Date: 20080128

Docket: T-1119-07

Citation: 2008 FC 106

Ottawa, Ontario, January 28, 2008

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

BASHIR AHMED ABDEL GAYOUM ALI

Applicant

and

CITIZENSHIP AND IMMIGRATION CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] The applicant is appealing the decision of Citizenship Judge George Springate (the Citizenship Judge), dated March 7, 2007 and communicated to the applicant by letter dated April 20, 2007 (the Decision), wherein it was decided that the applicant did not meet the residency requirements set out in paragraph 5(1)(*c*) of the *Citizenship Act*, R.S.C. 1985, c. C-29 (the Act) in order to be granted Canadian citizenship.

[2] The residency requirement is set out at paragraph 5(1)(*c*) of the Act, which reads as follows:

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

> residence the person shall be deemed to have accumulated one day of residence;

[3] The applicant, a citizen of Sudan, obtained his permanent residence status when he landed in Canada with his family on June 7, 2000. The applicant works for Alternatives, an international development non-governmental organization and has been on assignments overseas, in Sudan, the Netherlands, Egypt and the United Kingdom, since becoming a Canadian permanent resident. Alternatives is a not-for-profit registered charity with Revenue Canada that is partially funded by the Canadian International Development Agency, Foreign Affairs and International Trade Canada and Industry Canada. Alternatives' head office is in Montreal, Quebec.

[4] The Citizenship Judge, not convinced that the applicant fulfilled the residency requirement under the Act, rendered his Decision on March 7, 2007. The Citizenship Judge found that the applicant was 305 days short of the minimum 1,095 days of residence within the four years immediately preceding the date of his application. The applicant was informed of this by letter dated April 20, 2007 which summarizes the Decision, in part, as follows:

> In these circumstances, you had to convince me, in order to meet the residence requirements, that your absences from Canada [which totalled 398 days] could be considered as a period of residence in Canada.
>
> Federal Court precedents require that, to establish residence, an individual must show, in mind and in fact, a centralization of his or her mode of living in Canada. If such residence is established, absences from Canada do not affect this residence, as long as it is demonstrated that the individual left for a temporary purpose only and maintained in Canada some real and tangible form of residence.

> I carefully examined your case to determine if you established residence in Canada before your absences so that these absences could be considered as a period of residence; and if during your absences you maintained sufficient links with Canada. The facts lead me to the conclusion that you have not established nor maintained residence in Canada and therefore you do not meet the residence requirements.

[5] The issue on appeal is whether the Citizenship Judge erred in concluding that the applicant failed to meet the requirements for Canadian citizenship set out in paragraph 5(1)(*c*) of the Act. The question of whether a person has met the residency requirement under the Act is a question of mixed law and fact. Citizenship judges are owed some deference by virtue of their special degree of knowledge and experience.

[6] Applying a pragmatic and functional analysis to the review of the decisions of citizenship judges respecting the residency requirement of the Act, several judges of this court have concluded that the appropriate standard is reasonableness *simpliciter*: *Gunnarson v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 1913 (QL), 2004 FC 1592; *Rasaei v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 2051 (QL), 2004 FC 1688; *Chen v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 2069 (QL), 2004 FC 1693 (Chen); and *Zeng v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 2134 (QL), 2004 FC 1752. I accept that this is the appropriate standard of review.

[7] Likewise, I adopt the reasoning of Justice Mosley in *Huang v. Canada (Minister of Citizenship and Immigration.)*, [2005] F.C.J. No. 1078 (QL), 2005 FC 861, where at para. 12, he found that, "for pure questions of fact greater deference should be shown to the Citizenship Judge's

findings resulting in a standard of patent unreasonableness." Accordingly, I conclude that the appropriate standard of review applicable to the principal issue in this appeal is one of reasonableness *simpliciter*, and that the purely factual findings of the Citizenship Judge are reviewable on a standard of patent unreasonableness.

[8] The term "residence" is not defined by statute but rather by case law. The Federal Court's jurisprudence has yielded three distinct approaches to residence. A citizenship judge may adopt and apply whichever one she or he chooses as long as it is applied properly: *Lam v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 410 (QL), 164 F.T.R. 177 (Lam). These different approaches were summarized in *Zhao v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 1923 (QL), 2006 FC 1536, at paras. 50 and 51, as follows :

> Under the first test, a person cannot reside in a place where the person is not physically present. Thus, it is necessary for a potential citizen to establish that he or she has been physically present in Canada for the requisite period of time. This flows from the decision in *Pourghasemi (Re)* (F.C.T.D.) (1993), 62 F.T.R.122, 19 Imm. L.R. (2d) 259 at paragraph 3 (F.C.T.D.), where Justice Muldoon emphasized how important it is for a potential new citizen to be immersed in Canadian society. Two other contrary tests represent a more flexible approach to residency. First, Thurlow A.C.J. in *Papadogiorgakis*, [1978] 2 F.C. 208, 88 D.L.R. (3d) 243 (F.C.T.D.) held that residency entails more than a mere counting of days. He held that residency is a matter of the degree to which a person, in mind or fact, settles into or maintains or centralizes his or her ordinary mode of living, including social relations, interests and conveniences. The question becomes whether an applicant's linkages suggest that Canada is his or her home, regardless of any absences from the country.
>
> Justice Reed has outlined the third approach, which is really just an extension of Justice Thurlow's test. In *Re: Koo*, [1993] 1 F.C. 286 59 F.T.R. 27 (F.C.T.D.), Justice Reed held that the question before the Court is whether Canada is the country in which an applicant has

> centralized his or her mode of existence. This involves consideration of several factors:
>
> 1. Was the individual physically present in Canada for a long period prior to recent absences which occurred immediately before the application for citizenship?
> 2. Where are the applicant's immediate family and dependents (and extended family) resident?
> 3. Does the pattern of physical presence in Canada indicate a returning home or merely visiting the country?
> 4. What is the extent of the physical absences - if an applicant is only a few days short of the 1095 day total it is easier to find deemed residence than if those absences are extensive?
> 5. Is the physical absence caused by a clearly temporary situation such as employment as a missionary abroad, following a course of study abroad as a student, accepting temporary employment abroad, accompanying a spouse who has accepted temporary employment abroad?
> 6. What is the quality of the connection with Canada: is it more substantial than that which exists with any other country?
>
> The general principle is that the quality of residence in Canada must be more substantial than elsewhere. See also *Lin v. Canada (Minister of Citizenship and Immigration)* (2002), 21 Imm. L.R. (3d) 104, 2002 FCT 346.

[9] In the case at bar, the Citizenship Judge in his Decision dated March 7, 2007, applied the test set out in *Re: Koo*, above, to determine whether Canada was the place where the applicant "regularly, normally or customarily lives" based on his assessment of the six factors identified by Justice Reed, above.

Factor 1: Was the individual physically present in Canada for a long period prior to recent absences which occurred immediately before the application for citizenship?

[10] The applicant arrived in Canada on June 7, 2000. The Citizenship Judge found that he remained in Canada for approximately three and a half months before he returned to Sudan on

behalf of Alternatives. He was out of Canada for 83 days on what the applicant termed an "official visit to development [*sic*]." The Citizenship Judge stated in his Decision that seven other absences from Canada followed, six of which saw the applicant travel to Sudan. All of the absences were for Alternatives and they ranged in days absent from 22 to 74. The applicant traveled to Sudan for 21 days in May 2003 and 20 days in June and July of that same year. He applied for Canadian citizenship on September 8, 2003. A few days later he and his family left Canada for Egypt as he had signed a four-year contract to work with Alternatives in that country.

Factor 2: Where are the applicant's immediate family and dependents (and extended family) resident?

[11] According to the Citizenship Judge's Decision, the applicant's wife and two school-aged children were in Canada during his material time period. They all left Canada a few days after the applicant had applied for Canadian citizenship. As of the time the Citizenship Judge was reviewing the applicant's file (approximately 42 months later), the entire family had not regained residence in Canada. The applicant has a brother and sister who reside in Sudan.

Factor 3: Does the pattern of physical presence in Canada indicate a returning home or merely visiting the country?

[12] With respect to the third factor, the Citizenship Judge stated in his Decision that the applicant's wife and two children were in Canada with him and the children attended school here. However, a separate Canadian citizenship file was found to show the applicant's wife was out of Canada on 505 days over her material time period. Further, the applicant informed the Citizenship

Judge that his children have attended school in Egypt ever since the family left Canada in September 2003. The Citizenship Judge noted, "since the applicant entered Canada on June 7, 2000 to today, the applicant has been physically present in Canada for some 800 days – over a 2,460 day period." The Citizenship Judge also considered the applicant's employment history with Alternatives.

4. What is the extent of the physical absences - if an applicant is only a few days short of the 1095 day total it is easier to find deemed residence than if those absences are extensive?

[13] The fourth factor identified in *Re: Koo*, above, recognizes that it is easier to deem an individual to be resident if her/his absences place her/him only a few days short of the 1,095 day total. Nevertheless, in this case, the Citizenship Judge emphasized that the applicant was absent 398 days and physically present in Canada for only 790 days. Faced with a shortfall of 305 days, the Citizenship Judge concluded in his Decision: "Obviously the applicant is not merely a 'few days short of the 1095 day total.' "

5. Is the physical absence caused by a clearly temporary situation such as employment as a missionary abroad, following a course of study abroad as a student, accepting temporary employment abroad, accompanying a spouse who has accepted temporary employment abroad?

[14] With respect to this fifth factor, the Citizenship Judge's Decision reads:

> There is nothing temporary about what the applicant did. He, of his own free will, decided to work for Alternatives – outside of Canada. Immediately following his material time period, he signed a four-

> year contract to work for Alternatives in Egypt. Note that his entire family left with him at that time.

6. What is the quality of the connection with Canada: is it more substantial than that which exists with any other country?

[15] In the Decision, the Citizenship Judge re-iterated that the applicant has a substantial shortfall of 305 days. He noted that the applicant traveled out of Canada on eight occasions during his material time period and that seven of those absences were trips to Sudan. He further noted that a few days after applying for citizenship the applicant and his family left Canada on a four year contract to work in Egypt; his children are enrolled in school in Egypt; and, they "have not returned to live in Canada since they left 42 months ago." The Citizenship Judge acknowledged the applicant purchased a revenue-producing residence in Canada two weeks prior to his application. Although the applicant had written in his residence questionnaire that he held no property outside of Canada, at the hearing the Citizenship Judge was informed by the applicant that he owns property in Sudan. Indeed, the applicant admitted he was the owner of this property prior to, during and following the material time.

[16] According to the Citizenship Judge's Decision:

> I have thought the case over many times. And, I always come back to what the applicant said to me at the end of his hearing. He said he needed a Canadian passport. That would make his travel between countries much easier than traveling with a passport from Sudan.
>
> His statement dovetails with what attorney Richard Sheitoyan - Adjucorp International of Canada and the applicant's advisors in the matter – wrote in a December 12, 2006 letter to Citizenship and Immigration Canada. In part the lawyer wrote:

> We call your attention to the fact that Mr. Ali needs to travel from one country to another to carry out "government missions." On average he spends two to three weeks in every country and every time he has to travel he is required an entry visa for each of these country (sic). This adds additional delay and jeopardizes his work. In order to alleviate these difficulties, a Canadian passport would greatly facilitate his work.

[17] On the basis of this evidence, the Citizenship Judge noted that Canadian citizenship was not the vital issue. Rather, a Canadian passport as a "flag of convenience" was found to be the pressing need. He also reiterated that if the applicant worked for the Canadian government, his days working outside of Canada would have counted as 'physical presence days'. However, in this instance, it was concluded: "No matter how charitable and heart warming his work, his days out of Canada do not count – they are considered absences." Further, his pattern of work with Alternatives was found to clearly show that work outside of Canada is permanent and not temporary.

[18] Having assessed the six factors identified in *Re: Koo*, above, the Citizenship Judge stated that the applicant's connection to Sudan is much higher than his connection to Canada. He concluded that the applicant had not satisfied the residence requirement under the Act.

[19] The Citizenship Judge also considered whether to make a recommendation for an exercise of discretion under subsections 5(3) and (4) of the Act (as is required under subsection 15(1) of the Act). These exceptional provisions allow for a favourable recommendation in cases of special and undue hardship or where an applicant has provided services of an exceptional value to Canada. On

appeal, the applicant does not contest the Citizenship Judge's decision not to apply his discretion in a manner favourable to the applicant.

[20] In his memorandum of fact and law, the applicant contests the Decision of the Citizenship Judge arguing that he failed to specify which test he relied on to determine whether the applicant had fulfilled his residency requirements. Further, it is argued he failed to give adequate reasons, but this latter argument was not pressed at the hearing by counsel. However, at the hearing before this Court, counsel for the applicant submitted that there was a breach of procedural fairness because the Citizenship Judge failed to ask the applicant to produce relevant documentation. Since this is an entirely new argument, not raised in the memorandum of fact and law, I will not consider it at this late date.

[21] The applicant also submits the Decision of the Citizenship Judge was unreasonable and failed to take into consideration the specific facts of the case. The applicant refers the Court to several factors which, in his submission, indicate that he established a residence in Canada. The following is a summary of these factors. From the time of his arrival in 2000 until he applied for citizenship in 2003, the applicant and his family resided in Canada, and called no other country home. He bought a house in Canada; had a social insurance card; health card; bank accounts; and, his children attended school in Canada. Even though the applicant was sent on foreign assignments for Alternatives, he received a salary in Canadian dollars; filed income tax returns in Canada; and, always returned home to his family in Canada between missions. The applicant argues that his connection to Canada is more substantial than it is to Sudan or Egypt. Rather than characterizing

the periods of his stay in Canada as visits, the applicant submits that during these periods he was "returning home" after temporary business or employment situations required him to travel abroad.

[22] The applicant further submits that the Citizenship Judge based his Decision on irrelevant considerations such as where the applicant resided following his application. It is submitted in this regard that the language of paragraph 5(1)(*c*) is “backwards-looking” in orientation. Therefore, where an applicant resides following her or his application is not a relevant consideration. Indeed, applicant’s counsel argued that in the analysis supporting the Decision, the Citizenship Judge noted that a few days after the applicant filed his citizenship application, he and his family left Canada for Egypt as he had signed a four-year contract to work with Alternatives in that country. The Citizenship Judge emphasized that the applicant’s children have attended school in Egypt ever since the family left Canada in September 2003. He also stated that at the time he reviewed the applicant’s file (approximately 42 months after the applicant’s application date), the entire family had not regained residence in Canada.

[23] All these arguments made by the applicant must fail.

[24] First, the Citizenship Judge did not misunderstand the nature of the *Koo* test. As I have already noted above, the vast majority of the Decision involves the Citizenship Judge’s application of the six questions as enunciated by Justice Reed to the particular circumstances of the applicant’s application.

[25] Second, with respect to the adequacy of the Citizenship Judge's reasons, this specific issue was defined in the context of citizenship applications by Justice Lutfy in *Lam*, above, at para. 33, as an obligation to give "clear reasons which demonstrate an understanding of the case law". This obligation is clearly met in this case.

[26] Third, based on the evidence he had before him, and which has been reproduced in the tribunal's certified record, the Citizenship Judge was allowed to make the findings of fact he did and the applicant has failed to convince me that these findings are capricious or arbitrary. The applicant has in his possession documentation that is not part of the certified tribunal record which counsel has asked this Court to consider. As this is not an appeal *de novo*, I cannot and I have not examined this additional documentation.

[27] Fourth, having read the Decision as a whole, the Citizenship Judge's finding that the applicant did not establish a residence in Canada before his absences – so that these absences could be considered temporary and counted as a period of residence – is clearly supported by the evidence on record.

[28] Fifth, the Citizenship Judge did not take into account irrelevant factors in applying all six criteria of the *Koo* test. As noted above, the standard of review applicable to this appeal is one based on reasonableness. Accordingly, "as long as there is a demonstrated understanding of the case law and appreciation of the facts and their application to the statutory test, deference should be

shown." (*Chen*, above, at para. 5). Overall, I find the Citizenship Judge's conclusion reasonable in the circumstances.

[29] A citizenship judge does not discharge a mechanical or perfunctory function but rather must make a very important decision – the grant of Canadian citizenship – which has profound implications. As a first step, the applicant had to demonstrate the establishment of Canadian residency. This first step, establishment in Canada, is essential because, unless an applicant can satisfy it, absences from Canada will not be counted: *Jreige v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 1469 (QL) at para. 25. An issue may arise as to whether or not an applicant has established a centralized mode of living in Canada. The issue whether the applicant had established and maintained a residence in Canada is essentially a factual determination involving the appreciation of the degree to which a person in mind and fact settles into or maintains or centralizes his ordinary mode of living with its accessories in social relations, interests and conveniences at or in the place in question (*Re Papadogiorgakis*, above, at para. 14; *Seiffert v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1326 (QL), 2005 FC 1072 at para. 7; *Huang (Re)*, [1997] F.C.J. No. 112 (QL) at para. 2).

[30] In my opinion, the facts noted by the Citizenship Judge in his analysis are all relevant as they demonstrate an appreciation of the overall quality of connections with Canada and the degree of establishment of the applicant. The applicant had the onus of demonstrating that he had a centralized mode of life in Canada, and that he had satisfied the 1,095 day requirement. The substantive shortfall of 305 days was an objective fact indicating that the applicant has not met the

residency requirements during the relevant time period. He simply failed to satisfy the Citizenship Judge that his numerous absences from Canada should be counted towards his period of residence.

[31] Accordingly, this appeal should be dismissed. However, this does not prevent the applicant from making an application for citizenship at a later date when the residency requirement has been fulfilled.

ORDER

THIS COURT ORDERS that this appeal be dismissed.

"Luc Martineau"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	**BASHIR AHMED ABDEL GAYOUM ALI v. CITIZENSHIP AND IMMIGRATION CANADA**
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