

Federal Court



Cour fédérale

**Date: 20120425**

**Docket: T-1588-10**

**Citation: 2012 FC 487**

**Ottawa, Ontario, April 25, 2012**

**PRESENT: The Honourable Mr. Justice Rennie**

**BETWEEN:**

**ERICH KAINDL**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] The applicant appeals a decision of a Citizenship Court judge dismissing his application for Canadian citizenship. His appeal is brought pursuant to subsection 14(5) of the *Citizenship Act*, RS, 1985, c C-29 (the *Act*), and is governed by the *Federal Courts Rules* (SOR/98-106) pertaining to applications; hence his status as applicant and the Minister's as respondent. For the reasons that follow this appeal is dismissed.

***Facts***

[2] The applicant, Mr. Erich Kaindl, together with his wife and five children arrived in Canada on November 1, 1998 at the request of his employer, Siemens, to take on responsibilities for Siemens' Canadian operations. Two years later, the significant global downturn in the technology sector and the economy generally, resulted in the decision by Siemens to close its Canadian operations. After two years of searching for work in Canada Mr. Kaindl accepted the offer of his employer to take on responsibilities for Siemens back in Austria. He thus began a long period of what was, in effect, commuting between his workplace in Austria and his family, in Kanata, Ontario. His family remained in Canada, his children attended the local high school and universities. They are now all, save Mr. Kaindl, Canadian citizens, successfully integrated into and fully participating as active members of Canadian society. Mr. Kaindl's wife is the principal of the German Language School of Ottawa; three of his five children are in university, and two are nearing the end of high school.

[3] Mr. Kaindl became a Canadian permanent resident on November 6, 2003. He applied for Canadian citizenship on September 1, 2008. On September 15, 2010 the Minister communicated to the applicant that his citizenship application had been refused because he had not met the residence requirement under paragraph 5(1)(c) of the *Act*.

[4] The applicant conceded before the Citizenship Judge that it was his personal choice to accept the position in Austria; however, he argues that his absence from Canada was driven by economic necessity. His choice was social assistance or to accept the position in Siemens. He said

he made a choice that was reasonable and in the interests of Canada as he would not depend on employment insurance and social assistance.

[5] The Citizenship Judge applied the decision of this Court in *Re Pourghasemi*, [1993] FCJ No 232 in arriving at his decision not to grant the applicant Canadian citizenship. The Citizenship Judge found that the applicant fell short of the 1,095 days required under the *Act* in order to qualify for citizenship. The applicant had only 224 days of physical presence in Canada. He had been outside Canada for 871 days. The Citizenship Judge also found that a favourable exercise of discretion under sections 5(3) and (4) of the *Act* was unwarranted.

[6] The applicant is correct in noting that there was a miscalculation in the setting of the frame of reference for the calculation of the residency period. The Citizenship Judge extended the residency period by three months from September 1, 2008 to December 12, 2008, resulting in the an incorrect total residency requirement of 1236 days. However, the error is immaterial. Adjusting for the error in setting the dates for the four year period, the applicant was still only resident in Canada only 224 days during the required period. This does not warrant setting aside the decision.

### ***Standard of Review and Issue***

[7] The issue in this case is whether the decision of the Citizenship Judge refusing the applicant's citizenship application is correct in law per *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 and whether the decision not to recommend that the Minister give favourable consideration to the applicant's application for citizenship is a reasonable exercise of discretion.

*Analysis*

[8] In *Martinez-Caro v Canada (Citizenship and Immigration)*, 2011 FC 640 I concluded that it was Parliament's intention that residency was to be determined on the basis of physical presence in Canada:

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... 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.

[9] There, as here, the applicant was absent from Canada for a considerable period of time. In light of this, and in light of my view that *Pourghasemi* is the interpretation that reflects the intention of Parliament as set forth in section 5(1)(c) of the *Act*, the Citizenship Judge committed no error of law in adopting the test of physical presence in Canada to determine residency.

[10] The applicant does not challenge the correctness of the test; rather, he contends that had the error in the calculation of the residency period not been made, the outcome might have been different. He contends that the Citizenship Judge drew an adverse inference as to his credibility and that this, in turn, affected his approach to the exercise of discretion to make a favourable recommendation to the Minister that, in all the circumstances, citizenship be granted.

[11] There is nothing in the decision of the Citizenship Judge which suggests that adverse inferences were drawn as to the applicant's credibility. Indeed, the contrary seems to be the case. The Citizenship Judge accepted the facts as laid out before him by Mr. Kaindl and there is no

indication, direct or indirect, that the he disbelieved or discounted the applicant's evidence for any reason, let alone for reasons related to the Citizenship Judge's error in setting the period of residency.

[12] Mr. Kaindl also points to the fact that the Department of Citizenship and Immigration separated, administratively, his application from that of his wife and children when it became apparent that they had received citizenship. Mr. Kaindl argues that, in consequence, the Citizenship Judge did not have the full context of evidence before him and was thus unable to properly exercise his discretion under sections 5(3) and (4) of the *Act* to make a recommendation to the Minister that he favourably consider granting citizenship to Mr. Kaindl.

[13] Attractive as this argument is on its face, it does not fit well with the record. The applicant testified before the Citizenship Judge, and the decision indicates that the Citizenship Judge had before him a very complete picture of Mr. Kaindl's circumstances. The decision notes, for example, Mr. Kaindl's participation in the church choir, their home ownership, the fact that the family is well established financially and the fact that the applicant's wife and children continue to live in the home in Kanata. The Citizenship Judge also situates these findings of fact in context of the difficult choice that Mr. Kaindl had to make.

[14] While it is true that the decision does not refer to the fact that Mr. Kaindl's wife and children are now Canadian citizens, there is no requirement that a decision maker recite all of the evidence before them. The fact that the other family members are Canadian citizens and that he is married to

a Canadian wife is not so compelling or determinative a consideration that the failure to mention it expressly in the reasons renders the decision unreasonable.

[15] Finally, the applicant argues that the Citizenship Judge erred in the exercise of his discretion in failing to consider the best interests of the children. The applicant relies on the principles of *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 in support of this proposition and notes that he is the parent of five Canadian children.

[16] There is no support for the proposition that in considering the grant of citizenship, the best interests of Canadian children are to be taken into account. The guidance, support and direction integral to parenting can be exercised regardless of status as a permanent resident, or presence in Canada on a work or visitor's visa. The situation is far removed from that where parents are being separated from Canadian children, and returned to their country of origin with scant prospect of return or re-entry into Canada.

[17] While I am sympathetic to the applicant's situation, the Citizenship Judge did not err in reaching the conclusion that he did. For that reason the appeal must be dismissed. Nothing in the *Act* prevents the applicant from re-applying for Canadian citizenship when he has accumulated the number of days required to satisfy the requirements set out in the *Act*.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the appeal is dismissed. There is no order as to costs.

"Donald J. Rennie"

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Judge

## ANNEX A

*Citizenship Act* (R.S.C., 1985, c. C-29),  
**Section 5(1)(c)**

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:

(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;

...

*Citizenship Act* (R.S.C., 1985, c. C-29),  
**Sections 5(3) and (4)**

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

*Loi sur la citoyenneté* (L.R.C. (1985),  
CH. C-29) **section 5(1)(c)**

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 :

(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;

...

*Loi sur la citoyenneté*  
(L.R.C. (1985), CH. C-29)  
**Sections 5(3) and (4)**

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



- (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 requirement to take the oath of citizenship; and
- (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.
- (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.
- 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 de citoyenneté;
- 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.
- (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.

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1588-10

**STYLE OF CAUSE:** ERICH KAINDL v. THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** Ottawa

**DATE OF HEARING:** February 22, 2012

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

**DATED:** April 25, 2012

**APPEARANCES:**

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**SOLICITORS OF RECORD:**

None. FOR THE APPLICANT

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