Federal Court  Cour fédérale

Date: 20160519

Docket: T-1893-15

Citation: 2016 FC 550

Ottawa, Ontario, May 19, 2016

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

YVONNE ROSE HALL

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review, brought by the Minister of Citizenship and Immigration, of the decision of a Citizenship Judge [the Judge] dated September 25, 2015 wherein it was held that the Respondent met the residency requirements for Canadian citizenship as set out in section 5(1)(c) of the *Citizenship Act*, RSC 1985, c-29 [the Act].

[2] For the reasons that follow, this application is dismissed.

I. Background

[3] The Respondent, Yvonne Rose Hall, is a citizen of Jamaica. She has been a permanent resident of Canada since March 5, 1980 and submitted her application for citizenship on April 10, 2007. To meet the residence requirement in section 5(1)(c) of the Act, she was required to prove that she resided in Canada for at least 1095 days in the four years prior to her application, i.e. from April 10, 2003 to April 10, 2007 [the Relevant Period]. This translates into absences totalling no more than 365 days in the Relevant Period.

[4] In her application for citizenship, the Respondent stated that she had been physically present in Canada for 1207 days during the Relevant Period, and had been in Jamaica for a total of 253 days over the course of 10 trips. On February 5, 2010, Citizenship and Immigration Canada [CIC] requested that the Respondent submit a completed Residence Questionnaire [RQ]. On March 10, 2010, she submitted her completed RQ, which contained details on her presence in Canada between February 2008 and January 2010. However, this period falls outside of the Relevant Period.

[5] The Respondent also provided CIC with a copy of her Jamaican passport, valid from May 7, 2003, to May 6, 2013, which covers the Relevant Period except for the first 27 days. She also provided CIC with a copy of her Jamaican travel history, produced by the Jamaican Border Management System. As this system did not come into effect until 2005, it does not cover the entirety of the Relevant Period.

[6] Upon reviewing the information submitted by the Respondent, a CIC officer prepared a File Preparation and Analysis Template [FPAT] on July 2, 2015. In the FPAT, the officer noted that the Respondent's passport showed her entering Jamaica on December 23, 2004, but there was no stamp to confirm if or when she returned to Canada. Also, she had entered Canada on September 13, 2004, but there was no stamp to confirm when this trip began.

[7] As the officer was unable to conclude that the Respondent satisfied the residency requirement, he recommended that she be scheduled for a hearing with a citizenship judge, which took place on August 19, 2015. The Judge requested that the Respondent provide an accurate declaration of her absences from Canada during the Relevant Period, supported by a record provided by the Canadian Border Services Agency [CBSA].

[8] On August 31, 2015, the CBSA prepared an Integrated Customs Enforcement System Traveller History [ICES Report] detailing the Respondent's entries into Canada during the Relevant Period. The Respondent also provided a revised list of her absences during the Relevant Period, in which she declared that she had been absent from Canada for 368 days over 16 trips.

[9] On September 2, 2015, the ICES Report and the Respondent's revised list of absences were reviewed by a second CIC officer, who made handwritten notes on these documents prior to sending them to the Judge. On September 25, the Judge issued his decision approving the Respondent's application.

II. Impugned Decision

[10] The Judge found on a balance of probabilities that the Respondent had demonstrated that she resided in Canada for 1095 days during the Relevant Period and that she therefore met the residence requirements under section 5(1)(c) of the Act. The Judge acknowledged the concerns of the CIC officer who had initially reviewed the application, including a possible shortfall in the Applicant's physical presence and the provision of only a few documents to corroborate her physical presence in Canada. However, the Respondent had provided an updated declaration of her absence from Canada and this updated declaration had been checked by the second CIC officer against the ICES Report and the record of movement from Jamaica. The Judge stated that based on this data it is confirmed that the Respondent was physically present in Canada during the Relevant Period for 1095 days, thus meeting the residency requirements.

[11] The Judge referred to the Respondent having a history of marrying and then unsuccessfully sponsoring that husband to Canada but concluded that, while this perhaps showed poor personal choices, it did not indicate a credibility issue in itself, as nothing in the record indicated the Respondent was attempting to defraud. The Respondent had provided very few documents regarding her employment in Canada, but the Judge observed that the question of her physical presence in Canada, as evidenced by the updated declaration vetted against the unquestionable record, was resolved to his satisfaction.

[12] In conclusion, the Judge referred to the residency test set by Justice Muldoon in *Pourghasemi, (Re)*: [1993] FCJ No 232, and found that, on a balance of probabilities, the

Respondent had demonstrated that she resided in Canada for 1095 days during the Relevant Period and therefore had met the residence requirements under subsection 5(1)(c) of the Act.

III. Issues and Standard of Review

[13] The parties agree that the sole issue in this application for judicial review is whether the Judge's decision was reasonable. I concur that the applicable standard of review is reasonableness *(Canada (Minister of Citizenship and Immigration) v Khadra*, 2016 FC 71 at para 15; *El-Khader v Canada (Minister of Citizenship & Immigration*), 2011 FC 328 at paras 8-10). The Judge's decision is entitled to a high degree of deference (*Canada (Minister of Citizenship and Immigration) v Patmore*, 2015 FC 699 at para 14), but the Court must intervene where the Judge's decision fails to evidence justification, transparency, and intelligibility, and falls outside of the range of possible, acceptable outcomes (*NLNU v Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62 at para 11).

IV. Positions of the Parties

A. *Applicant's Position*

[14] The Applicant submits that the Judge's decision was unreasonable, because the record does not support the Judge's findings and because the reasons are inadequate.

[15] In support of the position that the record does not support the Judge's findings, the Applicant submits the following:

A. The Judge failed to consider that the Respondent's passport did not cover the first 27 days of the Relevant Period, and that the Jamaican traveller history was not operational until 2005;

B. The Judge failed to consider that the Respondent's passport bears no foreign entry stamp between her entries to Canada on August 12 and September 14, 2004; and

C. The Judge failed to state on what evidence he concluded that the Respondent had established her physical presence in Canada throughout the Relevant Period;

[16] The Applicant argues that the Judge unreasonably neglected to hold the Respondent to her evidentiary onus and relies on Justice LeBlanc's decision in *Canada (Minister of Citizenship and Immigration) v Pereira*, 2014 FC 574 [*Pereira*] at para 21:

> As it has been affirmed on many occasions by this Court, Canadian citizenship is a privilege that ought not to be granted lightly and the onus is on citizenship applicants to establish, on a standard of balance of probabilities, through sufficient, consistent and credible evidence, that they meet the various statutory requirements in order to be granted that privilege…

[17] The Applicant's position is that the Judge failed to independently assess the evidence on record, instead relying on the second CIC officer's handwritten notes on the Respondent's list of absences and ICES Report, in which the officer appeared to confirm that the Respondent had been absent from Canada for 365 days during the Relevant Period.

[18] In relation to the adequacy of reasons, the Applicant notes that, while this is no longer a standalone basis for judicial review, the reasons given by a citizenship judge must still allow the reviewing court to understand why the decision was made. The Applicant relies on *Canada (Minister of Citizenship and Immigration) v Raphael*, 2012 FC 1039 at para 28, where Justice Boivin found that, because several gaps in the evidence did not seem to have been considered or analyzed by the citizenship judge, the Court was unable to understand the judge's reasoning.

B. *Respondent's Position*

[19] The Respondent argues that the decision-maker is deemed to have considered all the evidence before him or her (*Canada (Minister of Citizenship and Immigration) v Goo*, 2015 FC 1363 at para 41) and that the Judge clearly did take into account the CIC officer's concerns about the lack of documentary evidence establishing the Respondent's physical presence, as these concerns are listed by the Judge in the decision.

[20] The Respondent further submits that the Judge stated the evidence on which he based his decision, namely the Respondent's updated declaration of her absences which had been checked by the second CIC Officer against the ICES Report and the travel history provided by Jamaican authorities. The Respondent argues that the Judge's statement that, "[b]ased on this data it is confirmed that the [Respondent] was physically present in Canada during the relevant material period …" indicates that the Judge assessed the evidence before him independently.

[21] In response to the Applicant's submission that the Judge's reasons are inadequate, the Respondent relies on *Canada (Minister of Citizenship and Immigration) v Abdulghafoor*, 2015

FC 1020 at paras 30- 36 [*Abdulghafoor*], in which Justice Gascon reviewed the jurisprudence on adequacy of reasons, focusing particularly on citizenship cases, and emphasized at paragraph 34 that the Court must defer to the decision-maker's weighing of the evidence and credibility determinations in the absence of clear error.

[22] Finally, the Respondent notes that the present case has a unique feature in that a second citizenship officer was consulted following the hearing and concluded that the Respondent's absence totalled 365 days. In reliance on the decision of the Supreme Court of Canada in *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, she argues that the Applicant's challenge of the Judge's finding on that point represents an impermissible effort to raise on judicial review an issue that was not raised before the Judge.

V. Analysis

[23] As a preliminary point, I do not agree with the Respondent that there is anything impermissible about the Applicant raising on judicial review arguments surrounding the number of days the Respondent was absent from Canada, just because the second citizenship officer did not raise this concern before the Judge. The Applicant has referred the Court to the decision in *Canada (Citizenship and Immigration) v. Vijayan*, 2015 FC 289, in which Justice Mosley held as follows at paragraph 80:

> [80] With respect to credit card activity, the Citizenship Judge also failed to investigate transactions which apparently occurred in the United States on days when the respondent claimed to be in Canada, namely: April 18, 2009; May 27, 2010; and July 9, 2010. The respondent counters that the Citizenship Officer did not flag this as a concern in his FPAT. That is irrelevant. The Citizenship Judge was the decision-maker and had the task of reviewing the

> entire record before rendering a decision. No error or omission by a Citizenship Officer could relieve him of that task. These transactions raise serious concerns. Ideally, they should have been examined by the Citizenship Judge.

[24] As identified in that authority, it is the role of a citizenship judge to assess the evidence in support of the citizenship application, and if the Judge committed a reviewable error in doing so, the Minister cannot be precluded from raising that error simply because it was not raised by one of the citizenship officers whose work was part of the record before the Judge.

[25] That having been said, it is my conclusion that the Judge in the present case did not commit a reviewable error. As acknowledged by the Applicant, adequacy of reasons is not a stand-alone basis for judicial review. However, as expressed by Justice Gascon at paragraph 31 of *Abdulghafoor*, the reasons for a decision must permit the Court to understand why the decision was made and determine whether the conclusion falls within the range of possible acceptable outcomes. While the Judge's reasons are brief, they demonstrate a basis for the decision that I consider to fall within the acceptable range.

[26] The record does not demonstrate whether the Judge personally performed the math to check the second citizenship officer's calculation of 365 days of absence from Canada based on the Respondent's updated declaration. However, in the absence of evidence of a mistake in this calculation, I do not regard it to be an error for the Judge to have relied on the officer's math. I note that the Respondent herself had calculated the days of absence to total 368 days, but the Applicant has acknowledged that this was the result of an error by the Respondent which was corrected by the officer. While the Applicant initially submitted that, based on the ICES Report,

the officer may have erred by one day in the 365 day calculation, it was identified at the hearing of this application that the calculation is correct if relying on the date of the Canadian entry stamp in the Respondent's passport, and the Applicant did not pursue an argument that the officer did not rely on the passport.

[27] However, the Applicant does emphasize that there is no documentary support for the Respondent's claim to have been in Canada for the first 27 days of the Relevant Period, as well as the lack of such support for the date she claims to have departed for Jamaica between her entries to Canada on August 12 and September 14, 2004.

[28] The Judge's decision accepts the Respondent's updated declaration as evidence of her physical presence in Canada. The Judge also refers to this declaration as having been vetted against the unquestionable record. I agree with the Applicant that this is a reference to the second immigration officer's review of the declaration against the ICES Report and the Jamaican records, and that those documents do not provide support for the Respondent's claims related to the first 27 days of the Relevant Period or the departure between August 12 and September 14, 2004. However, there are no inconsistencies between the updated declaration and those records, and the Judge's decision both notes the lack of corroborating documents and finds that the Respondent's history does not in itself indicate a credibility issue. Reading the Judge's reasons as a whole, I interpret the decision as accepting the credibility of the Respondent's declaration, with such acceptance supported by the fact that the declaration is consistent with the available documentary support.

[29] The fact that there are two relatively brief periods where there is no documentary support for the Respondent's declaration does not make this decision unintelligible or otherwise unreasonable. My view on this might be different if there were discrepancies in the evidence or evidence which contradicted that of the Respondent, as was the case in the authorities relied upon by the Applicant. However, the Judge's decision is not rendered unreasonable just because not all the evidence is corroborated (see *Canada (Citizenship and Immigration) v Kettani*, 2015 FC 1328 at para 11; *Abdulghafoor* at para 24).

[30] Having regard to the deference owed to citizenship judges in such matters, I find the Judge's decision to be within the range of acceptable outcomes and therefore reasonable. Therefore, this application for judicial review must be dismissed.

VI. Costs

[31] The Respondent seeks costs on this application. The Applicant takes the position that, pursuant to Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules* (SOR/93-22) which apply to this application, no costs are to be awarded unless the Court orders costs payable for special reasons. The Applicant also refers the Court to *Ndungu v Canada (Citizenship and Immigration)*, 2011 FCA 208 as identifying circumstances in which such special reasons can be found. The Respondent supports her request for costs by arguing that it is highly objectionable that the Minister challenged the Judge's decision, after the second citizenship officer's analysis of the Respondent's presence in Canada addressed the concerns that had originally resulted in the matter being referred to the hearing before the Judge.

[32] I find no basis to award costs in this matter. While I have not found the Judge's decision unreasonable, the positions taken by the Applicant were arguable, and I have not accepted the Respondent's argument that it was impermissible for the Applicant to challenge the Judge's decision after the second citizenship officer raised no concern about the number of days the Respondent was present in Canada.

[33] Neither party proposed any question of general importance for certification for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

No costs are awarded, and no question is certified for appeal.

"Richard F. Southcott"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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