Federal Court  Cour fédérale

Date: 20090622

Docket: T-2021-08

Citation: 2009 FC 653

Toronto, Ontario, June 22, 2009

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

RAJAN AGARWAL

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Minister of Citizenship and Immigration, pursuant to subsection 14(5) of the *Citizenship Act*, R.S.C. 1985, c. C-29, appeals the decision of Citizenship Judge Normand Allaire, dated October 31, 2008, granting the respondent's application for Canadian citizenship. The Minister asks that the decision be set aside. For the reasons that follow, this appeal is allowed.

I. Background

[2] Rajan Agarwal, an Indian national, acquired status as a Canadian permanent resident on August 2, 2000. He filed an application for Canadian Citizenship four years later, on August 1, 2004. For reasons that are not evident in the record, the citizenship application was apparently not examined by the applicant until 2008. The application was referred to a hearing before a Citizenship Judge owing to concerns as to whether the residency requirements established in the *Citizenship Act* were met.

[3] Subsection 5(1)(c) of the *Citizenship Act* requires that would-be citizens accumulate three years of residence in Canada in the four years immediately preceding the filing of an application for citizenship. Rajan Agarwal was absent from Canada for 753 days in that relevant timeframe.

[4] The circumstances of the respondent's absence from Canada may be summarized as follows. Although he had practiced as a radiologist in India prior to coming to Canada, he could not practice medicine in Toronto without first satisfying Canadian licensing requirements for foreign-trained physicians. He therefore attended the Kaplan Educational Centre in Toronto while working part-time, and sat the required examinations in 2001. Although he was successful on his tests, he was unable to secure a radiology residency in Canada. He did find such a position at Wyckoff Heights Medical Center in Brooklyn, New York and he left Canada to take up that position on July 1, 2002. He subsequently continued his medical studies at SUNY Downstate Medical Center in Brooklyn, New York from July 1, 2003 to June 30, 2004. He continued his medical residency training, specialist and internship program at Saint Barnabas Medical Centre

in Livingston, New Jersey from July 1, 2004 to June 30, 2007. On June 6, 2007 he was certified in Diagnostic Radiology. He then continued his studies in the specialty of neuroradiology from July 1, 2007 to June 30, 2008 at the Yale-New Haven Medical Centre. At the time of his hearing before the Citizenship Judge he was completing the practical requirements of his Fellowship at the Houston V.A. Medical Centre and was expected to complete it at the end of December 2008.

[5] The record indicates that Rajan Agarwal was certified by the American Board of Radiology on June 6, 2007, and that his wife and child, who was born in the United States of America in 2003, are Canadian citizens. At the hearing before the Citizenship Judge, the applicant explained that he intends to establish a practice in Toronto or Mississauga, where his wife's extended family reside, upon completion of his course of study.

[6] The following passages from the Citizenship Judge's reasons reveal the considerations that lead him to grant Dr. Agarwal's application:

> The applicant's continuous course of study has relevance to his citizenship application and residence in Canada obligations.
>
> …
>
> At the age of 40, the applicant can just about see the light at the end of his long "educational" tunnel. I use this analogy because medical education is not a short and self directed path. Requirements such as internship, rotation location and hours of work are not often left to the individual's choice. They are prescribed and arranged for by the medical institution overseeing the medical programs and stringent time frames must be observed.
>
> …

In *Papadogiorgakis*, 1978 2 F.C. 208, Thurlow A.C.J. established the principal that full-time physical presence in Canada is not an essential residential requirement. Furthermore, a person with an established home in Canada does not cease to be a resident when he leaves for temporary purposes, whether on business or vacation, or to pursue a course of study.

I am satisfied, based on the information provided at the hearing and the evidence contained in his file that the applicant established himself in Canada between his landing date of August 2, 2000 and July 1, 2002, living in Canada continuously during this time. His only absence during his relevant period, 753 days to the United States, is for the sole purpose of pursuing a course of study as a radiologist, an opportunity not afforded / not available to him in Canada.

It is noted that the applicant, in the strictness (*sic*) interpretation, has been more out of Canada (753 days) than in Canada (706 days) during his relevant period, however this is solely to pursue a course of study.

It is also noted that the applicant's course of study to obtain the designation of Fellow, in neuro-radiology has required a continuous course of study from July 1, 2002 to December 2008. Given my knowledge of medical education requirements and the applicant's expressed intention to return to Canada, I consider this time away from Canada as a temporary absence. The applicant is extremely concerned that he may not have his permanent residence status renewed because he has been unable to fulfill the requirement of 2 years out of 5 years stay in Canada.

…

Given the nature and length of the applicant's course of study, the issue of maintaining his connection with Canada during his medical studies is in my opinion a moot point at this time since the applicant is still pursuing, albeit almost completed the course of study which required him to absent himself from Canada on an almost fulltime basis.

…

The applicant's expressed desire is to become a Canadian citizen, return to Canada with his Canadian wife and child and serve

> Canada as a medical specialist in the filed of neurological radiology. Given the shortage of physicians in Canada and more so in the specialist categories, the applicant would obtain immediate employment in Canada. But, first he must become a Canadian citizen.
>
> For these reasons and following the jurisprudence cited earlier, I consider the absence of 706 days during the period of July 1, 2002 to August 1, 2004 for the sole purpose of pursuing a course of study as days of residence in Canada since the applicant had clearly established himself in Canada before this period.

II. Issue

[7] The applicant submits that that sole issue is whether the Citizenship Judge erred in finding that the respondent had satisfied the requirement prescribed in subsection 5(1)(c) of the *Citizenship Act* that within the four years immediately preceding the date of his application, he had accumulated at least three years of residence in Canada.

III. Analysis

[8] The applicant submits that the Citizenship Judge erred in finding that the respondent had satisfied the residency requirement prescribed at paragraph 5(1)(c) of the *Citizenship Act*. In her memorandum of fact and law, counsel for the Minister writes that “physical presence is an important, relevant and crucial factor in determining one’s residence” and that “having missed the minimum residency requirements by such a significant margin [389 days], the Respondent was not yet entitled to Canadian citizenship.”

[9] The applicant submits that the *Papadogiorgakis* decision relied on by the Citizenship Judge is distinguishable. Mr. Papadogiorgakis maintained a residence in Canada during his physical absence from Canada to attend university in the U.S.A., worked in Canada during his summers off, kept his personal property at his Canadian residence while studying, and returned at frequent intervals for weekends, and for the Christmas and summer breaks. Counsel contrasts Mr. Papadogiorgakis' situation with that of the respondent, who only returned to Canada once for a 10-day visit during his 25 month period of absence, has not worked in Canada since he began his studies in the United States, and has maintained no connection to Canada during his absence. Counsel objects to the characterization of Dr. Agarwal's absence from Canada as "temporary" given that it had reached some 6 years at the time of hearing, and refers to a "lack of evidence" that Dr. Agarwal has maintained any connection to Canada during this entire period of absence, which is now nearly seven years.

[10] Counsel for the Minister further submits that there was clear evidence before the Citizenship Judge that Dr. Agarwal, as early as 2004, might not have qualified to maintain his status as a permanent resident given his absence from the country. That citizenship could be granted to someone who might have failed to maintain his status as a permanent resident is, in counsel's words, an "absurd result".

[11] The respondent is unrepresented, failed to file a respondent's record and failed to attend at the hearing, although he was properly served with the Notice of Application.

[12] Commenting on the residency requirements under section 5 of the *Citizenship Act*, Justice Harrington observed in *Mann v. Canada (The Minister of Citizenship and Immigration)*, 2003 FC 1479, that "the law is in a sorry state." Six years later, it is unfortunate to observe that the comment remains accurate.

[13] Three distinct approaches have been sanctioned for calculating a would-be citizen's "residence" in Canada: (1) strict physical presence as described in *Re Pourghasemi* (1993), 62 F.T.R. 122; (2) quality of attachment as set forth in *Re Papadogiorgakis*, above; or (3) centralized mode of living as outlined in *Re Koo*, [1993] 1 F.C. 286 (T.D.). Justice Lutfy (as he then was) in *Lam v. Canada (Minister of Citizenship and Immigration)* (1999), 164 F.T.R. 177, concluded that it was open to a citizenship judge to adopt any one of the three tests of residency.

[14] It has been held that failure to identify which test has been used is an error of law which can justify setting aside a citizenship judge's decision. In this case, however, Citizenship Judge Allaire was using the quality of attachment test, even if he did not identify it by name, given his reference to *Papadogiorgakis*.

[15] The applicant submits, and I agree that the standard of review of a citizenship judge's decision is reasonableness: *Chen v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 763.

[16] I agree with the applicant that there must be indicia of attachment if the quality of attachment test is to have any meaning; however, conceiving of attachment too narrowly can only result in an artificial list of attachment factors that may be out-of-step with human realities in general and the realities of immigration in particular. I respectfully disagree with the notion that intent to return to Canada following completion of one's education is categorically irrelevant to attachment. While it is not enough for a prospective citizen to make bald statements of intent to reside in Canada, when these are backed up by specific actions that evidence that intention, they should not be ignored. In this case, there are some actions that support the stated intention, such as registering the U.S. born child as a Canadian citizen and obtaining a Canadian professional certification. To the degree that intent can be reasonably ascertained by the trier of fact, I would think that it can be and should be taken into account in terms of "quality of attachment."

[17] In this case, however, the respondent's stated intention was to remain in Canada but this proved to be impossible because he was unable to obtain a Canadian medical residency in Diagnostic Radiology. If it is reasonable and proper to examine facts after the date of application to support a stated intention, such facts ought to also be examined to counter it. In this case, the respondent obtained his certification in Diagnostic Radiology on June 6, 2007, but then decided to remain in the United States to do a fellowship in Neuroradiology at Yale School of Medicine, which he obtained on June 30, 2008. In his letter to the Citizenship Judge of April 12, 2008 he writes that "after completing my fellowship in the year 2008, I want to come back to Canada and settle down in Canada permanently." However, he did not come back to Canada. He decided to

remain in the United States to complete his “practical program to obtain his medical speciality designation.” In short, the evidence, when examined in full, does not support his stated intention of returning to Canada.

[18] The Court also notes that the respondent was served with the Notice of Application in this matter by sending a copy to his address in Houston, Texas and that he signed an Advice of Receipt from Canada Post on January 17, 2009. Accordingly, in spite of his intention, stated to the Citizenship Judge, to return following his practical studies which were to end December 31, 2008, there is no evidence that those intentions have been realized.

[19] I am of the view that the Citizenship Judge erred and his decision is unreasonable in that he relied on the irrelevant considerations of the shortage of medical specialists in Canada and the respondent’s employability in Canada. The Citizenship Judge’s remarks on this point cannot be said to have been merely obiter statements of well-known facts as they were immediately followed by his statement that “for these reasons …” the respondent satisfies the residency requirement in the Act.

[20] For all these reasons I find that the decision of the Citizenship Judge is not reasonable and this appeal is allowed.

[21] The applicant requested an order of costs and submitted a draft bill of costs using Tariff “B” (Column III) that totals $2,752.25 in fees and disbursements. The draft bill of costs is

reasonable. Awarding costs is within my discretion and I see no reason to deviate from the usual practice that the successful party is entitled to its costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The appeal is allowed and the decision of Citizenship Judge Normand Allaire, dated October 31, 2008, is set aside; and
2. The applicant is awarded its costs, fixed at $2,752.25.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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DATED:	June 22, 2009

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No Appearance	FOR THE RESPONDENT

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