Federal Court  Cour fédérale

Date: 20110314

Docket: T-1358-10

Citation: 2011 FC 301

Ottawa, Ontario, March 14, 2011

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

SAMUEL OLUSEYI SOTADE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Background

[1] Mr. Samuel Oluseyi Sotade, the Applicant, is a citizen of Nigeria who wishes to become a citizen of Canada. On May 30, 2008, he submitted a citizenship application, claiming that he had accumulated at least three years (1,095 days) of residence in Canada within the four years immediately preceding his application. In a decision dated June 29, 2010, a Citizenship Judge

concluded that the Applicant had not met the requirement for residency under s. 5(1)(c) of the *Citizenship Act*, RSC 1985, c C-29 [the *Citizenship Act*]. The Applicant seeks to have this decision quashed.

[2] This is an appeal pursuant to section 14(5) of the *Citizenship Act*. Such appeals proceed by way of application based on the record before a citizenship judge and are governed by the *Federal Courts Rules*, SOR/98-106, pertaining to applications (Rule 300(c); *Canada (Minister of Citizenship and Immigration) v Wang*, 2009 FC 1290, 87 Imm LR (3d) 184). There are no further appeals from decisions of this Court. If the matter is not sent back for re-determination, an unsuccessful applicant who meets the statutory criteria may reapply.

II. Issues and Standard of Review

[3] The only issue in this application is whether the Citizenship Judge erred in concluding that the Applicant had not demonstrated that he had been physically present in Canada for 1,095 days of the relevant four-year period.

[4] The assessment of, and weight given to, the evidence before a citizenship judge is within his or her expertise and specialized knowledge (see, for example, *Shubeilat v Canada (Minister of Citizenship and Immigration)* 2010 FC 1260, [2010] FCJ No 1546 (QL) at para 46). As settled by the jurisprudence and as accepted by the parties, the question of whether an applicant is physically present in Canada for 1,095 days is a question of fact, reviewable on a standard of reasonableness (*Ghahremani v Canada (Minister of Citizenship and Immigration)*, 2009 FC 411,

[2009] FCJ No 524 (QL) at para 19). On that standard, the decision will stand unless it does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47 [*Dunsmuir*]).

III. Relevant Statutory Framework

[5] The relevant provision of the *Citizenship Act* is s. 5(1)(c).

The Minister shall grant citizenship to any person who:	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:	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) 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	(i) un demi-jour pour chaque jour de résidence au Canada avant son admission à titre de résident permanent,
(ii) for every day during which the person was resident in Canada after	(ii) un jour pour chaque jour de résidence au Canada après son admission à titre de résident permanent;

> his lawful admission to Canada for permanent residence the person shall be deemed to have accumulated one day of residence;

IV. Analysis

[6] The Citizenship Judge noted in her decision that she relied on the analytical test of Justice Muldoon in *Re Pourghasemi* (1993), 62 FTR 122, 19 Imm LR (2d) 259 (FCTD) [*Re Pourghasemi*], where it was determined that a potential citizen must establish physical presence in Canada for a total of 1,095 days during the four years preceding the application for citizenship, pursuant to s. 5(1)(c) of the *Citizenship Act*. On this test, the Applicant was required to demonstrate that he had been physically present in Canada for a total of 1,095 days between May 29, 2004 and May 30, 2008.

[7] It is important to remember that the Applicant bears the burden of providing evidence to support his claim. As noted by Justice Rennie in *Abbas v Canada (Minister of Citizenship and Immigration)*, 2011 FC 145 [*Abbas*] at paragraph 8:

> [E]ach applicant for citizenship bears the onus of establishing sufficient credible evidence on which as assessment of residency can be based, whether it is quantitative (*Re Pourghasemi*) or qualitative (*Koo*). In this regard, the citizenship judge must make findings of fact – findings which this Court will only disturb if unreasonable.

[8] In this case, the Applicant declared that he had been present in Canada for 1,096 days during the relevant period. The Citizenship Judge questioned the accuracy of this number

because the Applicant had spent much of the relevant period commuting between the United States and Windsor, Ontario. He became a permanent resident of the United States on May 22, 2008 and ultimately sold his house in Canada (jointly held with his wife) in early 2009.

[9] The Applicant, in his written submissions, does not dispute the application of the physical presence test. Rather, the thrust of the Applicant's argument is that the Citizenship Judge ignored or failed to give proper weight to the voluminous documentary record that, in his view, supports his physical presence in Canada for the entire period.

[10] I am not persuaded that the Citizenship Judge ignored any of the material documentary evidence. Much of that evidence was specifically referred to by the Citizenship Judge and was explicitly found to not support the Applicant's physical presence in Canada. The remaining question is whether the Citizenship Judge's assessment of the documentary evidence was unreasonable. In my view, it was not.

[11] One of the key arguments of the Applicant revolves around his US permanent resident card dated May 22, 2008 and US entry passport stamps also on May 22, 2008. It is evident, from reading the decision, that the Citizenship Judge concluded that these two dated documents were indicative of a physical move to the United States on May 22, 2008. In her decision, the Citizenship Judge, in clear and unmistakable terms, explains why none of the documents provided by the Applicant rebutted this finding.

[12] The Applicant, before me, asserts that it is not unusual for a permanent resident, before a permanent move, to arrive in his new country but then leave immediately to “tidy up” loose ends in his home country. This may be so; however, one would expect to see clear and convincing evidence of the Applicant’s return to Canada. In this case, much of the evidence presented was vague and equivocal. For example:

- None of the letters describing the Applicant’s volunteer work in and around Windsor speak to his actual residence. Moreover, at his hearing, the Applicant told the Citizenship Judge that he continued with his volunteer work in Windsor even when he was resident in the United States.

- A bank account in Canada is not necessarily evidence of physical presence in Canada.

- Use of a UPS commercial mailing address does not establish residence (and raises a concern about whether the Applicant was seeking to “obscure” his place of residence).

- An OHIP card is not determinative of residence as it is self-evident why an applicant would try to hold on to Ontario health coverage, even if he were not physically present in Canada.

[13] While the Applicant presents alternative explanations for the US permanent resident card and passport stamps, the Citizenship Judge was not unreasonable in concluding that, on a balance of probabilities, the Applicant had not been physically present in Canada after May 22, 2008. This meant that the Applicant was short, by at least eight days, of the minimum physical presence requirement, pursuant to the *Citizenship Act*. The shortfall of eight days would have been sufficient to reject the application. However, the Citizenship Judge considered the entire application before arriving at her conclusion.

[14] The Citizenship Judge highlights many problems with the Applicant's declared residence in Canada between May 29, 2004 and May 30, 2008. For example, many of the documents were only in the wife's name, putting into question whether the Applicant had been physically present at all times during the relevant period. As stated by the Citizenship Judge:

> The main problem with this case is the lack of objective evidence showing an "audit trail" of a life in Canada during the relevant time period which serves to demonstrate that Mr. Sotade established and maintained a residence for the number of days required by the Act.

Stated differently, the evidence presented to the Citizenship Judge was not sufficient to establish his physical presence in Canada for many of the claimed 1,096 days. The Applicant failed to meet his burden of providing evidence sufficient to demonstrate that he met the residence requirement of the *Citizenship Act* (*Abbas*, above; *Maharatnam v Canada* (*Minister of Citizenship*), [2000] FCJ No 405 (QL), 96 ACWS (3d) 198 at para 5).

[15] The Applicant also raises the question of whether the Citizenship Judge erred by taking into account periods of time beyond May 30, 2008. In the view of the Applicant, any actions of

the Applicant beyond the claimed period are irrelevant to a s. 5(1)(c) determination. I acknowledge that the Citizenship would err by counting days of absence beyond the relevant period – in this case, after May 30, 2008 (*Shakoor v Canada (Minister of Citizenship and Immigration)*, 2005 FC 776, [2005] FCJ No 972 (QL)). However, in the case before me, the references by the Citizenship Judge to the period after May 30, 2008 were to events that were linked to the claims and actions of the Applicant during the relevant period. In particular, the sale of his house in 2009, even though after the relevant time period, was not inconsistent with an intention of the Applicant to live in the United States and not in Canada. This provides additional support for the Citizenship Judge's conclusion that the Applicant had actually moved to the United States as of some time prior to May 30, 2008. The Citizenship Judge was not counting days of absence from Canada after the relevant period; there is no error.

[16] Having reviewed the documentary evidence provided by the Applicant to the Citizenship Judge, I am satisfied that the stated inferences and findings were reasonably open to the Judge. While another Citizenship Judge might have come to a different conclusion on the basis of the evidence, I cannot conclude that the decision in this case was unreasonable. It is not up to this Court to re-weigh the evidence before the Citizenship Judge (*Dunsmuir*, above, para 47).

[17] In my view, the decision of the Citizenship Judge falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*, above, para 47). The appeal will be dismissed.

[18] In two letters written and delivered after the conclusion of the hearing, counsel for the Applicant forwarded documentation to the Court purporting to be further evidence of the Applicant's residence in Canada. This evidence was not contained in the tribunal record and was not before the Citizenship Judge. It is well-established that, under the current rules, the application before this Court should proceed solely on the basis of the record before the Citizenship Judge (see, for example, *Canada (Minister of Citizenship and Immigration) v Hung* (1998) Imm LR (2d) 182, [1998] FCJ No 1927 at para 8 (FCTD)). The evidence submitted after the hearing and the submissions made in respect thereof have not been considered.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the appeal of the Citizenship Judge's decision is dismissed.

"Judith A. Snider"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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