

Federal Court



Cour fédérale

Date: 20130530

Docket: T-1924-12

Citation: 2013 FC 578

Ottawa, Ontario, May 30, 2013

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Applicant

and

MANISHA DAS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an appeal pursuant to subsection 14(5) of the *Citizenship Act*, RSC 1985, c C-29 [Act] and section 21 of the *Federal Courts Act*, RSC 1985, c F-7, brought on behalf of the Minister of Citizenship and Immigration [applicant], from the decision of the Citizenship Judge Crist Grenikolos [Citizenship Judge], dated August 21, 2012, whereby he approved the application for Canadian citizenship of Ms. Manisha Das [respondent] made pursuant to subsection 5(1) of the Act.

Background

[2] The respondent is a fifty-nine year old citizen of India who became a permanent resident of Canada on August 7, 1974, after having been sponsored by her husband. On August 10, 2010, she submitted an application for Canadian citizenship, alleging that since her arrival in Canada, she had been residing at the same address in Scarborough, Ontario, with her husband and two daughters. The respondent alleged that her older daughter and her husband were employed in Ontario, that her younger daughter was a student at the University of Toronto at the time she filed her application for citizenship, and that she had been working part-time as a sales associate at Zellers since October 2007.

[3] In order to meet the residency requirement set out in paragraph 5(1)(c) of the Act, the respondent had to provide evidence that she resided in Canada for at least 1095 days during the reference period of August 10, 2006 to August 10, 2010. She declared four absences from Canada during the reference period, totaling 57 days of absence (three trips to Michigan and one trip to Calcutta). She therefore had 1403 days of physical presence in Canada which fairly exceeded the required 1095 days.

[4] As the respondent was more than fifty-five years old, she was not required to write the citizenship test. She was, however, interviewed by a Citizenship Officer, and was asked to complete a residence questionnaire and provide a number of additional documents to establish her residency. The Citizenship Officer also questioned the respondent about a stamp in her passport, showing a return to Canada via Toronto Pearson International Airport on April 13,

2010, which did not correspond to her declared absences. The respondent stated that she had gone to Michigan for a few days.

[5] Upon review of the information in the File Preparation and Analysis Template, it seems that the Citizenship Officer identified credibility as the main issue with the respondent's application, as the Citizenship Officer referred to the lack of evidence regarding the respondent's residence in Canada during the reference period and the documents filed being only "passive indicators" of residence as they did not demonstrate the respondent's physical presence in Canada.

[6] As per the Citizenship Officer's letter dated June 9, 2011 (Certified Tribunal Record [CTR], p. 76), the documents specifically required from the respondent, in addition to the Residence Questionnaire, were the following:

- a. All pages, including blank pages, of all passports and/or travel documents (valid, expired and cancelled passports) covering the period from 2006 to 2010;
- b. Valid provincial identification (Ontario Health Card, etc.);
- c. Notices of Assessment and Income Tax Returns, T4 slips, T5 slips, and employment letters, etc. from 2006 to 2010;
- d. Proof of employment from 2006 to 2010;
- e. Proof of school attendance for dependent children – transcripts, record cards, etc – from 2006 to 2010;
- f. Letter from financial institution that indicates the date account(s) were open and the maintenance of the account(s), including evidence of investments;

- g. Copy of the respondent's Personal Health Claims Payment Summary from the Ministry of Health and Long Term Care; and
- h. Proof of past and current immigration status in the United States and travel record during the reference period.

[7] The respondent asserts that the only document she was unable to provide to the Citizenship Judge was the passport that she had prior to March 30, 2009, as her husband had shredded her expired passport, believing that it would not be needed in the future. However, the respondent did not provide the documents listed at items 5 and 7, without providing specific justifications for not doing so, and although she has made a request to the U.S. authorities, she was unable to obtain the document mentioned at item 8. She also stated in her residence questionnaire that she had inadvertently forgotten to mention that she had travelled to Cuba for seven days in April 2010.

[8] The respondent provided her Tax Returns for 2006, 2008, 2009, 2010 and 2011, but filed no pay stubs, direct deposits or T4 slips for employment income. She added a brief letter from her employer stating that she was "a part time employee and has been a valuable member of our Team since October 2007." (CTR, p. 73). Furthermore, the respondent filed a copy of a 2006 annual mortgage statement showing that she owns a house in Canada with her spouse. Also, a summary of the respondent's accounts at her financial institution was provided. However, it contained no transaction records or other information regarding the use of the accounts (CTR, p. 30).

Decision under appeal

[9] On August 21, 2012, the respondent, accompanied by her daughter, was interviewed by the Citizenship Judge. The latter approved her application in the following terms:

Applicant has provided sufficient information and careful examination of both written and oral evidence satisfies me that she meets on the balance of probabilities residency. Passport covering part of R.P. was destroyed (shredded) by her spouse according to her statement as he did not realize it would be needed. Applicant works at Zellers (part-time), owns her house, and is very credible. All of her immediate family are c.c. with her children born in Canada.

Issues and Standard of Review

[10] The applicant raises three overlapping grounds of review against the impugned decision, arguing that the Citizenship Judge erred (i) by failing to clearly state which test for residency he applied, (ii) by concluding that the respondent had satisfied the residency requirement under paragraph 5(1)(c) of the Act, and (iii) by failing to provide the Minister with sufficient and adequate reasons pursuant to the requirement of subsection 14(2) of the Act.

[11] Both parties are in agreement that the question of whether or not an applicant for citizenship has met the residency requirement of paragraph 5(1)(c) of the Act is to be reviewed on the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Abdallah*, 2012 FC 985, at para 8 (*Abdallah*); *Canada (Minister of Citizenship and Immigration) v Jeizan*, 2010 FC 323 at para 12). The same standard applies to the question of adequacy of reasons, which forms part of the reasonableness analysis (*Baig v Canada (Minister of Citizenship and Immigration)*, 2012 FC 858 at para 10; *Canada (Minister of Citizenship and Immigration) v Raphaël*, 2012 FC 1039 at paras 15-16 (*Raphaël*)).

[12] It is well-known that when reviewing a decision on the standard of reasonableness, the Court should only intervene if the decision falls outside the “range of possible, acceptable outcomes which are defensible in respect of the facts and law” or otherwise fails to satisfy the requirements of

reasonableness, namely “the existence of justification, transparency and intelligibility within the decision-making process” (*Dunsmuir v New Brunswick*, 2008 SCC 9, at para 47).

Analysis

[13] Having carefully reviewed the evidence in the record, the parties’ arguments and the applicable jurisprudence, I find that the failure by the Citizenship Judge to have clearly stated which residency test he has applied and how that test was met by the respondent, renders his decision unreasonable and that the file should be sent back for redetermination (*Raphaël*, above, at paras 19 and 22-25; *Abdallah*, above, at para 19; *Canada (Minister of Citizenship and Immigration) v Al-Showaiter*, 2012 FC 12 at para 30; and *Canada (Minister of Citizenship and Immigration) v Abou-Zahra*, 2010 FC 1073 at para 21).

[14] Furthermore, while the Citizenship Judge vaguely discussed the fact that the respondent’s home, family and work are in Canada, which may suggest that a more qualitative test was applied, there is no reference or clear analysis in the Citizenship Judge’s reasons in light of the factors set out in *Koo (Re)*, [1993] 1 FC 286, at para 10:

Questions that can be asked which assist in such a determination are:

- (1) was the individual physically present in Canada for a long period prior to recent absences which occurred immediately before the application for citizenship?
- (2) where are the applicant's immediate family and dependents (and extended family) resident?
- (3) does the pattern of physical presence in Canada indicate a returning home or merely visiting the country?
- (4) what is the extent of the physical absences -- if an applicant is only a few days short of the 1,095-day total it is easier to find deemed residence than if those absences are extensive?
- (5) is the physical absence caused by a clearly temporary situation such as employment as a missionary abroad, following a

course of study abroad as a student, accepting temporary employment abroad, accompanying a spouse who has accepted employment abroad?

- (6) what is the quality of the connection with Canada: is it more substantial than that which exists with any other country?

[15] The respondent has addressed the above questions in her written submissions, assuming that the “centralized mode of existence” test has been applied in this case (*Islam v Canada (Minister of Citizenship and Immigration)*, 2009 FC 10 at para 5 and *Seiffert v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1072 at para 9). I agree that if the Court could read into the Citizenship Judge’s brief paragraph of reasons in order to address the above-stated issues, the record might contain enough evidence to suggest that one of the more flexible tests set out in *Koo (Re)*, above, or *Papadogiorgakis (Re)*, [1978] FCJ No 31 was applied in lieu of a physical presence test of *Pourghasemi (Re)*, [1993] FCJ No 232. However, the fact remains that the Citizenship Judge committed a reviewable error by failing to properly state the test that he chose to apply and by failing to carry out the proper analysis.

[16] This conclusion stands even if I disagree with the applicant that the evidence filed by the respondent is merely “passive evidence” which does not prove that she was physically present in Canada during the reference period. It is noteworthy that the Citizenship Judge found the respondent entirely credible and it was therefore open to him to consider that the respondent could establish residency without providing the expired Indian passport which she allegedly shredded after she received her new passport. For instance, the letter from the employer, although brief and silent on the number of hours the respondent has worked per week, strongly indicates that the respondent was physically present in Canada for significant periods since October of 2007.

[17] The applicant faults the respondent for not having filed more “active evidence” such as bank statements containing information about the maintenance and day-to-day use of the accounts. Those documents were neither required under the June 9, 2011 letter, nor discussed during the interview with the Citizenship Judge. Save for the exceptions indicated above, the respondent provided the requested documents and answered the questions put to her by the Citizenship Judge.

[18] Be that as it may, since the applicant expected the respondent to file documents that were not specifically listed in the June 9, 2011 letter from the Citizenship Officer, nor required by the Citizenship Judge during the interview he conducted, as well as documents that the respondent made all necessary efforts to obtain and provide, it would only be fair to allow the respondent additional time to file any supplementary documents in her possession, as proof of her residency, with the Citizenship Judge.

JUDGMENT

THIS COURT’S JUDGMENT is that:

- 1) the application for judicial review is granted and the decision of the Citizenship Judge is set aside;
- 2) the matter is sent back to a different Citizenship Judge for redetermination;
- 3) the respondent has until June 27, 2013 to file any additional documents in her possession, as proof of her residency in Canada, with the Citizenship Judge;
- 4) considering the mixed outcome, no costs are granted.

“Jocelyne Gagné”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1924-12

STYLE OF CAUSE: MCI v MANISHA DAS

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: May 27, 2013

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

DATED: May 30, 2013

APPEARANCES:

Evan Duffy

FOR THE APPLICANT

Chayanika Dutta

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Evan Duffy
William F. Pentney
Deputy Attorney General of Canada
Toronto, Ontario

FOR THE APPLICANT

Chayanika Dutta
Toronto, Ontario

FOR THE RESPONDENT