

Date: 20080618

Docket: T-1892-07

Citation: 2008 FC 757

Ottawa, Ontario, June 18th 2008

PRESENT: The Honourable Orville Frenette

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

HANI HUSSEIN

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Minister of Citizenship and Immigration (the “Minister”) seeks to set aside the decision of a Citizenship Judge on September 13, 2007 to grant Mr. Hussein (the “Applicant”) citizenship despite his falling short of the residency requirements set out in paragraph 5(1)(c) of the *Citizenship Act*, R.S.C. 1985, c.C-29 (the “Act”).

[2] Mr. Hussein was born in Jordan and became a permanent resident of Canada on June 28, 2003. Before coming to Canada, he had worked as an accountant at the University of Jordan. At the time of his application for Canadian citizenship on October 7, 2006, he had been physically present

in Canada for 984 days and absent for 212. The absences were a trip to Jordan from June 10 to September 17, 2005 to look after his ailing mother and from May 29 to September 19, 2006 to visit family and to work in Oman. On June 4, 2006 Mr. Hussein accepted a job offer to work in Muscat, Oman for a 2-year contract, terminating on June 28, 2008. These absences left him a total of 111 days short of the 1095 days of physical presence required and 212 days absent from the country in the 1460 days preceding his application.

[3] Mr. Hussein's wife and two young children arrived with him in 2003 and also applied for (and were granted) citizenship. They did not accompany him on his earlier travels, but after their application for citizenship (around November 2006) they joined him in Oman, where they since have all resided in a rented house.

I. The decision

[4] The Citizenship Judge, in a $\frac{3}{4}$ page hand-written decision, without analysis of the evidence, decided to grant citizenship by crediting the days Mr. Hussein was physically out of Canada toward his residency requirement; he accepted that he had to leave to obtain adequate employment and was saving money to open a business Canada. He also noted the relative total numbers of absence and presence (i.e. 212 vs. 984).

II. The issues

[5] The Applicant urges the Court to decide on four issues, but there is really only one issue in this case: “Did the Citizenship Judge err in granting citizenship to Mr. Hussein, when he was 111 days short of the requirement?”

III. The applicable legislation

[6] The provisions of section 5 of the *Act* are as follows:

Grant of citizenship

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

- (a) makes application for citizenship;
- (b) is eighteen years of age or 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

Attribution de la citoyenneté

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

- a) en fait la demande;
- b) est âgée d’au moins dix-huit 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

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

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;

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

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

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

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

(f) is not under a removal order and is not the subject of a declaration by the Governor in Council made pursuant to section 20.

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.

Residence

Période de résidence

(1.1) Any day during which an applicant for citizenship resided with the applicant's spouse who at the time was a Canadian citizen and was employed

(1.1) Est assimilé à un jour de résidence au Canada pour l'application de l'alinéa (1) c) et du paragraphe 11(1) tout jour pendant lequel l'auteur d'une

outside of Canada in or with the Canadian armed forces or the federal public administration or the public service of a province, otherwise than as a locally engaged person, shall be treated as equivalent to one day of residence in Canada for the purposes of paragraph (1)(c) and subsection 11(1).

Idem

(2) The Minister shall grant citizenship to any person who

(a) is a permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act, and is the minor child of a citizen if an application for citizenship is made to the Minister by a person authorized by regulation to make the application on behalf of the minor child; or

(b) was born outside Canada, before February 15, 1977, of a mother who was a citizen at the time of his birth, and was not entitled, immediately before February 15, 1977, to become a citizen under subparagraph 5(1)(b)(i) of the former Act, if, before February 15, 1979, or within such extended period as the Minister may authorize, an application for citizenship is made to the Minister by a person authorized by regulation to make the application.

demande de citoyenneté a résidé avec son époux ou conjoint de fait alors que celui-ci était citoyen et était, sans avoir été engagé sur place, au service, à l'étranger, des forces armées canadiennes ou de l'administration publique fédérale ou de celle d'une province.

Idem

(2) Le ministre attribue en outre la citoyenneté :

a) sur demande qui lui est présentée par la personne autorisée par règlement à représenter celui-ci, à l'enfant mineur d'un citoyen qui est résident permanent au sens du paragraphe 2(1) de la Loi sur l'immigration et la protection des réfugiés;

b) sur demande qui lui est présentée par la personne qui y est autorisée par règlement et avant le 15 février 1979 ou dans le délai ultérieur qu'il autorise, à la personne qui, née à l'étranger avant le 15 février 1977 d'une mère ayant à ce moment-là qualité de citoyen, n'était pas admissible à la citoyenneté aux termes du sous-alinéa 5(1)b(i) de l'ancienne loi.

Waiver by Minister on compassionate grounds

(3) The Minister may, in his discretion, waive on compassionate grounds,

(a) in the case of any person, the requirements of paragraph (1)(d) or (e);

(b) in the case of a minor, the requirement respecting age set out in paragraph (1)(b), the requirement respecting length of residence in Canada set out in paragraph (1)(c) or the requirement to take the oath of citizenship; and

(c) in the case of any person who is prevented from understanding the significance of taking the oath of citizenship by reason of a mental disability, the requirement to take the oath.

Special cases

(4) In order to alleviate cases of special and unusual hardship or to reward services of an exceptional value to Canada, and notwithstanding any other provision of this Act, the Governor in Council may, in his discretion, direct the Minister to grant citizenship to any person and, where such a direction is made, the Minister shall forthwith grant citizenship to the person named in the

Dispenses

(3) Pour des raisons d'ordre humanitaire, le ministre a le pouvoir discrétionnaire d'exempter :

a) dans tous les cas, des conditions prévues aux alinéas (1)d) ou e);

b) dans le cas d'un mineur, des conditions relatives soit à l'âge ou à la durée de résidence au Canada respectivement énoncées aux alinéas (1)b) et c), soit à la prestation du serment de citoyenneté;

c) dans le cas d'une personne incapable de saisir la portée du serment de citoyenneté en raison d'une déficience mentale, de l'exigence de prêter ce serment.

Cas particuliers

(4) Afin de remédier à une situation particulière et inhabituelle de détresse ou de récompenser des services exceptionnels rendus au Canada, le gouverneur en conseil a le pouvoir discrétionnaire, malgré les autres dispositions de la présente loi, d'ordonner au ministre d'attribuer la citoyenneté à toute personne qu'il désigne; le ministre

direction.

procède alors sans délai à
l'attribution.

IV. The nature of the recourse from a Citizenship Judge

[7] Before discussing the standard of review, one must consider that citizenship “appeals” are not ordinary appeals nor trials *de novo*; they are governed by s. 18(1)(4) of the *Federal Courts Act* (R.S., 1985, c. F-7).

[8] Therefore, to set aside a decision of the Citizenship Court, the Federal Court must find a reviewable error (*Canada (MCI) v. Tovbin (2000)*, 190 F.T.R. 102, 10 Imm. L.R. (3d) 306 (FCTD)). As for the standard of review, relating to the period of time required, the interpretation of s. 5 gave rise to various interpretations of the word “residing” which was not defined in the *Citizenship Act* (*Canada (MCI) v. Chen*, 2003 FCT 192, 228 F.T.R. 111; *Goudimenko v. Canada (MCI)*, 2002 FCT 447, 113 A.C.W.S. (3d) 766 (*Goudimenko*)).

[9] Case law reveals that the Federal Court has interpreted the word “residency” by invoking tests such as “the centralised mode of existence test” or the “quality of attachment test” but the law stipulates that the basic test is the physical presence in Canada at the appropriate time (*Canada (MCI) v. Adler*, 2002 FCT 227, 23 Imm. L.R. (3d) 241).

[10] The *Act* is very specific in that the basic test is the physical presence in Canada and it is only when this test fails, that the secondary tests created by the jurisprudence can be invoked.

V. The Standard of review

[11] It has been decided that the standard of review on an appeal of this nature invoked here is correctness insofar as it relates to the applications of the residency statutory test set out in para. 5(1)(c) of the *Act*, i.e. was there residency in Canada? (*Lam v. Canada (MCI)* (1999), 164 F.T.R. 177, 87 A.C.W.S. (3d) 432; *Zhang v. Canada (MCI)*, 2001 FCT 501, 105 A.C.W.S. (3d) 1017 (T.D.) at para. 7.

[12] In *Goudimenko*, above, Justice Layden-Stevenson suggested the existence of two stages required with respect to the residency requirements and the relationship between these stages. At the first stage, the Court determines if residency in Canada was established. If not, the matter ends there. If it is established there was residency, the required numbers of years or days and the various tests to apply as whether absences can be deemed residence must be decided.

[13] The question as to whether the residency requirement has been met involves a mixed question of law and fact; it is to be decided according to the standard of reasonableness (*Farshchi v. Canada (MCI)*, 2007 FC 487, 157 A.C.W.S. (3d) 701).

[14] However, it is recognized that some deference is granted to citizenship decisions by nature of the special degree of knowledge and experience of citizenship judges (*Chen v. Canada (MCI)*, 2004 FC 1693 at para. 5, 135 A.C.W.S. (3d) 773; *Morales v. Canada (MCI)*, 2005 FC 778, 45 Imm. L.R. (3d) 284).

[15] My colleague Justice Edmond P. Blanchard recently noted the effect of the Supreme Court's decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, 164 A.C.W.S. (3d) 727, on the review of the decision of a citizenship judge. He came to the conclusion that the appropriate standard is reasonableness and I concur in that finding: *Zhang v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 483, [2008] F.C.J. No. 603 (QL).

[16] That means that, as noted by Justice James O'Reilly in *Ishfaq v. Canada (MCI)*, 2008 FC 477, [2008] F.C.J. No. 598:

4 I can overturn the judge's decision only if I find it was unreasonable, in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, 2008 SCC 9, at para. 47.

VI. Analysis

[17] The Applicant wishes me to find that the Citizenship Judge erred either in applying the wrong test or by erroneously crediting the respondent with establishment in Canada throughout his absences. For the former allegation, he states that it is unclear which approach the Citizenship Judge took and that if he invoked the centralized mode of living test set out in *Koo Re*, [1993] 1 F.C. 286, [1992] F.C.J. No. 1107 (QL) (*Koo*), it was misinterpreted.

[18] The respondent asserts that there was sufficient evidence before the Judge to support his finding based on the “centralized mode of living” assessment, given the continuous residence of his wife and sons and that the decision to credit him with residence was reasonable. The respondent also notes that his wife and children are being deprived of their status, despite having qualified on the basis of the strict physical presence test. He claims their presence or absence from Canada after their application for citizenship is immaterial.

[19] The Applicant relies upon the decision in *Xu v. Canada (MCI)*, 2005 FC 700, 139 A.C.W.S. (3d) 433, where Justice de Montigny set aside a decision refusing citizenship in favour of an Applicant who had been in Canada for 571 days out of 1095. However, the evidence showed she travelled to China with her husband who was CEO of a company in Canada which had a joint venture with a Chinese company. They maintained a residence in Canada and has fixed roots here.

[20] The first test, as has been noted many times by this Court, is quantitative: the numeric assessment of days the person was physically resident in Canada. The second is qualitative: the deemed residence on the basis of a centralized mode of living. The factors which may be assessed under the second test to determine whether to deem residence despite physical absence, as set out in *Koo*, are as follows:

- 1) Was the individual physically present in Canada for a long period prior to recent absences which occurred immediately before the application for citizenship?
- 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 1,095-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 employment abroad?
- 6) What is the quality of the connection with Canada: is it more substantial than that which exists with any other country?

[21] For the instant case, it is unfortunate that the Citizenship Judge failed to individually analyse each of the *Koo* factors. He did not refer to any test. There is no analysis of the evidence and the reasons given are insufficient to constitute a thorough appreciation of the law and the facts.

[22] The Citizenship Judge failed to explain adequate reasons for failure to respect the requirement of the s. 5(1) c) of the *Act* by the Respondent. He did not analyse or comment upon the lengthy time the Respondent spent outside Canada between 2003 and 2006. Since June 4, 2006, he accepted employment for a period of two years in Oman. His wife and children joined him in November 2006 and they have no residence in Canada since then.

[23] I realise that the judge could take into account, as one of the *Koo* factors, the employment and residence outside the country and explain why it was not necessarily a negative factor.

[24] In the *Leung* case, the Court rejected an appeal by a citizenship Applicant who had a shortfall of physical residence because of the employment outside Canada and the Court explained why working outside Canada can not always be a valid reason for deemed residence. An Applicant for citizenship does not have the same freedom as a Canadian citizen because of the provisions of s. 5(1) of the *Act* (see *Leung (Re) (1991)*, 42 F.T.R 149 (FCTD), 13 Imm. L.R. (2d) 93).

[25] In another case where the facts resemble the ones in the present one, Justice Kelen decided that employment in the U.S., limiting Mr. Barker to a physical presence in Canada of 892 out of 1095 days during a four-year period, notwithstanding a long desire to return to Canada, did not satisfy the residency requirement of the *Act* (*Canada (MCI) v. Barker*, 2003 FCT 226, 229 F.T.R. 154).

[26] Justice Kelen reasoned that Mr. Barker had not centralized his mode of existence in Canada after his move to the U.S. Justice Kelen also decided that the Applicant's intention to return to Canada after 2004 should not have been considered by the Citizenship Judge (para.19)

[27] Therefore, considering the above analysis, I must conclude that the Citizenship Judge committed a reviewable error which compels me to annul the decision he rendered in the present case.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The appeal be granted; and
2. The decision of the Citizenship Judge be quashed.

"Orville Frenette"

Deputy Judge

FEDERAL COURT
SOLICITORS OF RECORD

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