

Federal Court



Cour fédérale

Date: 20090914

Docket: T-1805-08

Citation: 2009 FC 905

OTTAWA, Ontario, September 14, 2009

PRESENT: The Honourable Louis S. Tannenbaum

BETWEEN:

FERDOUS ULLAH SOHEL

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION CANADA**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application under subsection 14(5) of the *Citizenship Act*, R.S.C. 1985, c. C-29 (the “Act”), for judicial review of the decision of a citizenship judge rendered September 17, 2008, wherein the judge determined that the applicant did not meet the residence requirement provided at paragraph 5(1)(c) of the Act and had not filed any material in support of her making a favourable recommendation for the use of discretion under subsection 5(3) and (4) of the Act.

[2] The applicant, Mr. Ferdous Ullah Sohel, is a citizen of Bangladesh. He arrived in Canada and was landed on October 21, 2003. Prior to this date, he obtained a Master’s degree in Economics at the University of Houston and worked in the United States as a Financial Analyst.

[3] On October 24, 2003, within days of landing in Canada, Mr. Sohel married Imrana Islam. According to the evidence on file, Mr. Sohel's wife returned to Houston, Texas, United States, where she was studying Computer Science and resided. The applicant's wife was landed in Canada on May 27, 2005, stayed a few weeks then returned to the USA to complete her studies. Their daughter was born on March 27, 2007 in the United States, where she stayed with her mother.

[4] The applicant applied for Canadian citizenship on November 13, 2006. The material time period considered by the judge in order to assess his residence ran from October 21, 2003 to November 13, 2006.

[5] During the relevant residency period (1,118 days), the applicant declared 23 days of absences from Canada, leaving on its face a claim of 1,095 days of physical presence.

[6] The citizenship judge stated that she was not satisfied with the documents submitted by the applicant in support of his residence in Canada and indicated that she doubted the veracity of the absence dates indicated by the applicant. She concluded that she could not rely on the evidence provided to accurately reflect all of the applicant's absences from Canada and his residency here during the relevant period.

[7] Moreover, considering the lack of supporting evidence, she found that the use of her discretion, pursuant to subsections 5(1), 5(3) and 5(4) of the Act, was not warranted.

Standard of Review

[8] When the issue involves matters of facts or law applied to facts, a judicial review application is not to be granted if the decision falls within the range of reasonable assessments of these facts.

(See *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190; *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12).

Quantitative test for residency

[9] The citizenship judge has discretion when deciding how he or she will determine and assess an applicant's residence. Justice Eleanor R. Dawson explains this discretion as follows:

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?" (*Chen v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 763)

[10] Despite the applicant's argument to the effect that the test used was the qualitative one, in the case at bar, and as noted in *Chen*, above, the citizenship judge adopted the quantitative approach when assessing Mr. Sohel's residence in Canada.

[11] The applicant bears the onus to provide sufficient evidence to establish that he meets the residency requirement of the Act (*Maharatnam v. Canada (Minister of Citizenship and Immigration)*, T-668-99, at para. 5). 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.

[12] The citizenship judge noted in her decision that the applicant

[...] failed to provide critical information such as an updated residence questionnaire and motor vehicle registration information as requested. This failure and conflicting information provided lead me to also question the credibility of your statements of physical presence in Canada.

[...] I do not find that all the pieces of your oral and written presentation fit well together. Based on the evidence before me I am not persuaded on the balance of probabilities that you have been physically present in Canada for 1,095 days during the period under review.

I have based my decision on the absence of supporting documentation, your failure to provide consistent and convincing information as referred earlier and your failure to provide acceptable proof of residency in the relevant period. (Citizenship judge's decision, Applicant's Record, p. 8)

[13] In her decision, the citizenship judge noted several inconsistencies. Particularly, she noted that on his original Residency Questionnaire (dated May 22, 2007), Mr. Sohel stated that his wife and daughter were living in Canada since 2005 and 2007 respectively; however, he stated in his statutory declaration that his wife was living “more-or-less continuously in the United States”, first as a student and then with a work permit. This inconsistency was also present between the statutory declaration and the information in the FOSS notes. Moreover, the applicant failed to submit an updated Residency Questionnaire, confirming the whereabouts of his family, as requested. The citizenship judge also noted that Mr. Sohel was unable to provide convincing information nor did he provide acceptable proof of residency in the relevant period – consequently making an adverse credibility finding.

[14] As the citizenship judge found, I find it rather difficult to believe that Mr. Sohel would not have returned to the United States following his landing (See Tribunal Record, pp. 199-202). Recognizing that the citizenship judge’s decisions are given much deference, I believe, based on the evidence before me, that the reasons for finding that Mr. Sohel had not discharged his onus were intelligible and 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.

[15] The citizenship judge requested additional evidence in order to clarify the applicant’s residency in Canada (i.e. proof of employment in Canada, vehicle registration documents, rental receipts). This information was not provided by the applicant and, based on the evidence in the file, one is unable to clearly determine that the applicant remained in Canada the entire material time period, minus his trip to Bangladesh, as he has claimed.

Conclusion

[16] Based on the evidence that was before the citizenship judge, it was not unreasonable for her to find that there were serious credibility concerns and to doubt the veracity of the information in the applicant's citizenship application.

[17] In view of my conclusion as stated above, it is not necessary that I consider the additional ground raised by the Minister in counsel's letter dated July 23, 2009 to the effect that the notice of appeal was filed too late.

[18] For the reasons outlined herein, the application for judicial review will be dismissed without costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed without costs.

"Louis S. Tannenbaum"

Deputy Judge

Authorities consulted by the Court

1. *Ahmed v. Canada (M.C.I.)*, 2002 FCT 1067
2. *Berk v. Canada (M.C.I.)*, 2001 FCT 1015
3. *Canada (M.C.I.) v. Dhaliwal*, 2008 FC 797
4. *Chan v. Canada*, [2002] F.C.J. No. 376
5. *Dieng v. Canada (M.C.I.)*, 2009 FC 217
6. *El Fihri v. Canada (M.C.I.)*, 2005 FC 1106
7. *Goudimenko v. Canada*, [2002] F.C.J. No. 581
8. *Jreige v. Canada*, [1999] F.C.J. No. 1469
9. *Lam v. Canada (M.C.I.)* (1999), 164 F.T.R. 177
10. *Lama v. Canada (M.C.I.)*, 2005 FC 461
11. *Pourzand v. Canada (M.C.I.)*, [2008] F.C.J. No. 485
12. *Re Koo*, [1992] F.C.J. No.1107
13. *Re Pourghasemi* (1993), 19 Imm. L.R. (2d) 259 (F.C.T.D.)
14. *Rizvi v. Canada (M.C.I.)*, 2005 FC 1641
15. *Wong v. Canada (M.C.I.)*, 2008 FC 731
16. *Zhu v. Canada (M.C.I.)*, 2008 FC 5
17. *Sketchley v. Canada (Attorney General)*, [2005] F.C.J. No. 2056
18. *Haj-Kamali v. Canada (M.C.I.)*, 2007 FC 102
19. *Seiffert v. Canada (M.C.I.)*, 2005 FC 1072

FEDERAL COURT
SOLICITORS OF RECORD

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