Federal Court  Cour fédérale

Date: 20150716

Docket: T-140-15

Citation: 2015 FC 872

Montréal, Quebec, July 16, 2015

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

VENERA DEMUROVA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] A Citizenship Judge is not entitled to simply waive the requirement of physical presence, as this would run contrary to the purpose of the *Citizenship Act*, RSC 1985, c C 29 [Act] (*Canada (Minister of Citizenship and Immigration) v Pereira*, 2014 FC 574 at paras 28 and 29 [*Pereira*]). Moreover, this Court has found that a Citizenship Judge's "blending" of the

citizenship test constitutes an error of law (*Ukaobasi v Canada (Minister of Citizenship and Immigration)*, 2015 FC 561 at para 13 [*Ukaobasi*]).

II. Background

[2] The Minister challenges a decision dated December 31, 2014, rendered by a Citizenship Judge, granting Canadian citizenship to the Respondent, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

[3] The Respondent is a citizen of Russia who became a permanent resident of Canada on March 17, 2008.

[4] The Respondent filed an application for citizenship on July 25, 2011. The relevant time period for the purposes of determining the Respondent's residency in accordance with paragraph 5(1)(*c*) of the Act runs from July 25, 2007 to July 25, 2011.

[5] On February 25, 2013, the Respondent attended an interview with a citizenship officer. The officer prepared a File Preparation and Analysis Template [FPAT] and placed it on file for consideration by the Citizenship Judge.

[6] On December 29, 2014, the Respondent appeared before the Citizenship Judge.

III. Impugned Decision

[7] In the impugned decision, the Citizenship Judge considers the concerns raised by the citizenship officer in the FPAT, which include the observation of a two-day shortfall from the required minimal 1,095 days of presence in Canada, an undeclared re-entry stamp to Canada dated April 10, 2009, an undeclared entry/exit stamp from Turkey, and other credibility concerns relating to the Respondent's residence and employment history.

[8] First, the Citizenship Judge finds that a shortfall of two days of the minimal requirement of 1,095 days of physical presence in Canada is not significant.

[9] Second, the Citizenship Judge is satisfied that apart from the undeclared seven day trip to Cuba in 2009, the Respondent's passport entries support her declarations.

[10] Third, the Citizenship Judge finds that the Respondent's trip to Turkey is inconsequential to her number of days of presence in Canada because it occurred during the Respondent's declared 61-day trip to Russia. The Citizenship Judge also notes that this ambiguity was clarified by the Respondent in her Residence Questionnaire, at question 7.

[11] Fourth, the Citizenship Judge is satisfied that the Respondent's explanations for her absences during the relevant period are credible and supported by the evidence.

[12] The Citizenship Judge ultimately finds that:

> [T]he Applicant told her story in a forthright manner and was able to clearly explain the concerns raised by the agent in the FPAT. She did not give me any reasons to doubt her declarations. Furthermore, I gave particular weight to her travel documents which, along with the [Integrated Customs and Enforcement System] report, confirm her oral testimony. And, I note that she presented Notices of Assessment from Revenue Canada (except for 2010 when she was away as declared) and these also corroborate her oral and written statements.
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> (Impugned decision, Certified Tribunal Record, at p 14)

[13] Finally, the Citizenship Judge concludes that the Respondent meets the physical presence test enunciated in *Pourghasemi (Re)*, [1993] FCJ 232 [*Pourghasemi*].

IV. Legislative Provision

[14] Subsection 5(1) of the Act outlines the requirements applicants must fulfill in order to acquire Canadian citizenship:

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 :
(*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, has, subject to the regulations, no unfulfilled conditions under that Act relating to his or her status as a permanent resident and has, since becoming a permanent	*c*) est un résident permanent au sens du paragraphe 2(1) de la Loi sur l'immigration et la protection des réfugiés, a, sous réserve des règlements, satisfait à toute condition rattachée à son statut de résident permanent en vertu de cette loi et, après être devenue

resident,

(i) been physically present in Canada for at least 1,460 days during the six years immediately before the date of his or her application,

(ii) been physically present in Canada for at least 183 days during each of four calendar years that are fully or partially within the six years immediately before the date of his or her application, and

(iii) met any applicable requirement under the Income Tax Act to file a return of income in respect of four taxation years that are fully or partially within the six years immediately before the date of his or her application;

…

(*d*) if under 65 years of age at the date of his or her application, has an adequate knowledge of one of the official languages of Canada;

(*e*) if under 65 years of age at the date of his or her application, demonstrates in one of the official languages of Canada that he or she has an adequate knowledge of Canada and of the responsibilities and privileges of citizenship; and

(*f*) is not under a removal order and is not the subject of a declaration by the Governor in Council made pursuant to

résident permanent :

(i) a été effectivement présent au Canada pendant au moins mille quatre cent soixante jours au cours des six ans qui ont précédé la date de sa demande,

(ii) a été effectivement présent au Canada pendant au moins cent quatre-vingt-trois jours par année civile au cours de quatre des années complètement ou partiellement comprises dans les six ans qui ont précédé la date de sa demande,

(iii) a rempli toute exigence applicable prévue par la Loi de l'impôt sur le revenu de présenter une déclaration de revenu pour quatre des années d'imposition complètement ou partiellement comprises dans les six ans qui ont précédé la date de sa demande;

[…]

d) si elle a moins de 65 ans à la date de sa demande, a une connaissance suffisante de l'une des langues officielles du Canada;

e) si elle a moins de 65 ans à la date de sa demande, démontre dans l'une des langues officielles du Canada qu'elle a une connaissance suffisante du Canada et des responsabilités et avantages conférés par la citoyenneté;

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

section 20. application de l'article 20.

V. Issues

[15] The Respondent submits the following issues to the Court:

a) Did the Citizenship Judge err in the application of the strict physical presence test to determine whether the residency requirement under paragraph 5(1)(*c*) of the Act was met?

b) Did the Citizenship Judge fail to adequately assess the evidence resulting in unreasonable finding of fact?

VI. Standard of Review

[16] A Citizenship Judge's findings in respect of whether the residency requirements for the purposes of paragraph 5(1)(*c*) of the Act are met are questions of mixed fact and law that are reviewable on the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vijayan*, 2015 FC 289 at para 20; *Zhou v Canada (Minister of Citizenship and Immigration)*, 2013 FC 19 at para 13).

[17] As such, the highly discretionary nature of the Citizenship Judge's decision attracts considerable deference from this Court (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190 at para 48).

VII. Analysis

[18] Paragraph 5(1)(*c*) of the Act provides that citizenship applicants bear the onus of demonstrating that they have accumulated at least three years of residence in Canada – or 1,095 days – during the relevant four-year period.

[19] This Court's jurisprudence has recognized that Citizenship Judges are entitled to choose from among the three accepted citizenship tests (*Pereira*, above at para 15; *Chaudhry v Canada (Minister of Citizenship and Immigration)*, 2011 FC 179 at para 23).

[20] The Court may not intervene unless the chosen citizenship test was applied in an unreasonable manner (*Balta v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1509 at para 10).

[21] The physical presence test provided in *Pourghasemi*, above, is more restrictive than the qualitative residency tests elaborated in *Re Papadogiorgakis* [1978] 2 FC 208 ("centralized mode of living" test) and *Koo (Re)*, [1993] 1 FC 286 ("substantial connection" test), as it requires a quantitative assessment of the number of days the Respondent has physically spent in Canada (*Donohue v Canada (Minister of Citizenship and Immigration)*, 2014 FC 394 at para 19).

[22] In the case at hand, in applying the physical presence test found in *Pourghasemi*, above, the Citizenship Judge found that the Respondent was physically present in Canada for 1,093 days (Impugned Decision, Certified Tribunal Record, at pp 13 and 15).

[23] This is an unreasonable outcome which warrants the Court's intervention.

[24] A Citizenship Judge is not entitled to simply waive the requirement of physical presence, as this would run contrary to the purpose of the Act (*Pereira*, above at paras 28 and 29). Moreover, this Court has found that a Citizenship Judge's "blending" of the citizenship test constitutes an error of law (*Ukaobasi*, above at para 13).

[25] Justice Donald J. Rennie's reasoning in *Martinez-Caro v Canada (Minister of Citizenship and Immigration)*, [2011] FCJ 881 at paras 29-33, sheds light on Parliament's intent in legislating the residency requirements found in paragraph 5(1)(*c*) of the Act:

> [29] … There is, in sum, no principle of interpretation that would support the extension of periods of absences beyond the one year expressly provided by Parliament. Absent an issue of constitutionality the language of Parliament prevails and which a court, having reached a conclusion as to its interpretation, must apply.
>
> [30] In construing the statute, the fundamental question, therefore, is, why did Parliament prescribe *at least* three years of residency in the four years preceding the application? The use of the words *at least*, in the Act indicates that 1,095 days is the minimum number of days a given citizenship applicant must accumulate. Parliament provided to would-be citizens the flexibility to *accumulate* 1,095 days over the course of four years, or 1,460 days. *Accumulation* by its ordinary meaning, imports a quantitative analysis. A test of *accumulation* is, quite separate and distinct from tests of citizenship based on intention or where one centers ones life. *Intention* cannot be accumulated as the statute dictates nor does the concept of "centralizing ones mode of life" fit well with the quantitative elements of the words *at least*.
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> [31] Subsection 5 (1.1) has seldom been addressed in considering the definition of residency. It provides:
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> |---|---|
> | **5** (1.1) Any day during which an applicant for citizenship resided with the applicant's | **5** (1.1) Est assimilé à un jour de résidence au Canada pour l'application de l'alinéa (1)c) et |

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).	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.

> 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.
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> [32] Again, returning to the first principle of interpretation, residency signifies presence, not absence, in both official languages. The French version is equally authoritative as the English, and points to the same conclusion as to Parliament's intent.
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> [33] This interpretation is not new. It has a long antecedence which can be traced back to the decision of Pratte J. in Blaha, Nadon J. in Chen, and Muldoon J. in Re Pourghasemi. It finds its most recent expression in the decision of this Court in Sarvarian v. Canada (Minister of Citizenship and Immigration), 2010 FC 1117, of Justice Mosley in Hao and Justice Gauthier in Alinaghizadeh.
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> [Emphasis added.]

[26] Furthermore, as pointed out by Justice Peter B. Annis in *Canada (Minister of Citizenship and Immigration) v Naveen*, 2013 FC 972 at para 27, allowing the Citizenship Judge's reasoning to stand would render subsection 5(4) of the Act redundant:

> [27] Fortunately, my decision on which test to apply is much assisted by the reasons of Justice Rennie in Martinez-Caro. Justice Rennie provides persuasive grounds supporting an interpretation of residency in section 5(1)(c) that would necessitate the demonstration of a sufficient degree of "Canadianization" by physical presence in the country, as previously described in Re Pourghasemi, [1993] FCJ No 232 (QL) (TD) [Pourghasemi]. He explains that on a plain and ordinary reading, Parliament has expressly defined the amount of latitude allowed. Parliament has prescribed that over the course of 1,460 days, applicants for citizenship must accumulate at least 1,095 days of residence; this is not a test of their intentions, but a quantitative analysis of their actions. Furthermore, the statute expressly provides for exceptional circumstances in which days spent outside Canada nonetheless count towards residence, and also expressly provides at section 5(4) for a procedure to recommend to the Minister that the requirement for physical presence be waived" in cases of special and unusual hardship or to reward services of an exceptional value to Canada." This provision would be redundant if a Citizenship Judge could simply waive the requirement.
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> [Emphasis added.]

VIII. Conclusion

[27] For the reasons above, the Minister's application for judicial review is allowed.

[28] The Court observes that the Respondent may re-apply for citizenship if she so wishes.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted.

There is no serious question of general importance to be certified.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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