

Federal Court



Cour fédérale

Date: 20130923

Docket: T-763-13

Citation: 2013 FC 970

Ottawa, Ontario, September 23, 2013

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

EMMANUEL OLUWAGBENGA SALAKO

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] This is an appeal from the decision of a Citizenship Judge refusing the Appellant's application for citizenship. The grounds for the decision were the Appellant's failure to meet the residency requirements of paragraph 5(1)(c) of the *Citizenship Act*, RSC 1985, c C-29 [Act], and the absence of sufficient evidence of hardship or of exceptional service to justify a favourable recommendation for citizenship under subsection 5(4) of that Act and pursuant to the Citizenship Judge's jurisdiction under section 15 of the Act.

II. BACKGROUND

[2] The Appellant is a citizen of Nigeria and became a permanent resident on September 19, 2005. He is married to a Canadian and their two children are also Canadians.

[3] The relevant period of Canadian residency was September 19, 2005 to October 15, 2008. The Appellant, in his citizenship application, admitted that he did not meet the statutory requirement of 1,095 days in Canada during the relevant period because he was out of the country for 154 days.

[4] The Appellant explained his absences as due to his work. He is an exporter of used cars from Canada to Nigeria and is required to travel there for his job. He relies on this fact as “hardship” under subsection 5(4) because he will not be able to qualify for citizenship as long as he is so employed.

[5] The Citizenship Judge rejected the citizenship application on the basis that the Appellant failed the “quantitative test” which uses days of physical presence in Canada to calculate residency.

[6] In so doing the Citizenship Judge noted discrepancies in the Appellant’s declared absences which reduced the number of days of physical presence in Canada further below the 1,095 day threshold.

[7] The Citizenship Judge applied the strict quantitative test of *Re Pourghasemi* (1993), 62 FTR 122, 39 ACWS (3d) 251, such that even leaving aside the question of undeclared absences, the

Appellant failed to meet the residency requirements. The Citizenship Judge also noted a number of undeclared absences and found that in light of numerous inconsistencies, the Appellant had not met the burden of establishing the number of days of residence.

[8] The Citizenship Judge found that there was no evidence which would justify a recommendation for the exercise of discretion on the basis of hardship or services of exceptional value to Canada. Specifically, the Judge wrote “since you were unable to provide me with any such evidence [a reference to subsection 5(4) criteria], I see no reason to make a recommendation to the Minister”.

[9] The Appellant raises three points of contention:

- a) The Citizenship Judge violated a principle of procedural fairness by making errors of fact;
- b) The Citizenship Judge ignored evidence in respect of subsection 5(4); and
- c) The Citizenship Judge’s decision is unreasonable.

III. ANALYSIS

[10] With respect to errors of fact, there is no doubt that there were some errors with respect to undeclared absences. However, the errors are immaterial to the decision. The Citizenship Judge decided to base his decision on whether the Appellant met the 1,095 days of physical presence threshold. Among the tests available to a citizenship judge (a regrettable legal circumstance), the Citizenship Judge was entitled to pick the strict quantitative test, which he did.

[11] By his own admission, the Appellant did not meet the residency criteria selected by the Citizenship Judge (number of days physically spent in Canada). Any errors are irrelevant to that admission. There was no procedural unfairness. There was nothing capricious in the errors and they do not show a lack of care and attention.

[12] Similarly, the Citizenship Judge did not ignore or disregard evidence of hardship or exceptional service in respect of the exercise of discretion under subsection 5(4). The Appellant makes too much of the reference in the reasons to the Appellant not providing any evidence in this regard. Read in context the Citizenship Judge is not saying that there was no evidence at all on this point, merely that there was not sufficient evidence.

[13] As to the reasonableness of the decision on residency, there is no issue. The Appellant admits to the deficiency.

[14] As to the reasonableness of the decision on subsection 5(4), that provision provides the Citizenship Judge with wide discretion to recommend an applicant for citizenship on the basis of either hardship or exceptional service. The only hardship pleaded is that caused by the Appellant's choice of employment. That is not the type of hardship to which the provision is directed; nor is the provision directed to the fact that some members of the Appellant's family have Canadian citizenship and one or more do not.

IV. CONCLUSION

[15] Therefore, I can find no basis on which this Court can overturn the decision. The appeal will be dismissed.

JUDGMENT

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

"Michael L. Phelan"

Judge

SCHEDULE A*Citizenship Act, RSC 1985, c C-29*

5. (1) The Minister shall grant citizenship to any person who

...

(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:

(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

(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;

5. (4) In order to alleviate cases of special and unusual hardship

5. (1) Le ministre attribue la citoyenneté à toute personne qui, à la fois :

...

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) un demi-jour pour chaque jour de résidence au Canada avant son admission à titre de résident permanent,

(ii) un jour pour chaque jour de résidence au Canada après son admission à titre de résident permanent;

5. (4) Afin de remédier à une situation particulière et

or to reward services of an exceptional value to Canada, and notwithstanding any other provision of this Act, the Governor in Council may, in his discretion, direct the Minister to grant citizenship to any person and, where such a direction is made, the Minister shall forthwith grant citizenship to the person named in the direction.

inhabituelle de détresse ou de récompenser des services exceptionnels rendus au Canada, le gouverneur en conseil a le pouvoir discrétionnaire, malgré les autres dispositions de la présente loi, d'ordonner au ministre d'attribuer la citoyenneté à toute personne qu'il désigne; le ministre procède alors sans délai à l'attribution.

15. (1) Where a citizenship judge is unable to approve an application under subsection 14(2), the judge shall, before deciding not to approve it, consider whether or not to recommend an exercise of discretion under subsection 5(3) or (4) or subsection 9(2) as the circumstances may require.

15. (1) Avant de rendre une décision de rejet, le juge de la citoyenneté examine s'il y a lieu de recommander l'exercice du pouvoir discrétionnaire prévu aux paragraphes 5(3) ou (4) ou 9(2), selon le cas.

(2) Where a citizenship judge makes a recommendation for an exercise of discretion under subsection (1), the judge shall

(2) S'il recommande l'exercice du pouvoir discrétionnaire, le juge de la citoyenneté :

(a) notify the applicant;

a) en informe le demandeur;

(b) transmit the recommendation to the Minister with the reasons therefor; and

b) transmet sa recommandation motivée au ministre;

(c) in accordance with the decision that has been made in respect of his recommendation, forthwith on the communication of the decision to the judge approve or not approve the application.

c) approuve ou rejette la demande dès réception de la réponse du ministre, en se conformant à la décision prise par celui-ci à l'égard de sa recommandation.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-763-13

STYLE OF CAUSE: EMMANUEL OLUWAGBENGA SALAKO v THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: SEPTEMBER 16, 2013

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

DATED: SEPTEMBER 23, 2013

APPEARANCES:

Dov Maierovitz

FOR THE APPLICANT

Bradley Bechard

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Dov Maierovitz
Barrister and Solicitor
Toronto, Ontario

FOR THE APPLICANT

William F. Pentney
Deputy Attorney General of Canada
Toronto, Ontario

FOR THE RESPONDENT