Federal Court  Cour fédérale

Date: 20120830

Docket: T-186-12

Citation: 2012 FC 1039

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, August 30, 2012

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

NELLY RAPHAËL

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision dated November 21, 2011, by the citizenship judge, Gilles H. Duguay (citizenship judge), approving the citizenship application of Nelly Raphaël (respondent) in accordance with subsection 14(5) of the *Citizenship Act*, RSC 1985, c C-29 (Act). Pursuant to paragraph 300(*c*) of the *Federal*

Courts Rules, SOR/98-106 (Rules), citizenship appeals are submitted as applications and are subject to sections 300 *et seq*. of the Rules.

[2] The Minister of Citizenship and Immigration (applicant) is seeking to have the decision set aside and maintains that the citizenship judge erred in fact and in law by granting the respondent citizenship.

I. Facts

[3] The respondent is a Lebanese citizen. She arrived in Canada as a permanent resident on April 5, 1976.

[4] On April 1, 2009, the respondent filed a Canadian citizenship application, arguing that she had a total of 1169 days of physical presence and that she had been absent from Canada for 291 days in the four years preceding her application. Thus, the reference period, as defined in paragraph 5(1)(*c*) of the Act, was from April 1, 2005, to April 1, 2009.

[5] The respondent was interviewed by a citizenship officer (officer) on February 23, 2010.

[6] In a letter dated November 16, 2010, the officer requested additional documents from the respondent to support her citizenship application (Tribunal Record, page 173).

[7] The respondent sent the documents the officer requested on December 6, 2010 (Tribunal Record, page 14).

[8] The officer analyzed the respondent's record before referring it to the citizenship judge. In her memorandum to the citizenship judge dated December 14, 2010 (Tribunal Record, pages 12 and 13), the officer noted the following concerns in her comments:

> [TRANSLATION]
>
> *Passport and travel documents:*
>
> - All returns to Canada are confirmed by stamps from the Canadian authorities whereas few stamps confirm the dates of the start of Ms. Raphaël's trips.
>
> - A visa to enter Morocco was issued in Beirut on 30/01/2008 (PPT, page 21). Ms. Raphaël stated that she was in Canada on that date.
>
> *Professional ties:*
>
> - Ms. Raphaël did not fill out the table for question 9 with respect to her professional occupations. She declared in the interview that she never worked in Canada. In an attached letter, she explained that her age prevents her from being active in the labour market.
>
> *Family and residence ties:*
>
> - Bank services statements for a BMO account in her name were submitted; they cover the period from 21/03/2006 to November 2009. The transactions are generally very abundant (20 to 40 per statement). I note that several periods show no activity while Ms. Raphaël stated that she was in Canada.
>
> - During the interview, Ms. Raphaël stated that she has problems with diabetes and sees a doctor every 3-6 months for medical follow-ups. She submitted a note from her endocrinologist that lists 8 visits since September 2006. I note that there was apparently a visit on 12/01/2009,

> while the client stated that she was travelling (from 20/12/2008 to 25/01/2009).
>
> I note that few documents were submitted for the period from April 2005 to March 2006.

[9] In his decision dated November 21, 2011, the citizenship judge approved the respondent's citizenship application.

II. Decision under appeal

[10] The reasons for the citizenship judge's decision are set out in the form entitled "Notice to the Minister of the Decision of the Citizenship Judge" (Tribunal Record, at pages 8 and 9):

> [TRANSLATION]
>
> The applicant provided all of the necessary evidence to comply with paragraph 5(1)(*c*) of the Act, namely, a credible medical record on her illness (diabetes), as well as evidence of her financial means and of her husband (a doctor in Lebanon), who pays the bills in Canada, where he comes every year to maintain the family unit. On the balance of probabilities and after analysis of the evidence in the record, the applicant seems to have established and maintained her residence in Canada from 2005 to 2009.

[11] Furthermore, the citizenship judge wrote other comments directly on the memorandum prepared by the officer dated December 14, 2010.

III. Issues

[12] In this case, the issues are as follows:

1) Did the citizenship judge provide sufficient reasons for his decision?

2) Did the respondent meet the residence condition set out in the *Citizenship Act?*

IV. Relevant legislation

[13] Paragraph 5(1)(*c*) of the *Citizenship Act* states the following:

PART I	PARTIE I
THE RIGHT TO CITIZENSHIP	LE DROIT À LA CITOYENNETÉ
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 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	(ii) un jour pour chaque jour de résidence au Canada après son admission à titre de résident permanent.
	[…]

admission to Canada for permanent residence the person shall be deemed to have accumulated one day of residence;
. . .

[14] Subsection 14(5) of the *Citizenship Act* states the following:

PART V	PARTIE V
PROCEDURE	PROCÉDURE
Appeal	Appel
14. (5) The Minister or the applicant may appeal to the Court from the decision of the citizenship judge under subsection (2) by filing a notice of appeal in the Registry of the Court within sixty days after the day on which	**14.** (5) Le ministre et le demandeur peuvent interjeter appel de la décision du juge de la citoyenneté en déposant un avis d'appel au greffe de la Cour dans les soixante jours suivant la date, selon le cas :
(*a*) the citizenship judge approved the application under subsection (2); or	*a*) de l'approbation de la demande;
(*b*) notice was mailed or otherwise given under subsection (3) with respect to the application.	*b*) de la communication, par courrier ou tout autre moyen, de la décision de rejet.
. . .	[...]

V. Applicable standard of review

[15] Regarding the issue of the adequacy of the reasons for the decision, the parties initially argued that the applicable standard of review is correctness (Applicant's Memorandum of facts and law, paragraph 18). However, further to an oral directive from

this Court during the hearing on July 18, 2012, the parties filed further submissions on this issue on July 20, 2012, according to which they henceforth allege, by relying on *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 (*Newfoundland Nurses*), that the applicable standard in this case is reasonableness. The Court is in agreement with the parties. In fact, following the Supreme Court of Canada's decision in *Newfoundland Nurses*, it appears that the reasonableness standard of review will henceforth apply with respect to the adequate nature of reasons stated by a tribunal. The Supreme Court of Canada noted the following in *Newfoundland Nurses*:

> [21] It strikes me as an unhelpful elaboration on *Baker* to suggest that alleged deficiencies or flaws in the reasons fall under the category of a breach of the duty of procedural fairness and that they are subject to a correctness review. As Professor Philip Bryden has warned, "courts must be careful not to confuse a finding that a tribunal's reasoning process is inadequately revealed with disagreement over the conclusions reached by the tribunal on the evidence before it" ("Standards of Review and Sufficiency of Reasons: Some Practical Considerations" (2006), 19 *C.J.A.L.P.* 191, at p. 217; see also Grant Huscroft, "The Duty of Fairness: From Nicholson to Baker and Beyond", in Colleen M. Flood and Lorne Sossin, eds., *Administrative Law in Context* (2008), 115, at p. 136).
>
> [22] It is true that the breach of a duty of procedural fairness is an error in law. Where there are no reasons in circumstances where they are required, there is nothing to review. But where, as here, there *are* reasons, there is no such breach. Any challenge to the reasoning/result of the decision should therefore be made within the reasonableness analysis.

[16] The reasonableness standard of review therefore applies to the first issue.

[17] Regarding the second issue, that is, whether a person meets the conditions set out in paragraph 5(1)(*c*) of the Act, the reasonableness standard of review is also the applicable standard (see *Pourzand v Canada (Minister of Citizenship and Immigration)*, 2008 FC

395 at paragraph 19, [2008] FCJ No 485; *Canada (Minister of Citizenship and Immigration) v Saad*, 2011 FC 1508 at paragraph 9, [2011] FCJ No 1801).

A. *Analysis*

[18] In light of the evidence in the record, the parties' arguments and the applicable jurisprudence, the Court is of the opinion that the citizenship judge's decision is unreasonable for the following reasons.

[19] First, in his reasons, the citizenship judge indicated that [TRANSLATION] "the applicant seems to have established and maintained her residence in Canada from 2005 to 2009", but he did not specify the test he applied. The wording, as indicated by the applicant, indicates that the intention test could have applied. Furthermore, the use of the word "seems" is unfortunate and implies that there could still be doubt as to the respondent's residence during the designated period. Second, without deciding whether the citizenship judge's annotations in the record are part of his reasons or not, the annotations, which are not a model of clarity, may suggest that the judge applied the physical presence test. Thus, it must be noted that, in reading the citizenship judge's reasons and annotations, it is difficult for this Court to find, either explicitly or even implicitly, as suggested by the respondent, which test the citizenship judge used: *Canada (Minister of Citizenship and Immigration) v Abou-Zahra*, 2010 FC 1073, [2010] FCJ No 1326 (*Abou-Zahra*); *Canada (Minister of Citizenship and Immigration) v Al-Showaiter*, 2012 FC 12, [2012] FCJ No 7 (*Al-Showaiter*); *Canada (Minister of Citizenship and Immigration) v Baron*, 2011 FC 480, [2011] FCJ No 735 (*Baron*); *Saad*, above, and

Canada (Minister of Citizenship and Immigration) v Wong, 2009 FC 1085, [2009] FCJ No 1339.

[20] Regarding the respondent's argument that the test in *Pourghasemi (Re)*, [1993] FCJ No 232, 62 FTR 62 (*Pourghasemi*) is the only correct test that must be applied in assessing citizenship applications, the Court can only note that there is still a debate in the case law on the test to apply to determine "residence" in Canada in accordance with paragraph 5(1)(*c*) of the Act. The Court adopts the comments of Justice Bédard in *Saad*, above, at paragraph 14:

> . . . 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. . . .

[21] Finally, on this point, the case law raised by the respondent is of no help to her. For example, in *Martinez-Caro v Canada (Minister of Citizenship and Immigration)*, 2011 FC 640, [2011] FCJ No 881 (*Martinez-Caro*), it was clearly apparently in the citizenship judge's reasons that he relied on *Pourghasemi (Re)* in rejecting the applicant's citizenship application. Thus, the test chosen was clearly indicated. Furthermore, the Court notes that, in *Hysa v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1416, [2011] FCJ No 1759 (*Hysa*), the citizenship judge again clearly indicated in his reasons that the applicant was absent from Canada a total of 1,287 days and that the test stated in *Pourghasemi (Re)* had not been met. Moreover, in *Ye v Canada (Citizenship and*

Immigration), 2011 FC 1337, [2011] FCJ No 1639 (*Ye*) and *Al Khoury v Canada (Minister of Citizenship and Immigration)*, 2012 FC 536, [2012] FCJ No 534 (*Al Khoury*), the citizenship judges in question applied the interpretation of "residence" stated in *Pourghasemi (Re)* and clearly indicated that in their reasons.

[22] Regarding the adequacy of the reasons, the applicant alleges that the citizenship judge's decision was unreasonable because he failed to consider the gaps in the evidence in the record and, as a result, did not analyze the respondent's citizenship application critically. Essentially, the applicant refers to the memorandum prepared by the officer that identified several concerns and some gaps in the respondent's evidence, including, namely, several contradictions between the absences declared by the respondent, irregularities in her bank transactions and an absence of sufficient evidence establishing the respondent's residence in Canada.

[23] The respondent argues that the citizenship judge took the officer's concerns into account and obtained explanations from the respondent, which he deemed satisfactory—and this is apparent in the reasons for his decision. The respondent therefore claims that the citizenship judge's decision is reasonable.

[24] Even if the Court ignored the absence of an indication of the citizenship test applied in this case as discussed above, the respondent has not convinced this Court that the citizenship judge's decision is reasonable because several gaps in the evidence submitted by the respondent were not addressed by the citizenship judge.

[25] Regarding reasons for decisions in the context of citizenship judges, this Court agrees with the comments of Justice de Montigny in *Canada (Minister of Citizenship and Immigration) v Jeizan*, 2010 FC 323 at paragraph 17, [2010] FCJ No 373:

> Reasons for decisions are adequate when they are clear, precise and intelligible and when they state why the decision was reached. Adequate reasons show a grasp of the issues raised by the evidence, allow the individual to understand why the decision was made and allow the reviewing court to assess the validity of the decision. (citations omitted)

[26] In the case at bar, the Court notes that the officer's concerns in her memorandum were not considered by the citizenship judge, namely the following:

[TRANSLATION]

- With respect to the respondent's passport, the officer noted that [TRANSLATION] "all returns to Canada are confirmed by stamps from the Canadian authorities whereas few stamps confirm the dates of the start of Ms. Raphaël's trips". However, the citizenship judge did not discuss this, even in his handwritten notes (Tribunal Record, page 12);

- The officer noted that the respondent submitted few documents for the period of April 2005 to March 2006. However, the citizenship judge did not provide any explanation for that period, which consists of, nevertheless, 365 days (Tribunal Record, page 13).

[27] Furthermore, in his Memorandum of facts and law (Applicant's Record, Volume 1, pages D-16, D-17), the applicant pointed out the following:

[TRANSLATION]

- The respondent submitted a 12-month fixed-term lease from July 1, 2005, to June 30, 2006, however, there is no other lease in the Tribunal Record covering the period after June 30, 2006;

- No letters submitted by the respondent show that the respondent established and maintained her residence in Canada during the designated period;

- The curriculum vitae of her children in no way show that the respondent established and maintained her residence in Canada during the designated period;

- The FIDO Services bills submitted by the respondent cover only a three-month period on the relevant four-year period.

[28] It is not up to this Court to reassess the evidence submitted by the respondent. That being the case, the Court can only note that several gaps in the evidence do not seem to have been considered or analyzed by the citizenship judge (*Abou-Zahra, Al Showaiter,* above). Contrary to the respondent's argument, the Court is unable to understand the citizenship judge's reasoning on the mere reading of the reasons and notes and comprehend what were the relevant factors or documents that convinced him that the respondent met the residence tests (*Saad,* above). In fact, the respondent is in effect asking this Court to surmise the citizenship judge's reasoning. The respondent did not convince this Court that the citizenship judge's decision falls within a range of possible, acceptable outcomes in respect of the facts and law.

[29] For these reasons, the Court finds that the citizenship judge's decision is unreasonable and the Court's intervention is warranted.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that

1. The appeal is allowed.

2. The matter is referred back to another citizenship judge for redetermination.

"Richard Boivin"
Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-186-12
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APPEARANCES:

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