Federal Court  Cour fédérale

Date: 20160525

Docket: T-1646-15

Citation: 2016 FC 577

Montréal, Quebec, May 25, 2016

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

ANNEMARIE SWERDLOW

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Ms. Swerdlow, a German citizen, became a permanent resident of Canada in 1957. It was only in May 2011 that she applied for Canadian citizenship. The reason she gave was that she waited until Germany changed its law with respect to dual citizenship. Until shortly before her application for Canadian citizenship, she would have lost her German citizenship if she became a citizen of another country.

[2] Section 5(1)(c) of the *Citizenship Act* as it was at the time of her application required that she be a resident of Canada for at least 3 of the 4 years immediately preceding her application, in other words 1,095 days. She was only physically present here 836 days because she now winters outside the country. Her application was dismissed by a Citizenship Judge on that basis.

[3] Counsel mounted a strong argument with respect to procedural fairness. He referred to case law which states that the Citizenship Judge had to inform the applicant which of three residency tests he was going to apply so as to allow commentary thereon. In my view it is not necessary to consider those submissions because the Citizenship Judge unreasonably fettered his discretion.

[4] The sorry state of our law with respect to the residency requirements under the *Citizenship Act* has been repeated literally hundreds of times, with no respect whatsoever for comity.

[5] In *Papadogiorgakis (Re)*, [1978] 2 FC 208, Associate Chief Justice Thurlow was of the view that a person was resident where he centralized his mode of living. That mode of living did not change because he had left to study in the United States.

[6] In *Koo (Re)*, [1993] 1 FC 286, Madam Justice Reed expanded on that view. The issue was where an applicant "regularly, normally or customarily lives". She offered some indicia.

[7] Under both these tests, one might be "resident" of Canada for at least 3 of the 4 years immediately preceding a Citizenship application even if not physically present here for at least 1,095 days. I venture to say that under either of these two tests Ms. Swerdlow's application would have been approved.

[8] Four months after *Koo*, Mr. Justice Muldoon applied a strict physical presence test in *Pourghasemi (Re)*, (1993) 62 FTR 122.

[9] This led to the decision of Mr. Justice Lutfy, as he then was, in *Lam v Canada (Minister of Citizenship and Immigration)*, (1999) 164 FTR 177. He noted that a bill was then before Parliament which would clarify the residence issue. Unfortunately, Parliament did not deal with the issue at that time, but rather waited until 2014, when it established a physical presence test.

[10] At paragraphs 32 and 33 of his Reasons in *Lam*, Chief Justice Lutfy noted:

> **32** […] The decisions under appeal do not always make clear which of this Court's conflicting case law is being followed.
>
> **33** […] where citizenship judges, in clear reasons which demonstrate an understanding of the case law, properly decide that the facts satisfy their view of the statutory test in paragraph 5(1)(c), the reviewing judges ought not to substitute arbitrarily their different opinion of the residency requirement.

[11] In his Reasons, the Citizenship Judge stated: "Quel que soit le chiffre exact, elle est loin des 1095 jours de présence physique requis. […] J'ai expliqué à la requérante que c'est avec regret, mais catégoriquement pour respecter la loi, que je n'approuve pas la présente demande. […] Simplement dit, la loi est bonne, puisqu'elle est la loi."

[12] This decision shows no understanding whatsoever of the conflicting jurisprudence in this Court. It may well be that the Citizenship Judge did not even realize that before 2014, it was not necessarily a requirement to have 1,095 days of physical presence in Canada. Indeed, he expressed regret. If he had followed another test, he would not have had to be regretful. He would have granted the application.

[13] It is clear that the Citizenship Judge unreasonably fettered his discretion. Ms. Swerdlow is entitled to a new hearing under the law as it was before the amendment.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The matter is referred to another Citizenship Judge or authorized official for re-determination.

3. There is no serious question of general importance to certify.

"Sean Harrington"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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