Federal Court  Cour fédérale

Date: 20160122

Docket: T-619-15

Citation: 2016 FC 67

Ottawa, Ontario, January 22, 2016

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

RYEOME LEE

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review, brought by the Minister of Citizenship and Immigration, of the decision of a Citizenship Judge [the Judge] dated March 23, 2015 wherein it was held that the Respondent met the residency requirements for Canadian citizenship as set out in the *Citizenship Act*, RSC 1985, c-29 [Act].

[2] For the reasons that follow, this application is dismissed.

I. Background

[3] The Respondent is a citizen of the Republic of Korea. She entered Canada on May 6, 2006 as a permanent resident and applied for citizenship on November 4, 2010. To meet the residence requirement in section 5(1)(c) of the Act, she was required to prove that she resided in Canada for at least 1095 days in the four years prior to her application, from November 6, 2006 to November 4, 2010 [the Relevant Period].

[4] On her citizenship application, the Respondent declared she had absences from Canada totalling 226 days and was physically present in Canada for 1234 days during the Relevant Period. She states that her absences were for the purpose of visiting family in South Korea.

[5] On June 8, 2012, the Applicant was issued a Residence Questionnaire [RQ] due to discrepancies in her declared absences. In December 2012, she consented to the disclosure of her history of recorded entries into Canada from Canada Border Services Agency [CBSA] and this information, contained in CBSA's Integrated Customs and Enforcement System [ICES] report, was provided to the citizenship officer, who requested a recalculation of the Applicant's physical residence.

[6] The reviewing officer indicated that the revised calculation reflected 386 days of absence, 1074 days of presence, and an overall shortfall of 21 days. As a result of this shortfall, credibility concerns surrounding the Respondent's disclosure of her trips outside Canada and the status of her business and property interests, her application was referred to a hearing before the Judge.

II. Impugned Decision

[7] In the decision, the Judge noted that the Respondent submitted that her trips to Korea were for the purpose of tending to her husband, taking care of relatives, attending her daughter's wedding and later to assist her daughter in the early stages of her pregnancy. The Respondent indicated that discrepancies in her stated absences could be attributed to the work of the agent hired to help her with her application. She also indicated that it was her intent to continue living in Canada, where she had made her home since 2006, and noted that she owned property in Canada and had recently purchased a condo for her son in Toronto.

[8] In relation to the Respondent's failure to mention that she owned property in Korea, she explained at the hearing that the property was in her husband's name and that this was normal practice in Korea. The Judge found that this investment property did not present an obstacle to her application.

[9] The Judge also considered the absence of the Respondent's husband and daughter from Canada but found her explanation to be forthright, clear and credible. The husband had remained in Korea to tend to the family business and the daughter, although living with her Canadian husband in Korea, planned to eventually move back to Canada.

[10] Another concern was the Respondent's self-identification as "homemaker" on her application, as it contradicted the information on her RQ that she had worked for six months at a fast-food restaurant in Ontario. The Judge found that these occupations were not mutually

exclusive and that the Respondent's testimony was credible. Similarly, the Judge found her explanations in her testimony regarding her business income from Korea and ability to demonstrate financial self-sufficiency to be credible.

[11] Regarding the Respondent's undeclared absences, the Judge accepted her explanation that her reliance on a third party agency contributed to the failure to report this information. The Judge also found that the Respondent made an effort to correct her absences once the citizenship officer invited her to update her on-line calculation of absences.

[12] Having nevertheless found that the Respondent fell short of the legal requirement for physical presence to the extent of 21 days, the Judge applied the test prescribed by *Papadogiorgakis, Re*, [1978] 2 FC 208 [*Papadogiorgakis*], which recognizes that a person can be resident in Canada, even while temporarily absent, if he or she maintains or centralizes his or her ordinary mode of living in Canada. After considering the activities of the Respondent, the Judge found that during the Relevant Period, she consistently returned to her home in Canada, following her visits to Korea or driving her daughter to university in the United States, where she resumed normal activities such as English language classes and participation in her church.

[13] The Judge concluded that the Respondent did settle into her life in Canada and maintained an ordinary mode of living as homemaker and mother, who supported her young adult children during their studies in Canada and the US. Her son, now a Canadian citizen, works and lives in Canada, and her husband had re-joined her to live in the family home. The

Respondent had accordingly demonstrated that her ordinary mode of living was in Canada, as a result of which her application for citizenship was approved.

III. Issues and Standard of Review

[14] The Applicant's position is that the Judge erred in misapplying the test prescribed by *Papadogiorgakis* to overcome the shortfall in the required days of physical presence in Canada during the Relevant Period.

[15] The Applicant submits that a Judge's determination as to whether a person meets the residency requirement in the Act is a question of mixed fact and law which is reviewable under the reasonableness standard. I concur that this is the applicable standard of review (see *El-Khader v Canada (Minister of Citizenship & Immigration)*, 2011 FC 328 at paras 8-10), and I consider the issue in this application to be whether the Judge's decision was reasonable.

IV. Submissions of the Parties

A. *The Applicant's Position*

[16] The Applicant submits that, in determining whether an applicant for citizenship has established residency by employing the *Papadogiorgakis* test, a citizenship judge must as a first step decide whether the applicant established a residence in Canada and only then move to the second step of determining whether that residency meets the required number of days. The Applicant's position is that the Judge in this case erred in failing to consider whether residency was established.

[17] The Applicant also takes the position that the Judge's finding that the Respondent satisfied the *Papadogiorgakis* test was unreasonable as unsupported by the evidence, because the majority of the Respondent's family were not present in Canada and the Judge relied on passive evidence. These submissions are canvassed in more detail under my Analysis below.

[18] Finally, the Applicant submits that the Judge erred in dismissing various credibility concerns, which are again described in more detail under my Analysis below.

B. *Respondent's Position*

[19] The Respondent did not file written representations but appeared at the hearing through counsel, who made brief oral submissions. In response to the Applicant's argument that the Judge did not as a first step make the required threshold determination whether the Respondent had established a residence in Canada, the Respondent does not dispute that this is required but argues that it was implicitly answered in the decision.

[20] On the subject of credibility, the Respondent emphasized that mistakes can be made in the course of the complex process of applying for citizenship, particularly given language barriers.

V. Analysis

A. *Establishment of Residence in Canada*

[21] The Respondent does not dispute, and I accept, that there is a requirement, as a first step in consideration whether a person has met the residency requirements for Canadian citizenship under the Act, to determine whether residence has been established. Although expressed in the context of using the test in *Koo (Re)*, [1993] 1 FC 286 (TD), rather than the *Papadogiorgakis* test, the explanation of Justice O'Reilly at paragraph 21 of *Canada (Minister of Citizenship & Immigration) v Udwadia*, 2012 FC 394 is applicable:

> [21] In my view, the issue of residency involves the application of a two-step test. The judge must first decide whether the applicant has established a residence in Canada. If so, the next question is whether the applicant has met the required total days of residence. The analysis in *Koo*, above, applies to the second step.

[22] The Applicant argued at the hearing that the Judge was required to answer the question in the first step explicitly. However, this Court has held that this determination can be implicit in the citizenship judge's decision. At paragraph 18 of *Canada (Citizenship and Immigration) v Khan*, 2015 FC 1102, Justice Locke stated as follows:

> [18] It is not disputed that before arriving at the step of calculating the number of days spent in Canada, it must first be determined whether the respondent has established her residence in Canada: *Ahmed v Canada (Citizenship and Immigration)*, 2002 FCT 1067 [*Ahmed*] at para 4. However, no authority has been cited that this determination must be explicit. I am not satisfied that it is unreasonable that this determination be implicit. The possibility that it be implicit seems to be supported by the decision of Justice Yves de Montigny in *Boland v Canada (Citizenship and Immigration)*, 2015 FC 376 at para 22, on the ground that the citizenship judge continued calculating the number of days of presence in Canada:

> In the case at bar, it must be presumed that the Citizenship Judge was prepared to accept that the Applicant had established residence on the day of landing, otherwise there would have been no reason to determine whether the Applicant's residency satisfied the statutorily prescribed number of days.

[23] In the present case, it is not necessary to rely on a presumption that the Judge answered the first question simply based on the fact that she proceeded to consider the second question. Rather, I consider the answer to the first question to be implicit in the Judge's analysis commencing with paragraph 29 of her decision. At the beginning of paragraph 29, the Judge refers to the Applicant having come to Canada in 2006 and states she has resided in Ontario and Nova Scotia. The Judge then undertakes an analysis of the degree to which she had maintained her ordinary mode of living in Canada during the Relevant Period. I consider this analysis and the resulting conclusion to represent determinations by the Judge both that the Respondent had established residence in Canada by the commencement of the Relevant Period and that she maintained that residence through the Relevant Period.

B. *Whether the Evidence Supports the Judge's Conclusion*

[24] The Applicant takes the position that the *Papadogiorgakis* test requires more than only maintaining a physical home in Canada during absences. In order to satisfy this test, the Respondent had to demonstrate an established residence and strong attachment to Canada, even during her absences away from Canada. It is submitted that the Judge failed to consider the impact of the Respondent's ties outside Canada, including that the majority of the Respondent's family was not present in Canada during the Relevant Period. While her visits to her family are

understandable, this does not represent evidence that she centralized her mode of living in Canada.

[25] The Applicant notes that the Judge had focused on the return of the Respondent's husband to Canada and the fact that they have a residence in Bedford, Nova Scotia but argues that these are irrelevant considerations, as they fall outside the Relevant Period.

[26] The Applicant also submits that the Judge erred in relying on passive indicia of residence, specifically her maintaining a residence and paying related bills, as these do not demonstrate a centralized mode of living in Canada. She was not employed in Canada, the letter from her Church contained little detail as to her involvement, and the statement that she is active in her community of Bedford was vague and irrelevant because she did not move to Bedford until after the Relevant Period.

[27] I find that the Applicant's submissions on these points represent a request that I re-weigh the evidence, which is not the Court's role. It is clear from the Judge's decision that she was aware of the fact that the Respondent's husband did not move to Canada until 2010 and that her daughter pursued her studies in the United States. The Judge nevertheless found the required attachment to Canada based on factors such as the extent of her physical presence, her son's establishment in Canada, her maintaining a home and bank accounts, and her pursuit of English studies and church activities. I read the Judge's reference to the Respondent's visits to her husband and daughter not as themselves supporting evidence of attachment to Canada but as

representing reasons for her absence from Canada which do not detract from the extent of her attachment.

[28] While the Applicant takes issue with the Judge's reliance on passive indicia and her references to connections that post-date the Relevant Period, I do not consider the Judge's reliance on these factors to be sufficient to make her decision unreasonable. While a different decision-maker might have reached a different conclusion based on the evidence before the Judge, I do not find the arguments raised by the Applicant to take the Judge's decision outside the range of acceptable outcomes.

C. *Credibility Concerns*

[29] The Applicant submits that the Judge erred in dismissing credibility concerns related to the undeclared absences, failure to accurately report her business in Korea and failure to document her employment. Specifically, the Judge failed to consider that no third party agency was previously mentioned by the Respondent in her application. The Applicant argues that there was a significant discrepancy in the number of absences initially reported and the Judge should have made further inquiries. Similarly, the failure to accurately report her business in Korea should have also been further investigated. Finally, the Judge indicated there was no credibility concern surrounding the Respondent's inconsistent employment reporting, even though there was no explanation provided.

[30] I do not find any of these arguments to represent a basis for interference with the Judge's decision. With respect to the undeclared absences, the Judge turned her mind to the concern and

concluded that the Respondent's explanation was acceptable. While the Applicant suggests additional inquiries the Judge might have made or possible inconsistencies she might have considered, I do not consider these to undermine the reasonableness of the decision.

[31] The credibility concern surrounding the sale of the Respondent's business relates to a lack of explanation of why the Respondent originally reported its sale in 2006 and later explained that it had not been sold until 2009 or 2010 and that her husband had managed it in the meantime. The concern surrounding the Respondent's inconsistent reporting of her employment relates to the fact that she identified herself as a homemaker in her original application and later in her RQ identified 6 months of employment at Subway restaurant. I do not consider these concerns to represent a basis for interference with the decision. The Judge was satisfied that she correctly understood the facts - that the Korean business was maintained until 2009 and 2010 and that the Respondent did have 6 months of Canadian employment, which latter point would of course favour the Respondent's position.

[32] At the hearing of this application, the Applicant's counsel explained that her argument on credibility is based not just upon uncertainty surrounding the accuracy of the Respondent's evidence but also on the position that these credibility concerns show a lack of candour on the part of the Respondent. However, as with the undeclared absences, the Judge turned her mind to these issues and was left without residual concerns. Moreover, I do not consider the impugned points to be sufficiently material to the decision to represent a basis to conclude that it is outside the range of acceptable outcomes.

VI. Conclusion

[33] I therefore find no basis to conclude that the Judge's decision is unreasonable and must dismiss this application for judicial review. Neither party proposed a question of general importance for certification for appeal, and neither requested costs. As such, no question will be certified and no costs awarded.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is dismissed without costs. No question is certified for appeal

"Richard F. Southcott"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-619-15
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION v RYEOME LEE
PLACE OF HEARING:	HALIFAX, NOVA SCOTIA
DATE OF HEARING:	JANUARY 12, 2016
JUDGMENT AND REASONS:	SOUTHCOTT, J.
DATED:	JANUARY 22, 2016

APPEARANCES:

Melissa Chan	FOR THE APPLICANT
Brian Church	FOR THE RESPONDENT

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada Halifax, Nova Scotia	FOR THE APPLICANT
Brian Church Walker, Dunlop Halifax, Nova Scotia	FOR THE RESPONDENT