Federal Court  Cour fédérale

Date: 20091112

Docket: T-984-08

Citation: 2009 FC 1153

Ottawa, Ontario, November 12, 2009

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

DING YAN

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Ding Yang (identified in the style of cause as Ding Yan) appeals the refusal of his citizenship application pursuant to subsection 14(5) of the *Citizenship Act* ("*Act*"), section 18.1 of the *Federal Courts Act*, and rule 300 of the *Federal Court Rules*.

[2] Mr. Yang contends the Citizenship Judge lost jurisdiction due to delay and/or because the Judge did not consider all the evidence demonstrating residency. Mr. Yang seeks as a remedy a declaration by this Court essentially confirming his entitlement to citizenship.

FACTS

[3] Mr. Yang is 29 years old and from Hunan in the People's Republic of China. He first came to Canada on January 24, 1997 and he became a permanent resident on June 24, 2002. He applied to become a Canadian citizen on October 18, 2004.

[4] The time period relevant to Mr. Yang's citizenship application is October 18, 2000 to October 18, 2004. As calculated under the *Act*, Mr. Yang was physically present in Canada 1059 days, 36 days short of the minimum 1095 days required in a four pear period. Mr. Yang was absent for family visits to China and sightseeing.

[5] Mr. Yang sought to prove he established residence in Canada notwithstanding his absences. He had been married to a Canadian woman but later divorced. He entered into business relationships; he owned a condominium which he subsequently sold; and he was registered to study at York University. He even submitted documentation about being charged and convicted of summary offences, initially to show the convictions did not adversely affect his application but later submitting it also demonstrating residency.

[6] The Citizenship Judge interviewed Mr. Yang on January 15, 2007. At the conclusion of the hearing, the Judge reserved his decision and requested more documentation. Mr. Yang submitted further information to the Citizenship Judge on January 15 and February 9, 2007.

DECISION UNDER APPEAL

[7] On April 24, 2008, the Citizenship Judge issued the decision on Mr. Yang's application for citizenship.

[8] The Citizenship Judge noted that Mr. Yang was short 36 days of the minimum 1095 days residency required during the four years preceding application. The Judge referred to Mr. Yang's acknowledgement that his application was dependent on the submission of additional documentation and stated Mr. Yang failed to provide the additional documents requested. Finally, some of the documents did not relate to the relevant time period.

[9] The Citizenship Judge stated in part:

> … You stated in your application that you were physically present in Canada for 1154 days during the relevant period and absent 95 days. You are 36 days short of the minimum requirement of 1,095 days as prescribed in Paragraph 5(1)(c) of the Act.
>
> At the hearing, you were requested to provide additional documents to support your claim of residence in Canada. The letter of January 15, 2007, which you were given at the interview further stated that "I understand that, should such documentation not be provided, my Citizenship Application will be [sic] non approved by the Judge."
>
> To date, you have failed to provide the additional documents requested and some documents are not within the four year review period (October 18, 2000 to October 18, 2004). …
>
> I was therefore unable to determine whether or not you met all the requirements of the Act with respect to [sic] "Residence".
>
> The Issue:

> Have you, the applicant, accumulated at least three years (1,095 days) of residence in Canada within the four years (1,460 days) immediately preceding the date of your application for Canadian citizenship?
>
> Decision:
>
> For reasons provided above, I am unable to approve your application because you have not met the residence requirement under paragraph 5(1)(c) of the Act…

[10] The Judge refused Mr. Yang's application for citizenship.

ISSUES

[11] The issues in this appeal are:

1. What is the effect of the Citizenship Judge's failure to render a decision within the 60 days required by the *Act*?

2. Did the Citizenship Judge err in refusing the citizenship application?

3. What remedy is available if the citizenship judge erred in respect of either of the above issues?

LEGISLATION

[12] The *Act* provides:

5. (1) The Minister shall grant citizenship to any person who (a) makes application for citizenship; (b) is eighteen years of age or over; (c) is a permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act, and has, within the	5. (1) Le ministre attribue la citoyenneté à toute personne qui, à la fois : a) en fait la demande; b) est âgée d'au moins dix-huit ans; 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

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;

…

14. (1) An application for
(a) a grant of citizenship under subsection 5(1) or (5),
(b) [Repealed, 2008, c. 14, s. 10]
(c) a renunciation of citizenship under subsection 9(1), or
(d) a resumption of citizenship under subsection 11(1)
shall be considered by a citizenship judge who shall, within sixty days of the day the application was referred to the judge, determine whether or not the person who made the application meets the requirements of this Act and the regulations with respect to the application.

Interruption of proceedings

(1.1) Where an applicant is a permanent resident who is the subject of an admissibility hearing under the Immigration and

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;

…

14. (1) Dans les soixante jours de sa saisine, le juge de la citoyenneté statue sur la conformité — avec les dispositions applicables en l'espèce de la présente loi et de ses règlements — des demandes déposées en vue de :
a) l'attribution de la citoyenneté, au titre des paragraphes 5(1) ou (5);
b) [Abrogé, 2008, ch. 14, art. 10]
c) la répudiation de la citoyenneté, au titre du paragraphe 9(1);
d) la réintégration dans la citoyenneté, au titre du paragraphe 11(1).

Interruption de la procédure

(1.1) Le juge de la citoyenneté ne peut toutefois statuer sur la demande émanant d'un résident permanent qui fait l'objet d'une enquête dans le cadre de la Loi sur l'immigration et la protection des réfugiés tant qu'il n'a pas été décidé en dernier ressort si une mesure de renvoi devrait être prise contre lui.

Refugee Protection Act, the citizenship judge may not make a determination under subsection (1) until there has been a final determination whether, for the purposes of that Act, a removal order shall be made against that applicant.

(1.2) [Repealed, 2001, c. 27, s. 230]

Advice to Minister

(2) Forthwith after making a determination under subsection (1) in respect of an application referred to therein but subject to section 15, the citizenship judge shall approve or not approve the application in accordance with his determination, notify the Minister accordingly and provide the Minister with the reasons therefor.

Notice to applicant

(3) Where a citizenship judge does not approve an application under subsection (2), the judge shall forthwith notify the applicant of his decision, of the reasons therefor and of the right to appeal.

Sufficiency

(4) A notice referred to in subsection (3) is sufficient if it is sent by registered mail to the applicant at his latest known address.

Appeal

(5) The Minister or the applicant may appeal to the Court from the decision of the citizenship judge under subsection (2) by filing a

(1.2) [Abrogé, 2001, ch. 27, art. 230]

Information du ministre

(2) Aussitôt après avoir statué sur la demande visée au paragraphe (1), le juge de la citoyenneté, sous réserve de l'article 15, approuve ou rejette la demande selon qu'il conclut ou non à la conformité de celle-ci et transmet sa décision motivée au ministre.

Information du demandeur

(3) En cas de rejet de la demande, le juge de la citoyenneté en informe sans délai le demandeur en lui faisant connaître les motifs de sa décision et l'existence d'un droit d'appel.

Transmission

(4) L'obligation d'informer prévue au paragraphe (3) peut être remplie par avis expédié par courrier recommandé au demandeur à sa dernière adresse connue.

Appel

(5) Le ministre et le demandeur peuvent interjeter appel de la décision du juge de la citoyenneté en déposant un avis d'appel au greffe de la Cour dans les soixante jours suivant la date, selon le cas :

a) de l'approbation de la demande;
b) de la communication, par courrier ou tout autre moyen, de la décision de rejet.

Caractère définitif de la décision

(6) La décision de la Cour rendue

notice of appeal in the Registry of the Court within sixty days after the day on which (a) the citizenship judge approved the application under subsection (2); or (b) notice was mailed or otherwise given under subsection (3) with respect to the application. Decision final (6) A decision of the Court pursuant to an appeal made under subsection (5) is, subject to section 20, final and, notwithstanding any other Act of Parliament, no appeal lies therefrom. … 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.	sur l'appel prévu au paragraphe (5) est, sous réserve de l'article 20, définitive et, par dérogation à toute autre loi fédérale, non susceptible d'appel. … 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.

STANDARD OF REVIEW

[13] In *Lam v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 410, Chief Justice Lutfy stated on citizenship appeals at para. 33:

> The appropriate standard, in these circumstances, is one close to the correctness end of the spectrum. However, where citizenship judges, in clear reasons which demonstrate an understanding of the case law, properly decide that the facts satisfy their view of the statutory test in paragraph 5(1)(c), the reviewing judges ought not to substitute arbitrarily their different opinion of the residency requirement.

[14] In *Mizani v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 698, Justice Tremblay-Lamer further distinguished between the interpretation of statutes or jurisprudence and fact finding by citizenship judges:

> **7** It is well established that correctness is the appropriate standard of review for pure questions of law. Thus, this Court must first determine whether the Citizenship Judge selected the correct legal test in making the contested residency determination.
>
> 8 The remainder of the decision, involving the application of facts to the law of residency, is clearly a matter of mixed fact and law. I also note that while there is no privative clause, citizenship judges acquire a certain expertise in residency cases such as the present one (*Farshchi v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 487, [2007] F.C.J. No. 674 (QL) at para. 8). As I previously stated in *Canada (Minister of Citizenship and Immigration) v. Fu*, [2004] F.C.J. No. 88 (QL), at paragraph 7, I am convinced that a pragmatic and functional analysis reveals that the appropriate standard of review is reasonableness *simpliciter*.

[15] In *Dunsmuir v. New Brunswick*, 2008 SCC 9 the Supreme Court held it was not necessary to conduct a standard of review analysis where a standard was previously decided. Accordingly I conclude the standard of review in this matter is correctness in the interpretation of statute or jurisprudence and reasonableness in the application of facts to the law.

ANALYSIS

Sixty Day Requirement for Decision

[16] Mr. Yang contends he was prejudiced by delay since he left Canada shortly after the hearing to work for family in China, and by implication he lost the opportunity to remedy the 36 day

shortfall by staying in Canada. The Respondent responds by simply noting that Mr. Yang left even before the 60 days period expired.

[17] The *Act* provides:

14. (1) An application for (a) a grant of citizenship under subsection 5(1), … shall be considered by a citizenship judge who shall, within sixty days of the day the application was referred to the judge, determine whether or not the person who made the application meets the requirements of this Act and the regulations with respect to the application. (emphasis added)	14. (1) Dans les soixante jours de sa saisine, le juge de la citoyenneté statue sur la conformité — avec les dispositions applicables en l'espèce de la présente loi et de ses règlements — des demandes déposées en vue de : a) l'attribution de la citoyenneté, au titre des paragraphes 5(1) ou (5)…

[18] The *Act* is silent on the consequence of a decision rendered outside of the 60 days.

[19] In *Chung (Re),* [1998] F.C.J. No. 754, Justice Joyal found the 60 day limit in the Act was a procedural right. He found since section 14 of the *Act* at that time provided for an appeal *de novo* there was an effective recourse for a breach of the 60 day limit. However, *Chung* was decided before Rule 300 was amended to no longer permit appeals *de novo*.

[20] In *Sahota v. Canada (Minister of Citizenship and Immigration),* 2004 FC 52 a Citizenship Judge refused to adjourn a hearing beyond the 60 days allowed for decision in the *Act*. The applicant was ineligible for citizenship until after completing probation for a criminal conviction

and wanted the judge to wait. He would still have been on probation at the expiry of the 60 day period. Justice Mactavish considered the citizenship judge bound by the 60 day time limit. She stated "[a] denial of procedural fairness will not cause a reviewing court to set aside a decision where the court is satisfied that the breach could not have affected the result." *Sahota* para. 20.

[21] The *Act* states the judge "shall" render a decision within 60 days. Section 11 of the *Interpretation Act* states "shall" is imperative. However, as noted in *The Interpretation of Statutes*, there is room for two types of procedural requirements in statute: mandatory and directory:

> "A strong line of distinction may be drawn between cases where the prescriptions of the Act affect the performance of a duty and where they relate to a privilege or power. Where powers, rights or immunities are granted with a direction that certain regulations, …shall be complied with, it seems neither unjust nor inconvenient to exact a rigorous observance of them as essential to the acquisition of the right or authority conferred, …. But when a public duty is imposed and the statue requires that it shall be performed in a certain manner, or within a certain time, or under other specified conditions, such prescriptions may well be regarded as intended to be directory only in cases when injustice or inconvenience to others who have no control over those exercising the duty would result if such requirements were essential and imperative." 10th ed. (1953) at 376-77. As quoted in *Principles of Administrative Law*, 5th ed. Jones and de Villar, 2009 (Carswell, Toronto). (emphasis added)

[22] Justice Lemieux considered this issue in *McMahon v. Canada (Attorney General)*, 2004 FC 540. He stated:

> 13 …it has long been settled by the jurisprudence that, in certain circumstances, the word "shall" is to be interpreted as directory in which case failure to comply will not lead to invalidity.
>
> 14 The application of this principle in Canadian law reaches back at least to the Privy Council's decision in Montreal Street Railway Co. v. Normandin, [1917] A.C. 170, referred to by the Supreme Court of Canada in Reference re: Manitoba Language Rights, [1985] 1 S.C.R. 721, and applied recently by the

> Federal Court of Appeal in McCain Foods Ltd. v. Canada (National Transportation Agency), [1993] 1 F.C. 583 and in Canadian National Railway Co. v. Ferroequus Railway Co., [2002] F.C.J. No. 762, 2002 FCA 193.
>
> …
>
> 16 The approach mandated in Montreal Street Railway, supra, is a contextual one which requires the object of the statute must be examined in every case.
>
> 17 Sir Arthur Channell went on to say as follows:
>
> > When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done.
>
> (emphasis added)

[23] The Federal Court of Appeal upheld Justice Lemieux's finding that the provision in question was directory. *McMahon v. Canada (Attorney General)*, 2005 FCA 33, [2005] F.C.J. No. 166.

[24] The *Act* confers citizenship when an applicant meets the statutory requirements. Voiding citizenship decisions for being late would cause serious inconvenience and injustice for successful applicants. They would not be able to go about their affairs with the certain knowledge of citizenship. Equally important is the timely informing of unsuccessful applicants so that they may address shortcomings in their applications and apply anew.

[25] In my view the 60 day requirement in section 14(5) of the *Act* is directory. The Citizenship Judge did not lose jurisdiction because the delay exceeded the prescribed 60 days.

Did the Citizenship Judge err in refusing the citizenship application?

[26] In *Mizani* Justice Tremblay-Lamer described the jurisprudence that has emerged on the question of residency required to qualify for citizenship:

> 9. The legal criteria for citizenship are set out in subsection 5(1) of the Act (see annex for the relevant statutory provision). Among other things, it requires an applicant to have accumulated three years of residence in Canada during the previous four years. Though the term "residence" is undefined in the Act itself, it has been interpreted in various ways by this Court *Canada (Minister of Citizenship and Immigration) v. Nandre*, 2003 FCT 650, [2003] F.C.J. No. 841 (QL) at para. 6).
>
> Three Tests
>
> 10 This Court's interpretation of "residence" can be grouped into three categories. The first views it as actual, physical presence in Canada for a total of three years, calculated on the basis of a strict counting of days (*Pourghasemi (Re)*, [1993] F.C.J. No. 232 (QL) (T.D.)). A less stringent reading of the residence requirement recognizes that a person can be resident in Canada, even while temporarily absent, so long as he or she maintains a strong attachment to Canada (*Antonios E. Papadogiorgakis (Re)*, [1978] 2 F.C. 208 (T.D.). A third interpretation, similar to the second, defines residence as the place where one "regularly, normally or customarily lives" or has "centralized his or her mode of existence" (*Koo (Re)*, [1993] 1 F.C. 286 (T.D.) at para. 10).
> (emphasis added)

[27] A Citizenship Judge may apply any one of the three tests in deciding if the residency requirement is met. *Lam* supra, *Hsu v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 579, [2001] F.C.J. No. 862.

[28] The Judge may not “blend” the tests but may discuss alternatives in explaining the choice of test applied. In Tulupnikov, 2006 FC 1439 , Justice Gibson wrote:

> 21 …. I am satisfied that the reasons for decision here under consideration are sufficient …. In brief: the reasons clearly and succinctly demonstrate the Judge's conclusion that, against the "strict count of days" test, that is to say the Pourghasemi test, the Applicant's application for Canadian citizenship must fail. The fact that the Judge then goes on to comment extensively on the documentary evidence provided by the Applicant is irrelevant to the decision except in so far as it serves to explain why the Judge chose not to, or perhaps felt compelled not to, adopt the "quality of residence" test or the "centralization of mode of existence" test, both of which were open to him as alternatives to the "strict count of days" test. That the Judge then went on, without reference back to his conclusion on the "strict count of days" test, to conclude that he was unable to approve the Applicant's application because the Applicant had not met the residence requirement under paragraph 5(1)(c) of the Act, is entirely insufficient, if indeed, it is confusing at all, to justify allowing this appeal.
> (emphasis added)

[29] The *Act* requires the Citizenship Judge to give reasons. This is especially important where the judge refuses an application for citizenship. Jurisprudence calls for clear reasons. In *Mueller v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 961, Justice Barnes wrote:

> 8 …. Here I cannot tell which test for residency was applied but, suffice it to say, the test is not defined by the language employed by the Citizenship Court. If the Citizenship Court was attempting to apply the centralized mode of living test, it should have said so. Indeed, the Citizenship Court should, in its reasons, cite the specific authority that it is applying to avoid any confusion or doubt about how it is assessing the residency requirement. If it is applying a test other than the strict numerical standard, it also has an obligation to identify the material evidence before it and, where residency is not established, to explain why that evidence was insufficient.
> (emphasis added)

[30] The Citizenship Judge's reasons in this case are confusing. From the onset, Mr. Yang acknowledged his shortfall in days of physical presence in Canada. He requested the Citizenship Judge consider the centralized mode of living test. The Judge appeared to do so by reserving his decision and requesting more documents. However, the Judge then appears to dismiss any consideration of a centralized mode of living test and revert to a strict count of days.

[31] While citizenship judges may select which residency test to apply, applicants are entitled to clear and meaningful reasons. In *Chowdhury v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 709, Justice Teitelbaum found a mixed message and lack of guidance provided in the decision led him to conclude the citizenship judge erred.

[32] I am unable to say if the Citizenship Judge rejected the centralized mode of living approach because the Applicant gave what appears to be a waiver or because the documents and other information which had been submitted by Mr. Yang were inadequate. If the Citizenship Judge decided on the basis of an apparent waiver, that would be an error, since the judge is duty bound to consider the application. The Judge's use of the formalistic phrase "For reasons above" does not inform the Applicant in any meaningful way how his application for citizenship is deficient.

[33] In my view the Citizenship Judge's decision does not provide the Applicant with clear and meaningful reasons as required by the *Act* and jurisprudence. In this regard, the judge erred.

Available Remedies

[34] The Citizenship Judge breached the 60 day time period for rendering a decision. However, the breach of a procedural right cannot give rise to a substantive right, *Ho (Re)* 1997 F.C.J. 1154.

[35] Nothing in the *Act* remotely suggests citizenship can be achieved by any other means than what is set out in the legislation.

[36] The record before this Court is not complete. For instance, the interview of Mr. Yang is not available. In these circumstances, I consider it appropriate to remit the hearing back for re-determination before another citizenship judge.

[37] Finally, there remains the matter of addressing the failure to issue a decision within the statutory 60 day period. No explanation is offered for the fifteen month delay of the ruling on Mr. Yang's citizenship application.

[38] Costs have been awarded because failure to comply with a directory requirement should not be sanctioned. In *McMahon* (F.C.A.), the Federal Court of Appeal awarded costs for the unsuccessful applicant at both levels of court because non-compliance with a directory requirement should not be sanctioned.

[39] Accordingly, I find the Applicant is entitled to costs.

CONCLUSION

[40] I allow this appeal and direct that this matter be re-determined by a different Judge of the Citizenship Court.

[41] Costs are awarded to the Applicant.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. the appeal is allowed;
2. this matter is remitted back to be re-determined by a different Judge of the Citizenship Court; and
3. costs are awarded to the Applicant.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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