Date: 20071214

Docket: T-888-07

Citation: 2007 FC 1320

Ottawa, Ontario, December 14, 2007

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

JANET SALAFF

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] Janet Salaff's case is about numbers. At 1,095 or more, she would be enjoying the benefits of Canadian citizenship, including the right to come and go as she pleases, and to stay away as long as she pleases. At 729 or less, she runs the risk of losing her status as a Canadian permanent resident. Her number is 831; the number of days she was physically present in Canada in the four years immediately preceding her application for citizenship. If otherwise qualified, the *Citizenship Act* requires the Minister to grant citizenship to a permanent resident who has "within the four years immediately preceding the date of his of her application, accumulated at least three years of

residence in Canada…" The Citizenship Judge found that she was short 264 days and dismissed her application. This is the appeal thereof.

[2] Ms. Salaff is a credit to Canada. She came here from the United States in 1970 and became a permanent resident in 1974. Her daughter was born here and is a Canadian citizen. She is a scholar of note. She has been an esteemed professor of sociology at the University of Toronto since 1970, specializing in Chinese studies. She is widely published and has lectured worldwide. She has served as an expert witness. She has maintained her expertise by frequently visiting China, funded in large measure by Canadian non-governmental organizations. The Minister does not deny that she has been a Canadian goodwill ambassador.

[3] Although the Citizenship Judge dismissed her application, it was nevertheless open to her to recommend to the Minister that she be granted citizenship. She did not do so. This Court does not have jurisdiction to make that recommendation. Moreover, as I said in *Canada (Minister of Citizenship and Immigration) v. Wall* (2005), 271 F.T.R. 146, 2005 FC 110, good character is not enough. The law requires that she reside here at least 1,095 days in the four years immediately preceding her citizenship application.

[4] The Act does not define "residence". Different judges of this Court have taken three approaches. Unfortunately, the Act does not allow an appeal to the Federal Court of Appeal, and Parliament has not seen fit to amend the Act so as to clarify an unfortunate situation. Consequently, and sadly, a Citizenship Judge will not be overruled in appeal as long as he or she properly follows

one of the three schools of thought (*Lam v. Canada (Minister of Citizenship and Immigration* (1999), 164 F.T.R. 177, [1999] F.C.J. No. 410).

[5] All these schools require that an applicant must first establish herself in Canada. The Minister readily agrees that Ms. Salaff did so. The question is whether she maintained herself here, not over the past 37 years, but rather in the four years "immediately" preceding her application. Under one line of jurisprudence, she probably met the residency requirement, even though she was not physically present for 1,095 days. Under another, she was definitely short. However, the Citizenship Judge followed the more nuanced approach set out by Madam Justice Reed in *Koo (Re)*, [1993] 1 F.C. 286, 59 F.T.R. 27, 59 F.T.R. 27, [1992] F.C.J. No. 1107, the "centralized mode of living" approach.

[6] Had the Citizenship Judge followed the approach set out in *Re Papadogiorgakis*, [1978] 2 F.C. 208, 88 D.L.R. (3d) 243, Ms. Salaff would probably have met the residency requirement. Drawing on the treatment of "residence" in tax statutes, Associate Chief Thurlow held that a person who has established a home in Canada "does not cease to be resident there when he lives it for a temporary purpose whether on business or vacation or even to pursue a course of study."

[7] On the other hand, in *Re Pourghasemi* (1993), 62 F.T.R. 122, Mr. Justice Muldoon emphasized physical presence; if you're in, you're in; if not, you're out.

[8] Drawing on *Re Papadogiorgakis*, above, Madam Justice Reed was of the view that the residency test could be formulated two ways. Is Canada the place where the applicant "regularly, normally, or customarily lives" or "is Canada –the country in which he or she has centralized his or her mode of existence". She then posed six questions "…that can be asked which assist in such a determination – ". These questions should not be read as statutory conditions. *Re Koo* stands for the proposition that one may be here in mind, even if not in body.

[9] Most citizenship issues are mixed ones of fact and law, subject to analysis on the reasonableness simpliciter standard (*Wall*, above). However, I have come to the conclusion that the Citizenship Judge misdirected herself in law, which is reviewed on the correctness standard. Rather than focus on the four years in question, she took a prospective view. Although Ms. Salaff continues to maintain an office at the University of Toronto, she is now retired. She recently remarried a Norwegian professor, who has maintained his Norwegian residency. The couple lives a life many would envy; he spends time with her here; she spends time with him there; and they both spend time in Asia, or at her two-week timeshare in Hawaii. She teaches in Canada, in Norway and in Asia.

[10] I am satisfied that the citizenship judge properly summarized the evidence when she said: "In part due to research duties, vacations and conjugal visits with your husband in Norway, you enter and exit Canada on a regular basis." However, she then misdirected herself, by focusing on Ms. Salaff possible future intentions rather than on the situation current at the time of the citizenship application, by saying: "Now that you are retired from the University of Toronto, it is reasonable to expect the amount of time you spend outside the country may now increase."

[11] She thought it "…curious that you applied for citizenship at a time when you must have known that you might face a substantial residency shortfall." She concluded:

> While there is no question that you have contributed a great deal to Toronto's academic community, and Chinese community groups in particular, and that you have excelled in your chosen profession, there is insufficient evidence to suggest that you intend to make Canada your primary residence.

[12] I take reference to the timing of the application to be speculation that in the future Ms. Salaff might lose her permanent resident status for failure to be here at least 730 days in a 5 year-period as required by section 28 of the *Immigration and Refugee Protection Act*. While it is true that a citizen can come and go as she pleases, and that permanent resident does not quite have that freedom, this was improper surmise on the Citizenship Judge's part.

[13] If an administrative discretionary decision of the Minister of the Crown can be set aside for being based on irrelevant considerations, it follows that this decision must be set aside (*Maple Lodge Farm Ltd. v. Canada*, [1982] 2 S.C.R. 2, 137 D.L.R. (3d) 558).

[14] For these reasons, the appeal shall be allowed and the matter referred back for reconsideration before another citizenship judge. There shall be no order as to costs.

ORDER

THIS COURT ORDERS that:

1. The appeal is allowed and the matter is referred back for reconsideration before another Citizenship Judge.

2. There shall be no order as to costs.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-888-07
STYLE OF CAUSE:	JANET SALAFF v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	December 12, 2007
REASONS FOR ORDER:	HARRINGTON J.
DATED:	December 14, 2007

APPEARANCES:

Cathryn Sawicki	FOR THE APPLICANT
Jennifer Dagsvik	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Green and Spiegel LLP Barristers & Solicitors Toronto, Ontario	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT