Date: 20071217

Docket: T-897-07

Citation: 2007 FC 1328

Vancouver, British Columbia, December 17, 2007

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

BENOLOL JAIME SERFATY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an appeal by Benolol Jaime Serfaty from a decision of the Citizenship Court brought under subsection 14(5) of the *Citizenship Act*, R.S.C. 1985, c. C-29 (Act).

[2] The substantive issue raised on this appeal concerns, once again, the correctness of the legal test for determining residency under s. 5(1)(c) of the Act. It is common ground that Mr. Serfaty did not meet the strict numerical standard of residency and was found by the Citizenship Court to have fallen 385 days short of the minimum requirement of 1095 days

within Canada. Mr. Serfaty contends that there was ample evidence to support his *de facto* Canadian residency and he argues that the Court erred by failing to apply one of the more liberal approaches to that determination: see, for example, *Re Koo*, [1993] 1 F.C. 286, 59 F.T.R. 27 (T.D.).

[3] It was also argued that, because the Department advised Mr. Serfaty to submit evidence to establish his so-called centralized mode of living in Canada, the Court was bound to consider that evidence notwithstanding the failure to be physically present in Canada for 1095 days during the preceding four years.

[4] As this is a statutory appeal the standard of review to be applied to issues of law is correctness.

[5] On the basis of the admittedly unsatisfactory state of the jurisprudence on this issue, I am not able to accept Mr. Serfaty's argument. If there is one point that most of the authorities in this Court agree upon it is that the Citizenship Court is entitled to apply any one of three accepted tests for residency: see *Lam v. Canada (Minister of Citizenship and Immigration)*, (1999) 164 F.T.R. 177 at para. 14 and *So v. Canada (Minister of Citizenship and Immigration)*, (2001) FCT 733, 107 A.C.W.S. (3d) 736 at para. 29.

[6] Here, the Citizenship Court adopted the strict numerical approach in accordance with the authority of *Re Pourghasemi*, (1993) 62 F.T.R. 122. It was not an error to take that approach and there is nothing in the decision to suggest any confusion about the test being applied.

[7] I do not agree that, by the Department's invitation to Mr. Serfaty to submit other evidence of his *de facto* ties to Canada, the Citizenship Court was thereby bound to apply one of the more flexible tests for residency. The approach taken by the Department was simply a recognition that such evidence may be considered by the Citizenship Court if it chooses to apply one of the more liberal tests for establishing residency. I agree with counsel for the Respondent that the Citizenship Court cannot be fettered by positions adopted by the Department; but, in any event, the Department's position did not purport to stipulate a test for residency and Mr. Serfaty was not disadvantaged by anything Mr. Serfaty was told. He submitted a substantial body of evidence to establish his *de facto* ties to Canada but the Citizenship Court, acting within its authority, chose to disregard it.

[8] The second issue raised on this appeal concerns the following passage from the Citizenship Court decision:

> I am recommending to the Department of Citizenship & Immigration that they inform the Canadian Border Security Agency and Immigration officials that you provided incomplete and misleading information regarding your residence in Canada. Be aware that when you cross the border from outside of Canada you will be identified as a person who has attempted to mislead Citizenship & Immigration Canada.

[9] Mr. Serfaty contends that the above recommendation exceeds the jurisdiction of the Citizenship Court. I agree. It would not be appropriate or lawful for the Department to act upon this recommendation.

[10] There is nothing wrong with a Citizenship Judge expressing in a decision unfavorable views on an applicant's credibility or in making critical remarks about any other issue. There is also nothing wrong with the Department choosing to act upon such observations if it chooses to do so. The problem with the passage impugned in this case is that the Citizenship Judge actively purports to offer an administrative recommendation to the Department coupled with an unqualified assertion that Mr. Serfaty will be singled out at the border.

[11] The limits of the Citizenship Court's authority to officially communicate with the Minister in connection with its determination of a citizenship application are fixed by ss. 14(2) and ss. 15(1) of the Act. Those provisions limit the Court's reporting function to the provision of the reasons for its determination or to recommending to the Minister that certain statutory requirements be waived. It is not the role of the Citizenship Court to give, within its decisions, administrative advice to the Department about how it should treat a citizenship applicant for the purposes of maintaining border security. The Citizenship Court must protect its independence. It should scrupulously avoid any appearance that it has some official influence, beyond its statutory mandate, over the work of immigration or border officials, just as it must be free of any perceived influence operating in the opposite direction.

[12] I accept that the remarks of the Citizenship Court are not binding on the Department. However, those remarks may not be so benignly perceived by others both because they carry an imprimatur of authority and because, once put into action, the context may be lost. I would add that the remarks and the recommendation made here are unwarranted in the absence of a thorough analysis of the evidence. Mr. Serfaty offered a mitigating explanation for the errors made in his citizenship application which, if accepted, would not reasonably support the position taken by the Citizenship Judge. At a minimum, Mr. Serfaty was entitled to have that explanation thoroughly considered in the decision before being subjected to the kind of future scrutiny proposed by the Citizenship Court: see *Chiu v. Canada (The Minister of Citizenship and Immigration)*, 2005 FC 1036, 141 A.C.W.S. (3d) 13 at para. 3.

[13] For the reasons given, I would direct that the Respondent disregard the recommendation made by the Citizenship Court with respect to its future dealings with Mr. Serfaty and that the Respondent inform any other interested third parties, such as the Canadian Border Security Agency, of this direction.

[14] Subject to the above-noted direction, this application is dismissed without costs to either party.

JUDGMENT

THIS COURT ADJUDGES that this application is dismissed without costs to either party.

"R.L. Barnes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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