F ederal Court  Cour fédérale

Date: 20091023

Docket: T-419-09

Citation: 2009 FC 1085

Toronto, Ontario, October 23, 2009

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

SHING TIMOTHY WONG

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an appeal by the Minister of Citizenship and Immigration (the "Minister") pursuant to subsection 14(5) of the *Citizenship Act*, R.S.C. 1985, c. C-29, from the decision of a citizenship judge dated January 21, 2009, approving the application for Canadian citizenship made by Shing Timothy Wong (the "Respondent").

BACKGROUND FACTS

[2] The Respondent was born in Hong Kong and is a citizen of the United Kingdom. He came to Canada in 1996 with his wife and two children and became a permanent resident.

[3] The Respondent's family bought a house, registered in the Respondent's wife's name, in the Toronto region in 1996 and has lived there ever since. The Respondent's wife and children eventually became Canadian citizens.

[4] The Respondent travelled extensively, accumulating only 775 days in Canada out of 1460 in the relevant period (from June 2001 to June 2005). Most of the Respondent's trips were to Hong Kong, for business - or work-related purposes. Some were to the United States for tourism. At least some, though it is not quite clear how many, were to accompany one of his sons, who is suffers from some mental illness, for treatment at a clinic in Hong Kong.

[5] The Respondent applied for Canadian citizenship on June 15, 2005. That application was denied on May 13, 2007. While the reasons for the denial of the applications are somewhat confused, the citizenship judge seems to have based her decision on the Respondent's multiple and lengthy absences from Canada. The Respondent appealed.

[6] In *Wong v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 731 [*Wong I*], Justice Michael Phelan allowed the Respondent's appeal. Phelan J. held that the citizenship judge failed to consider the Respondent's residence in Canada prior to the material period; confused the

various residence tests; and, most importantly, failed to consider the quality of the Respondent's connection with Canada.

[7] The Respondent's application was then remitted to the citizenship judge, who approved it. The Minister is now appealing this decision.

DECISION UNDER REVIEW

[8] The citizenship judge's decision consists of one hand-written paragraph on the "Notice to the Minister" form; very nearly the same paragraph is reproduced on the "Note to File" form. The paragraph in the "Note to File" form reads:

> After personal interview and reviewing the requested documents i.e. Hong Kong record of movement, CRA Notice of Assessments (sic), Bank statements, *oral submissions*, Family presence in Canada for past 13 years, Canadian citizen, reason for travel being his son's treatment for autism, having declared all absences as per application and res. questionnaire, I am satisfied that client has set up residence in Canada and has maintained it. Approved. [My italics; the italicized words do not appear on the "Notice to the Minister" form]

[9] The citizenship judge also wrote down some facts about the Respondent in point form on another "Note to File".

ISSUES

[10] This appeal raises three main issues:

1) Is the issue of the Respondent's residency *res judicata*?

2) Did Judge Gill provide adequate reasons for his decision?

3) Did Judge Gill err in finding that the Respondent met the residence requirement of the *Citizenship Act*?

ANALYSIS

Res Judicata

[11] The Respondent submits that the issue of his residency is *res judicata* because Phelan J. "decided as a matter of fact that the Applicant and his family had established residence in Canada and has [sic] maintained residence in Canada."

[12] In fact, Phelan J. decided no such thing. At par. 20 of his reasons in *Wong I, supra,* Phelan J. wrote that:

> [t]here was sufficient material in the record to raise the issue of pre-existing residence but the Citizenship Judge failed to embark on that enquiry. … *This is not to suggest that there are no problems with the documents on this issue or certain inconsistencies in the record*. However, in my view it was the obligation of the Citizenship Judge to assess whether residency had been established, particularly where the Applicant and his family had been in Canada for 12 years, owning their own home, where members of the family had become citizens of Canada and to where the Applicant, having traveled from Canada to other points, including Hong Kong, always returned. [Emphasis mine]

[13] Phelan J. decided that the citizenship judge had a duty to determine "whether residency had been established." He certainly did not find it as a fact that it was. The Respondent's position on this issue is without merit.

Adequacy of Reasons

[14] Subsection 14(2) of the *Citizenship Act* provides that a citizenship judge shall "provide the Minister with the reasons" for his decision to grant or deny an application for citizenship made by a permanent resident.

[15] The Minister argues that the citizenship judge failed to discharge this duty by providing reasons that were "sparse, imprecise and unintelligible."

[16] In particular, the Minister submits that the citizenship judge failed to indicate which residency test he applied, and addressed neither the relevant legal factors nor the issues raised by the evidence. I agree with the Minister.

[17] In a recent case, *Canada (Minister of Citizenship and Immigration) v. Mahmoud*, 2009 FC 57 [*Mahmoud*], at par. 6, Justice Roger Hughes noted that, because the Minister – or, I would add, a citizenship applicant – has no remedy other than an appeal to this Court, and citizenship must be granted in the event of a positive recommendation by a citizenship judge, "the provision of reasons by the citizenship judge assumes a special significance. The reasons should be sufficiently clear and detailed so as to demonstrate to the Minister that all relevant facts have been considered and weighed appropriately and that the correct legal tests have been applied."

[18] Needless to say, the citizenship judge's reasons ought to speak for themselves. The fact that the Respondent has felt the need to explain the citizenship judge's reasoning in an affidavit is, in my view, a clear indication that the latter's reasons were inadequate.

[19] The Respondent argues that the citizenship judge applied the test developed by Justice Reed in *Re Koo*, [1993] 1 F.C. 286, (1992) 19 I.L.R. (2d) 1. But any references to it are well hidden in the citizenship judge's reasons. It is noteworthy that he did not use the existing form listing the six questions of that test and providing space for an answer to each.

[20] The Minister – or, in other cases, applicants – should not have to guess why a citizenship application is granted or denied. Although the form used by the citizenship judge left very little space for providing reasons, like Hughes J. at par. 19 in *Mahmoud*, *supra,* stated that*:*

> I find that the requirement that a citizenship judge provide clear and adequate reasons must prevail over any apparent constraint imposed by the form. It is unfortunate that a better form was not provided such as one indicating that a page or pages may be attached in which appropriate reasons shall be given. Citizenship and Immigration Canada should give immediate attention to improving the form.

[21] The short paragraph provided by the citizenship judge does not make clear which test he applied, what questions he asked, and barely mentions some evidence that he took into account.

The Residency Requirement:

[22] Given the conclusion to which I come on the issue of the adequacy of reasons, it is unnecessary for me to determine the issue of the residency requirement.

CONCLUSION

[23] The situation is most unfortunate for the Respondent, who will now have to undergo, because of poor work by two citizenship judges, a third determination of an application that has been pending for more than four and a half years. But the Minister is entitled to an explanation of a decision with which he disagrees, just as the Respondent was when Phelan J. quashed the first decision on his application in *Wong I, supra*.

[24] In oral argument, the Respondent urged the Court to use its appeal powers to find that he meets the residence requirement of the *Citizenship Act* and is therefore entitled to Canadian citizenship, rather than remit the matter for re-determination by another citizenship judge. My colleague Justice Douglas Campbell did so in *Seiffert v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1072, 277 F.T.R. 253. However, this case is not one where such a finding would be appropriate.

[25] Since paragraph 300(c) of the *Federal Courts Rules*, SOR/98-106, provides that appeals from decisions of citizenship judges are to be heard as if they were applications for judicial review, this Court will make use of its appeal powers and substitute its own decision for that of a citizenship judge in exceptional cases. *Seiffert, supra*, was such a case, as Campbell J. found, at par. 22, that "there [was] ample evidence on the record … that residency in Canada had been established well before the citizenship applications were filed." [My emphasis]

[26] This case is different, since, as Phelan J. found in *Wong I*, *supra,* at par. 20, while "[t]here was sufficient material in the record to raise the issue of pre-existing residence … This is not to suggest that there are no problems with the documents on this issue or certain inconsistencies in the record." The issue is thus not clear cut, and will have to be considered by a citizenship judge, who should provide a careful analysis of the facts before making his decision.

[27] For these reasons, the appeal is allowed and the matter remitted to a different citizenship judge for reconsideration.

[28] Although the parties have each requested costs, in my view this case is not one where an award of costs would be appropriate.

JUDGMENT

THIS COURT ORDERS that the appeal be allowed and the matter remitted to a different citizenship judge for reconsideration, without costs.

"Danièle Tremblay-Lamer"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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