Date: 20081024

Docket: T-650-08

Citation: 2008 FC 1193

Ottawa, Ontario, October 24, 2008

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

SHAHZAD HOOSHANG BAKHT

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 14(5) of the *Citizenship Act*, R.S.C. 1985, c. C-29 (the Act) and section 21 of the *Federal Courts Act*, R.S.C., 1985, c. F-7, by Shahzad Hooshang Bakht (the Applicant), to appeal the decision of Citizenship Judge Renata Brum Bozzi (Judge), dated February 26, 2008. The Citizenship Judge concluded the Applicant did not meet the residency requirement set out in paragraph 5(1)(c) of the Act in order to be granted Canadian citizenship.

I. Factual Background

[2] The Applicant is a citizen of India who first came to Canada on August 13, 1996 as a permanent resident. He applied for citizenship on August 4, 2006.

[3] The Applicant's wife and children are Canadian citizens who are living in Canada. They reside in a home owned by the Applicant and his wife.

[4] The relevant period for consideration of the Applicant's residency in Canada is from August 4, 2002 to August 6, 2006. The Applicant has 1,460 days of residence in this period.

[5] The Applicant claimed four absences during the relevant four-year period:

a) From October 7, 2002 until April 27, 2003 = 202 days for business trips;

b) From September 20, 2003 until April 14, 2004 = 207 days for business trips;

c) From March 28, 2005 until April 25, 2005 = 28 days to care for his sick brother;

d) From September 27, 2005 until June 23, 2006 = 269 days to care for his sick brother.

[6] The Applicant has declared 706 days of absence. He was physically present in Canada for 754 days and has a substantial shortfall of 341 days from the required 1,095 days of physical presence required by the Act.

[7] The Applicant attended a hearing before January 17, 2008, where he testified that he is part owner of a family restaurant in India called “New York Restaurant and Bar”. When he is in India, he takes on a supervisory role at the restaurant.

[8] The Applicant also testified that he took long trips when he was working for a restaurant in Canada called Bombay Behl in order to make purchases for that restaurant.

[9] He also travels to India for extended periods of time to care for his ill brother who has cirrhosis of the liver. As the eldest male in the family, the Applicant travels to India to assist his sister-in-law with her three children and to provide moral support to his brother and his family.

[10] At the hearing, the Applicant presented copies of his passports, as well as originals of all his passports with the exception of the passport that covered the relevant period for determining his residency. He testified that he had forgotten that passport in India. The Judge was not able to verify the original passport against the copies to confirm that the Applicant’s absences were limited to those claimed.

II. Decision Under Review

[11] The Judge rejected the Applicant’s application and concluded that the Applicant had not accumulated at least three years of residence in Canada within the four years immediately preceding the date of his application in order to comply with the residence requirement set out in paragraph 5(1)(c) of the Act.

[12] The Judge stated that based on her understanding of the recent jurisprudence, the most important factor in considering the residency requirement is whether the Applicant has established his presence in Canada by having lived and been physically present in Canada (*Pourghasemi (Re)*, 62 F.T.R. 122 (F.C.T.D.).

[13] The Judge also acknowledged that the physical presence of the Applicant for the entire 1,095 days contemplated by the Act is not always required when there are exceptional circumstances. The Judge found no evidence of such circumstances that could be considered a situation of special and unusual hardship, or of services of exceptional value to Canada (subsections 5(3) and 5(4) of the Act). The Applicant chose to visit his relatives with the knowledge that this would negatively impact on his residence in Canada and the timing of the application was also his choice. The Judge found no reason to depart from the requirement of physical presence in the Applicant's circumstances.

III. Issues

[14] This application raises the following questions:

a) Did the Citizenship Judge err by failing to clearly set out the test which was applied to determine residency?

b) Are the Citizenship Judge's reasons adequate?

[15] The present appeal shall be dismissed for the following reasons.

IV. Relevant Legislation

[16] Section 21 of the *Federal Courts Act*, R.S.C., 1985, c. F-7 and subsection 15(4) of the *Citizenship Act* set out the Applicant's right of appeal of the decision of the Citizenship Judge:

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.
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.

[17] The residency requirements are set out in paragraph 5(1)(c) of the *Citizenship Act*:

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	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

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:	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 be deemed to have accumulated one-half of a day of residence, and	(i) un demi-jour pour chaque jour de résidence au Canada avant son admission à titre de résident permanent,
(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;

[18] The special or extraordinary circumstances which can be considered at the discretion of the Citizenship Judge are enumerated in subsections 5(3) and 5(4) of the Act:

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	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

requirement to take the oath of citizenship; and	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.

V. **Analysis**

A. *Standard of Review*

[19] Whether the Applicant established that he was physically present in Canada for 1,095 days is a question of fact. The parties agree, and I am satisfied, that the Judge's finding on this point is reviewable on the newly articulated standard of reasonableness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Chen v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 763, [2008] F.C.J. No. 964 (QL)). The standard of review on breach of procedural fairness is correctness.

1. Did the Citizenship Judge adequately set out the test she applied in the Applicant's case?

[20] The Applicant argues that it is trite law that, as a general rule, the *Citizenship Act* should be interpreted liberally (*Canada (Secretary of State) v. Man*, 6 F.T.R. 222, 2 Imm. L.R. (2d) 256 (F.C.T.D.) and that this liberal interpretation is supported by the Court since the decision in *Re Papadogiorgakis*, [1978] 2 F.C. 208 (F.C.T.D.).

[21] Despite jurisprudence illustrating that a person's residency may be established for only a short period of time, the "qualitative" test (*Cheung (Re)*, 32 F.T.R. 245 (F.C.T.D.); *Lau (Re)*, 34 F.T.R. 81 (F.C.T.D.), the Judge in this case felt it was inappropriate to apply such a liberal interpretation and she preferred the "quantitative" and more restrictive test. The Applicant submits that this constitute an error, especially because the applicant had asked that the first one be applied knowing that he could not meet the second one.

[22] The Applicant acknowledges that the Judge is entitled to choose the most appropriate interpretation on the issue of what constitutes residency. However, the Applicant submits that if the Judge's explanation is lacking, this constitutes a reviewable error (*Haj-Kamali v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 102, 154 A.C.W.S. (3d) 1017).

[23] The Applicant alleges that there were factors which allowed for a liberal interpretation in the case at bar. The Applicant and his wife have owned a home in Canada since 2002 and his spouse and two children are Canadian citizens who reside in Canada. The Applicant also has a considerable

business interest in Canada. He states that Canada is his home and that he only left due to his brother's illness and to pursue business interests.

[24] Furthermore, the Judge herself noted: "I have no doubt that Mr. Bakht will someday make a very good Canadian citizen …" The Applicant therefore submits that the decision not to use the liberal interpretation was unreasonable.

[25] According to the Respondent, it is clear that the Judge applied the physical presence test set out in *Pourghasemi (Re)*, above. In her reasons, the Judge showed that physical presence is not necessarily required to demonstrate residency. Nevertheless, in the case at bar, she chose to apply the physical presence test, which was a decision that was open to her as it is the prerogative of the Citizenship Judge to adopt the approach she considers as appropriate in determining whether an Applicant has satisfied the residency requirements of the Act (*Rizvi v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1641, 144 A.C.W.S. (3d) 608; *Wang v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 390, 166 A.C.W.S. (3d) 220; *Chen v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 267, 112 A.C.W.S. (3d) 827; *Lam v. Canada (Minister of Citizenship and Immigration)*, 164 F.T.R. 177, 87 A.C.W.S. (3d) 432) (F.C.T.D.).

[26] The Respondent adds that the Court has recognized, as did the Judge, that the jurisprudence has created a strong inference that the presence in Canada during three years out of the four-year period must be substantial (*Rizvi*, above; *Canada (Minister of Citizenship and Immigration) v. Lu*,

2001 FCT 640, 106 A.C.W.S. (3d) 786; *Zhang v. Canada (Minister of Citizenship and Immigration)*, 197 F.T.R. 225 (F.C.T.D.).

[27] According to the Respondent, the question of whether the Applicant established that he was physically present in Canada for 1,095 days is a question of fact. The Judge considered all the relevant factors to the Applicant's application for citizenship. However, she found that he had not been physically present in Canada for the required number of days. This decision is supported by the evidence and was reasonably open to her.

[28] In *Lam*, above Justice Lutfy, as he then was said at paragraph 14:

> … In my opinion, it is open to the citizenship judge to adopt either one of the conflicting schools in this Court and, if the facts of the case were properly applied to the principles of the chosen approach, the decision of the citizenship judge would not be wrong. …

[29] This quote has been repeatedly cited since *Lam*, more recently in *Chen v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 763, [2008] F.C.J. No. 964 (QL).

[30] The Court is of the view that notwithstanding an applicant's request, a citizenship judge has the authority and discretion to choose one of the tests as long as it is properly applied to the facts that he or she is confronted with.

[31] In the case at bar, the Judge decided to employ the physical presence test. The Court finds that based on the facts of this case, the decision is defensible in fact and law and is therefore

reasonable. The Applicant has provided insufficient evidence to justify the consideration of special or particular circumstances in establishing whether he has met the residency requirement of the Act.

2. Are the Citizenship Judge's reasons adequate?

[32] The Applicant correctly states that providing meaningful reasons is necessary in order to ensure procedural fairness (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Adu v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 565, 139 A.C.W.S. (3d) 164).

[33] The Applicant submits that the reasons at bar are flawed because they do not explicitly set out the test used by the Judge and they do not clearly explain why the Judge found no special or exceptional circumstances requiring the application of the liberal interpretation in this case.

[34] The Respondent argues that the Judge's refusal letter clearly explains to the Applicant what residency test was applied, why it was applied and why he failed to meet it. A Judge's reasons are required to demonstrate an understanding of the case law, to be intelligible to the parties, and to provide the basis for meaningful appellate review. The Judge is required to set out the evidence supporting her findings in enough detail to disclose that she acted within jurisdiction and not contrary to the law. However, the Respondent notes that the Judge must not mention all of the evidence in her decision as she is presumed to have considered it all (*Ahmed v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1067, 225 F.T.R. 215; *Lam*, above; *Cheung*, above).

[35] The Respondent explains that the Court is required to adopt a functional approach to the requirement of reasons. An appeal based on insufficient reasons will only be allowed if the Applicant shows prejudice to his right of judicial review in order to sustain a challenge on the adequacy of reasons. The Respondent submits that the Applicant has not demonstrated such prejudice in this case (*Za'rour v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1281, 321 F.T.R. 120; *R. v. Dinardo*, 2008 SCC 24, 374 N.R. 198).

[36] I have already concluded that the Judge explicitly set out the test she used to establish whether the Applicant has met the residency requirements of the Act. Furthermore, the Judge stated that she examined the facts in this case and found no "evidence of special circumstances that could be considered a situation of special and unusual hardship, or of services of exceptional value to Canada." Reasons must explain to the parties why the Judge decided as she did and they must also be sufficient to enable the Court to discharge its appellate function.

[37] In *R. v. Sheppard*, [2002] 1 S.C.R. 869, the Supreme Court of Canada held that the inadequacy of reasons is not a free-standing right of appeal in that it automatically constitutes a reviewable error. The Court held that the "requirement of reasons, in whatever context it is raised, should be given a functional and purposeful approach." (see also *R. v. Kendall*, 75 O.R. (3d) 565 (Ont. C.A.)). A party seeking to overturn a decision on the basis of inadequate reasons must show that the deficiency in reasons has prejudiced the right of a party to file an appeal.

[38] In the present case, the Judge explained that the Applicant “chose to visit his relatives with the knowledge that this would negatively impact on his residence in Canada. The timing of the Application is also his choice.” This explanation as to why the Judge decided the way she did provides meaningful appellate review of the reasonableness of her decision.

[39] The Court's intervention is not warranted.

JUDGMENT

THIS COURT ORDERS that the appeal be dismissed.

"Michel Beaudry"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-650-08
STYLE OF CAUSE:	**SHAHZAD HOOSHANG BAKHT and THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	October 21, 2008
REASONS FOR JUDGMENT AND JUDGMENT:	Beaudry J.
DATED:	October 24, 2008

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