Federal Court  Cour fédérale

Date: 20100121

Docket: T-1726-08

Citation: 2010 FC 69

Ottawa, Ontario, January 21, 2010

Present: The Honourable Mr. Justice Shore

BETWEEN:

AMADOU BALIO BAH
and NENE IDIATOU BAH

Applicant

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Preliminary

[1] For the purposes of an application for citizenship, it is settled law that holding employment abroad, even with a Canadian entity or an entity linked to one, is not an acceptable justification for those absences, unless there is substantiating evidence, as this is a deliberate choice and not something beyond the applicants' control (*Canada (Minister of Citizenship and Immigration) v. Tarfi*, 2009 FC 188, [2009] F.C.J. No. 244 (QL) at paragraphs 8-9; *Canada (Minister of Citizenship and Immigration) v. Hussein*, 2008 FC 757, 330 F.T.R. 166; *Khan v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 47, 145 A.C.W.S. (3d) 379).

II. Introduction

[2] This is an application for judicial review of a decision of Citizenship and Immigration Canada dated September 10, 2008, rejecting the application for citizenship made by the applicants under subsection 14(5) of the *Citizenship Act*, R.S.C. 1985, c. C-29 (Act).

[3] Under paragraph 300(*c*) of the *Federal Court Rules*, SOR/98-106 (Rules), appeals in citizenship matters are brought as applications and are subject to sections 300 *et seq.* of the Rules.

III. Facts

[4] The applicants, Amadou Balio Bah and Nene Idiatou Bah, are citizens of the Republic of Guinea and arrived in Canada in August 1991 as temporary residents (citizenship file (CF) at pp. 1, 8, 46 and 49).

[5] They became permanent residents on July 5 and 7, 2002, and applied for Canadian citizenship on November 28, 2004 (CF at pp. 7 and 14).

[6] The applicants were summoned to appear before a citizenship judge on June 9, 2008. At that time, Idiatouh Bah and Balio Bah respectively had a total of 426 and 427 days of physical presence in Canada from November 28, 2000, to November 28, 2004 (CF at pp. 23 and 28). The reference period is therefore from November 28, 2000, to November 28, 2004.

[7] Their citizenship applications were rejected pursuant to paragraph 5(1)(*c*) of the Act because they did not show that they met the residency conditions.

[8] From November 18, 2002, to the dates of their citizenship applications, the applicant Balio Bah chose to hold employment with a Canadian non-government organization in Senegal. The applicant Idiatou Bah and the couple's two children chose to live with the applicant Balio Bah in Senegal.

IV. Issue

[9] Did the citizenship judge err in concluding that the applicants had not shown that they met the residency conditions within the meaning of paragraph 5(1)(*c*) of the Act?

V. Analysis

[10] The Court agrees with the respondent that the applicants did not show that the citizenship judge made an error of law or of fact subject to review by this Court when he decided to reject their applications for Canadian citizenship.

A. Applicable statutory provision

[11] Paragraph 5(1)(*c*) of the Act reads as follows:

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 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.

B. Citizenship judge's decision

[12] It is now acknowledged, since *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, that the decision of a citizenship judge on the issue of residency must be examined on the basis of the standard of reasonableness (*Tarfi*, above; *Canada (Minister of Citizenship and Immigration) v. Ntilivamunda*, 2008 FC 1081, 302 D.L.R. (4th) 345 at paragraph 5).

[13] In this case, the citizenship judge refused to grant citizenship to the applicants because they did not discharge their burden of showing, in accordance with paragraph 5(1)(*c*) of the Act, that they met the conditions concerning their physical presence in Canada (*El Fihri v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1106, 147 A.C.W.S. (3d) 745 at paragraph 12; *Malevsky v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1148, 120 A.C.W.S. (3d) 11).

[14] In his assessment of the concept of residence, the citizenship judge could adopt one of the following three approaches:

> [10] This Court's interpretation of "residence" can be grouped into three categories. The first views it as actual, physical presence in Canada for a total of three years, calculated on the basis of a strict counting of days (*Pourghasemi (Re)*, [1993] F.C.J. No. 232 (QL) (T.D.)). A less stringent reading of the residence requirement recognizes that a person can be resident in Canada, even while temporarily absent, so long as he or she maintains a strong attachment to Canada (*Antonios E. Papadogiorgakis (Re)*, [1978] 2 F.C. 208 (T.D.). A third interpretation, similar to the second, defines residence as the place where one "regularly, normally or customarily lives" or has "centralized his or her mode of existence" (*Koo (Re)*, [1993] 1 F.C. 286 (T.D.) at para. 10).

> [11] I essentially agree with Justice James O'Reilly in *Nandre*, above, at paragraph 11 that the first test is a test of physical presence, while the other two tests involve a more qualitative assessment:
>
> > Clearly, the Act can be interpreted two ways, one requiring physical presence in Canada for three years out of four, and another requiring less than that so long as the applicant's connection to Canada is strong. The first is a physical test and the second is a qualitative test.
>
> (Emphasis added.)

(*Mizani v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 698, 158 A.C.W.S. (3d) 879; also, *Lam v. Canada (Minister of Citizenship and Immigration)* (1999), 164 F.T.R. 177, 87 A.C.W.S. (3d) 432 (T.D.)).

[15] In the present case, the citizenship judge used the approach that was most favourable to the applicants, applying the test in *Koo (Re)*, [1993] 1 F.C. 286, 59 F.T.R. 27 (T.D.). He weighed the following six factors, explaining the relevant evidence and his conclusions for each one:

a. Were the applicants physically present in Canada for a long period prior to recent absences which occurred immediately before the application for citizenship?
b. Where are the applicants' immediate family and dependents (and extended family) resident?
c. Does the pattern of physical presence in Canada indicate a returning home or merely visiting the country?
d. 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)?

e. Is the physical absence caused by a clearly temporary situation such as working as a missionary abroad, following a course of study abroad as a student, accepting temporary employment abroad or accompanying a spouse who has accepted temporary employment abroad?

f. What is the quality of the connection with Canada: is it more substantial than that which exists with any other country?

1) Duration of the applicants' presence in Canada before filing their applications

[16] The applicants were absent from Canada for 741 days before filing their applications.

[17] However, the citizenship judge acknowledged that they had lived in Canada since 1991, came here as students and obtained their permanent residency in July 2002.

[18] The citizenship judge also noted that the applicants were already living in Senegal when they filed their applications for citizenship (CF at p. 23).

[19] In addition, the citizenship judge noted that the applicant had decided to work abroad from November 2002 for a Canadian company and that he was still holding this employment when his application was assessed (CF at pp. 25 and 29). The applicant Idiatou Bah had decided to accompany Balio Bah to Senegal (she also performs the same work in Senegal as her husband).

2) Lack of family in Canada

[20] Regarding the second criterion, the citizenship judge found that the applicants and their two Canadian children all live in Senegal.

[21] In addition, the applicant Idiatou Bah admitted that she and Balio Bah had left their apartment to go abroad and did not have any personal property in Canada. She also admitted that no family members live here (AR at pp. 25 and 29).

[22] The applicants therefore do not meet this criterion.

3) Physical presence in Canada shows that the applicants are merely visiting

[23] The applicants did not submit any evidence about the dates of their returns to Canada since they left in November 2002.

[24] The citizenship judge also found that the applicants did not have a temporary residence in Canada (the house acquired before they filed their citizenship application was rented) and had no family here. Although the applicants did not submit any evidence on this point, it appears that the applicant came to Canada in 2004 to give birth to her second child and then returned to Senegal.

[25] The applicants had to show that they had social ties to Canada. However, they did not substantiate their allegations (upon commencement of proof) to the effect that they founded and worked for a not-for-profit organization that facilitates exchanges between Canada and the

African continent and also participated in an association called “Lions Club – Montréal au service de l’enfance”.

[26] The applicants therefore do not have any real social ties to Canada.

[27] Accordingly, the citizenship judge concluded that the applicants had not [TRANSLATION] “shown that [their] return to Canada was a return to [their] home” (CF at pp. 25 and 29).

4) Lengthy absence

[28] Regarding the fourth criterion, that is, the extent of a physical presence in Canada (number of days of absence compared with the number of days of presence), the citizenship judge noted that the applicants spent 427 days (426 days for the applicant’s wife; CF at p. 29) in Canada during the period in question, versus 741 days abroad.

[29] Considering that the applicants have been living outside of Canada since November 2002, they did not in any way centralize their mode of living in Canada and did not “regularly, normally or customarily” live in Canada:

> [7] Specifically, I consider that even if the citizenship judge erred in calculating the number of days the applicant was absent (he mentioned 942 days), that error is not significant as the applicant himself indicated in his citizenship application that he was absent for 864 days because of his work abroad. As the applicant was not in Canada for 596 days during the reference period, he was far from meeting the minimum residence requirement of 1,095 days, which sufficed for the citizenship judge to reasonably deny his application.
>
> [8] In *Re Pourghasemi* (1993), 19 Imm. L.R. (2d) 259, at 260, Muldoon J. set out the purposes underlying paragraph 5(1)(*c*) of the Act:

> ... the purpose ... is to insure that everyone who is granted precious Canadian citizenship has become, or at least has been compulsorily presented with the everyday opportunity to become, "Canadianized". This happens by "rubbing elbows" with Canadians in shopping malls, corner stores, libraries, concert halls, auto repair shops, pubs, cabarets, elevators, churches, synagogues, mosques and temples - in a word wherever one can meet and converse with Canadians - during the prescribed three years. One can observe Canadian society for all its virtues, decadence, values, dangers and freedoms, just as it is. That is little enough time in which to become Canadianized. If a citizenship candidate misses that qualifying experience, then Canadian citizenship can be conferred, in effect, on a person who is still a foreigner in experience, social adaptation, and often in thought and outlook. . .
>
> (Emphasis added.)

(*Abderrahim v. Canada (Minister of Citizenship and de Immigration)*, 2004 FC 1486, 139 A.C.W.S. (3d) 810).

[30] As the Court recalled in *Xu v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 700, 139 A.C.W.S. (3d) 433:

> [15] Parliament made it clear that an applicant for citizenship must have accumulated "at least" three years of residence within the four years immediately preceding the date of his application. As for the notion of "residence", it is not specifically defined under s. 2(1) of the *Citizenship Act*. But it is certainly fair to say that the allowance for one year's absence during the four-year period under s. 5(1)(*c*) of the *Act* creates a strong inference that the presence in Canada during the other three years must be substantial. . . .

[31] In addition, in similar circumstances, this Court has already ruled that a trip of 616 days abroad was an indication that the applicant's life was not centralized in Canada (*Khan*, above, at para. 18 (international mining company – absence of 676 days); also *Ali v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 106, 164 A.C.W.S. (3d) 745 (employed by a non-

governmental organization (NGO) – absence of 305 days); *Sharma v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1384, 242 F.T.R. 185 (a UNICEF worker – absence of 958 days); *Fernandes v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 305, 121 A.C.W.S. (3d) 424 (international bank – absence of 857 days); *Canada (Minister of Citizenship and Immigration) v. Woldemariam* (1999), 175 F.T.R. 108, [1999] F.C.J. No. 1545 (QL) (absence of 412 days – former worker with the World Food Program (UN)).

[32] *Paez v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 204, 165 A.C.W.S. (3d) 228 states the following:

> [16] . . . :
>
> > When absences are a regular pattern of life rather than a temporary phenomenon, they will indicate a life split between two countries, rather than a centralized mode of existence in Canada, as is contemplated by the Act . . .
> >
> > . . .
>
> [17] I agree with my colleague. While the *Koo (Re)* test is inherently flexible, taking into account the personal circumstances of an applicant, that flexibility can extend only so far. At some point if an applicant wishes to become a Canadian citizen, he must centralize his mode of existence in Canada. (Emphasis added).

[33] The applicants did not therefore meet this criterion.

5) Permanent physical absences

[34] Regarding the fifth criterion, which requires determining the reasons for absences from Canada and whether those absences were the result of a temporary situation, the citizenship

judge acknowledged that the applicant Balio Bah had held employment abroad since 2002 and that the applicant Idiatou Bah had chosen to accompany him.

[35] The applicants claim that Balio Bah's employment in Senegal was temporary.

[36] However, Balio Bah's employment contract, which was initially for a two-year term, was subsequently renewed indefinitely after the applications for citizenship were filed (CF at p. 30).

[37] Balio Bah did not submit any evidence showing that his employer had offered him a position in Canada or had made a commitment to change his posting to Canada in the future.

[38] Quite the contrary, Balio Bah admitted having asked his employer for a change of posting and that this was refused. As mentioned above, Balio Bah also specifically accepted a renewal of his contract abroad after the applications for citizenship were filed.

[39] The applicants had to justify their absences from the country so that they could be considered as periods of residence in Canada and thereby show that they had centralized their lives here.

[40] For the purposes of an application for citizenship, it is settled law that holding employment abroad, even with a Canadian entity or an entity linked one, is not an acceptable justification for those absences, unless there is substantiating evidence, as this is a deliberate

choice and not something beyond the applicants' control (*Tarfi*, above, at paras. 8-9; *Hussein*, above; *Khan*, above).

[41] Moreover, the following was stated in *Khan*, above:

> [22] The applicant has made a choice to work for a company that requires him to work outside Canada at their diamond mining operation in Guinea. As noted in *(Re) Leung* (1991), 42 F.T.R. 149 at 154, 13 Imm. L.R. (2d) 93, many Canadian citizens, whether Canadian born or naturalized, must spend a large part of their time abroad in connection with their businesses, and this is their choice. An applicant for citizenship, however, does not have such freedom because of the provisions of section 5(1) of the Act. (Emphasis added.)

[42] The applicants' physical absences from Canada were therefore not due to a purely temporary situation. In fact, the evidence they submitted clearly shows that it was a permanent situation.

[43] It was therefore reasonable for the citizenship judge to conclude that Balio Bah's employment abroad was not temporary (*Khan*, above at paragraphs 20-21).

[44] As for Idiatou Bah, she argued that the citizenship judge should have considered that her volunteer activities for Balio Bah's employer should count as days of physical presence in Canada.

[45] The evidence submitted clearly shows that Idiatou Bah did not choose to leave Canada to do volunteer work, but to accompany the applicant Balio Bah abroad and combine work with pleasure by offering to devote time to her husband's business in return for compensation.

[46] Besides the agreement, no other evidence was submitted to show that the applicant Idiatou Bah actually did volunteer work. However, Balio Bah's employer did certify his employment (CF at p. 189).

[47] In addition, contrary to what the applicant Idiatou Bah stated, nothing in the evidence submitted showed that she had chosen to temporarily act as a co-operant.

[48] While the applicants' future intentions are not relevant in assessing the nature of the absences during the period covered by their applications for citizenship (*Ntilivamunda*, above, at para. 17), the citizenship judge noted that the applicants intended to return to Canada but were unable to specify the date of their return (CF at pp. 26 and 30).

[49] The decision also mentions the fact that the applicants had acquired property in Canada a few days before filing their citizenship applications but never lived in this property; it has been rented out since then (CF at pp. 26 and 30).

[50] The citizenship judge was therefore warranted in concluding that the applicants did not meet this criterion.

6) Few connections with Canada

[51] The citizenship judge concluded that the applicants did not have a more substantial connection with Canada than with any other country.

[52] In fact, the lack of family, a pied-à-terre and property (besides their rental property) in Canada, together with the permanent nature of Balio Bah's employment abroad and the lack of sufficient substantiating evidence showing a connection with Canada (for example, Balio Bah's income tax returns), warrants such a conclusion despite the fact that Idiatou Bah returned for the birth of the couple's second child.

[53] The applicants state that the citizenship judge erred in concluding that their connection with Canada was tenuous. They argue that the following factors were sufficient to allow the citizenship judge to conclude that they had centralized their mode of living in Canada:

a. A bank account in Canada;
b. The acquisition of property in which they never lived and which, according to the evidence, was being rented out at the time of the hearing;
c. The birth of their two children, who are Canadian citizens;
d. The sale of their property in Guinea.

[54] It is settled law that the four above-mentioned factors are sufficient to show the required connection to Canada:

> [18] Finally, with respect to the quality of connection to Canada, the existence of "passive" indicia such as the possession of homes, cars, credit cards, driver's licenses, bank accounts, health insurance, income tax returns, library cards, etc., the Court has been reluctant to find that on their own, these are sufficient to demonstrate a substantial connection (*Sleiman, supra,* at para. 26; *Eltom, supra*, at para. 25; *Canada (Minister of Citizenship and Immigration) v. Xia*, 2002 FCT 453, [2002] F.C.J. No. 613 (QL), at para. 25). When it comes to establishing a connection, there must be some evidence that would demonstrate a reaching out to the Canadian community or a rationale [*sic*] explanation for the lack such evidence, not merely passive indicia . . . (Emphasis added).

(*Paez*, above; also, *Khan*, above, at paras. 14 and 23; *Sleiman v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 230, [2007] F.C.J. No. 296 (QL); *Eltom v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1555, 284 F.T.R. 139; *Canada (Minister of Citizenship and Immigration) v. Xia*, 2002 FCT 453, 113 A.C.W.S. (3d) 765 at para. 25).

[55] The citizenship judge not only properly stated the six *Koo* criteria above, but also correctly applied them.

C. The applicants' other arguments

[56] In addition, the applicants argue that the citizenship judge should have considered that the male applicant's work was an exceptional contribution to Canadian society. However, they did not submit any evidence substantiating this allegation (CF at pp. 18 and 20).

[57] The applicants further argue that the citizenship judge did not take into consideration the fact that the head office of the male applicant's employer was located in Canada.

[58] However, this fact was specifically mentioned in the decision at criteria 1, 5 and 6 (CF at pp. 25 and 26).

VI. Conclusion

[59] Although the applicants disagree with the decision of the citizenship judge, they did not show any error that would warrant intervention by this Court.

[60] Indeed, they did not show that they met the residency test required under paragraph 5(1)(*c*) of the Act.

[61] Considering the above, the documents filed as a commencement of evidence without being substantiated by the applicants do not permit the Court to allow the application for judicial review.

[62] The application for judicial review is therefore dismissed.

JUDGMENT

THIS COURT ORDERS that

1. The application for judicial review be dismissed;

2. No serious question of general importance be certified.

"Michel M.J. Shore"
Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1726-08
STYLE OF CAUSE:	AMADOU BALIO BAH and NENE IDIATOU BAH v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	January 18, 2010
REASONS FOR JUDGMENT AND JUDGMENT:	SHORE J.
DATED:	January 21, 2010

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