Federal Court  Cour fédérale

Date: 20120320

Docket: T-1399-11

Citation: 2012 FC 333

Ottawa, Ontario, March 20, 2012

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

BASMA AHMED AL TAYEB

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] The Applicant seeks judicial review of a decision of a Citizenship Judge (Judge) denying citizenship on the basis that the Applicant had not met the residency requirements of the *Citizenship Act*, RSC 1985, c C-29. In this instance, the basis of the denial was that the Applicant was 750 days under the required 1,095 days of residency required.

II. BACKGROUND

[2] The Applicant, Ms. Al Tayeb, is a citizen of Saudi Arabia. She became a permanent resident of Canada on July 1, 1997 and made her most recent citizenship application on February 20, 2008. Therefore, the relevant period for assessing whether she met the residency requirement is February 20, 2004 to February 20, 2008 (the Relevant Period).

[3] The Applicant was registered at the University of Toronto between September 2003 and February 2004. After that she returned to Saudi Arabia to continue her studies. The Applicant's reason for changing schools was variously described as facilitating a change in her study program or because the Canadian study program was too difficult.

[4] In addition to the Applicant's course of studies from September 2003 to the present, she worked for her family's company selling Canadian products and providing training in the use of physiotherapy equipment exported from Canada to Saudi Arabia. The company is owned by the Applicant's parents who are also the directors and the officers (except for the Applicant who is a Vice President).

[5] The Applicant pays taxes in Canada, has an OHIP card, a SIN card, Canadian credit cards and Canadian bank accounts, owns property with her parents and lives in a condo owned by her parents. Further, the Applicant has a child born in Canada, and a brother who is also a Canadian citizen.

[6] In the Applicant's citizenship application, she admitted that she was significantly short of the required days of residence in Canada. She admitted to being present 383 days, later adjusted by the Judge.

[7] The Judge decided this application using the test in *Pourghasemi (Re) (FCTD)* (1993), 62 FTR 122, which is basically the "quantitative" method of considering "residency" whereby an applicant is required to have 1,095 days of physical presence in Canada. The Applicant was clearly and significantly deficient in terms of physical presence in Canada during the Relevant Period.

III. ANALYSIS

[8] This Court has created considerable confusion by establishing at least two approaches to considering "Canadian residence" for purposes of citizenship – the quantitative approach (as earlier described) and the qualitative approach (of which there are two streams).

[9] I do not intend to add to that debate as this case can be resolved on a different basis. I would, however, observe that the principle of reviewing questions of law from a tribunal or a court on a reasonableness standard can lead to the very kind of problem now seen in citizenship matters. There are at least two reasonable interpretations of law and an applicant is confined to the arbitrariness of luck as to which legal view is applied by a citizenship judge. The time may come when a judge will be unable or unwilling to decide an appeal because of this conflict which may invite the Court of Appeal to resolve the conundrum. This is not that case.

[10] This case may be determined more simply on the basis that the Judge did not engage in the type of inquiry mandated regardless of which of the two approaches to residency is eventually adopted.

[11] In *Goudimenko v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 447, Layden-Stevenson J. (as she then was) laid out a two-stage inquiry for determining whether the residency requirement under the *Citizenship Act* had been met:

> **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.

[12] In both *Canada (Minister of Citizenship and Immigration) v Xiong*, 2004 FC 1129, and *Wong v Canada (Minister of Citizenship and Immigration)*, 2008 FC 731, this Court referred to the first stage inquiry being engaged where the appeal record raises the issue.

[13] Justice Mosley in *Hao v Canada (Minister of Citizenship and Immigration)*, 2011 FC 46, reaffirmed that approach:

> **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.

[14] The facts of this case raise the issue of pre-existing residency. The Judge never considered whether residency had been established prior to the Relevant Period. Unlike *Canada (Minister of Citizenship and Immigration) v Guettouche*, 2011 FC 574, where Justice Zinn might have been prepared to infer that the threshold issue had been decided because the judge considered the *Koo* (qualitative) test, no such inference can be drawn by virtue of adopting the *Pourghasemi* (quantitative) test.

IV. CONCLUSION

[15] Therefore, this appeal is granted, and the matter is referred back to a different citizenship judge for a new determination.

JUDGMENT

THIS COURT'S JUDGMENT is that the appeal is granted, and the matter is to be referred back to a different citizenship judge for a new determination.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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