Federal Court  Cour fédérale

Date: 20160114

Docket: T-673-15

Citation: 2016 FC 42

Ottawa, Ontario, January 14, 2016

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

JAFFER ALI MAHER

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Pursuant to section 22.1 of the *Citizenship Act*, RSC 1985, C-29, as amended [the Act], the applicant, the Minister of Citizenship and Immigration, asks the Court to set aside the decision of a citizenship judge, dated April 1, 2015, that approved the citizenship application of the respondent, Jaffer Ali Maher, pursuant to subsection 5(1) of the Act.

I. Facts

[2] The respondent became a permanent resident of Canada on December 9, 2004. The decision recounts that the respondent is a mechanical engineer. He is originally from India and came to Canada in 2004 from Dubai, United Arab Emirates, with his family. He continued to work in Dubai until 2007, when he was offered a job in Canada by his company, Eagle Burgmann. He worked at the Canadian office from February 2007 to July 2009. He went on employment insurance in July 2009. He left for Dubai, being unable to find work in Canada in April 2010 after applying for citizenship.

[3] He worked in Dubai from 2010 to 2012, when he returned to Canada to join his family. In 2013, he found a job in the engineering field in Fort McMurray, Alberta.

[4] The respondent submitted his application for Canadian citizenship on April 3, 2010. The relevant period for the purposes of the residency requirement under paragraph 5(1)(c) of the Act is therefore between April 3, 2006 and April 3, 2010 (the four years preceding the application for citizenship).

[5] In his application, the respondent stated that he was physically present in Canada for 1,074 days and outside of Canada for 386 days during the relevant period.

[6] In his residence questionnaire, dated December 29, 2011, the respondent confirmed that he was physically present in Canada for 1,074 days and outside of Canada for 386 days during the relevant period.

[7] An officer of Citizenship and Immigration Canada [the reviewing officer] reviewed the respondent's application, prepared a File Preparation and Analysis Template and recommended a hearing. The reviewing officer noted several concerns with the application, including that the applicant re-entered Canada two days before the citizenship test and left immediately following the test, that the applicant's LinkedIn page indicated that he was working for the company Fluidyne SEALS INC in Dubai beginning in December 2009, while he declared being unemployed from August 2009 to March 2010 in his residence questionnaire and that six of the applicant's declared trips were off by up to three days, which leads to a seven day discrepancy between his declared absences and absences per the ICES report. The reviewing officer also noted that the applicant's spending abroad matches his declared absences.

[8] The respondent attended a hearing before the citizenship judge on March 12, 2015.

II. Decision

[9] In a decision dated April 1, 2015, the citizenship judge found that the respondent met the residence requirement under paragraph 5(1)(c) of the Act and approved his application for citizenship.

[10] The citizenship judge noted the respondent's employment history, that he purchased a house in Canada in 2007 and that his wife and children are Canadian citizens. The citizenship judge also noted that the respondent provided copies of his notices of assessment and health records at the hearing.

[11] The citizenship judge further noted that he was able to read the passport stamps for the relevant period from the passports which the reviewing officer had stated were illegible.

[12] The citizenship judge explained that the respondent bears the burden of proving that he meets the residency requirements. He noted that the respondent has established his residence in Canada and the shortage of days in his application is due to his honest mistake and applying a bit early. The citizenship judge indicated that the respondent lives in Canada, has no activity outside of Canada and his family lives in Canada.

[13] The citizenship judge applied the test for residency from *Koo (Re)* (1992), 59 FTR 27 (FCTD) [*Koo*], explaining that that test does not require physical presence for the whole 1,095 days and which assesses where the citizenship applicant "regularly, normally or customarily lives" or whether Canada is the country in which the applicant has "centralized [his] mode of existence." He then laid out the six questions from *Koo* that assist in this determination and answered each question in the respondent's favour.

[14] The following responses by the citizenship judge have given rise to particular issues in this judicial review:

> 1. Was the individually physically present in Canada for a long period prior to recent absences which occurred immediately before the application for citizenship?
>
> YES
>
> […]
>
> 4. What is the extent of the physical absences - if an applicant is only a few days short of the 1,095 total it is easier to find deemed residence than if those absences are extensive?
>
> YES, Canada is his home and he has been working in Canada in his own engineering field in Alberta. There is a letter from the employer on file
>
> 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?
>
> Yes, he has only 1074 days of physical presence in Canada during the relevant period, short of 21 days. He met the basic residence requirement but applied a bit too early in order to meet the physical presence requirement of 1095 days.

III. Issues

[15] The applicant raises the following issues:

1. There are material errors on the face of the decision.

2. The citizenship judge failed to assess a contradiction in the evidence.

[16] The applicant submits that, as a result of these errors, the reasons are inadequate.

[17] The respondent has not made any written submissions.

IV. Applicant's Written Submissions

[18] The applicant submits that the decision lacks justification, transparency and intelligibility and is therefore unreasonable. The applicant submits that the reasons do not allow a reviewing party to understand the decision or the Court to assess the reasonableness of the decision (*Canada (Minister of Citizenship and Immigration) v Jeizan*, 2010 FC 323 at para 27 [*Jeizan*]). The applicant makes this argument on the basis that there are material errors on the face of the decision and the citizenship judge failed to address a contradiction on the record.

A. *Material Errors on the Face of the Decision*

[19] The applicant submits that because the citizenship judge only wrote "Yes" in response to the first question laid out in *Koo*, the reasons are not actually reasons and do not allow a reviewing party to understand why the decision was made.

[20] Further, the applicant submits that the evidence contradicts the citizenship judge's finding on this factor because the respondent was absent from Canada for a long period (306 days) prior to a two year period of regular, short absences from Canada.

[21] The applicant also submits that the analysis of the fourth factor, of "the extent of the physical absences" does not respond to the question posed.

[22] Further, the applicant submits that the citizenship judge's response to this question relies on the respondent's employment after the relevant period, which is an irrelevant factor. Its consideration is a reviewable error.

[23] The applicant further submits that the analysis of the fifth factor, of whether the respondent's absences were "a clearly temporary situation", was contradictory and unreasonable. The applicant acknowledges that the citizenship judge may have intended this as the analysis of the fourth factor, but argues that the respondent cannot fail to accrue 1,095 days of physical presence and meet the basic requirement.

[24] Further, the applicant argues that it was unreasonable for the citizenship judge to accept the explanation that the 21 day shortfall was a result of him applying a bit early, when it is clear from the evidence that he left Canada for employment in Dubai immediately after signing the application form and did not return for 254 days. He would not meet the 1,095 day requirement until January 2011.

B. *Failed to Address Contradiction*

[25] The applicant submits that it is a reviewable error for a citizenship judge to fail to turn his mind to contradictions in the evidence that undermine the credibility of an applicant (*Canada (Minister of Citizenship and Immigration) v Vijayan*, 2015 FC 289 at para 65 [*Vijayan*] and *Canada (Minister of Citizenship and Immigration) v Baron*, 2011 FC 480 at para 17 [*Baron*]). The applicant submits that the citizenship judge committed this error by ignoring the reviewing

officer's note that the respondent's LinkedIn profile contradicted his claimed employment history.

[26] The respondent made oral submissions at the hearing with respect to his absences from Canada and that these absences were business related. The respondent also made submissions in relation to his LinkedIn profile.

V. Analysis and Decision

(1) Standard of Review

[27] The standard of review is reasonableness (*Jeizan* at para 12; *Canada (Minister of Citizenship and Immigration) v Safi*, 2014 FC 947 at paragraphs 15 and 16 [*Safi*]).

[28] Reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. It is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47).

(2) Adequacy of Reasons

[29] Many of the applicant's arguments relate to the adequacy of the citizenship judge's reasons. Madam Justice Catherine Kane provided a summary of the adequacy of reasons in the context of a decision of a citizenship judge in *Safi*:

> [48] The Minister needs to be able to assess whether the decision should be appealed, as does the applicant where the Application is refused, and the Court needs to be able to determine whether any appeals should be granted.
>
> [49] As noted in *Jeizan* by Justice de Montigny at para 17:
>
> > [17] 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: see *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] S.C.J. No. 23 at para. 46; *Mehterian v. Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 545 (F.C.A.); *VIA Rail Canada Inc. v. National Transportation Agency*, [2001] 2 F.C. 25 (F.C.A.), [2001] 2 F.C. 25 (C.A.), at para. 22; *Arastu*, above, at paras. 35-36.
>
> [50] In the present case, the Citizenship Judge's remarks are more in the nature of "notes to self" about the follow-up needed and do not reveal any reasoning.
>
> [51] I have considered the guidance of *Newfoundland Nurses* and have looked to the record to supplement and support the outcome. The notations do not reveal whether the Citizenship Judge critically examined the discrepancies in the documents and the passport stamps or actually had the ability to determine the dates of the stamps, the country that issued them, or the language in which these were stamped. This type of reliance on the record to supplement the decision goes well beyond what was contemplated in *Newfoundland Nurses* and requires the Court to speculate about whether the Citizenship Judge was aware of and considered the problems with the evidence. The Court cannot rewrite the decision to provide reasons which simply are not there (*Pathmanathan*).

(3) Analysis of *Koo* Factors

[30] It is not in dispute that the citizenship judge stated the test from *Koo* correctly. *Koo* provides:

> The conclusion I draw from the jurisprudence is that the test is whether it can be said that Canada is the place where the applicant "regularly, normally or customarily lives". Another formulation of the same test is whether Canada is the country in which he or she has centralised his or her mode of existence. 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 temporary employment abroad;
>
> (6) what is the quality of the connection with Canada: is it more substantial than that which exists with any other country.

[31] In the analysis of the first question from *Koo*, the applicant submits that the analysis is deficient because the respondent's long absence from Canada was not recent and was at the beginning of the relevant period and the respondent had a number of short-term absences throughout the relevant period.

[32] I agree that the reasons and record do not assist in determining why the citizenship judge answered "Yes" to this question and are therefore inadequate. Contrary to the citizenship judge's

finding, the long absence was not recent and the shorter absences occurred throughout the relevant period and were not recent; most were at the beginning of the relevant period in 2007.

[33] On the fourth and fifth questions, I think it is clear from the reasons that the citizenship judge mistakenly listed the answer to the fourth question beneath the fifth question and vice versa. The answer to the fourth question directly responds to the fifth question and the answer to the fifth question directly responds to the fourth question. Generally, a typographical error that does not reflect a misunderstanding of the evidence is not a reviewable error (*Caicedo Molina v Canada (Minister of Citizenship and Immigration)*, 2007 FC 289):

> [18] Justice Russell in *Petrova v. Canada (Minister of Citizenship and Immigration)* (2004), 251 F.T.R. 43, 2004 FC 506, addressed the implications of a typographical error in a decision-maker's reasons under review by the Court. At paragraph 51 of *Petrova*, above, Justice Russell writes: "[w]hen a mistake is typographical in nature, the Court should not interfere with the decision, especially if the error does not appear to have been a misunderstanding of the evidence." This proposition was recently followed in a decision of Mr. Justice Noël in *Lu v. Minister of Citizenship and Immigration*, 2007 FC 159.

[34] I will therefore assess the reasonableness of the responses assuming this was a typographical error.

[35] On the fourth question, I disagree with the applicant that it is unclear what the citizenship judge meant when he stated that the respondent "met the basic residence requirement." The jurisprudence is clear that the *Koo* analysis involves two steps (*Canada (Minister of Citizenship and Immigration) v Ojo*, 2015 FC 757 [*Ojo*], the first of which could easily be understood as a "basic residence requirement."

> [25] The jurisprudence establishes a two-step test for assessing residence. First, the Citizenship Judge must decide whether the person established a residence in Canada prior to or at the beginning of the relevant time period. This is a threshold question which must be answered before proceeding to the second step of the test: *Canada (Minister of Citizenship and Immigration) v Chang*, 2013 FC 432 at para 4 [*Chang*]; *Canada (Minister of Citizenship and Immigration) v Udwadia*, 2012 FC 394 at para 21 [*Udwadia*].
>
> [26] If the first step is met, the Citizenship Judge must assess whether the person's residency qualifies him for Canadian citizenship. The jurisprudence accepts three different tests for this determination. The *Koo* test is one of them. Again, the applicant does not dispute that it was open to the Citizenship Judge to apply this test.
>
> [27] In the case at bar, the Citizenship Judge never explicitly addressed the threshold question. She went immediately to the six *Koo* questions without asking whether Mr Ojo ever became resident in Canada. As my colleague Justice O'Reilly stated in *Udwadia*, above, at para 22, it is incumbent on a Citizenship Judge to ascertain whether the person before her established a residence in Canada and to "determine when that was". In the decision under review, this was not accomplished.
>
> [emphasis added]

[36] However, I agree with the applicant that the evidence on the record does not support that the respondent applied early. Rather, the evidence supports that the respondent applied for citizenship on the day (April 3, 2010) he left Canada for an extended period of time (254 days) for a new job in Dubai. Additionally, the citizenship judge appears to rely heavily on this finding in reaching his decision. He states before applying the *Koo* test that the respondent's shortage of days was due to his honest mistake and applying a bit early and again states that the respondent's shortage of days was due to applying a bit early in his analysis of the fourth factor.

[37] On the other hand, I note that the extent of the physical absences was short, only a 21 day shortfall. If one disregards the above error in the reasons, the record does demonstrate that a positive response to this question was reasonable.

[38] On the fifth question, I agree with the applicant that the citizenship judge relied on evidence from outside the relevant period to draw his conclusion (i.e. the evidence that the respondent works in his engineering field in Alberta, a position he has only held since 2013). The respondent's present employment does indicate that his employment in Dubai, during the relevant period, was temporary in a broad sense, because he eventually returned to Canada. However, the question posed by *Koo* asks whether the physical absence was due to a clearly temporary situation. There is no evidence that his employment in Dubai was a temporary contract. As a result, in my opinion, it is not clear from the reasons and the record how the citizenship judge drew his conclusion on the fifth factor.

(4) Ignoring Evidence

[39] On the issue of ignoring the evidence relating to the respondent's LinkedIn page, the citizenship judge is presumed to have considered all of the evidence (*Simpson v Canada (Attorney General)*, 2012 FCA 82). It was reasonable for the citizenship judge to prefer the evidence of the respondent's travel history (such as his passport, ICES report and consistent spending abroad) to his LinkedIn page, which has no checks or balances on its accuracy.

[40] The applicant cited *Vijayan* and *Baron* for the proposition that "[a] Citizenship Judge commits a reviewable error if he fails to turn his mind to the question of whether omissions and

contradictions in the evidence undermine the credibility of an individual" (*Vijayan* at paragraph 65). However, in *Vijayan* the omission was a failure to declare 12 absences from Canada and in *Baron* there were "significant omissions and contradictions." In my opinion, the failure to address a LinkedIn page is not analogous to the significant omissions and contradictions in *Vijayan* and *Baron*.

[41] I note that a positive finding on each factor was not required for the citizenship judge to find that the respondent met the residence requirement, for example, see *Ojo* at paragraph 32:

> I am also of the view that the Citizenship Judge applied the residence test unreasonably at the second stage, when evaluating the strength of Mr Ojo's connection to Canada. The *Koo* test requires a Citizenship Judge to make findings in relation to six factors and then to balance the positive findings against the negative ones. In this case, the Citizenship Judge did not do this. By and large, she simply explained the justifications for Mr Ojo's absences without any balancing.

[42] As noted above, the citizenship judge made findings that were not supported by the evidence in several parts of the decision: in his analysis of the first *Koo* factor and in finding that the applicant's early application was due to his honest mistake of applying a bit early. It is also not clear from the reasons and the record how the citizenship judge concluded, on the fifth factor, that the applicant's long physical absence was caused by a clearly temporary situation.

[43] Even though some of the citizenship judge's findings are supported by the reasons and record and a positive finding on each *Koo* factor was not required, it is not clear that the citizenship judge would have come to the same conclusion without the unreasonable findings. As a result, in my opinion, the decision as a whole is unreasonable.

[44] As a result, the application must be allowed and the decision of the citizenship judge must be set aside and the matter referred to a different citizenship judge for redetermination.

[45] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is allowed, the decision of the citizenship judge is set aside and the matter is referred to a different citizenship judge for redetermination.

"John A. O'Keefe"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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