Federal Court  Cour fédérale

Date: 20190311

Docket: T-1419-18

Citation: 2019 FC 291

Ottawa, Ontario, March 11, 2019

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

NARIMAN ZAKI ABDULFATTAH YOUNIS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant Nariman Younis seeks judicial review of a decision of the Citizenship Judge, dated June 7, 2018, which found that, on a balance of probabilities, she did not meet the residence requirement under paragraph 5(1)(*c*) of the *Citizenship Act*, RSC, 1985, c C-29, [the Act].

II. Background

[2] The Applicant is a citizen of Jordan, but has been a permanent resident of Canada since February 15, 2010. She was sponsored to Canada by her husband, Mr. Fouad Blasi, who was a permanent resident and who subsequently became a Canadian citizen on November 8, 2013.

[3] The Applicant entered Canada as a permanent Resident on February 15, 2010. She first applied for citizenship on May 3, 2013. In accordance with the Instruction Guide, she submitted her certificate from her Language Instruction for Newcomers course as proof of her language ability, and she also checked off the box authorizing the government to verify her scores.

[4] That application was returned to her on June 20, 2013, purportedly because her language proof was unacceptable and she had only enclosed her most recent passport. She could have fixed the issue with the passport promptly, but it took her more time to schedule and re-do a different language test. Ms. Younis was therefore only able to re-apply for citizenship on April 20, 2014. As a result, the first two months she had spent in Canada slipped out of the relevant period and Ms. Younis only had 1,065 days of physical presence in Canada by the date of her second application. She was referred to a hearing before another Citizenship Judge.

[5] On July 31, 2017, that Citizenship Judge rejected her application. He applied the test for residency set out in *Re Koo*, [1993] 1 FCR 286 [*Re Koo*]. Although he accepted that Ms. Younis resided in Canada for 40 months under that test, he found that Canada was not the place that she customarily resided because she had gone to the United Arab Emirates [UAE] for the last 293

days of the relevant period and stayed there after the relevant period ended, which the judge mistakenly thought was her country of citizenship.

[6] The Applicant alleges that apart from two visits to Jordan and a third visit to the United States, she lived in Canada continuously from February 15, 2010 to June 30, 2013. Her first two children were born here and she took care of them while her husband worked. After Mr. Blasi was hired by a company in Dubai, United Arab Emirates, Ms. Younis followed him there with the children and stayed there with a temporary status dependent on her husband's employer.

[7] The Minister's delegate recalculated the absences and found that the Applicant had 382 days of absence and 1078 days of presence. The delegate referred the file for a hearing for the shortfall and based on a finding that the Applicant had not established and maintained residence in Canada, among other concerns, was the fact that she packed her belongings and left Canada to join her husband in the UAE at the end of the period.

[8] The Applicant applied for judicial review of that decision to the Federal Court. On February 23, 2018, the Federal Court set aside the decision in *Younis v Canada (Citizenship and Immigration)*, 2018 FC 209. The error with respect to Ms. Younis' citizenship was fatal to the decision. The Federal Court also remarked that the Citizenship Judge's comments that Ms. Younis had resided in Canada for "just 40 months", implied that she had met the residency test for 38 months of the relevant period. The Federal Court therefore found that the "Judge's reasons also lack intelligibility as they appear to pay insufficient attention to residency being

required for only three out of the four years immediately preceding the application, whether it is residence deemed under *Re Koo* or physical presence."

[9] The Federal Court remitted the case to another Citizenship Judge, which led to a new hearing on June 5, 2018.

III. Impugned decision

[10] The Citizenship Judge began its analysis by examining the evidence of travel to determine whether the Applicant's declarations are verifiable and corroborated and whether there are undeclared absences. The Citizenship Judge concluded that the Applicant had 395 days of absence, 1065 days of physical presence, and a shortfall of 30 days.

[11] The Citizenship Judge then applied *Re Papadogiorgakis*, [1978] 2 FC 208 [*Papadogiorgakis*], which requires that a Judge determine whether the Applicant established residency in Canada prior to his first extensive absence from Canada. The Citizenship Judge noted that a Judge must be satisfied that the Applicant had established a residence in Canada prior to her absences before moving on to consider whether residence has been maintained.

[12] The Citizenship Judge found that the Applicant established herself in Canada before her first significant absence. They noted that during this time she and her husband secured an apartment, she began attending school to learn English, she obtained a driver's licence and she had a child.

[13] The Citizenship Judge then considered whether the Applicant maintained residence in Canada. They particularly took issue with the Applicant's last absence from Canada between July 1, 2013 and April 20, 2014. At this time, the Applicant had an open house, sold her belongings, terminated her tenancy, and with her two children joined her husband who was working in the UAE. In light of these facts the Citizenship Judge found that the Applicant ceased to be a resident in Canada and therefore did not maintain her residence in Canada. The Citizenship Judge was not convinced by the Applicant's argument that her husband's job is temporary and unstable in the UAE, as the Applicant did not give any indication that she would be returning at a fixed point in time. She did not, for instance leave her belongings in storage. As such, the Citizenship Judge found that the absence was indefinite and ongoing.

[14] The Citizenship Judge thus concluded that the Applicant failed to demonstrate that she did not cease to reside in Canada and that she centralized her mode of existence in Canada.

[15] The Applicant now seeks judicial review of this decision.

IV. Issues

[16] The Applicant raises three issues in this application:

a) Was it unreasonable for the Citizenship Judge to require the Applicant to prove that she resided in Canada for more than 1095 days in the relevant period?

b) Is a directed outcome an appropriate remedy?

c) Should costs be granted to the Applicant?

V. Statutory framework

Citizenship Act, RSC, 1985, c C-29 s 5(1)(c)

5 (1) The Minister shall grant citizenship to any person who

[…]

(c) is a permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act, has, subject to the regulations, no unfulfilled conditions under that Act relating to his or her status as a permanent resident and has

(i) been physically present in Canada for at least 1,095 days during the five years immediately before the date of his or her application, and

(ii) [Repealed, 2017, c. 14, s. 1]

(iii) met any applicable requirement under the Income Tax Act to file a return of income in respect of three taxation years that are fully or partially within the five years immediately before the date of his or her application;

5 (1) Le ministre attribue la citoyenneté à toute personne qui, à la fois :

[…]

c) est un résident permanent au sens du paragraphe 2(1) de la Loi sur l'immigration et la protection des réfugiés, a, sous réserve des règlements, satisfait à toute condition rattachée à son statut de résident permanent en vertu de cette loi et :

(i) a été effectivement présente au Canada pendant au moins mille quatre-vingt-quinze jours au cours des cinq ans qui ont précédé la date de sa demande,

(ii) [Abrogé, 2017, ch. 14, art. 1]

(iii) a rempli toute exigence applicable prévue par la Loi de l'impôt sur le revenu de présenter une déclaration de revenu pour trois des années d'imposition complètement ou partiellement comprises dans les cinq ans qui ont précédé la date de sa demande;

VI. Standard of review

[17] It is well-established that a Citizenship Judge's determination of whether the Applicant has met the residency requirements of the Act is a question of mixed fact and law. As such, the applicable standard of review is reasonableness (*Canada (Citoyenneté et Immigration) c Degheb*, 2019 FC 44 at para 4, *Kulemin v Canada (Citizenship and Immigration)*, 2018 FC 955 at para 21).

VII. Position of the parties

A. *Applicant*

[18] The Applicant argues that she remains subject to the unsettled jurisprudence surrounding the undefined term, "resident". Three potential tests exist: (1) the "centralized mode of living test" from *Papadogiorgakis* which allows some temporary absences from Canada to be counted as days of presence so long as the person has centralized his or her mode of living in Canada; (2) the "regularly, normally or customarily lives" test from *Re Koo,* builds upon that approach by applying a six—factor assessment to determine what absences can be counted; and (3) the "physical presence" test from (*Re*) *Pourghasemi*, [1993] FCJ No 32 [*Re Pourghasemi*] departs from both those tests and instead counts only the days when the person is physically in Canada.

[19] The Applicant maintains that there was no justification for the Citizenship Judge to reject the application solely because she concluded that Ms. Younis had stopped residing in Canada for the last 293 days of the relevant period, which is less than a year. In light of the Citizenship Judge' s clear findings of fact and the law the Judge was applying, the only defensible outcome would have been to accept that Ms. Younis had met the residency requirement.

[20] The Applicant also maintains that a directed outcome is the appropriate remedy in her circumstances. The standard remedy on judicial review is to set aside the decision and remit it to another decision-maker. The Federal Court, however, also has the power to issue directions under paragraph 18.1(3)(*b*) of the *Federal Courts Act*. In exceptional cases where there is only one reasonable outcome or where delay would threaten to bring the administration of justice into disrepute, the Federal Court of Appeal said in *D'Errico v Canada (Attorney General)* that a "directed outcome", which is really mandatory in order to reach a particular result in the nature of a writ of *mandamus*, is appropriate. The Applicant maintains that those exceptional circumstances exist here. In light of the tests chosen by two Citizenship Judge and the findings of fact they made, only one outcome was reasonable: Ms. Younis met the residency obligation. The mere possibility that a different judge could make different findings of fact does not justify a full reconsideration.

[21] Finally, the Applicant maintains that costs should be awarded to her. She argues that the Minister forced her to expend time and money to do all the work for another judicial review. It was never in the public's interest to defend this decision, and the application should never have been opposed. The Applicant should not have to fully bear the costs of a second judicial review to challenge the same error, and it was unjust for the Minister to force her to do so.

B. *Respondent*

[22] The Respondent argues that the Citizenship Judge's decision was reasonable. The Respondent submits that the discretion of the Citizenship Judge to choose which of the three tests to apply is well accepted. Furthermore, when the Applicant's citizenship application was

sent back for re-determination, Justice Elliott did not direct that any one of the three tests be used. No constraint was placed on the second Citizenship Judge's discretion to select which of the three tests to apply.

[23] The Respondent further argues that the Citizenship Judge properly set out the *Re Papadogiorgakis* test, and reasonably concluded that the Applicant failed to demonstrate that she had a centralized mode of existence in Canada, as required by the test. The Citizenship Judge reasonably found the Applicant's final trip — of 293 days continuing up to the point that she submitted her citizenship application from outside Canada caused her to cease to be a resident in Canada. The Citizenship Judge found that the Applicant's absence from Canada was "not temporary, but indefinite and ongoing."

[24] There is no suggestion in *Re Papadogiorgakis* that an applicant can meet the test if they have left Canada on an "indefinite and ongoing" basis at the time they file their citizenship application. The facts of this application are nothing close to *Re Papadogiorgakis*. Here, the Citizenship Judge found that the Applicant left Canada on an "indefinite and ongoing" basis encompassing the 293 days immediately before she signed her citizenship application. The Applicant no longer had a "temporary purpose" for her absence from Canada. The Applicant broke the continuity of centralizing her ordinary mode of living in Canada. Nothing in Justice Elliott's reasons directed how the *Re Papadogiorgakis* test —or any other test for residence under subsection 5(1) — was to be applied when the matter was re-determined. The Citizenship Judge properly applied the *Re Papadogiorgakis* test and reasonably found that the Applicant had not centralized her mode of existence in Canada.

[25] Finally, the Respondent argues that if the application is allowed, neither a directed outcome nor costs are appropriate. The rare and exceptional circumstances in which a directed outcome could be appropriate do not exist in this case. The granting of citizenship, and in particular the residence requirement, is a fact-driven assessment. Nor is there only one possible outcome if the matter is sent for re-determination. A Citizenship Judge has discretion to select one of three tests to assess whether the residence requirement is met. It is undisputed that the Applicant would fail the strict quantitative test in *Re Pourghasemi*. The *Re Koo* and *Re Papadogiorgakis* tests are qualitative, fact-driven assessments. Even if the application is allowed, a Citizenship Judge could still reach the conclusion that citizenship should not be granted.

VIII. Analysis

[26] This matter involves the interpretation of the test used by the Citizenship Judge as first stated in the decision of *Re Papadogiorgakis*. The nature of this test was aptly described by the Chief Justice in the matter of *Huang v (Citizenhip and Immigration)*, 2013 FC 576 at para 39 as follows with my emphasis:

> This test is a qualitative test that focuses upon "the degree to which a person in mind and fact settles into or maintains or centralizes his ordinary mode of living with its accessories in social relations, interests and conveniences at or in the place in question," even though the person may have lengthy absences from Canada.
>
> [Emphasis added.]

[27] The Citizenship Judge concluded that it was necessary to maintain in mind a centralized mode of living with its accessories and social relations, interests and conveniences in Canada for the entire four year period during which, if not maintained, the Act would otherwise require 1095 days of physical residency in the country.

[28] The Applicant had accumulated 1065 days of actual residency in Canada, 30 days short of the 1095 days required to meet the three-year statutory requirement of the four-year period designated by the Applicant in her application.

[29] Most of the Applicant's absences were accumulated in the last 293 days of the four-year period. The Citizenship Judge found that as of the date of departure for the extended period, being July 1, 2013, the Applicant's absence was not temporary, but "indefinite and ongoing".

[30] Prior to July 1, 2013, the Applicant had accumulated some 102 days of absences comprised in two trips to Jordan and one to the United States. The Citizenship Judge found that the Applicant had established her residence in Canada prior to her last absence of 293 days. Based on these findings, the Applicant submitted that she had met the three-year residency requirement by July 1, 2013 by adding the 102 days of temporary absences to her 1065 days of physical residency in Canada.

[31] Nevertheless, at paragraph 33 of the reasons, the Citizenship Judge concluded that "the Applicant failed to demonstrate that she did not cease to reside in Canada and that she centralized her mode of existence in Canada."

[32] I agree with the Citizenship Judge's conclusion and find it to be reasonable.

[33] A distinction must be made between the quantitative test of 1095 days of physical residency described in the Act, and the qualitative nature of days of residency attributed pursuant to the *Re Papadogiorgakis* test.

[34] The essence of the qualitative nature of the *Re Papadogiorgakis* test is that of demonstrating an intention to establish a permanent residence in Canada. For example, Mr. Justice de Montigny, as he then was, focused on the intention of the claimant to remain in Canada in the matter of *Boland v (Citizenship and Immigration)*, 2015 FC 376 at paragraph 14 as follows, with my emphasis:

> In Re *Papadogiorgakis* the Court created a test that requires a citizenship Judge to assess the quality of the applicant's attachment to Canada (the so-called "centralized mode of living test"). The applicant's absences from Canada during the relevant period can be counted towards satisfying the residence required where such absences are for temporary purpose and the applicant demonstrates an intention to establish a permanent home in Canada.
>
> [Emphasis added.]

[35] I also agree with the submission of the Respondent that in considering this issue, the Citizenship Judge could not turn a blind eye to the fact that the Applicant had ceased to reside in Canada and had not centralized her existence in Canada at the time of her application, being after the four-year period in question had been identified.

[36] I find that the Applicant is attempting to impose a strict definition more consistent with the statutory quantitative nature of residency than the qualitative concession allowed in *Papadogiorgakis*. By that I mean, that *Re Papadogiorgakis* creates an exception to the definition of "resident" found in section 5(1)(*c*)(ii) of the Act (as it appeared on 31 July 2014).

[37] The Applicant's interpretation, if adopted, would skew the whole purpose of permanent residency and Canadian citizenship. Its objective in inviting non-residents to become permanent residents, and thereafter, Canadian citizens is with the intention that applicants seek to contribute to their own well-being and that of Canada by living and remaining in the country.

[38] Canadian citizenship is not intended to provide aliens with a safe harbour that they may return to in a time of need, or to rely upon the goodwill that Canadian citizens carry wherever they travel, which is earned by the process of becoming Canadianized and making Canada their adopted country.

[39] The least that can be expected of persons applying for Canadian citizenship is that they demonstrate an intention to live and remain in the country for the relatively short period of four years, which has now been extended to five years.

[40] I also reject the alternative argument of the Applicant that the Citizenship Judge was required to apply the test enunciated in *Re Koo*. It described six different factors used to determine whether the applicant regularly, normally or customarily lives in Canada.

[41] This submission was based upon the Applicant's successful application in *Younis v Canada (Citizenship and Immigration)*, 2018 FC 2009. Madam Justice Elliott set aside the decision of the previous Citizenship Judge who had rejected her application which had been based on the test in *Re Koo*. It was set aside on the sole basis that the first Citizenship Judge had incorrectly found that the Applicant was a citizen of the UAE when she was in fact a citizen of

Jordan. Justice Elliott did not indicate, as she could have when returning it to be heard by a different Citizenship Judge, that the test in *Re Koo* be applied in the rehearing of the matter.

[42] I might agree with the submission if the Citizenship Judge had chosen the test in the matter of *Re Pourghasemi*, insofar as it is based upon the strict requirement of 1095 days of physical residence in Canada, it would have predetermined the outcome. However, having chosen the *Re Papadogiorgakis* test, I am satisfied that the outcome would have been the same had the test in *Re Koo* been applied.

[43] Essentially they are both qualitative tests and share the object of determining an intention on the part of the applicant to establish a permanent home in Canada. See for example the case law cited in *Re Koo* to this effect:

- *Lee Re* (1988), 24 FTR 188 (F.C.T.D.), at page 90: “demonstrated his intention to establish and maintain his home in a given place in Canada”.
- *Lau* Re, T-136-91, February 6, 1992 at page 1: “clearly intends to live in this country” reiterated in *Chien*, Re (1992) 51 FTR 317 (F.C.T.D.)
- *Law* (Re), T-1604-91, May 22, 1992 at page 6: “made Canada a place where he regularly, normally or customarily lives”.

[44] Accordingly, for the reasons provided the application for judicial review is dismissed without costs.

JUDGMENT in T-1419-18

THIS COURT'S JUDGMENT is that:

1. The style of cause is hereby amended to reflect the correct Respondent, the Minister of Citizenship and Immigration;

2. The application for judicial review is dismissed; and

3. No costs are awarded.

"Peter Annis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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