Federal Court  Cour fédérale

Date: 20100929

Docket: T-655-10

Citation: 2010 FC 975

Ottawa, Ontario, September 29, 2010

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

MUHAMMAD SALIM

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] In March of this year, Citizenship Judge Duguay approved Mr. Salim's application for Canadian citizenship. The Minister has appealed on the grounds that the *Citizenship Act* requires the judge to provide him with reasons for the decision. The Minister submits that the reasons given are inadequate in that it is not at all clear which line of jurisprudence the Citizenship Judge followed and, in any event, the decision is unreasonable. The issue is whether Mr. Salim satisfied the residency requirements of the *Act*. According to one school of thought, residence means physical presence. Two others state that in certain circumstances a person satisfies the requirement if here in spirit, but not in body.

[2] I agree with the Minister that the reasons did not satisfy the requirements of Section 14(2) of the *Act*. Failure to give reasons, when such is required by law, is a breach of procedural fairness. No deference is owed and so the decision must be set aside (*R .v. Shepphard*, 2002 SCC 26, [2002] 1 S.C.R. 869). Not only are the parties entitled to know why a decision was made, but so does the Court sitting in appeal or in judicial review. I am left to speculate as to what the judge had in mind.

[3] Section 5(1)*(c)* of the *Act* requires an applicant to be a permanent resident who has "within the four years immediately preceding the date of his or her application, accumulated at least three years of residence in Canada". The material in the record is such that the Citizenship Judge's conclusion that Mr. Salim satisfied the residency test could possibly be well-founded. Consequently, I have decided to grant the Minister's appeal but to refer the matter back to Citizenship Judge Duguay for redetermination.

I. The facts

[4] Mr. Salim became a permanent resident of Canada 28 December 2001. He applied for citizenship 8 September 2005. He calculated that the number of days intervening were 1350, although the officer preparing the citizenship application review calculated 1349. In his application form, Mr. Salim declared that he had been outside of Canada for 251 days during that timeframe. The citizenship officer determined 248. Thus, Mr. Salim calculated that he had been physically present in Canada 1099 days, while the officer calculated 1101. The difference is not explained, but appears to relate to whether the dates of departure or dates of return are counted. Residence for at

least three years within the meaning of the *Act* adds up to 1095 days. All these figures suggest Mr. Salim satisfied the *Act* by being physically present here for at least 1095 days.

[5] However, a citizenship agent had reported that according to passport stamps there were six trips outside Canada during that time which Mr. Salim did not declare. It is clear from the passport entries that these were not day trips from Montréal to Plattsburgh, New York. Mr. Salim admits that he was in Canada less than 1095 days, but adds that he did not deliberately misrepresent his situation.

II. The judgment

[6] The judgment is in the form of a "Notice to the Minister of the decision of the Citizenship Judge". This is a Citizenship and Immigration Canada printed form. Some particulars are typewritten, and some handwritten by the judge. In the Reasons column, all he wrote by hand was:

> After a careful examination of all evidence provided following an audition where the applicant's credibility is of quality, on the preponderance/balance of probabilities, it seems that the applicant has established and maintained his residence in Canada. I approve his application for Canadian citizenship.

[7] However, typewritten in the column on the upper right hand side of the page, we see total number of days 1349, total absences 248, physical presence 1101. This is clearly wrong. If prepared in advance of the hearing, it should have been corrected.

[8] In the judge's notes, which form part of the record, he shows both the 248 days away from Canada, and the 251 as mentioned above. He also refers to the memorandum he received and the

fact that there had been six non-declared trips. However, we have no idea how long Mr. Salim was away from Canada during those six trips.

[9] Unfortunately, we are also left to speculate as to whether the judge's finding that Mr. Salim was credible related to the number of days he was physically present in Canada or, as is more likely, that he was not in bad faith in not declaring six trips out of the country.

III. The law

[10] There has been a sea change in the recent jurisprudence of this Court following the decision of Mr. Justice Mainville, as he then was, in *Canada (Minister of Citizenship and Immigration) v. Takla*, 2009 FC 1120, [2009] F.C.J. No. 1371 and the decision of Mr. Justice Zinn in *Canada (Minister of Citizenship and Immigration) v. Elzubair*, 2010 FC 298, [2010] F.C.J. No. 2330. *Elzubair* with which I fully agree stands for the proposition that if the applicant has been physically present for at least 1095 days during the relevant period, the residency test has been satisfied. If not, the Citizenship Judge must go on to consider whether Canada is a place where the applicant "regularly, normally or customarily lives" in accordance with the non-exhaustive factors set out by Madam Justice Reed in *Koo (Re)*, [1993] 1 F.C. 286.

[11] For over 30 years, we have been plagued with three residency tests or, as some would have it, two tests, the second having two branches. Prior to amendments to the *Act* in the 1970s, this Court equated residency with physical presence. Following amendments to the *Act*, Associate Chief Justice Thurlow in *Re Papadogiorgakis*, [1978] 2 F.C. 208, [1978] F.C.J. No. 31, drew inspiration

from income tax law. The issue according to him, was whether an applicant's presence in Canada could be called a "stay" or a "visit". He said:

> 16 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 if he returns there frequently when the opportunity to do so arises.

[12] Thus, Mr. Papadogiorgakis who established himself here, and then went away to study, only had 79 days towards the required 1095. Nevertheless, it was held he met the residing requirement.

[13] Madam Justice Reed was far more nuanced in *Koo (Re)* above. She said :

> 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 centralized his or her mode of existence. Questions that can be asked which assist in such a determination are:
>
> (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 1,095-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 employment abroad?

> (6) what is the quality of the connection with Canada: is it more substantial than that which exists with any other country?

[14] Mr. Justice Muldoon took a contrary approach in *Pourghasemi (Re)* (1993), 62 F.T.R. 122, 19 Imm. L.R. (2d) 259. He said that the purpose of the *Act* was to ensure that everyone:

> ...at least has been compulsorily presented with 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.

[15] In *Harry (Re)*, 144 F.T.R. 141, [1998] F.C.J. No. 189, he reiterated the physical presence test and strongly disagreed with *Re Papadogiorgakis*, above. He said:

> 8 The word "residence" or "resident" appears to have given some flights of fancy to some judges over the years, but it too is a most straightforward word. It does not signify absence, but rather, presence. The English-language words mean the same as the French-language words. There is no difference of concept.

[16] Mr. Justice Lutfy, as he then was, noted this divergence in the jurisprudence in *Lam v. Canada (Minister of Citizenship and Immigration)*, 164 F.T.R. 177, 1999 F.C.J. No. 418. He lamented the fact that the *Act* did not provide for an appeal from the Federal Court, Trial Division to the Federal Court of Appeal, and that the divergence of views had brought uncertainty to the administration of justice. He expressed the view that the difficulty might soon be resolved by Bill C-63 which had received its second reading in March 1999. He held:

> 16 The issue which must be determined during this period of uncertainty is whether the Trial Division's scope of review has changed where the appeal is dealt with as an application and not as a trial de novo.

[17] He concluded that if a Citizenship Judge, in this interim period, adopted any one of the three conflicting lines of jurisprudence, and if the facts of the case were properly applied to the principles of that approach, the Citizenship Judge's decision should not be set aside.

[18] In *Chen v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1229, 213 F.T.R. 137, Mr. Justice Nadon, as he then was, said there could not be two correct interpretations of a statute. Although he preferred Mr. Justice Muldoon's approach rather than *Papadogiorgakis* as modified by *Koo*, it was not necessary for him to reach a conclusion on the facts before him.

[19] Unfortunately, Parliament did not address the problem by either setting out residency requirements in the *Act* or by providing for an appeal to the Federal Court of Appeal.

[20] This led Mr. Justice Mainville, as he then was, to conclude in *Takla* above that this interim period must come to an end. He opted for *Koo (Re)*.

[21] I adopt the analysis thereof by Mr. Justice Zinn in *Elzubair*, above, at paragraphs 12, 13 and 14 and am of the view:

a) the standard of review with respect to jurisdiction, procedural fairness and natural justice is correctness;

a. determination of compliance with the residency requirement is subject to the reasonableness standard of review;

b. if the applicant was physically present in Canada for at least 1095 days, then residence is proven;

c. if not physically present the required number of days, then the Citizenship Judge must make a threshold assessment as to whether residence was established at all and, if so, then to assess in accordance with *Koo (Re)*, above.

[22] Certainly there are circumstances where a physical presence test, no more no less, is inappropriate. I refer to my own decision in *Mann v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1479, 33 Imm. L.R. (3d) 282.

IV. Conclusion

[23] It may be that the Citizenship Judge was attempting to follow *Koo (Re)*, rather than the other two schools of thought from this Court which have now run their course. However, his reasons are far from clear. Certainly the Minister who in any event contests the significance of some of the documents presented, is entitled to know the basis of the decision.

JUDGMENT

1. The Minister's appeal is granted.

2. The matter is referred back to Citizenship Judge Duguay for redetermination, taking into account these reasons, or if he is unwilling or unable to act, to another judge.

3. There shall be no order as to costs.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-655-10
STYLE OF CAUSE:	M.C.I. v. MUHAMMAD SALIM
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	September 27, 2010
REASONS FOR JUDGMENT AND JUDGMENT BY:	HARRINGTON J.
DATED:	September 29, 2010

APPEARANCES:

Simone Truong	FOR THE APPLICANT
Harry Blank	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Myles J. Kirvan Deputy Attorney General of Canada Montréal, Quebec	FOR THE APPLICANT
Harry Blank Montréal, Quebec	FOR THE RESPONDENT