Federal Court  Cour fédérale

Date: 20110621

Docket: T-1481-10

Citation: 2011 FC 743

Ottawa, Ontario, June 21, 2011

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

RANA KHALIL ZABAD

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an appeal of the decision by a Citizenship Judge, J. M. Way, made on July 19, 2010, dismissing the Applicant's application for Canadian citizenship on the basis that the Applicant had not fulfilled the residency requirements under paragraph 5(1) of the *Citizenship Act*, R.S.C. 1985, c. C-29 (*Citizenship Act*).

[2] The Citizenship Judge found that the Applicant was 189 days short of the minimum requirement of 1095 days in Canada in the preceding four years. The Citizenship Judge conducted an analysis to determine whether or not the Applicant had centralized her mode of existence in Canada during the four year period prior to her application. The Citizenship Judge decided that although the Applicant had initially established herself in Canada, she had not centralized her mode of existence in Canada. This was because toward the end of the second half of the four year period, the Applicant had focused on transitioning to another country, having gone for job interviews in the United States of America (USA) and marrying an American citizen living in the USA.

[3] The Applicant appeals this decision, submitting that the Citizenship Judge erred in deciding the Applicant was transitioning to the USA during the qualifying four year period.

[4] I have decided to grant the appeal because I have come to the conclusion the Citizenship Judge erred in considering the Applicant's future intentions instead of the Applicant's degree of establishment, despite having chosen to adopt the analytical approach in *Re Koo*, [1993] 1 F.C. 286. The Citizenship Judge also erred in considering events after the qualifying four year residency period.

Background

[5] Ms. Zabad earned a medical degree in Lebanon and arrived in Canada in September 2002 after completing a residency in neurology in the United States where she had been studying. She completed a medical fellowship at the University of Calgary. After May 2005, she worked at the

Foothills Medical Centre as a neurologist until October 2007. She worked in Medicine Hat at the Palliser Health Regional Medical Centre until October 15, 2008. She initially stayed with friends, but later moved to her own rented accommodations.

[6] Ms. Zabad received permanent residence status on July 27, 2006. She applied for Canadian citizenship on September 11, 2008.

[7] She married her spouse, an American citizen who lives in the United States, on July 5, 2008. Ms. Zabad remained with the Palliser Health Regional Medical Centre in Medicine Hat until October 2008. She started in a new position as Assistant Professor and Director of the Multiple Sclerosis Program at the University of Nebraska in Omaha, Nebraska on October 27, 2008, and has been living in the United States since then. She continued to hold her licence with the College of Physicians and Surgeons of Alberta and continued a consulting position at the Palliser Health Regional Medical Centre at the time of the citizenship hearing in 2010.

Decision Under Review

[8] The Citizenship Judge found that the relevant four year period for the purpose of calculating her residence was September 11, 2004 to September 11, 2008 and that the Applicant was 189 days short of the minimum 1095 days as required under the *Citizenship Act*.

[9] The Citizenship Judge adopted the analytical approach in *Re Koo*, [1993] 1 F.C. 286 (*Koo*), which asks the question, is Canada the place where an applicant “regularly, normally or customarily

lives", or phrased differently, "is Canada the country in which the applicant has centralized her mode of existence?"

[10] The Citizenship Judge looked at each of six factors from *Koo*:

- *Was the individual physically present in Canada for a long period prior to recent absences which occurred immediately before the application for citizenship*? The Citizenship Judge noted that during the first year, the Applicant was absent approximately 44 days. The Citizenship Judge accepted that the Applicant established herself in Canada during the time after she received permanent status; however, the Citizenship Judge noted that in the last year of the relevant period, she was physically absent 112 days.

- *Where are the applicant's immediate family and dependents (and extended family) resident*? The Citizenship Judge noted that her husband lives in the USA, her parents live in Lebanon, her sister lives in the Ivory Coast, her husband's mother and eight of his siblings live in Tunisia, and one of her husband's brothers lives in France.

- *Does the pattern of physical presence in Canada indicate a returning home or merely visiting the country*? The Citizenship Judge outlined the Applicant's pattern of presence in and absences from the country, observing the reasons and lengths for the absences. The Citizenship Judge found that the pattern "seems to indicate that the focus of her home and family ties became the USA by the end of the relevant period." The Citizenship Judge did note that the Applicant was a member of the Alberta Medical Association and certified by the College of Physicians and Surgeons of Alberta.

- *What is the extent of the physical absences*? The Citizenship Judge found that the Applicant was short approximately 189 days of the minimum 1095 days as required by the *Citizenship Act*.

- *Is the physical absence caused by a clearly temporary situation*? The Citizenship Judge found that the absences were not clearly temporary, as the increased absences indicated a transitioning toward the United States. The Applicant is currently employed under a three year term in Nebraska.

- *What is the quality of the connection with Canada*? The Citizenship Judge found that the quality of the Applicant's connection to Canada was more substantial initially, but began to appear more temporary after she married her husband in

> the United States. The Citizenship Judge found that there was no confirmed documentary evidence of date of return.

[11] As a result, the Citizenship Judge decided that although the Applicant had established herself in Canada initially, this focus began to change after she married her husband and applied for jobs in the United States, finding "that your stay in Canada was of a temporary nature, and not one of centralizing." As such, the Citizenship Judge was not satisfied that the Applicant had fulfilled her residency requirement and therefore did not approve her application for citizenship.

Relevant Legislation

[12] The *Citizenship Act,* R.S.C.1985, c. C-29 provides:

5. (1) The Minister shall grant citizenship to any person who …	5. (1) 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	(i) un demi-jour pour chaque jour de résidence au Canada avant son admission à titre de résident permanent,

accumulated one-half of a day of residence, and (ii) for every day during which the person was resident in Canada after his lawful admission to Canada for permanent residence the person shall be deemed to have accumulated one day of residence;	(ii) un jour pour chaque jour de résidence au Canada après son admission à titre de résident permanent;

[13] *Rules for Regulating the Practice and Procedure in the Federal Court of Appeal and the Federal Court*, S.O.R./98-106 (*Federal Court Rules*).

53. (1) In making an order under these Rules, the Court may impose such conditions and give such directions as it considers just. Other orders (2) Where these Rules provide that the Court may make an order of a specified nature, the Court may make any other order that it considers just.	53. (1) La Cour peut assortir toute ordonnance qu'elle rend en vertu des présentes règles des conditions et des directives qu'elle juge équitables. Ordonnances équitables (2) La Cour peut, dans les cas où les présentes règles lui permettent de rendre une ordonnance particulière, rendre toute autre ordonnance qu'elle juge équitable.

Issues

[14] The Applicant and Minister frame the issue differently. In my view, this issue may be simply stated as: did the Citizenship Judge err in determining that the Applicant had not met the residency requirement under subsection 5(1)(c) of the *Citizenship Act*?

Analysis

[15] The standard of review applicable to a citizenship judge's decision on residence involving a question of mixed fact and law is reasonableness. *Canada* (*Minister of Citizenship and Immigration*) *v Ryan*, 2009 FC 1159, *Canada* (*Minister of Citizenship and Immigration*) *v Zhou*, 2008 FC 939.

[16] The Applicant submits the Citizenship Judge did not consider and analyze the evidence in support of her establishment in Canada. This evidence includes her employment as a physician, professional membership in the College of Physicians and Surgeons of Alberta, residence in Canada and various financial dealings such as the paying of income tax and personal banking. The Applicant also submits that the Citizenship Judge took into account irrelevant considerations, namely, the Applicant's absences after the date of filing of the application for citizenship.

[17] The Minister submits the Citizenship Judge is entitled to deference. The Minister submits it is in the Citizenship Judge's discretion which test to apply for residence. As long as the Citizenship Judge applies one of the residency tests articulated by the Federal Court, properly and in a coherent fashion, the Citizenship Judge will not have erred.

[18] The Minister submits that the allowance of a one year absence creates a strong inference that an applicant's physical presence in Canada is required during the remaining three years. *Canada* (*Minister of Citizenship and Immigration*) *v Ntilivamunda*, 2008 FC 1081. The Minister further submits the proposed changes in Bill C-37, *An Act to Amend the Citizenship Act* introduced in June

2010, inserting the word "physically present" strengthens the intention that a permanent resident must be physically present in Canada for 1095 days during the preceding four years.

[19] I begin by noting that the proposed legislative amendment was not in effect at the time the Applicant made her application for citizenship. What governs is the legislation in effect at the time. As Justice Mainville stated in *Khan v Canada (Minister of Citizenship and Immigration),* 2009 FC 1178 (*Khan*):

> An appeal pursuant to paragraph 14(5) of the [Citizenship] Act must normally proceed on the basis of the legislative and regulatory provisions and the policy considerations which existed at the time the citizenship judge made his decision.

[20] The Court has historically recognized three different tests for residency requirements:

> 1. *Pourghasemi (Re),* (1993) 62 FTR 122: Has the individual been physically present in Canada for three years?
>
> 2. *Papadogiorgakis (Re),* [1978] 2 FC 208: "mere intention to reside in Canada is sufficient to acquire Canadian citizenship insofar as a certain connection with Canada is maintained."
>
> 3. *Koo (Re)*: Has the individual centralized his or her mode of existence in Canada?

[21] The Citizenship Judge chose to apply the residence test articulated in *Koo*. I find that the Citizenship Judge did not err in that choice. As mentioned, the *Koo* test was articulated by Justice Reed as "Is Canada the place where the applicant regularly, normally or customarily lives" or

alternatively, “Is Canada the country in which the applicant has centralized his or her mode of existence?” This test has been endorsed by a number of Federal Court decisions including *Lam v Canada* (*Minister of Citizenship and Immigration*), [1999] 164 FTR 177 (*Lam*) and *Dedaj v Canada* (*Minister of Citizenship and Immigration*), 2010 FC 777 (*Dedaj*).

[22] Moreover, the Citizenship Judge is due deference in respect of findings of fact and the Court will intervene only if those findings are unreasonable. However, in this case, I am satisfied that the Citizenship Judge erred in considering the Applicant’s intentions for the period after the relevant four year period as well as in considering events after that period.

[23] In *Canada (Minister of Citizenship & Immigration) v Italia*, [1999] FCJ No 876 (FCTD), Associate Chief Justice Richard stated that the case law establishes that applicants for citizenship must demonstrate by objective facts that they have established a residence in Canada and that they have maintained that residence. A mere intention to establish residence is insufficient.

[24] In *Canada (Minister of Citizenship and Immigration) v Roberts*, 2009 FC 927 (*Roberts*), Justice Near followed *Italia* observing that future intentions is not sufficient evidence to establish a residence:

> 16 … Rather the Citizenship Court Judge seems to stress that Mr. Roberts intends to establish a residence in Canada once his personal circumstances allow for such. It is well established that a mere intention to establish a residence is insufficient: see *Canada (Minister of Citizenship & Immigration) v. Italia*, above, at para. 16. Indeed, during his oral submissions the Respondent advised the court that he had established a residence as of June, 2009 which would

> seem to confirm that no such residence had been established prior to this time or certainly during the material period in question.
>
> 17 While I have some sympathy for the circumstances that led to the Respondent's failure to establish a residence in Canada during the material period it seems clear that the Citizenship Judge was guided more by Mr. Roberts' future intentions with respect to establishing a residence and erred in his judgment by not clearly addressing this issue. …

[25] I should think that if future intentions are insufficient to establish a residence, they are also insufficient, on their own, to constitute abandonment of established residence. If residence has been established, what is required is the assessment of objective facts of either continued residence or abandonment of residence during the relevant four year period: did an applicant continue or move out of established accommodation, keep or place possessions in storage, continue or leave employment, maintain or close bank accounts or the like? Without this assessment of objective facts, ‘transitioning’ becomes too nebulous a criterion to be reliably assessed.

[26] In this case, the Citizenship Judge did list all of the evidence but then became preoccupied with the Applicant’s intentions after the four year residency period, in essence applying the *Papadogiorgakis* test despite having chosen to apply the *Koo* test. The Citizenship Judge’s focus on the Applicant’s intentions distracted the Citizenship Judge from weighing the degree of her establishment in Canada according to the factors listed in *Koo*. In focusing on the Applicant’s future intentions after the four year period and neglecting to weigh the evidence of continued establishment during the four year period submitted by the Applicant, the Citizenship Judge fell into error.

[27] The Citizenship Judge made specific reference to events after the relevant four year period. The Judge stated:

> In my opinion, the absences are not clearly temporary. The increased absences in the relevant period indicate a transitioning toward another country, the USA. Moreover, the applicant stated she is currently employed under a three year term in Nebraska. In my opinion, a three year term contract is not temporary. The applicant declared she "had to leave Canada because of my husband's job."

It is to be noted that the Applicant took the Nebraska medical teaching position in October 2008 after the relevant term, September 2004 to September 2008.

[28] I also note that according to the Applicant's unchallenged affidavit evidence, at the hearing in May 2010, the Citizenship Judge repeatedly asked the Applicant about coming back to Canada. This further supports my conclusion that the Citizenship Judge took into account future intentions and events after the relevant period. In taking into account facts after the relevant four year period, I find the Citizenship Judge erred.

Conclusion

[29] I conclude that the Citizenship Judge failed to properly assess evidence of the Applicant's establishment in Canada. Furthermore, the Judge considered events that occurred after the relevant four year period of required residence. In doing so, the Citizenship Judge decided unreasonably.

[30] The Applicant seeks a declaration that the Applicant has fulfilled the requirements for residency to be granted a positive citizenship determination or, alternatively, remitting the application to a different judge for redetermination. As I have found the Applicant's evidence of residency has not been properly assessed, I will remit the application back for redetermination by a different citizenship judge.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The appeal is granted.
2. The Applicant's citizenship application is remitted back for redetermination by a different citizenship judge.
3. No costs are awarded.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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