Date: 20080327

Docket: T-1052-07

Citation: 2008 FC 395

Ottawa, Ontario, this 27th day of March, 2008

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

NILOUFAR POURZAND

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an appeal of a decision of a Citizenship Judge dated March 31, 2007, (Decision) in which the Judge refused to grant the Applicant, Ms. Niloufar Pourzand, Canadian citizenship on the basis that she had not met the residency requirement under section 5(1)(*c*) of the *Citizenship Act*, R.S.C. 1985, c. C-29 [Act].

Background

[2] The Applicant, a citizen of Iran, became a permanent resident of Canada on March 27, 2001.

[3] The Applicant is a program coordinator and field officer for UNICEF. She has been employed with UNICEF for over 20 years and is currently under assignment in Barbados, a position that she accepted approximately one month after applying for citizenship. Because of the nature of the Applicant's work, she must spend the majority of her time outside of Canada.

[4] The Applicant's husband and two daughters are Canadian citizens. Her mother is a permanent resident and was sponsored by the Applicant. The Applicant's husband, daughters and mother live in Toronto in a home owned by the Applicant and her husband. The Applicant's husband is retired; the children attend school in Toronto. The Applicant has no siblings, and her father is deceased.

[5] The Applicant has not lived in Iran since 1997 and she owns no property in Iran. Her citizenship application reveals that during the relevant four-year period, the Applicant travelled to Iran on three occasions for purposes relating to her work with UNICEF.

[6] The Applicant has no connections with any other country. Her stays in other countries have been temporary and for professional reasons only. The majority of the Applicant's work with UNICEF has been in Pakistan, Afghanistan, and Tajikistan.

[7] At the beginning of the relevant four-year period in March 2002, the Applicant was living and working in Pakistan. She returned to Canada in June 2002 with her daughters, who had been living and studying in Pakistan.

[8] The Applicant took a leave from her responsibilities with UNICEF and remained in Canada from June 2002 until August 2003, during which time she worked on her PhD thesis as a visiting scholar at York University in Toronto.

[9] During this time, the Applicant made five trips to the United Kingdom to meet with the supervisor of her doctoral studies at the University of Greenwich in London, England. While in the United Kingdom, she attended two conferences and gave a presentation at a school.

[10] The Applicant worked with UNICEF as a Programme Coordinator in Tajikistan from August 2003 until February 2006. During this time, the Applicant frequently returned to Canada to visit her family.

[11] In March 2004, the Applicant received her PhD from the University of Greenwich.

[12] In February 2006, the Applicant commenced her position as a Programme Officer for UNICEF in Barbados.

[13] The Applicant applied for Canadian citizenship on January 3, 2006. It was determined that a residency hearing with a Citizenship Judge was required because the Applicant had been physically present in Canada for less than 900 days and there were credibility concerns. The hearing was conducted on February 21, 2007.

Decision Under Review

[14] The Citizenship Judge found that the Applicant was physically present in Canada for 691 days and absent for 769 days, leaving her 404 days short of having established the minimum requirement of 1095 days during the relevant four-year period as required by section 5(1)(*c*) of the Act. The Citizenship Judge applied the test in *Re Koo*, [1993] 1 F.C. 286 (F.C.T.D.) and refused the application for citizenship after concluding that the Applicant had not centralized her mode of existence in Canada. The Judge's notes also indicate that she found the Applicant had failed to supply sufficient evidence of a documentary and oral nature to satisfy the requirements of residency. She further stressed that the Applicant had been outside the country more than she had been in it.

Issues

[15] The Applicant challenges the Decision on three grounds:

1. **Did the Citizenship Judge err in finding that the Applicant did not meet the requirements of section 5(1)(*c*) of the Act?**

2. **Did the Citizenship Judge commit a breach of procedural fairness by failing to indicate to the Applicant during the residency hearing the areas of concern that would affect her Decision, thereby denying the Applicant the opportunity to answer the Citizenship Judge's concerns?**

3. Did the Citizenship Judge err in failing to provide a reason for not exercising her statutory discretion to make a favourable recommendation to the Minister under subsections 5(3) and 5(4) of the Act?

Reasons

[16] Section 5(1) of the Act sets out the necessary criteria for obtaining citizenship. Section 5(1)(*c*) requires that a person accumulate at least three years, or 1,095 days, of residence within the four years immediately preceding the date of his or her application for citizenship. The Act does not define "residency." There has been divergence in this Court as to the test to be applied in determining whether an applicant has satisfied the residence requirements. In short, these tests are set out in *Re Koo*, above, *Re Pourghasemi* (1993), 62 F.T.R. 122 (F.C.T.D.), and *Re Papadogiorgakis* [1978] 2 F.C. 208 (F.C.T.D.). A citizenship judge may adopt any of the three residency tests and not be in error for that reason.

[17] In this case, the Citizenship Judge applied the centralized mode of existence test, as set out in *Re Koo*, which permits an individual to satisfy the residency requirements by establishing that Canada is the country in which he or she regularly, normally or customarily lives.

[18] The Applicant challenges the Decision on the basis of several factual errors, as well as errors in the application of the legal test for determining residency under section 5(1) of the Act. The Applicant also argues that the Citizenship Judge breached the rules of procedural fairness.

[19] There has been general consensus in the jurisprudence of this Court that the applicable standard of review for a citizenship judge's determination of whether an applicant meets the residency requirement, which is a question of mixed fact and law, is reasonableness *simpliciter* (*Canada (Minister of Citizenship and Immigration) v. Chang*, 2003 FC 1472; *Rizvi v. Canada* (*Minister of Citizenship and Immigration)*, 2005 FC 1641; *Chen v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 85; *Zhao v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1536). In light of the Supreme Court of Canada's recent decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9 [*Dunsmuir*], wherein the Court collapsed this standard and the patent unreasonableness standards into one standard of reasonableness, I find that the applicable standard of review as regards the Citizenship Judge's determination of whether the Applicant met the residency requirement is reasonableness.

[20] With respect to the alleged factual errors, a number of pre-*Dunsmuir* authorities from this Court held that the patent unreasonableness standard was to be applied to a citizenship judge's findings of fact. Considerable deference is owed to citizenship judges' findings of fact, as they have access to the original documents and an opportunity to discuss the relevant facts with the applicant. Thus, applying *Dunsmuir*, these findings are also reviewable on a reasonableness standard. I note, however, that even if the patent unreasonableness standard had been applied when reviewing the Citizenship Judge's findings of fact in the present case, my findings would have been the same.

[21] Procedural fairness questions are pure questions of law reviewable on a correctness standard. The second issue is thus reviewable on this standard. The third issue raised concerning the

adequacy of reasons is also a question of procedural fairness and natural justice and is also reviewable on a standard of correctness (*Andryanov v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 186 at para. 15; *Jang v. Canada (Minister of Citizenship and Immigration)* (2004), 250 F.T.R. 303, 2004 FC 486 at para. 9; *Adu v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 565 at para. 9).

1. Did the Citizenship Judge err in finding that the Applicant did not meet the requirements of section 5(1)(*c*) of the Act?

[22] In her submissions, the Applicant outlines numerous errors of fact that, according to the Applicant, are cumulatively sufficient to have affected the Citizenship Judge's Decision to deny the Applicant citizenship and are grounds, in and of themselves, to allow this appeal. The Respondent, on the other hand, submits that many of the errors are differences of opinion while others are minor and insubstantial. It is the Respondent's position that none of the errors, if corrected, would have altered the outcome of the Decision and that, even if the Decision were quashed, a redetermination of this matter would result in the same conclusion.

[23] After carefully reviewing the Decision, the tribunal record, and the party's submissions, it is clear to me that the Citizenship Judge not only misapplied the *Re Koo* test in part, but she also made significant errors of fact which, if not made, may well have resulted in a different conclusion. In my view, the Applicant is entitled to have the merits of her application properly assessed based on the facts of her case.

[24] Some of the errors are as follows:

a) The Citizenship Judge noted that there appeared to be contradictory information in the Applicant's residency questionnaire and her resume with respect to the dates the Applicant worked as a Child Protection Officer in Afghanistan – the residency questionnaire indicated that she held this position from March 2001 to June 2002, whereas her resume stated that the position was from January 2000 to February 2002. The residency questionnaire asks applicants to list their employment and academic experience since their arrival in Canada. In accordance with these instructions, the Applicant stated that as of March 2001, when she arrived in Canada, she was a Child Protection Officer in Afghanistan. Thus, there was no actual contradiction. This is significant in light of the credibility concerns regarding the Applicant. However, in my view, this error by itself would not be sufficient to refer the matter back for redetermination;

b) The Citizenship Judge stated that some passport stamps appeared inconsistent with absences listed on the Applicant's residency questionnaire. In particular, there were two stamps that, according to the Citizenship Judge, were from Pakistan and acquired during times when the Applicant had declared she was in Tajikistan. A review of the stamps indicates that the Citizenship Judge was incorrect with respect to both stamps. Both stamps are from Tajikistan;

c) Although the Citizenship Judge noted that the Applicant said she returned to Canada in June 2002 and remained until August 2003, and also noted that the Applicant had

lived in Canada for a period of one year as a visiting PhD scholar, the Citizenship Judge mistakenly stated as follows:

> In March of 2004, you received a PhD in Gender and Ethnic Studies from the University of Greenwich, London, England, after a year of study. It is unclear whether your husband visited with you, or lived with you in London. Your daughters remained in Canada….

In my view, this is a significant error of fact, as the Applicant did not live in London at any time during the relevant four-year period, including the period during which she completed her PhD. From June 2002 to August 2003, she was living in Canada with her husband and two daughters. From August 2003 to March 2004, the Applicant was living in Tajikistan while working for UNICEF. The Applicant visited London on five occasions during the relevant four-year period for the purpose of meeting with the supervisor of her doctoral studies. These visits were for short periods during which the Applicant could not have been considered a resident of the United Kingdom;

d) In reference to an email sent by the Applicant outside the relevant four-year period to the Canadian Women's Club in Barbados in which the Applicant asked whether there were any Iranian-Canadian members in the Club, the Citizenship Judge noted as follows:

> It is reasonable to assume that the most obvious place to find Iranian-Canadian women is in Canada, not in Barbados; as a result, the email request suggests that you may not have developed friendships with many

> Iranian-Canadian women when you lived in Canada for a year as a visiting PhD scholar.

This inference of fact is unreasonable and unsupported by the evidence. The Applicant's attempt to seek out other Iranian-Canadian women does not suggest that the Applicant did not develop friendships with women of her nationality in Canada. In addition, the email and the Applicant's membership in this group indicates that, regardless of where the Applicant is living, she takes the initiative to surround herself with Canadian people. This finding is supported by a letter of recommendation from Mr. William Patton, United Nations Resident Coordinator in Tajikistan, in which he states that the Applicant "maintains good contacts with other Canadians in Tajikistan." It is further supported by the Applicant's residency questionnaire in which she lists her involvement with numerous Canadian organizations and says, "I also have some of my best friends based in Canada and these include immigrants and new citizens but also many 'old' Canadians."

[25] With respect to the Citizenship Judge's application of the *Re Koo* factors, the principle errors are as follows:

a) The Citizenship Judge stated that the Applicant was present in Canada for 283 days within the relevant four-year period. In fact, the Applicant was physically present in Canada for a total of 691 days and not the stated 283 days. However, the Citizenship Judge stated the correct number of days that the Applicant was physically present in Canada in both her factual findings and in her assessment of the fourth *Re Koo* factor.

Thus, this error, alone, in my view, is not sufficient to warrant a redetermination of the application. I regard it as a typo;

b) In her analysis of the third *Koo* factor, the Citizenship Judge noted, in part, as follows:

> You have provided insufficient evidence to establish that you intend to make Canada your primary place of residence or that you are working to establish a domicile which your family can refer to as a home. The onus is on you to provide sufficient documentary evidence to establish residency. There are no credit card transaction records, telephone records, household receipts, or daily banking records to reflect your purchases during the relevant four-year period. Due in part to the paucity of documentation provided to demonstrate a sustained presence in Canada, plus the fact that you presently live in Barbados and will continue to do so until your contract expires in 2019, it is reasonable to conclude that you do not reside in Canada and that you may not intend to return to Canada permanently.

The Citizenship Judge listed the documentary evidence submitted by the Applicant at the beginning of her Decision, but she failed to consider this evidence when she assessed whether the Applicant intended to make Canada her primary place of residence. Although the Applicant did not submit the passive indicia listed by the Citizenship Judge above, there was other documentary evidence available, including the following:

- she is a co-owner of a house in Toronto;
- she has made almost monthly wire transfers to a Canadian bank account shared with her husband since August 2001;
- there are utility bills (although many of the bills submitted fall outside the relevant four-year period, there is one bill from 2004 and another from 2005);
- there is an Ontario health card and a letter from her doctor in Toronto attesting to the fact that the Applicant has been his patient since 2002 and visits him every few months.

Further, the Citizenship Judge failed to consider that: (i) the Applicant does not own property elsewhere; (ii) the Applicant returns to Canada after each of her absences and as frequently as possible; and (iii) the Applicant’s stay in any other country is only

temporary and for work-related purposes. The Citizenship Judge also erred by failing to address the Applicant's family ties in conjunction with these other indicia of residence which, taken together, suggest that the Applicant has the intention of maintaining permanent roots in Canada. As stated in *Re Ho*, [1997] F.C.J. No. 1747 (F.C.T.D.) at paragraph 7:

> …residency in Canada for the purposes of citizenship does not imply full-time physical presence. The place of residence of a person is not where that person works but where he or she returns to after work. Hence, an applicant for citizenship who has clearly and definitively established a home in Canada with the transparent intention of maintaining permanent roots in this country ought not to be deprived of citizenship merely because he has to earn his livelihood and that of his family by doing business offshore. The most eloquent indicia of residency is the permanent establishment of a person and his family in the country.

c) The most significant error, in my view, appears in the Citizenship Judge's analysis of the sixth *Koo* factor, which relates to the quality of the Applicant's connection with Canada and whether it is more substantial than her connection with any other country. The Citizenship Judge observed as follows:

> There is no question that you have performed laudable work within the global community as a UNICEF employee. Nevertheless, you have chosen to accept employment in countries outside Canada at a time when you knew that by doing so, you might incur a residency shortfall when seeking citizenship. You have been outside of Canada more often than you have been in it. As for your family, your husband and daughters are Canadian citizens, but you will not return to join them in Canada until 2019. By that time, the dynamics of your family may have changed, and they may live elsewhere or under different circumstances, or perhaps even different countries. With that in mind, on the basis of the evidence before me, I am not persuaded that you have established a substantial connection with Canada.

This factor requires the Citizenship Judge to undertake a comparison to determine whether the Applicant's connection with Canada is more substantial than with any other country. In this case, the comparison would be with Barbados, Iran, or any other country where the Applicant has spent a significant amount of time or has a substantial connection. The Citizenship Judge's failure to do this constitutes a failure to properly apply the facts to this part of the *Koo* test, which in turn raises doubts as to whether the Citizenship Judge had a proper understanding of the law. On the facts of this case, Canada is the only country where the Applicant can be said to have centralized her mode of existence. This is where her children and her family are and this is where she comes when she has a break from her demanding international career and work for UNICEF. It is very telling, I feel, that the Citizenship Judge failed to make the comparison between the Applicant's connection to Canada and her connection with "any other country." Had she done so, the only conclusion on the facts is that Canada is the only country with which the Applicant has a connection, and this would have to impact the Judge's assessment of the quality of the Applicant's connection with Canada. Not to have made such a comparison renders the Decision unreasonable, and certainly does so when taken in conjunction with other errors;

d) The Judge is also highly critical of the Applicant's response to question 13 in the residency questionnaire and complains that the Applicant concentrates upon her institutional and education ties, and that the Applicant does not "describe [her] daily acclimatization to Canada, including the ways in which [she makes it her] home, nor [does she] provide observations about the challenges of adapting to Canada's society

> and customs." What is troubling about this response is that question 13 in the Residence Questionnaire specifically directs applicants, when describing social ties, to focus upon "active memberships in community or religious organizations, volunteer groups, etc." This is what the Applicant did, and yet she is faulted for not doing something else. In the absence of an explanation on this point from the Citizenship Judge, such criticism appears to be unreasonable given the directions contained in question 13.

[26] I have not referred to every mistake and error made by the Judge. But what I have referred to is, in my view, sufficient to render the Decision unreasonable.

[27] The number of factual errors and the misapplication of the *Koo* factors in this case are of such significance that they leave me with little confidence in the soundness of the other conclusions reached by the Citizenship Judge. Although some of these errors alone would not be sufficient to warrant a rehearing of the application, I am satisfied that they are cumulatively sufficient to warrant intervention by this Court. For these reasons, the appeal is allowed. Because of this finding, I need not consider the remaining issues raised by the Applicant in this appeal.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The appeal is allowed and the matter is referred back to another Citizenship Judge for re-determination.

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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