Federal Court  Cour fédérale

Date: 20111130

Docket: T-1958-10

Citation: 2011 FC 1389

Ottawa, Ontario, November 30, 2011

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

KENNETH HUGH BURCH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an appeal under section 21 of the *Federal Courts Act*, RSC 1985, c F-7 and subsection 14(5) of the *Citizenship Act*, RSC 1985, c C-29, of a decision dated September 27, 2010 of a citizenship judge of Citizenship and Immigration Canada (the Judge), wherein the applicant's application for Canadian citizenship was denied on the basis that he had not met the residency requirements under paragraph 5(1)(c) of the *Citizenship Act*.

[2] The applicant requests that this Court grant his Canadian citizenship.

Background

[3] The applicant, Kenneth Hugh Burch, is a citizen of the United Kingdom. He is employed as an offshore marine electrician.

[4] The applicant became a landed immigrant in Canada on November 5, 1999. Since then, his wife, Catherine Burch, and their daughter, Lynsey Burch, have applied for and been approved for Canadian citizenships. The family resides together in Oshawa in a home that the applicant purchased in 2005. The applicant also owns and maintains the following in Canada: vehicle; car and home insurance; life insurance policy with Canada Life; retirement savings plan contributions; and Canada Savings Bonds.

[5] The applicant pays income tax only in Canada and his friends and family live in Canada. There is no other country of which the applicant is a regular resident.

[6] On July 27, 2009, the applicant applied for Canadian citizenship. The relevant time period for assessing the applicant's residency is from July 27, 2005 to July 27, 2009. To be eligible for residency under paragraph 5(1)(c) of the *Citizenship Act*, the applicant must be physically present in Canada for 1,095 days (three years) during this time period.

[7] Due to his employment, the applicant must leave Canada for six week intervals to reside aboard a ship. Aside from two visits to Scotland for family illness, the applicant has always returned

home to his family in Canada after his work shifts. The locations of his jobs vary and he is rarely in the same location for extended periods of time. As a result, during the applicable period for his citizenship application, the applicant was only present in Canada for 675 days – short 420 days of the required 1,095 days.

Judge's Decision

[8] The Judge held that as the applicant was 420 days short of the 1,095 day (three year) residency requirement, he did not meet the requirement under paragraph 5(1)(c) of the *Citizenship Act*. The Judge acknowledged the existence of Federal Court jurisprudence that has granted exemptions from the three year physical presence requirement in special or exceptional circumstances. However, the Judge found that too long an absence, albeit temporary, is contrary to the purpose of the residency requirement of the *Citizenship Act*.

[9] The Judge also held that the applicant bears the burden of proof of satisfying a citizenship judge that he has fulfilled the requirements of the *Citizenship Act*.

[10] In his decision, the Judge acknowledged that the applicant would likely eventually make an excellent Canadian citizen. However, due to his failure to meet the residency requirement, the Judge was unable to approve the applicant's citizenship application at this time.

[11] The Judge also stated that he had considered whether to make a favorable recommendation in accordance with subsections 5(3), 5(4) and 15(1) of the *Citizenship Act*. However, as the

applicant did not file any material in support of such a recommendation, the Judge decided after considering all the circumstances of the case, that it did not warrant a favorable recommendation under these statutory provisions.

[12] The Judge concluded his decision by explaining two options available to the applicant – a right of appeal and reapplication for citizenship – should he wish to pursue his application further.

Issues

[13] The applicant submits the following point at issue:

Did the Judge err in denying the applicant his citizenship application based on his not meeting the residency requirements under paragraph 5(1)(c) of the *Citizenship Act*?

[14] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Did the Judge err in determining that the applicant did not meet the residence requirement under paragraph 5(1)(c) of the *Citizenship Act*?

Applicant's Written Submissions

[15] The applicant submits that the Judge erred in his finding that the applicant had not filed any material in support of a favourable recommendation under subsections 5(3) and 5(4) of the *Citizenship Act*. The applicant submits that such evidence was filed, namely: the applicant's proof

of vehicle and property ownership, employment by a Canadian employer, life insurance, payment of taxes in Canada, Canadian Savings Bonds and family members in Canada.

[16] The applicant submits that the applicable standard of review for a citizenship judge's determination of whether an applicant meets the residency requirement is reasonableness. The Court must assess whether the citizenship judge demonstrated a reasonable understanding and appreciation of the case law and the facts and the manner in which the law applies to them. In addition, the citizenship judge's reasons must be sufficiently clear and detailed to demonstrate that all relevant facts have been considered and properly weighed and that the correct legal tests have been applied.

[17] The applicant submits that although the term residence is undefined in the *Citizenship Act*, its meaning has been defined in the jurisprudence. Specifically, where an applicant has been resident in Canada but physically present less than the required amount, the applicant submits that a mandatory legal test has developed to determine whether an applicant still meets the residency requirement. This test asks whether Canada is the place where the applicant "regularly, normally or customarily lives" or the country in which he has centralized his mode of existence (see *Koo (Re) (TD)*, [1993] 1 FC 286, [1992] FCJ No 1107 at paragraph 10).

[18] The applicant refers to jurisprudence in which it submits the Court found that a citizenship judge who merely enumerated the facts failed to properly weigh the evidence and to ascertain the quality of the applicant's attachment to Canada in determining the place that the applicant regularly,

normally or customarily lived (see *Wu v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 435, [2003] FCJ No 639).

[19] The applicant also draws similarities between the case at bar and *Cheng v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 1143, 98 ACWS (3d) 982. The applicant submits that on similar facts, the Court held that the citizenship judge made a reviewable error in finding that the applicant failed to establish Canada as his place of residence without challenging the facts before him or commenting on the applicant's circumstances.

[20] In summary, the applicant submits that the Judge in this case failed to weigh the facts or consider the legal test established in *Koo* above. These failures rendered the decision unreasonable. The applicant submits that the Judge should have found that he normally and regularly lives in Canada and thereby granted him Canadian citizenship.

Respondent's Written Submissions

[21] The respondent, Minister of Citizenship and Immigration, submits that the style of cause should be amended to reflect the Minister of Citizenship and Immigration as the sole respondent in this case.

[22] The respondent submits that it was appropriate for the Judge to have found that the applicant's absence from Canada was too long and contrary to the purpose of the residency requirements under the *Citizenship Act*.

[23] The respondent submits that since the *Federal Court Rules, 1998* came into force on April 25, 1998, an appeal pursuant to subsection 14(5) of the *Citizenship Act* is no longer heard as a *de novo* appeal. Therefore, only evidence that was before the citizenship judge can be considered by the Federal Court on appeal.

[24] The respondent submits that although Federal Court Judges have interpreted the test for residency in different ways, the jurisprudence has consistently emphasized the need for substantial physical presence in Canada during the three out of four year requirement under paragraph 5(1)(c) of the *Citizenship Act*. Further, to calculate residency, no particular approach must be followed as long as the test that is ultimately chosen by the citizenship judge is properly applied. Therefore, a citizenship judge may focus on quantitative physical presence rather than employ other tests directed at more qualitative aspects of the applicant's presence in Canada.

[25] The respondent submits that having adopted the physical presence test for residency, the Judge reasonably concluded that the applicant had not met the residency requirement.

[26] The respondent also distinguishes the facts in this case from those in *Koo* above. The respondent submits that rather than 420 days, the applicant in *Koo* was short only a few days of the total residency time. In addition, his absence was due to temporary, rather than permanent, employment abroad.

[27] Finally, the respondent cites *Leung (Re)* (FCTD), 42 FTR 149, [1991] FCJ No 160, in which it submits this Court held that Canadian citizenship applicants do not have the freedom to spend a large amount of time abroad for business as a result of subsection 5(1) of the *Citizenship Act*.

[28] In summary, the respondent submits that it was reasonable for the Judge in this case to find that the applicant's absences were too long to satisfy the statutory residence requirements for Canadian citizenship.

Analysis and Decision

[29] The respondent's request to amend the style of cause by deleting the Attorney General of Canada as a respondent and having The Minister of Citizenship and Immigration as the sole respondent is granted.

[30] **Issue 1**

What is the appropriate standard of review?

There is general agreement in the jurisprudence that a citizenship judge's application of evidence to a specific test for residency under paragraph 5(1)(c) of the *Citizenship Act* is a decision of mixed fact and law and is reviewable on a standard of reasonableness (see *El Ocla v Canada (Minister of Citizenship and Immigration)*, 2011 FC 533, [2011] FCJ No 667 at paragraph 11; *Hao v Canada (Minister of Citizenship and Immigration)*, 2011 FC 46, [2011] FCJ No 143 at paragraph 13; *Johar v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1015, [2009] FCJ No 1273 at paragraphs 17 and 18; *Canada (Minister of Citizenship and Immigration) v Takla*, 2009 FC 1120,

[2009] FCJ No 1371 at paragraph 39; and *Pourzand v Canada (Minister of Citizenship and Immigration)*, 2008 FC 395, [2008] FCJ No 485 at paragraph 19).

[31] With respect to the citizenship judge's selection of the test for residence in reviewing a citizenship application under paragraph 5(1)(c) of the *Citizenship Act*, the appropriate standard of review is correctness (see *El Ocla* above, at paragraphs 12, 13 and 19, *Canada (Minister of Citizenship and Immigration) v Nandre*, 2003 FCT 650, [2003] FCJ No 841 at paragraphs 11, 12 and 21; and *Dedaj v Canada (Minister of Citizenship and Immigration)*, 2010 FC 777, [2010] FCJ No 945 at paragraphs 6 to 9).

[32] **Issue 2**

Did the Judge err in determining that the applicant did not meet the residence requirement under paragraph 5(1)(c) of the *Citizenship Act*?

A review of the Judge's reasons lead me to conclude that he applied the physical presence test for residence in this case.

[33] In *Mizani v Canada (Minister of Citizenship and Immigration)* 2007 FCJ No 947, Madame Justice Danièle Tremblay-Lamer described the different tests for residence that have emerged from the jurisprudence at paragraphs 10 and 11:

> 10 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).
>
> 11 I essentially agree with Justice James O'Reilly in *Nandre*, above, 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.

[34] This Court's jurisprudence has highlighted the problematic situation that arises from a deferential stance on a citizenship judge's choice of residence test (see *El Ocla* above, at paragraph 20; and *Hao* above, at paragraph 40). Therefore, some recent jurisprudence has held that where a citizenship applicant does not meet the physical presence test, the citizenship judge must proceed to the qualitative assessment and apply the *Koo* above, factors in assessing the facts of the particular case (see *El Ocla* above, at paragraph 19; and *Canada (Minister of Citizenship and Immigration) v Salin*, 2010 FC 975, [2010] FCJ No 1219 at paragraphs 10 and 21).

[35] In the present case, the Judge, as I stated earlier, appears to only have applied the strict physical presence test in finding that the applicant did not qualify for citizenship. He stated in part at page 2 of the decision (applicant's record, tab 2):

> In your case, after carefully reviewing all of the documentation you provided, I found that you do not meet the requirement under section 5(1)(c) of the Citizenship Act. You are 420 days short of

> the required 1,095 days. I have reviewed the information on file and that provided at the hearing and I have found no compelling reason to reduce or waive the strict minimum requirement of the Residency Act.

[36] The Judge did not proceed to apply the *Koo* above, test as noted by the jurisprudence and determine whether the applicant was resident in Canada even though not physically present. In my view, the failure to apply the *Koo* above, test with its factors was an error of law based on the facts of this case. Even if it was accepted that the Judge made reference to the other tests to determine residency, there was no analysis of the facts in relation to those tests.

[37] For these reasons, the appeal must be allowed. The decision of the Judge is set aside and the matter is referred to a different citizenship judge for redetermination.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The applicant's appeal is allowed, the decision of the citizenship judge is set aside and the matter is referred to a different citizenship judge for redetermination.

2. The Attorney General of Canada is deleted as a respondent and The Minister of Citizenship and Immigration shall be the respondent.

"John A. O'Keefe"
Judge

Federal Court  Cour fédérale

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1958-10
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PLACE OF HEARING:	Toronto, Ontario
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