Federal Court  Cour fédérale

Date: 20141103

Docket: T-2088-13

Citation: 2014 FC 1035

Toronto, Ontario, November 3, 2014

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

MUHAMAD MIRI MANSUR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review of a decision rendered by a Citizenship Judge on November 1, 2013, rejecting an application for citizenship by Muhamad Miri Mansur [the Applicant] on the basis that a removal order was issued against him, and that he did not satisfy the residency requirement for citizenship.

[2] Based on the analysis set out below, the application for judicial review should be dismissed.

II. Facts

[3] The Applicant is a 43-year-old citizen of the United States of America and a resident of Lebanon. His wife is a Canadian citizen who lives with their children in Lebanon.

[4] The Applicant came to Canada as a permanent resident on September 28, 2006.

[5] Over the years, the Applicant travelled in several countries for both business and personal reasons. Upon one of his returns to Canada (on November 5, 2012), a removal order was issued against him based on a failure to meet the residency requirement for a permanent resident (this requirement is different from that for citizenship). That removal order is the subject of a separate pending application for judicial review which was also pending during his hearing before the Citizenship Judge on July 10, 2013, which led to the decision under review in the present application.

[6] From 1998 to 2000, the Applicant worked in Texas with Telscape International. From 2000 to 2005, the Applicant worked in Boston with Sonus Networks. From 2006 to 2012, the applicant was self-employed in Canada as a telecom consultant. The Applicant alleges that he went back to work for Sonus in 2012.

[7] On September 8, 2010, the Applicant applied for Canadian citizenship. Under paragraph 5(1)(c) of the *Citizenship Act*, RSC 1985, c C-29 [the *Act*], the Applicant needed to accumulate three years of residency in Canada (1095 days) within the four-year period ending on September 8, 2010. The Applicant alleges that he accumulated a total of 1163 days of residency in Canada during that period.

[8] As mentioned, on July 10, 2013, the Applicant appeared before the Citizenship Judge for his hearing. Based on the existence of the removal order against the Applicant, the Citizenship Judge informed the Applicant the she had to refuse his application for citizenship. During the hearing, when the Applicant offered to show the Citizenship Judge further evidence of his residency during the relevant period (in response to her concerns about the credibility of his allegations, and in order to show that the removal order was improper), she stated that this was pointless because the removal order blocked his citizenship.

[9] The Applicant alleges that, during the hearing, the Citizenship Judge considered certain documents obtained from the Canada Service Border Agency [CBSA] in relation to the removal order, but never showed them to him. The Applicant alleges that these documents contain incorrect information about him and his family, and were relied upon by the Citizenship Judge in her decision.

[10] On August 27, 2013, the Citizenship Judge rendered her decision denying the Applicant's citizenship application under both paragraphs 5(1)(c) (insufficient time resident in Canada) and

5(1)(f) (removal order) of the *Act*. On November 1, 2013, the Applicant was informed that his application was rejected.

III. Decision

A. *Reasons for decision dated August 27, 2013.*

[11] The Citizenship Judge first noted that the Applicant allegedly stayed in Canada for a total of 1163 days. Therefore, she concluded that the Applicant apparently met the minimum of 1095 days required by paragraph 5(1)(c) of the *Act*.

[12] In her decision, the Citizenship Judge stated that the "applicant's case was far from routine" because he was under a removal order. She also stated that she had received a report "from immigration" which mentions some facts related to the Applicant's residency (which facts are refuted by the Applicant). This report contains information to the effect that, upon arrival in Canada in November 2012, the Applicant allegedly stated to CBSA officers, among other things, that (i) he does not live in Canada, but that his wife does, (ii) he lives in Lebanon with his Canadian citizen wife and their two children since 2004, and (iii) he lives in the United Arab Emirates working for Sonus.

[13] The Citizenship Judge then noted that while a stamp in the Applicant's second passport indicates a return to Canada on September 24, 2009, the Applicant did not declare this absence. The Citizenship Judge concluded that the Applicant failed to disclose at least one trip abroad. Based on this, the Citizenship Judge concluded that the Applicant failed to provide sufficient

information to allow her to conduct a quantitative analysis of the number of days spent by the Applicant outside of Canada. The Citizenship Judge then concluded that, in light of the foregoing contradictions the Applicant could not be considered credible.

[14] Finally, the Citizenship Judge noted that the Applicant was not eligible for citizenship because he was subject to a removal order.

B. *Letter dated November 1, 2013 to inform the Applicant of the decision*

[15] In a letter dated November 1, 2013, the Citizenship Judge informed the Applicant that his application for Canadian citizenship was refused. This letter mentioned that the Applicant did not meet the residency requirement under paragraph 5(1)(c) of the *Act*, and that he did not provide additional documentation that was requested from him. This letter also informed him that his application for Canadian citizenship was refused since he was under a removal order.

[16] Finally, the Citizenship Judge mentioned in this letter that the Applicant "did not file any material in support of a favourable recommendation for the use of discretion in your case" under subsection 5(4) of the *Act*. Subsection 5(4) provides that, despite failing to comply with the requirements of the *Act*, citizenship may be awarded at the discretion of the Governor in Council. Such discretion may be exercised at the recommendation of a Citizenship Judge.

IV. Issues

[17] Though there are several issues raised by the Applicant in this matter, it is necessary only to deal with the following issue:

1. Did the Citizenship Judge err in refusing to make a favourable recommendation under subsection 5(4) of the Act.

[18] The parties appear to be agreed that there is a removal order in place and that the existence of a removal order, even one that is under judicial review, leaves a Citizenship Judge with no choice but to conclude that paragraph 5(1)(f) of the *Act* has not been satisfied. Any disagreement as to the number of days of residency is therefore not relevant here because the blocking effect of the removal order remains either way. The Citizenship Judge is also not empowered to interrupt or stay her proceeding pending review of the removal order. The only remaining question is whether the citizenship application can be saved by subsection 5(4) of the *Act*.

[19] More specifically, the Applicant argues that the Citizenship Judge, when declining to recommend that citizenship be granted under subsection 5(4) of the *Act*, failed to take into account the alleged impropriety of the removal order. In support of this argument, the Applicant submits that the Citizenship Judge did not have all the relevant information to reach a conclusion as to whether the removal order was improper (because she had refused to allow the Applicant to

submit such information at the hearing), and indeed the Citizenship Judge had refused even to consider whether the removal was proper.

V. Relevant Provisions

Citizenship Act, L.C. R.S.C., 1985, c. C-29 (Note: Previous version: in force between Apr 17, 2009 and Feb 5, 2014)	*Loi sur la citoyenneté*, LRC 1985, c C-29 (Note : Version antérieure : en vigueur entre le 17 avr. 2009 et le 5 févr. 2014)
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 executed.	(ii) son exécution.
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

(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;

[…]

(*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.

[…]

(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.

14. (1) An application for

(i) un demi-jour pour chaque jour de résidence au Canada avant son admission à titre de résident permanent,

(ii) un jour pour chaque jour de résidence au Canada après son admission à titre de résident permanent;

[…]

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.

[…]

(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.

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)
[…] 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.	

VI. Analysis

A. *Standard of Review*

[20] Whether the Citizenship Judge erred in her decision not to recommend that the Governor in Council exercise discretion under subsection 5(4) of the *Act* is a question to be reviewed on a standard of reasonableness (*Zahra v Canada (Minister of Citizenship and Immigration)*, 2009 FC 444, at para 9). Great deference is owed to the Citizenship Judge when exercising her discretion under the subsection 5(4) of the *Act* (*Khan v Canada (Minister of Citizenship and Immigration)*, 2012 FC 593, at para 9).

[21] However, in this case, the dispute does not concern the Citizenship Judge's exercise of discretion. Rather, it concerns her failure (i) to exercise that discretion; and (ii) even to consider all of the information available and necessary to a consideration of the exercise of her discretion. This appears to be a question of procedural fairness which should be reviewed on a standard of

correctness (*Uluk v Canada (Minister of Citizenship and Immigration)*, 2009 FC 122, at para 16; *El-Kashef v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1151, at para 11).

B. *Did the Citizenship Judge err in refusing to make a favourable recommendation under subsection 5(4) of the Act?*

[22] The Applicant argues that, in assessing whether a favourable recommendation should be made under subsection 5(4), the Citizenship Judge should have (i) given the Applicant a chance during the hearing to answer her concerns about compliance with the residency requirement; (ii) taken into account the evidence that the Applicant brought to the hearing to demonstrate that he resided in Canada for more than 1095 days between September 28, 2006 (when he became a permanent resident), and September 8, 2010 (when he filed his application for citizenship); (iii) given the Applicant the opportunity to comment on and respond to the notes the Citizenship Judge received from the CBSA concerning the removal order; and (iv) considered whether the removal order was wrongly issued.

[23] Of course, all this could be relevant to the present application only if the impropriety of a removal order could be a valid consideration of "special and unusual hardship" under subsection 5(4) of the *Act*.

[24] I have been shown no jurisprudence directly on this point. In *Ayaz v Canada (Minister of Citizenship and Immigration)*, 2014 FC 701, at para 50-51 [*Ayaz*], Justice Russell explained the scope and the meaning of "a special and unusual hardship":

> The jurisprudence on "special and unusual hardship" under s. 5(4) of the Act is not as well developed as, for example, the

jurisprudence on the meaning of hardship under s. 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27. While there is no firmly established test for "special and unusual hardship" under s. 5(4) of the Act, in my view, the following remarks by Justice Walsh in *Re Turcan* (T-3202, October 6, 1978, FCTD), as quoted by him in *Naber-Sykes (Re)*, [1986] 3 FC 434, 4 FTR 204 [*Naber-Sykes*] remain valid and serve as a good starting point:

> The question of what constitutes "special and unusual hardship" is of course a subjective one and Citizenship Judges, Judges of this Court, the Minister, or the Governor in Council might well have differing opinions on it. Certainly the mere fact of not having citizenship or of encountering further delays before it can be acquired is not of itself a matter of "special and unusual hardship", but in cases where as a consequence of this delay families will be broken up, employment lost, professional qualifications and special abilities wasted, and the country deprived of desirable and highly qualified citizens, then, upon the refusal of the application because of the necessarily strict interpretation of the residential requirements of the Act when they cannot be complied with due to circumstances beyond the control of the applicant, it would seem to be appropriate for the Judge to recommend to the Minister the intervention of the Governor in Council…

[…]

[T]he Court has to consider as well whether the effect of applying those requirements strictly and thus denying citizenship would impose some hardship on the applicant or their family beyond the delay in citizenship itself. For example, in *Naber-Sykes*, the applicant, who had lived, studied and worked in Canada for nearly a decade but had only recently become a permanent resident, could not become licensed to practice her profession (law) without citizenship. Justice Walsh found that the citizenship judge had failed to properly consider the hardship this would impose.

[Emphasis added]

[25] In the present case, the Applicant did not provide sufficient evidence to establish that he would suffer "a special and unusual hardship" should he have to wait for the final decision regarding the removal order. The evidence before the Citizenship Judge is to the effect that the Applicant is a citizen of the United States of America and a resident of Lebanon who mainly works abroad. His family lives in Lebanon and he has ties with several countries, Canada being one. The Applicant is versatile and can be employed in several countries. There is no indication that he will suffer "a special and unusual hardship" should his request for citizenship be declined. I understand that the Applicant might face certain difficulties should he make a new citizenship application after the final determination of the removal order, for he has apparently spent a considerable amount of days abroad in the past few years. However, as stated in *Ayaz*, the mere fact of not having citizenship is not of itself a special and unusual hardship.

[26] Moreover, even if the Applicant had had the opportunity to provide the evidence mentioned above, the Citizenship Judge's decision that it would be inappropriate to make a favourable recommendation under subsection 5(4) of the *Act* would still be reasonable. I am not convinced that subsection 5(4) of the *Act* should ever be available to save a citizenship application from the blocking effect of a removal order, even in cases where the validity of such removal order has been put in issue in separate proceedings. In my opinion, permitting easy reference to subsection 5(4) for this purpose would defeat the purpose of paragraph 5(1)(f) of the *Act*. It would also invite frivolous challenges to removal orders. If citizenship were to be granted under subsection 5(4), based on the fact that the removal order that is blocking citizenship appears to be improper, one important consequence would be that, if the validity of the impugned removal order were later upheld, the Applicant would have his citizenship anyway,

without ever having satisfied the intended requirements for citizenship. Accordingly, any use of subsection 5(4) to overcome a special and unusual hardship resulting from denial of citizenship due to a removal order would have to be reserved for cases in which the invalidity of the removal order is obvious. This is not such a case.

VII. Conclusions

[27] The application is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is dismissed;

2. Costs in favour of the Respondent.

"George R. Locke"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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