Date: 20080926

Docket: T-421-08

Citation: 2008 FC 1081

Ottawa, Ontario, September 26, 2008

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

AUGUSTIN NTILIVAMUNDA

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an appeal brought by the Minister of Citizenship and Immigration (the Minister) pursuant to subsection 14(5) of the *Citizenship Act*, R.S.C. 1985, c. C-29 (the Act), in regard to a decision of Alain Gariépy, a citizenship judge (the citizenship judge), dated January 17, 2008, allowing the citizenship application filed by the respondent.

[2] On July 4, 2001, the respondent, Augustin Ntilivamunda, arrived in Canada from Djibouti with his family as a refugee from Rwanda. On July 26, 2001, twenty-two (22) days after his arrival,

the respondent left Canada to resume his work abroad as a physician for the World Health Organization (the WHO), a position that he has held since August 21, 1991. On August 6, 2004, the respondent filed an application for Canadian citizenship. To date, the respondent still travels for the WHO, and is currently the coordinator for the AIDS project in Swaziland. All of the members of the respondent's immediate family settled in Canada and have now lived here for six years. All are Canadian citizens.

[3] The conditions regarding the period of residence are set out at paragraph 5(1)(*c*) of the Act, which provides:

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	(i) un demi-jour pour chaque jour de résidence au Canada avant son admission à titre de résident permanent,

day of residence, and	
(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; […]

[4] The citizenship judge determined that the days that the respondent spent abroad could be counted as days that he was physically present in Canada, and therefore that he satisfied the requirements provided under paragraph 5(1)(*c*) of the Act:

> [TRANSLATION]
>
> …
>
> Based on the information provided by the applicant at the hearing as well as the analysis of the documentary evidence in the record, pursuant to the rule of the balance of probabilities, I find that the applicant centralized his mode of existence in Canada beginning in July 2001 and that he then maintained very close ties with his adopted country when he was forced to stay abroad. The 961 days of work that he performed in Africa in the course of temporary postings by the World Health Organization during trips after July 2001 are therefore accepted as days of residence in Canada.
>
> The applicant therefore meets the residence requirements stipulated under paragraph 5(1)(*c*) of the Act.

[5] The appropriate standard of review for the citizenship judge's decision on the issue of whether or not a permanent resident satisfies the residence obligation, which is a question of mixed fact and law, is that of reasonableness (*Pourzand v. Canada (Minister of Citizenship and Immigration)*, [2008] F.C.J. No. 485 (QL) paragraph 19, 2008 FC 395).

[6] The term “residence” is not expressly defined at subsection 2(1) of the Act. Therefore, the judges of our Court have expressed different opinions regarding whether or not it is necessary to maintain a physical presence in Canada during the relevant four-year period. The decision in *Zhao v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1536, [2006] F.C.J. No. 1923 (QL), properly summarizes the state of the case law:

> [50] There are three general tests that have been developed by the Federal Court, and a citizenship judge may adopt and apply whichever one he or she chooses as long as it is applied properly: *So v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 733 (CanLII), 2001 FCT 733 at paragraph 29. Under the first test, a person cannot reside in a place where the person is not physically present. Thus, it is necessary for a potential citizen to establish that he or she has been physically present in Canada for the requisite period of time. This flows from the decision in *Pourghasemi (Re) (F.C.T.D.)* (1993), 60 F.T.R.122, 19 Imm. L.R. (2d) 259 at paragraph 3 (F.C.T.D.), where Justice Muldoon emphasized how important it is for a potential new citizen to be immersed in Canadian society. Two other contrary tests represent a more flexible approach to residency. First, Thurlow A.C.J. in *Papadogiorgakis*, [1978] 2 F.C. 208, 88 D.L.R. (3d) 243 (F.C.T.D.) held that residency entails more than a mere counting of days. He held that residency is a matter of the degree to which a person, in mind or fact, settles into or maintains or centralizes his or her ordinary mode of living, including social relations, interests and conveniences. The question becomes whether an applicant’s linkages suggest that Canada is his or her home, regardless of any absences from the country.
>
> [51] Justice Reed has outlined the third approach, which is really just an extension of Justice Thurlow’s test. In *Re: Koo,* 1992 CanLII 2417 (F.C.), [1993] 1 F.C. 286 59 F.T.R. 27 (F.C.T.D.), Justice Reed held that the question before the Court is whether Canada is the country in which an applicant has centralized his or her mode of existence. . . .

[7] In this case, the citizenship judge chose to apply the requirements established in *Koo (Re)* (F.C.T.D.), [1992] F.C.J. No. 1107 (QL) paragraph 10, [1993] 1 F.C. 286 (*Koo*). In *Koo*, Madam Justice Reed stated that the issue before the Court was whether Canada was the country where an applicant had "centralized his mode of existence." To do so, the following factors must be weighed:

> . . .
>
> (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 dependants (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 temporary employment abroad?
> (6) what is the quality of the connection with Canada: is it more substantial than that which exists with any other country?

[8] In this case, the applicant argues that the citizenship judge erred in his analysis on four of the six requirements established by *Koo*, namely the first, the third, the fourth and the fifth criteria. The applicant argues that in doing so it was unreasonable according to the evidence to find that the respondent had centralized his mode of living in Canada since he did not fulfil the majority of the factors set out in *Koo*.

[9] In response to the first requirement set out in *Koo*, the citizenship judge states the following:

> [TRANSLATION]
>
> . . .
>
> He settled in Québec with his entire family: his wife, his five children and his young sister who is in his care. During his first stay in Québec, he spent 22 days here – from July 04 to July 26, 2006 [*sic*] – the period during which he permanently settled himself and his family in Québec.
>
> During this period he, with his wife, did the following:
>
> - took out private insurance for himself and his family pending receipt of health insurance coverage from the Government of Quebec;
> - took steps to obtain health insurance for the entire family;
> - took steps to obtain his social insurance number;
> - registered all of the children in educational institutions (universities and secondary school);
> - purchased a home to house the family;
> - purchased furniture and all the material necessary for the household;
> - took steps in Hull to obtain the "travel document" which would enable him to return to work for the WHO. …
>
> Given the information provided at the hearing and the abundance of documentary evidence filed at my request, I find that the applicant centralized his existence and the existence of his dependants in Canada when he arrived here on July 4, 2001, even if this first stay was only for 22 days. None of these dependants (7) left Canada afterwards and indeed they have already obtained Canadian citizenship without difficulty. The applicant had been obliged to leave Canada to resume his posting (Djibouti) since he had exhausted his leave.

[10] In response to the third requirement set out in *Koo, supra*, regarding the state of the respondent's physical presence in Canada, namely whether it indicated that the respondent was returning home to his country or merely visiting, the citizenship judge states:

> [TRANSLATION]
>
> Since his arrival in Canada, the applicant has systematically spent all of his vacations here. He did not travel abroad except for the trips for his employer, the World Health Organization.
>
> As he could not be here as he wanted to be, he contacted his family every day by e-mail and every week by telephone.
>
> The applicant has 36 days of annual leave, all of which he spends with his family in Canada. Therefore, in 2007, he came three times: in February, in May and in November.

[11] With regard to the fourth requirement set out in *Koo*, namely regarding the period the respondent was absent from Canada, the citizenship judge states:

> [TRANSLATION]
>
> During the period being considered, the applicant had been absent from Canada for 961 of 1128 days, leaving 167 days of physical presence in Canada, for six stays of 28 days on average during the three years covering the period being examined.

[12] In regard to the fifth requirement set out in *Koo*, the citizenship judge determined that the respondent's physical absences were due to a patently temporary situation since [TRANSLATION] "World Health Organization assignments are temporary indeterminate postings" and that [TRANSLATION] "it was not the [respondent's] first choice to continuously work abroad."

[13] The case law indicates that the establishment of residence in Canada is a condition precedent to obtaining citizenship: *Ahmed v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 1415 (QL), 2002 FCT 1067. Therefore, in what is now a well-established trend in

the case law, the Court decided that to fulfil the conditions required by the Act, residence had first to be established and, second, be maintained. Where the requirement of preliminary establishment in Canada is not established, the absences from Canada are not relevant and the assessment stops there. While the respondent shows the usual passive signs of residing in Canada, the evidence in the record in regard to determining whether he was established in Canada are not persuasive.

[14] In my opinion, the respondent's twenty-two (22) day stay in Canada before leaving again for abroad was clearly insufficient to amount to genuine establishment within the meaning of the case law (*Cheng v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 614 (QL); *Canada (Minister of Citizenship and Immigration) v. Vericherla*, 2003 FCT 267, [2003] F.C.J. No. 360 (QL). Accordingly, it appears that the citizenship judge made an unreasonable error in determining that the respondent had centralized his mode of existence in Canada, given the minimal number of days the respondent spent in Canada (*Abderrahim v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1486, [2002] F.C.J. No. 1867 (QL); *Zeng v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1752, [2004] F.C.J. No. 2134 (QL); *Shrestha v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 594, [2003] F.C.J. No. 778 (QL); *Canada (Minister of Citizenship and Immigration) v. Chen*, 2004 FC 848, [2004] F.C.J. No. 1040 (QL) and *Canada (Minister of Citizenship and Immigration) v. Zhou*, 2008 FC 939, [2008] F.C.J. No. 1170 (QL)).

[15] On the other hand, given the very considerable number of days that the respondent was absent, it cannot reasonably be argued that the respondent "centralized his mode of living in

Canada." According to the evidence, it is clear that the respondent does not "regularly, normally or customarily" live in Canada.

[16] The respondent's counsel assigns great importance to the fact that the respondent's wife and children all live in Canada. It is reasonably one of the reasons why the family members, who were not born in Canada, were awarded Canadian citizenship. Yet, the fact that the respondent's family members were established in Canada, that they had obtained citizenship and had not left Canada after their arrival is not determinative in this case. Bear in mind that it is important to distinguish the respondent's personal situation from that of his family (*Paez v. Canada (Minister of Citizenship and Immigration)*, [2008] F.C.J. No. 292 (QL) paragraph 15, 2008 FC 204; *Eltom v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1979 (QL) paragraph 22, 2005 FC 1555; *Faria v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 1849 (QL) paragraph 12, 2004 FC 1385; *Canada (Minister of Citizenship and Immigration) v. Chang*, [2003] F.C.J. No. 1871 (QL) paragraph 9, 2003 FC 1472).

[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.

[19] For the reasons stated, the appeal must be allowed and the decision of the citizenship judge dated January 17, 2008, must be set aside.

ORDER

THE COURT ORDERS that the appeal be allowed and sets aside the decision of the citizenship judge dated January 17, 2008.

"Luc Martineau"

Judge

Certified true translation

Kelley Harvey, BA, BCL, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-421-08
STYLE OF CAUSE:	MCI v. AUGUSTIN NTILIVAMUNDA
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