Federal Court  Cour fédérale

Date: 20110224

Docket: T-1136-10

Citation: 2011 FC 215

Ottawa, Ontario, February 24, 2011

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

SAIRA BANO KHAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] This is an appeal of a decision of a Citizenship Judge (Judge), pursuant to s 14(5) of the *Citizenship Act*, RSC 1985 c C-29 (Act) and s 21 of the *Federal Courts Act*, RSC 1985, c F-7, by Saira Bano Khan. The Judge denied the Applicant's application for citizenship by virtue of s 5(1)(c) of the Act.

Facts

[2] The Applicant is a citizen of Pakistan, born on January 6, 1969. She became a permanent resident of Canada on March 15, 2002. Prior to this, she lived with her husband, Saeed Masood Khan, and their son Ramiz Saeed Masood Khan in the United Arab Emirates (UAE). She worked there as a secretary, but left her employment in July 2002 in order to come to Canada more permanently. The Applicant and her son lived in Mississauga, Ontario, while the husband commuted back and forth between Canada and the UAE, where he continued to work and earn income for the family. All three applied for citizenship on April 10, 2006; the husband subsequently withdrew his application.

[3] During the relevant four-year period prior to her application (April 10, 2002 to April 10, 2006), the Applicant made frequent trips to the UAE to visit her husband as well as her mother and brother. She made only one trip to Pakistan, her country of citizenship. Her son attended grades four (4) to seven (7) in Canada, and the Applicant took courses at local colleges. In March 2006, the family purchased a home in Mississauga.

[4] On her application, the Applicant mistakenly indicated that that during the relevant four-year period, she was physically present in Canada for 1,119 days of the 1,095 which would have allowed her to meet the “physical presence” test for residency in s 5(1)(c) of the Act.

The Decision under review

[5] The Judge found that there were discrepancies between the number of days declared by the Applicant and the stamps found in her passport. The Judge held a hearing to finally determine the matter at which both the Applicant and the Judge recalculated the Applicant's absences. The Applicant declared that she had been present in Canada for 1,043 days, leaving her 52 days below the 1,095 requirement; the Judge determined that the Applicant had been present for 1,038 days and was therefore 57 days short of the statutory requirement.

[6] Noting that the Act does not define the concept of "residence", the Judge chose to adopt the strict "physical presence" test set out by Justice Muldoon in *Pourghasemi (Re)*, [1993] FCJ No 232, under which an applicant must establish that he or she has been physically present in Canada for 1,095 days during the four (4) years immediately preceding the date of application. As the Applicant was 57 days short of this number, she did not meet the residency requirement set out in s 5(1)(c) of the Act.

[7] The Judge considered whether she should nevertheless make a favorable recommendation under s 5(4) of the Act, but found that there was no evidence of special circumstances or special or unusual hardship, nor services of exceptional value to Canada. The Judge therefore decided not to exercise her discretion under this section.

Relevant legislation

[8] The relevant portions of the Act are as follows:

Grant of citizenship 5. (1) The Minister shall grant citizenship to any person who	**Attribution de la citoyenneté** 5. (1) Le ministre attribue la citoyenneté à toute personne qui, à la fois :

(a) makes application for citizenship;

a) en fait la demande;

(b) is eighteen years of age or over;

b) est âgée d'au moins dix-huit ans;

(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;

(d) has an adequate knowledge of one of the official languages of Canada;

d) a une connaissance suffisante de l'une des langues officielles du Canada;

(e) has an adequate knowledge of Canada and of the responsibilities and privileges of citizenship; and

e) a une connaissance suffisante du Canada et des responsabilités et avantages conférés par la citoyenneté;

(f) is not under a removal order and is not the subject of a declaration by the Governor in Council made pursuant to section 20.

f) n'est pas sous le coup d'une mesure de renvoi et n'est pas visée par une déclaration du gouverneur en conseil faite en application de l'article 20.

Waiver by Minister on compassionate grounds

Dispenses

5. (3) The Minister may, in his discretion, waive on compassionate grounds,

(a) in the case of any person, the requirements of paragraph (1)(d) or (e);
(b) in the case of a minor, the requirement respecting age set out in paragraph (1)(b), the requirement respecting length of residence in Canada set out in paragraph (1)(c) or the requirement to take the oath of citizenship; and
(c) in the case of any person who is prevented from understanding the significance of taking the oath of citizenship by reason of a mental disability, the requirement to take the oath.

5. (3) Pour des raisons d'ordre humanitaire, le ministre a le pouvoir discrétionnaire d'exempter :
a) dans tous les cas, des conditions prévues aux alinéas (1)d) ou e);
b) dans le cas d'un mineur, des conditions relatives soit à l'âge ou à la durée de résidence au Canada respectivement énoncées aux alinéas (1)b) et c), soit à la prestation du serment de citoyenneté;

c) dans le cas d'une personne incapable de saisir la portée du serment de citoyenneté en raison d'une déficience mentale, de l'exigence de prêter ce serment.

Special cases
5. (4) In order to alleviate cases of special and unusual hardship or to reward services of an exceptional value to Canada, and notwithstanding any other provision of this Act, the Governor in Council may, in his discretion, direct the Minister to grant citizenship to any person and, where such a direction is made, the Minister shall forthwith grant citizenship to the person named in the direction.

Cas particuliers
5. (4) Afin de remédier à une situation particulière et inhabituelle de détresse ou de récompenser des services exceptionnels rendus au Canada, le gouverneur en conseil a le pouvoir discrétionnaire, malgré les autres dispositions de la présente loi, d'ordonner au ministre d'attribuer la citoyenneté à toute personne qu'il désigne; le ministre procède alors sans délai à l'attribution.

Appeal
14. (5) The Minister or the applicant may appeal to the Court from the decision of the citizenship Judge under subsection (2) by filing a notice of appeal in the Registry of the Court within sixty days after the

Appel
14. (5) Le ministre et le demandeur peuvent interjeter appel de la décision du juge de la citoyenneté en déposant un avis d'appel au greffe de la Cour dans les soixante jours suivant la date, selon le cas :

day on which (a) the citizenship Judge approved the application under subsection (2); or (b) notice was mailed or otherwise given under subsection (3) with respect to the application.	a) de l'approbation de la demande; b) de la communication, par courrier ou tout autre moyen, de la décision de rejet.
Decision final 14. (6) A decision of the Court pursuant to an appeal made under subsection (5) is, subject to section 20, final and, notwithstanding any other Act of Parliament, no appeal lies there from.	**Caractère définitif de la décision** 14. (6) La décision de la Cour rendue sur l'appel prévu au paragraphe (5) est, sous réserve de l'article 20, définitive et, par dérogation à toute autre loi fédérale, non susceptible d'appel.

[9] The *Federal Courts Act* echoes the granting of jurisdiction to this Court to hear such appeals:

Citizenship appeals 21. The Federal Court has exclusive jurisdiction to hear and determine all appeals that may be brought under subsection 14(5) of the Citizenship Act.	**Appels en matière de citoyenneté** 21. La Cour fédérale a compétence exclusive en matière d'appels interjetés au titre du paragraphe 14(5) de la Loi sur la citoyenneté.

Issues

[10] The issues raised in the present case are:

a. Did the Citizenship Judge err in applying a strict physical presence test to determine residency under s 5(1)(c) of the Act?

b. Was the Citizenship Judge's decision to reject the application reasonable?

Standard of review

[11] The standard of review applicable to a Citizenship Judge's decision is reasonableness, as per *Takla v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1120, paras 23-24; *Khan v Canada (Minister of Citizenship and Immigration*), 2009 FC 1178, para 14.

Analysis

A. *Did the Citizenship Judge err in Using the Physical Presence Test?*

[12] The Applicant submits that the Judge erred in applying older jurisprudence to determine which test to apply to the Applicant's case. The Applicant notes that as recently as *Mizani v Canada (Minister of Citizenship and Immigration)*, 2007 FC 698, paras 10-12, this Court acknowledged that a Citizenship Judge could choose which test to apply to determine whether an applicant was "resident" as per s 5(1)(c), and the decision would stand as long as the application of the test and the conclusion reached were reasonable.

[13] In *Mizan*i, Madam Justice Danièle Tremblay-Lamer described the three tests as follows:

> 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 (Fed. 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 (Papadogiorgakis, Re, [1978] 2 F.C. 208 (Fed. 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 (1992), [1993] 1 F.C. 286 (Fed. T.D.) at para. 10).

The Applicant argues that this led to inconsistent and unpredictable results in the law, and cites Madam Justice Barbara Reed in *Chuang v Canada (Minister of Citizenship and Immigration)*

(1999), 175 FTR 312, para 8, who expressed a desire for Parliament to amend s 5(1)(c) of the Act and clarify what was intended by the undefined word “residence”. In that case, Madam Justice Reed held that she would apply the test most favorable to the applicant.

[14] The Applicant argues that reliance on the test set out in *Koo (Re)* in the majority of cases supports Justice Reed’s approach, as the *Koo (Re)* test is more contextual and less strict about physical presence. The Applicant contends that the *Koo (Re)* factors are preferable because they are included in Citizenship and Immigration Canada’s own Manual CP:5, section 5.9. The Applicant also cites Justice Michael L. Phelan in *Wong v Canada (Minister of Citizenship and Immigration)*, 2008 FC 731, para 24, where he wrote that the “strict physical presence test has become of limited, if any, use and would (if it were the appropriate test) hardly require the involvement of a Citizenship Judge in the mathematical calculation of physical presence”. The Applicant argues that, in effect, the *Pourghasemi* test renders all hearings completely moot if the 1,095 days of physical presence are not met.

[15] The Applicant further submits that despite Justice Reed’s approach, the case law remained unsettled for ten (10) years, but argues that the law has now changed subsequent to Justice Robert Mainville’s decision in *Takla v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1120, and that this Court is now moving towards a contextual approach. The Applicant cites extensively from *Takla* and focuses on the importance of paragraph 45, where Justice Mainville noted that Justice Alan Lutfy’s decision in *Lam v Canada (Minister of Citizenship and Immigration)* (1999), 164 FTR 177, para 15, providing Citizenship Judges with the discretion to choose which test to apply, was made in the context of a potential amendment to the Act that would have clarified the

residency requirement, and is therefore no longer contextually useful. The Applicant also relies on paragraph 46, where Justice Mainville held that it would be "appropriate, in my view, to settle on one interpretation. […] Considering the clear majority of this Court's jurisprudence, the centralized mode of living in Canada test established in *Koo*…should become the only test and the only analysis".

[16] The Applicant argues that *Takla* has been cited with approval in the following cases: *Elzubair v Canada (Minister of Citizenship and Immigration)*, 2010 FC 298, para 13; *Dedaj v Canada (Minister of Citizenship and Immigration)*, 2010 FC 777, paras 6-9; *Cobos v Canada (Minister of Citizenship and Immigration)*, 2010 FC 902, paras 6-9; and *Salim v Canada (Minister of Citizenship and Immigration)*, 2010 FC 975, para 9.

[17] The Applicant then refers to the following paragraphs from Justice Sean Harrington's decision in *Salim* referred to above:

> [10] … 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.
>
> […]
>
> [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 residency 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.

[18] The Applicant acknowledges that *Salim*, above, was rendered after the Citizenship Judge's decision in the current case, but notes that *Takla* and *Elzubair*, above, had already been published at the time.

[19] The Applicant argues that in not applying the *Koo (Re)* factors, the Judge erred and used a test no longer endorsed by this Court. It was furthermore unreasonable, in the Applicant's view, for the Judge to use the test least favorable to the Applicant's situation, especially when the Applicant contends that she was only 52 days short of the minimum.

[20] The Applicant further submits that had the Judge applied the *Koo (Re)* factors as required by *Takla*, she would have met the test for residency. She contends that it is clear that she had "centralized [her] mode of existence" in Canada. She further notes that the Judge did not refer to any of the evidence she presented to that effect both before the hearing and at the hearing; these include bank statements, mortgage payment statements, tax returns, her son's school reports, and health insurance claims.

[21] Finally, at the hearing the Applicant submitted that the Judge committed a reviewable error in that she considered facts that were outside of the relevant period to come to her decision.

[22] The Respondent contends that *Takla*, above, did not supersede the existing jurisprudence, and that Citizenship Judges retain complete discretion to choose which test to apply to a given case. The Respondent argues that as the Act already provides that an applicant may be out of the country for a full year during the four (4) years immediately preceding the application, this is a strong indication that physical presence is required for the other three (3) years.

[23] The Respondent relies on *Lam*, above, and *Mindich v Canada (Minister of Citizenship and Immigration)* (1999), 170 FTR 148, for the proposition that a Citizenship Judge may choose the test to apply. As the Judge in this case clearly chose to use the *Pourghasemi* test, the Respondent argues, the only question is whether it was applied reasonably.

[24] The Respondent counters the assertions regarding *Takla* by asserting that the *Koo (Re)* test and its reiteration in *Takla* did not displace the residency requirement in s 5(1)(c) of the Act, and by extension did not supersede the physical presence test from *Pourghasemi*.

[25] The Respondent argues that in the absence of an authoritative decision from the Federal Court of Appeal, *Takla*, above, is not binding on this Court. The Respondent notes that in June 2010, the government put forward Bill C-37, *An Act to Amend the Citizenship Act and to make consequential amendments to another Act*, which would have incorporated the physical presence test into s 5(1)(c).

[26] Finally, the Respondent questions some of the post-*Takla* cases, noting that Justice Russell Zinn, who decided *Elzubair*, above, also heard the case of *Tanveer v Canada (Minister of*

Citizenship and Immigration), 2010 FC 565, in which a Citizenship Judge had used the *Pourghasemi* test. Justice Zinn in *Tanveer* was silent on whether the test chosen and applied was appropriate, but allowed the judicial review application because the residency test had been incorrectly applied.

[27] Since Bill C-37, cited by the respondent in support of the physical presence test, never went further than first reading in Parliament, it has no probative value.

[28] In *Mizani*, above, Madam Justice Tremblay-Lamer indicated that the purpose of *Koo (Re)* was not to displace the residency requirement, but to interpret the undefined concept of "residency" in a manner that was not dependent on the number of days the applicant had been present in Canada, but rather on the manner in which the applicant had created a life in Canada (i.e. a person can be "resident" in Canada even while temporarily absent if the centre of their life is here).

[29] The recent case of *Ghaedi v Canada*, 2011 FC 85, is applicable to the present demand and must be considered. The Citizenship Judge in *Ghaedi* had considered the applicant's application solely on the basis of the *Pourghasemi* strict physical presence test, with no consideration given to the *Koo (Re)* factors once it was determined that the applicant had not met the minimum number of days. Justice Robert Barnes echoed the *Takla*, above, view of the old jurisprudence, noting at paragraph 10 that the choice of tests provided to Citizenship Judges was in the context of waiting for statutory amendments to the Act that never came. Justice Barnes found at paragraph 14 that recent citizenship decision of this Court which have applied the "choice of tests" ratio from *Lam*,

above, appear to have been rendered without consideration of *Takla* or the other recent cases "either because those authorities were not cited to the Court or were unnecessary to the final disposition".

[30] Justice Barnes makes the following observations to which I fully subscribe:

> [15] Counsel for the Respondent points out that with the exception of Dedaj, above, the outcome of Takla and the cases following it turned on the Citizenship Judge's proper application of the test for residency established by Re Koo, above. All of the discussions about the need for a single unified test for residency were accordingly obiter. Notwithstanding that interesting observation, I agree with counsel for Mr. Ghaedi that the views expressed by Justice O'Reilly and Justice Mainville are compelling and justify departing from the view expressed both in Lam, above, and the cases which have applied it, including several of my own decisions. In my view, the benefits of harmonizing the approach to residency outweigh the concerns expressed in Lam, above, about deferring to the judgment of the Citizenship Court. Deference is not a juridical value that outweighs the need for adjudicative consistency and the predictability of judicial outcomes.
>
> [16] Counsel for Mr. Ghaedi argued that I am bound to follow Takla, above, and the more recent decisions of my judicial colleagues. I do not agree that this is an issue for which judicial comity applies. Notwithstanding the views of any particular Judge, there will continue to be two lines of divergent authority on this issue and others may be quite properly disposed to follow Lam, above.

[31] I am of the opinion that *Takla* and the more recent line of cases that require a Citizenship Judge to consider the *Koo* factors, once a threshold of residency is established (as referred to by Justice Harrington in paragraph 21 of *Salim*, above), should be applied to the present case. As I review the decision of the Judge and her underlying notes, I find her decision to be unreasonable, the Applicant having clearly established her residency. The Judge should then have considered whether, despite the shortfall in her physical presence, the Applicant met the time requirement for residency through the exceptional circumstances found at section 5.9 of the Manual, which reads:

> B Exceptional circumstances
>
> In accordance with the established case law, an applicant may be absent from Canada and still maintain residence for citizenship purposes in certain exceptional circumstances ...
>
> In assessing whether the absences of an applicant fall within the allowable exceptions, use the following six questions as the determinative test. These questions are those set out by Mme. Justice Reed in the *Koo* decision. For each question, an example is given of a circumstance that may allow the applicant to meet the residence requirement.

[32] Moreover, in the present case, the Applicant has an even smaller shortfall in the number of physical presence days than did Mr. Ghaedi, and furthermore, as in *Ghaedi*, the Judge had the opportunity to follow the lead of *Takla* and *Elzubair*, above, both of which were published several months prior to the decision on the present Applicant's file.

[33] I am not convinced by the Respondent's argument that *Takla*, above has done nothing to counter the *Lam*, above, "choice of tests" ratio, nor by the Respondent's statement that a Federal Court of Appeal decision would be necessary since Section 14(6) of the *Citizenship Act* precludes any appeal of a decision of this Court to the Federal Court of Appeal. It, therefore, seems that any change in the jurisprudence must originate in this Court, in the manner referred to by Justice Barnes, in which a divergence in the jurisprudence will occur and judges will choose to follow one or the other until one becomes more dominant.

[34] For the above-mentioned reasons, I am allowing this appeal and remitting the matter for reconsideration by another Citizenship Judge.

JUDGMENT

THIS COURT'S JUDGMENT is that the appeal from the decision of a Citizenship Judge denying the Applicant's application for citizenship under paragraph 5 (1)(c) of the Citizenship Act, RSC 1985, c C-29 is allowed.

"André F.J. Scott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1136-10
STYLE OF CAUSE:	SAIRA BANO KHAN v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	February 3, 2011
REASONS FOR JUDGMENT:	SCOTT J.
DATED:	February 24, 2011

APPEARANCES:

Mario D. Bellissimo	FOR THE APPLICANT
Alex Kam	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Bellissimo Law Group Toronto, Ontario	FOR THE APPLICANT
Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT