Federal Court Cour fédérale

Date: 20140617

Dockets: T-1651-13
T-1652-13

Citation: 2014 FC 575

Ottawa, Ontario, June 17, 2014

PRESENT: The Honourable Mr. Justice LeBlanc

Docket: T-1651-13

BETWEEN:

MIGUEL ANGEL SLIKAS ARWAS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Docket: T-1652-13

AND BETWEEN:

KARINE MARIE CHRISTIANE WACHTER

Applicant

and

THE MINISTER OF CITIZENSHIP

AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] These are appeals brought under section 21 of the *Federal Courts Act*, RSC 1985, c C-7, and paragraph 14(5) of the *Citizenship Act*, RSC 1985, c C-29, against the decision of a citizenship judge denying the applicants' applications for Canadian citizenship on the ground that they do not meet the residency requirement as defined by paragraph 5(1)(*c*) of the *Citizenship Act* (the Act).Given the overlap of the facts and arguments, these two appeals were heard, and are decided, together.

I. Background

[2] The applicants are husband and wife. Mr. Arwas is a citizen of Venezuela. Ms. Wachter is a French citizen. Both became permanent residents upon arrival in Canada on April 13, 2006. They came from Trinidad and Tobago where the husband, a petroleum engineer, was employed. They applied for Canadian citizenship on December 15, 2010. As part of the conditions they had to meet in order to be granted Canadian citizenship, they needed to accumulate, within the four years immediately preceding the date of their citizenship applications, at least three years of residence in Canada.

[3] That condition, embedded in paragraph 5(1)(*c*) of the Act, reads as follows:

5. (1) The Minister shall	**5.** (1) Le ministre attribue

grant citizenship to any person who (*a*) makes application for 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; …	la citoyenneté à toute personne qui, à la fois : *a*) en fait la demande; *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; […]

[4] During the four year residency assessment period applicable to them, which was from December 15, 2006 to December 15, 2010, the applicants were physically present in Canada a total of 866 days, in the case of Mr. Arwas, and of 879 days, in the case of Ms. Wachter. Those figures are not contested.

[5] The applicants' citizenship applications were dismissed on August 7, 2103. Having opted for an interpretation of paragraph 5(1)(*c*) of the Act which requires being physically present in Canada for the minimum amount of time contemplated that provision (1,095 days out of 1,460), the citizenship judge found the applicants to be well short of that minimum threshold. As a result, he rejected their applications on the ground that they did not meet the Act's residency requirement.

[6] The applicants claim that the citizenship judge committed a reviewable error by mixing qualitative and quantitative factors in his analysis. As the Court understands it, the applicants contend that the judge erred by resorting to qualitative factors in his quantitative analysis, something he need not, and could not, do. Alternatively, they claim that since he did resort to such factors, the citizenship judge was bound to proceed to a qualitative analysis of the residency requirement, something which might have allowed them to meet that requirement despite not having been physically present in Canada for at least 1,095 days out of 1,460 immediately preceding the filing of their citizenship applications.

[7] The applicants seek an order quashing the citizenship judge's decision and sending the matter back for reconsideration by a different citizenship judge. They also seek full costs pursuant to Rule 400 of the *Federal Courts Rules*, SOR/98-106.

[8] For the reasons that follow, these two appeals must fail.

II. Issue and Standard of Review

[9] The only issue in these appeals is whether the citizenship judge erred in concluding that the applicants did not meet the Act's residency requirement and by dismissing, as a result, their applications for Canadian citizenship.

[10] Appeals from decisions of citizenship judges are not judicial review proceedings *per se* although they are governed by the same rules of procedure (Rule 300(*c*) of the *Federal Courts Rules*). Such appeals used to take the form of *de novo* proceedings but it is no longer the case as of 1998. Before *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, which reshaped the standard of review doctrine applicable in the field of administrative law, there was a consensus amongst the judges of this Court that the standard of review on appeal of citizenship judges' decisions regarding the residency requirement was reasonableness *simpliciter*. It was understood that the question of whether a person meets that requirement was a mixed question of fact and law for which citizenship judges were owed some deference given their special degree of knowledge and experience (*Wang v Canada (Minister of Citizenship and Immigration)*, 2005 FC 981, at para 6, [2005] FCJ No 1204 (QL); *Rizvi v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1641 at para 5, [2005] FCJ No 2029 (QL); *Canada (Minister of Citizenship and Immigration) v Takla*, 2009 FC 1120 at para 25, 359 FTR 248).

[11] As a result of *Dunsmuir*, above, the reasonableness *simpliciter* standard, together with the patent unreasonableness standard, were collapsed into a single form of reasonableness review, the standard of reasonableness (*Dunsmuir*, above at paras 44 and 45; *Takla*, above at para 30).

[12] The applicants claim that, when the residency requirement in a citizenship appeal is at play, the standard of reasonableness calls for 'qualified deference'.

[13] For the past three decades, there has been an ongoing debate within this Court as to what paragraph 5(1)(*c*) of the Act exactly means. This, in turn, has generated a debate as to the applicable standard of review of a citizenship judge's decision to opt for the interpretation that will form the basis of his or her analysis of the residency requirement in a given case. Some members of this Court say that this standard is correctness (*Donohue v Canada (Minister of Citizenship and Immigration)* 2014 FC 394 at para 13, [2014] FCJ No 443 (QL); *El Ocla v Canada (Minister of Citizenship and Immigration)* 2011 FC 533 at para 18, 289 FTR 241; *Dedaj v Canada (Minister of Citizenship and Immigration)* 2010 FC 777, 372 FTR 61). Others say it is reasonableness (*Chowdhury v Canada (Minister of Citizenship and Immigration)* 2009 FC 709 at para 24, 347 FTR 76; *Raad v Canada (Minister of Citizenship and Immigration)* 2011 FC 256 at para 21, [2011] FCJ No 306 (QL); *Gavrilutav Canada (Minister of Citizenship and Immigration)* 2013 FC 705 at paras 24 to 27, [2013] FCJ No 306 (QL); *Shubeilat v Canada (Minister of Citizenship and Immigration)* 2010 FC 1260 at para 14, 381 FTR 63).

[14] The competing jurisprudential schools that have emerged from that debate have been described this way by Madame Justice Snider, in *Sinanan v Canada (Minister of Citizenship and Immigration)* 2011 FC 1347, [2011] FCJ No 1646 (QL):

> [6] The Federal Court has, over the years, endorsed three different approaches to the question of how to interpret the words "resident" and "residence" in the legislation. Briefly stated, the three lines of jurisprudence fall into two categories: the "quantitative approach" and "qualitative approach". The quantitative approach is encompassed in the *Re Pourghasemi* test, applied by the

> Citizenship judge in this case, which asks whether the applicant has been physically present in Canada for 1,095 days out of the last four years. This has been referred to as the "physical presence" test. The qualitative approach was articulated in *Re Papadogiorgakis*, above, and refined in *Re Koo*, above. The test in *Re Koo*, as first utilized by Justice Reed, allows the citizenship judge to analyze six factors to determine whether an applicant has met the residence requirement by his or her "centralized … mode of existence", even where the applicant falls short of the 1,095-day requirement.
>
> [7] In *Lam v Canada (Minister of Citizenship and Immigration)* (1999), 164 FTR 177 (QL), 87 ACWS (3d) 432 (TD), Justice Lutfy noted the divergence in the jurisprudence and concluded that, if a citizenship judge adopted any one of the three conflicting lines of jurisprudence, and if the facts of the case were properly applied to the principles of that approach, the citizenship judge's decision should not be set aside.
>
> [8] In the 12 years since *Lam*, the divergence in the Court has not been resolved. Over the past two years, some of my colleagues have attempted to galvanize the Court around one or the other of the tests. In *Canada (Minister of Citizenship and Immigration) v Takla*, 2009 FC 1120, 359 FTR 248, Justice Mainville determined that the qualitative approach should be the only test. In contrast, Justice Rennie, in *Martinez-Caro v Canada (Minister of Citizenship and Immigration*), 2011 FC 640, 98 Imm LR (3d) 288 [*Martinez-Caro*], carried out a careful analysis of the proper statutory interpretation of s 5(1) (c) of the *Act* and concluded that the physical presence test was the only correct test.

[15] Recently, Chief Justice Crampton, in *Huang v Canada (Minister of Citizenship and Immigration)* 2013 FC 576, [2013] FCJ No 629 (QL), revisited the issue and observed that the jurisprudence of this Court pertaining to these three tests remains divided and unsettled with the result that deference should be accorded to a citizenship judge's decision to apply any of these tests. He held that this approach was consistent with this Court's dominant view that the standard to be applied in reviewing citizenship decisions is reasonableness (*Huang*, above at paras 24 to 26).

[16] In such context, I share the view that the standard applicable to the review of citizenship decisions is reasonableness, without need for any sort of qualification, and that this standard applies to the choice of the residency test made by the citizenship judge. This means, as is well established, that the review analysis is concerned with the existence of justification, transparency and intelligibility within the decision-making process and also with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir*, above at para 47; *Chowdhury*, above at para 28; *Raad*, above at para 22).

[17] It is true that Parliament, when it enacted paragraph 5(1)(*c*) of the Act, intended one meaning in particular. However, ascertaining the legislator's intent is not always an easy task as evidenced by the complexity of our rules of statutory construction. My own view on this is that Parliament meant that the residency requirement shall be met by being physically present in Canada for a minimum period of time, ensuring thereby that an applicant's establishment in Canada is assessed by way of an objective marker that does allow for absences from Canada but that does it while establishing clear limits with regards to the amount of time an applicant can spend outside Canada. In this regard, I fully endorsed the reasoning of Mr. Justice Rennie in *Martinez-Caro v Canada (Minister of Citizenship and Immigration)* 2011 FC 640, 391 FTR 138, and that of Mr. Justice Muldoon in *Pourghasemi (Re) (FCTD)* [1993] 62 FTR 122.

[18] That being said, in the area of statutory interpretation, as in others, competing views are the norm, not the exception, and the resolution of these issues is normally assured through the judiciary's appeal system. Here, however, as the Chief Justice and other members of this Court have pointed out on several occasions, Parliament has made the conscious choice that there be no

appeal of a decision of this Court on an appeal from a decision of a citizenship judge (see paragraph 14(6) of the Act).

[19] This has consequences. Here, this means that three reasonable interpretations of the Act's residency requirement "that have a long and rich heritage in this Court's jurisprudence" (*Huang*, above at para 25), have co-existed for quite some time without being put to the test through an appeal process.

[20] But this is not inconsistent with the *stare decisis* principle, which was created, as is well known, to ensure consistency and certainty in the law. This principle, as it is understood and applied today in Canada, means only that prior decisions of higher courts are binding on lower courts of the same jurisdiction, for neither the Supreme Court of Canada nor many of the country's courts of appeal consider themselves bound by their own previous decisions. For lower courts, this means that they are free to analyze the reasons given in their own previous decisions and to decide whether to apply the precedent or to distinguish the rule contained therein, including matters of statutory interpretation (*Woods Manufacturing Co. Ltd. v The King*, [1951] SCR 504 at p 515, 1951 CanLII 36 (SCC); *Régie des rentes du Québec v Canada Bread Company Ltd.* (2013), 2013 SCC 46 at para 63, [2013] 3 SCR 125; *Corlac Inc. v Weatherford Canada Ltd*, 2012 FCA 261 at para 18, [2012] FCJ No 1295 (QL).

[21] Therefore, as long as Parliament does not legislate to clarify the citizenship residency test or to create some form of an appeal process, or that this Court does not settle on one interpretation of the Act's residency requirement, therefore providing for a unique test and

analysis in this area, the reality of this Court's jurisprudence is that it offers citizenship judges three possible tests when assessing whether a citizenship applicant meets that requirement. In these circumstances, it can hardly be said that a citizenship judge's decision to opt for one of these three tests does not fall within a range of possible, acceptable outcomes which are defensible in respect of the law.

[22] This situation is less than optimal from the standpoint of ensuring consistency and certainty in the law but this was foreseeable when Parliament opted to invest this Court with the final say in citizenship matters. Some say that it is somewhat incongruous that the outcome of citizenship applications be determined on analysis and tests that differ from one judge to the next (*Takla*, above at para 47). As I said, this is far from a perfect situation but I nevertheless see nothing wrong in principle to the present state of affairs.

[23] I therefore join ranks with those of my colleagues who share the view that citizenship judges are entitled to choose which test they desire to use among the three tests developed by this Court and not be in error for choosing one over the other (*Choudhury*, above at paras 71 and 72; *Pourzand v Canada (Minister of Citizenship and Immigration)* 2008 FC 395 at para 16, [2008] FCJ No 485 (QL); *Xu v Canada (Minister of Citizenship and Immigration)* 2005 FC 700 at paras 15 and 16, [2005] FCJ No 868 (QL); *Rizvi v Canada (Minister of Citizenship and Immigration)* 2005 FC 1641 at para 12, [2005] FCJ No 2029 (QL); *Shubeilat*, above at para 30). That choice does not have to be rationalized (*Sinanan*, above at para 11); it is a matter of discretion (*Gavriluta*, above at para 27).

[24] In the end, citizenship judges are called upon to apply the chosen test consistently and to reach in any particular case a conclusion that falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Irani*, above at para 14).

[25] The role of this Court, in reviewing such decisions, is therefore not to substitute its opinion for that of the citizenship judge but to assess whether that judge applied the residency test chosen properly and in a coherent fashion (*El Falah v Canada (Minister of Citizenship and Immigration)* 2009 FC 736, at para 14; *Shubeilat*, above at para 15).

III. Analysis

[26] As indicated above, the applicants claim that the citizenship judge erred in assessing the residency requirements by mixing qualitative and quantitative factors. More particularly, they contend that the judge was not entitled to resort to qualitative factors in his quantitative analysis, namely to facts outside the relevant residency assessment period. Alternatively, they say that having resorted to such factors, the citizenship judge was bound to proceed to a qualitative analysis of their residency situation, which he failed to do.

[27] The applicants are right when they assert that it is a reviewable error for a citizenship judge to assess the residency requirement in a given case on the basis of more than one test or to proceed to a quantitative or physical presence analysis by counting absences from Canada that occurred outside the relevant assessment period.

[28] However, this is not what happened in this case.

[29] First, it is clear that the citizenship judge opted to assess the residency requirement on the basis of one test and one test only, which is that of physical presence developed in *Pourghasemi,* above. The citizenship judge's decision in this regard is transparent and intelligible. There is no mention whatsoever in his analysis of qualitative factors. Furthermore, it is clear that his quantitative assessment was limited to the four years immediately preceding the date of the applicants' citizenship applications, that is to the period of December 15, 2006 to December 15, 2010. It is worth in this regard reproducing that portion of the decision:

> "Analysis:
>
> In deciding to whether you satisfy the residence requirement of Section 5(1)(*c*) of the Act, I have chosen to adopt the analytical approach used by the Honourable Mr. Justice Muldoon in *Re Pourghasemi*. In *Pourghasemi*, [1993] F.C.J. No. 232 (T.D.), Muldoon J. considered that it was necessary for a potential citizen to establish that he or she has been physically present in Canada for 1,095 days during the relevant four-year period.
>
> "*It is clear that the purpose of paragraph 5(1)(c) is to ensure that everyone who is granted precious Canadian citizenship has become, or at least has been compulsorily presented with the everyday opportunity to become, "Canadianized". This happens by "rubbing elbows" with Canadians in shopping malls, corner stores, libraries, concert halls, auto repair shops, pubs, cabarets, elevators, churches, synagogues, mosques and temples – in a word wherever one can meet and converse with Canadian – during the prescribed three years. One can observe Canadian society for all its virtues, decadence, values, dangers and freedoms, just as it is. That is little enough time in which to become Canadianized. If a citizenship candidate misses that qualifying experience, then Canadian citizenship can be conferred, in effect, on a person who is still a foreigner in experience, social adaptation, and often in thought and outlook. If the criterion be applied to some citizenship candidates, it ought to apply to all.*
>
> …
>
> So those who would throw in their lot with Canadians by becoming citizens must first throw in their lot with Canadian by residing among Canadians, in Canada, during three of the preceding four years, in order to Canadianize themselves. It is not

> something we can do while abroad, for Canadian life and society exist only in Canada and nowhere else."
>
> After carefully reviewing all the documentary and oral evidence presented by you at the hearing, I am not satisfied that you meet the residence requirement of the Citizenship Act. Unfortunately, the length of time you have been absent from Canada during the period under review is substantial. In the four years previous to the date of your application, you were present in Canada only 865 days, and you were absent 595 days. You are short a significant 230 days of the minimum 1,095 days required by Section 5(1)(c) of the Citizenship Act. The time you have spent in Canada is insufficient to demonstrate that you fulfil the intent of Act.
>
> I have no doubt you might eventually become an excellent Canadian citizen. I regret, however, I cannot approve your application for citizenship. When you meet the residence requirement of the Citizenship Act, I invite you to consider re-applying."

[30] The present case is distinct from the two main cases relied upon by the applicants, *Chowdhury*, above, and *Cheung v Canada (Minister of Citizenship and Immigration)* 2012 FC 348, [2012] FCJ No 428 (QL). Indeed, in both cases, the citizenship judges failed to clearly state the residency test they were applying while there were mentions of both quantitative and qualitative factors in the actual analysis. Here, not only was the test used by the citizenship judge clearly stated but the applicants also admit, at paragraph 22 of their written submissions, that the citizenship judge did not take into account any qualitative factors and did not, as a result, proceed to an assessment of their ties and connections with Canada.

[31] What is clear also from the impugned decision is that the citizenship judge, contrary to the applicants' assertions, did not consider dates outside the relevant residency assessment period for the purposes of establishing whether the applicants had met the physical presence test.

[32] The judge did provide, in describing the evidence that was before him, a summary of the husband's employment history, which was the main reason why the applicants were in and out of the country on a certain number of occasions from the date they landed in Canada in April 2006 to the husband's transfer to Spain in March 2011. However, there is no indication whatsoever that the citizenship judge counted absences outside the relevant residency assessment period in order to conclude as he did on the applicants' failure to meet the residency quantitative test. It is not an error for citizenship judges to refer to dates outside relevant residency assessment period, provided they do not actually count them in their quantitative analysis (*Sotade v Canada (Minister of Citizenship and Immigration)* 2011 FC 301 at para 15, [2011] FCJ No 383 (QL)).

[33] Likewise, the case of *Raad*, above, is of no assistance to the applicants in this regard. In that case, the citizenship judge had actually counted absences outside the relevant residency period and had, on top of that, inaccurately assessed the number and length of these absences. This is not the case here. The same can be said of *Shakoor v Canada (Minister of Citizenship and Immigration)* 2005 FC 776, [2006] FCJ No 972 (QL), where it was unclear whether the citizenship judge in that case had taken into account evidence of absences outside the relevant residency assessment period. Again, this is not the case here.

[34] Finally, the applicants' argument that the citizenship judge failed to consider qualitative factors is without merit. This contention is based on the fact that the applicants were required by a citizenship officer to fill a Residence Questionnaire. This was done one year prior to their interview before the citizenship judge. This questionnaire is a standardized document that is

routinely sent to citizenship applicants who do not appear to have accumulated the minimum number of days of physical presence in Canada.

[35] This is entirely consistent with the way the processing of applications for Canadian citizenship is set up in the Act and the *Citizenship Regulations*, SOR/93-246. It is the Minister, through citizenship officers, who gathers the information citizenship applicants have the onus of providing and causes to be commenced the inquiries necessary to determine whether they meet the requirements of the Act (*Citizenship Regulations*, above section 11). Section 17 of the Act even empowers the Minister to suspend the processing of a citizenship application where he is of the opinion that there is insufficient information to ascertain whether an applicant meets the requirements of this Act.

[36] It is only when those inquiries are completed that a citizenship application and the materials in support of it is referred to a citizenship judge for consideration (*Citizenship Regulations*, above at subsection 11(5)).

[37] Consistent with that regulatory process, the Residence Questionnaire was sent to the applicants in this case way before the matter was referred to the citizenship judge. Although this questionnaire sought some information of a qualitative nature, this is not indicative, and cannot be indicative, of how and on what basis the citizenship judge was to assess the residency requirement. This was the first of a two-step process leading to the referral of the applicants' file to the citizenship judge. Also, no legitimate expectations that the applicants' applications would be reviewed by way of a qualitative test could reasonably flow from this process (*Canadian*

Union of Public Employees (CUPE) v Ontario (Minister of Labour), 2003 SCC 29 at para 131, [2003] 1 SCR 539; *Donohue*, above at paras 31 and 32).

[38] The information gathering process which precedes the referral of a citizenship application to a citizenship judge for consideration cannot have a binding effect on the way the application is to be decided. Once seized of the matter, it is up to the citizenship judge to opt for the test he wishes to apply and to require from the applicant further evidence, if he or she feels there is a need for it.

[39] In the present case, the citizenship judge was therefore under no obligation to conduct an analysis of the applicants' residency situation by way of a qualitative test. There was no reviewable error on his part by not doing so.

[40] The same can be said of the notes taken by the citizenship judge. There was nothing wrong for the judge in providing in his notes an overview of the status of various aspects of the applicants' application (*Zheng v Canada (Minister of Citizenship and Immigration)* 2007 FC 1311 at para 11, [2007] FCJ No 1686 (QL)). This did not change the fact that he clearly and transparently opted to dispose of the applicants' applications on the basis of the physical presence test.

[41] The two appeals are therefore dismissed. Since the respondent did not seek costs, none will be awarded.

[42] These reasons will be filed in Court file number T-1651-13 and a copy placed in Court file number T-1652-13.

JUDGMENT

THIS COURT'S JUDGMENT is that the appeals in these two cases are dismissed, without costs.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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