Federal Court | Cour fédérale

Date: 20120329

Docket: T-2185-10

Citation: 2012 FC 374

Ottawa, Ontario, March 29, 2012

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

AMIDU OLANIYI SALAMI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] The Applicant, Mr. Amidu Olaniyi Salami, appeals a decision of a Citizenship Judge (Judge) in which his application for citizenship was denied on the basis that he had not accumulated 1,095 days of residence in Canada within the four (4) years preceding the date of application.

II. BACKGROUND

[2] The facts are straightforward. The Applicant, a citizen of Nigeria, became a permanent resident on January 23, 2006. He applied for citizenship on August 25, 2009, less than four years after becoming a permanent resident. The relevant period for accumulating residency is January 23, 2006 to August 25, 2009.

[3] The Applicant worked from March 2006 to October 2006 for one company and from December 2006 to at least the end of the relevant period for another company.

[4] This second employer was a Canadian technology consulting company that provides consulting and training programs for banking applications to financial institutions in Africa and Europe.

[5] During the Applicant's employment at this company, he travelled to Haiti, Ghana, South Africa, Kenya and Nigeria to execute projects on behalf of the company.

[6] In his citizenship application, the Applicant declared 492 days absence from Canada during the relevant period, all of which (except 20 days) was for purposes of his employment. By his own admission, the Applicant was deficient 278 days residency of the 1,095 days requirement. This does not take into account 11 undeclared stamps in his passport which the Judge noted made the Applicant's residency shortfall even greater. (There is an apparent typographical error in the judgment in referring to declared days of 492 when, in fact, the days declared were 817. Nothing turns on this error.)

[7] The Judge held that even without the undeclared 11 stamps, the Applicant was short 278 days of the required 1,095. The Judge also found no compelling reason to reduce or waive the strict minimum requirement of the Act.

[8] On this appeal the Applicant raised (a) breach of natural justice alleging that the Judge made racial comments; and (b) error in the conclusion on residency.

III. ANALYSIS

[9] The standard of review applicable in this case has been well established in other cases. On an issue of law, the standard is correctness (*Chen v Canada (Minister of Citizenship and Immigration)*, 2006 FC 85 at para 8), as it is for breach of natural justice/reasonable apprehension of bias (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43). On the issue of whether the Applicant met the residency requirements, this is a question of mixed law and fact subject to a standard of reasonableness (*Pourzand v Canada (Minister of Citizenship and Immigration)*, 2008 FC 395 at paras 19-20).

A. *Natural Justice*

[10] This allegation must be addressed first as it undermines the whole process of the judgment under review. The Applicant claimed that the Judge made comments about the Applicant's ethnicity and background. Two specific incidents are cited:

- the Judge asked how many "white Canadians" were employed by the Applicant's second employer; and

- the Judge stated “you cannot bring all those nonsense that you practice in your country to Canada”.

[11] The Applicant outlines these facts in an affidavit. There was no cross-examination on the affidavit and no rebuttal evidence. Most importantly, there is no transcript of the hearing.

[12] There is no basis for the Court to conclude that these words were not spoken although the syntax of the second quote (“those nonsense”) is curious.

[13] However, even accepting that these words were used, there is no context in which to consider the words. The words may be unfortunate but without context, there is no way the Court can determine whether a reasonable, objective and informed person could have a reasonable concern for bias. The evidence is too thin for such a determination; a determination which would seriously affect the Judge.

[14] Therefore, I cannot assess the merits of the allegation and must dismiss the argument on reasonable apprehension of bias. It should be noted that I do not reject the argument on the basis that bias should have been raised at the time of the hearing or later.

B. *Error of Law*

[15] In my view, the judgment under review failed to address the threshold question of whether the Applicant had established residency before considering the quantum of “residency”.

[16] In *Goudimenko v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 447, Justice Layden-Stevenson (when on this Court) outlined the two stage inquiry in paragraph 5(1)*(c)* of the *Citizenship Act*:

> **13** The difficulty with the appellant's reasoning is that it fails to address the threshold issue, his establishment of residence in Canada. Unless the threshold test is met, absences from Canada are irrelevant. *Canada (Secretary of State) v. Yu* (1995), 31 Imm. L.R. (2d) 248 (F.C.T.D.); *Re Papadorgiorgakis*, *supra*; *Re Koo*, *supra*; *Re Choi*, [1997] F.C.J. No. 740 (T.D.). In other words, a two-stage inquiry exists with respect to the residency requirements of paragraph 5(1)*(c)* of the Act. At the first stage, the threshold determination is made as to whether or not, and when, residence in Canada has been established. If residence has not been established, the matter ends there. If the threshold has been met, the second stage of the inquiry requires a determination of whether or not the particular applicant's residency satisfies the required total days of residence. It is with respect to the second stage of the inquiry, and particularly with regard to whether absences can be deemed residence, that the divergence of opinion in the Federal Court exists.

[17] In *Wong v Canada (Minister of Citizenship and Immigration)*, 2008 FC 731, I made the same comment in the context of a case where the record gave rise to the issue of whether and when residency was acquired and whether it had been lost:

> **19** The first error is that the Citizenship Judge erred by failing to make a finding of whether the Applicant had established residency prior to the Period. My decision in *Canada (Minister of Citizenship and Immigration) v. Xiong*, [2004] F.C.J. No. 1356, 2004 FC 1129, held that a citizenship judge must first consider, where the record would support it, whether an applicant has established residence in the time frame before the four-year relevant period and, if so, whether the applicant had maintained that residence for the required amount of time during the relevant period.
>
> **20** There was sufficient material in the record to raise the issue of pre-existing residence but the Citizenship Judge failed to embark on that enquiry. In that regard, the Citizenship Judge erred in law. This is not to suggest that there are no problems with the documents on this issue or certain inconsistencies in the record. However, in my view it was the obligation of the Citizenship Judge to assess whether

> residency had been established, particularly where the Applicant and his family had been in Canada for 12 years, owning their own home, where members of the family had become citizens of Canada and to where the Applicant, having travelled from Canada to other points, including Hong Kong, always returned.

[18] More recently, Justice Mosley affirmed that two stage approach in *Hao v Canada (Minister of Citizenship and Immigration),* 2011 FC 46:

> **24** The determination of residency by citizenship judges has involved a two stage process. A threshold determination is made as to whether residence has been established in Canada. If it has not been established, the matter ends. If residence has been established, the second stage requires a determination as to whether the applicant's residency satisfies the statutorily prescribed number of days. It has remained open to citizenship judges to choose either of the two jurisprudential schools represented by *Pourghasemi* and *Papadogiorgakis/Koo* in making that determination so long as they reasonably applied their preferred interpretation of the statute to the facts of the application before them.

[19] In the present case, the Judge did not make an initial determination with respect to whether and when the Applicant established residence in Canada. On the facts of this case, that issue arises by virtue of the Applicant's presence in Canada from January 23, 2006 to at least December 2006 when he began work and travel with his second employer.

[20] As Justice Zinn observed, in *Canada (Minister of Citizenship and Immigration) v Guettouche*, 2011 FC 574, before one considers whether residency continued despite frequent absences, one must determine whether residence in Canada had been established initially.

> **13** Most troubling is the first issue raised by the Minister - whether the judge erred in failing to determine that Ms. Guettouche had initially established residence in Canada, before embarking on a consideration of the *Koo* factors to determine whether that residency had continued, notwithstanding her absences from Canada. This is of

> particular concern as the record before the judge indicates although Ms. Guettouche entered Canada on August 29, 2000, she left Canada with her husband five months later, on February 3, 2001, and was continually absent from Canada from that date until January 10, 2003, which was within the relevant period for determining residency for citizenship purposes.

IV. CONCLUSION

[21] For these reasons, this appeal is granted and the matter is remitted to another citizenship judge for a fresh determination.

JUDGMENT

THIS COURT'S JUDGMENT is that the appeal is granted, and the matter is to be remitted to another citizenship judge for a fresh determination.

"Michael L. Phelan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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