Federal Court  Cour fédérale

Date: 20101203

Docket: T-1954-09

Citation: 2010 FC 1213

Ottawa, Ontario, December 3, 2010

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

HUMERA KALSOOM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an appeal under s. 21 of the *Federal Courts Act*, R.S., 1985, c. F-7, subsection 14(5) of the *Citizenship Act*, R.S., 1985 c. C-29 (Act) and Rule 300(c) of the *Federal Courts Rules*, SOR/98-106 (Rules) of the decision of a Citizenship Judge, dated September 24, 2009 (the decision), refusing the applicant's application for Canadian Citizenship under section 5 of the Act.

[2] The application for judicial review shall be granted for the following reasons.

Facts

[3] The applicant is a citizen of Pakistan. She was married in August 2001 to Hassan Raza, who is a Canadian citizen. The applicant landed in Canada on June 7, 2002 under a Family Class Sponsorship made by her husband. She became a permanent resident on this same date.

[4] The couple had a daughter in 2003 in Windsor, Ontario where Mr. Raza was studying towards becoming a Chartered Financial Analyst.

[5] The applicant traveled to Pakistan to visit her family from November 14, 2003 to December 12, 2003 for a total of 28 days. She then came back to Canada and continued living with her family in Windsor until approximately the middle of 2005.

[6] At that time, Mr. Raza accepted a job in Saudi Arabia and the applicant and her husband left Canada in late May 2005. Mr. Raza went to Riyadh, whereas the applicant went to Pakistan.

[7] A second child was born in Pakistan in August 2005. The applicant then went to join her husband in Saudi Arabia on September 19, 2005. They have been living there since.

[8] In 2006, the applicant hired Mr. Enrico Caruso of the law firm Burgio and Associates for purposes of assisting her in applying for Canadian citizenship. On May 16, 2006, she applied for citizenship to the Case Processing Centre in Sydney, Nova Scotia.

[9] The relevant time period for the calculation of the applicant's residency for the purposes of section 5 of the Act begins from May 16, 2006 going back four years to May 16, 2002.

[10] The Citizenship Judge stated that in matters of residency, the onus falls on the applicant to demonstrate that he or she has resided in the country for three years of the four years in the relevant period in order to show that he or she meets the requirement of the Act (*Maharatnam v. Canada (Citizenship and Immigration)*, [2000] F.C.J. No. 405 (F.C.T.D.) (QL), at para. 5). In this case, the Citizenship Judge was not persuaded on the evidence that the applicant established and maintained residence in Canada for the number of days required.

[11] In particular, the Citizenship Judge took issue with the applicant's credibility due to inconsistencies in the stated number of days that the applicant had been in the country during the period in question. For example, the Judge referred to the applicant's permanent residence determination meeting in Saudi Arabia on January 5, 2009, in which the applicant acknowledged that she had spent a total of 508 days in Canada since landing on June 7, 2002, and found that this statement was contrary to what she had declared on her application for citizenship.

[12] In coming to her conclusion, the Citizenship Judge also referred to a letter from the applicant's counsel in which they admit that the applicant was only physically present in Canada for 803 days during the relevant time frame.

[13] Questions of facts are reviewable on a standard of reasonableness (*Canada (Citizenship and Immigration) v. Tarfi*, 2009 FC 188, [2009] F.C.J. No. 244 (QL) at para. 8), questions of procedural

fairness on a standard of correctness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 47).

[14] In the case at bar, the Citizenship Judge referred to another applicant “Abou el Houda” instead of “Humera Kalsoom” when she concluded that she was not satisfied that the residency requirements had been met. This raises questions as to the attentiveness of the Citizenship Judge in making her decision.

[15] The Citizenship Judge had problems with the credibility of the declarations made in the application, the documents submitted and the applicant's testimony at hearings. She decided that she would not make a favourable recommendation under subsections 5(3) and (4) of the Act.

[16] The Citizenship Judge applied the strict test of residency which in itself is not a reviewable error.

[17] The defendant concedes that the shortfall in the number of days is not 49 as stated by the Citizenship Judge (para. 7 of the decision) but 38 as acknowledged by the applicant.

[18] The Citizenship Judge was still not satisfied that the 49 days mentioned was still accurate.

[19] She also mentioned in her decision that the applicant had declared 1,428 days of possible physical presence and 231 days of absence during the relevant time frame. Nowhere in her application did the applicant declare 1,428 days; she stated 1,410 days.

[20] Although, the applicant had mentioned 231 days of absence, she corrected this statement in a letter of March 30, 2009. This letter is not mentioned in the decision.

[21] If this document had been considered or analyzed, would the Citizenship Judge have been in a position to reverse its findings on credibility and possibly make a favourable recommendation?

[22] The Citizenship Judge made numerous references to a period of 508 days in Canada mentioned by the applicant in her permanent residency application. She then concluded that this was contrary to the applicant's application for citizenship. In fact, the reference period to become a permanent resident is different than to become a citizen of Canada. There was no error by the applicant when she declared in her application for residency that she had spent 508 days in Canada.

[23] Again, if the Citizenship Judge had properly considered the applicant's statements in both applications, maybe she may not have had credibility concerns.

[24] Under the circumstances, the Court prefers to return the matter for reconsideration.

JUDGMENT

THIS COURT ORDERS that this application for appeal be allowed. The matter is remitted back for reconsideration by a different Citizenship Judge.

"Michel Beaudry"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1954-09
STYLE OF CAUSE:	HUMERA KALSOOM AND THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	December 1, 2010
REASONS FOR JUDGMENT:	BEAUDRY J.
DATED:	December 3, 2010

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