Federal Court  Cour fédérale

Date: 20140428

Docket: T-1824-13

Citation: 2014 FC 394

Ottawa, Ontario, April 28, 2014

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

ERIN CHRISTINE DONOHUE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an appeal of the decision of Floyd C. Babcock, a Citizenship Judge with the Citizenship Commission, Immigration Canada [the Judge]. The Judge denied the Applicant's application for Canadian citizenship by concluding that she did not meet the residency requirement as defined in 5(1)(c) of the *Citizenship Act*, RSC, 1985, c C-29 [the Act]. As a preliminary issue, this matter should have proceeded as an appeal pursuant to subsection 14(5) of the Act. I hereby convert the proceeding into an appeal.

I. Issues

[2] The issues in the present application are as follows:

A. Did the Judge err by applying the physical presence test?

B. Was the Judge's application of the facts to the physical presence test reasonable?

C. Did the Judge breach the duty of procedural fairness?

II. Background

[3] The Applicant is a citizen of the United States. In 2001, she entered Canada, and became a permanent resident on January 22, 2008. On February 28, 2010, the Applicant applied for Canadian citizenship. She submitted a Residence Questionnaire on April 14, 2011.

[4] On October 7, 2013, the Applicant appeared with counsel for a one-hour hearing before the Judge.

[5] The Judge evaluated whether the Applicant met the residency requirement in 5(1)(c) of the Act in accordance with the test from *(Re) Pourghasemi*, [1993] FCJ No 232 (TD) [*Pourghasemi*], which relies in a strict count of days. He determined that the Applicant failed to meet the requirement from *Pourghasemi* that she be physically present in Canada for at least 1095 days out of the four years immediately preceding her application for citizenship.

[6] In coming to this conclusion, the Judge noted that the Applicant declared 156 worth days of absences from Canada in her citizenship application, but 205 on her Residence Questionnaire.

Likewise, he found that the Applicant was physically present in Canada for 958 days according to her citizenship application, but 909 days according to her Residence Questionnaire.

[7] The Judge also concluded that he was unable to calculate the number of days of the Applicant's presence in Canada because her History of Entries to Canada [ICES Report] conflicts with information provided by the Applicant. In particular, he noted that the Applicant's ICES Report lists 49 exits from and entries into Canada, while her Residence Questionnaire lists 44. Further, only 19 of those listed on the ICES Report were verified against the Applicant's Residence Questionnaire.

[8] The Judge noted that the Applicant's history with the Ontario Ministry of Health and other documents submitted are passive indicators of residence in Canada.

[9] The Judge found that the Applicant had the burden to prove her physical presence in Canada via consistent and reliable evidence, but did not do so (*Atwani v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1353 at paras 12, 18).

[10] The relevant statutory provisions under consideration are attached as Annex A.

III. Standard of Review

[11] The first issue involves a question that has been the subject of much debate and uncertainty in the jurisprudence.

[12] In *Gavriluta v Canada (Minister of Citizenship and Immigration)*, 2013 FC 705 at para 27, Justice Elizabeth Heneghan stated that the appropriate standard of review is reasonableness. Her rationale was based on *Lam v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 410 at para 14 [*Lam*], where Chief Justice Lutfy, as he then was, stated that a citizenship judge has discretion to choose one of three legal tests to assess the residency requirement. Given this discretion, a citizenship judge's decision to select one of these tests should be reviewed on the standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9, at para 53 [*Dunsmuir*]).

[13] However, this issue involves the selection of an appropriate legal test to determine whether the requirements of 5(1)(c) of the Act are met. As this is a question of law of central importance to the legal system, I believe that the appropriate standard of review is correctness (*Dunsmuir*, above, at para 60), as been held in several cases (*Ghosh v Canada (Minister of Citizenship and Immigration)*, 2013 FC 282 at para 18; *Martinez-Caro v Canada (Minister of Citizenship and Immigration)*, 2011 FC 460 at para 52 [*Martinez-Caro*]; *El Ocla v Canada (Minister of Citizenship and Immigration)*, 2011 FC 533 at paras 17-18).

[14] The second issue, as a question of mixed fact and law, is reviewable on the standard of reasonableness. The third question is one of procedural fairness and is reviewable on the standard of correctness (*Canada (Minister of Citizenship and Immigration) v Takla*, 2009 FC 1120).

IV. Analysis

A. *Did the Judge err by Applying the Physical Presence test?*

[15] The Applicant argues that the Judge ought to have conducted a qualitative assessment of the evidence submitted which showed the quality of her ties to Canada. The Applicant suggests that such an assessment would allow her to meet the residency requirement, despite not satisfying the physical presence test.

[16] The Applicant submitted over 300 pages of documents with her Residence Questionnaire to demonstrate her attachment to Canada. Other than a blanket statement that he considered the evidence, there is no indication that the Judge undertook a qualitative assessment.

[17] The Applicant notes that the documents submitted show a detailed and continuous history of employment, residence, taxes, and auto and health insurance in Canada. Furthermore, they show evidence of her establishment via documentation relating to her husband, child and various community initiatives with which she is involved. The Respondent notes that this constitutes overwhelming evidence that she would meet the residency requirement if a qualitative assessment were conducted.

[18] The selection of the appropriate test to establish the residency requirement in 5(1)(c) of the Act is the subject of much debate, as three distinct tests have emerged from the jurisprudence of the Federal Court.

[19] The tests originate from *Pourghasemi, Re Papadogiorgakis* [1978] 2 FC 208 [*Papadogiorgakis*], and *Koo (Re),* [1993] 1 FC 286 [*Koo*]. The *Pourghasemi* test is the most restrictive: it requires a quantitative assessment of the number of days the applicant has physically spent in Canada in order to determine whether they have met the residency requirement in 5(1)(c) of the Act. In contrast, the tests from *Papadogiorgakis* and *Koo* make an additional qualitative assessment. They ask whether the applicant, while not meeting the physical presence requirement as articulated in *Pourghasemi*, can nonetheless meet the residency requirement based on the quality of their attachment to Canada. The tests from *Papadogiorgakis* ("centralized mode of living") and *Koo* ("substantial connection") both take different approaches to undertaking this qualitative assessment, but fundamentally ask the same question.

[20] The availability of the differing tests has endured because section 16 of the Act limits citizenship appeals to the Federal Court. As no appeal lies with the Federal Court of Appeal, there has been no unifying authority to guide trial decisions on this issue. Owing to this and the absence of legislated guidance by Parliament, various decisions by the Federal Court have taken different roads in determining which test or tests should be used by a citizenship judge in assessing the residency requirement in 5(1)(c) of the Act.

[21] The first approach is the one advanced by the Applicant on the basis of the precedent in *Lam*, above: a citizenship judge may apply any of the three tests described above.

[22] A second approach was first articulated in *Chen v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1229, and adopted in the *Martinez-Caro* decision. In *Martinez-Caro*,

Justice Rennie concluded that principles of statutory interpretation dictate that the residency requirement in 5(1)(c) of the Act must be assessed using the strict physical presence test from *Pourghasemi*.

[23] The third is a hybrid approach. Justice James O'Reilly in *Canada (Minister of Citizenship and Immigration) v Nandre*, 2003 FCT 650 at para 12, held that if the physical presence test from *Pourghasemi* is not met, one of the qualitative tests should be considered if an applicant has submitted evidence that would allow such an assessment. Justice O'Reilly later clarified that the *Koo* test should be the qualitative test used in this hybrid approach (*Dedaj v Canada (Minister of Citizenship and Immigration)*, 2010 FC 777 at para 7).

[24] I find the reasoning by Justice Rennie, at paras 29-34 of *Martinez-Caro*, compelling:

> 29 On a plain and ordinary reading of the statute, as a whole, Parliament has expressly defined the degree or extent of latitude or flexibility to be granted to putative citizens. Residence speaks of presence, not absence. In my view, the qualitative tests do not adequately take into account either the literal meaning of the section nor the requirement that the statute be read as a whole. The qualitative approach also leaves unanswered how or under what principle of statutory interpretation the Court imports into otherwise precise language greater absences or periods of non-residency greater than those already expressly defined by Parliament. There is, in sum, no principle of interpretation that would support the extension of periods of absences beyond the one year expressly provided by Parliament. Absent an issue of constitutionality the language of Parliament prevails and which a court, having reached a conclusion as to its interpretation, must apply.
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> 30 In construing the statute, the fundamental question, therefore, is, why did Parliament prescribe at least three years of residency in the four years preceding the application? The use of the words at least, in the Act indicates that 1,095 days is the minimum number of days a given citizenship applicant must accumulate. Parliament provided to would-be citizens the flexibility to accumulate 1,095

days over the course of four years, or 1,460 days. Accumulation by its ordinary meaning, imports a quantitative analysis. A test of accumulation is, quite separate and distinct from tests of citizenship based on intention or where one centers ones life. Intention cannot be accumulated as the statute dictates nor does the concept of "centralizing ones mode of life" fit well with the quantitative elements of the words at least.

31 Subsection 5 (1.1) has seldom been addressed in considering the definition of residency. It provides:

> 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).
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> * * *
>
> 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.

The plain reading of subsection 5 (1.1) reinforces the conclusion arising from a reading of the statute as a whole, namely that periods spent outside of Canada, by non-citizens, would not, save in the limited circumstances described, count. Parliament thus expressly contemplated the period of time during which putative citizens could be out of the country and in what circumstances. In my opinion, based on the plain reading of the text the requirement of three-year residence within a four-year period has been expressly designed to allow for one year's physical absence during the four-year period.

32 Again, returning to the first principle of interpretation, residency signifies presence, not absence, in both official

> languages. The French version is equally authoritative as the English, and points to the same conclusion as to Parliament's intent.
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> 33 This interpretation is not new. It has a long antecedence which can be traced back to the decision of Pratte J. in Blaha, Nadon J. in Chen, and Muldoon J. in Re Pourghasemi. It finds its most recent expression in the decision of this Court in Sarvarian v. Canada (Minister of Citizenship and Immigration), 2010 FC 1117, of Justice Mosley in Hao and Justice Gauthier in Alinaghizadeh.
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> 34 To conclude on the question of statutory interpretation, I note that Parliament conferred on the Citizenship Court judge the discretion to make recommendations to the Minister of Citizenship that citizenship be granted in cases of exceptional circumstances. The discretion to relieve from any undue hardship or unfairness, such as when an individual was kept out of Canada for reasons beyond their control were thus contemplated and addressed in subsection 5(4), and to read the same discretion into the very definition of residency, is to import, indirectly, that which Parliament has already addressed directly in subsection 5(4). It also, in effect, renders that discretionary power nugatory. Why else would it be necessary to make a recommendation to the Minister if, by the selection of a more lenient standard, citizenship can be conferred?

[25] While I have sympathy for the frustration of the Applicant in the inconsistent approaches taken both at the Citizenship Commission level and in this Court, I find that based on the plain and ordinary reading of the statute, the strict physical presence test is the principled approach to take.

B. *Was the Judge's Application of the facts to the Physical Presence test Reasonable?*

[26] The Applicant argues that the Judge erred in finding that there was an inconsistency between the number of days that the Applicant stated that she was absent from Canada in her citizenship application (156) versus her Residence Questionnaire (205). Likewise, the Applicant

takes issue with the Judge's finding that the number of days she was physically present in Canada was inconsistent between these two sources.

[27] The Applicant argues that this distinction is explainable, because the method of calculating days for purposes of 5(1)(c) of the Act differs depending on whether the days accumulated before or after the Applicant became a permanent resident while residing in Canada, as per 5(1)(i) and 5(1)(ii) of the Act. The Applicant notes that she listed 205 absences in total on her citizenship application, but 98 were in the period before she became a permanent resident. As per 5(1)(i), each day absent from Canada which occurred prior to her becoming a permanent residence is equal to one half-day for the purposes of fulfilling the residency requirement in 5(1)(c). Accordingly, these 98 days become 49 days for the purpose of the Act. Adding these to the remaining 107 days of absence, which occurred after she received permanent residency, the total is 156 days. This is consistent with the absences stated on her Residence Questionnaire.

[28] The Applicant also states that she noted 207 absences on her questionnaire, not 205 as the Judge suggests, as she remembered subsequent to filing her application that she was absent from Canada for an additional two days before she became a permanent resident. She acknowledges that, for the purposes of the Act, there is a discrepancy of one day between her citizenship application and her Residence Questionnaire.

[29] I agree with the Applicant that the discrepancy between the dates cited by the Judge is explainable. However, in light of the fact that neither the absences cited on the Applicant's

citizenship application or her Residence Questionnaire add up to 1095 days of physical presence in Canada, this explanation is irrelevant to the Citizenship Judge's conclusion. As such, I do not find the Judge's decision to be unreasonable.

C. *Did the Judge Breach the Duty of Procedural Fairness?*

[30] The Applicant argues two aspects of procedural fairness. First, she argues she had legitimate expectations as to which residency test would be used. Second, she claims that she was not given an opportunity to respond to a negative credibility finding made against her. The procedural fairness grounds are determined without a reference to the source of the complaints (IE the residence questionnaire and the line in the judge's decision regarding credibility).

[31] With regard to legitimate expectations, it is understandable that, when given a hearing despite not meeting the physical presence requirement, the Applicant might presume that a qualitative analysis would be undertaken by the Judge.

[32] However, I do not feel that any conduct or the representations made in the Residence Questionnaire could reasonably be described as "…clear, unambiguous and unqualified" as per *CUPE* at para 131. At best, it could be said that a reasonable inference might be made that a qualitative assessment would be undertaken. This is not sufficient to establish a breach of procedural fairness.

[33] Likewise, I do not believe that the Applicant's argument regarding the Judge's alleged credibility findings has merit. While it is not clear whether the Judge is referring to sufficiency of

evidence or credibility in the statement brought into issue by the Applicant, on balance I believe his statement effectively indicates his finding that the Applicant has not met the physical presence requirement. It is not an indictment of her credibility which requires a response. In any event, given that she acknowledges she has not satisfied the physical presence test, ambiguity around the credibility of her evidence is immaterial.

[34] I find that there was no breach of procedural fairness.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This appeal is dismissed.

"Michael D. Manson"

Judge

ANNEX “A”

Citizenship Act, RSC 1985, c. C-29

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;
(4) In order to alleviate cases of special and unusual hardship or to reward services of an exceptional value to Canada, and notwithstanding any other provision of this Act, the Governor in Council may, in his discretion, direct the Minister to grant citizenship to any person and, where such a direction is made, the Minister shall forthwith grant	(4) Afin de remédier à une situation particulière et inhabituelle de détresse ou de récompenser des services exceptionnels rendus au Canada, le gouverneur en conseil a le pouvoir discrétionnaire, malgré les autres dispositions de la présente loi, d’ordonner au ministre d’attribuer la citoyenneté à toute personne

citizenship to the person named in the direction.	qu'il désigne; le ministre procède alors sans délai à l'attribution.
14 (5) The Minister or the applicant may appeal to the Court from the decision of the citizenship judge under subsection (2) by filing a notice of appeal in the Registry of the Court within sixty days after the day on which (a) the citizenship judge approved the application under subsection (2); or (b) notice was mailed or otherwise given under subsection (3) with respect to the application.	14. (5) Le ministre et le demandeur peuvent interjeter appel de la décision du juge de la citoyenneté en déposant un avis d'appel au greffe de la Cour dans les soixante jours suivant la date, selon le cas : a) de l'approbation de la demande; b) de la communication, par courrier ou tout autre moyen, de la décision de rejet.
15 (1) Where a citizenship judge is unable to approve an application under subsection 14(2), the judge shall, before deciding not to approve it, consider whether or not to recommend an exercise of discretion under subsection 5(3) or (4) or subsection 9(2) as the circumstances may require.	15. (1) Avant de rendre une décision de rejet, le juge de la citoyenneté examine s'il y a lieu de recommander l'exercice du pouvoir discrétionnaire prévu aux paragraphes 5(3) ou (4) ou 9(2), selon le cas.
16. Notwithstanding section 28 of the Federal Courts Act, the Federal Court of Appeal does not have jurisdiction to hear and determine an application to review and set aside a decision made under this Act if the decision may be appealed under section 14 of this Act.	16. Nonobstant l'article 28 de la Loi sur les Cours fédérales, la Cour d'appel fédérale n'a pas compétence pour entendre et juger une demande de révision et d'annulation d'une décision rendue sous le régime de la présente loi et susceptible d'appel en vertu de l'article 14.

Federal Courts Act, RSC 1985, c F-7

18.5 Despite sections 18 and 18.1, if an Act of Parliament expressly provides for an appeal to the Federal Court,	18.5 Par dérogation aux articles 18 et 18.1, lorsqu'une loi fédérale prévoit expressément qu'il peut être

the Federal Court of Appeal, the Supreme Court of Canada, the Court Martial Appeal Court, the Tax Court of Canada, the Governor in Council or the Treasury Board from a decision or an order of a federal board, commission or other tribunal made by or in the course of proceedings before that board, commission or tribunal, that decision or order is not, to the extent that it may be so appealed, subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance with that Act.	interjeté appel, devant la Cour fédérale, la Cour d'appel fédérale, la Cour suprême du Canada, la Cour d'appel de la cour martiale, la Cour canadienne de l'impôt, le gouverneur en conseil ou le Conseil du Trésor, d'une décision ou d'une ordonnance d'un office fédéral, rendue à tout stade des procédures, cette décision ou cette ordonnance ne peut, dans la mesure où elle est susceptible d'un tel appel, faire l'objet de contrôle, de restriction, de prohibition, d'évocation, d'annulation ni d'aucune autre intervention, sauf en conformité avec cette loi.

Federal Court Rules, SOR/98-106

57. An originating document shall not be set aside only on the ground that a different originating document should have been used.	57. La Cour n'annule pas un acte introductif d'instance au seul motif que l'instance aurait dû être introduite par un autre acte introductif d'instance.

FEDERAL COURT

SOLICITORS OF RECORD

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