Federal Court  Cour fédérale

Date: 20090708

Docket: T-1344-08

Citation: 2009 FC 708

Ottawa, Ontario, July 8, 2009

PRESENT: The Honourable Max M. Teitelbaum

BETWEEN:

Syed Mohammad ARIF

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an appeal pursuant to subsection 14(5) of the *Citizenship* Act (R.S., 1985, c. C-29) ("the Act") and section 21 of the *Federal Courts Act* (R.S., 1985, c. F-7), of a decision rendered on May 26, 2008, wherein Citizenship Judge, Gordana Caricevic-Rakovich ("the judge"), rejected Mr. Syed Mohammad Arif's application for Canadian citizenship.

Background

[2] The applicant was born on June 21, 1964 in Karachi, Pakistan and is 43 years of age. On March 31, 2001 he became a permanent resident of Canada and arrived in Canada on the same day.

[3] On June 12, 2005, he applied for Canadian citizenship and was given a hearing with the judge on April 8th, 2008.

[4] On May 26, 2008, the judge denied the applicant Canadian citizenship and provided notice to the Minister of this decision.

[5] On July 4, 2008, a letter was sent to the applicant confirming the denial of citizenship following a review of the additional documentation requested at the hearing.

Impugned Decision

[6] The judge found that the applicant did not meet the requirements of subsection 5(1)(c) of the Act, according to which an applicant is required to have accumulated at least three years of residence in Canada within the four years immediately preceding his or her application.

[7] The four year period in question is that of June 12, 2001 to June 12, 2005 (the "review period").

[8] After noting that the applicant had been absent 326 days during the review period, the judge indicated that the primary issue is whether or not the applicant meets the residence requirement under subsection 5(1)(c) of the Act. In coming to the conclusion that the applicant does not meet this residence requirement, the judge made the following observations:

a. There is a discrepancy between the applicant's residence questionnaire and the solemn declaration provided by his sister. While the applicant states that he has lived at his sister's address since July 2002, his sister had written that he has lived there since March 31, 2001.
b. The applicant has not been able to find work in his field and has filed income tax returns for 2003 and 2004 showing an income of $0 for both years.
c. The applicant has not terminated his business outside of Canada because it is a family business managed by his brother, and the applicant has reported trips outside of Canada for business and family related purposes.
d. Bank statements and Rogers Wireless bills are not in and of themselves sufficient to prove residency.
e. The applicant is separated from his wife who lives with their children in the U.K. His mother and sister live in Canada.

[9] In the judge's letter to the applicant notifying him of the negative decision the judge explains that after considering all of the documents, including those additional documents requested at the hearing, the applicant does not meet the requirement as defined in subsection 5(1)(c) of the Act.

Issue

[10] The issue for determination by this court is the following:

1) Did the judge err in finding that the evidence submitted by the Applicant did not demonstrate that he meets the residency requirements provided at subsection 5(1)(c) of the Act?

Statutory Framework

[11] The relevant statutory provisions are the following:

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	(ii) un jour pour chaque jour de résidence au Canada après son

Canada after his lawful admission to Canada for permanent residence the person shall be deemed to have accumulated one day of residence;	admission à titre de résident permanent;
(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.

Analysis

Standard of Review

[12] In *Dunsmuir v. New Brunswick,* 2008 SCC 9, the Supreme Court established that where jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded to a particular category of question, there is no need to engage in a standard of review analysis (paragraph 57).

[13] Recently in *Zhang v. Canada (Minister of Citizenship and Immigration)* 2008 FC 483, Justice Blanchard explained, at paragraphs 7-8, that:

> The question of whether an appellant meets the residency requirement involves an issue of mixed fact and law on which Citizenship Judges are owed a degree of deference by reason of their special knowledge and expertise in these matters. The ample jurisprudence of this Court has established the applicable standard of review for such a question to be reasonableness *simpliciter*. (*Chen v. Canada (Minister of Citizenship and Immigration)* [2006] F.C.J. No. 119, 2006 FC 85 at paras, 6; *Rizvi v. Canada (Minister of Citizenship and Immigration)* [2005] F.C.J. No. 2029, 2005 FC 1641 at para. 5; *Xu v. Canada (Minister of Citizenship and Immigration)* [2005] F.C.J. No. 88, 2005 FC 700 at para. 13 and *Canada (Minister of Citizenship and Immigration) v. Fu*, [2004] F.C.J. No. 88, 2004 FC 60 at para. 7).
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> The Supreme Court of Canada in *David Dunsmuir v. Her Majesty the Queen in Right of the Province of New Brunswick*, [2008] S.C.J. No. 9, 2008 SCC 9, recently decided that there are now only two standards of review; reasonableness and correctness. I am satisfied upon consideration of the principles and factors discussed in *Dunsmuir* that the applicable standard of review for the question before me is reasonableness.

[14] That being said, while a Citizenship Judge is free to choose which residency test to adopt for the purposes of deciding an application, a blending of different tests is an error of law, and is proper ground for appeal. *Sio v. Canada*, [1999] F.C.J. No. 422 (Q.L.), at para. 10; *Hsu v. Canada (M.C.I.)*, 2001 FCT 579. A misunderstanding of the jurisprudence surrounding residency will lead to a decision being reviewed on a correctness standard. *Canada (Minister of Citizenship and Immigration) v. Xiong*, 2004 FC 1129.

[15] The thrust of the applicant's argument is that the judge erred in blending different residency tests. The applicant alleges that by citing a strict count of days of physical presence and then going on to refer at significant length and in a critical manner to the Applicant's documentary evidence, the judge engaged in a blending of tests. According to the applicant, this error is heightened by the

fact that the applicant has been physically present in Canada for at least three out of the four years immediately preceding his application for citizenship.

[16] The respondent argues that the reasons of the judge reveal that the applicant failed to meet the first stage of the two-pronged inquiry with respect to his residency requirements: i.e. the threshold determination as to whether residency has been indeed established. The respondent contends that, having failed the applicant on the first stage, the judge correctly denied citizenship to the applicant. The judge never addressed the second step of the analysis and could not, therefore, have erred in blending the various residency tests.

[17] It is generally accepted that the proper approach to an analysis under subsection 5(1)(c) of the Act is as explained in *Goudimenko v. Canada (Minister of Citizenship and Immigration)* [2002] FCT 447, at paragraph 13:

> …[A] two-stage inquiry exists with respect to the residency requirements of paragraph 5(1)(c) of the Act. At the first stage, the threshold determination is made as to whether or not, and when, residence in Canada has been established. If residence has not been established, the matter ends there. If the threshold has been met, the second stage of the inquiry requires a determination of whether or not the particular applicant's residency satisfies the required total days of residence. It is with respect to the second stage of the inquiry, and particularly with regard to whether absences can be deemed residence, that the divergence of opinion in the Federal Court exists.
>
> (my emphasis)

[18] This divergence of opinion, referenced above with respect to the second stage of the inquiry, refers to the different approaches to the definition of “residency” under the *Citizenship Act*. This is briefly explained in *Seiffert v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1072, at para 6:

> In a given case, a citizenship judge is free to select between three tests decided by this Court, being the stringent test found by Justice Muldoon in *Re Pourghasemi*, [1993] F.C.J. No. 232 (T.D.), the flexible test found by Justice Thurlow in *Re Papadogiorgakis*, [1978] 2 F.C. 208 (T.D.), and the test stated by Justice Reed in *Re Koo*, [1992] F.C.J. No. 1107 (T.D.) which is an adjunct to the decision in *Re Papadogiorgakis*.

[19] These various tests are explained in *Ping v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 777, at paragraph 4:

> …One of these tests, referred to as the physical presence test or the *Pourghasemi* test, [1993] F.C.J. No. 232, 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, [1992] F.C.J. No. 1107, 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.

[20] Therefore, according to the above, an analysis under subsection 5(1)(c) of the Act involves a two-stage analysis. In the first step it must be determined whether and when the applicant has established himself or herself in Canada. The second step involves a counting of days according to any of the three accepted methods.

[21] In my opinion, to be granted citizenship in a country like Canada, one should consider oneself privileged. Regardless of the method adopted by the Citizenship Judge, citizenship should only be granted to individuals who are prepared, not only to accept the benefits of Canadian citizenship, but to fulfill the obligations of Canadian citizenship as well. Residency can not be established until an applicant can show that he or she is so prepared. This is further substantiated by the requirement found in subsection 5(1)(e) of the Act that applicants have knowledge of the responsibilities of citizenship. The language of the Act does unfortunately not require that one be prepared to fulfill the obligations of citizenship. It only requires knowledge of the responsibilities of citizenship.

[22] In this case, the judge noted that the applicant filed income tax returns for 2003 and 2004 showing an income of $0. Yet, it is admitted by the applicant that since his date of landing, and in the years 2003 and 2004, he has traveled outside of Canada for family and business purposes. As it is required, under section 3 of the *Income Tax Act*, that taxable income include income earned outside of Canada, whatever the applicant earned on his business trips should have been declared. Filing truthful and accurate income tax returns is certainly an important responsibility of Canadian citizenship. In the present case the applicant was not asked why he did not receive any income for the time he spent at the family business but this question should have been put to him.

[23] I am returning this matter for a new hearing before a different Citizenship judge. I caution the Citizenship judge not to blend the different tests for residency.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the appeal is allowed and the matter is returned before a different Citizenship judge for redetermination.

"Max M. Teitelbaum"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1344-08
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