Federal Court  Cour fédérale

Date: 20110125

Docket: T-1048-10

Citation: 2011 FC 85

Ottawa, Ontario, January 25, 2011

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

GHOLAM GHAEDI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an appeal by Gholam Ghaedi brought under ss 14(5) of the *Citizenship Act*, RSC 1985, c C-29 [Act] from a decision of the Citizenship Court by which his application for citizenship was refused.

Background

[2] Mr. Ghaedi came to Canada in 2001 along with his wife and five children. At that time, the family was granted permanent resident status. The Ghaedi children have all since acquired their Canadian citizenship.

[3] Mr. Ghaedi applied for citizenship on November 10, 2005. In his application he claimed to have been absent from Canada for a total of 217 days during the preceding four years. All of Mr. Ghaedi's declared absences related to trips taken to Dubai and Iran. Because this declaration was inconsistent with information recorded in Mr. Ghaedi's passport, Mr. Ghaedi was ordered to complete a residency questionnaire and to attend for a citizenship interview. It was at this point that Mr. Ghaedi declared absences from Canada between September 2001 and November 2005 of 701 days, giving rise to a significant shortfall in meeting the minimum statutory threshold for residency of 1095 days.

The Decision Under Review

[4] The Citizenship Court rejected Mr. Ghaedi's application on the basis of the strict physical presence test of residency recognized by this Court in *Re Pourghasemi*, 62 FTR122, (1993) 19 Imm LR (2d) 259 (FCTD). No consideration was given to the application of the more flexible standard of so-called functional residency recognized in cases like *Re Koo*, [1993] 1 FC 286, 59 FTR 27. Mr. Ghaedi argues that, in keeping with several recent decisions of this Court, this approach to residency constitutes a reviewable error of law.

Issues

[5] Did the Citizenship Court err by determining Mr. Ghaedi's residency on the sole basis of the Applicant's physical presence in Canada during the four years preceding his application?

Analysis

[6] The issue before the Court is one of law and must be reviewed on the standard of correctness: see *Canada (Citizenship and Immigration) v Takla*, 2009 FC 1120, 359 FTR 248.

[7] This is a situation which requires the Court to revisit the issue of residency under ss 5(1)(c) of the Act and specifically whether the period of required residency can be determined solely on the basis of an individual's physical presence in Canada for a minimum period of 1095 days.

[8] At issue is whether this Court should continue to follow the decision in *Lam v Canada (Minister of Citizenship and Immigration)*,164 FTR. 177, [1999] FCJ No 410 or adopt the more recent views expressed by Justice Robert Mainville in *Canada (Minister of Citizenship and Immigration) v Takla*, 2009 FC 1120, 359 FTR 248.

[9] In *Lam*, above, Chief Justice Allan Lutfy examined the previous 20 years of conflicting Federal Court decisions that had recognized three different residency tests under the Act, namely those found in *Re Koo*, above; *Re Pourghasemi*, above; and *Re Papadogiorgakis*, [1978] 2 FC 208, 88 DLR (3d) 243 (FCTD). He observed that in the absence of a right of appeal to the Federal Court of Appeal, there was no judicial mechanism by which the jurisprudential disagreement as to the proper test could be readily resolved. He expressed the hope, however, that the impasse would be

solved by then pending legislative amendments. He concluded that, notwithstanding that the issue of residency was one "close to the correctness end of the spectrum", deference was required when the decision under review clearly demonstrated the proper application of the facts to any of the three previously recognized tests for residency. It is also apparent from his reasons that he was influenced in part by the expectation that legislative changes would be forthcoming[1].

[10] Unfortunately the legislative amendments anticipated in *Lam*, above, never came to fruition. In the result, the decision has become well entrenched in this Court's jurisprudence and the Citizenship Court has quite properly followed it. The inevitable consequence of not having a single test for residency is, however, that similar citizenship cases can be decided differently based upon which one of the recognized legal tests for residency is applied. Although the *Lam* approach may have largely eliminated the continuation of a residency debate in this Court, it has not led to greater certainty in the determination of residency at the Citizenship Court.

[11] In *Canada (Minister of Citizenship and Immigration) v Nandre*, 2003 FCT 650, [2003] FCJ No 841 Justice James O'Reilly considered the problem. He held that in keeping with the preponderance of jurisprudence, where an applicant for citizenship has failed to satisfy the statutory threshold of 1095 days of physical presence in Canada, a single unifying qualitative standard for residency was required. He concluded his analysis with the following admonition:

> 21 Accordingly, I find that the qualitative test set out in *Papadogiorgakis* and elaborated upon in *Koo* should be applied where an applicant has not met the physical test. I should add that I do not regard the qualitative test as one that is easy to meet. A person's connection to Canada would have to be quite strong in order

[1] At paras 32 and 33 Chief Justice Lutfy refers to the situation as a period of transition calling for some judicial stability around the standard of review.

> for his or her absences to be considered periods of continuous residency in Canada.

[12] In *Takla*, above, Justice Mainville attempted again to break through the jurisprudential impasse with a plea for a uniform and judicially coherent approach. He observed that of the three tests for residency the qualitative approach in *Re Koo*, above, was "by far, the dominant test" and that it should, therefore, be the only recognized standard in such cases.

[13] The *Takla* decision has since been cited with approval in *Canada (Citizenship and Immigration) v Elzubair*, 2010 FC 298, in *Canada (Citizenship and Immigration) v Salim*, 2010 FC 975 and noted as a "prevalent trend" by Justice O'Reilly when he revisited the issue in *Dedaj v Canada (Citizenship and Immigration)*, 2010 FC 777: also see *Canada (Minister of Citizenship and Immigration) v Alonso Cobos*, 2010 FC 903; *Canada (Citizenship and Immigration) v Abou-Zahra*, 2010 FC 1073; and *Khan v Canada (Minister of Citizenship et Immigration)*, 2009 FC 1178.

[14] Although the Respondent has cited a few recent Federal Court decisions where the ratio in *Lam*, above, has been applied, they appear to have been rendered without consideration of *Nandre*, above, or *Takla* either because those authorities were not cited to the Court or were unnecessary to the final dispositions.

[15] Counsel for the Respondent points out that with the exception of *Dedaj*, above, the outcome of *Takla* and the cases following it turned on the Citizenship Judge's proper application of the test for residency established by *Re Koo*, above. All of the discussions about the need for a single unified test for residency were accordingly obiter. Notwithstanding that interesting observation, I

agree with counsel for Mr. Ghaedi that the views expressed by Justice O'Reilly and Justice Mainville are compelling and justify departing from the view expressed both in *Lam*, above, and the cases which have applied it, including several of my own decisions. In my view, the benefits of harmonizing the approach to residency outweigh the concerns expressed in *Lam*, above, about deferring to the judgment of the Citizenship Court. Deference is not a juridical value that outweighs the need for adjudicative consistency and the predictability of judicial outcomes.

[16] Counsel for Mr. Ghaedi argued that I am bound to follow *Takla* , above, and the more recent decisions of my judicial colleagues. I do not agree that this is an issue for which judicial comity applies. Notwithstanding the views of any particular judge, there will continue to be two lines of divergent authority on this issue and others may be quite properly disposed to follow *Lam*, above. Needless to say, if this Court does not over time adopt a common view on this issue, it is unlikely that the Citizenship Court will do so and the only available resolution in that event will be legislative.

Conclusion

[17] For the reasons expressed above, this application is allowed with the matter to be remitted to a different Judge of the Citizenship Court for a redetermination on the merits and in accordance with these reasons. Given the circumstances of this case, I am not disposed to award costs to Mr. Ghaedi.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is allowed with the matter to be remitted to a different Judge of the Citizenship Court for a redetermination on the merits and in accordance with these reasons.

" R. L. Barnes "
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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