Federal Court  Cour fédérale

Date: 20130712

Docket: T-788-12

Citation: 2013 FC 783

Ottawa, Ontario, July 12, 2013

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

SORAYA KAMAL FARAG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

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, (the Act) of a decision of a citizenship judge dated February 15, 2012, rejecting the applicant's application for citizenship.

[2] The applicant seeks an order returning the matter for redetermination by a different citizenship judge.

Background

[3] The applicant became a permanent resident of Canada upon arrival on July 19, 1997. She applied for citizenship on August 16, 2010.

[4] On September 1, 2011, the applicant was sent a residency questionnaire by Citizenship and Immigration Canada (CIC). The questionnaire was received at CIC Windsor on September 27, 2011.

[5] She attended a hearing with the citizenship judge on December 15, 2011.

The Decision

[6] The decision is dated February 15, 2012. The citizenship judge identified August 16, 2006 to August 15, 2010 as the relevant time period for calculating residency under the Act. She indicated the applicant had claimed 1,286 days of possible physical presence. She was not persuaded the applicant established and maintained residence as required by the Act.

[7] The citizenship judge noted the lease for the applicant's address from August 19, 2005 to August 31, 2007 named the other members of the applicant's family but not her. The credit card statements provided only started 14 months into the residency period and indicated numerous overseas purchases during the time period the applicant claimed to be present in Canada. The bank statements submitted only included the first page of multi-page documents and could not therefore

be analyzed. They also included Interac purchases at times when the applicant was not physically present in Canada.

[8] The applicant provided tax returns for 2006, 2007, 2008 and 2010, but not 2009. All reflect no income. The citizenship judge questioned how the applicant could afford international travel. The applicant's University of Windsor record indicated she had not obtained any credits since the fall term of 2008 and was required to withdraw from that program.

[9] In the applicant's residence questionnaire, there were changes from the facts of the applicant's initial application. She included more home addresses in Montreal, Ottawa and Windsor. She added home schooling and St. Claire College to her education. She changed dates of a 2007 trip to reflect 10 days longer abroad.

[10] The citizenship judge indicated the applicant had been invited to a hearing to be tested for language, knowledge and to explain these discrepancies.

[11] At the hearing, the applicant provided a driver's license that had expired in August 22, 2010 and explained that she had never driven a vehicle and only used the license for identification purposes. The applicant said she had moved back and forth between Egypt and Canada several times after permanent residency, but this had not been reflected on her residency questionnaire. The applicant had listed an address that RCMP had advised CIC was false information. The applicant's explanation was that she had listed what her father told her to list.

[12] The applicant described her current home at the hearing. She had left the section of the questionnaire on social ties blank and advised the citizenship judge at the hearing she was not attending school or volunteering due to depression. She had never seen a dentist or doctor of any kind; her prescription eyeglasses were prescribed in Cairo in 2008.

[13] At the hearing, the citizenship judge had requested various extra documentation from the applicant. It was received by CIC on December 23, 2011. The United Arab Emirates entry and exit records indicated approximately 92 days of undeclared absences during the relevant time period.

[14] On a balance of probabilities, the citizenship judge was not satisfied that the information provided by the applicant accurately reflected the number of days that the applicant was physically present in Canada.

[15] The citizenship judge applied the test from *Re Koo*, [1992] FCJ No 1107. She applied its six factors as follow:

> (1) was the individual physically present in Canada for a long period prior to recent absences which occurred immediately before the application for citizenship;

The citizenship judge noted the applicant's extensive travel to Egypt and the United Arab Emirates before the residency period and that the applicant had indicated she had no social ties in Canada.

> (2) where are the applicant's immediately family and dependents (and extended family) resident;

The applicant's immediate family live in Windsor, Ontario, but the applicant has extended family in the United Arab Emirates and Egypt.

> (3) does the pattern of physical presence in Canada indicate a returning home or merely visiting the country;

The citizenship judge found it difficult to assess the applicant's actual physical presence. It did not seem credible to her that the applicant would not have any social ties despite her full time university studies. The fact that the applicant had no doctors, dentists or prescription drugs in Canada and handled her eyeglass prescriptions in Cairo indicated she had not established a footprint since her landing in 1997 and was merely visiting.

> (4) what is the extent of the physical absences - if an applicant is only a few days short of the 1095 day total it is easier to find deemed residence than if those absences are extensive;

The citizenship judge found that due to the many inconsistencies in the applicant's testimony and declarations, she had not proven that she was actually physically present in Canada for the required time.

> (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 temporary employment abroad;

The citizenship judge found the applicant's situation was not temporary. The applicant continued to travel extensively in 2009, 2010 and 2011. The citizenship judge found that the applicant must have income despite her tax filings of zero income.

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

The citizenship judge found that the applicant's only connection with Canada seemed to be her immediate family.

[16] The citizenship judge did not approve the application and declined to make a favourable recommendation under subsections 5(3) and 5(4) of the Act.

Issues

[17] The applicant's memorandum raises the following issue:

Did the citizenship judge err in law in finding that the applicant did not satisfy the residence requirements in paragraph 5(1)(c) of the Act?

[18] I would rephrase the issues as follows:

1. What is the appropriate standard of review?
2. Did the citizenship judge err in rejecting the application?

Applicant's Written Submissions

[19] The applicant argues the standard of review is reasonableness. She argues that the only proper test for residency under the Act is that set out in *Martinez-Caro v Canada (Minister of Citizenship and Immigration)*, 2011 FC 640, the physical presence test. The citizenship judge erred in using the test from *Re Koo* above. The citizenship judge's own calculation showed that the applicant had only been absent for 325 days, therefore giving her 1,135 days of physical presence.

[20] The applicant submits further that the citizenship judge erred in the application of the test from *Re Koo* above. The applicant had provided information to the citizenship judge relevant to the *Koo* factors:

1. She had asked to be home schooled due to her family landing in Quebec and her lack of French capabilities. She had some social ties and did not say she had no social ties.

2. Her time in Canada during the relevant period is accurate as per her residency questionnaire.

3. She stated she did not feel comfortable going to doctors and refused vaccinations at the University of Windsor out of fear.

4. Before her depression, the applicant attended two full years of university and the other years in Canada can be proven by bank statements. Her income comes from her father.

5. Her family is not her only tie in Canada as she also has friends from university.

[21] The documentation provided by the applicant supports the fact that she had centralized her mode of living in Canada. It was unreasonable for the citizenship judge to find otherwise.

Respondent's Written Submissions

[22] The respondent argues that reasonableness is the appropriate standard of review. It remains open to citizenship judges to adopt either of the tests this Court has set out for the residency requirement of the Act. So long as the test is reasonably applied, this Court ought not intervene.

[23] The citizenship judge's application of the chosen test was reasonable, but it would not have mattered which test she applied. There were too many discrepancies in the evidence so the citizenship judge reasonably concluded the evidence was insufficient. The main problem was the lack of objective evidence showing an audit trail. It is plain on the face of the evidence before the citizenship judge that the requirements had not been met.

Analysis and Decision

[24] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[25] This Court has previously held that reasonableness is the appropriate standard of review for appeals from the decisions of citizenship judges (see *Kohestani v Canada (Minister of Citizenship and Immigration)*, 2012 FC 373 at paragraph 12, [2012] FCJ No 443).

[26] In reviewing the citizenship judge's decision on the standard of reasonableness, the Court should not intervene unless the citizenship judge came to a conclusion that is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir* above, at paragraph 4). As the Supreme Court held in *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339, it is not up to a reviewing

court to substitute its own view of a preferable outcome, nor is it the function of the reviewing court to reweigh the evidence (at paragraph 59).

[27] **Issue 2**

Did the citizenship judge err in rejecting the application?

This appeal is not about which residency test to apply. It is clear that the citizenship judge would have rejected the application under any of the tests, as she was not convinced the applicant was more than minimally attached in Canada qualitatively and that she had not spent the requisite amount of time here quantitatively.

[28] I cannot, contrary to the applicant's argument, infer from the citizenship judge's notes contained in the certified tribunal record that she made a conclusion as to the number of days that the applicant was absent from Canada. Her calculations regarding the claimed number of days in Canada is clearly distinct from her judgment on whether there was sufficient evidence to support those claimed days.

[29] The citizenship judge considered the evidence submitted by the applicant and concluded that she had not been present for the requisite number of days, based on numerous inconsistencies in the documentary evidence. It was therefore to the applicant's advantage that the citizenship judge applied the qualitative test as opposed to ending the inquiry after this finding. The citizenship judge's application of that test was reasonable given the applicant's limited establishment in Canada.

[30] The appeal is therefore dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the applicant's appeal is dismissed.

"John A. O'Keefe"

Judge

ANNEX

Relevant Statutory Provisions

***Citizenship Act*, RSC 1985, c C-29**

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 :
(a) makes application for citizenship;	a) en fait la demande;
(b) is eighteen years of age or over;	b) est âgée d'au moins dix-huit ans;
(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 admission to Canada for permanent residence the person shall be deemed to have accumulated one day of residence;	(ii) un jour pour chaque jour de résidence au Canada après son admission à titre de résident permanent;
(d) has an adequate knowledge of one of the official languages of Canada;	d) a une connaissance suffisante de l'une des langues officielles du Canada;
(e) has an adequate knowledge of Canada and of the responsibilities and privileges of citizenship; and	e) a une connaissance suffisante du Canada et des responsabilités et avantages conférés par la citoyenneté;
(f) is not under a removal order and is not the subject of a declaration by the Governor in Council made pursuant to section 20.	f) n'est pas sous le coup d'une mesure de renvoi et n'est pas visée par une déclaration du gouverneur en conseil faite en application de l'article 20.

FEDERAL COURT

SOLICITORS OF RECORD

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