Federal Court  Cour fédérale

Date: 20110509

Docket: T-1512-10

Citation: 2011 FC 533

Ottawa, Ontario, May 9, 2011

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

HOSAM ELDEEN EL OCLA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an appeal by Dr. Hosam Eldeen El Ocla brought under s 14(5) of the *Citizenship Act*, RSC 1985, c C-29 (Citizenship Act). Dr. El Ocla challenges the decision of the citizenship judge dated July 22, 2010 by which his application for Canadian citizenship was rejected. This decision was based on the ground that Dr. El Ocla had not met the test for residency required by ss 5(1)(c) of the Citizenship Act.

Background

[2] Dr. El Ocla came to Canada from Egypt in 2001 and commenced employment as an Assistant Professor in the Department of Computer Science, Computer and Electrical Engineering at Lakehead University (Lakehead) in Thunder Bay. He became a permanent Canadian resident in 2006.

[3] Dr. El Ocla is now a fully tenured member of the teaching faculty at Lakehead holding the position of Associate Professor.

[4] Dr. El Ocla's curriculum vitae discloses that he is a highly regarded researcher and teacher at Lakehead. He is widely published and collaborates on an international level with several professional colleagues. He is also frequently invited to participate in international symposia and is well-known in his field of specialization. Dr. El Ocla has been a recipient of ongoing research grants from the Natural Sciences and Engineering Research Council of Canada (NSERC) mainly for the study of radar detection systems. These NSERC grants are contingent on his continued research and this has required him to be frequently absent from Canada to participate in collaborative work, mainly in Egypt and Japan.

[5] Dr. El Ocla is well established in Thunder Bay where he makes his home.

[6] Dr. El Ocla applied for Canadian citizenship on October 24, 2008. He acknowledged in his application that he had been physically present in Canada for only 996 days of the statutory

threshold of 1095 days but counted on the presiding citizenship judge to consider whether he had, nevertheless, established a constructive or qualitative Canadian residency.

[7] The citizenship judge declined to consider whether Dr. El Ocla had centralized his mode of living in Canada (a qualitative standard) and instead applied the test of residency requiring a physical presence in Canada of no less than 1095 days in the four years preceding the application. Because he fell 99 days short of the three year physical presence requirement, his application was rejected. It is from this decision that this appeal arises.

Issues

[8] What is the appropriate standard of review for the substantive issue raised on this appeal?

[9] Did the citizenship judge err by strictly applying the physical presence test for residency to the exclusion of the qualitative residency test?

Analysis

[10] There continues to be a disagreement in this Court with respect to the standard of review that applies to appeals from the decisions of citizenship judges concerning the test for residency under ss 5(1)(c) of the *Citizenship Act.* In *Ghaedi v Canada*, 2011 FC 85 I applied the standard of correctness, but more recently several of my colleagues have, in similar circumstances, applied the deferential standard of reasonableness: see *Hao v Canada (MCI)*, 2011 FC 46 , *Alinaghizadeh v Canada (MCI)*, 2011 FC 332, and *El-Khader v Canada (MCI)*, 2011 FC 328.

[11] In *Canada v Takla*, 2009 FC 1120, 359 FTR 248. Justice Robert Mainville also adopted the standard of reasonableness but he did so in the context of the application of the evidence to the legal test for residency established by *Re Koo*, [1993] 1 FC 286, 58 FTR 27. The issue under review in *Takla* was, accordingly, one of mixed fact and law where the standard of reasonableness was clearly applicable. Similarly, most of the decisions that are cited in *Takla* in support of the reasonableness standard of review, such as *Chen v Canada*, 2006 FC 85, 145 ACWS (3d) 770, *Canada v Ryan*, 2009 FC 1159, *Zhao v Canada*, 2006 FC 1536, 306 FTR 206, *Rizvi v Canada*, 2005 FC 1641, 51 Imm LR (3d) 146, *Morales v Canada*, 2005 FC 778, 45 Imm LR (3d) 284, *Xu v Canada*, 2005 FC 700, 139 ACWS (3d) 433, *Zeng v Canada*, 2004 FC 1752, 136 ACWS (3d) 15 and *Canada v Fu*, 2004 FC 60, 128 ACWS (3d) 1074, apply the reasonableness standard to what was characterized as an issue of mixed fact and law. Indeed, in most of this Court's jurisprudence, appeals of this nature have involved challenges to a citizenship judge's application of the predominant qualitative test for residency described in *Re Koo*, above. In other words, the concern was with the application of evidence to the *Re Koo* factors.

[12] The above authorities and decisions like them are to my mind distinguishable from cases such as the one at bar which involve a citizenship judge's selection of the physical presence test for residency to the exclusion of the *Re Koo* factors. The issue of whether this is the proper test for residency under ss 5(1)(c) of the *Citizenship Act* is a threshold question of law that can and should be isolated from its factual surroundings. This is a distinction that was well described by Justice Marshall Rothstein in the following passage from *Canwell Enviro-Industries Ltd. v Baker Petrolite Corp.*, 2002 FCA 158, [2003] 1 FC 49 at paras 51 and 52:

> [51] Where, however, on a question of mixed fact and law it is possible to extricate the legal question from the factual and determine

> that a legal error has been made, the standard of review will be correctness. At paragraph 27 of *Housen, supra*, Iacobucci and Major JJ. state:
>
> > In *Southam, supra*, at paragraph 39, this Court illustrated how an error on a question of mixed fact and law can amount to a pure error of law subject to the correctness standard
> >
> > [...] (i) if a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. <u>If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.</u>
>
> [52] Mischaracterizing the proper legal test results in the application of the correctness standard to the factual conclusions reached by the Trial Judge. At paragraph 35, Iacobucci and Major JJ. state:
>
> > This mischaracterization of the proper legal test (the legal requirements to be a "directing mind") infected or tainted the lower courts' factual conclusion that Captain Kelch was part of the directing mind. As this erroneous finding can be traced to an error in law, less deference was required and the applicable standard was one of correctness.
> >
> > …
>
> [Emphasis added]

[13] In *Dedaj v Canada*, 2010 FC 777, 90 Imm LR (3d) 138, Justice James O'Reilly stated that the Citizenship Court had an obligation to apply the test for residency recognized in *Re Koo*, above, a test he fairly described as representing the "prevalent trend" in the jurisprudence. He also found that the strict application of the physical presence test constituted an error of law reviewable on the standard of correctness: also see *Lin v Canada (MCI)*, 2002 FCT 346, 21 Imm LR (3d) 104 at

paras 9 and 19. I agree with Justice O'Reilly and I would add the following points to his thoughtful analysis.

[14] The idea that there are two, or perhaps three, distinct tests for residency to be found in ss 5(1)(c) of the *Citizenship Act* carries with it the implicit adoption of a correctness standard. This is because it acknowledges that there are finite options available to a citizenship judge and that other reasonable interpretations are unavailable. Presumably the application of a true reasonableness standard to the application of ss 5(1)(c) would recognize other possible approaches or, perhaps, even a hybrid approach. I would note that this Court has consistently rejected as an error of law the mixing by the Citizenship Court of the previously recognized tests for residency without any apparent assessment of the reasonableness of the approach taken.

[15] In drafting ss 5(1)(c)of the *Citizenship Act* – a discrete requirement for residency upon which the conferral of citizenship rests – Parliament could not have intended that it be open to a variety of optional interpretations. This provision is not at all a similar to the provision under consideration in *Smith v Alliance Pipeline Ltd.*, 2011 SCC 7 where the Supreme Court of Canada was able to identify a Parliamentary intent that the decision-maker (a tribunal with recognized and specialized expertise) be endowed with the authority to decide the nature and amount of an award of costs. There, the decision-maker was said to have had a wide margin of discretion, which was evidenced by the legislative direction that an arbitration committee could award costs it felt were "reasonably incurred". It was apparent to the Court in *Smith* that this costs provision was left open to interpretation to allow the decision-maker to accommodate for an array of potentially

unpredictable circumstances but with an underlying purpose of achieving full indemnity in the context of an expropriation.

[16] In contrast, it seems incongruous that an obvious Parliamentary intent that the ss 5(1)(c) residency requirement ought to have one meaning should be defeated by an inference that Parliament also intended that deference be extended to the a citizenship judge (a non-expert tribunal) on final appeals to the Federal Court on issues of law, thus leading to inconsistent outcomes in indistinguishable cases. Taken to its logical conclusion, the idea that statutory provisions such as the one applied here are open to a variety of "reasonable" interpretations would lead to administrative chaos and give rise to rampant inequity in a variety of decision-making contexts.

[17] To adopt a deferential standard for the type of question raised in *Smith*, above, and not to apply deference to the question presented in this case is, to my thinking, consistent with the standard of review analysis required by *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190: that is to say that, when conducting a standard of review analysis, a reviewing court must consider, *inter alia*, the expertise of the tribunal and the precise nature of the question under review.

[18] Notwithstanding the considered views of my colleagues who have decided this issue differently, I remain of the view that there can only be one recognized test for residency under ss 5(1)(c) of the *Citizenship Act*.

[19] As I said in *Ghaedi*, above, a citizenship judge must apply the test for residency that was recognized in *Re Koo*, above, in cases where an applicant like Dr. El Ocla has not been physically present in Canada for 1095 days during the preceding four years but presents evidence that he has centralized his mode of living here. Where, as in this case, a citizenship judge applies only the physical presence test, he or she commits an error of law reviewable on the basis of correctness.

[20] It is simply not an acceptable or tolerable situation that some applicants with perhaps less deserving claims to Canadian citizenship than Dr. El Ocla are successful because they have the good fortune to appear before a citizenship judge who chooses to apply the qualitative test for residency. Although many have said that this is a problem that can best be solved by Parliament, that is a solution that has not been forthcoming for more than 30 years and the suggestion is of scant comfort to people like Dr. El Ocla who are the victims of a lack of legislative clarity and a state of judicial inconsistency that has existed for far too long.

[21] In the result, this appeal is allowed. Dr. El Ocla's application for citizenship is to be redetermined on the merits by a different citizenship judge and in accordance with these reasons.

JUDGMENT

THIS COURT'S JUDGMENT is that this appeal is allowed with the matter to be redetermined on the merits by a different citizenship judge and in accordance with these reasons.

"R.L. Barnes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1512-10
STYLE OF CAUSE:	OCLA v MCI
PLACE OF HEARING:	Thunder Bay, ON
DATE OF HEARING:	April 20, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	BARNES J.
DATED:	May 9, 2011

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