Federal Court  Cour fédérale

Date: 20121127

Docket: T-529-12

Citation: 2012 FC 1360

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

PRESENT: The Honourable Mr. Justice Pinard

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

Ghada KHACHAB

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an appeal 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. A citizenship judge approved the application for Canadian citizenship made by Ghada Khachab (the respondent) on the basis of paragraph 5(1)(*c*).

[2] The respondent has been a permanent resident of Canada since July 10, 2002. She signed her application for Canadian citizenship on November 16, 2009, and Citizenship and Immigration Canada received the application on November 27, 2009. In her application, the respondent stated that, during the relevant period from November 16, 2005, to November 15, 2009, she had been in Canada for 1,115 days and away, for 345.

[3] In support of her application for citizenship, the respondent submitted bank statements, a certificate confirming that she had taken and completed four weeks of French classes at Collège Platon, photocopies of her passports, the passport of her son Hussein Khachab, documents regarding Hussein Khachab's schooling, an entry and exit record from Lebanon's General Directorate of General Security and a history of her entries into Canada provided by the Canada Border Services Agency (CBSA).

[4] A citizenship officer then drafted a memorandum to the citizenship judge in which he commented on the evidence submitted in support of the application for citizenship. This memorandum contains an opinion, supported by the respondent's statements, according to which the respondent had been in Canada for only 1,100 days during the period reviewed (still more than the 1,095 days required) rather than 1,115. The officer referred the application to a citizenship judge so that these questions could be resolved under paragraph 5(1)(*c*) of the Act.

[5] On November 21, 2011, the respondent appeared before a citizenship judge. At the hearing, counsel for the respondent objected to a number of the questions the citizenship judge asked the respondent. The judge determined that the hearing was not conclusive and granted

extra time to the respondent so that she could provide additional documents to establish her physical presence in Canada.

[6] The respondent subsequently provided a record of her medical examinations from the Régie de l'assurance-maladie du Québec ("RAMQ") [the Quebec health insurance board] and a confirmation of her voluntary work for the organization Femmes du monde. Upon receipt of these documents, the citizenship judge approved the application for citizenship.

[7] In her decision, the citizenship judge stated that counsel for the respondent [TRANSLATION] "obstructed the proper conduct of the hearing by objecting to most of (her) questions". Moreover, she found it difficult to trace the history of the respondent's activities in Canada and noted, for example, some of the questions to which counsel had objected, including questions on the respondent's activities prior to and following the reference period, the identities of the relatives who accompanied her to Canada, the identities of those who live with her in Canada and her involvement in an Ivory Coast business, IMPAC (short for "Importation de poissons et d'aliments congélés" [import of frozen fish and foods]).

[8] In her analysis, performed on the basis of the documents produced before and after the hearing, the citizenship judge provided several reasons for her conclusion that all of the evidence submitted by the respondent met the requirements of paragraph 5(1)(*c*) of the Act:

> - the citizenship judge noted that the respondent had reported 345 days of absence during the relevant period, but that, according to the citizenship officer who verified the file, this should have read 360 days;

- the citizenship judge ultimately believed the respondent about the stamps that she might have found in the Ivory Coast passport that, according to the respondent, was stolen on or around May 21, 2006;

- the judge determined that several of the travel dates reported by the respondent matched both the dates appearing in the RAMQ report that the respondent had submitted as additional documentation and the certificate issued by College Platon for the May 4 to 29, 2009, period;

- the citizenship judge noted that all of the other reported trips were generally listed in one of the two records submitted by the respondent;

- the citizenship judge noted that the stamps in the passport of the respondent's son Hussein Khachab, valid from February 2009 to February 2014, matched the respondent's trips;

- the citizenship judge pointed out that Hussein Khachab's school records showed constant attendance from 2004 to 2009;

- the citizenship judge noted that the respondent's bank statement established ongoing activities in Canada during the period under review.

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[9] Paragraph 5(1)(*c*) 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

(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;

(i) un demi-jour pour chaque jour de résidence au Canada avant son admission à titre de résident permanent,

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

[10] The issue in the present appeal, as raised by the applicant, is whether the citizenship judge made a reviewable error in not requiring the respondent to answer the questions she asked her.

[11] A citizenship judge's determination is a question of mixed fact and law that is reviewable on a standard of reasonableness (*The Minister of Citizenship and Immigration v. Abdallah*, 2012 FC 985 at para 8; *Balta v. Minister of Citizenship and Immigration*, 2011 FC 1509 at para 5). It is my opinion, however, that the standard of correctness applies to the interpretation of the residence requirement in the Act and that residence refers to physical presence in Canada (*Martinez-Caro v. The Minister of Citizenship and Immigration*, 2011 FC 640 [*Martinez-Caro*]).

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[12] The applicant submits that the citizenship judge erred by not requiring that the respondent answer important questions, thus depriving her of relevant evidence. The applicant argues that the answers could have affected the weight to be afforded to various pieces of evidence and that

the citizenship judge thus denied herself the opportunity to apply one of the three tests for residence in Canada recognized in the case law.

[13] In turn, the respondent submits that [TRANSLATION] "the citizenship judge may adopt any of the tests established by this Court" to assess paragraph 5(1)(*c*) of the Act. The respondent submits that, since the citizenship judge found that the respondent had been physically present in Canada for at least 1,095 days, the centralized mode of existence in Canada test established in *Koo(Re)*, [1993] 1 F.C. 286, was not relevant. The respondent adds that the evidence which her counsel challenged was not relevant in the case at bar.

[14] First, I do not agree with the parties that a citizenship judge has the discretion to apply any of the three tests recognized in the case law to interpret paragraph 5(1)(*c*) of the Act. In *Martinez-Caro*, above, Justice Donald J. Rennie thoroughly reviewed the case law on the residency requirements set out in paragraph 5(1)(*c*) of the Act and provided a detailed analysis of the relevant principles. As I indicated in *Hysa v. The Minister of Citizenship and Immigration*, 2011 FC 1416, at paragraph 3 [*Hysa*], I fully agree with the reasoning of Justice Rennie, 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 finds 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.

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

[16] In the matter at bar, the citizenship judge correctly applied the physical residence test under paragraph 5(1)(*c*) of the Act. It is therefore reasonable that the citizenship judge did not require evidence regarding the other factors.

[17] Second, I do not share the respondent's opinion that considering the evidence regarding activities outside the reference period is a reviewable error. Rather, I agree with Justice Snider's reasoning in *Sotade v. The Minister of Citizenship and Immigration*, 2011 FC 301, at paragraph 15:

> . . . I acknowledge that the Citizenship [*sic*] would err by counting days of absence beyond the relevant period – in this case, after May 30, 2008 (*Shakoor v Canada (Minister of Citizenship and Immigration)*, 2005 FC 776, [2005] FCJ No 972 (QL)). However, in the case before me, the references by the Citizenship Judge to the period after May 30, 2008 were to events that were linked to the claims and actions of the Applicant during the relevant period. In particular, the sale of his house in 2009, even though after the relevant time period, was not inconsistent with an intention of the Applicant to live in the United States and not in Canada. This provides additional support for the Citizenship Judge's conclusion

> that the Applicant had actually moved to the United States as of some time prior to May 30, 2008. The Citizenship Judge was not counting days of absence from Canada after the relevant period; there is no error.

[18] I note that, in *Sotade*, the citizenship judge also applied the physical residence test to interpret paragraph 5(1)(*c*) of the Act. However, even though it was open to the citizenship judge to require evidence beyond the relevant period in the matter at bar, as long as it was linked to the claims and the actions of the respondent during the reference period, the applicant has failed to satisfy me that it was unreasonable for the citizenship judge to not insist that the respondent answer the questions that were challenged. Both before and after the hearing, the respondent submitted many items of evidence to establish her physical presence in Canada during the relevant period. In her decision, the citizenship judge thoroughly analyzed all of the evidence provided. In the circumstances, I find that the citizenship judge could reasonably be satisfied that the evidence submitted by the respondent met the requirements of paragraph 5(1)(*c*) of the Act.

[19] Another citizenship judge might have required more information from the respondent, but it is not the role of this Court to substitute itself for a citizenship judge in assessing the evidence (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 [*Dunsmuir*]). The judge's decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*, at paragraph 47).

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[20] For all of these reasons, the appeal is dismissed. In the circumstances, in light of my assessment and my rejection of the arguments raised by both parties, there is no order as to costs.

JUDGMENT

The appeal from the decision of citizenship judge Renée Giroux dated January 13, 2012, and approving the application for Canadian citizenship made by the respondent is dismissed without costs.

"Yvon Pinard"
Judge

Certified true translation
Johanna Kratz, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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