

**Date: 20090225**

**Docket: T-935-08**

**Citation: 2009 FC 188**

**Ottawa, Ontario, February 25, 2009**

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

**BETWEEN:**

**MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Applicant**

**and**

**RABAH TARFI**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an appeal by the Minister of Citizenship and Immigration (the Minister), under subsection 14(5) of the *Citizenship Act*, R.S.C. 1985, c. C-29 (the Act), from a decision of a citizenship judge (the judge), dated April 14, 2008. The judge found that Rabah Tarfi (the respondent) met the residency requirements to become a Canadian citizen as stipulated at paragraph 5(1)(c) of the Act.

[2] For the reasons that follow, the appeal will be allowed.

[3] Drawing on *Koo (Re)*, [1993] 1 F.C. 286 (T.D.), at paragraph 10, the judge answered the following six questions:

- (1) was the individual physically present in Canada for a long period prior to recent absences which occurred immediately before the application for citizenship?
- (2) where are the applicant's immediate family and dependants (and extended family) resident?
- (3) does the pattern of physical presence in Canada indicate a returning home or merely visiting the country?
- (4) what is the extent of the physical absences—if an applicant is only a few days short of the 1095-day total, it is easier to find deemed residence than if those absences are extensive?
- (5) is the physical absence caused by a clearly temporary situation such as employment as a missionary abroad, following a course of study abroad as a student, accepting temporary employment abroad, accompanying a spouse who has accepted temporary employment abroad?
- (6) what is the quality of the connection with Canada: is it more substantial than that which exists with any other country?

### **Issues**

[4] Did the judge err in finding that the respondent met the residency criteria provided at paragraph 5(1)(c) of the Act? In other words, did he err in his application of the above test from *Koo*?

[5] Should the judge have addressed the issue of the respondent's credibility?

### **Relevant legislation**

[6] Subsection 5(1) of the Act states the following:

5. (1) The Minister shall grant	5. (1) Le ministre attribue la
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<p>citizenship to any person who</p> <p>(a) makes application for citizenship;</p> <p>(b) is eighteen years of age or over;</p> <p>(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:</p> <p>(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</p> <p>(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;</p> <p>(d) has an adequate knowledge of one of the official languages of Canada;</p> <p>(e) has an adequate knowledge</p>	<p>citoyenneté à toute personne qui, à la fois :</p> <p>a) en fait la demande;</p> <p>b) est âgée d'au moins dix-huit ans;</p> <p>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 :</p> <p>(i) un demi-jour pour chaque jour de résidence au Canada avant son admission à titre de résident permanent,</p> <p>(ii) un jour pour chaque jour de résidence au Canada après son admission à titre de résident permanent;</p> <p>d) a une connaissance suffisante de l'une des langues officielles du Canada;</p> <p>e) a une connaissance suffisante</p>
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<p>of Canada and of the responsibilities and privileges of citizenship; and</p> <p>(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.</p>	<p>du Canada et des responsabilités et avantages conférés par la citoyenneté;</p> <p>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.</p>
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[7] Section 10 sets out the circumstances in which citizenship may be annulled:

<p><b>10.</b> (1) Subject to section 18 but notwithstanding any other section of this Act, where the Governor in Council, on a report from the Minister, is satisfied that any person has obtained, retained, renounced or resumed citizenship under this Act by false representation or fraud or by knowingly concealing material circumstances,</p> <p>(a) the person ceases to be a citizen, or</p> <p>(b) the renunciation of citizenship by the person shall be deemed to have had no effect, as of such date as may be fixed by order of the Governor in Council with respect thereto.</p> <p>(2) A person shall be deemed to</p>	<p><b>10.</b> (1) Sous réserve du seul article 18, le gouverneur en conseil peut, lorsqu'il est convaincu, sur rapport du ministre, que l'acquisition, la conservation ou la répudiation de la citoyenneté, ou la réintégration dans celle-ci, est intervenue sous le régime de la présente loi par fraude ou au moyen d'une fausse déclaration ou de la dissimulation intentionnelle de faits essentiels, prendre un décret aux termes duquel l'intéressé, à compter de la date qui y est fixée :</p> <p>a) soit perd sa citoyenneté;</p> <p>b) soit est réputé ne pas avoir répudié sa citoyenneté.</p> <p>(2) Est réputée avoir acquis la</p>
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<p>have obtained citizenship by false representation or fraud or by knowingly concealing material circumstances if the person was lawfully admitted to Canada for permanent residence by false representation or fraud or by knowingly concealing material circumstances and, because of that admission, the person subsequently obtained citizenship.</p>	<p>citoyenneté par fraude, fausse déclaration ou dissimulation intentionnelle de faits essentiels la personne qui l'a acquise à raison d'une admission légale au Canada à titre de résident permanent obtenue par l'un de ces trois moyens.</p>
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### **Standard of review**

[8] Reasonableness is the applicable standard of review for a citizenship judge's decision on the issue of whether or not a permanent resident satisfies the residency obligation (*Pourzand v. Canada (Minister of Citizenship and Immigration)* 2008 FC 395, 166 A.C.W.S. (3d) 222, at paragraph 19; *Zhang v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 483, 167 A.C.W.S. (3d) 38; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190).

[9] It is recommended that deference be shown to citizenship judges, by virtue of their special degree of knowledge and experience (*Chen v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1693, 135 A.C.W.S. (3d) 773, at paragraph 5; *Morales v. Canada (Minister of Citizenship and Immigration)* 2005 FC 778, 45 Imm. L.R. (3d) 284).

1. *Did the judge err in finding that the respondent met the residency criteria provided at paragraph 5(1)(c) of the Act?*

[10] According to the applicant, the judge correctly identified the questions set out in *Koo*, above, but failed to apply them correctly. Conversely, the respondent supports the judge's decision.

(a) *Was the individual physically present in Canada for a long period prior to recent absences which occurred immediately before the application for citizenship?*

[11] According to the applicant, the judge mentioned 10 pieces of evidence, none of which answered the question. Contrary to what is required, the judge did not identify the respondent's periods of absence, or the duration of his absences immediately before the application for citizenship.

[12] The judge accepted, without evidence, the respondent's explanation that he was unable to find regular employment in Canada because of his skills and age (50 years).

[13] According to the applicant, it is inconceivable that an engineer in the petroleum field who is fluent in both official languages would be unable to find employment in Canada providing him with an income of \$24,000 per year.

[14] Regarding the respondent, the judge considered the time that had elapsed since the date the respondent settled in the National Capital Region and the date of his first departure from Canada for a business trip (68 days). He also mentioned the period of the respondent's first absence from Canada, the date of his first return to Canada and the date of his application for citizenship. The judge indicated when the respondent was absent from and present in Canada in terms of days during

the period relevant to the fourth question of the *Koo* test, above. He therefore did not need to repeat the dates for each question he had to analyse.

[15] The respondent further submits that, given that he established a centralized mode of living in Canada in the 68 days that he was here before going to work elsewhere, he could count his absences towards the 1095-day requirement of the Act (*Canada (Minister of Citizenship and Immigration) v. Vericherla*, 2003 FCT 267, 121 A.C.W.S. (3d) 611, at paragraphs 29 to 30). In *Papadogiorgakis v. Canada*, [1978] 2 F.C. 208 (T.D.), it was clearly established that physical presence in Canada is not absolutely essential to maintain residence here.

[16] The respondent cites *Badjeck v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1301, 214 F.T.R. 204, to show that physical presence over a continuous 1095-day period is not necessary if special and exceptional circumstances exist—provided, however, that the applicant shows that he or she has settled in Canada.

[17] The respondent is also in agreement with the judge's analysis of the steps taken by the respondent to find employment in Canada and the reasons for which he had to find employment elsewhere.

(b) *Where are the applicant's immediate family and dependants (and extended family) resident?*

[18] The second question in *Koo*, above, was not disputed by the applicant.

(c) *Does the pattern of physical presence in Canada indicate a returning home or merely visiting the country?*

[19] According to the applicant, the judge once again considered irrelevant factors. The judge made no distinction between the income tax return and the payment of taxes, and he should have known that it is unbelievable that an engineer working in Dubai in the petroleum field would make only \$24,000 a year. Although he files his tax returns in Canada, the respondent pays very little tax here.

[20] The children's schooling is not relevant. Instead, the judge should have tried to find out whether the respondent was a member of any clubs, associations or community organizations in Canada.

[21] The respondent argues that the applicant's argument regarding the amount of tax paid is irrelevant. Furthermore, it is the Minister of Revenue, and not the Minister of Immigration, who checks the veracity of tax returns and issues notices of assessment.

[22] According to the respondent, the applicant appears have forgotten that the respondent did not work full time and that the income declared is income obtained from contracts lasting less than one month. The respondent also submits that the judge took into account that ever since arriving in Canada, the respondent spent all of his holidays with his family and did not travel abroad except for family reasons or work.

(d) *What is the extent of the physical absences?*

[23] The applicant submits that the judge did not take into account the decision (*Xu v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 700, 139 A.C.W.S. (3d) 433, at paragraph 15) stating that the number of days of physical presence in Canada must be substantial, which it is not in the case at bar.

[24] The respondent submits that the judge properly directed himself in law when he adopted one of the two approaches in case law to establish residence under paragraph 5(1)(c) of the Act. He could have taken the mathematical approach, but he rightly chose the more liberal approach, namely the interpretation of habitual residence, in that a person may have occasional absences, provided that he or she has centralized his or her mode of living in Canada.

[25] The respondent states that the fourth factor is not more important than the others (*Nulliah v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1423, 153 A.C.W.S. (3d) 515, at paragraphs 13 and 14 and *Canada (Minister of Citizenship and Immigration) v. Tovbin* (2000), 190 F.T.R. 102, 100 A.C.W.S. (3d) 538, at paragraph 28). This factor must be assessed with the others, and the particular circumstances of each case must be taken into account. Therefore, contrary to the decision of the Court in *Xu v. Canada*, above, this Court has decided, in other circumstances, that physical presence for as few as 100 days in Canada was enough to obtain Canadian citizenship.

(e) *Is the physical absence caused by a clearly temporary situation?*

[26] The applicant is alleging that the judge did not answer this question. Given that the respondent admitted he had no intention of continuing his job search in Canada, his absences have become ongoing and will remain so until his retirement (*Canada (Minister of Citizenship and Immigration) v. Zhou*, 2008 FC 939, [2008] F.C.J. No. 1170 (QL), at paragraph 15).

[27] The applicant cites *Canada (Minister of Citizenship and Immigration) v. Hussein*, 2008 FC 757, 169 A.C.W.S. (3d) 954 and *Yip v. Canada (Minister of Citizenship and Immigration)*, 91 A.C.W.S. (3d) 525, [1999] F.C.J. No. 1393 (F.C.T.D.) (QL), at paragraphs 7 and 8, to demonstrate that working abroad is not an acceptable justification for absences.

[28] For his part, the respondent asserts that he never stated that he intended to halt his job searches in Canada. Moreover, he showed the steps he had undertaken without success.

[29] The defendant's contracts are of short duration (*Pourzand*, above, at paragraph 25). He returns to Canada at the end of each contract. That shows his intention of settling here.

[30] The respondent relies on *Badjeck*, above, at paragraph 43, in asserting that he should not be deprived of his citizenship merely because he must earn a living abroad.

[31] The respondent adds that in *Canada (Minister of Citizenship and Immigration) v. Pang*, 2002 FCT 962, 116 A.C.W.S. (3d) 816, at paragraphs 5 and 6, age and experience were considered to be factors increasing the difficulty of a job search.

(f) *What is the quality of the connection with Canada: is it more substantial than that which exists with any other country?*

[32] According to the applicant, the judge did not place enough emphasis on the fact that the respondent spent time in Algeria. In fact, the respondent owned a residence where one of his sisters-in-law lived. He was also dealing with his mother's affairs.

[33] The judge should have found that the respondent had not centralized his mode of living in Canada (*Eltom v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1555, 284 F.T.R. 139, at paragraph 22).

[34] Referring to the table provided to the tribunal, the respondent states that he made his business trips coincide with his visits to see his mother. None of his employers or immediate family were in Algeria.

### **Analysis**

[35] The case law indicates that the establishment of residence in Canada is a condition precedent to obtaining citizenship (*Ahmed v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1067, 225 F.T.R. 215). The Court decided that to fulfill the conditions required by the

Act, residence had first to be established and, second, be maintained. Where the establishment requirement is not shown to be met, the absences from Canada are not relevant and the assessment must stop.

[36] At paragraph 8 of his decision, the judge writes as follows:

[TRANSLATION]

Before leaving again to complete his contract in Dubai on February 20, 1998, he settled his family in Ottawa.

During this 68-day period, he

- moved all of his family into a hotel;
- etc. . . .

[37] The evidence on record contradicts the judge's statement to the effect that the respondent was present for a period of 68 days before leaving for Dubai on February 20, 1998. The Court refers, in particular, to the table of the respondent's absences (page 51, Tribunal Record). The judge likely forgot the respondent's absence from Canada from December 29, 1997, to January 30, 1998 (32 days), during the 68 days he counted between December 14, 1997, and February 20, 1998. In reality, the defendant only remained in Canada for a period of 15 days from December 14, 1997, to December 29, 1997, before leaving for Abu Dhabi, UAE.

[38] This observation also contradicts paragraph 11 of the decision, where the judge asserts that the respondent left Canada for the first time on February 20, 1998.

[39] Furthermore, the Court agrees with the applicant's allegation that the judge did not answer the first question from *Koo*. In analysing the documents filed, the Court notices that the respondent was only present in Canada for four days before the date of his application for citizenship, March 12, 2005 (page 27, Tribunal Record), following his absence from January 16, 2005, to March 8, 2005 (page 51, Tribunal Record), which certainly cannot be considered to be physical presence over an extended period.

[40] The judge also states as follows at paragraph 8 of his decision: [TRANSLATION] "undertook steps to find work in Alberta with the leading petroleum companies". According to the judge, these steps were taken during the 68-day period following the respondent's arrival in Canada. However, we now know that the number of days (68) is inaccurate and, furthermore, that there is no factual basis for the judge's statement.

2. *Should the judge have addressed the issue of the respondent's credibility?*

[41] According to the applicant, the judge's decision is flawed because he neglected to rule on the respondent's credibility. He should have dismissed the application by noting the serious discrepancies between the absences stated in the application for citizenship and in the questionnaire completed by the respondent (*Lama v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 461, 142 A.C.W.S. (3d) 925, at paragraphs 13 and 25).

[42] In the case at bar, the applicant initially stated that he had been outside of Canada for 233 days (page 19, Tribunal Record), but when completing the questionnaire, he indicated that he had been absent for 984 days (pages 51 and 52, Tribunal Record). That is a difference of 751 days.

[43] Under section 10 of the Act, the judge can annul a person's citizenship because of fraud or false representation. The applicant alleges that the judge made no reference regarding the contradiction in the days the respondent was absent. This shows that the judge disregarded the evidence. Clearly, the respondent's credibility was severely compromised.

[44] The respondent notes that the Court must show a considerable degree of deference regarding credibility issues, since the citizenship judge is in the best position to address them (*Wong v. Canada*, 2008 FC 731, 169 A.C.W.S. (3d) 952, at paragraph 15). Although the judge did not remark on them, that does not mean that he did not take them into consideration in his analysis.

[45] The respondent also submits that section 10 of the Act is not applicable here since the judge based his decision to grant citizenship on the questionnaire and not on the respondent's initial statement. Moreover, the information obtained through the questionnaire is consistent with the notices appearing on the respondent's passport. Therefore, this is not a false declaration, but possibly a calculation error made by the respondent.

[46] With respect for the contrary view, the Court believes that the judge should have dealt with this issue. The judge's refraining from commenting or deciding on such an important point shows that he disregarded an important part of the evidence.

[47] The intervention of this Court is warranted.

**JUDGMENT**

THE COURT ORDERS that the appeal be allowed. The matter is referred back for redetermination before a different citizenship judge.

“Michel Beaudry”

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Judge

Certified true translation  
Sarah Burns

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

**DOCKET:** T-935-08

**STYLE OF CAUSE:** **MINISTER OF CITIZENSHIP AND  
IMMIGRATION  
and  
RABAH TARFI**

**PLACE OF HEARING:** Montréal, Quebec

**DATE OF HEARING:** February 10, 2009

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

**DATED:** February 25, 2009

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