Federal Court  Cour fédérale

Date: 20121219

Docket: T-2111-11

Citation: 2012 FC 1516

Montréal, Quebec, December 19, 2012

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

REZA AYATIZADEH

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an appeal by the Minister of Citizenship and Immigration [the Minister] pursuant to subsection 14(5) of the *Citizenship Act*, RSC 1985, C-29 [the Act] from the decision of a citizenship judge, dated November 4, 2011, granting the respondent citizenship, on the basis that the citizenship judge erred in finding that the respondent had met the residency requirement under paragraph 5(1)*(c)* of the Act.

[2] The respondent is a citizen of Iran. On July 4, 2003 he entered Canada and was landed as a permanent resident. He applied for citizenship on May 10, 2008. The relevant period for calculating his residence in Canada is therefore May 10, 2004 to May 10, 2008.

[3] On April 28, 2009 a citizenship agent met with the respondent and asked him to complete a residence questionnaire. The agent considered the documents the respondent had submitted, including photocopies of his passports, pay stubs and bills, and proceeded to send a memorandum to the citizenship judge outlining her concern that the respondent had provided insufficient proof of his residency in Canada during the relevant period.

[4] The respondent appeared before the citizenship judge on October 11, 2011. After the hearing the respondent submitted additional evidence relevant to the period at issue, including pay stubs, college transcripts and an attestation of participation in a language training program.

[5] The entire decision of the citizenship judge reads as follows:

> The applicant has (20) twenty days to provide us with additional evidence to sustain his declaration made during the hearing. I've attached the list of requested documents. AA [initials of Judge Ayache]. No RQ [Residence Questionnaire] given to applicant. No need! Applicant submitted part of the requested documents. They are satisfactory. On balance and according to the criteria as defined by Justice Reed in *Re: Koo*, I approve the application.

[6] The issue in the present application is whether the citizenship judge erred in finding that the respondent met the residence requirement set out in paragraph 5(1)*(c)* of the *Citizenship Act*.

[7] A citizenship judge's decision that a person meets the residency requirement, which is a question of mixed fact and law, is reviewable on the reasonableness standard (*El-Khader v Canada (Minister of Citizenship and Immigration)*, 2011 FC 328 at para 7; *Canada (Minister of Citizenship and Immigration) v Saad*, 2011 FC 1508 at para 9).

[8] Paragraph 5(1)*(c)* of the Act requires an applicant to have accumulated at least three years of residence in Canada during the four years immediately preceding the date of his or her application:

5. (1) The Minister shall grant citizenship to any person who	5. (1) Le ministre attribue la citoyenneté à toute personne qui, à la fois :
[…]	[…]
(c) is a permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act, and has, within the four years immediately preceding the date of his or her application, accumulated at least three years of residence in Canada calculated in the following manner:	c) est un résident permanent au sens du paragraphe 2(1) de la Loi sur l'immigration et la protection des réfugiés et a, dans les quatre ans qui ont précédé la date de sa demande, résidé au Canada pendant au moins trois ans en tout, la durée de sa résidence étant calculée de la manière suivante :
(i) for every day during which the person was resident in Canada before his lawful admission to Canada for permanent residence the person shall be deemed to have accumulated one-half of a day of residence, and	(i) un demi-jour pour chaque jour de résidence au Canada avant son admission à titre de résident permanent,
(ii) for every day during which the person was resident in Canada after his lawful	(ii) un jour pour chaque jour de résidence au Canada après son admission à titre de résident permanent;

> admission to Canada for permanent residence the person shall be deemed to have accumulated one day of residence;

[9] The jurisprudence has recognized three possible approaches to the meaning of the word "residence" in paragraph 5(1)*(c)* of the Act: physical presence in Canada (*Re Pourghasemi*, [1993] FCJ 232, 62 FTR 122), centralized mode of living in Canada (*Re Papadogiorgakis*, [1978] 2 FC 208, 88 DLR (3d) 243 (TD)), or whether the person "regularly, normally or customarily lives" in Canada (*Re Koo* (1992), [1992] FCJ 1107, 59 FTR 27 [*Koo*]).

[10] This Court has held that any of these approaches are reasonable and it is open to the citizenship judge to adopt any one of these schools of thought as long as the chosen test is applied properly (*Lam v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ 410 at para 14). However, some members of the Court have found that only one of the tests is the correct one (see for example *El Ocla v Canada (Minister of Citizenship and Immigration)*, 2011 FC 533; *Dedaj v Canada*, 2010 FC 777, 90 Imm LR (3d) 138; *Martinez-Caro v Canada (Minister of Citizenship and Immigration)*, 2011 FC 640; *Hysa v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1416; *Al Khoury v Canada (Minister of Citizenship and Immigration)*, 2012 FC 536). In the case at bar, the Minister did not argue that the citizenship judge applied the wrong test to determine residence for the purpose of paragraph 5(1)*(c)* of the Act. It is therefore not necessary for me to address this issue on the present appeal.

[11] The applicant submits that a citizenship judge who chooses to apply the reasoning in *Koo* must make it clear that all relevant factors were addressed in reaching the decision (*Seiffert v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1072 at para 9 [*Seiffert*]). The applicant claims that the citizenship judge in the case at bar erred by not mentioning which factors of the *Koo* test were relevant to his decision. The applicant further argues that three of the *Koo* factors require the citizenship judge to determine when the respondent was physically present in Canada during the relevant period and that the citizenship judge erred by not doing so.

[12] According to the respondent, the citizenship judge must leave no doubt that he or she addresses the important and relevant factors (*Seiffert* at para 9). The decision in the case at bar is reasonable because it clearly mentions the *Koo* factors were addressed and that the required documents were satisfactory. With respect, I disagree for the following reasons.

[13] Inadequacy of reasons is a significant flaw that contributes to the unreasonableness of a citizenship judge's decision (see, for example, *Canada (Minister of Citizenship and Immigration) v Al-Showaiter*, 2012 FC 12 [*Al-Showaiter*]; *Canada (Minister of Citizenship and Immigration) v Abdallah*, 2012 FC 985 [*Abdallah*]; *Canada (Minister of Citizenship and Immigration) v Raphaël*, 2012 FC 1039). On this question, I endorse the following comments made by my colleague Justice Near in *Al-Showaiter*, which were also supported by Justice de Montigny in *Abdallah*:

> 30. Given the ongoing discussion concerning citizenship cases, it would be of great assistance to the Court if citizenship judges state clearly in one or two sentences which test they are using and explain their reasons for arriving at a particular conclusion. The detail required in these reasons will vary given the test employed and the surrounding context. However, even where it can be inferred that the physical presence in Canada test (which generally, in my view, is the test most in line with the legislation) is being used, citizenship judges

> must state that this is the case. Citizenship judges should also proceed to explain in more or less detail depending on the facts of the case why they either accepted or rejected the evidence placed before them. [Emphasis added.]

[14] The reasons in the case at bar are only one paragraph long and reproduced above in their entirety. The decision states that the application was approved on the basis of the *Koo* criteria and that the parts of the requested documentation submitted by the respondent after the hearing were satisfactory. There is no explanation as to which documents satisfied the citizenship judge or why the documents he received subsequent to the hearing responded to his concerns. All six factors from *Koo* did not need to be explicitly reviewed and analyzed by the citizenship judge, but at the very least he had to address the *Koo* factors which were relevant to his decision, depending on the facts of the case, as required by this Court in *Seiffert* and *Al-Showaiter*, above.

[15] In the case at bar, with the lack of adequate reasons I have identified, it is far from clear how the citizenship judge arrived at his decision to approve the respondent's citizenship application based on the evidence before him. I will therefore not attempt to undertake an analysis of what elements in the evidence, if any, could have resulted in a reasonable decision (Justice Near took a similar approach in *Al-Showaiter* at paragraphs 24-28).

[16] For these reasons, the decision of the citizenship judge is unreasonable. Therefore, the appeal is allowed and the matter is sent back to a different citizenship judge for redetermination.

JUDGMENT

THIS COURT'S JUDGMENT is that:

The appeal is allowed. The matter is referred back to another citizenship judge for redetermination.

"Danièle Tremblay-Lamer"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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