Federal Court  Cour fédérale

Date: 20100623

Docket: T-1688-09

Citation: 2010 FC 685

Ottawa, Ontario, June 23, 2010

PRESENT: The Honourable Mr. Justice Blanchard

BETWEEN:

JOSE MCILROY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] The applicant Jose McIlroy, appeals the decision of citizenship Judge Sonia Bitar (the Citizenship Judge) dated September 10, 2009, refusing his citizenship application on the basis that he had not met the residence requirement of paragraph 5(1)(*c*) of the Citizenship Act, R.S.C. 1985, c. C-29 (the Act). This appeal is brought pursuant to subsection 14(5) of the Act, and section 21 of the *Federal Courts Act*, R.S. 1985, c. F-7, s. 1; 2002, c. 8, s. 14.

Background

[2] The applicant is a citizen of Japan. He moved to Canada on February 9, 2002, on a one-year working holiday visa to work for Western Canada Machining in Edmonton, Alberta. He was granted permanent resident status on September 8, 2005. On April 11, 2008, the applicant returned to Japan and has been living there ever since.

[3] On April 12, 2008 the applicant filed an application for citizenship wherein he reported having been physically present in Canada for 1016 days during the four years preceding his application, namely from April 12, 2004 to April 12, 2008 (the review period). The applicant acknowledges that he has not met the statutory residence requirement of having accumulated 1095 days of physical presence during the review period.

[4] The application was reviewed by citizenship officer Rhoda Lutz on July 16, 2009, following which she noted:

(a) Mr. McIlroy indicated that he lives/studies/words in Japan;

(b) Mr. McIlroy was staying at his friend's residence in April 2008 and he did not provide another address for where he is living in Canada since April 2008;

(c) Mr. McIlroy's wife, parents and siblings all live in Japan;

(d) Mr. McIlroy was terminated from Western Canadian Machining in April 2008 and he failed to provide any documentation to show his current employment;

(e) Mr. McIlroy had 19 absences during the relevant period; and

(f) Mr. McIlroy failed to meet the statutory residency requirement by 79 days.

[5] Officer Lutz concluded that she was not satisfied that Mr. McIlroy was living in Canada and had built his life in Canada and referred the application to a Citizenship Judge for a hearing.

Decision of the Citizenship Judge

[6] At the hearing, held on August 20, 2009, the Citizenship Judge assessed whether the applicant had centralized his mode of existence in Canada according to the factors articulated in *Re Koo,* [1993] 1 F.C. 286. (T.D.) and determined that that the applicant did not satisfy the residence requirement under paragraph 5(1)(*c*) of the Act. In the September 10, 2009 decision letter, the Citizenship Judge noted:

- The applicant's wife, parents and siblings were living in Japan.
- Japan was the place where the applicant currently lived and worked.
- The applicant no longer had a residence in Canada, nor an employment, and had stayed with a friend last time he came to Canada.
- The applicant had no immediate plans to return to Canada.

[7] The Citizenship Judge further found no evidence to justify a recommendation for the exercise of the Minister's discretion to waive the residence requirement on compassionate grounds, pursuant to subsection 5(3) of the Act or for the Governor in Council to direct the Minister to grant citizenship based on special or unusual circumstances, pursuant to subsection 5(4) of the Act.

Issues

[8] The following issues arise in this appeal:

1. Did the Citizenship Judge err by considering indicia of residence subsequent to the review period and the applicant's future plans, in determining that the residence requirement was not met?

2. Did the applicant have a legitimate expectation that the Citizenship Judge would only consider the review period? If so, by proceeding as she did, did the Citizenship Judge breach the principles of procedural fairness?

Law

Legislation

[9] Paragraph 5(1)(*c*) of the Act sets out the requirement of residency:

5. (1) The Minister shall grant citizenship to any person who	**5.** (1) Le ministre attribue la citoyenneté à toute personne qui, à la fois :
…	[…]
(*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:	*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) 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	(i) un demi-jour pour chaque jour de résidence au Canada avant son admission à titre de résident permanent,
(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;	(ii) un jour pour chaque jour de résidence au Canada après son admission à titre de résident permanent;

Re Koo Test

[10] In the case at bar, there is no dispute that the Citizenship Judge applied the residency test articulated in *Re Koo.*

[11] The *Re Koo* test is not dependent solely on how many days an applicant has been physically present in Canada. In *Re Koo,* at paragraph 10, Justice Reed explained:

> The conclusion I draw from the jurisprudence is that the test is whether it can be said that Canada is the place where the applicant "regularly, normally or customarily lives". Another formulation of the same test is whether Canada is the country in which he or she has centralized his or her mode of existence. Questions that can be asked which assist in such a determination are:
>
> (1) was the individual physically present in Canada for a long period prior to recent absences which occurred immediately before the application for citizenship?
>
> (2) where are the applicant's immediate family and dependents (and extended family) resident?
>
> (3) does the pattern of physical presence in Canada indicate a returning home or merely visiting the country?
>
> (4) what is the extent of the physical absences -- if an applicant is only a few days short of the 1,095-day total it is easier to find deemed residence than if those absences are extensive?
>
> (5) is the physical absence caused by a clearly temporary situation such as employment as a missionary abroad, following a course of study abroad as a student, accepting temporary employment abroad, accompanying a spouse who has accepted employment abroad?
>
> (6) what is the quality of the connection with Canada: is it more substantial than that which exists with any other country?

[12] Whether an applicant has "centralized his or her mode of existence" is directly related to a two-pronged inquiry. First, the applicant must establish his or her residence in Canada during the requisite period; and secondly, he or she must have maintained his or her residence in Canada for the entire prescribed period in the Act, i.e. in the four years prior to the filing of the citizenship application (*Ahmed v. Canada (Minister of Citizenship and Immigration*), 2002 FCT 1067, at para. 7). The establishment of residency is a preliminary step in this analysis.

Applicant's position

[13] The applicant argues that the decision of the Citizenship Judge should be set aside on the following basis:

1. The Citizenship Judge erred in determining that the applicant never established residence in Canada;

2. The Citizenship Judge erred in taking into account the applicant's country of residence subsequent to the review period, and his intention with respect to future residence, and;

3. The applicant had legitimate expectations that the Citizenship Judge would only consider his indicia of residence during the review period.

[14] The applicant argues that the finding of Citizenship Judge, that he failed to establish residence, is contrary to the evidence. He contends that he established residence prior to the start of the review period and maintained it during the duration of the review period. He states that during the period he worked for a Canadian company, rented the same apartment, filed annual tax returns, maintained health coverage, had a bank account and a driver's license, and taught and trained at the Tokugawa Judo Club in Edmonton.

[15] The applicant argues that the primary reason the Citizenship Judge found that the he had not met the residence requirement is because the applicant was working and living in Japan at the time of the hearing and had no immediate plans to return to Canada. The applicant argues the Citizenship Judge failed to focus on the indicia of residence during the review period and instead erroneously focused on the subsequent period when he had returned to Japan.

[16] The applicant contends that in applying the *Re Koo* test, any consideration of residency after the review period is irrelevant, and relies on *Chowdhury v. Canada (Citizenship and Immigration)*, 2009 FC 709; *Nuliah v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1423; *Canada (Minister of Citizenship and Immigration) v. Chen*, 2004 FC 848, and; *Canada (Minister of Citizenship and Immigration) v. Barker*, 2003 FCT 226. On this basis, the applicant argues that his return to Japan after the review period should have had no effect on the determination of whether he met the residence requirement.

[17] The applicant also contends that the Act does not require that an applicant for citizenship establish an intention to reside in Canada upon the granting of citizenship. The applicant argues that the Citizenship Judge erred by requiring the applicant to have a present and continuing residence in Canada beyond the review period. He submits that this is a more onerous test of residence than that which is required by the Act.

[18] The applicant further argues he had legitimate expectations that the Citizenship Judge would only consider his indicia of residence during the review period, and that by considering the

subsequent time frames and the applicant's future plans, the Citizenship Judge breached the applicant's right to a fair hearing.

[19] With regard to the "legitimate expectations" argument, the applicant relies on the Citizenship Form CIT 0002 which states that only residence in Canada during the four years prior to the filing of the application will be considered. He also relies on the Residence Questionnaire instructions, which states that the documents establishing the applicant's ties to Canada "should cover at least the four (4) years immediately preceding the date of your citizenship application." The applicant further notes that he was advised by his counsel, who relied on the Act and relevant case law, that the only time period relevant to the residence determination was the review period.

Minister's Position

[20] The Minister notes that the applicant does not dispute the finding of the Citizenship Judge that he did not meet the statutory residence requirement of 1095 days of physical presence in Canada.

[21] The Minister argues that in applying the factors articulated in *Re Koo*, the Citizenship Judge was entitled to consider the totality of the applicant's circumstances in deciding that the applicant did not satisfy the residence requirement and, in particular, did not demonstrate that he had centralized his mode of existence in Canada. These circumstances are explained in the Citizenship Judge's decision and in her notes.

[22] With respect to the applicant's connection to Canada, the Minister argues that the existence of passive indicia of residence such as tax returns, banks accounts and medical insurance, is insufficient to demonstrate a substantial connection to Canada. To establish a substantial connection to Canada there must be a "reaching out to the community" or an explanation as to the lack thereof. The Minister relies on *Canada (Citizenship and Immigration) v. Camoringa-Posch*, 2009 FC 613; *Hernando Paez v. Canada (Citizenship and Immigration)*, 2008 FC 204, and; *Eltom v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1555. The Minister notes that the applicant only belonged to one organization (Judo), did not own property, and had stayed with friends or in hotels during his most recent visits to Canada

[23] The Minister argues that in considering the applicant's circumstances beyond the review period, the Citizenship Judge did not breach the principles of procedural fairness. Rather, she was placing the applicant's citizenship application in context. The Minister notes that the Citizenship Judge could have refused the application solely on the basis that the applicant did not meet the statutory residence requirement. The Minister notes that despite this, the Citizenship Judge went on to consider whether the applicant had centralized his mode of existence in Canada. The Minister argues that the onus is on the applicant to demonstrate that he satisfies the residence requirement and there is no obligation on the Citizenship Judge to raise the issue of the applicant's connection to Canada. The Minister relies on *Belghazi v. Canada (Citizenship and Immigration)*, 2009 FC 222; *Canada (Citizenship and Immigration) v. Aratsu*, 2008 FC 1222; *Chen v. Canada (Citizenship and Immigration)*, 2007 FC 1140, and; *So v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 733.

Standard of Review

[24] The question of whether or not an applicant for citizenship has met the residence requirements of the Act is a question of mixed fact and law. The applicable standard of review is reasonableness (*Canada (Citizenship and Immigration) v. Arastu*, 2008 FC 1222, at paras. 16-21; *Zhang v. Canada (Citizenship and Immigration)*, 2008 FC 483, at paras. 7-8, and; *Ishfaq v. Canada (Citizenship and Immigration.)*, 2008 FC 477, at para. 4). The decision of a Citizenship Judge will be reasonable "as long as there is a demonstrated understanding of the case law and appreciation of the facts and their application to the statutory test" (*Canada (Citizenship and Immigration) v. Ryan*, 2009 FC 1159, at para. 16; *Canada (Citizenship and Immigration) v. Ntilivamunda*, 2008 FC 1081, at para. 5).

Analysis

1. ***Did the Citizenship Judge err by considering indicia of residence subsequent to the review period and the applicant's future plans, in determining that the residence requirement was not met?***

[25] In determining whether the applicant had centralized his mode of existence in Canada, the Citizenship Judge refers repeatedly to the relevant four-year review period in her assessment. She noted the following in response to the first four *Re Koo* factors:

1. The applicant was only present in Canada for 42 days prior to his first absence.
2. The applicant's family was living in Japan.
3. Until April 2008, the applicant was coming back to Canada for his job. He had several absences to Japan (19 during the review period).
4. The applicant was short 79 days to meet the basic residence requirement under the *Act.*

It is clear that with respect to factors 1, 3 and 4, the Citizenship Judge only considered the review period. There is no dispute that the Citizenship Judge also referred to the applicant's absence from Canada outside the review period in her assessment.

[26] It is appropriate for Citizenship Judges to consider the entire context of the applicant's situation in assessing the *Re Koo* factors (*Hernando Paez v. Canada (Citizenship and Immigration)*, 2008 FC 204, at para. 14). In my view, reference to the applicant's business in Japan and his intention not to return to Canada until his uncle retired, simply served to place the application in context and did not affect the decision (*Chen v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1140, at para. 14-15; *Hernando-Paez*, at para. 22).

[27] In the end, the Citizenship Judge was unable to conclude that the applicant had established a residential base in Canada during the review period, and therefore was unable to conclude that he had centralized his mode of existence in Canada. On the facts, this conclusion was reasonably open to the Citizenship Judge.

2. Did the applicant have a legitimate expectation that the Citizenship Judge would only consider the review period? If so, by proceeding as she did, did the Citizenship Judge breach the principles of procedural fairness?

[28] In *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525 at 557, Sopinka J. (citing *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170) explained the doctrine of legitimate expectations as "an extension of the rules of natural justice and procedural fairness." If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness.

[29] In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paragraph 26, L'Heureux-Dubé J. explained further that:

> […] This doctrine, as applied in Canada, is based on the principle that the "circumstances" affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights.

[30] Finally, in *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, 2001 SCC 41, at paragraph 29, Binnie J. stated that:

> The doctrine of legitimate expectations […] looks to the *conduct* of the public authority in the exercise of that power (*Old St. Boniface*, *supra*, at p. 1204) including established practices, conduct or representations that can be characterized as clear, unambiguous and unqualified [citations omitted].

[31] The applicant argues he had legitimate expectations that the Citizenship Judge would consider only his indicia of residence during the four-year review period. In support of his argument, the applicant relies on the Citizenship Form CIT 0002 and Residence Questionnaire instructions.

[32] In my view, these forms do not create a legitimate expectation that only the four-year review period will be considered by the Citizenship Judge. The Citizenship Form CIT 0002 concerns the initial application and not the hearing before the Citizenship Judge. Further, the

Residence Questionnaire does not state that only the four-year review period will be considered. Rather, it states that the documents establishing the applicant's ties to Canada "should cover at least the four (4) years immediately preceding the date" of the application [emphasis added].

[33] In the application of the *Re Koo* test, there is no clear, unambiguous and unqualified practice of Citizenship Judges to consider only the applicant's circumstances during the review period. Certain factors, such as family attachment to Canada, transcend the review period. The Citizenship Judge did not breach the principles of procedural fairness by mentioning the applicant's circumstances post-review period. In the circumstances, the doctrine of legitimate expectations finds no application.

Costs

[34] Save in exceptional circumstances, costs are rarely awarded in citizenship appeals (*Chen v. Canada (Citizenship and Immigration)*, 2008 FC 763, at para. 23; *Canada (Minister of Citizenship and Immigration) v. Kovarsky*, (2000), 193 F.T.R. 155 (T.D.), at para. 12). In the exercise of my discretion, no order of costs will be made.

Conclusion

[35] For the above reasons, the appeal will be dismissed. No order is made as to costs.

ORDER

THIS COURT ORDERS that for the above reasons, the appeal is dismissed without costs.

"Edmond P. Blanchard"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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