Federal Court  Cour fédérale

Date: 20130318

Docket: T-882-12

Citation: 2013 FC 282

Ottawa, Ontario, March 18, 2013

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

ASHOK GHOSH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an appeal under section 21 of the *Federal Courts Act*, RSC 1985, c F-7 and subsection 14(5) of the *Citizenship Act*, RSC 1985, c C-29 [Act], of a decision of Judge Thanh Hai Ngo [Citizenship Judge], dated March 15, 2012, wherein the applicant's application for Canadian citizenship was denied on the basis that he had not met the "residency" requirement under paragraph 5(1)(c) of the Act. The applicant requests that the decision to refuse him Canadian citizenship be set aside and the matter referred back to a different Citizenship Judge for re-determination.

Background

[2] The applicant is a 57 years old citizen of India. He became a permanent resident of Canada under the Federal Skilled Worker category on March 9, 2004, when he moved to Canada with his wife and two sons and settled in Toronto, Ontario.

[3] In 2007, the applicant was offered employment as a project manager at Cowater International Inc. [Cowater], a Canadian management consulting firm specialized in the area of international development. The applicant started working for Cowater's Ottawa head office on May 1, 2007. His family permanently relocated to Ottawa in March 2008, where they purchased a house and his children transferred to local schools. They have lived in Ottawa since that time.

[4] While working for Cowater, the applicant was deployed to overseas project sites for long periods of time. Shortly after joining Cowater, he was promoted to the position of Project Director and is currently working as a Senior Project Director. He alleges that in these successive positions, he was required to be present at various job sites around the world and travel regularly to countries such as Bangladesh, Uganda, Rwanda, Nigeria and Bhutan. The applicant's business trips ranged from two to eight weeks. When not required to work on foreign projects, the applicant works at Cowater's head office in Ottawa, which allows him to be with his family.

[5] The applicant alleges that he and his family have their residence in Canada. He files his Canadian taxes every year and is not established in any country other than Canada.

[6] On September 10, 2010, the applicant and his family applied for Canadian citizenship. On October 6, 2011, the applicant's wife was convoked for an interview, while the applicant was required to complete a residence questionnaire and was asked to provide supporting evidence of his residence in Canada during the period of September 2006 to September 2010. The applicant's case was referred to the citizenship judge due to concerns regarding the duration of his absence from Canada.

[7] The applicant's application for citizenship was heard on March 6, 2012 and refused on March 15, 2012. Applying the test of physical presence in Canada adopted by Justice Muldoon in *Pourghasemi (Re)*, [1993] FCJ no 232, 62 FTR 122 [*Pourghasemi*], the citizenship judge noted that the applicant's documentary evidence showed 109 days of absence in 2006 (Uganda), 228 days of absence in 2007 (Uganda), 216 days of absence in 2008 (Uganda, Bangladesh, India and Sri Lanka), and 165 days of absence in 2010 (Rwanda, India and Bangladesh). He therefore found that the applicant had failed to accumulate 1,095 days of physical presence in Canada within the four years immediately preceding the date of his application and did not meet the residency requirements pursuant to paragraph 5(1)(c) of the Act.

Relevant Legislation

[8] Although the Act does not define "residence" or "resident", its subsection 5(1) requires certain period of residence for an applicant to be granted citizenship.

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	*a*) en fait la demande;

citizenship;

(*b*) is eighteen years of age or over;

(*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:

(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;

(*d*) has an adequate knowledge of one of the official languages of Canada;

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

b) est âgée d'au moins dix-huit ans;

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) 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;

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

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

(*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.	*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.

(emphasis added)

[9] As noted by Justine Rennie in *Martinez-Caro v Canada (Citizenship and Immigration),* 2011 FC 640, [2011] FCJ no 881, subsection 5 (1.1) of the Act is useful in considering the definition of residency. It reads as follow:

5. (1.1) Any day during which an applicant for citizenship resided with the applicant's spouse who at the time was a Canadian citizen and was employed outside of Canada in or with the Canadian armed forces or the federal public administration or the public service of a province, otherwise than as a locally engaged person, shall be treated as equivalent to one day of residence in Canada for the purposes of paragraph (1)(*c*) and subsection 11(1).	**5.** (1.1) Est assimilé à un jour de résidence au Canada pour l'application de l'alinéa (1)*c*) et du paragraphe 11(1) tout jour pendant lequel l'auteur d'une demande de citoyenneté a résidé avec son époux ou conjoint de fait alors que celui-ci était citoyen et était, sans avoir été engagé sur place, au service, à l'étranger, des forces armées canadiennes ou de l'administration publique fédérale ou de celle d'une province.

[10] Given that paragraph 5(1)(c) of the Act explicitly refers to the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], and having in mind the "proximity" between the Act and the IRPA, it would be useful to consider the wording of section 28 of the IRPA which defines more specifically the residency obligation for permanent residents:

28. (1) A permanent resident must comply with a residency obligation with respect to every five-year period.	**28.** (1) L'obligation de résidence est applicable à chaque période quinquennale.
(2) The following provisions govern the residency obligation under subsection (1):	(2) Les dispositions suivantes régissent l'obligation de résidence :
(*a*) a permanent resident complies with the residency obligation with respect to a five-year period if, on each of a total of at least 730 days in that five-year period, they are	*a*) le résident permanent se conforme à l'obligation dès lors que, pour au moins 730 jours pendant une période quinquennale, selon le cas :
(i) physically present in Canada,	(i) il est effectivement présent au Canada,
(ii) outside Canada accompanying a Canadian citizen who is their spouse or common-law partner or, in the case of a child, their parent,	(ii) il accompagne, hors du Canada, un citoyen canadien qui est son époux ou conjoint de fait ou, dans le cas d'un enfant, l'un de ses parents,
(iii) outside Canada employed on a full-time basis by a Canadian business or in the federal public administration or the public service of a province,	(iii) il travaille, hors du Canada, à temps plein pour une entreprise canadienne ou pour l'administration publique fédérale ou provinciale,
(iv) outside Canada accompanying a permanent resident who is their	(iv) il accompagne, hors du Canada, un résident permanent qui est son

spouse or common-law partner or, in the case of a child, their parent and who is employed on a full-time basis by a Canadian business or in the federal public administration or the public service of a province, or

époux ou conjoint de fait ou, dans le cas d'un enfant, l'un de ses parents, et qui travaille à temps plein pour une entreprise canadienne ou pour l'administration publique fédérale ou provinciale,

(v) referred to in regulations providing for other means of compliance;

(v) il se conforme au mode d'exécution prévu par règlement;

(*b*) it is sufficient for a permanent resident to demonstrate at examination

b) il suffit au résident permanent de prouver, lors du contrôle, qu'il se conformera à l'obligation pour la période quinquennale suivant l'acquisition de son statut, s'il est résident permanent depuis moins de cinq ans, et, dans le cas contraire, qu'il s'y est conformé pour la période quinquennale précédant le contrôle;

(i) if they have been a permanent resident for less than five years, that they will be able to meet the residency obligation in respect of the five-year period immediately after they became a permanent resident;

(ii) if they have been a permanent resident for five years or more, that they have met the residency obligation in respect of the five-year period immediately before the examination; and

(*c*) a determination by an officer that humanitarian and compassionate considerations relating to a permanent resident, taking into account the best interests of a child directly affected by the determination, justify the retention of

c) le constat par l'agent que des circonstances d'ordre humanitaire relatives au résident permanent — compte tenu de l'intérêt supérieur de l'enfant directement touché — justifient le maintien du statut rend inopposable

permanent resident status overcomes any breach of the residency obligation prior to the determination.	l'inobservation de l'obligation précédant le contrôle.

(emphasis added)

Issue and Standard of Review

[11] The only issue raised in this case is whether the citizenship judge erred by applying the physical presence test in refusing the applicant's citizenship application. In other words, did the citizenship judge properly interpret paragraph 5(1)(c) of the Act?

[12] The jurisprudence of this Court has recognized three different approaches to how the word residence as found in paragraph 5(1)(c) of the Act is to be interpreted. One approach, the one adopted by the citizenship judge in this case, is to settle for a quantitative computation of the number of days an applicant has been physically present in Canada (*Pourghasemi*, above). Two less restrictive approaches focus on whether the permanent resident has "centralized his mode of living in Canada" (*Papadogiorgakis (Re)*, [1978] 2 FC 208 at para 17, 88 DLR (3d) 243 (TD)), or whether the permanent resident "regularly, normally or customarily lives" in Canada (*Koo (Re) (FCTD)*, [1992] FCJ 1107, [1993] 1 FC 286 [Re *Koo*]).

[13] In *Re Koo*, above, at para 10, Justice Reed sets out six non-exhaustive factors which might be of assistance in determining whether the residence requirement is met:

> The conclusion I draw from the jurisprudence is that the test is whether it can be said that Canada is the place where the applicant "regularly, normally or customarily lives". Another formulation of the same test is whether Canada is the country in which he or she has centralized his or her mode of existence. Questions that can be asked which assist in such a determination are:

> (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 employment abroad?
>
> (6) what is the quality of the connection with Canada: is it more substantial than that which exists with any other country?

[14] As per *Lam v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ 410 at para 14, [1999] FCJ no 410, it is open to the citizenship judge to adopt any one of these schools of thought as long as the chosen test is applied properly. However, part of the jurisprudence has departed from this view, considering that only one of the tests is the correct one (see for example *Burch v Canada (Minister of Citizenship and Immigration*), 2011 FC 1389 at para 31, [2011] FCJ no 1695; *El Ocla v Canada (Minister of Citizenship and Immigration)*, 2011 FC 533 at paras 10-18, [2011] FCJ no 667 [*El Ocla*]; *Ghaedi v Canada (Minister of Citizenship and Immigration)*, 2011 FC 85 at para 6, [2011] FCJ no 94; *Martinez-Caro v Canada (Minister of Citizenship and Immigration)*, 2011 FC 640 at para 26, [2011] FCJ no 881).

[15] Relying on this latter line of jurisprudence, the applicant submits that the standard of review to be applied to the citizenship judge's selection of the test for assessing residency under paragraph 5(1)(c) of the Act is correctness, while the application of the selected residency test to the evidence should be reviewed against the standard of reasonableness. The respondent agrees that the question of whether the period of required residency can be determined solely on the basis of an individual's physical presence in Canada for a minimum period of 1,095 days (or three years out of four) is a question of law to be reviewed on the standard of correctness.

[16] In *El Ocla*, above, at para 14, Justice Barnes stated that "the idea that there are two, or perhaps three, distinct tests for residency to be found in ss 5(1)(c) of the *Citizenship Act* carries with it the implicit adoption of a correctness standard. This is because it acknowledges that there are limited options available to a citizenship judge and that other reasonable interpretations are unavailable." Of particular importance to this case, Justice Barnes held that citizenship judges' decisions which are solely based on the physical presence test for residency, to the exclusion of any qualitative analysis following the *Re Koo* factors, should be accorded less deference and should be reviewed against the standard of correctness.

[17] Referring to a number of cases, including *Canada (Minister of Citizenship and Immigration) v Takla*, 2009 FC 1120, [2009] FCJ no 1371, which stand in favour of reviewing a citizenship judge's selection of the residency test against the standard of reasonableness, Justice Barnes stated:

> [11] …Indeed, in most of this Court's jurisprudence, appeals of this nature have involved challenges to a citizenship judge's application of the predominant qualitative test for residency described in *Re Koo*, above. In other words, the concern was with the application of evidence to the *Re Koo* factors.
>
> [12] The above authorities and decisions like them are to my mind distinguishable from cases such as the one at bar which involve a citizenship judge's selection of the physical presence test for residency to the exclusion of the *Re Koo* factors. The issue of whether this is the proper test for residency under ss 5(1)(c) of the *Citizenship Act* is a threshold question of law that can and should be isolated from its factual surroundings…

[18] In view of the fact that, in the case before me, the citizenship judge decided not to give any consideration to the applicant's circumstances or the quality of his establishment in Canada, and that the respondent did not seriously question this position, I will apply the standard of correctness to the question raised by the applicant.

[19] For the reasons that follow, I have come to the conclusion that the intervention of this Court is not justified as the impugned decision and the citizenship judge's interpretation of paragraph 5(1)(c) of the Act are well founded in law.

Analysis

[20] Equally diverging lines of case law have developed regarding the proper test to be applied to the residency requirement of paragraph 5(1)(c) of the Act. This diversity necessarily comes from the lack of definition of the term "residence" or "residé" in the French version of paragraph 5(1)(c) of the Act. Should it be interpreted as meaning "physically present in Canada" or "present au Canada" as used by the legislator in paragraph 28(2)(a)(i) of the IRPA or should it receive a broader interpretation as it did in *Papadogiorgakis* and *Re Koo*?

[21] When one compares the wording of paragraphs 5(1)(c) of the Act and 28(2)(a) of the IRPA, it could be tempting to draw the conclusion that if the legislator used two different expressions ("residence" and "physically present in Canada") in two related pieces of legislation, they must be meant to address different situations. However, read in their entirety, the conditions set forth in section 28 of the IRPA to maintain a permanent residence and the conditions set fort in section 5 of the Act for a permanent resident to obtain Canadian citizenship, along with their respective exceptions (found in paragraphs 28(2)(a)(ii) to (v) of the IRPA and paragraph 5(1.1) of the Act), lead to an opposite finding.

[22] In order to maintain permanent resident status, one has to be physically present in Canada for two years during the five year reference period. That person will nevertheless maintain his or her permanent residency if he or she i) is accompanying a Canadian citizen spouse outside Canada, ii) is outside Canada employed on a full-time basis by a Canadian business or the federal or provincial public administration or iii) is accompanying a permanent resident spouse employed on a full-time basis by a Canadian business or the federal or provincial public administration. The applicant's situation is specifically covered by paragraph 28(2)(a)(iii) of the IRPA and he would maintain his permanent residency no matter how many days in a given reference period he spends abroad working for a Canadian company.

[23] In order to obtain Canadian citizenship, a permanent resident has to reside in Canada for three years during the 4 four year reference period. However, he or she will be deemed to reside in Canada if he or she resides outside Canada with a Canadian citizen spouse employed with the Canadian armed forces or with the public service of Canada or one of the Canadian Provinces. Being employed by a Canadian private company or residing outside Canada with a Canadian citizen working for a Canadian private company does not qualify as residing in Canada for the purpose of the Act.

[24] Although it could have been said in clearer words, I am of the opinion that residing in Canada for the purpose of paragraph 5(1)(c) of the Act requires physical presence in Canada. To interpret the term "residence" to mean anything else than physical presence in Canada is not only likely to lead to arbitrary decisions by the Minister (when paragraph 5(1) of the Act does not grant a great deal of discretion to the Minister), but it also renders the conditions to be met to obtain Canadian citizenship less strict than the ones that need to be met to maintain permanent residence, just as it renders paragraph 5 (1.1) of the Act useless.

[25] In my mind, the above analysis advocates in favour of the thesis that has considered the strict quantitative test to be the correct one (*Martinez-Caro above*; *Sinanan v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1347, [2011] FCJ no 1646; *Al Khoury v Minister of Citizenship and Immigration*, 2012 FC 536 at para 27, [2012] FCJ no 534; *Canada (Minister of Citizenship and Immigration) v Dabbous*, 2012 FC 1359; [2012] FCJ no 1490).

[26] For these reasons, the appeal will be dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The applicant's appeal is dismissed, without costs.

"Jocelyne Gagné"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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