Date: 20081103

Docket: T-620-08

Citation: 2008 FC 1222

Ottawa, Ontario, November 3, 2008

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

ARSHAD HUSSAIN ARASTU

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an appeal under subsection 14(5) of the *Citizenship Act*, R.S.C. 1985, c. C-29 (Act), from the decision of a Citizenship Judge (Judge), rendered February 26, 2008 (Decision), in which the Judge granted the Respondent Canadian citizenship on the ground that he had met the residency requirements under section 5 of the Act.

BACKGROUND

[2] The Respondent is a citizen of India and currently resides in Frisco, Texas in the United States of America (USA). He has permanent residence status in the USA. The Respondent's wife and daughter are Canadian citizens.

[3] On February 11, 2000, the Respondent acquired permanent residence status in Canada. However, he returned to India on March 1, 2000, within a month after he was landed. He then returned to Canada 43 days later, on April 24, 2000 but left Canada again and returned to India less than two months later on June 16, 2000. He remained in India for 158 days until November 22, 2000.

[4] On March 15, 2006 the Respondent completed an application for a grant of Canadian citizenship under s. 5(1) of the Act. He indicated at that time that his home address was in Troy, Michigan in the USA, and that he had been residing there with his family since July of 2004.

[5] On his Canadian citizenship application the Respondent reported that in the four years preceding the date of application (between March 16, 2002 and March 15, 2006) he had been absent from Canada for a total of 769 days, or more than 2 years. In addition, he reported that he was last in Canada in July 2004, as he had moved in July 2004 from Canada to the USA, where he currently lives with his family.

[6] On the Respondent's application form he reported the following absences during the four years preceding the date of his application:

07/09/2002 to 07/10/2002, for 30 days in India on vacation

21/07/2003 to 23/12/2003, for 153 days in India visiting ailing mother

06/07/2004 to 15/03/2006, for 586 days in the USA where he had moved with his family

[7] On the Residence Questionnaire, which the Respondent completed on October 10, 2006, he reported an additional period of absence from Canada in the four years preceding the date of his application including:

19/06/2003 to 23/06/2003 for 5 days in Chicago, USA for FPGEC Examination

[8] The Respondent reported a total absence of 774 days in the four years preceding the date of his application. During this period, he was in Canada for a total of 686 days (less than two years). He had a shortfall of 409 days of 1095 days (or three years) preceding the date of his Canadian citizenship application.

[9] From February 11, 2000 (when the Respondent was landed in Canada) and March 15, 2002, the Respondent was absent from Canada for another 230 days. He reported the following absences from Canada during the following time periods:

01/03/2000 to 12/04/2000 for 43 days, mother's illness in Mumbai India

16/06/2000 to 22/11/2000 for 158 days, mother's illness in Mumbai India

29/08/2001 to 26/09/2001 for 29 days, vacation in Mumbai India

[10] On the Respondent's Citizenship Application form, he reported addresses in the last four preceding years (March 16, 2002 to March 15, 2006) in Canada, India and the USA as follows:

03/2002 to 07/2003: #1001, 40 Tuxedo Court, Scarborough Ontario

08/2003 to 12/2003: #2 (or #4) Silver Plaza Fatima Nagarms, Pune India

01/2004 to 07/2004: # 307-2940 Elsmere Ave N8X 5A9, Windsor, Canada

07/2004 to 03/2006: #101, 2346 Golf View Dr., Troy Mi, USA

[11] The Respondent moved to Detroit after he acquired a USA green card, which he applied for while he had permanent residence status in Canada. Before moving from Canada to the USA, the Respondent was studying to acquire a pharmacist's license and he worked periodically in Canada for various employers in different locations in Southern Ontario.

[12] To support his Canadian citizenship application, the Respondent provided copies of his pre-August 2004 employment records, tax returns, phone bills, bank loans, credit card statements, automobile insurance, tenancy agreements, bank investments, education/school records, health card, proof of citizenship of his wife and daughter and SIN cards. The Respondent also submitted some post July 2004 records indicating he was paying off pre-existing debts acquired in Canada and maintaining a small RESP investment with his wife.

DECISION UNDER REVIEW

[13] On February 26, 2008, the Judge approved the Respondent's application for an adult grant of Canadian Citizenship under subsection 5(1) of the Act. The following are the Judge's handwritten notations regarding the six questions set out by Madam Justice Reed in *Re: Koo*, [1993] 1 F.C. 286 (F.C.T.D.):

> Was the individual physically present in Canada for a long period prior to recent absences which occurred immediately before the application for Citizenship;
>
> > Yes-20 days-had to go to India to see sick mother 42 days back 64 days-then back to see mother who was sick and widowed because her son had left
>
> Where are the applicant's immediate family and dependents (and extended family) resident;
>
> > Wife & daughter (cnd. Citizens) stayed when he left but…[sic-illegible] in US with him because of his work
>
> Does the pattern of physical presence in Canada indicate a returning home or merely visiting the country;
>
> > Yes-his dream was always to be in Canada-his family in India didn't want him to leave India but he resisted; then did not qualify to be a pharmacist here-has one more exam and then will qualify and seek work here
>
> What is the extent of the physical absences-if an applicant is only a few days short of the 1, 095 day total it is easier to find deemed residence than if those absences are extensive;
>
> > Out 802 in 658
>
> Is the physical absence caused by a clearly temporary situation such as employment as a missionary abroad, following a course of study abroad as a student, accepting temporary employment abroad, accompanying a spouse who has accepted temporary employment abroad;
>
> > Employed now-temporary because of need to work in US-will return here a.s.a.p.
>
> What is the quality of the connection with Canada: is it more substantial than that which exists with any other country.

See section 3

I believe he wants only to be here and to be a citizen of our country

ISSUES

[14] The Applicant raises the following issues on this application:

1) The Judge provided inadequate reasons for his decision;

2) The Respondent did not demonstrate on the record before the Judge that he satisfied the residence requirement set out under 5(1)(c) of the *Citizenship Act*;

3) The Judge erred in law and erred in his determination that the Respondent satisfied the requirements set out under 5(1)(c) of the *Citizenship Act*, and erred in his application of the principals of constructive residence as well as the residence test set out in *Koo.*

STATUTORY PROVISIONS

[15] The following provisions of the Act are applicable to this application:

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	*c*) est un résident permanent au sens du paragraphe 2(1) de la *Loi sur l'immigration et la*

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:

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 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.

Residence

(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).

Période de résidence

(1.1) Est assimilé à un jour de résidence au Canada pour l'application de l'alinéa (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.

Advice to Minister

14(2) Forthwith after making a determination under subsection (1) in respect of an application referred to therein but subject to section 15, the citizenship judge shall approve or not approve the application in accordance with his determination, notify the Minister accordingly and provide the Minister with the reasons therefore.

Information du ministre

14(2) Aussitôt après avoir statué sur la demande visée au paragraphe (1), le juge de la citoyenneté, sous réserve de l'article 15, approuve ou rejette la demande selon qu'il conclut ou non à la conformité de celle-ci et transmet sa décision motivée au ministre.

Periods not counted as residence

21. Notwithstanding anything in this Act, no period may be counted as a period of residence for the purpose of this Act during which a person has been, pursuant to any enactment in force in Canada,

Période ne comptant pas pour la résidence

21. Malgré les autres dispositions de la présente loi, ne sont pas prises en compte pour la durée de résidence les périodes où, en application d'une disposition législative en vigueur au Canada, l'intéressé

	:
(*a*) under a probation order;	*a*) a été sous le coup d'une ordonnance de probation;
(*b*) a paroled inmate; or	*b*) a bénéficié d'une libération conditionnelle;
(*c*) confined in or been an inmate of any penitentiary, jail, reformatory or prison.	*c*) a été détenu dans un pénitencier, une prison ou une maison de correction.

STANDARD OF REVIEW

[16] There has been general consensus in the jurisprudence of this Court that the applicable standard of review for a citizenship judge's determination of whether an applicant meets the residency requirement, which is a question of mixed fact and law, is reasonableness *simpliciter: Canada (Minister of Citizenship and Immigration) v. Chang* 2003 FC 1472; *Rizvi v. Canada* (*Minister of Citizenship and Immigration)* 2005 FC 1641; *Chen v. Canada (Minister of Citizenship and Immigration)* 2006 FC 85; *Zhao v. Canada (Minister of Citizenship and Immigration)* 2006 FC 1536.

[17] With respect to the alleged factual errors, a number of authorities from this Court have held in the past that the patent unreasonableness standard should be applied: *Huang v. Canada (Minister of Citizenship and Immigration)* 2005 FC 861 at paragraph 10:

> However, for purely factual findings the respondent submits the standard should be patent unreasonableness. The Citizenship Judge as the finder of fact has access to the original documents and an opportunity to discuss the relevant facts with the applicant. On citizenship appeals, this Court is a Court of appeal and should not disturb the findings unless they are patently unreasonable or

> demonstrate palpable and overriding error: Housen v. Nikolaisen, [2002] 2 S.C.R. 235.

[18] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada recognized that, although the reasonableness *simpliciter* and patent unreasonableness standards are theoretically different, "the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review": *Dunsmuir* at paragraph 44. Consequently, the Supreme Court of Canada held that the two reasonableness standards should be collapsed into a single form of "reasonableness" review.

[19] The Supreme Court of Canada in *Dunsmuir* also held that the standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[20] I find the standard of review applicable to the second and third issues raised in this application to be reasonableness. In accordance with *Dunsmuir*, when reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir* at paragraph 47. Put another way, the Court should only intervene if the

Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[21] Questions of procedural fairness are pure questions of law reviewable on a correctness standard. The issue raised concerning the adequacy of reasons is a question of procedural fairness and natural justice reviewable on a standard of correctness: *Andryanov v. Canada (Minister of Citizenship and Immigration)* 2007 FC 186 at paragraph 15; *Jang v. Canada (Minister of Citizenship and Immigration)* 2004 FC 486 at paragraph 9; *Adu v. Canada (Minister of Citizenship and Immigration)* 2005 FC 565 at paragraph 9.

ARGUMENTS

The Applicant

Inadequate Reasons

[22] The Applicant submits that the reasons of the Judge were inadequate because they are not clear, precise, intelligible, and they do not state why the Decision was reached. When residency is at issue, a citizenship judge must indicate which residency test is used, and that it is applied in accordance with the law: *Lam v. Canada (Minister of Citizenship and Immigration)* [1999] F.C.J. No. 410 and *Canada (Minister of Citizenship and Immigration) v. Mindich,* [1999] F.C.J. No. 978.

[23] In this matter, the Applicant contends that the reasons of the Judge were sparse, imprecise and unintelligible, as they do not demonstrate that the Judge understood the key legal principals

relating to constructive residence under the Act, or that he focused on relevant factors and relevant evidence in reviewing the test outlined in *Koo.*

Residence Requirement of s. 5(1)(*c*) of the Act not Satisfied

[24] The Applicant submits that s. 5(1)(*c*) of the Act provides that applicants for citizenship may be absent from Canada for one year during the four year period preceding the date of the application. However, Parliament has prescribed that an applicant must be a resident in Canada for at least three years within the prescribed period. The allowance for a one year absence during the four-year period under the Act creates a strong inference that a presence in Canada during the other three years must be substantial.

[25] The Applicant relies upon the cases of *Re: Papadogorgakis*, [1978] 2 F.C. 208 (F.C.T.D.); *Canada (Minister of Citizenship and Immigration) v. Uppal*, [1999] F.C.J. No. 699 at paragraph 14 (F.C.T.D.); *Canada (Secretary of State) v. Martinson*, [1987] F.C.J. No. 367 (F.C.T.D); and *Canada (Minister of State, Multiculturalism and Citizenship) v. Shahkar*, [1990] F.C.J. No. 506 (F.C.T.D.) for the principle that an applicant for citizenship must, first, demonstrate by objective facts that they have initially established a residence of their own in Canada at least three years preceding their application and, second, that they have maintained their established residence throughout that time.

[26] The Applicant further submits that a mere intention, desire or hope to establish or maintain residence is insufficient. Actual residence must be established and maintained *de facto: Canada*

(Minister of Citizenship and Immigration) v. Ting 2002 FCT 875; *Young v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 367 (F.C.T.D.) and *Canada (Minister of Citizenship and Immigration) v. Lui*, [1997] F.C.J. No. 1724 (F.C.T.D.). As well, the residence requirement under s.5(1)(*c*) of the Act is not met by depositing monies into bank accounts, rental payments and the purchase of furniture, clothing and other goods: *Koo; Re: Fung*, [1997] F.C.J. No. 250 (F.C.T.D.) and *Re: Lee*, [1996] F.C.J. No. 1590 (F.C.T.D.).

[27] The Applicant relies upon *Papadogorgakis* as authority that the requirement of actual presence in Canada can only be departed from in a "close case." The Applicant concludes on this issue by stating that there was a substantial shortfall and departure from Canada by the Respondent during the four-year period, and the Respondent's presence was sporadic and temporary in nature, which is inconsistent with the residence requirements of the Act. As well, the evidence provided does not indicate that the Respondent met the residency requirements during the relevant period of time.

Judge Erred in Law and in Application of *Koo* Test

[28] The Applicant submits that the physical presence part of the *Koo* test is an important, relevant and crucial factor in determining residence: *Morales v. Canada (Minister of Citizenship and Immigration)* 2005 FC 778 and *Cheung v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 1408 (F.C.T.D.).

[29] The Applicant says that the Judge completely failed to review the importance of the acquisition of permanent resident status in the USA in assessing whether Canada is "the country in which the Respondent regularly, normally or customarily lives or centralized his mode of existence" for the purpose of Canadian citizenship. This is a material and fatal error.

[30] The Applicant cites *Koo* at paragraph 12 where Madam Justice Reed rejected the notion of "dual residence" for the purposes of the Act:

> …In my view to allow physical absence to be treated as residence within the country for the purposes of obtaining citizenship, the quality of the person's connection with this country must demonstrate a primacy or priority of residence in Canada (a more substantial connection with Canada than with any other place).

[31] The Applicant goes on to point to *Panossian v. Canada (Minister of Citizenship and Immigration)* 2008 FC 255 and Mr. Justice Rothstein's (as he then was) reasons in *Tai (Re)*, [1994] F.C.J. No. 1841 (F.C.T.D.), where the difference between residence status under immigration legislation and the calculation of residence under the Act was pointed out:

> 3. …[The Citizenship Act] actually sets forth the manner for calculating the period of residence for the purposes of citizenship. It is not correct, in my view, to suggest that simply because an individual is a permanent resident and has not been found to have abandoned Canada as his or her place of permanent residence, that he automatically qualifies for citizenship after four years.

[32] The Applicant submits that the reasons of the Judge demonstrate that he failed to assess the nature and quality of the Respondent's connection to Canada for the purposes of citizenship. Instead, the Judge focused on the Respondent's subjective desires and wishes, his connection to his family and his desire to advance his employment prospects, to the exclusion of all else. This is a

mechanical approach to the requirements and caused the reasons to be devoid of content. It is not apparent whether the Judge addressed his attention to the relevant four-year period preceding the date of the application or the pattern of presence and absences from Canada during the relevant time period.

[33] The Applicant concludes that the reasons of the Judge show he erred in law by misapprehending the *Koo* test and his assessment of the facts in this case were unreasonable.

The Respondent

[34] The Respondent did not file any material on this appeal and did not appear at the hearing.

ANALYSIS

Inadequate Reasons

[35] The duty to provide reasons is a salutary one. Not only do reasons foster better decision-making by ensuring that the issues and judge's reasoning are well-articulated, but they also provide a basis for an assessment of possible grounds for appeal or review. This is particularly important when the decision is subject to a deferential standard of review: *VIA Rail Canada Inc. v. National Transportation Agency*, 193 D.L.R. (4th) 357 (F.C.A.) at paragraphs 17 and 19.

[36] The duty requires that the reasons be adequate. They must set out the findings of fact and 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. Further, a determination of whether reasons are adequate must be considered in light of the particular circumstances of each case. Where a person's status is at issue, the requirements are more stringent: *Baker* at paragraphs 25, 75 and *Via Rail* at paragraphs 21-22.

[37] I agree with the Applicant. Upon review of the Judge's reasons and the notes to file, there is no analysis to support the Judge's conclusion that the Respondent meets the requirements of the Act. Particularly since the notes to file indicate that the Respondent had an extremely weak case. He was residing in the USA. I find that the Judge erred by not providing more adequate reasons to support his conclusion.

Residence Requirement of s. 5(1)(*c*) of the Act not Satisfied

[38] Section 5(1) of the Act sets out the necessary criteria for obtaining citizenship. Section 5(1)(*c*) requires that a person accumulate at least three years, or 1,095 days, of residence within the four years immediately preceding the date of his or her application for citizenship.

[39] The purpose of section 5(1)(*c*) of the Act is, as stated by Justice Muldoon in *Re Pourghasemi*, [1993] F.C.J. No. 232 "to ensure that everyone who is granted precious Canadian

citizenship has become, or at least has been compulsorily presented with the opportunity to become 'Canadianized'".

[40] The Act does not define "residency". There has been divergence in this Court as to the test to be applied in determining whether an applicant has satisfied the residence requirements. In short, these tests are those set out in *Koo, Pourghesemi*, and *Papadogiorgakis*. A citizenship judge may adopt any of the three residency tests, and not be in error, provided they apply the relevant principles to the facts of the case.

[41] Federal Court jurisprudence holds that the analysis involves a two-stage process: the first stage involves a determination of whether the applicant has established residence; once this is found, the focus shifts to whether residency has been maintained. It is with respect to the second stage that there has been divergence in this Court as to what constitutes residency. The Court in *Ping v. Canada (Minister of Citizenship and Immigration)* 2007 FC 777 at paragraph 4 states:

> It is well-established that since there is no definition of residency in the Act that citizenship judges may apply one of three tests to determine whether an applicant has met the residency requirement (see *Rizvi v. Minister of Citizenship and Immigration*, [2005] F.C.J. No. 2029, 2005 FC 1641*; Eltom v. Minister of Citizenship and Immigration*, [2005] F.C.J. No. 1979, 2005 FC 1555, *Lam v. Minister of Citizenship*, [1999] F.C.J. No. 410 (QL)). One of these tests, referred to as the physical presence test or the *Pourghasemi* test, [1993] F.C.J. No. 232, requires an applicant be physically present in Canada for at least 1095 days. The other two tests take more flexible approaches to the residency requirement. For example the *Koo* test, [1992] F.C.J. No. 1107, requires an assessment of an applicant's absences from Canada with the aim of determining what kind of connection an applicant has with Canada and whether the applicant "regularly, normally or customarily lives" in Canada. A citizenship judge may apply any of the three tests and the Court can

> review the decision to ensure that the test chosen by the citizenship judge has been properly applied.

[42] An applicant bears the onus of establishing the residence requirement on a balance of probabilities.

[43] On the facts of this case, it is clear that the Respondent did not meet the requirements of citizenship under the Act, as he was neither residing in Canada for any substantial period of time, nor currently residing in Canada, but the USA. The Respondent failed all of the three tests available for the citizenship judge to apply. Therefore, I find the Judge's finding that the Respondent met the requirements of the Act to be in error.

Citizenship Judge Erred in Law and in Application of *Koo* Test

[44] Based upon the above finding, it is clear that the *Koo* test was applied incorrectly.

[45] I find the Decision to be incorrect and unreasonable.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The Application is allowed. The Decision of the Citizenship Judge is quashed. No order is made as to costs.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-620-08
STYLE OF CAUSE:	*MCI v. ARSHAD HUSSAIN ARASTU*
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	October 9, 2008
REASONS FOR JUDGMENT AND JUDGMENT:	JUSTICE RUSSELL
DATED:	November 3, 2008

APPEARANCES:

Leena Jaakkimainen	FOR THE APPLICANT
Arshad Hussain Arastu (Did not appear)	FOR THE RESPONDENT

SOLICITORS OF RECORD:

JOHN H.SIMS, Q.C. DEPUTY ATTORNEY GENERAL OF CANADA TORONTO, ONTARIO	FOR THE APPLICANT
Self-represented	FOR THE RESPONDENT