Federal Court  Cour fédérale

Date: 20161107

Docket: T-133-16

Citation: 2016 FC 1241

Ottawa, Ontario, November 07, 2016

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

GABRIELLA CUNHA LEITE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Gabriella Cunha Leite seeks judicial review of a decision of the Citizenship Judge denying her application for Canadian citizenship on the basis that she did not meet the residency requirement under subs. 5(1)(c) of the *Citizenship Act*, RSC, 1985, c C-29 [the Act] which requires at least three years of residence in Canada in the four years immediately preceding the date of the application.

[2] In concluding she did not meet the residency requirement, the Citizenship Judge relied upon the test outlined in *Pourghasemi (Re)*, [1993] FCJ No 232 (QL) [*Pourghasemi*] and concluded that it was impossible to determine the number of days Ms. Leite was physically present in Canada during the relevant four-year period.

[3] Ms. Leite argues that the Citizenship Judge erred in assessing the evidence of her physical presence in Canada. As well, she argues that the Citizenship Judge was wrong in relying upon the residency test outlined in the *Pourghasemi* case.

[4] In my view, the Citizenship Judge did not make any errors and for the reasons that follow, the judicial review is dismissed.

I. Background

[5] Ms. Leite is a citizen of Brazil who obtained permanent resident status in Canada in February 2007. She completed her application for Canadian citizenship on December 16, 2011, which means the relevant four-year period for assessing the residency requirement was December 16, 2007, to December 16, 2011.

[6] On her application, she declared 832 days of presence and 628 days of absence during the 1460 day (four years) period. This is a shortfall of 263 days of the 1095 days (three years) required.

[7] In a follow up Residency questionnaire on February 26, 2013, Ms. Leite reported absences from Canada different from those reported in her application. However, she was still short of the 1095 days by approximately 100 days.

[8] On November 9, 2015, she attended a hearing before a Citizenship Judge. In a decision dated December 15, 2015, her Citizenship application was denied.

II. Issues

[9] The following are the issues identified by the Applicant:

a. Did the Citizenship Judge properly assess the evidence?

b. Did the Citizenship Judge err by relying on the *Pourghasemi* test?

c. Is this an appropriate case for certified questions?

III. Standard of Review

[10] The parties agree that reasonableness is the applicable standard of review: *Huang v Canada (Citizenship and Immigration)*, 2013 FC 576 at para 13 [*Huang*]; *Canada (Citizenship and Immigration) v Purvis*, 2015 FC 368 at para 22 [*Purvis*]; *Canada (Citizenship and Immigration) v Zhang*, 2016 FC 951 at para 8 [*Zhang*].

IV. Analysis

a. *Did the Citizenship Judge properly assess the evidence?*

[11] Ms. Leite argues that she provided extensive evidence of her presence in Canada during the four-year period. However she does admit that her record of absences before the Citizenship Judge was somewhat unclear. She claims to have overestimated her days of absences. She also states that a few short trips to the United States were omitted from her original application but were corrected in the residency questionnaire.

[12] Ms. Leite argues that any errors on her absences from Canada should not be fatal to her application and that her credibility should not be affected by good faith estimations, especially considering that she suffers from attention-deficit disorder and depression.

[13] In her reasons, the Citizenship Judge refers to a three-month gap for which there were no active indicators of Ms. Leite's presence in Canada. Ms. Leite argues that this three-month gap was actually only a two-month gap and she pointed to evidence of her presence in Canada during this time in the form of notes from meetings with her psychiatrist. She argues that this is an error on the part of the Citizenship Judge in assessing the evidence and that it taints the decision as a whole.

[14] This is the only calculation error made by the Citizenship Judge. However, even allowing for this error, Ms. Leite still did not produce reliable evidence that she accumulated 1,095 days of physical presence in Canada. Therefore this minor error of the Citizenship Judge does not render the decision unreasonable.

[15] As well, it is important to emphasize that Ms. Leite has the burden of establishing the number of days of residence: *Atwani v Canada (Citizenship and Immigration)*, 2011 FC 1354.

[16] At the hearing, Ms. Leite was asked to produce her Brazilian passport. Ms. Leite advised the Citizenship Judge that she had thrown the passport in the garbage. The Citizenship Judge found this answer was not credible because it defied common sense. Ms. Leite argues that this conclusion by the Citizenship Judge failed to take into consideration her mental health issues and is therefore unreasonable.

[17] Asking for a passport to assist in assessing the evidence was a fair and reasonable request of the Citizenship Judge. Likewise, it was reasonable for the Citizenship Judge to find her answer that she threw it in the garbage not credible, especially considering the overall lack of clarity on the evidence of her presence in Canada.

[18] It is not the role of this Court to reweigh the evidence that was before the Citizenship Judge: *Zhang*, above, at para 21; *Canada (Citizenship and Immigration) v Iluebbey*, 2016 FC 946 at para 46.

[19] Here, the Citizenship Judge properly considered the evidence, such as it was.

b. *Did the Citizenship Judge err by relying on the Pourghasemi test?*

[20] Although a number of residency tests have developed, it is settled law that a Citizenship Judge may reasonably choose which test to apply and provided that test is applied correctly, this

Court will not intervene: *Purvis*, above; *Huang*, above; *Saad v Canada (Citizenship and Immigration)*, 2013 FC 570 at para 23 [*Saad*]; *El-Khader v Canada (Citizenship and Immigration)*, 2011 FC 328 at para 20.

[21] Here, the Citizenship Judge was reasonable in deciding to apply the *Pourghasemi* test. In doing so, the Citizenship Judge found, on a balance of probabilities, that Ms. Leite had not met the residence requirement under subs. 5(1)(c) of the Act. Considering the lack of cogent evidence of physical presence in Canada for the required period of time and the credibility concerns over the discarded passport, this is a reasonable conclusion.

[22] Further, Ms. Leite acknowledges that even allowing for the two versus three-month absence, she would still have been short of meeting the 1,095-day requirement.

[23] Therefore it cannot be unreasonable for the Citizenship Judge to conclude that, on a balance of probabilities, Ms. Leite was not physically present in Canada for 1,095 days.

[24] Here, the Citizenship Judge concluded that the facts did not meet the test. It is not the role of this Court to select a different test to be applied to the evidence: *Saad*, above, at para 23.

c. *Is this an appropriate case for certified questions?*

[25] The Applicant has proposed the following certified questions:

1. In determining residence for the purposes of subs. 5(1)(c), is the *Koo* test the only test available to a Citizenship Judge?

2. Does a Citizenship Judge err where she or he misapprehends the evidence relevant to one of the available tests, regardless of the test chosen?

[26] The Respondent disagrees that there is any question for certification in this case.

[27] This Court may certify a question only if it transcends the interests of the parties, has broad significance or general application and is determinative of an appeal. To be determinative of an appeal, the issue must have been decided by the application judge so that it arises before the Court of Appeal in its examination of the appeal: *Burton v Canada (Citizenship and Immigration)*, 2014 FC 910.

[28] Here, the issues in this case are fact specific and the lack of evidence was the determinative factor. This would not bring the case within the ambit of a proper certified question: *Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168 at para 11.

[29] Furthermore, the law is settled that the Citizenship Judge has discretion to choose the applicable residency test and this Court will not intervene unless the test was applied in error. This as well demonstrates the questions posed by the Applicant are not appropriate for certification: *Purvis*, above, at para 26 (on the fact that the law is well settled); *Mudrak v Canada (Citizenship and Immigration)*, 2016 FCA 178 at para 36 (for the proposition that settled law is not appropriate for certification of a question).

[30] I therefore decline to certify the questions proposed by the Applicant.

JUDGMENT

THIS COURT'S JUDGMENT is that the judicial review is:

1. The application for judicial review of the Citizenship Judge's decision is dismissed; and

2. No serious question of general certification is certified.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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