge is quashed.

[25] The Applicant raised the matter of costs. He alleged that the Applicant is entitled to costs due to the change of counsel from Mr. Napal to another counsel, who delayed and prolonged the matter, and then back to Mr. Napal as counsel.

While unfortunate, I do not find the level of conduct to rise to that requiring the extraordinary relief and sanction of costs. No costs are awarded.

JUDGMENT in T-1794-15

THIS COURT'S JUDGMENT is that the application for judicial review is granted, and the decision of the Citizenship Judge is quashed. No costs are awarded.

"Michael L. Phelan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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