Federal Court  Cour fédérale

Date: 20110318

Docket: T-1237-10

Citation: 2011 FC 332

Ottawa, Ontario, March 18, 2011

PRESENT: The Honourable Justice Johanne Gauthier

BETWEEN:

ROBABEH ALINAGHIZADEH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mrs. Robabeh Alinaghizadeh contests the validity of the decision of a Citizenship Judge denying her application for citizenship pursuant to subsection 14(5) of the *Citizenship Act*, RS 1985, c C-29 (the *Act*). Like many recent decisions, this application raises the issue of which test should be applied to establish residency under paragraph 5(1)(*c*) of the *Act*.

I. Background

[2] The Applicant is a fifty-seven year old citizen of Iran. She came to Canada on July 17, 1992 and became a permanent resident on that date. Her husband, Mr. Seyed Hossein Montazemi-Safari and their three children have all obtained Canadian citizenship years ago.

[3] For reasons unexplained, the Applicant waited many years to apply for Canadian citizenship. She applied for Canadian citizenship on September 7, 2006 and at that time alleged that she had been outside Canada for 166 days (allegedly five trips) out of the four years preceding her application (September 7, 2002 to September 7, 2006).

[4] In her Residence Questionnaire dated April 4, 2007, she alleged that she was outside Canada for 164 days (still five trips), and she provided some supporting documentation.

[5] She was issued a Notice to Appear on February 9, 2010 and effectively appeared before a Citizenship Judge on March 2, 2010. At the said interview, although this is disputed, she was accompanied by her son-in-law (Hossien Montazemi-Safari) who, according to the Respondent, acted as her interpreter.

[6] At the conclusion of the hearing, the Citizenship Judge requested that the Applicant provide additional supporting documents and complete another Residence Questionnaire. It appears from a handwritten note on pages 19 and 32 of the Respondent's Record that the Applicant understood that

she had to establish her physical presence in Canada albeit she appears to have misunderstood the number of days required pursuant to paragraph 5(1)(*c*) of the *Act* (900 days instead of 1095).

[7] On March 17, 2010 she provided additional information and in her Residence Questionnaire she claimed that she was only absent from Canada for 142 days (four trips).

[8] On June 1, 2010, the Applicant was informed by letter that her application for citizenship had been denied because she did not meet the requirements of paragraph 5(1)(*c*) of the *Act* (the relevant provisions of the *Act* are reproduced in Annex A). The letter also mentions, among other things, that at the hearing the Citizenship Judge had requested that she provide additional documents because he was not satisfied by those already submitted, and that unfortunately these documents were not found to be sufficient to meet her burden of establishing the residence requirement.

II. Issues

[9] The Applicant raises three issues:

i. The decision maker breached procedural fairness by refusing her the right to be assisted by a family member, who would act as an interpreter during the hearing.

ii. The decision maker breached his duty to provide the Applicant with proper and sufficient reasons, particularly because he failed to consider the totality of the documentation submitted by the Applicant.

iii. The decision maker erred in failing to apply the qualitative test set out in *Koo (Re)*, [1993] 1 FC 286.

[10] At the hearing, the Applicant's counsel attempted to raise a new argument, specifically, that even if the Citizenship Judge was entitled to apply the physical presence test set out in *Pourghasemi (Re)*, (1993) 62 FTR 122, Imm LR (2d) 259, his decision is unreasonable given that the Applicant

had established that she was in Canada more than 1095 days. The Applicant also sought leave to testify *viva voce* on the issue of the lack of an interpreter. The Respondent rightly raised an objection since neither this argument, nor the evidence alluded to by the Applicant's counsel at the beginning of the hearing was included in the record. Both requests were refused as there was no explanation as to why the Applicant failed to seek leave to file a reply affidavit or additional submission. Then, the Applicant verbally requested an adjournment and the right to file new evidence and an amended Application Record. This request was denied for various reasons, including that no explanation was given for the failure to raise these issues earlier.

III. Analysis

[11] At the hearing the Applicant's counsel acknowledged that there was absolutely no evidence in support of the first issue, for the Applicant's affidavit does not mention anything about the alleged refusal and the lack of interpretation. Moreover, the Respondent relies on the Interpreter's oath signed by the Applicant's son-in-law at the beginning of the interview and on the notes of the Citizenship Judge which state that the Applicant's son-in-law acted as an interpreter because she could not communicate correctly in either official language (free translation of notes, p. 12 of the Respondent's Record).[1] Nevertheless, the Applicant's counsel still insisted that the Court consider his argument.

[12] Obviously in the circumstances, there is not much to say except that the Applicant has failed to establish the factual background in support of this alleged breach of procedural fairness. In fact, it appears that the Applicant did indeed have the interpretation assistance of Mr. Montazemi-Safari.

[1] The decision maker also mentions that as the Applicant was more than 55 years old she was not required to pass an evaluation of her language skills or her knowledge.

[13] With respect to the second issue, the Applicant relies on subsection 14(3) of the *Act* which mandates that the "judge shall forthwith notify the applicant of his decision, of the reasons therefor and of the right to appeal."

[14] It is not disputed that the Applicant never requested further reasons from the Citizenship Judge after receiving the letter of denial, dated June 1, 2010. It also appears from the Respondent's Record that on April 28, 2010, the Citizenship Judge wrote detailed notes supporting his decision in which he reviews in sixteen paragraphs all the documentation provided by the Applicant. In the said notes, the Citizenship Judge indicates that the Applicant had to establish on the balance of probabilities that she meets the criteria set out in the *Act* particularly paragraph 5(1)(*c*). He also mentions that the Applicant had not provided sufficient documentation to support her declarations of residence in Canada for the applicable period. She had not submitted the totality of documents he had requested during the March 2, 2010 interview. He adds that overall, the evidence remained insufficient and that many questions raised were still unanswered and weighed heavily on the credibility of Mrs. Alinaghizadeh.

[15] The Citizenship Judge then reiterates that he has not been convinced on a balance of probabilities that the Applicant really resided in Canada for the 1318 days she declared in her last Residence Questionnaire without concrete evidence, particularly in respect of the dates of absence and other errors in her previous declarations for which no explanation or little explanation was provided. Finally, he notes that "considering the number of days where the residence of Mrs. Alinaghizadeh is still approximate, if one does not take into consideration the overall period not

truly justified, Mrs. Alinaghizadeh does not meet the conditions for the grant of citizenship under paragraph 5(1)(*c*) of the *Act*" (free translation of last paragraph on p. 14 of the Respondent's Record).

[16] The Applicant had a copy of those notes well before she filed her Application Record.

[17] Like any other breach of procedural fairness, the question of whether or not the Citizenship Judge gave adequate reasons is reviewable on a standard of correctness (*Dunsmuir v New Brunswick*, 2008 SCC 9; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43).

[18] In *Vancouver International Airport Authority v Public Service Alliance of Canada*, 2010 FCA 158 (recently followed in *Holmes v Canada (Public Safety and Emergency Preparedness)*, 2011 FC 112 at para 43), the Federal Court of Appeal reviewed the caselaw on the adequacy of reasons since *VIA Rail Canada v National Transportation Agency*, [2001] 2 FC 25 (CA) to distill the fundamental principles and the purposes involved. There is no doubt that the letter of June 1, 2010 read together with the notes of April 28, 2010 meets all the requirements described by the Federal Court of Appeal (paragraphs 16-17). As mentioned by the Court (para 17(a)), the written reasons given form part of a broader context and may be amplified and clarified by extraneous material such as the notes of April 28, 2010.

[19] However, in my view, the Citizenship Judge should have sent a copy of his notes with the letter of June 1, 2010 for one cannot circulate two sets of reasons for the same decision – notes sent

to the Minister with the Notice to the Minister form and the letter sent to the Applicant. That said, the Applicant did receive a copy of these notes on or about August 13, 2010 when the Certified Record was transmitted to her in accordance with Rule 318.[2] She had ample time to consider these notes before she filed her Application Record in November 2010. She knows how the documentation she provided was dealt with by the decision maker.

[20] In the present circumstances, considering among other things that the Applicant duly filed her appeal and that she and the Court now have sufficient information to assess whether the decision meets the standard of reasonableness, including the need to provide justification, transparency and intelligibility, the Court is not willing to quash the decision on the basis that these notes were not attached to the June 1, 2010 letter.

[21] As in *Dachan v Canada (Citizenship and Immigration)*, 2010 FC 538 at para 13, the Court is satisfied that this "technical" breach of procedural fairness simply has no possible material effect on the decision, on the Applicant's resolve to appeal it or on her ability to contest it.

[22] Thus, the Court will proceed to examine the reasonableness of the decision based on the reasons set out in the aforementioned letter and the notes of April 28, 2010.

[23] In respect of the transparency, intelligibility and justification aspect of the reasonableness standard, the Court cannot agree with the Applicant that the Citizenship Judge does not clearly indicate which test he used to assess whether she met the requirements of paragraph 5(1)(*c*) of the *Act*.

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[2] Respondent's Record, Tab A, para. 4.

[24] In fact, it was so clear at all times that he used the quantitative test of physical presence in Canada that the Applicant contested his right to apply such test instead of the qualitative test set out in *Koo (Re)*, above, and *Papadogiorgakis (Re)*, [1978] 2 FC 208 (TD). The Applicant also argues that he should have applied the *Koo (Re)* test once he came to the conclusion that she did not meet the quantitative test. Moreover, as mentioned earlier, it appears that after her interview, the Applicant knew that she had to establish her physical presence in Canada (Respondent's Record, p. 19 and 32).

[25] Turning to the third and final issue which is really the core of this proceeding, the Court has examined very closely all the authorities submitted by the parties, in light of the different views recently expressed in *Canada (Citizenship and Immigration) v Takla*, 2009 FC 1120[3] and in *Hao v Canada (Citizenship and Immigration)*, 2011 FC 46.[4]

[26] In *Takla*, as has been done by many judges for more than a decade, Justice Robert Mainville (as he then was) expressed the Court's frustration that the use of different tests, to assess whether or not a permanent resident meets the residence requirement set out in the *Act*, creates what another Judge described as an intolerable situation. In effect, the privilege sought (citizenship) may be

[3] The following post-*Takla* decisions either endorsed *Takla* or applied the *Koo (Re)* test: *Canada (Minister of Citizenship and Immigration) v Elzubair*, 2010 FC 298; *Canada (Minister of Citizenship and Immigration) v Cobos*, 2010 FC 903; *Canada (Minister of Citizenship and Immigration) v Salim*, 2010 FC 975; *Canada (Minister of Citizenship and Immigration) v Emmanuel Manas*, 2010 FC 1056; *Canada (Ministre de la Citoyenneté & de l'Immigration) c Abou-Zahra*, 2010 CF 1073; *Dedaj v Canada (Minister of Citizenship and Immigration)*, 2010 FC 777; *Ghaedi v Canada (Minister of Citizenship and Immigration)*, 2011 FC 85.

[4] The following post-*Takla* decisions permitted the Citizenship Judges a choice of which test to apply: *Shubeilat c Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2010 CF 1260; *Cardin v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 29, *Canada (Citizenship and Immigration) v Jeizan*, 2010 FC 323; *Shaikh v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1254; *Abbas v Canada (Minister of Citizenship and Immigration)*, 2011 FC 145; *Debai c Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2011 CF 146.

granted to one person while denied to another in identical circumstances, depending on which of two or three "reasonable" interpretations of the *Act* is chosen by the Citizenship Judge reviewing the file.

[27] In an obvious attempt to find a solution to the aforementioned situation, Justice Mainville, after essentially stating that, in his view, the proper and correct interpretation of paragraph 5(1)(*c*) of the *Act* requires physical presence in Canada for at least 1095 days, went on to conclude that the test in *Koo (Re)* (presumed to be the dominant test)[5] should nevertheless be the sole standard used to ensure uniformity of the law.

[28] However, it is now clear that Justice Mainville's attempt to redress the situation has not been successful, for in my view it is simply not one that can be solved by this Court alone. This is especially so when one considers, as Justice Richard Mosley did in *Hao*, above, the various decisions issued since *Takla*, above, not to mention those issued since *Hao*.

[29] The principle of judicial comity is not useful or applicable here given the diversity in the reasoning adopted by my colleagues (including that many comments were *obiters*) and the fact that after *Takla* and possibly in response to it, a new Bill to amend the *Citizenship Act* (Bill C-37) was tabled on June 10, 2010. In its current version, this Bill makes it absolutely clear that a permanent

[5] The Respondent pointed out that the Court sees only a fraction of the decisions made by Citizenship Judges and there is no evidence that the *Koo (Re)* test is the predominant test used by the original decision makers despite the form referred to at para 43 of *Takla.*

resident must be physically present in Canada during the period set out in paragraph 5(1)(*c*).[6] Is this a confirmation that this is what Parliament had intended all along?

[30] That said, I find the reasoning of Justice Mosley particularly compelling.[7] Like in *Hao*, above, the parties were agreed that the Court should review this issue on the standard of reasonableness. Similar to Justice Mosley in *Hao* (at para 39), I would have had difficulty finding that this question should be reviewed on a correctness standard. Had it been so, I would have had to request more detailed argumentation. In effect, the exercise of embarking on a full and detailed interpretation of this provision in accordance with the recognized modern approach to statutory interpretation may be warranted given that it appears to have not been done for some time.

[31] Turning back to the reasonableness of the decision before me, it is worth mentioning that in *Smith v Alliance Pipeline*, 2011 SCC 7, the Supreme Court of Canada clearly reminded reviewing courts that:

> Indeed, the standard of reasonableness, even prior to *Dunsmuir*, has always been "based on the idea that there might be multiple valid interpretations of a statutory provision or answers to a legal dispute" such that "courts ought not to interfere where the tribunal's decision is rationally supported" (*Dunsmuir*, at para 41).

[32] This was our highest Court's answer to Alliance Pipeline's argument that the "adoption of the reasonableness standard would offend the rule of law by insulating from review contradictory

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[6] As did Bill C-63, when the decision in *Lam v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 410 (QL) was issued.

[7] The Court generally shares Justice Mainville's views on the need for uniformity, but cannot agree that this is an argument that can trump the factors that the Court must consider when construing a statute (see Elmer A. Driedger, Construction of Statutes, 2d ed (Toronto, Butterworths, 1983), at p. 87; Ruth Sullivan, *Driedger on the Construction of Statutes*, 3d ed (Toronto: Butterworths, 1994) at p. 131).

decisions by Arbitration Committees as to the proper interpretation of s. 99(1) of the [*National Energy Board Act*, RSC 1985, c N-7]" which was under review in that case (para 38).

[33] Like in *Hao*, above, this Court has not been convinced that it is unreasonable for the Citizenship Judge to have applied the physical presence or so-called quantitative test to determine whether Mrs. Alinaghizadeh had established on a balance of probabilities that she meets the requirements of paragraph 5(1)(*c*) of the *Act*. Not only does the Judge's decision in that respect fall within the range of possible, acceptable interpretations of paragraph 5(1)(*c*), it may well be the only correct one. Thus, the Court cannot agree with the Applicant that the decision maker made a reviewable error in failing to apply the *Koo (Re)* test.

[34] As stated by Justice Eleanor Dawson (as she then was) many years ago in *Lin v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 346 at para 22, the incertitude in the law "can only be remedied by Parliament clearly expressing its will with respect to the residency requirement."

[35] As noted, this Court does not have to determine whether it was unreasonable for the Citizenship Judge to conclude that the applicant had not established that she was present for 1095 days. Thus, I will simply say that in light of the findings in respect of the quality of the evidence or lack thereof and the applicant's credibility, it would have been difficult to justify the Court's intervention.

[36] Mrs. Robabeh Alinaghizadeh can make a new application at any time. She now knows how important it is for her to provide sufficient documentation to support such an application. She knows that she must provide probative evidence that will place her in Canada during the whole period required.[8] With a new application, she will not have to face the hurdle of a stolen passport (before October 8, 2003). She will know that she should spare no efforts (money does not appear to be an issue here) to obtain monthly records for the whole period examined as opposed to, for example, a simple letter from her bank stating that she has been a client since 1992 or records covering a very limited period. I have little doubt that if she puts her mind to it and ensures that she takes no more than 90 days of holidays outside of Canada to visit her friends and family per year during the applicable period, she will obtain her Canadian citizenship like the other members of her family.

[37] Considering the legal issue (third issue) raised in this application, no costs shall be awarded.

[8] This evidence would be useful even if a future decision maker applied the *Koo (Re)* test.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed without costs.

"Johanne Gauthier"

Judge

ANNEX A

Citizenship Act (R.S., 1985, c. C-29)	**Loi sur la citoyenneté (L.R., 1985, ch. C-29)**
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	(ii) un jour pour chaque jour de résidence au Canada après son admission à titre de

Canada for permanent residence the person shall be deemed to have accumulated one day of residence;

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.

Consideration by citizenship judge

Examen par un juge de la citoyenneté

14. (1) An application for

14. (1) Dans les soixante jours de sa saisine, le juge de la citoyenneté statue sur la conformité — avec les dispositions applicables en l'espèce de la présente loi et de ses règlements — des demandes déposées en vue de:

(a) a grant of citizenship under subsection 5(1) or (5),

a) l'attribution de la citoyenneté, au titre des paragraphes 5(1) ou (5);

(b) [Repealed, 2008, c. 14, s. 10]

b) [Abrogé, 2008, ch. 14, art. 10]

(c) a renunciation of

c) la répudiation de la

citizenship under subsection 9(1), or

(d) a resumption of citizenship under subsection 11(1)

shall be considered by a citizenship judge who shall, within sixty days of the day the application was referred to the judge, determine whether or not the person who made the application meets the requirements of this Act and the regulations with respect to the application.

…

Notice to applicant

(3) Where a citizenship judge does not approve an application under subsection (2), the judge shall forthwith notify the applicant of his decision, of the reasons therefore and of the right to appeal.

citoyenneté, au titre du paragraphe 9(1);

d) la réintégration dans la citoyenneté, au titre du paragraphe 11(1).

…

Information du demandeur

(3) En cas de rejet de la demande, le juge de la citoyenneté en informe sans délai le demandeur en lui faisant connaître les motifs de sa décision et l’existence d’un droit d’appel.

FEDERAL COURT

SOLICITORS OF RECORD

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