Federal Court  Cour fédérale

Date: 20111221

Docket: T-471-11

Citation: 2011 FC 1508

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, December 21, 2011

PRESENT: The Honourable Madam Justice Bédard

BETWEEN:

MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

SAMER SAAD

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Pursuant to subsection 14(5) of the *Citizenship Act*, RSC 1985, c C-29 (Act), the Minister of Citizenship and Immigration (applicant) is appealing a decision dated January 21, 2011, by Citizenship Judge Thanh Hai Ngo, who approved the application for citizenship of Samer Saad (respondent). For the following reasons, the appeal is allowed.

I. Background

[2] The respondent, who is a citizen of Syria, became a permanent resident of Canada on March 30, 2005. He submitted an application for Canadian citizenship on October 16, 2008. In support of his application, he stated that he had been absent from Canada for 173 days during the four-year reference period set out in paragraph 5(1)(*c*) of the Act.

[3] The citizenship officer who evaluated the respondent's file referred the matter for hearing before a citizenship judge. In a note that the citizenship officer addressed to the citizenship judge, the citizenship officer stated, among other things, that the respondent had not found his entry passport and that she was therefore unable to verify his absences from Canada before September 3, 2007. She also noted other elements that made his periods of presence in and absence from Canada uncertain.

[4] During the hearing, the citizenship judge required the respondent to submit additional documents, namely a letter from the authorities in the United Arab Emirates attesting to his entries into and exits from that country, proof of his company's operations and corporate documents related to the company he incorporated in Canada.

[5] In reply, the respondent sent the citizenship judge two documents. He submitted a sworn letter accompanied by various documents describing his company's operations, and a letter from his former employer. He also indicated that he had approached the embassy in the United Arab Emirates to obtain evidence of his entries into and exits from that country, but was unsuccessful. He

also attached to his letter a sworn statement indicating his periods of absence from Canada between March 2005 and September 2008.

II. Decision under review

[6] The citizenship judge's decision is set out in the form entitled "Notice to the Minister of the Decision of the Citizenship Judge" (notice of the decision). In the appropriate boxes, the judge indicated the number of days of presence in and absence from Canada claimed by the respondent. In the section on reasons, he wrote the following:

> Wait for more docs to provide by Feb 10th, 2011- [illegible]
> Satisfying extra docs provided. Invoices – contracts home-
> ownership NOA (company).

[7] The citizenship judge also prepared handwritten notes, which were attached to the notice of the decision and which seemed to have been written before and during the respondent's hearing. These notes indicate the number of days of presence in and absence from Canada claimed by the respondent and basically consist of a list of documents provided by the respondent in support of his application for citizenship, a few sentences summarizing the respondent's circumstances and a few questions to ask the respondent during the hearing. These notes conclude with a list of additional documents the citizenship judge asked the respondent to provide.

III. Issue

[8] This appeal raises the issue of the reasonableness of the citizenship judge's decision.

IV. Standard of review

[9] Both parties submitted that the decision of a citizenship judge who must determine whether an applicant meets the conditions of residence set out in paragraph 5(1)(*c*) of the Act must be reviewed on the standard of reasonableness. I agree with the parties and I think that this is the standard of review recognized by the vast majority of judges of the Court (*El-Khader v Canada (Minister of Citizenship and Immigration)*, 2011 FC 328 at paragraphs 8-10 (available on CanLII) (*El-Khader*); *Raad v Canada (Minister of Citizenship and Immigration)*, 2011 FC 256 at paragraphs 20-22, 97 Imm LR (3d) 115; *Hao v Canada (Minister of Citizenship and Immigration)*, 2011 FC 46 at paragraphs 11-12, 383 FTR 125 (*Hao*); *Deshwal v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1248 at paragraphs 10-11 (available on CanLII); *Cardin v Canada (Minister of Citizenship and Immigration)*, 2011 FC 29 at paragraph 6, 382 FTR 164 (Cardin); *Chaudhry v Canada (Minister of Citizenship and Immigration)*, 2011 FC 179 at paragraphs 18-20, 384 FTR 117; *Chowdhury v Canada (Minister of Citizenship and Immigration*), 2009 FC 709 at paragraph 30, 347 FTR 76 (*Chowdhury*); *Pourzand v Canada (Minister of Citizenship and Immigration)*, 2008 FC 395 at paragraph 19, 166 ACWS (3d) 222).

[10] The adequacy of reasons is also part of the analysis of a decision's reasonableness, which is concerned with its justification, transparency, intelligibility and final outcome. In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47, 1 SCR 190, the Supreme Court specified the qualities that make a decision reasonable:

> . . . A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the

> decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[11] In the very recent decision *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paragraph 14 (available on CanLII) (*Newfoundland and Labrador Nurses' Union*), the Supreme Court specified the principles stated in this regard in *Dunsmuir*, above. Justice Abella, who wrote for the Court, stated the following:

> 14. . . . It is a more organic exercise — the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes" (para. 47).

V. Analysis

[12] The citizenship judge had to determine whether the respondent met the criteria set out in paragraph 5(1)(*c*) of the Act, including the following residence test:

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	(i) un demi-jour pour chaque

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	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;
. . .	[…]

[13] The Act does not provide a definition of "residence", and citizenship judges do not all apply the same interpretation. Some judges adopt an objective interpretation that requires physical presence during the reference period (*Pourghasemi (Re)* (1993), 62 FTR 122 at paragraph 6, 39 ACWS (3d) 251 (FCTD)). Other citizenship judges use a less strict approach to physical presence that involves a more qualitative analysis of the concept of residence. This approach recognizes the test of strong attachment to Canada (*Papadogiorgakis (Re)* (1978), [1978] 2 FC 208 at paragraphs 15-16, 88 DLR (3d) 243 (FCTD)), and the very similar test that defines residence as the place where a person centralizes his or her mode of existence (*Koo (Re)* (1992), [1993] 1 FC 286 at paragraph 10, 59 FTR 27 (FCTD) (*Koo*)). The jurisprudence of our Court has traditionally recognized that these different approaches are all reasonable and that citizenship judges may adopt the approach of their choice, provided that their application of the test chosen is reasonable (*Lam v Canada (Minister of Citizenship and Immigration)* (1999), 164 FTR 177 (FC) at paragraph 14, 87

ACWS (3d) 432 (FCTD)); for a good summary of the three tests, see *Mizani v Canada (Minister of Citizenship and Immigration)*, 2007 FC 698 at paragraphs 10-13, 158 ACWS (3d) 879).

[14] In *Canada (Minister of Citizenship and Immigration) v Takla*, 2009 FC 1120, 359 FTR 248 (*Takla*), Justice Mainville, then of the Federal Court, sought to standardize the jurisprudence in favour of the application of a single test, the one established in *Koo*, above. In spite of this attempt, and while certain judges of the Court did adopt the approach suggested by Justice Mainville (*Ghaedi v Canada (Minister of Citizenship and Immigration*), 2011 FC 85 at paragraphs 12-13, 332 DLR (4th) 169; *Canada (Minister of Citizenship and Immigration) v Elzubair*, 2010 FC 298 at paragraph 13 (available on CanLII); *Canada (Minister of Citizenship and Immigration) v Salim*, 2010 FC 975 at paragraphs 20-21, 92 Imm LR (3d) 196; *Dedaj v Canada (Minister of Citizenship and Immigration*), 2010 FC 777 at paragraphs 7-8, 372 FTR 61; *Canada (Minister of Citizenship and Immigration) v Cobos*, 2010 FC 903 at paragraph 9, 92 Imm LR (3d) 61; *Canada (Minister of Citizenship and Immigration) v Abou-Zahra*, 2010 FC 1073 at paragraphs 19-20 (available on CanLII)), other judges continue to recognize that, in the absence of legislative intervention, citizenship judges may continue to adopt any of the traditionally recognized tests (*Hao*, above, at paragraphs 46-47; *El-Khader*, above, at paragraph 18; *Alinaghizadeh v Canada (Minister of Citizenship and Immigration)*, 2011 FC 332 at paragraphs 28 and 33 (available on CanLII); *Abbas v Canada (Minister of Citizenship and Immigration)*, 2011 FC 145 at paragraph 7 (available on CanLII); *Cardin*, above, at paragraph 12; *Murphy v Canada (Minister of Citizenship and Immigration)*, 2011 FC 482 at paragraph 6, 98 Imm LR (3d) 243; *Martinez-Caro v Canada (Minister of Citizenship and Immigration)*, 2011 FC 640 at paragraphs 20-21, 98 Imm LR (3d) 288). I agree with this second school of thought. Even though I consider it unfortunate that the fate of

some applications for citizenship may depend, in part, upon the identity of the citizenship judge who processes the application and the interpretation of the concept of residence that that judge endorses, I believe that the three interpretations that have been traditionally accepted as reasonable are still reasonable and will continue to be so in the absence of legislative action. I support, in this regard, the words of Justice Snider in *El-Khader*, above, at paragraphs 18-22:

> **18** However, since that decision was released, a second line of equally compelling jurisprudence has emerged (see, for example, *Abbas*, above; *Sarvarian v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1117, [2010] FCJ No 1433 (QL)). The judges in these cases have continued to accept either the qualitative or quantitative interpretation of s. 5(1)(*c*) as reasonable.
>
> **19** The rationale behind this second line of jurisprudence is underscored by the Supreme Court of Canada's remarks in *Celgene*, above, and *Alliance Pipeline*, above. In both of these cases, the Supreme Court reinforced the principle that, the standard of reasonableness, even prior to *Dunsmuir*, has always been "based on the idea that there might be multiple valid interpretations of a statutory provision or answers to a legal dispute" such that "courts ought not to interfere where the tribunal's decision is rationally supported" (*Dunsmuir*, at para 41; *Alliance Pipeline*, at paras 38-39).
>
> **20** The Applicant rests his case on an assertion that the Citizenship Judge erred in law by not following the test articulated in *Takla*, above. This argument can only be correct if the decision in *Takla* overruled the decision in *Lam*. In my view, the conclusion of a judge of the Federal Court in *Takla* did not and could not overrule the conclusion of a judge of the Federal Court in *Lam*. As a consequence, the law remains that, provided a citizenship judge correctly adopts and applies either test, the decision ought to stand.
>
> **21** This conclusion is supported by the very words of Justice Mainville who acknowledges, at paragraph 47 of *Takla*, that "the test of physical presence for three years . . . is consistent with the wording of the Act". The physical presence test provides a reasonable interpretation of the words "resident" and "residence" in the legislative provision. In other words, the decision by a citizenship judge to interpret s. 5(1)(c) of the *Citizenship Act* to require physical presence is rationally supported by the words of

> the statute and by a lengthy line of jurisprudence from this Court. The Citizenship Judge did not err as alleged by the Applicant.
>
> **22** The Applicant submits that, as a matter of judicial comity, I should follow my former colleague, Justice Mainville, and those who have subsequently rejected the physical presence test. In response, I would echo the reasoning of Justice Mosley in *Hao*, above, at paragraphs 49 and 50:
>
> > In the interests of judicial comity, I have considered whether I should follow the analysis of my colleagues who favour the *Koo* test. The principle of judicial comity recognizes that decisions of the Court should be consistent so as to provide litigants with a certain degree of predictability: *Abbott Laboratories v. Canada (Minister of Health)*, 2006 FC 120, reversed on appeal on other grounds: *2007 FCA 73, 361 N.R. 90*. I note that Justice Barnes in *Ghaedi*, above, declined to apply the principle in this context, albeit in reference to the *Lam* line of authority.
> >
> > I agree that it would be preferable to have consistency in the test applied to determine residency but several judges of this Court, including myself, have found that the physical presence interpretation is appropriate on a plain reading of the statute. And this Court, for over 11 years, has deferred to decisions by citizenship judges to choose that interpretation over the alternative as a reasonable exercise of their discretion. While the inconsistent application of the law is unfortunate, it can not be said that every example of that inconsistency in this context is unreasonable. If the situation is "scandalous" as Justice Muldoon suggested many years ago in Harry, it remains for Parliament to correct the problem.

[15] Citizenship judges are also required to provide reasons for their decisions regardless of the test they choose to apply.

[16] In *VIA Rail Canada Inc v National Transportation Agency* (2000), [2001] 2 FC 25 at paragraphs 19, 22 and 24, 193 DLR (4th) 357 (CA), Justice Sexton, who wrote on behalf of the

Federal Court of Appeal, stated the following regarding the duty to provide reasons for the decisions of administrative tribunals:

> **19** In addition, reasons allow the parties to effectuate any right of appeal or judicial review that they might have. They provide a basis for an assessment of possible grounds for appeal or review. They allow the appellate or reviewing body to determine whether the decision maker erred and thereby render him or her accountable to that body. This is particularly important when the decision is subject to a deferential standard of review.
>
> . . .
>
> **22** The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion. Rather, the decision-maker must set out its findings of fact and the principal evidence upon which those findings were based. The reasons must address the major points in issue. The reasoning process followed by the decision-maker must be set out and must reflect consideration of the main relevant factors.
>
> . . .
>
> **24** Therefore, I believe that for this Court to hold that the Agency's reasons are adequate, we must find that those reasons set out the basis upon which the Agency found that the existence of the tariff constituted an obstacle, that they reflect the reasoning process by which the Agency determined that the obstacle was undue and include a consideration of the main factors relevant to such a determination.

[17] In *Newfoundland and Labrador Nurses' Union*, above, at paragraph 16, the Supreme Court stated the following with respect to the adequacy of reasons:

> **16** . . . In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

[18] In the more specific context of the duty of citizenship judges to provide reasons for their decisions, I agree with the following comment stated by my colleague, Justice de Montigny, in *Canada (Minister of Citizenship and Immigration) v Jeizan*, 2010 FC 323 at paragraphs 17-18 (available on CanLII) (*Jeizan*):

> **18** At the very least, the reasons for a Citizenship Judge's decision should indicate which residency test was used and why that test was or was not met: see *Canada (Minister of Citizenship and Immigration) v. Behbahani*, 2007 FC 795, [2007] F.C.J. No. 1039 at paras. 3-4; *Eltom v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1555, [2005] F.C.J. No. 1979 at para. 32; *Gao v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 605, [2003] F.C.J. No. 790 at para. 22; *Gao v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 736, [2008] F.C.J. No. 1030 at para. 13.

[19] I personally set aside a decision by a citizenship judge in *Baron*, above, at paragraph 17, on the ground that "[t]he citizenship judge did not indicate the method and the tests he used to determine that the respondent had met his residence requirement".

[20] The applicant submits that these principles must apply in this case and that the citizenship judge's reasons are completely unsatisfactory. The respondent maintains that the reasons for the decision, together with the notes written by the judge, are sufficient. The respondent infers from the notice of the decision and the notes written by the citizenship judge that the judge had applied the physical presence test and that he had been satisfied with the additional documents the respondent had submitted after the hearing.

[21] With respect, I do not share the respondent's opinion. I believe that the citizenship judge's reasons are insufficient and do not satisfy the justification and intelligibility criteria required to

make his decision reasonable. First, the judge in no way specified which test he chose to apply. I see nothing in his notes from which it may be inferred that he had applied the physical presence test. The judge's notes refer to certain elements that are relevant to the application of the physical presence test, but also to several other elements that are relevant to the application of the two other tests.

[22] It also appears from the judge's notes that, at the end of the hearing, he was not completely satisfied with the information obtained from the respondent because he asked him to provide additional documents. However, the notes do not specify how and why the judge was dissatisfied with the evidence submitted to him up until that point. Furthermore, some of the documents he asked the respondent to provide were relevant to the application of the physical presence test whereas others were related to a more qualitative interpretation according to one of the two other tests.

[23] In his notice of the decision, the judge stated that he was satisfied with the documents provided by the respondent, but again, it is unknown which test he applied or which document convinced him that the respondent had satisfied the residence criteria. During the hearing, counsel for the respondent did attempt to infer from the decision and the citizenship judge's notes that he had applied the physical presence test, that the applicant's secondary evidence to compensate for the lack of a passport was satisfactory and that the documents required during the hearing and related to the respondent's company were relevant to confirm that he had always been a resident, even after the expiry of the reference period, but, in doing so, he, in my opinion, compensated for the judge's decision. Justice Montigny indicated the following in *Jeizan*, above, at paragraph 20:

> **20** A decision-maker's reasoning should not require additional explanations. In the case at bar, it is the Respondent's counsel who explains the Citizenship Judge's reasoning in her memorandum of fact and law, speculation by way of counsel's argument is not different than speculation by way of a party's affidavit: *Alem v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 148, [2010] F.C.J. No. 176 at para. 19.

[24] I believe that my finding in *Baron*, above, at paragraph 18, fully applies to this case:

> **18** The reasons for the citizenship judge's decision are not adequate. The reasoning is unclear. The decision is not transparent and it is impossible to understand its basis. Given this situation, I am not in a position to determine whether it falls within a range of possible, acceptable outcomes in respect of the facts and law. The intervention of the Court is therefore warranted.

[25] I therefore believe that the citizenship judge's decision does not have the qualities that make it reasonable.

[26] As an alternative argument, the respondent has asked that I use my judicial discretion to confirm his citizenship despite insufficient reasons provided by the citizenship judge on the basis of evidence which, in his view, is amply sufficient to confirm the citizenship by applying one of the tests recognized by the jurisprudence. He based this application on *Seiffert v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1072, 227 FTR 253. Even though I am sensitive to the hardship that the respondent, who is not responsible for the errors made by the judge who processed his application for citizenship, must suffer, I believe that it is not the role of the Court to assess the respondent's application for citizenship. This role was clearly vested in citizenship judges and I see no reason that would lead me to make the decision in place of a citizenship judge. I believe that there are no extraordinary circumstances in this case that would warrant the Court making the decision in place of the citizenship judge.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the appeal is allowed. The decision dated January 21, 2011, by Judge Thanh Hai Ngo is set aside and the matter is referred back to another citizenship judge for redetermination.

"Marie-Josée Bédard"
Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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