Federal Court  Cour fédérale

Date: 20171002

Docket: T-566-17

Citation: 2017 FC 871

Ottawa, Ontario, October 2, 2017

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

QIULI XUE

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES, AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision dated March 6, 2017 in which a citizenship judge ("Citizenship Judge") determined the Applicant did not meet the residence requirements of s 5(1)(c) of the *Citizenship Act*, RSC 1985, c C-29 ("*Citizenship Act*") and denied her application for citizenship.

[2] The Applicant is a citizen of the People's Republic of China. She arrived in Canada on a study permit in 2008, she became a permanent resident of Canada on March 1, 2010, and applied for Canadian citizenship on June 10, 2014. The relevant period for determining whether the Applicant met the residence requirement of s 5(1)(c) of the *Citizenship Act* was from June 10, 2010 to June 10, 2014.

[3] In her citizenship application, the Applicant declared 10 trips outside Canada and that she was absent from Canada for 828 days during the relevant period. In the result, she was 463 days short of the 1095 days of presence required by the *Citizenship Act* at that time. On December 7, 2014, the Applicant submitted a residence questionnaire along with supporting documents, which noted 833 days of absence. On February 13, 2017, a hearing was held before the Citizenship Judge.

Decision Under Review

[4] The Citizenship Judge found, on a balance of probabilities, that the Applicant did not meet the residence requirements of s 5(1)(c) of the *Citizenship Act*. He noted that in the residence questionnaire the Applicant listed the addresses where she lived during the relevant period, being Shanghai, Vancouver, and the United States ("US"), and at the hearing she confirmed the dates and reasons of her absences as declared in her original application for citizenship and the residence questionnaire. These reasons were that: she returned to China during the summer months to visit her grandparents and for family reasons; she worked in China for her internships to obtain international work experience which would assist her in finding work in Canada; she studied at Wellesley College in the United States to learn North American

culture; and, she graduated with a master's degree from Columbia University in February 2015 and then commenced work in New York where she was currently employed. However, she submitted that she came to Vancouver when she was 18 years old and considered it to be her home.

[5] The Citizenship Judge noted the Applicant bore the burden of proving the conditions set out in the *Citizenship Act*, including the residence requirements, and stated that he chose to adopt the analytical approach in *Re Pourghasemi* (1993), 62 FTR 122 (FCTD) ("*Pourghasemi*"), which required the Applicant to prove she was physically in Canada for 1095 days during the relevant period.

[6] The Citizenship Judge determined, having reviewed the documentation submitted by the Applicant and having interviewed her, that the declarations and residence questionnaire did not accurately reflect the number of days the Applicant was physically in Canada. Having examined her passport, he determined the Applicant was in Canada for 623 days and absent for 837 days during the relevant period, which was 472 days short of the required 1095 days under the *Citizenship Act*. The Citizenship Judge also stated that he had considered the Applicant's reasons for her absences.

[7] As the Applicant bore the onus of meeting the residency requirement and had declared less than 1095 days of presence in Canada, using the *Pourghasemi* test, the Citizenship Judge held that the Applicant was not sufficiently resident in Canada and denied her application for citizenship.

Issues and Standard of Review

[8] The Applicant submits that the issues are whether:

1. The Citizenship Judge erred in selecting the *Pourghasemi* analysis when determining the appropriate citizenship analysis; and
2. The Citizenship Judge erred in determining the Applicant's original declaration or residence questionnaire did not accurately reflect the number of days the Applicant was present in Canada during the relevant period.

[9] I agree with the parties that the standard of review for the Citizenship Judge's consideration of the residence requirements under s 5(1) of the *Citizenship Act* is reasonableness (*Canada (Citizenship and Immigration) v Pereira*, 2014 FC 574 at para 18 ("*Pereira*"); *Canada (Citizenship and Immigration) v Ojo*, 2015 FC 757 at para 9; *Huang v Canada (Citizenship and Immigration)*, 2013 FC 576 at para 26 ("*Huang*")). Under this standard, the Court must be satisfied the decision bears the qualities of justification, transparency and intelligibility and that the decision falls "within a range of possible, acceptable outcomes which are defensible with respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 ("*Dunsmuir*")). The Court owes deference to the factual findings of a citizenship judge who is better positioned to determine whether an applicant met the residency requirement (*Martinez-Caro v Canada (Citizenship and Immigration)*, 2011 FC 640 at para 46). The correctness standard applies to questions of procedural fairness (*Dunsmuir* at para 56; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43).

ISSUE 1: Did the Citizenship Judge err in selecting the *Pourghasemi* test to assess the Applicant's residency in Canada?

[10] Although her written submissions are lengthy, the Applicant's position is easily summarized. She submits that the Citizenship Judge erred in law by applying the incorrect citizenship test, the *Pourghasemi* test, and instead should have applied the *Koo* (*Re Koo*, [1993] 1 FCR 286 at pp 293-294 (FC)) test when assessing residency. Under *Koo*, the Citizenship Judge would have looked at six residency factors, including whether the Applicant's absence was clearly a temporary situation arising from her studying abroad. Further, the Citizenship Judge should have used the *Koo* test and considered her exceptional circumstances, as indicated by s 5.9 of Citizenship and Immigration Canada's Citizenship Policy 5 – Residence ("CP-5"). She also submits that the Citizenship Judge ignored and misconstrued evidence, and fettered his discretion, in ignoring the Applicant's evidence concerning her studying abroad and in choosing the *Pourghasemi* test, which focuses exclusively on physical presence in Canada. The Applicant submits, had the *Koo* test been applied, her application would likely have been granted.

[11] In the alternative, the Applicant submits that her situation falls under s 5(4) of the *Citizenship Act* which specifically addresses special cases involving persons of an exceptional value to Canada. Her application should have been considered as such by the Citizenship Judge and, had he done so, he would have applied the *Koo* test.

[12] In my view, the Citizenship Judge did not commit a reviewable error in selecting or in applying the *Pourghasemi* residence test.

[13] As this Court has noted on many occasions, there are three possible tests for assessing residence under s 5(1) of the *Citizenship Act* (see *Pereira* at para 13-14; *Canada (Citizenship and Immigration) v Vijayan*, 2015 FC 289 at para 53 ("*Vijayan*"); *Huang* at para 18). These are:

1. *Pourghasemi* – which looks only at the applicant's physical presence in Canada using a strict counting of days. This is a quantitative test;
2. *Re Papadogiorgakis* ([1978] 2 FC 208 ("*Papadogiorgakis*")) – this test recognizes that a person can be resident in Canada, even while temporarily absent for business, vacation, or even a course of study;
3. *Koo* – this test builds on *Papadogiorgakis* and is often referred to as the centralized mode of living test. Residence is defined as where the person "regularly, normally, or customarily lives", based on six factors, including whether absences flow from temporary situations such as studying abroad. *Papadogiorgakis* and *Koo* are qualitative tests.

[14] As stated by Justice LeBlanc in *Pereira* (at para 15), the dominant view in this Court's jurisprudence is that citizenship judges are entitled to choose which test they desire to use among these three tests and they cannot be faulted for choosing one over the other (*Pourzand v Canada (Citizenship and Immigration)*, 2008 FC 395 at para 16; *Xu v Canada (Minister of Citizenship and Immigration)*, 2005 FC 700 at paras 15 and 16; *Rizvi v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1641 at para 12; also see *Huang* at para 26; *Vijayan* at para 53; *Canada (Citizenship and Immigration) v Bani-Ahmad*, 2014 FC 898 at para 25 ("*Bani-Ahmad*"); *Leite v Canada (Citizenship and Immigration)*, 2016 FC 1241 at para 29; *Miji v Canada (Citizenship and Immigration)*, 2016 FC 1324 at para 17). Accordingly, the Citizenship Judge did not err in choosing to apply the *Pourghasemi* test.

[15] While citizenship judges have discretion over which test to apply, they must indicate which residence test they are using (*Dina v Canada (Citizenship and Immigration)*, 2013 FC 712 at para 8 ("*Dina*")) and explain why an applicant did not meet the requirements of that test (*Saad*

v Canada (Citizenship and Immigration), 2013 FC 570 at para 22; *Dina* at para 8; *Bani-Ahmad* at para 26). Here the Citizenship Judge clearly stated that he was applying *Pourghasemi* and correctly articulated that test as assessing whether the Applicant was physically present in Canada for 1095 days during the relevant 4 year period. Given the Applicant's admission, and the Citizenship Judge's verification, that the Applicant was not in Canada for the required 1095 days, the Citizenship Judge did not err in his application of the test and reasonably concluded that the Applicant did not meet the requirements of the *Citizenship Act*. Accordingly, there is no basis upon which this Court should intervene (*Canada (Citizenship and Immigration) v Demurova*, 2015 FC 872 at paras 19-20).

[16] As to CP-5, this type of policy manual is not binding and instead serves to assist administrative decision-makers in their decision-making process (*Cheema v Canada (Citizenship and Immigration)*, 2016 FC 1170 at para 19). Indeed, a decision-maker who makes a decision based solely on a guideline and without focus on the underlying law fetters his or her discretion (*Toussaint v Attorney General*, 2010 FC 810 at para 55; *Ishaq v Canada (Citizenship and Immigration)*, 2015 FC 156 at paras 53-55). In any event, the Applicant misconstrues the policy. The policy does not speak to the selection of a residence test, rather it states that the authority to decide whether an applicant meets the requirements of the *Citizenship Act* rests entirely with the citizenship judge who renders his or her decision independently of the Minister.

[17] The policy goes on to state that, once a citizenship judge approves an application, then the Minister's delegate must review the file to determine whether the decision could be subject to an appeal. In that regard, s 5.6 states "for the administration of the *Citizenship Act*, a consistent

and fair approach must be followed. To achieve this end, you must make sure that you carefully follow the policy below in reviewing the decisions of the citizenship judge on the questions of residence". Section 5.8 states that, other than in exceptional circumstances, a citizenship application must have accumulated three years (1095 days) of physical presence in Canada in the four years preceding the date of the application. Section 5.9, relied upon by the Applicant, addresses exceptional circumstances noting that case law confirms that an applicant may be absent from Canada and still maintain residence for citizenship purposes in certain exceptional circumstances, setting out the *Koo* test. The section goes on to state that when a delegate is applying that test to an application they must decide whether the absences fall within the types of exceptional circumstances and if not, the delegate must refer the citizenship judge's complete file to the case management branch for possible appeal by the Minister.

[18] Thus, s 5.9 of CP-5 has no application in this case and, contrary to the Applicant's written submission, it does not serve to instruct the Citizenship Judge to apply the *Koo* test. The Applicant's interpretation of s 5.9 would, in effect, fetter the Citizenship Judge's discretion in his choice of residence test. I note that when appearing before me counsel for the Applicant acknowledged that s 5.9 of CP-5 did not compel the Citizenship Judge to apply the *Koo* test. Rather, she submitted that the policy served to acknowledge the availability of that test which, the Applicant submits, should have been applied in her exceptional circumstances.

[19] As to the Applicant's alternate argument, s 5(4) of the *Citizenship Act* states:

(4) Despite any other provision of this Act, the Minister may, in his or her discretion, grant citizenship to any person to	(4) Malgré les autres dispositions de la présente loi, le ministre a le pouvoir discrétionnaire d'attribuer la

alleviate cases of special and unusual hardship or to reward services of an exceptional value to Canada.	citoyenneté à toute personne afin de remédier à une situation d'apatridie ou à une situation particulière et inhabituelle de détresse ou de récompenser des services exceptionnels rendus au Canada.

[20] The Applicant submits that her past services of exceptional value to Canada should have been considered and potentially rewarded by citizenship as per the spirit and intent of s 5(4). I would first note that there is no evidence that the Applicant sought to have her application considered under s 5(4), either in her original citizenship application or when she appeared before the Citizenship Judge. When appearing before me, her counsel confirmed that the Applicant had not done so. Second, this provision permits the Minister to make a discretionary grant of citizenship. Thus, to the extent that the Applicant is suggesting the Citizenship Judge had the authority to afford her citizenship based on s 5(4), this cannot succeed. Nor does the Applicant argue that a prior version of the *Citizenship Act*, which may have required the Citizenship Judge to consider whether or not to recommend an exercise of discretion under the version of s 5(4) then in effect, applies to her circumstances.

[21] In any event, I see no merit to the Applicant's position. As noted by Citizenship Judge, the Applicant came to Canada as a student. She obtained a Bachelor of Commerce in May 2013 from the University of British Columbia. During the course of her studies for that degree she participated in an exchange programme, from September 2011 to May 2012 at Wellesley College in the US and completed internships in China. In 2013, she enrolled in a master's program at Columbia University graduating in 2015. She now works in New York. The Applicant submits

these are very good schools, she obtained very good marks and she could contribute significantly in the future of Canada. In my view, however, based on the evidence before him and even if it had been open to him to do so, it would not have been unreasonable for the Citizenship Judge not to have exercised his discretion and recommended citizenship to reward services of exceptional value to Canada arising from the Applicant's efforts to afford herself a good education, her limited school activities, volunteer and work experience. Further, the plain wording of s 5(4) speaks to having actually performed, rather than the anticipating of the future provision of exceptional services to Canada, as the Applicant suggests she would do. The provision does not address an applicant's anticipated services.

ISSUE 2: Did the Citizenship Judge err in determining the Applicant's original declaration or residence questionnaire did not accurately reflect the number of days the Applicant was present in Canada during the relevant period?

[22] The Applicant submits that the Citizenship Judge had concerns about the accuracy of her declarations as to the number of days she was physically present in Canada and was not satisfied that the declarations in her citizenship application or her residence questionnaire accurately reflected the number of days that she was physically present in Canada during the relevant period. However, the Citizenship Judge did not raise this with the Applicant and thereby breached procedural fairness by failing to provide her with an opportunity to answer the concerns. Alternatively, by not addressing his concerns, the Citizenship Judge based his decision on an erroneous finding of fact without regard to the material before him.

[23] It should be remembered that the Applicant declared in her citizenship application that she was absent from Canada for 828 days during the relevant period. In her residence

questionnaire she declared that she was absent for 833 days. As noted by the Citizenship Judge, a citizenship officer determined that she was absent for 837 days. The Citizenship Judge stated, having reviewed all of the documentation submitted by the Applicant and having interviewed her, he was not satisfied, on a balance of probabilities, that either declaration accurately reflected the number of days she was physically present in Canada. Having examined her passport, he determined that she was absent from Canada of 837 days in the relevant period. Thus, the discrepancy at issue is 4 days. The Applicant was found to be short 472 days of the required 1095 rather than 468 as she declared.

[24] While the Citizenship Judge did not explain exactly how he made his determination of the 4 day difference based on his review of her passport, he did identify the passport as the basis of his conclusion. And, in any event, inadequacy of reasons is not a stand-alone basis for challenging a decision, provided the outcome falls within a reasonable range (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board),* 2011 SCC 62 at para 14; *Canada (Citizenship and Immigration) v Sukkar*, 2017 FC 693 at para 8). Further, in these circumstances, and where the Citizenship Judge applied the *Pourghasemi* test, I am not convinced that the failure to explicitly raise this 4 day differential with the Applicant amounted to a breach of procedural fairness. And, even if he had done so and the Applicant had persuaded the Citizenship Judge that her declaration rather than his calculation was correct, the outcome would have been the same. She would still have been short 468 days.

[25] In conclusion, for the above reasons, no reviewable error arises and the Citizenship Judge's decision was reasonable.

JUDGMENT IN T-566-17

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. There shall be no order as to costs.

3. No question of general importance for certification was proposed or arises.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Phebe Chan	FOR THE APPLICANT
Brett Nash	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Phebe Chan Law Corporation Vancouver, British Columbia	FOR THE APPLICANT
Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT