Federal Court  Cour fédérale

Date: 20090611

Docket: T-1463-08

Citation: 2009 FC 613

Ottawa, Ontario, June 11, 2009

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

PEDRO CAMORLINGA-POSCH

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] "There is no doubt that he (Mr. Pedro Camorlinga-Posch) will make an exceptional citizen for Canada," as was said by Me Patrica Nobl for the Deputy Attorney General of Canada, in the Court room; however, as she explained, Mr. Camorlinga-Posch must spend the required period of time in Canada as stipulated by the legislation and as interpreted by the jurisprudence.

[2] It is tempting to say as I and others have in the past that she will make such a desirable citizen that she should be granted citizenship now without being required to wait; but that would be failing to apply the law on the facts of this case. There is

> fortunately no immigration problem. She remains a landed immigrant and there is little doubt that her returning resident visas will continue to be renewed, so she will not be seriously inconvenienced in her work or her life, nor prevented from making necessary business departures from the country as required from time to time. To attain citizenship however she must cease to have an ambivalent relationship with Canada and establish that her principal abode is here by spending more time here than on visits to the Orient in connection with her Canadian business activities as a public relations consultant here

(*Leung (Re)* (1991), 42 F.T.R. 149, **[**1991] F.C.J. No. 160 (QL)**).**

[3] And, as was reiterated by Me Nobl on several occasions during her pleadings, "he will make a wonderful Canadian citizen when he meets the objective of the Act (*Citizenship Act*, R.S., 1985, c. C-29); however, he cannot be exempted from the law".

[4] Me Nobl continued, "maybe, if filing for citizenship today, he would be eligible for a citizenship, but that is not the role of judicial review, it is to consider the decision of the Citizenship Judge"; that is before the Court on the basis of the evidence that was before the Citizenship Judge.

II. Judicial Procedure

[5] This is an appeal pursuant to subsection 14(5) of the Act of a decision rendered on July 22, 2008, wherein the Citizenship Judge granted the Respondent's application for Canadian Citizenship.

III. Facts

[6] On August 14, 2005, the Respondent, Mr. Camorlinga-Posch, filed his application for Citizenship.

[7] During the four-year period preceding the date of his application for Citizenship (from August 14, 2001 to August 14, 2005), Mr. Camorlinga-Posch was present 405 days in Canada and

absent 787 days, i.e. he had a deficit of 690 days short of the required 1095 days of residence in Canada.

[8] After having assessed the evidence in light of the criteria established by Justice Barbara Reed in the decision *Re Koo*, [1993] 1 F.C. 286 (T.D.), the Citizenship Judge granted Mr. Camorlinga-Posch's request for Canadian citizenship because she was "of the opinion … that he has established and centralized his mode of life in Canada by presenting the relevant proof" (Tribunal Record (TR) at pp. 11-12).

IV. Issue

[9] Did the Citizenship Judge err in finding that the Respondent satisfied the residence requirement provided at paragraph 5(1)(*c*) of the Act?

V. Analysis

Standard of Review

[10] Although subsection 14(5) of the Act still refers to a possibility of "appeal", it is well established that the present recourse is a judicial review. Then, the standard of review applicable to the decision of a Citizenship Judge is that of reasonableness:

> [19] There has been general consensus in the jurisprudence of this Court that the applicable standard of review for a citizenship judge's determination of whether an applicant meets the residency requirement, which is a question of mixed fact and law, is reasonableness *simpliciter* (*Canada (Minister of Citizenship and Immigration) v. Chang*, 2003 FC 1472; *Rizvi v. Canada* (*Minister of Citizenship and Immigration)*, 2005 FC 1641; *Chen v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 85; *Zhao v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1536). In light of the Supreme Court of Canada's recent decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9 [*Dunsmuir*], wherein the Court collapsed this standard and the patent unreasonableness standards into one standard of reasonableness, I find that the applicable standard of review as regards the Citizenship Judge's determination of whether the Applicant met the residency requirement is reasonableness. (Emphasis added).

(*Pourzand v. Canada (Minister of Citizenship and Immigration)*, 2008 CF 395, 166 A.C.W.S. (3d) 222; reference is also made to *Canada (Minister of Citizenship and Immigration) v. Ntilivamunda*, 2008 FC 1081, 302 D.L.R. (4th) 345).

[11] In the case at bar, the Citizenship Judge made an error by concluding that Mr. Camorlinga-Posch respected the requirements of the Act, and that her decision to grant him citizenship is unreasonable.

Case law relative to the residency requirement under the Act

[12] In the case at bar the Citizenship Judge applied the criterion established in *Re Koo*, above, to determine whether the defendant met the requirements stipulated at paragraph 5(1)(*c*) of the Act.

[13] Subsection 5(1) 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	(i) un demi-jour pour chaque jour de résidence au Canada avant son admission à titre de résident permanent,

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;	(ii) un jour pour chaque jour de résidence au Canada après son admission à titre de résident permanent;

[14] In *Ibrahim v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 633 case, Justice Sean Harrington reminds us that:

> [10] In re: *Papadogiorgakis*, [1978] 2 F.C. 208, 88 D.L.R. 3rd 243 Thurlow A.C.J. was of the view that a person is normally resident in Canada only if she or he is physically present here. However, by way of exception if one has established permanent residence, then days during which he or she is temporarily abroad count as Canadian days. This establishment of residency is still a prime requirement *(Goudimenko v. Canada (Minister of Citizenship and Immigration)* 2002 FCT 447, [2002] F.C.J. No. 581 and *Ahmed v. Canada (Minister of Citizenship and Immigration)* 225 F.T.R. 215, 2002 FCT 1067.)

[15] It is well established in the jurisprudence that the concept of “residence” can be interpreted in three different ways and that it is incumbent upon the Citizenship Judge to choose which criterion of analysis he or she intends to use:

> [9] 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).
>
> [10] 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.

[11] It has also been recognized that any of these three tests may be applied by a Citizenship Judge in making a citizenship determination (*Lam v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 410 (T.D.) (QL)). For instance, in *Hsu v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 579, [2001] F.C.J. No. 862 (QL), Justice Elizabeth Heneghan at paragraph 4 concludes that any of the three tests may be applied:

> The case law on citizenship appeals has clearly established that there are three legal tests which are available to determine whether an applicant has established residence within the requirements of the Citizenship Act (...) a Citizenship Judge may adopt either the strict count of days, consideration of the quality of residence or, analysis of the centralization of an applicant's mode of existence in this country.
>
> [citations omitted]

[12] 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). (Emphasis added).

(*Farrokhyar v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 697, 158 A.C.W.S. (3d) 878).

[16] In short, with regard to the interpretation of the notion of residence at paragraph 5(1)(*c*) of the Act, although a certain jurisprudence from this Court identifies three different interpretations, it is possible to summarize them in two major categories (*Lam v. Canada (Minister of Citizenship and Immigration)* (1999), 164 F.T.R. 177, 87 A.C.W.S. (3d) 432; *Badjeck v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1301, 214 F.T.R. 204).

[17] According to the first category, an applicant must have been physically present in Canada for 1095 days for his or her request for Canadian Citizenship to be granted (*Re Harry* (1998), 144 F.T.R. 141, 77 A.C.W.S. (3d) 933).

[18] According to the second category, extended absences from Canada will not be fatal to a Citizenship request if the applicant can demonstrate that he or she had established his or her residence in Canada before leaving and if Canada is the country in which he or she has centralized his or her mode of existence (*Re Papadogiorgakis*, [1978] 2 F.C. 208 and *Canada (Minister of Citizenship and Immigration) v. Nandre*, 2003 FCT 650, 234 F.T.R. 245).

[19] In Mr. Camorlinga-Posch's case, the Citizenship Judge adopted the more liberal interpretation and considered whether he had established his residence in Canada prior to leaving and whether Canada is the country in which he had centralized his mode of existence (TR at p. 10).

[20] In order to determine this, the Citizenship Judge analyzed each of the six criteria listed by Justice Reed in the *Koo (Re)* decision:

a. Was the individual physically present in Canada for a long period prior to recent absences which occurred immediately before the application for citizenship?
b. Where are the applicant's 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 1,095-day total, is it easier to find deemed residence than when those absences are extensive?
e. 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, or accompanying a spouse who has accepted employment abroad?

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

[21] As stated by Justice Harrington in the *Ibrahim* case above, this non-exhaustive list of six questions offers guidelines to assist the Citizenship Judge in the determination of whether the applicant ahs "centralized his or her mode of existence" in Canada:

> [11] … in re: *Koo*, [1993] 1 F.C. 286, 59 F.T.R. 27, Madam Justice Reed concluded that the residency test should be based on whether the applicant "regularly, normally or customarily lives" here. In other words, is Canada the country in which he or she has centralized his or her mode of existence. She set out a non-exclusive list of six questions which may be of assistance in reaching such a determination.

[22] In the *Ahmed v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1067, 225 F.T.R. 215 decision, Justice Carolyn Layden-Stevenson indicated that the determination of whether the applicant has "centralized his or her mode of existence" is directly related to a two-pronged inquiry. First, the applicant must initially elect domicile in Canada prior to the filing of a citizenship application in the **establishment** of his or her residence in Canada during the requisite period; and secondly, he or she must have **maintained** his or her residence in Canada for the entire prescribed period in the Act, i.e. in the four years prior to the filing of the citizenship application:

> [7] … In my view, ***Re Koo*** stands for the proposition that absences may be deemed residence if an individual has centralized his or her existence here. The phrase "centralized his existence", of necessity, requires that an individual has established his or her residence in Canada. If so, the phrase may also be relevant with respect to whether the individual has maintained his or her existence in Canada. The factors enunciated in ***Re Koo*** were offered as guidelines to assist in the determination of whether absences during the relevant time period can be deemed residence. They do not constitute a test that requires an exhaustive analysis of each and every segment of each and every factor. (Emphasis added).

(Reference is also made to *Goudimenko v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 447, 113 A.C.W.S. (3d) 766; *Sharma v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1384, 242 F.T.R. 185; In *Chan v. Canada (Minister of Citizenship and Immigration)*, 2002

FCT 270, 113 A.C.W.S. (3d) 23, Justice Denis Pelletier stated that “Residence is not established by the mere fact of landing”).

[23] Then, turning her attention to the facts surrounding the application of Mr. Ahmed, Justice Layden-Stevenson further stated in the *Ahmed*, case above:

> [8] In this particular matter, the appellant's argument regarding the citizenship judge's failure to consider his surrounding circumstances is misguided. While the appellant has the usual passive indicia of residence in Canada, his evidence is scant with respect to whether or not he had ever established himself in Canada. Counsel placed great weight on the fact that the appellant's wife and children live in Canada. That is, in all likelihood, one of the reasons why the appellant's wife and his two non-Canadian born children have been granted Canadian citizenship.
>
> [9] I was urged to consider the fact that the appellant lived in Canada for fifteen months before leaving for his employment in Afghanistan. The appellant referred to several cases where an individual was found to have established residence in Canada after residing here considerably less than fifteen months. The appellant's perception of the end result in those cases is correct but he fails to appreciate the nature and significance of the evidence that was provided in support of the end result. (Emphasis added).

[24] The basic principles set out in *Ahmed* are noteworthy in the present case given that it was found in that case that it cannot necessarily be concluded that a citizenship applicant met the first threshold (i.e. that he “established himself” in Canada) merely from the fact that he had lived in Canada uninterruptedly for fifteen months in Canada before leaving for his employment (also, *Canada (Minister of Citizenship and Immigration) v. Jasmine*, 2006 FC 1048, 151 A.C.W.S. (3d) 767).

[25] As well, the *Ahmed* case stands for the proposition that the “usual passive indicia of residence” do not represent in and of themselves proof that an applicant has centralized his or her mode of life in Canada (i.e. the establishment and maintenance of its existence in Canada).

[26] As to what my represent a “passive indicial of residence” in Canada, the *Paez v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 204, 165 A.C.W.S. (3d) 228 case gives the following illustration:

> [18] … 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)… (Emphasis added).

[27] On the same point, Justice Francis Muldoon’s comments in *Re Hui* (1994), 75 F.T.R. 81, [1994] F.C.J. No. 238 (QL) (F.C.T.D.) are relevant as well as he states:

> [15] What is the purpose of this legislative standard? It is surely not that applicants be out of Canada for any less than three out of four years. Parliament intends to confer citizenship not on de facto foreigners, but on persons who have been "in residence" in Canada, not absent, for three years during the previous four. It intends to confer citizenship on applicants who have "Canadianized" themselves by residing among Canadians in Canada. This cannot be accomplished abroad. Nor can it be accomplished by depositing bank-accounts, rental payment, furniture, clothing goods, and more importantly, spouses and children - in a word, all except oneself - in Canada, while remaining personally outside Canada. Parliament prescribes three out of the preceding four years for qualifying for citizenship. Parliament does not speak of depositing anything, nor of a pied-à-terre where one's furniture can become "Canadianized", nor yet of intentions, some day, to become a Canadian, nor of the acquisition of provincial driver's licences. It is true that one can frustrate Parliament's purpose by residing in a religious ghetto in Canada, but that exceptional conduct, that adoption of apartheid as a way of life in Canada does not derogate from the manifest purpose of paragraph 5(1)(c) of the Citizenship Act. This is a strict construction and it appears to be a justifiable and correct interpretation of the will of Parliament. (Emphasis added).

(Reference is also made to *Re Reza* (1988), 20 F.T.R. 188, 11 A.C.W.S. (3d) 6; *Pourghasemi (Re)* (1993), 62 F.T.R. 122, 39 A.C.W.S. (3d) 251 (F.C.T.D.)).

[28] In the case of *Shrestha v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 594, 123 A.C.W.S. (3d) 226, Justice Luc Martineau clearly underlined the following about the

reasonable justifications that an applicant may offer in support of his or her extensive periods of absence from Canada:

> [14] In my view, even if the applicant has a reasonable explanation for being absent for such extensive periods of time, it remains that he never demonstrated that he centralized his mode of living in Canada. He did demonstrate that he rented an apartment, purchased a house and a car, obtained a driver's licence and a health card from the province of Ontario, maintained an insurance policy, filed income tax reports, visited his immediate family, who live in Canada, at every opportunity and diligently renewed his returning resident permit …
>
> …
>
> [16] I note that the applicant seems to have no significant ties with any other country. However, this is not the sole criterion for fulfilling the residency requirements of the Act. An important recent decision, the facts of which are significantly similar to this case, is *Ahmed* v. *Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 1415 ("*Ahmed*")…
>
> [17] In *Ahmed, supra,* Layden-Stevenson J. stressed the fact that "[t]here exists a long line of authority from this Court wherein it has been determined that to meet the requirements of the *Citizenship Act*, residence must first be established and then it must be maintained [...]". Even though the applicant seemed to have resided 15 months in Canada before leaving…
>
> [18] Layden-Stevenson J. determined that the appellant in *Ahmed, supra*, did not meet the residency requirements because he did not establish residence in Canada even though he was assigned abroad for his employment.
>
> …
> [20] … However, it is also clear from the case law that the establishment of residency in Canada is a prerequisite to the acquisition of citizenship. As illustrated by Walsh J. in *Leung, Re* (1991), 42 F.T.R. 149 (F.C.T.D.):
>
> > Many Canadian citizens, whether Canadian born or naturalized, must spend a large part of their time abroad in connection with their business, and this is their choice. An applicant for citizenship, however, does not have such freedom because of the provisions of s. 5(1) of the Act. (Emphasis added).

[29] In short, even if an applicant for citizenship offers a reasonable explanation for being absent from Canada for an extensive period, the fact of purchasing a house and a car in Canada, obtaining a driver's license and filing his income tax reports are not of themselves sufficient for an individual to **establish** and **maintain** his residence in Canada.

[30] In fact, beyond any reasonable explanation that an applicant may tender in support of his or her extensive absences, the Citizenship Judge must evaluate ultimately whether these absences are temporary **or if they actually represent a regular patter of life**:

> [16] Moreover, while an applicant's physical presence is not the primary consideration, in remains an important factor in the *Koo (Re)* analysis and the Judge is free and indeed required to examine physical absences and the reasons for those absences (See *Canada (Secretary of State v. Nakhjavani*, [1988] 1 F.C. 84, [1987] F.C.J. No. 721 (QL), at para. 15; *Agha (Re)*, [1999] F.C.J. No. 577 (QL), at para. 45). More particularly, as Martineau J. has held in *Canada (Minister of Citizenship and Immigration v. Chen*, 2004 FC 848, [2004] F.C.J. No. 1040 (QL), at para. 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 […] (Emphasis added).

(*Paez*, above; reference is also made to *Sleiman v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 230, [2007] F.C.J. No. 296 (QL)).

[31] In the paragraphs below Mr. Camorlinga-Posch will demonstrate that the Citizenship Judge did not make – with the help of the six factors set out by Justice Reed in the *Koo (Re)* decision case – a proper assessment of the evidence on whether Mr. Camorlinga-Posch had indeed "centralized his or her mode of existence" in **establishing** his residence in Canada during the period provided in the Act; secondly, by **maintaining** his residence in Canada for the entire requisite period.

[32] The Applicant will demonstrate as well that the Citizenship Judge's decision is totally silent on different aspects of the evidence that show that Mr. Camorlinga-Posch's extensive periods of absences are not "temporary but rather a structural pattern of life".

An examination of the Citizenship Judge's decision

[33] The Citizenship Judge noted in her decision that Mr. Camorlinga-Posch was only present in Canada during 405 days of the required 1095 days (*Agha (Re)* (1999), 166 F.T.R. 245, 88 A.C.W.S. (3d) 26).

[34] Contrary to the Citizenship Judge's finding, according to the liberal interpretation of the notion of residence, Mr. Camorlinga-Posch's absences should not be counted as residence within Canada because he did not satisfy the *Koo (Re)* test as chosen by the Citizenship Judge in this case.

[35] The Citizenship Judge did not properly apply in her decision the facts to the different factors set out in *Koo (Re)*. More precisely, the Citizenship Judge erred in her analysis of five of the six factors listed in the *Koo (Re)* decision: i.e. the first, the third, the fourth, the fifth and the sixth criteria.

[36] As a result of her erroneous appraisal of the evidence in file vis-à-vis these five criterion, the Citizenship Judge erroneously concluded that Mr. Camorlinga-Posch had centralized his mode of existence in Canada.

> The Citizenship Judge's reasons for her decision are silent on different key aspects of the evidence and this failure shows that they were ignored

[37] In *Agha (Re)*, above, Justice François Lemieux exposes the elements that must be taken into consideration when the test set out in *Koo (Re)* is the one chosen by the Citizenship Judge in the assessment of an applicant's residency:

> [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. (Emphasis added).

[38] In the case at bar, the Citizenship Judge failed to "carefully examine" all the circumstances surrounding Mr. Camorlinga-Posch's physical absence from Canada.

[39] As rightly mentioned by the Citizenship Judge in her decision in the present case, Mr. Camorlinga-Posch did offer a reasonable explanation for being extensively absent from Canada during the requisite period. Indeed, the nature of Mr. Camorlinga-Posch's position as a customer system integrator for a multinational such as Ericsson was requiring him to travel on business often.

[40] The Citizenship Judge erred in her appraisal of Mr. Camorlinga-Posch's extended absences as she concluded that the said absences were "**evenly** spread out" during the requisite period (TR at p. 10). This inappropriate appraisal erroneously leads the Citizenship Judge to conclude that Mr. Camorlinga-Posch had "established and centralized his mode of life in Canada" (TR at p. 11).

[41] The fact that the list of absences provided by Mr. Camorlinga-Posch with his application for citizenship very noticeably reveals that his absences were not "evenly spread out", but were in constant progress and especially had drastically intensified in the two years before the filing of his citizenship application: i.e. 95 days in 2001, 139 days in 2002, and 176 days in 2003; but as much **339 days in 2004, 272 days in 2005, and finally 71 days over a calculated period of only three months in 2006**.

[42] The Citizenship Judge's decision is silent about this dramatic increase in Mr. Camorlinga-Posch's absences between the years 2004 and 2006.

[43] Furthermore, the Citizenship Judge noted in her Reasons for Judge's Decision that: "[at] the hearing, the Applicant states that he works for Ericsson Canada Inc…" and she stated further that

"[t]he Applicant provided a letter from Ericsson stating that the Applicant is a full time employee of that company stationed in Town of Mount Royal, QC." (TR at pp. 8 and 10).

[44] The fact is that in the said letter provided by the Canadian branchy of Ericsson Canada (and which head office is indeed located in the Town of Mount Royal, Qc), it is specified that Mr. Camorlinga-Posch's position with the Canadian branch of Ericsson ended on January 1st, 2005. Indeed, in the said letter, dated June 30th, 2005, from Ericsson Canada, one reads that:

> This letter will confirm the permanent, full-time employment of Mr. Pedro Camorlinga with Ericsson Canada Inc., a leader in the Telecommunications industry.
>
> **Mr. Camorlinga has been employed by Ericsson Canada from May 1st, 2000 to January 31st, 2005**. He **was working** on a full-time basis of 37.5 hrs/week.
>
> Mr. Camorlinga **was working** under the supervision of Mr. Peter Anzovino as a Customer System Integrator.
>
> As a Customer System Integrator, Mr. Camorlinga **was responsible**… (Emphasis added). (TR at p. 34).

[45] As a matter of fact, at question 9 of his Residence Questionnaire, dated March 20, 2006, Mr. Camorlinga-Posch indicated that **he was working for Ericsson Canada Inc. between January 2001 and January 2005**, and that **since February 2005**, he works for Ericsson Telecommunication **located in the Netherlands** (TR at p. 21, question 9).

[46] Then, the Citizenship Judge clearly made a mistake when she concluded that Mr. Camorlinga-Posch was still a full-time employee of the head office stationed in Mount Royal when she rendered her decision in support of Mr. Camorlinga-Posch's application for citizenship.

[47] In fact, the Citizenship Judge's decision is silent on the transition of Mr. Camorlinga-Posch's job with the Ericsson's head office located in the Town of Mount Royal and the new position with the Dutch branch.

[48] In actual fact, one observes that Mr. Camorlinga-Posch's recurrent visits in Rijen (Netherlands) for 2005, coincide with both the ending of his employment with Ericsson Canada and his new position with Ericsson Telecommunication based in the Netherlands (It is worth mentioning that contrary to previous years, Mr. Camorlinga-Posch did not submit any income tax report for 2005).

[49] It is considered to be his intention to make Canada his home; however, Mr. Camorlinga-Posch's intention has no relevance in a context where it is manifest that he has not yet centralized his mode of living in Canada. Indeed, in light of the aforementioned evidence, one must conclude, at the very least, that Mr. Camorlinga-Posch has not **maintained** his residence in Canada since 2005.

[50] In light of Mr. Camorlinga-Posch's recurrent and ever increasing sojourns abroad in the four-year period prior to the filing of his citizenship application – and above all, more recently with his new position with the Dutch branch of Ericsson – it must be concluded that Mr. Camorlinga-Posch's extensive absences from Canada constitute in his case a structural mode of living abroad rather than just a temporary situation.

[51] In light of all the aforementioned elements that transpire from the evidence in the file, it is manifest that the factors set out in *Koo (Re)*, were erroneously analyzed.

The Citizenship Judge's incorrect analysis of the facts vis-à-vis five of the six factors set out in *Koo (Re)*

a. The first factor of the test: Physical presence before the period of absence

[52] The first issue addressed by the Citizenship Judge in her decision flows from the test settled by Justice Reed in the *Koo (Re)* decision as to the following: "Was the individual physically present in Canada for a long period prior to his first absences. Are most of the absences recent and occurred immediately before the application for citizenship? (TR at p. 10).

[53] The Citizenship Judge gave the following answer to the above stated question:

> The Applicant works for Ericsson as a Customer System Integrator. The nature of the Applicant's job is such that he is required to travel on business often. The Applicant's absences were evenly spread out during the period in question. (Emphasis added). (TR at p. 10).

[54] The Citizenship Judge erred when she stated that "[t]he Applicant's absences were evenly spread out". The evidence does in fact reveal a very intensive pattern of absence for both the years 2004 and 2005, and during which period Mr. Camorlinga-Posch's presence in Canada was very scarce (i.e. 339 days of absence in 2004 and 272 days in 2005) (It is worth mentioning here that the Citizenship Judge could have taken into consideration Mr. Camorlinga-Posch's absence for the entire year of 2005 and not just for the period prior to the filing of his application on August 14, 2005: *Wang v. Canada (Minister of Citizenship and Immigration)* (1999), 87 A.C.W.S. (3d) 876, [1999] F.C.J. No. 439 (QL)).

[55] In addition, the Citizenship Judge did not properly assess this factor, which consisted in determining whether Mr. Camorlinga-Posch was present in Canada prior to recent absences that occurred immediately before the application for citizenship.

[56] The evidence shows that Mr. Camorlinga-Posch's absences from Canada were not simply recent, but highly recurrent over a much extended period of time during the requisite period of four years prior to the filing of his application for citizenship.

[57] Consequently, Mr. Camorlinga-Posch's days of absences could not be treated as residence within Canada because the evidence does not support the conclusion that Canada is the place where Mr. Camorlinga-Posch regularly, normally or customarily lives or the country in which he has centralized his mode of existence.

2) The second factor of the test: Whereabouts of Respondent's immediate family and dependants as to residence

[58] To the question "Where are the applicant's immediate family and dependants (and extended family) resident?", the Citizenship Judge noted that:

> The Applicant's parents and sister live in Mexico.
> The Applicant's common law partner lives in Canada. Since the filing of application, the Applicant became a father. Both his partner and his child are Canadian citizens. (TR a p. 10)

[59] Even though the second criterion was not discussed the following applies.

[60] The common-law partner of Mr. Camorlinga-Posch may have resided in Canada with visits to the Netherlands but recognizing that other members of his family lived elsewhere and that having a common-law partner and even immovable property in one country does not necessarily establish, in and of itself, the elementary requirements of the legislation. As one can have more than one residence and family residing in more than one country, even one's nuclear family, this does not necessarily meet the requirements of the legislation.

3) The third factor of the test: Returning home to Canada or mere visits (i.e. Mr. Camorlinga-Posch's pattern of presence in Canada

[61] To the question "Does the pattern of physical presence in Canada indicate a returning home or merely visiting the country?", the Citizenship Judge came to the following conclusion:

> The Applicant provided a letter from Ericsson stating that the Applicant is a full-time employee of that company stationed in Town of Mount Royal, Qc. The Applicant declares that during the period in question he resided on 5481 Queen Mary Rd, Montreal and that in 2004 he purchased a property where he lives to this day. The Applicant provided documents to prove this declaration notably deed of sale, mortgage load, municipal taxes, house assurance to prove the lease for 2001, real estate tax for the dwelling at 5481 Queen Mary Rd for 2002 and utility bills. (TR at p. 10).

[62] The problem with this statement is that the Citizenship Judge totally disregarded the fact that – precisely – Mr. Camorlinga-Posch was no longer a full-time employee of the Ericsson branch located in Canada, but that he was currently employed by the Dutch branch of Ericsson.

[63] As mentioned earlier, there is absolutely nothing in the Citizenship Judge's decision concerning this central evidence and there is nothing in the decision that shows that at the hearing she thoroughly investigated this matter with Mr. Camorlinga-Posch.

[64] As well, the pattern of Mr. Camorlinga-Posch's presence in Canada is more consistent with short visits than returns to a place where he "regularly, normally or customarily lives" and this especially for the years 2004 and 2005.

4) The fourth faction of the test: Extensive absences

[65] Concerning this factor, the Citizenship Judge indicates that: "[t]he Applicant was physically present in Canada for 405 days. The Applicant was outside Canada for 787 days" (TR at p. 10). Mr. Camorlinga-Posch is thus far from having attained the required threshold of 1095 days.

[66] Mr. Camorlinga-Posch did not live in Canada “regularly, normally or customarily”. As explained by Justice Yvon Pinard in the *Abderrahim v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1486, [2004] F.C.J. No. 1867 (QL) case, it is important for a Citizenship Applicant to spend time in Canada in order to be able to assert having centralized his mode of life in this country:

> **[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).

[67] In another similar case, *Zeng v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1752, 136 A.C.W.S. (3d) 15, by Justice Richard Mosley, the applicant for citizenship worked for a Canadian company, which required frequent travel abroad. Although he owned a home, and his wife and daughter remained in Canada permanently, the Citizenship Judge concluded, after analyzing the factors se tout in *Koo (Re)*, that the applicant had not centered his mode of life in Canada. Then, the Federal Court dismissed the applicant’s appeal for the following reasons:

> [21] It is not surprising, given the amount of time Dr. Zeng spent outside of Canada during the four years prior to his application, that the citizenship judge would focus on those absences and the reasons for them in arriving at his findings. Considering the *Re Koo* factors, there was no physical presence in Canada for a long period prior to recent absences. Indeed the pattern was of long absences interspersed with periods in Canada. Dr. Zeng was not "a few days short" of the requisite number. He had not established himself here for any length of time before he took employment with Cargill and began to travel abroad for prolonged periods. While there was evidence before the citizenship judge that Dr. Zeng was to be relocated back to Cargill headquarters in Winnipeg at the end of four years, in my view his employment abroad was not the type of temporary arrangement contemplated by Justice Reed in *Re Koo*.
>
> …
>
> [23] Contrary to the applicant's submissions, I can find no indication in the citizenship judge's reasons that he ignored the other facts in Dr. Zeng's favour. Indeed he acknowledged that there were strong points including the establishment of a home for the wife and daughter in Burnaby, B.C. In my view, however, the judge

> was entitled to weigh that factor against the others and to conclude that it did not demonstrate the necessary degree of connection to Canada. (Emphasis added).

[68] The Citizenship Judge committed a reviewable error in concluding that Mr. Camorlinga-Posch had centralized his mode of existence in Canada over the last prescribed period of four years, and particularly in the years 2004 and 2005.

5) The fifth factor of the test: Temporary absences or indefinite duration absences

[69] The Citizenship Judge wrote the following at the question: "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 temporary employment abroad?"

> All trips outside Canada that the Applicant took were business trips except his yearly vacation. The Applicant submitted letters from his employer addressed to various embassies to request that a visa be issued to the Applicant so he could perform his duties with Ericsson customers or installations abroad. The Applicant submitted a booklet of vaccines he took in Canada as a precaution for his business trips abroad. The Applicant, upon the completion of his task abroad, always returned to his home and to his work in Montreal. (Emphasis added). (TR at p. 11).

[70] In light of the above, the Citizenship Judge concluded in the prescribed section devoted to her decision:

> … Upon the completion of his assignment, the Applicant returned to his home on Queen Mary Rd, Montreal, rented in 2001 and subsequently to his condominium purchased in 2004… It is obvious that all the Applicant's absences were due to temporary situation and were related to the nature of his employment… (TR at p. 11).

[71] The Citizenship Judge did not properly address this fifth criterion.

[72] The Citizenship Judge could not realistically conclude in the case that Mr. Camorlinga-Posch's physical absences were "caused by a **clearly** temporary situation" given that:

a. Mr. Camorlinga-Posch's absences are not "evenly spread out" over the requisite period as erroneously declared by the Citizenship Judge, but that absences were in fact extensive and had significantly increased over the years 2004 and 2005;

b. Mr. Camorlinga-Posch no longer works for the Canadian branch of Ericsson since 2005;

c. Mr. Camorlinga-Posch currently works for the Dutch branch of Ericsson; nothing demonstrates that this position is simply a posting and would be of a temporary nature.

[73] The fact that Mr. Camorlinga-Posch works for a multinational company, such as Ericsson, that maintains branches and does business all around the world is not a valid justification for not complying with his obligation of residency under the Act (*Canada (Minister of Citizenship and Immigration v. Chang* (1999), 91 A.C.W.S. (3d) 198, [1999] F.C.J. No. 1352 (QL). For instance, in *Sharma*, above, Justice John O'Keefe stated the following:

> [37] The fact that the applicant is working for the United Nations agency UNICEF, does not assist him as this Court has held that persons in similar situations have to meet the requirements that they establish and maintain residency during the relevant time periods (see: *Ahmed, supra*; *Shrestha* v. *Canada (Minister of Citizenship and Immigration)*, 2003 FCT 594).

(Reference is also made to *Canada (Minister of Citizenship and Immigration v. Woldemariam* (1999), 175 F.T.R. 108, [1999] F.C.J. No. 1545 (QL); *Shreshta*, above; *Ahmed*, above).

[74] In the *Khan v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 47, 145 A.C.W.S. (3d) 379, the Citizenship Judge had rejected the citizenship application filed by Mr. Khan, a native of Pakistan. In this case, the applicant had come to Canada in January of 2000, and during the four years prior to the filing of his application, he had been absent for long period (i.e. for a total of 419 days) given that his job required him to work in the Republic of Guinea. Although Mr. Khan was employed by a Canadian company, this Court rejected his appeal, explaining that:

> [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).

(Reference is also made to *Leung (Re)*, above).

[75] Another decision rendered by this Court in the case of *Paez*, above. In this case, the applicant had spent 495 days in Colombia for business during the requisite period. The Court rejected the applicant's appeal as well for the following reasons:

> [16] Moreover, while an applicant's physical presence is not the primary consideration, in remains an important factor in the *Koo (Re)* analysis and the Judge is free and indeed required to examine physical absences and the reasons for those absences (See *Canada (Secretary of State v. Nakhjavani*, [1988] 1 F.C. 84, [1987] F.C.J. No. 721 (QL), at para. 15; *Agha (Re)*, [1999] F.C.J. No. 577 (QL), at para. 45). More particularly, as Martineau J. has held in *Canada (Minister of Citizenship and Immigration v. Chen*, 2004 FC 848, [2004] F.C.J. No. 1040 (QL), at para. 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 […]
>
> (See e.g. *Sleiman*, *supra*, at para. 28)
>
> [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.
>
> …
>
> [19] In the present case, I find that the citizenship judge's decision was reasonable. He examined the applicant's situation in light of the six *Koo (Re)* factors, highlighting the applicant's numerous trips abroad to Colombia, his home country, the fact that he retained his medical practice and glasses outlet in that country and also that the applicant is an investor and administrator of two Canadian construction companies. Based on these factors it was reasonable for the Judge to conclude that the applicant's absences were not temporary but rather a structural pattern of life.
>
> [20] It is true that, with the exception of the applicant's failure to remit tax to Canadian authorities, the Judge did not refer to any of the passive indicia of residency; however, as stated above, passive indicia on their own do not suggest that the applicant has centralized his mode of existence in Canada.

> [21] Further, while the Judge stated that the presence of the applicant's family in Canada was a "huge factor" it was not determinative. The applicant's willingness to travel abroad in order to provide for his family is commendable; however, based on the totality of factors; I find that the Judge reasonably concluded that the applicant has a stronger connection to Colombia than to Canada. (Emphasis added).

[76] Based on Mr. Camorlinga-Posch s extended lists of absence for the four years prior to the filing of his application – and more particularly for the years 2004 and 2005, coupled with his position held with Ericsson Telecommunication in the Netherlands – there was largely enough evidence for the Citizenship Judge to conclude that his absences are not temporary but rather a structural pattern of life.

6) Sixth factor of the test: Quality of connection with Canada

[77] The Citizenship Judge wrote the following to the questions "What is the quality of the connection with Canada? Is it more substantial than that which exists with any other country?

> The Applicant established his residence in Montreal by renting an apartment and subsequently buying a property where he lives now with his family. The Applicant took a job with Ericsson Canada, contributed to Quebec pension plan and declared income tax in Canada. He works for the same company from 2001 to this day. (Emphasis added). (TR at p. 11).

[78] In light of the above, the Citizenship Judge concluded in the designated section devoted to her decision that:

> … The Applicant found a common law partner in Canada, a Canadian citizen, and the couple has one child since the filing of application for citizenship… The Applicant possesses Canadian bank accounts, provincial health card, contributes to Quebec pension plan and all that indicates that Canada is a place where the Applicant regularly, normally and customarily lives. (TR at p. 11).

[79] In the case at bar, the elements that the Citizenship Judge took into account are precisely the same type as those designated in *Paez*, above, as being "passive indicia" of residence in 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 explanation for the lack such evidence, not merely passive indicia (*Xia, supra*, at para. 26). (Emphasis added).

[80] Whereas, Mr. Camorlinga-Posch posses a Canadian bank account, a provincial health card or that he contributes to a Quebec pension, these elements are considered by this Court as of little value for the assessment of a citizenship candidate's attachment to Canada. In short, they are insufficient to establish that Mr. Camorlinga-Posch has centralized his mode of existence in Canada.

[81] With regard to the fact that Mr. Camorlinga-Posch's immediate family is living in Canada, the Citizenship Judge has confounded the degree of his establishment with that of his family; however, as stated by Justice Danièle Tremblay-Lamer in the case of *Paez*, above, Mr. Camorlinga-Posch could not ""bootstrap" his qualification as a resident based on the conduct of his family".

[82] As well, in the case of *Yip v. Canada (Minister of Citizenship and Immigration)* (1999), 91 A.C.W.S. (3d) 525, [1999] F.C.J. No. 1393 (QL), even if Mr. Yip's family was living in Canada, Justice Reed concluded that his trips to Canada were visits only and did not evidence his settled intention to adopt Canada as the country in which he normally and usually resides as it appears from the following excerpts:

> [11] The second factor to consider is whether his immediate family is located in Canada. The appellant"s wife and children, as noted, have been located here since they were admitted as permanent residents. His parents have come. He has two sisters here. The presence of his immediate family members in Canada weighs in favour of treating his absences as residence within the country.
>
> …
>
> [15] Another factor to consider is whether the appellant"s pattern of absences shows a returning home to Canada or merely visits here. This is a neutral factor in

> the appellant"s case. As noted, his wife and children are here and he and his wife purchased a family home here. These are indicia that could lead to a conclusion that the returning is a returning home. At the same time, there have been constraints on the wife"s mobility, if she wishes to attain Canadian citizenship " she needs to accumulate the three years residence. This, together with the fact that the focus of the appellant"s business activities is in Hong Kong and China, invites a conclusion that his trips to Canada have been visits only and do not evidence a settled intention to adopt Canada as the country in which he normally and usually resides. With the passage of more time, it may become clear that the family has centralized its mode of existence in Canada, but that is not clear at the moment. (Emphasis added).

[83] Then, despite the presence of Mr. Camorlinga-Posch's immediate family in Canada, this element in itself has a decisive impact.

[84] As well, as stated by Justice Lemieux in *Hsu (Re)* (1999), 167 F.T.R. 72, 88 A.C.W.S. (3d) 25:

> [31] Mr. Hsu's counsel made much of the fact that Mr. Hsu always intended to return to Canada because his family and children were here and that he had sold his house and brought all personal belongings to Canada. Intention alone is not sufficient. Residence is also a matter of objective fact.

[85] In addition, as it appears from the following excerpt of the *Leung*, above, decision, the mere intention to stay in Canada or to return to Canada is not sufficient and an applicant must establish that Canada is his principal abode:

> I have no doubt that with the increased development of her business in Canada since the 1988 citizenship application, and conversely the diminution of her activities in Hong Kong, Applicant will spend more time in Canada, nor do I have any doubt that it is her intention to make Canada her home…
>
> …
>
> … **To attain citizenship however she must cease to have an ambivalent relationship with Canada and establish that her principal abode is here by spending more time here than on visits to the Orient in connection with her Canadian business activities as a public relations consultant here**. (Emphasis added).

[86] It is clear from the record, and particularly from the years 2004 and 2005, that Mr. Camorlinga-Posch has had a relationship of many absences from Canada, and which relationship is not adequately reflected in the Citizenship Judge's decision. These lacunae constitute a reviewable error.

VI. Conclusion

[87] For the reasons listed above, this decision is quashed.

JUDGMENT

THIS COURT ORDERS that the appeal filed by the Applicant be allowed.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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