Federal Court  Cour fédérale

Date: 20171213

Docket: T-845-12

Citation: 2017 FC 1141

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Montréal, Quebec, December 13, 2017

PRESENT: The Honourable Mr. Justice Gascon

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

MOHAMMED JOUADE GHARBI

Respondent

JUDGMENT AND REASONS

(Reasons for Judgment delivered orally from the bench on December 13, 2017, at Montréal)

I. Background

[1] This is an appeal by the Minister of Citizenship and Immigration [Minister] of a decision [Decision] rendered in March 2012 by a citizenship judge, in which the judge granted Canadian

citizenship to the respondent, Mohammed Jouade Gharbi, pursuant to paragraph 5(1)(c) of the *Citizenship Act*, RSC, 1985, c. C-29 [the Act]. The Minister submits that the citizenship judge made an error in her Decision that warrants this Court's intervention by failing to specify the residency test used to grant Mr. Gharbi Canadian citizenship and by misinterpreting the requirements for residency in Canada set out in the Act. The Minister is therefore asking the Court to overturn the Decision and to refer Mr. Gharbi's citizenship application to a different citizenship judge for reconsideration.

[2] Mr. Gharbi was not authorized to appear in this appeal or to make arguments in writing or at the hearing, either personally or through counsel, because of two prior orders issued by the Court, in October 2012 and in August 2017, refusing to grant Mr. Gharbi an extension of time to serve and file his notice of appearance and his reply record.

II. Analysis

[3] It is well established that the standard of review that applies to decisions made by citizenship judges on whether the residency requirement has been satisfied and on the appropriate test for that purpose is that of reasonableness (*Haba v. Canada (Citizenship and Immigration)*, 2017 FC 732 [*Haba*] at paragraphs 11–12; *Canada (Citizenship and Immigration) v. Samaroo*, 2016 FC 689 at paragraphs 10–15; *Lally v. Canada (Citizenship and Immigration)*, 2016 FC 688 at paragraphs 10–11). Where the standard of reasonableness applies, the Court must show deference and refrain from substituting its own opinion for that of the decision-maker, provided that the decision is justified, transparent, and intelligible, and that it falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts

and law" (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at paragraph 47). The reasons for a decision are considered to be reasonable "if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses*] at paragraph 16).

[4] In his submissions, the Minister argues in particular that the citizenship judge made an unreasonable decision by failing to specify the test she used to determine whether Mr. Gharbi had satisfied the residency requirement set out in the Act. I agree with the Minister's submissions in this regard.

[5] It is well accepted that citizenship judges can choose to apply any of three tests to grant an applicant Canadian citizenship (*Haba* at paragraphs 17–18). These tests are: (i) the test set out in *Re Pourghasemi*, [1993] FCJ No. 232 (QL) [*Pourghasemi*], whereby residency is determined based on a strict calculation of the number of days the applicant was actually in Canada (which must be at least 1,095 days of residency during the four years preceding the application); (ii) the test set out in *Re Papadogiorgakis*, [1978] 2 FC 208, which is more flexible and recognizes that a person may have resided in Canada even if he or she was temporarily absent, so long as he or she maintained solid ties with Canada and a lifestyle that reflected an intention to settle permanently in the country; or (iii) the test set out in *Re Koo*, [1993] 1 FC 286, which defines residence as the place where a person "regularly, normally or customarily lives" and the place where he has "centralized his existence." The last two tests are often described as qualitative tests, as opposed to the quantitative test in *Pourghasemi*.

[6] Even though case law grants citizenship judges the discretion to choose from these three tests to assess whether the residency requirement has been satisfied, the judges must, at a minimum, indicate which of these tests was used and why it was or was not satisfied (*Canada (Citizenship and Immigration) v. Bayani*, 2015 FC 670 [*Bayani*] at paragraphs 30–31). The failure to do so constitutes a reviewable error (*Canada (Citizenship and Immigration) v. Lin*, 2016 FC 58 at paragraphs 12–13). Therefore, the citizenship judge had to clearly identify the residency test that she chose to assess Mr. Gharbi's application or see her Decision overturned. That is clearly lacking in the Decision.

[7] In the brief supporting reasons set out in an appendix to the Decision, the citizenship judge simply provided a list of documents relating in particular to the loss of Mr. Gharbi's passport, as well as to his notice of assessment and his mortgage loan, following which, she summarily found that Mr. Gharbi met the residency requirements set out in paragraph 5(1)(c) of the Act. The judge also observed that Mr. Gharbi had declared more than 1,095 days of presence in Canada in the four-year period preceding the filing of his citizenship application. However, the Decision does not specifically or implicitly address any of the tests recognized in the jurisprudence, and the judge did not offer any indication of the residency test applied in her reasons. Rather, she stated only that the documents filed were conclusive and that Mr. Gharbi had met [TRANSLATION] "that requirement" on a balance of probabilities. The Decision lacks any analysis, and it is impossible to establish, in any manner whatsoever, a connection between the reasons set out by the Judge and any of the three residency tests. That is enough, in my opinion, to push the Decision outside the range of possible, acceptable outcomes, and to allow the Minister's appeal.

[8] Certainly, I acknowledge that the reasons for an administrative tribunal's decision do not have to be exhaustive, and that they must simply be understandable. However, to remain in the spectrum of reasonableness, a decision must still be intelligible and transparent, and the reasons must enable the reviewing court "to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland Nurses* at paragraph 16). I must find that such is not the case here.

[9] However, the analysis of the Decision's reasonableness does not end with the decision itself, and the Court may also review the citizenship judge's notes, as well as the record as a whole, to identify any reasoning that was not conveyed in the Reasons. In *Newfoundland Nurses*, the Supreme Court invites reviewing courts to undertake this exercise before finding that a decision is unreasonable. I would add that, in *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47 [*City of Edmonton*], the Supreme Court pushed this even further by stating that a reviewing court can consider reasons *which could be offered* in support of a decision in order to establish its reasonableness (*City of Edmonton* at paragraphs 36–38). The Federal Court of Appeal recently reiterated in *Canada (Transport) v. Canadian Union of Public Employees*, 2017 FCA 164 [*CUPE*] that a reviewing court must consider not only the reasons given by the decision-maker, but also the record before the decision-maker. Moreover, "for a decision to be upheld as being reasonable, it may not even be necessary for the decision-maker to have provided any reasons at all if the record allows the reviewing court to discern how and why the decision was reached and the decision-maker's conclusion is defensible in light of the facts and applicable law" (*CUPE* at paragraph 32). That said, the fact remains that the record must, at a minimum, contain evidence that allows the reviewing court to identify how and why

the decision-maker's finding is defensible with respect to the facts and law (*City of Edmonton* at paragraph 38; *CUPE* at paragraph 32; *Benko v. Canada (Citizenship and Immigration)*, 2017 FC 1032 at paragraph 35).

[10] Moreover, the Court is not expected to look to the record to fill in gaps to the extent that it rewrites the reasons (*Canada (Citizenship and Immigration) v. Safi*, 2014 FC 947 at paragraph 18; *Canada (Citizenship and Immigration) v. Abdulghafoor*, 2015 FC 1020 at paragraph 18). In fact, allowing the analysis of the record is not the same as granting the reviewing court the authority to re-examine the evidence and substitute itself for the decision-maker. On the contrary, the Supreme Court has noted time and again that this is not the role of the reviewing courts in an application for judicial review (*Newfoundland Nurses* at paragraph 17; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at paragraphs 59, 61). With respect to citizenship decisions, if the only way to understand the citizenship judge's reasons is to conduct a *de novo* examination of the record, "the decision is not likely to meet the requirements for transparency, justification and intelligibility" (*Bayani* at paragraph 36; *Canada (Citizenship and Immigration) v. Golafshani*, 2015 FC 1136 at paragraph 12; *Korolove v. Canada (Citizenship and Immigration)*, 2013 FC 370 at paragraphs 46–47).

[11] In Mr. Gharbi's case, I am not satisfied that the record can rescue the Decision. Even though it is extensive at over 240 pages, the record does not allow me to discern which of the three tests was used to anchor the Decision. Even after examining the record in detail, I do not see any evidence that could establish the residency test on which the citizenship judge based her Decision. It is also impossible for me to identify an analytical test on the basis of logical

inferences that I could attribute to the judge (*Canada (Citizenship and Immigration) v. Suleiman*, 2015 FC 891 at paragraph 39; *Komolafe v. Canada (Citizenship and Immigration)*, 2013 FC 431 at paragraph 10). In fact, in my opinion, the record obscures the citizenship judge's Decision more than it clarifies it, given that not only does the evidence fail to reveal the test the judge might have applied, but, in many respects, it indicates many gaps in Mr. Gharbi's residency and establishment in Canada.

[12] Since it is not possible, from the reasons for the Decision or from the record, to determine with any degree of precision which residency test the citizenship judge applied, I cannot understand the basis of the judge's conclusion or determine whether it is a possible, acceptable outcome under the circumstances.

[13] I recognize that an imperfect decision may sometimes, nevertheless, be reasonable. But, as liberal as it may be, the recent Supreme Court jurisprudence does not authorize the reviewing court to go so far as to uphold a decision that lacks justification, transparency and intelligibility. That is the case here. It is also not for the Court to guess what the citizenship judge might have wanted to say, to speculate on what she might have been thinking, or to rewrite the reasons that are lacking from the Decision and the record (*Bayani* at paragraph 32). That is an exercise for the decision-maker to undertake, on the basis of his or her specialized expertise, and deference therefore requires that the Decision be referred back to another citizenship judge for the purpose of undertaking that exercise.

III. Conclusion

[14] For all these reasons, the Minister's appeal is allowed, the Decision of March 2012 granting Mr. Gharbi Canadian citizenship is overturned, and Mr. Gharbi's citizenship application is referred back to the Minister for reconsideration by a different judge. The Minister did not propose any serious questions of general importance, and I agree that there are none in this case.

JUDGMENT in T-845-12

THIS COURT'S JUDGMENT is that:

1. The appeal is allowed, without costs;

2. The Decision of the citizenship judge dated March 2, 2012, granting Mr. Gharbi Canadian citizenship is quashed;

3. Mr. Gharbi's citizenship application is referred back to the Minister for reconsideration by a different judge;

4. No serious question of general importance is certified.

"Denis Gascon"
Judge

Certified true translation
This 1st day of October, 2019

Lionbridge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-845-12
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION v. MOHAMMED JOUADE GHARBI
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	DECEMBER 13, 2017
REASONS FOR JUDGMENT BY:	GASCON J.
DATED:	DECEMBER 13, 2017

APPEARANCES:

Émilie Tremblay	FOR THE APPLICANT

SOLICITORS OF RECORD:

Attorney General of Canada Montréal, Quebec	FOR THE APPLICANT