Court No. T-2689-95

IN THE MATTER OF THE *CITIZENSHIP ACT*,
R.S.C. 1985, c. C-29

AND IN THE MATTER OF an appeal from the
decision of a Citizenship Judge

AND IN THE MATTER OF

KIT PING LUI NG,

Appellant

- AND -

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IN THE MATTER OF THE *CITIZENSHIP ACT*,
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decision of a Citizenship Judge

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WING CHIU NG,

Appellant

REASONS FOR JUDGMENT AND JUDGMENT

CULLEN, J.:

At the hearing I dealt with two cases - a husband and wife. These two appeals are from the decisions of a Citizenship judge dated October 3, 1995 denying the appellants' application for citizenship because they had not fulfilled the residence requirements of the *Citizenship Act*, R.S.C. 1985, c. C-29 (hereinafter, the Act). The citizenship appeals before this Court are trials *de novo*.

With great respect I must disagree with the decisions reached by the Citizenship judge but can appreciate that actual physical residings in Canada were minimal. What must be emphasized, as indicated earlier, is the fact that these hearings are trials *de novo* so that I

can consider all the evidence provided at each hearing. Accordingly, I heard the oral testimony of the appellant's husband herein, which of course also applied to his wife.

Had these two cases been "appeals" in the usual sense of the word, I would have been confined to the decision of the Citizenship judge to determine whether that decision be upheld or overturned based solely on the evidence before the judge. Here, however, I was able to hear the evidence first hand and made my own decision on the strength of the evidence and the credibility of the witness. I found the evidence of the appellant husband most credible and forceful.

THE FACTS

The appellant was lawfully admitted to Canada for permanent residence on March 29, 1991. He was accompanied by his wife and two daughters who were also landed at that time. Upon arrival in Canada, the appellant sold two of his Hong Kong properties and bought his first home in Canada in Willowdale, Ontario. Eight months later, he purchased and settled into a home in Richmond, British Columbia. He continues to own this home. Since the beginning of 1994, he has also been renting a residence in Thornhill, Ontario. During his frequent business and family trips to Hong Kong, the appellant stays at his parents' flat there.

The appellant landed in Canada pursuant to the Investor Programme for immigrants. He invested $250,000 in a business in Canada but this business was not successful. The appellant did not sever all his business ties with Hong Kong and China.

The appellant has obtained a SIN, OHIP, a driver's licence, and automobiles in Canada. He also has established and maintained bank accounts and investments in Canada. His two daughters have attended local schools, although, according to the decision of the Citizenship judge, they have spent much of the time in school in Hong Kong. He has incorporated a Canadian company and has filed Canadian Income Tax returns. The appellant submits that he has generally settled into the Chinese Canadian way of life.

The appellant was absent from Canada for considerable periods of time during the four-year period immediately preceding the date of his application. He was absent from Canada for a total of 1068 days, being physically present in Canada for only 110 days. The reason for the appellant's absences was primarily business-related, although the appellant also extended his trips to provide moral and family support to his elder brother (who is ill with kidney disease) and his elderly and ill parents.

CITIZENSHIP JUDGE'S DECISION

The Citizenship judge did not approve the application for citizenship because the appellant had failed to fulfil the residency requirements under the Act. It was her view that since the appellant had not established his initial residence in Canada, his presence in Canada was only in the form of visits or temporary stays. In support of this conclusion, the judge cited the appellant's pattern of absences from Canada. Specifically, she referred to the fact that the appellant returned to Hong Kong on business only three weeks after landing in Canada, and then stayed in Hong Kong for about five months. In the judge's words in this regard, "three weeks ... is not long enough to plant roots here." The appellant returned to Canada again for three weeks, before leaving again for Hong Kong for one year and two months. He returned to Canada for eleven days, and then again returned to Hong Kong. The pattern continued. For these reasons, the judge concluded that the appellant had not centralized his mode of living in Canada, and therefore, his absences from Canada could not be counted as a period of residence in Canada.

The judge also concluded that the appellant did not maintain sufficient ties with Canada during his absences to have those absences count as periods of residence under the *Act*.

The judge concluded that since the appellant was not under a disability, his was not an appropriate case for which a recommendation under subsection 5(3) could be made. The judge further found that there were no grounds that could justify making a positive recommendation under subsection 5(4) with respect to special or unusual hardship, or reward for services of an exceptional value to Canada, since no evidence was provided in this regard.

The judge based her decision on the reasoning in *Canada (Secretary of State)* v. *Yu* [1995] F.C.J. No. 1919, (1995) 31 Imm. L.R. (2d) 248 (T.D.); *Re: Koo* (1992), [1993] 1 F.C. 286 (T.D.); and *Re: Abolghasem Poorghasemi*.

THE ISSUE

Are there any grounds for relief against the 1,095 day residency requirement in this case?

APPELLANT'S SUBMISSIONS

The appellant submits that the Citizenship judge made a number of errors in arriving at her decision:

1)The Judge manifested bias against the appellant and his legal counsel during the interview on August 25, 1995, and accordingly, the refusal of his application pursuant to section 14 of the *Citizenship Act* is void *ab initio* and of no force or effect in law;

2)The Judge misapprehended the facts of the appellant's case; misapprehended the law; and misapplied the law to the facts of the case;

3)The Judge was overly selective in her choice of case law, again displaying her bias;

4)The Judge made it known publicly that she would not interview any of the appellant's counsel's clients, again manifesting her bias;

5)The refusal letter dated October 3, 1995, and mailed on October 16, 1995, was not mailed in compliance with subsection 14(4) of the *Citizenship Act* to the appellant at his latest known address.

ANALYSIS

Accusations of bias are serious accusations to make against a judge. This appeal is a trial *de novo* and not an application for judicial review, and, therefore, I need not comment on the bias accusations.

Mr. Sheldon M. Robins is counsel to the appellant. A series of his Oshawa cases including this one were redistributed by the Ottawa registrar to courts geographically closer to the applicants' residence. Five of his cases were scheduled for the North York court. Mr. Robins complained, defaulted his clients, and made accusations about two judges at the North York court. After the third default, the North York Manager deemed the five cases to be abandoned. That apparently will be dealt with later if at all.

The appellant eventually came before Judge Godfrey for his citizenship interview.

I note that on October 11, 1996, I received a fax from the Registrar for this case, (Mike Switzer), concerning a letter that was sent from Judge Godfrey to the Amicus Curiae for this case. In the letter, Judge Godfrey requested that the Amicus Curiae be sure to review everything in the files, and affirmed her belief that there were no grounds for appeal based on the facts of each case.

Judge Godfrey's decision with respect to the appellant does not appear to be defective in any way. The decision is carefully worded, has taken into account the relevant case law, and, on the basis of the evidence before this Court so far, appears to have taken into account correctly all of the relevant facts. Furthermore, the letter from Mr. Robins, dated September 12, 1995, states that Judge Godfrey conducted herself during the citizenship interviews in a most professional and compassionate manner, with a full understanding of how anxiety-provoking these interviews can be for applicants" and "she is doing an excellent job."

STATUTORY PROVISION

Paragraph 5(1)(c) of the *Act*, which addresses residency, states:

> The Minister shall grant citizenship to any person who
>
> (c) has been lawfully admitted to Canada for permanent residence, has not ceased since such admission to be a permanent resident pursuant to section 24 of the *Immigration Act* and has, within the four years immediately preceding the date of his application, accumulated at least three years of residence in Canada.

THE CASE LAW RESPECTING RESIDENCY

The leading case concerning residency is *Re Papadogiorgaiis*, [1978] 2 F.C. 208 (C.A.). At 213-214, Associate Chief Justice Thurlow stated:

> It seems to me that the words "residence" and "resident" in para. 5(1)(b) of the new *Citizenship Act* are not as strictly limited to actual presence in Canada throughout the period as they were in the former statute but can include, as well, situations in which the person concerned has a place in Canada which is used by him, during the period as a place of abode to a sufficient extent to demonstrate the reality of his residing there during the material period even though he is away from it part of the time. This may not differ much from what is embraced by the exception referred to by the words "(at least usually)" in the reasons of Pratte, J., but in a close case it may be enough to make the difference between success and failure for an applicant.
>
> A person with an established home of his own in which he lives does not cease to be resident there when he leaves it for a temporary purpose whether on business or vacation or even to pursue a course of study. The fact of his family remaining there while he is away may lend support for the conclusion that he has not ceased to reside there. The conclusion may be reached, as well, even though the absence may be more or less lengthy. It is also enhanced it he returns there frequently when the opportunity to do so arises. <u>It is, as Rand, J., appears to me to be saying in the passage I have read, "chiefly a matter of the degree to which a person in mind and fact settles into or maintains or centralizes his ordinary mode of living with its accessories in social relations, interests and conveniences at or in the place in question</u>.

In the case of *Re Koo* (1992),[1993] 1 F.C. 286 (T.D.) at 293, Madame Justice Reed thoroughly surveyed the jurisprudence concerning residence and summarized the different formulations for determining whether an appellant was resident in Canada, despite a physical absence:

> The conclusion I draw from the jurisprudence is that the test is whether it can be said that Canada is the place where the applicant "regularly, normally or customarily lives." Another formulation of the same test is whether Canada is the country in which he or she has centralised his or her mode of existence.

To ascertain whether an appellant "regularly, normally or customarily lives" in Canada, Her Ladyship also suggested at 293-294 six questions which could be used by the Court as guidance in reaching a conclusion on residency:

> 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.

Apart from the *Koo* "place-of-living test," the Court has also used four other formulations for determining residency. Under the "reason test," the reason for the appellant's physical absence from Canada is considered. If the absence was temporary and involuntary in nature -- such as caring for a sick relative or attending school abroad -- the appeal is usually allowed. Pursuant to the "intention test," the Court must determine whether the appellant has demonstrated the intention to establish and maintain a home in Canada. The Court has also used a "three-part test:" the appellant must have established a residence in Canada, maintained a *pied-a-terre* in Canada, and intended to reside in Canada. Finally, the Court has referred to the "indicia of residency" and the "quality of attachment," noting that the stricter test, the quality of attachment, is gaining strength.

Although the character of the appellant may be a relevant factor, only one decision, *Re Chan*, 70 F.T.R. 171 (T.D.), has allowed an appeal on the grounds that the appellant was "precisely the kind of individual that Canada needs."

APPLICATION TO THE CASE AT BAR

This matter must be treated as a trial *de novo* and I am permitted the opportunity to reconsider the evidence that was before the Citizenship Judge.

DECISION

Given the appellant's significant absences from Canada, I am not surprised that the Citizenship judge did not approve his application for Canadian citizenship. However, it is quite possible to establish a "constructive residence" by examining the whole picture. Certainly, the onus on the appellant is greater due to the fact of his many absences from Canada.

I will first go through the six questions which should be used by this Court as guidance in reaching a conclusion on residency as established in *Koo*.

1) Physical presence in Canada: Three weeks after the appellant was landed in Canada, he began returning regularly to Hong Kong for business reasons and to visit ill members of his immediate family. These trips lasted, on average, between five months and fourteen months. The final two trips before the application date lasted only one-and-one-half and two months each, with the appellant staying in Canada eleven days between these two trips. On each occasion when he left Canada he was very careful to see to it that he got a Returning Resident Permit.

2) Residence of appellant's immediate family and dependants: The appellant's wife and two daughters became landed immigrants at the same time as the appellant. The appellant's wife has accompanied him to Hong Kong on all of his trips except the final two referred to above, making her physically present in Canada for a total of 214 days during the statutory period. The appellant submitted that his two children attended local schools in canada although the Citizenship judge's conclusion that they spent most of their school time in Hong kong would be more accurate.

3) Pattern of physical presence: returning home or merely visiting Canada?

Many people commute great distances daily from the country-side to the city in order to work, and still consider themselves to be returning home to the country-side at the end of the day. Even though they may spend the majority of their time in the city at work, they do not consider their trips home to be mere visits (even though, at times, they may seem to be mere visits!). In the modern world, where jet air travel is commonplace, and where capital is increasingly mobile, it is entirely conceivable that one may have to commute from Canada to Hong Kong (or to any other country for that matter) for extended periods of time in order to work, and still consider Canada to be one's home at the end of the day. The appellant maintains a residence in Canada. He also considers his parents' flat in Hong Kong to be a residence in that he stays there during his business trips to Hong Kong.

The Citizenship judge took the appellant's pattern of physical presence in Canada and the his desire to continue to support his family through his business ventures abroad to mean that the appellant had not severed his ties in Hong Kong and China. However, this pattern of physical presence can be equally indicative of a good business decision, and does

not necessarily have to work against the appellant in establishing residency, especially considering Chinese tradition wherein the age and health of the appellant's parents and the kidney transplant operation of his brother were a concern and a responsibility for him. The children, for the time, were to remain and live with the aged grandparents.

4) What is the extent of the physical absences? The appellant was absent for 1058 days of the 1095 day requirement. This Court has allowed appeals where the appellant was absent for 916 days (re: the matter of *Tzu-Fa Wang*, Court No. T-1085-95).

However, in *Canada (Secretary of State)* v. *Yu* (1995) 31 Imm.L.R. (2d) 248 (hereinafter, *Yu*), Rothstein J. of this Court allowed an appeal from a judge's *granting* a citizenship application despite the fact that the applicant had spent only 156 days in Canada prior to her citizenship application. It is on the basis of the reasoning in *Yu* that the Citizenship judge did not approve the appellant's application for citizenship. In *Yu*, the applicant was in Canada for 17 days after landing. She then returned to the United States to finish a course of study over the next three years. She returned to Canada whenever she was not required to be at school, so that she achieved a physical presence in Canada of 156 days. Rothstein J. found that the 17-day period spent by the applicant in Canada when she first arrived was not enough to establish an initial residency, in that the applicant could not have maintained or centralized an ordinary mode of living with its accessories and social relation, interests and conveniences in only 17 days with only a room at the residence of an uncle. Rothstein J. stated that the establishment of an initial residency is essential in order to comply with the residency requirement in paragraph 5(1)(c) of the *Act*, especially if one must be away from Canada for significant periods of time for a required purpose. The Citizenship judge similarly found that an initial stay of three weeks was not enough for the appellant to have established an initial residency in Canada.

However, the facts of *Yu* are distinguishable from the case at hand in the following ways: in *Yu*, the applicant merely roomed with an uncle while in Canada, while the appellant here owns his own residence. The appellant has also invested $250,000 in Canada, while the applicant in *Yu* had not. He has a business in Canada which dovetails with the business in Hong Kong.

5) Absence caused by a temporary situation? The appellant's absence was caused by two factors: business commitments and familial duties. The appellant submits that he has not terminated his employment or business abroad because it would not be prudent to do so until he is certain of financial success in Canada.

The appellant stresses that when he immigrated to Canada, the economic recession was quite severe, and he did not want to put his family's finances in jeopardy.

The appellant's business concerns in Hong Kong and China are of an on-going nature, and do not satisfy this test. However, it is also arguable that one can still maintain business interests in a foreign country and concurrently maintain constructive residency in Canada, especially considering that the Canadian business continues to operate in conjunction with the Hong Kong business.

6) Quality of connection with Canada more substantial than with Hong Kong?

Concerning this test, a number of factors can be taken into account: first is the fact that the appellant became a permanent resident of Canada on March 29, 1991. The appellant secured the *indicia* of residency by purchasing, on entry to Canada, a residence in Canada; paying Canadian income tax; maintaining a Canadian bank account; paying medical premiums in Canada; storing furniture in Canada; storing an automobile in Canada; and owning property in Canada.

The state of the Canadian economy made it difficult with his business to make an adequate income. The fact is that without the two operations in Hong Kong and in Canada he would not be able to meet his family obligations to his parents and brother. There is no suggestion that funds earned are going anywhere except to help the family members. The business in Hong Kong operates from a small rented office and the appellant's residence while in Hong Kong is his parents' home. He has no property or ownership of land and/or buildings in Hong Kong, whereas two houses are owned in Canada. The big question here is, will Toronto or Richmond, B.C. eventually be chosen as his residence.

An investment in Canada under the immigrant investors programme to the tune of $250,000 indicates a deep commitment to Canada..

Substantial business interests in another country will not necessarily work against an appellant with respect to residency. As my colleague, Nôel, J. wrote in *Stephen Yu Hung Lai*, F.C.T.C. T-2258-93:

> In cases where physical absence is encountered during a statutory period, proof of continued residence will require evidence as to the temporary nature of the absence, a clear intent to return and the existence of sufficient factual ties with Canada to assert residence in fact during the period ... where a businessman established Canada as his place of abode by setting up his matrimonial home and family there, he is permitted to travel within reason to earn a living.

In the present case, I considered whether there are sufficient factual ties with Canada, other than those mentioned above (i.e., the *indicia*) to assert residence in fact. To what extent did the appellant's family develop factual ties with Canada. We heard evidence from the appellant that he now has many friends in Toronto and Richmond and business contacts from his product sales.

The strengths of the appellant's case are that: 1) he invested $250,000 in a business in Canada, albeit this business was not successful; 2) he has purchased and/or acquired the usual accoutrements of Canadian citizenship (a residence, automobile, the usual bank, health, and government numbers, has paid taxes, etc.); 3) he does not own a home abroad, but, rather, stays with his parents while in Hong Kong.

The weaknesses of the appellant's case are that: 1) he did not sever all his business ties with Hong Kong and China; 2) the absences from Canada are significant: 1068 days in the four years preceding his application; the appellant's wife has accompanied him outside of Canada on all trips except the last two, making her physically present in Canada for a total of 214 days in the statutory period; and 3) no evidence of substantial ties to Canada made subsequent to the failed business investment and initial purchase of a home and basics has been submitted to this Court.

CONCLUSION

On balance I am satisfied that the appellants have met the requirement of constructive residence and, accordingly these appeals are allowed. The matter is referred to

the appropriate authorities to take what steps are necessary to award Canadian citizenship to the appellants.

OTTAWA

October 22, 1996.

B. Cullen

J.F.C.C.