Federal Court  Cour fédérale

Date: 20150831

Docket: T-81-15

Citation: 2015 FC 1029

Ottawa, Ontario, August 31, 2015

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

NINO MONGIOVI GENTILE

Respondent

JUDGMENT AND REASONS

[1] The applicant, the Minister of Citizenship and Immigration, seeks judicial review under section 22.1 of the *Citizenship Act*, RSC 1985, C-29, as amended [Act], of the decision of a Citizenship Judge, dated December 9, 2014, that approved the Citizenship Application [application] of the respondent, Mr Nino Mongiovi Gentile, pursuant to subsection 5(1) of the Act. The Minister argues that the Citizenship Judge erred in fact and law and that the reasons of

the Judge are inadequate and do not permit this Court to determine whether the decision is reasonable.

[2] For the reasons that follow, the application for judicial review is allowed. The Citizenship Judge made erroneous findings of fact and concluded that the respondent had met the test for residency from *Papadogiorgakis (Re)*, [1978] 2 FC 208 [*Papadogiorgakis*]. However, the reasons for the decision do not permit the Court to determine whether the Citizenship Judge fully grasped the issues or how the Judge analyzed the evidence and reached the conclusion that the respondent's residence in Canada during the relevant period satisfied the test in *Papadogiorgakis* and, in turn, to determine whether the Judge reached a reasonable outcome.

Background

[3] The respondent, Mr Gentile, a citizen of Venezuela, became a permanent resident of Canada on June 14, 1985, through spousal sponsorship by his wife. Mr Gentile and his family returned to Venezuela and remained there from 1985 until December 17, 2006. He returned to Canada briefly in 2002, and in 2003 applied to renew his permanent resident status. Mr Gentile and his family returned to Canada in 2006 and resided with his sister-in-law until 2009.

[4] On September 30, 2009, Mr Gentile applied for Canadian citizenship on the basis that he had resided in Canada for three out of the previous four years (from September 30, 2004 to September 30, 2009) and had met the residency requirements of subsection 5(1) of the Act.

[5] Subsection 5(1), as it read at the relevant time, provided:

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.

[6] Paragraph 5(1)(c), in other words, requires that the permanent resident accumulate 1095 days of residence in the 1460 day period preceding their application.

[7] Mr Gentile's application and Residency Questionnaire [RQ] are not consistent in setting out his absences from Canada in the relevant period with respect to particular dates and the totality of the absences. Mr Gentile also provided two passports with various exit and entry stamps including from Canada, US, Venezuela and Curaçao. An Integrated Customs Enforcement System [ICES] report also shows Mr Gentile's entries to Canada in November 2005, December 2006, January 2008 and March 2008.

[8] The record also includes cell phone bills, credit card statements, the respondent's driver's licence and health card, other bills that post-date the relevant period, his Ontario health claim history, and income tax assessments for 2007, 2008 and 2009.

[9] Mr Gentile states that he was present in Canada for 1028 days in the relevant period, a shortfall of 67 days of the required 1095 days (or an absence of 432 days). The applicant notes

that, on his RQ, Mr Gentile declared only 198 days of absence, but the record demonstrates 427 days of absence in the relevant period.

[10] Mr Gentile was not employed in 2005 and 2006. His application indicates that he was employed by Aurora Beverage in Barrie, Ontario between January 2007 and December 2007, was employed by 801 Packaging in Barrie, Ontario in 2008, was not employed in 2009, and began to work for Ma-Nina Ltd in January 2010 (outside the relevant period).

The Decision Under Review

[11] In a short decision, the Citizenship Judge noted that the onus was on Mr Gentile to prove that he meets the residence requirement.

[12] The Citizenship Judge stated that he applied the "analytical approach" from *Papadogiorgakis* to determine whether Mr Gentile satisfied the residency requirement. In *Papadogiorgakis*, the Court considered whether an applicant who had been absent from Canada attending university could meet the residency requirements. The Citizenship Judge simply cited the following passage from *Papadogiorgakis*:

> A person with an established home of his own in which he lives does not cease to be resident there when he leaves it for a temporary purpose whether on business or vacation or even to pursue a course of study. The fact of his family remaining there while he is away may lend support for the conclusion that he has not ceased to reside there. The conclusion may be reached, as well, even though the absence may be more or less lengthy. It is also enhanced if he returns there frequently when the opportunity to do so arises.

> It is, as Rand J. appears to me to be saying in the passage I have read, "chiefly a matter of the degree to which a person in mind and fact settles into or maintains or centralizes his ordinary mode of living with its accessories in social relations, interests and conveniences at or in the place in question.

[13] The Citizenship Judge noted under the heading “Facts”, that Mr Gentile became a permanent resident in 1985, has lived permanently in Canada since December 2006, worked at the water plant in Barrie from 2007 to 2009, began to work for Ma-Nina Ltd after 2009, bought a house in 2009, and opened a restaurant in 2012. The Citizenship Judge also stated that Mr Gentile was convinced that when he applied for citizenship that he met the residency requirement.

[14] The Citizenship Judge then found that:

- Mr Gentile presented Notices of Assessment indicating an income consistent with full-time employment;
- Mr Gentile presented an exact account of his absences from Canada, which can be verified against his passport and an ICES report;
- Mr Gentile’s history of medical visits in Canada demonstrates a use of medical services consistent with that of a person residing in Canada during the relevant period; and,
- Mr Gentile submitted his application believing that short vacations in the relevant period would not count against his residence.

[15] The Citizenship Judge concluded that Mr Gentile had met the residency requirements under paragraph 5(1)(c) of the Act.

The Issues

[16] The applicant submits that the decision is not reasonable and argues:

> The Citizenship Judge erred in law by failing to consider whether the respondent had provided false or misleading information (paragraph 29(2)(a) of the Act):
>
> > The Citizenship Judge erred in fact by finding that the respondent had met the residence requirement, ignored evidence and reached conclusions that were not supported by the evidence; and,
> >
> > The Citizenship Judge's reasons are inadequate as they do not permit the Court to determine whether the decision is reasonable.

Standard of Review

[17] The parties agree that the standard of reasonableness applies to the Citizenship Judge's determination of the application for citizenship as that determination involves questions of fact and law.

[18] The role of the Court is, therefore, to determine whether the decision "falls within 'a range of possible, acceptable outcomes which are defensible in respect of the facts and law' (*Dunsmuir*, at para 47). There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome." (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59,

[2009] 1 SCR 339 [*Khosa*], citing *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*]).

[19] The applicant argues that the reasons are inadequate, but agrees that the inadequacy of the reasons is not a stand-alone ground to allow an application for judicial review. In *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 [*Newfoundland Nurses*], the Supreme Court of Canada elaborated on the requirements of *Dunsmuir*, noting at paras 14-16, that the decision-maker is not required to set out every reason, every argument or all the details in the reasons. Nor is the decision-maker required to make an explicit finding on each element that leads to the final conclusion. The reasons are to "be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes" (at para 14). In addition, where necessary, courts may look to the record "for the purpose of assessing the reasonableness of the outcome" (at para 15). The Court summed up the principle at para 16:

> In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

[20] On the other hand, a Court is not expected to look to the record to fill in gaps to the extent that it rewrites the reasons (*Pathmanathan v Canada (Minister of Citizenship and Immigration)*, 2013 FC 353 at para 28, [2013] FCJ No 370 [*Pathmanathan*]).

Did the Citizenship Judge err by failing to consider whether the respondent provided false or misleading information?

[21] The applicant submits that the Citizenship Judge failed to consider paragraph 29(2)(a) of the Act, which provides that it is an offence under the Act to make false representations, commit fraud or knowingly conceal a material circumstance. However, the applicant notes that this issue was not raised in the report provided to the Citizenship Judge by the Citizenship and Immigration of Canada Officer [CIC Officer]. The applicant submits that, nonetheless, the Citizenship Judge had an obligation to check that the information in the application and the RQ, which the respondent had attested to be true, was in fact true.

[22] The respondent submits that there was no intention to misrepresent any information and that any discrepancies were the result of human error and most were corrected or clarified before the decision was made. In addition, the discrepancies raised by the applicant were not material or significant, and many relate to a period of time beyond the relevant period and during the relevant period when the respondent clearly indicated he lived outside of Canada.

[23] Although the Act provides for an offence for making false representations, I find that this issue should not be addressed on judicial review. The applicant raised this issue to highlight the importance of accuracy in the application for citizenship and the obligation on the Citizenship Judge to carefully scrutinize the evidence. As noted below, there were discrepancies regarding the respondent's presence or absence from Canada, which the Citizenship Judge appears to have ignored, but the key issue is whether the Judge reasonably found that the respondent met the test for residence that the judge applied despite the respondent's absences from Canada.

Did the Citizenship Judge err by finding that the respondent had met the residence requirement; did the Judge ignore evidence and reach conclusions that were not supported by the evidence?

The Applicant's Submissions

[24] The applicant notes that the onus was on the respondent to provide evidence to establish his residency in Canada for three out of the four years preceding his application.

[25] The applicant submits that in applying *Papadogiorgakis*, the Citizenship Judge was required to determine that the respondent had established a residence of his own in Canada for a period of at least three years preceding his application and that he maintained an established residence throughout the relevant time period.

[26] The applicant submits that the evidence does not support that the respondent established himself in Canada prior to his absences or that he had permanently lived in Canada with only some short term travel. Rather, the evidence demonstrates that the respondent left Canada after obtaining permanent resident status in 1985 and resided in Venezuela with his family, applied for a multiple entry visa to Canada in Venezuela in 2002, made an urgent application for a permanent residence card in 2003, and was present in Canada for only 29 days during 2005 and 2006. The applicant argues that the evidence does not demonstrate that the respondent established any residence in Canada between September 2005 and December 17, 2006, when he states he returned to Canada to reside.

[27] The applicant argues that there is no evidence that the majority of the respondent's absences were temporary and little evidence of the respondent's ties to Canada or that he had established a qualitative attachment to Canada during the relevant period.

[28] The applicant further submits that the passive evidence provided by the respondent, including cell phone, bank and credit card statements, is not enough to show a qualitative connection to Canada. The health records, which show medical appointments and tests are grouped in periods of time and only establish time spent in Canada to attend medical appointments. Although the medical records are consistent with other evidence of the time the applicant was present in Canada, this does not establish a connection with Canada.

[29] The applicant also points to the evidence of the CIC Officer which provides details of the respondent's travel history and compares this with the information provided by the respondent in his application and his RQ, noting the gaps and inconsistencies in days present and absent from Canada. The applicant argues that the conclusion of the Citizenship Judge that the respondent "presented an exact account of his absences from Canada on his RQ" and that "[t]he absences can be verified against his passport and an ICES report" is clearly wrong.

[30] Similarly, the conclusion that the respondent's income tax assessments were consistent with full-time employment in Canada during the relevant period is not supported by the evidence.

[31] The applicant submits, more generally, that the Citizenship Judge's reasons are so inadequate that they do not permit the Court to determine if the decision is reasonable. Subsection 14(2) of the Act provides that decisions to approve or deny a citizenship application must be accompanied by reasons. In the present case, the Citizenship Judge recited some information, much of which was inaccurate, and set out conclusions, but the reasons do not reveal how the Judge resolved the discrepancies in the evidence and what evidence the Judge relied on to find that the residence requirement was met.

[32] In addition, the record in this case does not assist the Court in understanding the reasons; rather, it highlights information that was before the Citizenship Judge which does not support the conclusion that the residency requirement was met.

The Respondent's Submissions

[33] The respondent notes that the *Papadogiorgakis* test applied by the Citizenship Judge does not require strict physical presence in Canada. Regardless, the respondent argues that he provided evidence of his presence in Canada, particularly since December 17, 2006, including health forms, tax documents, bank account statements and cell phone bills. He also demonstrated his qualitative attachment to Canada in the relevant period.

[34] The respondent acknowledges that there were contradictions in the evidence regarding his reported absences from Canada, most of which were due to human error and were not material, and submits that he was physically present in Canada after he returned to live in Canada on December 17, 2006. The respondent adds that the Citizenship Judge focused on the

period subsequent to December 2006, given that the respondent had clearly indicated that he did not reside in Canada until that date.

[35] The respondent argues that his presence in Canada (although physical presence was not the test applied), his family and his employment are all evidence of his qualitative attachment to Canada.

[36] The respondent submits that the Citizenship Judge is presumed to have considered all of the evidence and is not required to refer to every piece of evidence (*Khosa*, at paras 61, 64). The Citizenship Judge considered the discrepancies in the respondent's application and was satisfied with the evidence before him.

[37] The respondent further submits that the Citizenship Judge provided brief but adequate reasons. A Citizenship Judge is only required to provide sufficient grounds to allow the reviewing court to understand why a decision was reached and to assess its reasonableness (*Canada (Minister of Citizenship and Immigration) v Lee*, 2013 FC 270 at para 37, [2013] FCJ No 311). In this case, it is clear that the Citizenship Judge found that the respondent's evidence was compelling, he was credible and he had demonstrated qualitative ties to Canada.

The Citizenship Judge's Decision is Not Reasonable

[38] Given that the Citizenship Judge stated that he would apply the test from *Papadogiorgakis*, it is not necessary to attempt to reconcile the various accounts of the respondent's presence or absence from Canada and the inconsistencies between his RQ and

application with the passport information. The only conclusion to be reached is that there were inconsistencies which the Citizenship Judge appears to have ignored. However, the Citizenship Judge did acknowledge that the applicant fell short of the required days to establish his physical presence in Canada and, as a result, applied the qualitative test.

[39] The Citizenship Judge quoted a passage from *Papadogiorgakis*, but did not go on to describe how he interpreted or understood the test. Nor did the Citizenship Judge refer to any of the subsequent jurisprudence regarding that qualitative test, sometimes referred to as the "centralized mode of living" test.

[40] In *Martinez-Caro v Canada (Minister of Citizenship and Immigration)*, 2011 FC 640, 391 FTR 138, Justice Rennie, as he then was, noted the history of the three tests that have emerged to determine residency, the modification of the qualitative tests and his preference for the physical presence test, but ultimately confirmed that as long as the Citizenship Judge identifies the test to be used, the reasonableness of the decision will be determined in accordance with the test applied (at para 26).

[41] With respect to the evolution of the three tests for residency, Justice Rennie noted at para 7:

> Since the *Act* received Royal Assent in 1977, three lines of reasoning have emerged with respect to the residency requirement found in subsection 5(1)(c) of the *Act*: the centralized mode of living test; the so-called six-factor *Koo (Re)* test, which is focused on where the applicant regularly, normally or customarily lives, and the physical presence test, which is focused on whether the applicant's physical presence in Canada meets or exceeds 1,095 days. Justice Sean Harrington succinctly summarised the three

> schools in *Canada (Minister of Citizenship & Immigration) v Salim*, 2010 FC 975 at para 1:
>
> > According to one school of thought, residence means physical presence. Two others state that in certain circumstances a person satisfies the requirement if here in spirit, but not in body.
> >
> > […]
> >
> > For over 30 years, we have been plagued with three residency tests or, as some would have it, two tests, the second having two branches.

[42] Justice Rennie noted, at para 10, that *Papadogiorgakis* was one of the first cases to address the equivalent of subsection 5(1)(c) of the Act and described the outcome at para 11:

> The Citizenship Judge refused Papadogiorgakis's application on the basis that he had not accumulated three years of residency in the four years immediately preceding his application. On appeal, Associate Chief Justice Thurlow held that even though Papadogiorgakis had not accumulated 1,095 days of residence in Canada, because he had "centralized his mode of living in Canada" the three year residency requirement had indeed been met: *Papadogiorgakis*, para 17. Thurlow ACJ allowed the appeal and found that Papadogiorgakis had met the residency requirement.

[43] In *Canada (Minister of Citizenship and Immigration) v Purvis*, 2015 FC 368, [2015] FCJ No 360, Justice Mosley provided an overview of the three tests which may be applied by a Citizenship Judge, noting that the tests are really two and that a Judge cannot blend the quantitative and qualitative tests:

> [26] It is settled law that a Citizenship Judge may reasonably rely on one of three residence tests: (1) the quantitative test set out in *Pourghasemi (Re)*, [1993] FCJ No 232 (TD) [*Pourghasemi*]; (2) the qualitative test set out in *Papadogiorgakis (Re)*, [1978] FCJ No 31 (TD) [*Papadogiorgakis*]; or (3) the modified qualitative test set out in *Koo (Re)*, [1992] FCJ No 1107 (TD) [*Koo*].

> [27] As I explained in *Hao v Canada (Citizenship and Immigration)*, 2011 FC 46 at paras 14-19, these cases really set out two tests because *Koo* is an elaboration on *Papadogiorgakis*. These are the quantitative physical presence test from *Pourghasemi* and the qualitative test from *Koo* and *Papadogiorgakis*.
>
> [28] However, the jurisprudence of this Court prevents Citizenship Judges from "blending" the quantitative and qualitative tests in the same case: see e.g. *Mizani v Canada (Citizenship and Immigration)*, 2007 FC 698 at para 13; *Vega v Canada (Citizenship and Immigration)*, 2009 FC 1079 at para 13; *Saad v Canada (Citizenship and Immigration)*, 2013 FC 570 at para 19; *Canada (Citizenship and Immigration) v Bani-Ahmad*, 2014 FC 898 at paras 18-19 [*Bani-Ahmad*].

[44] In the present case, the Citizenship Judge did not blend the tests, although he did refer to Mr Gentile's "short" vacations and he found that Mr Gentile provided exact accounts of his absences, which is a finding not supported by the evidence. The Citizenship Judge appears to have blended the evidence and relied on physical presence during some periods after December 2006 to support the qualitative test. It is clear that the Citizenship Judge, despite not scrutinizing the respondent's absences from Canada, concluded the respondent fell short of the required 1095 days then moved on to apply *Papadogiorgakis*, which the Judge referred to as "analytical". The reasonableness of the decision must be determined on the basis of how the Citizenship Judge applied the evidence to this test.

[45] The Citizenship Judge recited facts which are not accurate, including regarding the respondent's employer and when the respondent was employed. The Citizenship Judge also appeared to take into account that the respondent purchased a home in 2009 (after the relevant period) and established a restaurant business in July 2012 (also after the relevant period). He then set out conclusions which are also not supported by the evidence.

[46] First, the Citizenship Judge stated that Notices of Assessment are consistent with full-time employment. However, the respondent was not employed in 2005, 2006 or 2009, so these notices could only show employment for two years of the relevant four year period.

[47] Second, the Citizenship Judge stated that the respondent provided an exact account of his absences on his RQ. This is not the case. The Citizenship Judge stated that the absences can be verified against his passport and ICES, which is also not the case.

[48] Third, the Citizenship Judge stated that the respondent's medical visits demonstrate use of medical services consistent with that of a person residing in Canada "during the times the [a]pplicant claimed to reside here." This only explains that his medical visits occurred while he was otherwise in Canada, not how this shows a qualitative connection to Canada.

[49] Fourth, the Citizenship Judge stated that Mr Gentile submitted his application believing that short vacations taken after December 17, 2006 would not account against his residence. While that may be so, and the Citizenship Judge appears to excuse these short absences, the relevance of this is not clear given that the Judge applied the *Papadogiorgakis* test, not the physical presence test.

[50] The Citizenship Judge did not indicate how any of these conclusions are relevant to the test in *Papadogiorgakis*, however, the Judge understood that test.

[51] In accordance with the principles of *Newfoundland Nurses*, at para 16, I have reviewed the record in detail and it does not shed any light on how the Citizenship Judge understood the test in *Papadogiorgakis* or what evidence he relied on to find that the respondent had established a or "a centralized mode of living" or a qualitative attachment to Canada in the relevant time period. As the applicant notes, the evidence clearly indicates that Mr Gentile did not establish a residence in Canada in 2005, at the starting point of the relevant four year period, and, therefore, did not leave that residence for a temporary purpose and then return. The respondent returned only in December 2006, 15 months later, and lived with his sister-in-law. With respect to the notion of a "centralized mode of living", the Citizenship Judge did not explain how the respondent's time and activities in Canada, to the extent it can be verified, established this to a sufficient degree to find that he met the residency requirements.

[52] Given that the test is described as qualitative and provides an alternative where physical presence in Canada falls short of the legislated requirements, in my view, the evidence of the qualitative attachment or a centralized mode of living must be fairly strong.

[53] As noted, the Citizenship Judge's reasons do not explain how he understood the test he applied, which he described as the "analytical" approach, how he conducted the analysis, or what he relied on to find such a qualitative attachment. The evidence on the record does not appear to support such a finding.

[54] In *Canada (Minister of Citizenship and Immigration) v Jeizan*, 2010 FC 323 at para 17, [2010] FCJ No 373, Justice de Montigny found that:

> Reasons for decisions are adequate when they are clear, precise and intelligible and when they state why the decision was reached. Adequate reasons show a grasp of the issues raised by the evidence, allow the individual to understand why the decision was made and allow the reviewing court to assess the validity of the decision. [Citations omitted]

[55] The jurisprudence has established that, although not a stand-alone ground for judicial review, reasons must permit the Court to determine if the decision is reasonable. Adequate reasons should be clear and intelligible and show that the decision-maker grasped of the issues raised and explain how the decision was reached (*Dunsmuir*, at para 47; *Newfoundland Nurses*, at para 16; *Jeizan*, at para 17). The reasons of the Citizenship Judge did not do so.

[56] The application for citizenship must be reconsidered. Given recent amendments to the Act which have modified the role of a Citizenship Judge, the application must be sent back for a redetermination to a "decision-maker".

JUDGMENT

THIS COURT'S JUDGMENT is that the application for citizenship must be reconsidered and the application is sent back for redetermination by a different decision-maker.

"Catherine M. Kane"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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