Federal Court  Cour fédérale

Date: 20160708

Docket: T-42-16

Citation: 2016 FC 783

Ottawa, Ontario, July 8, 2016

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

LEI HUANG

Applicant

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Background

[1] This is a judicial review, pursuant to section 22.1 of the *Citizenship Act*, RSC 1985, c C-29 [the Act], of a decision [Decision] by a Citizenship Judge [the Judge] denying the Applicant's application for citizenship on the basis that she had not met the Act's residence requirements. The decision is dated November 20, 2015.

II. Facts

[2] The Applicant was born in China and is 47 years old. She first arrived in Canada on May 28, 2003 and was landed as a permanent resident the same day. She applied for citizenship on April 13, 2009. As such, the relevant period for assessing whether she met the residency requirements of the Act was April 13, 2005 to April 13, 2009.

[3] In her application, the Applicant declared 352 days of absence, which would give her 1108 days, or 13 days above the minimum required by paragraph 5(1)(c) of the Act (as it read at the time of the decision):

> 5 (1) The Minister shall grant citizenship to any person who
>
> (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:
>
> (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
>
> (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;

[4] On October 6, 2014, the Applicant's application was rejected. She sought judicial review of that decision. On March 3, 2015, on the consent of the Respondent, her application was sent

back for redetermination, and on September 21, 2015, the Applicant appeared before the Judge for an interview.

III. Decision

[5] After reviewing the law and the Applicant's procedural history, the Judge stated that she found the Applicant vague and evasive at the hearing and that the Applicant gave contradictory testimony. For example, the Judge noted that the Applicant could not remember any details related to if or when her ex-husband came to visit her in Canada, even though he had acquired several visas in order to visit her and her child. The Applicant also stated that she was single on her application and her tax returns but identified herself as married on other documentation, and while the Applicant initially stated she had not seen her ex-husband during the entirety of the relevant period, when the Judge mentioned her ex-husband's visas, she stated that he had come more than once. The Judge concluded that these contradictions "introduced doubts about the reliability of her other testimony as well".

[6] Other than credibility, much of the Decision focused on a period from January 11, 2006 to September 27, 2006 [the eight month gap].

[7] The Applicant declared that she had returned to Canada from the United States on January 11 and then travelled to the U.S. on September 27, but the Judge noted that there was no evidence of either trip. As such, there was no way to determine the length of either of these absences. The Judge also noted that the Applicant's return date from the U.S. matched the date her ex-husband stated was the day that she returned from China, rather than the U.S., and

evidence from China suggested that the Applicant was there for some period in 2006, even though her application made no mention of such a trip. Finally, the Judge found that strict Homeland Security protocols in the U.S. made it unlikely that she could have entered the U.S. on September 27, 2006 without her entry being documented. As such, the Judge noted that it was possible that she had a second travel document – like her ex-husband, who had two passports – that had not been declared in her application.

[8] The Judge also noted that there were two stamps in the Applicant's passport for which she had not provided a translation. The Applicant stated that these stamps related to a 2003 trip but the Judge, citing *El Falah v Canada (Citizenship and Immigration)*, 2009 FC 736, refused to rely on this assertion alone.

[9] The Judge then turned to the Applicant's other evidence to determine whether there was any proof of active presence in Canada during the eight month gap:

a. *Medical Appointments*: The Judge noted that there was a gap in access to medical services from February 3, 2006 to October 12, 2006 and that this was curious since the Applicant was pregnant during this time. The Applicant stated that she had, during this period, received *in vitro* fertilization and then, in keeping with "traditional" Chinese practices, remained on strict bed rest. The Judge took issue with the fact that the Applicant provided no documentation to confirm the *in vitro* procedure and no confirmation from the individual who advised her to remain on bed rest. The Judge also questioned why there was no record of medical services after her bed rest ended (approximately July or August 2006) until October 12,

2006, given the fact that the Applicant described the pregnancy as high risk and that she planned to give birth in the U.S. For all these reasons, the Judge felt that the Applicant may have left to the U.S. earlier than she stated in order to receive the pre-natal care she did not, per the OHIP records, receive in Canada.

b. *Domicile*: The Applicant provided lease agreements, confirmations of rent paid, and mortgage payments, but the Judge found that none of these were proof that she was necessarily in Canada for the eight month gap.

c. *Employment*: The Judge observed that the Applicant had not identified any employment from February 2006 to the end of that year and that this coincided with the eight month gap.

d. *Income*: The Judge noted that in 2006, the Applicant's income came mainly from interest and investments, along with the $572 in employment income. As such, the Judge was unpersuaded that this demonstrated active proof of physical presence.

e. *Bank/Credit Card Statements*: The Judge reviewed the evidence on the Applicant's financial footprint in Canada and concluded that it did not establish a spending pattern indicative of physical presence during the eight month gap – only one withdrawal on June 15, 2006, and a debit, in U.S. dollars, on August 3, 2006. The Judge went further and stated that this raised the question of whether the Applicant's economic activity was in a different country, citing *Bains v Canada (Minister of Citizenship and Immigration)*, [2001] 1 FCR 284 at para 38:

> Where a party fails to bring before a tribunal evidence which is within the party's ability to adduce, an inference may be drawn that the evidence not adduced would have been unfavourable to the party.

f. *YMCA Membership*: The Applicant provided proof of a membership at the YMCA but the Judge did not find this compelling proof of physical presence since it neither showed specific dates nor gave any record of attendance.

g. *Course Attendance*: The Applicant provided a letter from the Support Enhance Access Service Centre [SEASC], a Toronto not-for-profit organization, stating that she had participated in a program for pregnant women from July to December 2006. The letter, however, provided no list of dates attended and the Applicant's description of her attendance shifted during the hearing. Ultimately, the Judge found that as the Applicant was on bed rest from April to August of 2006, she could not have attended until at least then. As such, the letter was given little weight.

[10] In conclusion, the Judge determined that it was impossible to ascertain the exact number of dates that the Applicant lived in Canada during the relevant four-year period:

> This finding is based in particular on my review of the period from 10 January 2006 – when she left for the United States on her first declared trip there – and 2 October 2006, when ICES confirms her return to Canada from her second trip to the US that year. The scarcity of active indicators of her presence during this period suggest [*sic*] that while she may have been in Canada at some points during this time, she was not continuously in this country as she had declared.

[11] Since the onus is on the Applicant to establish with compelling evidence that she met the residence requirement and she had not done so, the Judge denied her application for citizenship.

IV. Analysis

[12] The Applicant raises two issues in this judicial review: (1) the Judge ignored evidence and thus made erroneous findings of fact; and (2) the Judge breached her duty of procedural fairness. The first issue is reviewable on a standard of reasonableness (*Canada (Citizenship and Immigration) v Das*, 2013 FC 578 at para 11), and the second on the basis of correctness (*Fazail v Canada (Citizenship and Immigration)*, 2016 FC 111 at para 14).

[13] On the first issue, the Applicant argues that it was unreasonable for the Judge to rely on the ex-husband's statements as the basis for credibility findings since they came from notes made by a port of entry officer and so are not sworn, direct, or reliable testimony. The Applicant further submits that the Judge ignored evidence in determining the existence of the eight month gap, including visits to the doctor in January and February 2006, the two bank transactions, and her participation in the SEASC program.

[14] I find, however, that there was nothing unreasonable in the Judge's assessment that the Applicant had not demonstrated that she had been in Canada continuously for much, if not all, of the eight month gap. For instance, the Applicant made frequent – almost daily – use of medical services during the months bookending the eight month gap: OHIP evidence shows frequent visits to medical services in the winter of 2005 and then again in the period between October 13, 2006 and January 17, 2007. The OHIP records are "silent", however, for the period from the beginning of February 2006 to October 13 of the same year. Furthermore, it was open to the Judge to remain unpersuaded by the Applicant's explanations for why she did not see a doctor during this time, from not having a car, to not wanting to risk leaving her home in the winter, to

being on bed rest. The Judge correctly noted, for example, that much of the eight month gap did not take place in winter months, and considering that the Applicant herself described the pregnancy as high-risk, it was reasonable to find it strange that she would have visited a doctor at all.

[15] As for the SEASC letter, it gave no specifics regarding participation in the pregnancy course. It was therefore reasonable for the Judge to have found this vaguely-worded document unpersuasive. The letter would have needed to do more than simply state that the Applicant "participated" in programs to find her conclusion problematic. Moreover, even if the letter had provided some more detail regarding alleged participation in the course, this would still contradict the Applicant's own explanation of why she did not visit a doctor during the eight month gap (i.e. – because she was on bed rest).

[16] The other findings enumerated above are also reasonable. To take the financial transactions as just one example, the Applicant presented scant evidence of banking or spending during the eight month gap – namely two bank transactions, and no credit card activity. This stood in stark contrast to the plethora of financial activity that clearly situated the Applicant in Canada during other periods, including day-to-day activity on both her credit card and banking documentation.

[17] In essence, the Applicant is arguing that, in light of the voluminous evidence she presented, it was unreasonable to conclude that she was absent for some or all of the impugned period. The Applicant, however, bears the responsibility of demonstrating, with clear and

compelling evidence, that she was present for the amount of time declared (*Atwani v Canada (Citizenship and Immigration)*, 2011 FC 1354 at para 12; *Al-Askari v Canada (Citizenship and Immigration)*, 2015 FC 623 at para 20). The Judge was not required to take her declaration at face value.

[18] Regarding the second issue, the Applicant argues that the Judge unfairly failed to provide an opportunity to address the eight month gap and the other evidentiary shortcomings that she had identified. Furthermore, she contends that the Judge unfairly relied on port of entry notes regarding her husband's testimony, which constituted extrinsic evidence and thus obliged the Judge to provide her an opportunity to respond (*Amin v Canada (Citizenship and Immigration)*, 2013 FC 206 at paras 29-32).

[19] It is true that "a high level of procedural fairness must inform a citizenship judge's decision-making process" (*Qureshi v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1081 at para 24 [*Qureshi*]). Further, "the jurisprudence shows that applicants must be given an opportunity to respond to matters raised in extrinsic evidence… particularly when officers have relied on them in their decision-making process" (*Qureshi* at para 31; see also *Cheburashkina v Canada (Citizenship and Immigration)*, 2014 FC 847 at para 29).

[20] I do not, however, find that the Applicant has demonstrated any breach in procedural fairness. The Judge provided the Applicant with ample opportunity to respond to concerns at the hearing, which were put to her, as shown in the notes. While the record shows that the Judge did rely, to some extent, on the ex-husband's statements, she also informed the Applicant about

those statements and gave her an opportunity to respond, as is made clear from a review of the Judge's hearing notes:

> I told her info on file showed her as married and her husband kept getting visitor's visas to come and see her based on being married to her. The [*sic*] she admitted that he used to come to convince her to remarry him, and later to take care of the baby.
>
> I told her info on file suggested she was in China for much of 2006, and her husband had no visitor's visa at the time, and she became pregnant during this period. But she told me that this was in vitro fertilization, she had fertility problems, but her friend told her to try this since the problem was her husband's. She said her ex saw the baby as as [*sic*] his own, even though he was not the biological father. She said it's not correct that he accompanied her back to Canada from China in October 2006 to have the baby here, as suggested on file.

[21] As for the Applicant's claim that she was not shown the port of entry notes and should have been, I find that the Judge, in orally disclosing their existence and contents during the interview, met the requirements of procedural fairness. As explained by this Court in *Qureshi* at para 33:

[22] I do not accept the proposition that Mr. Qureshi was entitled to receive a copy of the actual letter and have concluded that disclosure of the contents of the letter coupled with the opportunity to address any allegations it may have contained fulfills the disclosure requirements and, as such, find that there was no breach of procedural fairness on the part of the Citizenship Judge. Just as I have found that the Applicant was sufficiently advised of the concerns regarding the ex-husband's statements, I find no breach of fairness relative to the Judge's concerns about the eight month gap. As explained above, the Applicant bears the burden of proving, with clear and compelling evidence, the number of days of that she has resided in Canada during the

relevant period. The Applicant knew well that she had to prove residency during the eight-month gap but failed to provide satisfactory evidence to support her claim.

[23] Finally, the Applicant cited no authority for the proposition that the Judge had to inform her that she was not satisfied with the Applicant's medical evidence during the gap period. Even if that were the case, the Judge's decision was based on numerous different insufficiencies in the evidence, rather than just one. The Judge provided the necessary degree of procedural fairness throughout.

V. Conclusion

[24] Despite the able and best efforts of Applicant's counsel to overcome the findings made against his client, I find that the Judge was well within the bounds of reasonableness in noting the scarcity of the Applicant's evidence for the eight month gap. I further find that the Judge was fair throughout. This application for judicial review is accordingly dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. There is no award as to costs.

3. There are no questions for certification.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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