Federal Court  Cour fédérale

Date: 20160120

Docket: T-1362-15

Citation: 2016 FC 58

Montréal, Quebec, January 20, 2016

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

JIA LIN

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is a judicial review application brought by the Minister of Citizenship and Immigration (the Minister) under section 22.1 of the *Citizenship Act*, RSC 1985, c C-29 (the Act) of a decision by a Citizenship Judge, dated July 21, 2015, which approved the Respondent's application for Canadian citizenship.

[2] The Respondent did not file a notice of appearance, nor file any materials before this Court and did not attend the hearing.

II. Background

[3] Ms. Lin is a citizen of China. She arrived in Canada with her husband and daughter in June 2007 and they were all landed as permanent residents.

[4] In November 2010, Ms. Lin filed an application for Canadian citizenship where she declared that she was absent from Canada for 90 days and present for 1148 days during the period from June 26, 2007 to November 5, 2010 (the Relevant Period). She met with a Citizenship Judge in December 2014 and again on May 28, 2015 for the purpose of determining whether she satisfied the residency requirement of paragraph 5(1)(c) of the Act.

[5] In her decision, the Citizenship Judge stated that her only concern was the absence of Ms. Lin's passport for the entire Relevant Period since Ms. Lin had only submitted a passport that was valid from November 15, 2010 to November 14, 2020. However, since Ms. Lin had brought the missing passport to the second hearing, the Citizenship Judge approved Ms. Lin's application for Canadian citizenship noting that the passport's entry and exist stamps matched her only declared trip of February 22, 2009 to May 21, 2009.

[6] The Minister challenges the Citizenship Judge's decision on the ground that she failed to identify the test used to determine how the Respondent met the Act's residency requirement. The Minister also claims that the Citizenship Judge committed a reviewable error by failing to

address numerous concerns flagged by a Citizenship officer's File Preparation and Analysis Template report (FPAT Report) dated April 10, 2014. In identifying the following gaps and contradictions in the Respondent's citizenship application, the officer concluded that there were "significant" concerns about Ms. Lin's credibility regarding her establishment and physical presence in Canada during the Relevant Period, namely:

a. No credit card or bank statements or other supporting documents to verify Ms. Lin's presences and absences from Canada were provided;

b. No documentation to support her declared residences in Canada was provided;

c. No documentation was provided in support of any home or family ties in Canada;

d. Her employment during the Relevant Period could not be assessed since she did not provide any supporting documentation;

e. Ms. Lin declared that she spends her vacation in China at her own home, yet failed to declare any property owned overseas;

f. No medical records were provided to establish that Ms. Lin had received medical services in Canada;

g. No documentation was provided to demonstrate Ms. Lin's social ties in Canada; and

h. Ms. Lin did not provide any passive indications of residence in Canada during the Relevant Period (i.e. utility bills, property tax statements, income tax returns).

[7] According to the FPAT Report, which was put before the Citizenship Judge, it was simply not possible to assess, with any degree of certainty, whether Ms. Lin had resided in Canada during the Relevant Period.

III. Issues and Standard of Review

[8] The issue to be determined in this case is whether the Citizenship Judge, by granting the Respondent's citizenship application, committed a reviewable error as contemplated by subsection 18.1(4) of the *Federal Courts Act*, RSC 1985, c F-7.

[9] In order to answer this question, I have applied the standard of reasonableness which is the standard of review applicable in citizenship appeals dealing with the Act's residency requirement (*Saad v Canada (Citizenship and Immigration)*, 2013 FC 570, at para 18, 433 FTR 174 and see also *Canada (Citizenship and Immigration) v Rahman*, 2013 FC 1274, at para 13, 445 FTR 32; *Balta v Canada (Citizenship and Immigration)*, 2011 FC 1509, at para 5, 403 FTR 134; *Canada (Citizenship and Immigration) v Baron*, 2011 FC 480, at para 9, 388 FTR 261; *Canada (Citizenship and Immigration) v Diallo*, 2012 FC 1537, at para 13, 424 FTR 156; *Huang v Canada (Citizenship and Immigration)*, 2013 FC 576, at paras 24 to 26; *Canada (Citizenship and Immigration) v Abou-Zahra*, 2010 FC 1073, at para 15, 196 ACWS (3d) 928 [*Abou-Zahra*]; *Canada (Citizenship and Immigration) v Bayani*, 2015 FC 670, at para 17 [*Bayani*].

[10] As is well established, the standard of reasonableness not only requires that the decision at issue fall within a range of possible, acceptable outcomes defensible in respect of the facts and law, but it also requires the existence of justification, transparency and intelligibility within the decision-making process (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190, at para 47).

IV. Analysis

[11] Pursuant to paragraph 5(1)(c) of the Act, as it read at the time Ms. Lin submitted her citizenship application, the Minister shall grant citizenship to any person who has "within four years immediately preceding the date of his or her application, accumulated at least three years of residence in Canada". The onus is on the citizenship applicant to establish that the residency requirement set out in the Act is met and a Citizenship Judge cannot rely on the applicant's claims alone in that regard, especially in the face of contradictory evidence (*El Falah v Canada (Citizenship and Immigration)*, 2009 FC 736, at para 21).

[12] While this Court's jurisprudence allows them to choose between three tests to assess whether the Act's residency requirement has been met (*Bayani*, above at paras 19-23; *Pourzand v Canada (Citizenship and Immigration)*, 2008 FC 395, at para 16), citizenship judges must at the very least indicate which residency test was used and why the test was met or not. Failure to do so is a reviewable error (*Bayani*, at paras 30-32; *Canada (Citizenship and Immigration v Jeizan* 2010 FC 323, at para 18, 386 FTR 1).

[13] In the case at bar, there is no indication whatsoever in the Citizenship Judge's decision as to whether the physical presence test was used, as elaborated in *Pourghasemi (Re)* (FCTD) 62 FTR 122, [1993] FCJ No 232 (QL), or if one of the two qualitative tests, as set out in *Re Papadogiorgakis*, [1978] 2 FC 208, [1978] FCJ No 31 (QL) and *Koo (Re)*, [1993] 1 FC 286, 59 FTR 27, was used to determine whether the Respondent was compliant with the residency

requirement. In particular, the Citizenship Judge's reasons for decision make it impossible to relate them, in any comprehensive way, to any of these three tests.

[14] As I have indicated in *Bayani*, the provision of reasons in the citizenship context "assumes a special significance" as the Minister must grant citizenship in the event of a positive recommendation by a citizenship judge (*Canada (Citizenship and Immigration) v Mahmoud*, 2009 FC 57, at par 6, 339 FTR 273 [*Mahmoud*]; *Canada (Minister of Citizenship and Immigration) v Wong*, 2009 FC 1085, at para 17-18). They should be "sufficiently clear and detailed so as to demonstrate to the Minister that all relevant facts have been considered and weighed appropriately and that the correct legal tests have been applied" (*Mahmoud*, above at para 6). At a minimum, this includes indicating which one of the three legal tests available to assess the residency requirement was used and why it was satisfied (*Bayani*, above at para 31).

[15] I must therefore find that the Citizenship Judge's decision lacks justification, transparency and intelligibility as the Judge failed to articulate, in any meaningful way, the residency test that was applied.

[16] I am also of the opinion that the Citizenship Judge committed a reviewable error by ignoring concerns raised by the Citizenship officer`s FPAT Report with respect to the Respondent's establishment and physical presence in Canada. In the past, this Court has found a citizenship judge's decision to be unreasonable where the citizenship judge failed to address concerns raised in a memorandum prepared by a Citizenship officer (*Canada (Citizenship and Immigration) v Raphaël*, 2012 FC 1039, at paras 24-25, 417 FTR 177). Moreover, in

Abou-Zahra, Justice Richard Boivin found that a citizenship judge's decision to be unreasonable where "the citizenship judge did not mention or attempt to explain the contradictions, inconsistencies and omissions that the documentary evidence revealed" (at para 28).

[17] It is evident that the Citizenship officer who prepared the FPAT Report found several contradictions and omissions in the Respondent's citizenship application, which raised serious doubts that the Respondent satisfied the residency requirement of paragraph 5(1)(c) of the Act. Despite this, the Citizenship Judge did not address any of the officer's concerns or turn her mind to the question of Ms. Lin's credibility, which has also been found to be a reviewable error (see *Canada (Citizenship and Immigration) v Vijayan*, 2015 FC 289, at para 65).

[18] As the record that was before the Citizenship Judge stands, it is simply not possible, as noted in the FPAT Report, to assess, in any meaningful way, whether Ms. Lin had resided in Canada during the Relevant Period, be it under the physical presence test (the *Pourghasemi* test) or either of the two qualitative tests (the *Papadogiorgakis* or *Koo* tests).

[19] For these reasons, the Minister's judicial review application is granted and the Citizenship Judge's decision is set aside. The Respondent, who did not seem concerned with the Minister's proceedings and the possibility of the Citizenship Judge's decision being overturned as she failed to appear and participate in these proceedings, will have to make a new application to the Minister if she decides to apply for Canadian citizenship again.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The judicial review application is granted;

2. The decision of Citizenship Judge Marie Senécal-Tremblay, dated July 21, 2015, is set aside;

3. No costs.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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