Federal Court  Cour fédérale

Date: 20240501

Docket: T-1552-22

Citation: 2024 FC 668

Ottawa, Ontario, May 1, 2024

PRESENT: The Honourable Madam Justice Turley

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

SUI DONG LIU

Respondent

JUDGMENT AND REASONS FOR JUDGMENT

I. Overview

[1] The Minister of Citizenship and Immigration [Applicant] seeks judicial review of a decision of a Citizenship Judge, dated June 9, 2022, approving the Respondent's citizenship application. The Citizenship Judge concluded that the Respondent had established her physical presence in Canada for the requisite time period in accordance with paragraph 5(1)(c) of the *Citizenship Act*, RSC 1985, c C-29 [*Citizenship Act*].

[2] I am allowing the application because the Citizenship Judge's decision is unreasonable in light of the governing legal principles and the evidentiary record. Given the Respondent's failure to respond to the Citizenship Judge's requests for further evidence to substantiate her physical presence in Canada immediately before August 14, 2016, and May 20, 2017, the Citizenship Judge erred in concluding that the Respondent had provided "sufficient proof" to meet the residency requirement in the *Citizenship Act*. In particular, the Citizenship Judge erred in relying on: (i) the absence of evidence showing that the Respondent had left Canada immediately prior to entering China on August 14, 2016, and May 20, 2017; and (ii) passport entry stamps, as sufficient and reliable proof of the Respondent's physical presence in Canada.

II. Background

A. *The Respondent's citizenship application*

[3] The Respondent, a citizen of China and a permanent resident of Canada, applied for Canadian citizenship on July 7, 2018.

[4] Pursuant to subparagraph 5(1)(c)(i) of the *Citizenship Act*, the Respondent was required to establish that she had been physically present in Canada for at least 1,095 days during the five years immediately preceding the date of her citizenship application (from July 7, 2013 to July 7, 2018).

[5] In her citizenship application, the Respondent declared three absences in the relevant five-year period: (i) September 17, 2013 to October 18, 2013; (ii) August 1, 2016 to April 11, 2017; and (iii) May 12, 2017 to June 20, 2018.

[6] After reviewing the Respondent's file, a Citizenship Officer [Officer] discovered an undeclared absence from Canada between November 10, 2015 and January 8, 2016. The Officer found that, based on this absence, the Respondent was short of the 1,095 required days of physical presence by 12 days. According to the Officer's calculations, the Respondent was only present in Canada for 1,083 days during the relevant time period.

[7] During an interview with the Officer in April 2019, the Respondent did not dispute that she was absent from Canada between November 10, 2015 and January 8, 2016. Further, by letter dated April 12, 2019, the Respondent acknowledged that she no longer met the physical presence requirement after she recalculated her physical presence in light of her "missing entry-exit record in 2015" and that she now only had 1,083 days of presence in Canada. The Respondent inquired whether she would need to reapply for citizenship given this shortfall or whether there was an alternative way to handle the issue.

[8] The Officer forwarded the file to the Citizenship Judge, recommending that the Respondent's citizenship application not be approved because she failed to meet the physical residency requirement under subparagraph 5(1)(c)(i) of the *Citizenship Act*.

B. *The Citizenship Judge's decision*

[9] In reviewing the Respondent's file, the Citizenship Judge found that passport entry stamps for the Respondent's August 2016 and May 2017 trips did not match the dates for which the Respondent declared being absent from Canada in her citizenship application. The entry stamps

showed that the Respondent entered China on August 14, 2016, and May 20, 2017, whereas the Respondent declared that she had left Canada on August 1, 2016, and May 12, 2017.

[10] The Citizenship Judge sent a procedural fairness letter to the Respondent on March 24, 2021, and a follow up letter on November 29, 2021, seeking information concerning when she left Canada in order to enter China on August 14, 2016, and May 20, 2017. The Respondent failed to respond to these letters.

[11] Despite not receiving the requested information about the Respondent's August 2016 and May 2017 trips, the Citizenship Judge approved the Respondent's citizenship application. The Citizenship Judge concluded that the Respondent "provided sufficient reliable evidence that she exceeded the minimum residence requirements of the law": Reasons and Decision dated June 9, 2022 at para 2 [Citizenship Judge's Decision]. In making this determination, the Citizenship Judge held that there was "no evidence" showing that the Respondent left Canada on August 1, 2016, and May 12, 2017, as claimed in her citizenship application: Citizenship Judge's Decision at paras 17-18. Furthermore, the Citizenship Judge found that the passport entries showed that the Respondent had left Canada later than she had declared in her citizenship application: Citizenship Judge's Decision at paras 5, 23-25.

C. *The judicial review application*

[12] While the Respondent was personally served with the Applicant's Application for Leave and for Judicial Review on July 28, 2022, she failed to file a Notice of Appearance in accordance with Rule 305 of the *Federal Courts Rules*, SOR/98-106 [*Rules*].

[13] In addition, the Applicant personally served the Respondent on August 17, 2022, with the Applicant's Application Record. At no point did the Respondent seek an extension of time to file a Notice of Appearance or to file any responding materials.

[14] On March 28, 2024, the Respondent requested that the Court adjourn the hearing of the judicial review application, scheduled for April 3, 2024, because she was unable to reach her legal counsel. The Applicant objected to this adjournment request. By Direction dated April 2, 2024, I determined that, in the circumstances, it was not in the interests of justice to adjourn the hearing of this application at such a late stage of the proceedings. I noted that the Respondent had failed to take any steps to defend the application prior to this adjournment request.

[15] On April 2, 2024, the Respondent requested a further adjournment on the basis that she did not understand English and required interpretation. The Applicant opposed this adjournment request as well. By Direction dated April 3, 2024, I determined that the matter would proceed as scheduled, noting that the Respondent had failed to address any of the concerns raised in the Court's April 2, 2024 Direction and that the Respondent had not sought an extension of time to defend this application or file any responding materials.

[16] The Respondent attended the April 3, 2024 virtual hearing accompanied by her daughter. I explained that, in accordance with Rule 119(1) of the *Rules,* an individual may act on their own behalf or be represented by a solicitor. On that basis, there was no authority for the Respondent's daughter to represent the Respondent before the Court.

[17] While I am sympathetic to the Respondent's position as a self-represented litigant with limited knowledge of the English language, the Respondent took no steps to defend this application despite being personally served with the application materials. Notably, in accordance with Rule 145 of the *Rules*, the failure to file a Notice of Appearance deprives a respondent of the right to receive further documents in the application prior to final judgment. There was therefore no requirement for the Applicant to serve their Application Record on the Respondent, or for the Court to advise the Respondent of the hearing date.

[18] In the circumstances, I decided to adjudicate this application based on the written materials on file (as served on the Respondent) and not hear any further submissions from the Applicant. I explained to the Respondent that even if I were to allow the application the result would not be a dismissal of her citizenship application. Rather, the matter would be remitted to another citizenship judge to consider the citizenship application afresh. On redetermination, a different citizenship judge may request that the Respondent provide further documents and/or information to substantiate her physical presence in Canada during the relevant five-year period. The Respondent should avail herself of any opportunity to respond to such requests.

III. Issue and Standard of Review

[19] The sole issue on this application is whether the Citizenship Judge erred in finding that the Respondent met the residency requirement in the *Citizenship Act*.

[20] The applicable standard of review is reasonableness. A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the

facts and law that constrain the decision maker": *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 85 [*Vavilov*]; *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 8 [*Mason*].

[21] A decision should only be set aside if there are "sufficiently serious shortcomings" such that it does not exhibit the requisite attributes of "justification, intelligibility and transparency": *Vavilov* at para 100; *Mason* at paras 59-61. Furthermore, the reviewing court "must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable": *Vavilov* at para 100.

IV. Analysis

A. *The Citizenship Judge erred in concluding that the Respondent met her evidentiary burden of proving her physical presence in Canada*

[22] In my view, the Citizenship Judge's decision approving the Respondent's citizenship application on the basis that she met her evidentiary burden by providing "sufficient reliable evidence that she exceeded the minimum residence requirements of the law" is unreasonable: Citizenship Judge's Decision at para 2. In particular, the Citizenship Judge's decision is not "justified in relation to the constellation of law and facts that are relevant to the decision": *Vavilov* at para 105.

[23] In accordance with subparagraph 5(1)(c)(i) of the *Citizenship Act*, applicants are required to establish a physical presence in Canada for at least 1,095 days during the five years immediately preceding the date of their citizenship application. Physical presence in Canada must be established

with clear and convincing evidence: *Labioui v Canada (Citizenship and Immigration)*, 2016 FC 391 at para 16; *Pornejad v Canada (Citizenship and Immigration)*, 2014 FC 455 at para 9; *Atwani v Canada (Citizenship and Immigration)*, 2011 FC 1354 at para 12.

[24] In light of a discrepancy in the evidence about the Respondent's absences from Canada in August 2016 and May 2017, the Citizenship Judge appropriately requested further information from the Respondent to substantiate her physical presence in Canada: *Zhao v Canada (Citizenship and Immigration)*, 2016 FC 207 at paras 22-23 [*Zhao*]. While the Respondent had declared that she left Canada on August 1, 2016, and May 12, 2017, passport entry stamps showed that the Respondent entered China on August 14, 2016, and May 20, 2017. This was significant because if the Respondent had left Canada on those later dates as opposed to what she declared in her application, then her absences from Canada would have been shorter than declared. On that basis, even with her previously undeclared absence, the Respondent would have met the physical presence requirement.

[25] In order to resolve this discrepancy and determine the Respondent's actual physical presence in Canada, the Citizenship Judge requested that the Respondent provide relevant information and documents, including:

- Information and evidence to show that the Respondent had left Canada on the dates declared in her citizenship application. In particular, any information to show that she was in Canada from August 1 to August 14, 2016, and from May 12 to May 20, 2017;

- Information regarding the Respondent's declared absence from August 1, 2016 to April 11, 2017, including when the Respondent left Canada in order to enter China on August 14, 2016;

- Information regarding the Respondent's declared absence from May 12, 2017 to June 20, 2018, including when the Respondent left Canada in order to enter China on May 20, 2017; and

- A clear copy of all pages for the Respondent's last two passports.

[26] Despite no response from the Respondent to the requests for further information, the Citizenship Judge concluded that the Respondent had satisfied her evidentiary burden and met the legislated residency requirement. The Citizenship Judge's conclusion that the Respondent proved her physical presence in Canada was based on two unreasonable findings: (i) that there was "no evidence" showing that the Respondent "left Canada earlier than August 14, 2016 and May 20, 2017": Citizenship Judge's Decision at para 24; and (ii) that passport entry stamps showing that the Respondent entered China on August 14, 2016, and May 20, 2017, were "sufficient proof" of her physical presence in Canada immediately before August 14, 2016, and May 20, 2017: Citizenship Judge's Decision at paras 5, 24.

(1) The Citizenship Judge erred in relying on "no evidence" to support the Respondent's physical presence in Canada

[27] The Citizenship Judge recognized that the Respondent had the burden of proving, on a balance of probabilities, that she met the residency requirements under the *Citizenship Act*:

Naboulsi v Canada (Citizenship and Immigration), 2019 FC 1651 at para 58; *Zhao* at para 20; *Saqer v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1392 at paras 20-21.

[28] The Citizenship Judge found that, on a balance of probabilities, the Respondent left Canada on August 14, 2016, and May 20, 2017, contrary to what she had declared in her citizenship application: Citizenship Judge's Decision at paras 17-18. However, given the Respondent's failure to respond to the Citizenship Judge's requests for further evidence about her August 2016 and May 2017 absences from Canada, the Citizenship Judge effectively relieved the Respondent of her evidentiary burden of establishing her physical presence in Canada with clear and convincing evidence.

[29] In the absence of further information from the Respondent, the Citizenship Judge's resolution of the discrepancy in the evidence regarding the Respondent's August 2016 and May 2017 absences from Canada is simply not justified. As the passages below demonstrate, the Citizenship Judge relied on a lack of evidence to the contrary ("no evidence") to find that the Respondent proved she had sufficient days of residency in Canada in the relevant five-year period:

> [17] Did the Applicant leave Canada on August 1, 2016 as claimed? A passport entry stamp showed the Applicant entered China on August 14, 2016. There is **no evidence before me to show the Applicant travelled to a third country** after leaving Canada and before entering China on this date. Further, there is **no evidence before me to show the Applicant was absent from Canada in the days immediately before** this date. As a result, I find on a balance of probabilities the Applicant left Canada on August 14 and not August 1, 2016 as claimed.
>
> [18] Did the Applicant leave Canada on May 12, 2017 as claimed? A passport entry stamp showed the Applicant entered China on May 20, 2017. There is **no evidence before me to show the Applicant travelled to a third country** after leaving Canada and before entering China on this date. Further, there is **no evidence before me**

> **to show the Applicant was absent from Canada in the days immediately before** this date. As a result, I find on a balance of probabilities the Applicant left Canada on May 20 and not May 12, 2017 as claimed.
>
> [Underlining in original. Emphasis in bold added.]

[30] Ultimately, the Citizenship Judge concluded that there was "no evidence before me to show the [Respondent] left Canada earlier than August 14, 2016 and May 20, 2017" [emphasis added]: Citizenship Judge's Decision at para 24. Notably, there was "no evidence" because the Respondent failed to respond to the Citizenship Judge's requests for information. However, a lack of evidence cannot reasonably ground a finding that physical presence has been established under the *Citizenship Act*.

[31] In addition, the Citizenship Judge's conclusion does not withstand scrutiny given the contradictory evidence in the record. Not only did the Respondent declare in her citizenship application that she left Canada on August 1, 2016, and May 12, 2017, but she also subsequently acknowledged her shortfall in communications with the Officer. The Respondent confirmed that, with her previous undisclosed absence, she no longer met the residency requirement. Significantly, the Citizenship Judge's decision failed to engage with the Respondent's concession. This failure to grapple with significant contradictory evidence is another serious shortcoming in the decision: *Vavilov* at para 100.

(2) The Citizenship Judge erred in relying on passport stamps as sufficient evidence of the Respondent's physical presence in Canada

[32] The Citizenship Judge further erred in relying on the Respondent's passport entry stamps as sufficient reliable evidence to establish her physical presence in Canada immediately prior to August 14, 2016, and May 20, 2017.

[33] This Court has made clear that passports alone are insufficient proof of an applicant's physical presence in Canada: *Canada (Citizenship and Immigration) v El Hady*, 2018 FC 833 at para 13 [*El Hady*]; *Canada (Citizenship and Immigration) v Abidi*, 2017 FC 821 at para 7 [*Abidi*]; *Moradi-Zirkohi v Canada (Citizenship and Immigration)*, 2016 FC 463 at para 17; *Haddad v Canada (Citizenship and Immigration)*, 2014 FC 977 at paras 27, 29; *Ballout v Canada (Citizenship and Immigration)*, 2014 FC 978 at para 30.

[34] In particular, passport entry stamps only demonstrate an entry into that country alone; they do not prove that the travel preceding the entry originated from Canada. Furthermore, as Justice Lafrenière explained, "Canadian authorities do not monitor exits from Canada": *El Hady* at para 13.

[35] It is therefore incumbent on a citizenship judge to "ensure that the applicant was actually on Canadian soil" during the relevant time period: *El Falah v Canada (Citizenship and Immigration)*, 2009 FC 736 at para 21. This requires verifying an applicant's actual presence in Canada through other reliable means, examples of which include: airline records, records of financial transactions in Canada, school attendance records, and attendance at medical appointments in Canada: *Abidi* at para 42; *Canada (Citizenship and Immigration) v Sukkar*, 2017

FC 693 at paras 18, 21; *Ozlenir v Canada (Citizenship and Immigration)*, 2016 FC 457 at para 26; *Canada (Citizenship and Immigration) v Salha*, 2016 FC 363 at para 13.

[36] Here, the Citizenship Judge acknowledged that passports alone do not "constitute irrefutable evidence of physical presence in Canada": Citizenship Judge's Decision at para 11, citing *Haddad v Canada (Citizenship and Immigration)*, 2014 FC 976. Indeed, in requesting further information of the Respondent, the Citizenship Judge specifically recognized that the passport entry stamps were insufficient to resolve the issue of when the Respondent actually left Canada in August 2016 and May 2017, and that further evidence was required. In particular, the Citizenship Judge requested "any information to show if [the Respondent was] in Canada from August 1 to August 14, 2016 and from May 12 to May 20, 2017". The Citizenship Judge also requested information about when the Respondent left Canada to enter China in August 2016 and May 2017. The Citizenship Judge thus understood that corroborating evidence was required to show that the Respondent was present in Canada immediately prior to entering China.

[37] Given the Respondent's failure to respond to the requests for information, the Citizenship Judge was unable to verify, as required, that the Respondent was actually present on Canadian soil in the days immediately preceding her entry into China on August 14, 2016, and May 20, 2017. The Citizenship Judge thus erred in finding that the passport entry stamps alone constituted "sufficient proof…to satisfactorily resolve these concerns": Citizenship Judge's Decision at para 5.

V. Conclusion

[38] For these reasons, the Citizenship Judge's resolution of the pivotal issue of when the Respondent left Canada in August 2016 and May 2017 lacks intelligibility, justification, and transparency. On this basis, the Citizenship Judge's decision is unreasonable and I am allowing the Minister's application.

[39] The Citizenship Judge's decision approving the Respondent's citizenship application is set aside. The matter is remitted for redetermination by a different citizenship judge.

[40] The parties did not raise a question for certification and I agree that none arises in this case.

JUDGMENT in T-1552-22

THIS COURT'S JUDGMENT is that:

1. The application is granted.

2. The decision of the Citizenship Judge dated June 9, 2022, is set aside and the matter is remitted to a different citizenship judge for redetermination.

3. There is no question for certification.

"Anne M. Turley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1552-22
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION v SUI DONG LIU
PLACE OF HEARING:	VIDEOCONFERENCE
DATE OF HEARING:	APRIL 3, 2024
JUDGMENT AND REASONS FOR JUDGMENT:	TURLEY J.
DATED:	MAY 1, 2024

APPEARANCES:

Asha Gafar	FOR THE APPLICANT
Sui Dong Liu	FOR THE RESPONDENT ON HER OWN BEHALF

SOLICITORS OF RECORD:

Attorney General of Canada Toronto, Ontario	FOR THE APPLICANT