Date: 20081028

Docket: T-563-08

Citation: 2008 FC 1205

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

DIEGO ALBERTO FIGUEROA CASTRO

Respondent

REASONS FOR JUDGMENT

GIBSON D.J.

I. Introduction

[1] These reasons follow the hearing of an appeal brought by the Applicant under ss.14(5) of the *Citizenship Act*[1]. The Applicant seeks an order or judgment allowing the appeal and quashing the decision of a Citizenship Judge allowing the Respondent's application for Canadian citizenship. The decision at issue is dated the 11th of February, 2008. The Applicant alleges that the Respondent failed to meet the residency requirement set out in paragraph 5(1)(c) of the Act. In general terms, that provision requires that an applicant for Canadian citizenship must be "resident" within Canada

[1] R.S., 1985, c. C-29. (the "Act").

for a period or periods amounting to three years within the four years immediately preceding the date of his or her application.

II. Background

[2] The Applicant arrived in Canada on the 3rd of August, 1999, on a student permit. At the time of his arrival, the Applicant was a citizen of Mexico. On the 5th of April, 2001, he was granted permanent resident status in Canada in the skilled worker category. In Canada, he completed both his undergraduate degree and a first level post-graduate degree and then worked in Canada for a period of time and for the University where he had studied.

[3] On the 11th of January, 2007, the Applicant applied for Canadian citizenship. Thus, the relevant period for determining whether or not the Applicant met the residency requirement set out in paragraph 5(1)(c) of the Act commenced on the 11th of January, 2003.

[4] On the 1st of August, 2003, the Applicant left Canada to return to Mexico where his parents and sister continued to live. He remained in Mexico until the 5th of August, 2005, which is to say, for 734 days, after which he returned to Canada. During his stay in Mexico, the Applicant was for a time unemployed, he was then self-employed and finally he was employed by Hewlett Packard.

[5] Following his return to Canada, and until the date of his application for Canadian citizenship, the Applicant was absent from Canada on four separate occasions, twice on holiday in Mexico, once to attend a wedding in Mexico and once to attend a conference in the United States.

In the result, in the relevant period, the Applicant was absent from Canada for 817 days and was present in Canada for 643 days. Thus, his physical presence in Canada was somewhat short of the statutory residence requirement to qualify for Canadian citizenship. However, the issue does not end there. The concept of "residence" in Canada has been interpreted not to require physical presence in Canada in all circumstances.

III. The Decision under Review

[6] The learned Citizenship Court Judge determined that the Applicant met the residency requirement and in so doing applied the test enunciated by Justice Reed in Re Koo[2]. In that decision, Justice Reed wrote:

> The conclusion I draw from the jurisprudence is that the test is whether it can be said that Canada is the place where the Applicant "regularly, normally or customarily lives". Another formulation of the same test is whether Canada is the country in which he or she has centralized his or her mode of existence. Questions that can be asked which assist in such a determination or:
>
> (1) was the individual physically present in Canada for a long period prior to recent absences which occurred immediately before the application for citizenship?
>
> (2) where are the applicant's immediate family and dependants (and extended family) resident?
>
> (3) does the pattern of physical presence in Canada indicate a returning home or merely visiting the country?
>
> (4) what is the extent of the physical absences - - if an applicant is only a few days short of the 1095 day-total it is easier to find deem residence than of those absences are extensive?

[2] [1993] 1 F.C. 286 (T.D.).

(5) is the physical absence caused by a clearly temporary situation such as employment as a missionary abroad, following a course of study abroad as a student, accepting temporary employment abroad, accompanying a spouse who has accepted employment abroad?

(6) what is the quality of the connection with Canada: is it more substantial than that which exists with any other country?

[7] The learned Citizenship Court Judge responded to the foregoing questions as follows[3]:

(1) Yes, Client came to Canada, studied Master of Science at York University started his company in Edmonton. Working for HP.

(2) Mother, father, sister live in Mexico. Good circle of friends and business associate in Canada.

(3) Canada is his home. He has centralized his mode of existence in Canada. Bank records, work, NOA, education, Travelling for business purposes

(4) In the relevant period he has been travelling for business and has been away 817 days vs. 643 days in. He is travelling for business and has strong ties to Canada.

(5) It is a temporary situation, he wishes to be transferred back to HP Canada.

(6) Strong connection, Studies for masters degree, pays taxes, running business.

[8] In the form in which the foregoing answers appear, under the heading "reasons", the following appears:

> Client has sufficiently strong ties to Canada, Pay [sic] taxes, Bank account, business set up, work for HP travels for business. I am

[3] The responses to the questions are taken from a typed version of the Citizenship Judge's handwritten responses to the questions. The typed version was submitted under cover of an Affidavit and was accepted by counsel for the Applicant and for the Respondent and by the Court.

> satisfied this to meets [sic] the residency requirements of the Act. Good knowledge about Canada – Approved.

[9] In the same form, under the heading "decision", the Citizenship Judge wrote:

> I am satisfied that the client has sufficiently strong ties to Canada. He has lived here for considerable length of time. Studied, set up business, pays taxes, travelling for business.
>
> Good knowledge about Canada Approved.

IV. The Issues

[10] As in all matters such as this, the issue of standard of review arises. A second issue here before the Court is whether or not the appropriate test has been properly applied against the relevant standard of review or, put another way, are the reasons of the citizenship judge for finding as he or she did that the Applicant has or has not discharged his or her onus, intelligible and justified by the evidence.

[11] In a case somewhat similar to this, *Chen v. Canada (Minister of Citizenship and Immigration)*[4], Justice Dawson wrote at paragraphs 3-5 and 18 of her reasons:

> The term "residence" is not defined under the Act or the *Citizenship Regulations*, … 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…. 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… 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…

[4] [2008] F.C.J. No. 964, 2008 FC 763, June 19, 2008.

> In this case, the citizenship judge adopted the test set forth in *Pourghasemi* [the quantitative test and not the test adopted here]. This is evidenced by her expressed reference to the question at issue: [has] the applicant met the residency requirement of 1095 days in Canada and is the information provided credible?
>
> Whether Mr. Chen established that he was physically present in Canada for 1095 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…
>
> …
>
> 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. … 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.
>
> [citations omitted]

[12] Counsel before me were satisfied that here, as in *Chen*, the appropriate standard of review is reasonableness. I agree. Against that standard then the issue that remains, paraphrased from the last quoted paragraph from *Chen*, are the following:

> are the reasons of the Citizenship Judge for finding that the respondent had discharged his onus to provide sufficient evidence to establish that he met the residency requirement of the Act intelligible and justified by the evidence?

V. Analysis

[13] Against the standard of review of reasonableness, I am satisfied that the response to the issue question just stated above must be: "No". Put another way, I conclude that the decision here

under appeal is not defensible in fact and law and so does not fall within the range of acceptable outcomes.

[14] In the responses quoted above to the Re *Koo* issue questions also quoted above, the Citizenship Judge evidences confusion, misunderstanding and vagueness. It cannot be determined how his answers to the questions support the conclusion that he reaches. Examples follow.

[15] In response to the first question it must be noted that the Respondent's most significant absence from Canada extending for slightly in excess of two years, ended in early August, 2005, almost a year and a half before the Respondent's application for Canadian citizenship was filed. During that absence, the Respondent worked in Mexico for Hewlett Packard and, during the same absence, and before working for Hewlett Packard, he was apparently self-employed.

[16] In response to the second question, the Citizenship Judge correctly acknowledges that all of the Respondent's immediate family lived in Mexico. There is no evidence that he has any dependants. The Citizenship Judge's reference to a "good circle of friends and [a] business associate in Canada" is hardly relevant to the question and is not elaborated upon.

[17] The response to question 3 only obliquely answers the related question and is not supported by any analysis, and is certainly without any balancing of whether the Respondent is more closely tied to Mexico and his family there than he is to Canada. The reference to "travelling for business

purposes" simply does not appear to be consistent with the evidence regarding the Respondent's long stay in Mexico.

[18] The Citizenship Judge's response to question 4 simply repeats what he has earlier written. The reference to the effect that the Respondent "… has been travelling for business…" in the relevant period is not consistent with the evidence.

[19] The response to question 5 is confusing. There is no explanation whatsoever as to why the Citizenship Judge concludes that, presumably the Respondent's long absence in Mexico is "… a temporary situation…" is non-existent and inconsistent with the evidence of the Respondent's activities post his application for Canadian citizenship.

[20] Finally, the statement in response to the last question to the effect that the Respondent has a strong connection to Canada based on his studies, his payment of taxes and his running of a business, all presumably in Canada, is inconsistent with the totality of the evidence and is unresponsive to the question in that it is in no sense a comparative analysis.

[21] For the foregoing brief reasons, I conclude that the decision under appeal, against the standard of review of reasonableness, cannot stand. The decision, on its face, is simply not defensible either in fact or in law. In the result, it does not fall within the range of acceptable outcomes.

VI. Conclusion

[22] This appeal is allowed. The decision under appeal, dated the 11th of February, 2008 and approving a grant of Canadian citizenship to the Respondent is quashed.

"Frederick E. Gibson"
Deputy Judge

OTTAWA, ONTARIO
October 28, 2008

FEDERAL COURT

SOLICITORS OF RECORD

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