Federal Court  Cour fédérale

Date: 20180731

Docket: T-14-18

Citation: 2018 FC 798

Ottawa, Ontario, July 31, 2018

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

KENNETH THORPE TANNER

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of the November 29, 2017, decision [the Decision] of a citizenship judge [the Citizenship Judge or the Judge], denying the Applicant's application for Canadian citizenship pursuant to s 5(1) of the *Citizenship Act*, RSC 1985, c C-29 [the Act].

[2] As explained in greater detail below, this application is allowed, because I have found that, in arriving at the conclusion that the Applicant had been physically present in Canada for less than the required 1095 days, the Citizenship Judge double-counted absences in the fall of 2014, rendering the Decision unreasonable.

II. **Background**

[3] The Applicant, Kenneth Thorpe Tanner, is a citizen of the United States of America [US] who has been working in Canada as a project manager for a company called Flatiron Constructors Canada Ltd. since May 22, 2006. He applied for Canadian Citizenship on May 2, 2015, making the relevant period for his application the four year period from May 2, 2011, to May 2, 2015 [the Relevant Period]. At the beginning of the Relevant Period, Mr. Tanner was living and working in Fort McMurray, Alberta. However, in the fall of 2013, his employment relocated to Richmond, British Columbia. He and his family then decided to move to Lynden, Washington, US. Following that move, Mr. Tanner usually commuted to Richmond daily during the work week, spending his weekends in Lynden.

[4] To be eligible for Canadian citizenship, Mr. Tanner was required by section 5(1)(c) of the Act to have resided in Canada for at least 1,095 days within the Relevant Period. In considering whether he satisfied the residence requirement, the Citizenship Judge adopted the strict physical presence test from *Re Pourghasemi*¸ [1993] FCJ No 232 (TD) [*Pourghasemi*], meaning that Mr. Tanner had to have been physically present in Canada for 1,095 days in the Relevant Period.

[5] Mr. Tanner calculated that he had been in Canada for 1,184 days during the Relevant Period, representing 276 days of absence. However, in the Decision, the Citizenship Judge states that Mr. Tanner declared 351 days of absence during the Relevant Period in his original application and residence questionnaire.

[6] In addition to these 351 days of absence, the Citizenship Judge identified the following absences, totalling at least another 14 days:

A. 2 days of absence indicated by a February 25, 2013, stamp from Calgary International Airport in Mr. Tanner's passport, which Mr. Tanner explained was related to his return from a trip to Scottsdale, Arizona, which he had omitted in error;

B. 8 days of absence arising from weekends spent in Lynden in September 2014; and

C. at least a further 4 days of absence based on the Citizenship Judge's conclusion that Mr. Tanner had spent some weekends in Lynden in the months of October, November, and December 2014.

[7] In arriving at these figures, the Citizenship Judge made reference to a document described as a Canada Border Agency – Traveller History (ICES report) [the ICES Report]. Mr. Tanner states in his affidavit in support of this application for judicial review that, while he did briefly view this document at the hearing of his citizenship application, it was not disclosed to

him prior to that time and he did not have the opportunity to fully respond to it with the benefit of counsel.

[8] Based on the sum of the absences described above, the Citizenship Judge concluded that Mr. Tanner was in Canada less than 1,095 days in the Relevant Period. Having adopted the analytical approach used in *Pourghasemi*, the Citizenship Judge found that Mr. Tanner had not been physically present in Canada sufficiently during the Relevant Period to become a Canadian citizen. Therefore his application for citizenship was not approved. This is the Decision that Mr. Tanner now challenges in this judicial review.

III. **Issues and Standard Of Review**

[9] The Applicant raises the following issues for the Court's consideration:

A. Did the Citizenship Judge breach the duty of procedural fairness and natural justice owed to the Applicant?

B. Did the Citizenship Judge err in deciding that the Applicant did not meet the residency requirement under section 5(1) of the Act?

[10] The parties agree, and I concur, that the standard of review applicable to questions of procedural fairness is correctness and that the standard of review of a citizenship judge's findings in relation the residency requirements of the Act is reasonableness (see *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 55 and 79; *Canada (Citizenship and Immigration) v Wang*, 2009 FC 1290 at para 19).

IV. **Analysis**

A. *Did the Citizenship Judge breach the duty of procedural fairness and natural justice owed to the Applicant?*

[11] Mr. Tanner submits that the Citizenship Judge breached the duty of procedural fairness owed to him, by relying on the ICES Report without providing a copy to him and his legal counsel to afford them an opportunity to respond to any questions or conclusions the Judge was tempted to draw from this document.

[12] I find little merit to this argument. A breach of procedural fairness can occur when an immigration official relies on extrinsic evidence without giving an applicant an opportunity to respond. Extrinsic evidence is evidence of which the applicant is unaware because it comes from an outside source. However, this Court has held that ICES reports, which are a common feature of citizenship analyses, and for which applicants may apply of their own accord, do not constitute extrinsic evidence for purposes of a procedural fairness analysis (see *Cheburashkina v Canada (Minister of Citizenship and Immigration)*, 2014 FC 847 at paras 29-31). Particularly on the facts of the present case, where Mr. Tanner acknowledges that, at the hearing, the Citizenship Judge referred to the ICES Report as a document that referenced his entries to Canada in October, November, and December 2014, I find no breach of the duty of procedural fairness.

B. *Did the Citizenship Judge err in deciding that the Applicant did not meet the residency requirement under section 5(1) of the Act?*

[13] Before addressing Mr. Tanner's arguments in support of his position that the Decision is unreasonable, I will address the principal argument of the Respondent, the Minister of Citizenship and Immigration [the Minister], in support of the position that this application for judicial review should be dismissed.

[14] Mr. Tanner's application for citizenship presents with an unusual fact pattern. As noted above, the Relevant Period extends from May 2, 2011, to May 2, 2015. At the beginning of the Relevant Period, and for approximately three years prior to that, Mr. Tanner and his family were living in Fort McMurray, Alberta. However, in the fall of 2013, he and his family moved to the US, living at an address in Bellingham, Washington, from August 24, 2013, to September 20, 2013, and thereafter at their present address in Lynden, Washington. After his move, Mr. Tanner commuted to his work in Canada.

[15] The Minister argues that, from the time of Mr. Tanner's move to the US in the fall of 2013, he no longer had an established residence in Canada, and therefore any days of physical presence in Canada following that move no longer counted towards his citizenship application. In support of this position, the Minister relies on jurisprudence (see, e.g. *Al Tayeb v Canada (Minister of Citizenship and Immigration)*, 2012 FC 333 at paras 8-13) establishing that citizenship applicants must satisfy a two stage test: (a) whether the applicant established residence in Canada; and (b) if so, whether the applicant maintained residence in Canada. If

residence has been established under the first stage of the test, the second stage can be considered, under the law at the time of Mr. Tanner's application, by employing either a quantitative approach (counting the number of days of physical presence in Canada, as did the Judge in the present case) or a qualitative approach (which, loosely speaking, involves consideration of the applicant's connection to Canada). However, if the first stage of the test is not met, because residence has not been established in Canada, the matter ends there. There is no need for consideration of the second stage.

[16] Based on Mr. Tanner's move to the US in the fall of 2013, the Minister submits that there are only 28 months over which he qualifies to have his days of physical presence in Canada considered and, as it is not possible to accumulate 1095 days of physical presence in 28 months, it was impossible for him to qualify for citizenship. The Minister draws a comparison with *Canada (Minister of Citizenship and Immigration) v Roberts*, 2009 FC 927 [*Roberts*], where, during the relevant period, a US citizen had no fixed address in Canada other than during a three month period when he resided in a University of Toronto residence. In setting aside the decision of the citizenship judge who approved the application for citizenship, Justice Near found at paragraphs 14 to 17 that the judge had not made any specific findings with respect to the applicant's establishment of a residence and that, even upon the most generous reading of judge's decision and the material before him, it was clear that the applicant did not establish residence in Canada.

[17] The principal difficulty with the Minister's argument is that it has no foundation in the reasons for which the Citizenship Judge arrived at the Decision in the present case to deny Mr.

Tanner's application. The Judge recognized the relevant sequence of events, as the Decision recites the various addresses where Mr. Tanner lived during and before the Relevant Period. However, the Decision does not turn on the point now raised by the Minister, i.e. a conclusion either that Mr. Tanner failed to establish a residence in Canada or that, as of the fall of 2013, he no longer had an established residence in Canada. Rather, the Decision turned strictly on the Judge's application of the *Pourghasemi* test and the subsequent conclusion that the number of days Mr. Tanner was absent from Canada during the Relevant Period were such that he did not meet the 1095 day requirement.

[18] It is trite law that, when sitting in a judicial review of an administrative decision, a Court should consider the reasonableness of the decision taking into account the reasons of the decision-maker. It is not available to the party seeking to uphold a decision to bolster its reasonableness by offering an alternative analysis which has no foundation in the decision-maker's reasons but supports the same result (see, e.g., *M.A.O. v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1406 at para 67). When this concern was raised at the hearing of this application for judicial review, the Minister's counsel argued that the Court should rule upon the Minister's position and dismiss the application because, regardless of the reasoning employed by the Citizenship Judge in arriving at the Decision, refusal of Mr. Tanner's citizenship application was the only valid outcome at law.

[19] The principle upon which the Minister relies was explained by the Federal Court of Appeal in *Robbins v Canada (Attorney General)*, 2017 FCA 24 at para 17 [*Robbins*]:

> [17] An important factor in exercising our remedial discretion is whether a quashing of the decision of the Appeal Division would

> have any practical significance: *MiningWatch*, above, and see, e.g., *Community Panel of the Adams Lake Indian Band v. Adams Lake Band*, 2011 FCA 37 (CanLII), 419 N.R. 385. In circumstances where the administrator could not reasonably reach a different decision, sending the matter back would have no practical significance and so a remedy should not be granted: *Stemijon Investments Ltd. v. Canada (Attorney General)*, 2011 FCA 299 (CanLII), 341 D.L.R. (4th) 710 at paras. 44-46. On the other hand, if an administrator could conceivably reach a different, reasonable decision, it is appropriate to quash and send the matter back to the administrator as the merits-decider: *Lemus v. Canada (Citizenship and Immigration)*, 2014 FCA 114 (CanLII), 372 D.L.R. (4th) 567 at para. 38. Here, caution must be exercised and any doubt resolved in favour of sending the matter back: *Immeubles Port Louis Ltée v. Lafontaine (Village)*, 1991 CanLII 82 (SCC), [1991] 1 S.C.R. 326 at p. 361. It must be remembered that the administrator, not the reviewing court, is the merits-decider: *Bernard v. Canada (Revenue Agency)*, 2015 FCA 263 (CanLII), 479 N.R. 189 at para. 23; *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 (CanLII), 428 N.R. 297 at paras. 16-19.

[20] In my view, the circumstances of the present case are not suitable to invoke the principle described in *Robbins*. If the Decision is unreasonable, based on the Citizenship Judge's reasons, I cannot conclude that there would be no practical effect in returning Mr. Tanner's application for consideration by another citizenship judge, i.e. that that there is no possibility of Mr. Tanner's application being granted. In reaching this conclusion, I note first that Mr. Tanner's circumstances are different from those of the applicant in *Roberts*, in that it appears that he did have a conventional residence in Canada for the first 28 months of the Relevant Period. I also note that it is possible that, if the Decision is quashed and returned to another citizenship judge for redetermination, that judge could choose to apply one of the qualitative tests, rather than the *Pourghasemi* test involving the strict counting of days of physical presence, in assessing Mr. Tanner's application. As the Minister acknowledges in written submissions, where an applicant for citizenship has lived outside of Canada during the relevant period for his or her citizenship

application, the application might have a better chance of success under one of the qualitative tests.

[21] I am therefore not prepared to decide this application for judicial review based on an analysis that has no foundation in the reasons of the Citizenship Judge, and I decline to comment further on the merits of the Minister's principal argument. Consideration of that argument is best left to another day, if the Court is presented with a decision by a citizenship judge that has analysis of that nature.

[22] I therefore turn to Mr. Tanner's arguments in support of his position that the Decision is unreasonable. His principal arguments are that the Citizenship Judge employed, as a starting point in calculating his days of absence, an unsupported figure different than the one he had declared in his application and residence questionnaire, and that the Judge then increased that figure by double-counting certain days of absence in the fall of 2014.

[23] First, Mr. Tanner notes that the Citizenship Judge states that, in the original application and residence questionnaire, he declared 351 days of absence from Canada in the Relevant Period. Mr. Tanner takes issue with the 351 day figure as the starting point for the Judge's analysis, as he points out that his application declared 276 days of absence, not 351 days.

[24] The genesis of the 351 day figure is explained in an affidavit filed in this judicial review application by the citizenship officer [the Officer] who reviewed Mr. Tanner's application before its submission to the Judge. The Officer's evidence is that the figure was generated by a

calculator employed by the Citizenship and Immigration Canada [CIC] Global Case Management System [GCMS], based on the information Mr Tanner had provided. The Officer then inserted that figure in a document entitled Citizenship Application Record of Decision [CARD], which was provided to the Citizenship Judge to assist with the Judge's analysis of the application. The 351 day figure appears in the CARD, in a box labelled "Total absences". The relevant statement in the Judge's Decision is that "…the Applicant declared 91 trips outside Canada in the relevant period for 351 days of absence." I read this as the Judge adopting the 351 day figure that had been conveyed by the Officer, after its generation by the GCMS system based on the absences identified by Mr Tanner.

[25] The difference between the 351 day figure and the 276 days of absence calculated by Mr. Tanner appears to turn on the method used to calculate the number of days represented by each absence. The Minister explains that, prior to amendments to the Act that became effective on June 11, 2015, CIC's practice was to include either the day a person left Canada or the day he or she returned in calculating the number of days to be attributed to a particular absence. However, after June 11, 2015, the method of calculation changed so that CIC would count neither the day of departure nor the day of return as a day of absence from Canada. Mr. Tanner employed the newer method, resulting in his calculation of fewer days of absence and more days of physical presence. The Minister, however, takes the position that, as Mr. Tanner submitted his citizenship application before the legislative amendment, the older method is applicable and this results in more days of absence and fewer days of physical presence in Canada.

[26] Mr. Tanner submits that it was reasonable for him to employ the calculation method that that he did and that it was not reasonable for the Citizenship Judge to adopt the 351 day figure, particularly without the Decision indicating how that figure was derived. However, my decision in this application for judicial review does not turn on which method of calculation is appropriate or reasonable in the circumstances of this case, because it does not turn on the Judge's adoption of the 351 day figure. As noted in the Decision, with 351 days of absence in the Relevant Period, Mr. Tanner would still have been able to count 1109 days present in Canada. As such, the rejection of his application resulted not from the adoption of the 351 day figure but from the Judge's conclusion that he was absent for more than 14 additional days.

[27] The determinative argument in this judicial review surrounds those additional 14 days, resulting from the Judge's treatment of Mr. Tanner's absences in the fall of 2014. With the benefit of the Officer's evidence explaining the generation of the 351 day figure by the GCMS calculator, and documentation of the GCMS calculation in the Certified Tribunal Record as identified by the Minister's counsel, the method by which the figure was generated is available. It is therefore possible to identify the particular absences giving rise to the 351 day calculation. This information confirms the merit of Mr. Tanner's submission that, in arriving at the conclusion that he had less than 1095 days of physical presence in Canada during the Relevant Period, the Judge double-counted absences in the months of September to December 2014.

[28] In arriving at that conclusion, the Judge took into account 2 days of absence in February 2013, which Mr. Tanner acknowledges he omitted in error. The remainder of the additional days of absence identified by the Judge related to weekends spent in the US in September to

December 2014. However, as Mr. Tanner correctly points out, the weekends in that period were already identified as absences in his application for citizenship.

[29] Similarly, if one reviews the document in the Certified Tribunal Record which the Minister's counsel identified as capturing the GCMS calculation, again the weekends (or, in some cases, periods longer than the weekend but including the weekend) were already included in the absences taken into account in the calculation. There is one exception to this conclusion, in that Mr. Tanner's citizenship application identifies a 7 day absence from December 21 to 29, 2014, which absence is not included in the GCMS calculation. With the exception of that absence, Mr. Tanner is correct in submitting that the GCMS calculation, which the Minister explains generated the 351 day figure, took into account the weekend absences from September to December 2014. It was therefore an error for the Citizenship Judge to add those weekend absences again in calculating the total days of absence during the Relevant Period. Even adding the December 21 to 29, 2014 absence, treating that absence as 8 days rather than 7 days to take into account the Minister's position that Mr. Tanner was undercounting each of his absences by one day by using the post-June 2015 calculation method, and adding the 2 days in February 2013, there are no more than 10 days of absence to be added to the 351 day figure. This still results in 1099 days of physical presence in Canada, which is above the required 1095 day threshold.

[30] It is accordingly my conclusion that the Judge erred in the analysis which resulted in the finding that Mr. Tanner was present in Canada for less than 1095 days in the Relevant Period.

The Decision is unreasonable and must be set aside, with Mr. Tanner's application to be referred to another citizenship judge for redetermination.

V. **Certified Questions**

[31] Each of the parties proposed a question for certification for appeal.

[32] The Applicant proposes the following question:

> Whether or not the calculation of days for an application for Canadian citizenship under section 5(1) of the *Citizenship Act* prior to June 11, 2015, includes any part of a day that the applicant was physically present in Canada?

[33] The Respondent proposes a different question, as follows:

> Is a permanent resident who has submitted a citizenship application entitled to continue to count days of physical presence in Canada pursuant to the *Pourghasemi* physical presence test for "residence" per s. 5(1)(c) of the *Citizenship Act* where, part way through the relevant period for calculating residence, the applicant has ceased to have an established residence in Canada?

[34] Each party opposes certification of the other's question.

[35] Neither of the proposed questions is appropriate for certification. In order to be certified for appeal to the Federal Court of Appeal as a question of general importance, the question must: (a) transcend the interests of the immediate parties to the litigation; and (b) be dispositive of an appeal. The question must have been raised and dealt with in the Federal Court decision which

certifies it (see *Torre v Canada (Citizenship and Immigration)*, 2016 FCA 48 at para 3 and *Canada (Minister of Citizenship and Immigration) v Zazai*, 2004 FCA 89 at paras 11-12). The above questions proposed by the parties in the present matter were not dealt with in my decision. The issues raised by those questions are not dispositive of this application for judicial review and therefore would not be dispositive of an appeal. As such, no question will be certified.

JUDGMENT IN T-14-18

THIS COURT'S JUDGMENT is that this application for judicial review is allowed, the Decision is set aside, and the matter is returned to another citizenship judge for redetermination. No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-14-18
STYLE OF CAUSE:	KENNETH THORPE TANNER v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	JUNE 27, 2018
JUDGMENT AND REASONS:	SOUTHCOTT J.
DATED:	JULY 31, 2018

APPEARANCES:

Brian Portas	FOR THE APPLICANT
Marjan Double	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Borden Ladner Gervais LLP Vancouver, British Columbia	FOR THE APPLICANT
Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT