Federal Court Cour fédérale

Date: 20180927

Dockets: T-2115-17
T-323-18

Citation: 2018 FC 955

Ottawa, Ontario, September 27, 2018

PRESENT: The Honourable Madam Justice Kane

Docket: T-2115-17

BETWEEN:

NIKOLAY KULEMIN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Docket: T-323-18

AND BETWEEN:

NATALIA KULEMINA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants, Nikolay Kulemin and Natalia Kulemina, appeal the decisions of a Citizenship Judge, dated November 29, 2017, which found that, on a balance of probabilities, they did not meet the residence requirement under paragraph 5(1)(c) of the *Citizenship Act*, RSC, 1985, c C-29, as amended [the Act].

[2] The Citizenship Judge issued two separate decisions, one for Mr. Kulemin and the other for Ms. Kulemina, although the decisions are almost identical.

[3] The Citizenship Judge applied the qualitative test for residence established in *Re Papadogiorgakis*, [1978] 2 FC 208, [1978] FCJ No 31 (QL) (FCTD) [*Papadogiorgakis*]. The Citizenship Judge found the Applicants' evidence to be credible. However, he found that there was insufficient reliable evidence to establish on a balance of probabilities that the Applicants had established and maintained a residence in Canada in the relevant period; using the wording of *Papadogiorgakis*, he found that they had not "centralized their mode of living in Canada".

[4] Mr. Kulemin and Ms. Kulemina both sought judicial review of their respective decisions (T- 2117-17 and T-323-18). The two Applications for Judicial Review were joined by Order of Prothonotary Milczynski, dated February 6, 2018, given that the decisions were almost identical and the grounds for judicial review were the same.

[5] For the reasons that follow, I find that the Citizenship Judge's decision is not reasonable.

I. Background

[6] The Applicants are Russian nationals, who arrived in Canada in 2008. Nikolay Kulemin is a professional hockey player who was drafted by the Toronto Maple Leafs in 2006. He continued to play hockey in Russia to further develop his skills. He signed his first contract with the Maple Leafs in May 2007, but remained playing in Russia at the request of the Maple Leafs, again to further develop his skills. He arrived in Canada in September 2008 and began his National Hockey League [NHL] career with the Maple Leafs. Mr. Kulemin's contract was extended in 2010 and again in 2012. He continued to play with the Maple Leafs until June 2014, when he was traded to the New York Islanders.

[7] The Applicants became permanent residents of Canada in 2012. Their two children were born in Toronto in 2009 and 2012. They applied for Canadian citizenship in December 2014.

II. The Decision Under Review

[8] The Citizenship Judge noted that the relevant period to determine whether the Applicants met the residency requirements for citizenship was December 26, 2010 to December 26, 2014.

[9] The Citizenship Judge cited paragraph 5(1)(c) of the Act, as it read at the relevant time, which required that a permanent resident has "accumulated at least three years of residence in

Canada" within the four years preceding the date of their application and which set out how that time is calculated.

[10] The Citizenship Judge assessed the documents submitted by the Applicants, including their Application Forms, Residence Questionnaires, Integrated Custom Enforcement System reports (the Canadian Border Service's database of travel history), and revised tables of absences, to determine their days of declared absence from Canada. Although there were some small discrepancies which were later clarified, the dates and the Citizenship Judge's calculations are not disputed. The Citizenship Judge concluded that Mr. Kulemin was absent 608 days and present 623 days in the relevant period and that the shortfall (from the requisite 1095 days out of 1460 days) was 472 days. The Citizenship Judge concluded that Ms. Kulemina was absent 455 days and present 776 days for a shortfall of 319 days.

[11] The Citizenship Judge stated that he would apply the "analytical approach" to determine whether the Applicants had satisfied the residency requirement. The Judge cited the test established in *Papadogiorgakis*.

[12] The Citizenship Judge noted that the success of the application rested on whether he found that the Applicants had established and maintained their residence in Canada during the relevant period. He concluded that the Applicants had not. The Citizenship Judge found that the Applicants were credible but did not provide sufficient reliable evidence that they met the minimum residence requirements and, as a result, refused their applications for citizenship.

[13] The Citizenship Judge noted the Applicants' submissions, including that their intention had been to live in Canada; their two children were born in Canada and are Canadian citizens; they have extensive investments and business ventures in Canada; and they have a network of friends and have integrated into Canadian society, including by Mr. Kulemin's involvement in minor hockey.

[14] The Citizenship Judge noted that Mr. Kulemin is a professional hockey player currently in the NHL and that he was subject to the "vagaries of this profession". The Citizenship Judge found that it was Mr. Kulemin's hockey career that brought him to Canada and permitted him and his wife to obtain permanent resident status. The Citizenship Judge further found that the birth of the Applicants' children in Canada was also due to Mr. Kulemin's hockey career, which placed him in Canada at the time of the children's births. The Citizenship Judge added that if Mr. Kulemin had been playing for an American team at the time, his children would be American citizens.

[15] The Citizenship Judge found that the Applicants had established a home in Toronto while Mr. Kulemin played for the Maple Leafs but that they had not maintained their residence. The Citizenship Judge focused on Mr. Kulemin's return to Russia to play hockey for his former team in the fall of 2012 during the NHL lockout, noting that his family moved with him and they did not return until January 2013.

[16] Although the Citizenship Judge acknowledged the Applicants' explanation that the family returned to Russia together because they did not know how long the lockout might be, he

concluded that this showed that the Applicants had centralized their mode of living in Russia for that period.

[17] The Citizenship Judge also focused on the Applicants' relocation to New York following Mr. Kulemin's trade to the New York Islanders in June 2014 and found that this showed that the Applicants "shifted" their centre of life to New York.

[18] The Citizenship Judge found that the Applicants' future intention to return to Canada at the end of Mr. Kulemin's NHL contract was not compelling. The Citizenship Judge noted that the Applicants had purchased a $5.2 Million home in the Toronto area in 2015, after their move to New York, but they did not live in the home and subsequently sold it. The Citizenship Judge found that the Applicants' investments in Canada were "passive", as they are managed by others, and did not support the Applicants' claim that they have centralized their mode of living in Canada. The Citizenship Judge also found that the Applicants' network of friends and community ties had not been strong enough to keep Ms. Kulemina and the children in Canada while Mr. Kulemin played in Russia during the NHL lockout and, therefore, did not show a significant tie to Canada.

III. The Issue and Standard of Review

[19] The only issue is whether the decision of the Citizenship Judge is reasonable.

[20] The jurisprudence has established that the administrative law principles governing the standard of review apply to appeals from decisions of a citizenship judge (*Canada (Minister of*

Citizenship and Immigration) v Rahman, 2013 FC 1274 at paras 11-14, [2013] FCJ No 1394 (QL); *Canada (Minister of Citizenship and Immigration) v Lee*, 2013 FC 270 at paras 15-17, [2013] FCJ No 311 (QL)).

[21] The Citizenship Judge's determination whether the Applicants met the residency requirements of the Act is a question of mixed fact and law. As such, the applicable standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Samaroo*, 2016 FC 689 at para 10, 43 Imm LR (4th) 129 [*Samaroo*]; *Huang v Canada (Minister of Citizenship and Immigration)*, 2013 FC 576 at para 26, 22 Imm LR (4th) 180 [*Huang*]).

[22] The jurisprudence has established that a citizenship judge may apply one of three tests to determine whether the residency requirements of the Act have been met. A citizenship judge must clearly indicate the test that has been applied (*Canada (Minister of Citizenship and Immigration) v Bani-Ahmad*, 2014 FC 898, at paras 18-19, [2014] FCJ No 1095 (QL)), and must correctly apply the test chosen (*Boland v Canada (Minister of Citizenship and Immigration)*, 2015 FC 376 at paras 17 and 19, [2015] FCJ No 340 (QL)).

[23] In this case, the Citizenship Judge stated that he applied the "analytical approach" as established in *Papadogiorgakis*. This judicial review, therefore, focuses on whether, in applying that test, the Citizenship Judge reached a reasonable conclusion based on the evidence on the record.

[24] The standard of reasonableness requires the Court to determine whether the decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190 [*Dunsmuir*]). The Court looks to the reasons of the Citizenship Judge and the record before him or her to determine whether the decision is reasonable.

IV. The Applicant's Position

[25] The Applicants submit that the Citizenship Judge misapprehended some of their evidence and ignored other evidence which supports the conclusion that they centralized their mode of living in Canada in the relevant period and had the intention to settle in Canada and to return to Canada at the end of Mr. Kulemin's 2014 contract. They note that the Citizenship Judge found them to be credible and accepted their evidence, including that NHL hockey players may have short careers, they travel extensively, and they do not generally have the option to choose where they play. However, the Citizenship Judge erroneously concluded that the Applicants centralized their mode of living wherever Mr. Kulemin's hockey career took them, rather than finding that he had intentionally pursued his hockey career in Canada and maintained his residence in Canada with his family.

[26] The Applicants submit that the *Papadogiorgakis* approach is intended to address the type of circumstances that they found themselves in. Their temporary absences from Canada — although some were lengthy — were due to Mr. Kulemin's employment as a professional hockey player, but their ties remained to Canada, where they returned after periods of absence due to hockey and vacations and where they intended to return permanently.

[27] The Applicants note that the Citizenship Judge focused on two periods of absence — the NHL lockout in 2012-2013 and Mr. Kulemin's trade to the New York Islanders in June 2014 — but viewed these in a manner different from and inconsistent with the approach to their other absences, the majority of which were also due to Mr. Kulemin's hockey career.

[28] The Applicants submit that their evidence shows that they established a residence in Canada in 2008 and maintained this residence during the relevant period (2010-2014). They highlight that they chose to come to Canada, their children were born in Canada, they sought and obtained permanent resident status in Canada, they own property only in Canada, their only investments are in Canada and are managed by a Canadian fund manager, they have active business interests in Canada and Mr. Kulemin has volunteered in various hockey related initiatives, including minor hockey, to the extent that his playing schedule permits him to do so.

[29] The Applicants submit that the Citizenship Judge ignored Mr. Kulemin's evidence that he sought a contract with the Maple Leafs and in doing so gave up the higher income he had been earning with his Russian team. Mr. Kulemin's evidence, which was found to be credible, that he worked hard for an additional two years developing his skills to secure his contract with the Maple Leafs after being drafted in 2006 and then to "make the team", shows that his intention was to come to Toronto. It was not "happenstance" that brought him to Canada, as found by the Citizenship Judge; it was his determination and intention. The Applicants point to the affidavit of Mr. Kulemin's agent, Mr. Greenstein, which explains that Mr. Kulemin's instructions were to negotiate a contract with the Maple Leafs and subsequently to seek extensions of the contract with the Maple Leafs, and Mr. Greenstein made efforts to do so.

[30] The Applicants submit that the Citizenship Judge's finding that the birth of their children in Canada was also the result of where Mr. Kulemin's hockey career placed him ignores their evidence that Mr. Kulemin sought to play and remain in Canada and made every effort to ensure this occurred.

[31] With respect to the Applicants' return to Russia during the NHL lockout, the Applicants submit that the Citizenship Judge erred in finding that they had centralized their mode of living in Russia. The Applicants note that their time in Russia, like other absences, was temporary and due to Mr. Kulemin's employment as a hockey player. Mr. Kulemin, like several other NHL players, was permitted by the Maple Leafs to play in his former league during the NHL lockout. However, it was certain that the NHL lockout would eventually end and he would return to the Maple Leafs. The Applicants explained that their family time was limited due to Mr. Kulemin's hockey schedule, and given the young ages of the children, it was preferable for the family to temporarily return to Russia during the lockout (a three and a half month period). The Applicants note that they maintained their residence in Toronto, which they returned to on January 9, 2013.

[32] With respect to the Applicants' move to New York in June 2014, the Applicants submit that the Citizenship Judge ignored their evidence that Mr. Kulemin's desire was to remain with the Maple Leafs or another Canadian team. The Applicants note that the reality is that there are many more American teams than Canadian teams, which greatly reduces the likelihood of securing a contract with a Canadian team. Despite Mr. Kulemin's agent's efforts to secure a contract with a team in Canada, this was not possible. The Applicants add that although they relocated to New York, they maintained their home in Toronto, along with all of their

investments and business interests in Canada. The Applicants add that they rented a home in New York and did not apply for any status in the United States.

[33] The Applicants further submit that the Citizenship Judge erred in his assessment of their investments, business ventures, and volunteer activities in Canada, which support their ties to Canada and their intention to make Canada home. The Applicants submit that the Citizenship Judge did not err by considering some investments that were made after 2014 and which fall outside the relevant period, noting that the jurisprudence appears to support consideration of such evidence However, having considered that evidence, the Citizenship Judge erred in assessing it. The Applicants note, in particular, that this evidence showed more than "passive" investments. Rather, Mr. Kulemin was actively involved, to the extent that he could be, in the business ventures, including NGAGE, and in local minor hockey.

V. The Respondent's Position

[34] The Respondent submits that the Citizenship Judge reasonably found that the Applicants failed to meet the onus on them to establish that they met the residency requirements. The Respondent submits that the Applicants have not shown any error in the decision, rather they now seek to have the Court re-weigh the evidence considered by the Citizenship Judge.

[35] The Respondent takes the position that the Applicants' centralized mode of living is wherever Mr. Kulemin's hockey career may take his family and that the Applicants did not centralize their mode of living in Canada with the intention of remaining in Canada. The Respondent argues that, contrary to the Applicants' submissions, they did not specifically intend

to permanently reside in Canada. Rather, they resided in Canada only because Mr. Kulemin's hockey career brought him here and they left Canada when Mr. Kulemin's hockey career took him elsewhere, i.e., during the lockout and when traded to the New York Islanders.

[36] The Respondent further submits that the Applicants' return to Russia as a family during the NHL lockout, which could have been for an indeterminate period, was reasonably found to be evidence of centralizing their mode of living in Russia, not Canada.

[37] The Respondent also argues that the Applicants' business ventures and investments were not overlooked by the Citizenship Judge. The Citizenship Judge reasonably found that these were passive investments, not requiring any involvement by Mr. Kulemin. The Respondent adds that several post-date the relevant period. More generally, the investments do not reflect ties to Canada.

[38] With respect to Mr. Kulemin's volunteer activities and ties to the community, the Respondent submits that these occurred while the Applicants lived in Toronto and cannot rebut the Citizenship Judge's conclusion that the Applicants had centralized their mode of living wherever Mr. Kulemin was playing hockey.

VI. The Citizenship Judge's Decision is Not Reasonable

[39] The Citizenship Judge correctly noted that an applicant for citizenship bears the onus of establishing that he or she meets the residency requirements (*El Falah v Canada (Minister of Citizenship and Immigration)*, 2009 FC 736 at para 21, [2009] FCJ No 1402 (QL); *Samaroo* at

para 14) and that clear and compelling evidence is required to support the application given that citizenship is a privilege.

[40] In the present case, the Citizenship Judge found the Applicants and their evidence to be credible but also found that the Applicants had not provided "sufficient reliable evidence" that they met the residency requirements.

[41] It is not inconsistent for a decision-maker to find evidence or testimony credible, yet to find it insufficient. The assessment of credibility is separate from the assessment of the weight to be given to the evidence (*Ferguson v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1067 at para 26, 74 Imm LR (3d) 306). In the present case, it appears that the Citizenship Judge found that the evidence provided was credible but that there was not enough evidence to establish that the Applicants had centralized their mode of living in Canada. While judicial review does not permit the Court to re-weigh the evidence, it does permit the Court to determine whether all the evidence provided was considered and understood and that the law, as it has evolved in the jurisprudence, was applied to the facts.

[42] The starting point is the excerpt from *Papadogiorgakis* which the Citizenship Judge relied on:

> A person with an established home of his own in which he lives does not cease to be resident there when he leaves it for a temporary purpose whether on business or vacation or even to pursue a course of study. The fact of his family remaining there while he is away may lend support for the conclusion that he has not ceased to reside there. The conclusion may be reached, as well, even though the absence may be more or less lengthy. It is also

> enhanced if he returns there frequently when the opportunity to do so arises.
>
> It is, as Rand J. appears to me to be saying in the passage I have read, “chiefly a matter of the degree to which a person in mind and fact settles into or maintains or centralizes his ordinary mode of living with its accessories in social relations, interests and conveniences at or in the place in question”.
>
> [My emphasis]

[43] The *Papadogiorgakis* test is subject to the two-stage approach of all residency tests; residency must be established at the outset of the period and before any temporary absences and then maintained (*Sud v Canada (Minister of Citizenship and Immigration*) (1999), 180 FTR 3, 92 ACWS (3d) 379) (TD); *Canada (Minister of Citizenship and Immigration) v Nandre*, 2003 FCT 650 at para 24, [2003] FCJ No 841 (QL)).

[44] The Citizenship Judge found that the Applicants had established a residence in Canada — this is not in dispute. However, the Citizenship Judge found that they had not maintained their residence — or more accurately, that they had not centralized their mode of living in Canada.

[45] The jurisprudence describes the requirement to maintain a residence or centralize the mode of living during temporary, even lengthy, absences from Canada to meet the *Papadogiorgakis* test (i.e., to excuse those absences) in slightly different ways.

[46] In *Mizani v Canada (Minister of Citizenship and Immigration),* 2007 FC 698, [2007] FCJ No 947 (QL), the Court characterized the *Papadogiorgakis* as requiring a strong attachment to Canada during absences, noting at para 10:

> [10] This Court's interpretation of "residence" can be grouped into three categories. The first views it as actual, physical presence in Canada for a total of three years, calculated on the basis of a strict counting of days (*Pourghasemi* (Re), [1993] F.C.J. No. 232 (QL) (T.D.)). A less stringent reading of the residence requirement recognizes that a person can be resident in Canada, even while temporarily absent, so long as he or she maintains a strong attachment to Canada (*Antonios E. Papadogiorgakis* (Re), [1978] 2 F.C. 208 (T.D.). A third interpretation, similar to the second, defines residence as the place where one "regularly, normally or customarily lives" or has "centralized his or her mode of existence" (*Koo (Re)*, [1993] 1 F.C. 286 (T.D.) at para. 10).
>
> [Emphasis added]

[47] In *Canada (Minister of Citizenship and Immigration) v Camorlinga-Posch*, 2009 FC 613, 347 FTR 37, the Court found:

> [18] According to the second category, extended absences from Canada will not be fatal to a Citizenship request if the applicant can demonstrate that he or she had established his or her residence in Canada before leaving and if Canada is the country in which he or she has centralized his or her mode of existence (Re *Papadogiorgakis*, [1978] 2 F.C. 208 and *Canada (Minister of Citizenship and Immigration) v. Nandre*, 2003 FCT 650, 234 F.T.R. 245).
>
> [Emphasis added]

[48] In *Canada (Minister of Citizenship and Immigration) v Ghafarri*, 2016 FC 1120, [2016] FCJ No 1134 (QL), the Court noted, at para 15:

> The *Papadogiorgakis* test looks to the quality of the applicant's attachment to Canada and recognizes that a person can meet the residency requirement, even while temporarily absent, by maintaining a strong attachment to Canada and "without closing out or breaking the continuity of maintaining or centralizing his ordinary mode of living" in Canada (*Papadogiorgakis*, at para 17)… This test allows for absences from Canada during the relevant period to count towards residency where the absences are temporary and the applicant can establish a centralized mode of

> living in Canada. Positive indicators of this include but are not limited to a permanent home in Canada, established before leaving and maintained for the purpose of permanent return.
>
> [Emphasis added]

[49] In *Canada (Minister of Citizenship and Immigration) v Runsewe,* 2016 FC 974, [2016] FCJ No 1082 (QL) [*Runsewe*] the Court noted, at para 8:

> When a Citizenship Judge applies the *Papadogiorgakis* test the judge is assessing whether having established the applicant's Canadian residence, the residence is continued notwithstanding the applicant's additional absences. The *Papadogiorgakis* test establishes a "constructive residence" in the circumstances, such that the applicant maintains his residence notwithstanding absences.
>
> [Emphasis added]

[50] It is also worth noting the facts underlying the decision in *Papadogiorgakis.* The applicant, a national of Crete, had lived in student accommodation in Nova Scotia and eventually roomed with good friends before leaving to study in Massachusetts. The Court noted that the applicant did not own the property, nor did he have a lease at the time, but, among other things, he left some of his possessions there when he attended the University in Massachusetts and he returned there when possible. The Court found that despite his significant shortfall in his days of residence in Canada, he had centralized his mode of living in Nova Scotia prior to departing for the US to study and he did not cease to centralize his mode of living in Nova Scotia while studying in the US.

[51] This sampling of the jurisprudence reflects that evidence of a constructive residence, a strong attachment to Canada, or a centralized mode of living or existence are all interpretations or descriptions of the qualitative test established in *Papadogiorgakis*. The jurisprudence also provides

indicators of what may meet that test, including establishing and maintaining a home in Canada for the purpose of permanent return.

[52] In *Huang,* Chief Justice Paul Crampton lamented the uncertainty in the determination of residency caused by the three tests that had emerged in the jurisprudence. That concern should soon be resolved due to changes to the Act which now focuses on physical presence.

[53] A related concern that I observe is the variation in outcomes based on the application of the same test. This should also be resolved by the recent changes to the Act. In the meantime, the Court's jurisprudence, which addresses either the Minister's appeal of a positive decision granting citizenship to an applicant or an applicant's appeal of a negative decision denying their citizenship, reveals that the decisions of citizenship judges that apply the *Papadogiorgakis* test vary. In some cases, long temporary absences with only a brief period in Canada have not been a barrier to finding that the residence has been maintained or the centralized mode of living has been established in Canada. For example, a doctor who fulfilled his medical residency requirements in a hospital in the United States and had only 177 days of physical presence in Canada, was found by a Citizenship Judge to have established that he centralized his mode of living in Canada, where his family resided with his in-laws. This Court found the decision to be reasonable (*Canada (Citizenship and Immigration) v Saddique,* 2017 FC 773, 52 Imm LR (4th) 175).

[54] In *Runsewe*, the applicant was absent from Canada more than 365 days (one year) in the four year period due to his work abroad. A citizenship judge found that the applicant had

maintained his residence in Canada. This Court found the decision to be reasonable, noting at para 11:

> It is clear from the record that Mr. Runsewe leaves Canada only for work purposes. He travels to Nigeria and works as an employee on an oil rig for approximately 28 days and then has approximately 28 days off. Each and every occasion when he is not working he returns to his family in Canada. He has no assets in Nigeria; they are all in Canada. The Minister notes that he pays taxes in Nigeria and pays little Canadian taxes, suggesting that this shows his lack of residence in Canada. This is not evidence of anything in my view.

[55] As noted by the Court in *Canada (Minister of Citizenship and Immigration) v Patmore,* 2015 FC 699 at para 18, 482 FTR 90, this Court's jurisprudence also supports finding that the residency requirement has been met in the case of students who leave Canada to study abroad for extensive periods after initially establishing only a brief period of residence in Canada.

[56] These examples highlight that it is difficult for any applicant for citizenship to determine what will be sufficient to show that they have maintained their residence in Canada — i.e., that they have centralized their mode of living in Canada or that they have maintained a strong attachment or close ties to Canada during their temporary, even lengthy, absences.

[57] It is trite law that on judicial review the Court's role is not to re-weigh the evidence or remake the decision but to ensure that the decision falls within a range of reasonable outcomes that are justified, i.e., are supported by the facts and the law. In the present case, as I describe below, some of the Citizenship Judge's findings are inconsistent with evidence he found to be credible. Some of the findings are based on a misunderstanding of the evidence presented. In addition, the Citizenship Judge did not refer to any of the jurisprudence that has applied the

Papadogiorgakis test, which may have been helpful in reminding the Citizenship Judge that where a centralized mode of living is established or a strong attachment to Canada is demonstrated, even lengthy temporary absences will not be fatal. This remains true where the applicant is clearly living, working and socializing elsewhere for that period.

[58] The Applicants' evidence, which the Citizenship Judge found to be credible, was that Mr. Kulemin's goal was to play for the Maple Leafs and he worked hard while playing hockey in Russia to make that happen. Mr. Kulemin stated that he continued to play in Russia after being drafted in 2006 and that it was not a certainty that he would get a contract or make the team, but his goal was to do so. He added that he worked with an agent to secure a contract with the Maple Leafs and that he took a cut in pay to join that team. The Applicants' evidence was also that Mr. Kulemin instructed his agent to attempt to secure contract extensions in Canada. Extensions were secured in 2010 and 2012, but this was not possible in 2014. The Citizenship Judge's finding that it was simply due to Mr. Kulemin's hockey career that he and his family were in Canada and the suggestion that they would go wherever hockey took them does not reflect Mr. Kulemin's evidence, which was found to be credible, that it was his intention to come to Canada and to remain in Canada.

[59] With respect to the NHL lockout, the Citizenship Judge found that the Applicants had centralized their mode of living in Russia during that period, despite that they maintained their home in Toronto. This appears to be based on the Citizenship Judge's view that the Applicants went wherever hockey took them. However, the findings regarding the lockout are inconsistent with the Citizenship Judge's acceptance that hockey was Mr. Kulemin's employment, that

hockey careers are short, and that the frequent travel due to hockey was the reason for the majority of Mr. Kulemin's absences from Canada.

[60] In addition, the Citizenship Judge appears to have twisted the *Papadogiorgakis* test, which permits temporary absences to be excused where an applicant has maintained their residence through their attachments or their centralized mode of living in Canada. In the present case, the Applicants maintained their home in Toronto, with their possessions, while they stayed in Russia for the three and a half month lockout period, with the intention to return to their home at the end of the lockout. The Citizenship Judge appears to have overlooked that Mr. Kulemin was under contract with the Maple Leafs even during the lockout. While he was permitted by the Maple Leafs to play in his former league during the lockout, it was clearly for a temporary period until he returned to fulfill his contract.

[61] The Citizenship Judge instead found that the Applicants had centralized their mode of living in Russia during that period, yet there is no evidence about where or how they lived in Russia. Clearly the *Papadogiorgakis* test recognizes that an applicant must live somewhere during their temporary absence from their established residence in Canada. If the absences from Canada for work or study were viewed as centralizing the mode of living elsewhere, the *Papadogiorgakis* test would have no purpose. For example, in *Papadogiorgakis*, the applicant lived in Massachusetts during the academic year and visited his Canadian home, which was simply a room in the home of friends in Nova Scotia. There was no suggestion that he centralized his mode of living in Massachusetts to the exclusion of centralizing his mode of living in Canada.

[62] I do not share the Respondent’s view that the Applicants cannot rely on *Papadogiorgakis* or other jurisprudence because the whole family returned to Russia during the NHL lockout rather than Mr. Kulemin leaving his wife and children in Canada in their Toronto home. In *Papadogiorgakis*, the Court noted that “[t]he fact of his family remaining there while he is away may lend support for the conclusion that he has not ceased to reside there”. The use of the word “may” signals that this is a consideration, not a requirement. The Court went on to state, “[t]he conclusion may be reached, as well, even though the absence may be more or less lengthy. It is also enhanced if he returns there frequently when the opportunity to do so arises.” In the present case, Mr. Kulemin returned after every hockey trip out of the country and the Applicants returned as a family immediately after the lockout.

[63] In my view, the Applicants provided a reasonable explanation for returning together to Russia, given that Mr. Kulemin would be unlikely to have any time with his wife and young children if they remained in Canada while he played hockey — i.e., was employed — temporarily in Russia.

[64] Moreover, the Citizenship Judge’s finding that the Applicants’ ties to Canada were not strong enough to keep Ms. Kulemina and the children in Canada during the lockout highlights the Citizenship Judge’s unreasonable rejection of their explanation for returning to Russia as a family. The Citizenship Judge also appears to have elevated or added a new requirement to the assessment of an applicant’s ties to Canada: that the ties be so strong that they prevent or strongly discourage temporary absences. Properly interpreted, the *Papadogiorgakis* test recognizes that strong attachments or “ties” to Canada may endure despite temporary absences

and such ties may indicate that applicants have maintained their residence or centralized their mode of living in Canada even though they are temporarily absent.

[65] The Citizenship Judge also misapprehended the evidence of the Applicants' investments and business ventures in Canada. The Applicants' evidence was that their only investments and property were in Canada. While the investments were managed by a professional, rather than by the Applicants personally, this does not justify finding that "passive" investments cannot support their ties to Canada, when coupled with the other evidence provided by the Applicants. For example, the Applicants purchased their condominium in 2011, which they had resided in until 2017, and then purchased another condominium. Their other significant investments and business ventures were all in Canada, and Mr. Kulemin's evidence — which, as noted, was found to be credible — was that he was as actively engaged as he could be given his hockey schedule.

[66] In conclusion, the decision is not reasonable and the application must be reconsidered by a different decision maker. While the Applicants' absences from Canada are significant, the issue for the decision maker will be whether these absences can be excused when the qualitative test for residency is applied and all the evidence is considered.

JUDGMENT in T-2115-17 and T-323-18

THIS COURT'S JUDGMENT is that:

1. The Applications for Judicial Review are allowed.
2. The Applicants' applications for citizenship shall be remitted to a different decision-maker for determination.

"Catherine M. Kane"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2115-17
STYLE OF CAUSE:	NIKOLAY KULEMIN v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
AND DOCKET:	T-323-18
STYLE OF CAUSE:	NATALIA KULEMINA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	AUGUST 27, 2018
JUDGMENT AND REASONS:	KANE J.
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APPEARANCES:

Mr. Lev Abramovich	FOR THE APPLICANTS
Mr. Daniel Engel	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Levine Associates Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT