Federal Court   Cour fédérale

Date: 20160519

Docket: T-1860-15

Citation: 2016 FC 560

Ottawa, Ontario, May 19, 2016

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

BASSEM SALAHELDIN MOSTAFA HELMI ELDERAIDY

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Bassem Salaheldin Mostafa Helmi Elderaidy appeals the decision of a Citizenship Judge denying his application for citizenship on the basis that he had failed to meet the residence requirements of the *Citizenship Act*. The Citizenship Judge chose to apply the physical presence test for residency, and Mr. Elderaidy admits that he was more than 250 days short of the 1095 days in Canada during the four years preceding the filing of his citizenship application that is required to satisfy this test.

[2] Mr. Elderaidy nevertheless asserts that the Citizenship Judge erred by failing to provide reasons for her decision to apply the physical presence test for residency in assessing his application for citizenship. The Citizenship Judge further erred, Mr. Elderaidy says, by failing to first determine whether or not he had established residency in Canada before proceeding to the day-counting exercise mandated by the physical presence test.

[3] I have not been persuaded the Citizenship Judge's decision was unreasonable. Consequently, Mr. Elderaidy's appeal will be dismissed.

I. Are Reasons Required to Explain the Citizenship Judge's Choice of Test?

[4] Paragraph 5(1)(c) of the *Citizenship Act*, R.S.C. 1985, c. C-29, provides that a permanent resident must have "within the four years immediately preceding the date of his or her application, accumulated at least three years of residence in Canada".

[5] There are three different schools of thought as to how the residency requirement of paragraph 5(1)(c) is to be applied. The first approach is the physical presence test that was applied in this case. First articulated in *Re Pourghasemi* (1993), 62 F.T.R. 122, [1993] F.C.J. No. 232, this test simply asks whether the applicant has been physically present in this country for the requisite three years out of four.

[6] In contrast to the objective *Re Pourghasemi* test, *Re Papadogiorgakis*, [1978] 2 F.C. 208, 88 D.L.R. (3d) 243, and *Re Koo*, [1993] 1 F.C. 286, 59 F.T.R. 27, prescribes a more subjective, qualitative assessment of residency. *Re Papadogiorgakis* asks whether an applicant has an established residence and a strong attachment to Canada, even if he or she has been temporarily absent from this country. *Re Koo* reflects a refinement of *Re Papadogiorgakis* test, identifying

six questions that should be asked in order to assess the quality of an individual's attachment to Canada.

[7] Because there is no appeal from Federal Court decisions in citizenship matters, there has never been an appellate determination as to which of these three approaches is the correct one. As a result, this Court has determined that it is open to Citizenship Judges to apply any one of the three accepted tests. The jurisprudence further teaches that "if the facts of the case were properly applied to the principles of the chosen approach, the decision of the citizenship judge would not be wrong": see *Lam v. Canada (Minister of Citizenship and Immigration)*, (1999), 164 F.T.R. 177 at para. 14, [1999] F.C.J. No. 410 (T.D.).

[8] Mr. Elderaidy accepts that Citizenship Judges have the discretion to select any one of the three accepted tests for residency, and that he was not entitled to have the test applied that would be the most favourable to his citizenship application. He submits, however, that the discretion that Citizenship Judges exercise to choose one of the three tests for residency is not unlimited, and must be explained.

[9] Citing my decision in *Cardin v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 29, 382 F.T.R. 164, Mr. Elderaidy argues that Citizenship Judges must have regard to the personal circumstances of the applicant when selecting the test to be applied in a given case. He further submits that where the underlying rationale of a particular test is not supported by the specific facts of the case at hand, the choice of test will be unreasonable.

[10] I would note, however, that *Cardin* was a unique case. The Citizenship Judge in that case was preoccupied with the question of whether Mr. Cardin had become sufficiently "Canadianized" by "rubbing elbows" with Canadians in a variety of circumstances.

[11] Mr. Cardin had come to Canada as a child, and had been raised and educated in this country at both the secondary and post-secondary levels, before going to work, in Canada, for a Canadian company. It was in this context that I concluded that it was unreasonable for the Citizenship Judge to find that Mr. Cardin had not become sufficiently "Canadianized" as a result of his recent business trips outside Canada. I specifically distinguished Mr. Cardin's case from that of the businessman who comes to Canada, establishes a home here, and then leaves Canada for extended periods of time in order to pursue business opportunities abroad, which is precisely the situation in Mr. Elderaidy's case.

[12] My decision in *Cardin* turned on its own unique facts, including the nature of the Citizenship Judge's concerns in that case, and the specific wording of the decision under review. It does not stand for the blanket proposition that Citizenship Judges must have specific regard to the personal circumstances of applicants in selecting the residency test to be applied in citizenship cases.

[13] It is, moreover, unnecessary for me to determine in this case whether, as a general proposition, Citizenship Judges are required to have specific regard for an applicant's personal circumstances when selecting the test to be applied in a given case. It is apparent from the Citizenship Judge's reasons here that she was well-aware of Mr. Elderaidy's personal circumstances, as they are discussed in some detail in her decision. Indeed, Mr. Elderaidy has not identified *any* circumstances relating to his personal situation that was overlooked or ignored by

the Citizenship Judge. Given this, I am not prepared to infer that the Citizenship Judge did not in fact have regard to Mr. Elderaidy's personal situation when she decided which test for residency to apply in this case.

[14] Mr. Elderaidy also says that Citizenship Judges have to provide reasons for their choice of test, particularly where, as here, the Citizenship Judge has applied one or other of the qualitative tests in other cases. These reasons need not be extensive, Mr. Elderaidy says, and it would suffice if a Citizenship Judge were to say something along the lines of "I believe that the strict physical presence test best encapsulates the meaning of 'residency' in the *Citizenship Act*".

[15] The applicant has not provided any case authority stating that Citizenship Judges are required to provide reasons for their choice of tests, and the case law says otherwise: *Ayaz v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 701 at para. 43, 459 F.T.R. 191; *Arwas v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 575 at para. 23, 464 F.T.R. 1; *Sinanan v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 1347 at paras. 11-12, [2011] F.C.J. No. 1646.

[16] Notwithstanding the above jurisprudence, Mr. Elderaidy submits that requiring reasons would promote transparency and consistency in the decision-making process.

[17] The problem with this argument is that the only way that requiring reasons for the choice of test could encourage consistency in the decision-making process would be if the existence of certain types of circumstances dictated the choice of a particular test. This would be inconsistent with the well-established principle that Citizenship Judges have the discretion to choose any one of the three accepted tests for residency.

[18] I would further note that Mr. Elderaidy's suggestion that a Citizenship Judge could simply state that he or she was of the view that, for example, "the strict physical presence test best encapsulates the meaning of 'residency' in the *Citizenship Act*" does not in fact respond to the personal circumstances of any individual applicant.

[19] It is, moreover, implicit in the Citizenship Judge's reasons in this case that she had determined that the use of the physical presence test was appropriate here. Consequently, I would not give effect to this ground of appeal.

II. Is a Citizenship Judge Required to First Determine Whether an Applicant had Established Residency in Canada in Applying the Physical Presence Test?

[20] Mr. Elderaidy's second argument is that the Citizenship Judge erred by failing to determine whether or not he had established residency in Canada before proceeding to the day-counting exercise mandated by the *Re Pourghasemi* physical presence test for residency.

[21] A number of the cases cited by Mr. Elderaidy in support of this argument involve situations where one of the two qualitative tests for residency was applied. I do not understand the respondent to disagree that where either of these tests are applied, a Citizenship Judge is indeed required to make a threshold determination as to whether an applicant has in fact established residency in Canada before applying the qualitative test chosen by the Judge.

[22] There is some question in the jurisprudence as to whether the two-stage inquiry is required in cases where the physical presence test for residency is being applied. I do not need to resolve that question in this case, however. There is no dispute that, regardless of whether he had established his residence in Canada, Mr. Elderaidy did not come close to satisfying the physical presence test for residency for the purposes of the *Citizenship Act*. As a consequence, any error

that may have been committed by the Citizenship Judge in this regard could not have affected the outcome of Mr. Elderaidy's citizenship application.

III. **Conclusion**

[23] For these reasons, Mr. Elderaidy has not persuaded me that the Citizenship Judge's decision was unreasonable. As a result, his appeal is dismissed.

IV. **Certification**

[24] The respondent proposes a question for certification relating to the need for a two-stage inquiry in cases where the physical presence test for residency is used. Mr. Elderaidy does not oppose certification of this question. As explained above, however, I have not found it to be necessary to finally decide this question for the purposes of this case. As a result, the answer to the respondent's question would not be determinative of the outcome of the appeal and the question is thus not appropriate for certification in this case.

<u>JUDGMENT</u>

THIS COURT'S JUDGMENT is that:

1. The appeal is dismissed.

"Anne L. Mactavish"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1860-15
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