Federal Court  Cour fédérale

Date: 20161207

Docket: T-161-16

Citation: 2016 FC 1348

Ottawa, Ontario, December 7, 2016

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

PEI XUAN HUANG

Respondent

JUDGMENT AND REASONS

[1] The respondent, Ms. Pei Xuan Huang, is a citizen of China who applied for Canadian citizenship on March 16, 2012. A citizenship judge approved her citizenship application on December 31, 2015. The applicant, the Minister of Citizenship and Immigration, seeks to have the impugned decision set aside and the matter redetermined by another citizenship judge.

[2] For the reasons that follow, the present application in judicial review is allowed.

[3] On June 2014, paragraph 5(1)(c) of the Act was amended and clarified that an applicant has to be "physically present" in Canada for a precise period of days in order to gain the Canadian citizenship. However, since the respondent filed application prior to this amendment, her citizenship application falls under the spectrum of the old version of the Act (paragraph 31(1)(a) of Bill C-24, *An Act to amend the Citizenship Act and to make consequential amendments to other Acts*, 2nd Sess, 41st Parl, 2014 (assented to 19 June 2014), SC 2014, c 22).

[4] The former text of paragraph 5(1)(c) of the *Citizenship Act*, RSC 1985, c C-29 [Act], reads as follows:

5 (1) The Minister shall grant citizenship to any person who	5 (1) Le ministre attribue la citoyenneté à toute personne qui, à la fois :
[…]	[…]
(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:	c) est un résident permanent au sens du paragraphe 2(1) de la *Loi sur l'immigration et la protection des réfugiés* et a, dans les quatre ans qui ont précédé la date de sa demande, résidé au Canada pendant au moins trois ans en tout, la durée de sa résidence étant calculée de la manière suivante :
[…]	[…]
[Emphasis added]	[Je souligne]

[5] In order to have her citizenship application approved, the respondent had the burden to demonstrate that "within the four years immediately preceding the date of […] her application, [she] accumulated at least three years of residence in Canada" from March 16, 2008 to March 16,

2012 [the relevant four year period]. The respondent declared in her citizenship application a total of 560 days of physical presence in Canada and 900 days of absence, for a total of 1460 days during the relevant four year period. It is not challenged that the applicant was not physically present at least 1095 days. Be that as it may, the applicant invited the citizenship judge to assess her application on the basis of her *qualitative* residence in Canada.

[6] According to the jurisprudence, in order to satisfy the requirements of former paragraph 5(1)(c) of the Act, an applicant had to demonstrate, in the first place, that he or she had established residency in Canada prior to or at the beginning of the relevant four year period. Moreover, an applicant had to establish that, during the relevant four year period, the required number of days of "residence in Canada" were met through one of the following methodologies: (1) physical presence in Canada for a minimum of 1095 days: *Pourghasemi (Re) (FCTD)*, [1993] FCJ No 232) [*Pourghasemi*]; (2) at least three years of "residence in Canada", being defined as the place where "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": *Re Papadogiorgakis*, [1978] 2 FC 208 (QL), 88 DLR (3d) 243 (TD) [*Papadogiorgakis*]; or (3) at least three years of "residence in Canada", being defined as the place where the applicant "regularly, normally or customarily lives according to six specified factors": *Koo (Re)*, 1992 CanLII 2417 (FC), [1993] 1 FC 286 [*Koo*], and which is the test chosen by the citizenship judge in the case at bar.

[7] In *Koo*, Justice Reed writes at paragraph 10 [the *Koo* test]:

> 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 centralized 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 employment abroad?
>
> (6) what is the quality of the connection with Canada: is it more substantial than that which exists with any other country?

[8] On December 31, 2015, in spite of the fact that the respondent was physically present only 560 days during the relevant four year period – leaving her 535 days short of the prescribed 1095 days –the citizenship judge was nevertheless satisfied that the respondent met the residency requirements under paragraph 5(1) of the Act.

[9] Purportedly applying the analytic approach in *Koo*, the citizenship judge reached the following conclusions:

(a) The evidence on the record showed that the respondent was physically present in Canada for approximately eight years prior to her recent absences;

(b) The respondent has established that her sister and parents are residing in Canada as permanent residents since 2010 and 2013 respectively. While she was abroad with her daughter and her Canadian citizen husband, her sister and brother-in-law took care of her condominium;

(c) The citizenship judge was convinced that the respondent's pattern of trips is one of who resides permanently in Canada, but left to accompany her husband;

(d) Although the respondent did not meet the minimal 1095 days required by the Act, the respondent's absences were due to her travelling with her husband for his work;

(e) The evidence showed that the respondent's physical absences were caused by a clearly temporary situation; and

(f) Various elements led the citizenship judge to believe that the respondent was connected to Canada, for instance her past study in French and in Law or her past ownership of a convenient store.

[10] The finding of the citizenship judge that the respondent meets the residency requirement in paragraph 5(1)(c) of the Act is a question of mixed fact and law. The issue before this Court is whether the citizenship judge has made a number of reviewable errors in her assessment of the *Koo* factors as alleged by the applicant. On judicial review, this Court cannot reweigh the evidence in order to reach its preferred outcome (*Canada (Citizenship and Immigration) v Iluebbey*, 2016 FC 946, [2016] FCJ No 927 at para 46). Accordingly, this Court will give deference to the findings made by the citizenship judge provided that they are supported by the evidence on record and the result reached by the citizenship judge falls within the range of possible and acceptable outcomes. However, this is not the case in this instance. Cumulatively, the answers provided by the citizenship judge to each of the six questions mentioned in *Koo* are tainted by a fundamental misunderstanding of the object and purpose of the analytical test. This renders the result unreasonable.

[11] The *Koo* test is not meant to be a rigid test, as the six factors are meant to be guiding factors for the decision-maker and not immutable factors. That being said, the *Koo* test requires a citizenship judge to make clear findings in relation to six factors and then to balance the positive findings against the negative ones (*Canada (Citizenship and Immigration) v Ojo*, 2015 FC 757, [2015] FCJ No 758 at para 32 [*Ojo*]). The qualitative test is not easy to meet, as the connection to Canada needs to be very strong for allowing the citizenship judge to count long period of absences as periods of residency in Canada (*Canada (Minister of Citizenship and Immigration) v Nandre*, 2003 FCT 650, [2003] FCJ No 841; *Canada (Citizenship and Immigration) v Du*, 2016 FC 420, [2016] FCJ No 435 at para 18). The physical presence is crucial in the determination of residence, even under the *Koo* test, since it is quite another to be literally in and out of Canada

without residing in this country for extended periods of time to experience living in Canada (*Canada (Citizenship and Immigration) v Olafimihan*, 2013 FC 603, [2013] FCJ No 672 at para 26 [*Olafimihan*]). The question whether the pattern of physical presence in Canada indicates a returning home or merely visiting Canada (third factor) is at the heart of the *Koo* test *(Olafimihan* at paras 25-26). The fact that an applicant has bought a house or is renting an apartment in Canada, or payed taxes in Canada are passive indicia which are insufficient by themselves to establish constructive residency in the relevant four year period (*Canada* (*Minister of Citizenship and Immigration) v Chen*, 2004 FC 848, [2004] FCJ No 1040 at para 10 referring to *Wu v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 435, [2003] FCJ No 639 (TD) (QL)). In short, although the respondent maintained her ownership in Canada during the relevant period, her extensive absence from Canada in company of her close family shows a structural mode of living abroad rather than a temporary situation (see *Canada (Citizenship and Immigration) v Chang*, 2013 FC 432, [2013] FCJ No 485 at para 11; *Canada (Citizenship and Immigration) v Willoughby*, 2012 FC 489, [2012] FCJ No 626 au para 9).

[12] In the case at bar, there is no indication that the citizenship judge actually conducted a balancing exercise of all the positive and negative factors, as mandated by *Koo*. On the contrary, the citizenship judge has overlooked significant negative factors in her examination. Nevertheless, the evidence in the record did not support the findings made by the citizenship judge. As such, her conclusion does not lie in the range of acceptable outcomes. One of the fundamental flaws in the reasoning of the citizenship judge has been to place undue emphasis on the justification for the respondent's very significant period of absence from Canada. In the present case, it is undisputed that the respondent had to leave Canada in 2008 because of her

husband's professional obligations, who, after losing his position in Canada, had found a new job in China. He then secured employment in the United States in 2010. Although the citizenship judge interpreted this as a temporary situation, the fact remains that during their stay in the United States, the respondent and her husband intentionally applied for permanent resident status. Thus, it is apparent here that the respondent and her husband, after leaving Canada, had voluntarily made the choice to reside permanently in the United States, and it was capricious and arbitrary for the citizenship judge to qualify the situation as "clearly temporary".

[13] The citizenship judge also stated in her decision that the respondent's pattern is that one of who resides permanently in Canada but has left Canada to accompany her husband. However, this does not change the fact that in living abroad with husband and child, the respondent had not centralized her mode of existence in Canada during the relevant four year period. It is also apparent that the respondent's short trips, with long duration of absence, indicate a pattern of one merely visiting Canada rather than one returning home. As stated by this Court, regarding the third factor in the Koo test, it boils down for the decision-maker to look for evidence that Canada is home, as opposed to a place one visits. As such, it is difficult for any applicant to overcome the conclusion that one merely "visits" when not even spending 50% of their time in that place (*Olafimihan* at para 25).

[14] The citizenship judge also overlooked the fourth factor of the *Koo* test. Indeed, the respondent was not "only a few days short of the 1,095 days total" but had a shortfall of 535 days compared to the minimum number of days required. As a matter of fact, the respondent was

physically present in Canada for less than forty percent of the time during the relevant four year period.

[15] With regards to the sixth factor of the *Koo* test, the citizenship judge erred in the qualification of the respondent's connection with Canada during this relevant period. The fact that the respondent had not ceased to be a "permanent resident" for the purposes of the provisions of subsection 28(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, because she was accompanying her husband abroad, does not equate to be "residing in Canada" for the purposes of paragraph 5(1)(c) of the Act. Indeed, before applying to the Canadian citizenship, the respondent was granted the status of permanent resident in the United States. Although it is unclear as to when exactly she applied, one thing is for sure is that her application for permanent residency in United States preceded her Canadian citizenship application. Thus, this cast even more doubt on the respondent's true intentions. While the respondent is apparently now established in Montreal since 2013, this is irrelevant as it does not add to the quality of the connection to Canada, not to mention that this event happened after the relevant four year period. In passing, the reasons for the respondent's return to Canada in 2013 are not clearly indicated.

[16] To conclude, this Court underlines that the ultimate purpose of the *Koo* test is to evaluate whether a person has a sufficiently strong connection to Canada to justify a grant of citizenship – not to evaluate whether that person left Canada for valid reasons (see *Ojo* at para 34). In the present case, the citizenship judge misapplied the *Koo* test by over emphasizing the justification for the respondent's lengthy absent and by failing to address significant negative factors. Thus, the impugned decision does not fall in the spectrum of reasonableness.

[17] For these reasons, the present application is granted. The impugned decision is set aside and the matter is returned for redetermination by another citizenship judge. No question is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the present judicial review application is allowed. The impugned decision made by the citizenship judge on December 31, 2015 is set aside and the matter returned for redetermination by another citizenship judge. No question is certified.

"Luc Martineau"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-161-16
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION v PEI XUAN HUANG
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	NOVEMBER 30, 2016
JUDGMENT AND REASONS:	MARTINEAU J.
DATED:	DECEMBER 7, 2016

APPEARANCES:

Me Andrea Shahin	FOR THE APPLICANT
Me Mai Nguyen	FOR THE RESPONDENT

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada Montréal, Quebec	FOR THE APPLICANT
Doyon, Nguyen, Tutunjian & Cliche-Rivard, avocats - S.E.N.C. Montréal, Quebec	FOR THE RESPONDENT