Federal Court Cour fédérale

Date: 20160818

Docket: T-95-16

Citation: 2016 FC 946

Ottawa, Ontario, August 18, 2016

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

PATRICK IMHOUDU ILUEBBEY

Respondent

JUDGMENT AND REASONS

[1] The applicant, the Minister of Citizenship and Immigration, appeals the decision of a Citizenship Judge dated December 8, 2015 which found that, on a balance of probabilities, the respondent, Mr. Iluebbey, met the residence requirement under paragraph 5(1)(c) of the *Citizenship Act*, RSC, 1985, c C-29, as amended [the Act].

[2] The Citizenship Judge applied the qualitative test established in *Re Papadogiorgakis*, [1978] 2 FC 208 (FCTD) [*Papadogiorgakis*]. The Citizenship Judge considered the concerns noted by the Citizenship Officer, questioned Mr. Iluebbey about those concerns and found his explanations to be credible. Mr. Iluebbey's testimony, coupled with the additional documents he provided, were found by the Citizenship Judge to be sufficient to establish on a balance of probabilities that Mr. Iluebbey had established and maintained a residence in Canada; in other words, that he had "centralized his mode of living in Canada" and met the test for residence.

[3] For the reasons that follow, the Citizenship Judge's reasons, together with the record, permit me to find that the decision is reasonable.

I. Background

[4] Mr. Iluebbey, a citizen of Nigeria, arrived in Canada on August 29, 2006 and became a permanent resident on that date. However, he did not remain in Canada at that time and spent much of his time outside of Canada before the commencement of the relevant period to assess residency for the purpose of citizenship. He applied for citizenship on January 14, 2012. Therefore, the relevant period for the purposes of determining whether he meets the residence requirement under paragraph 5(1)(c) of the Act is January 14, 2008 to January 14, 2012.

[5] On his citizenship application, Mr. Iluebbey declared that he had been physically present in Canada for 1120 days and absent for 340 days in the relevant period. In his Residency Questionnaire [RQ], he declared that he was absent for 424 days. Ultimately, it was determined that he had a shortfall of 59 days of physical presence in the relevant period.

[6] A Citizenship Officer reviewed the application and noted several concerns:

- Mr. Iluebbey had ten Canadian re-entry stamps compared to eleven declared absences.
- No residence was provided in Canada for the periods between January 2008 to December 2008 and December 2010 to October 2011 in his citizenship application.
- There were discrepancies in the listed addresses between his citizenship application and RQ.
- There was a discrepancy arising from the fact that he allegedly quit his job in Nigeria in 2008, yet listed the reason for his visits to Nigeria from 2009 to 2011 as for "business".
- Mr. Iluebbey did not list any income from his employer or business, Afromedia, in 2008 and 2009.
- Mr. Iluebbey did not provide financial evidence relating to his personal life and employment.
- There were few active indicators of residency.

[7] The Citizenship Officer referred Mr. Iluebbey to a hearing before the Citizenship Judge.

II. The Decision under Review

[8] The Citizenship Judge found that, although Mr. Iluebbey had a shortfall of 59 days of physical presence in the relevant period, he met the residence requirement under paragraph 5(1)(c) of the Act. At the conclusion of the reasons, the Citizenship Judge stated that he had applied the "analytical" approach established in *Papadogiorgakis*, cited a relevant passage from that case, and concluded that Mr. Iluebbey "has 'centralized his mode of living with its accessories' in Canada and provided sufficient documentation to prove that he and his family have established residence in Canada."

[9] The Citizenship Judge noted the concerns highlighted by the Citizenship Officer and the explanations offered by Mr. Iluebbey and found that Mr. Iluebbey had addressed most of the concerns in a credible manner. The Citizenship Judge also requested additional documents to address some of the noted concerns.

[10] With respect to the evidence of eleven declared absences, but only ten re-entry passport stamps into Canada, the Citizenship Judge relied on the exit stamp from Nigeria on December 18, 2010 and a purchase in Canada noted on Mr. Iluebbey's joint bank account statement in late December 2010 to establish that he had returned to Canada. The Citizenship Judge also noted that Mr. Iluebbey's absences formed a pattern: he left Canada in April, September and December of each year.

[11] With respect to the concern that Mr. Iluebbey had no declared address in Canada in 2008 or for the first ten months of 2011 and the inconsistencies in the residence information between his citizenship application and RQ, the Citizenship Judge noted that Mr. Iluebbey was often travelling to Nigeria to find content for his television show, but he "always had the Toronto address declared in the application."

[12] With respect to the lack of income from Afromedia and that the only income reported on his tax returns for 2008 and 2009 was from the Universal Child Care Benefit, the Citizenship Judge noted Mr. Iluebbey's explanation that there was no profit from Afromedia in its early years. The Citizenship Judge added that the material sent after the hearing exhibited a lot of activity for Afromedia, which reflects the necessary legal requirements of the Canadian

broadcasting environment. The Citizenship Judge found, based on his own experience as a broadcaster, that this "requires extensive physical presence and real commitment to Canadian ethno-cultural life."

[13] The Citizenship Judge referred to the children's school records and First Communion and Baptismal certificates sent by Mr. Iluebbey after the hearing, noting that some fell outside the relevant period, but found that these "confirm that the applicant has established residence in this country."

[14] The Citizenship Judge found that the documents related to Mr. Iluebbey's residence in Canada were not extensive, but "are enough to confirm that the applicant is still living in the same place he reported at the time he filed the application."

[15] The Citizenship Judge added that the application was "not up to the standard we are used to," but found that there were sufficient elements to convince him that Mr. Iluebbey had established residence in Canada.

III. The Issues

[16] The Minister submits that the decision is unreasonable because the Citizenship Judge erred in applying the test in *Papadogiorgakis*, including by failing to first determine whether Mr. Iluebbey had established a residence in Canada and by making findings regarding his residence in Canada which are inconsistent with the evidence on the record. The Minister also

argues that the Citizenship Judge's reasons are inadequate, making it impossible to determine if the decision is reasonable.

IV. The Standard of Review

[17] The jurisprudence has established that the administrative law principles governing the standard of review apply to appeals from decisions of a citizenship judge (*Canada (Minister of Citizenship and Immigration) v Rahman*, 2013 FC 1274 at paras 11-14, [2013] FCJ No 1394 (QL); *Canada (Minister of Citizenship and Immigration) v Lee*, 2013 FC 270 at paras 15-17, [2013] FCJ No 311 (QL)).

[18] The standard of reasonableness, therefore, applies to the review of the Citizenship Judge's decision, which involves the application of the test chosen by the Judge to the facts. The role of the Court is to determine 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 para 47, [2008] 1 SCR 190 [*Dunsmuir*]).

[19] It is well-established that boards and tribunals and other first decision makers who hear the testimony of witnesses are best placed to assess their credibility (*Aguebor v Canada (Minister of Employment and Immigration*), [1993] FCJ No 732 (QL) at para 4, 160 NR 315 (FCA)). The decision maker's credibility findings should be given significant deference (*Lin v Canada (Minister of Citizenship and Immigration*), 2008 FC 1052 at para 13, [2008] FCJ No 1329 (QL); *Fatih v Canada (Minister of Citizenship and Immigration*), 2012 FC 857 at para 65, 415 FTR 82; *Lubana v Canada (Minister of Citizenship and Immigration*), 2003 FCT 116 at para

7, 228 FTR 43). The same principles apply to the credibility findings of citizenship judges (*Martinez-Caro v Canada (Minister of Citizenship and Immigration*), 2011 FC 640 at para 46, [2011] FCJ No 881 (QL).

[20] The inadequacy of the reasons is not an independent 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 para 14 that 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." In addition, where necessary, courts may look to the record "for the purpose of assessing the reasonableness of the outcome" (at para 15). The key principle is summed up at para 16 that "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."

V. The Applicant's Submissions

[21] The Minister emphasizes that, regardless of the residence test applied, applicants for citizenship must demonstrate that they had a residence of their own in Canada prior to the relevant period and that they have maintained an established residence in Canada throughout the relevant time period (*Canada (Minister of Citizenship and Immigration) v Italia*, [1999] FCJ No 876 (QL) at para 14, 89 ACWS (3d) 22 (FCTD) [*Italia*]).

[22] The Minister acknowledges that *Papadogiorgakis* provides that days when a citizenship applicant is absent from Canada during the relevant period can count towards the residence requirement where such absences are temporary and the citizenship applicant demonstrates an intention to establish a permanent home in Canada.

[23] The Minister argues that the Citizenship Judge erred in applying the *Papadogiorgakis* test, which is dependent on residency being first established. There was no evidence that Mr. Iluebbey had established a residence in Canada at the beginning of the relevant period. The Minister argues that the Citizenship Judge erred by either not addressing this or erred by implicitly finding that this requirement was met.

[24] *Papadogiorgakis* also requires a citizenship applicant to have "centralized his mode of living in Canada." The "evidence of the qualitative attachment or centralized mode of living must be fairly strong" (*Canada (Minister of Citizenship and Immigration) v Gentile*, 2015 FC 1029 at para 52, [2015] FCJ No 1030 (QL)). The Minister argues that there is no evidence that can reasonably support this, let alone strong evidence.

[25] The Minister submits that the Citizenship Judge did not address the inadequacies of the evidence before him including Mr. Iluebbey's absences from Canada, his lack of employment income in 2008 and 2009, his employment in Nigeria for part of 2008 and the discrepancies in the residences listed.

[26] The Minister also argues that the Citizenship Judge's reasons are inadequate to the extent that they do not permit the Court to determine if the decision is reasonable on the record. The reasons do not reflect what documents the Citizenship Judge relied on to satisfy himself that the qualitative test for residency was met. Rather, the record highlights information which does not support the conclusion that the residency test was met.

VI. The Respondent's Submissions

[27] The respondent, Mr. Iluebbey, notes that the Citizenship Judge heard his testimony at the hearing and accepted his explanations as credible and that the findings of the Citizenship Judge should be given deference. In addition, he provided additional documents with a cover letter to explain the content of the documents to address the other concerns noted at the hearing. These were accepted by the Citizenship Judge, along with the documents previously provided, as sufficient evidence to find that Mr. Iluebbey had met the qualitative test for residency.

[28] Mr. Iluebbey acknowledges that he was outside Canada at the beginning of the relevant period and had extended absences in 2008. He also acknowledges that there were some discrepancies in the residences he listed in his RQ and citizenship application and the corresponding dates, but explained in the supplementary documents that he had two successive rental apartments where his family resided since 2006 and that he then purchased a home in 2010.

[29] He notes that the Citizenship Judge accepted his explanation that the nature of his work in Canada necessitated trips to Africa to seek out content for Afromedia. There is no

inconsistency in describing his trips as for business, despite his lack of employment income from Afromedia in 2008 and 2009.

[30] Mr. Iluebbey disputes that the Citizenship Judge ignored or discounted the weakness and contradictions in the evidence.

[31] Mr. Iluebbey also submits that the evidence shows that he was involved in the operations of the Afromedia Company; there was evidence of his presence in meetings and in discussions of regulatory issues, expansion of the scope of the business and recruitment of performance artists. Other documentary evidence, including the CRTC licence and the incorporation documents describe Afromedia's mandate which is consistent with Mr. Iluebbey's role in Afromedia and his need to travel to Africa frequently.

[32] With respect to the passive indicia of residency, Mr. Iluebbey argues that the reasons reflect that the Citizenship Judge's initial concerns were addressed after reviewing the evidence provided, including his letter which explained the lack of rental agreements for the apartments, the school records of his children, a Baptismal certificate and a First Communion certificate, acknowledging that some fell outside the relevant period.

VII. The Citizenship Judge did not err in applying the *Papadogiorgakis* test

[33] The jurisprudence has established that a citizenship judge may apply one of three tests to determine whether the residency requirements of the Act have been met. The citizenship judge cannot blend the tests (*Canada (Minister of Citizenship and Immigration) v Purvis*, 2015 FC 368,

[2015] FCJ No 360 (QL), at para 28) and must clearly indicate the test that has been applied (*Canada (Minister of Citizenship and Immigration) v Bani- Ahmad*, 2014 FC 898, at paras 18-19). The test chosen must be correctly applied (*Boland v Canada (Minister of Citizenship and Immigration*), 2015 FC 376, [2015] FCJ No 340 (QL), at paras 17 and 19).

[34] The Citizenship Judge stated that he applied the "analytical approach" as stated in *Papadogiorgakis*. The issue is whether he conducted the necessary analysis in accordance with that test and reached a reasonable conclusion based on the evidence on the record.

[35] The Citizenship Judge set out 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.
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> 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".

[36] That test is subject to the two-stage approach of all residency tests; that residency must be established at the outset of the period and then maintained (*Sud v Canada (Minister of Citizenship and Immigration*) (1999), 180 FTR 3, 92 ACWS (3d) 379).

[37] The Minister referred to *Italia* for the proposition that residence must be established before any absence from Canada:

> [15] Where an applicant has failed to first establish a Canadian residence prior to any absence from Canada during the four years preceding their application, the requirements of the *Citizenship Act* have not been met.

[38] Similarly, as noted by Justice O'Reilly in *Canada* (*Minister of Citizenship and Immigration) v Nandre*, 2003 FCT 650, [2003] FCJ No 841 (QL):

> [24] As mentioned, the *Citizenship Act* requires that an applicant for citizenship show a period of residence in Canada amounting to a total of at least three years over the course of the previous four. In order for applicants to satisfy the residence requirement, they must first show that they have established a residence in Canada and then demonstrate that they maintained residency for the required duration. Numerous cases of this Court make this clear: see, for example, *Chan v. Canada (Minister of Citizenship and Immigration*), 2002 FCT 270; [2002] F.C.J. No. 376 (QL) (T.D.); *Canada (Minister of Citizenship and Immigration*) *v. Xu*, 2002 FCT 111; [2002] F.C.J. No. 1493 (QL) (T.D.).

[39] A clear statement of the two-stage inquiry with respect to the residence requirement is found in *Canada (Minister of Citizenship and Immigration) v Roberts*, 2009 FC 927, [2009] FCJ No 1141 (QL):

> [14] As mentioned, a two-stage inquiry exists with respect to the residency requirement stipulated in paragraph 5(1)(c) of the Act. The case law indicates that applicants for citizenship must demonstrate that first, they have established a residence in Canada: see *Canada (Minister of Citizenship and Immigration) v. Italia*, 89 A.C.W.S. (3d) 22, [1999] F.C.J. No. 876 (T.D.) (QL), at paras. 14-16. This inquiry is the first stage of a two-part process in demonstrating whether an applicant has met the statutory residency requirement under the Act: see *Zhao v. Canada (Minister of*

> *Citizenship & Immigration*), 2006 FC 1536, 306 F.T.R. 206, at para. 49. Indeed, the establishment of a residence in Canada is a condition precedent to obtaining citizenship. Where the evidence demonstrates that residence has not been established, inquiries as to whether residence has been maintained or evidence as to whether the applicant has centralized his mode of living in Canada become irrelevant: see *Canada (Minister of Citizenship and Immigration v. Tarfi*, 2009 FC 188, [2009] F.C.J. No. 244 (T.D.) (QL), at para. 35.
>
> [Emphasis added.]

[40] Other jurisprudence has reiterated the two parts of the *Papadogiorgakis* test. In *Canada* (*Minister of Citizenship and Immigration) v Camorlinga-Posch*, 2009 FC 613, 347 FTR 37, the Court found:

> [18] According to the second category, extended absences from Canada will not be fatal to a Citizenship request if the applicant can demonstrate that he or she had established his or her residence in Canada before leaving and if Canada is the country in which he or she has centralized his or her mode of existence (Re *Papadogiorgakis*, [1978] 2 F.C. 208 and *Canada (Minister of Citizenship and Immigration) v. Nandre*, 2003 FCT 650, 234 F.T.R. 245).
>
> [Emphasis added.]

[41] The logic of the *Papadogiorgakis* test is that a person does not cease to reside in Canada when he or she leaves for only a temporary purpose (*Papadogiorgakis* at para 16), even if that period is fairly lengthy. However, this logic does not apply where a residence has not first been established in Canada to return to and to maintain as one's "centralized mode of living."

[42] In the present case, the Court must consider, first, whether the Citizenship Judge understood that the establishment of residence before or at the outset of the relevant period was a

requirement before excusing any temporary absences in the relevant period; second, whether the Judge found that such residence had been established; third, if the Judge found that such residence had been established, whether that finding is reasonable based on the evidence on the record; and, fourth, if this condition precedent is reasonably found to be met, whether the evidence supports the finding that Mr. Iluebbey also met the requirement of maintaining his residence or centralizing his mode of living in Canada.

[43] In *Canada (Minister of Citizenship and Immigration) v Du*, 2016 FC 420, [2016] FCJ No 435 (QL), Justice Strickland considered the application of *Re Koo*, (1992) 59 FTR 27, which is a similar qualitative approach to determining residency, and found that the assessment of whether residence has been established at the outset of the period does not need to be explicit:

> [10] In my view, the Applicant was correct that the jurisprudence has established a two-part approach to the assessment of an applicant's residency under s 5(1)(c) of the *Citizenship Act (*see *Ojo and Hao*). However, the jurisprudence has also established that the first part of the test, the determination of whether residency has been established, need not be explicit and may be implied in a citizenship judge's reasons (*Ojo* at para 28; *Canada (Citizenship and Immigration) v Khan*, 2015 FC 1102 at para 18; *Canada (Citizenship and Immigration) v Lee*, 2016 FC 67 at paras 21-23 [*Lee*]).

[44] In the present case, the reasons of the Citizenship Judge did not explicitly set out that Mr. Iluebbey had established a residence in Canada before or at the outset of the relevant period. However, the Judge found that Mr. Iluebbey "has provided sufficient documentation to prove that he and his family has [*sic*] established residence in Canada." The Judge also stated, with respect to the lack of declared addresses in 2008 and 2011, that "he always had the Toronto address declared in his application." In my view, this statement, read in the context of the

evidence on the record, including the residence information set out in the citizenship application and RQ, which showed rental addresses dating back to 2006 and into the early part of the relevant period, conveys that the Citizenship Judge, at least implicitly, found that the threshold of residency before or at the commencement of the relevant period was met.

[45] The citizenship application notes a rental address from January 2008 to November 2010 and an address on Millview Crescent from November 2011. The RQ lists a rental address from August 2006 to September 2008, another rental address from September 2008 to October 2010, and the Millview Crescent address, as owner, from October 2010. The discrepancy with respect to the Millview Crescent address appears to be a typo and is immaterial.

[46] The Citizenship Judge acknowledged that the “quantity” of the documents regarding residency was not extensive, but concluded that the evidence was sufficient. It is not the role of the Court to re-weigh the evidence. The Citizenship Judge’s implicit finding that Mr. Iluebbey had established residence before the relevant period was supported by the evidence accepted and weighed by the Judge. It is not an unreasonable finding that the apartment rented from 2006 to 2008 was the established residence the Citizenship Judge referred to in the statement that “he always had the Toronto address declared in his application.”

[47] As noted, the record includes information provided by Mr. Iluebbey to the Citizenship Judge post-hearing and includes a cover letter which explained that there are no rental agreements or documents for the apartments the family lived in because they paid by money order at the request of their landlord. The Citizenship Judge accepted the explanation.

The letter also describes the apartments as within the school boundaries where the children were enrolled. The school records, although some are dated after the relevant period, indicate that the two older children (born in 2003 and 2004) had been enrolled in that school since September 2008. The evidence portrays a family living in Canada, while Mr. Iluebbey travelled to Africa and returned to his family in Canada and to his Canadian business interests. This appears to reflect the circumstances contemplated in *Papadogiorgakis* at para 16.

[48] With respect to the finding that Mr. Iluebbey had established his centralized mode of living in Canada, the evidence relied on by the Citizenship Judge was not extensive. However, when the evidence that falls outside the relevant period is excluded, there remains the tax assessments, tuition paid to a distance learning MBA program, a few bank statements from a joint account with his wife, school records for the children, a Baptismal certificate for the child born in Canada, a First Communion certificate, the certificate of incorporation for Afromedia along with its CRTC licence and other print-outs of Afromedia information, and business related emails on which Mr. Iluebbey was copied.

[49] Mr. Iluebbey had no income for 2008 and 2009. His explanation that the start-up Afromedia business did not show profits at that time was accepted by the Citizenship Judge as a credible explanation. The Citizenship Judge also accepted that the nature of Mr. Iluebbey's role in the Afromedia business required his travel to Africa to seek out content for the business.

[50] I do not agree with the respondent's submission that the Citizenship Judge ignored the weaknesses and gaps in the evidence and that the findings regarding the initial and ongoing

establishment of residence are not justified. The Citizenship Judge acknowledged that the evidence was not extensive, probed the concerns and accepted the explanations offered by Mr. Iluebbey as credible. The Citizenship Judge noted that the application was not up to the customary standards, yet found that there was sufficient evidence to establish the qualitative test.

[51] As the respondent notes, judicial review is focussed on the reasonableness of the decision. The reasons need not address or make a finding on each element of the evidence considered in support of the application. The Court's role is not to re-weigh the evidence and re-make the decision.

[52] I have followed the guidance of *Newfoundland Nurses* in assessing the reasonableness of the Citizenship Judge's decision and have looked to the record "for the purpose of assessing the reasonableness of the outcome" (at para 15). The reasons, although not a model of clarity and not extensive, reveal that the Citizenship Judge grasped that the *Papadogiorgakis* test called for a two-part assessment of residence. The reasons are sufficient to allow me to understand why the Citizenship Judge made his decision that Mr. Iluebbey had established and maintained residence in Canada and showed sufficient qualitative attachment, or had centralized his mode of living in Canada. I have also considered that the Citizenship Judge found Mr. Iluebbey's explanations to be credible, and such findings are owed deference in the particular circumstances of this case. The reasons, together with the record, permit me to find that the decision falls within the range of acceptable outcomes and is reasonable.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"Catherine M. Kane"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Michael Butterfield	FOR THE APPLICANT
Jack C. Martin	FOR THE RESPONDENT

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE APPLICANT
Jack C. Martin Barrister and Solicitor Toronto, Ontario	FOR THE RESPONDENT