

Federal Court



Cour fédérale

Date: 20120322

Docket: T-1467-11

Citation: 2012 FC 348

Ottawa, Ontario, March 22, 2012

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

TEK SHIN WAN FOOK CHEUNG

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] The Applicant was denied citizenship by a Citizenship Judge [Judge] who did not state the basis of her decision other than that the Applicant did not meet the residency requirements under section 5(1)(c) of the *Citizenship Act*, RSC 1985, c C-29 [Act].

II. BACKGROUND

[2] Mr. Cheung, a citizen of Mauritius, became a permanent resident on December 28, 2003 and applied for citizenship on December 27, 2007. The relevant period for calculating residency is December 28, 2003 to December 27, 2007 [the Relevant Period].

[3] The Applicant is married and has three children. His wife and children are Canadian citizens.

[4] From January 2004 to February 2005, the Applicant travelled back and forth between Africa and Canada on business for a Mauritian company. He was ultimately laid off and until February 2007 he was either working in Canada or unemployed. He was outside of Canada for 15 days during this period.

[5] From February 2007 to December 2007, the Applicant was on a temporary contract which required him to work outside Canada. He was entitled to return to Canada every six to eight weeks for two-four weeks at a time.

[6] The Applicant acknowledged that he was 223 days under the required time calculated for residency.

[7] As part of the citizenship process, the Judge asked for additional documents including tax assessments, employment letters stating last day of employment and employment contracts. These were provided to the Judge.

[8] In her judgment, the Judge outlined the basic facts of the timing of the application and time calculation for residency including the deficiency of 223 days. The Judge then stated that having received the documents and interviewed the Applicant, she concluded that he did not meet the residency requirements. In outlining her reasons for this conclusion, the Judge noted:

- that the Applicant went to work for a company one month after arriving in Canada;
- inconsistencies between the Applicant's narrative and the documentation; and
- inconsistencies in employment history.

[9] Having then concluded that the testimony and documentary evidence were inconsistent and insufficient, the Judge again held that she was not satisfied that the Applicant had met the residency requirements. The Judge also concluded that there were no special circumstances justifying a favourable recommendation for a discretionary grant of citizenship.

III. ANALYSIS

[10] The record in this case does not raise an issue of pre-Relevant Period residency. The Applicant left Canada within a month of arriving in Canada and thereafter during the Relevant Period had a mixed lifestyle of time working in Canada and working abroad.

[11] Central to this appeal is the Applicant's submission that the Judge erred in failing to explain which residency test she used. This Court has held that, as this issue involves a question of law and procedural fairness, the applicable standard of review is correctness (*Johar v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1015 at para 20).

[12] Associated with this central issue is the Applicant's submission that the Judge erred in assessing whether he had met the residency requirement under the Act because she mixed the factors of different tests together. This mixing has been held to be an error of law subject to the correctness standard of review (*El Ocla v Canada (Minister of Citizenship and Immigration)*, 2011 FC 533 at para 14).

[13] Because of the basis of this Court's decision, the Court will refrain from commenting on whether the application of either of the two residency test paradigms (qualitative and quantitative) was reasonable.

[14] In *Vancouver International Airport Authority v Public Service Alliance of Canada*, 2010 FCA 158, the Federal Court of Appeal set out, fairly comprehensively, the rationale for requiring reasons; one of which is to know the basis upon which a decision rests. While *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses*], has clarified that adequacy of reasons is not a stand alone ground of review, the Supreme Court of Canada confirmed that inadequate reasons goes to the reasonableness of the decision.

[15] In this case, it is not possible to discern which test was used to deny the application for citizenship. Clearly the Applicant failed on a quantitative analysis since he was deficient of residency by 223 days.

[16] The Judge's decision exhibited a mixing of factors relevant to one test with factors relevant to the other. The documents requested by the Judge could have been used for a qualitative analysis or for purposes of making a favourable recommendation for a discretionary grant of citizenship. It is difficult, however, to see how some of the documents requested were pertinent to a quantitative analysis especially given the Applicant's admission that he was deficient in days of residency.

[17] With the *Newfoundland Nurses* decision, the Court has some form of obligation to uphold a decision where it can. Where the Court could identify the approach taken by the Judge, the Supreme Court of Canada has instructed courts to uphold a decision if it is reasonable. In the current circumstances it is not possible to discern the legal test which was applied and therefore this Court cannot uphold the decision.

IV. CONCLUSION

[18] Therefore, for these reasons, the appeal is granted and the matter is referred back to a different citizenship judge for a new determination.

JUDGMENT

THIS COURT’S JUDGMENT is that the appeal is granted, and the matter is to be referred back to a different citizenship judge.

“Michael L. Phelan”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1467-11

STYLE OF CAUSE: TEK SHIN WAN FOOK CHEUNG

and

THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: February 28, 2012

**REASONS FOR JUDGMENT
AND JUDGMENT:** Phelan J.

DATED: March 22, 2012

APPEARANCES:

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