Federal Court Cour fédérale

Date: 20160526

Docket: T-1959-15

Citation: 2016 FC 571

Ottawa, Ontario, May 26, 2016

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

YU-HSUAN LEE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review, brought by the Applicant, Yu-Hsuan Lee, of the decision of a Citizenship Judge [the Judge] dated October 22, 2015, refusing her application for citizenship on the basis that she did not meet the residency requirements as set out in section 5(1)(c) of the *Citizenship Act*, RSC 1985, c-29 [the Act].

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

I. Background

[3] The Applicant is a citizen of Taiwan who was granted permanent resident status on November 29, 2008 as part of her family's investor class application. Her parents eventually returned to Taiwan in 2012 and did not obtain Canadian citizenship. The Applicant attended school in Canada until December of 2011 and then pursued work and study opportunities in Taiwan and the UK. She applied for citizenship on December 23, 2011.

[4] The applicable section of the Act in force at the relevant time provides as follows:

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;
(b) is eighteen years of age or over;	b) est âgée d'au moins dix-huit ans;
(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	(i) un demi-jour pour chaque

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	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 accumulated one day of residence;	(ii) un jour pour chaque jour de résidence au Canada après son admission à titre de résident permanent;

[5] To meet the requirements of section 5(1)(c), the Applicant was required to prove that she resided in Canada for at least 1095 days in the four years prior to her application, i.e. from December 23, 2007 to December 23, 2011 [the Relevant Period]. At the time of her application, she claimed 1096 days of physical presence in Canada, bringing her one day over the requirement of 1095 days. On October 23, 2013, the Applicant had an interview with a Citizenship Officer [the Officer], who identified concerns surrounding an undeclared absence from Canada. The Officer referred her application to a hearing with a citizenship judge.

II. Impugned Decision

[6] The Judge considered two unclaimed absences that occurred around the dates of April 29, 2008 and November 13, 2010. The first trip was the one that had given rise to the Officer's concerns. The Applicant had advised the Officer that she travelled to the US to attend her cousin's wedding for 13 days. This caused the Officer to adjust her days of physical presence in Canada to 1090 days, 5 days short of the requirement. At the citizenship hearing, the Applicant indicated that she had given the Officer the wrong date for the wedding because English was not her first language and she was nervous. She stated that, in fact, the wedding took place on August 23, 2010, which was already claimed in her application form. The Judge did not accept the Applicant's explanation, finding that she was not forthcoming at the hearing, as it was difficult to believe that a well-educated student trained at English speaking universities for her Bachelor of Arts and Master's degree had made this mistake.

[7] Further, while the Applicant maintained that the April 19, 2008 trip was a one-day trip to the US, the Judge noted that the Applicant did not submit any documentation to indicate presence in Canada before or after this trip to support her statement that this was a one-day trip.

[8] The second unclaimed absence occurred around November 13, 2010. The Applicant claimed that this was another one-day absence for a shopping trip to the US. However, the Judge again noted that the Applicant did not submit any documentation to prove that it was a one day trip.

[9] The Judge also referred to the lack of any documentation proving the Applicant’s residence in Vancouver while living with her parents from September 2004 to September 2009 and lack of other documentary evidence such as bank statements, credit card statements, her parents’ property tax assessments, automobile insurance, cellular phone bills or medical services history.

[10] The Judge referred to the residency test described by Justice Muldoon in *Pourghasemi, (Re)*: [1993] FCJ No 232 [*Pourghasemi*], as requiring an applicant to establish that he or she has been physically present in Canada for 1095 days during the relevant four year period, and found that it was impossible to determine how many days the Applicant was actually present in Canada during the Relevant Period. As a result, the Judge concluded that the Applicant had failed to discharge the burden of proof and that the evidence suggested she was in Canada for less than the required 1095 days. On that basis, the Judge denied her application for citizenship.

III. Issues

[11] The two issues raised by the parties in this application are:

1. Did the Judge err by failing to identify which test for citizenship she would be applying in her determination?

2. Was the Judge’s decision unreasonable?

IV. Standard of Review

[12] The first issue raised by the Applicant is one of procedural fairness. The parties agree, and I concur, that this issue is to be reviewed on a standard of correctness (see *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, at para 43; *Abdou v. Canada (Citizenship and Immigration)*, 2014 FC 500, at para 4; *Miji v. Canada (Citizenship and Immigration)*, 2015 FC 142 [*Miji*], at para 18).

[13] The parties also agree that the other arguments raised by the Applicant, as explained in more detail below, are to be reviewed on a standard of reasonableness. I again concur that this is the applicable standard when considering the decisions of citizenship judges (see *Canada (Minister of Citizenship and Immigration) v Khadra*, 2016 FC 71 at para 15; *El-Khader v Canada (Minister of Citizenship & Immigration)*, 2011 FC 328 at paras 8-10). The judge's decision is entitled to a high degree of deference (*Canada (Minister of Citizenship and Immigration) v Patmore*, 2015 FC 699 at para 14), but the Court must intervene where the judge's decision fails to evidence justification, transparency, and intelligibility, and falls outside of the range of possible, acceptable outcomes.

V. Positions of the Parties

(1). Did the Judge err by failing to identify which test for citizenship she would be applying in her determination?

A. Applicant's Position

[14] The Applicant argues that the Judge failed to advise the Applicant of the citizenship test that she would be applying to the determination of residency. She relies on decisions of this Court, particularly those in *Dina v Canada (Minister of Citizenship and Immigration)*, 2013 FC 712 [*Dina*] and *Miji v Canada* (*(Minister of Citizenship and Immigration)*, 2015 FC 142 [*Miji*] to the effect that procedural fairness requires a citizenship judge to disclose to the applicant whether she will be applying the quantitative or qualitative test for residency. Otherwise, the applicant would not know the case he or she has to meet.

[15] At the hearing of this application, the Respondent identified the recent decision of Justice Kane in *Fazail v Canada* (*(Minister of Citizenship and Immigration)*, 2016 FC 111 [*Fazail*], which distinguished *Dina* and *Miji* on the facts and found that the citizenship judge did not breach procedural fairness by not advising the applicant of the legal test that would be applied. The Applicant argues that Justice Kane did not conclude that the principles in *Dina* and *Miji* are wrong, only that it was not a case in which they should be applied. The Applicant's position is that *Farzail* just narrowed the scope of the procedural fairness requirement and that, applied to the case at hand, there was still a breach of that requirement. She argues that in *Fazail* the claimant had the opportunity to make submissions on the test to be applied, whereas in the current case, the Judge asked qualitative questions at the hearing, leaving the Applicant confused as to the case she had to meet.

B. Respondent's Position

[16] The Respondent submits that there was no breach of procedural fairness in this case, as this Court has recognized a citizenship judge's discretion to apply any of the three tests recognized by the jurisprudence. A judge may accept evidence related to both quantitative and qualitative factors and then decide after the hearing which test to apply. The Respondent refers to Justice de Montigny endorsing this approach in *Boland v Canada (Minister of Citizenship and Immigration)*, 2015 FC 376 [*Boland*] at para 24, stating that it is a citizenship judge's prerogative to "opt in the final analysis for any of the tests currently in use to assess residency."

[17] Referring to *Fazail*, the Respondent argues that, notwithstanding the uncertainty in the law which permits a citizenship judge to apply different tests which could lead to different results, it is not a breach of procedural fairness not to bring this to an applicant's attention.

(1) Was the Judge's decision unreasonable?

C. Applicant's Position

[18] The Applicant submits that the Judge took into account irrelevant factors, failed to provide an accounting of the days the Applicant was absent from Canada, and failed to provide adequate reasons regarding the insufficiency of documents.

[19] While the Judge was entitled to apply the physical presence test from *Pourghasemi*, the Applicant's position is that the Judge was obliged to limit consideration to the four year Relevant

Period (*Deldelian v Canada (Minister of Citizenship and Immigration)*, 2014 FC 854 [*Deldelian*]). The Judge indicated that the Applicant failed to provide documentation to prove her residence with her parents from September 2004 to September 2009, and part of this time frame falls outside the Relevant Period. The Judge also discussed the Applicant's employment and education abroad and tax assessments after the Relevant Period, as well as whether she owned property in Taiwan, all of which the Applicant argues was irrelevant to the physical presence test.

[20] The Applicant also submits that, under the physical presence test, the Judge was required to count the days that the Applicant was present in Canada. The Judge failed to do this and did not adequately explain why she considered it impossible to do so. The Applicant refers to the discrepancy in her evidence as to the timing of her attendance at her cousin's wedding but notes that she had already included the number of days spent in the US at the wedding in her residency questionnaire, simply on other dates. Therefore, those days should not have detracted from the count of the days spent by the Applicant in Canada.

[21] Finally, the Applicant submits that the Judge found that the supporting evidence was insufficient to establish residency but failed to explain why. In particular, the Applicant provided evidence of the date of the wedding she attended in the US, to demonstrate that her earlier statement to the Officer was an error, but the Judge did not assess this evidence.

D. Respondent's Position

[22] The Respondent submits that the decision was reasonable. The Applicant claimed a presence of 1096 days, just one day over the required 1095, but she failed to claim two trips into the US, one in 2008 and one in 2010. While she gave evidence that these were day-trips, there was no corroborating documentary evidence to establish their actual length. It was not possible to do a strict counting of days when it was unclear how long the Applicant was absent from Canada during the undeclared trips.

[23] The Respondent submits that the facts falling outside the Relevant Period, while mentioned in the decision, did not factor into the Judge's determination.

VI. Analysis

(2) Did the Judge err by failing to identify which test for citizenship she would be applying in her determination?

[24] The different tests for citizenship, upon which this issue turns, are explained as follows in paragraphs 19 to 20 of *Miji*:

> [19] There are three separate tests to determine whether the requirements in paragraph 5(1)(*c*) of the Act have been met. One of these tests is quantitative and strictly based on an applicant's physical presence in Canada: *Pourghasemi*. The other two tests are so-called qualitative ones: (i) the test of "centralized mode of existence" established in *Re Papadogiorgakis*, [1978] 2 FC 208 (T.D.); and (ii) the test of determining in which location the person applying for Canadian citizenship "regularly, normally or

> customarily lives" established in *Koo (Re)*, [1993] 1 FC 286 (T.D.).
>
> [20] It is now established in recent case law that these three separate tests can be applied by a citizenship judge and that this Judge can choose to apply, at his or her discretion, any one of these three tests (*Huang v. Canada (Citizenship and Immigration)*, 2013 FC 576, at para 25; *Irani v. Canada (Citizenship and* Immigration*)*, 2013 FC 1273, at para 14; *Vinat v. Canada (Citizenship and Immigration)*, 2014 FC 1000, at paras 22-24).

[25] Justice Locke's decision in *Miji*, and Justice Hughes' decision in *Dina* on which it relies, found that in those cases it was a denial of procedural fairness not to reveal to the applicant, prior to the determination of the matter, which of the three tests would be applied by the citizenship judge. I agree with the Applicant that *Fazail* need not be read as disagreeing with those decisions. However, in that case, Justice Kane performs an analysis which is of significant assistance in understanding the nature and scope of the duty of fairness in citizenship matters.

[26] At paragraphs 39 to 46 of *Fazail*, Justice Kane considered the factors prescribed by the Supreme Court of Canada in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 to be applied in determining the scope of a duty of procedural fairness, and concluded that, while there is such a duty owed by citizenship judges to applicants, it is at the lower end of the spectrum. The affected individual must know the case he or she has to meet and have an opportunity to respond to that case, but the scope of the duty does not extend beyond that.

[27] In considering the impact of *Dina* and *Miji,* Justice Kane noted at paragraphs 37 and 38 that Justice Hughes did not elaborate on the scope of the duty of procedural fairness or why, on the facts in *Dina*, the applicant did not know the case to be met, and that Justice Locke in *Miji*

had relied on *Dina* without elaborating upon the scope of the duty. Justice Kane subsequently reviewed the principle of judicial comity and concluded that this principle was not at stake, because the key facts in *Dina* and *Miji* were different from those in the case before her. In *Fazail*, the applicant was aware that the citizenship judge had a choice of tests and made submissions that the qualitative test in *Koo* should apply. Therefore, the applicant was aware of the case to be met, had an opportunity to make submissions, and in fact did so.

[28] The applicant in *Fazail*, like the Applicant in this case, argued that *Dina* imposes a duty on a citizenship judge to advise an applicant in advance of the test that will be applied. However, Justice Kane concluded that the issue for the Court to consider is not whether the test a citizenship judge is contemplating using has been signaled in a particular manner. Rather, it is whether there was a breach of procedural fairness in that an applicant did not know the case to meet. *Fazail* did not interpret that duty as requiring that an applicant be given an irrevocable indication as to which test will be applied.

[29] This interpretation assists in reconciling these authorities with the decision in *Boland* on which the Respondent relies. At paragraph 24 of that decision, Justice de Montigny stated as follows:

> [24] The simple fact that during an interview, a citizenship judge may pose questions to an applicant that lead them to believe that one of the qualitative tests is being applied, does not cause the final decision to fall into error if that judge ultimately chooses to apply a quantitative test. The Citizenship Judge may well have chosen to disregard the strict physical presence test and to apply another test had she been convinced that the evidence established the Applicant's attachment to Canada or his centralized mode of existence in this country. It was her prerogative, however, to opt in

> the final analysis for any of the three tests currently in use to assess residency.

[30] Understanding the duty of procedural fairness as articulated in *Fazail*, I conclude that the record before me demonstrates that the Applicant was aware of the case to be met and had an opportunity to respond. The Judge chose to apply the *Pourghasemi* test, requiring the Applicant to demonstrate the required number of days of strict physical presence in Canada, and the Applicant had a fair opportunity to make submissions in that regard.

[31] In her Affidavit filed in support of this judicial review, the Applicant explains that at her interview before the citizenship officer, the officer interviewed her on her absences and that she made a mistake with respect to the date of her cousin's wedding. Her Affidavit also states that, at the hearing, the Judge asked her questions about her absences, the date of her cousin's wedding, and the day trip on April 19, 2008, and she explained that she has made a mistake when speaking with the officer. The Judge's notes of the hearing and the decision itself also reflect this questioning, as well as questioning on the Applicant's trip to the United States on November 13, 2010, which the Applicant described as a one-day trip to Seattle with friends.

[32] As canvassed in more detail below in my consideration of the reasonableness of the decision, the Judge's conclusion that the Applicant had not met the residence requirement under section 5(1)(c) of the Act turns on the evidence surrounding these trips to the United States and their impact upon the number of days the Applicant was physically present in Canada. Given the focus on these facts both before and at the hearing, there is no basis to conclude on the record in

this case that the Applicant did not know the case she had to meet or was deprived of an opportunity to respond to it.

[33] In support of her argument that she was denied procedural fairness, the Applicant refers to the Judge's questioning on qualitative factors such as her family members' presence in Canada and Taiwan, her bank accounts, RRSPs, payment of Canadian taxes, and properties in Canada. She argues these factors are relevant to the qualitative test, which is not the test the Judge subsequently applied. In this respect, there are similarities to Justice Locke's observation at paragraph 24 of *Miji* that the request for documentary evidence made to the applicant in that case at his interview with the citizenship judge included material which could imply that a qualitative test would be employed. However, the question whether an applicant has been deprived of procedural fairness must be assessed on the facts of each individual case. As explained above, my conclusion is that the Applicant had an opportunity to address the absences that were the focus of the Judge's decision in applying the strict physical presence test and, on the facts of the present case, the fact that the Judge asked questions that could be relevant to a qualitative test does not detract from that conclusion.

(3) Was the Judge's decision unreasonable?

[34] I can find no basis to conclude that the Judge's decision was unreasonable.

[35] The Applicant relies on the decision in *Hussein v Canada (Minister of Citizenship and Immigration)*, 2015 FC 88 [*Hussein*] to support her position that it is an error for a citizenship judge to fail to count the days as required by *Pourghasemi*. Further, she argues that the Judge's

reasons were not adequate to explain the conclusion that the supporting evidence was insufficient to establish residency.

[36] Justice LeBlanc's explanation of the principles governing the adequacy of reasons, at paragraph 24 of *Hussein,* is instructive:

> [24] ... [R]easons for decisions are adequate when they are clear, precise and intelligible and when they state why the decision was reached. Adequate reasons show a grasp of the issues raised by the evidence, allow the parties to understand why the decision was made and allow the reviewing court to assess the validity of the decision (*Dunsmuir v New Brunswick,* 2008 SCC 9 at para 47, [2008] 1 SCR 190; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board),* 2011 SCC 62, [2011] 3 SCR 708, at para 16; *Jeizan*, above, at para 17 and see also *Lake v Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 SCR 761 at para. 46; *Mehterian v Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 545 (F.C.A.); *VIA Rail Canada Inc. v National Transportation Agency*, [2001] 2 FC 25 (F.C.A.), at para. 22; *Canada (Minister of Citizenship and Immigration) v Arastu*, 2008 FC 1222, at paras. 35-36).

[37] Reading the Judge's decision as a whole, I do not have difficulty understanding why the decision was made or assessing its validity. The Judge states that the Applicant's original application declared 1096 days of physical presence in Canada during the Relevant Period, which is one day more than the 1095 days required. However, the accuracy of that declaration was called into question by the identification of the undeclared absences to the United States in April 2008 and November 2010. While the Applicant stated that these were both day trips and therefore should not detract from her days of physical presence, the Judge observed that the Applicant did not provide any documentation to support that contention. The Judge also found that the Applicant was not forthcoming at the hearing, having difficulty believing the Applicant's

explanation for giving the citizenship officer a mistaken date for her cousin's wedding during her interview. With credibility concerns and no documentation to support the Applicant's assertions that her undeclared absences were only day trips, the Judge concluded that the Applicant had not met her burden of proving she met the residency requirements.

[38] I find the decision intelligible and, while a different decision-maker could reach a different conclusion on the evidence, the Judge's conclusion is within the range of acceptable outcomes against which it must be assessed, taking into account the deference to be given to the decision. I read the Judge's statement that it is impossible to determine how many days the Applicant was actually present in Canada to be a reference to the lack of supporting evidence. In *Hussein*, Justice LeBlanc found the citizenship judge's decision to be problematic because the judge did not explain how inconsistencies in the evidence made it impossible to calculate the number of days of physical presence. In the case at hand, the Judge did not fail to engage with the evidence. Rather, the Judge had a starting point of the Applicant's declared 1096 days, but the evidence of the two undeclared trips and the lack of documentary support for their duration resulted in the Judge concluding that the Applicant had not met her burden.

[39] The Applicant refers to the evidence she provided to support the fact that her cousin's wedding was in August 2010 and argues that the 13 days represented by that trip were therefore taken into account in her calculation of 1096 days. However, I do not consider this to be material to the decision, which did not turn on either the timing or duration of the wedding trip but rather the lack of evidence surrounding the trips in April 2008 and November 2010, as well as a lack of documentary evidence overall.

[40] Finally, I have considered the Applicant's argument that the Judge took into account irrelevant factors including information that extended outside the Relevant Period. However, reading the decision as a whole, I return to my conclusion that the decision is based on the lack of support for the duration of the undeclared absences, which were both within the Relevant Period. There is nothing in the decision that leads to a concern, as it did in *Deldelian*, that the analysis underlying the decision took into account events outside the Relevant Period.

[41] I therefore find no basis to interfere with the Judge's decision, and I conclude that this application must be dismissed.

[42] Neither party proposed a question of general importance for certification for appeal, and none is stated.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

No question is certified for appeal.

"Richard F. Southcott"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Jacqueline Swaisland	FOR THE APPLICANT
Kevin Doyle	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Jacqueline Swaisland Waldman & Associates Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT