Federal Court Cour fédérale

Date: 20110214

Docket: T-2180-09

Citation: 2011 FC 179

Ottawa, Ontario, February 14, 2011

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

SALAHUDIN CHAUDHRY

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an appeal pursuant to section 14(5) of the *Citizenship Act*, RSC 1985, c C-29 (the "Act"), of a decision rendered by Normand Allaire, Citizenship Judge, on November 6, 2009, denying the Applicant's application for citizenship.

[2] Salahudin Chaudhry (the "Applicant") became a landed immigrant on November 18, 2003. Subsequently, his wife and two (2) sons joined him in Canada.

[3] The Applicant applied for citizenship on March 13, 2008. As such, the residency requirements must be met between March 13, 2004 and March 13, 2008. In his application for citizenship, the Applicant declared that he was away for 332 days during that period. His wife and sons applied separately for citizenship and are now citizens of Canada.

[4] On June 3, 2009, after the hearing, the Citizenship Judge requested the following documents be provided within 30 days: proof of arrival in Canada for declared absence; E-gate records of movement from Pakistan and from the United Arab Emirates (the "UAE") from November 13, 2003 to present date; income tax notice assessments for 2003 to 2008; any other type of proof of his physical presence in Canada; clear and legible copies of his other passport; proof of residence and proof of payments of rent every month (i.e. cheques or money withdrawals).

Decision to be reviewed

[5] At the outset, the Citizenship Judge stated that the issue was whether the Applicant accumulated three (3) years (i.e. 1095 days) of residence in Canada during the last four (4) years preceding his application as per section 5(1)c) of the Act.

[6] In order to establish the Applicant's residence in Canada, the Citizenship Judge cited the decision of J. Muldoon in *Re Pourghasemi*, where it is said that the Applicant must be physically present in Canada for 1095 days and applied this approach to the Applicant's situation. He stated

that the Applicant failed to provide sufficient proof to substantiate his claim of physical presence in Canada. He added that the onus of proof was on the Applicant to demonstrate that he was present for a minimum of three (3) years pursuant to the Act. Furthermore, the Applicant failed to comply with the June 3, 2009 request to provide additional information within the agreed time limit of 30 days.

[7] The Citizenship Judge concluded that the application information was not credible and that the Applicant's physical presence in Canada amounted to 161 days. He therefore denied the application. He did not recommend the exercise of the Minister's discretion pursuant to sections 5(3) and 5(4) of the Act.

Arguments of the parties

A. *Applicant's representations*

[8] The Applicant submits a two-page document explaining his situation, as well as an affidavit and documents. These documents included exit and entry records from the UAE, a new passport showing an entry stamp in Pakistan, a re-entry stamp in Canada and stamps for six short trips to the United States, as well as a letter from his landlord. He states that the other stamps in that passport are for transit purposes. He also claims that the other documents requested, such as documents pertaining to his medical history, bank records and traffic record were part of his original application.

[9] The Applicant submits that his application was refused for two (2) reasons. Firstly, because he was absent from Canada for 1299 days, according to his passport record, and secondly, because the documents requested, including his expired passport, were not available within 30 days.

[10] He also mentions that the Citizenship Judge calculated his absence from medical history and passport stamps. He adds that the assumption that he still has a job in the UAE is baseless as shown by the entry and exit records submitted and that a residence visa in the UAE is valid for three (3) years, regardless of the time spent outside the country.

B. *Respondent's representations*

[11] The Respondent first objects to the inclusion of the material filed after November 6, 2009. The Respondent argues that it cannot be considered by the Court as it was not part of the original record. The Respondent cites three (3) cases (*Canada (Minister of Citizenship and Immigration) v Chan* (1998), 150 FTR 68, 44 Imm LR (2d) 23, *Canada (Minister of Citizenship and Immigration) v Cheung* (1998), 148 FTR 237, 46 Imm LR (2d) 89, and *Canada (Minister of Citizenship and Immigration) v Tsang* (1999), 90 ACWS (3d) 348, [1999] FCJ No 1210 (QL)) to support his argument that this is not a *de novo* appeal.

[12] As for the standard of review, the Respondent states that the question whether an applicant meets the residency requirements is reviewed under the standard of review of reasonableness (*EL Falah v Canada (Minister of Citizenship and Immigration)*, 2009 FC 736, [2009] FCJ No 1402 (QL) at paragraph 14).

[13] The first argument of the Respondent is that the Applicant failed to prove that he met the residency requirements. As such, the Respondent submits that the onus of proof is on the Applicant to satisfy the Citizenship Judge that such requirements are met. In this case, the Respondent claims that the Applicant failed to establish his right to citizenship and did not provide sufficient evidence to prove his residence in Canada. Furthermore, the jurisprudence of the Court emphasizes the need for the Applicant's presence in Canada. The Applicant must demonstrate by objective facts that firstly, he established a residence of his own for three (3) years and secondly, that this residence was maintained. Finally, the Respondent states that the Citizenship Judge provided cogent reasons why the Applicant failed to meet the residency requirements. As stated at the hearing, he submits that this case rests primarily on the Applicant's failure to provide convincing evidence.

[14] For his second argument, the Respondent states that the Citizenship Judge applied the physical presence test, one of the three (3) tests developed to establish a person's presence in Canada. According to the Respondent, if a judge applies correctly one of the tests, there can be no interference by the Court. In this instance, the Citizenship Judge applied the physical presence test, declared by some judges of the Federal Court to be the proper and preferable test to establish residency. The Citizenship Judge reasonably concluded that the Applicant did not satisfy the residency requirement based on the factors mentioned in the decision. Furthermore, the Applicant failed to provide additional information to the Citizenship judge in the allotted time, never raised the issue of a tight time limit to present additional documentation with the Citizenship Judge, and did not ask for an extension.

[15] As for his third argument, the Respondent states that the Applicant's after-the-fact explanation does not show an error in the Citizenship Judge's decision. The Applicant is now relying on material that was not in front of the Citizenship Judge and is asking the Court to reweigh the evidence. The Respondent adds that none of the documents presented are definitive of the Applicant's presence in Canada.

[16] Finally, the Respondent affirms that the decision is reasonable. The Citizenship Judge applied the physical presence in Canada test, and concluded that the Applicant was physically present in Canada for 161 days. The Applicant did not demonstrate that this was not the case. He adds that the Applicant can reapply for citizenship once he meets the requirements.

Legal analysis

[17] This case raises the following legal issues:

1. What is the standard of review of a decision of a citizenship judge?
2. Can new evidence be presented to this Court in a citizenship appeal?
3. Did the Citizenship Judge err in finding that the Applicant did not meet the requirements of section 5(1)c) of the Act?

A. *The standard of review*

[18] The question of the standard of review of a decision of a citizenship judge is addressed in depth in *Canada (Minister of Citizenship and Immigration) v Takla*, 2009 FC 1120, 359 FTR 248, where Justice Mainville presented a history of the standard of review in cases of citizenship appeals. He stated at paragraph 19 and 20 that:

> Since the *Dunsmuir* decision, above, Federal Court decisions have, for the most part, favoured the reasonableness standard of review on an appeal from a decision of a citizenship judge under subsection 14(5) of the *Citizenship Act*: *Canada (Minister of Citizenship and Immigration) v. Tarfi*, 2009 FC 188, [2009] F.C.J. No. 244 (QL), at paragraph 8; *Canada (Minister of Citizenship and Immigration) v. Zhou*, 2008 FC 939, [2008] F.C.J. No. 1170 (QL), at paragraph 7; and *Zhang v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 483, 67 A.C.W.S. (3d) 38, at paragraph 8.
>
> Although I am also of the view that the reasonableness standard of review applies in this case in accordance with the Supreme Court of Canada's teachings in *Dunsmuir*, this standard is not uniform and it varies in accordance with the analysis that the Court must carry out pursuant to that decision. For the reasons set out in the analysis which follows, I am of the view that the reasonableness standard of review calls for qualified deference here where the Court is hearing an appeal from a decision of a citizenship judge under subsection 14(5) of the *Citizenship Act*.

[19] At paragraph 39 he concluded that:

> In this context, I am of the view that the reasonableness standard of review must be applied with flexibility and adapted to the particular context in question. Thus, the Court must show deference, but a qualified deference, when hearing an appeal from a decision by a citizenship judge under subsection 14(5) of the *Citizenship Act* concerning the determination of compliance with the residence requirement. The issues of jurisdiction, procedural fairness and natural justice raised in these appeals are now and nonetheless reviewed against the correctness standard in accordance with the principles outlined in Dunsmuir. This is an approach that is consistent with both Parliaments' expressed intentions to subject these decisions to a right of appeal and the Supreme Court of Canada's teachings concerning the duty of the courts to show deference when sitting on an appeal from decisions of administrative tribunals.

[20] According to the jurisprudence of this Court, the applicable standard of review of the decision of a citizenship judge is that of reasonableness.

B. *The introduction of new evidence*

[21] In his submissions, the Applicant presented new documentary evidence to this Court. The Respondent is arguing that such evidence cannot be considered. The issue of a *de novo* appeal in citizenship cases has been addressed in *Canada (Minister of Citizenship and Immigration) v Wang*, 2009 FC 1290, 360 FTR 1, where Justice Mandamin stated at paragraphs 23 and 24 that:

> In *Canada (Minister of Citizenship and Immigration) v. Hung*, [1998] F.C.J. No. 1927, Justice Rouleau wrote at paragraph 8, "Under the new Rules, citizenship appeals are no longer trials *de novo*, but instead are now to proceed by way of application based on the record before the Citizenship judge: no longer may new evidence be submitted before this Court".
>
> Accordingly, I will not consider the new evidence introduced by Minister's affiant concerning Ms. Wang's prior citizenship applications.

[22] I fully agree with the Respondent that the evidence submitted to this Court by the Applicant should not be taken into account.

C. *The reasonableness of the Citizenship Judge's decision*

[23] A citizenship judge can refer to three (3) tests in order to determine if an applicant can become a Canadian citizen. In *Pourzand v Canada (Minister of Citizenship and Immigration)*, 2008 FC 395, 71 Imm LR (3d) 289, Justice Russel discussed section 5(1) of the Act and mentioned at paragraph 16 that:

> Section 5(1) of the Act sets out the necessary criteria for obtaining citizenship. Section 5(1)(*c*) requires that a person accumulate at least three years, or 1,095 days, of residence within the four years immediately preceding the date of his or her application for citizenship. The Act does not define "residency." There has been divergence in this Court as to the test to be applied in determining whether an applicant has satisfied the residence requirements. In short, these tests are set out in *Re Koo*, [[1993] 1 FC 286], *Re*

> *Pourghasemi* (1993), 62 F.T.R. 122 (F.C.T.D.), and *Re Papadogorgakis* [1978] 2 F.C. 208 (F.C.T.D.). A citizenship judge may adopt any of the three residency tests and not be in error for that reason.

[24] The three (3) tests have been described by Justice Tremblay-Lamer in *Mizani v Canada (Minister of Citizenship and Immigration)*, 2007 FC 698, 158 ACWS (3d) 879, at paragraphs 10 to 13:

> 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).
>
> I essentially agree with Justice James O'Reilly in [*Canada (Minister of Citizenship and Immigration) v Nandre*, 2003 FCT 650, 234 FTR 245] at paragraph 11 that the first test is a test of physical presence, while the other two tests involve a more qualitative assessment:
>
> Clearly, the Act can be interpreted two ways, one requiring physical presence in Canada for three years out of four, and another requiring less than that so long as the applicant's connection to Canada is strong. The first is a physical test and the second is a qualitative test.
>
> It has also been recognized that any of these three tests may be applied by a Citizenship Judge in making a citizenship determination (*Lam v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 410 (T.D.) (QL)). For instance, in *Hsu v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 579, [2001] F.C.J. No. 862 (QL), Justice Elizabeth Heneghan at paragraph 4 concludes that any of the three tests may be applied in making a residency determination:
>
> The case law on citizenship appeals has clearly established that there are three legal tests which are available to determine whether an applicant has established residence within the requirements of the Citizenship Act (...) a

> Citizenship Judge may adopt either the strict count of days, consideration of the quality of residence or, analysis of the centralization of an applicant's mode of existence in this country.
>
> [Citations omitted]
>
> While a Citizenship Judge may choose to rely on any one of the three tests, it is not open to him or her to "blend" the tests ([*Tulupnikov v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1439, 153 ACWS (3d) 1037], at para. 16).

[25] Furthermore, the jurisprudence of this Court is clear that the onus to provide sufficient information to demonstrate his presence in Canada rests on the Applicant. As mentioned by Justice Tremblay-Lamer at paragraph 19 in *Mizani*:

> In this matter, the onus was on the applicant to provide sufficient evidence to demonstrate that he met residency requirements of the Act (*Rizvi v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1641, [2005] F.C.J. No. 2029 (QL) at para. 21). Therefore, according to the "physical presence" test he was required to demonstrate at least 1095 days in Canada in the relevant period, failing which, his application would be rejected. In the present case, the Judge was not able to confirm the applicant's assertions regarding the number of days he was present in Canada, given the inadequacy of his evidence.

[26] In the last year, the jurisprudence of this Court has taken a turn in order to reconcile the various tests available to determine one's residence in Canada. In *Takla*, above, after reviewing the tests in *Pourghasemi (Re)* and *Papadogiorgakis (Re)*, Justice Mainville stated at paragraph 42 and 43 that:

> The third jurisprudential school has become dominant with time and it is based on Madam Justice Reed's analysis in *Koo*, above. This jurisprudential school maintains that the test is whether the individual has centralized his or her mode of existence in Canada. To determine whether this test has been met, six questions must be asked (*Koo*, at pages 293 and 294):

> (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 1095 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 temporary employment abroad;
> (6) what is the quality of the connection with Canada: is it more substantial than that which exists with any other country.
>
> The *Koo* test was adopted in this Court's jurisprudence to the point that it is now, by far, the dominant test, "perhaps in part because the six questions were specifically set out on a form used by citizenship judges", as Mr. Justice Martineau notes in the recent decision in *Canada (Minister of Citizenship and Immigration) v. Zhou*, above, at paragraph 9.

[27] Recently, in *Abou-Zahra v Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2010 FC 1073, [2010] FCJ No 1326 (QL), Justice Boivin stated at paragraph 19 and 20 that:

> However, it should be noted that recently the jurisprudence of this Court on this issue was clarified following the decision of Mr. Justice Mainville in *Canada (Minister of Citizenship and Immigration) v. Takla*, 2009 FC 1120, 2009 F.C.J. No. 1371 and the decision of Mr. Justice Zinn in *Canada (Minister of Citizenship and Immigration) v. Elzubair*, 2010 FC 298, 2010 F.C.J. No. 330. I agree with those decisions.
>
> Thus, as Justice Zinn explained in *Elzubair*, where a citizenship judge finds that an applicant was physically present in Canada for at least 1,095 days -- the required minimum period -- residence is proven, and resort to the more contextual *Koo* test is unnecessary: *Koo (Re)* (T.D.) [1992] F.C.J. No. 1107, [1993] 1 F.C. 286. 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 1,095 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 (see also *Canada* (*The Minister of*

> *Citizenship and Immigration) v. Salim*, 2010 FC 975, [2010] F.C.J. No. 1219 (Justice Harrington).

[28] Justice Martineau distinguished the *Takla* decision in *Dachlan v Canada (Minister of Citizenship and Immigration)*, 2010 FC 538, [2010] FCJ No 643 (QL), where the factual situation was similar to that in the case before us. At paragraph 19, he mentioned that:

> The three test approach has been the subject of much critique. Recently, this Court in *Canada (Minister of Citizenship and Immigration) v. Takla*, 2009 FC 1120 (*Takla*), which was endorsed in *Canada (Minister of Citizenship and Immigration) v. Elzubair*, 2010 FC 298 at paragraph 13, argued in favor of one consolidated, contextual approach to be used when determining residence. In the case at bar, neither the applicant nor the respondent contend that a contextual approach should have been adopted. As a result, it is not necessary to consider whether this new approach should be applied. The Court will look only to whether the citizenship judge was reasonable in his conclusion that on a balance of probabilities the applicant did not establish her presence in Canada for a minimum of 1095 days.

[29] When I analyze the decision rendered by the Citizenship Judge in the case before us, it is obvious that he only applied the test found in *Pourghasemi (Re)* and did not look further at the evidence presented to see if the Applicant met other criteria developed in the qualitative tests. Neither party submitted that he should have applied another test. When the Citizenship Judge rendered his decision, the *Takla* decision had only been issued for four (4) days. I do not believe under these circumstances that the Citizenship Judge's decision to apply only the physical presence test can be faulted. It was quite reasonable under these circumstances.

[30] In appeals pursuant to section 14(5) of the Act, the role of this Court is not to substitute its finding to that of the Citizenship Judge, but rather to ensure that the Citizenship Judge has applied the correct test under the circumstances, given the applicable jurisprudence of this Court at the time.

In the present case, the Citizenship Judge properly assessed the information and documentation before him. Furthermore, he provided the Applicant with the opportunity to supplement his case within the following 30 days. The Applicant failed to file the agreed to documentation within the said period and did not ask for a further extension to do so. Although I am of the view that the *Takla* jurisprudential school should prevail, I cannot find any error in the determination that was made, at the time it was made. Under these circumstances, I have no alternative but to reject the Appeal, the whole with costs of $500.00 against the Applicant.

JUDGMENT

THIS COURT'S JUDGMENT is that this appeal is dismissed with costs of $500.00 against the Applicant.

"André F.J. Scott"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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