Date: 20091113

Docket: T-379-09

Citation: 2009 FC 1159

Vancouver, British Columbia, November 13, 2009

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

GLENDA ELAINE RYAN

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Minister of Citizenship and Immigration appeals the decision of a Citizenship Judge who approved the respondent's application for citizenship on the basis that the Citizenship Judge erred in finding that the respondent had met the residency requirement under paragraph 5(1)(c) of the *Citizenship Act*. The respondent did not file a record in these proceedings nor did she appear for the hearing. For the reasons that follow, the appeal is granted.

[2] Ms. Ryan is a citizen of New Zealand who became a permanent resident in Canada on July 6, 1980. For the next twenty-one years, she lived, worked and played an active role in the

community of Campbell River, B.C. Her husband, also a New Zealand citizen, obtained Canadian citizenship during those years. Her son was born and raised as a Canadian citizen and continues to live and work on Vancouver Island.

[3] In August 2001, Ms. Ryan and her husband sold their house in Canada and returned to New Zealand. In her answers to the residence questionnaire submitted with her application, Ms. Ryan indicated that from March 2001 to January 2004 they were travelling and visiting family in New Zealand. The reason Ms. Ryan gave for this extended stay, as described in her application, was “to support my husband”. From other information in the record, it appears that Ms. Ryan had lost her job with a B.C. airline that was closed down at that time and Mr. Ryan had discovered a biological family and siblings in New Zealand that he had never known and with whom he wished to establish a bond.

[4] It appears from letters in the record that the couple intended to eventually return to Canada but Ms. Ryan became ill with a debilitating disease known as Guillain-Barré syndrome which rendered her immobile for an extended period. Mr. Ryan returned to Canada in September 2006 and took a job at Fort McMurray, Alberta; from there he commutes back and forth to Vancouver Island when his wife is in Canada.

[5] Ms. Ryan rejoined her husband in May 2007 and completed her application for citizenship on January 4, 2008. Thus, the relevant period to calculate Ms. Ryan’s residency was from January 4, 2004 to January 4, 2008. In her application, Ms. Ryan declared that she had been absent from Canada for a total of 1120 days leaving her with 340 days of actual physical presence in

Canada. Based on the documentary evidence, including stamps in her New Zealand passport, a citizenship officer calculated that the actual period of absence was 1136 days. The Citizenship Judge referred to that number and also to a figure of 1138 days, apparently in error.

DECISION UNDER APPEAL:

[6] On January 16, 2009, the Citizenship Judge approved Ms. Ryan's application. While noting that it was a difficult case, he found her to be credible and determined that despite having been in Canada for only 324 days during the relevant period, she nevertheless met the residency requirement. He accepted that the effect of contracting a rare and serious disease was to unavoidably extend her absences from Canada during the statutory period for over a year.

[7] The Citizenship Judge noted that the jurisprudence does not require physical presence for the whole 1,095 days and concluded that the residency test can be articulated as follows: is Canada the place where the applicant regularly, normally, or customarily lives; or, in another formulation of the same test, which the Citizenship Judge found particularly helpful: is Canada the country in which the applicant has centralized his or her mode of existence?

[8] Applying the criteria for determining residency articulated by Madam Justice Reed in *Koo (Re)* (F.C.T.D.), [1993] 1 F.C. 286, [1992] F.C.J. No. 1107, the Citizenship Judge noted that prior to the statutory four year period, Ms. Ryan had been present in Canada for 8,481 days before her first extended absence. He found that she returned to Canada twice during the statutory period and observed that "[h]er two lengthy absences coincided with the statutory period in sharp contrast to her previously firm grip on Canadian soil."

[9] The Citizenship Judge considered that the applicant's family ties are now predominantly Canadian, while noting that she does have a daughter who is resident in New Zealand. He found that the pattern of her absences, taken in the context of her many years in Canada, and in the context of her son's continuing presence in Canada, and of her husband's return to Canada in 2006 indicate a returning home rather than merely visiting Canada. In his view, there was no indication of any act or intent to establish a home outside of Canada since the applicant first came here in 1980.

[10] The Citizenship Judge recognized that the applicant's absences from Canada were considerable, placing a burden on her to establish sufficient ties to Canada for the purposes of meeting the residence requirements of the Act. He took into account that she no longer would need to visit her husband in New Zealand as he had relocated to Canada. The Citizenship Judge accepted that this was always their intention. He found that the quality of their connection to Canada was of strong and long-standing family, employment and social ties which, while interrupted by two "lengthy and extremely inconveniently timed" absences, had been renewed since her return to Canada from New Zealand.

[11] In the result, the Citizenship Judge found that the applicant had sufficiently centred her mode of existence in Canada to meet the residency requirements of the Act.

ISSUE:

[12] The issue in this appeal is the following:

> Did the Citizenship Judge err in determining that Ms. Ryan met the residence requirement under paragraph 5(1)(c) of the *Citizenship Act*?

STANDARD OF REVIEW:

[13] Paragraph 5(1)(c) of the Act provides that the Minister shall grant citizenship to any person who, within the four years immediately preceding the date of his or her application, has accumulated at least three years of residence. “Residence” is not defined in the statute but has been the subject of judicial interpretation.

[14] The question of whether a person has met the residency requirements under the Act is a question of mixed law and fact for which the appropriate standard of review is reasonableness: *Chowdhury v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 709, [2009] F.C.J. No. 875, at para. 24, citing: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9, at paras. 44, 47, 48 and 53; see also *Pao Chi Chu v. Canada (Minister of Citizenship and Immigration)* 2008 FC 905, [2008] F.C.J. No. 1122.

[15] Under this standard, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir*, supra, at para.47. Thus, the Court should only intervene if the decision of the Citizenship Judge was unreasonable in the sense that it falls outside that range: *Chowdhury*, supra, at para. 28.

[16] Citizenship Judges are owed some deference on questions of mixed fact and law because of their special knowledge and expertise in these matters. The decision will be reasonable “as long as there is a demonstrated understanding of the case law and appreciation of the facts and their

application to the statutory test": *Canada (MCI) v. Ntilivamunda*, 2008 FC 1081, [2008] F.C.J. No. 1365, at para. 5; *Canada (MCI) v. Fu*, 2004 FC 60, [2004] F.C.J. No. 88, at paras. 6-7; *Rasaei v. Canada (MCI)*, 2004 FC 1688, [2004] F.C.J. No. 2051, at para. 4; *Zeng v. Canada (MCI)*, 2004 FC 1752, [2004] F.C.J. No. 2134, at paras. 7-10; *Huang v. Canada (MCI)*, 2005 FC 861, [2005] F.C.J. No. 1078, at paras. 11-12; *Xu v. Canada (MCI)*, 2005 FC 700, [2005] F.C.J. No. 868, at para. 13; *Rizvi v. Canada (MCI)*, 2005 FC 1641, [2005] F.C.J. No. 2029, at para. 5; *Chen v. Canada (MCI)*, 2006 FC 85, [2006] F.C.J. No. 119, at paras. 6-8.

ARGUMENT AND ANALYSIS:

[17] Since Ms. Ryan was in Canada for only 324 days out of the minimum statutory requirement of 1095 days during the relevant period, the Minister's position is that the Citizenship Judge erred by determining that Ms. Ryan had centralized her mode of living in Canada and in approving her application for Canadian Citizenship. While "residence" is not defined in the Act, the allowance for an absence of one year creates a strong inference that an applicant's physical presence in Canada is required during the remaining three years: *Canada (Minister of Citizenship and Immigration) v. Ntilivamunda*, 2008 FC 1081, [2008] F.C.J. No. 1365, at para. 6; *Morales v. Canada (MCI)*, 2005 FC 778, [2005] F.C.J. No. 982, at para. 8.

[18] The Minister made a number of submissions relating to the application of the *Koo* criteria. The most significant in my estimation are that the Citizenship Judge:

a. failed to properly consider the evidence and, in particular, failed to consider the pattern of Ms. Ryan's absences and whether Ms. Ryan's absences were recent or occurred over a long period of time before the filing of the application;

b. failed to consider that the respondent's extended family lived in New Zealand, including her daughter, and that her husband was also a New Zealand citizen;

c. erred by not requesting documentary evidence showing that Ms. Ryan had, in fact, contracted Guillain-Barré Syndrome;

d. failed to consider that Ms. Ryan had not sought medical assistance or treatment in Canada, that she had relinquished her medical insurance in Canada and that she was covered by New Zealand health care;

e. failed to consider that she had sold all of her property in Canada when she moved in New Zealand;

f. erred by relying too heavily on the fact that Ms. Ryan's husband and son had obtained Canadian citizenship and, in the case of the former, returned to Canada and in the case of the latter, never left Canada;

g. erred by relying on Ms. Ryan's future intentions of remaining in Canada as this is not a relevant consideration in assessing the nature of her absences over the period in question;

h. erred by failing to conduct any comparison of Ms. Ryan's connection with Canada with the quality of her connection to New Zealand;

i. failed to consider that Ms. Ryan's absences from Canada occurred precisely during the relevant period; and,

j. failed to consider that her absences were not "inconveniently timed", but deliberate.

[19] As noted above, the respondent took no active part in these proceedings and submitted no written representations.

[20] As Mr. Justice Michel Shore stated in *Morales v. Canada (MCI)*, 2005 FC 778, [2005] F.C.J. No. 982, at para. 8:

> Parliament has specifically provided that an applicant for citizenship may be absent from Canada for one year during the four-year period prior to the date of his or her application. Consequently, Parliament has specified that an applicant must be a resident in Canada for at least three years, or 1095 days. Although the term "residence" is not defined in subsection 2(1) of the Act, the allowance for an absence of one year creates a strong inference that an applicant's physical presence in Canada is required during the remaining three years. [Emphasis added]

[21] I agree with the highlighted statement and agree with the Minister's position that, in the circumstances of this case, approving an applicant who is 771 days short of the required 1,095 falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[22] In this instance, the Citizenship Judge appears to have applied what Mr. Justice James O'Reilly characterized as a qualitative or functional test in *Canada (Minister of Citizenship and Immigration) v. Nandre*, 2003 FCT 650, [2003] F.C.J. No. 841. Justice O'Reilly held that if an applicant established functional residence at least 1,095 days prior to the application for citizenship, then the applicant could satisfy the residency test despite not having 1,095 days of physical presence. In *Nandre*, however, functional residence was established immediately prior to the relevant period and not, as here, with an intervening gap of three years. In that case, the principal applicant was required to be frequently absent for the purpose of his immigration consulting business but, in every other respect, had centralized his existence in this country before the start of the relevant period.

[23] I note that the Minister's argument included an erroneous calculation of Ms. Ryan's residence in New Zealand prior to the relevant period. In both the written representations and oral argument it was said to be a "full 10 years before…as she was living in New Zealand for six years immediately prior to the relevant period." That is not correct. She was in New Zealand for three years prior to the commencement of the relevant period in January 2004. Nonetheless, this three years was a lengthy period to be absent from her country of customary residence. Moreover, Ms. Ryan had sold her property in Canada and relinquished her medical insurance. The circumstances of her departure suggest an intent to sever the functional residence previously acquired.

[24] It is unfortunate that Ms. Ryan did not take steps to obtain Canadian citizenship during the 21 years she spent in Campbell River. She may have formed a sincere intention to return to Canada and make it her home before her disabling condition intervened. But the pattern of her travels back and forth to New Zealand since then and her limited presence in this country during the relevant period suggest a more transient connection. She has taken seasonal employment while here and found accommodation through house-sitting and short term rentals between returns to New Zealand for extended periods. Indeed, when this matter came on for hearing, the registry was advised that Ms. Ryan was in New Zealand. No explanation was provided as to why she could not have arranged her affairs to submit an affidavit and written representations or to attend court. That does not indicate an earnest desire to centralize her mode of existence in this country.

[25] I agree with the applicant that the Citizenship Judge erred in failing to compare the nature of Ms. Ryan's connection to New Zealand with that of her connection to Canada during the relevant

period. The fact that she may, at some future point in time, wish to maintain her principal residence in this country is immaterial: *Ntilivamunda*, supra, at paras. 16-17. The statute requires a concrete demonstration of attachment to Canada in the four years prior to submitting an application for citizenship. The Citizenship Judge erred in finding that she had met that burden.

[26] The Minister seeks costs in keeping with the normal practice when a party has been successful. I accept that this appeal was necessary in the interests of maintaining the integrity of the citizenship application process but in light of the background facts, I will exercise my discretion to require both parties to bear their own costs.

JUDGMENT

IT IS THE JUDGMENT OF THIS COURT that:

1. the Minister's appeal is granted and the decision of the Citizenship Judge dated January 16, 2009 is set aside;
2. the parties shall bear their own costs.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION v. GLENDA ELAINE RYAN
PLACE OF HEARING:	Vancouver, BC
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APPEARANCES:

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No one appearing	FOR THE RESPONDENT (self-represented)

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