

Federal Court



Cour fédérale

Date: 20210617

Docket: T-169-20

Citation: 2021 FC 627

Ottawa, Ontario, June 17, 2021

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

ADEYINKA ILORI

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

AMENDED JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Adeyinka Ilori, entered Canada, from Nigeria, on July 30, 2010 and became a Permanent Resident on the same date. He applied for Canadian citizenship on December 17, 2013 and thus, the applicable period in this case for examining compliance with minimum residence requirements in paragraph 5(1)(c) of the *Citizenship Act*, RSC 1985, c C-29, is July 30, 2010 to December 17, 2013.

[2] Mr. Ilori represented himself at the hearing held in 2017. Two months after the hearing, the Citizenship Judge issued a decision in which he did not approve Mr. Ilori's application. The Judge was not satisfied that Mr. Ilori had provided sufficient reliable evidence he exceeded the minimum residence requirements. The Citizenship Judge also expressed credibility concerns in the decision.

[3] While the Citizenship Judge's decision was mailed within weeks of issuance, Mr. Ilori did not receive it. After several status inquiries, including Access to Information and Privacy [ATIP] requests, Mr. Ilori's counsel received the GCMS notes. Mr. Ilori's judicial review application was filed shortly after he reviewed the GCMS notes with his counsel, which disclosed the mailing of a negative decision. Mr. Ilori received a copy of the decision, after launching the judicial review, about 2½ years after the decision was rendered. Justice Barnes accepted Mr. Ilori's version of these events in his September 21, 2020 Order dismissing the Respondent's motion to dismiss the Applicant's Application for Leave and for Judicial Review.

[4] Mr. Ilori's judicial review raises two issues: (i) whether there was a breach of natural justice because the Judge relied on extrinsic evidence obtained during or as part of an investigation that was not put to Mr. Ilori to enable him to know the case he had to meet; and (ii) whether the Judge erred in the assessment of the Applicant's evidence. There also is a preliminary issue regarding the completeness and legibility of the certified tribunal record [CTR].

[5] I find that not only is the CTR incomplete but the poor reproduction quality significantly affects the CTR's legibility and hence, the Court's ability to review the record before the Citizenship Judge. I also find that there was a breach of natural justice regarding the Citizenship Judge's reliance on extrinsic evidence that was not put to Mr. Ilori prior to his hearing and, at best, only indirectly during the hearing. These issues are determinative. For the more detailed reasons that follow, I therefore grant the judicial review application. The Citizenship Judge's decision is set aside. The matter will be sent back for rehearing and redetermination.

II. Relevant Provisions

[6] See Annex "A" for applicable legislative provisions.

III. Standard of Review

[7] Breaches of procedural fairness in administrative contexts have been considered subject to a "reviewing exercise ... 'best reflected in the correctness standard' even though, strictly speaking, no standard of review is being applied": *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54. The duty of procedural fairness is context-specific, flexible and variable: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 77. In sum, the focus of the reviewing court is whether the process was fair and just.

[8] Otherwise, the presumptive standard of review is reasonableness: *Vavilov*, at para 10. A reasonable decision must be "based on an internally coherent and rational chain of analysis" and

it must be justified in relation to the factual and legal constraints applicable in the circumstances: *Vavilov*, at para 85. Courts should intervene only where necessary. To avoid judicial intervention, the decision must bear the hallmarks of reasonableness – justification, transparency and intelligibility: *Vavilov*, at para 99. The party challenging the decision has the onus of demonstrating that the decision is unreasonable: *Vavilov*, at para 100.

IV. Analysis

A. *Preliminary Issue Regarding the Incomplete CTR*

[9] Although the circumstances surrounding Mr. Ilori's delayed receipt of the Citizenship Judge's decision are seemingly unique, the manner in which the record was maintained in the years following the decision contributes to my conclusion that the CTR is incomplete. I also find that this state of the CTR is evident on its face. In my view, the case before me involves documentation that is central to the Citizenship Judge's determination that Mr. Ilori did not meet the applicable residence requirements, and that is known to have been before the Judge but is not before the Court. Because the documentation is not otherwise available to the Court, such as in the Applicant's record, the Court thus is unable to review the legality of the decision.

Consequently, for the more detailed reasons below, the decision must be set aside: *Togtokh v Canada (Citizenship and Immigration)*, 2018 FC 581 at para 16.

[10] Pursuant to Rule 17 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 [*IMM Rules*], Immigration, Refugees and Citizenship Canada [IRCC] sent the first version of the CTR to the Court on March 12, 2021; the Court received it on

the same day. This version of the CTR contains, among other things, handwritten hearing notes of the Citizenship Judge that are substantially illegible. Following correspondence to the Court from the parties regarding the CTR, and a Direction from the Court raising legibility concerns (not just with the Judge's notes but with other aspects of the CTR as well), the IRCC sent the second version of the CTR to the Court on May 7, 2021, including a typed transcript of the Judge's notes. Following additional correspondence and submissions at the hearing about the CTR, the Court is prepared to accept the second version of the CTR. Both versions comply technically with Rule 17 regarding their contents; the second version, however, is a clearer and somewhat more complete version of the CTR.

[11] The typed transcript is the only addition to the second version of CTR over the first version. While the notes provide some context for the Citizenship Judge's decision, they remain incomplete. For example, the typed transcript contains the following notation at the end: "NB. I was not able to decipher some of the words, partial words or dates in this note due to the passage of time and my poor penmanship. As a result I have replaced the word not transcribed with xxxx." It is not known whether the Judge faced that issue when preparing the decision that issued two months after the hearing.

[12] More significantly, however, the Citizenship Judge's decision refers to several documents that the Judge reviewed in connection with his assessment of whether Mr. Ilori met the residence requirements (i.e. "at least 1,095 days during the five years immediately before the date of his or her application": *Citizenship Act*, s 5(1)(c)(i)). The following documents, however, are not contained in either version of the CTR:

- the ICES report dated September 17, 2014 showing the dates on which the Applicant entered Canada;
- the Applicant's Nigerian passport entry stamps showing the dates the Applicant entered Nigeria (the Applicant declared the day before as departure dates from Canada in his application form);
- Applicant's Ontario Health Insurance Plan or OHIP records;
- TD and CIBC Visa credit card statements;
- TD account statements;
- evidence from the Applicant's LinkedIn account;
- any notes or written confirmation of information received from Wole Ayanleke, Group HR Manager at CFAO Nigeria Plc in Nigeria obtained six months prior to the Mr. Ilori's hearing regarding his employment as a General Manager Tax/Finance (versus Mr. Ilori's alleged consulting subsequent to his resignation as General Manager in 2010) with CFAO in Lagos, Nigeria.

[13] Also missing from the CTR are the following documents, copies of which are attached as exhibits to Mr. Ilori's affidavit in support of his judicial review application:

- Notice to Appear – Hearing with a Citizenship Judge dated January 19, 2017;
- Information Request from the Citizenship Judge dated February 22, 2017 issued to Mr. Ilori following the hearing;
- Mr. Ilori's response to the information request, with copies of those documents he had retained; missing are the passport entry stamps, OHIP records, TD and CIBC credit card statements, and TD account statements that the Citizenship Judge referred to in his decision.

[14] Because this documentation is missing from the CTR, and the majority of it also is not contained in the Applicant's record, I find the Court is prevented from judicially reviewing the Citizenship Judge's decision in any meaningful way. For example, I agree with the Respondent that passport stamps are not irrefutable proof of country entries and exits: *Haddad v Canada (Citizenship and Immigration)*, 2014 FC 976 at para 24. That said, as the Applicant emphasized at the hearing before me, and I agree, the decision appears to reflect the Citizenship Judge's willingness to accept the passport date stamps regarding the dates on which Mr. Ilori entered and

exited Nigeria, and the applicable length of time for returning to Canada, when assessing the bank account information that Mr. Ilori provided in response to the Judge's information request. Contradictorily, however, the Citizenship Judge did not accept the date stamps regarding the converse, being the dates on which Mr. Ilori exited Canada, and the applicable length of time for him to travel to Nigeria. Even discounting the date stamps by several days, however, would not necessarily reduce the physical presence days totalling 1117, noted in the completed File Preparation and Analysis Template – Long in the CTR, below the requisite 1,095 days.

[15] In my view, the documentation that is missing altogether is central to the Citizenship Judge's determination of whether Mr. Ilori met the presence requirements stipulated in the *Citizenship Act*, s 5(1)(c)(i). Further, the decision mentions the LinkedIn evidence and information obtained from Wole Ayanleke, Group HR Manager at CFAO, as the foundation for the Citizenship Judge's credibility concerns, about which Mr. Ilori appears to have been questioned only indirectly at the hearing. I find the incomplete state of the typed transcript of the hearing notes, in addition to the relevant missing documentation, also impedes the Court's ability to meaningfully judicially review the Citizenship Judge's decision. Although there was no legal requirement for the Citizenship Judge to take notes at the hearing, because notes were taken and included in the CTR, in my view they should be legible or rendered legible. At the very least, legible notes can assist the Court in determining whether a decision is based on an internally coherent and rational chain of analysis: *Vavilov*, at para 85.

[16] Finally, and also significantly, the Respondent admitted, at the hearing before me, that documents were missing from the file, and explained that because the file is old, the documents

were destroyed when the file was microfilmed. It is not evident in the CTR when this occurred. While, as mentioned above, the circumstances here are unique, having regard to the gap of 2½ years from the mailing of the decision to the filing of the Applicant's Application for Leave and Judicial Review, this matter nonetheless highlights the risk inherent in a policy that involves document destruction, after two years in this case. Such destruction may not be contrary, strictly speaking, to paragraph 4(1)(a) of the *Privacy Regulations*, SOR/83-508 under the *Privacy Act*, RSC 1985, c P-21, which provision relates to personal information that has been used by a government institution for an administrative purpose. Neither, however, does this provision mandate destruction, and further, paragraph 4(1)(b) contemplates the possibility that the documentation may need to be retained longer. The risk is that the documentation, if destroyed too soon, could be central to the decision under review, thus resulting in the decision being set aside and the matter having to be reheard and/or redetermined, as in the case before me.

[17] Although this issue in itself is determinative, because the matter will be sent back for rehearing and redetermination, in my view it is necessary to address the breach of natural justice that I am persuaded occurred in the circumstances, to avoid repetition to the extent possible.

B. *Breach of Natural Justice*

[18] The Respondent argues that Mr. Ilori was advised at the hearing of the evidence against him and that he was afforded the opportunity to clarify and respond to the credibility concerns. I disagree.

[19] The Respondent points, for example, to paragraphs 27 – 32 of the decision. The Citizenship Judge discusses concerns regarding Mr. Ilori's position as General Manager Tax/Finance at CFAO, based on the LinkedIn evidence and the information from Wole Ayanleke, and then discusses Mr. Ilori's testimony at the hearing, but without any indication of whether such evidence or information was raised with Mr. Ilori at the hearing. It is not evident in my view from these paragraphs or from the typed, transcribed hearing notes that he was asked any questions about such evidence or information. In fact, I find his answers about consulting for CFAO were not inconsistent, on the whole, with having resigned as CFAO's General Manager Tax/Finance in 2010 and subsequently having acted only as a consultant for the company.

[20] Rather, as argued by the Applicant, and I agree, the evidence and information was relied on to discredit the Applicant without confronting the Applicant with the Citizenship Judge's concerns. In my view, Mr. Ilori was not given an informed or fair opportunity, especially as a self-represented Applicant, to contradict or explain the LinkedIn evidence or information from Wole Ayanleke.

[21] In addition, the completed Analysis document and the GCMS Notes in both versions of the CTR refer to information obtained from the Applicant's spouse upon her return to Canada, at Pearson International Airport, in Toronto on September 4, 2012. According to these documents, when the spouse was examined, it was revealed that Mr. Ilori does not live in Canada but rather he continues to live and work as an accountant in Nigeria. The spouse and children moved to Canada for a better life (they are all now Canadian citizens), but Mr. Ilori only visits. The entries regarding the spouse's information conclude with, "Pls examine carefully for res. obligations."

This information was repeated three times in the completed Analysis document (that was not prepared by the Citizenship Judge) but was not mentioned specifically in the typed hearing notes nor in the decision. Mr. Ilori was questioned at the hearing, however, about his accounting firm in Nigeria, run by his partner and through which Mr. Ilori consulted for CFAO. To the extent that the spouse's information factored into or influenced the Citizenship Judge's consideration of Mr. Ilori's application, such information should have been put to Mr. Ilori for contradiction or explanation.

[22] The Applicant does not dispute the Minister's entitlement, under paragraph 13.1(a), to conduct investigations and inquiries for the purpose of ascertaining whether an applicant meets the requirements of the *Citizenship Act*. And although the duty of procedural fairness owed to applicants by Citizenship Judges is said to fall at the lower end of the spectrum, nonetheless the individual affected must know the case they have to meet and have an opportunity to respond to the case to be met: *Fazail v Canada (Citizenship and Immigration)*, 2016 FC 111 at para 46. Further, in my view extra care should be taken to ensure that self-represented applicants know the case they have to meet. They should not be ambushed or surprised at a hearing with, nor expected to deduce from a Notice of Appearance or an Information Request, the concerns a Citizenship Judge may have with their application or supporting documentation, either on their face or based on investigation findings.

[23] In addition, I agree with the Applicant that while the Citizenship Judge articulated the applicable test in the case before me as the quantitative physical presence test, the Citizenship Judge pivoted to a qualitative test by examining whether the Applicant continued to live and

work as an accountant in Nigeria. Not only was Mr. Ilori questioned at the hearing about his accounting firm and his continued involvement with CFAO, but the Citizenship Judge also focused on the houses and hotel Mr. Ilori continued to own and manage in Nigeria. For example, the typed, transcribed hearing notes state the following: “still has house; owned houses in 2010; still live in on [sic] of these houses; manage houses; still own hotel; owned in 2010; was getting income in 2010; partner manage accounting firm; started early 2000 while still working at CFAO; used identity to start firm; started CFAO as internal auditor...” The Judge mentioned these factors in connection with the credibility concerns outlined in his decision.

[24] According to this Court’s case law, there are three separate tests from which a citizenship judge can choose, one of which is quantitative based strictly on the physical presence requirements, while the other two are more qualitative in nature: *Miji v Canada (Citizenship and Immigration)*, 2015 FC 142 [*Miji*] at para 19. The focus of the third test, the *Koo* qualitative test, is the location in which the person applying for Canadian citizenship “regularly, normally or customarily lives”: *Miji*, at para 19, citing *Koo (Re)*, 1992 CanLII 2417 (FC), [1993] 1 FC 286 (TD). Procedural fairness dictates that an applicant, such as Mr. Ilori should not be placed in doubt as to which of the three citizenship tests a citizenship judge will be applying: *Miji*, at para 21. In my view, the so-called credibility concerns are a veiled *Koo* qualitative test.

[25] Thus, not only did the Citizenship Judge fail to ensure Mr. Ilori knew which citizenship test in fact was applied to his circumstances, but also the Judge failed to ensure Mr. Ilori knew the case he had to meet, resulting in breaches of natural justice.

V. Conclusion

[26] For the above reasons, I therefore grant the Applicant's judicial review application. The Citizenship Judge's April 21, 2017 decision is set aside and the matter will be sent back for rehearing and redetermination by a new decision maker.

[27] I provided the Applicant with an opportunity to propose a serious question of general importance for certification subsequent to the hearing of this matter. The Applicant proposed a question, and a possible variation, relating to the retention of accurate or verifiable records of an administrative hearing and documents relied upon by the administrative decision maker in reaching a decision. In my view, neither version of the proposed question would be dispositive of an appeal, and further, the issue of document retention (regarding personal information that has been used by a government institution for an administrative purpose) is governed at a minimum by the *Privacy Regulations*, s 4(1). I therefore decline to certify the Applicant's proposed question or the possible variation.

JUDGMENT in T-169-20

THIS COURT'S JUDGMENT is that:

1. The Applicant's judicial review application is granted;
2. The Citizenship Judge's April 21, 2017 decision is set aside;
3. The matter will be sent back for rehearing and redetermination by a new decision maker; and
4. No question will be certified.

"Janet M. Fuhrer"

Judge

Annex “A”: Relevant Provisions

Citizenship Act, RSC 1985, c C-29;
Loi sur la citoyenneté, LRC 1985, c C-29

Grant of citizenship	Attribution de la citoyenneté
<p>5 (1) The Minister shall grant citizenship to any person who</p> <p style="padding-left: 20px;">(a) makes application for citizenship;</p> <p style="padding-left: 20px;">(b) [Repealed, 2017, c. 14, s. 1]</p> <p style="padding-left: 20px;">(c) is a permanent resident within the meaning of subsection 2(1) of the <i>Immigration and Refugee Protection Act</i>, has, subject to the regulations, no unfulfilled conditions under that Act relating to his or her status as a permanent resident and has</p> <p style="padding-left: 40px;">(i) been physically present in Canada for at least 1,095 days during the five years immediately before the date of his or her application, and</p> <p style="padding-left: 40px;">(ii) [Repealed, 2017, c. 14, s. 1]</p> <p style="padding-left: 40px;">(iii) met any applicable requirement under the Income Tax Act to file a return of income in respect of three taxation years that are fully or partially within the five years immediately before the date of his or her application;</p> <p style="padding-left: 20px;">(c.1) [Repealed, 2017, c. 14, s. 1]</p> <p style="padding-left: 20px;">(d) if 18 years of age or more but less than 55 years of age at the date of his or her application, has an adequate knowledge of one of the official languages of Canada;</p> <p style="padding-left: 20px;">(e) if 18 years of age or more but less than 55 years of age at the date of his or her application, demonstrates in one of the official languages of Canada that he or she</p>	<p>5 (1) Le ministre attribue la citoyenneté à toute personne qui, à la fois :</p> <p style="padding-left: 20px;">a) en fait la demande;</p> <p style="padding-left: 20px;">b) [Abrogé, 2017, ch. 14, art. 1]</p> <p style="padding-left: 20px;">c) est un résident permanent au sens du paragraphe 2(1) de la <i>Loi sur l’immigration et la protection des réfugiés</i>, a, sous réserve des règlements, satisfait à toute condition rattachée à son statut de résident permanent en vertu de cette loi et</p> <p style="padding-left: 40px;">(i) a été effectivement présente au Canada pendant au moins mille quatre-vingt-quinze jours au cours des cinq ans qui ont précédé la date de sa demande,</p> <p style="padding-left: 40px;">(ii) [Abrogé, 2017, ch. 14, art. 1]</p> <p style="padding-left: 40px;">(iii) a rempli toute exigence applicable prévue par la Loi de l’impôt sur le revenu de présenter une déclaration de revenu pour trois des années d’imposition complètement ou partiellement comprises dans les cinq ans qui ont précédé la date de sa demande;</p> <p style="padding-left: 20px;">c.1) [Abrogé, 2017, ch. 14, art. 1]</p> <p style="padding-left: 20px;">d) si elle a 18 ans ou plus mais moins de 55 ans à la date de sa demande, a une connaissance suffisante de l’une des langues officielles du Canada;</p> <p style="padding-left: 20px;">e) si elle a 18 ans ou plus mais moins de 55 ans à la date de sa demande, démontre dans l’une des langues officielles du Canada qu’elle a une connaissance suffisante du</p>

<p>has an adequate knowledge of Canada and of the responsibilities and privileges of citizenship; and</p> <p>(f) is not under a removal order and is not the subject of a declaration by the Governor in Council made pursuant to section 20.</p> <p>Suspension of processing</p> <p>13.1 The Minister may suspend the processing of an application for as long as is necessary to receive</p> <p>a) any information or evidence or the results of any investigation or inquiry for the purpose of ascertaining whether the applicant meets the requirements under this Act relating to the application, whether the applicant should be the subject of an admissibility hearing or a removal order under the Immigration and Refugee Protection Act or whether section 20 or 22 applies with respect to the applicant; and</p> <p>...</p>	<p>Canada et des responsabilités et avantages conférés par la citoyenneté;</p> <p>f) n'est pas sous le coup d'une mesure de renvoi et n'est pas visée par une déclaration du gouverneur en conseil faite en application de l'article 20.</p> <p>Suspension de la procédure d'examen</p> <p>13.1 Le ministre peut suspendre, pendant la période nécessaire, la procédure d'examen d'une demande :</p> <p>a) dans l'attente de renseignements ou d'éléments de preuve ou des résultats d'une enquête, afin d'établir si le demandeur remplit, à l'égard de la demande, les conditions prévues sous le régime de la présente loi, si celui-ci devrait faire l'objet d'une enquête dans le cadre de la Loi sur l'immigration et la protection des réfugiés ou d'une mesure de renvoi au titre de cette loi, ou si les articles 20 ou 22 s'appliquent à l'égard de celui-ci;</p> <p>...</p>
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Privacy Regulations, SOR/83-508;
Règlement sur la protection des renseignements personnels, DORS/83-508

<p>Retention of Personal Information that Has Been Used by a Government Institution for an Administrative Purpose</p> <p>4 (1) Personal information concerning an individual that has been used by a government institution for an administrative purpose shall be retained by the institution</p> <p>(a) for at least two years following the last time the personal information was used for an administrative purpose unless the individual consents to its disposal; and</p> <p>(b) where a request for access to the information has been received, until such</p>	<p>Conservation de renseignements personnels utilisés par une institution fédérale à des fins administratives</p> <p>4 (1) Les renseignements personnels utilisés par une institution fédérale à des fins administratives doivent être conservés par cette institution :</p> <p>a) pendant au moins deux ans après la dernière fois où ces renseignements ont été utilisés à des fins administratives, à moins que l'individu qu'ils concernent ne consente à leur retrait du fichier; et</p> <p>b) dans les cas où une demande d'accès à ces renseignements a été reçue, jusqu'à ce</p>
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<p>time as the individual has had the opportunity to exercise all his rights under the Act.</p>	<p>que son auteur ait eu la possibilité d'exercer tous ses droits en vertu de la Loi.</p>
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FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-169-20

STYLE OF CAUSE: ADEYINKA ILORI v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

DATE OF HEARING: MAY 18, 2021

JUDGMENT AND REASONS: FUHRER J.

DATED: JUNE 17, 2021

APPEARANCES:

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