Federal Court  Cour fédérale

Date: 20210730

Docket: T-1277-20

Citation: 2021 FC 809

Ottawa, Ontario, July 30, 2021

PRESENT: Madam Justice Sadrehashemi

BETWEEN:

THE MINISTER OF CITZENSHIP AND IMMIGRATION

Applicant

And

KENNETH THORPE TANNER

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Over six years ago, in May 2015, the Respondent, Mr. Tanner, applied for Canadian citizenship. Over these years, the determinative issue for those reviewing and deciding his citizenship application (citizenship officers, citizenship judges, this Court) has been the number of days he was physically present in Canada in the four years immediately prior to making this application.

[2] The first citizenship judge (Citizenship Judge Wong) held that Mr. Tanner did not meet the physical presence threshold requirement operative at the time of his application of at least 1095 days in Canada in the four years preceding the filing of his application. This decision was set aside by this Court. Justice Southcott found that in coming to this calculation, Citizenship Judge Wong double counted 14 days of absences. The matter was sent back for redetermination.

[3] On redetermination, the second citizenship judge (Citizenship Judge Hart) determined that she was bound by Justice Southcott's findings that Mr. Tanner met the physical presence threshold and approved Mr. Tanner's citizenship application on this basis.

[4] The Minister has applied for judicial review of this positive citizenship decision, arguing that Citizenship Judge Hart fettered her discretion in finding that she was bound by Justice Southcott's comments on Mr. Tanner's days of physical presence in Canada. The Minister also argued, in the alternative, that the decision was unreasonable as Citizenship Judge Hart failed to consider the new evidence and submissions or explain how she reached her determination on physical presence in Canada other than to say she was bound by this Court's findings.

[5] I find the redetermination decision unreasonable due to the citizenship judge's failure to consider the new calculations, evidence or submissions before her. The record before Citizenship Judge Hart was different than what was before Justice Southcott. As such, I need not decide whether she fettered her discretion in considering herself bound by his comments because it was an error to not consider the new material on the redetermination.

[6] Citizenship Judge Hart's reasons explicitly indicate she did not consider the new materials before coming to a determination on Mr. Tanner's citizenship application. This is an error that makes her decision unreasonable.

[7] For the reasons set out below, I am allowing the Minister's application for judicial review.

II. Background

[8] The Respondent, Mr. Tanner, is a citizen of the United States. He has been working in Canada for over 14 years. In April 2009, he became a permanent resident of Canada. In August 2013, Mr. Tanner and his family moved to the United States but Mr. Tanner continued to commute to Canada for work.

[9] In May 2015, Mr. Tanner filed his application for Canadian citizenship. He indicated in his application that he was outside of Canada for 276 days and inside Canada for 1184 days in the four preceding years.

[10] In 2017, a citizenship officer assessing the application was not satisfied that Mr. Tanner met the physical presence in Canada requirement and sent the file to a citizenship judge for determination. In November 2017, Citizenship Judge Wong refused the application, finding Mr. Tanner did not meet the threshold requirement of 1095 days of physical presence in Canada in the four years preceding the filing of the application.

[11] Mr. Tanner judicially reviewed the negative citizenship decision and in July 2018, Justice Southcott set aside the refusal decision on the basis that there had been double counting of some of the absences and returned the matter to another citizenship judge for redetermination (*Tanner v Canada (Citizenship and Immigration)*, 2018 FC 798). There were no specific instructions provided by Justice Southcott, other than that the matter be returned to another citizenship judge for redetermination.

[12] In April 2019, a citizenship officer prepared a Note to File indicating that Mr. Tanner had not met the physical presence requirements and that there were some periods of time where they could not confirm whether he was present in Canada. The citizenship officer also noted their concern with counting days where Mr. Tanner worked in Canada but went home to the United States. This Note to File, along with an Excel spreadsheet the officer had created to calculate Mr. Tanner's absences from Canada, were sent to Citizenship Judge Hart. That same month, Citizenship Judge Hart held a hearing with Mr. Tanner and the Minister's representative.

[13] At this hearing, Mr. Tanner learned of the Excel spreadsheet that the citizenship officer had used to calculate Mr. Tanner's absences. He asked that the Excel spreadsheet be provided to him so that he could properly respond. The Minister's representative refused to provide the spreadsheet to Mr. Tanner and instead advised that he could make an access to information request to obtain the document.

[14] Following the hearing, Mr. Tanner's counsel provided submissions and further evidence to support that Mr. Tanner had been present in Canada on the particular days in dispute. The Minister's representative also made submissions.

[15] Due to procedural fairness concerns, Citizenship Judge Hart adjourned the matter until Mr. Tanner had access to the Excel spreadsheet being relied upon by the Minister. Mr. Tanner advised that he would inform Citizenship Judge Hart and the Minister's representative once the access to information request results were obtained.

[16] A year passed, and there were still no results to the access to information request. Without notifying the parties, Citizenship Judge Hart determined that the Excel spreadsheet was not relevant to her decision and decided to proceed with determining the application without it. Citizenship Judge Hart granted Mr. Tanner's citizenship application.

[17] Since Mr. Tanner's application for citizenship had been filed prior to June 11, 2015, Citizenship Judge Hart noted that she could adopt any of the three principal tests for assessing residence as set out in *Lam v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 7776. She decided, like Citizenship Judge Wong, to apply the strictly quantitative approach used in *Re Pourghasemi* 62 FTR 122 ("*Pourghasemi* Physical Residence Test"). Citizenship Judge Hart then found, having chosen the *Pourghasemi* quantitative approach, that she was bound by Justice Southcott's finding that Mr. Tanner had met the physical presence requirement threshold with 1099 days in Canada.

[18] The parties did not receive the decision until approximately five months after the determination had been made. Once they received the decision, the Minister applied for judicial review of the decision to grant citizenship to Mr. Tanner.

III. Issue and Standard of Review

[19] The issue on this judicial review is whether the citizenship judge erred in rendering a decision without a consideration of the new evidence and submissions filed after the case was sent back for redetermination.

[20] The parties agreed that the standard of review of reasonableness ought to be applied in reviewing Citizenship Judge Hart's decision. The Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] confirmed that reasonableness is the presumptive standard of review when reviewing administrative decisions on their merits. None of the exceptions to that presumption arise here.

IV. Analysis

[21] On redetermination, Citizenship Judge Hart reached her conclusion that Mr. Tanner had 1099 days of physical presence in Canada solely on the basis that she understood herself to be bound by comments made by Justice Southcott on judicial review regarding Mr. Tanner's days of physical presence in Canada. Once she opted to apply the *Pourghasemi* Physical Residence

Test, Citizenship Judge Hart believed that she was bound by these comments. This is explicitly stated in her decision:

> The finding of Justice Southcott that Mr. Tanner met the residence requirement, with 1099 days of physical presence in Canada, is clear and unambiguous. From the above authorities, it is also evident that having decided to apply the *Pourghasemi* test, that determination by the Federal Court is binding on me in this determination.

[22] Citizenship Judge Hart noted that she did not consider any of the new residence calculations prepared by either party in her decision. She determined that these new calculations were not relevant to her conclusion on physical residency. Nor did Citizenship Judge Hart deal with the new submissions made by the Minister's representative or Mr. Tanner in her decision. The new calculations, evidence and submissions were not relevant for Citizenship Judge Hart in making her decision because she determined, irrespective of them, that she would be bound by the "1099 days" figure in Justice Southcott's decision.

[23] The new evidence and submissions before Citizenship Judge Hart that were not before Justice Southcott included the following:

- Two updated ICES Traveller History reports dated January 31, 2019;
- April 2019 Note to File from another citizenship officer reviewing the file, who comes to a new calculation on Mr. Tanner's absences of at least 608 days during the relevant period;
- Submissions of the parties at the hearing before Citizenship Judge Hart that took place on April 24, 2019; and,

- Mr. Tanner's written submissions following the April 24, 2019 hearing that address the Minister's representative's position about how to calculate the days on which Mr. Tanner worked in Canada but then went home to his residence in the United States; Mr. Tanner also addressed a number of the dates raised at the hearing and provided a summary chart and further material to support his whereabouts on particular days in question.

[24] The citizenship officer who had reviewed the file on redetermination presented Citizenship Judge Hart with a different and higher number of absences for Mr. Tanner than had been submitted before Citizenship Judge Wong. A key issue in dispute between the parties that was addressed in Mr. Tanner's May 2019 submissions, and the April 2019 citizenship officer's Note to File, was how to calculate the days where Mr. Tanner worked in Canada but then later on the same day went home to his residence in the United States. Citizenship Judge Hart did not address these submissions in her decision.

[25] Citizenship Judge Hart erred when she held that Justice Southcott's finding that Mr. Tanner had 1099 days of physical presence in Canada was "clear and unambiguous" and binding on her irrespective of any new evidence and submissions that were filed on redetermination.

[26] First, in my view, Justice Southcott did not make a final determination as to the number of days Mr. Tanner was present in Canada. He noted in the decision that he was not determining which of the parties' starting points for calculating Mr. Tanner's presence in Canada was correct: the starting point of the Minister at that time (351 days of absence) or the starting point of Mr. Tanner (276 days of absence). Justice Southcott's evaluation was limited to determining whether

the double counting error would have made a difference to the decision given the 1095 physical residence threshold required. He determined that it would make a difference because even if he applied the Minister's starting point of a higher number of absences, Mr. Tanner would be over the threshold required, with 1099 days of physical presence in Canada. I do not understand these comments to be a final factual determination as to how many days of physical presence Mr. Tanner had in Canada.

[27] Second, Justice Southcott's comments certainly could not have meant that the 1099 number was required to be adopted on redetermination, without any need to consider the new evidence and submissions of the parties. Justice Southcott's only direction was that "the matter is returned to another citizenship judge for redetermination." As stated by the Federal Court of Appeal in *Canada (Citizenship and Immigration) v Yansane*, 2017 FCA 48 [*Yansane*] at paragraph 25, "an administrative tribunal to which a case is referred back must always take into account the decision and findings of a reviewing court *unless new facts call for a different analysis*" (emphasis added). It is impossible to determine whether the new facts (evidence and submissions) need a different analysis without considering them; the citizenship judge on redetermination had to consider the new evidence and the arguments in reaching her determination.

[28] Mr. Tanner argues that it was open to Citizenship Judge Hart to come to the same conclusion as Justice Southcott without having to do the math herself. I agree that it was open to the citizenship judge to come to the same determination, but on redetermination she had to address the submissions and evidence that were before her. The issue is not whether a decision-

maker could reach the same finding, or whether they considered the reasoning of the Court; as noted by the Federal Court of Appeal in *Yansane*, they are required to consider the comments of this Court in coming to a fresh determination. The issue here is that the decision-maker concluded that they had no other choice but to follow this Court's comments despite having received new submissions and evidence.

[29] Mr. Tanner also argues that "it can be implied that she [Citizenship Judge Hart] would have made the same findings as Justice Southcott on the record and evidence before her in any event." My role on judicial review is not to look at the record and try to assess whether I think the decision-maker *could* have reached a conclusion. There was evidence and submissions before Citizenship Judge Hart that were not in the record before Justice Southcott. The Supreme Court of Canada in *Vavilov* confirmed that "the reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it" (*Vavilov,* para 126). In my view, a review of Citizenship Judge Hart's reasons can lead to no other conclusion than she did not feel like it was necessary to consider the new evidence and submissions that had been filed. As noted above, Citizenship Judge Hart explicitly stated that she would not consider the new calculations because she believed she was bound by the comments on physical presence made by Justice Southcott. We cannot know how Citizenship Judge Hart would have determined the days of physical presence had she considered the new evidence and submissions before her.

[30] The failure to consider the parties' submissions and calculations also meant that a critical point in dispute between the parties remains unresolved, i.e. how to calculate the days where Mr.

Tanner worked in Canada but went home to his residence in the United States after work. As held by the Supreme Court of Canada at paragraph 127 of *Vavilov*: “The principles of justification and transparency require that an administrative decision maker’s reasons meaningfully account for the central issues and concerns raised by the parties.”

[31] Due to my finding that the citizenship judge erred in deciding to not consider the new evidence and submissions before her, I am allowing the Minister’s application for judicial review and sending the case back for redetermination by a different citizenship judge.

[32] Though it was not specifically argued as a basis for relief, I would like to comment on the delay in this case. Mr. Tanner submitted his citizenship application over six years ago. There was an error in double counting that resulted in the first decision being sent back for redetermination on July 31, 2018. On redetermination, there were two periods of delay that, in my view, are particularly unfortunate.

[33] Section 14(1) of the *Citizenship Act*, RSC 1985, c C-29, provides that once an application is referred to a citizenship judge because the Minister is not satisfied that the applicant meets the requirements, “the citizenship judge shall determine whether the applicant meets those requirements within 60 days after the day on which the application is referred.” This Court has held that this requirement is not mandatory but directory in nature. Nonetheless, it provides a clear indication that the intention of Parliament was to process these files relatively quickly (*Al Khoury v Canada (Citizenship and Immigration),* 2012 FC 536 at paragraphs 17-19 citing *Yan v Canada (Citizenship and Immigration),* 2009 FC 1153 at paragraph 21-25).

[34] The Minister's representative refused to provide Mr. Tanner with the Excel spreadsheet they used to make their new calculations of Mr. Tanner's absences, a document that they were relying upon and which was provided to Citizenship Judge Hart. It is unclear why the Minister's representative would not want Mr. Tanner to have the same materials that they were asking the decision-maker to consider; as noted by Citizenship Judge Hart when she adjourned the matter, this would seem to lead to a clear breach of the principles of procedural fairness. The insistence that Mr. Tanner make an access to information request to obtain this document, instead of providing the document directly to him, resulted in approximately a year of delay in processing this file. Eventually, as set out above, Citizenship Judge Hart decided she could determine the case without relying on the document.

[35] The second delay was that neither Mr. Tanner nor the Minister received the decision until approximately five months after it had been made. Sections 14(2) of the *Citizenship Act* requires that notice of a citizenship judge's decision to approve or not approve an application must be provided to the Minister "without delay after making a determination." There is no explanation in the record before me for this delay.

[36] It is my hope, given the delays outlined above, that Mr. Tanner's application will be dealt with expediently.

[37] In his written submissions, Mr. Tanner asked for costs to be awarded. As I have determined that the matter ought to be sent back for redetermination, there is no basis to award costs to Mr. Tanner.

[38] The parties have not asked to certify a question and I agree that none arises.

JUDGMENT IN T-1277-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed;
2. The decision of Citizenship Judge Hart is set aside and the matter is returned to another citizenship judge for redetermination on an expedited basis; and
3. No question is certified for appeal.

"Lobat Sadrehashemi"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Erica Louie	FOR THE APPLICANT
Brian Portas	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Vancouver, British Columbia	FOR THE APPLICANT
Borden Ladner Gervais LLP Barristers & Solicitors Calgary, Alberta	FOR THE RESPONDENT