Federal Court Cour fédérale

Date: 20100426

Docket: T-1140-09

Citation: 2010 FC 449

Ottawa, Ontario, April 26, 2010

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

HUILING NIE

Respondent

<u>REASONS FOR JUDGMENT AND JUDGMENT</u>

[1] The Minister of Citizenship and Immigration (the Minister) appeals, pursuant to subsection 14(5) of the *Citizenship Act*, R.S.C. 1985 c. C-29 (the *Act*), the Citizenship Judge's decision to approve Ms. Huiling Nie's October 1, 2008 application for citizenship.

[2] Ms. Huiling Nie came to Canada from China in 2000 on a student visa. She obtained permanent residence status in 2005 and left Canada for a post-doctoral studies position at Harvard

University in the United States of America that same year. Her husband and children remained in Canada for a couple of years while the Respondent studied and worked in the U.S.A.

[3] The Respondent applied for citizenship in Canada in 2008 maintaining she intended to return to work in Canada. She had been physically present in Canada for 346 days during the four years prior to her citizenship application. The Citizenship Judge determined the Respondent met the residency requirement based on the test in *Re Koo* [1992] F.C.J. 1107 (*Koo*).

[4] The Minister submits the Citizenship Judge erred by considering irrelevant factors and unreasonably concluded the Respondent met the residency requirements for citizenship.

[5] For the following reasons I allow the appeal and dismiss the Respondent's application for citizenship.

DECISION UNDER APPEAL

[6] The Judge wrote: "I approve. See KOO [sic] report which I am relying upon but the Thurlow decision re Papdugiorgakis would however apply as well."

[7] In his reasons for decision regarding residence, the Citizenship Judge considered her absence from Canada to be temporary because she has been in Canada since 2000 and is applying for jobs in Canada. The Respondent impressed the Citizenship Judge. He found her to be devoted to Canada and a likely credit to Canada's scientific and academic communities. He found her

indeterminate contract at Harvard, renewed annually, was to fill the time until “a position equal to her education and talents is found in Canada.” He added:

> “She is as devoted to our country as anyone I have met. Her whole focus has been in being in Canada whenever possible and in living and working here in the future. I approve strongly. She has been away because of educational opportunities only. She is very advanced in her field (post-doctoral studies at Harvard) and (illegible) and would be a great credit to Canada and our scientific and academic communities.”

[8] In his consideration of the *Koo* questions, the Judge wrote:

> Was the individual physically present in Canada for a long period prior to recent absences which occurred immediately before the application for citizenship? - “Definitely - more than five years with the exception only of brief departures for conferences and only one month back to China to see family- just before going to Harvard University”.
>
> Where are the applicant’s immediate family and dependants (and extended family) resident? - “Her husband and two children now live in U.S. where applicant studies (post doctoral studies at Harvard – but were previously here and will be in the future.”
>
> Does the pattern of physical presence in Canada indicate a returning home or merely visiting the country? - “It [sic] is always returning home without exception. Her friends are here and she loves Canada and much prefers the culture and values of our country to any other.”
>
> What is the extent of the physical absence? (number of days away from Canada VS number of days present in Canada) - “346 here 869 away”.

LEGISLATION AND JURISPRUDENCE

[9] The *Act* provides as follows:

5. (1) The Minister shall grant citizenship to any person who (a) makes application for citizenship;	5. (1) Le ministre attribue la citoyenneté à toute personne qui, à la fois : a) en fait la demande;
(b) is eighteen years of age or	b) est âgée d’au moins dix-huit

over;

(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 in Canada calculated in the following manner:

(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

(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;

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

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

(f) is not under a removal order and is not the subject of a declaration by the Governor in

ans;

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 calculée de la manière suivante :

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

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

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

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

f) n'est pas sous le coup d'une mesure de renvoi et n'est pas visée par une déclaration du gouverneur en conseil faite en application de l'article 20.

14(5) Le ministre et le demandeur peuvent interjeter appel de la décision du juge de la citoyenneté en déposant un avis d'appel au greffe de la Cour dans les soixante jours

Council made pursuant to section 20. 14 (5) The Minister or the applicant may appeal to the Court from the decision of the citizenship judge under subsection (2) by filing a notice of appeal in the Registry of the Court within sixty days after the day on which (a) the citizenship judge approved the application under subsection (2); or (b) notice was mailed or otherwise given under subsection (3) with respect to the application. (emphasis added)	suivant la date, selon le cas : a) de l'approbation de la demande; b) de la communication, par courrier ou tout autre moyen, de la décision de rejet.

[10] Section 5(1)(c) requires an Applicant for citizenship to establish residence in Canada for three of the four years preceding their application; that is at least 1095 days out of 1461 days.

ISSUES

[11] The Minister submits the Citizenship Judge committed a number of errors which are:

1. the Citizenship Judge erred in law by granting the Respondent citizenship based on factors that are irrelevant to the test in Koo;

2. the Citizenship Judge erred in law by providing inadequate reasons;

3. the Citizenship Judge erred in law by ignoring evidence;

4. it was unreasonable for the Citizenship Judge to conclude that the Applicant met the residency requirements as the evidence is clear she failed to met this criteria.

[12] In my view, the issue is whether the Citizenship Judge erred in his application of the Koo test.

ANALYSIS

[13] In *Re Paopadogiorgakis*, [1978] 2 F.C.J. 208 (*Paopadogiorgakis*) Justice Thurlow had interpreted residence as including situations in which an applicant for citizenship has a place in Canada which is used to a sufficient extent to demonstrate the reality of his residing there during the material period even though he is away. The facts in *Paopadogiorgakis* involved a student who had centralized his mode of living in Canada before leaving for university studies in the U.S.A. The student left the remainder of his belongings in Canada, came back at frequent intervals, and, significantly, returned when his studies were concluded. Judge Thurlow found the student's absence was for the temporary purpose of pursuing his studies.

[14] In *Koo* Madam Justice Barbara Reed expanded the view of residency beyond a strict day count. She found in some cases, applicants establish residency through their degree of attachment to Canada even when they may not have been present the minimum number of days. She concluded the residency test should ask if an applicant for citizenship has centralized their existence in Canada. Justice Reed provided a set of questions to help determine if an applicant who falls short of the day count may still satisfy the residency requirement. She stated:

> …the test is whether it can be said that Canada is the place where the applicant "regularly, normally or customarily lives". Another formulation of the same test is whether Canada is the country in which he or she has centralized his or her mode of existence. Questions that can be asked which assist in such a de-termination are:

> (1) was the individual physically present in Canada for a long period prior to recent absences which occurred immediately before the application for citizen-ship;
>
> (2) where are the applicant's immediate family and dependents (and extended family) resident;
>
> (3) does the pattern of physical presence in Canada indicate a returning home or merely visiting the country;
>
> (4) what is the extent of the physical absences - if an applicant is only a few days short of the 1095 day total it is easier to find deemed residence than if those absences are extensive;
>
> (5) is the physical absence caused by a clearly temporary situation such as employment as a missionary abroad, following a course of study abroad as a student, accepting temporary employment abroad, accompanying a spouse who has accepted temporary employment abroad;
>
> (6) what is the quality of the connection with Canada: is it more substantial than that which exists with any other country.

[15] These questions have been adapted into a questionnaire used by citizenship judges when applying the *Koo* test as was done in this case.

[16] Justice Reed cautioned against using this flexible approach to residence to favour applicants a judge might feel sympathy towards. She insisted the *Act* be interpreted consistently so that all applicants are assessed on the same objective criteria.

[17] In the case at hand, the Citizenship Judge concluded the Respondent meets the requirements of the *Koo* test relying on subjective and irrelevant criteria and speculation that reflect his sympathetic impression of her. However, relevant and objective factors emerging from the evidence undermines the Respondent’s application.

[18] The Citizenship Judge fails to address two vital questions. First, did the Respondent centralize her mode of existence before leaving for the U.S.A.? Second, was the quality of her connection with Canada more substantial than with any other country?

[19] The Respondent attended university in Canada on a student visa; she lived with her family, rented property and paid taxes from 2000 to 2004 before leaving for the U.S.A. in 2005. By themselves, these are not strong indicators of a permanent and centralized mode of existence in Canada. Many students temporarily establish themselves in the place where they pursue their studies. The Respondent spent the majority of the relevant four year period, 2004 to 2008, in the U.S.A. pursuing post-doctoral work on a contract basis at Harvard. The Respondent was offered a position at a Canadian university, but she turned it down. I find her attendance at Harvard to be a matter of personal choice rather than necessity. Furthermore, her family has moved from Canada to join the Respondent south of the border. Notwithstanding the Respondent's stated preference for Canada and Canadian culture, it cannot be said the quality of her connection to this country is more substantial than it is to the U.S.A.

[20] I appreciate the Respondent's academic aspirations and her admiration of Canada but those are not the criteria by which citizenship is awarded. Citizenship is awarded when permanent residents satisfy the requirements of the *Act*. As a result, I grant the Minister's appeal of the Citizenship Judge's decision.

[21] The Minister submits the Respondent’s citizenship application lacks sufficient evidence to satisfy the residency requirement for citizenship and urges this Court to dismiss the Respondent’s application instead of referring it back to be re-heard. I agree. This does not prevent the Respondent from reapplying for citizenship in the future.

CONCLUSION

[22] The appeal is allowed. The Citizenship Judge's decision is set aside and the Respondent’s application for citizenship is dismissed.

[23] I make no order of costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The decision of the Citizenship Judge granting citizenship is set aside.

2. The Respondent's application for Citizenship is dismissed.

3. I do not make any award of costs.

"Leonard S. Mandamin"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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