Federal Court  Cour fédérale

Date: 20180223

Docket: T-1407-17

Citation: 2018 FC 209

Ottawa, Ontario, February 23, 2018

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

NARIMAN ZAKI ABDULFATTAH YOUNIS

Applicant

and

THE MINISTER OF CITIZENSHIP OF IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review by Nariman Zaki Abdulfattah Younis [the Applicant] pursuant to s 22.1(1) of the *Citizenship Act*, RSC 1985, c C-29 [the Act], of a decision rendered by a Citizenship Judge [the Citizenship Judge or the Judge]. The Citizenship Judge found in a decision dated July 31, 2017 that the Applicant did not meet the requirements of paragraph 5(1)(c) of the Act. He therefore denied her application for citizenship [the Decision].

[2] For the reasons that follow, this application is allowed and the matter is returned for redetermination by a different Citizenship Judge.

II. **Background**

A. *Personal History of the Applicant*

[3] The Applicant is a 39 year old woman who was born in Dubai, United Arab Emirates [UAE], on December 1, 1978. The Applicant however is only a citizen of Jordan; she is not a citizen of any other country.

[4] The Applicant is a stay at home mother caring for her three children. All three children are Canadian citizens. One child was born in the UAE in 2015 and the other two older children were born in Canada.

[5] The Applicant is married to a Canadian Citizen, Fouad Blasi. In 2007 they met in the UAE and were married in Dubai on February 18, 2008. The Applicant's husband, prior to meeting the Applicant, had become a Canadian permanent resident through the Federal Skilled Worker program on October 29, 2006. The Applicant came to Canada on February 15, 2010, after her permanent residency was approved. The Applicant's husband received his Canadian citizenship on November 8, 2013.

[6] From December 2008 to May 2013 the Applicant's husband worked for Nav Canada as an Installation Technologist however he was informed that his position would not be renewed at the end of his contract. Mr. Blasi was unsuccessful seeking another position in Canada however he obtained a position as an Air Traffic Engineer in Dubai. He started in that position in May 2013, two days after finishing his job with Nav Canada.

[7] The Applicant and her children left Canada on July 1, 2013 to live with her husband in the UAE. Other than returning to Canada twice in connection with her citizenship application, the Applicant has not lived in Canada since she move to the UAE to join her husband.

B. *The Applicant's Citizenship Application*

[8] On May 3, 2013 the Applicant first applied for citizenship. At that time the Applicant calculated she would have met the residency test based on physical presence. She had 1102 days physically present in Canada since February 15, 2010 with two 35 day trips out of Canada to UAE/Jordan as her only absences.

[9] The Applicant's 2013 citizenship application was returned on June 29, 2013 as incomplete, with an explanation that the language evidence (training program at Ottawa-Carleton District School Board) was not acceptable and that the passport(s) provided did not cover the entirety of the relevant period.

[10] On April 20, 2014 the Applicant submitted a new application for citizenship. This 2014 application failed to mention 19 days in the United States however the Applicant remedied this in her residency questionnaire [RQ] on April 10, 2016.

[11] The 2014 application was set to the side by the Respondent for follow up as it did not include a Canadian address. The Respondent then sent a letter January 9, 2015 apologising for the delay and requesting a Canadian address to which the Applicant responded on January 22, 2015 by providing the address of a friend in Canada.

[12] The Applicant wrote her citizenship exam on March 2, 2016 after travelling to Canada on February 27, 2016. She returned again to Canada on July 7, 2017 for her hearing before the

Citizenship Judge on July 17, 2017. For each of these visits the Applicant entered Canada on a visa because her permanent residency card had expired as of March 20, 2015. During this period the Applicant received the RQ on March 14, 2016 which she submitted as discussed above. The Applicant also received requests for additional supporting documents to which the Applicant sent a number of materials in response.

[13] The Applicant's matter was referred to a citizenship judge as she self-reported a shortfall of 17 days of physical presence in Canada after she took into account the 19 days she spent in the United States.

III. **Issue and Standard of Review**

[14] The only issue to be determined is whether the Citizenship Judge erred when he determined that the Applicant did not meet the requirements of paragraph 5(1)(c) of the Act.

[15] There is agreement between the parties and the Court that the standard of review for the Decision is reasonableness. The findings by the Citizenship Judge are entitled to considerable deference: *Al-Askari v Canada (Citizenship and Immigration)*, 2015 FC 623 at para 17-18, 255 ACWS (3d) 34.

[16] A decision is reasonable if the decision-making process is justified, transparent and intelligible resulting in a determination that falls within the range of possible, acceptable outcomes which are defensible on the facts and law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190 [*Dunsmuir*]. If the reasons, when read as a whole, "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, [2011] 3 SCR 708.

IV. **Analysis of the Decision under Review**

[17] The Applicant, Respondent, and Citizenship Judge all agree that during the relevant time period (April 20, 2010 to April 20, 2014) the Applicant was physically present for 1,078 days which is 17 days less that the amount of residence time required by the Act.

[18] The Citizenship Judge chose to apply the test set out in the *Re Koo*, [1993] 1 FC 286, [1992] FCJ No 1107 (QL) (FCTD) [*Koo*] and the 6 factors discussed therein in considering whether the Applicant met the residence requirement. The factors can help to determine if an Applicant has a centralized mode of existence in Canada permitting an applicant to have deemed residency during periods of physical absence. In applying this test it is incumbent upon the Citizenship Judge to consider whether the Applicant had "residence in Canada" for at least three years, during the relevant period, with this "residence in Canada" meaning whether an applicant "regularly, normally or customarily lives" in Canada and determined using the *Koo* factors, not based solely on physical presence: *Canada (Citizenship and Immigration) v Huang*, 2016 FC 1348 at para 6, 275 ACWS (3d) 33. In this instance, the Judge was not so satisfied.

[19] The Citizenship Judge found that since February 15, 2010 the Applicant had been absent from Canada more than she has been present. He acknowledged that most of the absences were outside the end of the relevant period but characterized nearly a full year of absence within the relevant period as being "a prelude to living in the UAE continuously".

[20] While the Applicant raised several issues, only one need be addressed to allow this judicial review: the error made with respect to the citizenship of the Applicant. The Citizenship Judge found in his reasons that the Applicant is a national of the United Arab Emirates. She is not. She is a national of Jordan who was born in Dubai. That statement by the Judge is therefore contrary to the evidence.

[21] The handwritten notes of the Judge refer to the Applicant as a citizen of Jordan, born in the UAE. In addition, the Residence Questionnaire clearly states the Applicant is a citizen of Jordan. The File Preparation and Analysis Template [FPAT] also notes that the Applicant is a citizen of Jordan. The Citizenship Application states she is a citizen of Jordan. There is no evidence that she is a national of the UAE. In fact the FPAT also shows that not only does the Applicant not have permanent residence status in any other country, she has not applied for permanent residency in any other country.

[22] In the abstract, the error would not be determinative. Indeed, the Respondent acknowledges that the Judge's statement was an error but submits that it was immaterial as it did not affect the ultimate conclusion. The Respondent notes that nationality is not mentioned by the Judge again in the Decision and says that nothing turned on that point.

[23] In oral submissions the Respondent raised with the Court that the Judge's hearing notes reflect the Applicant's birth in the UAE and citizenship in Jordan. I am not satisfied however that the incorrect statement of the Applicant's citizenship in the Judge's reasons when writing the Decision can be remedied on the basis that during the hearing he correctly wrote down the Applicant's citizenship and birthplace. There were a number of documents, as listed above, in addition to Judge's notes that were available to him in the record confirming the Applicant's

citizenship and permanent residency. None of this multitude of documents prevented the Judge from still finding, incorrectly, that the Applicant was a citizen of the UAE when writing his reasons for the Decision.

[24] Contrary to the Respondent's argument of immateriality the Applicant points to various references in the Decision that emphasize the Applicant's residence in the UAE and says that it appears from those references the Judge believed the Applicant had a right and an intention to permanently reside in the UAE, which she does not. The Applicant submitted that such belief tainted his review of the *Koo* factors.

[25] I am not able to find that the mistake about the Applicant's citizenship was immaterial. In this case, the mistake is material.

[26] The Applicant's connection to the UAE appears to have been very important to the Judge. One of the main issues the Judge identified was the Applicant's ties to the UAE. He finds for example that she has a more substantial connection to the UAE than she has to Canada because she resided in Canada "for just 40 months" before returning to the UAE to resume residence there. At the time of the application for citizenship the legislative requirement to obtain citizenship was that the Applicant accumulate at least three years (36 months) of residence in Canada within the four years (48 months) immediately preceding the date of the application. In that respect, by saying that the Applicant had "just" 40 months of residing in Canada at the time she left for the UAE (July 1, 2013), the Judge appears to find implicitly that she had met the test for residency as 38 of those 40 months (April 20, 2010 to July 1, 2013) were during the relevant period. This comment and other comments by the Judge that the first three absences (89 days of absence) "were temporary" and were "reasonable periods of absence" further illustrate that the

Judge's reasons also lack intelligibility as they appear to pay insufficient attention to residency being required for only three out of the four years immediately preceding the application, whether it is residence deemed under Koo or physical presence.

[27] Looking at the Judge's comment about "just 40 months" when considering ties to Canada and the UAE while bearing in mind that only 36 months were required, the comment appears unintelligible.

[28] Certainly as a citizen of the UAE the Applicant would have rights leading to a substantial connection to the UAE. As a person without either citizenship or permanent residency in the UAE however I am not able to say that the Citizenship Judge would have reached the same conclusion if he had not been mistaken as to her citizenship.

[29] Given the statements made by the Judge regarding the importance of the UAE to the Applicant it is my view that the error regarding the Applicant's nationality was material. By finding that she had a substantial connection to the UAE the Judge determined that the 40 months he says she resided in Canada, which clearly meets the requirements of the Act during the relevant period, was not enough.

[30] As a result of the error, the Decision is neither transparent nor intelligible; I am unable to find that the outcome falls within a range that is defensible on the facts and the law.

[31] This application is allowed and the matter is to be re-determined by another citizenship judge. There is no question for certification on the facts of this case.

JUDGMENT IN T-1407-17

THIS COURT'S JUDGMENT is that:

1. The application is allowed and the matter is returned for re-determination by a different citizenship judge.

2. There is no question for certification.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Ms. Arghavan Gerami	FOR THE APPLICANT
Ms. Abigail Martinez	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Gerami Law Professional Corporation Ottawa, Ontario	FOR THE APPLICANT
Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT