

Federal Court



Cour fédérale

Date: 20121206

Docket: T-904-12

Citation: 2012 FC 1434

Ottawa, Ontario, December 6, 2012

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

LASSINA DEMBELE

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. OVERVIEW

[1] This is an appeal from the decision of a Citizenship Judge [Judge] refusing the Applicant's citizenship application. The application was denied because the Applicant had not met the residency test nor were there extraordinary circumstances justifying citizenship even where residency had not been established.

II. BACKGROUND

[2] Dr. Lassina Dembele is a citizen of the Ivory Coast who entered Canada in January 1993 as a student. He was granted permanent residence on January 30, 2004 and applied for citizenship on October 6, 2008. The period for determining residency for purposes of s 5(1) of the *Citizenship Act*, RSC 1985, c C-29 [*Citizenship Act* or the Act], is October 6, 2004 to October 6, 2008 [the Relevant Period].

[3] The record establishes that the Applicant is in a fairly specialized area of mathematical science related to cryptography. He was a teacher in the Ivory Coast before coming to Canada on scholarship to study for his Masters of Science degree in statistics at the Université de Laval. He then obtained a PhD from McGill University in 2002 with a research focus in algebraic number theory. He is now working in the United Kingdom at the University of Warwick funded by a Career Acceleration Fellowship from the UK Research Council following the completion of his appointment as the Marie-Curie Research Fellow at the University of Warwick. The Applicant was delayed in obtaining his PhD due to surgery to address complications from childhood polio.

[4] Following his PhD, the Applicant spent periods of time in Boston on post-doctorate work as well as at the University of Calgary with the cryptography group. From July 2005 to June 2007 the Applicant was named as a Pacific Institute for Mathematical Sciences (PIMS) Postdoctoral Fellow at the University of Calgary.

[5] At the conclusion of his PIMS fellowship and as a result of limited Canadian employment opportunities in his field of study, he worked at the Max Plank Institute in Germany from October

2007 to July 2009. He then became the Marie-Curie Research Fellow at the University of Warwick in the United Kingdom.

[6] There is no debate that the Applicant is 237 days short of the 1,095 days required by the *Citizenship Act*.

[7] The Judge chose to apply the qualitative residency test outlined in *Koo (Re)*, 59 FTR 27, 1992 CanLII 2417 (FC) [*Re Koo*]. In so doing the Judge concluded that the Applicant had established residence in Canada prior to the Relevant Period for residency calculation – October 6, 2004 to October 6, 2008.

[8] The Judge further concluded that the Applicant had sufficient physical presence in the first three years of the Relevant Period and had a continuing intent to return to Canada even during absences. However, the Judge concluded that this pattern of continuing intent changed when the Applicant moved to Germany in September 2007 as he gave up most of his furniture, ended his apartment lease and ceased paying Canadian taxes.

[9] The Judge further concluded that the absence from Canada while in Germany had been anticipated as temporary but since the Applicant had not returned to reside in Canada, the situation was no longer temporary even though there was a continuing intention to return. In reaching this conclusion, the Judge relied on matters outside the Relevant Period.

[10] Lastly, the Judge determined that there was no unusual hardship nor should citizenship be granted to reward services of an exceptional value to Canada.

III. ANALYSIS

[11] The parties agree and I concur that the standard of review of the Judge's decision is reasonableness (*Khan v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1178 (available on CanLII) at para 14). However, any breach of procedural fairness must be subject to a correctness standard of review (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190).

[12] This appeal can be determined on the issue of procedural fairness alone. It would therefore be unhelpful and unnecessary to delve into the reasonableness of the merits of the decision.

[13] The Applicant maintained a current address with the Respondent's department and there is no challenge to the Applicant's position that documents were sent. Therefore, there is no issue that any documents missing from the Certified Tribunal Record cannot be attributed in any fashion to the Applicant.

[14] There were six (6) documents which were in the possession of the department which did not, for some reason, form part of the record before the Judge. Among the missing documents was material related to the Marie-Curie Fellowship at the University of Warwick as well as other materials related to the Applicant's fellowships at the University of Calgary and University of Duisburg-Essen in the Institute of Experimental Mathematics.

[15] In addition to addressing the unique nature of the Applicant's work, the evidence (particularly that regarding the Marie-Curie Fellowship) speaks to links with Canada and the Applicant's role therein as well as to the likelihood of obtaining tenured positions in Canada or the United States.

[16] This evidence goes some way in addressing the Judge's conclusion that the position at the University of Warwick was permanent – a conclusion which may not have been reached if the Judge had before her the materials from the University of Warwick.

[17] The Judge also accepted that the Applicant had been resident in Canada for more than three of the four years required but appears to have concluded that at some unstated time while the Applicant was in Germany this residency ceased. In reaching this conclusion, the Judge looked outside the four-year period which was the focus of the inquiry to draw the conclusion that the Applicant's absence had transformed from temporary to permanent. The point at which this absence was deemed to be permanent is unclear.

[18] Aside from the legal issue as to whether the Judge can look to events outside the four-year period to reach conclusions as to residency, no such exercise either within or outside the four years can be sustained where relevant documents are missing somewhere within the department.

[19] The documents are relevant both to the qualitative residency test under *Re Koo*, above, as well as to the exceptional circumstances considered under s 5(4) of the Act.

IV. CONCLUSION

[20] For these reasons, there has been a denial of procedural fairness and a failure to consider relevant evidence which requires this appeal to be granted.

[21] In referring this matter back for a new determination, I will not expose the Applicant to the vagaries of the residency test selection. This matter, in so far as it relates to residency, is to be redetermined in accordance with the factors laid out in *Re Koo*, above.

JUDGMENT

THIS COURT’S JUDGMENT is that the appeal is allowed and the matter is remitted back for reconsideration by a different judge applying the factors in *Koo (Re)*, 59 FTR 27, 1992 CanLII 2417 (FC).

“Michael L. Phelan”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-904-12

STYLE OF CAUSE: LASSINA DEMBELE

and

THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: November 29, 2012

**REASONS FOR JUDGMENT
AND JUDGMENT:** PHELAN J.

DATED: December 6, 2012

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