

Federal Court



Cour fédérale

**Date: 20120608**

**Docket: T-790-11**

**Citation: 2012 FC 721**

**[UNREVISED CERTIFIED ENGLISH TRANSLATION]**

**Ottawa, Ontario, June 8, 2012**

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

**BETWEEN:**

**ROBERT ROUSSE**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

**I. Introduction**

[1] This is an appeal by Robert Rousse (Mr. Rousse) under subsection 14(5) of the *Citizenship Act*, RSC 1985, c C-29 (the Act) from the decision of citizenship judge Renée Giroux rejecting his application for citizenship.

[2] For the reasons that follow, this appeal is allowed.

## **II. Facts**

[3] Mr. Rousse is a citizen of France. He arrived in Canada on March 26, 2000. He worked as an osteopath in Toronto before settling in Quebec.

[4] On August 24, 2004, Mr. Rousse was granted permanent resident status in Canada.

[5] On November 12, 2007, he filed his application for citizenship, in which he stated he had been absent from Canada for 475 days during the designated period, rather than the 365 days allowed.

[6] Mr. Rousse's application was heard on December 14, 2010. At the interview, the citizenship judge granted an extension of time to allow Mr. Rousse to submit further evidence.

[7] On March 15, 2011, after analyzing the additional evidence, the citizenship judge rejected Mr. Rousse's citizenship application.

## **III. Legislation**

[8] Section 5(1) of the Act provides:

**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 :

(a) makes application for citizenship;

a) en fait la demande;

(b) is eighteen years of age or over;

b) est âgée d'au moins dix-huit ans;

(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 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;

(ii) un jour pour chaque jour de résidence au Canada après son admission à titre de résident permanent;

d) has an adequate knowledge of one of the official languages of

d) a une connaissance suffisante de l'une des langues officielles du

Canada;

(e) has an adequate knowledge of Canada and of the responsibilities and privileges of citizenship; and

(f) is not under a removal order and is not the subject of a declaration by the Governor in Council made pursuant to section 20.

Canada;

e) a une connaissance suffisante du Canada et des responsabilités et avantages conférés par la citoyenneté;

f) n'est pas sous le coup d'une mesure de renvoi et n'est pas visée par une déclaration du gouverneur en conseil faite en application de l'article 20.

#### IV. Question in Issue and Standard of Review

##### A. Question in Issue

- *Did the citizenship judge err in rejecting Mr. Rousse's application under paragraph 5(1)(c) of the Act?*

##### B. Standard of Review

[9] Review of the decision of a citizenship judge as to whether an applicant meets the requirements set out in the Act is a question of mixed fact and law, when the judge must, among other things, apply the facts to the criteria in the *Koo* test (see *Chowdhury v Canada (Minister of Citizenship and Immigration)*, 2009 FC 709, at paras. 24 to 28; see also *Canada (Minister of Citizenship and Immigration) v Zhou*, 2008 FC 939 at para. 7). However, where the issue before the Court, as in this case, relates to the selection of the test or confusion between the criteria that apply

to the test chosen, the standard in that case is correctness (see *El Ocla v Canada (Minister of Citizenship and Immigration)*, 2011 FC 533 at paras. 10 to 12).

## **V. Position of the Parties**

### **A. Position of Mr. Rousse**

[10] Mr. Rousse submits that the citizenship judge erred in law in that she confused the criteria that apply to whether there was a centralized residence in Canada (*Koo (Re)* (T.D.), [1993] 1 FC 286 [*Koo*]) with the strict physical presence criterion (*Pourghasemi (Re)*, [1993] FCJ No. 232 [*Pourghasemi*]).

[11] Mr. Rousse submits that there are several grounds that support his argument that the judge's conclusion was unreasonable.

[12] First, he states that the citizenship judge failed to have regard to his affidavit describing his establishment in Canada, which therefore allowed the *Koo* criteria to be applied.

[13] He also submits that the judge considered facts that took place outside the designated period.

[14] Last, he submits that the judge failed to make a determination as to whether he had actually established residence, and accordingly to apply the *Koo* test.

[15] In short, Mr. Rouse contends that the judge did not make a determination regarding a fundamental element of his application, and this vitiates her decision.

## **B. Position of the Respondent**

[16] The respondent submits that “[i]t has remained open to citizenship judges to choose either of the two jurisprudential schools represented by *Pourghasemi* and *Papadogiorgakis/Koo* in making that determination so long as they reasonably applied their preferred interpretation of the statute to the facts of the application before them” (*Hao v Canada (Minister of Citizenship and Immigration)*, 2011 FC 46 at para. 24).

[17] The respondent submits that the citizenship judge applied the physical presence criterion. Mr. Rouse contends that the citizenship judge confused the *Koo* and *Pourghasemi* criteria. In the respondent’s submission, however, the judge clearly stated that her decision was based on the quantitative criteria in *Pourghasemi*.

[18] The respondent further submits that the judge was required to take the *Koo* criteria into account, among other things, in order to determine whether Mr. Rouse was resident in Canada. In addition, the respondent referred to *Wang v Canada (Minister of Citizenship and Immigration)*, 2008 FC 390 at para. 10, which held: “The jurisprudence suggests that this involves a two-stage inquiry: a threshold determination as to whether or not residence in Canada has been established and then, if that threshold is met, a further determination of whether or not the particular applicant’s residence satisfies the required total number of days.”

[19] Mr. Rouse's occupation, his home addresses and his income tax returns are all evidence that can establish his residence. It was therefore open to the citizenship judge to comment on that evidence in the record. The fact that the citizenship judge commented on evidence does not create confusion as to the approach she adopted and does not constitute an error. The respondent referred the Court to *Tulupnikov v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1439 in support.

[20] In the respondent's submission, since Mr. Rouse did not meet the requirements of paragraph 5(1)(c) of the Act, the citizenship judge's conclusion is reasonable and there are therefore no grounds for this Court to intervene (*Deshwal v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1248 at para. 20; *Abbas v Canada (Minister of Citizenship and Immigration)*, 2011 FC 145 at paras. 8-9).

## **VI. Analysis**

- ***Did the citizenship judge err in rejecting Mr. Rouse's application under paragraph 5(1)(c) of the Act?***

[21] The citizenship judge erred in rejecting Rouse's application under paragraph 5(1)(c) of the Act.

[22] “Thus, the Court must show deference, but a qualified deference, when hearing an appeal from a decision by a citizenship judge under subsection 14(5) of the *Citizenship Act* concerning the determination of compliance with the residence requirement” (see *Canada (Minister of Citizenship and Immigration) v Takla*, 2009 FC 1120 at para. 39).

[23] In *Ahmed v Canada (Minister of Citizenship and Immigration)*, 2002 FCJ No. 1415 (QL) at para. 4, the Court stated that because “the ‘issue’ regarding the divergence of opinion in Federal Court jurisprudence with respect to the residency requirement of the Act inevitably surfaces during argument on citizenship appeals, I believe that it is beneficial to distinguish between the instances where that issue has relevance and when it does not. In my view, the ‘issue’ regarding the divergence of opinion in Federal Court jurisprudence is not relevant to the issue of whether an appellant has established a residence in Canada.”

[24] In the notes in the record explaining the reasons for the decision, the citizenship judge had regard to all of the evidence in the record, including Mr. Rousse’s previous addresses, a letter from his former employer and his income tax returns.

[25] She did in fact conduct an analysis in light of the criteria in *Koo*.

[26] The Citizenship judge’s manual provides, in section 5.9 B – Exceptional circumstances:

In accordance with established case law, an applicant may be absent from Canada and still maintain residence for citizenship purposes in certain exceptional circumstances.

...



In assessing whether the absences of an applicant fall within the allowable exceptions, use the following six questions as the determinative test. These questions are those set out by Madame Justice Reed in the Koo decision. For each question, an example is given of a circumstance that may allow the applicant to meet the residence requirement.

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 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?

...

[27] The citizenship judge noted that Mr. Rouse lived at his business premises for some time, before the owner asked him to stop living there (see the letter from Ameen Patel dated July 28, 2003). She also noted that some addresses had been omitted from the residency questionnaire signed by Mr. Rouse on March 9, 2009.

[28] The citizenship judge noted that Mr. Rouse's numerous absences were attributable to his business activities, in that he offered internships and provided training courses outside Canada.

[29] The judge also noted that Mr. Rouse filed bank statements, insurance invoices and memberships in clubs and associations, and that Mr. Rouse made no mention of any community involvement in Canada.

[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*.

**JUDGMENT**

**FOR THESE REASONS, THE COURT ALLOWS** the appeal and **REFERS THE  
MATTER BACK TO A DIFFERENT CITIZENSHIP JUDGE**, with no order as to costs.

“André F.J. Scott”

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Judge

Certified true translation  
Daniela Guglietta, Reviser

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-790-11

**STYLE OF CAUSE:** ROBERT ROUSSE  
v  
MINISTER OF CITIZENSHIP  
AND IMMIGRATION

**PLACE OF HEARING:** Montréal, Quebec

**DATE OF HEARING:** April 25, 2012

**REASONS FOR JUDGMENT  
AND JUDGMENT:** SCOTT J.

**DATED:** June 8, 2012

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