**Date: 20081118**

**Docket: T-545-08**

**Citation: 2008 FC 1289**

**Toronto, Ontario, November 18, 2008**

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

**BETWEEN:**

**IBRAHIM ISMAIL MUHANNA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Muhanna is appealing the decision of Citizenship Judge Normand Allaire, dated March 18, 2008, refusing his application for Canadian citizenship. In fact, this is the third application for citizenship that Mr. Muhanna has had refused. The two previous applications were refused in 2002 and 2005, respectively. For the reasons that follow, I am of the view that this appeal must be allowed and the decision of the Citizenship Judge referred back for a redetermination by a different Judge.

**Background**

[2] Mr. Muhanna is a Jordanian national. He has had status in Canada as a permanent resident since 1995. Three of his six children are Canadian citizens, and another child and his wife have filed citizenship applications which are in process.

[3] In his 2006 application, the most recent and the one at issue, Mr. Muhanna affirmed that he had been outside of Canada for a total of 121 days in the preceding four years (that is, from March 14, 2002 to March 14, 2006), and submitted that his trips abroad were mainly related to his business activities and his dealing with the United Nations Compensation Committee for Gulf War Victims. He filed hundreds of pages of supporting material, including utility bills, medical documents, Canadian identification cards, income tax documentation for the years 2002 to 2005, copies of bank and credit card statements, and a Jordanian passport issued in Canada in 2002, that was renewed in Dubai in 2004, allegedly by one of his sons. Along with this passport, he included a list of entry and exit stamps contained therein, as well as a summary of all of his travels to and from Canada within the relevant timeframe.

[4] In his affidavit filed in support of his appeal, he states that he arrived late at the hearing on account of a traffic accident. He says that he was accused by the presiding Citizenship Judge of “not being serious about [his] application". He protested and was told not to shout. He replied that he was not shouting but merely speaking loudly on account of a hearing problem. This incident is also briefly mentioned in the Judge's written decision. Nothing turns on it. In his affidavit Mr. Muhanna states that the Citizenship Judge asked to see his passport, that he took it and reviewed it,

and advised Mr. Muhanna that he had not accumulated sufficient time in Canada. Mr. Muhanna claims that he asked precisely what dates in the application were problematic, but that the Judge would not answer and replied only that “he would receive it in writing".

[5] The relevant portion of the Citizenship Judge’s decision, under the heading “Analysis" reads as follows:

> Before approving an application for a grant of citizenship made under subsection 5(1) of the Act, I must determine whether you meet the requirements of this Act and the regulations, including the requirements set out in paragraph 5(1)(c) to have accumulated **at least three years** (1,095 days) of residence within the four years (1,460 days) immediately preceding the date of your application. “At least three years" does not mean less time; it means not fewer than three years.
>
> There is Federal Court jurisprudence, which does not require physical presence of the applicant for citizenship for the entire 1,095 days, when there are special or exceptional circumstances. However, in my view, too long an absence from Canada, albeit temporary, during the minimum period of time set out in the Act, as in the present case, in (*sic*) contrary to the purpose of the residency requirements of the Act. Indeed, the Act already allows a person who has been lawfully admitted to Canada for permanent residence not to reside in Canada during one of the four years preceding the date of that person's application for citizenship.
>
> During your relevant period of 1,460 days, I found 438 days of absences. This was (438-121) 317 days more than declared on your application. As a result, I found that your physical presence in Canada was reduced to 1,022 days. It (*sic*) did not find that your application was credible. I found that you did not meet the requirement of 1,095 days under the Act. You are 73 days short [of] the minimum required 1,095 days as per the Act.

**Issues**

[6] Mr. Muhanna raises three issues in this application:

(a) Whether the Citizenship Judge erred in denying his application on the basis that he did not satisfy the residency requirements of section 5(1)(c) of the Act in that he failed to apply any of the residency tests that have been considered by this Court or, if he did apply one of those tests, in failing to indicate which of those tests he applied;

(b) Whether the Citizenship Judge breached procedural fairness by failing to provide reasons for his negative credibility finding with respect to Mr. Muhanna's residency calculation; and

(c) Whether the Citizenship Judge breached procedural fairness by failing to indicate to Mr. Muhanna during the hearing, the areas of concern that would affect his decision, thereby denying him the opportunity to answer the Citizenship Judge's concerns.

**Analysis**

[7] Mr. Muhanna relies on the recent decision of Justice Phelan in *Wong v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 731, wherein he held that although this Court has embraced, at various times, three different residency tests for the purposes of section 5 of the Act (i.e. strict physical presence in *Re Pourghasemi* [1993] 62 F.T.R. 122; quality of attachment in *Re Papadogiorgakis*, [1978] 2 F.C. 208; and centralized mode of living in *Re Koo*, [1993] 1 F.C. 286),

the strict physical presence test has essentially been displaced, and the "blending" of the other two is an error of law. Mr. Muhanna submits that the Judge blended the latter two in the decision under appeal.

[8] The respondent submits that the Judge used and relied on the strict physical presence test and that he was entitled to do so, notwithstanding *Wong*.

[9] In my view, it is not at all certain which test the Judge employed. While the respondent submits that the Judge based his determination on the strict physical presence test, any certainty in this respect is clouded by the Judge's statement that "too long an absence from Canada, albeit temporary, during the minimum period of time set out in the Act, as in the present case, is contrary to the purpose of the residency requirements of the Act" [my emphasis]. The minimum period set out in the Act is the 1,095 day period. This statement of the Citizenship Judge implies that a brief absence, or one that is not "too long", in that 1,095 day period, may be acceptable. If so, then the strict physical presence test has not been used. But beyond that observation, it is impossible to ascertain with any certainty what test he was using. For this reason alone the appeal must be allowed.

[10] This is not the only flaw in the decision. It is clear that the Judge rejected the evidence of Mr. Muhanna that he had been absent for only 121 days, and found that he was absent for 438 days. There is evidence in the record that, if believed, would support the conclusion that Mr. Muhanna lied about the extent of his absences from Canada. For instance, there is evidence that he

transmitted his passport back to Canada to have it renewed, ostensibly in order to create the impression that he was residing in Canada, whereas in fact he was out of the country. It is clear enough that Mr. Muhanna's evidence was disbelieved by the Judge; however, he provides no analysis of either Mr. Muhanna's evidence or the evidence in the record that suggests that he had lied and, most importantly, he provides no basis at all for his credibility finding. One cannot simply state that an applicant is not credible without setting out the basis for that finding. In so doing, the Judge erred in law.

[11] Lastly, although the Judge states that he found that Mr. Muhanna had been absent from Canada for a total of 438 days, it cannot be ascertained with any certainty how he arrived at that determination. Certainly, he was relying on something other than the material filed by Mr. Muhanna. From the materials in the certified record, the determination appears to have been based on a calculation made by an Immigration Officer and set out in a briefing note. That calculation of absences ought to have been put to Mr. Muhanna in order to see if he had any explanation for the additional absences claimed by the respondent; not to do so, in this case, was a denial of procedural fairness. Mr. Muhanna provided an explanation for the discrepancy in the affidavit filed in support of the application. I did not consider that explanation as it was evidence that was not before the Citizenship Judge. The point is that it should have been before the Judge, because he ought to have asked the applicant for an explanation of the additional absences claimed by the respondent. Only then he would have been in a position to make a credibility finding. As it was, until the written decision was made, and this appeal filed, and the certified record produced, Mr. Muhanna appears not to have had any way of knowing that there were additional absences claimed by the respondent.

[12] The respondent submitted at the hearing that Mr. Muhanna would have known that there were additional absences claimed by the respondent, as the residency period of the instant application overlapped by some 13 months with his previous application for citizenship, which had been dismissed because the residency requirement had not been met. If the previous decision determined that Mr. Muhanna had been absent during that 13 month period of overlap and if that had been communicated to Mr. Muhanna, then the respondent's submission might be persuasive. However, there was no evidence before the Citizenship Judge or this Court as to what information was provided to Mr. Muhanna in connection with the rejection of his earlier application. Accordingly, the Court cannot determine if he was in a position to know that he had to address this or not. Clearly, it would be unreasonable to expect him to respond to evidence unknown to him.

[13] Accordingly, I must allow this appeal. The matter is remitted to another citizenship Judge for redetermination. It may well be that once these issues are fully explored, that Judge will dismiss Mr. Muhanna's application, for despite the errors noted above, there are some very serious issues raised in the certified record that cry out for a believable explanation from Mr. Muhanna, corroborated with objective evidence, if he is to be successful in his application.

**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that** the appeal is allowed and the matter is referred back to another citizenship judge for a new determination of the citizenship application.

"Russel W. Zinn"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-545-08 |
| **STYLE OF CAUSE:** | *IBRAHIM ISMAIL MUHANNA v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION* |
| **PLACE OF HEARING:** | Toronto, Ontario |
| **DATE OF HEARING:** | November 17, 2008 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | ZINN J. |
| **DATED:** | November 18, 2008 |

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| Asha Gafar | FOR THE RESPONDENT |

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