Federal Court Cour fédérale

Date: 20161020

Docket: T-642-16

Citation: 2016 FC 1170

Ottawa, Ontario, October 20, 2016

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

AMANDEEP CHEEMA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Amandeep Cheema, seeks judicial review of a decision of a Citizenship Judge [the Judge] dated February 23, 2016, concluding that she did not met the residency requirements for Canadian citizenship under the *Citizenship Act*, RSC 1985, c-29 [the Act].

[2] As explained in greater detail below, this application is dismissed, because the Judge reached a reasonable decision, both as to Ms. Cheema having a shortfall of days of physical presence in Canada and that her centralized mode of existence is not in Canada. I also find that, in reaching this decision, the Judge did not rely on extrinsic evidence in breach of obligations of procedural fairness as alleged by Ms. Cheema.

II. Background

[3] Ms. Cheema is a 27 year old national of India. On November 22, 2008, at the age of 19, she entered Canada as a permanent resident as a dependent child of her mother. Ms. Cheema applied for Canadian citizenship on November 18, 2012. As such, the relevant period for calculating days of residency to qualify for Canadian citizenship is from November 18, 2008 to November 18, 2012 [the Relevant Period]. In her application, Ms. Cheema declared 360 days of absence in the Relevant Period and believed she met the residency requirement with 1096 days of residence in Canada during the Relevant Period, a surplus of one day over the required 1095 days.

[4] The officer reviewing Ms. Cheema's application determined that she had two undeclared absences from Canada, based on information contained in the Integrated Customs Enforcement System report issued by the Canada Border Services Agency [the ICES Report] and what is described as the United States Entry and Exit Record issued by US Customs and Border Protection [the US Record]. Based on these undeclared absences and resulting calculation of a shortfall of 4 days from the 1095 days required by the Act, Ms. Cheema was referred to a hearing before the Judge.

[5] Because the Judge considered not only Ms. Cheema's days of physical presence in Canada but also the test in *Re Koo*, [1993] 1 FCR 286, [*Koo*], as to where an applicant regularly, normally or customarily lives, or whether Canada is the country in which the applicant has centralized his or her mode of existence, further background on Ms. Cheema's activities during the Relevant Period is relevant to this application.

[6] Commencing in 2009, Ms. Cheema studied at York University in Toronto until April 2011. In July 2010, she visited India for a period of approximately six weeks, during which time she helped her mother sell property there and met her future husband, Tripanjeet Singh Ghuman, and his family. Mr. Ghuman has been in the United States under a student visa and then a temporary work permit, which continues to be valid until October 2018. He has no permanent status in the United States. During 2011, Ms. Cheema visited the United States several times on short trips to visit her then fiancé. Ms. Cheema married Mr. Ghuman in India in December, 2011. Following their marriage, Ms. Cheema accompanied Mr. Ghuman to the United States.

[7] Ms. Cheema returned to Canada for a period of time beginning in March, 2012 and then obtained a US student visa. She returned to the United States in May, 2012 and enrolled at Brookhaven College, in Texas, in the summer of 2012. Ms. Cheema returned to Canada one additional time after that, for approximately 3 weeks in August, 2012, before the end of the Relevant Period. During the periods she spent in the United States, Ms. Cheema resided with her husband, where she continues to reside along with their daughter who was born in 2015. She has changed her status in the United States to a dependent visa.

[8] Because the undeclared absences resulted in a shortfall in days of physical presence in Canada, the Judge applied the test prescribed by Justice Reed in *Koo* in deciding whether Ms. Cheema satisfies the residence requirement under the Act. However, the Judge, after considering the questions proposed in *Koo,* concluded that Canada was not the place where Ms. Cheema normally, customarily or regularly lives and that her centralized mode of existence is not in Canada. As such, her application for citizenship was not approved.

III. Issues

[9] Ms. Cheema has identified the following as the issues for the Court's consideration in this application for judicial review:

A. What is the standard of review?

B. Did the Judge breach the duty of procedural fairness by failing to give Ms. Cheema an opportunity to disabuse his concerns with respect to extrinsic evidence relied upon to reject the application?

C. In the face of the evidence before the Judge, did he arrive at an erroneous finding of fact that Ms. Cheema was short on 1095 days as required in the Act?

D. In the face of the evidence, did the Judge erroneously conclude that Ms. Cheema's centralized mode of existence was not Canada?

IV. Analysis

A. *What is the standard of review?*

[10] Ms. Cheema submits that the standard of correctness applies to the issue which raises the duty of procedural fairness, but that the standard of reasonableness is applicable to the other issues. The Respondent has not taken issue with Ms. Cheema's position on the standard of review, and I concur with her position.

B. *Did the Judge breach the duty of procedural fairness by failing to give Ms. Cheema an opportunity to disabuse his concerns with respect to extrinsic evidence relied upon to reject the application?*

[11] Ms. Cheema argues that the ICES Report and the US Record represent extrinsic evidence and that the Judge committed a breach of procedural fairness in relying upon this evidence without giving her an opportunity to respond to it. She refers the Court to the decision in *Mehta v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1073, in support of the general proposition that an officer errs in relying upon extrinsic evidence without giving an applicant an opportunity to respond to that evidence.

[12] While this legal proposition is sound, I find that it has no application to the case at hand. As noted in *Asmelash v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1732, at paragraph 15, whether there is a requirement to disclose a document before relying upon it, pursuant to the duty of procedural fairness, turns on whether the document is one of which the

individual is aware or deemed to be aware. With respect to the US Record, the Respondent refers to correspondence in the Certified Tribunal Record indicating that the US Record was provided by Ms. Cheema along with other requested documents such as her passport. The Respondent therefore argues, and I agree, that the US Record cannot be characterized as extrinsic evidence which gives rise to the duty of procedural fairness.

[13] Turning to the ICES Report, the Respondent relies upon the authority in *Abdelhamid v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1223, at paragraph 17, where Justice Mactavish noted that this Court has previously held that ICES reports are not extrinsic evidence and do not create a procedural obligation on the part of a citizenship judge to provide the applicant for citizenship with an opportunity to respond to such reports. I find this authority applicable to the present case and therefore must reject Ms. Cheema's argument that the Judge was obliged to give her an opportunity to respond to the ICES Report.

[14] Ms. Cheema argues that the issue of procedural fairness arises in view of the conflict between the evidence she presented and the information available to the Judge related to her entry records to the US and Canada. I find this argument to be particularly lacking in merit, given that the affidavit filed by Ms. Cheema in this judicial review application swears to the details of her physical absences from Canada during the Relevant Period and includes the two absences (in June 2011 and August 2011) which are described by the reviewing officer and the Judge as having been undeclared by Ms. Cheema in her citizenship application. As she is not contesting that those absences occurred, it cannot be said that she was prejudiced by the Judge failing to give her an opportunity to respond to the evidence which identified those absences.

C. *In the face of the evidence before the Judge, did he arrive at an erroneous finding of fact that Ms. Cheema was short on 1095 days as required in the Act?*

[15] Ms. Cheema's principal argument on this issue, which she emphasized through her counsel's oral submissions at the hearing of this application, is that the Judge erred in calculating her absences from Canada during the Relevant Period in reliance on the Program Delivery Instructions [the Instructions] issued by the Minister on the calculation of residence/physical presence for citizenship applications. The Instructions state that, for applications received before June 11, 2015, either the day the applicant leaves Canada or the day he or she returns is considered an absence, but not both. Ms. Cheema contrasts this approach with that which is provided in the Instructions for applications received on or after June 11, 2015. For such applications, dates that an applicant left Canada or returned to Canada will not be counted as an absence.

[16] Ms. Cheema notes that the relevant statutory provision is section 5(1)(c) of the Act:

Citizenship Act, RSC 1985, c C-29	***Loi sur la citoyenneté***, LRC (1985), ch C-29
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 :
…	…
(c) is a permanent resident within the meaning of subsection 2(1) of the	(c) est un résident permanent au sens du paragraphe 2(1) de la *Loi sur l'immigration et la*

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

[17] Ms. Cheema argues that the Minister has no authority to issue the Instructions and that the approach to the calculation of residence for applications received before June 11, 2015, as set out in the Instructions, conflicts with the plain language and spirit of section 5(1)(c), which refers to counting every day “during which” the person was resident in Canada. She also submits that

the approach contained in the Instructions is arbitrary and discriminatory, in providing different criteria for applicants who submit their applications before and after June 11, 2015.

[18] The Respondent notes that the Act was amended effective June 11, 2015, now requiring counting of days of physical presence in Canada, rather than days of residence. The Respondent argues on that basis that there is nothing arbitrary about the change in the Instructions effective as of that date. With respect to Ms. Cheema's argument that the Minister has no authority to issue the Instructions, the Respondent notes that this Court has observed that the Act does not define the term "residence" (see *Canada (Minister of Citizenship and Immigration) v Samaroo*, 2016 FC 689, at para 19). The Respondent argues that it is open to the Minister to assist with the interpretation of legislation and that the interpretation offered by the Instructions is not inconsistent with the wording of the legislation.

[19] I find merit to the Respondent's arguments. This Court has held that there is nothing improper about agencies making and relying on guidelines to assist in their administrative decision-making processes and that agencies do not need enabling statutory authority to make and rely on guidelines (see *Toussaint v Canada (Attorney General)*, 2010 FC 810, at para 55).

[20] However, I do not consider it necessary to analyse this issue further in the context of this particular case, as the Judge was employing the approach that Ms. Cheema had herself adopted in submitting her citizenship application. As noted by the Judge in his decision, Ms. Cheema's application for citizenship declared 360 days of absence. In contrast with the affidavit she submitted in this application for judicial review, in which she appears to have calculated her days

of absence based on the approach applicable to applications received after June 11, 2015, the Certified Tribunal Record reveals that that her calculation of 360 days in her citizenship application employed the pre-June 11, 2015 approach. The reviewing officer then identified two undeclared absences totaling five days, again apparently using the same pre-June 11, 2015 approach as had been employed by Ms. Cheema.

[21] Ms. Cheema first entered Canada on November 22, 2008, four days after the commencement of the Relevant Period. Therefore the 360 days of absence that she calculated, plus the four days at the commencement of the Relevant Period and the additional five days identified by the officer, result in 1091 days of physical presence and the four day shortfall noted by the officer and the Judge.

[22] As submitted by Ms. Cheema, the Judge's finding as to the shortfall is reviewable on a standard of reasonableness. The reasonableness standard extends to the interpretation of enabling legislation (see *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 SCR 190 [*Dunsmuir*], and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 (CanLII), [2009] 1 SCR 339).). In employing the approach to the calculation of absences set out in the Instructions, the officer and the Judge were following not only departmental guidelines but the approach employed by Ms. Cheema herself in calculating her days of absence in the submission of her citizenship application. As Ms. Cheema did not take issue with this approach in the proceeding before the Judge, his decision cannot be characterized as unreasonable on this basis.

D. *In the face of the evidence, did the Judge erroneously conclude that Ms. Cheema's centralized mode of existence was not Canada?*

[23] In applying the *Koo* test, the Judge considered the six questions prescribed by that case. His analysis can be summarized as follows:

A. Was the individual physically present in Canada for a long period prior to recent absences which occurred immediately before the application for citizenship?

[24] The Judge answered this question in the negative. He noted that the Relevant Period starts November 18, 2008, Ms. Cheema was not a permanent resident at the beginning of the Relevant Period, and her first absence was 20 months into the Relevant Period. The Judge noted that Ms. Cheema lived with her mother and sister in Canada until October 3, 2011, and that following her marriage (in December 2011), her home was with her husband in the United States.

B. Where are the applicant's immediate family and dependents (extended family) resident?

[25] The Judge noted that Ms. Cheema's husband and daughter live in the United States, her mother and sister live in Canada and are Canadian citizens, one grandparent, an aunt and uncle live in Canada, and her mother and father in law were landing in Canada on February 22, 2016.

C. Does the pattern of physical presence in Canada indicate a returning home or merely visiting the country?

[26] The Judge concluded that from the beginning of the Relevant Period to October 3, 2011, it was evident that Ms. Cheema was returning home to her mother's residence in Canada, but that from October 3, 2011, her home was with her husband in the United States. The Judge noted that from that time forward her presence in Canada consisted of two visits, of 46 and 21 days respectively, with 311 days absent from Canada.

D. 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?

[27] The Judge noted that Ms. Cheema is four days short of the requirements, but that from October 3, 2011 to November 22, 2012, with the exception of two short periods, she was absent almost continually for 311 days.

E. 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?

[28] The Judge describes the absences from the beginning of the Relevant Period to October 3, 2011 as temporary, as Ms. Cheema had returned to India to help her mother sell a property and had gone on short visits of two or three days to visit her then fiancé in the United States.

[29] The Judge found that from October 3, 2011, the absences were no longer of a temporary nature. He noted that Ms. Cheema went to India for 82 days to marry her husband; that her husband had been in the United States since 2008 initially as a student and now employed with a work visa, which may or may not be renewed; that following their marriage she began living with him in Texas; and that in the summer of 2012 she obtained a US study permit and enrolled in courses at Brookhaven College, Texas.

[30] The Judge described Ms. Cheema's absences during this latter part of the Relevant Period as "permanently temporary" in nature, as she was studying in the United States but also beginning a new life with her new husband there.

F. What is the quality of the connection with Canada; is it more substantial than that which exists with any other country?

[31] The Judge considered Ms. Cheema's connection to Canada to be surpassed by her substantial connection to the United States because: (a) she ceased to maintain a residence in Canada upon her marriage; (b) she and her husband purchased a home in the United States; (c) she changed her US student visa to a dependent visa; (d) despite Ms. Cheema's husband being granted permanent resident status, there was no evidence of any efforts to relocate to Canada in the near future; and (e) except for coming to Canada for her test, document review and hearing before the Judge, Ms. Cheema administered her application for citizenship from the United States. The Judge concluded that Ms. Cheema had for all intents and purposes abandoned any notion of having a home in Canada when she was married.

[32] In concluding his analysis, the Judge noted that Ms. Cheema did not have a long history in Canada prior to becoming a permanent resident, that her immediate family, her husband and child, lived in the United States, and that since October 3, 2011 she had lived with her family in the United States and visited Canada. While her shortfall is not significant, it was the result of relocating to the United States upon being married and creating a new life in that country. The Judge concluded that she severed her connection to Canada and that her attachment to the United States was reinforced by her husband's eight year employment history there, by her changed immigration status there, and by them purchasing a home there. The Judge found that Ms. Cheema does not normally, customarily, or regularly live in Canada and that her centralized mode of existence was not Canada.

[33] Ms. Cheema submits that the Judge erred in reaching these conclusions. She notes that all of her close family members reside in Canada except her husband, that her husband has no permanent status in the United States, and that there is no evidence that she or her husband had sought such status. Rather, her husband was in the United States only because he could not find suitable employment in Canada, and his temporary work permit was valid only until October 2018. Ms. Cheema submits that it is illogical for the Judge to believe that she had to stay separate and apart from her husband in order to maintain her centralized mode of existence in Canada.

[34] Ms. Cheema raises arguments in connection with the Judge's consideration of each of the questions proposed by *Koo.* Overall, these arguments amount to emphasizing that she was short only a few days from the required 1095 days of physical presence, that she had fully established her centralized mode of existence in Canada before going to the United states with her husband,

that she did so out of necessity to be with her husband and to study, and that this clearly represented a temporary situation. Ms. Cheema submits that she has an intention to return to Canada, that there is no evidence to the contrary, and that the Judge's decision does not meet the requirements of justifiability and intelligibility necessary to be reasonable under *Dunsmuir*.

[35] Ms. Cheema's arguments on this issue are credible, in that another citizenship judge might have concluded based on the facts of this case that the circumstances of her presence in the United States were sufficiently temporary such that her centralized mode of existence remained in Canada. However, I cannot find the Judge's decision to fall outside the range of possible, acceptable outcomes, defensible on the facts and the law, which would be necessary to find the decision to be unreasonable in accordance with the principles prescribed by *Dunsmuir*. Based on the key conclusions that Ms. Cheema resides in the United States with her immediate family, that they have bought property there, and that she has essentially relocated there following her marriage, the Judge's determination that her centralized mode of existence is not in Canada falls within the range of reasonable outcomes.

[36] In reaching this conclusion, I have considered Ms. Cheema's allegations of specific errors made by the Judge in his decision. In particular, she takes issue with the Judge answering the first of the *Koo* questions in the negative, concluding that she was not physically present in Canada for a long period prior to recent absences. Ms. Cheema submits that the Judge should have concluded she was physically present in Canada for a long period, given that she lived with her mother in Canada for three years following her immigration in November 2008. The Respondent concedes that the Judge probably did not answer this question correctly but argues

that it is clear from the decision that the Judge understood the facts correctly and that this error doesn't affect the overall reasonableness of the decision.

[37] I agree with the Respondent's position on this error. It is clear from the Judge's later analysis that he understood that Ms. Cheema lived in Canada at her mother's residence prior to her marriage in late 2011. Based on the analysis at the end of the decision, it may be that, in answering "no" to the first question, the Judge was noting that Ms. Cheema did not have a long history in Canada prior to becoming a permanent resident. Regardless, I do not find the Judge's treatment of the first *Koo* question to have affected his overall decision in a way which undermines its justifiability, intelligibility or reasonableness.

[38] Ms. Cheema also takes issue with the Judge's characterization of her absence from Canada after her marriage as "permanently temporary". This is an unusual term. However, it is apparent from the context in which the Judge uses the term, both in his consideration of the fifth *Koo* question and the decision overall, that he is intending to convey his conclusion that the facts demonstrated Ms. Cheema beginning a new life with her husband in the United States in late 2011, such that her physical absence could not be characterized as the sort of clearly temporary situation about which the fifth question was inquiring.

[39] Ms. Cheema also correctly points out certain factual errors in the decision. The first is the Judge's reference to one of her visits to Canada as consisting of 46 days, when that trip from March 4, 2012 to May 22, 2012 was actually 79 or 80 days. I agree that this is a factual error. However, the Judge concludes in the same paragraph that Mr. Cheema was absent from Canada

for 311 days from October 3, 2011 (when she went to India to get married) to the end of the Relevant Period on November 22, 2012. This calculation appears to be correct (subject to slight variations depending on whether one counts the first and/or last day of each absence). As such, the decision demonstrates that the Judge understood the cumulative period of Ms. Cheema's absence during this period of time, and I cannot find the factual error related to one of the visits to Canada to be a material error which would warrant the Court interfering with the decision.

[40] Similarly, Ms. Cheema points out the Judge's reference to her husband having an eight year employment history in the United States, when in fact his time there was split between first studying and then working. Again, while a factual error, other parts of the decision demonstrate that the Judge understood that Ms. Cheema's husband was first studying in the United States and then employed there. I cannot find the mischaracterization, in one location in the decision, of the whole period as relating to employment to represent a material error which undermines the reasonableness of the overall decision.

V. Certified Question

[41] Ms. Cheema proposes the following question for certification for appeal:

> Did the Respondent exceeded his powers in issuing the policy directive, and does the policy directive for calculating days of residence conflict with section 5(1)(c) of the Act?

[42] The reference to policy directive relates to the Instructions, the effect of which was analysed earlier in these Reasons. The Respondent opposes certification.

[43] I decline to certify this question, as the answer would not be determinative of an appeal in this matter. I have dismissed the ground of review that was based on Ms. Cheema's argument that the Judge's decision was unreasonable in relying on Instructions which the Minister had no authority to issue. This dismissal was based not only on agreement with the Respondent's position on authority to issue policy guidelines but also on the fact that both the reviewing officer and the Judge simply adopted Ms. Cheema's calculation of her days of absence and, employing the same methodology as she had, added the extra days related to the undeclared absences. As this ground of review raises an argument which is inconsistent with Ms. Cheema's own approach to the calculation of absences in the proceeding before the Judge, my conclusion is that appellate consideration of the proposed question would not alter the decision in this particular judicial review.

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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