Federal Court  Cour fédérale

Date: 20150924

Docket: T-2479-14

Citation: 2015 FC 1102

Ottawa, Ontario, September 24, 2015

Present: The Honourable Mr. Justice Locke

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

JAHANARA BEGUM KHAN

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is a judicial review of the decision of the citizenship judge, Marie Sénécal-Tremblay (the Judge), dated November 7, 2014 (the Decision), granting citizenship to the respondent and finding that she meets the criteria provided at paragraph 5(1)(*c*) of the *Citizenship Act*, RSC 1985, c C-29 [the Act].

II. Facts

[2] The respondent is a citizen of Bangladesh and the second wife of a Canadian citizen who obtained his citizenship in 2012. The respondent's husband is originally from Bangladesh and established himself in Canada as an investor. The respondent received permanent resident status on December 4, 2004, and filed an application for citizenship on June 5, 2010.

[3] The respondent's husband is the father of three children from his first marriage. After his first wife died, he married the respondent in 2003, at which time the youngest of his children was 6 years old. At the time of the decision, the three children were respectively 16, 27, and 34 years old. The three children are Canadian citizens, live in Canada (in Ontario and Quebec) and are studying or working here.

[4] The couple has a house on Île des Sœurs in Montréal and a condo in Toronto.

[5] During most of her marriage, the respondent did not have any paid employment and she participated in family life as a housewife.

[6] The respondent's husband, who still has a business in Bangladesh, must travel there on a regular basis to manage it. It was in accompanying her husband during his travels that the respondent went to Bangladesh several times, for 318 days during the relevant period, being the four years before her application for citizenship (from June 5, 2006, to June 5, 2010).

[7] The respondent initially failed her language test and test of knowledge of Canada in August 2011, but she passed both tests with a score of 15/20 in November 2013.

[8] On November 7, 2014, the respondent and her husband met with the Judge for the consideration of the respondent's citizenship application.

III. Decision

[9] In the beginning of the decision, the Judge recognizes that, because the respondent has not held employment or studied during the period in question and she often travelled abroad with her husband, it was difficult to verify how much time she had spent in Canada and whether she was a resident here. It seems that this is the reason she met with the respondent.

[10] The Decision describes the activities of the respondent's husband, and the couple's frequent travels.

[11] The Decision indicates that the respondent was accurate regarding her absences from Canada and that, despite her frequent travels, there was no confusion with respect to the stamps in her passport. The Judge accepted the absences from Canada as they were declared by the respondent.

[12] The Judge notes in the Decision that the respondent's answers during the meeting were not evasive, confusing or contradictory.

[13] The Judge arrived at the conclusion in the Decision that the evidence is sufficiently clear and compelling to establish the physical presence of the respondent in Canada and to satisfy the requirements of paragraph 5(1)(*c*) of the Act.

IV. Issues

[14] The applicant submitted that the Judge failed in her preliminary obligation to determine whether the respondent had established her residence in Canada, before calculating the number of days of presence and absence during the period in question to determine whether she maintained her residence in Canada. The applicant argued that this error alone is sufficient to set aside the Decision.

[15] Furthermore, the applicant submitted that the evidence was insufficient to allow the Judge to conclude that the requirements of paragraph 5(1)(*c*) of the Act were met. The applicant also submitted that the reasons in the Decision are insufficient. Since these two arguments are related, they will be dealt with together.

[16] The applicant also submitted that the Judge erred (i) in not indicating which of the tests for determining the residence she applied, and (ii) by mixing up the tests.

V. Analysis

[17] The parties agree, and so do I, that the standard of review for all the issues is that of reasonableness. On the subject of compliance with the residence requirement, I refer to *Canada*

(Citizenship and Immigration) v Al-Showaiter, 2012 FC 12 at para 13. As regards the sufficiency of the evidence and reasons, I refer to *Canada (Citizenship and Immigration) v Matar*, 2015 FC 669 at para 12.

A. *Preliminary issue: establishing residence in Canada*

[18] It is not disputed that before arriving at the step of calculating the number of days spent in Canada, it must first be determined whether the respondent has established her residence in Canada: *Ahmed v Canada (Citizenship and Immigration)*, 2002 FCT 1067 [*Ahmed*] at para 4. However, no authority has been cited that this determination must be explicit. I am not satisfied that it is unreasonable that this determination be implicit. The possibility that it be implicit seems to be supported by the decision of Justice Yves de Montigny in *Boland v Canada (Citizenship and Immigration)*, 2015 FC 376 at para 22, on the ground that the citizenship judge continued calculating the number of days of presence in Canada:

> In the case at bar, it must be presumed that the Citizenship Judge was prepared to accept that the Applicant had established residence on the day of landing, otherwise there would have been no reason to determine whether the Applicant's residency satisfied the statutorily prescribed number of days.

[19] The applicant noted that the decision in *Ahmed* also requires that the date when residence in Canada is established must be determined. I am of the view that it is also reasonable that this determination be implicit. However, when I am deciding if the Judge considered whether the respondent's residence in Canada was established, I must also consider the date when residence was allegedly established.

[20] I note that the Decision states the following in the "Facts" section: "Date of Arrival and Permanent Residence: 02 December 2004". This corresponds to the date when the respondent obtained her permanent resident status. However, residence in Canada is not established by merely arriving in Canada and obtaining permanent resident status: *Canada (Citizenship and Immigration) v Lau*, 1999 CanLII 8473 at para 5; *Chan v Canada (Citizenship and Immigration)*, 2002 FCT 270 at para 9.

[21] The evidence shows that the respondent did not stay in Canada long after December 2, 2004. She left Canada on January 1, 2005 (one month later), and returned only on October 19, 2006 (approximately 20 months after she left). For this reason, I am not prepared to find that the Judge implicitly accepted that the respondent had established her residence in Canada before her return to Canada.

[22] The evidence also shows that after her return to Canada on October 19, 2006, the respondent stayed only 18 days before leaving again on November 6, 2006. This time, she returned on February 5, 2007, 92 days later. After this second return, she remained in Canada for long periods and her absences were shorter.

[23] It is not disputed that the period in which it must be determined whether the respondent meets the criteria in paragraph 5(1)(*c*) of the Act (three years (or 1,095 days spent) in Canada over a period of four years) is from June 5, 2006, to June 5, 2010.

[24] The fact that the Judge had calculated the number of days of residence seems to indicate implicitly that she was satisfied that the respondent had established her residence in Canada at some date. Based on the evidence, this date seems to be around the date of her second return to Canada (February 5, 2007).

[25] The dates during which the respondent was present in Canada before her residence in Canada was established must not be included in the calculation of the number of days of presence in Canada, according to paragraph 5(1)(*c*) of the Act. But I note that the Judge included the 18 days of presence in Canada from October 19, 2006, to November 6, 2006, in her calculation, which is not appropriate in a case where the respondent's residence in Canada was established only around February 5, 2007.

[26] However, I note that the Decision indicates a physical presence in Canada, which was of 1,142 days, or 47 days in excess of the requirements of paragraph 5(1)(*c*) of the Act. Even if the 18 days in question are subtracted, the respondent still exceeds the required number of days of physical presence in Canada. Since the Judge's error does not change the result of the calculation, I accept the implicit conclusion in the Decision that the respondent has established her residence in Canada and early enough to meet the requirements of paragraph 5(1)(*c*) of the Act.

B. *Alleged insufficiency of the evidence or the reasons*

[27] The Decision acknowledges the lack of evidence of the respondent's physical presence in Canada:

> Given the fact that she did not work or study in Canada and travelled a great deal with her Canadian citizen husband … it was hard to ascertain how much time she was spending in Canada and if she was in fact living in Canada or Bangladesh.

[28] As stated above, this lack of evidence seems to be the reason that the Judge met with the respondent. During this meeting, the Judge seems to have been entirely satisfied with the respondent's testimony. She stated that she carefully reviewed the respondent's passport with her and that there was no problem with her declared absences. The Judge also indicated that, in the respondent's testimony, her answers were not evasive, confusing or contradictory.

[29] Clearly, the Judge was counting on the respondent's testimony to complete the documentary evidence of her residence in Canada. This documentary evidence is primarily her passport. The Judge had the right to come to her conclusion in this manner.

[30] It is true that the respondent made some errors in her statements regarding her absences from Canada. But these errors were minor and did not affect the number of days of physical presence calculated by the Judge.

[31] It is arguable that the Judge erred in saying the following in her Decision:

> My review of the file indicated that the Applicant was accurate in reporting her absences on her Original Application, her Residency Questionnaire, and her passport stamps.

[32] However, if the Judge focused on the number of days of physical presence in Canada, instead of the minor errors, this phrase is entirely correct.

[33] The Judge might have pointed out these errors to avoid the possibility of a conclusion that she had not noticed them, but I find that it was not unreasonable for her to have remained silent on this topic.

[34] The applicant noted that a passport is not irrefutable evidence of the presence of a person in Canada: *Haddad v Canada (Citizenship and Immigration)*, 2014 FC 976 at para 24. But this is not the real question. The real question is rather whether it is reasonable for the Judge to have relied primarily on the respondent's passport and her testimony. In my view, this was entirely reasonable.

[35] In this regard, I reproduce the excerpt of a recent decision by Justice Denis Gascon in *Canada (Citizenship and Immigration) v Suleiman*, 2015 FC 891 [*Suleiman*] at para 27:

> The Minister is right to point out that there remains at all times a positive obligation on the citizenship applicants to provide true, correct, and complete information and to refrain from making false declarations. This however does not mean that corroborative evidence is required on every single element. It is well recognized that the *Citizenship Act* does not require corroboration on all counts; instead, it is "the responsibility of the original decision-maker, taking the context into consideration, to determine the extent and nature of the evidence required" (*Canada (Minister of Citizenship and Immigration) v El Bousserghini*, 2012 FC 88 at para 19 [*El Bousserghini*]). The citizenship judge may not have reconciled the apparent discrepancy as clearly as the Minister would have liked to see it in his reasons, or explained in as much detail as the Minister would have hoped how Mr. Suleiman convinced the judge that the discrepancy did not harm his credibility. But there is nothing to indicate that the judge's finding on Mr. Suleiman's return to Canada prior to the beginning of the reference period was not reasonable.

[36] The applicant noted that a citizenship officer provided a memorandum to the Judge. The applicant submitted that the Judge was obliged to refer to it in the Decision.

[37] The officer's conclusion was that the evidence in the file before the meeting with the Judge was insufficient to determine the respondent's physical presence in Canada during the period in question. As already indicated, the Decision recognized this fact. This seems to be the reason for which the Judge counted so much on the respondent's testimony. In this context, the absence of an explicit description regarding the content of the memorandum from the citizenship officer does not make the Decision unreasonable.

[38] The applicant submitted that, with the lack of evidence of the respondent's skill in French, it was unreasonable that the Judge accepted that the respondent had worked as a clerk at her husband's gas station in LaPrairie, Quebec, for several months. I am not prepared to agree that this conclusion is unreasonable. Furthermore, I am of the view that it is a peripheral issue given that the key evidence of the respondent's physical presence in Canada was her passport and her testimony.

[39] The applicant also referred to the absence in the evidence of the respondent's tax returns during the period in question. Again, I find that this is a peripheral issue. In any case, it is not clear to me what relevant information might have been revealed by these returns. In my view, it was not unreasonable for the Judge to have remained silent on this topic.

[40] The applicant submitted that the Judge erred when she referred to the properties on Île des Sœurs in Montréal and in Toronto as belonging to the couple (the respondent and her husband). The applicant noted that these properties are both in the husband's name only. I am of the view that the Judge did not err here. The respondent and her husband are married. Therefore, the property of each person is the matrimonial property. Although the properties are in the husband's name, the respondent benefits from them and has rights to them.

[41] With respect to the sufficiency of the reasons in the Decision, the parties seem to agree that the Supreme Court of Canada decisions in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] and *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses*] are applicable. I quote *Suleiman* at para 38 in this matter:

> The decision-maker is not required to refer to each and every detail supporting his or her conclusion. It is sufficient if the reasons permit the Court to understand why the decision was made and determine whether the conclusion falls within the range of possible acceptable outcomes (*Newfoundland Nurses* at para 16). The reasons are to be read as a whole, in conjunction with the record, in order to determine whether the reasons provide the justification, transparency and intelligibility required of a reasonable decision (*Dunsmuir* at para 47; *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 53; *Construction Labour Relations v Driver Iron Inc.*, 2012 SCC 65 at para 3).

[42] I am satisfied that the reasons in the Decision meet these requirements.

[43] Paragraph 34 of the decision in *Suleiman* is also relevant here:

> The Court understands the Minister's desire to receive more detailed or more complete reasons from a citizenship judge, as the process established by the *Citizenship Act* requires a citizenship

> officer to refer a matter to a citizenship judge when the officer has concerns and is not satisfied that residency requirements are met. But the test this Court has to apply is not whether the decision satisfies the expectations of the Minister; the test is the reasonableness of the decision. None of the conclusions of the citizenship judge are outside the range of reasonableness. Where there might have been some alleged inconsistencies, they were either immaterial or could be reasonably reconciled within the decision.

C. *Test of residence*

[44] The parties agree that there are three possible tests to determine whether the requirements of residence for citizenship have been satisfied. The three tests are illustrated respectively in the following decisions: *Pourghasemi (Re)*, [1993] FCJ No 232 [*Pourghasemi*]; *Koo (Re)*, [1993] 1 FC 286 (TD); and *Papadogiorgakis (Re)*, [1978] 2 FC 208 (TD).

[45] The parties also agree that the Judge had the right to choose which test she would apply, but she had to choose one test. She did not have the right to mix the tests.

[46] The applicant submitted (i) that it is not clear which of the tests the Judge applied, and (ii) that the Judge indeed mixed the tests. To support these arguments, the applicant referred to (i) the scope of the analysis of the life of the respondent's husband (instead of the respondent herself); and (ii) the following sentence in the Decision:

> The strong ties the Applicant and her husband have to their 3 children, all Canadian citizens, who are all actively living, studying and working in Quebec and Ontario, their ownership of property in both provinces and their clear testimony regarding Mrs. Khan's absences combine to make a sufficiently clear and compelling case in favour of the Applicant's physical presence in Canada as declared.

[47] In my view, this excerpt, as well as the decision as a whole, indicates that the Judge applied the test illustrated in *Pourghasemi,* which is focused on the number of days of physical presence in Canada during the period in question. This is the case despite the fact that the Judge noted other factors (such as the strong ties with the children and the couple's properties in Canada). I note that the excerpt concluded with "a sufficiently clear and compelling case in favour of the Applicant's physical presence in Canada as declared" [emphasis added].

[48] With respect to the analysis of the life of the respondent's husband, this analysis is relevant because the couple often travels together and the reasons for these travels are relevant in establishing the respondent's presence in and absence from Canada as well as her husband's.

VI. Conclusion

[49] It seems sufficiently clear that the Judge agreed that the respondent and her family have made a life in Canada, although the respondent and her husband travel frequently to Bangladesh.

[50] In my view, this application for judicial review must be dismissed.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that this application is rejected.

"George R. Locke"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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