Federal Court  Cour fédérale

Date: 20110112

Docket: T-663-10

Citation: 2011 FC 29

Ottawa, Ontario, January 12, 2011

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

ALEXANDER DAVID CARDIN

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Alexander Cardin's application for Canadian citizenship was refused on the basis that he did not meet the residency requirement of the *Citizenship Act*, R.S.C. 1985, c. C-29. There is no dispute about the fact that Mr. Cardin was away from Canada for 688 days in the four year period immediately prior to the filing of his application.

[2] The Citizenship Judge applied the test articulated in *Re Pourghasemi* [1993] F.C.J. No. 232, 62 F.T.R. 122 (Fed. T.D.), which requires that an applicant be physically present in Canada for 1095 days in the relevant four year period. In so doing, the Citizenship Judge adopted the reasoning of Justice Muldoon in *Re Pourghasemi*, where he stated that the purpose of paragraph 5(1)(c) of the *Citizenship Act* is to ensure that anyone receiving Canadian citizenship "has become, or at least has been compulsorily presented with the everyday opportunity to become, 'Canadianized'".

[3] Quoting Justice Muldoon, the Citizenship Judge noted that 'Canadianization' occurs "by 'rubbing elbows' with Canadians in shopping malls, corner stores, libraries, concert halls, auto repair shops, pubs, cabarets, elevators, churches, synagogues, mosques and temples - in a word wherever one can meet and converse with Canadians - during the prescribed three years." This 'Canadianization' can only occur through living in Canada as "Canadian life and society exist only in Canada and nowhere else".

[4] The Citizenship Judge noted Justice Muldoon's statement that three years "is little enough time in which to become Canadianized". If an applicant did not have that qualifying experience, it would mean that citizenship could be conferred on someone "who is still a foreigner in experience, social adaptation, and often in thought and outlook.": all quotes from *Re Pourghasemi* at para. 3, as cited in the Citizenship Judge's decision.

[5] The Citizenship Judge found that Mr. Cardin had not done this.

[6] It is common ground that the standard of review to be applied to the Citizenship Judge's decision is that of reasonableness: *Zhang v Canada (MCI)*, 2008 FC 483 at para. 7-8; *Canada (MCI) v Elzubir*, 2010 FC 298 at para. 12.

[7] Paragraph 5(1)(c) of the *Citizenship Act* provides that a permanent resident must have "within the four years immediately preceding the date of his or her application, accumulated at least three years of residence in Canada".

[8] There are three different schools of thought as to how the residency requirement of paragraph 5(1)(c) is to be applied. The first is the *Re Pourghasemi* test used in this case, which only asks whether the applicant has been physically present in this country for a total of three years out of four, or a minimum of 1095 days.

[9] The second test is that articulated in *Re Papadogiorgakis*, [1978] 2 F.C. 208; [1978] F.C.J. No. 31. This is a less stringent test in that it looks at whether an applicant has an established residence and strong attachment to Canada, even if he or she has been temporarily absent away from Canada.

[10] The third test is the one most commonly used in citizenship cases. This is the so-called "*Koo*" test, established in *Re Koo*, [1993] 1 F.C. 286; [1992] F.C.J. No. 1107. The *Koo* test looks at residence as being the place where one "regularly, normally or customarily lives" or has "centralized his or her mode of existence". *Re Koo* identifies six questions that are to be asked in order to determine whether this test has been met.

[11] Because there is no appeal from Federal Court decisions in citizenship matters, there has never been an appellate determination as to which is the appropriate test.

[12] In light of the conflicting jurisprudence, this Court has determined that it is open to Citizenship Judges to apply any of the three tests. Moreover, "if the facts of the case were properly applied to the principles of the chosen approach, the decision of the citizenship judge would not be wrong": see *Lam v Canada (MCI)*, [1999] F.C.J. No. 410 at para. 14.

[13] Mr. Cardin's application for citizenship was rejected based on the Citizenship Judge's finding that his absences from Canada meant that he had not sufficiently "Canadianized" himself. This finding was unreasonable on the particular facts of this case.

[14] Mr. Cardin is 26 years old. He came to Canada with his family in 1999, when he was 14 years old. He went to high school in Canada. He spent four years at university in Canada, ultimately receiving a Bachelor of Arts in Political Science from the University of Western Ontario in 2006. He became a permanent resident of Canada in 2005. He has worked in Canada. His parents and two brothers are Canadian citizens.

[15] Mr. Cardin has thus undoubtedly had ample opportunity to immerse himself in Canadian society and to 'rub elbows' with Canadians throughout the formative years that he spent in this country.

[16] In 2006, Mr. Cardin's Canadian employer sent him to a management training program in the United States. It was his attendance at this program that resulted in a substantial portion of his absences from Canada. Mr. Cardin has since returned to Canada, and continues to work for his Canadian employer.

[17] During the time that Mr. Cardin was in the United States, his possessions remained at his family's home in Ontario, he maintained bank accounts in Canada, and he returned to Canada from time to time to visit family and friends.

[18] While it is clearly open to a Citizenship Judge to choose one of the three approved residency tests, whichever test is selected nevertheless had to be applied with common sense. If the underlying rationale for the application of a particular test is not present on the facts of the case, then the application of the test simply does not make sense. That is, it is not reasonable.

[19] The *Re Pourghasemi* test is usually applied in cases where an individual comes to Canada, and then immediately absents him- or herself from this country on a regular basis, perhaps for business reasons, often without ever really integrating into Canadian society. The principle underlying the day-counting exercise prescribed by *Re Pourghasemi* is to ascertain whether such an applicant has had any real exposure to, or involvement with Canadian society. That is, whether they had become "Canadianized".

[20] This is not the situation here. Mr. Cardin developed a deep and long-standing connection to Canada long before the commencement of the residency period specified in paragraph 5(1)(c) of the *Citizenship Act*. He had already had ample opportunity to become "Canadianized".

[21] I am thus satisfied that the facts of this case were not properly applied to the principles underlying the *Re Pourghasemi* test. Consequently, the appeal will be allowed. Mr. Cardin's citizenship application is remitted to a different Citizenship Judge for re-determination in accordance with these reasons.

[22] I would leave this matter by simply echoing the observations that have repeatedly been made by judges of this Court. The law in this area is in a very unsatisfactory state. As Justice Dawson observed, it is fundamentally unfair that two persons may apply for citizenship on identical facts and yet obtain opposite results, depending on which test is applied: see *Lin v Canada (Minister of Citizenship & Immigration)*, [2002] F.C.J. No. 492, 2002 FCT 346 (Fed. T.D.). It is an area that cries out for legislative reform.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this appeal is allowed, and the matter is remitted to a different Citizenship Judge for re-determination in accordance with these reasons.

"Anne Mactavish"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-663-10
STYLE OF CAUSE:	ALEXANDER DAVID CARDIN v MCI
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	January 10, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	Mactavish J.
DATED:	January 12, 2011

APPEARANCES:

Alexander David Cardin	SELF-REPRESENTED APPLICANT
Peter Nostbakken	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Nil	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT