Federal Court  Cour fédérale

Date: 20160602

Docket: T-2003-15

Citation: 2016 FC 616

Ottawa, Ontario, June 2, 2016

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

BARBARA MARTINEZ D BADULESCU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant seeks judicial review of a decision rendered by a Citizenship Judge on October 7, 2015, denying her application for Canadian citizenship on the ground that she did not meet the residence requirement pursuant to paragraph 5(1)(c) of the *Citizenship Act*, RSC, 1985, C-29 (the Act), as amended, which governed her application at the time.

[2] The Applicant's main contention is that the Citizenship Judge breached the duty of procedural fairness by failing to advise the Applicant of the residency test to be applied to her case so that she would know the case to meet and by refusing her the assistance of an interpreter at her Citizenship hearing.

[1] For the reasons that follow, the appeal is dismissed.

II. **Background**

[2] The Applicant is a citizen of Mexico. She entered Canada on July 25, 2004 and became a permanent resident on March 1, 2007 after having been sponsored by her husband. Her husband and two children are Canadian citizens.

[3] The Applicant applied for Canadian citizenship on April 8, 2012. The relevant four year period for assessing residency is, therefore, April 8, 2008 to April 8, 2012. In a letter covering her citizenship application package, the Applicant acknowledged that she had lengthy absences from Canada within that period and fell short, as a result, of the required days of physical presence.

[4] The Applicant attended a hearing before the Citizenship Judge on September 14, 2015. The Citizenship Judge allegedly questioned the Applicant exclusively on the qualitative nature of her residence in Canada and did not inform the Applicant, at any time during the hearing, that the Applicant's shortfall of days physically present in Canada was a concern.

[5] Relying on *Re Pourghasemi,* [1993] FCJ No 232 [*Pourghasemi*], the Citizenship Judge found on a balance of probabilities, that the Applicant did not meet the residence requirement pursuant to paragraph 5(1)(c) of the Act. According to a citizenship officer's calculations, which the Citizenship Judge accepted, the Applicant had 479 days of physical presence in Canada during the relevant period and 981 days of absence. This equates to a shortfall of 616 days from the minimum 1095 day requirement of physical presence.

[6] As indicated previously, the Applicant submits that the Citizenship Judge breached the rules of procedural fairness in three ways:

a. by failing to disclose the applicable citizenship test prior to the hearing;

b. by depriving her, as a result, of an opportunity to address the Citizenship Judge's concerns regarding her physical presence in Canada, including the concerns regarding her ICES traveler history report which records a traveller's entries into Canada; and

c. by refusing the Applicant's husband to act as an interpreter during the hearing.

[7] The Applicant further contends that the Citizenship Judge committed a reviewable error by conflating the quantitative and qualitative residency tests as evidenced by the fact that she conducted a liberal or qualitative assessment at the hearing, and then applied the quantitative *Pourghasemi* test in her decision.

III. **Issue and Standard of Review**

[8] The issue to be determined in this case is whether the Court should interfere with the Citizenship Judge's decision on the basis that it was rendered in violation of the rules of

procedural fairness, as contended by the Applicant, or that it is the result of a misapplication of the applicable law respecting the residency requirement.

[9] The standard of review that applies to a Citizenship Judge's analysis of whether a person meets the residency requirements pursuant to paragraph 5(1)(c) the Act is that of reasonableness as it raises a question of mixed fact and law (*El-Khader v Canada (Citizenship and Immigration*, 2011 FC 328, at para 10, 386 FTR 142; *Raad v Canada (Citizenship and Immigration)*, 2011 FC 256, at para 21; *Haddad v Canada (Citizenship and Immigration)*, 2014 FC 977, at para 18; *Saad v Canada (Citizenship and Immigration)*, 2013 FC 570, at para 18, 433 FTR 174; *Huang v Canada (Minister of Citizenship and Immigration)*, 2013 FC 576, at para 13 [*Huang*]).

[10] Questions related to procedural fairness are reviewable on the correctness standard (*Huang*, at para 11; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, at para 43, [2009] 1 SCR 339).

IV. **Analysis**

[11] I will deal first with the Applicant's contention that the Citizenship Judge conflated the quantitative and qualitative residency tests.

[12] This Court's case law has established that a Citizenship Judge may rely on one of three tests when assessing whether an applicant has met the residency requirement under the Act. The first test was established in *Pourghasemi* and involves the strict counting of days of physical

presence in Canada, which must total 1095 days in the four years preceding the application. The second test is generally known as the *Re Papadogiorgakis* test. This test recognizes that a person can be a resident of Canada, even while temporarily absent, if there remains a strong attachment to Canada (*Re Papadogiorgakis*, [1978] 2 FC 208 (FCTD); *Canada (Citizenship and Immigration) v Bayani,* 2015 FC 670, at para 21). The third test is a more generous qualitative test and defines residence as the place where one has centralized his or her mode of living (*Re: Koo,* [1993] 1 FC 286 (FCTD)).

[13] It has also been well-established that "while a Citizenship Judge may choose to rely on any one of the three tests, it is not open to him or her to "blend" the tests" (*Tulupnikov v Canada (Minister of Citizenship and Immigration),* 2006 FC 1439, at para 17).

[14] In my view, it is clear that the Citizenship Judge did not blend the tests in the case at hand. The reasons for the Citizenship Judge's decision demonstrate that the only test relied on was the test established in *Pourghesemi.* The reasons for decision are unequivocal in this respect. The fact that the Applicant presented a significant shortfall from the minimum 1095 day requirement of physical presence in Canada is not in dispute. Therefore, it was reasonably open to the Citizenship Judge to conclude as she did. In other words, her decision falls squarely within the range of possible, acceptable outcomes defensible on the facts and the law (*Dunsmuir v New Brunswick*, 2008 SCC 9, at para 47, [2008] 1 SCR 190). The fact that the Citizenship Judge asked the Applicant questions about her life in Canada during the hearing does not, in of itself, demonstrate that the Citizenship Judge misapprehended the strict residency requirement test. Given the state of this Court's jurisprudence on the residency test, it was reasonably open to

the Citizenship Judge to ask these questions even if, ultimately, she opted to apply the quantitative test.

[15] This brings me to the Applicant's procedural fairness concerns, beginning with her main contention in this regard which is that the Citizenship Judge should have informed the Applicant of the test to be applied so that she could know the case to be met. In this respect, the Applicant relies on *Dina v Canada (Citizenship and Immigration)*, 2013 FC 712 [*Dina*] and *Miji v Canada (Citizenship and Immigration)*, 2015 FC 142 [*Miji*] for the principle that a Citizenship Judge has an obligation to explicitly inform an applicant prior to a hearing which of the three citizenship tests will be applied.

[16] This principle was very recently distinguished by my colleague Justice Catherine Kane in *Fazail v Canada (Citizenship and Immigration)*, 2016 FC 111 [*Fazail*]. Further to an analysis of the factors enumerated in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, Justice Kane concluded the following on the extent of the duty of procedural fairness owed to citizenship applicants:

> [46] […] the duty of procedural fairness owed to applicants by Citizenship Judges is at the lower end of the spectrum. Even at the lower end of the spectrum, the individual affected must know the case he or she has to meet and have an opportunity to respond to the case to be met. However, based on the *Baker* analysis, the scope of the duty of procedural fairness does not extend beyond this.

[17] In that case, Justice Kane found that the duty of procedural fairness had been met despite the Citizenship Judge failing to inform the applicant of the test to be applied since the applicant made submissions to the Citizenship Judge asking that the *Koo* test be applied. Justice Kane

found that the applicant's submissions in this regard demonstrated that the applicant in that case knew the case to be met and was provided with the opportunity to make submissions.

[18] Given that in a letter attached to her citizenship application, the Applicant requested the Citizenship Judge to take qualitative factors into account and was then provided with an opportunity to expand on these factors in greater detail during the interview, I am of the opinion that no breach of procedural fairness occurred. The Applicant was well aware that she did not meet the quantitative factors and as a result specifically requested the Citizenship Judge to consider the fact that her husband and two children are Canadian citizens and that the nature of her position requires her to travel extensively outside of the country. Moreover, the Applicant indicated in her affidavit that she discussed the following with the Citizenship Judge:

a. Her employment with the Vancouver Film School since 2008 and that her positions at the school required her to travel extensively;

b. That her husband, son and daughter are Canadian citizens, who are studying and living in Canada;

c. That she was the primary income-earner for her family at the time her application was processed as her husband and children were full-time students;

d. That all her assets, including two properties and a vehicle, are in Canada;

e. That her family doctor and dentist are in Canada; and,

f. That the Applicant is the Secretary of a Canadian corporation.

[19] I acknowledge as Justice Kane did in *Fazail* and Justice Locke did in *Miji*, the unfortunate results of the uncertainty in the law which permits a Citizenship Judge to apply different tests which could lead to different outcomes. As the Applicant knew the case to be met and was given an ample opportunity to respond, the Court's hands are tied in this regard.

[20] Clearly, the Applicant was hoping that one of the two qualitative residency tests would be applied to her circumstances as the quantitative test was, for all intent and purposes, out of reach. She clearly had expectations in this regard but unfortunately for her, in the citizenship context as it stood before the amendments brought to the Act in 2014 changing the residency requirement and focus on physical presence, the fact that such expectations were not met is neither procedurally unfair nor did it create a right to a particular substantive outcome.

[21] The Applicant further claims that the Citizenship Judge failed to provide her with an opportunity to address her concerns regarding her physical presence in Canada. In my opinion, the fact that the Citizenship Judge did not question the Applicant regarding her physical presence in Canada does not constitute a breach of procedural fairness. The Applicant admitted in her citizenship application package that she had a shortfall of 539 days from the 1095 day requirement. Even if the Applicant were given an opportunity to address the Citizenship Judge's concerns in this respect, it would have no material consequence since it is not contested that the Applicant did not meet the requisite days of physical presence in Canada during the relevant period.

[22] For the same reasons, I am of the view that the Citizenship Judge's failure to disclose the ICES traveler history report is immaterial (*Mobil Oil Canada Ltd v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202, at 228-229).

[23] Finally, the Applicant claims that the Citizenship Judge's refusal to let her husband act as an interpreter during the hearing was procedurally unfair and breached her protected right to an

interpreter. This Court has established that candidates for Canadian citizenship "may have legitimate expectations […] that Citizenship Judges will follow the guidance provided by the CIC policy manual prescribing procedures for citizenship hearings" (*Indran v Canada (Citizenship and Immigration),* 2015 FC 412). Section 3 of the guideline recognizes that applicants have the right to an interpreter pursuant to section 14 of the *Canadian Charter of Rights and Freedoms* and section 2(g) of the *Canadian Bill of Rights* (CP 13 Administration, dated January 17, 2008 [CP 13]). Section 3.7 of the guideline indicates that the decision to permit a language interpreter at a hearing "rests with the citizenship judge" (CP 13). I cannot therefore agree with the Applicant's submissions that the simple refusal to let the Applicant's husband in the room was enough to breach her "constitutionally protected" right to an interpreter.

[24] The Applicant relies on *R v Tran*, [1994] 2 SCR 951 (*Tran*) in this regard. I find that this matter, which was rendered in the context of a criminal proceeding, has no bearing on the issue at bar. Indeed, the Supreme Court of Canada in that case cautioned that the teachings in *Tran* relate "specifically to the right of an accused in criminal proceedings" and "must not be taken as necessarily having any broader application" (at para 12). Specifically, the Supreme Court left open for future consideration "the possibility that different rules may have to be developed and applied to other situations which properly arise under s. 14 of the Charter — for instance, where the proceedings in question are […] administrative in nature" (*Tran*, at para 12). Given the aforementioned, I do not agree with the Applicant's submissions that the right to an interpreter during a hearing with a Citizenship Judge is, as she claims, absolute and that she is therefore

under no obligation to show that she was prejudiced by the Citizenship Judge's refusal to let her husband act as an interpreter.

[25] Moreover, I am not satisfied that the absence of an interpreter breached the Applicant's right to procedural fairness in the circumstances of this case. The Applicant states in her affidavit that the Citizenship Judge told her that her husband could not be with her during the interview before she was able to inform the Citizenship Judge that she intended for her husband to act as her interpreter. The Applicant was interviewed by the Citizenship Judge for approximately an hour and a half. During this time, the Applicant did not object to not having an interpreter nor request for one. Yet, the Applicant's affidavit suggests that the Applicant was provided with an opportunity to be heard and meet her case. As is well-established, procedural fairness concerns must be brought at the very first opportunity (*Kamara v Canada (Citizenship and Immigration)*, 2007 FC 448, at para 26; *Ambat v Canada (Citizenship and Immigration)*, 2011 FC 292, at para 24, 386 FTR 35). Here, there is no evidence that this was done.

[26] As a matter of fact, the record shows that the Applicant holds a Master's degree from the University of British Columbia. It is therefore fair to assume that at the time of the hearing, she possessed a level of language skills in English allowing her to understand the questions put to her by the Citizenship Judge, provide meaningful and intelligible answers and make her point as to why she should be found to meet the residency requirement.

[27] The judicial review application is dismissed. Neither party has requested the certification of a question for the Federal Court of Appeal. None will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The judicial review application is dismissed;

2. No question is certified.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2003-15
STYLE OF CAUSE:	BARBARA MARTINEZ D BADULESCU v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	MAY 23, 2016
JUDGMENT AND REASONS:	LEBLANC J.
DATED:	JUNE 2, 2016

APPEARANCES:

Theressa Etmanski	FOR THE APPLICANT
Kim Sutcliffe	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Theressa Etmanski Elgin Cannon & Associates Vancouver, British Columbia	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT