Federal Court Cour fédérale

Date: 20190104

Docket: T-1122-18

Citation: 2019 FC 9

Ottawa, Ontario, January 4, 2019

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

SAMEH AHMED MOHAMED AHMED HASHEM

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Minister of Citizenship and Immigration [Minister] seeks judicial review, pursuant to section 22.1 of the *Citizenship Act*, RSC 1985, c C-29 [Act], of the May 4, 2018 decision of a citizenship judge granting Mr. Sameh Ahmed Mohamed Ahmed Hashem's application for citizenship.

[2] The Minister submits that in seeking to address a one-day shortfall in Mr. Hashem's required days of physical presence, the Citizenship Judge [Judge] erred by adopting a unique interpretation of the "date of application." The Judge found that the "date of application," as that term is used at subparagraph 5(1)(c)(i) of the Act, was to be interpreted in this case to mean the date Mr. Hashem's citizenship application was received at the Case Processing Centre [CPC] as opposed to the date his application for citizenship was signed.

[3] Mr. Hashem, who has very ably represented himself in this matter, submits that the Judge did not err. He argues that the decision was fair and accounted for difficulties in using the Physical Presence Calculator. In oral submissions, he submitted that the Judge recognized that the circumstances warranted approval of the citizenship application and that it was open to the Judge to depart from the Immigration, Refugees and Citizenship Canada [IRCC] guidelines interpreting the "date of application."

[4] Having carefully considered the parties' submissions, I am persuaded that the Court's intervention is warranted. The impugned decision reflects nothing more than a conclusion with respect to the interpretation of subparagraph 5(1)(c)(i) of the Act. Although a reviewing court may look to the record and supplement the reasons of a decision-maker, this does not extend so far as allow a court to undertake, *de novo*, a consideration and interpretation of the relevant statutory provisions, the very analysis in which the decision-maker was required to engage in.

[5] In granting the application, I wish to emphasize that Mr. Hashem's honesty and sincerity in seeking to accurately set forth his days of physical presence in Canada and obtain citizenship are not in issue.

II. Background

[6] Mr. Hashem is a citizen of Egypt. He entered Canada in July 2010 as a permanent resident. On November 22, 2016, he signed his application for citizenship, reporting 1466 days of physical presence in Canada and 726 days of absence. His application was received at the CPC in Sydney, Nova Scotia, on November 25, 2016.

[7] A Citizenship Officer reviewed the application and determined that Mr. Hashem had 733 days of absence and 1459 days of physical presence in Canada during the eligibility period (November 22, 2010 to November 22, 2016). This was one day short of the 1460 days required pursuant to section 5 of the Act.

[8] On May 12, 2017, Mr. Hashem attended an interview with IRCC in Kitchener, where he was informed that he had made errors in calculating his absences using the Physical Presence Calculator and that he did not meet the physical presence requirement. Mr. Hashem initially decided to withdraw his application. However, on May 15, 2017, he sent a letter cancelling his withdrawal, resubmitting his Physical Presence Calculator with corrections made by hand, and requesting a second appointment to clarify the details of his application.

[9] In a letter dated May 24, 2017, the Citizenship Officer summarized Mr. Hashem's declared absences, again found he had 1459 days of physical presence, and advised that he did not meet the physical presence requirement. The Officer referred the matter to a Citizenship Judge.

III. Relevant Law and Policy

[10] At the time of application, the Act required that the Minister grant citizenship to any person who was a permanent resident and who, during the six years preceding the date of application, (1) had been physically present in Canada for at least 1460 days; (2) had been physically present in Canada for at least 183 days for each of four calendar years; and (3) had complied with any applicable requirement under the *Income Tax Act*, RSC 1985, c 1 (5th Supp)) to file a return in respect of four taxation years (Act, paragraph 5(1)(c)).

[11] The Act does not define the "date of application"; however, the IRCC guidelines provide that the date an applicant signs an application is considered the date of filing of the application for processing purposes.

[12] The "physical presence" requirement in paragraph 5(1)(c) came into effect in June 2015 as the result of amendments to the Act contained in Bill C-24, the *Strengthening Canadian Citizenship Act*, SC 2014, c 22, amending *Citizenship Act*, RSC 1985, c C-29. Prior to Bill C-24, the Act required a minimum period of "residence" as opposed to "physical presence." The term "residence" had been interpreted as encompassing not only periods of physical presence in Canada but also periods of absence where the evidence demonstrated an ongoing substantial

connection to Canada. Different lines of jurisprudence relating to the interpretation of "residence" had developed, resulting in different legally permissible residency tests with the choice of test resting with the citizenship judge in any given case. Parliament addressed this situation and clarified the eligibility criteria in Bill C-24, adopting a test of strict physical presence.

[13] For ease of reference, the relevant provisions of the Act are reproduced in Schedule A.

IV. The Decision under Review

[14] In considering the application, the Judge noted the Officer's only concern was the physical presence shortfall; no credibility concerns existed. The Judge framed the issue as being whether Mr. Hashem met the residence requirement under paragraph 5(1)(c), noting that applicants have the burden of proving that they meet the requirements of the Act.

[15] After reviewing the declared periods of absence, the Judge found Mr. Hashem was absent 733 days. The Judge noted the requirement to be physically present in Canada for at least 1460 days during the six years immediately before the date of the application. The Judge noted that "date of application" is not defined in the Act, but the "department [had] established a practice where the date an Applicant signs the application is the date of application for the purpose of calculating the physical presence requirement." The Judge noted that this was logical given that this date was in the applicant's control.

[16] Applying the guidelines, the Judge acknowledged that the relevant period was from November 22, 2010 to November 22, 2016, a period of 2192 days, and that the calculated absence of 733 days resulted in 1459 days of presence, a shortfall of one day.

[17] The Judge then determined that the departmental guidelines should not be applied in this case. Instead, the Judge determined that the date of application should be interpreted as meaning the date Mr. Hashem's application was received at the CPC. The result was to redefine the relevant period as being November 25, 2010 to November 25, 2016. The Judge then relied upon an Integrated Customs Enforcement System Traveller History report showing that Mr. Hashem last entered Canada on May 24, 2016 to conclude Mr. Hashem was present in Canada between November 22, 2016 and November 25, 2016. As a result, the Judge found Mr. Hashem had 1465 days of physical presence during the November 25, 2010 to November 25, 2016 period.

[18] In holding that it was appropriate to interpret the date of application as meaning the date of receipt in this case, the Judge considered four questions. First, whether the shortfall was modest and found that a shortfall of less than seven calendar days was modest. Second, he considered the amount of time between the date of signature and date of receipt of the application and found that if the duration exceeded 14 calendar days, the alternative interpretation of "date of application" would not be available. Third, he noted that the applicant was physically present in Canada between the date of signature and the date of receipt. Finally, he noted that there were no credibility concerns relating to the applicant's claim of sufficient days of physical presence.

[19] The Judge concluded that on a balance of probabilities, Mr. Hashem had provided sufficient documentary evidence to prove his physical presence in Canada and had met the residency requirement under subparagraph 5(1)(c)(i) of the Act. He granted the citizenship application.

V. Issues

[20] The Minister has raised two issues in this application:

(1) Did the Judge err in finding Mr. Hashem had met the physical presence requirement under subparagraph 5(1)(c)(i) of the Act?

(2) Did the Judge err in fact by finding that the evidence established Mr. Hashem was physically present in Canada between November 22, 2016 and November 25, 2016?

[21] In my view, the determinative and only issue that arises is whether the Judge's failure to engage in an analysis or provide an explanation to support the interpretation of subparagraph 5(1)(c)(i) of the Act relied upon amounts to an error warranting the Court's intervention.

VI. Standard of Review

[22] It is well established in the jurisprudence of this Court that a citizenship judge's determination as to whether an applicant has satisfied the prior residency requirements of the Act is a question of mixed fact and law to be reviewed against a standard of reasonableness (*Kulemin v Canada (Citizenship and Immigration)*, 2018 FC 955 at para 21; *Ebied v Canada (Citizenship and Immigration)*, 2016 FC 1038 at para 13). The deferential reasonableness

standard also presumptively applies to issues involving the interpretation of a decision-maker's home statute (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 54 [*Dunsmuir*]).

[23] When reviewing the reasonableness of a decision, a reviewing court is required to consider whether the elements of justification, transparency, and intelligibility are reflected in the process and whether the decision falls within a range of possible, acceptable outcomes defensible in respect of the facts and law (*Dunsmuir* at para 47). In conducting a reasonableness review, the court can look to the record and supplement a decision-maker's reasons where the context demonstrates that a matter was considered. However, in supplementing reasons, a reviewing court must not substitute its own reasons or conduct the very analysis in which the decision-maker was required to engage (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 15; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 54; *Bonnybrook Park Industrial Development Co Ltd v Minister of National Revenue*, 2018 FCA 136 at paras 75–86, Stratas JA, dissenting [*Bonnybrook*]).

VII. Analysis

[24] The Minister advances the argument that the Judge's interpretation of paragraph 5(1)(c) of the Act is unreasonable. It argued that finding the "date of application" to mean either the date the applicant signs the application or, in circumstances where the merits of the case so warrant, the date of receipt of the application, opens the door to inconsistent, unfair, and unintended results, all contrary to Parliament's intent.

[25] The Minister submits that when the words "date of application" are considered within their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament, the words can only be interpreted as meaning the date the application was signed. The following is my summary of the arguments advanced in support of the Minister's position:

A. An applicant for citizenship is required to attest that the information provided is true, correct, and complete at the time of application. Providing this attestation is not consistent with the "date of application" being an undefined future date;

B. Other requirements set out in the Act, including the requirement to undergo language skills and knowledge tests (paragraphs 5(1)(d) and 5(1)(e) of the Act), are based on the applicant's age at the "date of application." It is submitted that a fair and consistent application of these requirements requires an interpretation of "date of application" that leads, in all instances, to a certain date;

C. Subparagraph 5(1)(c)(i) of the Act requires that an applicant be physically present for "at least 1,460 days during the six years immediately before the date of his or her application" [emphasis added]. This requires applicants to ensure that they are eligible to apply for citizenship on the day before the application for citizenship is signed and that only those days of physical presence prior to the date of signature of an application can be used when calculating physical presence;

D. The legislative amendments contained in Bill C-24 reflect Parliament's intent to move away from a discretionary assessment of residence to a defined concept of "physical presence" and to promote a more systematic and consistent manner of

assessing presence. The Judge's interpretation creates uncertainty and confusion and defeats the purpose of the strict physical presence requirement;

E. The Judge disregarded the difference between the "filing date" and the "receipt date"; and

F. The Judge's references to a shortfall of more than seven calendar days or receipt of an application more than 14 days after signature are irrational and arbitrary considerations that will lead to an inconsistent and incoherent application of the law.

[26] I agree with the Minister's view that the Judge erred. However, I arrive at that result on the basis that the Judge's decision fails to set out any reasons or analysis in support of the statutory interpretation relied upon to achieve the end result.

[27] In this case, the Judge reached a conclusion on the interpretation of the Act based on the factual circumstances and the view that decision-makers are not bound by administrative guidelines.

[28] I do not take issue with the Judge's view that guidelines are not generally binding on a decision-maker. However, not being bound by guidelines does not open the door to the adoption of an interpretation of a statute without first engaging in some consideration of whether the meaning to be adopted is consistent with a reading of the words "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the

Act, and the intention of Parliament" (*Re Rizzo & Rizzo Shoes Ltd*, [1998] 1 SCR 27 at para 21, citing Elmer A Driedger, *Construction of Statutes*, 2d ed (Toronto: Butterworths, 1983) at 87).

[29] This circumstance was recently considered by the Federal Court of Appeal in *Bonnybrook,* a case involving the interpretation of the *Income Tax Act.* The majority and dissenting judgments both acknowledged the absence of meaningful and coherent reasons in support of the decision. Justice Woods, writing for the majority, took the position that the reasons could be supplemented. Justice Stratas, in dissent, found the absence of an explanation as to how the decision-maker's final position was reached "fatally hobbled" the Court's ability to conduct a reasonableness review (*Bonnybrook* at paras 33 and 88).

[30] In considering whether reasons can be supplemented, the reviewing court must assess each case on the basis of the record. As noted above, a court may supplement reasons where there are "dots on the page" that the court can connect (*Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431 at para 11). But it is not the role of a court on judicial review to undertake the very task that Parliament has imposed upon the decision-maker (*Bonnybrook* at para 91, Stratas JA, dissenting).

[31] In challenging the reasonableness of the Judge's interpretation, the Minister has advanced arguments that, while persuasive, can only be considered if I were to undertake, *de novo*, the very interpretative analysis that the Judge was required to undertake. There are no dots on the page. The decision is lacking in the required elements of transparency and justification, rendering any meaningful review impossible.

[32] I need not address the Minister’s argument that the Judge erred in finding that the evidence established Mr. Hashem was physically present in Canada between November 22, 2016 and November 25, 2016.

VIII. Conclusion

[33] The application is granted and the matter is returned for redetermination in accordance with these reasons.

[34] In granting the application, I am mindful of the further delay Mr. Hashem will experience in obtaining a final determination of his application, an application he has pursued in good faith.

[35] I have considered ordering that the redetermination be completed within a defined period of time but have also been mindful that it is not this Court’s role to insert itself into the Minister’s processes and procedures absent unique or exceptional circumstances. I have therefore not imposed a time limit on the reconsideration decision. However, I strongly encourage the matter be re-determined within three months of the date of this Judgment.

[36] Mr. Hashem might also have the opportunity to choose to submit a fresh application for citizenship. Should he do so, I also encourage the Minister to consider that fresh application in light of the significant amount of time that has passed since Mr. Hashem’s initial application and to take steps to expedite the processing and determination of any fresh application.

[37] The parties have not identified any question of general importance, and none arises.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is granted;
2. The matter is returned to be redetermined in accordance with the reasons set out in this Judgment; and
3. No question is certified.

"Patrick Gleeson"

Judge

SCHEDULE A

Citizenship Act, RSC 1985, c C-29	**Loi sur la citoyenneté, LRC 1985, c C-29**
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, has, subject to the regulations, no unfulfilled conditions under that Act relating to his or her status as a permanent resident and has, since becoming a permanent resident,	**c)** est un résident permanent au sens du paragraphe 2(1) de la Loi sur l'immigration et la protection des réfugiés, a, sous réserve des règlements, satisfait à toute condition rattachée à son statut de résident permanent en vertu de cette loi et, après être devenue résident permanent :
(i) been physically present in Canada for at least 1,460 days during the six years immediately before the date of his or her application,	**(i)** a été effectivement présent au Canada pendant au moins mille quatre cent soixante jours au cours des six ans qui ont précédé la date de sa demande,
(ii) to enter into, or continue in, employment outside Canada in or with the Canadian Armed Forces, the federal public administration or the public service of a province, otherwise than as a locally engaged person, or	**(ii)** a été effectivement présent au Canada pendant au moins cent quatre-vingt trois jours par année civile au cours de quatre des années complètement ou partiellement comprises dans les six ans qui ont précédé la date de sa demande,

(iii) met any applicable requirement under the Income Tax Act to file a return of income in respect of four taxation years that are fully or partially within the six years immediately before the date of his or her application;	**(iii)** a rempli toute exigence applicable prévue par la Loi de l'impôt sur le revenu de présenter une déclaration de revenu pour quatre des années d'imposition complètement ou partiellement comprises dans les six ans qui ont précédé la date de sa demande;
(c.1) intends, if granted citizenship,	**c.1)** a l'intention, si elle obtient la citoyenneté, selon le cas :
(i) to continue to reside in Canada,	**(i)** de continuer à résider au Canada,
(ii) to enter into, or continue in, employment outside Canada in or with the Canadian Armed Forces, the federal public administration or the public service of a province, otherwise than as a locally engaged person, or	**(ii)** d'occuper ou de continuer à occuper un emploi à l'étranger, sans avoir été engagée sur place, au service des Forces armées canadiennes ou de l'administration publique fédérale ou de celle d'une province,
(iii) to reside with his or her spouse or common-law partner or parent, who is a Canadian citizen or permanent resident and is employed outside Canada in or with the Canadian Armed Forces, the federal public administration or the public service of a province, otherwise than as a locally engaged person;	**(iii)** de résider avec son époux ou conjoint de fait, son père ou sa mère — qui est citoyen ou résident permanent — et est, sans avoir été engagée sur place, au service, à l'étranger, des Forces armées canadiennes ou de l'administration publique fédérale ou de celle d'une province;
(d) if under 65 years of age at the date of his or her application, has an adequate knowledge of one of the official languages of Canada;	**d)** si elle a moins de 65 ans à la date de sa demande, a une connaissance suffisante de l'une des langues officielles du Canada;

(e) if under 65 years of age at the date of his or her application, demonstrates in one of the official languages of Canada that he or she has an adequate knowledge of Canada and of the responsibilities and privileges of citizenship; and

e) si elle a moins de 65 ans à la date de sa demande, démontre dans l'une des langues officielles du Canada qu'elle 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.

Immigration, Refugees and Citizenship Canada, "Accepting Applications" (Last updated June 11, 2015)

Immigration, Réfugiés et Citoyenneté Canada, « Acceptation des demandes » (Dernière mise-à-jour le 11 juin 2015)

For applications received at the CPC-S on or after June 11, 2015

Procédures pour les demandes reçues au CTD-S à compter du 11 juin 2015

An application must be complete to be accepted for processing and is considered complete only if all of the following conditions are satisfied:

- the application is made in the form and manner and at the place required;
- it includes the required information;
- it is accompanied by any supporting evidence and fees.

Pour être acceptée aux fins de traitement, une demande doit être complète. Une demande n'est jugée complète que si toutes les conditions ci-après sont réunies :

- la demande est présentée selon les modalités, en la forme et au lieu prévus;
- elle contient les renseignements prévus;
- elle est accompagnée des éléments de preuve à fournir à son appui et des droits à acquitter à son égard.

The date a person signs the application form is the date of filing. It is important to note that this is not the date on which the application is determined to be complete and accepted for processing. Where the date on an application is more than three months old (90 calendar days) when received (staledated), or where the date is a date in the future (postdated), the application will be treated as if it is unsigned. An unsigned application is not a duly completed application and will be returned to the applicant. See also the transitional provisions.

La date à laquelle une personne signe le formulaire de demande est la date de dépôt. Il est important de noter qu’il ne s’agit pas de la date à laquelle la demande est jugée complète et acceptée aux fins de traitement. Dans les cas où la date figurant sur la demande remonte à plus de trois mois (90 jours civils) au moment où CIC reçoit la demande (demande périmée) ou lorsque la date se situe dans l’avenir (demande postdatée), la demande est traitée comme si elle n'était pas signée. Une demande non signée n’est pas une demande dûment remplie et elle est retournée au demandeur. Voir également les dispositions transitoires.

FEDERAL COURT

SOLICITORS OF RECORD

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