**Date: 20080612**

**Docket: T-1165-07**

**Citation: 2008 FC 731**

**Ottawa, Ontario, June 12, 2008**

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

**BETWEEN:**

**SHING TIMOTHY WONG**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

## I. INTRODUCTION

[1] This is an appeal of a Citizenship Judge's decision in which the citizenship application of the Applicant, Shing Timothy Wong, was denied because he had not met the residency requirements under s. 5(1)*(c)* of the *Citizenship Act* (Act). Mr. Wong was born in Hong Kong and is

a citizen of the United Kingdom. In July 1996, the Applicant, together with his wife and two children, entered Canada and were admitted as permanent residents.

## II. BACKGROUND

[2] In September 1996, the Applicant purchased and moved into a home in Thornhill, Ontario, which he continues to own and in which he and his family have resided since that date. In September 1996, the Applicant incorporated his first business in which he was the sole shareholder and director. The corporation's address was the Applicant's home and the business activity is listed in the corporation's records as "consulting". In each of the years 2001, 2002 and 2003, the Applicant received employment income from that corporation.

[3] Commencing in 2001, the Applicant began renting an apartment in Hong Kong which he used when travelling there for business and other activities as disclosed in the documents filed with the citizenship application.

[4] In 2003, the first corporation was dissolved and in 2004, the Applicant incorporated a second company in which he was the sole shareholder and director. The corporate offices were at the Applicant's residence. That business was listed as engaged in "export recycled metal".

[5] The Applicant received no employment income from the corporation in 2004 and received a modest amount of income in 2005.

[6] On June 15, 2005, the Applicant filed an application for citizenship, having previously filed an earlier application which he withdrew. Therefore, the relevant four-year period under the Act for the determination of residence is calculated from June 15, 2001 to June 15, 2005 (the Period).

[7] On May 13, 2007, the Citizenship Judge denied the Applicant's application. The Citizenship Judge defined the issues before him as:

> Have you, the Applicant, accumulated at least three years (1,095 days) of residence in Canada within the four years (1,460 days) immediately preceding the date of your application for Canadian citizenship? I must determine whether you meet the requirements of this Act and the Regulations including the requirement 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.

[8] Notwithstanding the framing of the issue as above, the Citizenship Judge then went on to answer the six questions posed by Madame Justice Reed in the decision *Re: Koo*, [1993] 1 F.C. 286 (T.D.).

[9] In reviewing the questions posed in *Re: Koo* and in particular the question "Does the pattern of physical presence in Canada indicate a returning home or merely visiting the country?", the Citizenship Judge noted that there were 21 separate occasions of absence from Canada and that the absences were described in various documents as either due to "working and tourism" or "business and vacation". In the context of the same question, the Citizenship Judge continued "the onus was on you to establish the physical presence of 1,095 days during the relevant four-year period".

[10] The Citizenship Judge, in further analysing the issue of whether absences were temporary in nature, noted that the Applicant had testified that he had travelled to Hong Kong in part to obtain medical treatment for his son, who is autistic, but that fact was not mentioned in either the application for citizenship or in the residence questionnaire.

[11] In conclusion, the Citizenship Judge held as follows:

> I took into consideration your age, and the length of time it has been since you first landed in Canada, as well as the fact that your wife and children are already Canadian citizens. However, I believe that on the balance of probabilities you have not yet centralized your mode of existence in Canada. You have not "regularly, normally or customarily" resided or lived in Canada. As such, at this time, you have not met the residence requirements of Article 5(1)*(c)* of the Act.

[12] Therefore, the Citizenship Judge did not approve the application for citizenship.

## III. ANALYSIS

[13] The Applicant had raised, as one of the grounds for appeal, the issue of breach of procedural fairness. However, at the hearing, no submissions were addressed to this issue and I am unable to find anything in the record which would suggest any valid basis for considering, much less deciding, this issue.

A. *Standard of Review*

[14] The Respondent has submitted that despite the decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, since the determination of this case is largely based on an assessment of facts, the standard of review is that of the higher end of reasonableness approaching that of patent unreasonableness. In my view, the Supreme Court of Canada did not embark on an analysis of the standard of review in *Dunsmuir* and reduce the standard of review to two tests of correctness and reasonableness merely to have the test of "patent unreasonableness" reappear under another guise.

[15] In my view, in respect of factual matters, the Court should give weight to the role of the Citizenship Judge, the expertise in the organization, the statutory function of the judge and the fact that the judge was in a better position to make assessments of evidence particularly as it relates to credibility. Therefore, a considerable degree of deference within the spectrum of reasonableness is owed to the factual conclusions of the Citizenship Judge.

[16] In many regards, the Citizenship Judge's conclusions are based upon some element of an assessment of credibility or at least consistency in the Applicant's story. For example, the Applicant's reliance on trips to Hong Kong to obtain treatment for his son for the condition of autism is used to explain the number of trips to that area. However, there were only 5 trips which listed autism treatment as the reason for travel out of the 21 foreign trips listed by the Applicant. In none of the records of these other trips submitted to the Citizenship Judge was there a notation that the trip was made, even in part, for the purposes of medical treatment; the reasons listed were business, vacations or tourism. The Applicant's counsel asked the Court to speculate that the

absence of any record of the treatment for autism was based on embarrassment or shame felt by the parents. There is no evidence on this point and the Court is not prepared to speculate or to second-guess the Citizenship Judge on this point.

B. *Legal Errors*

[17] The problem with this decision is not so much with respect to the assessment of facts; the Applicant's record and submissions before the Citizenship Judge in this regard are at best confusing. The problems with this decision rest with the legal analysis conducted by the Citizenship Judge.

[18] With due respect to the Citizenship Judge, I have identified three legal errors which go to the core of the decision and which justify the granting of this appeal.

[19] The first error is that the Citizenship Judge erred by failing to make a finding of whether the Applicant had established residency prior to the Period. My decision in *Canada (Minister of Citizenship and Immigration) v. Xiong*, 2004 FC 1129, held that a citizenship judge must first consider, where the record would support it, whether an applicant has established residence in the time frame before the four-year relevant period and, if so, whether the applicant had maintained that residence for the required amount of time during the relevant period.

[20] There was sufficient material in the record to raise the issue of pre-existing residence but the Citizenship Judge failed to embark on that enquiry. In that regard, the Citizenship Judge erred in law. This is not to suggest that there are no problems with the documents on this issue or certain

inconsistencies in the record. However, in my view it was the obligation of the Citizenship Judge to assess whether residency had been established, particularly where the Applicant and his family had been in Canada for 12 years, owning their own home, where members of the family had become citizens of Canada and to where the Applicant, having travelled from Canada to other points, including Hong Kong, always returned.

[21] The second error of law arises from the importance emphasized by the Citizenship Judge with respect to the number of days of actual physical presence in Canada.

[22] While it is trite law that this Court has interpreted the test of residency in a number of different ways, it is a truly unfortunate result. Justice Lutfy (as he then was) in *Lam v. Canada (Minister of Citizenship and Immigration)* (1999), 164 F.T.R. 177, concluded that it was open to a citizenship judge to adopt any of the tests of residency promulgated in what he described as this Court's conflicting jurisprudence: (1) strict physical presence as described in *Re Pourghasemi* (1993), 62 F.T.R. 122; (2) quality of attachment as set forth in *Re Papadogiorgakis*, [1978] 2 F.C. 208; or (3) centralized mode of living as outlined in *Re: Koo*.

[23] With the greatest of respect, I cannot see how a person's citizenship should be determined on the basis of mere chance by virtue of whichever test a citizenship judge elects to use. This is an area which cries out for resolution as it is impossible to appeal any decision to obtain a final ruling from the Federal Court of Appeal.

[24] The strict physical presence test has become of limited, if any, use and would (if it were the appropriate test) hardly require the involvement of a citizenship judge in the mathematical calculation of physical presence.

[25] In any event, in this case, the Citizenship Judge chose the *Re: Koo* test upon which to base the analysis. However, the Citizenship Judge continued to lay considerable emphasis on aspects of the strict physical presence and the lack of 1,095 days in Canada. In that regard, the Citizenship Judge erred in a manner similar to that found by Justice Heneghan in *Hsu v. Canada (Minister of Citizenship and Immigration)* (2001), 206 F.T.R. 10 at paragraph 7:

> In my opinion, it appears that the Citizenship Judge blended two tests, that is the strict calculation of time with the substantial connection test expressed in *Re: Koo*, [1993] 1 F.C. 286 (T.D.).

[26] Lastly and most importantly, the Citizenship Judge failed to properly consider what is commonly referred to as question 6 in the *Re: Koo* analysis. The sixth question in *Re: Koo* is “What is the quality of the connection with Canada? Is it more substantial than that which exists with any other country?”.

[27] While the courts have recognized that a non-Canadian citizen residing in Canada returning to their home country during the relevant period raises more complex issues in respect of residency than a similar Canadian resident travelling to non-home foreign countries, nevertheless this factor must be approached on its own.

[28] As held by Justice Russell in *Pourzand v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 395, the sixth factor requires the citizenship judge to undertake a comparison to determine whether the applicant's connection with Canada is more substantial than with any other country.

[29] The Citizenship Judge in this case concluded that based upon the frequent absences during the Period, the Applicant continued to have strong ties to Hong Kong. This may well have been based upon such evidence as the rental of an apartment for purposes of business trips and indeed the number of trips taken. However, the Judge failed to consider whether the Applicant had property elsewhere, that he returned to Canada after each of the absences, or that the stays in Hong Kong and other countries were only temporary and work-related. Some of these factors are also relevant to the fifth question in *Re: Koo*, but in any event the Citizenship Judge did not engage in the comparative analysis of connections as required by *Re: Koo*.

## IV. CONCLUSION

[30] For the above reasons, I have concluded that the Citizenship Judge erred in law and that the appeal will be granted. In so finding, I note that the quality of the Applicant's application and records are a source of the adverse factual findings which, on any test of reasonableness, would be sustained. This appeal is granted simply on the basis of the errors of law.

**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.

"Michael L. Phelan"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-1165-07 |
| **STYLE OF CAUSE:** | SHING TIMOTHY WONG<br><br>and<br><br>THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
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