Federal Court  Cour fédérale

Date: 20110420

Docket: T-1619-10

Citation: 2011 FC 482

Ottawa, Ontario, April 20, 2011

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

ANNE MARIE MURPHY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 14(5) of the *Citizenship Act* (R.S., 1985, c. C-29) (the *Act*) for judicial review of a Citizenship Court decision dated August 10, 2010 denying the applicant's application for Canadian citizenship.

[2] The facts are straightforward. The applicant is originally from the United States. She has a Master's degree in Film from the University of California, Los Angeles (UCLA). She currently

lives in Kingston, Ontario with her daughter who attends senior kindergarten. The applicant operates, or operated, film-consulting businesses in Canada and the United States. At the time she completed her citizenship application, she was in the process of closing the U.S. portion of her business. The applicant employs four Canadian citizens at the Canadian business. The applicant has also lectured at Queen's University's Media Studies department.

[3] The applicant came to Canada on November 6, 2003 and became a permanent resident on October 13, 2004. She submitted her application for Canadian citizenship on June 9, 2008. In the period of time preceding her citizenship application, the applicant declared that she had been absent from Canada for 696 days and had only been physically present in Canada for 701 days. On August 10, 2010 the Citizenship Judge denied the applicant's application for Canadian citizenship. The applicant now seeks a writ of certiorari quashing the decision, a writ of mandamus ordering that she be granted citizenship, and costs of her judicial review application.

[4] The *gravamen* of the appeal is that in failing to apply the *Koo* test; *Koo (Re)*, [1993] 1 FC 286, the Citizenship Judge rendered an unreasonable decision. The applicant contends that she meets the requirements for citizenship set forth in *Koo (Re)*. The applicant contends that the decision of this Court in *Canada (Citizenship and Immigration) v Takla*, 2009 FC 1120 makes *Koo (Re)* the controlling and sole test.

[5] The record before this Court is lengthy and indicates that the applicant had centralized her mode of living in Kingston, Ontario. It is also clear that the applicant's intent to become a Canadian citizen in genuine. This evidence cannot, however, be used to overcome the requirement of

physical presence, if it is used to define residency. The applicant was, at the time her application was made, absent from Canada for 696 days. It is perhaps more appropriate to say that she was only physically present in Canada for 701 days.

[6] This finding is not in issue. What is in issue, however, is whether the Citizenship Judge was correct in choosing to follow the test in *Re Pourghasemi* [1993] FCJ No 232 which requires that residency be established by physical presence. As noted by this Court in *Abbas v Canada (Citizenship and Immigration)*, 2011 FC 145; *Hao v Canada (Citizenship and Immigration)*, 2011 FC 46; *El-Khader v Canada (Citizenship and Immigration)*, 2011 FC 328; the decision of this Court in *Canada (Citizenship and Immigration) v Takla*, 2009 FC 1120 did not and could not overrule the decision in *Lam v Canada (Minister of Citizenship and Immigration)*, (1999), 164 FTR 177. That case, it should be recalled, held that a Citizenship judge is free to choose any of the tests, and, provided that it was properly applied, this Court would not set it aside.

[7] Counsel for the applicant also contended that this case fell within the range of exceptional circumstances, as contemplated by the Citizenship Courts' Policy Manual. In my view, the Policy Manual is of limited effect in constraining the exercise of discretion of a Citizenship judge in selecting the test of residency. In any event, even if it did, the applicant fell far short of the required number of days, and exceptional circumstances as contemplated by the Manual are likely to be events beyond a putative citizen's control such as medical illness or emergencies.

[8] Simply put, it is not an error for a Citizenship judge to assess residency by applying only the physical presence test. The jurisprudence as it currently stands provides Citizenship judges with the

discretion to choose any of the three tests. Clearly, some Federal Court judges prefer one test to another, but Citizenship judges retain the ability to choose and apply any of the three tests.

[9] In this case, the Citizenship Judge, having adopted the physical presence test for residency, reasonably concluded that the applicant had not met the physical residency requirement.

[10] The application for judicial review is dismissed.

[11] There is no order as to costs.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be and is hereby dismissed. There is no order as to costs.

"Donald J. Rennie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1619-10
STYLE OF CAUSE:	ANNE MARIE MURPHY v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto
DATE OF HEARING:	March 29, 2011
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