

Federal Court



Cour fédérale

Date: 20101208

Docket: T-1167-09

Citation: 2010 FC 1254

Ottawa, Ontario, December 8, 2010

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

HAFIZ JAMEEL AHMED SHAIKH

Applicant

and

**MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an appeal under section 21 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 and subsection 14(5) of the *Citizenship Act*, R.S.C. 1985, c. C-29, of a decision dated May 20, 2009 of a Citizenship Judge wherein the applicant's application for Canadian citizenship was denied on the basis that he had not met the residency requirements under paragraph 5(1)(c) of the *Citizenship Act*.

[2] The applicant requests that the decision of the Citizenship and Immigration Canada (CIC) Citizenship Judge be set aside and the matter referred back to a different Citizenship Judge for re-determination.

Background

[3] Hafiz Jameel Ahmed Shaikh (the applicant) is a citizen of Pakistan. He has been a permanent resident in Canada since November 11, 2002.

[4] In January 2007, the applicant went to Pakistan to care for his ill parents-in-law and attend to personal affairs. He returned to Canada in October 2007.

[5] Following his return from Pakistan, the applicant filed for citizenship on November 9, 2007. In his application, he calculated that he had been absent from Canada 286 days since he became a permanent resident.

[6] The applicant failed to attend the following scheduled appointments:

1. Citizenship Test, April 18, 2008;
2. First Hearing, June 3, 2008; and
3. Final Hearing, August 18, 2008.

[7] On August 12, 2008, CIC received a letter from an immigration consulting agency which stated that the applicant was unable to attend his hearing due to the hospitalization and severe illness of his father and mother-in-law.

[8] The applicant attended a hearing with a Citizenship Judge on December 5, 2008. He was requested to provide at the hearing, copies of all of his passports and copies of rental agreements for the years 2004 to 2007.

[9] The applicant alleged that he lost his previous passport numbered J797282. He submitted a police report dated April 16, 2007, which indicated that he reported this to the police in Karachi, Pakistan.

[10] The copy of the passport provided to the Citizenship Judge by the applicant was passport number AZ5192901. This passport was issued May 3, 2007. It indicates that the previous passport was numbered KE139458. The applicant alleges that this previous passport was replaced by the government of Pakistan with a machine readable passport and that he no longer possesses the previous passport.

[11] The applicant provided the Citizenship Judge with a tenancy application in his brother's name, dated October 10, 2002, which indicated that the applicant was an occupant. He also provided a letter from the landlord acknowledging that the applicant is an occupant of the apartment in this tenancy agreement. This letter was dated November 5, 2007.

[12] The applicant further provided T4 forms and notices of assessment from the Canada Revenue Agency for each year of 2002 to 2007 inclusive. However, these forms do not indicate when he earned this salary during each year. In addition, the total income earned in each of the documents varies from \$1,400 one year to \$9,600 another year.

[13] A letter from the Minister of Health and Long-Term Care indicated that no medical claims had been processed for the applicant between November 1, 2002 and December 5, 2008.

[14] The Citizenship Judge declined to approve the citizenship application and the applicant appealed to this Court.

Citizenship Judge's Decision

[15] The Citizenship Judge found that the onus was on the applicant to satisfy him that he fulfilled the requirements of the *Citizenship Act*. The Citizenship Judge found that the applicant did not prove that he met the residence requirement of paragraph 5(1)(c) of the *Citizenship Act* and his application was not approved.

[16] The applicant had been requested to provide a copy of all his passports and a copy of rental agreements for 2004 to 2007, which he did not provide. Since the applicant did not provide a copy of his previous passport number KE13948 (the actual passport number was KE139458), the Citizenship Judge held that he was unable to verify all of the applicant's absences from Canada.

[17] The Citizenship Judge found that the Federal Court jurisprudence does not require physical presence for the entire 1,095 days when there are special circumstances. However, he stated that too long of an absence from Canada during the minimum period was contrary to the purpose of the residence requirement of the *Citizenship Act*.

[18] In addition, the Citizenship Judge noted that the applicant did not file any material in support of the use of his discretion to issue a favourable recommendation. As such, the Citizenship Judge declined to make such a recommendation.

Issues

[19] The applicant submitted the following issues for consideration:

1. Did the tribunal err in rejecting cogent evidence?
2. Did the tribunal ignore uncontradicted evidence?
3. Did the tribunal improperly decline to exercise its jurisdiction for discretion?

[20] I would rephrase the issues as follows:

1. What is the appropriate standard of review?
2. Did the Citizenship Judge err in determining that the applicant did not meet the residence requirement under paragraph 5(1)(c) of the *Citizenship Act*?
3. Did the tribunal improperly decline to exercise its jurisdiction for discretion?

Applicant's Written Submissions

[21] The applicant submits that the Citizenship Judge did not consider the evidence in front of him.

[22] The applicant submits that he provided a reasonable explanation for why he did not produce the residential tenancy agreements for the years 2004 to 2007: that he is in a continuing tenancy where a new agreement is not signed every year. He also submits that he provided evidence, by way of a police report, that his previous passport was lost and therefore could not be produced. Since the evidence he presented was uncontradicted, the Citizenship Judge had a duty to make a decision based on a reasonable assessment of the evidence as a whole.

[23] The applicant further submits that the materials, explanations and excuses provided by him at the citizenship hearing should have been considered by the Citizenship Judge in deciding to use his discretion to make a favourable recommendation.

[24] The applicant submits that there was a duty to provide reasons for rejecting the applicant's application in clear and unmistakable terms.

Respondent's Written Submissions

[25] The respondent submits that the determination of whether a candidate meets the residency requirement should be assessed on the standard of reasonableness.

[26] The respondent submits that notwithstanding the different formulations of the residency test, applicants for citizenship must objectively demonstrate that they have established residence in Canada and that they have maintained their established residence throughout the period of at least three years preceding their application.

[27] The applicant did not meet the burden of proof for establishing residence on a balance of probabilities. The applicant was requested to produce all passports and previous rental agreements for the years 2004 to 2007. However, he did not produce his previous passports, his record of landing or his residential tenancy agreements for some of the period in question. Without these, the respondent submits, it was reasonable for the Citizenship Judge to find that there was inadequate evidence to assist him in verifying the applicant's absences from Canada.

Analysis and Decision

[28] I would note that this matter should have proceeded by way of a notice of appeal as the applicant has a right to appeal pursuant to subsection 14(5) of the *Citizenship Act*. I will therefore apply Rule 57 of the *Federal Court Rules*, SOR/98-106 and convert the application for judicial review into an appeal.

[29] **Issue 1**

What is the appropriate standard of review?

A standard of review analysis need not be conducted in every case. Where the standard of review applicable to a particular issue before the court is determined in a satisfactory manner by

previous jurisprudence, the reviewing court may adopt that standard of review (see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraph 57).

[30] The jurisprudence is settled that a determination about whether an applicant meets the residency requirement of the *Citizenship Act* is one of mixed fact and law and is reviewable on a standard of reasonableness (see *Johar v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1015, 83 Imm. L.R. (3d) 299 at paragraphs 17 and 18; *Canada (Minister of Citizenship and Immigration) v. Arastu*, 2008 FC 1222 at paragraphs 16 and 17).

[31] **Issue 2**

Did the Citizenship Judge err in determining that the applicant did not meet the residence requirement under paragraph 5(1)(c) of the *Citizenship Act*?

The applicant bears the burden of proof to show that he meets requirements of the *Citizenship Act* on a balance of probabilities (see *Maharatnam v. Canada (Minister of Citizenship and Immigration)* (2000), 96 A.C.W.S. (3d) 198, [2000] F.C.J. No. 405 (QL) at paragraph 5; *Malevsky c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2002 FCT 1148 at paragraph 7).

[32] This includes proving the requirements of residency:

5.(1) The Minister shall grant citizenship to any person who

...

(c) is a permanent resident within the meaning of

5.(1) Le ministre attribue la citoyenneté à toute personne qui, à la fois :

...

c) est un résident permanent au sens du paragraphe 2(1) de la

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:

...

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 :

...

[33] The term residence is not expressly defined under subsection 2(1) of the *Citizenship Act*. Consequently, decision-makers must look to the jurisprudence of the Federal Court to understand the parameters of residency. In addition, since the *Citizenship Act* precludes appeals to the Federal Court of Appeal through section 16 and thus limits appellate review, there exist three concurrent tests for residency found in the cases of: *Re Papadogiorgakis* (1978), 88 D.L.R. (3d) 243 (F.C.T.D.), [1978] F.C.J. No. 31 (QL) at paragraphs 15 to 17; *Re Pourghasemi* (1993), 62 F.T.R. 122, [1993] F.C.J. No. 232 (QL) (F.C.T.D.); *Re Koo*, [1993] 1 F.C. 286 (QL) (F.C.T.D.) at paragraph 10. The central difference between these tests is the manner in which residency is measured. One test counts the exact number of days physically present in Canada, while the others look at physical presence as well as quality of attachment to Canada and the location of an individual's central mode of existence. However, with each test, the applicant must be able to objectively show that he was physically present in Canada for some period of time in addition to providing supplementary information for the tests of *Re Koo* and *Re Papadogiorgakis* above.

[34] The applicant did not provide sufficient evidence to verify when he was absent from Canada. The only passport he submitted was issued on May 3, 2007, only six months before he

applied for citizenship. The tenancy applications he submitted indicate that he was an occupant in his brother's apartment from 2002 to 2007 but do not provide evidence of when he was physically present in Canada. The same is true of the Canada Revenue Agency documents he submitted. Finally, the Minister of Health letter indicates that there were no claims processed for the applicant in the six year period of November 1, 2002 and December 5, 2008.

[35] It was reasonable for the Citizenship Judge to conclude that he was unable to verify any amount of time that the applicant was present in Canada and could not approve the citizenship application. Previous case law confirms that a Citizenship Judge may deny a citizenship application if he or she must rely on "information regarding absences from Canada that cannot be verified by a passport examination" (*Johar* above, at paragraph 37).

[36] Specifically, in *Farrokhyar v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 697, 158 A.C.W.S. (3d) 878 at paragraph 18, Madam Justice Danièle Tremblay-Lamer held that:

In the present case, the Judge was not able to confirm the applicant's assertions regarding the number of days he was present in Canada, given the inadequacy of his evidence. Consequently, she could not logically make a determination of the exact number of days he spent in Canada, and cannot be faulted for her failure to do so.

[37] The reasons provided to the applicant for the decision clearly indicate that because the applicant failed to provide satisfactory proof of residence in Canada, the Citizenship Judge was unable to verify all of his absences. This fulfills the duty to provide reasons.

[38] In my view, the Citizenship Judge's decision was transparent, intelligible and justified, and a possible outcome in view of the facts and the law.

[39] **Issue 3**

Did the tribunal improperly decline to exercise its jurisdiction for discretion?

The applicant claims that the Citizenship Judge erred by not recommending the exercise of discretion pursuant to subsection 5(4) of the *Citizenship Act*. I have reviewed the Citizenship Judge's reasons and the file materials and I agree with his decision. There was insufficient evidence presented to him to allow him to make a recommendation for the use of discretion.

[40] For the above reasons, the applicant's appeal is dismissed.

JUDGMENT

[41] **IT IS ORDERED that:**

1. The applicant's application for judicial review is converted into an appeal.
2. The applicant's appeal is dismissed.

“John A. O’Keefe”

Judge

ANNEX

Relevant Statutory Provisions

Citizenship Act, R.S.C. 1985, c. C-29

5.(1) The Minister shall grant citizenship to any person who

...

(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: . . .

(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.

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

5.(1) Le ministre attribue la citoyenneté à toute personne qui, à la fois :

...

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 : . . .

(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.

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

notice of appeal in the Registry of the Court within sixty days after the day on which

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.

...

...

16. Notwithstanding section 28 of the *Federal Courts Act*, the Federal Court of Appeal does not have jurisdiction to hear and determine an application to review and set aside a decision made under this Act if the decision may be appealed under section 14 of this Act.

16. Nonobstant l'article 28 de la *Loi sur les Cours fédérales*, la Cour d'appel fédérale n'a pas compétence pour entendre et juger une demande de révision et d'annulation d'une décision rendue sous le régime de la présente loi et susceptible d'appel en vertu de l'article 14.

Federal Courts Act, R.S., 1985, c. F-7

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*.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1167-09

STYLE OF CAUSE: HAFIZ JAMEEL AHMED SHAIKH
- and -
MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: September 9, 2010

**REASONS FOR JUDGMENT
AND JUDGMENT OF:** O'KEEFE J.

DATED: December 8, 2010

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