

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV-2004-404-007105

BETWEEN KEPTAN AHMADZAI
 Applicant

AND THE ATTORNEY-GENERAL
 Respondent

Hearing: 31 August 2005

Appearances: Michelle Clark for Applicant
 Anna Longdill for Respondent

Judgment: 23 September 2005

JUDGMENT OF HARRISON J

*In accordance with R540(4) I direct that the Registrar
endorse this judgment with the delivery time of
5.00 p.m. on 23 September 2005*

SOLICITORS

Vallant Hooker & Partners (Auckland) for Applicant
Meredith Connell (Auckland) for Respondent

Introduction

[1] Mr Keptan Ahmadzai was born in Afghanistan on 1 January 1964. He arrived in New Zealand on 27 June 2000. The New Zealand Immigration Service granted his application for refugee status on 18 December 2001. It issued a residence permit for him to live here permanently on 25 March 2002.

[2] Mr Ahmadzai has left New Zealand twice since then. On the first occasion he visited Pakistan between 13 June 2002 and 12 December 2002 to trace his wife, six children and other relatives in Afghanistan and to see his sick mother. On the second he returned to Pakistan between 7 May 2003 and 7 September 2003 to assist his wife and children to apply for the necessary visas to travel to New Zealand.

[3] On 3 October 2003 Mr Ahmadzai applied to the Minister of Internal Affairs for a grant of citizenship. On 27 May 2004 the Department recommended that the Minister decline the application because Mr Ahmadzai was not "... throughout the period of three years immediately preceding the date of his application ordinarily resident in New Zealand" (s 8(2)(a) Citizenship Act 1977). The Minister accepted this advice. He declined Mr Ahmadzai's application on 14 July 2004.

[4] Mr Ahmadzai has applied to review the Minister's decision. He says that the Minister erred in law. The relevant facts are not in dispute. The question is one of statutory interpretation.

Minister's decision

[5] The Department has formulated a policy for determining whether a person is ordinarily resident for statutory purposes over the relevant period. An applicant is considered to be clearly able to meet the ordinary residence requirement if: (1) he has been physically resident in New Zealand for a minimum of two out of the three years; (2) he has not had a single absence for more than six months; and (3) he has not entered into a settled lifestyle overseas. In order to determine whether an applicant has fulfilled this last requirement, the policy requires consideration of (a) the reason for the absence (if greater than four months); (b) the applicant's residence

status in the overseas country; (c) whether he resided in one town or city for more than four months; (d) whether he had paid employment during that time; and (e) whether his day to day life was ordered around his residency in that place.

[6] The Department's letter of advice to the Minister relied upon its policy direction that applicants who have been absent for greater than four months during the three year ordinary residence period must be assessed to determine whether or not they have entered into a settled life overseas. The letter recited the factual background summarised above. It recorded also that Mr Ahmadzai had stored his possessions in New Zealand with a friend during both absences, maintained a bank account, retained ownership of his motor vehicle, and continued his membership of the Afghan Association of New Zealand and of Super Taxis Ltd. While he was absent, the company stored his taxi in Auckland.

[7] The Department's letter concluded:

Mr Ahmadzai is clearly able to fulfil each of the requirements for the grant of citizenship under s 8(1) with the exception of the ordinary residence requirement. **Mr Ahmadzai is unable to clearly meet the ordinary residence requirement as he has been absent overseas for two trips, one for more than six months and the second for more than four months during his ordinary residence period. The Department considers that Mr Ahmadzai has not provided sufficient evidence to show he maintained a permanent base in New Zealand while overseas.** It is also considered by the Department that the length and reasons for his travel overseas show that Mr Ahmadzai did not usually live in New Zealand throughout the three years preceding his date of application, and that he entered into a settled lifestyle overseas.

[Emphasis added]

[8] As already noted, the Minister then declined Mr Ahmadzai's application for citizenship. On 28 June 2005 Mr Gary Basham, the Acting Manager Citizenship of the Department, swore an affidavit in answer to Mr Ahmadzai's application for judicial review. Mr Basham said that in reaching his decision:

... the Minister took into account all of the evidence presented to him but, despite the evidence, he was not persuaded that Mr Ahmadzai was able to meet the ordinary residence standard required by the Citizenship Act 1977. On 5 July 2004 the Minister signed the recommendation to decline the grant of New Zealand citizenship to Mr Ahmadzai.

The Minister has consistently held this view in cases of similar nature. The Minister's predecessors have also held this view. It appears that the Minister was of the opinion that there were factors which clearly counted against Mr Ahmadzai in the determination whether he had entered into a settled lifestyle overseas, and he has agreed with the Department's recommendation.

[9] Ms Michelle Clark, Mr Ahmadzai's counsel, has emphasised the hearsay nature of Mr Basham's evidence, and the Minister's failure to provide an affidavit. I shall return to this subject later.

[10] Mr Basham admits that the Department failed to obtain information about Mr Ahmadzai's right to reside in Pakistan indefinitely when advising the Minister on the application. On 23 May 2005 the Department wrote a second letter of advice in almost identical terms to the first, supplemented only by this statement in the narrative:

It is unclear whether or not Mr Ahmadzai had the right to reside in Pakistan indefinitely, however, the Department accepts that given he is a refugee from Afghanistan it is almost certain that he did not have the right to reside in Pakistan indefinitely.

The Minister's decision remained unchanged.

Submissions

[11] Ms Clark cited two authorities in this Court in support of Mr Ahmadzai's application. Both judgments were delivered in the context of reviewing decisions made by statutory bodies about whether a person had remained 'ordinarily resident' in New Zealand for the purposes of entitlement to benefits under s 14 Social Welfare Act 1964. In the first (*Wilson v Social Security Commission* (1988) 1 NZSC 40,146) Tompkins J said this at 40,150:

It will be essentially a question of fact and degree, whether in any particular instance, a person who is out of New Zealand ... has remained ordinarily resident in New Zealand. Although in some cases other factors may predominate, in many the most important factor **will be the person's intention during the period of absence**. If during that period, the person has a firm, clear intention to return to New Zealand when the purpose of the period of absence has ended or has been achieved, then that person may well remain ordinarily resident in New Zealand. Conversely, if that person, although ultimately intending to return to New Zealand, remains overseas

after the specific purpose is no longer applicable, then that person may well cease to fulfil the test. There is little point in attempting any further definition. It should not be difficult in any particular case to determine, by giving the words their ordinary meaning, whether the test is satisfied during the period of the absence.

[Emphasis added]

[12] In formulating this statement of principle, Tompkins J relied upon Ormrod LJ's observation (*R v London Borough of Barnet, Ex Parte Shah* [1980] 3 All ER 679 at 683) that:

We think that the most significant point which emerges from this analysis is that the concept of 'ordinary residence' embodies a number of different factors such as time, intention and continuity, each of which may carry a different weight according to the context in which, and the purpose for which, the phrase 'ordinarily resident' is used in a particular statute.

[13] The Judge also referred to this passage from *Halsbury's Laws of England*, Vol.8, 5th Ed. at 443:

'Ordinary residence' is residence in the ordinary, regular course of life, as opposed to such residence as is casual, temporary or unusual ...

[14] In the second case (*Carmichael v Director-General of Social Welfare* [1994] 3 NZLR 477) Smellie J approved and adopted Tompkins J's statement of principle in *Wilson*, although concluding on the facts that the applicants case were not ordinarily resident in New Zealand at the relevant time.

[15] In reliance on these authorities Ms Clark submitted Mr Ahmadzai was ordinarily resident in New Zealand for the three year period because he always intended to return here from Pakistan.

[16] Ms Longdill mounted a powerful argument for the Minister in answer. She relied upon a later decision by Hammond J (*Yan v Minister of Internal Affairs* [1997] 3 NZLR 450) who did not refer either to *Wilson* or *Carmichael*. The Judge heard an application for a declaration that the Minister had insufficient grounds to justify making an order depriving Mr Yan of New Zealand citizenship (s 19 Citizenship Act 1977). In deciding in Mr Yan's favour, Hammond J adopted a passage from the speech of Lord Scarman on appeal in *Barnet's case (R v Barnet London Borough Council, Ex Parte Shah* [1983] 2 AC 309 at 342-343) as follows:

I agree with Lord Denning MR that in their natural and ordinary meaning the words [ordinarily resident] mean ‘that the person must be habitually and normally resident here, apart from temporary or occasional absences of long or short duration’. The significance of the adverb ‘habitually’ is that it recalls two necessary features ... namely residence adopted voluntarily and for settled purposes... I unhesitatingly subscribe to the view that ‘ordinarily resident’ refers to a man’s abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration.

[17] Ms Longdill emphasised the House of Lords’ reversal of the Court of Appeal’s decision in *Shah* on which both Tompkins J and Smellie J relied in *Wilson* and *Carmichael* respectively (it is unclear why neither judgment referred to the House of Lords decision, given that it had been delivered in 1983). She highlighted Lord Scarman’s discussion of the extent to which the applicant’s state of mind is relevant (*Shah* at 344B-D). There are two essential requirements. One is that the residence is voluntarily adopted. The other is the existence of a degree of settled purpose. His Lordship said this:

... The purpose may be one; or there may be several. It may be specific or general. All that the law requires is that there is a settled purpose... All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.

[18] Ms Longdill also noted Lord Scarman’s criticism of the Court of Appeal for attaching (348A-B):

... too much importance to the particular purpose of the residence; and too little to the evidence of the regular mode of life adopted voluntarily and for a settled purpose, whatever it be, whether study, business, work or pleasure. In so doing, they were influenced by their own views of policy and by the immigration status of the student.

[19] In Ms Longdill’s submission, the proper test is whether or not Mr Ahmadzai could satisfy the Minister that he had voluntarily adopted New Zealand as his place of abode for settled purposes (*Shah* at 343G-H). Ms Longdill also submitted that in the context of the Citizenship Act it is impossible for a person to be ordinarily resident in two places at the same time, acknowledging that Lord Scarman was of the contrary view (*Shah* at 342F-G; 345C-D). In the circumstances it was open to the Minister to reach the view that Mr Ahmadzai had adopted a settled lifestyle in Pakistan. Hence he was ordinarily resident there, not in New Zealand. The Minister had evidence available that Mr Ahmadzai did not retain a residence here; all he did

was to store some personal chattels with a friend, and his bank account was in overdraft when he left New Zealand in June 2002.

[20] Ms Longdill filed a supplementary synopsis to address a point which arose during oral argument; namely, whether the Minister erred in law if there was insufficient evidence to substantiate his decision. That general proposition is well settled. It was reaffirmed recently by the Supreme Court (*Bryson v Three Foot Six Ltd* [2005] NZSC 34 at paras 26-28). Ms Longdill contended that an error of law could only arise in this respect if (a) there was no evidence to support the determination; (b) the evidence was inconsistent with and contradictory to the determination; or (c) the true and only reasonable conclusion contradicts the determination. A party relying on this ground must climb a “very high hurdle” (*Bryson* at para 27). Ms Longdill submitted that Mr Ahmadzai’s case fell well short of crossing this threshold. In particular, she relied on evidence that Mr Ahmadzai remained in one location for the duration of his first period of absence from New Zealand in 2002 and paid rent for four of the six months.

Decision

[21] In *Wilson and Carmichael*, Tompkins J and Smellie J warned against the risks of adopting a judicial construction of a phrase where used in another statute in a different jurisdiction and different circumstances. In *Shah* Lord Scarman stressed the importance of giving words their natural and ordinary meaning where used in their statutory context, and deprecated a construction which was influenced by views of policy. Lord Scarman did, however, reaffirm that a purposive interpretation is permissible. That approach is mandatory in New Zealand (s 5 Interpretation Act 1999), although nothing turns on it in this case.

[22] Mr Ahmadzai applied to the Minister for a grant of citizenship (s 8 Citizenship Act). That status can be acquired also by birth, by descent or in certain specified cases (ss 6, 7 and 9). A grant would bestow upon Mr Ahmadzai all the rights, privileges and responsibilities of citizenship in this country. The legislature has prescribed that a person can apply for a grant if he is over 18 years of age, of full capacity, and satisfies the Minister that he meets a series of stipulated requirements.

Mr Ahmadzai satisfied him that he is entitled to be in New Zealand indefinitely in terms of the Immigration Act 1987; he is of good character; he has sufficient knowledge of the responsibilities and privileges attaching to New Zealand citizenship; he has a sufficient knowledge of the English language; and he intends, if granted New Zealand citizenship, to continue to be ordinarily resident in New Zealand (s 8(2)(b)-(f)). He was only unable to satisfy the Minister that throughout the period of three years immediately preceding the date of his application he was ordinarily resident in New Zealand.

[23] I accept that Lord Scarman's speech in *Shah* provides the most authoritative assistance in this area. I agree with Ms Longdill that the correct test is whether or not Mr Ahmadzai could satisfy the Minister that he had voluntarily adopted New Zealand as his place of abode for settled purposes; that is, he was habitually or normally resident for the three years preceding his application for citizenship 'as part of the regular order of his life' for that time (*Shah* at 343H). But in my judgment the Minister failed to apply this test.

[24] The Minister apparently based his decision on four related and overlapping grounds as follows:

- (1) Mr Ahmadzai's absence on two overseas visits for a total of 10 months was evidence that he was not ordinarily resident in New Zealand over the three year period. This ground is legally erroneous. Absence from New Zealand for a certain period, however long, does not of itself establish that Mr Ahmadzai was not ordinarily resident here. The duration of his absences, whether short or long, is relevant but not determinative (*Shah* at 343G-H). Other factors are also relevant. The Minister failed to undertake the primary inquiry into whether Mr Ahmadzai had voluntarily adopted New Zealand as his place of abode for settled purposes, 'that is, with a sufficient degree of continuity to be described as settled' (*Shah* at 344D), and whether, in this context, his absences were temporary or occasional, regardless of duration (*Shah* at 342A-B);

- (2) Mr Ahmadzai had failed to provide sufficient evidence of a permanent base in New Zealand while overseas. This ground is equally erroneous in law. Again it ignores the primary inquiry into ordinary residence because it relies solely on financial type evidence relevant only to a period of absence. I add that the Minister knew Mr Ahmadzai had come to New Zealand as a refugee. He also knew Mr Ahmadzai had no family members here. He was unlikely to have the financial means to maintain a permanent accommodation base, for example, in Auckland while he went to Pakistan and would have to surrender his rented premises;
- (3) The length and reasons for Mr Ahmadzai's overseas travel show that he did not live here for three years. This ground is a restatement of the first ground and equally erroneous. It suggests that the Minister again misdirected his inquiry into Mr Ahmadzai's absences. As I have said, their length was not determinative. Also, his unchallenged reasons for leaving New Zealand twice, to locate and then arrange for his family to join him in New Zealand, were entirely consistent with adopting New Zealand as his normal abode. It was logical in that context for Mr Ahmadzai to take all necessary steps for the purpose of bringing his wife and children here to live permanently;
- (4) Mr Ahmadzai entered into a settled lifestyle overseas. This ground suggests that the Minister was of the view that an applicant for citizenship cannot be ordinarily resident in two countries at the same time. I respectfully adopt Lord Scarman's opinion to the contrary (*Shah* at 342F-G). In any event, there was no evidence to support this ground which would not of itself be sufficient to support the decision. Moreover, when revising its original recommendation on Mr Ahmadzai's application, the Department accepted that he had no right to reside indefinitely in Pakistan; that is, to enter into a settled lifestyle there.

[25] I am satisfied that the Minister erred in these respects because he abdicated his discretionary power by giving undue weight to a fixed rule – ‘the single absence for more than six months’ policy. There can be no criticism of the Department’s formulation of policy guidelines designed to assist a Minister in deciding a question of residence providing that they do not lead him to err in law. I am satisfied the policy provisions had that effect here.

[26] In my judgment, an inquiry by the Minister in accordance with the correct legal test would have taken into account and given proper weight to, first, the nature and circumstances of Mr Ahmadzai’s arrival in New Zealand and, second, the steps he took in the relevant three year period. Such an inquiry would establish that Mr Ahmadzai (a) came here voluntarily, and was granted refugee status 18 months later; (b) then applied for and obtained a permit of permanent residency; (c) made arrangements for his wife and children to join him here; and (d) purchased assets, principally a taxi which he drove for employment purposes, and opened a bank account.

[27] All these acts were consistent with Mr Ahmadzai’s voluntary adoption of New Zealand as his place of abode for the settled purpose of habitual and ordinary residence here. They were part of the regular order of his life. They provided an objective or tangible measure of whether his purpose in living here in the preceding three years was settled; that is, whether there was a sufficient degree of continuity in his residence in New Zealand to be characterised as ordinary or habitual. In this context the Minister’s inquiry would be whether the purpose of Mr Ahmadzai’s absences was consistent with other evidence relating to his state of residence in New Zealand.

[28] I am satisfied that the Minister erred in law in failing to apply the correct test when determining Mr Ahmadzai’s application for a grant of citizenship. Additionally or alternatively, his decision was erroneous in that it was inconsistent with and contradictory to all the available evidence; it was not one reasonably open to him in the circumstances. Accordingly, I quash his decision declining Mr Ahmadzai’s application on 14 July 2004.

[29] I have earlier referred to Mr Basham's hearsay evidence about the reasons for the Minister's decision. I agree with Ms Clark. A Departmental officer cannot give reliable evidence on this point. The decision is personal to the Minister. It is preferable that he should swear an affidavit when challenged. If he relied upon Departmental advice, and did not take into account any other factors, he should give evidence to this effect. If he is physically unavailable, a Departmental officer should say so. The means used by him in this case, to give reasons in a hearsay way through another party, is unsatisfactory. I also note the contradictory nature of Mr Basham's advice that the Minister took account of all the evidence presented to him "but, despite the evidence, he was not persuaded ...". The only evidence presented by the Department to the Minister was designed to support its recommendation to decline Mr Ahmadzai's application.

Conclusion

[30] Mr Ahmadzai is entitled to:

- a) A declaration that the Minister erred in law when declining his application for New Zealand citizenship on 14 July 2004; and
- b) An order directing the Minister to reconsider Mr Ahmadzai's application.

[31] I trust that counsel are able to resolve the question of costs between them. I assume that Mr Ahmadzai is in receipt of a grant of legal aid. In that event he will not pursue costs. However, if he has met the costs of this litigation from his own financial resources, I record that he would be entitled to costs in accordance with category 2B.

[32] I wish to express my appreciation to both Ms Clark and Ms Longdill for the quality of their submissions, both written and oral.

Rhys Harrison J