Federal Court  Cour fédérale

Date: 20110707

Docket: T-1586-10

Citation: 2011 FC 844

Vancouver, British Columbia, July 7, 2011

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

ZHAO ZHANG

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an appeal by the Minister of Citizenship and Immigration (the Minister) pursuant to subsection 14(5) of the *Citizenship Act*, RSC 1985, c C-29 [*Citizenship Act*], from the decision of a citizenship judge, dated August 4, 2010, granting the respondent 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*.

I. Background

[2] The respondent is a citizen of China. On March 1, 1999, she entered Canada and was landed as a permanent resident. She submitted her application for Canadian citizenship on May 6, 2008. On July 7, 2010, the respondent appeared before the citizenship judge and on August 4, 2010, he approved her application.

II. Decision under Appeal

[3] Without explicitly referring to it, the citizenship judge applied the qualitative test for residence set out by Justice Barbara Reed in *Re Koo* (1992), [1993] 1 FC 286, 59 FTR 27 [*Koo*], asking himself whether Canada was the country in which the respondent had centralized her life and answering that question in the affirmative. He found that the respondent spent substantial time in Canada before the relevant four-year period, that her absences were exclusively caused by her husband's employment in Japan, noting that she is Chinese and has no other ties to Japan. He also noted that her husband and her two daughters are Canadian, and that she had a third daughter who was deceased who had lived in Canada.

[4] The citizenship judge also based his conclusion on the fact that the respondent had investments, a car, and insurance in Canada, and on the fact that the respondent had a British Columbia driver's licence, a local bank account, a Nanaimo park and recreation membership, etc. He also took into account her efforts to qualify in Canada as a chartered accountant, the fact that her husband's company was Canadian, and her involvement with different organizations in Nanaimo.

III. Issue

Did the citizenship judge err in finding that the respondent met the residence requirement set out in paragraph 5(1)(*c*) of the *Citizenship Act*?

IV. Analysis

[5] The residence requirement set out in paragraph 5(1)(*c*) of the *Citizenship Act* requires an applicant to have accumulated at least three years of residence in Canada during the four years immediately preceding the date of his or her application:

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 :
…	…
(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	(ii) un jour pour chaque jour de résidence au Canada après son admission à titre de résident permanent;

> Canada after his lawful admission to Canada for permanent residence the person shall be deemed to have accumulated one day of residence;

[6] The meaning of the word "residence" has been interpreted by this Court in a number of ways. Associate Chief Justice Arthur Thurlow in *Re Papadogiorgakis*, [1978] 2 FC 208, 88 DLR (3d) 243 (TD) [*Papadogiorgakis*] held that a person who had "centralized his mode of living in Canada" could leave for periods of time and still be regarded as having been resident in Canada for the purposes of the *Citizenship Act*. On the other hand, in *Re Pourghasemi* (1993), 62 FTR 122, 19 Imm LR (2d) 259 (TD) [*Pourghasemi*], Justice Francis Muldoon interpreted the residence requirement more narrowly as requiring the applicant to have been physically present in Canada for at least three of the four years prior to the application. In *Koo*, above, Justice Reed described the appropriate test as being, "whether it can be said that Canada is the place where the applicant 'regularly, normally or customarily lives'". She set out six non-exhaustive questions to assist in answering this question.

[7] Although it is sometimes said that there are three tests for residence, the *Papadogiorgakis* test, the *Pourghasemi* test and the *Koo* test, as Justice Richard Mosley recently pointed out in *Hao v Canada (Minister of Citizenship and Immigration)*, 2011 FC 46 at para 19, "there are effectively only two: strict physical presence or residency as determined by the *Koo* qualitative factors."

[8] In the current case, the Minister did not argue that the citizenship judge erred in applying the wrong test to determine residence – i.e. he did not argue that the quantitative physical presence test

should have been applied, as opposed to the qualitative test from *Koo*. Indeed, in *Lam v Canada (Minister of Citizenship & Immigration)* (1999), 164 FTR 177, 87 A.C.W.S. (3d) 432 (TD) [*Lam*], Justice Lutfy held that it was open to the citizenship judge to apply either of the tests, so long as the chosen test was applied properly. While there has been some recent disagreement on the question of whether or not more than one test is permissible (Justice Robert Barnes in *El Ocla v Canada (Minister of Citizenship and Immigration)*, 2011 FC 533 [*El Ocla*] and Justice James O'Reilly in *Dedaj v Canada*, 2010 FC 777, 90 Imm LR (3d) 138 found that the qualitative *Koo* test was the correct test to apply, while Justice Donald Rennie in *Martinez-Caro v Canada (Minister of Citizenship and Immigration)*, 2011 FC 640 found that the quantitative *Pourghasemi* test was the correct test to apply), it is not necessary for me to address this issue on the current appeal.

[9] The Minister's argument in the current case was simply that the citizenship judge erred in the way that he applied the qualitative *Koo* test. This is a question of mixed fact and law to which the reasonableness standard of review ought to be applied (*El Ocla*, above at para 11). As discussed below, I find that the *Koo* test was not reasonably applied in this case and, as such, it is unnecessary for me to consider the threshold question of whether or not a different test ought to have been applied.

[10] As discussed, the *Koo* test asks whether it can be said that Canada is the place where the applicant "regularly, normally or customarily lives". The six questions that can be asked to assist in this determination were set out by Justice Reed as follows:

> (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 dependents (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 1095 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.

[11] On the first question, the Minister points out that the respondent was not, in fact, physically present in Canada for a long period prior to the relevant four years and, as such, he argues that the citizenship judged erred by describing the time she spent in Canada prior to the relevant period as being “substantial”. He points out that the respondent was, in fact, physically present in Canada for only 1568 days (or slightly less than 4.5 years) over a period of 11 years.

[12] I agree with the Minister that the citizen judge’s treatment of this question is of particular concern. I note that in the residence questionnaire, the respondent stated at question 9 that she worked from November 2001 to March 2006 in Tokyo, Japan; this is almost 3.5 years spent outside of Canada for employment purposes. Moreover, the table labelled “Zhao Zhang Record of Days stayed inside Canada,” which was also before the citizenship judge, indicates that the respondent had spent only 821 days in Canada between her arrival on March 1, 1999 and May 2004, or

approximately two years and three months over a five-year period. I have difficulty understanding how this could be deemed as a "substantial time in Canada before the four year period."

[13] On the second question, the Minister argues that the citizenship judge failed to consider the fact that the respondent had no family actually living in Canada: her daughters were attending school in Japan, her husband was working in Japan, her parents and brother were resident in China, while her sister was resident in Seattle.

[14] I also agree with the Minister on this point. The citizenship judge mentioned the fact that the respondent's daughters were born in Canada, but failed to consider that they attended school in Japan and that the respondent, at the time, had no close family in Canada as her parents and brother resided in China and her sister in Seattle.

[15] On the third question, the Minister takes issue with the citizen judge's conclusion that the respondent's pattern of physical presence in Canada indicated a returning home as opposed to merely visiting the country. The Minister notes that the respondent worked in Japan from November 2001 until March 2006 and that most of her trips to Canada coincided with her children's summer and Christmas holidays. I agree that this is a concern as well.

[16] On the fifth question, I agree with the Minister that the citizenship judge failed to consider that the respondent's absences from Canada during the relevant period were structural in nature and not merely temporary.

[17] On the sixth question, the Minister submits that the passive indicia mentioned by the citizenship judge – such as her driver's licence, her Canadian investments, etc. – are insufficient to demonstrate a substantial connection to Canada. According to the Minister, the citizenship judge should have compared the respondent's connection to Canada with her connection to Japan.

[18] I agree with the Minister that the mere existence of "passive" indicia such as income tax returns, medical insurance, bank accounts, are not on their own sufficient to demonstrate a substantial connection (*Hernando Paez v Canada (MCI)*, 2008 FC 204 at para. 18).

[19] Thus, it is clear from the decision that relevant facts and evidence were not properly assessed by the citizenship judge. The conclusion of the citizenship judge that the respondent had centralized her life in Canada was unreasonable.

[20] For these reasons, the appeal must be allowed. The decision of the citizenship judge is set aside and the respondent's application for Canadian citizenship is refused.

JUDGMENT

THIS COURT ADJUDGES that the appeal is allowed. The decision of the citizenship judge is set aside and Ms. Zhang's application for Canadian citizenship is refused.

"Danièle Tremblay-Lamer"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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