Federal Court  Cour fédérale

Date: 20160811

Docket: T-68-16

Citation: 2016 FC 919

Ottawa, Ontario, August 11, 2016

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

MOHANMMAD CHARBAND

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Mohanmmad Charband appeals a decision of a citizenship judge dated December 21, 2015. The citizenship judge refused his application for citizenship because he found that Mr. Charband could not demonstrate that he was resident in Canada for three of the four years immediately preceding his application, as required by s 5(1)(c) of the *Citizenship Act*, RSC 1985, c 29 [*Act*].

[2] For the following reasons, I have concluded that a citizenship judge has a discretion to apply the strict quantitative test for residence, provided that the citizenship judge's choice of test is evident from the facts of the case. A citizenship judge is not obliged to provide an explicit rationale for applying the strict quantitative test, nor to give notice of the test for residence that will be applied. The appeal is therefore dismissed.

II. Background

[3] Mr. Charband is a citizen of the Islamic Republic of Iran. He came to Canada in 2002 and was found to be a Convention refugee in 2003. He obtained permanent resident status on November 23, 2006.

[4] The four year period immediately preceding Mr. Charband's application for Canadian citizenship began on June 16, 2007 and ended on June 16, 2011 [the relevant period]. In his application, he declared 830 days of absence, not all of which fell within the relevant period.

[5] Mr. Charband attended a hearing before the citizenship judge on December 21, 2015, accompanied by his brother. The citizenship judge refused his application the same day, applying the quantitative test endorsed by Mr. Justice Muldoon in *Re Pourghasemi*, [1993] FCJ No 232, 62 FTR 122 [*Pourghasemi*].

III. Decision under Review

[6] According to the citizenship judge, during the hearing Mr. Charband apologized for making a mistake because he thought he had "enough days" to be eligible for Canadian

citizenship. The citizenship judge acknowledged that other family members were Canadian citizens, that he was in the process of sponsoring his immediate family from Iran, and that his son was already in Canada. The citizenship judge accepted Mr. Charband's submissions that he had been a taxpayer since his arrival in Canada, that he works full-time, and that he is a small business owner.

[7] The citizenship judge held that under the analytical approach found in *Pourghasemi*, it is necessary for a prospective citizen to be physically present in Canada for 1,095 days during the relevant four-year period. Mr. Charband acknowledged a shortfall of 188 days, and the citizenship judge therefore rejected his application without further analysis.

IV. Issues

[8] This application for judicial review raises the following issues:

A. Is *Pourghasemi* still good law?

B. Was the citizenship judge obliged to provide a rationale for applying the strict quantitative test for residence found in *Pourghasemi*, rather than the more flexible qualitative test found in other jurisprudence?

C. Was the citizenship judge obliged to give notice of which test for residence would be applied?

D. Should a question be certified for appeal?

V. Analysis

A. *Is Pourghasemi still good law?*

[9] Mr. Charband says that the test for residence to be applied by a citizenship judge is a fraught area of the law. He notes that *Pourghasemi* was decided 23 years ago, and argues that the decision has been superseded by a wealth of contrary jurisprudence.

[10] Mr. Charband relies on *Canada (Minister of Citizenship and Immigration) v Takla*, 2009 FC 1120 [*Takla*], and says that the strict quantitative test found in *Pourghasemi* has been replaced by the more flexible qualitative test found in *Re Koo*, [1993] 1 FC 286 [*Koo*]. The qualitative test requires a citizenship judge to consider six questions (*Koo* at pages 293 and 294):

> (1) was the individual physically present in Canada for a long period prior to recent absences which occurred immediately before the application for citizenship;
>
> (2) where are the applicant's immediate family and dependents (and extended family) resident;
>
> (3) does the pattern of physical presence in Canada indicate a returning home or merely visiting the country;
>
> (4) what is the extent of the physical absences - if an applicant is only a few days short of the 1,095 day total it is easier to find deemed residence than if those absences are extensive;
>
> (5) is the physical absence caused by a clearly 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 ;(6) what is the quality of the connection with Canada: is it more substantial than that which exists with any other country.

[11] In *Lam v Canada (Minister of Citizenship and Immigration)*, 164 FTR 177, [1999] FCJ No 410 (QL) [*Lam*], Justice Lutfy established the principle that "it is open to the citizenship judge to adopt either one of the conflicting schools in this Court and, if the facts of the case were properly applied to the principles of the chosen approach, the decision of the citizenship judge would not be wrong." However, in *Takla*, Justice Mainville observed that *Lam* was rendered in a situation that was perceived to be temporary, given the statutory amendments that were under consideration at the time. Because the situation subsequently became permanent, he considered it appropriate to settle on one interpretation of s 5(1)(*c*) of the *Act* (*Takla* at para 46):

> [46] …Considering the clear majority of this Court's jurisprudence, the centralized mode of living in Canada test established in *Koo*, above, and the six questions set out therein for analytical purposes should become the only test and the only analysis.

[12] Four years later, in *Huang v Canada (Minister of Citizenship and Immigration)*, 2013 FC 576 [*Huang*], Chief Justice Crampton remarked that Justice Mainville's "laudable attempt to standardize the applicable law" had not been successful:

> [21] In short, while his view that the *Koo* test should be the sole standard has been endorsed in several subsequent decisions of this Court (see for example, the cases listed in *Hao*, above, at para 42, and in *El Khader v Canada (Minister of Citizenship and Immigration)*, 2011 FC 328, at para 17 [*El Khader*]; see also *Imran*, above, at para 32), a citizenship judge's discretion to apply one of the other recognized tests has been upheld in several other decisions (see, for example *Dachan v Canada (Minister of Citizenship and Immigration)*, 2010 FC 538, at para 19; *Sarvarian v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1117, at paras 8-9; *Shubeilat v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1260, at paras 30-37 [*Shubeilat*]; *Cardin v Canada (Minister of Citizenship and Immigration)*, 2011 FC 29, at para 18; *Hao*, above, at paras 48-50; *El Khader*, above, at para 23; *Canada (Minister of Citizenship and Immigration) v Saad*,

> 2011 FC 1508, at para 14 [*Saad*]; *Murphy v Canada (Minister of Citizenship and Immigration)*, 2011 FC 482, at paras 6-8; *Alinaghizadeh v Canada (Minister of Citizenship and Immigration)*, 2011 FC 332, at para 28; *Canada (Minister of Citizenship and Immigration) v Abdallah*, 2012 FC 985, at para 14 [*Abdallah*]; *Zhou v Canada (Minister of Citizenship and Immigration)*, 2013 FC 19, at para 30 [*Zhou*]).
>
> [22] Indeed, this Court has held in a number of other decisions that the "physical presence" test, discussed below, is the correct test to apply (*Martinez*, above, at para 52; *Al Khoury c Canada (Ministre de la Citoyenneté)* 2012 CF 536, at para 27; *Canada (Minister of Citizenship and Immigration) v Dabbous*, 2012 FC 1359, at para 12; *Ghosh v Canada (Minister of Citizenship and Immigration)*, 2013 FC 282, at para 25).
>
> [23] In other decisions, the Court appears to have adopted a hybrid approach, which would require a citizenship judge to proceed to conduct a qualitative assessment, as contemplated by the *Koo* test, even if the "physical presence" test has been selected by the citizenship judge and failed by the applicant (*Canada (Minister of Citizenship and Immigration) v Elzubair*, 2010 FC 298, at para 14 [*Elzubair*]; *Salim v Canada (Minister of Citizenship and Immigration)*, 2010 FC 975, at para 10; *Canada (Minister of Citizenship and Immigration) v Nandre*, 2003 FCT 650, at para 21).
>
> [24] What is clear from the foregoing is that the jurisprudence pertaining to the test(s) for citizenship remains divided and somewhat unsettled.
>
> [25] In this context, it is particularly appropriate that deference be accorded to a citizenship judge's decision to apply any of the three tests that have a long and rich heritage in this Court's jurisprudence.

[13] The Court's most recent pronouncements regarding the test for residence to be applied by a citizenship judge are Justice Mactavish's decision in *Elderaidy v Canada (Minister of Citizenship and Immigration)*, 2016 FC 560 [*Elderaidy*], and Justice Kane's decision in *Fazail v*

Canada (Minister of Citizenship and Immigration), 2016 FC 111 [*Fazail*]. Both of these decisions confirm that citizenship judges have discretion to apply the strict quantitative test for residence found in *Pourghasemi*, or the more flexible qualitative test found in *Koo*.

[14] Mr. Charband says that the doctrine of comity does not compel this Court to follow either *Elderaidy* or *Fazail* because, in both of those cases, the applicants conceded that a citizenship judge has discretion to apply any of the tests for residence recognized in the jurisprudence. Those cases ultimately turned on other questions, such as the need for a citizenship judge to provide reasons for selecting one test rather than another, or the need to provide notice of which test would be applied. I am nevertheless satisfied that the dominant view of this Court continues to be the one expressed by the Chief Justice in *Huang*: the jurisprudence governing the test for residence remains divided and somewhat unsettled and, in this context, it is important that deference be accorded to a citizenship judge's decision to apply any of the tests that have been recognized in the Court's jurisprudence. It follows that *Pourghasemi* remains good law.

B. *Was the citizenship judge obliged to provide a rationale for applying the strict quantitative test for residence found in Pourghasemi, rather than the more flexible qualitative test found in other jurisprudence?*

[15] In *Elderaidy*, the citizenship judge chose to apply the strict quantitative test for residence. Mr. Elderaidy admitted that he was more than 250 days short of the requisite 1,095 days of physical presence in Canada during the four years immediately preceding his citizenship application. He nevertheless argued that the citizenship judge should have provided reasons for her decision to apply the physical presence test. *Elderaidy* therefore bears some resemblance to the present case.

[16] Mr. Elderaidy cited Justice Mactavish's earlier decision in *Cardin v Canada (Minister of Citizenship and Immigration)*, 2011 FC 29 [*Cardin*] for the proposition that citizenship judges must have regard to an applicant's personal circumstances when selecting the test for residence. According to *Cardin*, where the underlying rationale of a particular test is not supported by the specific facts of the case at hand, the choice of test will be unreasonable. However, Justice Mactavish cautioned in *Elderaidy* that *Cardin* was a unique case, in that Mr. Cardin had come to Canada as a child, and had been raised and educated in this country before going to work in Canada for a Canadian company. In this context, Justice Mactavish concluded that it was unreasonable for the citizenship judge to find that Mr. Cardin had not become sufficiently "Canadianized" as a result of his business trips outside Canada.

[17] Justice Mactavish observed that Mr. Elderaidy's argument that citizenship judges must provide reasons for their choice of test was not supported by jurisprudence (see *Elderaidy* at para 15 and the cases cited therein). Mr. Elderaidy nevertheless submitted that reasons would promote transparency and consistency in the decision-making process. Justice Mactavish disagreed (at para 17):

> [17] The problem with this argument is that the only way that requiring reasons for the choice of test could encourage consistency in the decision-making process would be if the existence of certain types of circumstances dictated the choice of a particular test. This would be inconsistent with the well-established principle that Citizenship Judges have the discretion to choose any one of the three[1] accepted tests for residency.

[1] In *Canada (Minister of Citizenship and Immigration) v Purvis*, 2015 FC 368 at paragraph 27, Justice Mosley explained that there are really only two tests, the quantitative and the qualitative test.

[18] I agree with Mr. Charband that *Cardin* and, to a lesser extent, *Elderaidy*, support the proposition that a rationale for the citizenship judge's choice of the test for residence must be evident from the facts of the case. However, it is only in extreme cases that a citizenship judge's choice of test will be found by this Court to be unreasonable. In most cases, the rationale for the choice of test will be implicit in a citizenship judge's decision. The law is clear that there is no requirement for a citizenship judge to provide explicit reasons for the choice of test.

[19] In this case, Mr. Charband arrived in Canada as a refugee. He remained in Canada only until he obtained permanent resident status, and then returned to Iran for extended periods of time. In these circumstances, it cannot be said that the rationale for the citizenship judge's choice of the strict quantitative test for residence was not evident from the facts of the case, or that it was unreasonable.

C. *Was the citizenship judge obliged to give notice of which test for residence would be applied?*

[20] In *Fazail*, the applicant acknowledged that the citizenship judge had discretion to apply one of the recognized tests for residence, and was obliged to apply the chosen test correctly and consistently. However, the applicant argued that the citizenship judge was also required to provide notice of the test that would be applied, to enable the applicant to know the case to be met. Mr. Charband makes a similar argument in this case.

[21] Like Mr. Charband, Mr. Fazail relied on Justice Hughes' decision in *Dina v Canada (Minister of Citizenship and Immigration)*, 2013 FC 712 [*Dina*] and Justice Locke's decision in *Miji v Canada (Minister of Citizenship and Immigration)*, 2015 FC 142 [*Miji*]. However, Justice

Kane noted that *Dina* had been cited in other cases for the proposition that it is an error for a citizenship judge to "fail to articulate which residency test was applied in a given case" (see *Fazail* at para 34 and the cases cited therein). She observed that Justice Hughes did not elaborate upon the scope of the duty of procedural fairness, nor why the applicant in that case did not know the case he had to meet. She distinguished *Miji* on the ground that the applicant in that case was not aware of the test that would be applied, and may have been led to believe that it would be the qualitative test (*Fazail* at paras 37-38).

[22] I agree with Justice Kane that the key issue is whether there was in fact a breach of procedural fairness. The duty of procedural fairness owed to applicants by citizenship judges is at the lower end of the spectrum. Even at the lower end of the spectrum, the individual affected must know the case he or she has to meet and have an opportunity to respond (*Fazail* at paras 39, 46).

[23] In this case, Mr. Charband does not suggest that he was unaware of the test he had to meet. On the contrary, the hearing notes confirm that he acknowledged he did not meet the physical presence test, and he apologized for his mistake.

[24] Mr. Charband complains that the uncertainty surrounding the different tests for residence that may be applied by a citizenship judge results in unfairness. However, as Justice Kane found in *Fazail* at paragraph 55, while the uncertainty in the law is unfortunate and may lead to different outcomes, this is not a breach of procedural fairness.

[25] Mr. Charband also says that he had a legitimate expectation that the citizenship judge would apply the *Koo* test, based on Citizenship and Immigration Canada's "Manual" (Citizenship Policy (CP-5): Residence, June 11, 2010) [Manual], specifically s 5.9 B "Exceptional circumstances – Residence", which states that the *Koo* factors may be considered when the physical presence test is not strictly met. The Minister objects that the Manual, which is frequently updated, is not properly in evidence before this Court. Regardless, the version of the Manual relied upon by Mr. Charband indicates that the *Koo* factors will be considered only in "exceptional circumstances". Mr. Charband has not identified any exceptional circumstance that may apply in his case.

[26] I am satisfied that Mr. Charband understood his application for Canadian citizenship could be determined in accordance with the strict quantitative test. He acknowledged that he had a shortfall of 188 days, and apologized for his mistake. He also understood that the *Koo* factors would be applied, if at all, only in exceptional circumstances, but he did not identify any exceptional circumstances for consideration by the citizenship judge. Nor do there appear to have been any. I am unable to conclude that there was a breach of procedural fairness in this case.

D. *Should a question be certified for appeal?*

[27] Chief Justice Crampton began his judgment in *Huang* with the following remarks:

> [1] This case is yet another example of why something needs to be done to address the unacceptable state of affairs concerning the test for citizenship in this country.
>
> [2] The optimal resolution of this state of affairs would be for Parliament to legislate a clearer test for citizenship under the

> *Citizenship Act*, RSC 1985 c C-29. […] Another potential approach would be for a citizenship judge to bring a reference to the Court under subsection 18.3(1) of the *Federal Courts Act*, RSC 1985, c F-7 [*FC Act*]. Among other things, this would provide an opportunity for the issue to then be brought before the Federal Court of Appeal, pursuant to paragraph 27(1)(d) of the *FC Act*, to finally settle the divergence in this Court's jurisprudence that has persisted now for several decades.

[28] Justice Mactavish observed in *Elderaid*y at paragraph 7 that there was still (at that time) no appeal from Federal Court decisions in citizenship matters and, for this reason, there had never been an appellate determination of which of the recognized tests for residence is correct.

[29] In *Boland v Canada (Minister of Citizenship and Immigration)*, 2015 FC 376, Justice de Montigny said the following at paragraph 19:

> [19] Like the Chief Justice in *Huang*, I am of the view that *Lam* is still good law and that a citizenship judge is free to assess an application for citizenship according to any one of these three tests, provided of course that the test selected is then applied correctly to the facts of the case. That may not be the most satisfying outcome for litigants, but until the matter is resolved legislatively or judicially, this is the inevitable result of the absence of a definition for the concept of "residence" in the *Act*. Fortunately, the introduction of sections 22.1 and 22.2 in the *Act* will allow for this matter to be definitively resolved by the Federal Court of Appeal, on a certified question from this Court.

[30] Section 5 of the *Act* has been amended by the *Strengthening Canadian Citizenship Act*, SC 2014, c 22, s 3 [*Strengthening Canadian Citizenship Act*], and the strict quantitative test is now enshrined in statute. In addition, s 22.2(d) of the *Act* now provides that "an appeal to the Federal Court of Appeal may be made only if, in rendering judgment, the judge certifies that a serious question of general importance is involved and states the question."

[31] Mr. Charband has proposed numerous certified questions for appeal. The Minister says that the divergent tests for residence have been resolved by statutory amendment, and no longer give rise to a serious question of general importance. The Minister takes the position that the remaining "backlog" of cases decided under the previous statutory regime may be satisfactorily dealt with in accordance with the existing jurisprudence of this Court.

[32] In *Zhang v Canada (Minister of Citizenship and Immigration)*, 2013 FCA 168 at paragraph 9, the Federal Court of Appeal held that a question may be certified for appeal only if it (i) is dispositive of an appeal, and (ii) transcends the interests of the immediate parties to the litigation, and contemplates issues of broad significance or general importance. The question must have been raised and dealt with by the Court, and it must arise from the case, not from the judge's reasons. A question is one of general importance where its resolution will be applicable to numerous future cases (*Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982 at para 43).

[33] In *Mudrak v Canada (Minister of Citizenship and Immigration)*, 2016 FCA 178 at paragraph 35, the Federal Court of Appeal held that a question had been improperly certified because it pertained to the reconciliation of divergent case law, and was "theoretical" and made "in the nature of a reference".

[34] The "optimal resolution" advocated by the Chief Justice in *Huang* has been achieved by the enactment of the *Strengthening Canadian Citizenship Act*. Parliament has legislated a clearer test for citizenship, and the strict quantitative test now governs all citizenship applications.

Mr. Charband points to the backlog of cases decided under the previous regime, but I have been given no information about the nature or extent of this backlog. I agree with the Minister that existing jurisprudence, while in many respects unsatisfactory, provides a means of addressing any remaining backlog that may still come before the courts.

[35] The reconciliation of divergent case law in the present context may be regarded as largely theoretical. Given recent legislative amendments, the questions proposed for certification by Mr. Charband are no longer of general importance, and their resolution will not be applicable to numerous future cases. It would be inappropriate to certify questions for appeal in these circumstances.

VI. Conclusion

[36] The appeal of the citizenship judge's decision is dismissed. No questions are certified for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that the appeal of the citizenship judge's decision is dismissed. No questions are certified for appeal.

"Simon Fothergill"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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