Date: 20080707

Docket: T-7-08

Citation: 2008 FC 736

Ottawa, Ontario, July 7, 2008

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

JIAN GAO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] This is an appeal from a Citizenship Judge's decision refusing citizenship on the basis that the Applicant had not met the residency requirement of s. 5(1)*(c)* of the *Citizenship Act* (Act).

II. BACKGROUND

[2] The Applicant entered Canada on June 24, 2003, having been sponsored by her then-spouse as a permanent resident. She applied for citizenship on July 7, 2006.

[3] Therefore, for purposes of residency, the relevant time to be assessed is from June 24, 2003 to July 7, 2006. During that time the Applicant was physically present in Canada for 531 days, just under half of the required minimum of 1,095 prescribed in s. 5(1)*(c)* of the Act.

[4] From 2004, the Applicant worked for L.Y. Marketing, a Canadian company. The company wanted to establish a Shanghai office and the Applicant was sent to China to conduct marketing research and lay the groundwork to open the office there. The Applicant's absences from Canada were largely attributed to this employment requirement.

[5] The Citizenship Judge framed the issue as whether the Applicant had accumulated at least three (3) years of residence within Canada. The Citizenship Judge's analysis lays emphasis on the amount of time away from Canada, the absence of residency credit for working for a Canadian company while outside Canada and the absence of any intention to change jobs. The Citizenship Judge found that the Applicant should have produced evidence of family ties or social activities.

[6] Post-hearing and at the request of the Citizenship Judge, the Applicant filed a letter from her employer which contained the curious wording "It is our plan to hire her to work for us when she finishes her job in China and returns back to Canada".

[7] The employer's letter arose from a document request on a form which contained these words:

> I understand that, should such documentation not be provided, my Citizenship Application will be non-approved by the judge.

III. ANALYSIS

[8] The standard of review applicable was described in *Wong v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 731, as deference in respect of facts. What was not said and therefore clarified is that on issues of law, the standard is correctness.

[9] There was significant evidence (or lack thereof) which could call the Applicant's residency into question. There was, as noted, an absence of family ties or social activities. The Applicant was separated within her first year in Canada, and she was absent from Canada for considerable periods of time – individually and cumulatively. As held in *Faria v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1385, the residency requirements may make matters difficult for business people engaged in international work, but that is an issue for Parliament.

[10] However, in cases such as *Jreige v. Canada (Minister of Citizenship)*, [1999] F.C.J. No. 1469 (QL) and *Wong*, above, the Court has outlined that a citizenship judge is to perform a two-step analysis: (1) was residency established, and (2) was residency maintained.

[11] In the decision under appeal there is no analysis of the first issue of establishment of residency despite the existence of some evidence on this issue, particularly in the Applicant's first year in Canada.

[12] Whether that evidence was sufficient to establish residency and whether other evidence counters it or shows that whatever was established was not maintained will no doubt be part of the new hearing ordered.

[13] This Court has expressed its concern about the multiple tests of residency which may be applied, but even if that is the result of the jurisprudence, a citizenship judge must nevertheless be clear as to which test is being applied. In this case, it is unclear which test was selected and applied.

[14] In addition, the Document Request form which states that failure to produce a requested document "will" result in denial of citizenship is highly questionable. It indicates a pre-determination of the result of the case and is categorical in not admitting reasonable explanations for failure to produce. One would think that less absolute words such as "may" could be used without undermining the message that production of the document requested is of a high degree of importance. While this case does not turn on this point, it very well might have had the document not been produced.

IV. CONCLUSION

[15] For the above reasons, this appeal is allowed. The Court will not direct a result or substitute its decision. The matter is to be referred back to another citizenship judge for a hearing *de novo*.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this appeal is allowed. The matter is to be referred back to another citizenship judge for a hearing *de novo*.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-7-08
STYLE OF CAUSE:	JIAN GAO and THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	July 3, 2008
REASONS FOR JUDGMENT AND JUDGMENT:	Phelan J.
DATED:	July 7, 2008

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