Federal Court  Cour fédérale

Date: 20110420

Docket: T-1500-10

Citation: 2011 FC 480

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, April 20, 2011

PRESENT: The Honourable Madam Justice Bédard

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

BRUNO ALAIN GEORGES BARON

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an appeal by the Minister of Citizenship and Immigration (applicant) under subsection 14(5) of the *Citizenship Act*, R.S.C. 1985, c. C-29 (Act), of a decision dated July 20, 2010, by a citizenship judge who approved the respondent's application for Canadian citizenship.

I. Factual background

[2] The respondent is a French citizen. He became a permanent resident of Canada on September 21, 2003. Since 2005, he has resided and worked in France. On September 3, 2008, he sent his application for Canadian citizenship from France. On June 18, 2010, he entered Canada to appear before the citizenship judge at his hearing, which took place on June 22, 2010. During the hearing, the citizenship judge asked the respondent to provide additional information, including the residence questionnaire, which he did.

[3] On July 20, 2010, the citizenship judge approved the respondent's citizenship application. The applicant filed a request for an appeal in accordance with the *Federal Courts Rules*, SOR/98-106 (Rules).

[4] The applicant filed an *ex parte* motion to obtain an order that would permit a special mode of service beyond the prescribed deadline. On October 15, 2010, the Court issued an order to allow this motion and authorized the applicant to serve his notice of application and any other document by regular mail to the respondent's address in Montréal. This order was sent to the respondent at his home address in Montréal, while the notice of application was served on the respondent both at his address in Montréal and at his address in France. The respondent did not appear or file an affidavit or memorandum in his defence as set out by Rules 305, 307 and 310 of the Rules.

[5] The applicant filed a requisition for a hearing pursuant to Rule 314 of the Rules. On March 22, 2011, the Court ordered that the hearing for this matter take place on April 13, 2011, before this Court, in Montréal. The Registry of the Court sent this order to the applicant by priority post on March 23, 2011, again to his Montréal address. The respondent was not present at the hearing. The applicant made oral submissions.

[6] The Court may decide to render a judgment by default when the respondent, on whom proceedings were duly served, does not appear and/or does not produce a defence (*Canada (Minister of Citizenship and Immigration) v. Dhaliwal*, 2008 FC 797, 168 A.C.W.S. (3d) 710 (the respondent did not appear); *Canada (Minister of Citizenship and Immigration) v. Fouodji*, 2005 FC 1327 at paragraph 1, 149 A.C.W.S. (3d) 478). This judgment is therefore rendered by default.

II. Issues

[7] The applicant raised two issues in his appeal. The first concerns the reasonableness of the citizenship judge's decision when he found that the respondent met the conditions set out in paragraph 5(1)(*c*) of the Act, and the second concerns the adequacy of the reasons for the decision, which, I believe, is the determinative issue in this case.

III. Applicable standard of review

[8] The adequacy of reasons is generally viewed from the standpoint of procedural fairness, which requires that the standard of correctness be applied (*Dunsmuir v. New Brunswick*, 2008 SCC

9, [2008] 1 S.C.R. 190; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *Chowdhury v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 709 at paragraph 29, 179 A.C.W.S. (3d) 522; *Andryanov v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 186 at paragraph 15, 308 F.T.R. 292; *Jang v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 486 at paragraph 9, 250 F.T.R. 303; *Adu v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 565 at paragraph 9, 139 A.C.W.S. (3d) 164).

[9] Moreover, it is well established that the decision that determines whether a person has met the residence requirement is a question of mixed fact and law that is subject to the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v. Chang*, 2003 FC 1472 at paragraph 7, 128 A.C.W.S. (3d) 441; *Rizvi v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1641 at paragraph 5, 144 A.C.W.S. (3d) 608; *Chen v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 85 at paragraph 6, 145 A.C.W.S. (3d) 770; *Zhao v. Canada* (*Minister of Citizenship and Immigration*), 2006 FC 1536 at paragraph 39, 306 F.T.R. 206; *Pourzand v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 395 at paragraph 19, 166 A.C.W.S. (3d) 222).

IV. Analysis

[10] In determining whether he should allow the respondent's citizenship application, the citizenship judge had to apply subsection 5(1) of the Act, which stipulates the following:

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 :

. . .	[…]
(*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; […]

[11] In *Vancouver International Airport Authority v. Public Service Alliance of Canada*, 2010 FCA 158 at paragraphs 16 and 17, 320 DLR (4th) 733, the Federal Court of Appeal found that the adequacy of reasons must be evaluated with four purposes in mind, that is, the substantive purpose; the procedural purpose; the accountability purpose; and the "justification, transparency and intelligibility purpose". The substantive purpose refers to the reasoning of the decision-maker. The procedural purpose refers to the fact that the parties must be able to decide whether to invoke their

rights to have the decision reviewed: without bases, it becomes impossible to do so. The accountability purpose refers to the fact that the decision must have enough information so that the supervising court can assess whether the decision meets “minimum standards of legality”. The Federal Court of Appeal specified that this is an important aspect of the rule of law that merits respect. Regarding the “justification, transparency and intelligibility” purpose, it implies that the decision must be “understandable, with some discernable rationality and logic” and that the parties to the proceeding and the public are able to understand the meaning. The Federal Court of Appeal specified that the reasons may be considered sufficient if the administrative decision-maker fulfils them at a minimum.

[12] To meet the requirement of adequate reasons, this Court’s jurisprudence also requires the citizenship judge to demonstrate that he or she has sufficiently analyzed the evidence and considered all important factors. In *Seiffert v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1072, 277 F.T.R. 253, the Court stated the following in this respect at paragraph 9:

> [9] First, I agree with Justice Snider's conclusion that a citizenship appeal can be granted for failure to provide a proper analysis of the evidence. I consider this requirement of a citizenship judge to be a fundamental part of the duty of fairness. Second, I accept the proposition advanced by the Respondent that there is no hard and fast rule that important factors have to addressed in the manner and order which Justice Reed suggests, but, nevertheless, the decision must leave no doubt that all important relevant factors were addressed in reaching the decision. . . .

[13] In *Canada (Minister of Citizenship and Immigration) v. Jeizan*, 2010 FC 323 at paragraphs 17 and 18 (available on CanLII), the Court specified what constituted adequate reasons

for a decision and determined that the reasons had to state the tests used to establish whether the person applying for citizenship had fulfilled his or her legal residence requirement:

> [17] Reasons for decisions are adequate when they are clear, precise and intelligible and when they state why the decision was reached. Adequate reasons show a grasp of the issues raised by the evidence, allow the individual to understand why the decision was made and allow the reviewing court to assess the validity of the decision: see *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] S.C.J. No. 23 at para. 46; *Mehterian v. Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 545 (F.C.A.); *VIA Rail Canada Inc. v. National Transportation Agency*, [2001] 2 F.C. 25 (F.C.A.), [2001] 2 F.C. 25 (C.A.), at para. 22; *Arastu*, above, at paras. 35-36.
>
> [18] At the very least, the reasons for a Citizenship Judge's decision should indicate which residency test was used and why that test was or was not met: see *Canada (Minister of Citizenship and Immigration) v. Behbahani*, 2007 FC 795, [2007] F.C.J. No. 1039 at paras. 3-4; *Eltom v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1555, [2005] F.C.J. No. 1979 at para. 32; *Gao v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 605, [2003] F.C.J. No. 790 at para. 22; *Gao v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 736, [2008] F.C.J. No. 1030 at para. 13.

[14] This Court's jurisprudence, which has evolved with respect to interpreting the residence requirement set out in paragraph 5(1)(*c*) of the Act, traditionally recognized that there were three different methods of analysis and that the citizenship judge could accept any one of them. The three methods of analysis were stated as follows in *Mizani v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 698, at paragraphs 10 to 13, 158 A.C.W.S. (3d) 879:

> [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)*, [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).

[15] Despite an attempt by Justice Mainville (then of the Federal Court) to standardize the case law by recognizing only one method of analysis in *Canada (Minister of Citizenship and Immigration) v. Takla*, 2009 FC 1120, 359 F.T.R. 248, several judges of this Court continue to

recognize that citizenship judges may apply one of the three traditionally recognized methods of analysis (see *Hao v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 46 (available on CanLII); *El-Khader v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 328 (available on CanLII) and *Alinaghizadeh v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 332 (available on CanLII), which outline the current state of the jurisprudence). Therefore, a citizenship judge may use the method he or she deems appropriate insofar as he or she shows the logical progression that was followed.

[16] In this case, the citizenship judge's decision is limited to one single paragraph of five lines written by hand and inserted into the "Notice to the Minister" form, which reads as follows:

> [TRANSLATION]
>
> I gave a residence questionnaire to the applicant, giving him 20 days (14.7) to provide additional evidence of his residence in Canada. Mr. Baron provided me with additional evidence of his establishment in Canada. On a balance of probabilities, Mr. Baron established and maintained his residence in Canada for the necessary period and met the requirements of 5(1) of the Act.

[17] The citizenship judge did not indicate the method and the tests he used to determine that the respondent had met his residence requirement. The onus that was on the judge to provide adequate reasons for his decision and explain why he found that the respondent had met his residence requirement was even greater because the evidence submitted by the respondent contained significant omissions and contradictions. However, he made no reference to the contradictions or omissions raised by the applicant, or to the content of the questionnaire or the citizenship application, which raises doubt as to whether he considered all of the relevant factors in his analysis.

[18] The reasons for the citizenship judge’s decision are not adequate. The reasoning is unclear. The decision is not transparent and it is impossible to understand its basis. Given this situation, I am not in a position to determine whether it falls within a range of possible, acceptable outcomes in respect of the facts and law. The intervention of the Court is therefore warranted.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the appeal is allowed. The decision dated July 20, 2010, by the citizenship judge Gilles H. Duguay to grant citizenship to the respondent is set aside and the matter is referred back to another citizenship judge for redetermination in accordance with these reasons.

"Marie-Josée Bédard"
Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1500-10
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The respondent was absent.	FOR THE RESPONDENT

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