Federal Court Cour fédérale

Date: 20160705

Docket: T-1637-14

Citation: 2016 FC 743

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, July 5, 2016

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

MALIKA HADDAD

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review filed under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, chapter 27 [IRPA] of a decision rendered by a citizenship judge on June 19, 2014, [the decision] denying the applicant's citizenship application

because she had not met the requirements of paragraph 5(1)(*c*) of the *Citizenship Act* [the Act]. The applicant seeks to have this decision rescinded and to have her case referred to another citizenship judge for reconsideration.

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

II. Facts

[2] The applicant, Malika Haddad, is a citizen of Morocco. She came to Canada in 2006 to join her husband, a Canadian citizen, and obtained her permanent residence on November 4, 2006.

[3] On December 19, 2009, the applicant filed a citizenship application with Citizenship and Immigration Canada (CIC).

[4] In her initial application, she declared 44 total days of absence from Canada and 1096 days of physical presence in Canada.

[5] After her initial application was filed, the applicant consulted legal counsel and realized that she had made an error in calculating her number of days of residence. She notified CIC of her error and provided a new list of absences. According to this list, the applicant had accumulated 828 days of presence in Canada.

[6] In December 2013, the applicant obtained a score of 100% on the citizenship test.

[7] On March 12, 2014, she was invited to an interview with the citizenship judge.

[8] At the beginning of the hearing, the citizenship judge noted that the applicant had made an error in good faith in calculating her number of days of residence, but explained to her that the decision regarding residence was dependent on the number of days spent in Canada.

[9] The citizenship judge nevertheless invited the applicant to provide additional documentation in support of her ties with Canada, and provided her with a list of documents to submit to the panel.

[10] On May 12, 2014, the citizenship judge denied the applicant's citizenship application.

III. Impugned decision

[11] First, the citizenship judge noted that the applicant had acted in good faith and had submitted evidence substantiating her ties with the community and testimonies of her social ties, as well as active and passive evidence of residence. The citizenship judge also noted that the applicant had benefitted considerably from being married to a Canadian citizen who lived and worked abroad, since she could accompany him without fear of losing her permanent resident status. The judge nevertheless noted that this advantage did not apply to the Act within the context of obtaining Canadian citizenship.

[12] The citizenship judge therefore chose to adopt the strict count of days of physical presence in Canada used in *Re Pourghasemi*, [1993] 62 F.T.R. 122 (F.C.T.D.) [*Pourghasemi*]. She highlighted that the applicant had been absent from Canada for 312 days during the reference period and that she had accumulated 828 days of physical presence in Canada. Since this number represented 267 days fewer than the prescribed minimum of 1095 days of presence, the applicant did not meet the residency criteria to obtain Canadian citizenship.

IV. Legal framework

[13] The following provisions of the Act are relevant in this case:

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 person was resident in Canada before his lawful	(i) un demi-jour pour chaque jour de résidence au Canada avant son admission à

admission to Canada for permanent residence the person shall be deemed to have accumulated one-half of a day of residence, and	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;

V. Issues

[14] The Court must first determine whether the citizenship judge created a legitimate expectation in the applicant by telling her that she would apply the criteria set out in *Re Koo* and *Re Papagiordakis* to assess the citizenship application and, if so, whether the citizenship judge breached her duty of procedural fairness by applying the test used in *Re Pourghasemi*.

[15] If no legitimate expectation exists, the Court must determine whether the citizenship judge's decision was reasonable.

VI. Analysis

[16] It is undisputed that matters of procedural fairness must be reviewed using the standard of correctness (*Mission Institution v. Khela*, [2014] 2014 SCC 24 at paragraph 79), whereas the matter of applying residency criteria must be reviewed using the standard of reasonableness (*Haddad v. Canada (Citizenship and Immigration)*, 2014 FC 977 at paragraphs 16–17).

[17] This Court's case law has established that a citizenship judge can choose to use, at his or her discretion, one of three available tests to determine whether an applicant meets the residency requirements under the Act. The first test was developed in *Pourghasemi* and involves a strict count of the number of days of physical presence in Canada, which must total 1095 days in the four years preceding the application for citizenship. The second test, known as the *Re: Papadogiorgakis* test, is based on the decision of Mr. Justice Thurlow in *Re: Papadogiorgakis*, [1978] 2 F.C. 208 (F.C.T.D.). This test acknowledges that a person may continue to reside in Canada despite a temporary absence, as long as he or she maintains strong ties to Canada. The third test is a more lenient qualitative test and defines "residence" as the country in which he or she has centralized his or her mode of existence: *(Koo (Re)*, 1992 CanLII 2417 (FC), [1993] 1 FCR 286 (FCTD) [*Koo*].

[18] In this case, the applicant maintains that the citizenship judge indicated that she could expect a positive decision if she could provide documentary evidence showing that she had sufficient residential ties. Under the circumstances, given that it had already been established that the applicant had not spent enough days in Canada to meet the requirements of the *Pourghasemi*

test, this statement made by the judge must be construed as a promise that the applicant would be found to meet the criteria of one of the less stringent tests that did not require 1095 days of physical presence in Canada. Based on this interpretation of the evidence, the applicant argues that the citizenship judge created a legitimate expectation that her application would be approved, which the judge did not fulfil in applying the strict residence test.

[19] The principles of the doctrine of legitimate expectation are probably best summarized in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, in which the Supreme Court adopted a passage from the text *Judicial Review of Administrative Action in Canada*, by Brown and Evans:

> The distinguishing characteristic of a legitimate expectation is that it arises from some conduct of the decision-maker, or some other relevant actor. Thus, a legitimate expectation may result from an official practice or assurance that certain procedures will be followed as part of the decision-making process, or that a positive decision can be anticipated. As well, the existence of administrative rules of procedure, or a procedure on which the agency had voluntarily embarked in a particular instance, may give rise to a legitimate expectation that such procedures will be followed. Of course, the practice or conduct said to give rise to the reasonable expectation must be clear, unambiguous and unqualified.
>
> D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), Toronto: Canvasback, 1998, §7:1710 (updated in August 2012)

[20] Two relevant criteria are highlighted in the preceding excerpt. First, a legitimate expectation may result from an assurance “that a positive decision can be anticipated.” Second,

the practice or conduct that has given rise to a reasonable expectation must be "clear, unambiguous and unqualified."

[21] The applicant refers to this Court's decision in *Qin v. Canada (Citizenship and Immigration)*, 2014 FC 846 [*Qin*]. In this case, Mr. Justice Diner found that the citizenship judge had created a legitimate expectation that the applicant's citizenship application would be approved, based on the following paragraph from the decision:

> [11] The evidence on the Record is that Judge Babcock advised the Applicant at the hearing, with her counsel present, that if he found that she was indeed in Canada for 938 days, then she would receive a positive decision.

[22] By explicitly indicating that the applicant would receive a positive decision if the evidence showed that she had been physically present in Canada for 938 days, the citizenship judge had provided an assurance that it was possible to expect a positive decision. However, *Qin* differs from the present case in two ways.

[23] First, considerable ambiguity exists in the citizenship judge's statement, as reported in the applicant's affidavit. The description that she provides there is inconsistent with the judge's notes. The citizenship judge asked the applicant to provide additional evidence on a printed form, which indicated:

> In order to proceed in processing your application for Canadian citizenship, additional information or documents are required [printed note]:

> . . .
>
> 5. Additional evidence in support of your ties with Canada.
> [handwritten note]

[24] The judge's explicit request was therefore not [TRANSLATION] "to help her approve the application by providing evidence that could support the existence of sufficient residential ties." Rather, it was a request for additional information [TRANSLATION] "in <u>support</u> of your ties with Canada" "in order <u>to proceed in processing your application</u> for Canadian citizenship."

[25] Second, even if the applicant's version were accepted without question, I do not believe that the citizenship judge's statement can be equated with a clear, unambiguous and unqualified assurance that the applicant could expect a positive decision. In *Qin*, the clear, unambiguous and unqualified assurance was that a positive decision would be made if the documentary evidence showed that the number of days of physical presence was that which was declared by the applicant.

[26] Based on the applicant's description, the goal of the citizenship judge's assurance was to help her find a way of approving the application, which is not the same thing as promising a positive outcome. This is not a clear, unambiguous and unqualified indication of the way in which the application will be processed and decided upon.

[27] Helping a person find a way to approve a decision on the basis of submitted information is, at best, an implicit assurance that is more ambiguous than the promise of a result based on the demonstration of a set number of days of residence like in *Qin*.

[28] Furthermore, this Court has rendered several decisions indicating that citizenship judges have considerable discretion in requiring additional documentation and information from applicants who do not meet the criteria of the strict test in *Pourghasemi*. For example, in *Boland v. Canada (Citizenship and Immigration)*, 2015 FC 376, Mr. Justice de Montigny, a Federal Court judge at the time, was faced with a similar situation, wherein the applicant had been absent from Canada for 477 days and therefore did not meet the criteria of the test in *Pourghasemi*. The judge nevertheless found, in paragraph 24 of his decision:

> [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.

[29] The decisions in *El Chmoury v. Canada (Citizenship and Immigration)*, 2014 FC 1250, *Donohue v. Canada (Citizenship and Immigration)*, 2014 FC 394, *Arwas v. Canada (Citizenship and Immigration)*, 2014 FC 575, and *Adibnazari v. Canada (Citizenship and Immigration)*, 2016 FC 251 follow similar lines.

VII. Conclusion

[30] Thus, this application must be dismissed, since it does not appear that the citizenship judge gave the applicant any assurance of a positive decision, or that this assurance was clear, unambiguous and unqualified.

JUDGMENT

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

"Peter Annis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1637-14
STYLE OF CAUSE:	MALIKA HADDAD v. MCI
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	JULY 4, 2016
JUDGMENT AND REASONS:	ANNIS J.
DATED:	JULY 4, 2016

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