Federal Court  Cour fédérale

Date: 20130625

Dockets: T-946-12
T-947-12

Citation: 2013 FC 705

Docket: T-946-12

BETWEEN:

DRAGOS OVIDIU GAVRILUTA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Docket: T-947-12

AND BETWEEN:

CLAUDIA GAVRILUTA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT

HENEGHAN J.

I. Introduction

[1] Mr. Dragos Ovidiu Gavriluta and his wife Mrs. Claudia Gavriluta (collectively "the Applicants") appeal from a decision of Citizenship Judge Aris Babikian (the "Citizenship Judge") denying their applications for citizenship. The appeal is brought pursuant to subsection 14(5) of the *Citizenship Act*, R.S.C., 1985, c. C-29 (the "Act"). The applications for citizenship were denied on the basis that the Citizenship Judge was not satisfied that the Applicants had presented credible evidence to show that they had satisfied the residency requirements of the Act.

[2] Pursuant to section 21 of the *Federal Courts Act*, R.S.C., 1985, c. F-7, appeals under the Act proceed as applications governed by Part 5 of the *Federal Courts Rules*, SOR/98-106. The Applicants commenced individual applications but in view of the overlap of the facts and arguments in these two appeals, I will review the background facts of both applications together.

II. Background

[3] The Applicants are citizens of Romania.

[4] The male Applicant claims that he began employment with Clariant Corporation in Minneapolis, Minnesota in August 2001. He says that he first entered Canada in November 2004, upon a work permit, for a business trip. He also claims that he was promoted to General Manager at Clariant (Canada) Inc. in January 2005. On August 14, 2005, he became a "permanent resident" of Canada within the meaning of that term in the *Immigration and Refugee Protection Act*, S.C. 2001,

c. 27. His wife entered Canada in February 2005 and became a permanent resident on August 17, 2005.

[5] On December 29, 2008, a "non-computer based entry" was made in the Field Operation Support System ("FOSS") as follows:

> Received call from Officer Smith, Customs & Border Control at Windsor Ambassador Bridge stating that she is currently interviewing the subject who is re-entering the USA after being in Canada for work for the last 2 weeks. Subject is employed by Clariant USA. Subject stated to Officer Smith that he has only lived in the USA (Minnesota) since 2004 and has never lived in Canada. Subject is a permanent resident in the USA A#097-963-928.

[6] On March 8, 2009, the Applicants submitted applications for Canadian citizenship. They were required to meet the statutory residence requirements as set out in subsection 5(1) of the Act as follows:

5. (1) The Minister shall grant citizenship to any person who	5. (1) Le ministre attribue la citoyenneté à toute personne qui, à la fois :
(a) makes application for citizenship;	a) en fait la demande;
(b) is eighteen years of age or over;	b) est âgée d'au moins dix-huit ans;
(c) is a permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act, and has, within the four years immediately preceding the date of his or her application, accumulated at least three years of residence in Canada calculated in the following	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 :

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	(i) un demi-jour pour chaque jour de résidence au Canada avant son admission à titre de résident permanent,
(ii) for every day during which the person was resident in Canada after his lawful admission to Canada for permanent residence the person shall be deemed to have accumulated one day of residence;	(ii) un jour pour chaque jour de résidence au Canada après son admission à titre de résident permanent;
(d) has an adequate knowledge of one of the official languages of Canada;	d) a une connaissance suffisante de l'une des langues officielles du Canada;
(e) has an adequate knowledge of Canada and of the responsibilities and privileges of citizenship; and	e) a une connaissance suffisante du Canada et des responsabilités et avantages conférés par la citoyenneté;
(f) is not under a removal order and is not the subject of a declaration by the Governor in Council made pursuant to section 20.	f) n'est pas sous le coup d'une mesure de renvoi et n'est pas visée par une déclaration du gouverneur en conseil faite en application de l'article 20.

[7] In his application for citizenship the male Applicant said that he had been present in Canada for 1,214 days during the relevant period, that is the four years immediately preceding the date of his application for citizenship. He said he had been absent for 166.5 days.

[8] The female Applicant declared physical presence in Canada of 1,298 days and an absence of 73 days.

[9] Each Applicant, in their citizenship applications, also declared that they did not have permanent resident status in any other country.

[10] On August 10, 2010, the Applicants completed a citizenship test. They were interviewed at that time by a citizenship officer. They were issued residence questionnaires which they returned approximately two weeks later, together with copies of other documents.

[11] The Applicants' file was reviewed by another citizenship officer in or around November 2011. This Officer, in examining copies of the Applicants' passports, noticed that many stamps in the passports were imprinted "ARC", sometimes with a number. This Officer formed the opinion that "ARC" meant "Alien Registration Card". The Officer was also aware of the December 2008 FOSS notes referred to above.

[12] As a result, on November 5, 2011, the Officer telephoned the male Applicant to discuss his residence status in the United States. According to the Global Case Management System notes, the Officer initially advised the male Applicant only about the 2008 FOSS notes. According to the Officer, the male Applicant replied that he was not a resident of the United States and that there had been a misunderstanding, but that it had been clarified.

[13] When asked by the Officer if he knew the meaning of the "ARC" stamps in his passport, the male Applicant replied in the negative. When the Officer said that she believed "ARC" to stand for "Alien Registration Card", the male Applicant admitted that he held a U.S. Green Card. The Officer then informed the male Applicant that he needed to obtain a letter from the American authorities stating that he is not a U.S. resident. The Officer provided her contact information. However, the male Applicant did not subsequently contact the Officer or provide the requested information.

[14] The Officer decided that a hearing would be necessary in order to verify the period of the Applicants' residency in Canada. On December 28, 2011, the Applicants appeared before the Citizenship Judge for their residence hearing.

[15] Following the hearing, the Applicants were afforded further time to provide additional information. They submitted further documents throughout February 2012. The Citizenship Judge delivered his decision on April 10, 2012.

[16] In his decision, the Citizenship Judge reviewed the conflicting evidence as to the male Applicant's resident status in the United States. Page 2 of the decision provides, in part, as follows:

> On page 2 of the Canadian Citizenship Application (CIT 0002), and in response to Question 7(d) of that form which asks "Do you have permanent resident status in any other country," the Applicant ticked the "No" box.
>
> Yet, in Port of Entry (FOSS) notes, NCB #Z011511300, created on Dec. 29, 2008, a Canadian officer received the following information from a US counterpart and noted:
>
> > "Received call from Officer Smith, Customs & Border Control at Windsor Ambassador Bridge stating that she is currently interviewing the subject

> [Mr. Gavriluta] who is reentering the USA after being in Canada for work for the last 2 weeks. Subject is employed by Clariant USA. Subject stated to Officer Smith that he has only lived in the USA (Minnesota) since 2004 and has never lived in Canada. Subject is a permanent resident in the USA A#097-963-928."
>
> The Applicant's Romanian passport has many USA entry stamps with a hand-written imprint of "ARC." The imprint "ARC" means Alien Registration Card." Also, under some of these stamps the serial number A #097-963-928 is written. The serial number is identical to the number referred to in the FOSS notes mentioned above. [Emphasis in original]

[17] The Citizenship Judge then commented upon the examination of the male Applicant at the hearing of December 28, 2011, as follows:

> At the Dec. 28, 2011 hearing, I raised the Green Card issue with the Applicant and his response to Question 7(d) on Page 2 of the Canadian Citizenship Application (CIT 0002). He stated:
>
> > "The way I interpreted is that when it says 'resident' it means that where I reside. I have also Romanian passport but I do not reside there. It was misunderstanding.
>
> When I read him Question 7(d) on page 2 of the Citizenship Application and stated that the question is very clear about the issue of having permanent residency status in any other country, he replied:
>
> > "That's how I understood it; it is misunderstanding."
>
> I asked him about the US Custom and Border Patrol Officer's comments in the FOSS note. To this query he said, "It was misunderstanding." I asked him if he still has his Green Card and if the US authorities are aware that he has permanent residency status in Canada. He replied "Yes" to both questions. I asked him to provide me a letter from the US authorities stating that they are aware that he is a permanent resident holder in the US and Canada simultaneously and then requested an outline of the policy on retaining the Green Card. He stated "I will go and ask them."

> After interviewing Mr. and Ms. Gavriluta separately, I called them back together to my office to give them the new Residency Checklist to submit the missing supporting documents which they failed to submit with the Aug. 10, 2010 [residency questionnaire] request. I also asked them to provide to me their US Green Card applications and a letter from US authorities stating that they are aware that the Applicants are permanent residents of Canada and stating the US policy vis-à-vis Green Card Holders who reside in Canada.
>
> To this request, Ms. Gavriluta turned to her husband and said to him: "You will lose your Green Card." Mr. Gavriluta then said to me, "We will consult our lawyer." This response indicates that Ms. Gavriluta had an awareness that holding permanent residence status in two countries might raise red flags for immigration and citizenship officials in both countries.
>
> At the hearing the Applicant stated that he "files income tax in the US but he doesn't pay." This raises the question as to why would someone who is living, working, and filing income tax in Canada has to file US income tax unless they have residence status in the US.
>
> The above observation leads me to conclude that Mr. Gavriluta has US residence status and this puts into question his physical presence in Canada, and the number of days he claims that he resided in Canada during the relevant period.

[18] The Citizenship Judge also noted that two re-entries to Canada could be seen in the male Applicant's Integrated Customs Enforcement System ("ICES") Travel History and three in the female Applicant's travel history, none of which were declared by the Applicants in either their citizenship applications or their residency questionnaires. In the case of the male Applicant the undeclared re-entry dates were March 21, 2006, and November 25, 2007. In the case of his wife, the undeclared re-entry dates were March 4, June 17, and November 25, 2007.

[19] By a letter dated February 10, 2012, the Applicants' lawyer acknowledged these dates after receiving a copy of the ICES Travel History and advised that "Mr. and Ms. Gavriluta advised that these are 1-day return trips to the US as they are not stamped on their passport." However, without

documentary evidence to confirm that statement, the Citizenship Judge found that the departure dates, and the true length of the trips, could not be established.

[20] After noting other minor inconsistencies in the travel dates given by the Applicants, the Citizenship Judge then reviewed the Applicants' Ontario Health Insurance Plan ("OHIP") usage history by examining their OHIP claims. He noted a break of approximately two years, that is from February 2006 to January 2008, in the male Applicant's usage history. There was a thirteen month gap, that is from September 2006 to October 2007, in the female Applicant's usage history. The Citizenship Judge expressed the view that these breaks were inconsistent with the Applicants' otherwise "extensive utilization of the medical system in Ontario."

[21] The Citizenship Judge then considered that the Applicants had not obtained the information and documents that they had been requested to obtain from the American authorities. The Citizenship Judge did not accept their lawyer's statement that the requested information and materials "were not available".

[22] The Citizenship Judge then proceeded to review other documents that had been provided by the Applicants, including Canada Revenue Agency Assessments, mortgage statements, municipal tax bills, and joint bank account statements. The Citizenship Judge characterized these documents as "passive indicia" of residency. Overall, the Citizenship Judge was not satisfied that the Applicants had submitted credible evidence or that they had discharged their burden of proving, on a balance of probabilities, that they had met the residency requirements of the Act as set out in subsection 5(1) of the Act.

III. Issues

[23] The within proceeding raises the following issues:

i) What is the applicable standard of review;

ii) Did the Citizenship Judge err in selecting the wrong test for residency under paragraph 5(1)(c) of the Act;

iii) Did the Citizenship Judge err in his assessment of credibility; and

iv) Did the Citizenship Judge err in calculating the time for the purposes of establishing residency?

IV. Discussion and Disposition

[24] The first issue to be addressed is the applicable standard of review. According to the decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, there are only two standards of review in the domain of administrative law, that is correctness for issues of law and procedural fairness, and reasonableness for questions of fact and mixed fact and law.

[25] The Applicants argue that the Citizenship Judge's selection of the applicable test for residency is correctness, referring to several decisions including *El Ocla v. Canada (Minister of Citizenship and Immigration)* (2011), 389 F.T.R. 241 at para. 14, and *Dedaj v. Canada (Minister of Citizenship and Immigration)* (2010), 372 F.T.R. 61.

[26] The Respondent submits that it remains within the discretion of the Citizenship Judge to decide which test to apply and that as long as one of these tests is correctly applied there will be no error on that basis alone; see the decisions in *El-Khader v. Canada (Minister of Citizenship and*

Immigration) (2011), 386 F.T.R. 142 at para. 10 and *Balta v. Canada (Minister of Citizenship and Immigration)* (2011), 403 F.T.R. 134 at para. 10.

[27] In my opinion, since the jurisprudence allows for a choice among the tests for the purpose of establishing residency, the choice of test is a question of discretion for the Citizenship Judge; see the decision in *Lam v. Canada (Minister of Citizenship and Immigration)* (1999), 164 F.T.R. 177. Discretionary decisions are subject to deference; see *Dunsmuir, supra*, at para. 53. It follows that both the choice of the residency test and its application are reviewable on the standard of reasonableness.

[28] The Citizenship Judge chose to apply the residency test set out in *Pourghasemi, Re* (1993), 62 F.T.R. 122. This test relies upon a strict count of days, as opposed to the "centralized mode of living" test as per *Re Papadogiorgakis*, [1978] 2 F.C. 208 at page 214, or the test of "substantial connection" as set out in *Koo, Re* (1992), 59 F.T.R. 27 at para. 10.

[29] The Citizenship Judge was allowed to choose one of the three tests. The next question is whether he reasonably applied the test chosen, that is, did the Citizenship Judge reasonably conclude that the Applicants had failed to establish their physical presence in Canada for 1,095 days, in order to satisfy the requirements of the Act?

[30] In addressing this issue, I must necessarily look at the manner in which the Citizenship Judge assessed the credibility of the Applicants, as well as his assessment of the reliability of the various documents that were submitted.

[31] In my opinion, the Citizenship Judge's concerns about the Applicants' credibility were well-founded. The most obvious matter is the FOSS note entry, reproduced above, which shows that the male Applicant was not forthright about the history of his residence in both Canada and the United States. The male Applicant did not give a clear answer as to why he told the Canadian immigration officer that he had never lived in Canada and had been living in the United States since 2004. According to the reasons of the Citizenship Judge, the male Applicant dismissed this statement as a "misunderstanding". The Citizenship Judge reasonably found that there were serious grounds to disbelieve the male Applicant.

[32] There is a further related serious concern about the Applicants' truthfulness and credibility, arising from the Applicants' answer to question 7(d) on the citizenship application, that is the question "Do you have permanent resident status in any other country?" The Applicants gave a negative answer. Both Applicants were examined on this issue, separately, according to the reasons of the Citizenship Judge. He concluded that the Applicants had misrepresented the facts in giving negative answers to this question. He did not accept their explanation that the negative answers were a result of a misunderstanding.

[33] The Citizenship Judge made a reasonable finding that the Applicants had misrepresented their status in the United States.

[34] The Applicants' arguments about the "materiality" of their misrepresentation cannot succeed. They submit that the "damage" arising from the missing re-entry data can be limited to a certain range of dates, based on the "undisputed" re-entry dates entered in the record. However,

even if those particular re-entry dates can be limited by the previously recorded re-entry dates in the ICES travel history, there is no means of verifying the accuracy of the departure dates.

[35] In these circumstances, the entire travel history of the Applicants is in doubt. No independent confirmation of their claim has been provided. I am satisfied that the Citizenship Judge considered the materiality of the Applicants' misrepresentation and reasonably found that misrepresentation to be relevant to all their claims. The Citizenship Judge acted reasonably in rejecting the Applicants' claim to Canadian citizenship on the basis of the evidence before him.

[36] Although the Citizenship Judge erred in setting out the relevant time period for determining residency, a point addressed by Counsel in post-hearing submissions, this error does not affect the ultimate decision and disposition of these appeals.

[37] The Citizenship Judge found that the relevant period for assessing the residency required for the male Applicant was August 14, 2005, to March 8, 2009. This was wrong; the relevant period was March 8, 2005, to March 8, 2009. In my opinion, the error is immaterial since it is clear from the decision that the Citizenship Judge was applying the physical presence test and given the problems with the evidence submitted by the Applicants, he could not determine if the Applicants had met the threshold of 1,095 days of residency.

[38] In conclusion, the Applicants have failed to show that the Citizenship Judge committed any reviewable error or that the decision fails to meet the standard of reasonableness. The decision falls

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

[39] These reasons will be filed in cause number T-946-12 and placed on the file in cause number T-947-12.

[40] The appeals will be dismissed. Since the Respondent did not seek costs, none will be awarded.

"E. Heneghan"
Judge

Toronto, Ontario
June 25, 2013

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-946-12
STYLE OF CAUSE:	DRAGOS OVIDIU GAVRILUTA v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
DOCKET:	T-947-12
STYLE OF CAUSE:	CLAUDIA GAVRILUTA v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
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DATED:	June 25, 2013

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