Date: 20080327

Docket: T-865-07

Citation: 2008 FC 390

Ottawa, Ontario, this 27th day of March, 2008

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

NING WANG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT

[1] This is an appeal of a decision of a Citizenship Judge dated April 29, 2007, (Decision) in which the Judge refused to grant the Applicant Canadian citizenship on the ground that he had not met the residency requirement under section 5(1)(*c*) of the *Citizenship Act*, R.S.C. 1985, c. C-29 [Act].

BACKGROUND

[2] The Applicant, Mr. Ning Wang, was born in China on December 7, 1969, and was landed as a permanent resident of Canada on October 10, 2000. Mr. Wang, the sole owner of a Canadian company, is a dealer in Chinese art and antiques. Because of the nature of his work, he frequently travels to China, Hong Kong, London and New York to see collections and attend auctions. His parents and sister live in Beijing. He is a member of numerous Canadian associations and clubs and is a volunteer and fundraiser for the Royal Ontario Museum and the Chinese Cultural Centre of Greater Ontario.

[3] Mr. Wang applied for citizenship on March 1, 2006. His citizenship hearing took place on February 20, 2007. His application for citizenship was denied on April 29, 2007.

Decision Under Review

[4] The Citizenship Judge found that the Applicant was physically present in Canada for 507 days during the relevant period, leaving him 588 days short of the minimum requirement of 1,095 days.

[5] The Judge rejected the Applicant's submission that his absences from Canada fell within the exceptions that allow an applicant to maintain residence and, in effect, earn days of residence while absent. She had two reasons for concluding that the exceptions did not apply to the Applicant: first,

the Act does not allow an applicant to earn days of residence while employed outside of Canada on business, and this is so even if the company that an applicant works for is incorporated in Canada (the only exception to this rule being that found in section 5(1.1) which applies to spouses of Canadian citizens employed with the Canadian armed forces, or the federal public administration or the public service of a province); second, the Citizenship Judge found that there was insufficient evidence to verify that the Applicant's absences fell within the allowable exceptions, and she stressed that this was particularly so given that he had spent more time out of Canada than he had spent in Canada during the relevant four-year period.

[6] In support of this finding, the Citizenship Judge cited this Court's decision in *Re Leung*:

> Many Canadian citizens, whether Canadian born or naturalized, must spend a large part of their time abroad in connection with their businesses, and this is their choice. An applicant for citizenship, however, does not have such freedom because of the provisions of section 5(1) of the Act. [(1991), 42 F.T.R. 149 at para. 32, [1991] F.C.J. No. 160.]

[7] The Citizenship Judge then concluded that, despite some favourable indicia of residence (the Applicant's having returned to Canada after each of his absences; his involvement in several social and cultural organizations; the fact that he does not appear to own any property outside of Canada and that he resides in hotels or with family members while travelling on business), on a balance of probabilities, she was not persuaded that the Applicant had remained in Canada for a sufficient period to establish residence here. She then refused his application on the basis that the Applicant did not meet the residence requirement under paragraph 5(1)(*c*) of the Act.

ISSUES

[8] The Applicant challenges the Decision on two grounds:

1. **Did the Judge err in finding that the Applicant did not satisfy the residence requirement provided in section 5(1)(*c*) of the Act?**

2. **Did the Citizenship Judge err by failing to articulate clearly which test she applied to determine residency?**

REASONS

[9] There has been general consensus in this Court that the standard of review applicable to citizenship judges' determinations of whether an applicant has met the residence requirement of the Act is reasonableness *simpliciter* (*Canada (Minister of Citizenship and Immigration) v. Chang*, 2003 FC 1472; *Rizvi v. Canada* (*Minister of Citizenship and Immigration)*, 2005 FC 1641; *Morales v. Canada (Minister of Citizenship and Immigration)* (2005), 45 Imm. L.R. (3d) 284, 2005 FC 778; *Chen v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 85; *Zhao v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1536 [*Zhao*]; *Tulupnikov v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1439; *Farrokhyar v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 697; *Farshchi v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 487). Following this jurisprudence and in light of the Supreme Court of Canada's recent

decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, I regard the applicable standard of review as reasonableness. Section 5(1) of the Act sets out the necessary criteria for obtaining citizenship. Section 5(1)(*c*) requires that a person should 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. Each applicant bears the onus of establishing the residence requirement on a balance of probabilities.

[10] As the Respondent and the Applicant agree, in order to meet the standards of the *Citizenship Act*, residence must be established and maintained (see *Ahmed v. Canada (Minister of Citizenship and Immigration)* (2002), 225 F.T.R. 215, 2002 FCT 1067 at para. 6). The jurisprudence suggests that this involves a two-stage inquiry: a threshold determination as to whether or not residence in Canada has been established and then, if that threshold is met, a further determination of whether or not the particular applicant's residence satisfies the required total number of days. As the Applicant and the Respondent also agree, since there is no definition of residency in the Act, the Citizenship Judge may apply one of three tests to determine whether an applicant has met the residence requirement. One of those tests is the physical presence test (see *Ping v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 777 at para. 4).

[11] The Respondent says that the Citizenship Judge in this case decided that the Applicant had not satisfied the threshold requirement. In the alternative, the Respondent argues that the Judge applied the physical presence test for maintenance of residence and concluded that section 5(1)(*c*) of the Act was not satisfied.

[12] When the Decision is reviewed as a whole, it seems to me that the Citizenship Judge is saying quite simply that the Applicant has not established residency under section 5(1)(*c*) because the Applicant has not satisfied the physical presence test.

[13] The Applicant says it is not clear which test the Citizenship Judge applied in this case and, in particular, her references to the decision in *Re Leung* and her citing of qualitative criteria show that the Judge did not obviously apply the physical presence test in the way suggested by the Respondent.

[14] My review of the Decision suggests that, irrespective of what *Re Leung* may stand for, the Citizenship Judge felt it supported her reasoning that physical presence in Canada should be required in this case to support residency.

[15] The Judge certainly does acknowledge the qualitative criteria put forward by the Applicant, but I think she makes it clear that the basis of her Decision is that "I am not persuaded that you have remained in Canada for a sufficient period to establish residence in this country." This basic position is supported by the hand-written reasons found in the Notice to the Minister: "The applicant has failed to meet the basic residency requirement of 1,095 days. He has spent more time out of the country than in it." The Judge remains focused on the number of days.

[16] In the Decision itself, the Citizenship Judge says that "for the reasons provided above, I am unable to approve your application because you have not met the residence requirement under paragraph 5(1)(*c*) of the Act." The "reasons provided above" come down to the final conclusion that "on the balance of probabilities, I am not persuaded that you have remained in Canada for a sufficient period to establish residence in this country."

[17] Even though the Judge acknowledges various positive, qualitative factors put forward by the Applicant, there is no blending of the tests and I think she makes it clear that, for her, the deciding factor is quantitative and this is the basis of her decision under section 5(1)(*c*).

[18] Because the physical presence test set out in *Re Pourghasemi* (1993), 62 F.T.R. 122, appears to be an allowable approach to determining section 5(1)(*c*) of the Act, I cannot say that the Judge's Decision in this case was either incorrect for applying the wrong test or unreasonable for the conclusions reached on whether the Applicant met the residency requirement. Even if the Applicant did meet the threshold residency requirement, he did not satisfy this judge on the physical presence test that he qualified under section 5(1)(*c*).

[19] Counsel are requested to serve and file any submissions with respect to certification of a question of general importance within seven days of receipt of these Reasons for Judgment. Each

party will have a further period of three days to serve and file any reply to the submission of the opposite party Following that, a Judgment will be issued.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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