Federal Court  Cour fédérale

Date: 20100726

Docket: T-2044-09

Citation: 2010 FC 777

Ottawa, Ontario, July 26, 2010

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

TONI DEDAJ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] Mr. Toni Dedaj applied for Canadian citizenship in 2007. He thought he had the exact minimum number of days of residency in Canada required by the *Citizenship Act*, R.S.C. 1985, c. C-29. The Act obliges applicants to live in Canada for three out of the four preceding years – 1,095 days. Mr. Dedaj thought he met that threshold, but a citizenship judge disagreed. She found that he was a couple of days short and dismissed his application. Mr. Dedaj appeals.

[2] Mr. Dedaj argues that the judge erred in her finding that he did not meet the residency requirement for citizenship. He also suggests that she had a duty to go on to consider whether he had established and maintained his residence in Canada for the required duration, even if he was not actually physically present in Canada for all the 1,095 days.

[3] In my view, while the citizenship judge was entitled to make the factual finding that Mr. Dedaj was not physically present for each of the required 1,095 days, she was also obliged to consider whether he had established and maintained his residence for that period of time. Accordingly, I must allow his appeal and order a reconsideration of his application for citizenship.

II. Analysis

(1) Factual Background

[4] Mr. Dedaj left Albania in 1997 and moved to the United States where he met and married his wife. He arrived in Canada in 2002, made a successful refugee claim, and became a permanent resident in 2005. He claims to have been physically present in Canada from October 2, 2002 until August 30, 2007, the day he submitted his citizenship application. Because he was credited a half day for every day of physical presence in Canada prior to becoming a permanent resident, and a full day for every day thereafter, he achieved, in his view, exactly 1,095 days of physical presence in Canada as of August 30, 2007.

(2) The Citizenship Judge’s Decision

[5] The citizenship judge concluded that Mr. Dedaj had not met the residency requirement because he had stayed with his parents in the United States for a couple of nights during the relevant time frame. The judge was also concerned that, shortly after submitting his Canadian citizenship application, Mr. Dedaj had moved to the United States, had become a permanent resident there, had acquired a Michigan driver's licence, and obtained a U.S. social security number.

(3) Did the Citizenship Judge Err?

[6] The citizenship judge deserves deference in respect of findings of fact. The Court will intervene only if those findings are unreasonable. In this case, it is unnecessary for me to determine whether the judge's findings were unreasonable because I am satisfied that the judge made an error of law.

[7] Some years ago, this Court recognized that there was more than one valid approach to determining whether an applicant had met the residency requirement of the Act. The two principal approaches involve, on the one hand, a purely physical test and, on the other, a qualitative test of residency: *Canada (Minister of Citizenship and Immigration)* v. *Nandre*, 2003 FCT 650, at para. 11. In *Nandre*, I concluded, citing six main reasons, that where a citizenship judge finds that an applicant had not satisfied the physical test, he or she has an obligation to go on to apply the qualitative test. The latter involves an inquiry, based on a consideration of several factors, into whether the applicant had established and maintained a residence in Canada for the required period. The relevant factors appeared in *Koo (Re)*, [1993] 1 F.C. 286 (T.D.).

[8] This approach has been adopted by other judges and represents the prevalent trend in recent Federal Court jurisprudence. See, for example, *Zhang* v. *Canada (Minister of Citizenship and Immigration)*, 2008 FC 483; *Canada (Minister of Citizenship and Immigration)* v. *Takla*, 2009 FC 1120; *Canada (Minister of Citizenship and Immigration)* v. *Elzubair*, 2010 FC 298.

[9] In my view, the citizenship judge had an obligation to consider the qualitative test. While she did consider Mr. Dedaj's ties to the United States and commented on his having centralized his life there, she relied mainly on developments that post-dated his citizenship application. Further, she did not appear to consider the evidence supporting Mr. Dedaj's ties to Canada. Nor did she analyze the relevant factors from *Koo*, above.

III. Conclusion and Disposition

[10] I will allow this appeal because the citizenship judge failed to consider whether Mr. Dedaj had met the residency requirement by having established and maintained his residency in Canada for the required period, even if he was not physically present in Canada for all of the 1,095 days. I will return the matter to another citizenship judge to reassess Mr. Dedaj's application.

JUDGMENT

THIS COURT'S JUDGMENT IS that

1. The appeal is allowed and a reconsideration of this application for citizenship, by another citizenship judge, is ordered.

"James W. O'Reilly"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Benjamin Kranc	FOR THE APPLICANT
Alison Engel-Yan	FOR THE RESPONDENT

SOLICITORS OF RECORD:

KRANC ASSOCIATES Toronto, Ontario	FOR THE APPLICANT
MYLE J. KIRVAN Deputy Attorney General of Canada Toronto, ON.	FOR THE RESPONDENT