Federal Court  Cour fédérale

Date: 20120504

Docket: T-108-11

Citation: 2012 FC 536

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, May 4, 2012

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

BASSAM AL KHOURY

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an appeal filed under subsection 14(5) of the *Citizenship Act*, RSC 1985, c C-29 [the Act], from a decision by a citizenship judge to not grant Canadian citizenship to the applicant.

I. Facts and decision under appeal

[2] The applicant, a Syrian citizen, became a permanent resident of Canada on December 15, 2001.

[3] He applied for citizenship on October 17, 2007. The relevant period for examining whether he met the criteria in the Act is from October 3, 2003, to October 3, 2007.

[4] In his application for citizenship, the applicant declared 1,460 days of basic residence and 365 days of absence from Canada during this period, for a total of 1,095 days of physical presence, i.e. the minimum number required by paragraph 5(1)(*c*) of the Act (Respondent's record, Exhibit P-14). However, the residence questionnaire that the applicant subsequently filled out indicated that he was present in Canada for 1,081 days at most (Respondent's record, Exhibit P-12, paragraph 598).

[5] After reviewing the documents submitted by the applicant in support of his application, an officer sent a memorandum to the citizenship judge in order to submit the application to a hearing prior to the decision. In the memorandum, the officer expressed her concerns about the application, namely the fact that the applicant had not indicated ten days of absence in his initial application, that there was an inconsistency regarding the date on which the applicant arrived in Canada to live and that the officer had doubts about whether the applicant had indicated all his absences from Canada (Certified tribunal record at pp 591-592).

[6] In a letter dated July 14, 2010, the applicant was invited to attend an interview with the citizenship judge for July 28, 2010. Following the hearing, the judge gave the applicant a new residence questionnaire with a list of documents required to support his application, including a statement from the Régie de l'assurance maladie du Québec [RAMQ].

[7] A week later, the applicant hand-delivered to the judge's office the new residence questionnaire partially completed with an explanatory letter dated August 4, 2010, referring to his

previous residence questionnaire. The applicant did not include the statement from the RAMQ, which he had been requested to do (Applicant's affidavit, Exhibits P-31 to P-33).

[8] According to the judge's notes, most of the evidence that the applicant submitted to him was copies of documents submitted earlier to the officer, which he had already determined to be unsatisfactory; the applicant's physical presence was 1,081 days, but it [TRANSLATION] "still had to be confirmed"; the scant supplementary evidence submitted by the applicant raised doubts instead of operating in his favour; the applicant did not seem to have been very active in Canada and he had difficulty responding correctly to questions about his knowledge of Canada and even his place of residence in Montréal (Certified tribunal record at pp 13-14).

[9] Accordingly, in his reasons dated December 3, 2010, the citizenship judge refused the citizenship application because the applicant did not meet the requirements of paragraphs 5(1)(*c*) and 5(1)(*e*) of the Act:

Citizenship Act, RSC 1985, c C-29	*Loi sur la citoyenneté*, LRC 1985, ch C-29
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:
. . .	[…]
(*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	*c*) est un résident permanent au sens du paragraphe 2(1) of the Act *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

Canada calculated in the following manner:	de la manière suivante:
. . .	[…]
(*e*) has an adequate knowledge of Canada and of the responsibilities and privileges of citizenship; . . .	*e*) a une connaissance suffisante du Canada et des responsabilités et avantages conférés par la citoyenneté; […]
[Emphasis added.]	[Nous soulignons.]

[10] With respect to paragraph 5(1)(*c*), the judge again reviewed all the documents submitted by the applicant and determined that they were not satisfactory evidence of his residence in the country, as required by the physical test established in *Pourghasemi (Re)* (1993), 62 FTR 122, [1993] FCJ 232 [*Pourghasemi*]. Regarding paragraph 5(1)(*e*), the answers provided by the applicant at the interview on July 28, 2010, did not demonstrate that he had adequate knowledge of Canada. Finally, with respect to the possibility of recommending the exercise of discretion under subsection 5(4) of the Act, although he tried to find out at the interview whether there were special circumstances that could justify such a recommendation, according to the citizenship judge, the applicant did not submit any evidence in this regard.

II. Positions of the parties

[11] First, the applicant disputes the delay between the communication of the citizenship judge's preliminary decision to the Minister on August 13, 2010, and the official decision issued on December 3, 2010, because section 14 of the Act states that the citizenship judge shall determine whether the applicant meets the statutory requirements "within sixty days of the day the application was referred to the judge".

[12] Second, the applicant disputes the fact that the citizenship judge applied the physical test of residence established in *Pourghasemi*, above, and not the "centralized mode of living in Canada" test, which does not require a physical presence of 1,095 days if the applicant can adequately satisfy the six factors set out in *Koo (Re)*, [1992] FCJ 1107 at para 10, [1993] 1 FC 286 [*Koo*]. The applicant is of the opinion that, on those six factors, he has clearly established his residence in Canada but that the citizenship judge did not examine and consider all the documentary evidence provided.

[13] Third, regarding the determination under paragraph 5(1)(*e*) of the Act, the applicant states that he had a legitimate expectation that he would take a written test on his knowledge of Canada and that the citizenship judge did not adhere to procedural fairness by having him instead take an oral test at the interview.

[14] For his part, the Minister of Citizenship and Immigration [the Minister] states that, having regard to the evidence before him, the citizenship judge's decision was reasonable, that the extended period to decide the application did not invalidate the decision and that assessing the applicant's knowledge of Canada orally did not result in a breach of the rules of procedural fairness.

III. Issues

1. What are the consequences of the citizenship judge's failure to issue his decision within the 60-day time period prescribed by the Act?

2. Did the citizenship judge err in applying the physical test when assessing the application for citizenship?

3. Did the citizenship judge breach the rules of procedural fairness by assessing the applicant's knowledge of Canada orally?

IV. Applicable standard of review

[15] After carefully reviewing the jurisprudence concerning this type of appeal, I support Justice Donald Rennie's reasoning as stated in *Martinez-Caro v Canada (Minister of Citizenship and Immigration)*, 2011 FC 640 at paras 36-52, [2011] FCJ 881 [*Martinez-Caro*], where he recommended applying the correctness standard to the interpretation of paragraph 5(1)(*c*) of the Act. Justice Rennie recognized in his reasons the exception to the correctness standard where a specialized tribunal is interpreting its home statute (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 54, [2008] SCJ 9 and *Smith v Alliance Pipeline Ltd*, 2011 SCC 7 at para 37, [2011] SCJ 7) but concluded convincingly that this exception applies only to the question of interpreting the definition of residence, given its general importance for the legal system and the fact that Parliament's intention is clear and "cannot be circumvented by the choice of a deferential standard of review" (*Martinez-Caro* at para 51). The application of the appropriate standard to the facts remains subject to the reasonableness standard (*Yan v Canada (Minister of Citizenship and Immigration*), 2009 FC 1153 at para 15, [2009] FCJ 1438 [*Yan*]).

[16] With regard to the procedural fairness issues, this Court must apply the correctness standard (*Sadykbaeva v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1018 at para 12, [2008] FCJ 1261 [*Sadykbaeva*]).

V. Analysis

A. *What are the consequences of the citizenship judge's failure to issue his decision within the 60-day time period prescribed by the Act?*

[17] The applicant says that he did not receive an explanation for the more than three-month delay between his interview and the citizenship judge's decision on December 3, 2010, despite the fact that the citizenship judge communicated his preliminary decision to the Minister on August 13, 2010. The applicant states that a [TRANSLATION] "decision by the citizenship judge within the time limit would have implicitly given the applicant the opportunity to bridge the gap to obtain the missing days of residence by remaining in Canada or to gain more time to file an immediate appeal of the decision rejecting citizenship" (Applicant's memorandum at para 36).

[18] In *Yan*, above, a judgment that the applicant relies on in his written submissions, Justice Leonard Mandamin examined this same issue. He noted, *inter alia*, that the Act is silent on the consequences of a decision rendered outside the time limit and concluded that "the 60 day requirement in section 14(5) of the *Act* is directory. The Citizenship Judge did not lose jurisdiction because the delay exceeded the prescribed 60 days" (*Yan*, above, at para 25).

[19] In this case, the applicant would not have been able, as he argues, to [TRANSLATION] "bridge the gap to obtain the missing days of residence by [subsequently] remaining in Canada" because the specific assessment period was from October 3, 2003, to October 3, 2007. As such, the applicant is, however, still free to file a new application at any time when he believes that he satisfies the requirements of the Act for the four-year period immediately preceding the date of his application. With respect to the statement that he would have had more time to file an appeal of the decision if he had received the decision earlier, paragraph 14(5)(*b*) of the Act states that the applicant may appeal to the Court from the decision by filing a notice of appeal in the Registry of the Court within sixty days after the day on which notice was given with respect to the application. Accordingly, the citizenship judge's delay in issuing a final decision did not in any way interfere with the opportunity to appeal the decision, and the applicant still had 60 days to file an appeal from the date the decision

was provided to him. In these circumstances, I share Justice Mandamin's opinion that the citizenship judge did not lose jurisdiction because of the delay in issuing the decision.

B. *Did the citizenship judge err in applying the physical test when assessing the application for citizenship?*

[20] The applicant does not dispute that he had 1,081 days of physical presence in Canada, that is, 14 days less than the physical residence test established in *Pourghasemi*, above, requires. However, the applicant explains his absence of 14 days as being justified by his mother's illness, vacation and business trips. The applicant alleges that, in these circumstances, the citizenship judge should have applied the "centralized mode of living in Canada" test established in *Koo*, above. To support this, the applicant relies on three decisions of this Court (*Bah v Canada (Minister of Citizenship and Immigration)*, 2010 FC 69, [2010] FCJ 44 [*Bah*]; *Canada (Minister of Citizenship and Immigration) v Takla*, 2009 FC 1120, [2009] FCJ 1371 [*Takla*]; *Canada (Minister of Citizenship and Immigration) v Elzubair*, 2010 FC 298, [2010] FCJ 330 [*Elzubair*]).

[21] First, Justice Michel Shore stated in *Bah*, at para 14, that the citizenship judge could adopt one of the three tests established by this Court. Thus, this decision is not favourable to the applicant, and the Minister also points to the decisions in *Mizani v Canada (Minister of Citizenship and Immigration)*, 2007 FC 698 at paras 10-13, [2007] FCJ 947 and *Debai v Canada (Minister of Citizenship and Immigration)*, 2011 FC 146 at para 13, [2011] FCJ 202 where Justices Danièle Tremblay-Lamer and Michel Beaudry both agree with Justice Shore.

[22] We will now examine the *Elzubair* decision cited by the applicant, where Justice Russel Zinn stated that when a citizenship judge finds that an applicant was physically present in Canada for at least 1,095 days, residence is proven. Otherwise, the judge must resort to the contextual *Koo* test. However, I note that this finding of Justice Zinn is based on the following

comment: "At paras. 46-49 of *Takla*, Justice Mainville convincingly supported his finding that there should only be one test for residence, despite this Court's jurisprudence that suggests otherwise. I concur with his view." (*Elzubair*, above, at para 13). Justice Zinn's conclusion is therefore not the result of a comparative analysis between the two tests or the result of his own interpretation of the Act, but instead was made to support Justice Robert Mainville's finding "that there should only be one test for residence".

[23] Indeed, after reading paragraphs 46 to 49 of the *Takla* decision that Justice Zinn refers to, I too can only agree with the following statements of Justice Mainville (*Takla*, above, at para 47):

> [I]t appears to me preferable to promote a uniform approach to the interpretation and application of the statutory provision in question. I arrive at this conclusion in an attempt to standardize the applicable law. It is incongruous that the outcome of a citizenship application is determined based on analyses and tests that differ from one judge to the next. To the extent possible, coherence in administrative decision making must be fostered . . .

However, like Justice Zinn, Justice Mainville did not rule against the physical test in *Pourghasemi*. On the contrary, he recognized even being "of the view that the test of physical presence for three years maintained by the first jurisprudential school is consistent with the wording of the Act" (*Takla*, above, at para 47). In fact, Justice Mainville did not adopt the contextual *Koo* test after a comparative analysis of the two tests or because of his own interpretation of the Act, but because this test "was adopted in this Court's jurisprudence to the point that it is now, by far, the dominant test" (*Takla*, above, at para 43). On this point, Justice Mainville relied on Justice Luc Martineau's comments in *Canada (Minister of Citizenship and Immigration) v Zhou*, 2008 FC 939 at para 9, [2008] FCJ 1170, where he speculated that this dominance can be explained "perhaps in part because the six questions were specifically set out on a form used by citizenship judges".

[24] Bearing in mind the fact that the *Takla* and *Elzubair* decisions were not the result of a statutory interpretation but of an entirely laudable desire to standardize the law, I would like to point out the *Martinez-Caro* decision again. Although it was not raised by the parties, Justice Rennie addressed the reasoning in *Takla* by stating that "comity, while highly desirable, does not provide a basis for departing from a conclusion as to the intention of Parliament as expressed in a statute" (*Martinez-Caro*, above, at para 25). Justice Rennie then began, in a methodical, detailed and persuasive manner, a literal, purposive and contextual interpretation of the Act.

[25] He relied in particular on the following remarks of Justice Francis Muldoon in *Pourghasemi*, above, at paras 2-3 (incorrectly attributed to Justice Marc Nadon in *Chen v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1229, [2001] FCJ 1693):

> **2** . . . Parliament introduces an element of emphasis into the statutory text by enacting "at least three years of residence in Canada". Those emphasized words are unnecessary, except for emphasis. The appellant accumulated less than one year, before the date of his application for citizenship. In drawing a purposive interpretation of the statutory language it should be asked: Why did Parliament prescribe at least 3 years of Canadian residence in the 4 years immediately before applying for citizenship?.
>
> **3** It is clear that the purpose of paragraph 5(1)(c) is to insure that everyone who is granted precious Canadian citizenship has become, or at least has been compulsorily presented with the everyday opportunity to become, "Canadianized". . . .

[26] In his analysis, Justice Rennie considered not only paragraph 5(1)(*c*) but also subsections 5(1.1) and 5(4) of the Act, which are very relevant to the interpretation exercise:

Citizenship Act, RSC 1985, c C-29	*Loi sur la citoyenneté*, LRC 1985, ch C-29
Residence	Période de résidence
5. (1.1) Any day during which an applicant for citizenship resided with the applicant's spouse who at the time was a Canadian citizen and was employed outside of Canada in or with the Canadian armed forces or the federal public administration or the public service of a province, otherwise than as a locally engaged person, shall be treated as equivalent to one day of residence in Canada for the purposes of paragraph (1)(c) and subsection 11(1).	5. (1.1) Est assimilé à un jour de résidence au Canada pour l'application de paragraph (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.
. . .	[…]
Special cases	Cas particuliers
(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 citizenship to the person named in the direction.	(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 qu'il désigne; le ministre procède alors sans délai à l'attribution.

We need only repeat the following statements of Justice Rennie regarding these provisions (*Martinez-Caro*, above, at paras 31 and 34):

> **31** . . . 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.
>
> . . .
>
> **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?
>
> [Emphasis added].

[27] I agree as did my colleages before me, Justices Judith Snider (*Sinanan v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1347, [2011] FCJ 1646 and *Ye v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1337, [2011] FCJ 1639) and Yvon Pinard (*Hysa v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1416, [2011] FCJ 1759), with Justice Rennie's legal interpretation of paragraph 5(1)(*c*) and with his conclusion that residence means physical

presence in Canada. For this reason, I am of the opinion that the citizenship judge did not err in applying the physical test when assessing the application for citizenship.

C. *Did the citizenship judge breach the rules of procedural fiarness by assessing the applicant's knowledge of Canada orally?*

[28] The applicant states that he had a legitimate expectation that he would take a written test on his knowledge of Canada, that he was [TRANSLATION] "deprived of the advantage of a written test . . . and if the opportunity had been fairly provided to him, he would have passed" (Applicant's memorandum at para 52). To support his argument that the citizenship judge did not adhere to procedural fairness by having him take an oral test, the applicant cites a long passage from the *Sadykbaeva* decision, where Justice Yves de Montigny allowed the appeal of an applicant who had been required to take an oral examinatioin.

[29] However, as the Minister points out, the applicant had received a letter in that case stating that the written test would take about 30 minutes. Justice de Montigny found that, since the written test was the only form of evaluation mentioned in the letter, "it clearly gave rise to the expectation that the applicant would be tested in that way. Such an expectation was clearly legitimate, especially in light of the publicly available CIC "Policy and Program Manuals" . . ." (*Sadykbaeva*, at paras 17-18). Indeed, these manuals specify that all applicants 18 to 54 years of age applying for citizenship must write the citizenship test but that applicants who fail the written test must pass an oral interview with a citizenship judge to assess their language skills and knowledge. The applicant in *Sadykbaeva* had not yet taken the written test. It is also important to note that Justice de Montigny recognized that it would be possible to remedy this situation in the future by changing the policy in the Policy Manuals or by being more explicit in the call-in letter about the type of test that would be administered (*Sadykbaeva*, above, at paras 23 and 27).

[30] Indeed, the applicant's situation in *Sadykbaeva* is clearly distinguishable from the applicant's case. In this case, the letter sent to the applicant on July 14, 2010, inviting him to attend the interview stated the following (Applicant's affidavit, Exhibit P-29):

> [TRANSLATION]
>
> The citizenship judge requires more information to make a decision about your citizenship application. You are therefore invited to attend an interview so that the judge can determine if your application meets all the prescribed conditions. Also, the judge will ask you questions in order to determine whether you have adequate knowledge of French or English and adequate knowledge of Canada.
>
> [Emphasis in the original.]

The applicant had therefore been notified that he would be asked questions orally about his knowledge of Canada. In addition, the current operational guide "CP 4 Grants" specifies at section 7.3 that the requirements concerning knowledge of Canada can be assessed by a written test or by an interview with a citizenship judge. Accordingly, the applicant cannot state that he had a legitimate expectation of taking a written test because the operational guide mentions the possibility of an oral test and the letter he received advised him that he would be questioned by the citizenship judge.

[31] For all these reasons, the citizenship judge did not err in applying the physical presence test as set out in *Pourghasemi*, above, or in ruling that the applicant had not met the requirement in paragraph 5(1)(*c*) of the Act to reside for at least 1,095 days in Canada during the four years immediately preceding the application, or in concluding that the applicant had not satisfied the requirement of adequate knowledge of Canada in paragraph 5(1)(*e*) of the Act.

[32] The respondent is seeking costs. Taking into account the evidentiary arguments and the history of the case, no costs are awarded.

JUDGMENT

THE COURT ORDERS AND ADJUSGES that the appeal is dismissed. No costs will be awarded.

"Simon Noël"

_____

Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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