Federal Court  Cour fédérale

Date: 20111214

Docket: T-425-11

Citation: 2011 FC 1416

Ottawa, Ontario, this 14th day of December 2011

Present: The Honourable Mr. Justice Pinard

BETWEEN:

Luftar HYSA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] On March 14, 2011, Luftar Hysa (the "applicant") filed the present appeal, under subsection 14(5) of the *Citizenship Act*, R.S.C. 1985, c. C-29 (the "Act"), from a decision of Judge Marcel Tremblay, the Citizenship Judge. The latter refused the applicant's application for citizenship due to his failure to meet the residency requirement under paragraph 5(1)(*c*) of the Act. During the relevant

period set out in paragraph 5(1)(*c*) of the Act, the applicant was physically present in Canada for only 173 days, as he was living and working in Mexico, leaving him short 922 days from the required 1,095 days of physical presence in the country.

[2] The applicant argues that the Citizenship Judge erred in failing to clearly state the applicable test for residency, in failing to properly apply the *Re Koo*, [1993] 1 F.C. 286 [*Re Koo*] test to evaluate his centralized mode of existence in Canada, and in failing to provide adequate reasons. I do not agree. Consequently, the appeal is dismissed.

[3] This appeal is dismissed on the basis of *Martinez-Caro v. The Minister of Citizenship and Immigration*, 2011 FC 640 [*Martinez-Caro*]. In that case, my colleague Justice Donald J. Rennie thoroughly reviewed the jurisprudence on the residency requirement of paragraph 5(1)(*c*) of the Act, and provided a compelling analysis of the relevant applicable principles. I fully adopt his reasoning which lead to the following conclusion contained at paragraphs 52 and 53 of the decision, wherein Mr. Justice Rennie refers to *Re Pourghasemi*, [1993] F.C.J. No. 232, 62 F.T.R. 122 [*Re Pourghasemi*], and *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27:

> [52] In my view therefore, the interpretation of the residency provision of the *Citizenship Act* is subject to the standard of correctness and that residency means physical presence in Canada.
>
> [53] It is my opinion that *Re Pourghasemi* is the interpretation that reflects the true meaning, intent and spirit of subsection 5(1)(*c*) of the Act: *Rizzo*, paras 22 and 41. For this reason it cannot be said that the Citizenship Judge erred in applying the *Re Pourghasemi* test. Furthermore, the Citizenship Judge correctly applied the *Re Pourghasemi* test in determining that a shortfall of 771 days prevented a finding that 1,095 days of physical presence in Canada had been accumulated.

[4] In the case at bar, the Citizenship Judge, in his reasons, clearly indicated that the applicant was absent from Canada a total of 1,287 days. Consequently, the latter did not meet the physical residency requirement under paragraph 5(1)(*c*) of the Act, failing to meet the test in *Re Pourghasemi*. The applicant not having been physically present in Canada for the equivalent of three years, the Citizenship Judge went on to consider whether these absences qualified nonetheless as a period of residence in Canada, considering his centralized mode of existence.

[5] In my view, in light of *Martinez-Caro*, it would have been sufficient for the Citizenship Judge to solely base his decision on *Re Pourghasemi*, without going on, as he did, to further consider the elements of the test stated in *Re Koo*. The Citizenship Judge, in the case at bar, was correct in applying the *Re Pourghasemi* test and in concluding that a presence of only 173 days in Canada was insufficient to establish residency: the applicant had not accumulated 1,095 days of physical presence, as required by paragraph 5(1)(*c*) of the Act. Thus, this conclusion as to the applicant's lack of physical presence was sufficient for the Citizenship Judge to refuse the applicant's citizenship application. Moreover, the Citizenship Judge's reasons are sufficient as they clearly allowed the applicant to know why his application for Canadian citizenship was refused: he did not meet the residency requirement under paragraph 5(1)(*c*) of the Act, having been absent from Canada for 1,287 days.

[6] For the above reasons, the appeal is dismissed. There is no order as to costs.

JUDGMENT

The appeal from the decision of Citizenship Judge Marcel Tremblay, refusing the applicant's application for citizenship due to his failure to meet the residency requirement under paragraph 5(1)(*c*) of the *Citizenship Act*, R.S.C. 1985, c. C-29, is dismissed. There is no order as to costs.

"Yvon Pinard"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-425-11
STYLE OF CAUSE:	Luftar HYSA v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	October 18, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	Pinard J.
DATED:	December 14, 2011

APPEARANCES:

Me Mitchell Goldberg	FOR THE APPLICANT
Me Catherine Brisebois	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Blanshay Goldberg Berger Montréal, Quebec	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT