Federal Court  Cour fédérale

Date: 20120814

Docket: T-631-11

Citation: 2012 FC 995

Ottawa, Ontario, August 14, 2012

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

ABED HADAYDOUN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an appeal by Abed Hadaydoun (the Applicant) under subsection 14(5) of the *Citizenship Act*, RSC 1985, c C-29 (the *Act*) of a decision dated March 1, 2011 by Alain Ayache, a citizenship judge of Citizenship and Immigration Canada (CIC). In the decision, the citizenship judge refused to approve the Applicant's application for citizenship.

[2] For the reasons that follow, I have come to the conclusion that the appeal should be dismissed and that the decision of the citizenship judge should stand.

FACTS

[3] The Applicant, was born on March 26, 1954 and is a citizen of Jordan. He was granted permanent residency in Canada on March 9, 2000 and moved to Canada on that date. As his employer was not willing to terminate his employment contract, he had to return to Jordan to train a replacement. In July 2002, the Applicant completed his work with the Saudi Arabian company (Al-Wafa Printing Press Co.) and settled in Montreal with his family.

[4] In September 2004, the Applicant negotiated a new employment agreement with the printing company to work as a consultant. The agreement provided that the Applicant attends meetings in Jordan to provide guidance, but the company covers all travelling expenses. At his interview with a citizenship officer on April 7, 2010, the Applicant stated that he travelled for this position about every three to four months, with each trip lasting approximately five days.

[5] On October 14, 2008, the Applicant submitted his application for citizenship to the CIC, and indicated that he had spent more than the required number of days within Canada in the previous four (4) years. The Applicant indicated that he had spent 240 days outside of Canada and 1220 days within Canada during the requisite period, which exceeds the minimum number of days of 1095.

[6] The Applicant was brought in for appointments and interviews with CIC officials on April 7, October 26 and November 15, 2010. It is unclear from the Certified Tribunal Record what transpired in advance and at the November 15 meeting, as no notes are included. The Applicant states that a citizenship officer prepared a Section 44 Report and as a result, a departure order was issued to the Applicant at that meeting.

[7] The departure order states that the (unnamed) officer was satisfied that the Applicant fell under paragraph 41(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]: "… in that, on a balance of probabilities, there are grounds to believe is a permanent resident who is inadmissible for failing to comply with the residency obligation of section 28 of the [*IRPA*]".

[8] On November 16, 2010, the Applicant filed an appeal to the Immigration Appeal Board against the decision to issue the departure order.

IMPUGNED DECISION

[9] The Applicant appeared before the citizenship judge on February 24, 2011, and a brief decision was issued on March 1, 2011. The judge found that the Applicant was under a removal order, which entailed the loss of his permanent resident status. Therefore, the judge concluded that the Applicant's application for citizenship must be refused, as he failed to satisfy both paragraph 5(1)(c) and paragraph 5(1)(f) of the *Act*.

[10] The citizenship judge also considered whether a favourable recommendation was warranted under subsection 5(4) of the *Act*, which is meant to alleviate special or unusual hardship. The judge found that no material support was presented by the Applicant and concluded that the case did not warrant a favourable recommendation. The judge also noted in the decision that a new application for citizenship could be made at any time.

ISSUES

[11] The citizenship judge rejected the Applicant's application on the basis that he fell afoul of paragraphs 5(1)(c) and 5(1)(f) of the *Act*. Accordingly, there are two separate issues to be discussed in the context of this appeal:

1) Did the citizenship judge err by determining that the Applicant had lost his permanent resident status?

2) Did the citizenship judge err by determining that the Applicant was subject to a removal order?

THE RELEVANT LEGISLATION

[12] The relevant provisions of the *Citizenship Act* provide as follows:

2. (2) For the purposes of this Act,	2. (2) Pour l'application de la présente loi :
…	…
(c) a person against whom a removal order has been made remains under that order	c) une mesure de renvoi reste en vigueur jusqu'à, selon le cas :
(i) unless all rights of review by or appeal to the Immigration Appeal Division of the Immigration and Refugee Board, the Federal Court of Appeal and the Supreme Court of Canada have been exhausted with respect to the order and the final result of those reviews or appeals is that the order has no force or effect, or	(i) son annulation après épuisement des voies de recours devant la section d'appel de l'immigration de la Commission de l'immigration et du statut de réfugié, la Cour d'appel fédérale et la Cour suprême du Canada,
(ii) until the order has been	(ii) son exécution.

executed.

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;
(b) is eighteen years of age or over;	b) est âgée d'au moins dix-huit ans;
(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;
(d) has an adequate knowledge	d) a une connaissance suffisante

of one of the official languages of Canada;

de l'une des langues officielles du Canada;

(e) has an adequate knowledge of Canada and of the responsibilities and privileges of citizenship; and

e) a une connaissance suffisante du Canada et des responsabilités et avantages conférés par la citoyenneté;

(f) is not under a removal order and is not the subject of a declaration by the Governor in Council made pursuant to section 20.

f) n'est pas sous le coup d'une mesure de renvoi et n'est pas visée par une déclaration du gouverneur en conseil faite en application de l'article 20.

Special cases

Cas particuliers

5. (4) In order to alleviate cases of special and unusual hardship or to reward services of an exceptional value to Canada, and notwithstanding any other provision of this Act, the Governor in Council may, in his discretion, direct the Minister to grant citizenship to any person and, where such a direction is made, the Minister shall forthwith grant citizenship to the person named in the direction.

5. (4) Afin de remédier à une situation particulière et inhabituelle de détresse ou de récompenser des services exceptionnels rendus au Canada, le gouverneur en conseil a le pouvoir discrétionnaire, malgré les autres dispositions de la présente loi, d'ordonner au ministre d'attribuer la citoyenneté à toute personne qu'il désigne; le ministre procède alors sans délai à l'attribution.

Consideration by citizenship judge

Examen par un juge de la citoyenneté

14. (1) An application for

14. (1) Dans les soixante jours de sa saisine, le juge de la citoyenneté statue sur la conformité — avec les dispositions applicables en l'espèce de la présente loi et de ses règlements — des

	demandes déposées en vue de :
(a) a grant of citizenship under subsection 5(1) or (5),	a) l'attribution de la citoyenneté, au titre des paragraphes 5(1) ou (5);
(b) [Repealed, 2008, c. 14, s. 10]	b) [Abrogé, 2008, ch. 14, art. 10]
(c) a renunciation of citizenship under subsection 9(1), or	c) la répudiation de la citoyenneté, au titre du paragraphe 9(1);
(d) a resumption of citizenship under subsection 11(1)	d) la réintégration dans la citoyenneté, au titre du paragraphe 11(1).
shall be considered by a citizenship judge who shall, within sixty days of the day the application was referred to the judge, determine whether or not the person who made the application meets the requirements of this Act and the regulations with respect to the application.	
Interruption of proceedings	Interruption de la procédure
(1.1) Where an applicant is a permanent resident who is the subject of an admissibility hearing under the *Immigration and Refugee Protection Act*, the citizenship judge may not make a determination under subsection (1) until there has been a final determination whether, for the purposes of that Act, a removal order shall be made against that applicant.	(1.1) Le juge de la citoyenneté ne peut toutefois statuer sur la demande émanant d'un résident permanent qui fait l'objet d'une enquête dans le cadre de *la Loi sur l'immigration et la protection des réfugiés* tant qu'il n'a pas été décidé en dernier ressort si une mesure de renvoi devrait être prise contre lui.

[13] Also of relevance are the following provisions of the *IRPA*:

Residency obligation	Obligation de résidence

28. (1) A permanent resident must comply with a residency obligation with respect to every five-year period.

28. (1) L'obligation de résidence est applicable à chaque période quinquennale.

Application

Application

(2) The following provisions govern the residency obligation under subsection (1):

(2) Les dispositions suivantes régissent l'obligation de résidence :

(a) a permanent resident complies with the residency obligation with respect to a five-year period if, on each of a total of at least 730 days in that five-year period, they are

a) le résident permanent se conforme à l'obligation dès lors que, pour au moins 730 jours pendant une période quinquennale, selon le cas :

(i) physically present in Canada,

(i) il est effectivement présent au Canada,

(ii) outside Canada accompanying a Canadian citizen who is their spouse or common-law partner or, in the case of a child, their parent,

(ii) il accompagne, hors du Canada, un citoyen canadien qui est son époux ou conjoint de fait ou, dans le cas d'un enfant, l'un de ses parents,

(iii) outside Canada employed on a full-time basis by a Canadian business or in the federal public administration or the public service of a province,

(iii) il travaille, hors du Canada, à temps plein pour une entreprise canadienne ou pour l'administration publique fédérale ou provinciale,

(iv) outside Canada accompanying a permanent resident who is their spouse or common-law partner or, in the case of a child, their parent and who is employed on a full-time basis by a Canadian business or in the federal public administration or the public service of a province, or

(iv) il accompagne, hors du Canada, un résident permanent qui est son époux ou conjoint de fait ou, dans le cas d'un enfant, l'un de ses parents, et qui travaille à temps plein pour une entreprise canadienne ou pour l'administration publique fédérale ou provinciale,

(v) referred to in regulations

(v) il se conforme au mode

providing for other means of compliance;

d'exécution prévu par règlement;

(b) it is sufficient for a permanent resident to demonstrate at examination

b) il suffit au résident permanent de prouver, lors du contrôle, qu'il se conformera à l'obligation pour la période quinquennale suivant l'acquisition de son statut, s'il est résident permanent depuis moins de cinq ans, et, dans le cas contraire, qu'il s'y est conformé pour la période quinquennale précédant le contrôle;

(i) if they have been a permanent resident for less than five years, that they will be able to meet the residency obligation in respect of the five-year period immediately after they became a permanent resident;

(ii) if they have been a permanent resident for five years or more, that they have met the residency obligation in respect of the five-year period immediately before the examination; and

(c) a determination by an officer that humanitarian and compassionate considerations relating to a permanent resident, taking into account the best interests of a child directly affected by the determination, justify the retention of permanent resident status overcomes any breach of the residency obligation prior to the determination.

c) le constat par l'agent que des circonstances d'ordre humanitaire relatives au résident permanent — compte tenu de l'intérêt supérieur de l'enfant directement touché — justifient le maintien du statut rend inopposable l'inobservation de l'obligation précédant le contrôle.

Non-compliance with Act

Manquement à la loi

41. A person is inadmissible for failing to comply with this Act

41. S'agissant de l'étranger, emportent interdiction de territoire pour manquement à la présente loi tout fait — acte ou omission — commis directement ou indirectement en contravention avec la présente

(a) in the case of a foreign national, through an act or omission which contravenes, directly or indirectly, a

provision of this Act; and

(b) in the case of a permanent resident, through failing to comply with subsection 27(2) or section 28.

loi et, s'agissant du résident permanent, le manquement à l'obligation de résidence et aux conditions imposées.

Preparation of report

44. (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.

Rapport d'interdiction de territoire

44. (1) S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre.

Referral or removal order

(2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.

Suivi

(2) S'il estime le rapport bien fondé, le ministre peut déférer l'affaire à la Section de l'immigration pour enquête, sauf s'il s'agit d'un résident permanent interdit de territoire pour le seul motif qu'il n'a pas respecté l'obligation de résidence ou, dans les circonstances visées par les règlements, d'un étranger; il peut alors prendre une mesure de renvoi.

Conditions

(3) An officer or the Immigration Division may impose any conditions, including the payment of a deposit or the posting of a

Conditions

(3) L'agent ou la Section de l'immigration peut imposer les conditions qu'il estime nécessaires, notamment la remise d'une garantie

guarantee for compliance with the conditions, that the officer or the Division considers necessary on a permanent resident or a foreign national who is the subject of a report, an admissibility hearing or, being in Canada, a removal order.

d'exécution, au résident permanent ou à l'étranger qui fait l'objet d'un rapport ou d'une enquête ou, étant au Canada, d'une mesure de renvoi.

Permanent resident

46. (1) A person loses permanent resident status

(a) when they become a Canadian citizen;

(b) on a final determination of a decision made outside of Canada that they have failed to comply with the residency obligation under section 28;

(c) when a removal order made against them comes into force; or

(d) on a final determination under section 109 to vacate a decision to allow their claim for refugee protection or a final determination under subsection 114(3) to vacate a decision to allow their application for protection.

Résident permanent

46. (1) Emportent perte du statut de résident permanent les faits suivants :

a) l'obtention de la citoyenneté canadienne;

b) la confirmation en dernier ressort du constat, hors du Canada, de manquement à l'obligation de résidence;

c) la prise d'effet de la mesure de renvoi;

d) l'annulation en dernier ressort de la décision ayant accueilli la demande d'asile ou celle d'accorder la demande de protection.

Permanent resident

(2) A person who ceases to be a citizen under paragraph 10(1)(a) of the *Citizenship Act*, other than in the circumstances

Effet de la perte de la citoyenneté

(2) Devient résident permanent quiconque perd la citoyenneté au titre de l'alinéa 10(1)a) de la *Loi sur la citoyenneté*, sauf s'il

set out in subsection 10(2) of that Act, becomes a permanent resident.

est visé au paragraphe 10(2) de cette loi.

In force

49. (1) A removal order comes into force on the latest of the following dates:

(a) the day the removal order is made, if there is no right to appeal;

(b) the day the appeal period expires, if there is a right to appeal and no appeal is made; and

(c) the day of the final determination of the appeal, if an appeal is made.

Prise d'effet

49. (1) La mesure de renvoi non susceptible d'appel prend effet immédiatement; celle susceptible d'appel prend effet à l'expiration du délai d'appel, s'il n'est pas formé, ou quand est rendue la décision qui a pour résultat le maintien définitif de la mesure.

In force — claimants

(2) Despite subsection (1), a removal order made with respect to a refugee protection claimant is conditional and comes into force on the latest of the following dates:

(a) the day the claim is determined to be ineligible only under paragraph 101(1)(e);

(b) in a case other than that set out in paragraph (a), seven days after the claim is determined to be ineligible;

(c) 15 days after notification that the claim is rejected by the Refugee Protection Division, if no appeal is made, or by the

Cas du demandeur d'asile

(2) Toutefois, celle visant le demandeur d'asile est conditionnelle et prend effet :

a) sur constat d'irrecevabilité au seul titre de l'alinéa 101(1)e);

b) sept jours après le constat, dans les autres cas d'irrecevabilité prévus au paragraphe 101(1);

c) quinze jours après la notification du rejet de sa demande par la Section de la protection des réfugiés ou, en

Refugee Appeal Division, if an appeal is made;	cas d'appel, par la Section d'appel des réfugiés;
(d) 15 days after notification that the claim is declared withdrawn or abandoned; and	d) quinze jours après la notification de la décision prononçant le désistement ou le retrait de sa demande;
(e) 15 days after proceedings are terminated as a result of notice under paragraph 104(1)(c) or (d).	e) quinze jours après le classement de l'affaire au titre de l'avis visé aux alinéas 104(1)c) ou d).
Right to appeal — visa and removal order	Droit d'appel : mesure de renvoi
63. (2) A foreign national who holds a permanent resident visa may appeal to the Immigration Appeal Division against a decision at an examination or admissibility hearing to make a removal order against them.	63. (2) Le titulaire d'un visa de résident permanent peut interjeter appel de la mesure de renvoi prise au contrôle ou à l'enquête.

STANDARD OF REVIEW

[14] The appeal in this case relates essentially to the determination made by a citizenship judge under section 5 of the *Act*. The Federal Court has produced a great deal of jurisprudence on these types of decisions, most of which relates to interpretations of the residence requirements. Justice Mainville engaged in a very detailed analysis of this jurisprudence and the appropriate standard of review to be applied in these types of appeals in *Canada (Minister of Citizenship and Immigration) v Takla*, 2009 FC 1120 at paras 16 to 39, concluding at para 39 with:

> In this context, I am of the view that the reasonableness standard of review must be applied with flexibility and adapted to the particular context in question. Thus, the Court must show deference, but a qualified deference, when hearing an appeal from a decision by a citizenship judge under subsection 14(5) of the *Citizenship Act*

> concerning the determination of compliance with the residence requirement. The issues of jurisdiction, procedural fairness and natural justice raised in these appeals are nonetheless reviewed against the correctness standard in accordance with the principles outlined in *Dunsmuir*. This is an approach that is consistent with both Parliament's expressed intention to subject these decisions to a right of appeal and the Supreme Court of Canada's teachings concerning the duty of the courts to show deference when sitting on an appeal from decisions of administrative tribunals.

[15] Since the two issues to be decided in this appeal primarily concern the proper interpretation of certain provisions of the *Citizenship Act* and of the *IRPA*, as well as their application to the facts that were put before the citizenship judge, the proper standard of review to be applied would seem to be that of reasonableness. I recognize however that in *Obi v Canada (Minister of Citizenship and Immigration)*, 2011 FC 573 [*Obi*], the Court came to the conclusion that the proper interpretation of subsection 14(1.1) of the *Citizenship Act* affects the jurisdiction or *vires* of the citizenship judge to determine the citizenship application and therefore attracts the standard of correctness. While I am of the view that this case differs from *Obi* and does not turn on the application of subsection 14(1.1), there is another, more compelling reason not to apply the correctness standard.

[16] In *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011 3 SCR 654], Justice Rothstein, writing for the majority, revisited the issue of 'true question of jurisdiction or *vires*' and acknowledged that this category has led to confusion. He explicitly narrowed its application to exceptional circumstances (at paras 33 to 39). Justice Rothstein directed reviewing courts to take a narrow approach to the 'true jurisdiction' category, particularly where a tribunal is interpreting its enabling statute.

[17] He went so far as to foreshadow the Court's openness to abolishing the 'pure jurisdiction' category of correctness review in a future case (at para 34). While that category still exists, there is a presumption that the standard of reasonableness will nonetheless apply, and that the party will be required to "demonstrate why the court should not review [the] tribunal's interpretation of its home statute on the deferential standard of reasonableness" (at para 39).

[18] On the basis of this latest pronouncement by the Supreme Court of Canada, I will proceed to review the decision of the citizenship judge on a standard of reasonableness.

1) Did the citizenship judge err by determining that the Applicant had lost his permanent resident status?

[19] The citizenship judge erred by determining that the Applicant had lost his permanent resident status and was therefore ineligible for citizenship as per paragraph 5(1)(c) of the *Citizenship Act*. Neither the Applicant nor the Respondent have specifically addressed this issue in their representations, but it is clear from a careful reading of paragraph 46(1)(c) and subsection 49(1) of the *IRPA* that the Applicant had not yet lost his permanent resident status.

[20] The only paragraph relevant to the Applicant in subsection 46(1) is paragraph (c), whereby a person loses permanent resident status "when a removal order made against them comes into force". Pursuant to subsection 49(1), a removal order comes into force only on the day of the final determination of the appeal, if an appeal is made. Since the appeal of the Applicant had not been decided at the time of the citizenship judge's decision, the Applicant retained his permanent resident status and could not be denied citizenship for the reason that he had lost his permanent resident

status.

2) Did the citizenship judge err by determining that the Applicant was subject to a removal order?

[21] Counsel for the Applicant submitted that, at the time of the hearing before the citizenship judge, there was no valid removal order in existence, and that the citizenship judge's finding that there was one, is an error. According to counsel, a removal order is stayed until all avenues of review and appeal are exhausted and there is a final disposition. I cannot agree with that argument.

[22] The interpretation advanced by counsel for the Applicant is unequivocally contradicted by paragraph 2(2)(c) of the *Citizenship Act*.

[23] Therefore, according to that provision, the Applicant remained "under a removal order" (the language used in paragraph 5(1)(f) of the *Act*) unless a final determination has been made and the result of that final determination is to quash the removal order. From the time that a removal order is issued and for the period during which the removal order is under judicial review or appeal, the person is ineligible for citizenship under paragraph 5(1)(f) of the *Act*.

[24] Moreover, the citizenship judge did not have jurisdiction to postpone the hearing until the appeal process of the removal order was completed. The procedure and timeline is laid out by subsection 14(1) of the *Act*, according to which the citizenship judge must come to a determination of an application for a grant of citizenship "within sixty days of the day the application was referred to [him]". There is no provision for a delay or adjournment, or extension of time available for

citizenship judges to come to a determination on the citizenship application once it is referred to them.

[25] Counsel for the Applicant tried to argue that the Applicant's situation is exactly the same as that of Mr. Obi and that his case should therefore be decided in the same manner. I agree with counsel for the Respondent that the two cases are quite different and cannot be equated.

[26] In *Obi*, the Applicant was issued a removal order for inadmissibility on the grounds that he had not disclosed a previous conviction in the United States. This order was appealed to the Immigration Appeal Division (IAD), which granted him a stay of removal for four years, at which time the IAD would revisit the stay of the removal order. Before the term of the stay was up, the applicant's application came before a citizenship judge, who refused him citizenship based on paragraph 5(1)(c) and paragraph 5(1)(f) of the *Act*. Relying on subsection 14(1.1) of the *Act*, the Court allowed the appeal.

[27] Under section 44 of the *IRPA*, a report by an officer who determines that a permanent resident is inadmissible to Canada is forwarded to the Minister. If the Minister is of the view that the report is well-founded, he may refer the report to the IAD for an admissibility hearing. However, where the sole ground of inadmissibility is that a permanent resident has failed to meet the residency requirements under section 28 of the *IRPA*, a removal order is issued without the need for an admissibility hearing.

[28] This is precisely what happened in the case at bar. The Applicant was not awaiting an admissibility hearing and was not entitled to such a hearing. As a result, the exception provided in subsection 14(1.1) of the *Citizenship Act* did not apply to the Applicant's removal order, as he was not subject to an admissibility hearing. In fact, the removal order issued against the Applicant was a "departure order", pursuant to paragraph 229(1)(k) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227.

[29] As a result, I am of the view that this appeal must fail. Despite the fact that the citizenship judge erred in denying citizenship on the basis of paragraph 5(1)(c), he was obligated to reject the application within 60 days of the date the application was referred to him as per paragraph 5(1)(f) and subsection 14(1) of the *Citizenship Act*.

[30] While this result may seem harsh, the Applicant is nevertheless free to re-apply if he is successful in his appeal of the removal order.

JUDGMENT

THIS COURT'S JUDGMENT is that the appeal is dismissed, without costs.

"Yves de Montigny"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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