Date: 20080724

Docket: T-1775-07

Citation: 2008 FC 905

Ottawa, Ontario, July 24, 2008

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

PAO CHI CHU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Pao Chi Chu (the Applicant) is appealing pursuant to subsection 14(5) of the *Citizenship Act*, R.S.C. 1985, c. C-29 (the Act) and section 21 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, from a decision made on September 5, 2007 (the Decision) under subsection 14(3) of the Act by a Citizenship Judge (the Judge) to deny the Applicant's application for citizenship.

[2] The Applicant was born in Taiwan and is a citizen of the People's Republic of China.

[3] On January 13, 1988, the Applicant, together with his wife and eldest daughter, first entered Canada as permanent residents.

[4] The Applicant's wife and elder daughter are now Canadian citizens. The Applicant also has a second daughter who was born in Canada.

[5] On February 8, 1988, shortly after arriving in Canada, the Applicant returned to work in Taiwan.

[6] The Applicant continued to spend most of his time in Taiwan over the next 15 years until June 3, 2003 when he returned to Canada. He remained in Canada until March 29, 2006 when he applied for citizenship (the Application). Thereafter, in June 2006, he returned to work in Taiwan.

[7] On October 2, 2006, the Applicant was asked to complete a Residence Questionnaire. On October 27, 2006, the Applicant submitted a partially completed questionnaire and, through his counsel, objected to the form. He said:

> The residency questionnaire is a form designed for people who apply for citizenship based on centralized mode of living/de facto resident of Canada and not physical resident. Mr. Chu is applying as a full time resident. The form is inappropriate in that it asks for periods reaching back to the time of Mr. Chu's landing and his employment situation outside the 3 or 4 years preceding the application. To qualify as a full time resident, Mr. Chu only has to prove on a balance of probabilities that he has the requisite time. His record of movement and passport alone can satisfy that point.

[8] In his Application, the Applicant claimed he had been physically present for 1,100 days during the four-year period from March 29, 2002 to March 29, 2006 (the Period). This was five days over the requirement of 1,095 days.

[9] However, the Applicant neglected to declare a trip to the United States in August 2002 when he obtained permanent resident status in that country.

[10] As a result, the parties agree that the Applicant was not physically present in Canada for the 1,095 required days. The Judge found that the Applicant had been present for 1,090 days or five days short of the requirement. The Applicant disagreed and says he was only 2 days short of the requirement but nothing turned on this difference.

[11] Since the Applicant did not have 1,095 days of physical presence, the Judge also considered when the Applicant became a functional resident of Canada, following the decision of Mr. Justice James O'Reilly in *Canada (Minister of Citizenship and Immigration) v. Nandre*, 2003 FCT 650, 234 F.T.R. 245. In that decision, Justice O'Reilly held that if an applicant established functional residence at least 1,095 days prior to the application for citizenship, then the applicant could satisfy the residency test despite not having 1,095 days of physical presence.

[12] The Citizenship Judge concluded that the Applicant established functional residence on June 3, 2003. However, this meant that he had only 1,030 days and not the required 1,095 days.

[13] The Applicant says that the Judge:

1. erred in failing to include in his calculations the periods during which the Applicant was in Canada after his landing but before he established his functional residence on June 3, 2003;
2. erred in applying the functional residence test without giving him notice.

STANDARD OF REVIEW

[14] Issue 1 involves a question of law that is within the specialized expertise of the Judge. For this reason, based on an analysis of the principles established by the Supreme Court of Canada in is decision in *Dunsmuir v. New Brunswick,* 2008 SCC 9, paragraph 55, I have concluded that reasonableness is the appropriate standard of review. Issue 2 is a question of fairness which does not attract deference.

DISCUSSION

[15] In my view, it is settled law that only periods of residence, after functional residence is established, are counted.

[16] In this regard, I rely on the decision of Mr. Justice Denis Pelletier in *Sud v. Canada (Minister of Citizenship and Immigration)* (1999), 180 F.T.R. 3 in which he said, at paragraph 5:

> **5** Residence does not begin to accumulate until it has been established. This principle was confirmed by the Federal Court of Appeal shortly after the decision of Mr. Justice Thurlow in Re Papadogiorgakis [1978] 2 F.C.R. 208 in a case called Re Pattni [1980] F.C.J. No. 1017. In Papadogiorgakis, Thurlow J. established the principle of constructive residence in which periods of absence from Canada could count towards the residence requirement found at s. 5 (1)(c) of the Act. It is implicit in Papadogiorgakis that residence must first be established before periods of absence can count as periods of residence. This was made explicit in Pattni:
>
> > In order that physical absences from Canada may count as residence in Canada an applicant must first have established a residence in Canada.

[17] I have reviewed the Applicant's post-hearing submissions and am not persuaded by his interpretation of the decision in *Sud*. Instead, I agree with Mr. Justice Edmond Blanchard's conclusion in *Zhang v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 483, [2008] F.C.J. No. 603 where he says that in *Nandre*, Mr. Justice O'Reilly clearly stated that an applicant must first establish residence and then show that it was maintained for three of the four years preceding an application for citizenship.

[18] In my view, there is no authority for the Applicant's proposition that, when an analysis of functional residence is undertaken, credit is to be given for time spent in Canada as a permanent resident before functional residence is established.

[19] Regarding Issue 2, the Judge was not required to assess functional residence. The Applicant made it very clear in his terse response to the Residence Questionnaire that his application depended only on physical presence. Accordingly, once it was correctly determined that physical presence was insufficient, the matter ended (see *Re: Pourghasemi* (1993), 62 F.T.R. 122). In these circumstances, there was no obligation on the Judge to give the Applicant notice that the application was being evaluated using another test.

JUDGMENT

UPON reviewing the material filed;

AND UPON hearing the submissions of counsel for both parties in Vancouver, on March 27, 2008;

AND UPON reviewing the post-hearing submissions of counsel for both parties.

NOW THIS COURT ORDERS AND ADJUDGES that, for the reasons given above, this appeal is hereby dismissed with costs.

"Sandra J. Simpson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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