Federal Court  Cour fédérale

Date: 20160122

Docket: T-813-15

Citation: 2016 FC 65

Ottawa, Ontario, January 22, 2016

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

TSAI CHUAN LIAO

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 April 20, 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 and her husband are nationals of Taiwan. The Respondent applied for Citizenship on October 26, 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 time period from February 3, 2007, when she received permanent residence, to October 26, 2010 when she applied for citizenship [the Relevant Period].

[4] The Respondent's husband, who has qualified as an acupuncturist in Canada, supports her and their children financially, although in recent years she has worked at a rental property they purchased in Halifax. During the Relevant Period, the Respondent travelled to Taiwan on multiple occasions to care for family members who were critically ill. As a result, she declared more time out of Canada than in and was referred to a hearing with the Judge. She initially declared 703 days of presence and 658 days of absence on her application. The reviewing agent revised these calculations to reflect 692 days of absence and an overall shortfall of 427 days in the Relevant Period.

II. Impugned Decision

[5] In deciding whether the Respondent satisfies the residence requirement under paragraph 5(1)(c) of the Act, the Judge used the test prescribed in *Re Koo*, [1993] 1 FC 286 [*Koo*]. The Judge noted that this test, which does not require physical presence for the whole 1095 days, can be articulated as whether Canada is the place where the applicant regularly, normally or customarily lives or whether Canada is the country in which the applicant has centralized his or

her mode of existence. The Judge identified the following six questions that assist in this determination.

> (1) Was the individual physically present in Canada for a long period prior to recent absences which occurred immediately before the application for citizenship?

[6] Although the Respondent was not in Canada for a long period prior to her first absence, the Judge concluded that her absence was necessitated by an emergency situation. Specifically, the absences were dictated by the poor health of her father and father-in-law and by her husband's inability to leave his profession and certification process required for his new career in Canada.

> (2) Where are the applicant's immediate family and dependents (extended family) resident?

[7] The Respondent's husband and children live in Halifax. The children are in university and reside in an apartment building which the family purchased in 2011. Her mother lives in Nanto and her father-in-law lives in Taipei. A sister lives in Toronto and has two children who are also Canadian.

> (3) Does the pattern of physical presence in Canada indicate a returning home or merely visiting the country?

[8] The Judge concluded that the Respondent's pattern reflects Canada as home, as she returned to Canada following her care-giving duties in Taiwan.

> (4) What is the extent of 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.

[9] While noting that the Respondent had a significant shortfall of physical presence, the Judge concluded these were absences required by the needs of her family, including her husband whose work prevented him from leaving Canada. Even during the extensive absences to care for her family, she still returned to Canada. The Judge found that the Respondent's travel pattern indicates that her deemed residence is in Halifax.

> (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?

[10] The Judge found that the pattern of travel indicates that her absence was caused by a temporary situation brought on by the poor health of her parents and father-in-law.

> (6) What is the quality of the connection with Canada; is it more substantial than that which exists with any other country?

[11] The Judge found that the quality of the Respondent's connection with Canada is more substantial than that which exists with Taiwan or any other country and concluded Canada was her customary home.

[12] The Judge concluded that Canada is the place where the Respondent regularly, normally or customarily lives and has centralized her mode of existence.

III. Issues and Standard of Review

[13] The Applicant's position is that the Judge erred in applying the test for residency and the application of the *Koo* factors to overcome the significant shortfall of required days of physical presence in Canada.

[14] The Applicant submits that a citizenship 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 Citizenship Judge's decision was reasonable.

IV. Submissions of the Parties

A. *The Applicant's Position*

[15] The Applicant submits that the Judge erred in the application of the *Koo* factors. The Applicant argues that justification for absences is not the test under *Koo*. The Applicant relies on *Canada (Minister of Citizenship and Immigration) v Olafimihan*, 2013 FC 603 [*Olafimihan*], where a citizenship judge allowed the application despite absences and this Court overturned the decision, on the basis that it was an error to focus on the justification for absences for business reasons.

[16] The Applicant then raises concerns (canvassed in more detail below) with respect to the Judge's findings in relation to the individual *Koo* factors. However, the principal basis for the challenge to the Judge's decision is the Applicant's argument that the Judge failed to make findings on each factor and then balance the positive findings against the negative ones. The Applicant relies on Justice Mosley's decision in *Canada (Minister of Citizenship and Immigration) v Ojo*, 2015 FC 757 [*Ojo*], where a citizenship judge's decision to grant citizenship was set aside for failure to conduct this analysis.

B. *Respondent's Position*

[17] The Respondent argues that, in applying the *Koo* factors, citizenship judges must examine the reasons for absence and are required to consider justification even in the case of extreme and prolonged absences from Canada (see *Badjeck v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1301). In the case at hand, the Respondent's justification for absence is supported by undisputed evidence, and her credibility is not challenged. The Applicant is merely impugning the weight accorded by the Judge to the Respondent's justification. The Respondent refers to cases with similar facts to the case at hand where absences were justified by caring for ailing family members.

[18] The Respondent also submits that her absences from Canada were an unavoidable obligation, as members of her extended family were ill and needed care. She assumed that obligation so that her husband and children could continue with their work and studies and argues that the decision to do so should not be held against her.

[19] In response to the Applicant's reliance on *Olafimihan* and *Ojo*, the Respondent argues that those decisions are distinguishable as they involved absences for business or employment reasons and cannot be compared to absences to provide care, particularly given the ultimately temporary nature of caring for aging family members. The Respondent also notes that, at paragraph 34 of *Ojo*, Justice Mosley referred to the ultimate purpose of the *Koo* test being to evaluate whether a person has a sufficiently strong connection to Canada to justify a grant of citizenship. She argues that this analysis was conducted in this case, that the Judge did canvas all *Koo* factors including the negative ones and that, even though the Judge did not expressly refer to balancing those factors, the decision falls within the range of acceptable outcomes required by the reasonableness standard of review.

V. Analysis

[20] I have no difficulty concluding that the Respondent's decision to assume the obligation to care for members of extended family, and thereby permit her husband and children to pursue their work, studies and integration into Canadian society, is a laudable one. However, as submitted by the Applicant, whether the Respondent's absences from Canada were justified is not the applicable test. The question for my consideration, in assessing the reasonableness of the decision, is whether the applicable test prescribed by *Koo* has been properly applied by the Judge and whether the decision falls within the range of acceptable outcomes.

[21] I have first considered the concerns that the Applicant has raised with respect to the Judge's findings in relation to the individual *Koo* factors and do not find that any of these concerns would justify interference with the decision.

> Factor 1 – Was the individual present in Canada for a long period of time prior to recent absences which occurred immediately before the application for citizenship?

[22] The Applicant argues that the evidence does not favour a positive finding on this factor. While I agree with this, I do not read the Judge's decision as making a positive finding. Rather, she acknowledges that the family illnesses became an issue soon after the Respondent's landing in 2007, such that she landed on February 3rd and went to Taiwan on February 23rd. I do not read the Judge's subsequent reference to the absence being necessitated by the health of family members as suggesting the Judge considered this factor to be a positive one.

> Factor 3 – Does the pattern of physical presence in Canada indicate a returning home or merely visiting the country?

[23] The Applicant argues that the Judge's positive finding on this factor is not supported by the evidence upon which the Judge relies, being the ICES report, her passport history and her testimony that she returned to Canada following her care-giving duties in Taiwan. The Applicant's position is that this evidence made it difficult for the Judge to determine the purpose of her returns to Canada. However, I do not consider it unreasonable for the Judge to have concluded that the pattern of travel, as evidenced by the ICES report and passport history, demonstrated that she returned to Canada when her care-giving duties had been discharged, without requiring further evidence as to the purpose of her travel other than her testimony.

[24] The Applicant also takes issue with the Judge relying on the fact that the Respondent owns property in Canada, without considering that she also owns property in Taiwan, and with

the fact that the Respondent's occasional incorporation of vacation time into her trips to Taiwan did not influence the Judge. I find nothing unreasonable about the Judge's analysis of this factor. The Judge was aware of the condo owned in Taiwan, which was referred to in the analysis under factor 6, and her analysis under factor 3 refers to the vacation time in Taiwan. The Judge was under no obligation to refer to every relevant piece of evidence in considering each individual factor (*Hassan v Canada (Minister of Employment & Immigration)*, [1992] FCJ No 946 (FCA)). I consider the Applicant's position on this factor to be asking for a re-weighing of the evidence, which is not the Court's role.

[25] The Applicant refers to the explanation in *Olafimihan* of the difficulty in overcoming a presumption that an individual is just visiting when he or she has a physical presence of less than 50% of what is required. However, I do not read this case as precluding a positive finding on factor 3 in circumstances such as those in the present case, particularly where the family home and immediate family members are in Canada.

> Factor 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.

[26] The Applicant argues that this factor was almost completely ignored and that a finding that this factor is in the Respondent's favour is not reasonable. As with factor 1, I do not read the Judge's reference to the absences being necessitated by the health of her family members as suggesting the Judge considered this factor to be a positive one. The Judge acknowledges that the Respondent has a significant shortfall of physical presence in the amount of 427 days.

> Factor 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?

[27] The Applicant argues that the Judge should have required medical documentation to support the contention that the Respondent's father-in-law was ill and requiring care between 2007 and 2010 and notes that, even after the health of the Respondent's father-in-law stabilized, her travelling pattern did not change according to trips declared on her Residence Questionnaire.

[28] I do not consider it unreasonable for the Judge to have accepted the Respondent's explanation of the reasons for her absences prior to 2010, notwithstanding that the corroborating medical documentation relates only to his diagnoses in that year. I also agree with the Respondent's submissions that her ongoing care for aging family members, a fact which was acknowledged by the Judge, does not preclude a finding that this represents a temporary situation.

> Factor 6 – What is the quality of the connection with Canada: is it more substantial than that which exists with any other country?

[29] The Applicant submits that the Judge's reliance on the apartment building is an error, as the building was purchased in April 2011 and therefore falls outside the Relevant Period. Similarly, her daughter's intention to pursue education in the United Kingdom cannot contribute to demonstrating the quality of the Respondent's connection to Canada. The Applicant also argues that there is no independent corroboration of the Respondent's involvement with the Taiwanese and Chinese Society on which the Judge relies, and that the fact the Respondent owns

property in both Canada and Taiwan precludes a finding that she has a more substantial connection to Canada.

[30] Overall, I consider these submissions to be a request to have the Court re-weigh the evidence. Taking into account the various point the Judge relies on in reaching her conclusion on this factor, I do not consider the conclusion to be unreasonable, notwithstanding that not all the facts recited by the Judge relate to connections with Canada within the Relevant Period. With respect to the condo in Taiwan, I note that the Judge draws a distinction between the family home in Canada and the condo, which is used for short term stays when visiting Taiwan.

B. *Balancing of Koo Factors*

[31] Having found that none of the concerns that the Applicant has raised with respect to the Judge's findings in relation to the individual *Koo* factors would justify interference with the decision, I have therefore considered the Applicant's argument that the Judge failed to conduct the required balancing of these factors. The Applicant relies on the reasoning of Justice Mosley in *Ojo*. The relevant portion of that decision is found in paragraphs 32 to 34 as follows:

> [32] I am also of the view that the Citizenship Judge applied the residence test unreasonably at the second stage, when evaluating the strength of Mr Ojo's connection to Canada. The *Koo* test requires a Citizenship Judge to make findings in relation to six factors and then to balance the positive findings against the negative ones. In this case, the Citizenship Judge did not do this. By and large, she simply explained the justifications for Mr Ojo's absences without any balancing.
>
> [33] My colleague Justice Roy criticized similar reasoning in *Canada (Citizenship and Immigration) v Olafimihan*, 2013 FC 603 at paras 23 and 29, where he wrote that:

> Considering the analysis done with respect to questions 1, 3 and 5, one is struck by the importance put by the Citizenship Judge on the reasons for those absences, as if that could constitute an adequate justification or proxy for actually continuous residency and living in Canada before one can apply to become a citizen of this country.
>
> [...]
>
> The picture that emerges from the examination of the six factors in this case is one where the Citizenship Judge substituted the requirements for physical attachment, as per paragraph 5(1)(c) of the Act, for a justification of absences on the basis of business needs. By not properly addressing criteria devised in *Koo*, the Citizenship Judge creates in effect a different test. No weight is given to criterion 4 and criteria 1, 3 and 5 are in effect ignored. That is hardly satisfying the test.
>
> [34] Like Justice Roy, I conclude that this approach distorts the *Koo* test. The ultimate purpose of this 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.

[32] The factors that obviously weigh against the Respondent are 1 and 4, where the Judge noted that the Respondent was not in Canada for a long period prior to her first absence and that the Respondent has a significant shortfall of physical presence in the amount of 427 days. In relation to both these factors, the Judge refers to the Respondent's absences being necessitated by the need to care for extended family members and the inability for her husband or other family to assume this role. However, the Respondent has correctly submitted that consideration of the reasons for absences is an appropriate and required part of the *Koo* analysis (see *Canada (Minister of Citizenship and Immigration) v Camorlinga-Posch*, 2009 FC 613). I do not read the

Judge's decision as representing an abandonment of the *Koo* test in favour of an evaluation whether the absences were justified, as was the concern in *Ojo*.

[33] At paragraph 34 of *Ojo*, Justice Mosley remarks 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. In my view, this is the evaluation that the Judge conducted. This is evident in the analysis under factor 4, where she acknowledged that the Respondent had a significant shortfall of 427 days but then noted the reason for the absences and the fact that even during the extensive absences, the Respondent still returned to Canada to spend time with her husband and children. The Judge followed this analysis with a conclusion that the circumstance of her family and her travel pattern indicate the Respondent's deemed residence to be in Canada.

[34] While this analysis and conclusion is not conducted as a discrete and explicit balancing exercise at the conclusion of the findings on all the factors, it is my view that such a process is implicit in this aspect of the decision. It follows the findings on factors 1 and 4, which are those that are negative for the Respondent, and takes into account the lack of physical presence, the reasons arising from the needs of the family, the fact that the Respondent's husband and children are in Canada, and the travel pattern as representing returns to Canada to be with her husband and children. Factors 5 and 6 favour the Respondent. I accordingly see no error in the Judge not revisiting the analysis after reviewing factor 6, before reaching her conclusion that Canada is the place where the Respondent regularly, normally or customarily lives and has centralized her mode of existence.

[35] Overall, I find the Judge's approach to be consistent with the ultimate purpose of the *Koo* test, being to evaluate whether a person has a sufficiently strong connection to Canada to justify a grant of citizenship, and consider the conclusion to be within the range of acceptable outcomes and reasonable.

VI. Conclusion

[36] This application will accordingly be dismissed. Neither party requested certification of a question of general importance for appeal.

[37] The Respondent has sought costs in the nominal amount of $1000. She refers to paragraph 48 of *Canada (Minister of Citizenship and Immigration) v Suleiman*, 2015 FC 891 [*Suleiman*] and acknowledges that costs in citizenship matters are to be awarded only where merited by special circumstances. However, she argues that cost are merited because the Applicant had originally asserted, but then withdrew a few days before the hearing, an argument that the Judge's decision should be set aside for failing to consider the threshold question of whether residency had been established, before moving to the analysis whether it was maintained though the Relevant Period. The Applicant did not seek costs in this matter and submits that the original argument on threshold residency was based on the applicable jurisprudence and that the decision not to pursue this argument should not merit a costs award.

[38] I have considered these arguments and do not consider these circumstances to fall within any of the categories prescribed by paragraph 48 of *Suleiman* as meriting a costs award. I therefore decline to make an order as to costs.

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-813-15
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION v TSAI CHUAN LIAO
PLACE OF HEARING:	HALIFAX, NOVA SCOTIA
DATE OF HEARING:	JANUARY 13, 2016
JUDGMENT AND REASONS:	SOUTHCOTT, J.
DATED:	JANUARY 22, 2016

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