

Federal Court



Cour fédérale

Date: 20180622

Docket: T-1717-17

Citation: 2018 FC 647

Ottawa, Ontario, June 22, 2018

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

**THE MINISTER OF IMMIGRATION,
REFUGEES AND CITIZENSHIP CANADA**

Applicant

and

JAMES BYRON SMITH

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr James Byron Smith, a part-time resident of Canada and a citizen of the United States, seeks Canadian citizenship. He applied for citizenship in 2014 knowing that he could not prove that he resided in Canada during three of the previous four years, as required by the *Citizenship Act*, RSC 1985, c C-29 s 5(1)(c), because he travelled frequently, and often for lengthy periods, from his home in Ottawa to work in the United States. Still, a citizenship judge concluded that,

because Mr Smith had established himself in Canada prior to the relevant period of time (*i.e.*, before 2010), he could meet the residency requirement notwithstanding his many absences from Canada.

[2] The Minister of Citizenship and Immigration seeks judicial review of the citizenship judge's decision, arguing that the decision was unreasonable because it was unsupported by the evidence before the judge. The Minister submits that the evidence did not support a conclusion that Mr Smith had established himself in Canada before 2010 to the extent that his many absences could be considered periods of ongoing residency in Canada.

[3] I agree with the Minister that the evidence of establishment in the documentary record is scant. On its own, that evidence does not support the citizenship judge's conclusion. However, the judge held a hearing on the issue of residency and received Mr Smith's oral testimony on that issue. The evidence the judge relied on appears to have been obtained from Mr Smith directly. The judge's three pages of notes from the hearing appear in the record, but they are largely illegible.

[4] Given that the citizenship judge made a factual finding based on the whole of the evidence, including Mr Smith's oral testimony, I have no basis on which to find that the judge's decision was unreasonable. I must, therefore, dismiss this application for judicial review.

II. The Citizenship Judge's Decision

[5] The citizenship judge purported to follow the approach described by Associate Chief Justice Arthur Thurlow in *re Citizenship Act and in re Antonios E. Papadogiorgakis*, [1978] 2 FC 208 (TD). According to that approach, a person who had established a residence in Canada could be considered a resident even if he or she were temporarily out of the country for business, vacation, or schooling. This would especially be true for persons whose family remained in Canada, and who returned frequently to Canada when possible.

[6] Here, the citizenship judge found that Mr Smith had “established himself in Canada well before his first significant absence by the length of time he was in Canada and by making a conscientious effort to integrate himself into life in Canada”. The judge, accepting that Mr Smith fell well short of the required period of residence (by 665 days), concluded that he had established himself in Canada and had maintained that connection even during his lengthy absences to work in the US. The judge noted that Mr Smith had married his Canadian wife in 2003, became co-owner of their house in Nepean, Ontario, and gradually moved his belongings there. The judge found that Mr Smith held real property in Canada, as well as an automobile, that he had bank accounts here, that he paid taxes in Canada, and that he had social connections and other ties to Canada. When he worked in the US, Mr Smith stayed in hotels, or with friends, or in temporary residences. He continuously tried to find work in Canada in his field (as a sound recording specialist), and sometimes took odd-jobs that allowed him to be closer to home. Nevertheless, Mr Smith acknowledged that he would likely never be able to meet the residency

requirement in the *Citizenship Act* if it demanded that he be physically present in Canada most of the time.

[7] The fact that Mr Smith sometimes resided in the US because of the requirements of his employment did not detract, according to the judge, from the fact that his real home is in Canada. The judge stated that Mr Smith “has all of the accessories of life in Canada, in terms of social ties, interests, and conveniences.” In addition, the judge found that Mr Smith’s absences from Canada were temporary, even though they were ongoing and unlikely to diminish.

III. Was the Citizenship Judge’s Decision Unreasonable?

[8] Mr Smith, representing himself, concedes that the citizenship judge’s decision was generous, and he expressed his appreciation for it.

[9] My role, though, is to determine whether the judge’s decision was unreasonable, considering the evidence that was actually before the judge. The Minister, pointing to the record, maintains that the documentary evidence does not support the judge’s conclusion. As mentioned, I agree with the Minister that the evidence cited by the judge does not appear in the documentary record. It must, therefore, have been presented at the oral hearing, and it is that evidence that the judge found persuasive. I have no basis on which to conclude that the judge’s assessment of that evidence was unreasonable.

[10] It is important to emphasize what the law requires. An applicant for citizenship must show residence in Canada for three out of the four years preceding the application. The case law

tells us that a person can be considered to be resident in Canada, even while temporarily outside the country, so long as the person was already firmly established as a Canadian resident (see *e.g.*, *Canada (Minister of Citizenship and Immigration) v Nandre*, 2003 FCT 650). The focus in these cases is on what the person did on arrival to Canada, what connections were made here, how strong those connections were, how long he or she stayed in Canada before leaving, what the purpose of the absences from Canada was, and how extensive were the absences.

[11] A person who has a firm connection with Canada can be regarded as a resident even though he or she is often outside the Canada for legitimate reasons. Once a person has a firm footing in Canada, he or she can be considered a Canadian resident even when outside the country temporarily. The *Citizenship Act* imposes a residency requirement, not a physical presence requirement, so the question is whether an applicant could be considered to be a Canadian resident even when outside the country on temporary business. That can be the case only if the person was already well-established here, and had maintained his or her residence while outside the country.

[12] As mentioned, the documentary record contains little evidence that Mr Smith had established himself in Canada, or had maintained his residence here during the relevant period of time. However, in the reasons for judgment, the judge referred to a number of indicia of establishment capable of supporting a positive conclusion. I see nothing that would justify a finding that the judge's treatment of that evidence was unreasonable.

[13] The Minister also contends that the citizenship judge unreasonably found that Mr Smith's absences from Canada were temporary. Again, I cannot conclude that the judge's conclusion was unreasonable.

[14] From my own review of the record, it is obvious that, during the recent past, Mr Smith has spent more time outside of Canada than within it, a fact he does not dispute. His time in Canada over the relevant period ranges from four days to two months, while his time outside Canada ranges from ten days to four months.

[15] Still, the evidence before the judge showed that Mr Smith tends to work from one project to the next, each one of which is temporary. Accordingly, each trip he makes to the US to work on a given assignment is temporary. Mr Smith's circumstances are similar to those who are forced to travel internationally for business reasons and whose absences from Canada have been found to be temporary (see, for example, *Canada (Minister of Citizenship and Immigration v Iluebbey*, 2016 FC 946, and *Canada (Minister of Citizenship and Immigration v Onur*, 2011 FC 936). I can see nothing unreasonable about the judge's finding that Mr Smith's absences from Canada were temporary.

IV. Conclusion and Disposition

[16] The decision of the citizenship judge was based on the whole of the evidence and I must, therefore, conclude that it was not unreasonable. I will, therefore, dismiss this application for judicial review.

JUDGMENT IN T-1717-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;
2. There is no order as to costs.

“James W. O’Reilly”

Judge

Annex

Citizenship Act, RSC 1985, c C-29

Grant of citizenship

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*, has, subject to the regulations, no unfulfilled conditions under that Act relating to his or her status as a permanent resident and has

(i) been physically present in Canada for at least 1,095 days during the five years immediately before the date of his or her application, and

(ii) [Repealed, 2017, c. 14, s. 1]

(iii) met any applicable requirement under the *Income Tax Act* to file a return of income in respect of three taxation years that are fully or partially within the five years immediately before the date of his or her application;

Loi sur la citoyenneté, LRC 1985, ch C-29

Attribution de la citoyenneté

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*, a, sous réserve des règlements, satisfait à toute condition rattachée à son statut de résident permanent en vertu de cette loi et :

(i) a été effectivement présente au Canada pendant au moins mille quatre-vingt-quinze jours au cours des cinq ans qui ont précédé la date de sa demande,

(ii) [Abrogé, 2017, ch. 14, art. 1]

(iii) a rempli toute exigence applicable prévue par la *Loi de l'impôt sur le revenu* de présenter une déclaration de revenu pour trois des années d'imposition complètement ou partiellement comprises dans les cinq ans qui ont précédé la date de sa demande;

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STYLE OF CAUSE: THE MINISTER OF IMMIGRATION, REFUGEES AND
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PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: MAY 7, 2018

JUDGMENT AND REASONS: O'REILLY J.

DATED: JUNE 22, 2018

APPEARANCES:

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