Federal Court  Cour fédérale

Date: 20100316

Docket: T-1052-09

Citation: 2010 FC 298

Ottawa, Ontario, March 16, 2010

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

AREEJ HUSSEIN ELZUBAIR

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an appeal by the Minister of Citizenship and Immigration, pursuant to s. 14(5) of the *Citizenship Act*, R.S.C. 1985, c. C-29, and s. 21 of the *Federal Courts Act*, of a decision by a Citizenship Judge to grant the respondent's citizenship application.

[2] In light of the respondent's apparent misrepresentation regarding the frequency and length of her absences from Canada during the relevant residency period, the Citizenship Judge's brief reasons insufficiently justified the grant of citizenship. This appeal is allowed.

Background

[3] Areej Hussein Elzubair is a citizen of Sudan. She arrived in Canada and became a permanent resident on May 28, 2004. On June 3, 2008, she applied for citizenship. An applicant must show compliance with the residency obligation set out in subsection 5(1)(c) of the *Citizenship Act* which provides that the applicant must have accumulated at least 1095 days "residence in Canada" within the previous four years. This permits an applicant not to have residence in Canada for 365 days in that period.

[4] The respondent used the applicant's online residence calculator. She listed two absences from Canada for trips to Sudan and Ireland totaling 311 days within the four-year period preceding the date of her application.

[5] The applicant requested supporting documentation from the respondent including her passport, tax information, rental agreements, and the completion of an additional residence questionnaire.

[6] On the second residence questionnaire that the respondent provided she claimed that she was absent from Canada on three separate occasions, rather than two as previously claimed, for a period totaling 359 days, rather than 311 days. The absences were for the previously mentioned trips to Sudan and Ireland as well as for an additional trip to Sudan.

[7] The respondent's passport that she provided strongly suggested additional absences from Canada, including a previously undisclosed trip to Ireland.

[8] The respondent was called for a hearing before a citizenship judge, but she failed to appear because she was not in Canada. Her hearing was rescheduled and she returned to Canada to attend the hearing.

[9] After the hearing, the Citizenship Judge approved the respondent's application for citizenship, concluding that she had been absent from Canada for a total of 312 days in the relevant period. The reasons supporting that finding and the grant of citizenship are brief:

> After reviewing the applicants [*sic*] documents and the information shared with me at the hearing on March 25th /09, I am satisfied that the applicant meets the residence criteria.

[10] It is from this decision that the Minister appeals.

Issues

[11] The Minister raises the following issues:

1. What is the standard of review for an appeal of a residency determination made pursuant to s. 5(1)(c) of the *Citizenship Act*; and
2. Whether the citizenship judge erred in finding the respondent to have met the residency requirement under s. 5(1)(c) of the *Citizenship Act*?

Analysis

[12] In light of the recent decision of this Court regarding the standard of review on a citizenship appeal in *Canada (Minister of Citizenship and Immigration) v. Takla*, 2009 FC 1120, the first issue was not pursued by the Minister. *Takla* holds that the reasonableness standard of review applies to a citizenship judge's determination of compliance with the residence requirement, whereas issues of jurisdiction, procedural fairness and natural justice are to be reviewed against the correctness standard.

[13] At paras. 46-49 of *Takla,* Justice Mainville convincingly supported his finding that there should only be one test for residence, despite this Court's jurisprudence that suggests otherwise. I concur with his view. Therefore, the approach to be followed by citizenship judges is to first make a threshold assessment as to whether residence was established at all: *Goudimenko v. Canada (Minister of Citizenship and Immigration),* 2002 FCT 447, and then, if it was established, to assess, following the test described in *Koo (Re),* [1993] 1 F.C. 286 (T.D.), whether that residence is sufficient to satisfy the obligation described in subsection 5(1)(c) the *Citizenship Act*.

[14] When a citizenship judge finds that an applicant was physically present in Canada for at least 1095 days, the required minimum period, then residence is proven, and resort to the more contextual *Koo* test is unnecessary. The *Koo* test need only be relied on where the applicant has been resident in Canada, but has been physically present in Canada for less than 1095 days. In that situation, citizenship judges must apply the *Koo* test to determine whether the applicant was resident in Canada, even though not physically present here.

[15] In this case, the Citizenship Judge concluded that the applicant was physically present in Canada for 1148 days during the relevant period, so it was unnecessary to assess her residency according to the *Koo* test. Presumably the Citizenship Judge first determined that the respondent had established residency in Canada, although that is not stated in the reasons he provided.

[16] The deficiency with the Citizenship Judge's decision was not his application of the appropriate test, but his complete failure to explain how he reached his conclusion regarding the respondent's physical presence in Canada.

[17] The Citizenship Judge was faced with an applicant who had submitted two residency questionnaires that indicated absences from Canada that differed by 48 days, as well as a passport that suggested further previously undisclosed absences from Canada. The documents provided by the respondent to the Citizenship Judge are *prima facie* evidence of a misrepresentation by the respondent and raise serious questions as to whether she satisfied the residency requirement.

[18] The Citizenship Judge stated that his review of these documents "and the information shared with him" by the respondent led him to the conclusion that the residency requirement was satisfied. The Citizenship Judge did not state what information was shared with him or how this information overcame the serious issues raised by the respondent's documentary evidence. In this regard, the Citizenship Judge's decision was insufficiently justified and is therefore unreasonable.

[19] In *Canada (Minister of Citizenship and Immigration) v. Dhaliwal*, 2008 FC 797, at para. 26, Frenette D. J. stated:

> The privilege of acquiring Canadian citizenship is just that: a privilege. One must be truthful in their application for such a privilege. Moreover, misrepresentation by an applicant for citizenship puts into question their credibility and has the potential to impact the weight given to their evidence submitted in support of their application.

[20] Noting the requirement that applicants for Canadian citizenship be honest, Justice Lemieux recently upheld a refusal to grant citizenship in a case where the applicant satisfied the residency requirement, but had committed a serious misrepresentation in order to expedite his application: *Raslan v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 189.

[21] It is part of the role of a citizenship judge to ensure that citizenship is not obtained through misrepresentation. If citizenship is granted in circumstances where it appears on the face of the record that there may have been misrepresentation, the citizenship judge must explain and justify why citizenship was granted; otherwise, the very value of Canadian citizenship is debased.

[22] As it stands, there are minimal repercussions for misrepresentation on citizenship applications. Such actions do not render a permanent resident inadmissible to Canada, and subject to removal proceedings. The foreign national can simply re-apply for citizenship. This may be contrasted with the provisions of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 which provide that if a permanent resident has committed a misrepresentation he or she can be found inadmissible and removed from Canada or, in other circumstances, be unable to sponsor previously undisclosed family members to enter Canada. It may be argued that a misrepresentation on an application for citizenship ought to be visited with similarly harsh consequences.

[23] As the law stands, there are no such consequences and the respondent is at liberty to re-apply for Canadian citizenship.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this appeal is allowed and the decision of the Citizenship Judge granting the respondent Canadian citizenship is quashed.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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Nil	RESPONDENT SELF REPRESENTED