Federal Court Cour fédérale

Date: 20150617

Docket: T-2619-14

Citation: 2015 FC 757

Ottawa, Ontario, June 17, 2015

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

AKINTOMIWA OLADAPO OJO

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review brought by the Minister pursuant to sections 22.1 and 22.2 of the *Citizenship Act*, RSC 1985, c C-29 [the Act]. The Minister asks the Court to quash a decision rendered by a Citizenship Judge which granted Canadian citizenship to Mr Ojo. For the reasons that follow, the application is granted.

I. **Background**

[2] The respondent, Mr Ojo, is a citizen of Nigeria. He entered Canada with his wife and three children on October 12, 2007. He became a permanent resident the following day.

[3] Later in October 2007, the respondent left Canada for 675 days and lived in other countries, including Nigeria. He attributes this absence to the process of relocation.

[4] On February 7, 2013, the respondent applied for Canadian citizenship. Thus, the relevant four year period for residence runs from February 7, 2009 to February 7, 2013.

[5] On his citizenship application, the respondent declared 1,460 days of presence and 953 days of absence. The reviewing agent revised these figures to 505 days of presence and 955 days of absence, resulting in a shortfall of 590 days of physical presence.

[6] The respondent completed a residence questionnaire. He submitted it to the immigration authorities along with an array of documents, including reports from educational institutions for his wife and sons, proof of property ownership, tax assessments and bank statements.

[7] A Citizenship Judge summoned the respondent for an oral hearing on October 16, 2014. She approved his application by decision dated November 27, 2014. The Minister then applied for leave and judicial review.

II. **Issue**

[8] The issue to be decided on this application is whether the Citizenship Judge erred in assessing the respondent's residence in Canada.

III. **Standard of Review**

[9] The applicable standard of review is reasonableness: see e.g. *Canada (Citizenship and Immigration) v Pereira*, 2014 FC 574 at para 18.

IV. **Decision under Review**

[10] On the balance of probabilities, the Citizenship Judge concludes that Mr Ojo meets the residence requirement under paragraph 5(1)(c) of the Act.

[11] The Citizenship Judge begins by canvassing the facts. She explains that the respondent moved to Prince Edward Island with his wife and children in 2007, after selling his home and possessions in Nigeria. He is an airline pilot by profession. When he arrived in Canada, he had achieved the level of co-pilot but could only find work, via recurring contracts, with airlines based in Africa. In order to obtain employment in Canada, he worked to earn a designation awarded by Transport Canada known as an Airline Transport Pilot Licence [ATPL]. In pursuit of this goal, he maintained his employment with African airlines so as to accumulate flying hours.

[12] Mr Ojo’s family remained in Charlottetown while he worked abroad. He returned home to visit them at every possible opportunity. He had a pattern of working 12 consecutive weeks on contract and then spending 4 weeks in Canada.

[13] When he was in Canada, the respondent was an active member of a local church. He purchased and maintained a family home in Charlottetown – although the family has recently moved to Alberta, where the wife was offered a position at a bank. The children have always been enrolled in school in Canada. The respondent obtained his ATPL twenty days before the hearing and showed it to the Citizenship Judge. He explained that he is now looking for employment in Canada and that he intends to join his family in Alberta when he succeeds.

[14] The Citizenship Judge recalls that an individual who applies for citizenship bears the burden of proving that he meets the conditions set out in the Act. To determine whether he meets the residence requirement, the Citizenship Judge adopts the qualitative approach used by Justice Reed in *Koo (Re)*, [1992] FCJ No 1107 (TD) [*Koo*]. The question is whether Canada is the place where Mr Ojo “regularly, normally or customarily lives”. It has also been formulated as whether Canada is the place in which he has centralized his mode of existence. The Citizenship Judge explains that the *Koo* test requires answering six questions.

[15] The first question is whether the individual was physically present in Canada for a long period prior to recent absences. The Citizenship Judge explains that the respondent’s absences correspond to his work as an airline pilot. His credentials restricted him to working in his birth

country. Prior to the relevant period, the respondent lived in Canada for one year and four months.

[16] The second question asks where the individual's family and dependants are located. The Citizenship Judge recalls that the respondent's wife and children lived in Charlottetown during the relevant period. The children attended school there and the wife completed an MBA program. They now live in Alberta and the respondent is anxious to join them. Moreover, the respondent has godparents and a sister in Canada. He has a father and three siblings who still live in Nigeria.

[17] The third question is whether the pattern of physical presence in Canada indicates a returning home or merely visiting the country. The Citizenship Judge asserts that the respondent returns home to his core family members whenever possible. She further asserts that his absences are temporary in nature and do not show any connection or link with any particular location. The respondent's travel and work patterns clearly indicate that he makes his home in Canada and is not merely a visitor.

[18] The fourth question inquires into the extent of the individual's physical absences. The Citizenship Judge recalls that the respondent has a shortfall of 590 days. These absences were work-related and do not indicate a significant tie to any country other than Canada except by way of employment.

[19] The fifth question is whether the physical absences were caused by a clearly temporary situation. The Citizenship Judge answers that they were. During the relevant period, the totality of the respondent's travel was related to his work and training as an airline pilot. The Citizenship Judge accepts that this pattern is the norm for pilots worldwide. The respondent had to follow it to preserve his professional credentials. Moreover, he pays Canadian income tax. Now that he has achieved his ATPL designation, he is well-positioned to secure permanent employment in Canada.

[20] The sixth question is whether the individual's connection with Canada is more substantial than that with any other country. According to the Citizenship Judge, the respondent demonstrated a committed connection to Canada, centred on his wife and three sons. The family settled down in Charlottetown and the respondent became entrenched in the life of the community and his church. Prior to leaving Nigeria, he divested himself of all his property there. He has achieved Canadian flying credentials and wishes to work in Canada. He espouses Canadian values and wishes to give back to the community. He has no property or business interests in Nigeria or elsewhere. His work as a pilot took him to various places including the United States, France, South Africa and Nigeria. There is no substantial tie to any other country.

[21] In conclusion, the Citizenship Judge finds that the respondent is more substantially connected to Canada than to any other country, despite the shortfall in days of physical presence. Therefore, she approves his application for Canadian citizenship.

V. **Analysis**

[22] The Minister does not object to the Citizenship Judge's selection of the *Koo* test. However, he contends that the Citizenship Judge's decision ought to be overturned because she misapplied that test. By contrast, the respondent argues that the Citizenship Judge provided an intelligible decision which the Court should respect.

[23] The law is settled that a reviewing court must show significant deference to the findings of Citizenship Judges. These officials are in the best position to examine citizenship applications due to their experience and knowledge in these matters. Unlike the courts, they have the benefit of interviewing applicants in person and listening to their sworn evidence. For these reasons, the Court cannot reweigh the evidence in order to reach its preferred outcome. On judicial review, the Court simply inquires whether the Citizenship Judge rendered a decision that is transparent, justified and intelligible: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47.

[24] In this case, I am satisfied that the Citizenship Judge did not apply the residence test properly. Despite the deference which the Citizenship Judge deserves, her decision in this particular case was unreasonable.

[25] The jurisprudence establishes a two-step test for assessing residence. First, the Citizenship Judge must decide whether the person established a residence in Canada prior to or at the beginning of the relevant time period. This is a threshold question which must be answered before proceeding to the second step of the test: *Canada (Minister of Citizenship and*

Immigration) v Chang, 2013 FC 432 at para 4 [*Chang*]; *Canada (Minister of Citizenship and Immigration) v Udwadia*, 2012 FC 394 at para 21 [*Udwadia*].

[26] If the first step is met, the Citizenship Judge must assess whether the person's residency qualifies him for Canadian citizenship. The jurisprudence accepts three different tests for this determination. The *Koo* test is one of them. Again, the applicant does not dispute that it was open to the Citizenship Judge to apply this test.

[27] In the case at bar, the Citizenship Judge never explicitly addressed the threshold question. She went immediately to the six *Koo* questions without asking whether Mr Ojo ever became resident in Canada. As my colleague Justice O'Reilly stated in *Udwadia*, above, at para 22, it is incumbent on a Citizenship Judge to ascertain whether the person before her established a residence in Canada and to "determine when that was". In the decision under review, this was not accomplished.

[28] In other cases, it might be possible to infer an implicit answer to the threshold question from the Citizenship Judge's reasons. In this respect, I refer to *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 14-15. However, in this particular case, the Court cannot infer a reasonable answer. This is because the Citizenship Judge committed a clear error of fact which likely affected her view of the matter.

[29] When discussing the first *Koo* question, the Citizenship Judge wrote that Mr Ojo had lived in Canada for one year and four months before the beginning of the relevant period. This is

incorrect. On his residence questionnaire, Mr Ojo declared an absence of 675 days starting sometime in October 2007. The relevant period began on February 7, 2009. Consequently, Mr Ojo's absence covered more than the first six months of the relevant period.

[30] It would appear that a Citizenship Officer erroneously stated that Mr Ojo had lived in Canada for one year and four months prior to the relevant period in an internal document. Nevertheless, the Citizenship Judge bore the ultimate responsibility of reviewing the totality of the evidence. The source of the error is not relevant to the question of whether the decision under review is reasonable.

[31] Following this initial absence, Mr Ojo returned to Canada for brief periods of time and then left for longer periods due to his employment obligations. The record does not disclose any moment where he unequivocally became resident in Canada. The Citizenship Judge did not provide a transparent, intelligible and justified finding on the matter to which the Court might defer. It is a reviewable error to leave this question unanswered in circumstances where a clear answer cannot be gleaned from the record: *Udwadia*, above, at para 25; *Chang*, above, at para 8.

[32] I am also of the view that the Citizenship Judge applied the residence test unreasonably at the second stage, when evaluating the strength of Mr Ojo's connection to Canada. The *Koo* test requires a Citizenship Judge to make findings in relation to six factors and then to balance the positive findings against the negative ones. In this case, the Citizenship Judge did not do this. By and large, she simply explained the justifications for Mr Ojo's absences without any balancing.

[33] My colleague Justice Roy criticized similar reasoning in *Canada (Citizenship and Immigration) v Olafimihan*, 2013 FC 603 at paras 23 and 29, where he wrote that:

> Considering the analysis done with respect to questions 1, 3 and 5, one is struck by the importance put by the Citizenship Judge on the reasons for those absences, as if that could constitute an adequate justification or proxy for actually continuous residency and living in Canada before one can apply to become a citizen of this country.
>
> [...]
>
> The picture that emerges from the examination of the six factors in this case is one where the Citizenship Judge substituted the requirements for physical attachment, as per paragraph 5(1)(*c*) of the Act, for a justification of absences on the basis of business needs. By not properly addressing criteria devised in *Koo*, the Citizenship Judge creates in effect a different test. No weight is given to criterion 4 and criteria 1, 3 and 5 are in effect ignored. That is hardly satisfying the test.

[34] Like Justice Roy, I conclude that this approach distorts the *Koo* test. The ultimate purpose of this test is to evaluate whether a person has a sufficiently strong connection to Canada to justify a grant of citizenship – not to evaluate whether that person left Canada for valid reasons.

[35] The Minister has also taken exception to various findings made by the Citizenship Judge when applying the *Koo* factors to the evidence. For example, the Minister contends that it was unreasonable for her to conclude that Mr Ojo does not have a significant tie to any country except for Canada. In essence, by arguing that the positive findings under each and every *Koo* factor were unreasonable, the Minister seems to suggest that the record precludes a grant of citizenship to Mr Ojo.

[36] In light of the deference which the Court must show to the mixed findings of fact and law rendered by Citizenship Judges, I am not inclined to address these arguments. I do not wish to be understood as expressing any opinion on whether Mr Ojo should be granted citizenship at the end of the day. The legal errors which I have already identified suffice to overturn the decision under review. There is no reason to speculate whether a positive decision would have been open to the Citizenship Judge if she had answered the threshold question and conducted the balancing exercise mandated by *Koo*.

VI. **Conclusion**

[37] In the result, this application is granted without costs. The parties did not propose any questions for certification and none will be certified.

[38] As I explained in *Canada (Citizenship and Immigration) v Vijayan*, 2015 FC 289 at paras 90-95, the appropriate remedy is to return the matter to the Minister, who may grant Canadian citizenship to the respondent or refer the matter to a Citizenship Judge once again.

[39] In this proceeding, the parties debated the admissibility of evidence which Mr Ojo attempted to introduce as exhibits to an affidavit sworn by his spouse. I did not consider any of the evidence which had not been placed before the Citizenship Judge, since the law is settled that a reviewing court must confine itself to the evidentiary record that was before the decision-maker. Indeed, the purpose of judicial review is to determine whether the decision-maker erred; it is not to receive new evidence and arguments in order to make an independent decision on the merits: *Gitxsan Treaty Society v Hospital Employees' Union*, [1999] FCJ No 1192 (FCA) at

paras 13-15; *Zolotareva v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1274 at para 36.

[40] However, now that the decision will be reconsidered, I can see no obstacle to Mr Ojo's submitting this evidence directly to the Minister or bringing it to an eventual hearing with a Citizenship Judge, should one be convened. I draw attention to section 28 of the *Citizenship Regulations*, SOR/93-246, which reads as follows:

> Notwithstanding anything in these Regulations, a person who makes an application under the Act shall furnish any additional evidence in connection with the application that may be required to establish that the person meets the requirements of the Act and these Regulations.

[41] Although individuals are expected to provide evidence establishing their residence in Canada with their initial application for citizenship, this does not preclude them from providing better evidence afterwards. In fact, the authorities regularly request that individuals submit specific evidence upon reviewing their applications: see e.g. *Azziz v Canada (Citizenship and Immigration)*, 2010 FC 663 (where DNA test results were requested) and *Bains v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 1264 (TD) (where fingerprints were requested). It appears that such evidence would be admissible even if it were submitted by Mr Ojo on his own initiative.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is granted without costs. No questions are certified.

"Richard G. Mosley"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2619-14
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND AKINTOMIWA OLADAPO OJO
PLACE OF HEARING:	HALIFAX, NOVA SCOTIA
DATE OF HEARING:	JUNE 10, 2015
JUDGMENT AND REASONS:	MOSLEY J.
DATED:	JUNE 17, 2015

APPEARANCES:

Melissa Chan	FOR THE APPLICANT
Anthony O. Merah	FOR THE RESPONDENT

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada Halifax, Nova Scotia	FOR THE APPLICANT
Anthony O. Merah Merah Law Office Calgary, Alberta	FOR THE RESPONDENT