Federal Court  Cour fédérale

**Date: 20141222**

**Docket: T-1261-14**

**Citation: 2014 FC 1250**

**Ottawa, Ontario, December 22, 2014**

**PRESENT: The Honourable Mr. Justice Zinn**

**BETWEEN:**

**RONY HUSSNI EL CHMOURY**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## JUDGMENT AND REASONS

[1] The applicant appeals the decision of a Citizenship Judge, which did not approve his application for citizenship. It is submitted that the Citizenship Judge erred by assessing the evidence under the qualitative residency test and then refusing the application under the quantitative residency test.

[2] The quantitative residency test set out in *Re Pourghasemi,* [1993] FCJ 232 [*Pourghasemi*] requires that an applicant have 1095 days of actual physical residency in Canada in the relevant four-year period. The qualitative tests are found in two decisions. *Re Papadogiorgakis,* [1978] 2 FC 208, held that what is required is evidence of a centralized mode of living established in Canada. *Re Koo,* [1993] 1 FC 286 [*Koo*], held that a centralized mode of existence or where the applicant "regularly, normally or customarily lives" can be determined by considering a number of qualitative factors including (1) whether the individual was physically present in Canada for a long period prior to recent absences which occurred immediately before the application for citizenship; (2) whether the applicant's immediate family and dependents (and extended family) are resident in Canada; (3) whether the pattern of physical presence in Canada indicates a returning home or merely visiting the country; (4) whether the extent of the physical absences results in an applicant being only a few days short of the 1095 days or are extensive; (5) whether the physical absences are caused by a temporary situation such as employment as a missionary abroad, following a course of study abroad as a student, accepting temporary employment abroad, accompanying a spouse who has accepted temporary employment abroad; and (6) whether the quality of the connection with Canada is more substantial than that which exists with any other country.

[3] Mr. El Chmoury entered Canada to study in June 2001. He was granted permanent residency on November 6, 2008, and he filed an application for citizenship on February 4, 2011. In his application he stated that he had 1082 days of residency during the relevant four-year period. Therefore, he was 13 days short of the required days of physical residence.

[4] In March 2012, Mr. El Chmoury received a Residence Questionnaire from Citizenship and Immigration Canada asking him to provide further information and documentation on residency. He had a hearing before the Citizenship Judge on February 11, 2014. At the conclusion of the hearing the judge requested that he provide further documentation.

[5] In his decision letter dated March 25, 2014, the Citizenship Judge refused the application citing the residency requirement of 1095 days from *Re Pourghasemi*. He did, however, engage in some analysis of the oral and documentary evidence submitted by Mr. El Chmoury.

[6] It is accepted that a Citizenship Judge may apply any of the three established residency tests, as long as the judge applies the criteria of the chosen approach. Mr. El Chmoury submits that it has held that it is a reversible error if the Citizenship Judge conducts an assessment under one test but then renders the decision under a different test: *Chueng v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 348 [*Cheung*], *Chowdhury v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 709 [*Chowdhury*], and *Rousse v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 721 [*Rousse*].

[7] In *Cheung*, Justice Phelan observed at para 15 that "it is not possible to discern which test was used to deny the application for citizenship" and on that basis allowed the appeal. Similarly, Justice Teitelbaum allowed the appeal in *Chowdhury*, observing that the judge did not clearly state the approach he was taking. Neither decision can be said to be similar to that under appeal because here the Citizenship Judge expressly stated that he was using the *Pourghasemi* test.

[8] In *Rousse* the Citizenship Judge appeared to go through the *Koo* factors, before rejecting the application on the *Pourghasemi* test. Justice Scott held that the Citizenship Judge erred in so doing:

> [30] In short, the judge conducted a thorough analysis, applying the *Koo* criteria. However, and therein lies the rub, she rejected the application on the basis of *Pourghasemi*, that is, based on the physical presence criterion alone.
>
> [31] This confusion about the approach and the applicable criteria cannot be accepted, since it constitutes an error of law. The decisions of this Court rightly acknowledge, given the law as it now stands, that it is up to the citizenship judge to select the applicable test. However, once a judge makes that selection, they must apply the test selected consistently. The applicant must be able to understand the decision and the reasons and basis for that decision.
>
> [32] In this case, the judge failed to make a determination, after completing her analysis applying the *Koo* criteria, as to whether Mr. Rousse had or had not established residence. She concluded:
>
> [TRANSLATION]
>
> Following the hearing on December 14, 2010, and after doing a careful review of the documentation submitted, I again find that Robert ROUSSE does not meet the requirement in section 5(1)(*c*) of the *Citizenship Act* in that he was not in Canada for long enough during the period considered.
>
> I refer to the criteria stated by Muldoon J. in Pourghasemi, (RE): [1993] F.C.J. No. 232, which are clear, on this point. (See notes of Judge Renée Giroux in the record.)
>
> [33] In conclusion, the Court allows the appeal because the judge erred by conducting an analysis under the *Koo* criteria and reaching a conclusion on the basis of the physical presence criterion in *Pourghasemi*. [emphasis added]

[9] In my view, the facts in *Rousse* are significantly different than those here. In *Rousse*, the Citizenship Judge was clearly conducting a *Koo* analysis but reached no decision on that basis.

That is not so here. Here the Citizenship Judge, in examining the evidence, did so only with an eye to the physical presence of Mr. El Chmoury in Canada. That analysis led the Citizenship Judge to a conclusion only regarding physical presence: "Unfortunately, your oral and documentary evidence gives rise to DOUBTS that you were indeed residing here for the period claimed [emphasis in original]."

[10] Mr. El Chmoury submits that in undertaking this analysis and requesting further documents, the Citizenship Judge had embarked on a qualitative analysis and could not then reject the application on the basis of the quantitative analysis. That is not my view of the decision or the record.

[11] Every Citizenship Judge knows that he or she has discretion to apply any one of three tests that have been developed. Each also knows that an applicant may be granted citizenship even when he or she has less than the required days of physical presence, if one of the qualitative tests is used. As such, in my view, a Citizenship Judge cannot be faulted for making inquiries of an applicant and reviewing the oral and documentary evidence in order to arrive at a decision as to which of the three tests he or she will use in any particular case. It is possible that had the Citizenship Judge here been satisfied that Mr. El Chmoury had in fact been resident in Canada for the 1082 days of physical presence claimed, that the judge may have considered whether to use a qualitative test of residence in assessing his application. There is no error of law in so doing. It is a reasonable and proper inquiry upon which to base the discretionary decision as to the test to be applied.

[12] In this case, the Citizenship Judge examined the evidence and concluded that it did not even support Mr. El Chmoury's claim to have been physically present in Canada for 1082 days. Unlike the authorities relied on by Mr. El Chmoury, there was no *Koo* analysis; rather, there was an analysis of the oral and documentary evidence as evidence of physical presence. I do not accept the submission that in the face of an application having less than 1095 days presence such an analysis was irrelevant unless the Citizenship Judge was undertaking a *Koo* analysis of the application. It is and was a relevant analysis going to whether to exercise discretion and use a qualitative test.

[13] For these reasons the appeal is dismissed, with costs fixed at $250.00.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** this appeal is dismissed, with costs payable to the respondent, fixed at $250.00.

"Russel W. Zinn"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-1261-14 |
| **STYLE OF CAUSE:** | RONY HUSSNI EL CHMOURY v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | CALGARY, ALBERTA |
| **DATE OF HEARING:** | DECEMBER 18, 2014 |
| **JUDGMENT AND REASONS:** | ZINN J. |
| **DATED:** | DECEMBER 22, 2014 |

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