

Federal Court



Cour fédérale

Date: 20151102

Docket: T-565-15

Citation: 2015 FC 1239

Toronto, Ontario, November 2, 2015

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Applicant

and

YANA KHOREVA

Respondent

JUDGMENT AND REASONS

[1] The Minister of Citizenship and Immigration seeks judicial review of the decision of a Citizenship Judge approving Yana Khoreva's application for Canadian citizenship. The Minister alleges that the Citizenship Judge erred in his application of the physical presence test for residency in Canada. Although Ms. Khoreva did not respond to the Minister's application, she did appear at the hearing and the Minister consented to her making submissions opposing the application.

[2] For the reasons that follow, I have concluded that the Citizenship Judge's decision was unreasonable. The application will therefore be granted.

I. Analysis

[3] Ms. Khoreva originally declared that she had been absent from Canada on 14 occasions during the relevant period, during which she had been outside of Canada for a total of 364 days. In other words, Ms. Khoreva's citizenship application indicated that she was just one day over the 1095-day minimum necessary to satisfy the residency requirements of the *Citizenship Act*, R.S.C. 1985, c. C-29.

[4] Because there were discrepancies between the absences declared by Ms. Khoreva in her citizenship application and the stamps in her passport, she was required to complete a Residence Questionnaire. This time, Ms. Khoreva declared that she had been absent from Canada for a total of 368 days during the relevant four-year period.

[5] Thus, on Ms. Khoreva's own evidence, she was three days short of the 1095-day minimum.

[6] The Citizenship Judge chose to apply the physical presence test for residency established in *Re Pourghasemi* (1993), 62 F.T.R. 122, [1993] F.C.J. No. 232. In approving Ms. Khoreva's citizenship application, the Citizenship Judge noted the discrepancies in the absences that had been declared by Ms. Khoreva and the stamps in her passport. The judge was nevertheless satisfied that "in light of the documents provided post-hearing those discrepancies caused by mistakes are minor in nature and do not impact on the residence requirement".

[7] The documents referred to by the Citizenship Judge included Notices of Assessment, report cards for Ms. Khoreva's daughters, letters of employment and Ms. Khoreva's separation agreement. None of these documents shed any light on when Ms. Khoreva left Canada, or the duration of her absences.

[8] The Citizenship Judge made no mention of Ms. Khoreva's admission in her Residence Questionnaire that she had been outside of Canada for 368 days during the period under review. It is true that a tribunal is not required to refer to every piece of evidence in the record and will be presumed to have considered all of the evidence that is before it: *Hassan v. Canada (Minister of Employment and Immigration)*, (1992), 147 N.R. 317, [1992] F.C.J. No. 946 (F.C.A.). That said, the more important the evidence that is not specifically mentioned and analyzed in the tribunal's reasons, the more willing the Court may be to infer that the tribunal made an erroneous finding of fact without regards to the evidence: *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, (1998) 157 F.T.R. 35 at paras.14-17, [1998] F.C.J. No. 1425.

[9] In this case there was highly probative evidence that directly contradicted the judge's finding that Ms. Khoreva had satisfied the *Re Pourghasemi* physical presence test. The failure of the Citizenship Judge to come to grips with this evidence means the decision approving Ms. Khoreva's application for Canadian citizenship lacks the transparency, justification and intelligibility required of a reasonable decision.

[10] This finding is sufficient to dispose of this application. I will, however, address Ms. Khoreva's submissions so that she may better understand why the Citizenship Judge's decision is being set aside.

[11] Ms. Khoreva explained to me that she had done her best to be accurate in her citizenship application, and that she had been mistaken when she stated that she had been outside of Canada for 364 days during the relevant period. She says that she did not intend to mislead citizenship officials, and that she had corrected her error when she completed her Residence Questionnaire, correctly stating that she had been outside of Canada for 368 days during the period in issue. Ms. Khoreva also stated that had she been aware of the number of days that she had actually been away from Canada, she would have simply waited another week before filing her citizenship application.

[12] I accept Ms. Khoreva's statement that she had not intended to mislead anyone in relation to her application for Canadian citizenship, and I have sympathy for the position in which she now finds herself. However, once the Citizenship Judge chose to apply the physical presence test for residence, Ms. Khoreva was required to establish that she had in fact been physically present in Canada for at least 1095 days during the four-year period immediately preceding her application for citizenship. She admitted in her Residence Questionnaire that she had been outside of Canada for 368 days during this period, and the Citizenship Judge failed to consider this evidence. This means that his decision cannot stand.

II. Conclusion

[13] For these reasons, the application for judicial review is granted. I agree with the parties that the case is fact-specific, and does not raise a question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed,
and the matter is remitted to a different Citizenship Judge for re-determination.

"Anne L. Mactavish"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-565-15

STYLE OF CAUSE: THE MINISTER OF CITIZENSHIP AND
IMMIGRATION v YANA KHOREVA

PLACE OF HEARING: TORONTO, ONTARIO

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JUDGMENT AND REASONS: MACTAVISH J.

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