

Federal Court



Cour fédérale

Date: 20140313

Docket: IMM-553-13

Citation: 2014 FC 245

Ottawa, Ontario, March 13, 2014

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

HATEM MESAUD TANTOUSH

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] This is a judicial review of a decision of the Immigration Appeal Division [IAD] refusing the Applicant's appeal from a refusal to issue him a travel document.

The Applicant had applied to renew his permanent resident card [PRC] and was informed in March 2009 that a renewed PRC was awaiting pick-up. Prior to picking the card up, the Applicant travelled to Libya where he applied for a travel document. The Applicant submits that he was

entitled to receive a travel document and that had he received it, he would have returned to Canada in time to pick up his renewed PRC before it expired.

[2] The critical provisions of *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] read as follows:

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

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

(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

(i) physically present in Canada,

...

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

(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

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

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

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) il est effectivement présent au Canada,

...

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;

years or more, that they have met the residency obligation in respect of the five-year period immediately before the examination;

...

31. (2) For the purposes of this Act, unless an officer determines otherwise

(a) a person in possession of a status document referred to in subsection (1) is presumed to have the status indicated; and

(b) a person who is outside Canada and who does not present a status document indicating permanent resident status is presumed not to have permanent resident status.

(3) A permanent resident outside Canada who is not in possession of a status document indicating permanent resident status shall, following an examination, be issued a travel document if an officer is satisfied that

(a) they comply with the residency obligation under section 28;

(b) an officer has made the determination referred to in paragraph 28(2)(c); or

(c) they were physically present in Canada at least once within the 365 days before the examination and they have made an appeal under

...

31. (2) Pour l'application de la présente loi et sauf décision contraire de l'agent, celui qui est muni d'une attestation est présumé avoir le statut qui y est mentionné; s'il ne peut présenter une attestation de statut de résident permanent, celui qui est à l'extérieur du Canada est présumé ne pas avoir ce statut.

(3) Il est remis un titre de voyage au résident permanent qui se trouve hors du Canada et qui n'est pas muni de l'attestation de statut de résident permanent sur preuve, à la suite d'un contrôle, que, selon le cas :

a) il remplit l'obligation de résidence;

b) il est constaté que l'alinéa 28(2)c) lui est applicable;

c) il a été effectivement présent au Canada au moins une fois au cours des 365 jours précédant le contrôle et, soit il a interjeté appel au titre du paragraphe

subsection 63(4) that has not been finally determined or the period for making such an appeal has not yet expired.

63(4) et celui-ci n'a pas été tranché en dernier ressort, soit le délai d'appel n'est pas expiré.

II. BACKGROUND

[3] The Applicant is a citizen of Libya. He became a permanent resident of Canada in December 2000.

[4] In January 2009 the Applicant applied to renew his PRC. His application was approved in February and the Applicant was sent a letter on March 19, 2009 informing him of this approval and requesting he come and pick up his renewed card. The letter advised "at this appointment an officer will review your documents and may request additional information to determine your eligibility for PR Card."

[5] In April 2009 the Applicant travelled to Libya. He was not in possession of a PRC at that time. Shortly after his arrival he applied for a travel document. The Applicant provided a photocopy of his expired PRC, a copy of the March 2009 letter informing him to pick up his new card and some tax and banking statements in support of his application.

[6] On May 7, 2009 the visa office contacted the Applicant by email requesting further documents supporting his permanent residency such as employment documents, tax notices of assessment for the remaining years and rental agreements. The email informed the Applicant that he had 60 days in which to provide these documents. The visa office also attempted to contact the

Applicant at the telephone number provided in the application, but was informed it was a wrong number.

[7] The Applicant contacted the visa post on June 25, 2009 by fax requesting an update on his application. The visa office responded the following day that it was still waiting to receive the additional information requested on May 7. The Applicant was given until July 6, 2009 to provide additional documents. No additional documents were provided.

[8] On August 13, 2009 the Applicant was informed that his application for a travel document had been refused on the basis that he had not established he was compliant with his residency requirements under subsection 28(1) of IRPA.

[9] The Applicant appealed this refusal to the IAD. In a decision dated December 11, 2012, the IAD refused the appeal. It reviewed the evidence submitted by the Applicant and concluded that he had only proven 118 days of physical presence in Canada during the relevant period (the five years immediately preceding the application for a travel document). As the Applicant had not established that he met his residency obligation, the IAD found that his application for a travel document had been properly refused. This is the decision under review.

III. ANALYSIS

[10] The IAD's determination that the Applicant had not met his residency obligations is reviewable on the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Jiang*, 2011 FC 349 at paras 29-31; *Wei v Canada (Minister of Citizenship and Immigration)*, 2012

FC 1084, 418 FTR 78, at paras 36-39; *Ambat v Canada (Minister of Citizenship and Immigration)*, 2011 FC 292, 386 FTR 35, at para 15 [*Ambat*]).

[11] The thrust of the Applicant's argument is that the Visa Officer who assessed his travel document application was bound by the determination made on the PRC renewal application. For the reasons that follow, I do not accept this argument.

A. *Visa Officer not bound by determination on the PRC renewal application*

[12] The starting point of this analysis is the nature of the determination for PRC renewal. The Applicant appears to assume that a final and complete decision to renew the PRC had been made. This is incorrect.

[13] As is readily apparent from the plain wording of the March 19, 2009 letter, the approval was subject to a determination that the Applicant was entitled to a PRC. Therefore, the PRC application process was not complete and the factual basis for the Applicant's assertion that the Visa Officer was somehow bound by the alleged approval of a PRC is not made out. This is sufficient to dispose of this Judicial Review but for completeness, the Court will address the other issues raised.

[14] Even if there was such a determination, neither the IAD nor the Visa Officer assessing the travel document application were bound by the pertinent determination made on the PRC renewal application. The PRC renewal and travel document applications are two separate processes, each involving an independent assessment of the Applicant's residency. The assessment of the

Applicant's residency at the time of the travel document application was different from the assessment at the time of the PRC renewal application in two important ways.

[15] Firstly, when the Applicant applied for his PRC renewal, he was in possession of a valid PRC. Accordingly he was entitled to the presumption, set out in subsection 31(2) of IRPA, that he had permanent resident status. When the Applicant applied for this travel document, he was not entitled to this presumption, as he did not have a valid PRC. The letter from the CIC inland office indicating a renewed PRC was available for pick-up is not sufficient to trigger the presumption of permanent resident status.

[16] Secondly, the relevant periods under assessment are different. For both applications the Applicant must demonstrate physical presence in Canada for a total of at least 730 days in the five year period immediately preceding the application. The relevant period for the Applicant's PRC renewal application was January 2004 – January 2009. The relevant period for the Applicant's travel document application was May 2004 – May 2009. A four month difference may prove significant in many cases.

[17] The Applicant relies on *Khan v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1471, 423 FTR 198 [*Khan*]. The applicant in that case received a letter while in Pakistan informing him that his renewed PRC was ready to be picked up. Upon his return to Canada he attempted to pick up the card, but was prevented by the issuing immigration officer who questioned him about his presence in Canada during the period between submitting the renewal application and the

pick-up day. The officer determined the applicant no longer complied with his residency requirements and refused to issue the card.

[18] Justice Zinn allowed the application for judicial review on the basis that proof of compliance with the residency obligation is not a precondition to the issuance of a renewed PRC as set out in subsection 59(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227.

Accordingly, once the officer determined that Mr. Khan met all the requirements set out in subsection 59(1), he or she was required to issue the card. However, Justice Zinn noted that pursuant to section 28 of IRPA all permanent residents must meet the residency obligation in every five year period. Accordingly it was open to the officer to confirm whether Mr. Khan met the residency obligation at the time of pick-up or any earlier date, and if the officer concluded that he was in breach the officer could take whatever steps against Mr. Khan as CIC deemed appropriate.

[19] The Applicant submits that the facts in this case are similar to those in *Khan*. The only difference is that the Applicant was attempting to pick up his PRC from outside Canada when he applied for a travel document.

[20] *Khan* is distinguishable from the case at hand. The most important difference is that the decision under review in *Khan* - the refusal to issue an approved PRC – is not conditional upon the officer being satisfied that the applicant meets his or her residency obligations. In contrast, the application for a travel document is expressly contingent upon such a determination, as set out in section 31(3) of IRPA.

[21] The facts in this case resemble those in *Ambat*. The applicant in that case applied to renew his PRC. His family received a letter advising that his renewed card was available for pick-up. The applicant, then living in Dubai while working for what he submitted was a Canadian company, applied for a travel document allowing him to travel to Canada to pick up the new card. The Abu Dhabi visa officer refused the application on the basis that the applicant failed to meet the residency requirements as his employer was not a genuine Canadian company. The visa officer's decision was upheld at the IAD.

[22] Justice Near dismissed the application on the basis that a determination on residency is not precluded by a letter advising that a PRC is ready to pick up. At paragraph 41 Justice Near concluded:

The above provisions make it clear that a permanent resident must comply with the residency requirement at the time of examination. The Applicant was not in possession of his PRC when he applied for a travel document, and there was therefore no presumption that he was a permanent resident. There is no basis in the IRPA for finding that the overseas visa officer was precluded from assessing whether or not the Applicant met the residency obligation simply because he had a letter from the CIC inland office showing that his renewed PRC was ready for pick up.

[23] The same reasoning applies to the case at hand.

B. *The refusal of the travel document was reasonable*

[24] A travel document will only be issued if the officer is satisfied that one of the following conditions is met:

- (a) the applicant complies with his or her residency obligations under section 28 (31(3)(a));

- (b) an officer has determined that humanitarian and compassionate considerations relating to a permanent resident overcome any breach of the residency obligation prior to the determination (31(3)(b)); or
- (c) the applicant was physically present in Canada for at least one day within the past 365 days and a decision has been made with respect to their residency obligations outside of Canada which has either been appealed or is still capable of being appealed.

[25] The Visa Officer found that none of these conditions were met and refused to issue the travel document. After reviewing the matter on a *de novo* basis and with the benefit of additional evidence and submissions, the IAD concluded the same.

[26] With respect to paragraph 31(3)(a), the Visa Officer was required to satisfy him or herself that the Applicant met his residency obligations for the five years immediately preceding the travel document application. As the Applicant did not have a permanent resident card at the time of application, pursuant to paragraph 31(2)(b) he was presumed not to have permanent resident status. Based on the evidence submitted by the Applicant, the Visa Officer concluded that the Applicant had not met his residency obligations. The IAD found that the Applicant had proven physical presence in Canada for only 118 days during the relevant period, far fewer than the requisite 730 days.

[27] There is nothing to indicate that the Applicant had brought an H&C application seeking relief from his residency obligations prior to the travel document application; accordingly paragraph 31(3)(b) is not relevant.

[28] The Applicant submits that he was entitled to a travel document at the time of his application pursuant to paragraph 31(3)(c). However, that paragraph establishes a two-part conjunctive test. To trigger it, (1) the Applicant must have been physically present in Canada for one day during the past year, and (2) a decision regarding his residency must have been made outside of Canada which the Applicant has either appealed, or still has the option of appealing. At the time of the Applicant's application for a travel document, he only met the first part of this test. Accordingly, he was not entitled to a travel document under paragraph 31(3)(c) at that time.

C. Evidence

[29] The Applicant also submits that the IAD ignored or misapprehended the evidence by ignoring his oral evidence at the hearing and the affidavits submitted by his friends. The IAD is presumed to have considered all the evidence before it; it is not required to mention every piece of evidence before it (*Sidhu v Canada (Minister of Citizenship and Immigration)*, 2012 FC 515, 409 FTR 58, at paras 71-72; *Lai v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 125, 253 DLR (4th) 606, at para 90). The Applicant has not rebutted the presumption that the IAD considered all the evidence.

IV. CONCLUSION

[30] In conclusion, the IAD's decision was reasonable. Neither the IAD nor the Visa Officer were prevented by the decision on the PRC renewal application from assessing the Applicant's residency obligations for a different period.

[31] Therefore, I would dismiss this application for judicial review.

[32] The Applicant's proposed questions for certification presupposes that there was a final determination to issue a PRC. As that is not the case, the questions proposed are irrelevant. There are no questions for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"Michael L. Phelan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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