Federal Court Cour fédérale

**Date: 20120614**

**Docket: T-852-11**

**Citation: 2012 FC 756**

**Ottawa, Ontario, June 14, 2012**

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

**BETWEEN:**

**HINA IMRAN**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## REASONS FOR ORDER AND ORDER

***"The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law"***

The Path of the Law, Oliver Wendell Holmes Jr.
10 Harvard Law Review (1897) 457.

[1] I doubt that even Mr. Justice Holmes, after having read the literally hundreds of decisions of this Court on point, would have, with confidence, predicted the outcome of Mrs. Imran's application for citizenship.

[2] The citizenship judge dismissed her application on the grounds that she did not meet the residency requirement. This is the appeal from that decision.

[3] Under section 5 of the *Citizenship Act*, the Minister shall grant citizenship to a permanent resident who, among other things, has “within the four years immediately preceding the date of his or her application, accumulated at least three years of residence in Canada…”

[4] The word “residence” is not defined, which has led to a great deal of mischief and agony over the years. Some citizenship judges have strictly counted the days, while others have taken a more nuanced approach. Decisions may be appealed to this Court. Our judges have not seen eye to eye. Unfortunately, there is no appeal to the Federal Court of Appeal, and Parliament has not seen fit to rectify this lamentable situation.

[5] Mrs. Imran applied for Canadian citizenship 12 August 2008. At that time, she was only physically present 881 days, rather than 1,095, over the preceding four years.

[6] Nevertheless, her application was far from hopeless. Had the citizenship judge applied the decision of Associate Chief Justice Thurlow in *Re Papadogiorgakis*, [1978] 2 FC 208, [1978] FCJ No 31 (QL), after determining that Mrs. Imran was not physically present in Canada for three of the four preceding years, *i.e.* 1,095 days, she would have had to direct her mind to why she was absent. In *Papadogiorgakis*, the applicant was far short of the number of days of physical presence in Canada. The prime reason for his absence was that he was attending university in the United States. Associate Chief Justice Thurlow said that residence:

> …can include, as well, situations in which the person concerned has a place in Canada which is used by him during the period as a place of abode to a sufficient extent to demonstrate the reality of his residing there during the material period even though he is away from it part of the time.

[7] He added:

> A person with an established home of his own in which he lives does not cease to be resident there when he leaves it for a temporary purpose whether on business or vacation or even to pursue a course of study.

[8] The learned judge drew inspiration from the meaning of "residence" in tax law.

[9] On the other hand, the citizenship judge may have followed the decision of Madam Justice Reed in *Koo (Re)*, [1992] 59 FTR 27, [1992] FCJ No 1107 (QL), in which she expanded somewhat upon Associate Chief Justice Thurlow's decision. She concluded that the test was whether it could be said that Canada was the place where the applicant regularly, normally or customarily lives, or in other words whether Canada is the country in which the applicant has centralized his or her mode of existence. She set out a non-exhaustive list of questions which might be of aid in reaching a 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;
>
> b. where are the applicant's immediate family and dependents (and extended family) resident;
>
> c. does the pattern of physical presence in Canada indicate a returning home or merely visiting the country;
>
> d. 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;

e. 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;

f. what is the quality of the connection with Canada: is it more substantial than that which exists with any other country.

**THE DECISION**

[10] The citizenship judge, however, applied the decision of Mr. Justice Muldoon in *Pourghasemi (Re)* (1993), 19 Imm LR (2d) 259, [1993] FCJ No 232 (QL), and held it was necessary for an applicant to be physically present in Canada for 1,095 days during the relevant four-year period. Therefore, her application was denied.

**MRS. IMRAN'S CASE**

*[11]* Counsel for the applicant makes a very powerful argument that the standard of review is correctness; that *Pourghasemi* was wrongly decided, and that the correct approach is the more nuanced one expressed by Madam Justice Reed in *Koo* and more recently by Mr. Justice Mainville, as he then was, in *Canada (Minister of Citizenship and Immigration) v Takla*, 2009 FC 1120, [2009] FCJ No 1371 (QL).

[12] Under this approach, after having found, correctly, that Mrs. Imran had not been physically present for 1,095 days, a further analysis was required, an analysis which was not carried out. The citizenship judge simply listed the absences and the reasons therefore without deciding whether she

had centralized her life here, and, if so, whether the standard set out in *Koo* was satisfied. The recourse Mrs. Imran seeks is that her appeal be allowed and that the matter be referred back to another citizenship judge with directions to apply the test set out in *Koo*. Certainly it is not up to this Court to usurp that function of the citizenship judge.

[13] This lack of comity among our judges led Mr. Justice Lutfy, as he then was, in *Lam v Canada (Minister of Citizenship and Immigration)* [1999] 164 FTR 177, [1999] FCJ No 410 (QL), to hold that it was open to a citizenship judge to adopt any one of the three conflicting lines of jurisprudence, and that if the facts of the case were properly applied to the principles of that approach, we could not hold that the decision was wrong. *Lam* was intended to be a stop-gap measure as Parliament was reconsidering the *Citizenship Act* and it was expected that it would clarify the residency requirement. Unfortunately, that has not come to pass.

[14] In *Chen v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1229, [2001] FCJ No 1693 (QL), Mr. Justice Nadon, as he then was, was of the view that there could not be two correct interpretations of the same provisions of the same statute. However, in that particular case, no matter which test was followed, and he preferred the test enunciated by Mr. Justice Muldoon, the applicant was not entitled to citizenship. Little did he then know that the Supreme Court would later hold that there may be more than one reasonable interpretation of a statute, and that this Court should show deference to the decision maker whose decision is under review if the statute is his or her “home” or a related statute.

## THE MINISTER’S CASE

[15] The Minister points out, correctly, that the citizenship judge clearly stated that she was following *Pourghasemi*, and did follow it.

[16] While it is quite true that in *Takla*, above, Mr. Justice Mainville was of the view that the best test was that enunciated by Madam Justice Reed in *Koo*, Mr. Justice Rennie, in *Martinez-Caro v Canada (Minister of Citizenship and Immigration)*, 2011 FC 640, [2011] FCJ No 881 (QL), set forth cogent reasons why the best approach is that of Mr. Justice Muldoon in *Pourghasemi*.

[17] Notwithstanding these two decisions, this Court has continued to apply *Lam*. Counsel also pointed out that there is disagreement among the members of this Court as to whether a decision of a citizenship judge on the residency issue should be reviewed on the standard of correctness or on the standard of reasonableness.

**<u>ANALYSIS</u>**

[18] If I were unencumbered by the existing case law, I would have held:

a. The residency requirement under the *Citizenship Act* is a mixed question of fact and law, subject to the reasonableness standard of review. "Residence" is not defined and so cannot be isolated from the context in which it is applied.

b. It is unreasonable to simply count the days. There must be consideration as to whether the applicant has centralized his or her life here, and as to why he or she was physically absent for more than one of the four years immediately preceding the application.

c. The appeal would have been granted and the matter referred back to another citizenship judge with appropriate directions.

[19] I would have reached a decision along the lines of *Koo*. The first citizenship appeal I heard was *Mann v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1479, [2003] FCJ No 1875 (QL). Although the citizenship judge purported to follow *Koo*, I held that his findings were patently unreasonable. Ms. Mann left Canada with her husband and mother-in-law on what was to be an eight-day trip. However, they stole her Indian passport and her Canadian visa and left her stranded. It took her years of confrontation with Canadian consular officials, and a successful judicial review by this Court, before replacement Canadian documents were issued.

[20] In *Pourghasemi*, Mr. Justice Muldoon said that the purpose of the *Citizenship Act* was to ensure that everyone:

> …at least has been compulsorily presented with everyday opportunity to become "Canadianized". This happens by "rubbing elbows" with Canadians in shopping malls, corner stores, libraries, concert halls, auto repair shops, pubs, cabarets, elevators, churches, synagogues, mosques and temples - in a word wherever one can meet and converse with Canadians - during the prescribed three years.

[21] I commented, however, in *Mann* at paragraph 25:

> Furthermore, if the purpose of the Act is that the applicant rub elbows with Canadians, Ms. Mann did rub elbows, and rather sharp elbows at that, with Canadian Immigration officers, then had to deal with a Canadian lawyer, and through him with this Court.

[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.

[23] By characterizing the residency issue as a mixed question of fact and law, subject to the reasonableness standard of review, I have avoided the necessity of offering any opinion as to whether deference should be owed to a citizenship judge on a pure question of law arising out of his or her "home" statute, the *Citizenship Act*.

[24] When it comes to pure questions of law decided by this Court, no deference whatsoever is owed by the Federal Court of Appeal; that is how it should be. In *dela Fuente v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 186, [2007] 1 FCR 387, the Court of Appeal had to deal with the meaning of "at the time of that application" in section 117(9)(d) of the *Immigration and Refugee Protection Regulations*. Some judges of this Court were of the view that the application timeframe ended when it was filed at the visa office, while others were of the view that it extended to the time when permanent residence status was required.

[25] As Mr. Justice Marc Nöel stated at paragraphs 38 and 39:

> [38] The question which needs to be clarified is the time that is referenced in the phrase "at the time of that application". Is it the time when the application is filed at the visa office as the applications judge held, or is it the time that runs from the filing of the application to the time when permanent resident status is acquired as was held in *Dave*?
>
> [39] Recognizing that the phrase can reasonably be read either way, I have concluded that the interpretation proposed in *Dave* is to be preferred for the following reasons.

[26] However, the same lack of deference does not apply in review by this Court of a decision of a tribunal based on its "home" or related statute. In *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654, Mr. Justice Rothstein, with whom Chief Justice McLachlin and Justices LeBel, Fish, Abella and Charron concurred, said at paragraph 34:

> […] it is sufficient in these reasons to say that, unless the situation is exceptional, and we have not seen such a situation since *Dunsmuir*, the interpretation by the tribunal of "its own statute or statutes closely connected to its function, with which it will have particular familiarity" should be presumed to be a question of statutory interpretation subject to deference on judicial review.

The reference to *Dunsmuir* is a reference to *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190.

[27] However, the concurring reasons of Justices Binnie and Deschamps, on the one hand, and Justice Cromwell, on the other, were somewhat different.

[28] This issue was considered in great depth by Mr. Justice Martineau in *King v Canada (Attorney General of Canada)*, 2012 FC 488, [2012] FCJ No 537 (QL). He quoted from the late professor Chaïm Perelman (1912-1984) at paragraph 92:

> The diversity of laws is proof of our ignorance of true justice. That which conforms to reason cannot be just here and unjust there, just today and unjust tomorrow, just for one and unjust for another. That which is just in reason should, like that which is true, be so universally. Disagreement is a sign of imperfection, of a lack of rationality.
>
> If two interpretations of the same text are reasonably possible, it is because the law is ambiguous, therefore imperfect. If the law is clear, then at least one of the two interpreters disputes in bad faith. In any case, disagreement is a scandal, due either to the imperfection of the legislator or to the deceptive subtlety of the lawyers. The innate sense of justice, which each equitable judge certainly possesses, should permit the rapid reestablishment of correct order.

[29] My prophecy of what the Supreme Court will do, in fact, is that it will revisit the standard of review to be applied to tribunals interpreting their "home" statutes, just as it revisited the standards of judicial review in *Dunsmuir*.

**<u>THE DECISION</u>**

[30] To bring this matter to an end, notwithstanding his decision in *Martinez-Caro*, Mr. Justice Rennie had earlier held in *Murphy v Canada (Minister of Citizenship and Immigration)*, 2011 FC 482, [2011] FCJ No 596 (QL), at paragraph 8:

> Simply put, it is not an error for a Citizenship judge to assess residency by applying only the physical presence test. The jurisprudence as it currently stands provides Citizenship judges with the discretion to choose any of the three tests. Clearly, some

> Federal Court judges prefer one test to another, but Citizenship judges retain the ability to choose and apply any of the three tests.

He remained of that view in *Martinez-Caro* as he said that "Chief Justice Lutfy's caution about the deleterious impact of conflicting interpretations on the administration of justice remains valid and accurate to this day" (para. 21) and went on to say at paragraph 26:

> I conclude therefore, that the Citizenship Judge adopted and correctly applied a legally accepted test to the facts as found. Consistent with *Lam* this is sufficient to dispose of this appeal. It is however, also my view that the test of physical presence is the correct interpretation of the residency provision, and that decisions by Citizenship Court judges on this issue should be reviewed on the standard of correctness.

[31] In *Canada (Minister of Citizenship and Immigration) v Saad*, 2011 FC 1508, [2011] FCJ No 1801 (QL), Madam Justice Bédard stated at paragraph 14:

> […] Even though I consider it unfortunate that the fate of some applications for citizenship may depend, in part, upon the identity of the citizenship judge who processes the application and the interpretation of the concept of residence that that judge endorses, I believe that the three interpretations that have been traditionally accepted as reasonable are still reasonable and will continue to be so in the absence of legislative action…

[32] Although judicial comity, which encourages predictability, has certainly taken a beating in citizenship matters, I think it preferable to continue to follow *Lam*, as did Justices Rennie and Bédard, and many others, including myself, notwithstanding different opinions as to how the residency requirement should be interpreted. It is bad enough that there is a high level of uncertainty at the citizenship judge level, without adding further uncertainty at the Federal Court level. If I, as a follower of *Koo*, were to grant this appeal and send it back with directions, the next judge, a

follower of *Pourghasemi*, might set aside a decision based on *Koo* and send it back with different directions. As this Court has said time and time again, the answer lies with Parliament.

[33] As I stated during the hearing, no matter the outcome of the case, it would not be appropriate to award costs.

## ORDER

**FOR REASONS GIVEN;**

**THIS COURT ORDERS that**:

1. The appeal is dismissed.

2. The whole without costs.

"Sean Harrington"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | T-852-11 |
| **STYLE OF CAUSE:** | IMRAN v MCI |
| **PLACE OF HEARING:** | Toronto, Ontario |
| **DATE OF HEARING:** | June 11, 2012 |
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| **DATED:** | June 14, 2012 |

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