Federal Court  Cour fédérale

Date: 20150522

Dockets: T-2117-13
T-2-14
T-3-14

Citation: 2015 FC 670

Ottawa, Ontario, May 22, 2015

PRESENT: The Honourable Mr. Justice LeBlanc

Docket: T-2117-13

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

NARGES BAYANI

Respondent

Docket: T-2-14

AND BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

NILOUFAR BAYANI

Respondent

Docket: T-3-14

AND BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

KHADIJEH NEZAM-MAFI

Respondent

JUDGMENT AND REASONS

[1] The three Respondents in this case are family members. Narges and Niloufar Bayani are sisters, Khadijeh Nezam-Mafi is their mother and they are all Iranian citizens. Narges entered Canada on December 10, 2003. She was followed by her mother and sister on June 18, 2004. All three were granted landed immigrant status on that date and subsequently applied for Canadian Citizenship. All three applications were approved by Citizenship Judge Angelo Persichilli on November 7, 2013.

[2] The Minister of Citizenship and Immigration (the Minister) has appealed these decisions under former subsection 14(5) of the *Citizenship Act*, RSC, 1985, c C-29 (the Act). The Minister seeks an order setting aside these decisions and returning all three matters for reassessment on the ground that the Citizenship Judge, in each case, (i) failed to articulate which of the three residency tests was used, (ii) erred when he concluded that the Respondents had satisfied the

residency requirement set out in subsection 5(1)(c) of the Act, and (iii) failed to provide adequate reasons in support of his decisions.

[3] All three appeals were heard together. For the reasons that follow, these appeals are granted. The present Judgment and Reasons will be filed in Court dockets T-2117-13, T-2-14 and T-3-14.

I. Background

[4] According to subsection 5(1)(*c*) of the Act, the Minister shall grant citizenship to any citizenship applicant who is a permanent resident within the meaning 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 – or 1095 days - of residence in Canada.

A. *Khadijeh Nezam-Mafi*

[5] Ms. Nezam-Mafi is retired and married to a Canadian citizen. She filed her application for Canadian citizenship on January 30, 2010. The relevant four-year period for the purposes of establishing the residency requirement (the Residency period), ran, in her case, from January 30, 2006 to January 2010.

[6] In her citizenship application, Ms. Nezam-Mafi declared 350 days of absence from Canada, leaving her slightly above the 1095 day-threshold of physical presence in Canada. She submitted two passports to the Citizenship and Immigration Canada (CIC) as evidence of her

presence in Canada. However, these passports left a gap of 771 unaccounted days within Ms. Nezam-Mafi's Residency period. That two year gap was apparently covered by a third passport but that passport was not provided to CIC by Ms. Nezam-Mafi on the ground that she had left it at her residence in Iran.

[7] According to the record, this information about the missing passport was put by CIC to the Citizenship Judge. It was further put to the Citizenship Judge that there were insufficient port stamps as well as illegible stamps in the other two passports to verify what Ms. Nezam-Mafi had declared regarding her absences from Canada during the Residency period.

[8] In approving Ms. Nezam-Mafi's citizenship application, the Citizenship Judge noted he was satisfied that Ms. Nezam-Mafi had "cleared the concerns about the two year gap in the two relevant passports" by explaining that her family was the victim of a fraud in Iran and that the third passport had to be filed as evidence for the prosecution of the suspected swindlers. With respect to this "gap" issue, the Citizenship Judge further asked for additional information, namely the Integrated Customs Enforcement System (ICES) report recording her entries into Canada as well as a translation of the passports filed by Ms. Nezam-Mafi. He noted that aside from minor discrepancies, the ICES report confirmed the absences reported in the Citizenship application.

[9] Then, under the heading "Decision", the Citizenship Judge wrote the following:

> Considering all of the above, considered that the applicant complied with the request of more documentation, on the balance of probabilities and based on my careful assessment of the applicant's testimony, as well as my consideration of the

> information and evidence before me, I am satisfied that the applicant has established residence in Canada and complies with the Citizenship Act. For all of the above I approve the application for citizenship of Khadijeh Nezam-Mafi.

B. ***Narges and Niloufar***

[10] Narges and Niloufar applied for Canadian citizenship a year apart. At the time, they were both full-time students. Their respective Residency periods were October 10, 2005 to October 10, 2009 and November 4, 2006 to November 4, 2010.

[11] In her citizenship application, Narges declared having been absent from Canada for a total of 321 days over the course of her Residency period. In the Residency Questionnaire she subsequently filled, that figure went up to 732 days, which meant that she was outside Canada for a longer period of time than she was in Canada during her Residency period.

[12] Similarly, Niloufar first declared having been absent from Canada for a total of 581 days and then changed that figure to 729 days in her Residency Questionnaire. That meant that she had spent as much time outside Canada as in Canada during the four-year period immediately preceding the filing of her application for citizenship.

[13] As was the case for the mother, the Citizenship Judge indicated in his notes having asked for the ICES report on Narges' entries into Canada "because she has only 1,033 days of physical presence in Canada during the relevant time". The Citizenship Judge indicated that aside for one exception, which "would increase the days of absence of 5 days", he was satisfied that the ICES

report confirmed "the travel pattern declared in the original application". He also made notes regarding the Respondent's studies, her source of income, the family she has in Canada and abroad, her physical presence in Canada, the passports issues and the place of residence while in Canada.

[14] The Citizenship Judge's actual decision on Narges's application was delivered in the exact same terms as that of her mother.

[15] The decision regarding Niloufar's citizenship application was rendered in slightly different terms. It reads as follows:

> Considering all of the above, on the balance of probabilities based on my careful assessment of the applicant's testimony, as well as my consideration of the information and evidence before me and cross-info obtained during the interview with the applicant's mother (KHADIJEH NEZAM-MAFI - FILE No 3906070), I am satisfied that the applicant has established residence in Canada and complies with the Citizenship Act.

[16] The "above", consisted of the following three-bullet notes:

- The applicant is a full time student.
- She applied along with other members of the family but her application was sent back because some documents were missing. When she filed again, the other members were already scheduled for tests.
- The reason why she has less days of physical presence that the other members of her family is related to the delay with her application. She went to New-York for dance classes immediately after the first application but, because she had to re-apply.

II. Issue and Standard of Review

[17] The sole issue to be resolved in this matter is whether the Citizenship Judge's decisions in these three cases warrant intervention by this Court. In order to answer that question, I have applied the standard of reasonableness which is the standard of review applicable in citizenship appeals dealing with the residency requirement (*Saad v Canada (Minister of Citizenship and Immigration)*, 2013 FC 570, 433 FTR 174, at para 18, and see also *Canada (Minister of Citizenship and Immigration) v Rahman*, 2013 FC 1274 at para 13; *Balta v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1509, 403 FTR 134 at para 5; *Canada (Minister of Citizenship and Immigration) v Baron*, 2011 FC 480, 388 FTR 261 at para 9; *Canada (Minister of Citizenship and Immigration) v Diallo*, 2012 FC 1537, 424 FTR 156 at para 13; *Huang v Canada (Minister of Citizenship and Immigration)* 2013 FC 576 at paras 24 to 26).

[18] As is well established, the standard of reasonableness not only requires that the decision at issue fall within a range of possible, acceptable outcomes defensible in respect of the facts and law, but it also requires the existence of justification, transparency and intelligibility within the decision-making process (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190, at para 47).

III. Analysis

[19] According to the jurisprudence of this Court, three different tests are available to Citizenship Judges in assessing the Act's residency requirement in any given case (*Sinanan v*

Canada (Minister of Citizenship and Immigration) 2011 FC 1347 at paras 6 to 8; *Huang*, above, at paras 17 and 18).

[20] The first test involves the strict counting of days of physical presence in Canada which must total 1095 days in the four years preceding the application. It is often referred to as the quantitative test or the *Pourghasemi* test (*Pourghasemi (Re) (FCTD)* [1993] 62 FTR 122, [1993] FCJ No 232 (QL)).

[21] The second test is less stringent. It recognizes that a person can be resident in Canada, even while temporarily absent, if there remains a strong attachment to Canada. This test is generally known as the *Re Papadogiorgakis* test (*Re Papadogiorgakis*, [1978] 2 FC 208, [1978] FCJ No 31 (QL)).

[22] The third test builds on the second one by defining residence as the place where one has centralized his or her mode of living. It is described in the jurisprudence as the *Koo* test (*Re Koo*, [1993] 1 FC 286, 59 FTR 27; see also *Paez v Canada (Minister of Citizenship and Immigration)* 2008 FC 204 at para 13, *Sinanan*, above, at paras 6 to 8; *Huang*, above, at paras 37 to 40). That test is built around six factors:

1. was the citizenship applicant present in Canada for a long prior to recent absences which occurred immediately before the application for citizenship;
2. where are the applicant's immediate family and dependants (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 1095-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 temporary employment abroad; and
6. what is the quality of the connection with Canada: is it more substantial that that which exists with any other country,

(Re *Koo*, at pages 293-294)

[23] The last two tests are often referred to as qualitative tests (*Huang*, above at para 17).

[24] The dominant view in the case law is that citizenship judges are entitled to choose which test they desire to use among these three tests and that they cannot be faulted for choosing one over the other (*Pourzand v Canada (Minister of Citizenship and Immigration)* 2008 FC 395 at para 16; *Xu v Canada (Minister of Citizenship and Immigration)* 2005 FC 700 at paras 15 and 16; *Rizvi v Canada (Minister of Citizenship and Immigration)* 2005 FC 1641 at para 12).

[25] However, they can be faulted if they fail to articulate which residency test was applied in a given case (*Dina v Canada (Minister of Citizenship and Immigration)* 2013 FC 712, 435 FTR 184, at para 8).

[26] As is well settled, administrative decision-makers are required to provide reasons so as allow the reviewing court to understand why they made their decisions and permit it to determine whether the conclusions reached are within a range of acceptable outcomes defensible both on

the facts and the law (*Dunsmuir*, above at para 47; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board),* 2011 SCC 62, [2011] 3 SCR 708**,** at para 16; *Canada (Minister of Citizenship and Immigration) v Saad*, 2011 FC 1508, at para 16-17).

[27] Here, I find that in all threes instances, the decision of the Citizenship Judge lacks justification, transparency and intelligibility either because the judge failed to articulate the residency test that was applied or because his reasons in each case do not otherwise allow the Court to understand why he made the decision.

A. ***The decisions regarding Narges and Niloufar***

[28] It is undisputed that the Citizenship Judge did not expressly state or articulate which of the three residency tests was used in his assessment of both Narges and Niloufar's citizenship applications.

[29] Both Narges and Niloufar claim that on the face of the record, it is clear that the Citizenship Judge did not apply the quantitative test but rather conducted a qualitative assessment of their applications as it was clear from the outset that they had not been physically present in Canada for the minimum threshold of physical presence contemplated by subsection 5(1))c) of the Act. They contend that based on the evidentiary record that was before him, it was open to the Citizenship Judge to conclude that they both qualitatively met the Act's residency requirement.

[30] The difficulty with that argument, as the Minister points out in his written submissions, is that in order to be clear, precise and intelligible, as required by *Dunsmuir*, above, reasons for decisions in the citizenship context must, at the very least, indicate which residency test was used and why that test was met or not (*Canada v Jeizan* 2010 FC 323, 386 FTR 1, at para 17-18; *Dina*, above, at para 8; *Canada (Minister of Citizenship and Immigration) v Al-Showaiter*, 2012 FC 12, at para 21, *Canada (Minister of Citizenship and Immigration) v Baron*, 2011 FC 480, 388 FTR 261, at para 13-18, *Saad*, above, at paras 18-24; *Canada (Minister of Citizenship and Immigration) v Bani Ahmad*, 2014 FC 898, at para 25).

[31] The provision of reasons in the citizenship context "assumes a special significance" as the Minister must grant citizenship in the event of a positive recommendation by a citizenship judge (*Canada (Minister of Citizenship and Immigration) v Mahmoud*, 2009 FC 57, at par 6; *Canada (Minister of Citizenship and Immigration) v Wong*, 2009 FC 1085, at para 17-18). Since the Minister has no other remedy against such a positive recommendation than to appeal to this Court, the reasons provided in support of it, which are statutorily required (subsections 14(2) and 3 of the Act), "should be sufficiently clear and detailed so as to demonstrate to the Minister that all relevant facts have been considered and weighed and that the correct legal tests have been applied" (*Mahmoud*, above at para 6). At a minimum, this includes indicating which one of the three legal tests available to assess the residency requirement was used and why it was satisfied.

[32] In a context where, through judicial precedent, not one but three interpretations of a statutory provision can be picked and chosen by a decision-maker and in any given case, the chosen interpretation has to be clearly identified in the reasons for decision. For the parties and

the reviewing court, identifying that interpretation should not amount to a guessing game. In such a peculiar context, there is no place for approximations. This goes, in my view, to the integrity of the legislative scheme respecting the granting of Canadian citizenship.

[33] Even assuming here that it can be inferred from the Citizenship Judge's notes that he did not apply the physical presence test with respect to both Narges and Niloufar's applications, I see nothing in these notes that indicate which one of the two qualitative tests was applied. In the case of Niloufar, the notes are particularly unintelligible as it is impossible to relate them, in any comprehensive way, to either of these two tests. Furthermore, the reference in the decision to the "cross-info obtained during the interview with the applicant's mother", is not helpful to Niloufar's case as the nature of this "cross-info" is not specified, making it therefore impossible to understand how it might have contributed to the Citizenship Judge being satisfied that Niloufar met the residency requirement.

[34] In the case of Narges, the Citizenship Judge was also clearly wrong in finding that she had 1033 days of physical presence in Canada during her Residency period. The record that was before him showed that Narges only had 728 days of physical presence, which means that she had been in Canada less that half of her Residency period. That figure was significant, and so was the Citizenship Judge's error. Given that a citizenship applicant's physical presence in Canada remains a factor of "primary importance" even in a qualitative analysis (*Jeizan*, above, at para 28), the decision to approve Narges' application lacks the qualities to make it reasonable as it fails to explain why Narges satisfied the residency requirement despite spending that much time outside Canada.

[35] The Citizenship Judge's reasons in both cases do not indicate a grasp of the issues raised by both the evidence and the law. They are wholly inadequate.

[36] Counsel for Narges and Niloufar attempted to compensate for the Citizenship Judge's decisions by explaining the judge's reasoning in referring to the evidentiary record. This sort of reconstruction cannot be done. As Justice Yves de Montigny stated in *Jeizan*, above, at para 20, a decision-maker's reasoning should not require additional explanations (see also *Saad*, above, at para 23). When the only way to understand the Citizenship Judge's reasons is to conduct a *de novo* examination of the record, the decision is not likely to meet the requirements for transparency, justification and intelligibility set out in *Dunsmuir*, above (*Korolove v Canada (Minister of Citizenship and Immigration)*, 2013 FC 370, 430 FTR 283, at para 47). Indeed, it is not the role of this Court to re-assess the application of a failed citizenship claimant and to make a decision in place of the Citizenship Judge (*Saad*, above, at para 26).

B. *The decision regarding Ms. Nezam-Mafi*

[37] The decision regarding Ms. Nezam-Mafi also fails to identify which of the three residency tests was used. Ms. Nezam-Mafi contends that it is clear from his notes that the Citizenship Judge applied the physical presence test in her case as he referred to the fact that "she has 1,110 days of physical presence in Canada during the relevant period", which places her above the minimal threshold of physical presence contemplated by subsection 5(1)(c) of the Act.

[38] As the Minister points out, the choice of the test used remains unclear as the Citizenship Judge also referred to qualitative factors by noting Ms. Nezam-Mafi "is retired and married to a

Canadian citizen" and that "she was living with her daughters in Montreal and Waterloo (where they were attending university)".

[39] But even assuming that it can be inferred from his notes that the Citizenship Judge assessed Ms. Nezam-Mafi's citizenship application using the physical presence test, two problems remain. First, there is no discussion in the decision or the notes concerning the contradictory explanations Ms. Nezam-Mafi gave about the non-availability of the missing passport. The Citizenship Judge accepted the explanation she gave at the hearing of her application that that passport was missing because it had been filed as evidence in a fraud case in Iran. This contradicted the explanation given to CIC that this passport had been left at her residence in Iran.

[40] Passports are important for calculating the residence requirement (*Canada (Minister of Citizenship and Immigration) v Rahman*, 2013 FC 1274, at para 51-53). The missing passport was of material importance to the case of Ms. Nezam-Mafi as it covered half of her Residency period. This two-year gap was significant in a physical presence test analysis. As it has been affirmed on many occasions by this Court, Canadian citizenship is a privilege that ought not to be granted lightly and the onus is on citizenship applicants to establish, on a standard of balance of probabilities, through sufficient, consistent and credible evidence, that they meet the various statutory requirements in order to be granted that privilege (*Canada (Minister of Citizenship and Immigration) v Elzubair*, 2010 FC 298 at paras 19 and 21; *Canada (Minister of Citizenship and Immigration) v El Boussergh*ini, 2012 FC 88 at para 19; *Canada (Minister of Citizenship and*

Immigration) v Dhaliwal, 2008, FC 797 at para 26; *Abbas* v *Canada (Minister of Citizenship and Immigration)*, 2011 FC 145 at para 8; *F.H. v McDougall*, 2008 SCC 53, [2008] 3 SCR 41).

[41] The two different explanations provided by Ms. Nezam-Mafi as to the absence of that passport were before the Citizenship Judge. There is nothing in his notes or decision which permit the Court to understand if and how he dealt with these contradictory statements and why he preferred the explanation given at the hearing. On such an important aspect of Ms. Nezam-Mafi's application, clear and detailed reasons were required so as to demonstrate that all relevant facts had been considered. This requirement was not met. In addition, there is no evidence on record as to why Ms. Nezam-Mafi did not provide the missing passport after the court case in Iran concluded in 2012.

[42] Ms. Nezam-Mafi contends that she provided evidence establishing that she was physically present in Canada during the two-year period covered by the missing passport. There is no reference whatsoever to that evidence in the Citizenship Judge's notes or decision. Again, this amounts to conducting a *de novo* examination of the record in order to understand the Citizenship Judge's reasons. As I indicated previously, this is not the role of the Court. When a citizenship judge's reasoning requires additional explanations in order to be understood, it is a sign that it lacks justification, transparency and intelligibility.

[43] Second, I agree with the Minister that the Citizenship Judge overly relied on the ICES report considering that this report only records entries into Canada and is not free from error. As a result, CIC could not even verify the self-declared trips Ms. Nezam-Mafi took during her

Residency period as there were insufficient corroborative port of entry stamps and entries documented in the ICES report confirming these trips. This information was put before the Citizenship Judge but there are no mentions in his reasons indicating that he actually verified when Ms Nezam-Mafi left and returned from these declared trips.

[44] As the Minister correctly points out, without her undisclosed passport and proper analysis of both exits from - and entries into – Canada regarding the trip Ms. Nezam-Mafi declared in her citizenship application material, it is unclear how the Citizenship Judge could have concluded that she had established residence in Canada and complied with the Act in this respect.

[45] Again, the decision of the Citizenship Judge, in the case of Ms. Nezam-Mafi this time, lacks justification, transparency and intelligibility and does not comply, as a result, with the *Dunsmuir* requirements.

[46] The Minister's appeal in all three cases is therefore granted. Given the amendments to the Act which came into force on August 1, 2014, and which modified the manner in which applications for citizenship are to be determined by placing the adjudication of such applications within the ambit of the Minister, the matter will be sent back for re-determination to the "decision-maker", rather than to a citizenship judge, as it is to be re-determined, pursuant to section 35 of the Act, in accordance with the Act, as it now reads.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The appeal is granted.

2. The decision of Citizenship Judge Angelo Persichilli, dated November 7, 2013, is set aside and the matter is referred back to the decision-maker for redetermination.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION v NARGES BAYANI
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