

Date: 20070614

Docket: T-798-06

Citation: 2007 FC 633

Toronto, Ontario, June 14, 2007

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

BASHEER IBRAHIM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] One is entitled to Canadian citizenship either by birth or by subsequent grant. Section 5 of the *Citizenship Act* sets out the bases on which non-Canadians may obtain citizenship. One requirement is that the applicant be a permanent resident and has “within the four years immediately preceding the date of his or her application, accumulated at least three years of residence in Canada—”. This Court has struggled with the meaning of residence within the context of the *Act* for many years.

[2] Mr. Ibrahim applied for citizenship on December 18, 2002. During the previous four year period he was absent 498 days. The Citizenship Judge said he was 133 days short of the minimum requirement and dismissed his application.

[3] This is a judicial review of that decision.

The Facts

[4] The facts on which the decision is based are straight forward. Apart from an 18 day personal trip, his absence from Canada for the other 480 days over the four year period are attributable to his job with a Canadian employer. Except for a brief trip to France, all that time was spent in Jordan.

[5] The documentation on file may well have, as Mr. Ibrahim submits, established that he resides here and in no other place. His family is here, he pays taxes here, he banks here, he is part of the community, and spends most of his time here. Nevertheless the Citizenship Judge, after reviewing the documentation, found he did not meet the residency requirement.

[6] He noted the *Act* allows a citizenship applicant to reside outside Canada for one of the four years preceding his or her application. He also noted there was Federal Court jurisprudence holding that “when there are special or exceptional circumstances,” applicants can meet the *Act*’s residency requirements without physically residing in Canada for a minimum of 1,095 days in the four-year period. The judge found no such circumstances in this case.

Issues

[7] The primordial issue is the standard against which the decision should be reviewed. It has been clearly established that the appropriate standard of review is reasonableness *simpliciter*. As long as there is a demonstrated understanding of the case law, and an appreciation of the facts and the manner in which the law is applicable to them, the decision should not be disturbed. See for instance: *Chen v. Canada (Minister of Citizenship and Immigration)* 2006 FC 85, [2006] F.C.J. No. 119.

[8] Did then the Citizenship Judge demonstrate an understanding of the case law in this mixed question of both fact and law?

Discussion

[9] The unfortunate situation in which Mr. Ibrahim, whom the Citizenship Judge said would otherwise make a fine citizen, finds himself is that there are three lines of jurisprudence with respect to the residency requirement for citizenship purposes.

[10] In re: *Papadogiorgakis*, [1978] 2 F.C. 208, 88 D.L.R. (3d) 243 Thurlow A.C.J. was of the view that a person is normally resident in Canada only if she or he is physically present here. However, by way of exception if one has established permanent residence, then days during which he or she is temporarily abroad count as Canadian days. This establishment of residency is still a prime requirement (*Goudimenko v. Canada (Minister of Citizenship and Immigration)* 2002 FCT

447, [2002] F.C.J. No. 581 and *Ahmed v. Canada (Minister of Citizenship and Immigration)* 225 F.T.R. 215, 2002 FCT 1067.)

[11] However, in re: *Koo*, [1993] 1 F.C. 286, 59 F.T.R. 27, Madam Justice Reed concluded that the residency test should be based on whether the applicant “regularly, normally or customarily lives” here. In other words, is Canada the country in which he or she has centralized his or her mode of existence. She set out a non-exclusive list of six questions which may be of assistance in reaching such a determination.

[12] In contrast, Mr. Justice Muldoon applied a strict physical presence approach in re: *Pourghasemi* (1993), 62 F.T.R.122.

[13] This divergence in the case law was commented upon by Mr. Justice Lutfy, as he then was, in *Lam v. Canada (Minister of Citizenship and Immigration)* (1999), 164 F.T.R. 177. He held it was open to a citizenship judge to apply 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 decision should not be disturbed. Unfortunately, the *Act* does not allow for appeals to the Federal Court of Appeal, and the residency requirement has not been clarified by statute. Thus *Lam* applies by comity.

[14] It is clear that the Citizenship Judge followed Mr. Justice Muldoon’s decision in re: *Pourghasemi, supra*.

[15] Mr. Ibrahim chose to spend more than one of the four years in question abroad because of his business. It was not unreasonable for the Citizenship Judge to determine that his application for citizenship was therefore adversely affected (*Alibhal v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 248, 2003 FCT 169 and re: *Leung* (1991), 42 F.T.R. 149.)

[16] In essence Mr. Ibrahim submits that the proper test of residency is that set out in re: *Koo*. However, for the reasons aforesaid, as long as one of the three lines of jurisprudence has been followed and properly applied, the decision should not be disturbed. The Citizenship Judge made no reviewable error.

[17] This case is distinguishable from that of *Canada (Minister of Citizenship of Immigration) v. Wall* 2005 F.C. 110, [2005] F.C.J. No. 146. In that case a Citizenship Judge's decision was written out on a printed form which reflected the principles set out in re: *Koo, supra*. I held that unless parts of the printed form were scratched out, there was a presumption that the judge had intended to follow re: *Koo*. The judge did not use that form here and thus there was no onus on him to establish that he was departing from re: *Koo*.

ORDER

THIS COURT ORDERS that the judicial review of the decision of the Citizenship Judge dated May 3rd of 2006 is dismissed.

“Sean Harrington”

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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