Federal Court Cour fédérale

Date: 20111101

Docket: T-455-11

Citation: 2011 FC 1248

Ottawa, Ontario, November 1, 2011

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

BINDU SINGH DESHWAL

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an appeal of the decision of a Citizenship Judge under subsection 14(5) of the *Citizenship Act*, RSC, 1985, c C-29 (the Act). The Applicant contests the refusal to grant her citizenship on the basis that she did not meet the residency requirements mandated by subsection 5(1)(c) of the Act.

[2] For the following reasons, this appeal is dismissed.

I. Facts

[3] The Applicant, Bindu Singh Deshwal, is a citizen of India. She arrived in Canada and became a permanent resident on June 9, 2002.

[4] The Applicant submitted her application for citizenship on November 24, 2008. The relevant time period for residency purposes is therefore from November 24, 2004 to November 24, 2008. During this time period, however, the Applicant returned to India from July 16, 2002 to July 13, 2005. She was also absent from Canada for the periods of December 26, 2007 to January 20, 2008 and February 14, 2009 to September 24, 2010.

II. Citizenship Determination

[5] Having applied the six factors established in *Re Koo* (1992), 59 FTR 27, [1993] 1 FC 286, the Citizenship Judge was not satisfied that the Applicant had met the residency requirement under subsection 5(1)(c) of the Act.

[6] The Applicant departed Canada only 37 days after her arrival and was absent for 1,092 days. Thereafter, she was absent for 25 day and 586 day periods. She could not provide evidence to confirm that her husband lived in Canada or that her son attended school in the relevant period. In addition, she could not confirm her residential addresses in the country. Although the Applicant

claimed she was in Canada for 1,204 days, the Citizenship Judge was unable to determine the extent of her physical absences due to a lack of documentation.

[7] Similarly, there was no evidence that her absences from Canada related to a clearly temporary situation. It was noted that the Applicant recently returned to Canada with her son but that her husband remained in India. She claims that her husband remained to care for his sick father but there was no evidence of this illness.

[8] Despite her recent return to Canada and attempts to re-establish herself and her son, she had spent more time in India than in Canada. There was a lack of documentation that her connection to Canada was more substantial than that of any other country during the relevant period. The Citizenship Judge could not approve her application.

III. Issues

[9] This application raises the following issues:

(a) Can the Applicant submit new evidence to this Court as part of her citizenship appeal?

(b) Did the Citizenship Judge err in finding that the Applicant did not meet the residency requirement under subsection 5(1)(c) of the Act?

III. Standard of Review

[10] In *Pourzand v Canada (Minister of Citizenship and Immigration)*, 2008 FC 395, 2008 CarswellNat 831 at para 19, it was found that reasonableness is the applicable standard of review for a citizenship judge's determination as to whether an applicant meets the residency requirement since it is a question of mixed fact and law.

[11] As articulated in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47, reasonableness is "concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process" as well as "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."

IV. Analysis

Issue A: *New Evidence*

[12] The Applicant has attempted to submit new evidence as part of her appeal to address some of the concerns raised by the Citizenship Judge. This includes property documents and evidence related to the employment of her spouse.

[13] This Court has, however, clarified that citizenship appeals are no longer trials *de novo*. They proceed by way of application under Rule 300(c) of the *Federal Courts Rules*, SOR/98-106

based on the record before the Citizenship Judge (see for example *Lama v Canada (Minister of Citizenship and Immigration)*, 2005 FC 461, [2005] FCJ no 577 at para 21).

[14] As a consequence, I cannot consider new evidence presented by the Applicant as part of this appeal.

Issue B: *Residency Requirement*

[15] Subsection 5(1)(c) establishes that citizenship will be granted where an applicant "within the four years immediately preceding the date of his or her application, accumulated at least three years of residence in Canada" according to the prescribed formula.

[16] This Court has interpreted the term "residence" in different ways. In *Re Pourghasemi* (1993), 62 FTR 122, 19 Imm LR (2d) 259, Justice Francis Muldoon favoured a strict physical presence test while Justice Barbara Reed described residence as being where an applicant "regularly, normally or customarily lives" and enumerated a series of six relevant qualitative factors in *Koo*, above. It is open to a Citizenship Judge to adopt either test (see *Lam v Canada (Minister of Citizenship and Immigration)* (1999), 164 FTR 177, 87 ACWS (3d) 432).

[17] Although there has been some recent debate as to whether one test is more appropriate (contrast the approach of Justice Robert Barnes in *El Ocla v Canada (Minister of Citizenship and Immigration)*, 2011 FC 533, [2011] FCJ no 667 with the emphasis placed on physical presence by Justice Donald Rennie in *Martinez-Caro v Canada (Minister of Citizenship and Immigration)*,

2011 FC 640, [2011] FCJ no 881), the issue is not pertinent to this appeal. The Applicant was given the benefit of the qualitative *Koo* test but was still found not to have met the residency requirement. This Court must consider whether the Citizenship Judge was reasonable in its application of the test to the evidence presented by the Applicant in this case.

[18] The Applicant asserts that she has met the residency requirement of subsection 5(1)(c) based on the *Koo* factors. Despite two trips to India, she insists that she was physically present during the relevant time period for 1,204 days. She also contends that she centralized her mode of existence with her husband and son at an address in Canada.

[19] As the Respondent submits, however, given the Applicant's frequent absences from Canada, it was reasonable for the Citizenship Judge to require corroborating documentation. The Applicant could not provide proof of her addresses or that her husband lived with her during the relevant time period. There simply was not enough evidence that she met the residency requirement.

[20] I must agree with the Respondent that the onus was on the Applicant to provide sufficient evidence establishing that she satisfied the residency requirement in the relevant period (see *Rizvi v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1641, 2005 CarswellNat 4153 at para 21). The Court cannot justify overturning the decision of the Citizenship Judge. I also note that nothing precludes the Applicant, having re-established herself in Canada, from reapplying at a later date.

V. Conclusion

[21] Given the lack of supporting evidence, it was reasonable for the Citizenship Judge to conclude that the Applicant had not met the residency requirements prescribed by subsection 5(1)(c) of the Act.

[22] Accordingly, this appeal is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that this appeal is dismissed.

" D. G. Near "

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**T-455-11**
STYLE OF CAUSE:	**BINDU SINGH DESHWAL v. MCI**
PLACE OF HEARING:	**CALGARY**
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