Federal Court  Cour fédérale

Date: 20111018

Docket: T-590-11

Citation: 2011 FC 1173

[ENGLISH TRANSLATION]

Ottawa, Ontario, October 18, 2011

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

AKEMI TAZAKI

respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] Every decision-maker has a duty to ensure that the requirements of the statute to be interpreted are respected, i.e. that the legislative intent to achieve certain goals be respected by a faithful interpretation of the statute to be applied. Our system of government, where three separate branches co-exist, depends on an interaction where each branch exercises its own

jurisdiction in accordance with the constitutional responsibility that it is conferred to it without exceeding that jurisdiction.

[2] The goal of citizenship legislation does not only involve quantity, but also quality in regard to the presence of the person who immigrated to Canada; therefore, of course, the number of days is counted to arrive at the number necessary for citizenship to be granted but, also, bear in mind that the quality or the raison d'être of the residence is significant.

[3] The legislation does not only require that days be counted, but requires that the individual days, in themselves, count in terms of the quality, or the purpose, or the raison d'être of the person's presence in Canada.

II. Judicial proceeding

[4] This is an appeal by the Minister of Citizenship and Immigration pursuant to subsection 14(5) of the *Citizenship Act*, RSC, 1985, c. C-29 [Act], of a decision by a Citizenship Judge, dated February 18, 2011, in which the Citizenship Judge approved the respondent's citizenship application.

III. Facts

[5] The respondent, Ms. Akemi Tazaki, born on December 31, 1968, is a Japanese citizen.

[6] On October 14, 2000, Ms. Tazaki was admitted to Canada under the foreign researchers program. She has high-level expertise in the field of new technologies.

[7] Ms. Tazaki, by virtue of her professional expertise, is often away from Canada for business trips.

[8] Ms. Tazaki became a permanent resident on May 9, 2002.

[9] Ms. Tazaki was away from Canada for almost two years (from September 2003 to June 2005) in order to pursue professional training in Italy.

[10] Ms. Tazaki filed a citizenship application on June 8, 2007. In it, she declared 170 days of absence for the reference period from June 8, 2003, to June 8, 2007. These days of absence were justified by business trips, studies, or travel for family reasons. In this application, she did not declare her trip to Italy for the period from September 2003 to June 2005.

[11] A citizenship officer, holding information that the respondent was absent from Canada for almost two years, sent the respondent a new residence questionnaire. In it, she again declared 170 days of absence, specifying, however, that she had pursued studies in Italy between September 2003 and June 2005.

[12] On February 10, 2011, shortly before the hearing before the Citizenship Judge, Ms. Tazaki sent, at the request of that Citizenship Judge, another residence questionnaire justifying her absence from Canada specifically for when she was studying in Italy. This time, she declared 824 days of absence between June 8, 2003, and June 8, 2007.

IV. Impugned decision

[13] The Citizenship Judge approved the respondent's citizenship application by relying on the tests set out in *Re Koo*, [1993] 1 FC 286, to determine whether the respondent's 824-day absence from Canada during the reference period beginning on June 8, 2003, and ending on June 8, 2007, was justified in light of the quality of the respondent's connection with Canada.

[14] In the Citizenship Judge's decision, the tests of the *Koo* decision are set out for the purposes of the analysis of the case:

> [TRANSLATION]
>
> a. Was the respondent present in Canada for a long period before the absences preceding her citizenship application?
> b. Where were the members of the respondent's immediate family, as well as her more extended family, living?
> c. Does the overall perspective or global pattern of the respondent's absences show that she was visiting Canada or, alternatively, that it is clear that she had established her residence in Canada?
> d. What comparison can be made between the number of days of the respondent's absence and the number of days of the respondent's physical presence in Canada?
> e. Was the prolonged absence caused by a temporary situation, for example, to further studies abroad?

f. What is the quality of the respondent's establishment in Canada? Is it more substantial than the establishment that she has in another country?

[15] To the first question, the Citizenship Judge, relying on the respondent's income tax returns for 2000, 2001, and 2002, responds in the affirmative.

[16] With regard to the second test, even if the Citizenship Judge admits that the respondent's immediate family resides in Japan, he considers that the respondent has a [TRANSLATION] "Canadian family" represented by her Canadian friends and colleagues.

[17] The Citizenship Judge also finds that the respondent satisfies the third test, noting that Canada became her country of establishment for the reference period. This finding is based on the evidence submitted by the respondent indicating that she managed expenses in Canada (rent and bills), and that she was well-known in her field in Canada, that her friends lived in Canada, and that her absences were brief, as the respondent always returned to Canada.

[18] With respect to the number of days of the respondent's absence and the number of days of the respondent's physical presence, the Citizenship Judge found that the respondent created a significant imbalance between the days she was present in Canada (636), and the days she was absent (824) due to her two-year stay in Italy. Even if he admits that 1,095 days are required under the Act for the residency obligation in Canada, he considers that serious reasons can be accepted to justify the failure to comply with this obligation.

[19] These serious reasons are analyzed in the fifth question. The Citizenship Judge specifies, in fact, that the stay in Italy for training was necessary for the respondent's career and was temporary in nature.

[20] The Citizenship Judge finds that the respondent also satisfies the sixth test in that both her professional life and her personal life are rooted in Canada. He points out that the respondent's professional expertise is recognized in Canada and that her job allows her to pay significant taxes in Canada.

V. Issue

[21] Did the Citizenship Judge make a reviewable error in finding that the respondent complied with the conditions set out in paragraph 5(1)(c) of the Act?

VI. Relevant statutory provisions

[22] Subsection 5(1) of the *Citizenship Act* reads as follows:

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;
(*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*	*c*) est un résident permanent au sens du paragraphe 2(1) de la *Loi sur l'immigration et la*

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:

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

f) n’est pas sous le coup d’une mesure de renvoi et

of a declaration by the Governor in Council made pursuant to section 20.	n'est pas visée par une déclaration du gouverneur en conseil faite en application de l'article 20.
Residence	**Période de résidence**
(1.1) Any day during which an applicant for citizenship resided with the applicant's spouse who at the time was a Canadian citizen and was employed outside of Canada in or with the Canadian armed forces or the federal public administration or the public service of a province, otherwise than as a locally engaged person, shall be treated as equivalent to one day of residence in Canada for the purposes of paragraph (1)(*c*) and subsection 11(1).	(1.1) Est assimilé à un jour de résidence au Canada pour l'application de l'alinéa (1)*c*) et du paragraphe 11(1) tout jour pendant lequel l'auteur d'une demande de citoyenneté a résidé avec son époux ou conjoint de fait alors que celui-ci était citoyen et était, sans avoir été engagé sur place, au service, à l'étranger, des forces armées canadiennes ou de l'administration publique fédérale ou de celle d'une province.

VII. The position of the parties

[23] The applicant submits a three-part argument that the Citizenship Judge erred by failing to determine whether the respondent had indeed established her residence in Canada, incorrectly applying the *Koo* tests, and failing to rule on the respondent's credibility.

[24] With respect to the first argument, the applicant argues that the Citizenship Judge erred in that he did not consider whether the respondent had established her residence in Canada, a condition precedent to the analysis of the *Koo* tests. The applicant submits that the study of the stamps in the respondent's passport supports a finding that the respondent never made Canada her country of residence.

[25] The applicant also argues that the Citizenship Judge erred in his application of the *Koo* tests. According to the applicant, the following factors preclude the respondent from meeting any of the six tests:

a. The respondent was apparently physically absent from Canada for 48 days in the six months immediately preceding her citizenship application. Moreover, the nature of her work led her to travel constantly;
b. The respondent's immediate family is in Japan. There is no evidence in the record that would support the Judge's finding that the respondent developed quasi-family connections in Canada;
c. The indicia of the respondent's establishment accepted by the Citizenship Judge must be characterized as passive and are apparently not indicative of the respondent's establishment in Canada;
d. The number of days that the respondent was absent from Canada is too far from the minimum number of 1,095 days required under the Act;
e. The multiple days of absence from Canada are apparently attributable to the nature of the respondent's work and do not relate to a temporary situation;
f. The passive indicia in evidence are not probative to show the respondent's connections with Canada. Also, there is reportedly no evidence that supports that the respondent's friends and contacts live in Canada.

[26] Further, the applicant submits that the Citizenship Judge erred in failing to discuss the respondent's credibility when there were many contradictions. This contention is based on the respondent's failure to declare, in her citizenship application and in the second residency

questionnaire, the number of days of absence caused by her stay in Italy. The applicant submits, ipso facto, that there are inconsistencies with the analysis of the invoices that the respondent filed into evidence.

VIII. Analysis

[27] It is well established in the jurisprudence that the Citizenship Judge is free to choose from three different categories to assess the concept of "residence" (*Mizani v Canada (Minister of Citizenship and Immigration)*, 2007 FC 698; *Hao v Canada (Minister of Citizenship and Immigration)*, 2011 FC 46).

[28] In this case, the Citizenship Judge chose to apply the *Koo* tests, at paragraph 10, to determine whether the respondent lived "regularly, normally or customarily" in Canada.

[29] Moreover, even though it is important to show deference to the Citizenship Judge's decision, the Citizenship Judge's decision must be supported by a tenable explanation based on the evidence in the record (*Paez v Canada (Minister of Citizenship and Immigration)*, 2008 FC 204 at para 12).

Threshold test

[30] It is necessary to consider whether the citizenship candidate established her residence in Canada, and when, before considering the possibility of a presumed residence based on the *Koo* tests. This threshold test must be satisfied, otherwise, the analysis advocated in *Koo* can hardly

be possible (also, Goudimenko *v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 447).

[31] In this case, the Citizenship Judge does not determine the exact date that the respondent established her residence in Canada. Ipso facto, he does not take into account the respondent's multiple absences from Canada that are evidenced by the stamps in her passport (Tribunal Record [TR] at pp 45 to 70).

[32] However, it is possible to infer that the threshold test for the *Koo* analysis was applied in this case. In fact, the Citizenship Judge mentions in his decision, *inter alia*, the respondent's two addresses, the job that she held when she was in Montréal, as well as the date that that her permanent residence was obtained, before he continues his analysis (Decision at paras c, d, and e).

[33] It can reasonably be inferred from these indicia that the Citizenship Judge considered the threshold residence test (*Canada (Minister of Citizenship and Immigration) v Guettouche,* 2011 FC 574 at para 15). The analysis must therefore be pursued based on the six *Koo* tests in order to determine whether the respondent maintained her residence in Canada.

(1) The respondent's physical presence in Canada before the citizenship application was filed

[34] This test focuses specifically on the physical presence in Canada of the individual who applies for citizenship, and this, before absences.

[35] Yet, the Citizenship Judge supports his finding with the fact that the respondent paid taxes in 2000, 2001, 2002, and that she had held a research permit since the year 2000. These documents do not support a finding of the respondent's physical presence, which is required to satisfy the first *Koo* test.

[36] The respondent was absent for 824 days before her citizenship application was filed. It also appears from the evidence that the respondent traveled constantly because of her job (TR at p 28). The Citizenship Judge should have discussed these factors that were so directly related to the respondent's physical presence. Otherwise, he could not validly answer the question and find that the respondent satisfies the first *Koo* test.

(2) Place of residence of the immediate or extended family

[37] The objective of this factor is to identify the place where the citizenship applicant has her family ties. In this case, the Citizenship Judge assigns great importance to the respondent's "quasi-family", composed of her friends, but does not determine the true place of residence of the respondent's family.

[38] Yet, it appears clearly from the record that the respondent's family, i.e. the respondent's mother and brother, resides in Japan (TR at p 30). Although the Citizenship Judge recognizes that the respondent visits her family members, he adds that these visits take place on the occasion of business trips, which is contrary to the documentary evidence (TR at p 33), as the respondent explicitly declared that she went to Japan for family reasons.

(3) The state of the physical presence in Canada

[39] This test gives a qualitative overview of the citizenship candidate's presence in Canada. Has the candidate made Canada her country or is she only visiting?

[40] The reasoning of Justice Danièle Tremblay-Lamer in *Paez*, above, explains:

> [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 rational explanation for the lack such evidence, not merely passive indicia . . .

[41] In this case, the Citizenship Judge notes that Canada has become the respondent's adopted country, by relying on the respondent's payment of her taxes, her bills from a Canadian bank account, and her rent for the reference period from June 2003 to June 2007. However, these factors, characterized as "passive" in the jurisprudence, cannot alone support a finding that the respondent made Canada her country of residence.

[42] There are significant shortcomings in the evidence. In fact, with respect to the evidence related to the payment of rent, the respondent only submitted a copy of the contract of assignment of lease covering the period from November 1, 2005, to July 1, 2006 (TR at p 95) and an attestation of domicile for the period between September 2003 and October 2005 (TR at p 97). This last piece of evidence is problematic in that the respondent declared that she was absent

from Canada from September 12, 2003, to December 19, 2004, and from December 23, 2004, to August 31, 2005 (TR at p 33).

[43] With regard to the evidence related to the invoices that the Citizenship Judge relied on, the detailed analysis indicates that it did not cover the entire reference period. Instead, the evidence indicates that the respondent did not pay invoices on a continuous basis, contrary to what is suggested by the Citizenship Judge (TR at pp 341 to 407, 408 to 601, and 646 to 752).

[44] Moreover, the analysis of the transaction statements of the Canadian bank account referred to by the Judge, highlights transactions that were made at Canadian retailers on January 5 and 6, 2005, and between December 28, 2005, and January 4, 2006, when, according to the respondent's declaration, she was absent from Canada (TR at pp 33, 831-839).

[45] These passive factors are therefore inadequate and have little probative value to support the Citizenship Judge's finding that the respondent satisfied the third test.

(4) Extent of physical absences

[46] In *Koo*, this factor is formulated, at paragraph 10, as follows:

> (4) 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?

[47] The Citizenship Judge, having reformulated this factor differently in a manner that does not consider the extensive absence, does not directly answer the question. In fact, although he

admits that [TRANSLATION] "the residency obligation of 1,095 days required by the Act remains" (TR at p 19), he does not address the extent of the respondent's absence.

[48] The number of days of absence is an important indication to determine whether an individual has truly centralized their existence in Canada. Justice Yvon Pinard puts it this way in *Abderrahim v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1486:

> [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. [Emphasis added.]

[49] The respondent was absent for 824 days, for a total of 636 days of physical presence, which is far from the total number of 1,095 days required by the Act. Accordingly, the Citizenship Judge should have noted that this situation does not militate in favour of granting citizenship to the respondent.

(5) <u>Permanent or temporary absence</u>

[50] The applicant focuses, in his arguments, on an important factor, namely the nature of the respondent's professional responsibilities leading her to travel constantly. The respondent admitted this herself in these terms in a letter addressed to the Citizenship Judge:

> [TRANSLATION]
>
> I was invited on several occasions between 2003 and 2005 to go to Europe for work sessions with renowned industry sponsor partners (Telecom Italia, Nokia, Sony, Hitachi, Alcatel, Flat, Lavazza, Mattel, Orange etc.).
>
> . . .

> To remain at the top of my field, I continue to work by travelling for contracts. I offer counselling services to businesses to innovate on the smartphone market and on new mass market technologies as project leader for designing user experience.

(TR at p 40).

[51] The review of the residence questionnaire filled out by the respondent, as well as the stamps appearing in her passport, indicate that the respondent travelled often during the reference period, specifically in 2004, 2005, 2006, and 2007 (TR at pp 33 and 43).

[52] However, the Citizenship Judge concentrates his analysis only on the respondent's trip to study in Italy between 2003 and 2005 to characterize the respondent's temporary absence. The Citizenship Judge justifies this absence by adopting the following view:

> [TRANSLATION]
>
> She has become, as hundreds and thousands of Canadians or permanent residents, living proof that Canadians need, nowadays, to go abroad to further their education and remain competitive in a global world.

[TR at p 20].

[53] In adopting this point of view, the Citizenship Judge, apart from disregarding the evidence regarding the other absences, does not take into account the fact that the respondent is a citizenship candidate and must accordingly comply with the requirements of the Act (*Canada (Minister of Citizenship and Immigration) v Ntilivamunda*, 2008 FC 1081). The reasoning of Justice Richard Mosley in *Khan v Canada (Minister of Citizenship and Immigration)*, 2006 FC 47, applies in this case:

> [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].

[54] Moreover, in *Canada (Minister of Citizenship and Immigration) v Chen*, 2004 FC 848, Justice Luc Martineau states:

> [10] . . . 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 (*Wu v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 435, [2003] F.C.J. No. 639 (T.D.) (QL)).
> [Emphasis added].

[55] The consideration of all the evidence leads to the conclusion that the respondent's absences were permanent and not temporary as found by the Citizenship Judge.

(6) Quality of the connection

[56] The Citizenship Judge found that the respondent has significant ties with Canada particularly because of her professional responsibilities which allowed her to pay [TRANSLATION] "significant taxes" in Canada (TR at p 21).

[57] Yet, the evidence in the record, as explained earlier, does not support a finding that the respondent has [TRANSLATION] "lived and worked for 11 years" in Canada (TR at p 21). The evidence is instead to the effect that the respondent was often absent in recent years because of her job. In *Agha (Re)* (1999), 166 FTR 245 [1999] FCJ No. 577 (QL/Lexis), Justice J. François

Lemieux explained that the finding of ties with Canada must rest on a review of the citizenship candidate's absences and the consideration of relevant evidence. He puts it this way:

> [45] The *Koo* test, in my view, compels the Citizenship Judge to carefully examine the nature, purpose, extent and all of the circumstances surrounding the physical absence from Canada in order to find out the true nature of the applicant's connection, commitment and ties with Canada.
>
> [46] In this perspective, the *Koo* test focusses the inquiry on the substantive *indicia* of residence in Canada as contrasted with less meaningful factors such as holding bank accounts, making investments, making rental payments (or being the owner of a condo), owning furniture, having a driver's licence or health card and filing income tax returns. [Emphasis added].

[58] Although the Judge considers the respondent's preference toward Canada, he assigns, here again, great importance to the respondent's qualities as a future citizen of Canada, as demonstrated by the following passage from his decision:

> [TRANSLATION]
>
> In short, Ms. Tazaki is the prototype of the "New Canadian", attracted by Canada, Quebec, and Montréal by virtue of the well-perceived official bilingualism and multiculturalism in our country. [Emphasis added.].

(TR at p 21).

[59] In doing so, he acts contrary to the principle set out by Justice Barbara Reed, in *Koo*:

> [9] The same criteria are required to be met by all applicants regardless of the judge's opinion on the individual's qualities as a potential citizen. The law should be applied equally to all.

[60] Even if the respondent is an exemplary citizen from the Citizenship Judge's point of view, she does not, after analysis, satisfy the tests established by the jurisprudence.

IX. Conclusion

[61] The analytical approach adopted in *Koo* serves as a guide that weighs against granting citizenship to the respondent. For this reason, it is not necessary to decide further on the respondent's credibility as the applicant submits. The issue in this case relates more to the Citizenship Judge's assessment of the evidence.

[62] Based on this analysis, it is clear that the Citizenship Judge's decision was not reasonable. The "prototype" image that the respondent had in the Judge's assessment appears to have led to an analysis that is not supported by the evidence in the record.

[63] Accordingly, the Court allows this judicial review and refers the matter back for redetermination by a differently constituted panel.

JUDGMENT

THE COURT ALLOWS this application for judicial review and refers the matter back for redetermination by a differently constituted panel. No question for certification.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-590-11
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION v AKEMI TAZAKI
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	October 11, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	SHORE J.
DATED:	October 18, 2011

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