Federal Court  Cour fédérale

Date: 20131220

Docket: T-2292-12

Citation: 2013 FC 1274

Ottawa, Ontario, December 20, 2013

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

YASMIN RAHMAN

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an appeal under subsection 14(5) of the *Citizenship Act*, RSC 1985, C-29 [Citizenship Act] and section 21 of the *Federal Courts Act*, RSC 1985, c F-7 [Federal Courts Act] of a decision of a Citizenship Judge dated 8 November 2012 [Decision] approving the Respondent's citizenship application under subsection 5(1) of the Citizenship Act.

BACKGROUND

[2] The Respondent is a citizen of Bangladesh who first came to Canada as a Permanent Resident in August 2006. She applied for Canadian citizenship, along with two of her children, on 30 August 2010. This appeal relates only to the Decision on the Respondent's citizenship application, and not to that of her children.

[3] As part of the citizenship process, the Respondent was asked in November 2011 to submit a traveller history for herself and her children from Canada Border Services Agency (ICES Traveller History), photocopies of all pages of all passports covering the relevant period, and certain other documents relating to taxation, schooling and domicile, and to complete a Residence Questionnaire. On 5 October 2012, she was asked to submit ministry of health claims from 30 August 2006 to 30 August 2010 [Review Period], a record of her entry and exit from Bangladesh during the Review Period, and a letter from the proper authorities in Bangladesh indicating all passports ever issued to her, with issue and expiry dates.

[4] The Respondent provided the record of entry and exit from Bangladesh on a single sheet of paper, which she attests was self-generated based on the date stamps in her passports and was never represented to be anything else. The Respondent suggested that this record "purports to be from the Bangladesh Minister of the Interior," but this contention does not appear to be central to the appeal.

[5] The list of the Respondent's passports provided by the Department of Immigration and Passports of Bangladesh indicates that she held two passports from that country for part of the

Review Period - specifically from 30 August 2006 to 12 October 2007. The Respondent's explanation was that she had exhausted the pages for stamps prior to the expiration of the first passport (R0476041), and therefore applied for and obtained a new one (Z0326827). The Applicant says the Citizenship Judge overlooked the overlapping passports, and this was a reviewable error.

[6] Along with her own application, the Respondent submitted citizenship applications for two of her children. However, these children were attending school in Bangladesh during most of the Review Period, and the Respondent now acknowledges that it was a "mistake" to apply for their citizenship as there was no way they could have met the residency requirement. She states that it was an "error on [her] part" to list only their first extended absence from Canada during the Review Period, when in fact they were rarely in Canada during this time.

DECISION UNDER REVIEW

[7] The Decision of the Citizenship Judge was entered on the usual form, indicating that the requirements under subsection 5(1) of the Act had been met. The handwritten reasons provided in support of the Decision read, in their entirety:

> Careful review of all documents now on file indicate that applicant on the balance of probabilities meets residence. Specifically, ICES confirms declared entries into Canada. As per letter from Bangladeshi passport authority, it appears that applicant was not in possession of second passport for review period. Concern why children schooled in Bangladesh, according to applicant children were enrolled in American "Ivy League" type school not available to them in Canada at that time. Absences also confirmed by relevant ppt.

ISSUES

[8] The Applicant submits that there are two issues on this appeal:

1. Did the Citizenship Judge err when he concluded that the Respondent had satisfied the residency requirement under paragraph 5(1)*(c)* of the Citizenship Act?; and

2. Were the Citizenship Judge's reasons inadequate?

[9] In *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses*], the Supreme Court of Canada held at para 14 that the adequacy of reasons is not a stand-alone basis for quashing a decision. Rather, "the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes." Given my conclusion below that reasonableness is the appropriate standard of review in this case, any issue that may arise as to the adequacy of reasons will be considered in the context of the reasonableness of the Decision.

[10] As such, the only issue on this appeal is whether the Citizenship Judge applied the residency requirement under paragraph 5(1)*(c)* of the Citizenship Act in a manner that made the Decision unreasonable.

STANDARD OF REVIEW

[11] While this is a statutory appeal from a decision of a Citizenship Judge and not a judicial review, case law has established that it is the administrative law principles governing the standard of

review that apply: see *Canada (Minister of Citizenship and Immigration) v Takla*, 2009 FC 1120 at paras 16-39 [*Takla*].

[12] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48 [*Agraira*].

[13] The Applicant argued that reasonableness is the appropriate standard of review in this case, citing *Canada (Minister of Citizenship and Immigration) v Jeizan*, 2010 FC 323 at para 12 [*Jeizan*], and while not addressing the issue directly, it is clear from the Respondent's arguments that she takes the same view. I agree with my colleague Justice Gagné's observation that "[i]t is generally accepted in the case law that a citizenship judge's application of evidence to a specific test for residency under paragraph 5(1)*(c)* of the Act raises questions of mixed fact and law and is thus reviewable on a standard of reasonableness": *Saad v Canada (Minister of Citizenship and Immigration)*, 2013 FC 570 at para 18.

[14] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-

making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at para 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59 [*Khosa*]. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

STATUTORY PROVISIONS

[15] The following provisions of the Citizenship Act are applicable in these proceedings:

Grant of citizenship	**Attribution de la citoyenneté**
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 :
(a) makes application for citizenship;	*a)* en fait la demande;
(b) is eighteen years of age or over;	*b)* est âgée d'au moins dix-huit ans;
(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:	*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) for every day during which the person was resident in Canada before his lawful admission to Canada for	(i) un demi-jour pour chaque jour de résidence au Canada avant son admission à titre de résident permanent,

permanent residence the person shall be deemed to have 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;

(d) has an adequate knowledge of one of the official languages of Canada;

d) a une connaissance suffisante de l'une des langues officielles du Canada;

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

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

(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.

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.

[…]

[…]

14 […]

14 […]

Appeal

Appel

(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

(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

a) de l'approbation de la demande;

subsection (2); or	
(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.
(6) A decision of the Court pursuant to an appeal made under subsection (5) is, subject to section 20, final and, notwithstanding any other Act of Parliament, no appeal lies therefrom.	(6) La décision de la Cour rendue sur l'appel prévu au paragraphe (5) est, sous réserve de l'article 20, définitive et, par dérogation à toute autre loi fédérale, non susceptible d'appel.

[16] The following provision of the Federal Courts Act is applicable in these proceedings:

Citizenship appeals	**Appels en matière de citoyenneté**
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*.

ARGUMENT

Applicant

[17] The Applicant argues that the Citizenship Judge erred in finding that the Respondent met the residency requirement for citizenship, without a proper analysis of the evidence and without stating which residency test he applied.

[18] It is not clear from the reasons which test of residency the Citizenship Judge applied. The Applicant argues that this alone makes the Decision unreasonable. The Citizenship Act does not

define "residence" or "resident," and the jurisprudence of this Court is split as to the legal test to be applied, with three different tests emerging: *Zhao v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1536 at paras 50-51. These include a test based on the quality of the applicant's attachment to Canada (see *Re Papadogiorgakis*, [1978] 2 FC 208, 88 DLR (3d) 243 at paras 15-17), a test based on physical presence in Canada for the requisite number of days (see *Re Pourghasemi* (1993), 62 FTR 122; 19 Imm LR (2d) 259), and a third test combining elements of both of the aforementioned tests, focusing on where the applicant "regularly, normally or customarily lives" or has "centralized his or her mode of existence" (see *Re Koo*, [1993] 1 FC 286, 19 Imm LR (2d) 1 at para 10). The Applicant argues that while a Citizenship Judge has discretion to apply any one of the residency tests noted above, they must clearly state which test they have applied (*Cardin v Canada (Minister of Citizenship and Immigration)*, 2011 FC 29 at paras 12, 18 [*Cardin*]; *Canada (Minister of Citizenship and Immigration) v Saad*, 2011 FC 1508 at paras 14, 18, 19, 21; *Jeizan*, above at para 18), and that the Citizenship Judge failed to do so in this case.

[19] In addition, the Applicant argues that a citizenship applicant must provide sufficient objective evidence to demonstrate that they have satisfied the residency requirement, irrespective of the test eventually applied by the Citizenship Judge (*Vega v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1079 at para 13; *Farrokhyar v Canada (Minister of Citizenship and Immigration)*, 2007 FC 697 at para 17; *Rizvi v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1641 at para 21; *Abbas v Canada (Minister of Citizenship and Immigration)*, 2011 FC 145 at paras 8-9, 11), and that the Citizenship Judge in this case erred in finding that the residency requirement was met in the absence of such evidence.

[20] Specifically, the Applicant argues that the Citizenship Judge made a material factual error when he found, based on the letter provided by the Bangladesh passport authorities, that the "applicant was not in possession of [a] second passport for [the] review period." On the contrary, the Respondent had two valid Bangladeshi passports (Z0326827 and R0476041) for 407 days of the Review Period (30 August 2006 to 12 October 2007), and her residency cannot be properly assessed in the absence of the second passport. If these 407 days are deducted from the residency period in addition to the Respondent's declared absences, the Applicant says that the Respondent would only have 697 days of residency during the Review Period, which is far short of the required 1095 days.

[21] The Citizenship Judge also erred, the Applicant argues, by relying upon an unauthenticated and unreferenced record of entry and exit from Bangladesh. There were also inconsistencies in the Respondent's own evidence relating to her residency in June and July 2007 that the Citizenship Judge failed to deal with, and the Respondent's representations regarding the residency of her two accompanying children, which showed only one absence from Canada greater than six months, were inconsistent with the fact that they were being schooled in Bangladesh.

[22] Finally, the Applicant argues that the Citizenship Judge's reasons lacked sufficient clarity, precision and intelligibility. While acknowledging that this is no longer a stand-alone ground of review, the Applicant says the reasons provided here hinder any assessment of the reasonableness of the Decision: *Newfoundland Nurses*, above, at para 14; *Canada (Minister of Citizenship and Immigration) v Al-Showaiter*, 2012 FC 12 at para 21-23 [*Al-Showaiter*]; *Canada (Minister of Citizenship and Immigration) v El-Koussa*, 2012 FC 13 at paras 22-24. Specifically, the reasons do

not sufficiently explain the grounds on which the application was approved, or engage in a meaningful analysis of how the Respondent met the residency requirement under paragraph 5(1)(c) of the Act. As such, the reasons do not allow a reviewing court to understand why the Citizenship Judge made his Decision, or to determine whether the conclusion is within the range of reasonable outcomes: *Newfoundland Nurses*, above, at para 16.

Respondent

[23] The Respondent argues that the Applicant has failed to demonstrate any error in the Decision that warrants judicial intervention.

[24] The Respondent reiterates that the adequacy of reasons is not a stand-alone basis for quashing a decision (*Newfoundland Nurses*, above; *Hannoush v Canada* (*Minister of Citizenship and Immigration*), 2012 FC 945 at para 6 [*Hannoush*]), and argues that the brevity of reasons is not in itself a sufficient ground to impugn the Decision of the Citizenship Judge. Rather, the requirement is to provide a sufficient basis for a court sitting in review to understand why the Decision was made and to assess its reasonableness: *Canada (Minister of Citizenship and Immigration) v Lee*, 2013 FC 270 at para 37 [*Lee*]; *SRI Homes Inc v Canada*, 2012 FCA 208 [*SRI Homes*].

[25] Here, the Citizenship Judge identified the basis for the Decision and the evidence relied upon when he wrote: "Specifically, ICES confirms declared entries into Canada." This is similar to *Lee*, where the reasons were also brief but made it clear that the decision was based mainly on the ICES report showing entries into Canada (*Lee*, above, at paras 34, 38). It is distinguishable from

other cases where appeals were allowed on the basis that no reasons were given (see *Hannoush*, above; *Canada (Minister of Citizenship and Immigration) v Elzubair*, 2010 FC 298 [*Elzubair*]; *Salim v Canada (Minister of Citizenship and Immigration)*, 2010 FC 975 at para 23 [*Salim*]; *Al-Showaiter*, above, at para 17).

[26] In *Lee*, above, the Court found that while the ICES report did not in itself establish residency, it did at least corroborate the Respondent's statements and did not cast doubt on her evidence or declarations. The Respondent argues that the same applies here, as the dates from the ICES report are consistent with those provided by the Respondent in the documents supporting her application, and do not cast doubt on any of her evidence or declarations. Furthermore, the Court in *Lee* observed that the Citizenship Act does not require corroboration, and it is up to the original decision-maker to determine the extent and nature of the evidence required, taking the context into consideration: *Lee*, above at para 38. Deference is owed to the decision-maker's choices in weighing the evidence, and the fact that the Citizenship Judge here chose to focus on the ICES report is not a reviewable error: *Khosa*, above, at paras 25, 61; *Lee*, above at para 48.

[27] The Respondent says it is now trite law that a Citizenship Judge is not obliged to expressly identify the test being applied. Rather, if the record shows that the Applicant has been in Canada for the requisite period of time and there is no qualitative assessment, it is reasonable to infer that the Citizenship Judge applied the physical presence or "quantitative" test, which is the most stringent of the three tests: *Hannoush*, above, at para 13; *Lee*, above, at para 30; *SRI Homes*, above, at paras 13-15; *Elzubair*, above, at para 14; *Salim*, above, at para 10; *Imran v Canada (Minister of Citizenship and Immigration)*, 2012 FC 756 at para 22. Here, given that the Citizenship Judge made a clear

reference to the ICES report and the Respondent's passports and made no assessment of any of the qualitative assessment criteria, it is more than reasonable to infer that the "quantitative" test was applied. Moreover, the rationale for the application of one test or another can be inferred from the facts of the case (*Cardin*, above, at para 18), and in this case, the rationale for applying the "quantitative" test is present in the facts shown in evidence.

[28] The Respondent submits that the only factual inconsistency in her evidence regarding her residency in Canada arose from a typographical error, which listed her as being in Bangladesh from 14 August 2006 to 21 July 2007, when the latter date should have read 21 June 2007. This resolves the apparent conflict with her evidence that she was in the United States from 28 June 2007 to 8 July 2007. She submits that based on all of the evidence provided in support of her application, and taking the above clarification into account, she spent 1,131 days in Canada during the review period, exceeding the required 1095 days under the quantitative test.

[29] As noted above, the Respondent acknowledges that her children could not have met the residency requirements, and that it was a mistake to apply for their citizenship, but she argues that this should not impact her own citizenship application, as she meets the residency requirement.

[30] Also as noted above, the Respondent submits that her reason for holding two Bangladeshi passports at the same time was that she exhausted the stamp pages in the first before it expired. She argues that no improper purpose could have been served by the second passport vis-à-vis her citizenship application, as she had reported herself to be in Bangladesh for most of the time of the overlap (i.e. from 14 August 2006 to 21 June 2007), and did not purport to be in Canada.

[31] As such, the Respondent argues that none of the factual errors alleged by the Applicant were material to the Citizenship Judge's overall determination that the Respondent met the residency requirement under paragraph 5(1)*(c)* of the Citizenship Act, and the appeal should be denied.

ANALYSIS

[32] The inadequacy of reasons is not a stand-alone basis for review in this type of case (see *Newfoundland Nurses*, above, at para 22, and *Hannoush*, above, at para 6) and the issue is whether the reasons allow the Court to understand why the Citizenship Judge made the Decision and permit it to understand whether the conclusion falls within the range of acceptable outcomes as established in *Dunsmuir* at para 47. See *Lee*, above, at para 37.

[33] The Respondent places a heavy reliance on *Lee*, above, where the decision of the citizenship judge relied mainly on the ICES report. As Justice Strickland pointed out in *Lee* at paras 34 and 38:

> 34 In his reasons, the Citizenship Judge stated that "after very careful consideration of all of the documentary evidence along with the verbal evidence presented at the hearing", he was "satisfied that [the] applicant, on the balance of probabilities, meets the requirements of 5(1)(c)" of the *Citizenship Act*. The Citizenship Judge also stated that he based his decision "mostly on the strength of the ICES report that shows no entries into Canada during [the] review period." Taken together, the extent and nature of this evidence satisfied him that the Respondent met the residency requirements.
>
> […]
>
> 38 Here, the ICES report appears to have formed the main basis for the Decision. The Applicant asserts that in and of itself the ICES report does not establish the Respondent's residency during the relevant four-year period. Although this may be correct, the report at least corroborates the Respondent's statement that she has not left Canada during the relevant period. Further, it does not cast doubt on

> any of her evidence or declarations (*Tanveer*, above, at para 11). As this Court stated in *El Bousserghini*, above, at para 19, the *Citizenship Act* "does not require corroboration. It is the responsibility of the original decision-maker, taking the context into consideration, to determine the extent and nature of the evidence required".

[34] The Respondent acknowledges that her children could not have met the residency requirement for their citizenship applications, but she says that their ineligibility should not impact her own citizenship application. I agree, and I do not think this was a consideration in the Decision. The Citizenship Judge appears to have accepted that the fact of the children being in Bangladesh attending an "Ivy League" school was no reason to question the Respondent's period of residence in Canada.

[35] In my view, the only problematic aspect of the reasons is the reference to the Bangladeshi letter which, contrary to the reasons, reveals that the Respondent was in possession of a second passport that does overlap with part of the Review Period.

[36] The Respondent has explained to the Court as part of this review application that the reason she held two passports between August 30, 2006 and October 12, 2007 was that her passport (R0476041) was valid until October 12, 2007, but she had exhausted the stamp pages prior to the expiry date and so applied for and obtained a new passport (Z0326827). In other words she concedes that she had two "valid" passports.

[37] She also says that the second passport is not material because she reported herself that she was in Bangladesh for most of the time covered by the second passport (specifically from August 14, 2006 to June 21, 2007) and she did not purport to be in Canada.

[38] However, we do not know how much of the time covered by the second passport the Respondent spent in Bangladesh, or elsewhere outside of Canada. If it was the whole period covered, this would mean an additional 100 days of absence. When this is subtracted from the 1,131 days the Respondent says she spent in Canada, this results in 1,031 days of residency within the applicable period, and this falls below the 1,095 quantitative threshold which she says the Citizenship Judge applied in this case.

[39] If the Respondent says that she spent most of the overlap period in Bangladesh, then she has not demonstrated to the Court that she meets the 1,095 day residency requirement.

[40] The Respondent was required to submit copies of all pages of all passports covering the period from August 30, 2006 to the date of the request. The requirement is clear and unequivocal. The Respondent was required to provide a "letter from the proper authorities in Bangladesh indicating all passports ever issued to you with issue and expiry dates." The letter from the Bangladesh Department of Immigration and Passports revealed that two passports had been issued for the relevant period:

R0476041 - 13 October 2002 – 12 October 2007

Z0326827 - 10 April 2006 – 12 October 2012

[41] The Relevant Period for her citizenship application was August 30, 2006 to August 30, 2010. This means that from August 30, 2006 to October 12, 2007 the Respondent had two passports that were relevant to the Decision.

[42] In oral argument before me, Respondent's counsel said that the passport overlap of three months does not relate to the Review Period, the Citizenship Judge was fully aware that there were two passports, and the second passport was not material. These assertions are not tenable. The overlap does relate to the Review Period. Clearly, then, the Citizenship Judge was wrong when he said that:

> As per letter from Bangladesh authority, it appears that applicant was not in possession of second passport for review period.

[43] The Respondent attempts to overcome this problem by pointing out that the October 20, 2012 letter from the Bangladesh Department of Immigration and Passports says that the passports listed have been issued "from this office as per govt. rules and regulation." This means, says the Respondent, that the second passport must have been issued because the first passport was "exhausted." I do not think this addresses the mistake.

[44] The problem is how to make sense of the Citizenship Judge's words that the letter from the Bangladesh authority reveals that the Respondent was not in possession of a second passport for the Review Period (clearly wrong), and whether or not this mistake is material to the Decision.

[45] As per instructions, the Respondent was obliged to provide copies of all pages from relevant passports. See Applicant's Record at page 172. The Respondent only provided copies from passport

No. Z0326827. The stamps in this passport and the report from the ICES that the Respondent was required to request and submit reveal the following absences from Canada:

August 30, 2006 – June 21, 2007	Bangladesh	296 days
June 28, 2007 – July 7, 2007	United States	10 days
February 22, 2008 – March 6, 2008	Bangladesh	14 days
August 16, 2009 – August 27, 2009	Bangladesh	12 days
May 30, 2010 – June 10, 2010	Bangladesh	12 days

[46] Copies of the second passport, No. R0476041, were not provided to the Citizenship Judge by the Respondent and are not part of the record before me. We simply do not know what, if anything, this passport shows regarding the Respondent's presence in or absence from Canada during the review period.

[47] Had the Citizenship Judge been aware of both passports, it is not possible to tell what his Decision would have been. Passports are clearly important for calculating the residence requirement, and the Citizenship Judge obviously concluded that there was only one passport of relevance.

[48] The question turns on the Respondent's whereabouts during two periods of time: June 22, 2007 to June 27, 2007 (6 days); and July 9, 2007 to October 12, 2007 (95 days). The reason this is so can be understood from the chart below:

Dates	Location	Days in Canada	Days Outside Canada	Days When Location Uncertain	Notes
August 30, 2006 – June 21, 2007	Bangladesh		296		Respondent declared this absence and ICES confirms re-entry on June 22, 2007.
June 22, 2007 – June 27, 2007	**Unknown**			**6**	**This is during the period that Respondent had two valid passports.**
June 28, 2007 – July 7, 2007	United States		10		Respondent declared this absence and ICES confirms re-entry on July 8, 2007.
July 8, 2007 – July 9, 2007	Canada	1			ICES confirms Respondent entered Canada from the United States on July 8, 2007, and the record shows she attended a doctor's appointment on July 9, 2007.
July 10, 2007 – October 12, 2007	**Unknown**			**94**	**This is during the period that Respondent had two valid passports.**
October 13, 2007 – February 21, 2008	Canada	132			Respondent had only one valid passport during this period. The latest she could have re-entered Canada on the previous passport was October 12, 2007.
February 22, 2008 – March 6, 2008	Bangladesh		14		Respondent declared this absence and ICES shows re-entry on March 7, 2008.
March 7, 2008 – August 15, 2009	Canada	527			Respondent had only one valid passport, which shows no departures or re-entry during this period.
August 16, 2009 – August 27, 2009	Bangladesh		12		Respondent declared this absence and ICES shows re-entry on August 28, 2009.

August 28, 2009 – May 29, 2010	Canada	275			Respondent had only one valid passport, which shows no departures or re-entry during this period.
May 30, 2010 – June 10, 2010	Bangladesh		12		Respondent declared this absence and ICES shows re-entry on June 11, 2010.
June 11, 2010 – August 30, 2010	Canada	81			Respondent had only one valid passport, which shows no departures or re-entry during this period.
		1,016	344	100	**Total = 1460**

[49] While the parties' post-hearing submissions continue to discuss earlier discrepancies and inaccuracies (apparently in an effort to impugn and defend credibility, respectively), I do not think there is any serious dispute at this stage about the dates listed above. The only dispute is about what inferences can and should be drawn from the evidence about the Respondent's whereabouts on the approximately 100 days when she claims she was in Canada, but had access to a second valid passport that was not placed in evidence before the Citizenship Judge.

[50] As the chart above makes apparent, if the additional 100 days are added to the days of residency, the total would be 1,116, exceeding the minimum requirement of 1095. If these 100 days are added to the days of absences, the Respondent falls short of meeting the numerical test for residency.

[51] The Applicant argues that the Respondent's whereabouts during these 100 days (in their view, 102 days) cannot be known because only one of the two passports was in evidence before the Citizenship Judge. The Respondent says that it is unreasonable speculation to say that she could

have been out of the country during these days, since there is no evidence to that effect. In my view, it was the Respondent's responsibility to place evidence before the Citizenship Judge showing that she met the test for residency (*Vega* at para 13; *Farrokhyar* at para 17; *Rizvi* at para 21; *Abbas* at paras 8-9, all above). Based on the analysis that follows, I do not think she discharged that burden.

[52] My review of the record suggests the following:

a. Passport R0476041 was valid from October 13, 2002 to October 12, 2007. The portion of the Review Period during which this passport was valid was August 30, 2006 to October 12, 2007. Copies of the pages of this passport were not provided to the Citizenship Judge, and are therefore not part of the CTR or the record before me. We simply do not know what if anything this passport shows in terms of the Respondent's presence or absence from the country during the disputed periods of time. I will call this passport #1, because it was chronologically the first to be issued;

b. Copies of the pages in passport ZO326827 were provided to the Citizenship Judge. This passport was valid throughout the Review Period (it was valid from April 10, 2006 to October 12, 2012). I will call this passport #2, because it was chronologically the second to be issued;

c. The Respondent argues that, according to the laws and regulations of Bangladesh, a new passport can only be issued if the previous passport is lost, full or expired, and the letter from the Bangladeshi Department of Immigration and Passports states that the listed passports were issued as per government rules and regulations (see copy in Respondent's Record at page 31). Thus, there is no way she would have been issued passport #2 if

passport #1 was still in a usable state. However, the Applicant points out that the letter does not state that a new passport can only be issued if the previous one is lost, full or expired, and that there is no evidence before me about the Bangladeshi government's rules and regulations for issuing passports. I agree with the Applicant. The Respondent would need to prove this as a matter of foreign law (i.e. as a matter of fact), and this has not been done. The Court cannot take judicial notice of the laws and regulations of Bangladesh;

d. The Respondent was directed (see page 172 of Applicant's Record) to provide copies of all passports covering the Review Period. The letter of November 15, 2011 from V. Huang, Citizenship Officer to the Respondent states in relevant part [all emphasis in original]:

> …After further review of your application and accompanying documentation, we require a **photocopy** of the following before a decision can be rendered on your application…
>
> Please ensure that you provide **CLEAR** and **LEGIBLE** photocopies.
>
> […]
>
> 2. All pages, including blank pages, of all passports and/or travel documents (valid, expired and cancelled passports) covering the period from 2006 to PRESENT. This request applies to yourself and your children.

The Respondent argued in post-hearing submissions that she disclosed the existence of both relevant passports, since they were listed in the letter from the government of Bangladesh. Counsel acknowledged that the Respondent "did not provide a copy of [passport #1]" to the Citizenship Judge, and stated that she "did so for a good reason: she did not utilize said passport during the review period, because it had become full prior to August 30, 2006 and was therefore unusable for travelling purposes." I do not agree that the Respondent had a good reason for not providing copies of passport #1 to the Citizenship Judge. The

instructions quoted above seem clear and unequivocal, and the Respondent failed to comply with them. I agree with the Applicant that there is no evidence on the record that the Respondent "did not utilize said passport during the review period, because it had become full prior to August 30, 2006 and was thus unusable for travelling purposes." Passport #1 may very well reveal exactly what the Respondent claims, but the Citizenship Judge could not have known this, nor can the Court, because it was not and is not in evidence.

e. The Applicant states that the ICES only records entries involving air travel, while passports track all entries and exits from Canada (Applicant's Post-Hearing Reply Submissions at para 20). This is not the kind of easily verifiable information of which I can take judicial notice (i.e. a question on which easily accessible information of undisputed reliability can be found). I do not have direct evidence on these points, but it may be possible to draw certain inferences from the evidence I do have;

f. With respect to the latter statement (that passports track all entries and exits from Canada), the record seems to indicate that Canada does not track exits (or at least does not provide exit stamps in passports), so this claim would be reliant on the fact that other countries will always stamp passports on entry (see Applicant's Record at 48, which summarizes the stamps in the passport that the Respondent did provide: for many countries we see both entry and exit stamps, but for Canada, the "exit" column is always blank);

g. With respect to the former statement (that the ICES only captures air travel), the Respondent does not appear to dispute this. Rather, her argument is that it is irrational to argue that the Respondent could have avoided entries in the ICES system for the 100 days in dispute by using a different passport, when in fact she could have done so at any time during the four

year Review Period by making land crossings to and from the U.S. and flying from there. As such, the Respondent argues that it is "declared" absences and not "possible" absences that must form the basis of citizenship decisions. I think this argument misses the point. The Applicant's argument is not simply that the undisclosed passport (passport #1) could have enabled the Respondent to avoid further entries under passport #2 in the ICES system, but rather that the passports themselves provide important evidence of entry and exit that the Respondent was required to submit;

h. The ICES system seems to capture some land crossings. The request form provided to the Respondent with the November 15, 2011 letter from CIC, to enable her to request the ICES records from CBSA, includes the following pre-checked selections (Applicant's Record at page 174):

> I would like my ICES Traveller History for the period **2006 to PRESENT.**
>
> I would like my ICES Traveller History Records to be released in their entirety.
>
> If you have Land Border crossings to/from the United States, include additional proof of return AND departure.

All of the entries listed for the Respondent were by air (see Applicant's Record at page 37);

i. CBSA's response, dated March 13, 2012 (see Applicant's Record at 35) lists only the disclosed passport Z0326827 (passport #2) and not passport #1 as a basis for the records search. The response reads in relevant part:

> This letter is in response to your request under the Privacy Act. Your request reads:

> ***Traveller's history report including land border crossings from 2006 to present pertaining to RAHMAN, Yasmin; DOB: Feb. 06-1965; FOSS ID: 5631-4623; Passport: ZO326827…***
>
> The processing of your request is now complete. Please note that the records are being released in their entirety.
>
> Please note that when travelling by coach, passenger travel documents are not always scanned in the Canada Border Services Agency's Integrated Customs Enforcement System.

Without knowing more about this system (and I appear to have no evidence in this regard), it seems impossible to know whether, based on the other fields included (i.e. date of birth, FOSS ID), this report would have also picked up entries and exits for which passport #1 was used.

[53] Considering all of the evidence, I do not think there is sufficient information to say that the Respondent was in Canada during the 100 days in dispute, or that she was not in Canada. What is clear is that: a) the burden of proof was the Respondent's to meet; and b) she was instructed to submit copies of "all passports and/or travel documents (valid, expired and cancelled passports)" covering the Review Period, and failed to do so. She did not argue that this passport was lost or somehow inaccessible to her, but simply that she had a "good reason" for not providing it. In these circumstances, I think it is appropriate to find that the Respondent has not met the numerical test of residency.

[54] In my view, *Lee*, above, cited by the Respondent, is distinguishable. In that case, the Court found that the fact that the Citizenship Judge relied mainly on the ICES, and that the latter did not in and of itself establish the Respondent's residency during the relevant four-year period, was not a

sufficient reason to overturn the decision (see *Lee* at para 38). The Court quoted *Canada (Minister of Citizenship and Immigration) v El Bousserghini*, 2012 FC 88 at para 19 for the proposition that the Citizenship Act "does not require corroboration. It is the responsibility of the original decision-maker, taking the context into consideration, to determine the extent and nature of the evidence required." Had the Citizenship Judge properly considered the evidence in this case and decided that it was sufficient to render a positive decision, I would agree that the Court should not intervene. However, what is at issue here is an error in considering the evidence. It is not the Court's role to say what conclusion the Citizenship Judge would have reached had he or she properly considered the evidence.

[55] In my view, the Citizenship Judge made an error in assessing the evidence, and that error was material to the Decision. It cannot be said that the outcome would not have been different if the error had not been made, because the Respondent has not shown that she met the numerical test of residency in order to qualify for citizenship.

[56] It is not possible to say what the result would have been had the Citizenship Judge been aware of the second passport and its contents. In my view, then, the Decision lacks transparency and intelligibility and must be returned for reconsideration.

[57] The Applicant also argues that it is not clear from the reasons which residency test the Citizenship Judge applied. As the Respondent points out, however, Justice Harrington found in *Hannoush*, above, at para 13, that if the record shows that the physical presence requirement of

1,095 has been met and the citizenship judge did not carry out a qualitative analysis, the inference can be made that the physical presence test was applied:

> 13 However, basing myself on the decision of the Supreme Court in *Newfoundland Nurses*, above, and the very recent decision of the Federal Court of Appeal in SRI Homes, above, if the record shows that the applicant claims to have been present here at least 1,095 days, and no analysis has been done along the lines of the applicant's heart being here although his body was elsewhere, it is reasonable to infer that the physical presence test, the most stringent one, was applied. It has been held on a number of occasions that once it is established that an applicant has been here for 1,095 days, it is not necessary to consider the other tests *(Canada (Minister of Citizenship and Immigration) v. Elzubair*, 2010 FC 298, [2010] F.C.J. No. 330; *Canada (Minister of Citizenship and Immigration v. Salim*, 2010 FC 975, [2010] F.C.J. No. 1219 (QL) and *Imran v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 756).

[58] As Justice Harrington also pointed out in *Imran*, above, at para 22:

> 22 In *Canada (Minister of Citizenship and Immigration) v Salim*, 2010 FC 975, [2010] FCJ No 1219 (QL), I agreed with Mr. Justice Mainville's decision in *Takla* adding, as did Mr. Justice Zinn in *Canada (Minister of Citizenship and Immigration) v Elzubair*, 2010 FC 298, [2010] FCJ No 330 (QL), that if the applicant had been physically present for at least 1,095 days during the relevant period, the residency test had been established, without the need for further inquiry.

[59] In the present case, the Citizenship Judge does not indicate how the Respondent established a minimum of 1,095 days of physical residence in Canada. As set out above, my own review of the record suggests that there is insufficient evidence to support a minimum of 1,095 days. This being the case, the Respondent cannot rely upon *Hannonsh*, above, and *Imran*, above. It is not clear upon which basis the Citizenship Judge concluded that residency had been established. Once again, the Decision lacks transparency and intelligibility on this issue.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is allowed. The Decision is quashed and the matter is returned for reconsideration by a different citizenship judge.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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