Federal Court  Cour fédérale

Date: 20160415

Docket: T-1716-15

Citation: 2016 FC 420

Halifax, Nova Scotia, April 15, 2016

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

JIAN DU

Respondent

JUDGMENT AND REASONS

[1] This is an appeal by the Minister of Citizenship and Immigration, the Applicant, of the decision of a Citizenship Judge, dated July 17, 2015, in which it was determined that Dr. Jian Du Caines, the Respondent, met the s 5(1)(c) residency requirement of the *Citizenship Act*, RSC 1985, c C-29 ("*Citizenship Act*").

Background

[2] The facts are largely undisputed and were set out in the decision of the Citizenship Judge. The Respondent is a citizen of China who came to Canada in 2002 to pursue doctoral studies in atmospheric physics at the University of New Brunswick ("UNB"). She became a permanent resident of Canada in September 2006. She met her future husband, a Canadian citizen, in September 2002 and they married on July 17, 2007, in Nova Scotia, where his family resides. She worked as a research scientist at UNB from January 2008 until June 2008 and obtained her Ph.D in May 2008. On June 27, 2008 she began a three year post-doctoral fellowship at the University of Cambridge in the United Kingdom ("UK"), her husband joined her there in October 2008. On August 26, 2009, the Respondent's son was born in the UK. In May 2011, upon the conclusion of her post-doctoral fellowship, the Respondent and her family moved back to Canada. On July 26, 2011, the Respondent submitted her citizenship application.

[3] The Respondent claims that her search for jobs in Canada in 2011 was unsuccessful due to reductions in funding to the Canadian Foundation for Climate and Atmospheric Sciences. She applied for ten academic positions in Canada from October 2010 to December 2012, but none were successful. As a result, she accepted a teaching position at the University of Louisville in Kentucky, United States of America ("USA") to begin in August 2011. Her husband and son remained in Windsor, Ontario and the Respondent traveled between there and Louisville every ten days and on holidays to be with them. In April 2012 she moved back to Windsor but, again failing to find employment in Canada, accepted a re-appointment for a second term at the University of Louisville. In August 2012 she moved back to Kentucky, this time bringing her

family with her. The Respondent was given a three year temporary work visa in the USA, and her husband a dependent visa without authorization to work.

[4] In September 2014 the Respondent successfully completed her citizenship test and on July 17, 2015 she appeared before a Citizenship Judge at which time she provided additional information to establish residency in Canada. On September 15, 2015, the Citizenship Judge granted the Respondent's citizenship application.

Decision Under Review

[5] The Citizenship Judge noted that the Respondent had applied for citizenship on July 26, 2011 and, therefore, that the relevant period for calculating her residency in Canada under s 5(1)(c) of the *Citizenship Act* was from July 26, 2008 to July 26, 2011 ("relevant period"). Further, that the Respondent had declared 1460 days of presence and 1066 days of absence, for a total of 394 days of physical presence in Canada during the relevant period. This resulted in a shortfall of 701 days. The Citizenship Judge then reviewed the Respondent's submissions regarding her absences and the concerns raised by an immigration officer in the File Preparation and Analysis Template ("FPAT").

[6] In assessing the Respondent's application, the Citizenship Judge applied the test from *Koo (Re)*, (1992) 59 FTR 27 [*Koo*] and framed her analysis around its six guiding questions. Having done so, the Citizenship Judge concluded that the facts and the evidence fit within the *Koo* test, that the Respondent had met her burden of proof and, in spite of her temporary absence

to attend the University of Cambridge and her shortfall of 701 days, that she had centralized her mode of existence in Canada and met the residency requirements of the *Citizenship Act*.

Relevant Legislation

Citizenship Act

Grant of citizenship	**Attribution de la citoyenneté**
5 (1) The Minister shall grant citizenship to any person who	5 (1) Le ministre attribue la citoyenneté à toute personne qui, à la fois :
(a) makes application for citizenship;	a) en fait la demande;
…	…
(c) is a permanent resident within the meaning of subsection 2(1) 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 of residence in Canada calculated in the following manner:	c) est un résident permanent au sens du paragraphe 2(1) de la Loi sur l'immigration et la protection des réfugiés et a, dans les quatre ans qui ont précédé la date de sa demande, résidé au Canada pendant au moins trois ans en tout, la durée de sa résidence étant calculée de la manière suivante:
(i) for every day during which the person was resident in Canada before his lawful admission to Canada for permanent residence the person shall be deemed to have accumulated one-half of a day of residence, and	(i) un demi-jour pour chaque jour de résidence au Canada avant son admission à titre de résident permanent,
(ii) for every day during which the person was resident in Canada after his lawful admission to Canada for permanent residence the person shall be deemed to have	(ii) un jour pour chaque jour de résidence au Canada après son admission à titre de résident permanent;

accumulated one day of residence;

… …

Issue and Standard of Review

[7] The Applicant submits that the sole issue is whether the Citizenship Judge erred in the application of the *Koo* test for residency.

[8] It is well established that the reasonableness standard applies to a citizenship judge's determination on the residency requirement under s 5(1)(c) of the *Citizenship Act* (*Canada (Citizenship and Immigration) v Safi*, 2014 FC 947 at paras 15-16; *Canada (Citizenship and Immigration) v Jeizan*, 2010 FC 323 at para 12; *Farag v Canada (Citizenship and Immigration)*, 2013 FC 783 at paras 24-26; *Zhou v Canada (Citizenship and Immigration)*, 2013 FC 313 at para 10). Accordingly, the issue is whether the decision of the Citizenship Judge was reasonable.

Analysis

[9] The Applicant submitted that the determination of residency under s 5(1)(c) of the *Citizenship Act* is a two-part assessment. The first step requires a determination of whether the Respondent established a residence in Canada prior to or at the start of the relevant period (*Canada (Citizenship and Immigration) v Ojo*, 2015 FC 757 at para 25 [*Ojo*]). It is only after this threshold question has been answered that the Citizenship Judge should consider whether the Respondent's residency met the required number of days under one of the three tests. While the Applicant initially submitted that the Citizenship Judge failed to consider this threshold question

and that this was a reviewable error (*Hao v Canada (Citizenship and Immigration)*, 2011 FC 46 at para 24 [*Hao*]), this was not pursued at the hearing.

[10] In my view, the Applicant was correct that the jurisprudence has established a two-part approach to the assessment of an applicant's residency under s 5(1)(c) of the *Citizenship Act* (see *Ojo* and *Hao*). However, the jurisprudence has also established that the first part of the test, the determination of whether residency has been established, need not be explicit and may be implied in a citizenship judge's reasons (*Ojo* at para 28; *Canada (Citizenship and Immigration) v Khan*, 2015 FC 1102 at para 18; *Canada (Citizenship and Immigration) v Lee*, 2016 FC 67 at paras 21-23 [*Lee*]).

[11] In this case, as in *Lee*, it is not necessary to rely on a presumption that the Citizenship Judge answered the threshold question simply based on the fact that she proceeded to consider the second question (*Boland v Canada (Citizenship and Immigration)*, 2015 FC 376 at para 22). That is because the Citizenship Judge's answer to the first part of the assessment is implicit in her decision. For example, she noted that: the Respondent came to Canada in 2002 to pursue her doctorate; she became a permanent resident on September 20, 2006; she married a Canadian Citizen in Canada in 2007; she had lived in Canada with limited interruptions during that period; her Residence Questionnaire reported only 112 days of absence prior to August 2006; and, that the FPAT indicated that she spent 2051 days in Canada before the relevant period. The Citizenship Judge specifically concluded that the Respondent was "present in Canada for a long period of time prior to her absence for studies in Cambridge". In my view,

this analysis and conclusion is an implicit determination that residency had been established prior to or at the start of the relevant period, thereby satisfying the first part of the assessment.

[12] As to the second part, the application of one of the three tests to determine whether the Respondent meets the required number of days of residency, the Applicant does not dispute the selection of the *Koo* test but submits that the Citizenship Judge erred in her application of four of the six *Koo* factors.

[13] The *Koo* factors are as follows:

1. Was the individual physically present in Canada for a long period 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 1,095 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;
6. What is the quality of the connection with Canada: is it more substantial than that which exists with any other country.

[14] The Applicant submits that the Citizenship Judge erred in her assessment of factors two, three, four and six and by making findings that are not supported by the evidence.

[15] In summary, the Applicant submits that the second factor cannot favour the Respondent. This is because there is an assumption in this factor that, if immediate family remains in Canada, this demonstrates a Canadian connection; in this case the Respondent's husband and son resided abroad with her during most of the relevant period. Further, the Citizenship Judge erred in basing her finding on a temporary period after the relevant period. The Applicant submits that the third factor was erroneously assessed because the Citizenship Judge focused on the Respondent's residency prior to and after the relevant period while ignoring evidence that the Respondent did not return to Canada during the majority of the relevant period. As to the fourth factor, the Applicant submits that the Citizenship Judge failed to consider the significance of the Respondent's physical absences, 701 days, and submits that the Citizenship Judge considered irrelevant items to mitigate the significance of the absence. Further, that emphasizing the reasons for absences as justification has been found to be an error (*Canada (Citizenship and Immigration) v Olafimihan*, 2013 FC 603 at para 23 [*Olafimihan*]).

[16] Finally, the Applicant submits that the Citizenship Judge erred in assessing the sixth factor. Despite the Citizenship Judge's finding of educational, employment and familial ties in Canada, the Applicant submits that the Respondent's connection with Canada is no greater than with other countries. While she had an educational relationship with Canada, she also had a similar relationship with China and the UK. Most of her employment in the relevant period was in the UK as a post-doctoral research fellow. The Respondent's immediate family have largely resided with her and, while her in-laws reside in Canada, this is insufficient to find a greater connection. The Applicant submits that rather than analyzing the evidence, which did not favour

the Respondent, the Citizenship Judge focused primarily on justifications for the Respondent's absence.

[17] I would note that the overriding concern in *Koo* has been described as whether the applicant "regularly, normally or customarily lives" in Canada or whether "he or she has centralized his or her mode of existence" in Canada (*Koo*; *Ojo* at paras 14 and 34) and that the ultimate purpose of the test is to evaluate whether a person has a sufficiently strong connection to Canada to justify a grant of citizenship, not to evaluate if the person left for valid reasons (*Ojo* at para 34). The six factors elaborated in *Koo* are not immutable tests, but are "questions that can be asked which assist in such a determination" (*Koo*). In short, a citizenship judge must balance positive and negative findings under the *Koo* factors in determining where the applicant centralized his/her existence or where he/she customarily lives (*Ojo* at para 32).

[18] That said, in *Canada (Minister of Citizenship and Immigration) v Nandre*, 2003 FCT 650, this Court found that the qualitative test is not easy to meet, as a connection to Canada would have to be quite strong for absences to count as periods of residency in Canada. However, I would also note the Court's commentary in *Hsu, Re,* (1994) 82 FTR 203 concerning the purpose of applying the qualitative test:

> ...the residency rule has been flexibly interpreted to provide some relief from the otherwise stringent physical presence in Canada requirement. It seems to me that it has also respected individual needs to minimize economic loss or to assure economic survival or to enhance career opportunities, all of these being elements of human existence and aspirations which certainly are in sync with Canadian values and which the *Citizenship Act* recognizes and endorses by way of all of its s. 5 provisions.

[19] There are some similarities between the present case and the facts in *Olafimihan* and *Ojo*, which are relied upon by the Respondent. Each of these cases involves significant shortfalls: 590 days in *Ojo*; 473 days in *Olafimihan*; and 701 in the present case. However, there are also significant distinctions. For example, in *Olafimihan*, Justice Roy found that the citizenship judge had implicitly determined that the respondent deserved citizenship, a form of assessment that was rejected in *Koo* (see *Koo at* paras 18-19). In my view, there was no such implicit determination in the present case. Further, Justice Roy found that the applicant was "never even close to satisfying the first factor", that is, being present prior to recent absences. In this situation the Respondent's prior presence of 2051 days, uncontested by the Applicant, clearly distinguishes her circumstances from *Olafimihan*. Justice Roy also noted in *Olafimihan* that the absences were caused by business endeavours abroad and were taken over numerous trips back and forth. Of note is Justice Roy's comment that "Presumably one ought not to be penalized for having been a student abroad or accepting temporary employment during the four years preceding the application". In this case the Citizenship Judge noted that the Respondent's absence, taken in one block from 2008 to 2011, was to attend the University of Cambridge and was related to a course of study abroad.

[20] *Ojo* is also distinguishable. There, the citizenship judge found that the respondent was present prior to the relevant period for one year and four months. However, Justice Mosley found that this was a factual error which likely affected the citizenship judge's view of the matter (*Ojo* at para 28) and that the threshold question had not been met. As to the second stage, Justice Mosley noted that, by arguing that the positive factors under each *Koo* factor were unreasonable, the Minister seemed to suggest that the record precluded a grant of citizenship. However, in

light of the deference which the Court must show to mixed findings of fact and law rendered by citizenship judges, he was not inclined to address those arguments as the legal errors that he had previously identified sufficed to overturn the decisions.

[21] In this case, like in *Ojo*, the Applicant carefully parses the Citizenship Judge's assessment of each of the disputed four *Koo* factors. However, the question is whether the evidence supports the Citizenship Judge's conclusion or if reviewable errors were made.

[22] I would note that the Citizenship Judge's reasons are thorough and discuss numerous facts under the *Koo* factors that evidence the Respondent's connection to Canada, including that: the Respondent's son and husband are Canadian citizens; the Respondent considers her husband and son to be her immediate family; they maintain contact with her husband's family who are all in Canada; she has not returned to China for over ten years; she has no family in the United States; the family returned to Canada immediately following her period of post-doctoral fellowship in the UK and she considered her post-doctoral work at the University of Cambridge to be an important addition to her professional resume; from the time of her arrival in Canada in 2002 she had limited departures until 2008 when she left for educational purposes; she spent 2051 days in Canada before the relevant period; she maintained professional contacts and memberships during her absence; her work in the United States commenced after the relevant period and was not considered by the Citizenship Judge to be a determining factor in considering her residency; she maintained a Canadian mailing address while working in the United States; she did not demonstrate a travel pattern to other countries during the relevant period; her absence

of 1066 days was taken in one block and was for the purpose of completing her post-doctoral research fellowship, a temporary course of study abroad as a graduate student.

[23] The Citizenship Judge concluded that while the absence appeared lengthy in comparison to the relevant period, it was reasonable in the circumstances. She also stated that she found the Respondent's testimony to be forthright and candid, that she had demonstrated an educational, familial and employment relationship with Canada and that her connection with Canada was more substantial than with any other country.

[24] The Applicant submits that the Citizenship Judge focused primarily on the Respondent's justifications for her absence. In my view, the Citizenship Judge clearly considered the Respondent's explanation for her absence, however, she based her decision on the Respondent's credibility and on the totality of the evidence regarding her connections to Canada. And, contrary to the Applicant's submissions, the Citizenship Judge was aware of the significance of the Respondent's 701 day absence, but in balancing the absence against other considerations, determined it was reasonable in the circumstances.

[25] I have considered the Applicant's able submissions but I am not convinced that the Citizenship Judge erred in applying the *Koo* factors or that she misapprehended or ignored evidence. In essence, what the Applicant asks is that this Court re-weigh the evidence or re-conduct the balancing undertaken by the Citizenship Judge, which is not its role (*Ojo* at para 23; *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at paras 19-33).

[26] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility of the decision making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 62 [*Dunsmuir*] at para 47; *Khosa v Canada (Citizenship and Immigration)*, 2009 SCC 12 at para 59). There may be more than one reasonable outcome. Put otherwise, the Court should only intervene if the decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and the law" (*Dunsmuir* at para 47).

[27] While in this matter it is possible that the evidence could support a different conclusion or that a different decision-maker might have balanced the factors differently, the Court must show significant deference to the findings of the Citizenship Judge (*Ojo* at para 23; *Lee* at para 28; *Idahosa v Canada (Minister of Citizenship and Immigration)*, 2013 FC 739 at para 20). In my view, the Citizenship Judge clearly explained how she applied the *Koo* test and her decision is justifiable, transparent and intelligible and falls within the possible, acceptable outcomes based on the unique circumstances in this case.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. There shall be no order as to costs.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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