Federal Court  Cour fédérale

Date: 20130703

Docket: T-1772-12

Citation: 2013 FC 739

Ottawa, Ontario, July 3, 2013

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

YVONNE EDIRI IDAHOSA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an appeal pursuant to subsection 14(5) of the *Citizenship Act*, RSC 1985, c C-29, of a decision refusing an application for Canadian citizenship. The applicant, Ms. Idahosa, ably represented herself at the hearing of the appeal. The name of the respondent, initially identified as the Attorney General of Canada in the style of cause, was corrected at the hearing to read as the Minister of Citizenship and Immigration.

BACKGROUND:

[2] Ms. Idahosa is a Nigerian citizen. She moved to the United States in the mid-1990s. On November 11, 1999, she had a son, born in California. She married an American citizen on January 27, 2002. Three months later, on April 25, 2002, Ms. Idahosa, then aged 29, came to Canada as a permanent resident, a skilled worker in the Computer Programmer occupation. Two days after securing permanent residence, she returned to the U.S. In November 2002 she set up a Canadian company but due to medical problems, never used it as a viable business. She had a daughter in the U.S. in 2005.

[3] In early 2005, the house in the U.S. was sold and Ms. Idahosa shipped furniture to Canada. She filed for divorce in September 2005. In 2006, she bought a house in Port Moody. Her children have been attending schools in Coquitlam since the autumn of 2005 for the boy and the autumn of 2008 for the girl. The ex-husband is not the father of either child. Their father apparently lives with the family in British Columbia.

[4] On August 21, 2006, Ms. Idahosa applied for Canadian citizenship but the citizenship judge, following the *Re Pourghasemi* (1993), 19 Imm LR (2d) 259, [1993] FCJ No 232 (QL) (TD), line of cases (strict count of days), decided that she had not spent the required 1,095 days in Canada and denied the application.

[5] On June 30, 2009, Ms. Idahosa applied for Canadian citizenship again, basing her application on residence in Canada between June 2005 and June 2009. On August 2, 2012,

citizenship judge Anne-Marie Kains, applying the *Re Koo*, [1992] 59 FTR 27, [1992] FCJ No 1107 (QL) (TD) [*Re Koo*] line of authority ("regularly, normally, or customarily lives"), also denied the application.

IMPUGNED DECISION:

[6] The citizenship judge reviewed all of the evidence and noted that Ms. Idahosa claimed to have accumulated 1,361 days of residence during the relevant material period, June 30, 2005 to June 30, 2009. However, she found that Ms. Idahosa's evidence was problematic for a number of reasons; she had difficulty remembering facts and there were contradictions, and omissions. There were no stamps in her passport for claimed travel to and from Canada and elsewhere. The citizenship judge therefore adopted the *Re Koo* analytical approach, which did not require physical presence in Canada for the whole 1,095 days.

[7] In considering the six questions required by the *Re Koo* analysis, the citizenship judge found that Ms. Idahosa had not been physically present in Canada for a long time prior to recent absences which occurred immediately before the application for citizenship; that her immediate family (other than her children) lived in California and Nigeria; that her failure to provide requested U.S. travel records prevented determining whether her pattern of physical presence in Canada indicated returning home or merely visiting the country; that due to problems with the evidence it was impossible to determine the extent of her absences from the country; that the reasons for Ms. Idahosa's travel could not be determined as she had not been forthcoming; and that the quality of

her connection with Canada did not reflect more substantial ties that those existing with any other country.

ISSUE:

[8] The issue is whether the citizenship judge erred when she determined that Ms. Idahosa did not meet the residency requirement under the Citizenship Act.

STANDARD OF REVIEW:

[9] The standard of review has been satisfactorily determined by the jurisprudence to be reasonableness (*Imran v Canada (MCI)*, 2012 FC 756 at paras 18-29).

APPLICABLE LEGISLATION:

[10] The relevant provisions of the Citizenship Act are as follows:

Citizenship Act **R.S.C., 1985, c. C-29**	**Loi sur la citoyenneté** **L.R.C. (1985), ch. C-29**
5. (1) The Minister shall grant citizenship to any person who	**5.** (1) Le ministre attribue la citoyenneté à toute personne qui, à la fois :
(*a*) makes application for citizenship;	*a*) en fait la demande;
(*b*) is eighteen years of age or over;	*b*) est âgée d'au moins dix-huit ans;
(*c*) is a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*, and has,	*c*) est un résident permanent au sens du paragraphe 2(1) de la *Loi sur l'immigration et la protection des réfugiés* et a,

within the four years immediately preceding the date of his or her application, accumulated at least three years of residence in Canada calculated in the following manner:

dans les quatre ans qui ont précédé la date de sa demande, résidé au Canada pendant au moins trois ans en tout, la durée de sa résidence étant calculée de la manière suivante :

(i) for every day during which the person was resident in Canada before his lawful admission to Canada for permanent residence the person shall be deemed to have accumulated one-half of a day of residence, and

(i) un demi-jour pour chaque jour de résidence au Canada avant son admission à titre de résident permanent,

(ii) for every day during which the person was resident in Canada after his lawful admission to Canada for permanent residence the person shall be deemed to have accumulated one day of residence;

(ii) un jour pour chaque jour de résidence au Canada après son admission à titre de résident permanent;

(*d*) has an adequate knowledge of one of the official languages of Canada;

d) a une connaissance suffisante de l'une des langues officielles du Canada;

(*e*) has an adequate knowledge of Canada and of the responsibilities and privileges of citizenship; and

e) a une connaissance suffisante du Canada et des responsabilités et avantages conférés par la citoyenneté;

(*f*) is not under a removal order and is not the subject of a declaration by the

f) n'est pas sous le coup d'une mesure de renvoi et n'est pas visée par une

Governor in Council made pursuant to section 20.	déclaration du gouverneur en conseil faite en application de l'article 20.
2. (1) In this Act,	**2.** (1) Les définitions qui suivent s'appliquent à la présente loi.
. . .	. . .
"Court" *« Cour »* "Court" means the Federal Court;	« Cour » *"Court"* « Cour » La Cour fédérale.
14. (5) The Minister or the applicant may appeal to the Court from the decision of the citizenship judge under subsection (2) by filing a notice of appeal in the Registry of the Court within sixty days after the day on which	**14.** (5) Le ministre et le demandeur peuvent interjeter appel de la décision du juge de la citoyenneté en déposant un avis d'appel au greffe de la Cour dans les soixante jours suivant la date, selon le cas :
(*a*) the citizenship judge approved the application under subsection (2); or	*a*) de l'approbation de la demande;
(*b*) notice was mailed or otherwise given under subsection (3) with respect to the application.	*b*) de la communication, par courrier ou tout autre moyen, de la décision de rejet.

ARGUMENTS:

[11] Ms. Idahosa argued that she met all of the conditions in s 5(1) of the *Citizenship Act*. She submitted that only the material period of 4 years can be counted for determining residence in Canada, that the material period was June 30, 2005 to June 29, 2009, and that she spent 1,361 days in Canada between those dates. She says that this can be verified from her Nigerian passport and other documentation beyond a reasonable doubt.

[12] In her oral submissions, supplemented by written talking points which were received by the Court at the hearing, Ms. Idahosa contended that the citizenship judge misinterpreted her evidence and erred in calculating periods when she was alleged to be absent from Canada travelling on other documents, either a US passport resulting from her marriage to the US citizen or a Nigerian passport other than the one presented on her application.

[13] The respondent submits that the citizenship judge was entitled to choose the *Re Koo* test of centralized mode of existence. The six factors considered are not exhaustive and it is the role of the citizenship judge to weigh them. In the present case, the citizenship judge thoroughly reviewed the evidence and properly considered all six factors. Ms. Idahosa had the burden of providing sufficient evidence to establish her substantial connection to Canada and did not discharge it. Moreover, the citizenship judge questioned Ms. Idahosa's credibility. This Court has stated that a credibility finding may have an impact on all relevant evidence. In this case, it affected the weight given to the evidence and raised concern about possible additional undisclosed absences. It was evident in the reasons that the citizenship judge was alert to the relevant period and examined previous travel for the purposes of establishing the credibility of the claimed absences and clarifying the evidence concerning the use of only the Nigerian passport to travel.

ANALYSIS:

[14] As noted by the respondent, "residence" is not defined in the Act, nor is a test for assessing it prescribed. In addition, a citizenship judge does not have to justify her choice of test. As Justice

Harrington stated in *Imran*, above, at paras 30-32, as long as a citizenship judge applies the chosen test consistently, the Court should not overturn the decision on the basis of choice of test:

> **30** To bring this matter to an end, notwithstanding his decision in *Martinez-Caro*, Mr. Justice Rennie had earlier held in *Murphy v Canada (Minister of Citizenship and Immigration)*, 2011 FC 482, [2011] FCJ No 596 (QL), at paragraph 8:
>
> > Simply put, it is not an error for a Citizenship judge to assess residency by applying only the physical presence test. The jurisprudence as it currently stands provides Citizenship judges with the discretion to choose any of the three tests. Clearly, some Federal Court judges prefer one test to another, but Citizenship judges retain the ability to choose and apply any of the three tests.
>
> He remained of that view in *Martinez-Caro* as he said that "Chief Justice Lutfy's caution about the deleterious impact of conflicting interpretations on the administration of justice remains valid and accurate to this day" (para. 21) and went on to say at paragraph 26:
>
> > I conclude therefore, that the Citizenship Judge adopted and correctly applied a legally accepted test to the facts as found. Consistent with *Lam* this is sufficient to dispose of this appeal. It is however, also my view that the test of physical presence is the correct interpretation of the residency provision, and that decisions by Citizenship Court judges on this issue should be reviewed on the standard of correctness.
>
> **31** In *Canada (Minister of Citizenship and Immigration) v Saad*, 2011 FC 1508, [2011] FCJ No 1801 (QL), Madam Justice Bédard stated at paragraph 14:
>
> > [...] Even though I consider it unfortunate that the fate of some applications for citizenship may depend, in part, upon the identity of the citizenship judge who processes the application and the interpretation of the concept of residence that that judge endorses, I believe that the three interpretations that have been traditionally accepted as reasonable are still reasonable and will continue to be so in the absence of legislative action...
>
> **32** Although judicial comity, which encourages predictability, has certainly taken a beating in citizenship matters, I think it preferable to continue to follow *Lam*, as did Justices Rennie and Bédard, and many others, including myself, notwithstanding different opinions as to how the residency requirement should be interpreted. It is bad enough that there is a high level of uncertainty at the citizenship judge level, without adding further uncertainty at the Federal Court level. If I, as a follower of *Koo*, were to grant this appeal and send it back with directions, the next judge, a follower of *Pourghasemi*, might set aside a decision based on *Koo* and send it back with different directions. As this Court has said time and time again, the answer lies with Parliament.

[15] In the present case, having chosen the *Re Koo* test, the citizenship judge considered the totality of the evidence and the six specific questions which assist a decision-maker in coming to a conclusion.

[16] Justice Francis Muldoon's comments in *Re Hui* (1994), 75 F.T.R. 81, [1994] F.C.J. No. 238 (QL) (F.C.T.D.) are instructive. He stated, among other things, at paragraph 15, that the Parliamentary intent of conferring citizenship upon applicants who have "Canadianized" themselves by residing among Canadians in Canada cannot be accomplished by "…by depositing bank-accounts, rental payment, furniture, clothing goods, and more importantly, spouses and children - in a word, all except oneself - in Canada, while remaining personally outside Canada."

[17] Ms. Idahosa argued that her home ownership in British Columbia, her children's school reports, her provincial drivers' license and care card, and her bank statements, tax documents, and permanent resident card indicated ties to Canada. She did not rely upon the presence of the children's father in Canada, stressing her independence from him.

[18] The citizenship judge accepted that Ms. Idahosa had bought a house in Port Moody in 2006 but found that few, if any, other factors pointed to ties with Canada. She provided no evidence of employment, volunteer work, or community involvement which supported an everyday presence in Canada during the relevant period. On the other hand, a number of factors pointed to substantial ties with the U.S.; the birth of both of her children, correspondence graduate degrees from two U.S. universities, continuing reliance on US medical services and a California divorce.

[19] Notwithstanding the steps taken to establish a presence in this country, the citizenship judge did not believe that Ms. Idahosa had centralized her existence in Canada. Particularly telling was her decision not to provide the relevant US travel records as this made the calculation of her absences inconclusive. She was also unable to explain how she was able to travel to and from the US without a travel document that would allow entry in the absence of a legal status in that country.

[20] In a very thorough decision, the citizenship judge clearly explained which test was chosen and how she had applied it. Her factual findings, having reviewed the six factors of the chosen test and the evidence with which she was provided as the basis for an assessment, were reasonable. Although I might have come to different conclusions on some points, the overall decision displayed justification, transparency, and intelligibility and fell within the range of possible, acceptable outcomes defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9, at para 47). There are no grounds for this Court to intervene.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is denied.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1772-12
STYLE OF CAUSE:	YVONNE EDIRI IDAHOSA AND THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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