

Federal Court



Cour fédérale

**Date: 20120111**

**Docket: T-730-11**

**Citation: 2012 FC 34**

**Ottawa, Ontario, January 11, 2012**

**PRESENT: The Honourable Madam Justice Bédard**

**BETWEEN:**

**MOHAMMAD MAHMOU TAWFIQ AND  
KHALEDA MOHSEN KHALED**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] The applicants have Syrian Citizenship. They were accepted as refugees in Canada and became permanent residents on May 12, 2005. They have three children; their eldest son was born in Jordan in 2003; their second son was born in Canada in December 2005, and their daughter was also born in Canada. The date of her birth is not specified in the record but she was born after the period that is relevant in regard to these proceedings.

[2] On June 12, 2008, the applicants each submitted an application to obtain Canadian Citizenship. In his application, Mr. Tawfiq indicated that he was absent from Canada for 21 days during the period relevant to his residency calculation. Those absences were due to a trip to Jordan made in October 2007 to visit his parents. Ms. Khaled indicated that she had not left Canada since her arrival in May 2005.

[3] On March 15, 2011, Citizenship Judge Renée Giroux issued two decisions wherein she refused to grant the applicants Canadian Citizenship on the grounds that they failed to meet the residency requirement set out in the *Citizenship Act*, RSC 1985, c C-29 [the Citizenship Act]. The applicants are appealing these decisions.

#### I. The decisions under review

[4] The Citizenship Judge concluded that the applicants failed to meet the requirement set out in paragraph 5(1)(c) of the Citizenship Act, which requires that the applicants accumulate at least three years of residence in Canada within the four years immediately preceding the date on their citizenship applications. In both cases, the Citizenship Judge adopted the physical presence test established in *Pourghasemi (Re)* (1993), 62 FTR 122, 39 ACWS (3d) 251 (TD) but she was not satisfied, on a balance of probabilities, that the applicants had spent as many days residing in Canada as they claimed in their applications. In both cases, the Citizenship Judge found that there was too little conclusive evidence to make a finding of physical presence in Canada. She determined that the number of days both applicants spent in Canada remained unknown and unverifiable and, consequently, concluded that they failed to meet the residency requirement.

[5] The Citizenship Judge issued separate reasons for each application in which she discussed the documentary evidence provided by the applicants in support of their citizenship applications and the oral evidence given during their interview with her. In both sets of reasons, the Citizenship Judge noted that the documentation submitted by the applicants in support of their applications was not very helpful in showing a continuous physical presence in Canada during the reference period. More precisely, she mentioned documents such as joint bank statements, financial documents, a few medical appointment attestations, utility bills, and the like. In both decisions, she noted that, since their arrival in Canada, the applicants took a few languages courses but she focused mainly on the fact that the applicants had not secured employment since they landed in Canada and that they depended on social assistance benefits to live. She found this situation, especially, unhelpful in proving their residency in Canada. The Citizenship Judge also took issue with the lease for the apartment in which Mr. Tawfiq and his family live. The apartment building is owned by Mr. Tawfiq's brother, a Canadian citizen who has resided outside of Canada since 2006. The Citizenship Judge further noted that the applicants did not mention any community, social or athletic involvement in Canada.

## II. Issues

[6] In their appeal, the applicants raised the following three issues:

- a) Did the Citizenship Judge err in assessing whether the applicants met the physical residency requirement?
- b) Did the Citizenship Judge err in not considering the more subjective residency factors endorsed in *Koo (Re)* (1992), [1993] 1 FC 286, 59 FTR 27, if she was not satisfied that the applicants met the physical presence test?

c) Did the Citizenship Judge's comments at the hearing and irrelevant considerations in her written reasons give rise to a reasonable apprehension of bias?

[7] I am satisfied that this appeal should be allowed on the first ground and, therefore, will not dispose of the second and third grounds.

### III. Standard of review

[8] Both parties submitted, and I agree, that the Citizenship Judge's decisions are reviewable under the reasonableness standard of review (see *El-Khader v Canada (Minister of Citizenship and Immigration)*, 2011 FC 328 at paras 8-10 (available on CanLII) [*El-Khader*]; *Raad v Canada (Minister of Citizenship and Immigration)*, 2011 FC 256 at paras 20-22, 97 Imm LR (3d) 115; *Chaudhry v Canada (Minister of Citizenship and Immigration)*, 2011 FC 179 paras 18-20, 384 FTR 117; *Hao v Canada (Minister of Citizenship and Immigration)*, 2011 FC 46 at paras 11-12, 383 FTR 125 [*Hao*]; *Cardin v Canada (Minister of Citizenship and Immigration)*, 2011 FC 29 at para 6, 382 FTR 164 [*Cardin*]; *Deshwal v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1248 at paras 10-11 (available on CanLII); *Chowdhury v Canada (Minister of Citizenship and Immigration)*, 2009 FC 709 at paras 24-28, 347 FTR 76; *Pourzand v Canada (Minister of Citizenship and Immigration)*, 2008 FC 395 at para 19, 166 ACWS (3d) 222; *Canada (Minister of Citizenship and Immigration) v Takla*, 2009 FC 1120 at para 23, 359 FTR 248).

### IV. Analysis

[9] The Citizenship Judge chose to apply the physical presence test in her interpretation of the residency requirement set out in paragraph 5(1)(c) of the Citizenship Act. I do not find it necessary,

for the purpose of this judgment, to expand on the different interpretations of the residency requirement that Citizenship Judges may apply. Suffice it to say that the Citizenship Act does not provide a definition of the term “residence” and that Citizenship Judges do not apply a uniform interpretation of the residency requirement set out in paragraph 5(1)(c) of the Citizenship Act. Some judges, including the Citizenship Judge who disposed of the applicants’ applications, choose to apply the strict physical presence test. This test has been recognized to be a reasonable interpretation of the residency requirement, and in my view, it is still a valid interpretation of paragraph 5(1)(c) of the Citizenship Act (See generally *Hao*, above, at paras 42-50; *El-Khader*, above, at para 17-19; *Alinaghizadeh v Canada (Minister of Citizenship and Immigration)*, 2011 FC 332 at paras 28-33 (available on CanLII); *Abbas v Canada (Minister of Citizenship and Immigration)*, 2011 FC 145 at paras 6-7 (available on CanLII); *Cardin*, above, at para 12; *Murphy v Canada (Minister of Citizenship and Immigration)*, 2011 CF 482 at paras 6-8, 98 Imm LR (3d) 243; *Martinez-Caro v Canada (Minister of Citizenship and Immigration)*, 2011 CF 640 at paras 20-26, 98 Imm LR (3d) 288; *Balta v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1509 at paras 11-13 (available on CanLII); and *Canada (Minister of Citizenship and Immigration) v Saad*, 2011 FC 1508 at paras 13-14). Therefore, I do not consider that the Citizenship Judge erred in choosing to apply the physical presence test. However, I am of the view that the decision that she reached is unreasonable because she ignored relevant evidence.

[10] I acknowledge that the onus is on the applicants to establish that they satisfy the residency requirement. While the applicants’ applications could have been better documented, they submitted some evidence that was relevant but that seems to have been ignored by the Citizenship Judge. As mentioned above, the Citizenship Judge focused on the fact that the applicants did not secure

employment since landing in Canada and expressed the view that this did not help them establish a physical presence in Canada during the reference period. She further indicated that the documentary evidence submitted by the applicants was insufficient to establish a continuous physical presence and referenced documents such as the joint bank statements, financial documents, bills, language class attestations and a few medical appointments attestations. I agree that these documents, in and of themselves, may not have been sufficient to prove the applicants' physical presence in Canada.

[11] However, I find that the Citizenship Judge failed to consider other documentary evidence that was relevant to assessing whether the applicants were physically present in Canada during the reference period.

[12] First, the Citizenship Judge did not mention the applicants' travel documents. Mr. Tawfiq's Refugee Travel Document shows a single 21-day trip to Jordan in October 2007 and Ms. Khaled's Refugee Travel Document shows no evidence of trips outside Canada since her landing in Canada in May 2005. While these travel documents are not always sufficient to establish physical presence, they were certainly a relevant factor. Yet, the Citizenship Judge did not indicate whether she considered those travel documents or, if she discounted them, why she did not afford them any weight. Accordingly, I find that she overlooked this relevant evidence. This finding is also supported by the applicants' affidavits in which they both stated that the Citizenship Judge never questioned them about their travel history nor did she asked any question about their Refugee Travel Documents.

[13] Second, the Citizenship Judge mentioned that the applicants were receiving social assistance benefits. However, she did so in reference to the fact that the applicants did not have any employment since their arrival in Canada, which she found was not helpful in proving their residency. In their affidavits, the applicants stated that, in order to be eligible for social assistance benefits, they needed to submit monthly declarations to the Government of Quebec and that, therefore, the fact that they received social assistance benefits should have been considered as evidence supporting their physical presence in Canada. At the hearing, counsel for the respondent took issue with the applicants' assertion that they needed to submit monthly declarations in order to remain eligible for social assistance benefits but I wish to stress that the applicants were never cross-examined on their affidavits and their evidence remains un-contradicted. In her reasons, the Citizenship Judge did not assess whether the fact that the applicants had been receiving social assistance benefits since their arrival could be a factor in favour of determining their residency. In my view, this element was relevant.

[14] Third, the Citizenship Judge failed to consider the fact that the second child of the applicants was born in Canada in December 2005. She also failed to consider evidence relating to the residency of the applicants' sons namely, the Canadian Passport issued in May 2007 for the youngest son and the vaccination booklets of both sons. In my view, these elements were relevant to establish the children's presence in Canada and, as a consequence, their parents' presence.

[15] Fourth, the Citizenship Judge concluded that Ms. Khaled did not have any community involvement. This finding is in clear contradiction with Ms. Khaled's declaration in her application that she was a member of a community group called "Familles en action". This declaration was

supported by her membership card. The Citizenship Judge's statement that "La requérante ne fait mention d'aucune participation communautaire ou implication sociale ou sportive au Canada" leads me to conclude that she simply overlooked this evidence which, in my view, was relevant.

[16] In sum, the Citizenship Judge concluded that the evidence was insufficient and that the number of days both applicants were resident in Canada was unknown and unverifiable but she reached this conclusion without considering relevant evidence that tends to establish some physical presence. It is not the Court's role to determine whether the elements that were ignored by the Citizenship Judge were sufficient to find that the applicants have met the physical presence test. However, these elements were relevant and, by ignoring them, the Citizenship Judge rendered an unreasonable decision.



**JUDGMENT**

**THIS COURT’S JUDGMENT is that** the appeal is allowed. The decisions issued on March 15, 2011, by Citizenship Judge Renée Giroux are overturned and the applications are sent back for re-determination by another Citizenship Judge.

“Marie-Josée Bédard”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-730-11

**STYLE OF CAUSE:** MOHAMMAD MAHMOU TAWFIQ ET AL.  
v MINISTER OF CITIZENSHIP AND  
IMMIGRATION

**PLACE OF HEARING:** Montréal, Quebec

**DATE OF HEARING:** December 13, 2011

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

**DATED:** January 11, 2012

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