

Federal Court



Cour fédérale

Date: 20091218

Docket: T-1871-08

Citation: 2009 FC 1290

Ottawa, Ontario, December 18, 2009

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

**MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Applicant

and

FANG WANG

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Minister of Citizenship and Immigration (the “Minister”) appeals the Citizenship Judge’s decision to approve Ms. Fang Wang’s October 1, 2008 application for citizenship pursuant to subsection 14(5) of the *Citizenship Act*, R.S.C. 1985 c. C-29 (the “Act”).

[2] The Minister submits the Citizenship Judge:

(a) gave inadequate reasons for his decision, and

(b) made an error of law in his determination Ms. Wang satisfied the residency requirements section 5(1)(c) of the Act.

[3] For the following reasons I allow the appeal and return the matter for redetermination by another citizenship judge.

Background

[4] Ms. Wang (the “Respondent”) is a 33 year old woman from Shanghai in the People’s Republic of China. She came to Canada in 1998 as a student and became a permanent resident of Canada on September 24, 2001. She married her Canadian citizen husband on August 17, 2001.

[5] Ms. Wang applied for citizenship on October 9, 2007. The relevant period for satisfying the residency requirement was the preceding four years commencing October 9, 2003. In her application the Respondent declared she was physically present in Canada during the previous four years; 1383 days out of the relevant 1460 days.

[6] On June 11, 2008 Ms. Wang received a request for additional documentation including:

- Passport including all pages from October 9, 2003 to present
- Income tax returns and assessments from 2003 to present
- Financial institution banking records
- Personal health claims
- Marriage and/or divorce certificates
- Proof of domicile
- Completed residence questionnaire
- Record of movement for China Oct 9, 2003 to present
- Current immigration status in the U.S.A. including travel records for the U.S.A. 2003 to present

[7] She responded by letter on July 14, 2008 providing some of the requested documents and stating:

First [sic], on applicable dates, from 05/11/1998 to 30/10/1999 I was a registered student at Centennial College, Scarborough, 01/11/1999 to 30/10/2000 I was employed at William Medical Technologies, Inc. Ajax, Ontario. On 17/8/2001 I married my husband Trevor Jon Williams. I have been married to Trevor John Williams, date of birth May 18, 1963, a Canadian Citizen now for **7 years** [sic] as of this coming August 17th, I landed Canada on Sept. 24, 2001. I was employed at Shitori Japanese Restaurant from March 2002, to June 2003. After leaving this job, I stayed home from June 2003 to Sept 2006. Now I am studying a on-line real estate course and helping a real estate professional conduct marketing. On Oct. 2007 my husband and I purchased a Condo at One Bloor West. I have documented my residence status, confirmed my Canadian education, my marriage to a Canadian citizen, and most recently the purchase of our new condo. For the past ten years my life has been devoted to Canada and my Canadian husband. It is for these reasons I wish to become a Canadian citizen.

[8] On July 23, 2008 a Notice to the Citizenship Judge was placed on the Respondent's file, flagging as reasons for the Notice the failure to provide: copies of personal health claims payments, all pages of current and expired passports, record of movement from China, past and current status in the U.S.A. and proof of employment or means of income to support living in Canada. An additional reason for the Notice was because her current passport was issued by the Chinese Consulate in Los Angeles, California, U.S.A. The issue raised by the Notice was whether the Respondent provided proof she resided in Canada.

[9] Ms. Wang attended the Citizenship hearing on August 19, 2008. On that same day, August 19, 2008, she was given a further Request for Supporting Documentation for:

- Copy of landing passport or police report (of lost passport)
- Record of movement from China
- Proof of employment in Canada
- Proof of status in the U.S.A.
- Marriage certificate

[10] On September 30, 2008, Ms. Wang provided additional documents.

[11] Ms. Wang declares in her affidavit the Citizenship Judge asked for her passports, which she provided during the interview. He asked why she hadn't reported trips to the U.S.A. recorded in the passports and she explained an immigration consultant completed her application incorrectly. She told the Judge she had taken three separate one week trips to the U.S.A. The Respondent also declares her husband accompanied her to the citizenship interview and told the Citizenship Judge he travelled to the United States for investments to explain why they held E-2 investment visas issued by the U.S.A.

Decision under Appeal

[12] The Notice to the Minister signed by the Citizenship Judge states Ms. Wang satisfied all the citizenship requirements, including the residency requirements of paragraph 5(1)(c) of the Act. The Citizenship Judge gave as very brief reasons:

After reviewing the Applicants documents and the information shared with me I am satisfied that the Applicant meets the residence criteria.

[13] The Citizenship Judge approved Ms. Wang's application for citizenship on October 1, 2008.

Legislation

[14] Section 5(1) of the Act requires the Minister grant citizenship to any person:

- (a) who applies for citizenship,
- (b) is eighteen years or over,
- (c) is a permanent resident and has accumulated in the previous four years at least three years of residence in Canada calculated in the manner specified in the Act,
- (d) has an adequate knowledge of one of the official languages,
- (e) has an adequate knowledge of Canada and the responsibilities of citizenship, and
- (f) is not under a removal order or the subject of a declaration by the Governor in Council under section 20 of the Act.

[15] A citizenship application is reviewed by a citizenship officer and the applicant has an opportunity to address any gaps in the documentation at that point. Where the documentation is incomplete, a citizenship judge may require the applicant attend, alone or with others, and give evidence that may satisfy the judge the requirements of the Act are met. *Canada (Minister of Citizenship and Immigration) v. Mahmoud*, 2009 FC 57 (*Mahmoud*) at paragraph 3.

[16] Subsection 14(1) of the Act requires citizenship judges to consider an application for citizenship and determine whether or not an applicant meets its requirements. After determination, the citizenship judge shall approve or deny the application and notify the Minister accordingly with reasons for the decision. Specifically, subsection 14(2) provides:

Forthwith after making a determination under subsection (1) in respect of an application referred to therein but subject to section 15, the

citizenship judge shall approve or not approve the application in accordance with the determination, notify the Minister accordingly and provide the Minister with the reasons therefore. (emphasis added)

[17] Section 14(5) of the Act provides the Minister or the applicant with a right of appeal to this Court of the citizenship judge's decision.

Standard of Review

[18] Reviewing the adequacy of a citizenship judge's reasons is a question of procedural fairness. Justice Russell of this Court found the standard for questions of procedural fairness is correctness in *Pourzand v. Canada (Minister of Citizenship and Immigration)* 2008 FC 395 at paragraph 21 where he wrote, "Procedural fairness questions are pure questions of law reviewable on a correctness standard." (also see *Andryanov v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 186 at paragraph 15).

[19] Reviewing a citizenship Judge's findings of fact and analysis of the facts in light of the statute is a question of mixed fact and law. The appropriate standard of review of a citizenship judge's findings in regards to the residency requirements of the act is reasonableness. *Dunsmuir v. New Brunswick*, 2008 SCC 9 (*Dunsmuir*) at paragraphs 44, 47, 48 and 53; *Canada (Minister of Citizenship and Immigration) v. Mueller*, 2005 FC 227 at paragraph 4.

[20] When reviewing a decision on the standard of reasonableness, the analysis is concerned with "the existence of justification, transparency and intelligibility within the decision-making process" and also "whether the decision falls within a range of possible, acceptable outcomes which

are defensible in respect of the facts and law": *Dunsmuir* at paragraph 47. Put another way, this Court should only intervene if the determination was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

Analysis

Preliminary Issue

[21] The Minister submitted an affidavit containing a copy of an earlier citizenship application by Ms. Wang. That earlier application was not part of the Record before the Citizenship Judge. The only reference to Ms. Wang's prior application in the Record was in the July 23, 2008 Notice to the Citizenship Judge which contained a brief statement the previous application failed because Ms. Wang did not provide satisfactory documentation to explain lengthy absences from Canada.

[22] Ms. Wang also provides evidence not on the Record in her affidavit stating she and her husband gave further evidence to the Citizenship Judge at the hearing. That evidence was not placed on the Record and came to light only after this appeal was commenced.

[23] In *Canada (Minister of Citizenship and Immigration) v. Hung*, [1998] F.C.J. No. 1927, Justice Rouleau wrote at paragraph 8, "Under the new Rules, citizenship appeals are no longer trials *de novo*, but instead are now to proceed by way of application based on the record before the Citizenship judge: no longer may new evidence be submitted before this Court".

[24] Accordingly, I will not consider the new evidence introduced by Minister's affiant concerning Ms. Wang's prior citizenship application.

[25] Ms. Wang's affidavit evidence requires a more nuanced treatment. She declares her husband provided evidence to the Citizenship Judge at the time of the hearing. This is unchallenged. However, I do not find this evidence retrospectively explains the Citizenship Judge's reasons because the Judge does not state it is evidence he considered in his decision.

Reasons for Determination

[26] The Minister argues the reasons given by the Citizenship Judge for the decision are inadequate. He submits: "Reasons for decision are adequate when they are clear, precise, intelligible and when they state why the decision was reached. Adequate reasons show a grasp of the issues raised by the evidence."

[27] The issue raised by the evidence is residency as was brought to the Citizenship Judge's attention by the July 23, 2008 Notice. The Minister points to the gaps on the Record including missing or inconclusive documents it characterizes as necessary:

- No proof of domicile
- No health insurance summary
- No travel records
- Selective portions of her passport
- Minimal banking information

[28] The Minister contends in addition to missing documentation, there were indicia on the record of an existing and continuing connection to the U.S.A. Ms. Wang's marriage licence shows

she was a resident of Long Beach, California in 2001 and her current Chinese passport was issued by the Chinese Consulate in Los Angeles, California in 2007. I note, however, the date of marriage and the date of issuance of the passport are outside the residency period at issue.

[29] Ms. Wang submits the Citizenship Judge had the benefit of the information provided at the hearing as set out in her affidavit. She argues, based on *Canada (MCI) v. Lau*, [1999] F.C.J. No. 290 (T.D.), a judge who benefits from *viva voce* evidence has likely filled the gaps in the record.

[30] Ms. Wang further submits the Notice to the Minister form provides limited space for Citizenship Judge's reasons and more extensive reasons are not required.

[31] Addressing the last point first, I agree with Justice Hughes in *Mahmoud* at paragraphs 19 and 20 where he writes:

“... Respondent's Counsel further argues that a space about 4 centimetres high is all that the form provides for Reasons, thus the Reasons are expected to be cryptic. ... I find the requirement that a citizenship judge provide clear and adequate reasons must prevail over any apparent constraint imposed by a form. It is unfortunate that a better form was not provided such as one indicating that a page or pages may be attached in which appropriate reasons shall be given. ...” (emphasis added)

[32] Section 14(2) of the Act requires the Citizenship Judge to give reasons when he notifies the Minister. In *Mahmoud* at paragraph 6 Justice Hughes wrote:

“Thus, unless there is an appeal, the approval or refusal by a citizenship judge, is a final matter as to the applicant's Canadian citizenship. The Minister has no further function to perform or other remedy other than an appeal. Therefore the provision of reasons by the citizenship judge assumes a special significance. The reasons 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.” (emphasis added)

[33] The New Brunswick Supreme Court of Appeal concluded where there is a statutory right of appeal, reasons should always be provided. *R.D.R. Construction LTD. v. Rent Review Commission*, [1982] N.S.J. No. 546; 139 D.L.R. (3d) 168. This case was later cited by Justice L’Heureux-Dubé for the same principle in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraph 42.

[34] David Phillip Jones and Anne de Villars make this argument in *Principles of Administrative Law*, 5th ed. (Toronto: Carswell, 2009) at p. 374:

“Without reasons, it may be impossible to demonstrate to the reviewing court that an error of law occurred, and therefore, impossible to correct a result arrived at on irrelevant evidence, bad faith, or for an improper purpose”.

[35] There is no allegation of impropriety against the Citizenship Judge in this case. However, it is the Minister’s role to protect the right of citizenship and the Minister should be afforded the simple tool of reasons to fulfill that role. The Minister may not exercise any discretion once a citizenship judge has made a determination. The only recourse the Minister has to challenge a citizenship judge’s decision is appeal to this Court. In order to decide whether an appeal should or should not be initiated, the Minister needs to know the reason for the citizenship judge’s determination on issues arising from the application.

[36] Justice Russell considered the sufficiency of reasons in *Wang v. Canada (Minister of Citizenship and Immigration)* 2008 FC 391 at paragraph 25 where an unsuccessful applicant for citizenship had appealed:

“26 Not only do reasons foster better decision-making by ensuring that the issues and reasoning are well-articulated, but they also provide a basis for an assessment of possible grounds for appeal or review. This is particularly important when a decision is subject to a deferential standard of review *VIA Rail Canada Inc. v. National Transportation Agency*, 193 D.L.R. (4th) 357 (F.C.A.) at paragraphs 17 and 19.

27 The duty requires that the reasons be adequate. They must set out the findings of fact and must address the major points in issue. The reasoning process followed by the decision-maker must be set out and must reflect a consideration of the main relevant factors. Further, a determination of whether reasons are adequate must be considered in light of the particular circumstances of each case. Where a person's status is at issue, the requirements are more stringent. *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraphs 25, 75, *Via Rail*, above, at paragraphs 21-22.” (emphasis added)

[37] It may be possible to infer the reasons are sufficient if the Citizenship Judge's notes indicate some analysis and consideration of the evidence. Justice L'Heureux-Dubé wrote in *Baker* at paragraph. 44:

“...part of the flexibility that is necessary ... when courts evaluate the requirements of the duty of fairness with recognition of the day-to-day realities of administrative agencies and the many ways in which the values underlying the principles of procedural fairness can be assured. It upholds the principle that individuals are entitled to fair procedures and open decision-making, but recognizes that in the administrative context, this transparency may take place in various ways.” (emphasis added)

[38] The Citizenship Judge did not outline the information he considered in regards Ms. Wang's residency. He neither made reference to the nature of information received nor did he refer to

documents he reviewed at the hearing. The Citizenship Judge simply stated a conclusion to the effect that after reviewing documents and information he was satisfied Ms. Wang meets the residence criteria. The Citizenship Judge has a statutory duty under section 14(2) of the Act to provide reasons. He did not comply with his duty and his decision therefore cannot stand.

[39] Coming to the conclusion I have on the inadequacy of the reasons, I need not decide whether the Citizenship Judge failed to articulate the legal test used in determining residency.

Remedy

[40] Ms. Wang submits she provided further information to the Citizenship Judge which was not in the Record. In these circumstances I consider the appropriate course is to refer the matter back for redetermination before a different citizenship judge and afford Ms. Wang the opportunity to file further documentation as she considers necessary.

[41] The Minister seeks costs of this appeal. I choose to follow Justice Hughes' decision in *Mahmoud* not to award costs. Even though I find for the Minister, he shares some of the responsibility because the form he provides to Citizenship Judges invites abbreviated reasons.

Conclusion

[42] The appeal is allowed. The Citizenship Judge's decision is set aside and the matter is to be re-determined by another citizenship judge.

[43] I make no order of costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The decision of the Citizenship Judge granting citizenship is set aside.
2. The matter is referred back to a different citizenship judge for reconsideration.
3. The Respondent may file such further information or documents as she considers necessary for the redetermination.
4. I do not make any award of costs.

“Leonard S. Mandamin”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1871-08

STYLE OF CAUSE: MINISTER OF CITIZENSHIP AND IMMIGRATION
and FANG WANG

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: NOVEMBER 24, 2009

**REASONS FOR JUDGMENT
AND JUDGMENT:** MANDAMIN, J.

DATED: DECEMBER 18, 2009

APPEARANCES:

Catherine Vasilaros FOR THE APPLICANT

Matthew Jeffery FOR THE RESPONDENT

SOLICITORS OF RECORD:

John H. Sims, Q.C. FOR THE APPLICANT
Deputy Attorney General of Canada
Toronto, Ontario

Matthew Jeffery FOR THE RESPONDENT
Barrister & Solicitor
Toronto, Ontario