

Federal Court



Cour fédérale

Date: 20091026

Docket: T-168-09

Citation: 2009 FC 1079

Ottawa, Ontario, October 26, 2009

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

ERIKA NINO VEGA

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This application is an appeal of the decision (the Decision) of a Citizenship Judge dated December 11, 2008 wherein it was decided to refuse the Applicant's application for Canadian Citizenship.

[2] The Applicant takes the position that the Decision was deficient and that the Citizenship Judge ignored evidence and failed to consider if the Applicant was a resident in Canada even if she was physically absent for a portion of the relevant period. The Respondent argues that there was no error in the Citizenship Judge's decision or reasons and the appeal should be dismissed.

[3] For the reasons set out below the appeal is dismissed.

I. Background

[4] The Applicant is a 32-year-old citizen of Mexico who is married to a Canadian citizen and has a Canadian born child. She became a landed immigrant on June 24, 2003 and applied for Canadian citizenship on May 10, 2007. In support of her application, the Applicant provided, *inter alia*, her healthcare records, T-1 Summaries for the tax years 2002-2006, and proof of educational status. Initially there was an issue with the period used to calculate the number of days of physical presence in Canada. However, the Applicant did not take issue with the Citizenship Judge's calculation of physical days in Canada in her Memorandum of Fact and Law. Therefore, this issue will not be addressed.

[5] In her citizenship application the Applicant declared 500 days of absences from Canada that were re-calculated by Citizenship and Immigration Canada (CIC) to 503 days. The Applicant was therefore present in Canada for 935 days during the relevant time period, June 24, 2003 to May 10, 2007. The Applicant appeared before the Citizenship Judge on August 1, 2008.

[6] The Citizenship Judge provided the Applicant with three pages of reasons for the Decision to not approve her citizenship application. The reasons briefly summarized the documentary and oral evidence presented at the hearing and then set out the relevant issue as "if the Applicant had

accumulated at least three years of residence in Canada within the four years immediately preceding the date of the citizenship application”.

[7] In the analysis section of the reasons the Citizenship Judge calculated that the Applicant had 935 days of physical presence in Canada and described the residency requirement under the *Citizenship Act*, R.S.C. 1985, c. C-29 (the Act). The Citizenship Judge then stated that there is Federal Court jurisprudence which does not require physical presence of the applicant for citizenship for the entire time period, but that too long an absence from Canada, during the minimum period set out in the Act, is contrary to the purpose of the residence requirement. The Citizenship Judge found that the Applicant was 160 days short of the required 1,095 days of residency in Canada and indicated that she found no compelling reasons to reduce or waive the strict residency requirement.

[8] The reasons then set out the decision and advised the Applicant of her rights to appeal or re-apply.

II. Standard of Review

[9] The applicable standard of review regarding a Citizenship Judge’s determination of whether the Citizenship applicant met the residency requirement is reasonableness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Pourzand v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 395, 71 Imm. L.R. (3d) 289 per Justice James Russell at paragraph 19).

Procedural fairness questions and the adequacy of reasons are questions of law reviewable on a correctness standard (*Pourzand*, above, at paragraph 21).

III. Issues

A. *The Residency Test*

[10] Section 5(1) of the Act sets out the necessary criteria for obtaining citizenship. Section 5(1)(c) requires that a person 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.

<u>Grant of citizenship</u>	<u>Attribution de la citoyenneté</u>
5. (1) The Minister shall grant citizenship to any person who	5. (1) Le ministre attribue la citoyenneté à toute personne qui, à la fois:
(a) makes application for citizenship;	a) en fait la demande;
(b) is eighteen years of age or over;	b) est âgée d'au moins dix-huit ans;
<u>(c) is a permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act, and has, within the four years immediately preceding the date of his or her application, accumulated at least three years of residence</u>	<u>c) est un résident permanent au sens du paragraphe 2(1) de la Loi sur l'immigration et la protection des réfugiés et a, dans les quatre ans qui ont précédé la date de sa demande, résidé au Canada pendant au moins trois ans en tout, la durée de sa résidence étant</u>

in Canada calculated in the following manner:

calculée de la manière suivante:

(i) for every day during which the person was resident in Canada before his lawful admission to Canada for permanent residence the person shall be deemed to have accumulated one-half of a day of residence, and

(i) un demi-jour pour chaque jour de résidence au Canada avant son admission à titre de résident permanent,

(ii) for every day during which the person was resident in Canada after his lawful admission to Canada for permanent residence the person shall be deemed to have accumulated one day of residence;

(ii) un jour pour chaque jour de résidence au Canada après son admission à titre de résident permanent;

[Emphasis added]

[Je souligne]

(d) has an adequate knowledge of one of the official languages of Canada;

d) a une connaissance suffisante de l'une des langues officielles du Canada;

(e) has an adequate knowledge of Canada and of the responsibilities and privileges of citizenship; and

e) a une connaissance suffisante du Canada et des responsabilités et avantages conférés par la citoyenneté;

(f) is not under a removal order and is not the

f) n'est pas sous le coup d'une mesure de renvoi

subject of a declaration
by the Governor in
Council made pursuant to
section 20.

et n'est pas visée par une
déclaration du
gouverneur en conseil
faite en application de
l'article 20.

[11] The Act does not define "residency". As outlined by Justice Danièle Tremblay-Lamer in *Mizani v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 698, [2007] F.C.J. No. 947 at paragraph 10, the 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), 62 F.T.R. 122, 19 Imm. L.R. (2d) 259 (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.), 88 D.L.R. (3d) 243). 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.), 19 Imm. L.R. (2d) 1 at paragraph 10).

[12] The Applicant argued at paragraph 10 of her Memorandum of Fact and Law that:

[...] the jurisprudence of this Court indicates very clearly that where a Citizenship Judge concludes an applicant has not met the residency requirement by being physically present in Canada for the required three years, the judge must then consider whether the applicant had met the residency requirement by centralizing her mode of living in Canada by applying the test set out in *Re Koo* or another test recognized as validly the jurisprudence.

[Emphasis added]

[13] This is not the case. The Citizenship Judge is required to apply one of the three tests to determine whether an applicant has met the residency requirement. They are not required to run through the three tests to see if one “fits”. It is also not open to the Citizenship Judge to “blend” the tests (*Mizani*, above, paragraphs 12-13). The onus is on the citizenship applicant to provide sufficient objective evidence to demonstrate they have met the residency requirements (*Mizani*, above, at paragraph 19 per Justice Tremblay-Lamer, see also *Canada (Minister of Citizenship and Immigration) v. Italia*, [1999] F.C.J. No. 876, 89 A.C.W.S. (3d) 22 at paragraph 14).

B. *The Reasons Provided*

[14] The facts in this matter are similar to those addressed by Justice Max Teitelbaum in *Islam v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 10, 77 Imm. L.R. (3d) 146. In *Islam*, above, the Applicant appealed from a Citizenship Judge’s decision that she did not meet the residency requirements with the result that her application for citizenship was denied. I note that a portion of the Citizenship Judge’s reasons in this matter is similar to the reasons reviewed by Justice

Teitelbaum. At paragraph 23 of *Islam*, above, Justice Teitelbaum held that the Citizenship Judge's reasons were not entirely clear on which test he was applying and allowed the appeal.

[15] While a portion of the Citizenship Judges reasons in *Islam*, above, is similar to those used in this case, I find that it was clear the physical presence test was being applied in this matter. The Citizenship Judges stated that the Applicant did not have the correct number of days of physical presence in Canada to meet the requirements. At page two of the Decision, the Citizenship Judge wrote:

I have determined that you were absent 503 days, during the relevant period, leaving you with a physical presence in Canada of 935 days. The calculation (1,095-935) leaves you 160 days short of the minimum required 1,095 days as per the Act. You failed to provide consistent and convincing proof of residency in the relevant period.

[16] It was clear from the reasons that the Citizenship Judge applied the physical presence test.

[17] The Applicant further argues that reasons were deficient as they merely stated the tribunal's conclusion and that important documentary evidence was ignored. The Respondent argues that the Citizenship Judge did not address evidence of connection and ties with Canada as the physical presence test was used to determine residency and therefore such evidence was not relevant to the test applied.

[18] The Citizenship Judge provided the Applicant with three pages of reasons for the Decision. As the Citizenship Judge used the physical presence test the Decision was based on the calculation

of the number of days of physical presence in Canada and not a detailed analysis of various factors. The method of calculating this number and the answer was provided to the Applicant. The reasons provided the Applicant with the basis for the Citizenship Judge not approving her application in sufficient detail and the Applicant was able to commence an appeal. There was no failure to provide reasons.

[19] The Citizenship Judge did not err by not considering the evidence of ties to Canada as the physical presence test was used. The evidence provided by the Applicant with regard to her family ties and her employment are not relevant to the physical presence test and therefore it was not an error to ignore this evidence in the reasons.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. the appeal is dismissed; and
2. there is no Order as to costs.

“ D. G. Near ”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-168-09

STYLE OF CAUSE: NINO VEGA
v.
MCI

PLACE OF HEARING: TORONTO

DATE OF HEARING: OCTOBER 6, 2009

**REASONS FOR JUDGMENT
AND JUDGMENT BY:** JUSTICE NEAR

DATED: OCTOBER 26, 2009

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