Federal Court  Cour fédérale

Date: 20170726

Docket: T-206-17

Citation: 2017 FC 723

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Montréal, Quebec, July 26, 2017

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

MOTCHIAN AMAN

Respondent

JUDGMENT AND REASONS

I. Background

[1] The *Citizenship Act*, RSC, 1985, c. C-29 [Act] is not arbitrary regarding the length of time a person must be present to become a Canadian citizen. A line has been drawn and must be drawn to ensure that the time a person must be present in Canada to become a citizen does not become optional or academic. Clearly, a range of exceptions could demonstrate that the Act

leads to incomprehensible situations, given that a lack of employment often places an individual between a rock and a hard place in terms of the essential durations for establishment in Canada. This is reflected in the decisions of judges, who are also between a rock and a hard place, knowing that the interpretation of the Act leads to an outcome that is difficult to deliver, and thus to accept, but, nevertheless, it is the Act that does not offer any choice in this type of case before the Court.

> There exists a long line of authority from this Court wherein it has been determined that to meet the requirements of the *Citizenship Act*, residence must first be established and then it must be maintained: *Canada (Minister of Citizenship and Immigration) v. Chen*, [1999] F.C.J. No. 877 (T.D.) per Richard, A.C.J. (as he then was); *Canada (Minister of Citizenship and Immigration) v. Yu*, [1999] F.C.J. No. 421 (T.D.) per Lutfy, J.(as he then was); *Canada (Secretary of State) v. Yu* (1995), 31 Imm.L.R. (2d) 248 (F.C.T.D.) per Rothstein, J. (as he then was) [now a Supreme Court justice]; *Re Sun* (1992) 58 F.T.R. 264 per Noël, J. (as he then was); *Re Choi*, [1997] F.C.J. No. 740 (T.D.) per Nadon, J. (as he then was); *Young v. Canada (Minister of Citizenship and Immigration)* (1999) 9 Imm.L.R. (3D) 234 (F.C.T.D.) per Evans, J. (as he then was); *Chan v. Canada (Minister of Citizenship and Immigration)*, *supra*; *Badjeck v. Canada (Minister of Citizenship and Immigration)* (2001) 19 Imm.L.R. (3D) 8 (F.C.T.D.) per Rouleau, J.; *Re Shaw* (1991), 49 F.T.R. 270 per Pinard, J.; *Re To* (1997), 37 Imm.L.R. (2d) 274 (F.C.T.D.) per Teitelbaum, J.; *Re Lo* (1996), 128 F.T.R. 247 per MacKay, J.; *Canada (Minister of Citizenship and Immigration) v. Liu*, [2000] F.C.J. No. 323 (T.D.) per Gibson, J.; *Canada (Minister of Citizenship and Immigration) v. Rahman*, [1999] F.C.J. No. 655 (T.D.) per Simpson, J.; *Jreige v. Canada (Minister of Citizenship and Immigration)* (1998) 175 F.T.R. 250 per Lemieux J.; *De Lima v. Canada (Minister of Citizenship and Immigration)* 2002 FCT 852, [2002] F.C.J. No. 1139 per Martineau, J.; *Re Papadogiorgakis*, [1978] 2 F.C. 208 (T.D.) per Thurlow, A.C.J.; *Canada (Minister of State, Multiculturalism and Citizenship) v. Shahkar*, [1991] 1 F.C. 177 (T.D.) per Addy, J.; *Re Hung* (1996), 106 F.T.R. 236 per Dubé, J.; *Canada (Minister of Citizenship and Immigration) v. Ho* (1999) 48 Imm.L.R. (2D) 262 (F.C.T.D.) per Cullen, J.; *Canada (Secretary of State) v. Martinson* (1987), 13 F.T.R. 237 per Martin, J. [Reference added.]

(*Ahmed v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1067.)

II. Nature of the matter

[2] This is an application for judicial review of a decision by a citizenship judge who, on January 5, 2017, approved the respondent's application for Canadian citizenship under the requirements of paragraph 5(1)(c) of the Act.

III. Facts

[3] The respondent, a 49-year-old citizen of Côte d'Ivoire, arrived in Canada as a permanent resident on December 17, 2008. His spouse and their two youngest children also became permanent residents on December 17, 2008, while their oldest son became a permanent resident on February 15, 2009.

[4] Before arriving in Canada, the respondent and his spouse resided in Geneva, Switzerland, and both worked for the Office of the United Nations High Commissioner for Refugees [HCR]. When they moved to Canada, the respondent's spouse began graduate studies, and their children began attending school, while the respondent resumed his foreign missions for the HCR on January 11, 2009. Despite his experience and qualifications, he was unable to find work in Canada and had to meet his family's needs until his spouse was able to find work. When his spouse completed her studies and found a job in Canada, the respondent apparently returned to begin searching for a job from February to October 2013. When his spouse was laid off after 20 months, he had no choice but to accept another foreign mission for the HCR.

[5] The respondent's spouse and two youngest children obtained Canadian citizenship on August 1, 2014.

[6] On July 24, 2014, the respondent filed an application for Canadian citizenship, for the reference period from July 24, 2010, to July 24, 2014. During the relevant period, he reported 1,040 days of absence and 420 days present in Canada, a shortfall of 675 days of physical presence.

[7] On December 2, 2015, the respondent attended an interview with a citizenship officer and obtained a result of 19/20 on a citizenship test. On January 5, 2017, the respondent appeared at a hearing before a citizenship judge.

IV. Decision

[8] On January 5, 2017, the citizenship judge found, on the balance of probabilities, that the respondent met the residency obligation set out in paragraph 5(1)(c) of the Act.

[9] The citizenship judge chose to apply the qualitative residency criteria developed in *Koo (Re)*, [1993] 1 FCR 286, 1992 CanLII 2417 (FC) [*Koo*] to determine whether the respondent had centralized his mode of existence in Canada.

[10] The citizenship judge found that Canada was the place where the respondent "regularly, normally or customarily lives," based on the six questions proposed by Justice Reed in *Koo*:

> [TRANSLATION]
> 1. The applicant was physically present in Canada for a long period prior to recent absences which occurred immediately before the application for citizenship. He arrived on December 17, 2008, and was therefore in Canada for approximately 19 months before the start of the reference period.
>
> 2. The applicant's immediate family and dependants, i.e. his spouse and their three children, live in Canada and were studying or working in Canada during the reference period.
>
> 3. The applicant's pattern of physical presence indicates that he returns to his home country. At the end of each humanitarian mission, he reported that he returned home.
>
> 4. The extent of the applicant's physical absences from Canada represents a shortfall of 675 days of physical presence. However, the applicant met the requirements, given the reasons for his temporary absences and the fact that he always returns to Canada, where he built his life with his family.
>
> 5. The applicant's physical absence is attributable to a clearly temporary situation, as all his trips were made for his work with the HCR, which assigned him contracts of varying length. He filed his income tax returns and paid taxes in Canada throughout the reference period.
>
> 6. The applicant has a strong connection to Canada. His spouse and their children study and work here. The applicant and his spouse have owned the family home in Canada since 2009 and a condo occupied by their son since 2011.

V. Issue

[11] The parties identified the following issue: Did the citizenship judge err in finding that the respondent met the requirements set out in paragraph 5(1)(c) of the Act?

[12] The parties agree that the reasonableness standard of review applies to a decision made by a citizenship judge (*Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9, at

paragraph 47; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 SCR 708, 2011 SCC 62, at paragraph 12 [*Newfoundland Nurses*]).

VI. Relevant provisions

[13] At the time when the respondent applied for citizenship, the Act stipulated the following:

Grant of citizenship	**Attribution de la citoyenneté**
5 (1) The Minister shall grant citizenship to any person who	**5** (1) Le ministre attribue la citoyenneté à toute personne qui, à la fois :
…	[…]
(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:	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) 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	(i) un demi-jour pour chaque jour de résidence au Canada avant son admission à titre de résident permanent,
(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;	(ii) un jour pour chaque jour de résidence au Canada après son admission à titre de résident permanent;

VII. Analysis

[14] For the reasons that follow, this application for judicial review is allowed.

A. *First factor – The condition of prior establishment in Canada from the Koo test*

[15] The applicant submits that the citizenship judge committed errors in applying the *Koo* test. First, the citizenship judge apparently failed to analyze whether the respondent would satisfy the first factor of the *Koo* test, namely the condition of prior establishment of his residence in Canada (*Canada (Citizenship and Immigration) v. Chang*, 2013 FC 432, at paragraph 4 [*Chang*]; *Canada (Citizenship and Immigration) v. Ojo*, 2015 FC 757, at paragraphs 25–27 [*Ojo*]; *Canada (Citizenship and Immigration) v. Maher*, 2016 FC 42, at paragraph 35; *Canada (Citizenship and Immigration) v. Huang*, 2016 FC 1348, at paragraph 6). She allegedly never specifically addressed the preliminary issue, and it is impossible to infer from her reasons whether she did so. The applicant notes that, during his initial stay of 25 days in Canada, the respondent took steps to get his spouse and children settled, but his family's establishment is not equivalent to his own establishment, which the citizenship judge allegedly confused (*Canada (Citizenship and Immigration) v. Ntilivamunda*, 2008 FC 1081, at paragraph 13 [*Ntilivamunda*]). The decision is apparently fatally flawed because it was unreasonable to find that the respondent had already established his residence in Canada prior to the reference period.

[16] The respondent argues, to the contrary, that the citizenship judge implicitly found that he had established his residence in Canada since December 17, 2008, based on clear facts showing

that he had fully, permanently and unequivocally transferred his ties to Canada (*Ojo*, above, at paragraph 28). It can be inferred that the citizenship judge was satisfied that the respondent had met the prior establishment condition (*Tulupnikov v. Canada (Citizenship and Immigration)*, 2006 FC 1439, at paragraph 14; *Canada (Citizenship and Immigration) v. Tazaki*, 2011 FC 1173, at paragraph 32). Moreover, the respondent's case apparently differs from the cases cited by the applicant, as he did not maintain ties with his country of origin (*Ojo*, above), has no home or family outside of Canada (*Chang*, above), and did not return to his country of origin to continue working (*Ntilivamunda*, above).

[17] The Court finds that this issue is not determinative for the outcome of this judicial review and is satisfied with the respondent's arguments that the citizenship judge implicitly found that he had met the conditions of prior establishment set out in the *Koo* test.

B. *Second factor – The six criteria of the Koo test*

[18] Alternatively, the applicant submits that the citizenship judge erred in analyzing the criteria established in *Koo*. Rather than making findings based on the six factors and assessing and weighing the favourable and unfavourable findings, the citizenship judge apparently simply restated the respondent's explanations for his absences. Moreover, the citizenship judge's findings are apparently neither justified, transparent nor intelligible, as the respondent does not meet certain criteria.

[19] The respondent instead qualifies the criteria of the *Koo* test as being guidelines, examples of questions to be used to determine whether the applicant has centralized his or her mode of

existence in Canada. He has no ties to his country of origin, Côte d'Ivoire, to his last country of residence, Switzerland, or to the various unstable countries where he was deployed by the HCR during missions and where he lived in temporary shelters. The only country where he is established is Canada, and there is no alternative country of reference (*Collier v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1511).

(1) First criterion: physical presence in Canada for a long period before being absent

[20] Contrary to what the citizenship judge found, the applicant does not consider the respondent to have been physically present in Canada for a long period before being absent from Canada prior to the reference period. She allegedly incorrectly considered the 19-month period from December 2008 to July 2010, during which the respondent was with his family in Canada for only 25 days before resuming foreign missions for the HCR.

[21] The respondent submits that the citizenship judge simply did not express herself well but that this is not a critical error that is subject to judicial review. She was aware that the respondent had continued his missions for the HCR. It would therefore be logical for the citizenship judge to instead refer to the fact that the respondent had been a permanent resident of Canada for 19 months prior to the start of the reference period. The respondent notes that the decision-maker is not held to an abstract standard of perfection and that the decision must be reviewed in its entirety, without dwelling on a single problematic reason (*R. v. Sheppard*, [2002] 1 SCR 869, 2002 SCC 26; *Newfoundland Nurses*, above, at paragraph 12).

(2) Third criterion: the person's physical presence in Canada—a return or visit to the country?

[22] The applicant submits that the respondent was only visiting when he returned to Canada, as he spent more than 50% of his time abroad. The evidence apparently shows that the respondent has continually travelled back and forth since his family arrived in Canada and that he is still working abroad at this time. His short stays in Canada do not support a finding that Canada is the country where he regularly, normally or customarily lives.

[23] The respondent instead submits that the citizenship judge drew the only reasonable conclusion that could be made based on the facts. Following HCR missions to unstable countries, he returned home, to Canada, where his family, his home and all his connections are established. The respondent's absences are allegedly a temporary situation, while waiting for his spouse to find full-time employment to meet the family's needs so that he could stop his HCR missions and find work in Canada. The decision by the citizenship judge was therefore supported by the evidence. Physical presence of less than 50% of the time is allegedly insufficient to find that an applicant is only visiting Canada (*Badjeck v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1301, at paragraphs 42–43; *Pourzand v. Canada (Citizenship and Immigration)*, 2008 FC 395, at paragraph 25).

(3) Fourth criterion: extent of the physical absences

[24] The applicant notes that the extent of the respondent's physical absences is considerable; he was present in Canada only 38% of the time during the reference period. The citizenship

judge allegedly erred by substituting the requirements of the Act regarding physical ties with the explanation for the respondent's absences of his family's financial needs (*Canada (Citizenship and Immigration) v. Olafimihan*, 2013 FC 603, at paragraphs 15, 28–29 [*Olafimihan*]).

[25] The respondent notes that the citizenship judge considered his physical absences from Canada and that she did not commit any error in assessing them. The extent of the physical absences is allegedly not a solely quantitative test. All the respondent's ties—emotional, financial—are in Canada, and his absences were simply a necessity in order to meet his family's needs.

(4) Fifth criterion: the temporary nature of the physical absence from Canada

[26] The applicant argues that the respondent's physical absences are not attributable to a clearly temporary situation. The applicant notes that the respondent has conducted HCR missions from 2006 to the present and that the respondent filed no evidence of a job search in support of his citizenship application. The citizenship judge allegedly placed emphasis on the justification for the respondent's absences rather than analyzing the criterion set out in *Koo* (*Ntilivamunda*, above, at paragraphs 17–18). Under the circumstances, it was unreasonable to find that the respondent's absences were a temporary situation (*Olafimihan*, above, at paragraph 27).

[27] The respondent argues that the fifth criterion in *Koo* concerns the physical absence and the reasons for it and, thus, that the citizenship judge was required to examine this factor. The respondent reiterates that his travels on HCR missions were always temporary and limited to a

period of less than three months and that he always intended to find permanent employment in Canada when his family's financial resources allowed.

(5) Analysis

[28] The Court finds that the citizenship judge erred in finding that the respondent had been physically present in Canada for a long period, that is, 19 months, when, by his own admission, he left his family after they were settled in Canada less than one month after arriving. Nonetheless, this error alone is not fatal to the citizenship judge's decision.

[29] However, the Court finds that the citizenship judge erred with regard to the respondent's physical presence in Canada, the extent of his absences and their temporary nature. As a result of his job, the respondent was simply not present in Canada for a sufficient period to show that he regularly, normally or customarily lives here. His job, which is commendable and which even helps Canada in its efforts with respect to refugees, cannot offset the considerable extent of his absences from Canada. Although the Court regrets that the respondent had difficulties finding work in Canada that corresponds to his talent, it adopts the words of Justice Martineau in similar circumstances:

> [17] On the other hand, the respondent's physical absences from Canada over the period in question were not entirely due to a purely temporary situation. To the contrary, according to the evidence in the record, it is clear that it is a permanent situation. While the respondent's future intentions are not relevant in assessing the nature of the absences over the period in question (*Khan v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 47, [2006] F.C.J. No. 73 (QL); *Paez v. Canada (Minister of Citizenship and Immigration)*, [2008] F.C.J. No. 292 (QL), 2008 FC 204), the respondent indeed indicated that he intended to retire from the WHO only in eight (8) years. At this rate, while he spent

> all of his leave in Canada (36 days per annum, according to the record), the respondent did not, even over eight years, accumulate the number of days required to genuinely centralize his existence in Canada.
>
> [18] It is deplorable that for one reason or another, the respondent cannot now work as a physician in the province of Quebec. Unfortunately, the respondent does not satisfy the residence requirement of the Act and his application for citizenship is clearly premature. In this case, the respondent is currently at an impasse similar to a number of permanent residents who want to obtain Canadian citizenship, but whose professional or other obligations abroad are an obstacle for establishing residence within the meaning of the Act.
>
> (*Ntilivamunda*, above.)

VIII. Conclusion

[30] The Act is not arbitrary regarding the length of time a person must be present to become a Canadian citizen. A line has been drawn and must be drawn to ensure that the time a person must be present in Canada to become a citizen does not become optional or academic. Clearly, a range of exceptions could demonstrate that the Act leads to incomprehensible situations, given that a lack of employment often places an individual between a rock and a hard place in terms of the essential durations for establishment in Canada. This is reflected in the decisions of judges, who are also between a rock and a hard place, knowing that the interpretation of the Act leads to an outcome that is difficult to deliver, and thus to accept, but, nevertheless, it is the Act that does not offer any choice in this type of case before the Court.

[31] For these reasons, the application for judicial review is allowed.

JUDGMENT in T-206-17

THE COURT ORDERS that the application for judicial review be allowed, the decision be set aside, and the case be referred back for reconsideration by a different citizenship judge. There are no questions of general importance to be certified.

"Michel M.J. Shore"
Judge

Certified true translation
This 11th day of November 2019

Lionbridge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-206-17
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