Federal Court  Cour fédérale

Date: 20180620

Docket: T-1806-17

Citation: 2018 FC 639

Ottawa, Ontario, June 20, 2018

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

JUN LI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Ms. Li seeks review of the Citizenship Judge [the Judge] decision of October 20, 2017 finding that she did not meet the residency requirements to qualify for citizenship pursuant to s.5(1)(c) of the *Citizenship Act* [the Act]. The Judge calculated that Ms. Li was not physically present in Canada for the required 1095 days during the relevant 4 year period. For the reasons that follow, I find that the decision of the Judge is reasonably grounded on the evidence that was before him and therefore this judicial review is dismissed.

I. Background

[2] Ms. Li is a citizen of China who became a permanent resident of Canada on September 17, 2010. She applied for citizenship on December 20, 2014. The relevant four year period for citizenship consideration is December 20, 2010 to December 20, 2014 (1460 days). On her application for citizenship she declared 1124 days of physical presence during the relevant four years. On her residency questionnaire, she declared 339 days of absence, which means she was present in Canada for 1121 days.

[3] As a result of concerns raised regarding residency during an interview with a citizenship officer, her application was referred to the Judge and a hearing took place on August 23, 2017. At the hearing additions to the documentary evidence were provided by Ms. Li and she gave oral evidence.

II. Decision Under Review

[4] In the decision, the Judge begins by noting that the relevant four year period stipulated by s.5(1)(c) of the *Act* is December 2010-December 2014 (1460 days). Ms. Li was required to be present in Canada for 1095 days or three years during that four year period.

[5] The Judge noted that he was applying the test set out in *Pourghasemi (Re)* (1993), 62 FTR 122 (TD) [*Pourghasemi*]. He undertook the three part analysis to determine a baseline number of days of Ms. Li's physical presence in Canada by: (1) determining the number of declared absences and whether the departure and return dates of these absences can be verified

on a balance of probabilities; (2) whether there is evidence of undeclared trips; (3) if so, determining the duration of the undeclared trips on a balance of probabilities.

[6] On the declared absences, the Judge considered the documents and submissions made by Ms. Li and concluded that there were 34 declared trips. On the return dates, the Judge noted that a Canada Border Services Agency [CBSA] report recorded Ms. Li returning to Canada 31 times during the relevant four year period. The Judge noted that Ms. Li was not in Canada at the end of the relevant four year period, as she left Canada on December 19, 2014 for the United States and did not leave the United States until January 1, 2015. The Judge analyzed three trips taken by Ms. Li and verified the 34 return dates as claimed.

[7] The Judge considered the declared departure dates and noted that three declared departure dates could not be confirmed – namely July 24, 2011, November 6, 2011, and March 16, 2012. For the July 2011 date, the evidence showed Ms. Li's last presence in Canada was on July 12, 2011. For the November 6, 2011 date, the evidence on the last presence of Ms. Li in Canada was an entry into Canada on October 16, 2011 as recorded in the CBSA report. The Judge noted that there were no credit card statements submitted by Ms. Li to evidence any activity in Canada for November 2011. Finally, for the claimed departure date of March 16, 2012, the Judge noted Ms. Li's last entry into Canada was on February 2, 2012 and noted a credit card transaction on February 3, 2012.

[8] Based on this analysis, the Judge was able to verify 32 absences, but was unable to verify three departure dates because of a lack of evidence. The Judge also noted that Ms. Li consistently

underreported her absences on her application and in her submissions. Accordingly the Judge gave no weight to Ms. Li's claimed departure dates on these three occasions.

[9] The Judge concluded that from a calculation of the 32 known absences, Ms. Li had accumulated 359 days of absence, meaning she had only 6 days left of absences to claim before falling below the threshold of 1095 days. The Judge noted that using the last-known presence in Canada for the three departure dates which he could not confirm would put her below the 1095 day threshold.

[10] The Judge concluded, on a balance of probabilities, that Ms. Li did not meet the residence requirement as he was unable to establish a baseline of the days of physical presence in Canada during the relevant period for the application, and as a result, Ms. Li did not meet the residence requirement under s.5(1)(c) of the *Act.*

III. Issues

[11] The issues raised by the Applicant in her submissions are as follows:

A. Did the Judge err in calculating Ms. Li's presence in Canada?

B. Did the Judge err in concluding that there was no evidence to support the claimed departure dates?

IV. Standard of Review

[12] The standard of review of the Judge's determination of whether the s.5(1)(c) residence requirement has been met is reasonableness (*Farghal v Canada (Citizenship and Immigration)* 2018 FC 3 at para 12).

[13] Further, the highly discretionary nature of the Judge's analysis of residency attracts considerable deference on judicial review (*Al-Askari v Canada (Citizenship and Immigration)*, 2015 FC 623 at para 18).

V. Analysis

A. *Did the Judge err in calculating Ms. Li's presence in Canada?*

[14] Ms. Li argues that the Judge was unreasonable in his approach to calculating her days of physical presence in Canada. She argues that the Judge used the assessment of the dates of arrival and departure against her in the overall calculation. She also argues that the Judge fettered his discretion by applying a policy for calculating dates established by Immigration, Refugees, and Citizenship Canada [IRCC].

[15] Ms. Li's application was received before June 11, 2015, therefore in accordance with the IRCC policy in place at that time, when a person is absent from Canada, either the day they leave or the day they return is counted as a day absent from Canada.

[16] Here, had the Judge relied solely on the policy without reference to the governing law this might constitute a reviewable error as the Judge may have fettered his discretion (*Canada (Citizenship and Immigration) v Thamotharem,* 2007 FCA 198 at para 62).

[17] However, as can be seen from the decision, the Judge does not base his calculations *solely* on the policy. In fact the policy is not even referenced by the Judge. Rather, he makes his decision on the provisions in the *Act* and the fact that Ms. Li did not meet the required number of days of physical presence in Canada.

[18] The Judge can choose to use the *Pourghasemi* method of determining residency, which is strictly a quantitative exercise (*Canada (Citizenship and Immigration) v Gharbi*, 2017 FC 1141 at para 5). As well, Ms. Li filed her application on the basis of calculating the number of days of presence in Canada. She could have requested that the Judge depart from this particular method of determining residency, but there is nothing in the record indicating that she did.

[19] Accordingly there is no merit to the argument that the Judge fettered his discretion. Furthermore, the use of the policy in determining residency has been accepted as reasonable (*Cheema v Canada (Citizenship and Immigration),* 2016 FC 1170 [*Cheema*]). As noted in *Cheema*, the Judge is entitled to rely on the policy. Accordingly, the Judge's decision is reasonable on this ground.

[20] Furthermore, it is not the role of this court to reweigh the evidence or engage in a recalculation of Ms. Li's arrivals and departures from Canada under the reasonableness standard

(*Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at para 55).

B. *Did the Judge err in concluding that there was no evidence to support the claimed departure dates?*

[21] Ms. Li alleges that pages are missing from her citizenship file and that the record before the Judge was incomplete. She argues that the missing information would have provided evidence to confirm the November 6, 2011 and March 16, 2012 departure dates. In her affidavit she asserts that she provided the missing information. She states that her affidavit is entitled to a presumption of truthfulness (*Jack v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 2 at para 11; *Maldonado v Canada (Minister of Employment and Immigration)*, [1979] FCJ No. 248 at para 5).

[22] Rule 17 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules* provides that the tribunal has an "obligation" to produce a certified record, including all papers "relevant to the matter that are in the possession or control of the tribunal" (*Yadav v Canada (Citizenship and Immigration)*, 2010 FC 140 at para 44; Rule 17(b), *Federal Courts Citizenship, Immigration and Refugee Protection Rules*). Rule 17 provides that the evidentiary record before this Court on judicial review is restricted to the evidentiary record that was before the Judge (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 19).

[23] Here however, notwithstanding her allegation that evidence is missing from the record, Ms. Li did not attach the missing evidence (credit card records) to her affidavit filed on this judicial review. Presumably she would have been able to secure other copies of the credit card records she states are missing. The onus is on Ms. Li to demonstrate that information was before the decision-maker but not in the record (*Ogbuchi v Canada (Citizenship and Immigration)*, 2016 FC 764 at para 15).

[24] Ms. Li has not met the onus in this case. Aside from the statement in her affidavit, she has not offered any other proof that the credit card records which would support her claimed departure dates were before the decision-maker and erroneously kept out of the record. Ms. Li's bare assertion that there is missing information will not suffice to meet the burden to demonstrate that the record is incomplete (*El Dor v Canada (Citizenship and Immigration)*, 2015 FC 1406 at para 32).

[25] Even though her affidavit is entitled to a presumption of truthfulness, that presumption "will only operate to a certain degree" (*Canada (Citizenship and Immigration) v Pereira*, 2014 FC 574 at para 30). In this case, it only operates to the degree she can demonstrate that the evidence was sent and should have been before the Judge.

[26] A review of the decision demonstrates that the Judge based his decision on the evidence which was before him. The Judge looked for corroborating evidence on the departure dates but could not find it in the record. There is no positive obligation on the Judge to attempt to fill in gaps in the evidence nor is there an obligation on the Judge to give Ms. Li the benefit of the

doubt. It is Ms. Li who had the obligation to put forward reliable and comprehensive evidence, but she failed to do so.

[27] Therefore the Judge did not err by basing his date calculations on the record as it stood before him and concluding that there was a lack of sufficient and reliable evidence upon which to base his decision.

JUDGMENT in T-1806-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review of the Citizenship Judge decision is dismissed; and

2. There is no serious question for certification.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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