Date: 20091013

Docket: T-1619-07

Citation: 2009 FC 1025

Ottawa, Ontario, October 13, 2009

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

MOKHTAR ALLOU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an appeal by the Applicant, Mokhtar Allou, pursuant to subsection 14(5) of the *Citizenship Act*, R.S.C. 1985, c. C-29 (the Act) challenging the decision by Citizenship Judge George Springate (the citizenship judge) dated August 24, 2007, denying the Applicant's second application for citizenship because he did not satisfy the residency requirement found at paragraph 5(1)(c) of the Act.

[2] For the reasons that follow, the appeal will be dismissed.

Factual Background

[3] The Applicant came to Canada on January 13, 1997 as a Convention refugee and was granted permanent resident status on December 7, 1999.

[4] The Applicant was also granted permanent residence in the United States on December 16, 1999 and this status is valid until July 26, 2010.

[5] On December 8, 2001, the Applicant filed his first application for citizenship for which the relevant period for consideration of his residency was from December 8, 1997 until December 8, 2001.

[6] On June 5, 2003, the Applicant's application was refused because he did not meet the residency requirement set out in paragraph 5(1)(c) of the Act. This decision was not challenged before the Federal Court.

[7] On June 23, 2003, the Applicant filed a second application for citizenship for which the relevant period for consideration of his residency was from June 23, 1999 until June 23, 2003. In this application, the Applicant declared three brief periods of absence from Canada in 1999 and 2000, during which time he visited the United States for a total of 35 days.

[8] The Applicant appeared for an interview before the citizenship judge on June 12, 2007, where he produced numerous documents which had not been previously filed, including income tax returns from 1999 to 2002.

[9] The Applicant's second application for citizenship was denied on June 27, 2007.

Impugned Decision

[10] The Applicant has the burden of establishing, on a balance of probabilities, that he satisfies the residency requirement pursuant to paragraph 5(1)(c) of the Act (*Maharatnam v. Canada (Minister of Citizenship and Immigration)*, (2000), 96 A.C.W.S. (3d) 198, [2000] F.C.J. No. 405 (QL)). In order to succeed in his application for citizenship, the Applicant had to demonstrate that he resided in Canada during three years (1,095 days) of the relevant four year period beginning on June 23, 1999 and ending on June 23, 2003.

[11] The citizenship judge denied the Applicant's citizenship application on the grounds that he failed to satisfy the residence requirement set out at paragraph 5(1)(c) of the Act because there was evidence he resided in the United States from 1999 until 2001 and the Applicant failed to rebut that evidence. The information provided by the Applicant did not accurately reflect the number of days he was absent from Canada.

[12] The Applicant's original application stated that he had been in the United States one day in 1999 and 34 days in 2000 and he insisted that he had not traveled to the United States since then. The Applicant has 1,376 material days and admitted to being outside of Canada on 36 days, which totals 1,340 days of physical presence in Canada. However, documentation in the Applicant's file shows that U.S. Border Patrol advised their Canadian counterparts on May 12, 2005 that the

Applicant “was a permanent resident of the United States from 1999 to 2001”, but the Applicant denied this.

[13] The citizenship judge found confusion and contradictions in the Applicant’s story and insufficient documentation in support of his claim of residency to allow the citizenship judge to conclude that the Applicant was not in Canada during the periods of time he claims to have been and that he meets the residency requirement under paragraph 5(1)(c) of the Act. The Applicant thus failed to meet the onus, on a balance of probabilities, that he was residing in Canada for the required 1,095 days during the relevant four year period.

Issues

[14] The Applicant submits the following questions to the Court:

1. Did the citizenship judge err in finding that there was evidence that the Applicant resided in the United States from 1999 until 2001, and that this evidence had not been rebutted?
2. Did the citizenship judge violate the Applicant’s right to know the case to be met, and thus his right to procedural fairness, by failing to disclose the information from the U.S. Border Patrol and thus failing to provide him the opportunity to respond to that information?

Relevant Legislation

[15] The residency requirements are set out in subsection 5(1) of the *Citizenship Act*, R.S.C. 1985, c. C-29:

Grant of citizenship **5.** (1) The Minister shall grant citizenship to any person who	Attribution de la citoyenneté **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 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;

Analysis

Standard of Review

[16] In the case at bar, the citizenship judge adopted the test set forth in *Re Pourghasemi*, (1993), 62 F.T.R. 122, 39 A.C.W.S. (3d) 251. This is evidenced by his analysis and finding that the Applicant failed to meet the onus, on a balance of probabilities, that he was residing in Canada for the required 1,095 days during the relevant four year period.

[17] With respect to the first question, whether the Applicant established that he was physically present in Canada for 1,095 days, this is a question of fact. I am satisfied and the parties agree that this question is reviewable on the standard of reasonableness, as recently articulated by the Supreme Court in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190.

[18] With respect to the second question, I agree that questions of natural justice must be decided on the correctness standard (*Arrachch v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 999, 299 F.T.R. 1).

1. Did the citizenship judge err in finding that there was evidence that the Applicant resided in the United States from 1999 until 2001, and that this evidence had not been rebutted?

[19] The Applicant states that the citizenship judge failed to properly consider the evidence which demonstrates he resided in Canada during the relevant period. In particular, while the citizenship judge's decision reveals that he had correspondence from the U.S. Border Patrol which, in his view, indicates that the Applicant resided in the United States from 1999 until 2001, the Applicant argues the citizenship judge never confronted the Applicant with that information and did not disclose the correspondence in question.

[20] The Applicant submits that there was ample evidence in the record demonstrating his residence in Canada during the relevant period and, given the absence of evidence to the contrary, the citizenship judge erred in concluding that the Applicant had not met the residency requirement.

[21] The Respondent notes that the citizenship judge relied on multiple factual elements in concluding that the Applicant was not only absent for 36 days during the relevant period and it was reasonable for the citizenship judge to conclude that too few documents were filed in support of the Applicant's claim to allow him to conclude, on a balance of probabilities, that he meets the residency requirement.

[22] It is the prerogative of the citizenship judge to adopt the approach he sees appropriate in determining whether the Applicant has met the residency requirement of the Act (*Rizvi v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1641, 144 A.C.W.S. (3d) 608 at paragraph 12; see also *Wang v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 390 at paragraph 18; 166 A.C.W.S. (3d) 220).

[23] As noted above, the citizenship judge in the case at bar used the physical presence requirement set out in *Re Pourghasemi*. This Court has recognized, as did the citizenship judge, that the jurisprudence has created a strong inference that presence in Canada during three years out of the four year period must be substantial (*Rizvi*, above at paragraph 12; *Canada (Minister of Citizenship and Immigration) v. Lu*, 2001 FCT 640, 106 A.C.W.S. (3d) 786 at paragraph 7; *Zhang*

v. Canada (Minister of Citizenship and Immigration), (2000), 197 F.T.R. 225 at paragraph 9; 101 A.C.W.S. (3d) 691). The onus was on the Applicant to provide sufficient evidence to demonstrate that he met the residency requirement of the Act (*Rizvi*, above at paragraph 21).

[24] The Applicant failed to put forward sufficient evidence demonstrating his presence in Canada during the relevant period, as highlighted by the citizenship judge in his reasons:

> A June 26, 2003 letter states the applicant has been a leasee at 3505 # 804 Ste. Famille since February 1, 1997. However, the applicant failed to submit any rent receipts or monthly utility statements.
>
> A Royal Bank letter dated June 11, 2003 states the applicant has been a client of the bank since September 8, 1997. However, the applicant did not submit any monthly bank (or credit card) statements.
>
> The applicant did not submit any documents to show he visited a doctor, dentist or any medical person during his material time period. Nor did the applicant submit any receipts showing he had made purchases at a pharmacy during the four-year material time period.
>
> The applicant did not submit any letters of support from any friends, neighbours, business associates or employers. Moreover, other than paying an annual membership fee to Club La Cite, the applicant failed to present any letters or memberships in any Canadian community, cultural, religious, social club, organization, group or association.

[25] These facts are not challenged by the Applicant.

[26] The citizenship judge is not required to mention each and every piece of evidence before him and submitted by the Applicant (*Cheng v. Canada (Minister of Citizenship and Immigration)*,

(2000), 97 A.C.W.S. (3d) 393, [2000] F.C.J. No. 614 (QL); *Kwan v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 738, 107 A.C.W.S. (3d) 21; *Bakht v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1193, [2008] F.C.J. No. 1510 (QL)). However, there is one piece of evidence referred to by the citizenship judge that raises questions in the case at bar, namely the evidence regarding the correspondence between Canadian authorities at the Canada Border Services Agency (CBSA) and U.S. authorities at the U.S. Border Patrol on May 11 and May 12, 2005.

[27] As noted by the citizenship judge in his reasons, this evidence refers to the correspondence between the U.S. Border Patrol and the CBSA which states that the Applicant "was a permanent resident of the United States from 1999 to 2001".

[28] Counsel for the Applicant has argued that the correspondence in question was about the legal status of the Applicant in the United States from 1999 to 2001 as opposed to his physical presence.

[29] The Applicant has further argued that the citizenship judge may have misread the correspondence at issue and its true meaning and that it is at most "ambiguous".

[30] This alleged misinterpretation of the correspondence at issue is, according to the Applicant, further evidenced by the memorandum dated April 5, 2005 sent by a "citizenship adviser" to the

"citizenship judge" stating that the Applicant is "in the USA since Dec 1999. Still living there in 2000." (Emphasis is ours).

[31] In light of this evidence, it appears possible that the citizenship judge may have misinterpreted the correspondence between the U.S. Border Patrol and the CBSA in finding that the Applicant was a resident in the United States from 1999 to 2001, as it consists of correspondence regarding the Applicant's legal status in the United States, as opposed to his physical presence in the United States or in Canada.

[32] Indeed, this could have led the citizenship judge to conclude that the correspondence at issue demonstrated that the Applicant was not in Canada during the period in question (1999 to 2001). This correspondence is the only evidence in the record which could have indicated that the Applicant was absent from Canada during the relevant period.

[33] Notwithstanding the above, upon its review of the record in full, the Court is of the view that the evidence as a whole – including the 1999-2001 portion of the relevant period – remains insufficient, inadequate and highly incomplete for purposes of demonstrating a substantial physical presence in Canada during the relevant period.

[34] By way of example, the Applicant submitted training certificates in support of his application. Yet, these certificates fail to indicate the period during which the training courses were attended. A mere date confirming the completion of such courses in 2000 is insufficient in this

regard as it provides no information about the dates the Applicant attended the courses. These courses could have been attended outside the relevant period in question.

[35] Further, during his interview with the citizenship judge in June 2007, the Applicant did not provide any information about his income or other form of benefits received in 2003.

[36] The jurisprudence of this Court has continued to emphasize the need for substantial physical presence in Canada during the relevant time period (*Re Pourghasemi*; *Chen*; *Ghahremani v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 411, [2009] F.C.J. No. 524 (QL); *Huan v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 448, 147 A.C.W.S. (3d) 746; *Rizvi v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1641, 144 A.C.W.S. (3d) 608). *Canada (Minister of Citizenship and Immigration) v. Lu*, 2001 FCT 640, 106 A.C.W.S. (3d) 786 at paragraphs 6-7). In this case, the Applicant has failed to meet his burden of proof.

[37] The Court therefore finds that the alleged misinterpretation of correspondence between the U.S. Border Patrol and the CBSA by the citizenship judge could not have been and is not material to the end result (*Patel v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 55, 288 N.R. 48; *Goudimenko v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 447, 113 A.C.W.S. (3d) 766 at paragraphs 17-18). The Court is not convinced, on the balance of probabilities, that the Applicant satisfied the residency requirement pursuant to paragraph 5(1)(c) of the Act. The citizenship judge's conclusion was reasonable and does not warrant this Court's intervention.

2. Did the citizenship judge violate the Applicant's right to know the case to be met, and thus his right to procedural fairness, by failing to disclose the information from the U.S. Border Patrol and thus failing to provide him the opportunity to respond to that information?

[38] The Applicant alleges that this Court has held that the duty of fairness owed to an applicant for citizenship is "fairly high" and the discretion of the citizenship judge is quite broad (*Sadykbaeva v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1018, 336 F.T.R. 51 at paragraphs 14-16).

[39] In the case at bar, the Applicant submits that it was a violation of procedural fairness for the citizenship judge to fail to disclose the correspondence between the CBSA and the U.S. Border Patrol authorities to the Applicant.

[40] The Respondent submits that the present case is one of those instances in which even if there was an error, it would not affect the outcome of the case and would not justify this Court's intervention.

[41] It is a known fact that the Applicant's permanent residence status in the United States is valid until July 26, 2010 and the Applicant has not denied this information. Therefore, the information provided by the U.S. Border Patrol on May 12, 2005 stating that the Applicant was a permanent resident of the United States from 1999 to 2001 does not constitute new information.

[42] This information did not create a possibility of prejudice to the Applicant (*Kane v. University of British Columbia*, [1980] 1 S.C.R. 1105, 31 N.R. 214; *International Woodworkers of America, Local 2-69 v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282 at 339, 105 N.R. 161). As noted in *Canadian Cable Television Assn. v. American College Sports Collective of Canada, Inc.*, [1991] 3 F.C. 626, 129 N.R. 296 (F.C.A.): "It therefore appears that a board's referring to material from publicly known government sources, and entirely supplemental in its nature and kind to the very material the parties themselves applied to the board, will not of itself violate the principles of natural justice." The Applicant was aware of the government information concerning his permanent resident status in the United States and he even admitted in his evidence that he obtained this status in 1999 and it is valid until July 2010. On the facts of this particular case, the citizenship judge acted fairly towards the Applicant.

[43] The information regarding the permanent residence of the Applicant does not amount to third party information unknown to the Applicant. Therefore, the citizenship judge was under no obligation to disclose a known fact to the Applicant (*Yassine v. Canada (Minister of Citizenship and Immigration)*, (1994), 172 N.R. 308, 48 A.C.W.S. (3d) 1434 at 9-10 (F.C.A.); *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202 at 228, 163 N.R. 27; *Cartier v. Canada (Attorney General)*, [2003] 2 F.C. 317, 300 N.R. 362 at paragraphs 32-33 (F.C.A.)). The Court's intervention is thus not warranted.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the appeal is dismissed.

"Richard Boivin"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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