

Federal Court



Cour fédérale

Date: 20120928

Docket: T-1739-11

Citation: 2012 FC 1151

Ottawa, Ontario, September 28, 2012

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

TANIA EL-KASHEF

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an appeal by Ms. Tania El-Kashef (Ms. El-Kashef), pursuant to subsection 14(5) of the *Citizenship Act*, RSC 1985, c C-29 [Act], of a decision rendered by citizenship judge Alain Ayache, dated August 12, 2011, denying her application for Canadian citizenship.

[2] For the following reasons, this appeal is dismissed.

II. Facts

[3] Ms. El-Kashef is a 27 year old citizen of Egypt. She acquired her Canadian residency in 2001.

[4] On June 27, 2006, Ms. El-Kashef and her family made an application for Canadian citizenship in Mississauga, Ontario. On April 21, 2008, they withdrew their application. They filed a second application on June 17, 2008.

[5] Ms. El-Kashef declared trips outside Canada for a total of 198 days of absence over the period.

[6] In November 11, 2008, further to a request from an immigration officer, Ms. El-Kashef provided the following documents in support of her application:

1. A letter by Me Hrair Djihanian dated November 11, 2008;
2. Miramar Communications' certificate of incorporation; and
3. An extract from the "Registraire des Entreprises du Québec" on the East West Communications Company.

[7] On July 25, 2011, Ms. El-Kashef appeared before the citizenship judge. On August 12, 2011, the citizenship judge rendered his decision rejecting her application on the following grounds:

“She failed her knowledge test and therefore did not demonstrate that she had sufficient knowledge of Canada and of the responsibilities and privileges of citizenship (subsection 5(1)(e) of the Act);

She did not prove that she was physically present in Canada for at least 1095 days within the three years prior to her citizenship Application: her testimony was improbable, contradictory and not supported by any evidence.” (see Respondent’s Record, vol. 1, at page 344)

[8] Furthermore, the citizenship judge decided not to make a recommendation for an exercise of discretion under subsections 5(3), 5(4) and 15(1) of the Act.

III. Legislation

[9] Paragraphs 5(1)(c) and (e); and subsections 5(3), 5(4) and 15(1) of the Act provide as follows:

5. (1) The Minister shall grant citizenship to any person who

(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

5. (1) Le ministre attribue la citoyenneté à toute personne qui, à la fois :

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

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;

...

[...]

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

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

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

5. (3) Pour des raisons d'ordre humanitaire, le ministre a le pouvoir discrétionnaire d'exempter :

(a) in the case of any person, the requirements of paragraph (1)(d) or (e);

a) dans tous les cas, des conditions prévues aux alinéas (1)d) ou e);

(b) in the case of a minor, the requirement respecting age set out in paragraph (1)(b), the requirement respecting length of residence in Canada set out in paragraph (1)(c) or the requirement to take the oath of citizenship; and

b) dans le cas d'un mineur, des conditions relatives soit à l'âge ou à la durée de résidence au Canada respectivement énoncées aux alinéas (1)b) et c), soit à la prestation du serment de citoyenneté;

(c) in the case of any person who is prevented from understanding the significance of taking the oath of citizenship by reason of a mental disability, the requirement to take the oath.

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

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

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

15. (1) Where a citizenship judge is unable to approve an application under subsection 14(2), the judge shall, before deciding not to approve it, consider whether or not to recommend an exercise of discretion under subsection 5(3) or (4) or subsection 9(2) as the circumstances may require.

15. (1) Avant de rendre une décision de rejet, le juge de la citoyenneté examine s'il y a lieu de recommander l'exercice du pouvoir discrétionnaire prévu aux paragraphes 5(3) ou (4) ou 9(2), selon le cas.

IV. Issues and standard of review

A. Issues

1. *Did the citizenship judge err by finding that Ms. El-Kashef failed to meet the requirements set out in paragraphs 5(1)(c) and (e) of the Act?*
2. *Did the citizenship judge breach his duty of procedural fairness?*

B. Standard of review

[10] The applicable standard of review of a decision rendered by a citizenship judge is the standard of reasonableness (see *Bhatti v Canada (Minister of Citizenship and Immigration)*, 2010 FC 25 at para 14). In reviewing the citizenship judge's decision on the standard of reasonableness, the Court will consider “the existence of justification, transparency and intelligibility within the decision-making process” and “whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]).

[11] Furthermore, issues of procedural fairness and natural justice require the application of the standard of correctness (*Navidi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 372 at para 13; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43).

V. Parties' submissions

A. Ms. El-Kashef's submissions

[12] Ms. El-Kashef submits that considering the number of errors committed by the judge on the issue of her credibility, the decision must be set aside. She also claims that the judge failed to properly assess all of the evidence adduced before him (see *Owusu-Ansah v Canada (Minister of Employment and Immigration)*, [1989] FCJ No 442 (QL); and *Pourzand v Canada (Minister of Citizenship and Immigration)*, 2008 FC 395). Ms. El-Kashef argues that the judge failed to take into

account all of the documentary evidence demonstrating her presence in Canada for 2004 and 2005. He did not mention the Egyptian Government document showing her entries to and exits from Egypt. Ms. El-Kashef underlines that it would be unconceivable to travel without having entry stamps or visas from other countries in her passport. She also submits that even if the stamps do not demonstrate that she was physically in Canada at the time, it does not contradict her testimony (see *Tanveer v Canada (Minister of Citizenship and Immigration)*, 2010 FC 565 at para 11).

[13] Ms. El-Kashef notes that the judge failed to take in consideration her Revenue Canada assessment for the year 2004 and a document showing that she was a director of Miramar Corporation. The judge also failed to mention the following documents: a letter from the Bank of Montreal confirming that she was a client at that bank from June 2003 to March 2009, a letter from the Rotary Club letter confirming her participation in the organization of fund raising events and her donation to the Montreal Children's Hospital on May 3, 2005.

[14] Ms. El-Kashef further submits that the citizenship judge improperly applied the strict residency test in *Pourghasemi (Re)* (1993), 62 FTR 122 [*Pourghasemi*]. Having assessed improperly the evidence adduced, Ms. El-Kashef alleges that the judge could not have possibly applied the proper criterion. The failure to properly address the existence of more than one test and to consider the application of the three residency tests is a reviewable error. Ms. El-Kashef also relies on *Khan v Canada (Minister of Citizenship and Immigration)*, 2011 FC 215 at para 31 [*Khan*], where I held that "I am of the opinion that *Takla* and the more recent line of cases that require a Citizenship Judge to consider the *Koo* factors, once a threshold of residency is established (as referred to by Justice Harrington in paragraph 21 of *Salim*, above), should be applied to the

present case”. Some recent judgments of this Court have held that where a citizenship Applicant does not meet the physical presence test, the citizenship judge must proceed to the qualitative assessment and apply the qualitative test set out in *Koo (Re)*, [1993] 1 FC 286 (TD) at para 10 [*Koo*]).

[15] It is submitted by Ms. El-Kashef that the judge’s reliance on the analysis of immigration officers and the failure to assess all of the evidence adduced constitutes a failure to exercise his jurisdiction under the Act.

[16] Ms. El-Kashef also contends that the judge breached his duty of procedural fairness as he did not provide sufficient reasons to explain his refusal to make a recommendation under subsection 15(1) of the Act and failed to properly administer the citizenship knowledge of Canada test. She is also of the opinion that the judge did not provide sufficient reasons for dismissing her application under paragraphs 5(1)(c) and (e) of the Act.

B. Respondent’s submissions

[17] The Respondent underlines that in order for the citizenship judge to accede to her demand, Ms. El-Kashef had to meet all the requirements found in subsection 5(1) of the Act. When an Applicant fails to meet these requirements, a citizenship judge has the discretion, under subsections 5(3), 5(4) and 15(1) of the Act, to make a recommendation to the Minister for a waiver on these requirements. The failure to make such recommendation cannot be appealed, according to the Respondent, who relies on the following cases: *Koo* cited above at paras 25 to 27; *Goudimenko v*

Canada (Minister of Citizenship and Immigration), [2002] FCJ No 581 at para 22; and *Henoud v Canada (Minister of Citizenship and Immigration)*, [2003] FCJ No 889 at para 12.

[18] The Respondent further asserts that it is not uncommon, nor does it amount to an error, for a citizenship judge to address both the residency and the adequate knowledge of Canada test requirements under subsections 5(1)(c) and 5(1)(e) of the Act (*Alfonso v Canada (Minister of Citizenship and Immigration)*, [2003] 2 FC 683; *Haddad v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 692; *Haddad v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 690; and *El Fihri v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1106).

[19] In the case at hand, according to the Respondent, the Applicant failed her knowledge test and did not adduce sufficient probative evidence before the citizenship judge to allow the exercise of his discretion and make a favorable recommendation to the Minister for a waiver on humanitarian and compassionate grounds.

[20] In addition, the Respondent submits that the judge correctly applied the physical presence test, following the *Pourghasemi* decision. Ms. El-Kashef failed to prove that she was physically present for at least 1 095 days in Canada. The citizenship judge, according to the Respondent, properly questioned the lack of probative evidence presented with respect to the period extending from June 17, 2004 to August 28, 2005.

[21] Furthermore, the Respondent affirms that Ms. El-Kashef is not credible as her testimony was both contradictory and implausible.

[22] Finally, the Respondent argues that the citizenship judge's reasons for decision were adequate and sufficient. He clearly explained why he refused Ms. El-Kashef's application.

VI. Analysis

1. Did the citizenship judge err by finding that Ms. El-Kashef failed to meet the requirements set out in paragraphs 5(1)(c) and (e) of the Act?

[23] The citizenship judge did not err by finding that Ms. El-Kashef failed to meet the requirements of the subsection 5(1) of the Act.

[24] To qualify for her Canadian citizenship, Ms. El-Kashef had to demonstrate that she was physically present at least 1 095 days in Canada within a time frame of four years preceding her citizenship application.

[25] Ms. El-Kashef failed to adduce sufficient probative evidence to demonstrate that she had fulfilled the requirements of the Act particularly with respect to the period extending from June 17, 2004 to August 28, 2005. In that respect, the citizenship judge wrote the following remarks:

“[Ms. El-Kashef] submitted many other documents that do not place her physically or confirm her presence on balance for a minimum of 1, 095 days in Canada;

[Ms. El-Kashef] submitted pay slips from her work at San REMO Boutique after the appropriate period. This boutique's [owner] is the same as the applicant's [lawyer], namely Esq. Hrair Djihanina. When I asked the lawyer about the Boutique in question he answered that it

was his brother's. Since the information is beyond the examined period and is not concerned by this analysis, I disregarded the information and did not take it into consideration.

...

Since the supporting documents that have been returned by [Ms. El-Kashef] are not sufficient and since she failed to satisfactorily demonstrate that she was physically present in Canada during the examined period, and precisely from June 14th, 2004 until at least August 24th, 2005;

Due to the report on file from Immigration at P.E.T. that place [Ms. El-Kashef] for a maximum of 886 days from May 14th, 2004 until May 14th, 2008 (see Justice Muldoon in *Re: Pourghasemi*);

Due to the multiple unsupported claims she has made, on balance [Ms. El-Kashef] failed to satisfy me that she was physically present in Canada for 1,095 days of her material time period;

As such, she has not met the residence requirements of s. 5(1)(c) of the Act." (see citizenship judge's decision at pages 14 and 15 of the Certified Tribunal Record)

[26] The evidence adduced by Ms. El-Kashef does not demonstrate her physical presence in Canada between June 2004 and August 2005. For instance, the letter from the Bank of Montreal only mentions that "Tania El Kashef est cliente avec la Banque de Montréal depuis le 20 juin 2003 et que tout est en règle à ce jour" (see Respondent's Record, vol.1, at page 238). Furthermore, her donation to the Montreal Children's Hospital Foundation, on May 3, 2005, does not necessarily demonstrate that she was physically present in Canada at the time (see Respondent's Record, vol. 1, at page 324). The letter from Mahesh Sharma of the Montreal-Westward Rotary Club is also silent as to the dates of her involvement in the fund raising activities (see Respondent's Record, vol. 1, at page 325).

[27] Ms. El-Kashef submitted an income tax form issued by the Canada Revenue Agency for the year 2004, stating that she earned 5 250 \$. Again, this form does not attest that the revenue earned over the period can be attributable to a physical presence through employment in Canada. Moreover, Ms. El-Kashef affirms that between 2004 and 2005, she was a director of Miramar Communications. The Notice of Director issued by Industry Canada does not prove her presence in Canada.

[28] In addition, the Court must underline that she waited 14 days after her hearing before the citizenship judge to adduce additional evidence to explain her failure to provide more documentary evidence for the period questioned by the citizenship judge. She wrote that she had lost most of her documents when she moved.

[29] More importantly, it is apparent, from a list of her travels provided by the Ministry of the Interior of Egypt, that she was in Europe in 2004 and 2005 (see Respondent's Record, vol. 1, at page 24).

[30] The judge had no obligation to apply the qualitative test as set out in *Koo*. Contrary to Ms. El-Kashef's interpretation of my judgment in *Khan* cited above, a threshold of residency must be met before a citizenship judge elects to apply the *Koo* decision. In the present case, the evidence adduced by Ms. El-Kashef did not demonstrate that she had met that residency threshold. Consequently, the judge did not have to consider applying the qualitative test.

[31] For these reasons, the citizenship judge's decision is reasonable and "falls within the range of possible and acceptable outcomes which are defensible in respect of the facts and law" (see *Dunsmuir* cited above at para 47).

2. *Did the citizenship judge breach his duty of procedural fairness?*

[32] The citizenship judge did not breach his duty of procedural fairness. There is no evidence on file to substantiate Ms. El-Kashef's claim that the judge misapplied the knowledge of Canada test. In reading the judge's decision, it is also clear that he provided sufficient reasons for his decision. "if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met" (see *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16). The judge's decision is indeed within the range of acceptable outcomes.

VII. Conclusion

[33] This appeal of the citizenship judge's decision is dismissed. The judge reasonably determined that Ms. El-Kashef failed to meet the requirements of subsection 5(1) of the Act.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. This appeal of the citizenship judge's decision is dismissed.
2. The whole with costs to the Respondent.

"André F.J. Scott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1739-11

STYLE OF CAUSE: TANIA EL-KASHEF
v
THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Montréal, Québec

DATE OF HEARING: July 5, 2012

**REASONS FOR JUDGMENT
AND JUDGMENT:** SCOTT J.

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