**Date: 20091113**

**Docket: T-1948-08**

**Citation: 2009 FC 1157**

**Ottawa, Ontario, November 13, 2009**

**PRESENT: The Honourable Mr. Justice Shore**

**BETWEEN:**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Applicant**

**and**

**SLAVOLJUPKA ZEGARAC**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**
**(Correction to name of Applicant's Counsel at para. 2 and Counsel Sheet)**

I. Introduction

[1] A Citizenship Judge must provide adequate reasons to ensure for an understanding as to why citizenship was granted.

II. Judicial Procedure

[2] This is an appeal by the Minister of Citizenship and Immigration of a decision of a Citizenship Judge, dated June 23, 2008, granting the Respondent citizenship. The Applicant makes this appeal on the grounds that the Citizenship Judge committed a reviewable error by providing insufficient reasons for his conclusion that the Respondent had satisfied the residency requirement

set out in paragraph 5.(1)(*c*) of the *Citizenship Act*, 1974-75-76, c. 108. (N.B. Counsel for the Applicant is Ms. Camille N. Audain; the Respondent has not filed any materials and was represented by her husband, Mr. Dusan Zegarac as she is out of the country).

III. Background

[3] The Respondent, Ms. Slavoljupka Zegarac, is a citizen of Serbia who landed in Canada on June 9, 1994. On April 4, 2006, Ms. Zegarac applied for citizenship.

[4] When Ms. Zegarac applied for citizenship, she noted that she travelled outside of Canada twice; between June 15, 2001 and August 10, 2001 and again between April 10, 2005 and May28, 2005 (Applicant's Memorandum of Fact and Law at para. 3).

[5] The Applicant takes issue with Ms. Zegarac's residency in Canada during this period. The Applicant points to evidence that was before the Citizenship Judge which shows Ms. Zegarac travelled to Serbia in 2001 and did not return to Canada until 2005 (Applicant's Memorandum of Fact and Law at para. 4). If the Citizenship Judge had accepted this evidence, Ms. Zegarac would have failed to meet her residency requirements under paragraph 5.(1)(*c*) of the *Citizenship Act*.

IV. Issue

[6] Did the Citizenship Judge fail to give sufficient reasons for allowing the Respondent's application?

V. Decision under Review

[7] Ms. Zegarac filed her application for citizenship on April 4, 2006 (Tribunal Record (TR) at p. 1). Since the Act requires citizenship applicants to acquire at least three years of residence in Canada in the four years preceding their application for citizenship, Ms. Zegarac had to acquire three years of residence between April 4, 2002 and April 4, 2006.

[8] The Citizenship Judge found that Ms. Zegarac had acquired 48 days of absence from Canada during the relevant period and accordingly granted her application for citizenship on October 27, 2008 (TR at p. 1).

VI. Relevant Legislative Provisions

[9] Subsection 5.(1) of the *Citizenship Act* states:

| 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 Protection Act, and has, within the four years immediately preceding the date of his or her | *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 |

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.

pendant au moins trois ans en tout, la durée de sa résidence étant calculée de la manière suivante :

(i) un demi-jour pour chaque jour de résidence au Canada avant son admission à titre de résident permanent,

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

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

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

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

[10] Subsections 1.4(2) and 14.(5) of the *Citizenship Act* state:

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| Advice to Minister | Information du ministre |
| **14.** (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. | **14.** (2) Aussitôt après avoir statué sur la demande visée au paragraphe (1), le juge de la citoyenneté, sous réserve de l'article 15, approuve ou rejette la demande selon qu'il conclut ou non à la conformité de celle-ci et transmet sa décision motivée au ministre. |
| … | [ … ] |
| Appeal | Appel |
| **14.** (5) The Minister or the applicant may appeal to the Court from the decision of the citizenship judge under subsection (2) by filing a notice of appeal in the Registry of the Court within sixty days after the day on which | **14.** (5) Le ministre et le demandeur peuvent interjeter appel de la décision du juge de la citoyenneté en déposant un avis d'appel au greffe de la Cour dans les soixante jours suivant la date, selon le cas : |
| (*a*) the citizenship judge approved the application under subsection (2); or | *a*) de l'approbation de la demande; |
| (*b*) notice was mailed or otherwise given under subsection (3) with respect to the application. | *b*) de la communication, par courrier ou tout autre moyen, de la décision de rejet. |

[11] Section 21 of the *Federal Courts Act*, R.S., 1985, c. F-7 states:

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

[12] Rule 300 of the *Federal Courts Rules*, SOR/2004-283 states:

| Application | Application |
|---|---|
| **300.** This Part applies to | **300.** La présente partie s'applique : |
| (*a*) applications for judicial review of administrative action, including applications under section 18.1 or 28 of the Act, unless the Court directs under subsection 18.4(2) of the Act that the application be treated and proceeded with as an action; | *a*) aux demandes de contrôle judiciaire de mesures administratives, y compris les demandes présentées en vertu des articles 18.1 ou 28 de la Loi, à moins que la Cour n'ordonne, en vertu du paragraphe 18.4(2) de la Loi, de les instruire comme des actions; |
| (*b*) proceedings required or permitted by or under an Act of Parliament to be brought by application, motion, originating notice of motion, originating summons or petition or to be determined in a summary way, other than applications under subsection 33(1) of the Marine Liability Act; | *b*) aux instances engagées sous le régime d'une loi fédérale ou d'un texte d'application de celle-ci qui en prévoit ou en autorise l'introduction par voie de demande, de requête, d'avis de requête introductif d'instance, d'assignation introductive d'instance ou de pétition, ou le règlement par procédure sommaire, à |

| | |
|---|---|
| | l'exception des demandes faites en vertu du paragraphe 33(1) de la Loi sur la responsabilité en matière maritime; |
| (*c*) appeals under subsection 14(5) of the Citizenship Act; | *c*) aux appels interjetés en vertu du paragraphe 14(5) de la Loi sur la citoyenneté; |
| (*d*) appeals under section 56 of the Trade-marks Act; | *d*) aux appels interjetés en vertu de l'article 56 de la Loi sur les marques de commerce; |
| (*e*) references from a tribunal under rule 320; | *e*) aux renvois d'un office fédéral en vertu de la règle 320; |
| (*f*) requests under the Commercial Arbitration Code brought pursuant to subsection 324(1); | *f*) aux demandes présentées en vertu du Code d'arbitrage commercial qui sont visées au paragraphe 324(1); |
| (*g*) proceedings transferred to the Court under subsection 3(3) or 5(3) of the Divorce Act; and | *g*) aux actions renvoyées à la Cour en vertu des paragraphes 3(3) ou 5(3) de la Loi sur le divorce; |
| (*h*) applications for registration, recognition or enforcement of a foreign judgment brought under rules 327 to 334. | *h*) aux demandes pour l'enregistrement, la reconnaissance ou l'exécution d'un jugement étranger visées aux règles 327 à 334 |

VII. Standard of Review

[13] In the case of *Canada (Minister of Citizenship and Immigration) v. Mahmoud*, 2009 FC 57, 78 Imm. L.R. (3d) 254, Justice Roger Hughes held that if a citizenship judge fails to provide

sufficient reasons for a decision "such that the Minister cannot determine whether to appeal nor upon which this Court can exercise its appellate function," then there has been a breach of natural justice which is reviewable on a standard of Correctness (*Mahmoud* at para. 9).

[14] In the case of *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the Supreme Court of Canada held that Correctness mandates the reviewing court to undertake its own analysis of the question. The Court is not to be deferential to the agency's reasoning, but rather is to question whether the agency's decision was correct (*Dunsmuir* at para. 50).

VIII. Summary of Pertinent Submissions

[15] The jurisprudence has laid down three different tests for determining whether a citizenship applicant has met the residency requirement in paragraph 5(1)(*c*) (Applicant's Memorandum of Fact and Law at para. 14).

[16] The "central existence" test was developed in *Re Papadogiorgakis*, [1978] 2 F.C. 208 (T.D.) and states that, in close cases, physical presence in Canada is not necessary to meet the requirement in paragraph 5.(1)(*c*), but that the applicant must centralize his or her mode of living in Canada (Applicant's Memorandum of Fact and Law at para. 14).

[17] The "middle ground" test was developed in *Re Koo* (1992), 59 F.T.R. 27, [2003] 1 F.C. 286 (T.D.), and takes into account both physical presence in Canada as well as whether the applicant has centralized his or her mode of living (Applicant's Memorandum of Fact and Law at para. 15).

[18] The "physical presence" test was developed in *Pourghasemi, Re* (1993), 62 F.T.R. 122, 39 A.C.W.S. (3d) 251 (T.D.), and requires the applicant to be physically present in Canada for three of the four years before the filing of the citizenship application (Applicant's Memorandum of Fact and Law at para. 16).

[19] The case of *Canada (Minister of Citizenship and Immigration) v. Mindich* (1999), 170 F.T.R. 148, 89 A.C.W.S. (3d) 1125 (T.D.), at paragraph 9, puts forward the proposition that it is open to the citizenship judge to select any of the three tests and it is the reviewing court's function to ensure that the test was properly applied (Applicant's Memorandum of Fact and Law at para. 18).

[20] Section 14.(2) of the *Citizenship Act* was violated by failing to provide sufficient reasons for the decision. A reviewable error occurred as it is impossible for a reviewing court to determine which test was applied to the facts (Applicant's Memorandum of Fact and Law at para. 19).

[21] The Citizenship Judge failed to provide any reasons to support his decision and there is no evidence in the tribunal record to show that Ms. Zegarac had established residence in Canada (Applicant's Memorandum of Fact and Law at para. 22).

[22] In order for the Citizenship Judge to have considered the days absent from Canada between April 4, 2002 and April 4, 2006 as days of residence, there must be some evidence that Ms. Zegarac had centralized her mode of existence with Canada. No such evidence exists and therefore, the

Citizenship Judge's decision is unreasonable (Applicant's Memorandum of Fact and Law at para. 24).

[23] The Act requires citizenship judges to provide reasons for their decisions and a judge commits an error of law when he or she fails to provide adequate reasons to support a decision (*Canada (Minister of Citizenship and Immigration) v. Megally*, 2008 FC 743, 169 A.C.W.S. (3d) 153 at paras. 18-21).

[24] The Citizenship Judge failed to provide adequate reasons as it is not possible to verify the basis upon which Ms. Zegarac was found to have met the requirements of Section 5 of the *Citizenship Act*.

IX. Analysis

[25] The decision states that Ms. Zegarac had 48 days of absence from Canada during the relevant four year period and a total of 1412 days of physical presence in Canada (Certified TR at p. 1). Although it is open for the Citizenship Judge to choose from the three tests for residency, it is vitally important that he or she explain which test was chosen so that a court can determine whether the law was properly applied.

[26] In the case of *Mahmoud*, above, Justice Hughes held that the reasons given by the citizenship judge were inadequate because it was unclear what test was used to determine the number of days the applicant had been in Canada. The Citizenship Judge's reasons in *Mahmoud*

suggest that the “central existence” test had been applied, but the court found the reasons inadequate because it was unclear whether this test was actually used (*Mahmoud* at para. 20).

[27] The reasons in *Mahmoud* filled up the entirety of the space on the judgment form that is devoted to reasons, whereas the reasons given in this case consist of five words: “verify”, “PPY”, “OK”, “LOK”, “& absence” (Applicant’s Record at Tab C). The counsel for the Applicant, when asked in open Court, had no idea what the acronyms meant nor to what they referred. It is the Court’s conclusion that these reasons are inadequate because it is impossible to determine which test was applied.

[28] In addition to this, the tribunal record contains evidence which shows Ms. Zegarac lived in Calgary until her husband lost his job in June 2001, at which time she returned to Serbia with her children (Certified TR at p. 42). These notes also show Ms. Zegarac returned to Canada in June 2005 (Certified TR at pp. 41, 47). A citizenship judge must make a decision based on all of the evidence and it is impossible to tell from the reasons whether this evidence was considered.

## X. Conclusion

[29] It is the Court’s conclusion that the decision of the Citizenship Judge is to be quashed and the matter sent back for re-determination by a different Citizenship Judge who must have regard to all of the evidence and give sufficient reasons for a determination which ensures that the law has been properly applied.

[30] Citizenship and Immigration Canada receives more than 180,000 citizenship applications annually; therefore, it is understandable when the twenty-five citizenship judges in Canada give succinct reasons in support of their decisions. That being said, succinctness still requires sufficient explanation to allow for an understanding of how a decision is reached. Although key words may represent signposts that allow the decision-maker to recognize a frame of reference, that frame of reference does not necessarily enable the recipient of the decision to understand the thought process and jurisprudence which underlie the conclusion.

[31] More than mere precision is required in order for the law to be understood and for jurisprudence of a specialized tribunal to be made clear; it demands (pursuant to Section 14.(2) of the Act and the associated case law) the drafting of transparent and accessible decisions. When there is no possibility by which to verify the basis upon which Ms. Zegarac was found to have met the requirements of Section 5 of the *Citizenship Act*, the decision must be overturned.

## JUDGMENT

**THIS COURT ORDERS that** the appeal be granted; thereby, the decision be quashed and the matter returned for re-determination by a different Citizenship Judge.

"Michel M.J. Shore"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | T-1948-08 |
| **STYLE OF CAUSE:** | THE MINISTER OF CITIZENSHIP AND IMMIGRATION v. SLAVOLJUPKA ZEGARAC |
| **PLACE OF HEARING:** | Edmonton, Alberta |
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