

Federal Court



Cour fédérale

Date: 20090917

Docket: T-1163-08

Citation: 2009 FC 927

Ottawa, Ontario, September 17, 2009

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Applicant

and

MICHAEL SAMUEL LEROY ROBERTS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an appeal made pursuant to section 14(5) of the *Citizenship Act*, R.S.C. 1985, c. C-29 (“Act”), section 21 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, and Rule 300(c) of the *Federal Courts Rules*, SOR/98-106, by the Minister of Citizenship and Immigration of a decision made by Citizenship Judge Robert M. Morrow, dated 28 May 2008, approving the Respondent’s application for Canadian citizenship.

I. Background

[2] Michael Samuel Leroy Roberts is a citizen of the United States. He entered Canada on a student visa in 2002 to study law at the University of Toronto. During this time, he stayed at motels, slept in his car, as well as overnight with fellow students. According to Mr. Roberts, he would also commute to Buffalo three days a week for his job as a law clerk and return to Toronto in the afternoon on those days.

[3] Between 30 May 2003 and 01 September 2003 Mr. Roberts resided at Sorbara Hall on the University of Toronto campus while participating in the Ontario bar admissions course. He submits that he was no longer employed in the United States during this time and remained in Canada full-time to attend the course.

[4] Mr. Roberts returned to having no fixed address in Canada immediately upon the completion of the bar admissions course. Specifically, between 05 September 2003 and 31 July 2004, while employed as an articling student, Mr. Roberts admits that he had “no fixed abode” and that he slept in his car and sometimes overnight at the residence of friends. He adds that during this time he visited family in Buffalo every other week on Saturdays using a round-trip bus ticket.

[5] Subsequently, during August 2004, Mr. Roberts resided at his home in Buffalo to study for the New York State bar exam and to care for his ailing grandmother. Starting in 13 September 2004,

Mr. Roberts was enrolled in a part-time course at Seneca College in Toronto. However, it does not seem that Mr. Roberts had a fixed abode in Canada during this time.

[6] He landed as a permanent resident on 25 January 2005. A few months later in April 2005, Mr. Roberts was called to the Ontario Bar. In October of the same year, he began employment at Legal Aid Ontario as criminal duty counsel. However, Mr. Roberts admits that he even now did not establish “an actual physical residence in Canada” during this time.

[7] Since becoming licensed, Mr. Roberts started a law practise dealing primarily with immigration law which services the Niagara Region including both parts of the United States and Southern Ontario. In addition, Mr. Roberts states that he was employed at two H&R Block offices – one in the United States and one in Canada preparing tax returns for clients. As a result, he commuted across the border into Canada to work, all the while returning to his home in Buffalo which he owned with his two siblings.

[8] Mr. Roberts applied for Canadian citizenship on 18 May 2007. On his citizenship application, Mr. Roberts declared an absence of 76.5 days and a physical presence of 1075 days in Canada. Subsequent to his application, he was invited to an interview with a Citizenship Judge to assess the extent of his residency. The forms prepared by officers at Citizenship & Immigration Canada indicate that Mr. Roberts was referred for an interview due to the fact that he had an address in the United States and only a P.O. Box in Canada. In addition, officers noted that Mr. Roberts’

days of physical presence (as indicated by him on his citizenship application) were below the number required for citizenship.

II. Analysis

A. Decision Under Review

[9] On 31 March 2008, Citizenship Judge Robert M. Morrow approved Mr. Roberts' application for citizenship. The decision contained short, hand-written observations made by the Citizenship Judge in relation to the six factors enumerated in *Koo (Re)*, [1993] 1 F.C. 286 (T.D.), [1992] F.C.J. No. 1107 (T.D.) (QL), for determining residency. Briefly, the Citizenship Judge concluded that Mr. Roberts was present in Canada for a long period; that his two siblings live in Buffalo; that his physical presence indicates a returning home and that ninety percent of Mr. Roberts work and income is derived in Canada; that he has spent more time in Canada than outside; that his absences from Canada were temporary; and that Mr. Roberts' connection with Canada is more substantial than with the United States. In these reasons, the judge revised the number of days absent from Canada from 76.5 to 469 and the number of days present in Canada from 1075 to 685.

[10] The Citizenship Judge also provided further reasons after subsequent meetings with Mr. Roberts. In these reasons, the judge notes that despite the fact that Mr. Roberts was forced to live in Buffalo due to financial constraints, he was working toward living in Canada. Regardless, the judge concluded that Mr. Roberts has spent more time in Canada than in the United States based on his studies, employment, and time spent socializing in the country.

B. *Relevant Legislation*

[11] The relevant portion of the Act is paragraph 5(1)(c) which provides:

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, 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

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 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

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;

chaque jour de résidence au Canada après son admission à titre de résident permanent;

III. Issues

[12] The issues which present themselves in this case are as following:

- (a) Did the Citizenship Judge err in failing to address one branch of the two-part process in exploring whether an applicant has established residence?

- (b) Did the Citizenship Judge misapply one of the legal tests regarding duration of residence, resulting in an unreasonable finding that the Respondent met the statutory residence requirement under paragraph 5(1)(c) of the *Act*?

- (c) Did the Citizenship Judge fail to adequately assess the evidence resulting in unreasonable findings of fact?

(1) Did the Citizenship Judge Err in Failing to Address One Branch of the Two-Part Process in Exploring Whether an Applicant Has Established Residence?

[13] The standard of review applicable to this issue is correctness. In *Chen v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 85, 145 A.C.W.S. (3d) 770, Justice Phelan explains at para. 8 that “...the standard of review is correctness in that a citizenship judge must address (a) whether an applicant has established residence and (b) whether an applicant has maintained that residence. A failure to address either issue is an error of law for which the standard of review is correctness.”

[14] As mentioned, a two-stage inquiry exists with respect to the residency requirement stipulated in paragraph 5(1)(c) of the Act. The case law indicates that applicants for citizenship must demonstrate that first, they have established a residence in Canada: see *Canada (Minister of Citizenship and Immigration) v. Italia*, 89 A.C.W.S. (3d) 22, [1999] F.C.J. No. 876 (T.D.) (QL), at paras. 14-16. This inquiry is the first stage of a two-part process in demonstrating whether an applicant has met the statutory residency requirement under the Act: see *Zhao v. Canada (Minister of Citizenship & Immigration)*, 2006 FC 1536, 306 F.T.R. 206, at para. 49. Indeed, the establishment of a residence in Canada is a condition precedent to obtaining citizenship. Where the evidence demonstrates that residence has not been established, inquiries as to whether residence has been maintained or evidence as to whether the applicant has centralized his mode of living in Canada become irrelevant: see *Canada (Minister of Citizenship and Immigration) v. Tarfi*, 2009 FC 188, [2009] F.C.J. No. 244 (T.D.) (QL), at para. 35.

[15] Similarly, in *Canada (Minister of Citizenship and Immigration) v. Nandre*, 2003 FCT 650, 123 A.C.W.S. (3d) 28, Justice O'Reilly states at paragraph 24 of his decision that:

[...] In order for applicants to satisfy the residence requirement, they must first show that they have established a residence in Canada...

[16] The Citizenship Judge did not make any specific findings with respect to the establishment of a residence for Mr. Roberts and the evidence in this regard is weak and almost non-existent. Mr. Roberts lived in a student residence for three months during the material period with the remainder of the time being spent with no fixed address or at his family home in the United States. Rather the Citizenship Court Judge seems to stress that Mr. Roberts intends to establish a residence in Canada once his personal circumstances allow for such. It is well established that a mere intention to establish a residence is insufficient: see *Canada (Minister of Citizenship and Immigration) v. Italia*, above, at para. 16. Indeed, during his oral submissions the Respondent advised the court that he had established a residence as of June, 2009 which would seem to confirm that no such residence had been established prior to this time or certainly during the material period in question.

[17] While I have some sympathy for the circumstances that led to the Respondent's failure to establish a residence in Canada during the material period it seems clear that the Citizenship Judge was guided more by Mr. Roberts' future intentions with respect to establishing a residence and erred in his judgment by not clearly addressing this issue. Federal Court jurisprudence also demonstrates that establishing such a residence is a condition precedent before proceeding to an examination as to whether the applicant in question has maintained such a residence. In the case of Mr. Roberts, upon

even the most generous reading of the Citizenship Judge's decision and the material before him, it is clear that the Respondent did not establish a residence in Canada and for that reason alone the appeal must be allowed.

[18] Given my conclusion with respect to issue (a) – the failure of the Citizenship Judge to make a determination with respect to the establishment of a residence by the Respondent, there is no need to address issues (b) and (c).

[19] Accordingly, the appeal is allowed and the decision of the Citizenship Judge is set aside.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The appeal is allowed.
2. The decision of the Citizenship Judge granting the Respondent citizenship is set aside.

“ D. G. Near ”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1163-08

STYLE OF CAUSE: MCI
v.
ROBERTS

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: SEPTEMBER 8, 2009

**REASONS FOR JUDGMENT
AND JUDGMENT BY:** JUSTICE NEAR

DATED: SEPTEMBER 17, 2009

APPEARANCES:

Rhonda Marquis
416-952-4640

FOR THE APPLICANT

Michael Samuel Leroy Roberts
1-716-881-1050

SELF REPRESENTED

SOLICITORS OF RECORD:

John H. Sims, Q.C.
Deputy Attorney General Canada

FOR THE APPLICANT

Michael Samuel Leroy Roberts
Fort Erie, Ontario

SELF REPRESENTED