Federal Court  Cour fédérale

Date: 20161130

Docket: T-312-16

Citation: 2016 FC 1324

[ENGLISH TRANSLATION]

Ottawa, Ontario, November 30, 2016

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

JEAN JACQUES MUKULA MIJI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS:

I. Introduction

[1] This is an application for judicial review under subsection 72(1) of the *Federal Courts Act* and subsection 22(1) of the *Citizenship Act*, R.S.C., 1985, c. C-29 (the Act) of a citizenship judge's (the judge) decision dated January 19, 2016, which rejected the applicant's application

for Canadian citizenship on the ground that he did not meet the residency requirements set out in paragraph 5(1)(c) of the Act.

[2] The applicant argued that this decision was unreasonable and breached the principles of procedural fairness.

[3] A review of the case revealed that the judge's assessment of the evidence was reasonable and, accordingly, the application is dismissed.

II. Facts

[4] The applicant is a citizen of the Democratic Republic of the Congo. He came to Canada in August 2006.

[5] On July 25, 2010, the applicant filed an application for Canadian citizenship. The relevant period for assessing the residency requirement was from August 7, 2006, to July 25, 2010. On October 17, 2013, the citizenship judge rejected his application based on the stringent test set out in *Pourghasemi (Re)* (1993), 62 FTR 122 [*Pourghasemi*] and because he found that the applicant could not confirm the exact number of days during which he had been physically present in Canada.

[6] The applicant applied for judicial review of this decision and, on February 4, 2015, the Federal Court allowed this application, referring the matter to a new citizenship judge. In his decision, Mr. Justice Locke found that the first citizenship judge had breached his duty of

procedural fairness. According to Locke J., the applicant could not reasonably know what test he needed to satisfy since the request to bring certain documents to the hearing might have implied that the qualitative test could apply (*Miji v Canada (Citizenship and Immigration)*, 2015 FC 142 at paragraph 38 [*Miji*]). According to Locke J., the result could have been different if the judge had used the qualitative test (*Miji* at paragraph 22).

[7] On January 19, 2016, a new citizenship judge rejected the applicant's application for Canadian citizenship. She also applied the stringent test set out in *Pourghasemi* and found that the applicant did not meet the residency requirements set out in paragraph 5(1)(c) of the Act.

[8] The judge summarized the circumstances which led her to this conclusion as follows:

> [TRANSLATION}
> [49] Because the applicant did not work for nearly a year and a half at the beginning of the qualifying period; the passport covering the same period had not been filed; the dates of the trips reported were not corroborated by any stamps with the exception of the last trip in 2009; the Integrated Customs Enforcement System report (from the Canada Border Services Agency) did not match the reported trips; several contradictions and omissions were observed in the documents and at the hearing; and the applicant did not discharge his burden of proof and I found his testimony unreliable. This leads me to conclude that the witness failed to demonstrate that he lived in Canada during the days he reported in his application.

[9] The applicant filed an application for judicial review of this decision on February 19, 2016.

III. Relevant Act

[10] The judge rejected the applicant's application for Canadian citizenship on the ground that he did not meet the residency requirements set out in paragraph 5(1)(c) of the *Citizenship Act*:

Grant of citizenship	*Attribution de la citoyenneté*
5 (1) The Minister shall grant citizenship to any person who	**5 (1)** Le ministre attribue la citoyenneté à toute personne qui, à la fois :
[…]	[…]
(c) is a permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act, and has, within the four years immediately preceding the date of his or her application, accumulated at least three years of residence in Canada calculated in the following manner:	**c)** est un résident permanent au sens du paragraphe 2(1) de la Loi sur l'immigration et la protection des réfugiés et a, dans les quatre ans qui ont précédé la date de sa demande, résidé au Canada pendant au moins trois ans en tout, la durée de sa résidence étant calculée de la manière suivante :
(i) for every day during which the person was resident in Canada before his lawful admission to Canada for permanent residence the person shall be deemed to have accumulated one-half of a day of residence, and	**(i)** un demi-jour pour chaque jour de résidence au Canada avant son admission à titre de résident permanent,
(ii) for every day during which the	**(ii)** un jour pour chaque jour de

person was resident in Canada after his lawful admission to Canada for permanent residence the person shall be deemed to have accumulated one day of residence;	résidence au Canada après son admission à titre de résident permanent;

IV. Issues

[11] This application raises the following issues:

1. Did the judge err by breaching the principles of procedural fairness?
2. Was the judge's decision reasonable?

V. Standard of review

[12] The parties agree (and I agree) that the issues of procedural fairness raised in this case should be reviewed on the standard of correctness (*Mission Institution v Khela*, 2014 SCC 24 at paragraph 79).

[13] That being said, insofar as the applicant argues that the judge erred in her assessment of the evidence or in the application of the facts to the law, one must question the reasonableness of the decision. Regarding this issue, we must rely on the "justification, transparency and intelligibility within the decision-making process. But it is also concerned with 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] 1 SCR 190, at paragraph 47).

VI. Analysis

A. *Did the judge err by breaching the principles of procedural fairness?*

[14] The applicant submitted that the judge erred by breaching the principles of procedural fairness. In particular, the applicant argued that the judge did not adequately advise the applicant regarding the test he intended to apply. Locke J. in his decision granting the application for judicial review of the initial rejection of the applicant's application for citizenship stated that "individuals such as the applicant in the instant case should not be put in a position of doubt as to what test a citizenship judge will be applying" (*Miji* at paragraph 21). In light of Locke J.'s decision, the applicant said he had a legitimate expectation that the judge would provide an opinion as to his intention to use the quantitative test. No notice was provided.

[15] The duty of procedural fairness owed to applicants by citizenship judges is at the lower end of the spectrum (*Fazail v Canada (Citizenship and Immigration)*, 2016 FC 111 at paragraph 46 [*Fazail*]). To satisfy procedural fairness in this case, it must be concluded that the applicant could reasonably have known what test he had to satisfy (*Fazail* at paragraph 50). The purpose of this rule is to ensure that an applicant may have the opportunity to submit any relevant evidence and make any arguments necessary to satisfy the test to be applied.

[16] There is no doubt that the applicant knew what test he had to meet and that he had the opportunity to submit any relevant evidence to satisfy the stringent test. Moreover, the applicant maintained in his affidavit and at the hearing that he was physically in Canada for 1197 days during the relevant period. He was therefore prepared to satisfy the stringent test. Furthermore, he was not prejudiced in his ability to present any relevant evidence to meet it. The judge did not breach the principles of procedural fairness in this regard.

B. *Was the judge's decision reasonable?*

[17] The applicant first submitted that the judge erred in stringently applying the physical presence test established in *Pourghasemi* to the exclusion of the qualitative residency test. He stated, citing *El Ocla v Canada (Citizenship and Immigration)*, 2011 FC 533 at paragraph 19, that when a judge applies only the physical presence test, he or she commits an error of law reviewable on the basis of correctness. Chief Justice Crampton's subsequent decision in *Huang v Canada (Citizenship and Immigration)*, 2013 FC 576, which provided an overview of the case law on this issue, established that citizenship judges can freely choose among the three tests and that they cannot be faulted for choosing one over the other (see also *Canada (Citizenship and Immigration) v Pereira*, 2014 FC 574 at paragraph 15). The judge did not commit any errors in this regard.

[18] The applicant also argued that, based on the evidence, the only reasonable decision was to find that the applicant met the test of the Act. The applicant challenged several of the judge's findings of fact.

[19] At the hearing, counsel for the applicant raised, among other things, that the judge erroneously assessed the evidence by finding in paragraph 32 of her decision that

> [TRANSLATION]
> [32] However, this pay stub does not indicate the country in which the applicant worked or the starting date. I would point out here that the applicant filed a letter from PWC stating that he had worked for that firm in the Congo from December 2, 1992 to August 5, 2006, prior to his arrival in Canada, but no letters or records of employment were submitted for the period from January 16, 2008 to August 6, 2010.
>
> [My emphasis]

[20] In his record before this Court, the applicant included a letter from PricewaterhouseCoopers [PwC] dated March 14, 2012 stating that:

> [TRANSLATION]
> Jean Jacques
>
> was a full time employee of PwC from January 16, 2008 to August 6, 2010. He was the Audit and Certification Manager at the Vancouver office.

[21] The Court then conducted a thorough review of the Certified Tribunal Record to ascertain whether it contained this letter from PwC. The letter was not there.

[22] The Court then directed the parties to confirm whether or not PwC's letter dated March 14, 2012, was before the judge who had rejected the applicant's application for citizenship on January 19, 2016.

[23] Having reviewed the written submissions of the parties on this issue, I conclude that this letter was not before the judge. Moreover, in her notes of the hearing, the judge noted that she asked the applicant why he had not provided evidence of this employment with PwC in Vancouver as requested by the respondent on several occasions. Her notes indicated that the applicant claimed to have filed these documents, despite their absence from the record, and that the judge had checked again before the applicant without finding the documents.

[24] These notes allow me to conclude that the letter in question was not before the judge and that the applicant had the opportunity to present that evidence.

[25] Given that this evidence was not on the record and for all the reasons stated in paragraph 49 of her decision, I confirm that the judge's review of the evidence and her decision were reasonable and that there is no basis to set it aside.

[26] The application for judicial review is dismissed.

JUDGMENT

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

"Peter Annis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-312-16
STYLE OF CAUSE:	JEAN JACQUES MUKULA MIJI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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APPEARANCES:

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