Federal Court  Cour fédérale

Date: 20120327

Docket: T-1067-11

Citation: 2012 FC 361

Ottawa, Ontario, March 27, 2012

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

MICHAEL HADDAD

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an appeal of the decision of a Citizenship Judge under subsection 14(5) of the *Citizenship Act*, RSC 1985, c C-29. Michael Haddad contests the refusal of his application for not satisfying the residency requirement of subsection 5(1)(c) in a letter dated April 27, 2011.

I. Facts

[2] On October 14, 2003, the Applicant became a permanent resident of Canada. On October 24, 2007, he applied for citizenship. The relevant residency period was from October 24, 2003 to October 24, 2007. He declared 351 days of absence, leaving him with 1109 days of physical presence.

[3] On April 11, 2011, the Applicant appeared before a Citizenship Judge. He was also given the opportunity to file additional evidence. He submitted various invoices from a gas station.

[4] On April 27, 2011, the Citizenship Judge issued his decision. There are, however, two letters addressed to the Applicant in the Certified Tribunal Record both containing the same overall reasons for decision but one with the wrong facts.

[5] Leaving aside the incorrect statement of facts in one of the decisions for the moment, I will address the reasons for denying the application for review purposes as this is consistent in both letters.

II. Citizenship Determination

[6] The Citizenship Judge identified the main problem with the application as “the lack of evidence of ongoing physical presence and concerns regarding the credibility of the Applicant’s oral statements in this regard.”

[7] It was difficult for the Citizenship Judge to believe that it would take a young mechanical engineer seven years to learn how to operate a gas station. His vague answers describing his duties during the day raised questions regarding his employment situation in Canada.

[8] The Applicant's banking records led to further doubts regarding his residency. He stated that he lived and worked with his brother. A letter from the building management company also indicated that the Applicant lived with his brother, but the Citizenship Judge did not attribute much weight to this letter because it referred to residence in general terms. The Applicant did not provide any rent receipts, leases or letters from neighbours to demonstrate that he supported himself in Canada.

[9] The Applicant had also failed to mention his collection of Employment Insurance (EI) payments towards the end of the period in his Residence Questionnaire.

[10] Though the Applicant claimed to live in Canada during the entire period, he had to look at his driver's licence to provide his postal code.

[11] The Citizenship Judge concluded:

> It is impossible for me to determine, on balance of probabilities, how many days the Applicant was actually physically present in Canada, because there is insufficient evidence of his continued physical presence during the periods that he claims to have been in Canada.
>
> Also, I find the Applicant's claims and evidence regarding his work and life in Canada – virtually all of which are supplied in one way or another by his brother –to be troubling, and to lack credibility.

III. Issues

[12] The issues that arise in this application are as follows:

(a) Given the existence of two sets of reasons for decision, which set is under review for the purposes of this application?

(b) Can the Applicant submit new affidavit evidence as part of this application?

(c) Did the Citizenship Judge err in finding that the Applicant did not meet the residency requirement under subsection 5(1)(c)?

(d) Did the Citizenship Judge breach procedural fairness or natural justice?

IV. Standard of Review

[13] The determination of a Citizenship Judge regarding the number of days of physical presence in Canada to meet the residency requirement of subsection 5(1)(c) is reviewed based on reasonableness (*Ghahremani v Canada (Minister of Citizenship and Immigration)*, 2009 FC 411, [2009] FCJ no 524 at para 19; *Chen v Canada (Minister of Citizenship and Immigration)*, 2008 FC 763, [2008] FCJ no 964 at para 5).

[14] According to the reasonableness standard, this Court should not intervene unless the decision fails to demonstrate "the existence of justification, transparency and intelligibility" or does not fall "within a range of possible, acceptable outcomes" (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

[15] By contrast, issues of procedural fairness and natural justice warrant the correctness standard (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, 2009 CarswellNat 434 at para 43).

V. Analysis

[16] The Applicant understandably raises concerns regarding the existence of two sets of reasons for decision. This is particularly the case where one set of facts does not apply to him and references the wrong dates for the relevant residency period. It also discussed undisclosed absences and different declarations.

[17] The second letter contains the correct facts but did not explain the mistake. This letter was never received by the Applicant and only came to his attention on the arrival of the Certified Tribunal Record. As a consequence, the Applicant takes issue with the same finding on these correct facts that he was untruthful in his application.

[18] The Respondent acknowledges that a mistake was made in this instance. It has provided an affidavit from Kamesh Yeleswarapu indicating that she made an inadvertent error re-formatting and initially inputted the wrong set of facts in the decision sent to the Applicant.

[19] According to the Respondent, the second letter citing the correct facts should be the decision under review for the purposes of this application. Alternatively, the Respondent argues that the error in the first set of reasons is immaterial and that the reasons provided are adequate based on the principles referred to in *Vancouver International Airport Authority v Public Service Alliance of Canada*, 2010 FCA 158, [2010] FCJ no 809. With the exception of the brief facts section, the analysis and conclusions reached in the decision clearly refer to the Applicant's situation. It is evident that credibility concerns were the basis for the Citizenship Judge's denial of the application.

[20] I cannot accept the Respondent's position. The confusion surrounding the two letters warrants the intervention of this Court. The Applicant only received the first letter with the primary finding that he was not credible but also referring to a set of incorrect negative facts. This undeniably raised questions in his mind regarding the fairness and reasonableness of the decision-making process that can only be remedied by the reconsideration of a different Citizenship Judge.

[21] Irrespective of whether the error was clerical in nature as the Respondent claims, the Applicant should have received an explanation as to what occurred in the circumstances as soon as it came to the Citizenship Judge's attention. The receipt of the Certified Tribunal Record containing the second letter after the fact and the late affidavit was insufficient.

[22] I am not prepared to find a decision to deny citizenship, based on a failure to satisfy the residency requirement, reasonable where it is based on an incorrect letter and a correction not sent to the Applicant. It is therefore unnecessary for me to deal with the other issues raised by this application.

VI. Conclusion

[23] Given the concerns that arise as a result of the existence of two sets of reasons, the Applicant's appeal is allowed. The matter is sent back to a different citizenship judge for re-determination.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is allowed and the matter is sent back to a different citizenship judge for re-determination.

" D. G. Near "
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**T-1067-11**
STYLE OF CAUSE:	**HADDAD v MCI**
PLACE OF HEARING:	**TORONTO**
DATE OF HEARING:	**FEBRUARY 21, 2012**
REASONS FOR JUDGMENT AND JUDGMENT BY:	**NEAR J.**
DATED:	**MARCH 27, 2012**

APPEARANCES:

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Veronica Cham	FOR THE RESPONDENT

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