Federal Court Cour fédérale

Date: 20140715

Docket: T-1487-13

Citation: 2014 FC 701

Ottawa, Ontario, July 15, 2014

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

MUHAMMAD AYAZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

INTRODUCTION

[1] This is an appeal under s. 14(5) of the *Citizenship Act*, RSC 1985, c C-29 [Act] of a decision of a Citizenship Judge dated July 8, 2013 [Decision], which refused the Applicant's citizenship application under s. 5(1) of the Act. Under Rule 300(c) of the *Federal Courts Rules*, SOR/98-106, such appeals proceed by way of application and are governed by the *Federal*

Courts Rules pertaining to applications: see *Canada (Minister of Citizenship and Immigration) v Hung*, [1998] FCJ No 1927 at para 8, 47 Imm LR (2d) 182; *Canada (Citizenship and Immigration) v Wang*, 2009 FC 1290 at para 23; *Hao v Canada (Citizenship and Immigration)*, 2011 FC 46 at para 2 [*Hao*].

BACKGROUND

[2] The Applicant is a citizen of Pakistan who became a permanent resident of Canada on October 6, 2004, and applied for citizenship on October 10, 2008. Thus, the four-year period to be considered to determine whether he met the residency requirement set out in s. 5(1)*(c)* of the Act was October 10, 2004 to October 10, 2008, a period of 1460 days [relevant period].

[3] The Applicant employed an immigration consultant to assist with his initial application. He stated in that application that he had spent 1134 days in Canada within the relevant period, surpassing the minimum 1095 days required by the quantitative or “physical presence” test discussed below.

[4] After a year or so without a response, the Applicant says he hired a lawyer to follow up on his citizenship application. He was then asked by Citizenship and Immigration Canada [CIC] to complete a residency questionnaire. His responses on that questionnaire reflected a revised calculation of the days he had spent in Canada. He stated that he spent 1,118 days in Canada during the relevant period, which still exceeded the minimum 1095 days required by the “physical presence” test.

[5] After another year without a response, the Applicant hired another lawyer to follow up on his application, and filed an application with this Court for a mandamus order. He withdrew the mandamus application when a date was set for his interview with a Citizenship Judge.

[6] At the beginning of that interview, on May 16, 2013, the Applicant's counsel submitted an "Updated Calculation of Residency" to the Citizenship Judge. That document showed that he had spent only 711 days in Canada during the relevant period.

[7] Given that this fell substantially below 1095 days, the Applicant conceded that he could not meet the "physical presence" test and requested that the Citizenship Judge consider the factors set out in *Re Koo*, [1993] 1 FC 286, 19 Imm LR (2d) 1 [*Koo*] and assess whether he had "centralized his mode of existence" in Canada during the relevant period in a manner that met the residency requirement for citizenship. He says that he gave extensive oral evidence regarding the reasons for his absences from Canada, and he has attempted to place much of that evidence before the Court by way of affidavit in this application.

[8] In essence, the Applicant explains in his affidavit that after his family came to Canada in 2004, his father continued to carry on a seafood business in Dubai, and it fell to the Applicant, who was 18 years old at the time, to provide for his family's daily needs in Canada. He managed to start a trucking business, while also attending college part time, and his father made a down-payment for the construction of a new house. However, things became difficult in 2005 when his father had hip surgery in Pakistan that did not go well and left him bedridden. The Applicant says his father's business went downhill while being managed by an uncle. The Applicant had to

sell his trucking business to pay for the house, and eventually had to go to Dubai himself and take over his father's business, staying there from 2007 to 2009. After managing to turn the business around, he returned to Canada. He says he has continued to operate the seafood business, expanding it to Canada, while also taking on a new job as a marketing manager for another company.

[9] The Applicant says he pointed out to the Citizenship Judge that the course of action he chose was better than asking the Canadian government for welfare for him and his 13 family members, and that this explanation for his absences, along with the fact that he has assumed responsibility as the "social" and financial head of his household, should receive positive consideration based on the *Koo* factors. He says this suggestion was positively received by the Citizenship Judge, and he was therefore quite surprised when the Citizenship Judge refused his citizenship application without considering whether he had centralized his life in Canada.

[10] While I think it is at least questionable whether this affidavit evidence is admissible in this application, I do not think I need to decide this issue for the purposes of my decision.

DECISION UNDER REVIEW

[11] The Decision of the Citizenship Judge focuses on the residency requirement set out in s. 5(1)*(c)* of the Act, which requires that an applicant must have "within the four years immediately preceding the date of his or her application, accumulated at least three years of residence in Canada." The Citizenship Judge states that "[t]he applicant has the burden of

establishing, on a balance of probabilities, that he/she satisfies the residency requirements pursuant to paragraph 5(1)*(c)* of the Act," and later states that "I am using the strict test established by the Honourable Mr. Justice Muldoon, in [*Re Pourghasemi*, [1993] FCJ No 232, 62 FTR 122 (TD)]." The Citizenship Judge was "not satisfied, on a balance of probabilities that the applicant was, in fact, physically present in Canada at least 1095 days as required by the Act."

[12] The Citizenship Judge identified the relevant period for assessing residency in relation to s. 5(1)*(c)* as October 10, 2004 to October 10, 2008, a period of 1460 days. After reviewing the differences between the calculations of the Applicant's presence in Canada during the relevant period in the initial application (1126 days), the residence questionnaire (1126), and the new submissions provided at the interview (711 days), the Citizenship Judge stated:

> … I note, by his Counsel's admission, the applicant now states his absences within the relevant material period as 749 days and his shortfall as required by the Act is stated as 384 days.
>
> I am completely befuddled as to how the applicant and his two different Counsel arrived at their magic numbers. We now have four sets of numbers relating to absences and thus physical presence.
>
> I am unable to determine the applicant's time in Canada during the relevant period and after the relevant period.
>
> […]
>
> It is my determination on a balance of probability that the applicant, in fact, does not comply with Paragraph 5(1)(c) of the Act.

[13] The letter to the Applicant of the same date advising him of the Decision includes the following additional information:

> Pursuant to subjection 15(1) of the Citizenship Act I have considered whether or not to make a recommendation for an exercise of discretion under subsection 5(4) of the Act. Subsection 5(4) of the Act empowers the Governor in Council to direct the Minister to grant citizenship to any person in cases of special and unusual hardship or to reward services of an exceptional value to Canada.
>
> I enquired at the hearing whether there were any circumstances that could justify such a recommendation. Since you were unable to provide me with any such evidence I see no reason to make a recommendation to the Minister.
>
> Pursuant to subsection 14(3) of the Act you are therefore advised that, for the attached reasons, your application for Citizenship is not approved.

ISSUES

[14] The Applicant raises the following issues in this application:

a. Did the Citizenship Judge err by not explaining why he chose to apply the strict residency test rather than the *Koo* substantial connection test?

b. Did the Citizenship Judge err by not considering whether to recommend granting citizenship through the "special and unusual hardship" exception?

c. Is the decision that the Applicant had not established the required length of residency unreasonable because the judge ignored, disregarded or misconstrued the evidence?

[15] The third of these issues was not elaborated in the Applicant's written arguments and was not advanced in argument before me. As such, only the first two issues truly arise for consideration.

STANDARD OF REVIEW

[16] While this is a statutory appeal from a decision of a Citizenship Judge and not a judicial review, case law has established that it is the administrative law principles governing the standard of review that apply: see *Canada (Minister of Citizenship and Immigration) v Takla*, 2009 FC 1120 at paras 16-39.

[17] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[18] Citing *El Ocla v Canada (Minister of Citizenship and Immigration)*, 2011 FC 533 at paras 10-12 and *Rousse v Canada (Minister of Citizenship and Immigration)*, 2012 FC 721 at para 9, the Applicant says that the central issue here is the selection of the test to be applied, and so the standard of correctness applies. By contrast, the Respondent says that the question of whether or not the Applicant meets the residency requirement is a mixed question of fact and law

reviewable on a standard of reasonableness, citing *El Falah v Canada (Minister of Citizenship and Immigration)*, 2009 FC 736 at para 14 [*El Falah*] and *Hao*, above, at para 11.

[19] I am satisfied that a Citizenship Judge, in determining the test to be applied to the residency requirement under s. 5(1)*(c)* of the Act, is interpreting and applying his or her home statute. As such, a presumption of reasonableness review applies: see *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at paras 21-22; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654 at para. 34. No reason has been shown why that presumption should be rebutted here, and so a standard of reasonableness applies to issue a. above. Similarly, a Citizenship Judge's decision of whether to recommend a waiver on compassionate grounds under s. 5(4), which is the subject of issue b. above, is reviewable on a standard of reasonableness: *Kalkat v Canada (Minister of Citizenship and Immigration)*, 2012 FC 646 at para 24 [*Kalkat*].

[20] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at para 47, and *Canada (Minister of Citizenship and Immigration) v Khosa,* 2009 SCC 12 at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

STATUTORY PROVISIONS

[21] The following provisions of the Act are applicable in these proceedings:

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	(ii) un jour pour chaque jour de résidence au Canada après son admission à titre de résident permanent;

residence;

(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.

[…]

[…]

14. […]

14. […]

Appeal

Appel

(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

(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.

Decision final

Caractère définitif de la décision

(6) A decision of the Court pursuant to an appeal made under subsection (5) is, subject to section 20, final and,

(6) La décision de la Cour rendue sur l'appel prévu au paragraphe (5) est, sous réserve de l'article 20,

notwithstanding any other Act of Parliament, no appeal lies therefrom.	définitive et, par dérogation à toute autre loi fédérale, non susceptible d'appel.
Recommendation re use of discretion	**Exercice du pouvoir discrétionnaire**
15. (1) Where a citizenship judge is unable to approve an application under subsection 14(2), the judge shall, before deciding not to approve it, consider whether or not to recommend an exercise of discretion under subsection 5(3) or (4) or subsection 9(2) as the circumstances may require.	15. (1) Avant de rendre une décision de rejet, le juge de la citoyenneté examine s'il y a lieu de recommander l'exercice du pouvoir discrétionnaire prévu aux paragraphes 5(3) ou (4) ou 9(2), selon le cas.
[…]	[…]

ARGUMENT

Applicant

[22] The Applicant notes that there are three potential tests that may be applied by a citizenship judge when assessing whether an applicant meets the residency requirement, and that this situation remains despite various attempts by judges of this Court to settle the test as being one or the other: *Lam v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 410, 164 FTR 177 (TD) [*Lam*]; *Imran v Canada (Minister of Citizenship and Immigration)*, 2012 FC 756. In essence, the Applicant submits, these three tests are really just two – a quantitative test and a qualitative test: *Hao*, above, at paras 14-19.

[23] The Applicant argues that while a citizenship judge may choose from among these tests when assessing residency in a particular case, he or she must provide a rationale for adopting the specific test applied. Citing *Cardin v Canada (Minister of Citizenship and Immigration)*, 2011 FC 29 at para 18 [*Cardin*] and *Canada (Minister of Citizenship and Immigration) v Baron*, 2011 FC 480 at para 17 [*Baron*], he argues that where one test seems more relevant to the facts of the case, and particularly where the applicant specifically requests its application, the citizenship judge should at least explain why he or she chose to apply a different test.

[24] In the present case, the Applicant says he conceded at the beginning of the interview that he did not meet the strict physical presence (or quantitative) test, and requested that the Citizenship Judge instead consider the factors set out in *Koo*, above. He argued that he had centralized his life in Canada. He says the analysis in *Re Papadogiorgakis*, [1978] 2 FC 208 [*Papadogiorgakis*] would also have been relevant. However, the Citizenship Judge applied the strict residency test without explaining why the tests from *Koo* or *Papadogiorgakis* were not applicable under the circumstances. The Applicant argues that this was a reviewable error.

[25] The Applicant says that the Citizenship Judge also failed to properly consider whether to recommend a grant of citizenship under s. 5(4) of the Act on the basis of special and unusual hardship. While acknowledging that this is a highly discretionary decision, the Applicant argues that the Citizenship Judge had a duty to act with absolute objectivity, without any indication of bias or closed-mindedness to the relief sought: *Kalkat*, above.

[26] The Applicant says he described in considerable detail to the Citizenship Judge the reasons why he had been unable to remain physically in Canada for a full three years during the relevant four year period, but the Citizenship Judge dealt with s. 5(4) in only a cursory fashion in the letter providing him with notice of the decision. He argues that the Citizenship Judge's findings in this regard were completely unreasonable, as they made no mention whatsoever of the hardships the Applicant had experienced which prevented him from being able to remain in Canada physically for the entire three year period.

[27] The Applicant says there is no doubt that the Citizenship Judge was aware of these circumstances, as he made some notes describing them (Applicant's Record at p. 55).

[28] The Applicant argues that the Citizenship Judge ignored or disregarded this evidence or, in the alternative, fettered his discretion by failing to recognize that the hardship experienced by the Applicant fell within the purview of s. 5(4) of the Act. The Decision was therefore either unreasonable or decided unfairly.

[29] The Applicant also argues that the Decision is unreasonable because the Citizenship Judge devoted the entirety of his reasons to discussing the Applicant's absences from Canada and supporting the conclusion that he had not been in Canada for three years within the relevant period, when the Applicant conceded this from the outset and requested consideration based on the *Koo* factors. As to the Citizenship Judge's "hand wringing" over the different sets of numbers, the Applicant says he explained at the hearing that the previous submissions were prepared by his former counsel based on incomplete information and were therefore inaccurate

and could be disregarded. He says he provided clear evidence, including passports and entry and exit records, to support his new, accurate submissions regarding his absences. As such, the Applicant argues, the Citizenship Judge's statement that he could make no sense of the Applicant's "magic numbers" was unreasonable.

[30] The Applicant argues that a citizenship judge has a duty to arrive at a conclusion based on the evidence, even where the evidence is complicated, and that the failure of the Citizenship Judge to do so in the present case amounts to a failure to perform his statutory duty and constitutes a reviewable error: *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425, 157 FTR 35 (TD) [*Cepeda-Gutierrez*].

Respondent

[31] The Respondent argues that, based on a misreading the case law, the Applicant is asking the Court to reweigh the evidence that was before the Citizenship Judge. The Citizenship Judge was entitled to choose the strict residency test and had no obligation to justify that choice. In light of the Applicant's eventual admission to being absent from Canada for more than two years during the relevant period, the Decision is unquestionably reasonable.

[32] The Respondent submits that this Court has consistently held that the physical presence test for residency set out in *Re Pourghasemi*, [1993] FCJ No 232, 62 FTR 122 (TD) [*Pourghasemi*] is an appropriate test to use: *Farshchi v Canada (Minister of Citizenship and Immigration)*, 2007 FC 487 at para 12. The onus is on the Applicant to prove that he met the

residency requirement, and this includes proof of physical presence on Canadian soil where the physical presence test is being applied: *El Falah*, above, at para 21.

[33] The residency requirement is a statutory requirement, but the Act provides no definition of residency. As such, the Respondent argues, a citizenship judge has discretion to apply any one of the three established tests for assessing residency, including the *Pourghasemi* test, which the Citizenship Judge chose and correctly applied here: *Lam*, above; *Murphy v Canada (Minister of Citizenship and Immigration)*, 2011 FC 482 at paras 8-9. As long as a citizenship judge applies one of the residency tests articulated by this Court properly and in a coherent fashion, the Respondent argues, they will not have erred. The Applicant has not suggested that the Citizenship Judge erred in his application of the law to the facts: *Ghaedi v Canada (Minister of Citizenship and Immigration)*, 2011 FC 85 at para 9.

[34] The Applicant's argument that the Citizenship Judge was obligated to provide a rationale for adopting the strict residency test is not supported by the cases cited in support of it, the Respondent argues. Neither *Cardin* nor *Baron*, both above, states that a citizenship judge must explain why a test was chosen. In *Baron*, there was no description of the test used at all.

[35] The Respondent says a citizenship judge is still "entitled to pick the strict quantitative test" where an applicant admits to being short of the residency requirement: *Salako v Canada (Minister of Citizenship and Immigration)*, 2013 FC 970 at para 10 [*Salako*]. The Respondent also notes Chief Justice Crampton's observation that "it is particularly appropriate that deference be accorded to a citizenship judge's decision to apply any of the three tests that have a long and

rich heritage in this Court's jurisprudence": *Huang v Canada (Minister of Citizenship and Immigration)*, 2013 FC 576 at para 25. Furthermore, some members of the Court have held that the term "residence" in s. 5(1)(c) requires physical presence: *Ghosh v Canada (Minister of Citizenship and Immigration)*, 2013 FC 282 at para 24.

[36] Thus, the Respondent argues, the jurisprudence is clear that the Court will give deference to the Citizenship Judge's choice of test, and there is no requirement to justify the test used. The Applicant's admission to being short of the residency requirement based on physical presence did not obligate the Citizenship Judge to use a test that could have been more favourable to him.

[37] The Respondent also argues that the Applicant's submissions miss the point of the Citizenship Judge's reasons, which was that he could not grant citizenship because he could not determine with any degree of certainty how long the Applicant had been in Canada. Where an accurate number of days of physical presence cannot be determined, the Respondent argues, a citizenship application will fail regardless of the test applied: *Atwani v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1354 at para 15-17.

[38] In the Respondent's view, the Applicant's arguments ignore his own actions in submitting several sets of false numbers during the application process, which caused the Citizenship Judge to reach the conclusion he did. The Applicant willingly presented false numbers and, while he blames his former counsel, he has not explained why he signed an application form that said he was in Canada for 423 days more than he actually was. In light of

the Applicant's own actions, the Respondent argues, it cannot be said that the Citizenship Judge was unreasonable for being leery of anything the Applicant told him.

[39] Finally, the Citizenship Judge did consider s. 5(4), and his decision in that regard is a discretionary one that is owed a high degree of deference: *Arif v Canada (Minister of Citizenship and Immigration)*, 2007 FC 557 at paras 7-8 [*Arif*]. The Citizenship Judge's observation regarding the lack of evidence to support a recommendation for the exercise of discretion under s. 5(4) must be read in the context of the reasons as a whole. The Respondent quotes Justice Phelan's analysis in *Salako*, above, at para 12 as being applicable to the current case:

> [12] Similarly, the Citizenship Judge did not ignore or disregard evidence of hardship or exceptional service in respect of the exercise of discretion under subsection 5(4). The Appellant makes too much of the reference in the reasons to the Appellant not providing any evidence in this regard. Read in context the Citizenship Judge is not saying that there was no evidence at all on this point, merely that there was not sufficient evidence.

[40] The Respondent says that the Applicant's failure to provide consistent evidence permeates all aspects of the Decision, and his choice to be deceptive in his application clearly mitigated against any "special and unusual hardship" that may exist. The Citizenship judge reviewed all of the evidence and found that no special circumstances justified the granting of citizenship to someone who was more than one year short of the residency requirement. Considering the Applicant's failure to be candid about his absences from the beginning, such a conclusion is not unreasonable.

ANALYSIS

[41] There is no dispute between the parties that the Applicant could not qualify for citizenship under the numerical test that the Citizenship Judge applied in this case.

[42] The Applicant's view is that, given he could not satisfy the numerical, physical presence test, and given that he asked the judge to apply the *Koo* substantial connection test, the Citizenship Judge was at least obliged to explain why he chose to apply the numerical test, and should have applied the *Koo* test.

[43] The case law is clear that, as unsatisfactory and unfair as the situation is, a citizenship judge can choose to apply any one of three recognised tests for citizenship. See *Pourghasemi* and *Salako*, both above. The Applicant has cited no case law that supports his position that a citizenship judge must somehow rationalize whichever test he or she chooses, and must provide reasons for the choice. The Court has long lamented the current state of the law on this issue but, until Parliament rectifies the situation, the choice of which of the three tests to apply appears to be at the complete discretion of the citizenship judge. No reasons for the choice are required because the Court has recognised that a physical presence and a qualitative approach are equally suitable. An applicant who cannot fulfill the quantitative requirement cannot compel the citizenship judge to undertake a qualitative approach and/or provide a rationale for not doing so. I do not think that *Cardin*, above, relied upon by the Applicant, changes this situation.

[44] In any event, the judge in this case makes it clear that, in applying the numerical test, he is relying upon *Pourghasemi*, above, where the strict test was "established" by Justice Muldoon. Hence, the rationale in *Pourghasemi* for accepting the test is imported into this case.

[45] In my view, the only arguable issue raised by the Applicant is with regards to the Citizenship Judge's treatment of s.5 (4) of the Act. The letter advising Mr. Ayaz of the Decision makes it clear that the Citizenship Judge considered this issue and his conclusion is as follows:

> I enquired at the hearing whether there were any circumstances that could justify such a recommendation. Since you were unable to provide me with any such evidence I see no reason to make a recommendation to the Minister.

[46] The Applicant has advanced a *Cepada-Gutierrez* argument on the basis that he provided extensive H&C evidence to the Citizenship Judge . He also says that the reasons on this point are inadequate.

[47] In *Salako*, above, Justice Phelan dealt with a similar issue:

> [12] Similarly, the Citizenship Judge did not ignore or disregard evidence of hardship or exceptional service in respect of the exercise of discretion under subsection 5(4). The Appellant makes too much of the reference in the reasons to the Appellant not providing any evidence in this regard. Read in context the Citizenship Judge is not saying that there was no evidence at all on this point, merely that there was not sufficient evidence.
>
> [13] As to the reasonableness of the decision on residency, there is no issue. The Appellant admits to the deficiency.
>
> [14] As to the reasonableness of the decision on subsection 5(4), that provision provides the Citizenship Judge with wide discretion to recommend an applicant for citizenship on the basis of either hardship or exceptional service. The only hardship pleaded is that caused by the Appellant's choice of employment. That is not the

> type of hardship to which the provision is directed; nor is the provision directed to the fact that some members of the Appellant's family have Canadian citizenship and one or more do not.

[48] In the present case, I don't think the Citizenship Judge is saying there is no evidence. Reading the Decision and the record as a whole, I cannot say the judge overlooked the Applicant's evidence. The Applicant, in his affidavit for this application, outlines what he said to the Citizenship Judge at the hearing about the circumstances that caused him to leave Canada to attend to family and business issues. The judge refers to these matters in notes to file. See p. 55 of the Application Record.

[49] It appears to me, then, that the judge is saying that the evidence presented does not amount to the kind of "special and unusual hardship" that would justify a recommendation under s. 5(4). In this regard, a decision of a citizenship judge under s. 5(4) is "entitled to great deference." See *Arif*, above, at para 8.

[50] The jurisprudence on "special and unusual hardship" under s. 5(4) of the Act is not as well developed as, for example, the jurisprudence on the meaning of hardship under s. 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27. While there is no firmly established test for "special and unusual hardship" under s. 5(4) of the Act, in my view, the following remarks by Justice Walsh in *Re Turcan* (T-3202, October 6, 1978, FCTD), as quoted by him in *Naber-Sykes (Re)*, [1986] 3 FC 434, 4 FTR 204 [*Naber-Sykes*] remain valid and serve as a good starting point:

> The question of what constitutes "special and unusual hardship" is of course a subjective one and Citizenship Judges, Judges of this Court, the Minister, or the Governor in Council might well have

> differing opinions on it. Certainly the mere fact of not having citizenship or of encountering further delays before it can be acquired is not of itself a matter of "special and unusual hardship", but in cases where as a consequence of this delay families will be broken up, employment lost, professional qualifications and special abilities wasted, and the country deprived of desirable and highly qualified citizens, then, upon the refusal of the application because of the necessarily strict interpretation of the residential requirements of the Act when they cannot be complied with due to circumstances beyond the control of the applicant, it would seem to be appropriate for the Judge to recommend to the Minister the intervention of the Governor in Council…

[51] Thus, it is not purely or even primarily a question of whether the individual in question would make a desirable citizen, or has good reasons (perhaps even, as in the present case, laudable reasons) for not being able to comply with the requirements of the Act strictly read. Rather, the Court has to consider as well whether the effect of applying those requirements strictly and thus denying citizenship would impose some hardship on the applicant or their family beyond the delay in citizenship itself. For example, in *Naber-Sykes*, the applicant, who had lived, studied and worked in Canada for nearly a decade but had only recently become a permanent resident, could not become licensed to practice her profession (law) without citizenship. Justice Walsh found that the citizenship judge had failed to properly consider the hardship this would impose.

[52] In *Linde v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 739, [2001] FCJ No 1085, which also dealt with absences due to employment obligations, Justice Blanchard reviewed some of the jurisprudence on this question, which emphasized the discretionary nature of the decision. Unless the citizenship judge fails to take into account some relevant factor (see *Khat (Re)*, [1991] FCJ No 949, 49 FTR 252), or acted with bias or improper motive (see *Kalkat*,

above; *Akan v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 991 at para 11, 170 FTR 158), there is generally no basis for a court to interfere. With respect to the case before him, Justice Blanchard observed:

> [24] I am satisfied that the Citizenship Judge in this case did indeed take into account the relevant factors in the exercise of his discretion pursuant to subsection 15(1) of the Act. The applicant has not shown that the Citizenship Judge ignored any evidence before him, or erred in any way in determining that there was no unusual hardship which would result under subsection 5(4) of the Act. The only evidence before the Citizenship Judge is reflected in the applicant's affidavit alleging "irreparable harm" to her family if they split up during the prolonged period while her husband was working in Romania. I agree with the respondent's contention that the applicant's husband's choice to work in Romania was his own and that his choice does not constitute special or unusual hardship to the applicant, as contemplated by the Act. The issue of family separation was considered in *Re: Chehade*, [1994] F.C.J. No. 1461, online: QL. The facts in that case were similar to the case at bar. The appellant had to work abroad to support his family. Mr. Justice Teitelbaum at paragraph 12 stated:
>
> > I understand the Appellant's dilemma. On the one hand he must work to earn funds to support his family and this in the United Arab Emirates and at the same time to try to "Canadianize" himself to obtain his citizenship. It is a problem but Canadian Citizenship, as Mr. Justice Muldoon states "is precious" and the Appellant will simply have to make a greater effort.
>
> In the case before me, the applicant chose to follow her husband abroad. She could have chosen to remain in Canada with her child and thereby meet the residency requirements.

[53] In fairness to the Applicant in this case, he argues that he had no choice but to work abroad. He had to ensure that his father's business did not fail when his father became ill, or his large family would have ended up in dire circumstances.

[54] I do not doubt that the Applicant had legitimate and even noble reasons for being abroad. There is every indication that he is industrious, entrepreneurial, and devoted to his family. What he has not demonstrated, however, is that he or his family will face some hardship beyond the delay in acquiring citizenship that was ignored by the Citizenship Judge, such that the matter should be returned for redetermination. It appears he is still a permanent resident of Canada (there is no indication otherwise), and he attests that he is engaged in business here both on his own behalf and as a marketing manager for another company. He has not indicated that he is prevented from practising his profession or otherwise participating in Canadian society. It is true that, in order to meet the residency requirements for citizenship in the future, he may have to curtail his travels outside of the country more than he otherwise would if he were already a citizen, but there is no evidence before me that this imposes special or unusual hardship in his current circumstances.

[55] Given the above, the Court cannot say that the Citizenship Judge's assessment of this issue falls outside the *Dunsmuir* range. It is not, therefore, unreasonable.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is dismissed with costs to the Respondent.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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