Federal Court  Cour fédérale

Date: 20121127

Docket: T-1992-11

Citation: 2012 FC 1359

[UNREVISED ENGLISH CERTIFIED TRANSLATION]
Ottawa, Ontario, November 27, 2012

PRESENT: The Honourable Mr. Justice Pinard

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

Hisham DABBOUS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an appeal brought by the Minister of Citizenship and Immigration (the applicant) under subsection 14(5) of the *Citizenship Act*, R.S.C., 1985, c. C-29 (the Act), and section 21 of the *Federal Courts Act*, R.S.C., 1985, c. F-7. On October 13, 2011, the citizenship judge, relying on paragraph 5(1)(*c*) of the Act, approved the application for Canadian citizenship made by Hisham Dabbous (the respondent).

[2] The respondent, a citizen of Lebanon, has been a permanent resident of Canada since September 15, 2004. He applied for Canadian citizenship on March 27, 2008. In his application, he declared that, during the relevant period from September 15, 2004, to March 27, 2008, he was present in Canada for 1,177 days and absent for 111 days.

[3] The respondent met with an immigration officer at an interview held on March 10, 2009. The officer then sent him a "Residence Questionnaire" on May 20, 2009. The respondent sent back all his documents on June 6, 2009. A citizenship officer then wrote a memorandum to the citizenship judge, describing the deficiencies in the file and making remarks and raising questions about the quality of the evidence submitted in support of the citizenship application. The officer referred the application to a citizenship judge to have these questions resolved under paragraph 5(1)(*c*) of Act.

[4] On August 18, 2011, the respondent appeared before the citizenship judge. The judge granted him additional time to fill out and sign a new "Residence Questionnaire" and to file additional evidence regarding his residence in Canada, particularly a report by the Canada Border Services Agency (the CBSA) listing his entries during the relevant period for the purposes of his citizenship application.

[5] On August 29, 2011, the respondent filed a new questionnaire, bank statements and tax returns covering the entire relevant period. After receiving this documentation, the citizenship judge granted the citizenship application.

[6] In his decision, the citizenship judge noted that the issue to be decided was whether the respondent met the requirements of paragraph 5(1)(*c*) of the Act, according to which a permanent resident must, within the four years preceding the date of his or her application, have accumulated at least three years (1,095 days) of residence in Canada. After taking note of the exhibits received after the hearing, the citizenship judge found as follows:

> [TRANSLATION]
> DECISION: On the basis of all the evidence in the record, I find that, on a balance of probabilities, the applicant established and maintained his residence in Canada from 2004 to 2008 and that he centralized his life and the lives of his family in Canada for more than 1,095 days of physical residence, in Canada, as required by the *Citizenship Act*.

* * * * * * * *

[7] The relevant paragraph of the Act reads as follows:

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 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;

[8] The issue in this appeal is whether the citizenship judge erred in finding that the respondent met the residence conditions provided for in paragraph 5(1)(*c*) of the Act.

[9] The applicant also raises the question of the adequacy of the reasons as a distinct issue. However, in my opinion, given the decision of the Supreme Court of Canada in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board),* 2011 SCC 62, [2011] 3 S.C.R. 708 at paragraphs 21 and 22, this question is, rather, a factor to be considered when analyzing the reasonableness of the decision.

[10] The decision of the citizenship judge involves a question of mixed fact and law that must be reviewed on the reasonableness standard (see, among others, *The Minister of Citizenship and Immigration v. Abdallah*, 2012 FC 985 at paragraph 8, and *Minister of Citizenship and Immigration v. Saad*, 2011 FC 1508 at paragraph 9 [*Saad*]). However, I find that it is the correctness standard that applies to the interpretation of the residency provisions of the Act, and that residency means physical presence in Canada (see *Martinez-Caro v. The Minister of Citizenship and Immigration*, 2011 FC 640 [*Martinez-Caro*]).

* * * * * * * *

[11] First, the applicant argues that it is impossible to determine which of the three residency tests considered by this Court was used by the citizenship judge. Second, the applicant submits that the citizenship judge's decision does not contain adequate reasons since it does not include the required critical analysis. The applicant submits that the citizenship judge should have explained in greater detail his finding that the respondent met the requirements of paragraph 5(1)(*c*) of the Act. Finally, the applicant submits that the citizenship judge ignored numerous deficiencies in the evidence filed by the respondent.

[12] I dismiss the applicant's first argument related to identifying the particular residency test used, relying on *Martinez-Caro*, above. In that case, my colleague Justice Donald J. Rennie thoroughly reviewed the case law on the residency requirement of paragraph 5(1)(c) of the Act, and provided a detailed analysis of the relevant principles. As I stated in *Hysa v. The Minister of Citizenship and Immigration*, 2011 FC 1416 at paragraph 3 [*Hysa*], I fully adopt his reasoning, which led him to the following conclusion. Justice Rennie refers to *Re Pourghasemi* (1993), 19 Imm.L.R. (2d) 259, 62 F.T.R. 122 [*Pourghasemi*], and *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 [*Rizzo*], and concludes as follows:

> [52] In my view therefore, the interpretation of the residency provision of the *Citizenship Act* is subject to the standard of correctness and that residency means physical presence in Canada.
>
> [53] It is my opinion that *Re Pourghasemi* is the interpretation that reflects the true meaning, intent and spirit of subsection 5(1)(*c*) of the Act: *Rizzo*, paras 22 and 41. For this reason it cannot be said that the Citizenship Judge erred in applying the *Re Pourghasemi* test. Furthermore, the Citizenship Judge correctly applied the *Re Pourghasemi* test in determining that a shortfall of 771 days prevented a finding that 1,095 days of physical presence in Canada had been accumulated.

[13] My colleagues Justice Judith Snider (*Ye v. The Minister of Citizenship and Immigration*, 2011 FC 1337 at paragraph 10) and Justice Simon Noël (*Al Khoury v. Minister of Citizenship and Immigration*, 2012 FC 536 at paragraph 27) adopted this same reasoning regarding the legal interpretation of paragraph 5(1)(*c*) and agreed with Justice Rennie that residency means physical presence in Canada.

[14] In the present case, the citizenship judge clearly stated in his reasons that the issue was whether the respondent could prove that he met the residency requirement under paragraph 5(1)(*c*) of the Act, which requires 1,095 days of physical presence in Canada. He also found that the respondent [TRANSLATION] "established and maintained his residence in Canada from 2004 to 2008 and that he centralized his life and the lives of his family in Canada for more than 1,095 days of physical residence, in Canada, as required by the *Citizenship Act*".

[15] In my opinion, in light of *Martinez-Caro*, above, and my decision in *Hysa*, it would have been enough for the citizenship judge to rely solely on the physical presence test (the most stringent test), if the evidence justified it, without inquiring into whether the respondent had [TRANSLATION) "centralized his life and the lives of his family" in Canada during the relevant period.

[16] However, I find that the citizenship judge's decision contained inadequate reasons. In the present case, the citizenship judge stated the issue to be decided, noted the evidence filed by the respondent after his appearance before him and concluded that the respondent had met the residency condition set out in paragraph 5(1)*c*) of the Act because he had proved physical

presence on Canadian soil for more than 1,095 days during the relevant period. However, he failed to explain how and why the respondent had met this requirement. Moreover, he did not consider any of the concerns raised by the citizenship officer in her memorandum to the citizenship judge, particularly regarding the following:

> a. the respondent's passport, that is, the agent's note to the effect that, despite the stamp indicating a return to Canada on March 27, 2007, no trip had been reported for that date;
>
> b. the bank statements for an account for which the applicant is the agent, with his spouse, that is, the agent's note according to which the direct transactions were generally frequent and regular except for periods where there were no direct transaction when the client claimed to be in Canada. The officer listed these periods, which often vary in length from one to two months.

[17] Furthermore, as the applicant notes, it appears from the reasons of the citizenship judge that the judge was of the opinion that the respondent's record lacked information concerning his absences from Canada, given the additional time granted so that the respondent could file a second "Residence Questionnaire" and additional evidence regarding his residency in Canada, including the CBSA report listing his entries and exits during the relevant period. The respondent returned the second questionnaire, but not the CBSA report. However, the judge wrote in his decision that [TRANSLATION] "the subject submitted the additional documentation as requested".

[18] Consequently, I am of the opinion that, in the present case, it was not reasonable for the citizenship judge to declare himself to be satisfied that the respondent was present in Canada for more than 1,095 days without giving any explanation or analysis regarding the additional evidence he mentions. As Justice Marie-Josée Bédard notes in *Saad*, above:

[22] It also appears from the judge's notes that, at the end of the hearing, he was not completely satisfied with the information obtained from the respondent because he asked him to provide additional documents. However, the notes do not specify how and why the judge was dissatisfied with the evidence submitted to him up until that point. . . .

[23] In his notice of the decision, the judge stated that he was satisfied with the documents provided by the respondent, but again, it is unknown which test he applied or which document convinced him that the respondent had satisfied the residence criteria. During the hearing, counsel for the respondent did attempt to infer from the decision and the citizenship judge's notes that he had applied the physical presence test, that the applicant's secondary evidence to compensate for the lack of a passport was satisfactory and that the documents required during the hearing and related to the respondent's company were relevant to confirm that he had always been a resident, even after the expiry of the reference period, but, in doing so, he, in my opinion, compensated for the judge's decision. Justice Montigny indicated the following in *Jeizan*, above, at paragraph 20:

20 The decision-maker's reasoning should not require additional explanations. In the case at bar, it is the Respondent's counsel who explains the Citizenship Judge's reasoning in her memorandum of fact and law, speculation by way of counsel's argument is not different than speculation by way of a party's affidavit: *Alem v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 148 (CanLII), 2010 FC 148, [2010] F.C.J. No. 176 at para 19.

[24] I believe that my finding in *Baron*, above, at paragraph 18, fully applies to this case:

18 The reasons for the citizenship judge's decision are not adequate. The reasoning is unclear. The decision is not transparent and it is impossible to understand its basis. Given this situation, I am not in a position to determine whether it falls within a range of possible, acceptable outcomes in respect of the facts and law. The intervention of the Court is therefore warranted.

[25] I therefore believe that the citizenship judge's decision does not have the qualities that make it reasonable.

(Emphasis added.)

[19] Upon reading the reasons for decision of the citizenship judge in the present case, the Court is unable to understand the reasoning of the judge, as the Court is unable to see how and why, in the circumstances, the evidence persuaded him that the respondent had met the residence criteria (see *Saad*, above). I am not satisfied that the citizenship judge's decision falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

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[20] For all these reasons, the appeal is allowed. The decision of the citizenship judge, dated October 13, 2011, is quashed, and the case is referred back to a different citizenship judge for redetermination.

JUDGMENT

The appeal of the Minister of Citizenship and Immigration is allowed. The decision dated October 13, 2011, of the citizenship judge, Gilles H. Duguay, granting Canadian citizenship to the respondent is quashed, and the case is referred back to another citizenship judge for redetermination.

"Yvon Pinard"
Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

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