

Federal Court



Cour fédérale

Date: 20151202

Docket: T-1006-15

Citation: 2015 FC 1334

Ottawa, Ontario, December 2, 2015

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Applicant

and

MUSSARRAT KHAN

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for leave and for judicial review of a decision by a Citizenship Judge [Judge] to approve an application for a grant of Canadian citizenship to Mussarrat Khan [Khan]. The central issue in this case is the Judge's finding of a 130 day shortfall of the statutory minimum against evidence that the shortfall was 495 days.

[2] This application was unopposed although the Court requested counsel (Mr. King) to appear and speak to certain issues in the Minister's application.

[3] Khan advised the Court that she would not be appearing due to her pregnancy and that she had no "comments or arguments on this matter". She concluded her letter of November 4, 2015 "... please review the decision of the Citizenship Judge as per law permits" [*sic*].

[4] It is also noteworthy that Khan neither filed an Appearance nor sought an adjournment. Therefore, given all these circumstances, this was an appropriate case to proceed with an *ex parte* hearing.

II. Background

[5] Khan is a national of Bangladesh who arrived in Canada in August 2004 when she was 20 years old.

[6] Thereafter, she had a number of absences: first to marry, and then to attend school in Australia. She returned to Canada in 2007 to have a baby and to attend college in Western Newfoundland.

She had a second child in 2011 and claimed that her husband became a Canadian citizen in the same year – a matter in dispute in this Court.

[7] Khan filed a citizenship application on February 26, 2013; therefore, the Relevant Period for determining residency is February 26, 2009 to February 26, 2013. She declared 495 days of

absence for a total of 965 days of physical presence, which constituted a shortfall of 130 days from the statutory threshold of 1095 days of physical presence in Canada during the applicable Relevant Period.

[8] The Judge adopted the *Koo* test for the purpose of her residency determination (*Koo (Re) (FCTD)*, [1993] 1 FC 286, 59 FTR 27). As a result of the *Koo* test, physical presence for the 1095 days is not required and a citizenship judge may consider six factors in addressing whether to grant citizenship despite a shortfall in physical presence.

[9] The Judge concluded that the physical absence and shortfall of 130 days was caused by a temporary situation – Khan’s father-in-law’s illness and death – and that her presence out of Canada was a matter of family responsibilities.

[10] The Judge decided in favour of granting citizenship.

III. Analysis

[11] The applicable standard of review is reasonableness (*Canada (Citizenship and Immigration) v Moniz Pereira*, 2014 FC 574 at para 18, 456 FTR 287).

Therefore, the issue is whether the Judge’s conclusion that Khan met the residency requirement of s 5(1)(c) of the *Citizenship Act*, RSC 1985, c C-29, is reasonable.

[12] The central point is the Judge’s finding of a 130 day shortfall. The Applicant alleges that the shortfall was actually 495 days.

[13] On this record, the Applicant is clearly correct. The factual error starts at the Residence Questionnaire where the Respondent lists that she was absent between August 28, 2011 and November 29, 2012. The Respondent lists the number of days absent as 160 days (not the actual calculation of 459 days) – clearly a wrong calculation.

[14] As the Applicant's counsel candidly (as an officer of the Court) pointed out, an official used a Residence Calculator form which listed the absences as including August 28, 2011 to November 29, 2011 (not 2012 as the Respondent had listed). This led to a listing of the absence for the wrong period as 93 days rather than 459.

[15] In the Judge's finding, this error is repeated such that the Judge found the total shortfall from 1095 days to be 130 days rather than 495 days.

[16] Even an explanation of typographical error that the November 2012 entry should be 2011 does not resolve the issue, since there is a record of Khan entering Canada on November 30, 2012.

[17] The error of fact is material. It could reasonably affect a citizenship judge's conclusions in applying the *Koo* test. A shortfall of 130 days may be one thing – a shortfall of 495 is quite another. The longer the shortfall the more difficult it is to justify “deemed residence”.

[18] However phrased, whether the result is an acceptable outcome or whether the result is justifiable, transparent or intelligible, this error goes to the core of the Judge's decision. The decision cannot be allowed to stand.

[19] There is a further issue which is left unresolved, which is whether threshold residency had been established (*Al Tayeb v Canada (Citizenship and Immigration)*, 2012 FC 333 at paras 11-13, 9 Imm LR (4th) 113). This Court should not be left, in this case, to infer that threshold residency had been established where there were 861 days of absence during the Relevant Period.

IV. Conclusion

[20] Therefore, this application for leave and judicial review will be granted, the Citizenship Judge's decision will be quashed and the matter will be referred back to a different judge for a new decision.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for leave and judicial review is granted, the Citizenship Judge's decision is quashed and the matter is referred back to a different judge for a new decision.

"Michael L. Phelan"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1006-15

STYLE OF CAUSE: THE MINISTER OF CITIZENSHIP AND
IMMIGRATION v MUSSARRAT KHAN

PLACE OF HEARING: ST. JOHN'S, NEWFOUNDLAND AND LABRADOR

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DATED: DECEMBER 2, 2015

APPEARANCES:

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FOR THE RESPONDENT