Federal Court Cour fédérale

Date: 20160517

Docket: T-478-15

Citation: 2016 FC 551

Ottawa, Ontario, May 17, 2016

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

SYEDA IFFAT ZEHRA

Respondent

JUDGMENT AND REASONS

I. Background

[1] This is a judicial review, pursuant to section 22.1 of the *Citizenship Act*, RSC 1985, c C-29 [Act], of a decision by a Citizenship Judge [Judge] granting the Respondent citizenship after finding that she met the Act's residence requirements.

[2] The Respondent was born in Karachi, Pakistan on December 28, 1971. She came to Canada on December 17, 2004. She is married to a Canadian citizen and has three children who are also Canadian citizens. She applied for citizenship on November 1, 2008.

[1] In his decision, dated March 11, 2015 [Decision], the Judge identified the relevant period for the purposes of establishing residence as December 17, 2004 to November 1, 2008.

[2] The Judge then noted that the key issue, based on a referral pursuant to credibility concerns identified by a Citizenship Officer [Officer] in a File Preparation and Analysis Template [FPAT], was the number of days the Respondent had been resident in Canada. The Judge chose to assess the residency requirement pursuant to the quantitative test set out in *Pourghasemi, (Re)*, [1993] FCJ No 232 [*Pourghasemi*]. The applicable statutory provision, which has since been amended, read as follows:

> 5. (1) The Minister shall grant citizenship to any person who
>
> …
>
> (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:
>
> (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
>
> (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 accumulated one day of residence;

[3] As mentioned above, the Judge, in adjudicating the application request, chose to apply *Pourghasemi* and thus to engage in "a strict counting of days of physical presence in Canada" (*Afkari v Canada (Citizenship and Immigration)*, 2016 FC 421 at para 28). The Respondent had indicated that, over the relevant 1414 day period, she had been physically present in Canada for 1141 days, over and above the three years, or 1095 days, required by the Act. The Judge concluded that there were no inconsistencies and nothing in the documents before him to suggest that she had not acquired, as she claimed, 1141 days of physical presence in Canada during the relevant period. The Judge also noted that he found the Respondent forthright and credible. He concluded that the Respondent was physically present in Canada for more than the 1095 days required and thus, granted the Respondent's application for citizenship.

[4] The Applicant argues that the Judge erred in concluding that the Respondent had provided sufficient documentation to establish her physical presence in Canada during the relevant period and failed to adequately explain how the Respondent met the residency requirement under the Act.

II. Analysis

[5] This Court must review a citizenship judge's determination of whether an applicant has met the residency requirements of the *Act* on a reasonableness standard (*Canada (Citizenship and Immigration) v Abdulghafoor*, 2015 FC 1020 at para 15 [*Abdulghafoor*]). A decision is reasonable if it is justifiable, transparent, intelligible, and "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]). While the reasons issued for a decision need not

include "all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred", so long as they "allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the Dunsmuir criteria are met" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16 [*Newfoundland Nurses*]).

[6] The Applicant contends that the Judge's finding that the Respondent was physically present in Canada for 1141 days was not reasonable because a review of the documents that were before the Citizenship Judge indicates that he simply could not have arrived at that conclusion based on the evidence.

[7] I agree with the Applicant's argument. The Judge failed to demonstrate how the Respondent met the required amount of days necessary under the Act, either by any type of accounting or any other explanation as to how he arrived at his conclusion. This left serious gaps in the Decision, including the following:

(a) First, the Respondent declared six absences, though the documentary evidence could only confirm one. Confirmation may have come in the Respondent's oral evidence. Unfortunately, that is only speculation, as the reasons offer no explanation on this point.

(b) Second, while the Judge found that the Respondent's US-born child had entered Canada, there was no documentary evidence to confirm when this occurred. Again, this may have been confirmed orally, but this is left unsaid in the reasons. The Judge simply noted that a "Child born on 14 April 2008 was entered into Canada on her birth certificate and is now

Canadian citizen" (Application Record at page 8 [AR]). Presumably this statement was included to respond to the Officer's concerns around the timing of the child's entrance but it does not actually address those concerns in any way. The reader is left with a finding of fact that seems out of place and irrelevant to the ultimate conclusion.

(c) Third, and most notably, there were uncharacteristic and significant gaps in the Ontario Health Insurance Plan [OHIP] evidence that suggested a lengthier absence from Canada than the Respondent had claimed – for example, whereas the Respondent claimed an absence from Canada from April 4 to April 26, 2008, the gap in the Respondent's OHIP history ran from February 28 to July 27, 2008. The Judge simply stated, in contradiction with the record, that the "OHIP health record and history is in correlation to the Applicant's declared absences and no inconsistencies are noted" (AR at page 10). The lack of attention to this gap and others contributed greatly to the lack of clarity, precision, or intelligibility in the reasons and to my conclusion that this Decision was unreasonable.

[8] The law is trite that citizenship judges may choose the test they wish to apply when determining whether an applicant has met the residency requirements under the Act (*Hussein v Canada (Citizenship and Immigration)*, 2015 FC 88 at para 12). In choosing and applying a test, however, they must provide some kind of analysis as to why an applicant either qualifies or fails to qualify under the chosen test. Here, the latter analysis is absent: the judge simply stated that the Respondent met the physical residency threshold without providing any assessment to justify that conclusion or any explanation as to how the many gaps in the evidence could be reconciled with that conclusion.

[9] In terms of the oral evidence provided at the citizenship interview hearing, there is certainly nothing wrong with a citizenship judge relying on oral evidence. Citizenship judges are entitled to deference in their finding and weighing of evidence and they are far better positioned to determine the credibility of testimony than this Court is on review (*Martinez-Caro v Canada (Minister of Citizenship and Immigration)*, 2011 FC 640 at para 46).

[10] In this case, however, unlike in other matters I have decided recently (see, for instance, *Canada (Citizenship and Immigration) v Balogun*, 2016 FC 375 [*Balogun*]), the problem is not that the Judge may have relied on the oral evidence but rather that the Decision does not explain how the oral evidence overcame any of the numerous significant gaps and inconsistencies in the documentary evidence as identified through the FPAT. It isn't even clear if it was the oral evidence that played that role in the decision.

[11] I recognize that a citizenship judge does not have an obligation to explicitly address each inconsistency, or each piece of evidence, as per *Newfoundland Nurses*. For instance, this Court recently held in *Canada (Minister of Citizenship and Immigration) v Suleiman*, 2015 FC 891 at para 23 that "[a] decision-maker like a citizenship judge is deemed to have considered all the evidence on the record... A failure to mention an element of evidence does not mean that it was ignored or that there was a reviewable error".

[12] Having said that, a citizenship judge must provide, in making a decision, a minimally coherent and intelligible route by which they navigated the facts, chose a test, and reached a conclusion. This is especially true where the citizenship judge reaches a conclusion on a strict

quantitative test that is not supported by the available documentary evidence and may have relied on oral testimony given at a citizenship hearing, evidence that is not recorded and not made available to this Court upon review – a problem that I have been commented upon recently (*Balogun* at para 12).

[13] The notion of navigating to a cogent conclusion by a minimally coherent and intelligible route does not set an unduly high bar. In *Balogun*, for instance, I found that it was sufficient for a citizenship judge to state clearly in the reasons that an applicant had addressed any outstanding concerns in her oral testimony. Even a statement like this would have gone a long way towards providing the clarity and coherence necessary to render this decision reasonable, given the underlying facts in that case.

[14] Otherwise stated, despite the significant amount of deference afforded to citizenship judges in terms of fact-finding, weighing of evidence, determination of credibility, and adequacy of reasons, a citizenship decision must nonetheless remain justifiable, transparent, intelligible, and defensible in respect of the facts and law. As Justice Phelan noted in *Canada (Citizenship and Immigration) v Liu*, 2012 FC 1403, another judicial review of a citizenship decision:

> [9] With respect to the adequacy of reasons, while *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 [*Newfoundland Nurses*], has held that adequacy of reasons is not a stand alone grounds for review, inadequate reasons go to the root of "reasonableness" of a decision. The Court is, according to *Newfoundland Nurses*, required to find support for a decision in the record where it can. However, that does not mean the Court must guess as to the reasons or substitute its reasons for those of the decision-maker.

[15] This is particularly so when the judge has chosen to apply a quantitative residency test and the numbers do not add up. To find this Decision reasonable would require this Court to guess vis-à-vis the content of the Respondent's oral testimony, as to the extent to which it addressed the concerns identified by the Officer, and as to the extent it responded to the inadequacies of the documentary evidence, which the Applicant amply noted. This Decision contains precisely the kind of "significant unaddressed inadequacies which make it impossible to determine how the citizenship judge weighed the evidence, such as contradictions between the decision and the record" that Justice O'Keefe described in *Canada (Citizenship and Immigration) v Lee*, 2015 FC 1362 at para 37. Perhaps, for example, the Respondent's testimony clarified the number of days that she was absent from Canada in the relevant period. It is impossible, however, to determine if that is or is not the case from either the Decision itself or from the materials on the record.

III. Conclusion

[16] The contradictions between the available evidence, the reasons provided, and the conclusion reached are such that this decision is unreasonable, and this application for judicial review is accordingly granted.

IV. Judgment

[17] The judicial review is granted. There are no costs or certified questions.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The judicial review is granted;

2. There are no costs or certified questions.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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