

Federal Court



Cour fédérale

Date: 20161006

Docket: T-320-16

Citation: 2016 FC 1120

Ottawa, Ontario, October 6, 2016

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Applicant

and

SOGUL GHAFFARI

Respondent

JUDGMENT AND REASONS

I. Background

[1] The Applicant, the Minister of Citizenship and Immigration [the Minister], challenges a decision of Citizenship Judge Angelo Perschilli [the Citizenship Judge], dated January 28, 2016.

[2] The impugned decision approved the application submitted by Sogol Ghaffari [Ms. Ghaffari], for a grant of Canadian citizenship under paragraph 5(1)(c) of the *Citizenship Act*,

RSC 1985, c C-29 [the Act]. In the style of cause her name is spelt Sogul but the proper spelling is Sogol.

[3] I am satisfied that Ms. Ghaffari was served with the materials including the order with the date of the hearing. The Applicant and the Registry attempted to speak with Ms. Ghaffari several times including as late as the day before the hearing but were unable to reach Ms. Ghaffari via telephone. Previously, the Registry was told by someone who answered the phone that Ms. Ghaffari was in England. Ms. Ghaffari did not file material or choose to attend the hearing. I will make the decision based on the materials filed and the Certified Tribunal Record [CTR] as Ms. Ghaffari has chosen not to file materials or to appear at the hearing.

[4] Ms. Ghaffari did not meet the minimum three years residency required under the Act therefore the Citizenship Judge chose to make a determination using the *Papadogiorgakis* legal test (*Re: Papadogiorgakis*, [1978] 2 FC 208 at paras 15-17 [*Papadogiorgakis*]).

[5] The Applicant argues that the Citizenship Judge's decision using the *Papadogiorgakis* test was unreasonable based on the evidence and reasons that was before him. I agree and will set aside this decision and send it back to be re-determined by a different officer.

[6] Ms. Ghaffari is a citizen of Iran who arrived in Canada on August 11, 2007, becoming a permanent resident on the same day. She is married to a Canadian Citizen and has one child born in Canada and one in Iran in 2012.

[7] Ms. Ghaffari had to prove that she resided in Canada for at least 1,095 days in the four years prior to submitting her application [the relevant period] (paragraph 5(1)(c) of the Act). The relevant period for the purposes of the residency requirements was August 11, 2007, the day she first arrived in Canada, to January 19, 2011. Ms. Ghaffari declared 1,056 days of presence and 199 days of absence over the 1257 days in the relevant period. After a revision, she was still 36 days short of the legislated required days.

[8] Initially, a Citizenship Officer [the officer] reviewed her file and found that it needed to proceed to a hearing before a Citizenship Judge. The officer noted that he was “unable to confirm [the] applicant’s establishment in Canada.”

[9] In her citizenship application, in addition to the shortfall of days, the officer noted the following concerns that needed to be addressed:

- That Ms. Ghaffari had zero time in Canada before and after the relevant time. She signed her application the day before she left for Qatar and has only returned to Canada on one occasion for her citizenship test in December 2014 after failing to appear on October 24th, 2011 and May 1st, 2012. The officer was concerned that her application had no documents to prove establishment in the relevant time period.
- Ms. Ghaffari stated she was accompanying her Canadian spouse overseas for work. The officer’s online search showed her husband as a director of three United Kingdom (UK) companies with Ms. Ghaffari’s brothers also being linked to the UK companies. The officer was concerned that the husband’s work did not seem temporary.

- The officer indicated that some of these absences were unverified, as the passports Ms. Ghaffari had submitted were missing pages or did not include translations for Iranian stamps. The stamps that were present do confirm the other five (5) absences declared.
- Ms. Ghaffari submitted no documentation to indicate that she maintained a residence in Canada other than a lease agreement for a residential property in Waterloo that had been signed in Qatar by her spouse after the relevant period. A contract for sale of their house after the relevant period was also provided, as was an address in Waterloo that was linked to her son and another Iranian family.
- The officer noted that Ms. Ghaffari was a housewife who had never worked in Canada and never filed an income tax return in Canada.
- It was also observed that the only social ties that she had included in her residence questionnaire were in reference to a mom's group in Doha, Qatar.
- No active documents were provided to show residence other than her son's birth certificate in Canada.
- The officer noted Ms. Ghaffari's Permanent Resident card expired in September 2012 and that she did not submit for renewal until January 2014. At that time she claimed to be absent from Canada with her husband for 1168 days.

[10] The Citizenship Judge said in the decision that he had acknowledged the concerns raised by the officer and addressed them with Ms. Ghaffari. While recognizing that some of the “strictly traditional elements” associated with Canadian citizenship were absent, he was satisfied

that Ms. Ghaffari had met the requirements for residency under the *Papadogiorgakis* test and granted Citizenship.

[11] In the CTR there are no notes by the Citizenship Judge of the interview. The CTR does include the material submitted by the Applicant upon which the Citizenship Judge made his determination.

II. Issue

[12] The issue I must determine is whether the Citizenship Judge's application of the citizenship test was reasonable (*Huang v Canada (Minister of Citizenship and Immigration)*, 2013 FC 576 at para 13 [*Huang*]).

III. Standard of Review

[13] The question of whether or not an applicant for citizenship has met the residency requirement is a question of mixed fact and law and will be reviewed on a standard of reasonableness (*Zhang v Canada (Minister of Citizenship and Immigration)*, 2008 FC 483 at paras 7-8 [*Zhang*]).

IV. Analysis

[14] The Act does not define the term "residence" and Citizenship Judges are entitled to choose from one of three tests established by the jurisprudence in determining whether a citizenship applicant has established residence (*Huang*, above at para 37). Of the three tests

available, the Citizenship Judge applied the *Papadogiorgakis* test. Irrespective of which test he applied the applicant for citizenship bears the onus of providing sufficient credible evidence for assessment, in this case the qualitative assessment of residency.

[15] The *Papadogiorgakis* test looks to the quality of the applicant's attachment to Canada and recognizes that a person can meet the residency requirement, even while temporarily absent, by maintaining a strong attachment to Canada and “without closing out or breaking the continuity of maintaining or centralizing his ordinary mode of living” in Canada (*Papadogiorgakis*, at para 17). This test is a more qualitative assessment than the strict residency test in *Re: Pourghasemi*, [1993] FCJ No 232. The *Papadogiorgakis* test is often characterized as the Citizenship Judge determining two steps: first, whether the applicant is short of the minimum 1,095 days of physical presence in Canada; and second, whether the applicant has “centralized mode of life in Canada”. This test allows for absences from Canada during the relevant period to count towards residency where the absences are temporary and the applicant can establish a centralized mode of living in Canada. Positive indicators of this include but are not limited to a permanent home in Canada, established before leaving and maintained for the purpose of permanent return.

[16] The test of *Papadogiorgakis* is justified on the basis that a centralized place of residence in Canada negates a temporary -- even lengthy -- absence from Canada.

[17] On the facts of *Papadogiorgakis*, the applicant was a student attending postsecondary school in the United States. Justice Thurlow instructed that the applicant still needed to be physically in Canada for more than 80% of the three years. The evidence was that

Papadogiorgakis had resided in Canada for an additional three years before the citizenship determination period so he had already centralized his mode of living with its accessories in Nova Scotia. Justice Thurlow directed that the person needs to have lead other probative evidence on their integration into Canada with family and education which would support their ordinary mode of living to have been in Canada. Using this test the evidence must show the quality of the attachment to Canada. A sufficient factual foundation to make such a finding will only be disturbed by this Court if unreasonable.

[18] In light of the evidence before the Citizenship Judge and given the materials in the CTR, in the Court's opinion the decision of the Citizenship Judge is unreasonable. From a review of the evidence before me that does not include any notes from the interview, I can only conclude that the usual signs of residency were not considered and other factors which are irrelevant were considered. Ms. Ghaffari could not meet the test as there was no evidence that she centralized her mode of living in Canada either before or after the relevant period. The Citizenship Judge was unreasonable as Ms. Ghaffari produced limited evidence of any attachment to Canada during the relevant period and certainly not the demonstration of an established residence before leaving Canada that the legal test requires.

[19] A Citizenship Judge is assumed to have considered all the evidence on the record (*Canada (Minister of Citizenship and Immigration) v Samaroo*, 2016 FC 689 at para 30). However, there are several critical points which were entirely omitted in the reasons.

[20] The Citizenship Judge did not consider the fact Ms. Ghaffari did not live in Canada prior to or following the relevant period. Further the Citizenship Judge ignored the fact that her residency outside of Canada was not of a temporary nature. Ms. Ghaffari could give no evidence of ties to Canada and her only ties were of a play group in Doha. She had no evidence of volunteering, religious ties, friends, neighbourhood affiliation, residential home in Canada or any of the other indicia that is seen as being integrated into Canadian society. Though her husband was born and had family in Canada there was no evidence of those family ties or social ties that would show integration into Canadian society. Nor is there any indication that her absence from Canada was of a temporary nature. In fact even when the family lived in Canada for part of that period while residing in Ottawa they lived in a hotel and from her evidence she was not able to participate in Canadian society. There is little if any evidence of the second child ever having been in Canada.

[21] The Citizenship Judge, though acknowledging that Ms. Ghaffari does not own property in Canada, found that the family does not own property anywhere. The Citizenship Judge appears to have ignored that after selling their residence in Canada there was no active evidence that they were going to return. In fact, the evidence was that the husband's job out of Canada was not temporary and there is no return to Canada in the foreseeable future.

[22] The missing pages of the passport were explained – all blank pages – but the stamps were never translated which the Citizenship Judge chose to ignore. While this evidence is more attuned to proving the number of days of physical residency, it was ignored by the Citizenship Judge despite being raised as an issue by the officer.

[23] There was no real evidence that Ms. Ghaffari was establishing a central mode of residency in Canada. She had never previously lived in Canada and failed to centralize her mode of life before she left Canada to follow her husband. In no way is this criticism or comment on the explanation of why she lives with her husband; it is only that the evidence upon which the Citizenship Judge relied was vague and incomplete.

[24] You would expect the Citizenship Judge to give persuasive reasons why he found Ms. Ghaffari met the test. The evidence the Citizenship Judge used to make the decision were all passive indicators such as contributing into a RESP or the retention of her son's umbilical cord in Canada. Passive indicators do not centralize a person's presence in the country because they often do not require an applicant to be in Canada or arise out of circumstantial necessity. By contrast, active indicators demonstrate an ongoing commitment that builds ties to a community. For example, Ms. Ghaffari's child was born in Canada so the collection of its umbilical cord would logically have to be in Canada. Another passive indicator was that she had started the process to sponsor her parents without a plan or timeframe for everyone to move to Canada which might indicate a commitment to remaining here. Rather, she led evidence that she would continue to move with her husband whose out of Canada employment was not of a temporary nature.

[25] Without notes on the CTR, I cannot say the decision is reasonable given the only explanation the Citizenship Judge gave was that even though the "strictly traditional elements of Canadian Citizenship" were absent he was granting citizenship. The Citizenship Judge's reasons

based on the evidence before him does not meet the test set out in *Papadogiorgakis* to show a qualitative attachment or centralized mode of living in Canada.

[26] The officer set out clearly the areas of concern that had to be determined. In the case at bar, the court notes that the Citizenship Judge says he was satisfied with respect to the referring officer's concerns but he does not in his reasons explain how he was satisfied. Either the concerns of the officer were ignored or the Citizenship Judge failed to address them. The reasons need to be clear and precise so that it is known by the parties and the court why the decision was made. It was unreasonable for the Citizenship Judge to not address the areas of concern in his decision. These gaps in reasoning make this decision unreasonable.

[27] The court is of the opinion that the conclusion reached by the Citizenship Judge had no basis and as such the decision does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The appeal is granted;
2. The decision of the Citizenship Judge granting Ms. Ghaffari citizenship is quashed;
3. The decision is sent back to a different officer to make a new determination.

"Glennys L. McVeigh"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-320-16

STYLE OF CAUSE: THE MINISTER OF CITIZENSHIP AND
IMMIGRATION v SOGUL GHAFFARI

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