Federal Court Cour fédérale

Date: 20160415

Docket: T-1582-15

Citation: 2016 FC 421

Halifax, Nova Scotia, April 15, 2016

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

HASSAN AFKARI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an appeal by Hassan Afkari, the Applicant, of the decision of a Citizenship Judge, dated June 25, 2015, which found that the Applicant did not meet the residency requirements of s 5(1)(c) the *Citizenship Act*, RSC 1985, c C-29 (“*Citizenship Act*”).

Background

[2] The Applicant is an Iranian citizen. He arrived in Canada on January 18, 2008, together with his wife, two sons and two daughters. They arrived as permanent residents. Two other children did not accompany the family. Prior to coming to Canada, the Applicant held a residence permit for and lived in Kuwait with his family where he was the managing partner and a 50 percent shareholder of a textile company. He claims that in January 2008 he sold half of his interest in the company to his son, who remained in Kuwait. He retained a 25 percent interest in the company to provide him with income but that his role was subsequently informal, advisory and unpaid.

[3] On February 25, 2014 the Applicant applied for citizenship. The relevant period under s 5(1)(c) of the *Citizenship Act* is from February 25, 2010 to February 24, 2014. In his application, the Applicant claimed 1095 days of physical presence and 365 days of absence. He was issued and completed a Residence Questionnaire which was received by Citizenship and Immigration Canada ("CIC") on June 18, 2014. On March 17, 2015 a CIC officer ("CIC Officer") completed a File Preparation and Analysis Template ("FPAT") and calculated 1068 days of physical presence and absences totalling 392 days, for a shortfall of 27 days in the relevant period.

[4] A comment in the FPAT noted that, in his citizenship application, the Applicant had declared being a permanent resident of Kuwait since October 29, 2013. However, his passport indicated four Kuwaiti residence permits having been issued and expired during the relevant

period, the first commencing on December 25, 2008. Additionally, that the Applicant could provide only passive indicators of residence, that no explanation had been provided for the shortfall and that no documentation had been provided as to clients, billings, income or advertising of his company in Kuwait. The CIC Officer referred the file to a citizenship judge for determination.

Decision Under Review

[5] The Citizenship Judge provided a brief introduction and fact summary. In her analysis she noted that the Applicant claimed that his residency status in Kuwait was necessary because he would not be permitted to own property or a business there without a residence visa, nor to visit his children and grandchildren. She then identified the concerns identified by the CIC Officer in the FPAT and structured her analysis around those issues.

[6] On the issue of the Applicant's permanent residence in Kuwait, the Citizenship Judge noted that the Applicant had declared on his application that he had obtained his Kuwaiti residence status on October 29, 2013, but that his passport shows several residence permits dating before 2013. When asked about this at the hearing, the Applicant explained that the discrepancy was caused by an error in interpretation and he only filled in the date of his most recent permit. However, his passport showed that he had been in Kuwait for twenty years. When asked to explain how he could be permanent resident of both Kuwait and Canada, he stated that the Kuwaiti residence visas were merely a legal requirement to maintain his property, business and family visitation rights. As long as he returns every six months it can be renewed,

however, that residence permits are no longer being given to Iranians. Thus, should he fail to renew or cancel his permit, he would lose these rights.

[7] On the second issue, the Citizenship Judge asked why the Applicant had not provided information about his business in Kuwait. She noted his response that he felt he had provided all necessary information and that no one had asked him for more detail. Further, he stated that he stopped working in the business in January 2008, but later testified that he had to travel to Kuwait because "I can't stay here to do the business". The Citizenship Judge found the Applicant's responses to be unclear and that they left her with questions regarding the extent of his ongoing business interests in Kuwait.

[8] The Citizenship Judge then addressed the Applicant's 27 day shortfall. When asked for an explanation, the Applicant stated that when he applied for citizenship he was not aware that there was a shortfall. It was only during the course of the application process, when he was reminded that he had more absences than originally declared, that he realized that a shortfall existed. The Citizenship Judge noted the Applicant's claim that the reason for his absence was to visit his children and because he could not stay in Canada to conduct business. She also noted that the latter reason appeared to contradict his prior statement that he had not worked in his Kuwaiti business since 2008 and raised questions as to the reason for the shortfall.

[9] On the fourth issue, the lack of information about the Applicant's social ties in Canada and the mainly passive indicators of his residence, the Citizenship Judge noted the Applicant's claim that he did not know and no one had asked him about his social ties, although he did go to

Tim Horton's. Further, she found that the Applicant had submitted inadequate documentation of an active nature to support his physical presence in Canada during the relevant period.

[10] The Citizenship Judge concluded, having assessed the submissions and testimony, that the Applicant had left unanswered questions regarding the purpose of his travel, the reason for the shortfall and had submitted inadequate documentation to demonstrate an active physical presence in Canada during the relevant period. Therefore, it was impossible to determine how many days the Applicant was actually present in Canada because there was insufficient evidence of his continued physical presence during the period that he claimed to have been in Canada. Referring to the residency test set out in *Pourghasemi, Re*, [1993] FCJ No 232 [*Pourghasemi*], the Citizenship Judge found that the Applicant had not met requirements of s 5(1)(c) of the *Citizenship Act*.

Relevant Legislation

Citizenship Act

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 :
(a) makes application for citizenship;	a) en fait la demande;
…	…
(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	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

application, accumulated at least three years of residence in Canada calculated in the following manner:	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 Canada after his lawful admission to Canada for permanent residence the person shall be deemed to have accumulated one day of residence;	(ii) un jour pour chaque jour de résidence au Canada après son admission à titre de résident permanent;
…	…

Issues

[11] The Applicant submits three issues:

1) Did the Citizenship Judge err in not first determining whether the Applicant had established a residence in Canada and before applying her choice of residency test?

2) Did the Citizenship Judge properly apply the *Pourghasemi* test?

3) Did the Citizenship Judge violate principles of natural justice and the Applicant's right to procedural fairness?

Standard of Review

[12] It is well established that the reasonableness standard applies to a citizenship judge's determination on the residency requirement under s 5(1)(c) of the *Citizenship Act* (*Canada (Citizenship and Immigration) v Safi,* 2014 FC 947 at paras 15-16; *Canada (Citizenship and Immigration) v Jeizan*, 2010 FC 323 at para 12; *Farag v Canada (Citizenship and Immigration)*, 2013 FC 783 at paras 24-26; *Zhou v Canada (Citizenship and Immigration)*, 2013 FC 313 at para 10 [*Zhou*]). Reasonableness is concerned with the existence of justification, transparency and intelligibility, and with whether the decision falls within a range of possible, acceptable outcomes (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]).

[13] It is also well established that questions of procedural fairness are reviewable on the correctness standard (*Khosa v Canada (Citizenship and Immigration)*, 2009 SCC 12 at para 43; *Zhou* at para 12; *Fazail v Canada (Minister of Citizenship and Immigration)*, 2016 FC 111 at para 17 [*Fazail*]).

Issue 1: Did the Citizenship Judge err in not first determining whether the Applicant had established a residence in Canada and before applying her choice of residency test?

Applicant's Position

[14] The Applicant submits that the determination of residency under s 5(1)(c) is a two stage test. The first step requires a determination of whether the applicant has established a residence in Canada prior to or at the start of the relevant period (*Canada (Citizenship and Immigration) v Ojo*, 2015 FC 757 at para 25). It is only if this threshold question has been answered

affirmatively that the judge should consider whether the applicant's residency meets the required number of days under one of the three residency tests established in *Koo, Re,* (1992), 59 FTR 27 [*Koo*], *Papadogiorgakis, Re,* [1978] 2 FC 208 [*Papadogiorgakis*], or *Pourghasemi*. The Applicant further submits that once residency has been established, and if the applicant possesses a shortfall, then the citizenship judge must apply the test from *Koo* (*Canada (Citizenship and Immigration) v Elzubair*, 2010 FC 298; *Canada (Citizenship and Immigration) v Takla*, 2009 FC 1120). The Applicant submits that the Citizenship Judge failed to consider this threshold question and that her lack of analysis precludes an implicit finding in that regard. This constitutes a reviewable error.

Respondent's Position

[15] The Respondent submits that the threshold question of whether residence was established is not applicable to the *Pourghasemi* test. The question arose in *Papadogiorgakis*, the rationale being that an individual who was established in Canada did not cease to be a resident despite leaving Canada for temporary purposes. That is, there must first be a determination of whether the individual established a residence in Canada before it can be determined that this residence was maintained during absences from Canada. In any event, regardless of whether the Applicant had established residence, he still would not have met the *Pourghasemi* test as he did not have the required 1095 days of physical presence.

[16] The Respondent further submits that the Citizenship Judge had the discretion to select the *Pourghasemi* test, rather than *Koo* (*Canada (Citizenship and Immigration) v Pereira*, 2014 FC 574 at para 14 [*Pereira*]) even after the Applicant admitted to being short of the residency

requirement (*Salako v Canada (Citizenship and Immigration)*, 2013 FC 970 at paras 10-11; *Ayaz v Canada (Citizenship and Immigration)*, 2014 FC 701 at para 43 [*Ayaz*]).

Analysis

[17] In my view, the Applicant is correct that the jurisprudence has established a two-stage approach to the assessment of an applicant's residency under s 5(1)(c) of the *Citizenship Act*, regardless of which test is chosen in the second part. While I acknowledge the Respondent's point that the threshold question was developed based on the qualitative tests (*Papadogiorgakis* and *Koo*), subsequent jurisprudence has held that the threshold analysis is relevant even if the citizenship judge chooses to apply the quantitative test from *Pourghasemi*. This is because the first stage, as a threshold, is determinative of the case. In *Hao v Canada (Citizenship and Immigration)*, 2011 FC 46 Justice Mosley stated:

> [24] The determination of residency by citizenship judges has involved a two stage process. A threshold determination is made as to whether residence has been established in Canada. If it has not been established, the matter ends. If residence has been established, the second stage requires a determination as to whether the applicant's residency satisfies the statutorily prescribed number of days. It has remained open to citizenship judges to choose either of the two jurisprudential schools represented by *Pourghasemi* and *Papadogiorgakis/Koo* in making that determination so long as they reasonably applied their preferred interpretation of the statute to the facts of the application before them.

[18] This suggests that Justice Mosley did not see *Pourghasemi* and the threshold residency question as mutually exclusive.

[19] Further, in *Al Tayeb v Canada (Citizenship and Immigration)*, 2012 FC 333 Justice Phelan granted judicial review of a citizenship judge's decision, which was decided based on *Pourghasemi*, because it had not dealt with the threshold issue:

> [14] The facts of this case raise the issue of pre-existing residency. The Judge never considered whether residency had been established prior to the Relevant Period. Unlike *Canada (Minister of Citizenship & Immigration) v. Guettouche*, 2011 FC 574 (F.C.), where Justice Zinn might have been prepared to infer that the threshold issue had been decided because the judge considered the *Koo* (qualitative) test, no such inference can be drawn by virtue of adopting the *Pourghasemi* (quantitative) test.

[20] Accordingly, I do not agree with the Respondent that the threshold question is not applicable. And, in this matter, nothing in the Citizenship Judge's reasons suggest that she turned her mind to that question. In fact, the record suggests that the issue of the whether the Applicant had established residence was one of the concerns that prompted the CIC Officer to refer the matter to a citizenship judge for determination.

[21] In that regard, section 2 of the FPAT, "Absences from Canada", refers to "Time in Canada before relevant period". In this case, the CIC Officer wrote, "Unable to assess the time (absences have not been declared not listed by the applicant)". The following section refers to, "Time in Canada in relevant period before first significant absence". There, the CIC Officer wrote, "0 days (left to Kuwait on January 13, 2010 and came back on March 17, 2010)". The CIC Officer also raised the issue of the Applicant's permanent residence in Kuwait.

[22] Although jurisprudence has established that the threshold finding can be implicit (see *Canada (Citizenship and Immigration) v Guettouche*, 2011 FC 574 at paras 14-16 [*Guettouche*];

Canada (Citizenship and Immigration) v Khan, 2015 FC 1102 at para 18; *Canada (Citizenship and Immigration) v Lee*, 2016 FC 67 at para 22 [*Lee*]), in this matter there is an insufficient basis on which to infer that the Citizenship Judge considered this issue. As in *Guettouche*, the evidence raised the question of when, if ever, the Applicant established his residency (*Guettouche* at para 15). The FPAT should have brought the threshold issue to the Citizenship Judge's attention, yet, as the Applicant notes, nothing in the decision indicates that she was aware of or addressed the issue.

[23] And, while some decisions have presumed that a citizenship judge has answered the threshold question simply based on the fact that the judge proceeded to consider the second stage of the residency test (see *Boland v Canada (Citizenship and Immigration)*, 2015 FC 376 [*Boland*] at para 22; *Lee* at para 23), in these circumstances I am not prepared to make that presumption.

[24] As to the question of whether a citizenship judge must apply *Koo* in the second part of the analysis if the Applicant falls short of the required 1095 days, when appearing before me the Applicant conceded that it was open to the Citizenship Judge to select any of the three available tests.

Issue 2: Did the Judge properly apply the *Pourghasemi* test?

Applicant's Position

[25] The Applicant submits that the Citizenship Judge conducted a truncated *Koo* inquiry into the adequacy of the Applicant's evidence and the justifications for his shortfall prior to arriving at her quantitative conclusion based on *Pourghasemi*. The Applicant notes that it is settled law that judges may not apply hybrid tests, they must choose either a qualitative or quantitative test (*Edwards v Canada (Citizenship and Immigration)*, 2014 FC 748 at para 27 [*Edwards*]). Further, the *Pourghasemi* test must be unambiguously and consistently applied, a citizenship judge may not conduct a residence inquiry under a constructive residence test and then reach a negative decision under a quantitative test (*Muhanna v Canada (Citizenship and Immigration)*, 2008 FC 1289 [*Muhanna*]). Despite the fact that the Applicant did not dispute his shortfall, the Citizenship Judge repeatedly drew adverse inferences from the lack of an explanation for it. It is unclear from the reasons what would have been an adequate explanation for a shortfall that is strictly disallowed under *Pourghasemi*. The Citizenship Judge's reasons speak to factors appropriate to a *Koo* analysis, including "passive indicia" of physical presence and the extent of his social ties in Canada. Where a citizenship judge examines the adequacy of an applicant's evidence in the face of an uncontested shortfall, the *Pourghasemi* test has not been applied correctly (*Tshimanga v Canada (Citizenship and Immigration)*, 2005 FC 1579 at para 21 [*Tshimanga*]).

[26] The Applicant notes that, since his shortfall was uncontested, it is unclear why the Citizenship Judge considered it necessary to find that it was "impossible to determine…how

many days the Applicant was actually present in Canada" due to insufficient evidence. Where a shortfall is admitted, "sufficiency" of indicia of presence is not a consideration under *Pourghasemi*. Therefore, this finding implies the incorrect application of the *Pourghasemi* test or application of a blended test. The Applicant submits that the situation in *Purvis v Canada (Citizenship and Immigration)*, 2015 FC 368 [*Purvis*], cited by the Respondent, applies equally to this case. Although the Citizenship Judge did not mention *Koo* by name, as in *Purvis*, she invoked *Pourghasemi* after finding that the Applicant did not satisfy the *Koo* test. Further, the Respondent's critique of *Muhanna* assumes that the Citizenship Judge's approach was intelligible. The Applicant submits that it is untenable to maintain that the Citizenship Judge clearly applied *Pourghasemi* when the decision discusses justifications for absences and sufficiency of evidence at length. The Applicant submits that while the Citizenship Judge decided under a *Pourghasemi* test, she did not conduct a *Pourghasemi* analysis.

Respondent's Position

[27] The Respondent submits that the evidence in the record is not sufficient to demonstrate that the Citizenship Judge blended the legal tests (*Purvis* at paras 29 and 32) and that she did not err in canvassing the evidence before her and this is not evidence of a blending of the tests. The Respondent submits that the Citizenship Judge was clear that the *Pourghasemi* test was applied. Further, considerations from *Koo* were not imported, rather, the application was denied because the Applicant had not met the physical presence threshold required by the *Pourghasemi* test. The cases cited by the Applicant simply state that the tests cannot be blended, but do not demonstrate that such a blending took place in this case. The uncertainty and ambiguous statements that persuaded the Court in *Muhanna* were not present in this case as there was a clear statement that

the *Pourghasemi* test was being applied. The Respondent submits that *Tshimanga* is distinguishable because that case dealt with the question of whether the citizenship judge considered the *Koo* factors. Further, *Alouache v Canada (Minister of Citizenship and Immigration),* 2003 FC 858, cited in *Tshimanga*, is distinguishable because the citizenship judge had failed to indicate which test was being used and because of the influence that qualitative evidence had on the citizenship judge's decision. In this case, the determination that the *Pourghasemi* test was not satisfied was based on the Applicant's shortfall of days and not on *Koo* factors or analysis.

Analysis

[28] As recently described by Justice LeBlanc in *Hussein v Canada (Citizenship and Immigration)*, 2015 FC 88 [*Hussein*] the *Pourghasemi* test involves a strict counting of days of physical presence in Canada which must total 1095 days in the four years preceding the application. It is often referred to as the quantitative test. The *Papadogiorgakis* test is less stringent and recognizes that a person can be resident in Canada, even while temporarily absent, if there remains a strong attachment to Canada. The *Koo* test builds on *Papadogiorgakis* by defining residence as the place where one has centralized his or her mode of living. The last two tests are often referred to as qualitative tests (*Huang v Canada (Citizenship and Immigration)*, 2013 FC 576 at para 25 [*Huang*]).

[29] It is now settled law that citizenship judges are free to select from either of the three residency tests (*Hussein* at para 15; *Lam v Canada (Minister of Citizenship and Immigration)*, (1999) 164 FTR 177 at para 33; *Boland* at paras 18-19; *Huang* at paras 21, 24, 41-44; *Ayaz* at

para 43; *Purvis* at para 26; *Fazail at* para 27). Once that selection has been made, the role of this Court is limited to ensuring that the test has been properly applied. In applying the selected test, it is an error to blend the qualitative and quantitative tests (*Edwards* at para 27; *Purvis* at para 28).

[30] In her decision, the Citizenship Judge raised and addressed each of the concerns that had been identified by the CIC Officer in the FPAT. I see no error in that approach. This permitted the Applicant an opportunity to specifically address the concerns that gave rise to the need for a hearing by the Citizenship Judge (see *Stine v Canada (Minister of Citizenship and Immigration)*, (1999), 1999 CanLII 8618 (FC); *El-Husseini v Canada (Citizenship and Immigration)*, 2015 FC 116 at para 21; *Abdou v Canada (Citizenship and Immigration)*, 2014 FC 500 at para 24). It was in this context, for example, that the Applicant was asked to and explained why he maintained permanent residence in both Kuwait and Canada during the relevant period.

[31] However, in this case, beyond the exercise of raising and permitting the Applicant to address the issues raised by the CIC Officer, the Citizenship Judge's analysis and reasons are limited. She states only that:

> [33] In assessing the Applicant's submissions and testimony, I find that he has left unanswered questions regarding the purpose of his travel during the relevant period and the reason for his shortfall in physical presence. He has not provided an adequate submission of documents to demonstrate his active presence in Canada during the relevant period. As noted in *El Fihri* and *Saqur* above, he has not met the burden of proving that he meets the conditions set out in the Act, and in particular the residence requirements.
>
> [34] Given the forgoing, it is impossible to determine, on a balance of probabilities, how many days the Applicant was actually present in Canada, because there is insufficient evidence

> of his continued physical presence during the period that he claims to have been in Canada.
>
> [35] Referring to the residency test as set by Muldoon J. in *Pourghasemi*, (Re): [1993] F.C.J No. 232, I find that, on a balance of probabilities, the Applicant has not met the residence requirements under s 5(1)(c) of the *Act*.

[32] The *Pourghasemi* test required the Citizenship Judge to determine whether the Applicant has been physically present in Canada for at least 1095 days during the relevant period based on a strict counting of days (*Boland* at para 15; *Pereira* at para 14). From her reasons it seems that the Citizenship Judge accepted the number of days of physical presence and absence as determined by the CIC Officer and recorded in the FPAT. Stating, in the introduction of her decision, that the Applicant declared 1068 days of presence and 365 days of absence on his application but that this was later reassessed by the reviewing agent to be 392 days of absence during the relevant period leaving a shortfall of 27 days.

[33] She addressed the shortfall as a concern raised by the CIC Officer. The Applicant did not dispute the shortfall. The Citizenship Judge, presumably anticipating the possibility that she would apply a qualitative test, sought reasons for the absence. She was of the view that part of his explanation, that he could not stay in Canada to conduct his business, contradicted his prior statement that he had not worked in the business since 2008. She agreed with the CIC Officer that an adequate explanation for the shortfall had not been provided. In other words, she questioned the Applicant's credibility.

[34] As noted above, this analysis was conducted in the context of addressing the concerns raised by the CIC Officer. Had the Citizenship Judge, in her subsequent and concluding

analysis, simply found that the strict *Pourghasemi* test applied and could not be met because of the uncontested 27 day shortfall, her decision would have been reasonable. However, she found that the Applicant had left unanswered questions as to the purpose of his travel and the reason for the shortfall in his physical presence in Canada. If she were applying the strict quantitative test, those issues would not be relevant to her decision. She also stated that the Applicant had not provided adequate documentation to demonstrate his "active presence" in Canada during the relevant period. However, given that the 27 day shortfall was not contested, the purpose of this finding is also unclear in the context of the quantitative test.

[35] Further, the Citizenship Judge stated that, given her outstanding questions and the absence of an adequate explanation from the Applicant, it was impossible to determine how many days the Applicant was actually present in Canada. Again, however, given the uncontested shortfall and the fact that the Citizenship Judge appeared to accept the figures suggested by the CIC Officer without conducting a counting of the days herself, the purpose of this finding is unclear.

[36] In that regard, I note Justice LeBlanc's recent comments in *Hussein*:

> [16] First, the Citizenship Judge did not engage in any counting of days as required with the *Pourghasemi* test. When reviewing the decision, it is clear that the Citizenship Judge accepted, as a starting point, the number of 1099 days of physical presence in Canada. However, there is no further mention of the number of days that would ensue from the filing of Ms Hussein's Residence Questionnaire and the further days of absence. There is also no mention of the number of days Ms Hussein would have been in Canada in total while this is at the crux of the test chosen and used by the Citizenship Judge. As this Court stated in *Jeizan v Canada (Minister of Citizenship and Immigration)*, 2010 FC 323, 386 FTR 1, at para 18:

> At the very least, the reasons for a Citizenship Judge's decision should indicate which residency test was used and why that test was or was not met: see *Canada (Minister of Citizenship and Immigration) v Behbahani*, 2007 FC 795, at paras 3-4; *Eltom v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1555, at para 32; *Gao v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 605, [2003] F.C.J. No. 790 at para 22; *Gao v Canada (Minister of Citizenship and Immigration)*, 2008 FC 736, at para. 13. (Emphasis added)
>
> [17] In particular, the Citizenship Judge did not explain how the so-called inconsistencies in the evidence submitted by Ms Hussein made it "impossible" for him to proceed with that calculation.

[37] In this case, it is entirely unclear, as in *Hussein*, why the Citizenship Judge found it "impossible" to determine how many days the Applicant was present in Canada. This suggests the Citizenship Judge misunderstood the evidence or misapplied the *Pourghasemi* test, either of which is a reviewable error. Although *Hussein* involved an applicant who appeared to meet the threshold for physical presence, as opposed to the Applicant's apparent shortfall, in my view, the same principle applies in the present case.

[38] It is also unhelpful that the Citizenship Judge did not refer to *Pourghasemi* until the last sentence of her reasons.

[39] Given her reasons, it is not clear how the Citizenship Judge came to her conclusion, even though she did make reference to the *Pourghasemi* test. While adequacy of reasons is not a stand-alone ground of review (*Newfoundland and Labrador Nurses' Union v Newfoundland and*

Labrador (Treasury Board), 2011 SCC 62 at para 14), as Justice Rennie noted in *Komolafe v Canada (Citizenship and Immigration),* 2013 FC 431 at para 11:

> *Newfoundland Nurses* is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what findings might have been made or to speculate as to what the tribunal might have been thinking. This is particularly so where the reasons are silent on a critical issue. […] N.L.N.U. allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn. Here, there were no dots on the page.

[40] In the present case, the dots on the page lead in two directions, to *Koo* and to *Pourghasemi* without any way for the Court to determine which was actually applied. As stated by Justice Scott in *Rousse v Canada (Citizenship and Immigration)*, 2012 FC 721 at para 31, once a citizenship judge selects a test, they must apply the test consistently. The applicant must be able to understand the decision and the reasons and basis for that decision. That is not what happened in this case and, therefore, the decision was unreasonable.

[41] Given my conclusion above, it is not necessary to address the question of whether the Citizenship Judge blended tests. However, in my view, this is a circumstance similar to *Muhanna*. There, Justice Zinn held that the citizenship judge had impermissibly blended the qualitative and quantitative tests, making it unclear which one he had applied:

> [9] In my view, it is not at all certain which test the Judge employed. While the respondent submits that the Judge based his determination on the strict physical presence test, any certainty in this respect is clouded by the Judge's statement that "too long an absence from Canada, albeit temporary, during the minimum period of time set out in the Act, as in the present case, is contrary to the purpose of the residency requirements of the Act" [my emphasis]. The minimum period set out in the Act is the 1,095 day period. This statement of the Citizenship Judge implies that a brief absence, or one that is not "too long", in that 1,095 day period,

> may be acceptable. If so, then the strict physical presence test has not been used. But beyond that observation, it is impossible to ascertain with any certainty what test he was using. For this reason alone the appeal must be allowed.

[42] As in *Muhanna*, in the present case the Citizenship Judge's finding demonstrates that she likely imported qualitative factors in making her decision. For example, she appears to suggest that, if the Applicant had provided an adequate reason for the shortfall or concerning the purpose of his travel, he might have been successful. Yet these are not relevant considerations in a strict counting of days under the *Pourghasemi* test.

[43] And, unlike *Boland*, in this case the Citizenship Judge's decision does not leave "no ambiguity" as to the rationale for not approving his application and, while she does not mention *Koo*, based on her reasons it is not clear that she did not import factors that would have been relevant had that test been applied to her decision which she stated to be based on *Pourghasemi*.

[44] Reasonableness is concerned with the existence of justification, transparency and intelligibility, and with whether the decision falls within a range of possible, acceptable outcomes (*Dunsmuir* at para 47). In these circumstances, as I am unable to determine with any degree of certainty why the Citizenship Judge concluded as she did, her decision is not reasonable.

[45] Given my conclusions above, it is not necessary to address the third issue.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted. The decision of the Citizenship Judge is set aside and the matter is remitted for redetermination by a citizenship judge.
2. There will be no order as to costs.

"Cecily Y. Strickland"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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