Federal Court  Cour fédérale

Date: 20111121

Docket: T-269-11

Citation: 2011 FC 1337

Toronto, Ontario, November 21, 2011

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

MAO YE

Applicant

and

CITIZENSHIP AND IMMIGRATION CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, Mr. Mao Ye, became a permanent resident of Canada on June 1, 2005. On February 3, 2009, he applied for Canadian citizenship. In a decision dated December 22, 2010, a Citizenship Judge denied the application on the basis that he was not satisfied that the Applicant had accumulated the required 1,095 days of residence in the four years (1,460 days) immediately preceding the application date. Specifically, the Judge found that the Applicant was short 978 days of the minimum requirement. The Citizenship Judge concluded that the Applicant had not met the

requirement for residency under s. 5(1)(c) of the *Citizenship Act*, RSC 1985, c C-29 [*Citizenship Act* or *Act*].

[2] The Applicant seeks to have this decision overturned, raising the following issues:

1. Did the Citizenship Judge err by applying the physical presence test set out in *Re Pourghasemi* (1993), 62 FTR 122 (QL), 39 ACWS (3d) 251 (TD) [*Re Pourghasemi*], rather than the qualitative test set out in *Re Koo* (1992), [1993] 1 FC 286 (QL), [1992] FCJ No 1107 (TD) [*Re Koo*]?

a. Did the Judge, through his statements and actions at the interview, raise a reasonable apprehension of bias?

[3] This is an appeal pursuant to s. 14(5) of the *Citizenship Act*. Such appeals proceed by way of application based on the record before the citizenship judge and are governed by the *Federal Courts Rules*, SOR/98-106, pertaining to applications: Rule 300(c); *Canada (Minister of Citizenship and Immigration) v Wang*, 2009 FC 1290, 87 Imm LR (3d) 184. There are no further appeals from decisions of this Court. If the matter is not sent back for re-determination, an unsuccessful applicant who meets the statutory criteria may reapply.

[4] An applicant who meets the criteria set out in s. 5 of the *Citizenship Act* will be granted citizenship. A certain period of residence is required. Pursuant to s. 5(1)(c), an applicant for citizenship must demonstrate that he or she has, within the four years immediately preceding the date of his or her application, accumulated at least three years of residence in Canada.

[5] There is no definition of “resident” or “residence” under the *Citizenship Act*.

[6] In this case, the Citizenship Judge applied the interpretation of s. 5(1)(c) of the *Act* as set out in *Re Pourghasemi*, above. He required that the Applicant demonstrate 1,095 days of physical presence in Canada. The Applicant was not just a few days short; the evidence demonstrates that he was absent from Canada for all but 117 days in the four year period prior to his application for citizenship.

[7] The Federal Court has, over the years, endorsed three different approaches to the question of how to interpret the words “resident” and “residence” in the legislation. Briefly stated, the three lines of jurisprudence fall into two categories: the “quantitative approach” and the “qualitative approach”. The quantitative approach is encompassed in the *Re Pourghasemi* test, applied by the Citizenship Judge in this case, which asks whether the applicant has been physically present in Canada for 1,095 days out of the last four years. This has been referred to as the “physical presence” test. The qualitative approach was articulated in *Re Papadogiorgakis* [1978] 2 FC 208 (QL), 88 DLR (3d) 243 [*Re Papadogiorgakis*] and refined in *Re Koo*, above. The test in *Re Koo*, as first utilized by Justice Reed, allows the citizenship judge to analyze six factors to determine whether an applicant has met the requirement of residence by his or her “centralized … mode of existence”, even where the applicant falls short of the 1,095-day requirement.

[8] In *Lam v Canada (Minister of Citizenship and Immigration)* (1999), 164 FTR 177 (QL), 87 ACWS (3d) 432 (TD), Justice Lutfy noted the divergence in the jurisprudence and concluded that, if a citizenship judge adopted any one of the three conflicting lines of jurisprudence, and if the facts of

the case were properly applied to the principles of that approach, the citizenship judge's decision should not be set aside.

[9] Over the past two years, some of my colleagues have attempted to galvanize the Court around one or the other of the tests. In *Canada (Minister of Citizenship and Immigration) v Takla*, 2009 FC 1120, 359 FTR 248, Justice Mainville determined that the qualitative approach should be the only test. In contrast, Justice Rennie, in *Martinez-Caro v Canada (Minister of Citizenship and Immigration*), 2011 FC 640, 98 Imm LR (3d) 288 [*Martinez-Caro*], carried out a careful analysis of the proper statutory interpretation of s. 5(1)(c) of the *Act* and concluded that the physical presence test was the only correct test.

[10] In my view, the matter has come a long way to resolution through the decision of my colleague, Justice Rennie, in *Martinez-Caro*, above. His decision differs from the others cited because, for the first time, a judge of our Court conducted an exacting analysis of s. 5(1)(c) using well-established modern principles of statutory interpretation. Justice Rennie concluded that application of the principles of statutory interpretation supports the physical presence test, and not the qualitative approach. Even if I might quibble with his characterization of the standard of review as correctness, his analysis and conclusion are compelling. I adopt his reasons and conclusion on this question.

[11] In sum, on this issue, the Citizenship Judge did not err by applying the physical presence test. The Judge's interpretation of s. 5(1)(c) of the *Citizenship Act* to require physical presence for 1,095 days is not unreasonable. In other words, if the standard of review is reasonableness, as

established in *Lam*, above, the Judge did not err. Moreover, if the standard of review is correctness, I adopt the reasoning of my colleague, Justice Rennie, in *Martinez-Caro*, above, and conclude that the application of the physical presence requirement is the correct interpretation of s. 5(1)(c). On either a standard of reasonableness or correctness, the Citizenship Judge did not err by applying the physical presence test to the facts before him.

[12] On the second issue, the Applicant submits that the actions of the Citizenship Judge demonstrated a closed mind or a breach of procedural fairness. In particular, the Applicant points to three problems:

1. at the commencement of the hearing, the Judge informed the Applicant that he had not lived in Canada long enough to obtain citizenship;

2. the Judge misled the Applicant during the citizenship knowledge test by using certain misleading gestures and unusual pauses, in an alleged attempt to fail the Applicant; and

3. the Judge did not send the Applicant the official decision within the three-month time limit.

I am not persuaded that the conduct described rises to the level of a breach of procedural fairness. The remarks allegedly made to the Applicant at the beginning of his interview were nothing more than a statement of fact; the Applicant did not have sufficient physical presence days to meet the requirements of the *Citizenship Act*. The Applicant passed the knowledge test even though he believes that the Judge improperly suggested incorrect answers. Finally, the slight delay in

providing the official decision to the Applicant was not material. I accept that the Citizenship Judge appears to have been curt with and possibly impolite to the Applicant. However, I am not satisfied that the Judge's behaviour amounts to a breach of procedural fairness.

[13] For these reasons, the appeal will be dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that this Court orders and adjudges that the appeal of the Citizenship Judge's decision is dismissed.

"Judith A. Snider"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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