

Date: 20090424

Docket: T-625-08

Citation: 2009 FC 411

Ottawa, Ontario, April 24, 2009

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

MOHAMMAD REZA GHahremani

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an appeal by the Applicant, Mohammad Reza Ghahremani, pursuant to subsection 14(5) of the *Citizenship Act*, R.S.C. 1985, c. C-29 (the Act), challenging the decision of Citizenship Judge John K.S. Koulouras (the Judge), dated March 7, 2008, denying the Applicant's application for citizenship. The Applicant is self-represented.

Factual Background

[2] The Applicant is a citizen of Iran who became a landed immigrant of Canada on March 14, 2000. He applied for Canadian citizenship on May 14, 2006.

[3] The Applicant lived in Canada from March 14, 2000 until March 11, 2002, when he left Canada due to extreme depression. He returned to his home country where he was treated by a psychologist for his depression and later by a cardiologist for heart problems.

[4] The Applicant's depression was improving under the treatment of the psychologist, but the Applicant then became concerned with his wife and children after hearing that his wife had apparently filed for divorce and had married his friend. The Applicant suffered a heart attack and then underwent coronary bypass surgery. Because of this new physical condition, the Applicant's depression intensified.

[5] During the seven months following his heart surgery, the Applicant worried about his daughter because he did not receive any news from her. He decided to apply to return to Canada and his request was approved. He returned to Canada on December 21, 2005 to learn that his eldest daughter had become paralyzed following a car accident.

[6] The Applicant has lived in Canada since his return here.

Impugned Decision

[7] Applying the physical presence test for residence, the Citizenship Judge found that the Applicant did not meet the residence requirement under the Act.

[8] In the Applicant's case, the relevant four year period to establish residence is from May 14, 2002 until May 14, 2006, for a total of 1,460 days. The Applicant declared 1,303 days of absences from Canada, leaving a physical presence of only 157 days.

[9] At the hearing before the Citizenship Judge, the Applicant provided a list of the requested information to validate his statements of residence in Canada and the Citizenship Judge reminded the Applicant that the onus rests upon him to satisfy the requirements of the Act (*Maharatnam v. Canada (Minister of Citizenship and Immigration)* (2000), 96 A.C.W.S. (3d) 198, [2000] F.C.J. No. 405 (F.C.T.D.) (QL)).

[10] The Citizenship Judge noted that there is jurisprudence to the effect that the physical presence of a citizenship Applicant for the entire 1,095 days is not required when there are special or exceptional circumstances. However, in the Judge's view, too long an absence from Canada, albeit temporary, during the minimum period of time set out in the Act, as in the present case, is contrary to the purpose of residency requirements of the Act. Indeed, the Act already allows a person who has been lawfully admitted to Canada for permanent residence not to reside in Canada during one of the four years preceding the date of that person's application for citizenship.

[11] Based on the evidence and upon careful review of all the documents submitted in support of his application, the Citizenship Judge found that the Applicant did not meet the requirement under subsection 5(1)(c) of the Act.

[12] The Judge determined that the Applicant was absent from Canada 1,303 days within the relevant four year period and he had spent more time outside of Canada than in. The Applicant was short 938 days from the 1,460 days as required under the Act and the documents he provided did not prove his physical presence in Canada.

[13] Before deciding to dismiss his application, the Judge considered, in accordance with subsection 15(1) of the Act, whether to make a favourable recommendation under subsections 5(3) and (4). The Applicant did not file any material in support of the Judge making a favourable recommendation for the use of discretion. After having carefully considered all the circumstances of the Applicant's case, the Citizenship Judge decided that his case did not warrant making a favourable recommendation.

Issue

[14] This application raises the following question: Is the Citizenship Judge's decision unreasonable?

[15] The present appeal shall be dismissed for the following reasons.

Relevant Legislation

[16] Section 21 of the *Federal Courts Act*, R.S.C., 1985, c. F-7 and subsection 15(4) of the *Citizenship Act* set out the Applicant's right of appeal of the decision of the Citizenship Judge:

21. The Federal Court has exclusive jurisdiction to hear and determine all appeals that may be brought under subsection 14(5) of the *Citizenship Act*.

21. La Cour fédérale a compétence exclusive en matière d'appels interjetés au titre du paragraphe 14(5) de la *Loi sur la citoyenneté*.

14. (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

14. (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.

[17] The residency requirements are set out in subsection 5(1)(c) of the *Citizenship Act*:

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 :

(c) is a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*, and has, within

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

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:

(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

(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 residence;

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) un demi-jour pour chaque jour de résidence au Canada avant son admission à titre de résident permanent,

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

[18] The special or extraordinary circumstances which can be considered at the discretion of the Citizenship Judge are enumerated in subsections 5(3) and 5(4) of the *Citizenship Act*:

5. (3) The Minister may, in his discretion, waive on compassionate grounds,

(a) in the case of any person, the requirements of paragraph (1)(d) or (e);

(b) in the case of a minor, the requirement respecting age set out in paragraph (1)(b), the requirement respecting length of residence in Canada set out in paragraph (1)(c) or the

5. (3) Pour des raisons d'ordre humanitaire, le ministre a le pouvoir discrétionnaire d'exempter :

a) dans tous les cas, des conditions prévues aux alinéas (1)d) ou e);

b) dans le cas d'un mineur, des conditions relatives soit à l'âge ou à la durée de résidence au Canada respectivement énoncées aux alinéas (1)b) et c), soit à la prestation du serment

requirement to take the oath of citizenship; and

de citoyenneté;

(c) in the case of any person who is prevented from understanding the significance of taking the oath of citizenship by reason of a mental disability, the requirement to take the oath.

c) dans le cas d'une personne incapable de saisir la portée du serment de citoyenneté en raison d'une déficience mentale, de l'exigence de prêter ce serment.

5. (4) In order to alleviate cases of special and unusual hardship or to reward services of an exceptional value to Canada, and notwithstanding any other provision of this Act, the Governor in Council may, in his discretion, direct the Minister to grant citizenship to any person and, where such a direction is made, the Minister shall forthwith grant citizenship to the person named in the direction.

5. (4) Afin de remédier à une situation particulière et inhabituelle de détresse ou de récompenser des services exceptionnels rendus au Canada, le gouverneur en conseil a le pouvoir discrétionnaire, malgré les autres dispositions de la présente loi, d'ordonner au ministre d'attribuer la citoyenneté à toute personne qu'il désigne; le ministre procède alors sans délai à l'attribution.

Analysis

Standard of Review

[19] Whether the Applicant established that he was physically present in Canada for 1,095 days is a question of fact. The Judge's finding on this point is reviewable on the newly articulated standard of reasonableness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Chen v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 763, [2008] F.C.J. No. 964 (QL)).

Is the Citizenship Judge's decision reasonable?

[20] The Applicant states that he returned to Iran due to his health problems and depression. He thought of committing suicide twice but abandoned the idea when he thought of his children and never gave up hope during the difficult times.

[21] He explains that he obtained a Professional Engineer (P.Eng.) license from the Council of Professional Engineers Ontario (PEO) on April 15, 2008. He also passed the National Board Commission Examination to become a Boiler and Pressure Vessel inspector on December 12, 2008. The Applicant wants to pursue his studies in Mechanical Engineering and he plans on obtaining a Master's degree in Mechanical Engineering from Ryerson University.

[22] On December 2, 2008, the Applicant was also approved for the Ontario Support Disability Program (OSDP) due to his heart problems and depression. The Applicant notes that his depression is improving, particularly because he obtained his P.Eng. license and passed the National Board Commission Examination.

[23] When the Applicant applied for Canadian citizenship, he assumed that the two years he lived in Canada from March 2000 until March 2002 and the fact that he had lived in Canada since December 2005 would be sufficient for him to be eligible to become a Canadian citizen.

[24] The Applicant is very committed to contributing to Canadian society and he notes that by granting him citizenship, he will be better able to help take care of his two daughters.

[25] The Respondent explains that the Court has effectively established two types of tests for residence: one quantitative and the other qualitative. The first requires an Applicant to be physically present in Canada for a total of three years, calculated on the basis of a strict counting of days, as set out in *Pourghasemi (Re)* (1993), 62 F.T.R. 122, 39 A.C.W.S. (3d) 251 (F.C.T.D.). The second type adopts a more contextual and flexible reading of residence, requiring the Applicant to have a strong connection to Canada and to centralize his or her mode of living in Canada, as in *In re Citizenship Act and in re Antonio E. Papadogiorgakis*, [1978] 2 F.C. 208 (T.D.) or *Koo (Re)*, [1993] 1 F.C. 286 (T.D.) (see also *Lam v. Canada (Minister of Citizenship and Immigration)* (1999), 164 F.T.R. 177, 87 A.C.W.S. (3d) 432).

[26] It is the prerogative of the Citizenship Judge to adopt the approach he sees appropriate in determining whether the Applicant has satisfied the residency requirements of the Act (*Rizvi v. Canada*, 2005 FC 1641 at par. 12, 144 A.C.W.S. (3d) 608; see also *Wang v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 390 at par. 18, 166 A.C.W.S. (3d) 220).

[27] The Respondent submits that the Citizenship Judge showed in his reasons that he was aware this Court's jurisprudence does not necessarily require physical presence. Nevertheless, he chose to apply the physical presence test set out in *Pourghasemi (Re)*, above. That decision was open to him.

[28] This Court has recognized, as did the Citizenship Judge, that the jurisprudence has created a strong inference that presence in Canada during three years out of the four year period must be

substantial (*Rizvi*, above at par. 12; *Canada (Minister of Citizenship and Immigration) v. Lu*, 2001 FCT 640 at par. 7, 106 A.C.W.S. (3d) 786; *Zhang v. Canada (Minister of Citizenship and Immigration)* (2000), 197 F.T.R. 225 at par. 9, 101 A.C.W.S. (3d) 691).

[29] The Citizenship Judge's decision that the Applicant was physically present in Canada for only 157 days during the relevant four-year period is supported by the evidence. This decision was reasonable and the Court's intervention is not warranted.

[30] Furthermore, the Applicant asks this Court to consider information about his residence that post-dated his application for citizenship. However, the only relevant timeframe for the purpose of this appeal is the four-year period starting on May 14, 2002 and ending on May 14, 2006.

[31] Finally, the Applicant asks this Court to grant him Canadian citizenship. However, this Court does not have jurisdiction to make such an order (*Zhang*, above at par. 11-14).

[32] In *Lam*, above, Justice Lutfy, as he then was, wrote at paragraph 14:

... In my opinion, it is open to the citizenship judge to adopt either one of the conflicting schools in this Court and, if the facts of the case were properly applied to the principles of the chosen approach, the decision of the citizenship judge would not be wrong. ...

[33] In the case at bar, the Judge decided to employ the physical presence test. The Court finds that based on the facts of this case, the decision is defensible in fact and law and is therefore reasonable.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the appeal be dismissed.

“Michel Beaudry”

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-625-08

STYLE OF CAUSE: **MOHAMMAD REZA GHahremani
and
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IMMIGRATION**

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: April 21, 2009

**REASONS FOR JUDGMENT
AND JUDGMENT:** Beaudry J.

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