Date: 20090121

Docket: T-437-08

Citation: 2009 FC 57

Ottawa, Ontario, January 21, 2009

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

TAREK ABDEL GHAFAR MAHMOUD

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an appeal brought by the Minister of Citizenship and Immigration under the provisions of section 14(5) of the *Citizenship Act* R.S.C. 1985, c. C-29 from a decision of a citizenship judge dated January 17, 2008 wherein the application for Canadian citizenship made by the Respondent Tarek Abdel Ghafar Mahmoud was approved. For the reasons that follow, I find that the appeal is allowed and the matter is returned for redetermination by a different citizenship judge. No order as to costs.

[2] The Respondent is an adult male born outside Canada, who entered Canada from Egypt in June, 2002 and claims to be a permanent resident of Canada. He is not under a removal order. As

such, the Respondent's right to acquire Canadian citizenship is governed by section 5(1) of the *Citizenship Act* which states:

> ***5.*** *(1) The Minister shall grant citizenship to any person who*
>
> > *(a) makes application for citizenship;*
> > *(b) is eighteen years of age or over;*
> > *(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:*
> >
> > > *(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*
> > >
> > > *(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;*
> >
> > (*d) has an adequate knowledge of one of the official languages of Canada;*
> > (*e) has an adequate knowledge of Canada and of the responsibilities and privileges of citizenship; and*
> > (*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.*

[3] The process by which a person such as the Respondent may apply for citizenship is set out in sections 11 and 12 of the *Citizenship Regulations*, 1993 (SOR/93-246). Without repeating those

regulations in full, they provide that an application may be filed which is then reviewed by a citizenship officer. The applicant is given opportunities to redress any apparent omissions. A citizenship judge may require a personal appearance to require that the applicant attend alone or with others to provide evidence under oath that may satisfy the judge as to what otherwise may be information that is lacking.

[4] A citizenship judge is not a "judge" as it may be understood in the sense of a superior Court or provincial Court judge. Section 26 of the *Citizenship Act* states that any "citizen" may be a citizenship judge, no legal training or other qualifications are apparently necessary. The power of a citizenship judge, as set out in the Act and amplified by the Regulations, is found in section 14(2) of the Act which is captioned "Advice to Minister" and is to approve or not approve the application but with an important addendum "*…and provide the Minister with the reasons therefor*":

> *Advice to Minister*
> *(2) Forthwith after making a determination under subsection (1) in respect of an application referred to therein but subject to section 15, the citizenship judge shall approve or not approve the application in accordance with his determination, notify the Minister accordingly and provide the Minister with the reasons therefor.*

[5] This "advice" takes the form of "approval" or "not" together with reasons therefor. The only remedy thereafter as provided by the *Citizenship Act* is for an appeal to this Court by either the Minister or the applicant under section 14(5) of the Act. The decision of this Court as provided by section 14(6) is final:

> *Appeal*
> *(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 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.*
>
> *Decision final*
> *(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 therefrom.*

[6] Thus, unless there is an appeal, the approval or refusal by a citizenship judge, is a final matter as to the applicant's Canadian citizenship. The Minister has no further function to perform or other remedy other than an appeal. Therefore the provision of reasons by the citizenship judge assumes a special significance. The reasons should be sufficiently clear and detailed so as to demonstrate to the Minister that all relevant facts have been considered and weighed appropriately and that the correct legal tests have been applied. Material provided by Citizenship and Immigration Canada for the assistance of applicants, citizenship judges and others, which material is not binding as legal authority, but may provide guidance says in sections 1.20 and 1.26 to 1.29 of volume CP2, "Decision-Making" (*CP2 Decision Making* (Ottawa: Citizenship and Immigration Canada, 2007):

> ***1.20 Must give reasons for decision***
>
> *The decision-maker must justify the decision.*
>
> *This means that the parties should receive a clear explanation of the reasons for the decision, how it was reached, and the evidence that was taken into account.*

Section 15 of the Citizenship Act says there is an obligation to give reasons for a decision when a citizenship judge non-approves an application.

Failure to give reasons for a decision when the law requires reasons for a decision may result in reversal of that decision.

Properly justifying a decision makes it possible to inform the applicant of the reasons for the decision. It also makes it possible for the applicant to consider whether or not to appeal the decision.

…

Content of the decision

1.26 Give reasons for decision

When the judge does not approve of an application, the judgment:

- *tells the applicant that the application is not approved;*
- *gives full reasons for the decision;*
- *presents the reasons for the decision so the applicant or the Minister of Citizenship and Immigration can decide whether to appeal the decision.* …

1.27 What do include in justifying the decision

The decision must include:

- *the facts;*
- *an analysis of the facts; and*
- *the deductions from the analysis.*

1.28 Conclusion not enough

Giving a conclusion and repeating the criteria set out in the Citizenship Act is not enough.

The arguments and the evidence must be discussed.

The judge must then show why the decision was made, and state the evidence supporting the decision.

> ***1.29 Elements of a decision to refuse citizenship***
>
> *The following are the elements of a decision to refuse citizenship:*
> - *a summary of evidence considered;*
> - *the evidence rejected (if applicable), and reasons for rejecting the evidence;*
> - *findings of fact (evidence);*
> - *an explanation of the findings and how they relate to the requirements of the Act;*
> - *show that the applicant has been given the two options open to him or her:*
>   - *submit a new application when the applicant believes that he or she meets the requirements of the Act;*
>   - *appeal the decision to the Federal Court-Trial Division within 60 days of being notified or the decision.*

[7] Justice Russell of this court in *Pourzand v. Canada (MCI)*, 2008 FC 395 at paragraph 21 has characterized the failure to provide adequate reasons as a question of procedural fairness and natural justice reviewable on a standard of correctness:

> ***21*** *Procedural fairness questions are pure questions of law reviewable on a correctness standard. The second issue is thus reviewable on this standard. The third issue raised concerning the adequacy of reasons is also a question of procedural fairness and natural justice and is also reviewable on a standard of correctness (Andryanov v. Canada (Minister of Citizenship and Immigration), [2007] F.C.J. No. 272, 2007 FC 186 at para. 15; Jang v. Canada (Minister of Citizenship and Immigration) (2004), 250 F.T.R. 303, 2004 FC 486 at para. 9; Adu v. Canada (Minister of Citizenship and Immigration), [2005] F.C.J. No. 693, 2005 FC 565 at para. 9).*

[8] Justice Blanchard of this Court in *Canada (Minister of Citizenship and Immigration) v. Li*, 2008 FC 275 at paragraph 6 has stated that reasons must be sufficient to enable the appeal court to

discharge its appellate function, a reviewable error is committed by a failure of a citizenship judge to provide sufficient reasons for a decision:

> ***6*** *The Act imposes a statutory obligation on citizenship judges to provide reasons for their decisions. The reasons must be sufficient to enable the appeal court to discharge its appellate function. The jurisprudence has established that a citizenship judge commits a reviewable error by failing to provide sufficient reasons for a decision. See: Seiffert v. Canada (M.C.I.), [2005] F.C. J. No. 1326, at para. 9 and Ahmed v. Canada (M.C.I.), [2002] F.C.J. No. 1415, at para. 12.*

[9] Thus I find that should there be a failure to provide sufficient reasons such that the Minister cannot determine whether to appeal nor upon which this Court can exercise its appellate function, there has been a failure of natural justice. The matter is reviewable on a standard of correctness.

THE FACTS OF THIS CASE

[10] The file as was before the citizenship judge demonstrates that the Respondent and his family, comprising his wife and two children, one of whom had not yet reached the age of majority and thus could not independently apply for citizenship, came to Canada from Egypt and subsequently made application for citizenship. The wife and child who had reached the age of majority subsequently withdrew their application. The Respondent withdrew a first application and submitted a second application. The second application is the subject of this appeal.

[11] The record raises a number of questions, for instance the Respondent was denied health benefits from the Province of Ontario for failure to provide adequate information as to residency. A question arises as to how this relats to residency in Canada as a whole. The Respondent made

several trips, some of several months duration, to the United Arab Emirates. A question arises as to whether he truly does have roots in Canada. The Respondent has no employment in Canada other than self-employment, whereas he has a contract for work to be done in the United Arab Emirates. Again a question arises as to whether he truly has roots in Canada. The Respondent filed a document showing that he had spent less than the required number of days in Canada. Subsequently he filed a correcting document stating that he did spend the required number of days in Canada. These are matters that a citizenship judge is expected to consider and resolve, but not only to do that, but state in the reasons provided that these matters were considered and how a resolution was made.

[12] The record of the file respecting the citizenship application was provided to the Court which record indicated one page of handwritten notes made by the citizenship judge. These notes indicate that at least some of the factual matters were at one time or another in the mind of the citizenship judge. These notes however do not form part of the reasons.

[13] On this appeal the Respondent has filed an affidavit addressing, in large part, several of the factual issues raised in his application. It is not appropriate on an appeal such as this for this Court to receive evidence not before the citizenship judge. I repeat what justice Russell of this Court said in *Zhao v. Canada (MCI)*, 2006 FC 1536 at paragraph 35:

> ***35*** *Under Rule 300(c), an appeal from a decision of a Citizenship Judge under subsection 14(5) proceeds as an application. The old system operated as a trial* de novo *and an applicant was entitled to present fresh evidence. However, several decisions have concluded that an appeal such as the one before me in this application should proceed solely on the basis of the record*

> *before the Citizenship Judge. See, for instance, the decisions of Justice Rothstein in* Canada *(Minister of Citizenship & Immigration) v. Chan (1998), 150 F.T.R. 68, 44 Imm. L.R. (2d) 23 at para.3 (F.C.T.D.) and Justice Rouleau in Tsang v. Canada (Minister of Citizenship and Immigration), [1999] F.C.J. No. 1210 at para.2 (F.C.T.D.)(QL). See also Canada (Minister of Citizenship and Immigration) v. Hung (1998), 47 Imm. L.R. (2d) 182, [1998] F.C.J. No. 1927 at para.8 (F.C.T.D.)(QL) where Justice Rouleau held explicitly that no new evidence is to be submitted before this Court. Finally, Justice de Montigny has referenced all of these cases in the recent decision* of *Lama v. Canada (Minister of Citizenship and Immigration), , [2005] F.C.J. No. 577, 2005 FC 461 at paragraph 21 and has concluded that the only evidence that may be considered on appeal is the evidence that was before the Citizenship Judge.*

[14] In considering an application for Canadian citizenship and the issue of "residency" there are three different ways the matter can be considered, one is a strict counting of number of days in Canada. The second is less stringent and requires a showing of a strong attachment to Canada. The third is similar to the second and gives consideration to where one customarily lives or has a centralized mode of existence. These three tests, however, cannot be blended. Only one of the three must be selected, then applied. I repeat what Justice Tremblay-Lamer of this Court said in *Mizani v. Canada (MCI)*, 2007 FC 698 at paragraphs 10 and 13:

> ***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).*

…

> ***13*** *While a Citizenship Judge may choose to rely on any one of the three tests, it is not open to him or her to "blend" the tests (Tulupnikov, above, at para. 16).*

[15] Counsel for the Applicant concedes that if one were to consider only the corrected number of days present in Canada as submitted by the Respondent and to apply only the first of these tests, the simple counting of days in Canada, then it would be reasonable to accept that a citizenship judge may have concluded that it would be appropriate to approve the citizenship application. However, from the reasons given, as best they may be deciphered, this is not what the citizenship judge did. It is difficult to make out the handwritten reasons but, as best can be deciphered, they say:

> *"…OK – FP Nov/07 – Stamps match…RQ – Engineer couldn't get recognized of work in Cda – has contract to…from Canada to Egypt UAE, - Res permit in Egypt…getting visa each time he left Canada. No MOH card due to address change & appears to be a problem with MOH. Provided correspondence with MOH. Rented @ Minto…Jan/04., Incorp his business 28/01/05 T1 for 0203, …2004, 05 GST 2006. School docs. I am satisfied that applicant has established his roots in Canada."*[24]

[16] It appears from the transcription that the citizenship judge applied the "strong attachment" or "roots" test and not the strict counting of days but that is by no means clear.

[17] Respondent's Counsel argues that the reasons must be taken from the whole of the one page form that the citizenship judge completed in which form the judge has put a checkmark beside the printed statement in the form indicating that the Respondent (Applicant) "*has…complied with paragraph 1(c) (residence)*". Thus, it is argued, the residency test has been applied and the applicant

meets the test. Respondent's Counsel further argues that a space about 4 centimetres high is all that the form provides for Reasons, thus the Reasons are expected to be cryptic. This is best illustrated by the completed form in question which I attach to this decision.

[18] Applicant's Counsel argues that, in a case such as the present, it would be expected that the citizenship judge would attach to the form a page or pages in which sufficient reasons were set out. The citizenship judge should not be constrained by the form.

[19] I find that the requirement that a citizenship judge provide clear and adequate reasons must prevail over any apparent constraint imposed by the form. It is unfortunate that a better form was not provided such as one indicating that a page or pages may be attached in which appropriate reasons shall be given. Citizenship and Immigration Canada should give immediate attention to improving the form.

[20] Here I find that the reasons provided are both inadequate and confusing. They are inadequate in that a number of factual matters are presented by this application yet there is nothing set out in the reasons as to whether and how these matters were considered and resolved. The reasons are also confusing in that the legal basis for the decision, whether the "roots" test or strict counting of days test, was applied. These defects are such that neither the Minister nor this Court can determine what was considered and applied by the citizenship judge. There has been a failure to comply with the statutory requirement to give reasons.

REMEDY

[21] This proceeding is characterized by the *Citizenship Act* section 14(5) as an appeal. Rule 300 of the *Federal Courts Rules* provides that the procedure to be followed is by way of an application.

[22] The *Citizenship Act* does not state what remedies this Court can provide on such an appeal. Section 52 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, by way of contrast provides for a number of remedies respecting an appeal from the Federal Court including dismissing the appeal, giving the award that should have been given, ordering a new trial and making a declaration as to certain conclusions and ordering the continuation of a trial. Further, if this were a judicial review, this Court could dismiss the application or quash the decision under review and return it for redetermination usually by a different person.

[23] In reviewing a number of decisions of my colleagues I note that, in granting remedies other than a dismissal of the appeal, they have, in allowing an appeal by the Minister dismissed an application for citizenship. In other cases they have allowed an appeal and sent the matter back for redetermination, sometimes by a different citizenship judge.

[24] In the present case, I will allow the appeal. I believe that it is most appropriate to have the matter sent back for redetermination and most appropriate to have the matter redetermined by a different citizenship judge.

[25] It is appropriate that no costs be awarded. The Minister, although successful, must bear some consequences for the inadequacy of the form.

5

Citizenship and Immigration Canada / Citoyenneté et Immigration Canada

NOTICE TO THE MINISTER OF THE DECISION OF THE CITIZENSHIP JUDGE
Section 5

AVIS AU MINISTRE DE LA DÉCISION DU JUGE DE LA CITOYENNETÉ
Article 5

PART I / PARTIE I

Judge - Juge: Judge [illegible]

Surname - Nom de famille: [illegible]

Given name(s) - Prénom(s): TAREK ABDEL [illegible]

Date of birth - Date de naissance: 06 May [illegible]

Documents: [illegible] W527768818

Date landed - Date établie: 07 June 2000

Date of filing - Date du dépôt: 15 February 2006

Other documents - Autres documents: Other

Comments - Commentaires:

File no. - N° de dossier: [illegible]

Client ID - N° du client: [illegible]

[illegible]: 17 July 2008

[illegible]: 19 July 2008

[illegible]: 04 December 2008

Scheduled date - Date de convocation: 14 January 2009

Certificate no. - N° du certificat: [illegible]

Total # of days - # total de jours: [illegible]

☐ has satisfied	☐ has not / n'a pas satisfait	complied with paragraph 5(1)(a) (application). / aux dispositions de l'alinéa 5(1)a) (demande).
☑ has satisfied	☐ has not / n'a pas satisfait	complied with paragraph 5(1)(b) (age). / aux dispositions de l'alinéa 5(1)b) (âge).
☑ has satisfied	☐ has not / n'a pas satisfait	complied with paragraph 5(1)(c) (residence). / aux dispositions de l'alinéa 5(1)c) (résidence).
☑ has satisfied	☐ has not / n'a pas satisfait	complied with paragraph 5(1)(d) (language). / aux dispositions de l'alinéa 5(1)d) (langue).
☑ has satisfied	☐ has not / n'a pas satisfait	complied with paragraph 5(1)(e) (knowledge). / aux dispositions de l'alinéa 5(1)e) (connaissances).
☑ is not / n'est pas	☐ is / est	under a removal order. / sous le coup d'une mesure de renvoi.
☑ is not / n'est pas	☐ is / est	the subject of a declaration by the Governor in Council under Section 20. / visé par une déclaration du gouverneur en conseil selon l'article 20.
☑ is not / n'est pas	☐ is / est	subject to a prohibition under Section 22. / visé par une interdiction selon l'article 22.

ATTESTATION
The statements made herein are true and correct and I confirm that I have not been subject to immigration or criminal proceedings since I filed my application for citizenship.

ASSERMENTATION
Les déclarations faites dans le présente sont exactes et conformes à la vérité et je confirme que, depuis ma demande de citoyenneté, je n'ai pas fait l'objet de procédures criminelles ou concernant l'immigration.

[signature]

Applicant's signature - Signature du demandeur

Sworn/Affirmed before me at - Assermenté(e) devant moi à: Place - Lieu: [illegible] Date: JUL 1 [illegible] 2008

Signature of judge - Signature du juge: [signature]

Application - Demande

☑ is not / n'est pas	☐ is / est	referred to the Minister for consideration under subsection 5(3). Give reasons below. / soumise au ministre pour fin d'étude en vertu du paragraphe 5(3). Donnez les motifs ci-dessous.
☐ is not / n'est pas	☐ is / est	referred to the Minister for consideration under subsection 5(4). Give reasons below. / soumise au ministre pour fin d'étude en vertu du paragraphe 5(4). Donnez les motifs ci-dessous.

Date of recommendation - Date de la recommandation: D-J M Y-A

Signature of Judge - Signature du juge

Reasons - Motifs: [illegible handwriting]

DECISION / DÉCISION: The application for Canadian citizenship / La demande de citoyenneté canadienne ☑ is / est ☐ is not / n'est pas approved. / approuvée.

D-J M Y-A: JUL 1 7 2008

Signature of Citizenship Judge - Signature du juge de la citoyenneté

Date

PART II / PARTIE II CITIZENSHIP OFFICIAL'S DECISION / DÉCISION DU (DE LA) RESPONSABLE DE LA CITOYENNETÉ

Decision seen / Décision vue — Citizenship granted / Attribution de la citoyenneté 5(1) ☐ 5(4) ☐

D-J M Y-A

Signature of Citizenship Official - Signature du (de la) responsable de la citoyenneté

Date

JUDGMENT

For the Reasons provided:

THIS COURT ORDERS that:

1. The appeal is allowed;
2. The matter is returned for redetermination by a different citizenship judge;
3. There is no order as to costs.

"Roger T. Hughes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-437-08
STYLE OF CAUSE:	**THE MINISTER OF CITIZENSHIP AND IMMIGRATION v. TAREK ABDEL GHAFAR MAHMOUD**
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	January 20, 2009
REASONS FOR JUDGMENT AND JUDGMENT:	Hughes, J.
DATED:	January 21, 2009

APPEARANCES:

Ms. Claudine Patry	FOR THE APPLICANT MINISTER OF CITIZENSHIP AND IMMIGRATION
Rezaur Rahman	FOR THE RESPONDENT TAREK ABDEL GHAFAR MAHMOUD

SOLICITORS OF RECORD:

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