

Date: 20070726

Docket: T-16-07

Citation: 2007 FC 777

OTTAWA, Ontario, July 26, 2007

PRESENT: The Honourable Max M. Teitelbaum

BETWEEN:

LAU KWOK PING

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an appeal from a decision of a citizenship judge, (the “Judge”), dated November 9, 2006, wherein Lau Kwok Ping, the applicant, was found not to have met the residency requirement in section 5(1)(c) of the *Citizenship Act*, R.S.C. 1985, c. 29, (the *Act*), and consequently her application for citizenship was denied.

[2] Pursuant to section 5(1)(c) of the *Act*, an applicant must have accumulated at least three years of residence (1095 days) in Canada within the four years (1460 days) immediately preceding the date of the applicant’s application for citizenship. In the present case, the evidence indicated that Ms. Lau had only been physically present in Canada for 982 days.

[3] In his decision, the Judge noted that although there is Federal Court jurisprudence which does not require physical presence of an applicant for citizenship for the entire 1095 days he was of the view too long an absence from Canada during the minimum period of time set out in the Act is contrary to the purpose of the residency requirements of the Act. He went on to conclude that since the applicant was not physically present in Canada for 1095 days she had not met the residency requirement set out in paragraph 5(1)(c) of the *Act*.

[4] It is well-established that since there is no definition of residency in the *Act* that citizenship judges may apply one of three tests to determine whether an applicant has met the residency requirement (see *Rizvi v. Minister of Citizenship and Immigration*, 2005 FC 1641; *Eltom v. Minister of Citizenship and Immigration*, 2005 FC 1555, *Lam v. Minister of Citizenship*, [1999] F.C.J. No. 410 (QL)). One of these tests, referred to as the physical presence test or the *Pourghasemi* test, requires an applicant be physically present in Canada for at least 1095 days. The other two tests take more flexible approaches to the residency requirement. For example the *Koo* test requires an assessment of an applicant's absences from Canada with the aim of determining what kind of connection an applicant has with Canada and whether the applicant "regularly, normally or customarily lives" in Canada. A citizenship judge may apply any of the three tests and the Court can review the decision to ensure that the test chosen by the citizenship judge has been properly applied.

[5] The applicant submits that the Citizenship Judge erred in failing to clearly articulate which test for citizenship he was applying. With respect, I see no merit to the applicant's submission on this issue. The Judge quite clearly chose the physical presence test by stating his view that assessing residence in any other way than counting the number of days an applicant was physically present in Canada is contrary to the purpose of the Act. After having expressed his choice of test, he went on to apply it when he stated that "You have failed to satisfy me that you were physically present in Canada during the required period of time".

[6] The applicant also challenges the Judge's decision on the grounds that the Judge made a negative credibility finding against the applicant without informing the applicant of his concerns in this respect. This argument is based on the fact that in his notes the Judge wrote that:

You claim to be away only 478 days from the 1460 days giving you a total physical presence of 982 days making you short 113 days from the minimum requirement of 1045 as per the Act. But I believe you are short even more days when looking at your documentation. I don't believe you are being honest and truthful of all your absences (Certified Tribunal Record at pp. 6 and 7).

The respondent submits that this argument has no merit because the Citizenship Judge's decision was not based on a negative credibility finding.

[7] There is no indication from the Judge's decision that his concern about the applicant's truthfulness was a factor in his decision. Indeed, there was no need for the Judge to decide whether the applicant had been untruthful about her absences from Canada because the applicant by her own evidence had failed to meet the physical presence test. In the circumstances, there was no need for

the Judge to inform the applicant that he had concerns about the truthfulness of her claims as this adds nothing to the validity of the Judge's decision.

[8] In that the Judge denied the appellant's citizenship because she was unable to show the residency requirement of the Act, the appeal must be denied.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the appeal is denied.

"Max M. Teitelbaum"

Deputy Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-16-07

STYLE OF CAUSE: LAU KWOK PING v. MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: July 17, 2007

REASONS FOR ORDER: Teitelbaum, D.J.

DATED: July 26, 2007

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