Federal Court  Cour fédérale

Date: 20130702

Docket: T-21-13

Citation: 2013 FC 732

Ottawa, Ontario, July 2, 2013

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

MAHTIS MOSHIRZADEH MOAYEDI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] Ms Mahtis Moayedi, a citizen of Iran, applied for Canadian citizenship in April 2010. Under Canadian law, an applicant must be resident in Canada for three out of the four years preceding the application (*Citizenship Act*, RSC 1985, c C-29, s 5(1)(*c*) – see Annex for provisions cited). A citizenship judge found that Ms Moayedi had not fulfilled that requirement. She argues that the

judge made an error of law by applying the wrong test of residency and rendered an unreasonable decision. She asks me to quash it.

[2] In my view, the citizenship judge's decision was not unreasonable. The judge applied the correct test and took account of all the relevant facts and criteria. Therefore, I cannot overturn the judge's decision.

[3] There are two issues:

1. Did the citizenship judge apply the correct test?
2. Did the citizenship judge render an unreasonable decision?

II. The Citizenship Judge's Decision

[4] The judge summarized the relevant facts. Among the most pertinent were these:

- Ms Moayedi arrived in Canada in 2001 and attended the University of Calgary until her graduation in June 2006;
- She acquired permanent resident status on April 17, 2008;
- She married a Canadian citizen on September 17, 2006; they lived in Alberta in rented accommodation and then in a condominium they purchased together;
- She applied for citizenship on April 23, 2010, making the relevant period of residence from April 23, 2006 to April 23, 2010;

- Each day of her residence in Canada from April 23, 2006 to April 17, 2008, the date on which she acquired permanent residence, could only be counted as a half-day of residence according to the *Citizenship Act*, s 5(1)(*c*)(i);
- Soon after she acquired permanent residence, Ms Moayedi left Canada to live with her husband in Texas – she stayed there from May 13, 2008 to June 14, 2009;
- Ms Moayedi left Canada again in July 2010 to work in the United States;
- She flew back to Canada for a few days in September 2012 for her citizenship hearing;
- Her husband continues to work in the US;
- Ms Moayedi was 407 days short of the required 1,095 days of residence.

[5] The judge applied the test in *Re Koo*, [1993] 1 FC 286 (FCTD), which involves the weighing of six factors:

(1) Was the individual physically present in Canada for a long period prior to recent absences which occurred immediately before the application for citizenship?

[6] The judge found that Ms Moayedi had been physically present in Canada for several years prior to the relevant period, with only one short absence of 23 days.

(2) Where are the applicant's immediate family and dependents resident?

[7] Ms Moayedi lived with her husband in Canada for about eighteen months after their marriage in September 2006 before he moved to the US. He moved back to Canada in June 2009 but returned to the US in November 2009 and is still there. Her parents and brother live in Iran. Her sister, as well as her husband's parents and brother, are Canadian citizens and live here.

(3) Does the pattern of physical presence in Canada indicate a returning home or merely visiting?

[8] The judge found that Ms Moayedi's trips to Canada largely exhibited a returning home, except when she was actually living the US in 2008 to 2009. In June 2009, she returned home.

(4) What is the extent of the physical absences? If an applicant is only a few days short of the 1,095 day total it is easier to find deemed residence than if those absences are extensive.

[9] The judge found that Ms Moayedi's shortfall of 407 days was 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, or accompanying a spouse who has accepted temporary employment abroad?

[10] The judge noted that Ms Moayedi's absence from Canada in 2008 and 2009 to be with her husband in the US appeared to be temporary. Both she and her husband returned to Canada in 2009. However, given that her husband returned to the US in November 2009 and has remained there

suggests that her absence from Canada is not a clearly temporary situation. She went back to the US in 2010 to be with him.

(6) What is the quality of the connection with Canada: is it more substantial than that which exists with any other country?

[11] The judge noted Ms Moayedi's tangible connections with Canada - her family connections, property, employment, Canadian bank accounts, and investments.

[12] On the other hand, Ms Moayedi had a substantial connection with the US during her time there. She left her job in Canada, leased her condominium, acquired a US driver's license, and worked for a non-Canadian company. Further, her husband returned to the US in the fall of 2009, which reduced her connection to Canada.

[13] Overall the judge concluded that Ms Moayedi had not met the residency requirement because she had not centralized her mode of existence in Canada during the relevant time frame. The judge also observed that Ms Moayedi had not met the three-year residency requirement. Accordingly, the judge denied Ms Moayedi's citizenship application.

III. Issue One - Did the citizenship judge apply the correct test?

[14] Ms Moayedi argues that the judge conflated the three-year residency test with the *Koo* factors. After citing the *Koo* test, the judge stated: "Thus, if Canada is not the applicant's primary

residence for at least three out of the four year period preceding the date of application, the application should not be approved".

[15] In my view, the judge clearly understood the *Koo* test. The decision sets out the test in detail and reviews the evidence relevant to each factor. The statement quoted above simply does not correspond with the test the judge applied. In context, I cannot conclude that the judge's statement reflected a misunderstanding or misapplication of the test.

IV. Issue Two - Did the citizenship judge render an unreasonable decision?

[16] Ms Moayedi argues that the judge rendered an unreasonable decision by counting three of the six *Koo* factors against her, after finding the first three of them in her favour.

[17] In particular, Ms Moayedi contends that her 407-day shortfall was not "extensive". Further, the judge focussed too greatly on her one-year absence from Canada, finding that her absence was not temporary, and that her attachment was divided between Canada and the US.

[18] In my view, the judge's conclusions were not unreasonable.

[19] Clearly, Ms Moayedi fell substantially short of the requirement that she be resident in Canada for three out of the four years prior to her application. The judge reasonably concluded that the shortfall was "extensive".

[20] Further, Ms Moayedi's absence from Canada to accompany her husband in the US was not a clearly temporary situation. She obtained employment in the US for a non-Canadian company during that period. Further, her husband returned to the US and continues to work there, as does Ms Moayedi.

[21] In addition, the judge found that Ms Moayedi had centralized her existence in the US while she was working there. Similarly, it was relevant that her husband returned to work in the US and that, once again, she followed him there. The judge was entitled to take into account Ms Moayedi's conduct after she filed her application for citizenship, as well as her behaviour during the relevant time frame (*Sotade v Canada (Minister of Citizenship and Immigration)*, 2011 FC 301, at para 15.)

V. Conclusion and Disposition

[22] The citizenship judge applied the proper test and reached a conclusion on the evidence that is defensible based on the facts and the law. Therefore, I have no basis on which to overturn the judge's decision. Accordingly, I must dismiss this appeal, with costs.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The appeal is dismissed with costs.

"James W. O'Reilly"
Judge

Annex

Citizenship Act, RSC 1985, c C-29

Grant of Citizenship

5. (1) The Minister shall grant citizenship to any person who

[…]

(*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,

Loi sur la citoyenneté, LRC 1985, ch C-29

Attribution de la citoyenneté

5. (1) Le ministre attribue la citoyenneté à toute personne qui, à la fois :

…

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,

FEDERAL COURT

SOLICITORS OF RECORD

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