Date: 20080619

Docket: T-1648-07

Citation: 2008 FC 763

Ottawa, Ontario, June 19, 2008

PRESENT: The Honourable Madam Justice Dawson

BETWEEN:

YIN WEN CHEN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Yin Wen Chen's application for citizenship was denied because a citizenship judge found that Mr. Chen had not demonstrated that he resided in Canada for the 1,095 days required by paragraph 5(1)(*c*) of the *Citizenship Act*, R.S.C. 1985, c. C-29 (Act). The judge found that Mr. Chen had provided conflicting, incomplete, and misleading evidence. This appeal from that decision is dismissed because the citizenship judge's finding that Mr. Chen had not demonstrated that he spent 1,095 days in Canada was not unreasonable.

[2] Paragraph 5(1)(*c*) of the Act is set out in the appendix to these reasons.

Standard of Review

[3] The term "residence" is not defined under the Act or the *Citizenship Regulations, 1993*, SOR/93-246. The Court has effectively established two types of tests for residence: one quantitative and the other qualitative. The first requires an applicant to be physically present in Canada for a total of three years, calculated on the basis of a strict counting of days. See: *Pourghasemi (Re)* (1993), 62 F.T.R. 122 (T.D.). The second adopts a more contextual and flexible reading of residence, requiring an applicant to have a strong connection to Canada or to centralize his or her mode of living in Canada. See: *Papadogiorgakis (Re)*, [1978] 2 F.C. 208 (T.D.), and *Koo (Re)*, [1993] 1 F.C. 286 (T.D.). It is open to a citizenship judge to choose one of these recognized approaches, and it is the role of the Court, on judicial review, to determine whether the chosen test has been properly applied. See: *Lam v. Canada (Minister of Citizenship and Immigration)* (1999), 164 F.T.R. 177 (T.D.) at paragraph 14.

[4] In this case, the citizenship judge adopted the test set forth in *Pourghasemi*. This is evidenced by her express reference to the question at issue: "[h]as the applicant met the residency requirement of 1095 days in Canada and is the information provided credible?"

[5] Whether Mr. Chen established that he was physically present in Canada for 1,095 days is a question of fact. I am satisfied, and the parties agree, that the judge's finding on this point is reviewable on the standard of reasonableness. See: *Dunsmuir v. New Brunswick*, [2008] S.C.J. No.

9 (QL) at paragraphs 51 and 53. This is also consistent with the conclusion of my colleague Justice Russell in *Pourzand v. Canada (Minister of Citizenship and Immigration)*, [2008] F.C.J. No. 485 (QL) at paragraph 20.

Facts

[6] Mr. Chen applied for Canadian citizenship on April 27, 2005. In his application, he declared that he had been absent from Canada for 359 of the relevant 1,460 days. He thus declared that he had been in Canada for 1,101 days.

[7] On April 12, 2006, an officer noted a discrepancy of three days in Mr. Chen's calculation of the number of days he had been physically present in Canada. On September 19, 2006, Mr. Chen was asked to provide further documentation to permit the continued processing of his application. Specifically, Mr. Chen was told to provide photocopies of his passport and travel documents since his entry into Canada. Mr. Chen was also provided with a residence questionnaire, which was to be completed and returned. In his residence questionnaire, Mr. Chen declared that he had been absent from Canada for 362 days. Thus, he had been in Canada for 1,098 days, only three days over the minimum requirement.

[8] On April 3, 2007, Mr. Chen was given a notice to appear before a citizenship judge and, on May 2, 2007, Mr. Chen attended an interview before a citizenship judge. At that time, the judge requested that Mr. Chen provide additional documentation to support his claim of residency in Canada. On June 20, 2007, the additional documentation was received from Mr. Chen.

The Decision

[9] At the outset of her decision, the citizenship judge framed the relevant issue to be as follows:

> The issue to be decided is whether the applicant has met the residency requirement of 1095 days in Canada as specified in the Citizenship Act and whether the information that he has provided is credible.

[10] The citizenship judge identified credibility concerns arising from Mr. Chen's application, residency questionnaire, and interview. In particular, the judge found to be implausible Mr. Chen's statement that he was not able to provide transcripts from his studies in Taiwan and found to be inconsistent Mr. Chen's stated reasons for traveling to Taiwan. The judge went on to review the additional documentation provided by Mr. Chen, noting that:

- the residential property statements, which indicated that Mr. Chen's parents owned a house in Canada, were insufficient to show that Mr. Chen had an ongoing presence in Canada;
- the bank statements, while in the name of Mr. Chen, showed "little to no activity" for most months;
- the documents supporting Mr. Chen's ownership of a women's fashion store, which indicated that his ownership interest lasted one month, were not indicative of his living in Canada;
- the credit card statements, while generally consistent with Mr. Chen's absences from Canada, showed charges in Canada for a period of time when Mr. Chen claimed to be in Taiwan, specifically March 19 to 27, 2004; and

- the cellular telephone statements, which indicated that Mr. Chen's mother was the registered owner and user of the phone, showed that calls in Canada were "just as extensive" during periods when Mr. Chen claimed to be in Taiwan.

[11] The citizenship judge also noted that a credit card statement indicated that two cards had been issued to Mr. Chen. For this reason, the judge stated that she was not convinced that Mr. Chen was the only person using the credit card for which statements had been provided. The judge further noted that, based on the cellular telephone statements, there was no way to verify whether Mr. Chen or his mother was using the telephone in question.

[12] The citizenship judge concluded that Mr. Chen failed to provide "substantive evidence of a continuing presence in Canada" and that the information submitted by Mr. Chen was "conflicting, incomplete and misleading." In the end, the citizenship judge found that Mr. Chen had not demonstrated that he spent the requisite 1,095 days in Canada.

The Asserted Errors

[13] Mr. Chen submits that the citizenship judge made four reviewable errors in failing to approve his application. They are:

- First, Mr. Chen argues that, by providing copies of his passport and a record of movement from Taiwan, he "more than satisfactorily discharged his onus of proof." The citizenship judge is said to have erred by requiring Mr. Chen to provide further documentation supporting his residence in Canada.

- Second, Mr. Chen argues that the citizenship judge erred in finding that he was in Canada between March 19, 2004 and March 27, 2004. According to Mr. Chen, the credit card statements before the citizenship judge showed that he was in Taiwan during that time period.
- Third, Mr. Chen argues that the citizenship judge fell into error when she found that he had provided "misleading" information. While Mr. Chen acknowledges that the cellular telephone records before the citizenship judge "could have been mixed," Mr. Chen contends that the records do not "prove [that] he intended to mislead the [j]udge."
- Fourth, Mr. Chen argues that, in refusing to approve his application, the citizenship judge relied on an irrelevant factor. According to Mr. Chen, the citizenship judge "chastised" him for not contributing to Canada by way of employment and for being an "underachiever." Given that the issue before the citizenship judge was one of residency, such factors are said by Mr. Chen to be irrelevant.

Application of the Standard of Review

[14] With respect to the provision of Mr. Chen's passport and Taiwanese record of movement, as Mr. Chen notes, Canada does not have exit controls and it is not routine for Canadian officials to stamp the passport of a returning resident. Therefore, Mr. Chen's passport did not conclusively establish his physical presence in Canada. The record of movement is only relevant to time spent in Taiwan. The citizenship judge was entitled to require better evidence from Mr. Chen on this point.

[15] The Minister acknowledges that the citizenship judge erred in finding that the credit card statements showed Mr. Chen to be in Canada from March 19 to 27, 2004, when he claimed to be in Taiwan. I do not, however, consider this error to be material. While Mr. Chen argues that this error predisposed the citizenship judge to reject him as being dishonest, Mr. Chen does not challenge the judge's earlier findings that it was implausible that he could not provide transcripts from his alleged studies in Taiwan and that he gave inconsistent answers about why he travelled to Taiwan.

[16] With respect to the cellular telephone statements, the statements fail to corroborate Mr. Chen's stated absences from Canada. As the citizenship judge correctly observed, the statements filed by Mr. Chen identified his mother as the registered user of the telephone and recorded extensive use of the telephone in Canada during periods when Mr. Chen declared that he was in Taiwan visiting relatives. While Mr. Chen did state in his covering letter to the citizenship judge that he was the user of the telephone, the citizenship judge noted that there was no way to verify whether that was in fact the case. This was not an improper observation, especially in light of the credibility concerns expressed by the citizenship judge. The citizenship judge's finding is also supported by the statements, which indicate that the telephone was used extensively in Canada during periods when Mr. Chen stated that he was in Taiwan. It was, in my view, unfortunate that the judge described the statements to be "misleading." The word "equivocal" would have better characterized their evidentiary weight.

[17] The final asserted error is that the citizenship judge erred by relying on an irrelevant factor, namely Mr. Chen's lack of employment in Canada or, as Mr. Chen describes it, his status as an

"underachiever." However, reviewing the decision of the citizenship judge as a whole, I conclude that Mr. Chen's lack of contribution to, or participation in, Canada was not determinative of his application.

[18] To summarize, the onus was on Mr. Chen to provide sufficient evidence to establish that he met the residency requirement of the Act. Statements made in an application for citizenship need not be taken at face value. See: *Bains v. Canada (Minister of Citizenship and Immigration)*, [2001] 1 F.C. 284 (T.D.) at paragraph 27. The reasons of the citizenship judge for finding that Mr. Chen had not discharged his onus were intelligible and, with the one exception noted above, were justified by the evidence. The decision is defensible in fact and law, and so falls within the range of acceptable outcomes. The decision was, therefore, reasonable.

Improper Recommendation

[19] Mr. Chen does not put in issue the following passage from the reasons of the citizenship judge:

> I am recommending that the Canadian [*sic*] Border Security [*sic*] Agency and Immigration officials be informed that the applicant provided conflicting, incomplete and misleading information regarding his residence in Canada. When he crosses the border from outside of Canada he will be identified as a person who has attempted to mislead Citizenship & Immigration Canada.

[20] This Court has previously expressed its disapproval of this type of recommendation. As my colleague Justice Barnes wrote in *Serfaty v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 1723 (QL), at paragraph 11:

> The limits of the Citizenship Court's authority to officially communicate with the Minister in connection with its determination

> of a citizenship application are fixed by ss. 14(2) and ss. 15(1) of the Act. Those provisions limit the Court's reporting function to the provision of the reasons for its determination or to recommending to the Minister that certain statutory requirements be waived. It is not the role of the Citizenship Court to give, within its decisions, administrative advice to the Department about how it should treat a citizenship applicant for the purposes of maintaining border security. The Citizenship Court must protect its independence. It should scrupulously avoid any appearance that it has some official influence, beyond its statutory mandate, over the work of immigration or border officials, just as it must be free of any perceived influence operating in the opposite direction. [emphasis added]

[21] I endorse, and adopt, those comments. The recommendation and view of the citizenship judge should be wholly disregarded.

[22] I direct the Minister as follows. If the recommendation of the citizenship judge was followed and the Canada Border Services Agency (CBSA), or any other authority, was informed of the judge's view by the Minister or her officials, the Minister shall advise the CBSA and any other authority so informed that the Court has directed that the recommendation of the citizenship judge be wholly disregarded.

Costs

[23] The Minister seeks costs. However, costs are seldom allowed on citizenship appeals. See, for example, *Canada (Minister of Citizenship and Immigration) v. Kovarsky* (2000), 193 F.T.R. 155 (T.D.) at paragraph 12. No costs are awarded.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that**:**

1. The appeal is dismissed without costs.

"Eleanor R. Dawson"
Judge

APPENDIX

Paragraph 5(1)(*c)* of the *Citizenship Act* reads as follows:

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 :
[…]	[…]
(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;	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;

FEDERAL COURT

SOLICITORS OF RECORD

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