Federal Court  Cour fédérale

Date: 20141021

Docket: T-768-14

Citation: 2014 FC 1000

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, October 21, 2014

PRESENT: The Honourable Madam Justice Bédard

BETWEEN:

ANATOLIY VINAT

Applicant

and

THE MINISTER OF CITZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant filed an appeal under subsection 14(5) of the *Citizenship Act*, RSC 1985, c C-29 (Act), from a decision dated December 6, 2013, by a citizenship judge (judge) who denied his citizenship application on the ground that he did not meet the residency requirement set out in paragraph 5(1)(*c*) of the Act. For the following reasons, the appeal is dismissed.

I. Background

[2] The applicant is originally from Ukraine, but arrived in Canada from Israel on January 25, 2008, as a temporary worker. His spouse and son joined him six months later and they obtained their permanent resident status on May 27, 2010.

[3] Since 2008, the applicant has been working as a truck driver and his duties include delivering goods in Canadian and American cities. He is therefore regularly asked to go to the United States for short periods of time.

[4] The applicant filed a citizenship application on May 27, 2012.

[5] Subsection 5(1) of the Act governs the granting of citizenship and reads as follows:

Grant of citizenship	Attribution de la citoyenneté
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 Canada;	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	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.

[6] Subsection 5(4) of the Act sets out that, in certain circumstances, the Minister has the authority to grant citizenship to an individual even if he or she does not meet the residency requirement:

Special cases	Cas particuliers
(4) Despite any other provision of this Act, the Minister may, in his or her discretion, grant citizenship to any person to alleviate cases of special and unusual hardship or to reward	(4) Malgré les autres dispositions de la présente loi, le ministre a le pouvoir discrétionnaire d'attribuer la citoyenneté à toute personne afin de remédier à une

services of an exceptional value to Canada.	situation particulière et inhabituelle de détresse ou de récompenser des services exceptionnels rendus au Canada.

[7] The applicant completed the residence questionnaire with the assistance of an accountant who prepared a detailed list of his absences from Canada, which were all related to his work as a truck driver. He declared 423 days of absence.

II. Impugned decision

[8] The judge lowered the number of days of absence declared by the applicant. Instead of the 423 days of absence stated in the applicant's residence questionnaire, she found that during the relevant period (between January 25, 2008, and May 27, 2010), he was present in Canada for 810 days and absent for 285 days.

[9] The judge clearly stated that she was applying the quantitative test for residency developed in *Pourghasemi (Re)*(1993), 62 FTR 122, [1993] FCJ No 232, which requires the applicant's physical presence to determine whether the applicant met the residency requirement. Under that test, the applicant had to therefore demonstrate that he had been present in Canada for at least 1,095 days within the four years immediately preceding his citizenship application. Because the applicant had been present for only 810 days, the judge found that he did not meet the residency requirement.

[10] She also stated that the applicant did not argue any circumstance that would justify her making a recommendation to the Minister that he be granted citizenship under the discretionary authority set out in subsection 5(4) of the Act.

III. Analysis

[11] The applicant raises three main arguments against the decision, which, with respect, cannot be accepted.

[12] The applicant's first argument is that the judge erred in calculating the number of days he was absent and that, had it not been for that error, she would have probably granted him citizenship.

[13] The applicant claims that the days during which he was present in Canada for part of the day, namely the days when he was leaving Canada for the United States and the days when he was coming back to Canada from the United States, should have been considered days of presence. To support his position, he relies on subsection 27(3) of the *Interpretation Act*, RSC 1985, c I-21 and argues that the word "time" that is mentioned in that section must be understood in a broad sense, that is, as referring to the period required to accomplish something. Subsection 27(3) reads as follows:

Beginning and ending of prescribed periods (3) Where a time is expressed to begin or end at, on or with a specified day, or to continue to or until a specified day, the time includes that day.	Début et fin d'un délai (3) Si le délai doit commencer ou se terminer un jour déterminé ou courir jusqu'à un jour déterminé, ce jour compte.

[14] According to the calculation method proposed by the applicant, he was not absent from the country for 288 days during the reference period, but only for 70 days.

[15] First, it is useful to note that the applicant never claimed before the judge that he was absent from Canada only 70 days during the reference period. In his citizenship questionnaire, the applicant declared 423 days of absence. It was the judge herself who pointed out at the hearing that the applicant had claimed too many days of absence. The new calculation method proposed by the applicant was therefore never presented or raised before the judge.

[16] In any event, I find it unnecessary to determine whether that method has merit because even in adopting the calculation method proposed by the applicant, he does not attain the minimum number of days required to be granted citizenship according to the physical presence test for residency. Based on his calculations, the applicant would end up with 1,025 days of presence whereas he needs 1,095 days to meet the requirement.

[17] The applicant adds that if the judge had found that he had been absent for only 70 days instead of 285 days during the period examined, she might have applied a residency test that is less strict than the purely quantitative physical presence test. He raises the following passage from the reasons for decision in support of his argument:

> When I met with the applicant, I had already reviewed the many documents he had previously submitted. These documents show that, on the balance of probabilities, the applicant has lived in Canada during the relevant period, but not for the required number of days, as outlined in the *Citizenship Act*.
>
> When I explained to him that he had a significant shortfall, he seemed surprised and told me that the CIC website said he could

> apply after three years in Canada. I admitted that this is correct, but he must also have deducted any absences he had.
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> [Emphasis added.]

[18] The applicant also states that it is clear from the case law submitted by the respondent that citizenship judges apply the physical presence test in circumstances where the number of days of absence is high.

[19] With respect, the applicant's argument is speculative at best. First, it is clear that the judge chose to apply the quantitative test for residency. The only inference that I can make from the passage of the decision cited by the applicant is that the judge explained the nature of the physical presence test to the applicant. In that same paragraph, she stated that the applicant was required to subtract his days of absence. Therefore, nothing in her decision suggests that she chose to apply the numerical test for residency based on the applicant's number of days of absence.

[20] As for the argument regarding the case law, I would like to make two comments. First, that argument was not advanced by the applicant in his memorandum and the respondent was correct in answering that he was unable to respond to it. Second, the applicant did not submit any exhaustive study of decisions of citizenship judges or of this Court to maintain that, generally, the physical presence test is recognized as a reasonable interpretation of paragraph 5(1)(*c*) of the Act only when the applicant's number of days of absence from Canada is high. That argument is not supported by the evidence or the case law submitted.

[21] The applicant's second argument is that, by choosing to apply the numerical test for residency, the judge applied old case law without considering most of the Court's recent decisions that confirm the well-foundedness of the qualitative test developed in *Koo (Re)*, [1993] 1 FC 286, 59 FTR 27. He referred to *Canada (Minister of Citizenship and Immigration) v Takla*, 2009 FC 1120, 359 FTR 248 (*Takla*) and to judgments of the Court that followed the reasoning of Justice Mainville in that matter. With respect, I do not agree with the applicant and I find that the case law of the Court has remained divided.

[22] I have stated in at least three decisions (*Canada (Minister of Citizenship and Immigration) v Saad*, 2011 FC 1508 at paragraphs 12-14, [2011] FCJ No 1801; *Balta v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1509 at paragraph 11, [2011] FCJ No 1830 and *Tawfiq v Canada (Minister of Citizenship and Immigration)*, 2012 FC 34 at paragraph 9, [2012] FCJ No 1711) that I believe that in the absence of a definition of the term "residence" in the Act, citizenship judges may choose to adopt one of the three tests traditionally recognized in the case law of this Court as being reasonable interpretations of the residency requirement. I expressed that point of view, and continue to adhere to it, despite Justice Mainville's attempt, in *Takla*, above, to introduce uniformity into the rulings.

[23] The Chief Justice himself also shared this same view recently and reiterated that the three tests for residency still constituted reasonable interpretations of the residency requirements set out in the Act in *Huang v Canada (Minister of Citizenship and Immigration)*, 2013 FC 576, paragraphs 18, 21-23, [2013] FCJ No 629.

[24] I therefore find that the judge did not err by choosing to apply the quantitative physical presence test for residency and that she did not err by finding that the applicant was not present in Canada for the minimum number of days required to be granted citizenship.

[25] The applicant's third argument is that the judge should have considered his special circumstances, namely the fact that all of his absences were for a short period of time and were related to his work as a truck driver, to recommend that the Minister exercise the discretion conferred on him under subsection 5(4) of the Act.

[26] In *Ayaz v Canada (Minister of Citizenship and Immigration)*, 2014 FC 701 at paragraphs 50-51, [2014] FCJ No 724, the Court recently addressed the circumstances that could give rise to the application of subsection 5(4) of the Act:

> 50 The jurisprudence on "special and unusual hardship" under s. 5(4) of the Act is not as well developed as, for example, the jurisprudence on the meaning of hardship under s. 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27. While there is no firmly established test for "special and unusual hardship" under s. 5(4) of the Act, in my view, the following remarks by Justice Walsh in *Re Turcan* (T-3202, October 6, 1978, FCTD), as quoted by him in *Naber-Sykes* (Re), [1986] 3 FC 434, 4 FTR 204 [*Naber-Sykes*] remain valid and serve as a good starting point:
>
> > The question of what constitutes "special and unusual hardship" is of course a subjective one and Citizenship Judges, Judges of this Court, the Minister, or the Governor in Council might well have differing opinions on it. Certainly the mere fact of not having citizenship or of encountering further delays before it can be acquired is not of itself a matter of "special and unusual hardship", but in cases where as a consequence of this delay families will be broken up, employment lost, professional qualifications and special abilities wasted, and the country deprived of desirable and

> highly qualified citizens, then, upon the refusal of the application because of the necessarily strict interpretation of the residential requirements of the Act when they cannot be complied with due to circumstances beyond the control of the applicant, it would seem to be appropriate for the Judge to recommend to the Minister the intervention of the Governor in Council. . . .
>
> 51 Thus, it is not purely or even primarily a question of whether the individual in question would make a desirable citizen, or has good reasons (perhaps even, as in the present case, laudable reasons) for not being able to comply with the requirements of the Act strictly read. Rather, the Court has to consider as well whether the effect of applying those requirements strictly and thus denying citizenship would impose some hardship on the applicant or their family beyond the delay in citizenship itself. For example, in *Naber-Sykes*, the applicant, who had lived, studied and worked in Canada for nearly a decade but had only recently become a permanent resident, could not become licensed to practice her profession (law) without citizenship. Justice Walsh found that the citizenship judge had failed to properly consider the hardship this would impose.

[27] In this case, nothing in the evidence suggests that the applicant's situation corresponds to circumstances that give rise to the application of the discretionary authority set out in subsection 5(4) of the Act and the judge did not err in finding that there were no circumstances that justified her making a recommendation that the Minister grant the applicant citizenship under that section.

[28] For all of these reasons, the appeal is dismissed.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the appeal is dismissed.

"Marie-Josee Bédard"
Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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