Federal Court  Cour fédérale

Date: 20101102

Docket: T-627-10

Citation: 2010 FC 1073

[UNREVISED CERTIFIED TRANSLATION]

Ottawa, Ontario, November 2, 2010

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

WADAD ABOU-ZAHRA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant is appealing the decision accepting the citizenship application of Wadad Abou-Zahra (Citizenship Record 3456333), issued on February 24, 2010, by Citizenship Judge Gilles Duguay.

[2] On April 22, 2010, the Minister filed a notice of application against this decision under section 21 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, subsection 14(5) of the *Citizenship Act*, R.S.C. 1985, c. C-29 (the Act) and paragraph 300(*c*) of the *Federal Courts Rules*, SOR/98-106.

[3] Ms. Abou-Zahra did not appear on this application either in person or through counsel, despite being personally served on April 23, 2010. Consequently, the facts are taken from the Minister's memorandum of fact and law.

Facts

[4] Ms. Wadad Abou-Zahra is a citizen of Lebanon. She became a permanent resident on December 14, 1990, and applied for citizenship on December 14, 2007.

[5] Since 1990, she has been living with her husband and adolescent son in the basement of her niece's home in the province of Quebec. However, she owns a home in Lebanon. Her son was born in Lebanon in 1995. Ms. Abou-Zahra's husband did not apply for citizenship because of numerous trips: he is self-employed in the import/export field.

[6] On July 15, 2009, a request to provide complete copies of all passports issued and to fill out the citizenship questionnaire was sent to Ms. Abou-Zahra. Since she failed to respond to this request within 20 days, her file was referred to a citizenship judge.

[7] On February 3, 2010, Ms. Abou-Zahra explained this omission to a citizenship officer by saying that she was in Lebanon when the letter was sent. Then, she also stated that she had not lived in Canada since July 2009. She only returned to Canada on January 31, 2010, three days before the hearing scheduled for February 3, 2010. At the hearing, the citizenship judge gave Ms. Abou-Zahra an additional 20 days to produce the required documents.

[8] Ms. Abou-Zahra filed a relatively large amount of documentary evidence in support of her application.

[9] The citizenship judge accepted Ms. Abou-Zahra's citizenship application on February 24, 2010, but the only reasons given were in a brief paragraph included in the form Notice to the Minister of the Decision of the Citizenship Judge.

[10] The Minister challenges the legitimacy of this decision on the basis that the evidence disclosed an insufficient presence in Canada as well as discrepancies in the evidence adduced. The Minister also alleges that the reasons for the decision were inadequate having regard to paragraph 5(1)(*c)* of the Act and that the decision did not take into account the consideration of the evidence. The Minister submits that the citizenship judge applied a lower requirement than the one set out in the Act.

Impugned decision

[11] The handwritten reasons for the impugned decision read as follows:

[TRANSLATION]

> I gave the applicant a residence questionnaire and a period of 20 days to allow me to decide on 5(1)(c). [Illegible] after examining today 24/02/2010 all the supplementary evidence about residence that I was given, on a balance of probabilities, it appears that the applicant established and maintained her residence in Canada during the critical period (2003-2007). I approve her citizenship application. [Notice to the Minister of the Decision of the Citizenship Judge]

[12] The Minister submits that the citizenship judge's decision was unreasonable because he made at least three reviewable errors:

a. He did not identify the legal test he relied on to determine whether the applicant had satisfied the residence requirements, nor did he state whether he applied any test to a specific series of facts;

b. He did not give reasons in support of his decision that demonstrate that he correctly included, analyzed, considered or weighed all the documentary evidence that was provided to him;

c. He erred in law by applying a lower requirement than the one mandated by the Act.

Relevant statutory provisions

[13] The following provisions of the *Citizenship Act* apply 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 *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:	*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:

(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,

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

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).	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.
. . .	…
Consideration by citizenship judge	Examen par un juge de la citoyenneté
. . .	…
Appeal	Appel
14. (5) The Minister or the applicant may appeal to the Court from the decision of the citizenship judge under subsection (2) by filing a notice of appeal in the Registry of the Court within sixty days after the day on which	**14.** (5) Le ministre et le demandeur peuvent interjeter appel de la décision du juge de la citoyenneté en déposant un avis d'appel au greffe de la Cour dans les soixante jours suivant la date, selon le cas:
(*a*) the citizenship judge approved the application under subsection (2); or	*a*) de l'approbation de la demande;
(*b*) notice was mailed or otherwise given under subsection (3) with respect to the application.	*b*) de la communication, par courrier ou tout autre moyen, de la décision de rejet.
. . .	…

Issues

[14] The following issues are raised in this application for judicial review:

a. Did the citizenship judge err by finding that the application satisfied the conditions in paragraph 5(1)(*c*) of the Act ?

b. Are the citizenship judge's reasons for decision adequate?

Standard of review

[15] The Minister submits that even though subsection 14(5) of the Act refers to the possibility of an "appeal", it is settled law that what this involves in reality is a judicial review, which attracts a reasonableness standard. In *Pourzand v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 395, [2008] F.C.J. No. 485, at paragraph 19, Mr. Justice Russell of this Court considered the applicable standard of review for a citizenship judge's finding as to whether a person applying for citizenship meets the residence requirement:

> [19] 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). In light of the Supreme Court of Canada's recent decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9 [*Dunsmuir*], wherein the Court collapsed this standard and the patent unreasonableness standards into one standard of reasonableness, I find that the applicable standard of review as regards the Citizenship Judge's determination of whether the Applicant met the residency requirement is reasonableness.

[16] However, the lack of adequate reasons to support the decision is a procedural fairness issue. As this Court has repeatedly stressed, where the Court is seized with a procedural fairness or natural justice issue, the appropriate standard of review is correctness (see *Chowdhury v. Canada (Minister of Citizenship and Immigration*), 2009 FC 709, [2009] F.C.J. No. 875, at paragraph 29).

Analysis

[17] In this case, the designated period is between December 14, 2003, and December 14, 2007. During these four years immediately preceding her application for citizenship, Ms. Abou-Zahra alleges that she spent a total of 109 days outside of Canada and 1,351 days in Canada.

[18] The legal test that applies on citizenship appeals is set out in subsection 5(1) of the Act. However, the term "residence" is not defined. As Madam Justice Tremblay-Lamer explained clearly in *Mizani v. Canada (Minister of Citizenship and Immigration*) 2007 FC 698, [2007] F.C.J. No. 947, at paragraphs 10-13, the jurisprudence of this Court has interpreted the term "residence" in three different ways:

> [10] . . . This Court's interpretation of "residence" can be grouped into three categories. The first views it as actual, physical presence in Canada for a total of three years, calculated on the basis of a strict counting of days (*Pourghasemi (Re)*, [1993] F.C.J. No. 232 (QL) (T.D.)). A less stringent reading of the residence requirement recognizes that a person can be resident in Canada, even while temporarily absent, so long as he or she maintains a strong attachment to Canada (*Antonios E. Papadogiorgakis (Re)*, [1978] 2 F.C. 208 (T.D.). A third interpretation, similar to the second, defines residence as the place where one "regularly, normally or customarily lives" or has "centralized his or her mode of existence" (*Koo (Re)*, 1992 CanLII 2417 (F.C.), [1993] 1 F.C. 286 (T.D.) at para. 10).

> [11] I essentially agree with Justice James O'Reilly in *Nandre*, above, at paragraph 11 that the first test is a test of physical presence, while the other two tests involve a more qualitative assessment:
>
> > Clearly, the Act can be interpreted two ways, one requiring physical presence in Canada for three years out of four, and another requiring less than that so long as the applicant's connection to Canada is strong. The first is a physical test and the second is a qualitative test.
>
> [12] It has also been recognized that any of these three tests may be applied by a Citizenship Judge in making a citizenship determination (*Lam v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 410 (T.D.) (QL)). For instance, in *Hsu v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 579, [2001] F.C.J. No. 862 (QL), Justice Elizabeth Heneghan at paragraph 4 concludes that any of the three tests may be applied in making a residency determination:
>
> > The case law on citizenship appeals has clearly established that there are three legal tests which are available to determine whether an applicant has established residence within the requirements of the Citizenship Act (...) a Citizenship Judge may adopt either the strict count of days, consideration of the quality of residence or, analysis of the centralization of an applicant's mode of existence in this country.
> >
> > [Citations omitted]
>
> [13] While a Citizenship Judge may choose to rely on any one of the three tests, it is not open to him or her to "blend" the tests (*Tulupnikov*, above, at para. 16).

[19] However, it should be noted that recently the jurisprudence of this Court on this issue was clarified following the decision of Mr. Justice Mainville in *Canada (Minister of Citizenship and Immigration) v. Takla*, 2009 FC 1120, 2009 F.C.J. No. 1371 and the decision of Mr. Justice Zinn in *Canada (Minister of Citizenship and Immigration) v. Elzubair*, 2010 FC 298, 2010 F.C.J. No. 330. I agree with those decisions.

[20] Thus, as Justice Zinn explained in *Elzubair*, where a citizenship judge finds that an applicant was physically present in Canada for at least 1,095 days—the required minimum period—residence is proven, and resort to the more contextual *Koo* test is unnecessary: *Koo (Re)* (T.D.) [1992] F.C.J. No. 1107, [1993] 1 F.C. 286. The *Koo* test need only be relied on where the applicant has been resident in Canada but has been physically present in Canada for less than 1,095 days. In that situation, citizenship judges must apply the *Koo* test to determine whether the applicant was resident in Canada, even though not physically present here (see also *Canada (The Minister of Citizenship and Immigration) v. Salim*, 2010 FC 975, [2010] F.C.J. No. 1219 (Justice Harrington).

[21] In the case before us, the citizenship judge's decision contains a major shortcoming in that he did not clearly state which test he chose to apply. There is nothing in the brief paragraph of reasons that enables us to identify what the test was.

[22] The Minister also submits that there is no evidence establishing that Ms. Abou-Zahra demonstrated actual physical presence in Canada for a total of three years during the designated period.

[23] To demonstrate an actual physical presence in Canada, Ms. Abou Zahra had to prove that she was present in Canada for at least 1,095 days during the relevant period, failing which her application would be rejected. On this point, the evidence disclosed a contradiction. In her *Application for Canadian Citizenship*, Ms. Abou-Zahra stated that she had been absent from Canada from June 20, 2007, to July 24, 2007; from September 15, 2006, to October 14, 2006; from

August 1, 2004, to September 16, 2004; and from May 22, 2003, to July 15, 2003. In her *Residence Questionnaire* that she filled out and submitted after her hearing, she stated that she had been absent from July 15, 2006, to October 14, 2006, i.e. a difference of two additional months spent outside Canada.

[24] The Minister also submits that, despite the specific request in the letter dated July 15, 2009, Ms. Abou-Zahra did not provide a complete copy of all her passports with all the pages, including the blank pages. Since she had not complied with this request as of the date of the hearing with the citizenship judge, he gave Ms. Abou-Zahra a 20-day extension. The onus was on her to provide sufficient evidence demonstrating that she met the residence criteria in the Act (see *Rizvi v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1641, [2005] F.C.J. No. 2029, at paragraph 21).

[25] On February 16, 2010, Ms. Abou-Zahra finally submitted certain documents, including partial copies of two of her three known passports. As counsel for the Minister correctly notes, it is important to file all the pages of a passport, including the blank pages, so that the decision-maker can ensure that all the entries and exits are clearly indicated in the various questionnaires. The evidence in the record reveals that Ms. Abou Zahra did not submit all the passports. She also provided only partial copies of the passports that were submitted. For instance, the Court notes that the passport issued to her in Beirut, Lebanon, on November 2, 1998—the validity of which was extended to October 20, 2008—has significant parts of pages missing, i.e. pages 6 and 7 and 12 to 43. Also, Ms. Abou Zahra did not mention any absence from Canada prior to 2003 whereas the

evidence indicates that she was absent in 1995 at the very least because she gave birth to her son in Lebanon (Tribunal Record at page 71).

[26] The evidence in the record also establishes that Ms. Abou Zahra's bank account documents show activity for only three of the four months of statements she provided and only on a minimal number of days.

[27] Furthermore, the tax documents Ms. Abou Zahra submitted do not establish her actual residence in Canada. The copies of three cell phone bills and the Visa statements are also incomplete and fragmentary.

[28] In his decision, the citizenship judge did not mention or attempt to explain the contradictions, inconsistencies and omissions that the documentary evidence revealed.

[29] The Court points out that in a recent judgment, *Canada (Minister of Citizenship and Immigration) v. Mahmoud*, 2009 FC 57, [2009] F.C.J. No. 91, at paragraph 6, Mr. Justice Roger Hughes wrote that because the Minister—or a citizenship applicant—has no recourse other than to appeal to the Court and because citizenship must be granted if a citizenship judge makes a favourable recommendation, ". . . the provision of reasons by the citizenship judge assumes a special significance. The reasons should be sufficiently clear and detailed so as to demonstrate to the Minister that all relevant facts have been considered and weighed appropriately and that the correct legal tests have been applied."

[30] After reviewing the evidence and the citizenship judge's reasons for decision, the Court finds that the citizenship judge did not examine, weigh and analyze the evidence, which contained major shortcomings. In these circumstances, his decision is unreasonable and the Court's intervention is warranted. Consequently, the Court allows the appeal.

JUDGMENT

THE COURT ORDERS AND ADJUDGES THAT

1. The appeal is allowed.

2. The matter is remitted to a different citizenship judge for reconsideration.

"Richard Boivin"
Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET:	T-627-10
STYLE OF CAUSE:	MCI v. WADAD ABOU-ZAHRA
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APPEARANCE:

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