Federal Court  Cour fédérale

Date: 20130626

Docket: T-81-13

Citation: 2013 FC 712

Toronto, Ontario, June 26, 2013

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

ADEKUNLE OLUFEMI DINA

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an appeal from a decision of a Citizenship Judge, who declined to approve the Applicant's application for Canadian citizenship. For the reasons that follow I am allowing that appeal and will return the matter for redetermination by that judge.

[2] The Applicant is originally from Nigeria, he together with his wife and family came to Canada in March 2005 and were granted landed immigrant status. His wife has a job at a university

in the Toronto area and he and his wife have purchased a home in the Toronto area. The Applicant has a business in which he travels to Nigeria frequently. The citizenship judge had concerns as to the credibility of the Applicant as to how many days he was actually not in Canada, however, even accepting the Applicant's evidence at face value, as the Citizenship Judge did, the Applicant had a shortfall of 255 days from the number of days required by section 5(1)(c) of the *Citizenship Act* RSC 1985, c. C-29.

[3] The Citizenship Judge elected to apply the test respecting citizenship as established in *Re Pourghasemi*, (1993) F.C.J. No. 232 and determined, on that basis, that the Applicant did not meet the requirements of section 5(1)(c) of that *Act*. I repeat a portion of his decision:

> *The applicant insists that he was absent from Canada on seven occasions totalling 620 days only. This, in itself, gives the applicant a shortfall of 255 days. However, I am not satisfied that he was not out of Canada on more than 620 days. I believe that applicant has a credibility issue as to the days he was out of Canada.*
>
> *On the balance of probabilities, and based on my assessment of the applicant's testimony, as well as my careful consideration of the information and evidence before me, that, while the applicant did declare addresses in Canada during his entire relevant time period, I am not satisfied that he was actually living – was physically present – in Canada on the number of days he claims to have been.*
>
> *I have decided to use the strict test as established by the Honourable Mr. Justice Muldoon in Re Pourghasemi – (1993) F.C.J. No. 232 (OL)(T.D.)*

[4] Applicant's Counsel before me argued that had the Citizenship Judge elected to apply the test in *Re Koo,* [1993] 1 FC 286, the Applicant would have satisfied those criteria and would have been entitled to Canadian citizenship.

[5] The jurisprudence in this area was recently reviewed by Chief Justice Crampton of this Court in *Huang v Canada (Minister of Citizenship and Immigration)*, 2013 FC 576. At paragraph 2 of his reasons he recognized that the jurisprudence needed clarification, possibly by legislative amendment or by a reference to this Court under section 18.3(1) of the *Federal Courts Act*. He wrote:

> ***2*** *The optimal resolution of this state of affairs would be for Parliament to legislate a clearer test for citizenship under the Citizenship Act, RSC 1985 c C-29. The Court has noted this on several occasions (see, for example, Harry (Re) [1998] FCJ No 189, at paras 15-26; Imran v Canada (Minister of Citizenship and Immigration),* 2012 FC 756, at para 32 [*Imran*]; *Hao v Canada (Minister of Citizenship and Immigration), 2011 FC 46, at para 50* [*Hao*]; and *Ghaedi v Canada (Minister of Citizenship and Immigration*), *2011 FC 85, at para 16). Another potential approach would be for a citizenship judge to bring a reference to the Court under subsection 18.3(1) of the* Federal Courts Act, *RSC 1985, c F-7 [*FC Act*]. Among other things, this would provide an opportunity for the issue to then be brought before the Federal Court of Appeal, pursuant to paragraph 27(1)(d) of the* FC Act, *to finally settle the divergence in this Court's jurisprudence that has persisted now for several decades.*

[6] The Chief Justice reviewed the state of jurisprudence in this Court and, at paragraphs 36 to 44 determined that there were three different tests for citizenship, any one of which a Citizenship Judge could elect to apply. I repeat what he wrote at paragraphs 37 and 38:

> ***37*** *As noted above, the jurisprudence of this Court has established three tests for citizenship. These are generally known as the "centralized mode of living" test, the* Koo *test (which focuses upon where the applicant "regularly, normally or customarily lives") and the "physical presence" test.*
>
> ***38*** *It is now well established that before any of these tests can be applied, an applicant for citizenship must establish that he or she is physically resident in Canada (*Takla, *above, at para 50;* Martinez, *above, at para 9;* Hao, *above, at para 24;* Elzubair, *above, at para 13).*

[7] Turning to the present case, the Citizenship Judge was not wrong in stating that, even on the Applicant's own submissions he was 255 days short, and was not wrong in applying the "physical presence" that *of Pourghasemi, supra*. Nonetheless, I will return the matter for re-determination.

[8] My reasoning for returning the matter is that persons such as the Applicant here should not be put in a position of doubt as to what test a Citizenship Judge will be applying. The three different tests could yield a different result on the same set of facts. It is a denial of natural justice not to reveal to the Applicant, prior to the time that the matter is to be determined, which of the three tests will be applied by the Judge. In that way the Applicant, and Applicant's Counsel will know the case to be met.

[9] The messy state of the jurisprudence is largely a result of inconsistent and contradictory jurisprudence in the Federal Court for which this Court must bear the blame. No appeal from decisions such as this one is possible, however if the Citizenship Commission were to refer a question to this Court under section 18.3(1) of the *Federal Courts Act*, any decision of this Court could be appealed to the Federal Court of Appeal.

[10] Therefore, I will return the matter for redetermination by the same judge. That judge is to give adequate notice to the Applicant as to which test will be applied. That judge is strongly urged to consider a section 18.3(1) reference. I will not make any order as to costs.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The appeal is allowed;

2. The matter is returned for redetermination by the same Citizenship Judge who shall give adequate notice as the test to be applied;

3. The Citizenship Commission is urged to make a reference as to the proper test to this Court under section 18.3(1) of the *Federal Courts Act*; and

4. No Order as to costs.

"Roger T. Hughes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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