Date: 20090320

Docket: T-924-08

Citation: 2009 FC 299

Ottawa, Ontario, March 20, 2009

PRESENT: The Honourable Mr. Justice Blanchard

BETWEEN:

MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

Zein FARAG

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Zein Farag (the Respondent) applied for Citizenship on March 19, 2003. On April 11, 2008, Citizenship Judge Bitar (the Judge) determined that the Respondent had satisfied the residency requirement of paragraph 5(1)(*c*) of the *Citizenship Act*, R.S.C. 1985, c. C-29 (the Act) and granted his application.

[2] The Minister of Citizenship and Immigration appeals the judge's determination by way of judicial review of the decision pursuant to subsection 14(5) of the Act, on the grounds that the citizenship judge:

(1) erred in law by failing to determine whether the respondent had initially established residence in Canada;

(2) erred by making findings of fact without regard to the material before her, and

(3) failed to observe a principle of natural justice by providing inadequate reasons for her decision.

[3] The Minister asks me to allow the appeal and set aside the decision. For the following reasons I will allow the appeal.

I. Facts

[4] The Respondent is a citizen of France originally from Egypt. He was sponsored by his former spouse and was landed in Canada on October 24, 1998. He became a permanent resident that same day.

[5] In 2002, the Respondent and his wife divorced. The Respondent lost custody of the children as well as access to the Matrimonial home.

[6] The Respondent applied for Citizenship on March 19, 2003. The applicable review period was therefore the period between March 18, 1999 and March 19, 2003.

[7] On February 18, 2005, the Respondent was issued a departure order because a Minister's delegate determined that the Respondent was a person described in subsection 41(b) of the *Immigration and Refugee Protection Act* S.C. 2001, c. 27 (IRPA) for failing to comply with the residency obligations in section 28 of the IRPA. The Respondent appealed the departure order to the Immigration Appeal Division (IAD).

[8] On September 26, 2007, the IAD allowed the Respondent's appeal on grounds that humanitarian and compassionate considerations including the best interests of children warranted granting special relief in the circumstances. However, the IAD found that, on the evidence before it, the Respondent's primary residence from May 1999 to May 2004 was France, and that the reason for his many absences from Canada was his intent to continue business operations in France. In addition, the IAD found no reliable evidence supporting the Respondent's claim that he had tried to establish himself in Canada since his landing or had made a reasonable attempt to return to Canada at the first opportunity.

[9] On November 21, 2007, the Respondent renewed his efforts to obtain Canadian citizenship and completed a revised Residence Questionnaire indicating that his initial calculation for absences during the relevant review period was incorrect (he claims to have misread the question), to which he attached a hand-written schedule showing 300 days of absences from Canada during this same review period.

[10] A Citizenship Officer (the Officer) reviewed the renewed application and noted that the photocopy provided of a passport was missing pages and was partly illegible. The Officer concluded that the Respondent had stayed outside of Canada voluntarily to run his business in France during the review period, that his trips to Canada constituted a pattern of visiting, and that he had not established himself permanently in Canada. In addition, the Officer was unable to establish the exact length of the Respondent's physical presence in Canada because of insufficient documentation.

[11] This same Officer prepared a Hearing Form on January 19, 2008, noting that she was unable to assess the Respondent's physical presence in Canada and that the Respondent's photocopy of his passport could not be used to ascertain physical presence as pages were missing and it was illegible.

[12] On February 4, 2008, the Respondent appeared at his hearing before the Judge. The Judge granted the Respondent's citizenship on April 11, 2008 and notified the Minister of her decision.

II. Impugned Decision

[13] I summarize below the findings upon which the Judge based her decision. In her decision the Judge refers to the Respondent as "the client".

- The client's physical absence from Canada was for business reasons only;
- The client's connection with Canada is very strong;
- Despite being now divorced and alienated from his children, the client works at Ft. McMurray and hopes that the situation with his family will improve;

- The client's date of landing was 24 October 1998 and in 1999 he spent 20 days in France for business. His revised Residence Questionnaire indicates that he had been absent Canada for 300 days, and this matches what appears in his "3 passports";
- The client's ex-wife and three children, his two brothers and his sister are in Canada. Other members of his family are in Egypt and France;
- During the hearing, the client stated that since 1999, he has always lived in Canada but would travel to France on occasion for business;
- During the hearing, the client was very cooperative and was aware he was under oath; and
- The client has his children's best interests in mind.

[14] The Judge ended the hearing by requesting, within 30 days, a letter from the Respondent's manager in France detailing his role in the business and length of stay in France, as well as a letter confirming his employment at Fort McMurray – both to be written under oath. The Judge also requested documents from the Respondent's membership at Clubfit as well as receipts from his child support payments.

[15] These documents were received and considered by the Judge before rendering her final decision. No further reference is made to these documents or to their content in the Judge's decision. There are no additional reasons provided concerning the content of these documents.

III. Issues

[16] The Applicant raises the following issues:

(1) Did the Judge fail to observe a principle of natural justice by providing inadequate reasons for her decision?

(2) Did the Judge err by failing to determine whether the respondent had initially established residence in Canada?

(3) Did the Judge err by misapplying the *Koo* factors?

IV. Standard of Review

[17] Adequacy of reasons is a question of procedural fairness and natural justice reviewable on a standard of correctness. See: *Canada (Minister of Citizenship and Immigration) v. Arastu* 2008 FC 1222, at para. 21.

[18] Whether an applicant meets the residency requirement involves a question of mixed fact and law. On such questions Citizenship Judges are owed a degree of deference by reason of their special knowledge and expertise in these matters. The jurisprudence of this Court has established the applicable standard of review for such a question to be reasonableness. *Zhang v. Canada (Minister of Citizenship and Immigration)* 2008 FC 483, at para. 7-8.

[19] Whether the Citizenship Judge misapplied the proper legal test for residency is a question of law reviewable on the standard of correctness. See also *David Dunsmuir v. Her Majesty the Queen in Right of the Province of New Brunswick*, [2008] S.C.J. No. 9, 2008 SCC 9.

V. Statutory Scheme

[20] The grant of citizenship is governed by section 5 of the Act, which I reproduce below.

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 :
(*a*) makes application for citizenship;	*a*) en fait la demande;
(*b*) is eighteen years of age or over;	*b*) est âgée d'au moins dix-huit ans;
(*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;
(*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	*f*) n'est pas sous le coup d'une mesure de renvoi et n'est pas visée par une déclaration

in Council made pursuant to section 20.	du gouverneur en conseil faite en application de l'article 20.

VI. Analysis

The law

[21] A two-stage inquiry exists with respect to the residency requirements of paragraph 5(1)(c) of the Act. Mme Justice Layden-Stevenson described the approach to be followed in *Goudimenko v. Canada (Minister of Citizenship and Immigration)* [2002] FCT 447, at paragraph 13:

> 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.

[22] The Act does not define "residency". As stated above, there has been divergence in this Court as to the test to be applied in determining whether an applicant has satisfied the residence requirements. In short, these tests are those set out in *Koo, Pourghesemi*, and *Papadogiorgakis*. A citizenship judge may adopt any of the three residency tests, and not be in error, provided they apply the relevant principles to the facts of the case.

[23] The Applicant argues that the Judge failed to provide adequate reasons for her decision, failed to determine if the Respondent had established residency in Canada and erred by misapplying the *Koo* factors.

[24] This case will turn on the adequacy of the Judge's reasons and whether she turned her mind to the first stage inquiry in respect to the threshold question of whether or not the Respondent had established residence in Canada.

[25] The *Pourghasemi* test, [1993] F.C.J. No. 232 (Lexis), requires an applicant be physically present in Canada for at least 1095 days. The other two tests take more flexible approaches to the residency requirement. For example the *Koo* test, [1992] F.C.J. No. 1107 (Lexis), requires an assessment of an applicant's absences from Canada with the aim of determining what kind of connection an applicant has with Canada and whether the applicant "regularly, normally or customarily lives" in Canada.

[26] The standard form, employed by the Citizenship Judge in this case, creates a presumption, that the Citizenship Judge is following the *Re Koo* approach to residency. There is no dispute here that the judge applied the *Re Koo* test. However, the presumption does not extend to the first stage inquiry. The Judge made no express finding as to whether or not, and when, the Respondent had established residence in Canada. At pages 3 and 4 of the notice of decision to the Minister, the Judge indicated that the Respondent's connection to Canada is very strong; his date of landing was October 24, 1998; his first trip to France was in 1999; and that, according to what he said, he always lived in Canada since 1999, but occasionally he will travel to France because of his 50% ownership in a supermarket.

[27] Apart from the above factors considered by the Judge, there was other evidence before her which supported the contention that the Respondent had not established residency in Canada in the applicable time period. Both the Citizenship Officer who referred the matter to the Judge and the IAD concluded that residency had not been established by the Respondent in the applicable time period. The IAD cited the Respondent's April 17, 2002 affidavit before the Alberta Court of Queen's Bench, wherein he attests that, "[W]hile I am still residing in France, I do verily believe that it is reasonable for me to have access to the children several times per year." It is true that the record before the IAD is not the same as the record before the Judge, however, both proceedings dealt with the Respondent's establishment in Canada.

[28] It was incumbent on the Judge to make a clear finding on the threshold question of establishment in Canada which she did not do. Even with a generous read of the reasons, it cannot be discerned that the Judge turned her mind to the above findings of the IAD and Citizenship officer which squarely contradict a finding of the Respondent's establishment in Canada during the applicable period. Having failed to expressly deal with this evidence, I am left to conclude the Judge erred by deciding the application without regard to the material before her. In the circumstances this amounts to a reviewable error.

[29] I also find the Judge's reasons to be inadequate. Given the nature of the evidence before her regarding the Respondent's pattern of establishment in Canada during the applicable period, clear reasons would have been required by the Judge on the threshold question of residency. By failing to provide sufficient reasons, the Judge committed a reviewable error.

VII. Conclusion

[30] For the above reasons the appeal will be allowed. The judge's decision granting the Respondent citizenship is set aside. The matter will be sent back for reconsideration by a different citizenship judge to be decided in accordance with the above reasons.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The appeal is allowed.

2. The April 11, 2008, decision of the Citizenship Judge granting the Respondent citizenship is set aside.

3. The matter is sent back for reconsideration by a different citizenship judge to be decided in accordance with the above reasons.

"Edmond P. Blanchard"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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