Federal Court  Cour fédérale

Date: 20131018

Docket: T-1959-12

Citation: 2013 FC 972

Ottawa, Ontario, October 18, 2013

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

And

FATIMA NAVEEN

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

1. Introduction

[1] This is an application by the Minister of Citizenship and Immigration [the Minister] under section 14(5) of the *Citizenship Act*, RSC 1985, c C-29 [the *Act*] and section 21 of the *Federal Courts Act*, RSC 1985, c F-7, to appeal and have set aside the decision of a Citizenship Judge [the Judge] dated August 31, 2012 [the decision], wherein the Judge granted the Respondent's application for citizenship pursuant to section 5 of the *Act*.

[2] The Applicant claims that the Judge failed to consider whether the Respondent had established a residence in Canada before assessing whether her physical absences could count towards residency and that there is no evidence on the record that indicates she could have met this requirement, with which submissions I am in agreement.

[3] I am in further agreement with the Applicant's other arguments that there was no consideration of the issue of dependency of the Respondent or evidence to support such a finding. Similarly, I agree that the Judge misapprehended the evidence in concluding that the Respondent always returned to Canada at every opportunity, when the evidence appears to be to a contrary effect.

[4] With respect to any error in the residency tests, most significantly I find that, although the Judge could take guidance from *Re Papadogiorgakis*, [1978] FCJ No 31 (QL), [1978] 2 FC 208 (TD) [*Papadogiorgakis*], he failed to properly discern its intention and import in imputing to it an interpretation of residency bearing no relationship to the facts and principles enunciated in that case.

[5] However, the misinterpretation of the *ratio* of *Papadogiorgakis* dates back more than 20 years giving rise to alternative residency tests and therefore no fault can be attributed to the Judge for the misstatement of its principles.

[6] When *Papadogiorgakis* is carefully analyzed, there is no basis for any divergence in residency tests. The case states a requirement to adhere to the three-year physical residency rule

except in limited exceptional circumstances. These generally do not permit the imputation of residency in situations exceeding six to nine months absence from the country, except on the basis of conclusive evidence proving that the Applicant's living circumstances demonstrate the reality of a centralized mode of residence in Canada even though temporarily living abroad.

2. The Facts

[7] The Respondent in this case, Ms. Fatima Naveen, was born in Pakistan in 1982. In 2001, aged 19, she was accepted as an international student at Pomona College in Claremont, California. She studied there until graduating in 2005. During that time she spent a semester at Oxford University, UK, in 2003 and two months as an intern at the Aga Khan University Hospital in Karachi, Pakistan, in 2003-2004. She was offered a graduate fellowship at Cambridge University, UK, in 2005 but declined it. She applied to medical schools in Canada but was rejected by all of them. She was accepted by Harvard Medical School, and went there. After graduation, she continued on to a residency program in Boston, Massachusetts.

[8] The Respondent's father was admitted to Canada as a permanent resident in the Entrepreneur class in August 2004. He and the Respondent's mother and brother have settled in Richmond Hill, Ontario. Her parents both work in Ontario, while her brother was completing undergraduate studies at McGill University at the time of application. Her sister died in a tragic laboratory accident at the University of California, Los Angeles (UCLA) in early 2009 and is buried in Ontario.

[9] Ms. Fatima Naveen visited Canada in December 2002-January 2003 and again in March 2003. On September 17, 2004, she became a permanent resident of Canada. She spent four days in Canada, then returned to college in California. After that date, she visited her family in Canada during school breaks and spent other vacation time in the U.S. and in Pakistan. She never worked in Canada, but did work in the U.S. as a college residence advisor, a teaching assistant, and a research mentor. By the date of application, the parties calculate that she had spent either 143 days or 159 days, as stated alternatively in her documents, being physically present in Canada in the preceding four years.

[10] On December 15, 2007, Ms. Fatima Naveen applied for citizenship. Although she fell short of the *Act*'s requirement (at section 5(1)(*c*)) of 1,095 days of physical presence in Canada in the four years preceding her application, she submitted that she had centralized her ordinary mode of living in Canada with her family during her years as a student in the U.S., had demonstrated many indicia of establishment in Canada, and had always had the intention of settling in Canada upon completion of her medical training.

[11] The Citizenship Judge accepted these arguments, commenting:

> Based on Justice Thurlow's analysis in *Re Papadogiorgakis*, I am satisfied the client has met the residency requirement of the *Act*. She resides in Canada wither family and is studying medicine at Harvard Univ. She returns to Canada at every opportunity she gets and plans to practise medicine in Canada. Approved.
> [. . .]
> Based on Justice Thurlow's analysis in *Papadogiorgakis* and Justice Reed's analysis in *Re Koo*, I am satisfied that she has centralized her mode of residence in Canada. She has strong ties to Canada, in fact stronger than any other country in the world. Despite her lack of physical presence, I am satisfied that based on above analysis she meets the 5(1)(*c*) requirement of the Act.

> Note: While studying in USA, she has always returned to Canada at every opportunity she gets and is planning to practice medicine in Canada.
> [. . .]

3. Issues

[12] The issues raised by the applicant are whether:

a. The Citizenship Judge erred by failing to have regard to the evidence that demonstrated that the Respondent had never established residence in Canada, before assessing whether her physical absences could count towards residency in Canada; and

b. The Citizenship Judge erred by blending the residency tests - which in turn raises the issue of the proper interpretation of *Papadogiorgakis*.

4. Standard of review

[13] The Respondent submits that a Citizenship Judge's determination as to residency is reviewable on the more deferential standard of reasonableness. In the recent case of *Martinez-Caro v Canada (MCI)*, 2011 FC 640 [*Martinez-Caro*], where the applicant had argued that the definition of residency in the *Act* did not require physical presence in Canada, Justice Rennie analyzed the issue of citizenship residency requirements in detail. He concluded at paras 36-52 that the proper standard of review is correctness where the Citizenship Judge is interpreting the statutory residency requirement, as opposed to applying it. I agree. The criteria for citizenship are of broad general importance to the legal system, as citizenship status is integral to the operation of many statutes.

[14] However, the other issues put before the court in this case concern the Citizenship Judge's assessment of the evidence and the application of the chosen tests, which attract a standard of review of reasonableness.

5. Analysis

A. Initial Residency, Dependency on Family and Continued Intention to Become a Canadian Citizen

[15] The present case must be set aside on several grounds. The first problem with the Citizenship Judge's decision is its failure to consider whether the Respondent demonstrated by objective facts that she had initially established a residence in Canada. It is common ground in this Court that the initial establishment of a residence is a prerequisite for a citizenship application (*Jreige v Canada (MCI)*, [1999] FCJ No 1469 (QL) (TD) at paras 23-25; *Ahmed v Canada (MCI)*, 2002 FCT 1067 at paras 4-5; *Canada (MCI) v Camorlinga-Posch*, 2009 FC 613, at para 18; *Canada (MCI) v Takla*, 2009 FC 1120, at para 50). Given the very limited initial stay of the Respondent in Canada, the Judge was required to consider this issue, and failed to do so.

[16] Secondly, this case falls into what I would describe as an "outlier" subset of residency cases involving students with limited physical presence in Canada due to their attendance at universities abroad. For instance, the situation is it similar to that in *Re Cheung*, [1990] FCJ No 11 (QL) (TD), where the appellant left Canada four days after establishing a permanent residence at her family's home to complete her medical degree and subsequently spent only a total of 81 days in Canada and

1,240 days in Hong Kong in the period before applying for Canadian citizenship, yet was successful in the application.

[17] In the student cases, the courts have minimized the importance of physical presence in Canada as a secondary consideration. Instead they have treated an inferred intention to return to Canada as the salient factor. In effect, these decisions piggyback the students' residency on that of their families. So long as there is a strong family nexus and a state of dependency of the student, the requirements of section 5(1)(*c*) are considered to have been met.

[18] The dependency of the student on the family is a key factor contributing to the implied intention to return to Canada. See for instance *Ng v Canada*, [2001] FCJ No 55 (QL) (TD), where Justice Hansen allowed the appeal on the basis that the Citizenship Judge did not consider the issue of the dependency of the student on the parents who were paying for the applicant's education. At paragraph 10 of its reasons the Court stated:

> 10 In the present case, the Citizenship Judge did not acknowledge there is case law that speaks to situations similar to this one: where the applicant is a dependent student of parents in Canada, who were paying for the applicant's education and to whose home the student returns during school vacations. [. . .]

[19] The same complaint is made in this appeal, except that this time it comes from the Minister. There is no evidence on the situation of dependency of the Respondent on her parents to subsidise her education or otherwise.

[20] The case law also points out that in situations of students studying abroad, there is a requirement that they demonstrate a commitment to return to Canada at every opportunity, see *Chan v Canada (MCI)*, [1998] FCJ No 1796 (QL) (TD); *Canada (MCI) v Sze*, [2000] FCJ No 351 (QL) (TD). In this regard, the Citizenship Judge misapprehended the evidence in concluding of the Respondent "[w]hile studying in USA, she has always returned to Canada at every opportunity she gets…".

[21] The evidence demonstrates that during at least two summers of her medical residency, the Respondent did not return to Canada immediately, remaining absent for the majority of the time in question. Given her very short initial stay in the country, any failure to return to Canada when opportunities availed themselves undermines the implied intention to establish continued residency in Canada.

[22] For all of the foregoing reasons, the Citizenship Judge's decision must be set aside. If I were to stop at this point I would send the matter back with directions to properly determine the three circumstances described, failing which the Respondent's request for Canadian citizenship must be rejected. However, I have greater concerns with this case which relate to the appropriate residency test to apply in citizenship cases.

B. The Need for Significant Physical Presence in Canada

[23] While I am able to conclude that the Citizenship Judge's decision must be set aside for reasons unrelated to which test to apply, I think it necessary for me to decide on the appropriate

definition of "residence" in section 5(1)(*c*) in order to provide directions to the Judge conducting the new hearing.

[24] I have already alluded to my discomfiture with the line of cases that permit the acquisition of Canadian citizenship with little physical presence in the country such as are the facts of this case. The Applicant made submissions urging me to adopt a strict interpretation of the residency requirement in section 5(1)(*c*). This argument was in reference to the fact that the Federal Court has interpreted "residence" by invoking three tests commonly referred to as the "Canadianization test", the "centralized mode of existence test" and the "quality of attachment test".

[25] I have difficulty distinguishing between the latter two tests except by the result. These were the source of complaint about the Judge's blending of tests. Either the second or the third test would permit the acquiring of Canadian citizenship with a significantly reduced physical presence of less than the three years stipulated in section 5(1)(*c*).

[26] Moreover, as there is no right of appeal of the Federal Court's decisions, the issue remains unsettled leaving Judges free to choose which of the three they prefer to apply to determine an appeal. This untenable situation has received much comment from the Court. See Chief Justice Crampton's comments in *Huang v Canada (Minister of Citizenship and Immigration)*, 2013 FC 576, at para 2, seeking legislative intervention. See also the recent suggestion by Justice Hughes in *Dina v Canada (MCI)*, 2013 FC 712, at para 9, that the Citizenship Commission should consider referring a question to this Court under section 18.3(1) of the *Federal Courts Act*, noting that any decision of this Court could then be appealed to the Federal Court of Appeal.

[27] Fortunately, my decision on which test to apply is much assisted by the reasons of Justice Rennie in *Martinez-Caro*. Justice Rennie provides persuasive grounds supporting an interpretation of residency in section 5(1)(*c*) that would necessitate the demonstration of a sufficient degree of "Canadianization" by physical presence in the country, as previously described in *Re Pourghasemi*, [1993] FCJ No 232 (QL) (TD) [*Pourghasemi*]. He explains that on a plain and ordinary reading, Parliament has expressly defined the amount of latitude allowed. Parliament has prescribed that over the course of 1,460 days, applicants for citizenship must accumulate at least 1,095 days of residence; this is not a test of their intentions, but a quantitative analysis of their actions. Furthermore, the statute expressly provides for exceptional circumstances in which days spent outside Canada nonetheless count towards residence, and also expressly provides at section 5(4) for a procedure to recommend to the Minister that the requirement for physical presence be waived "in cases of special and unusual hardship or to reward services of an exceptional value to Canada." This provision would be redundant if a Citizenship Judge could simply waive the requirement.

[28] I also agree with Justice Rennie's reliance upon the analysis of Justice Nadon referred to in *Martinez-Caro* at para 29:

> 29 Nadon J.'s analysis of the statute is compelling. On a plain and ordinary reading of the statute, as a whole, Parliament has expressly defined the degree or extent of latitude or flexibility to be granted to putative citizens. Residence speaks of presence, not absence. In my view, the qualitative tests do not adequately take into account either the literal meaning of the section nor the requirement that the statute be read as a whole. The qualitative approach also leaves unanswered how or under what principle of statutory interpretation the Court imports into otherwise precise language greater absences or periods of non-residency greater than those already expressly defined by Parliament. There is, in sum, no principle of interpretation that would support the extension of periods

> of absences beyond the one year expressly provided by Parliament. Absent an issue of constitutionality the language of Parliament prevails and which a court, having reached a conclusion as to its interpretation, must apply.

C. Re-analysis of Re Papadogiorgakis and Re Koo

[29] Despite the foregoing endorsement of *Martinez-Caro*, it nevertheless remains that Justice Thurlow, a highly respected Court of Appeal judge, admittedly sitting as Associate Chief Justice in the former Trial Division at the time, set out his interpretation of the residency terms of the *Citizenship Act* which was supposedly subsequently applied in cases such as *Re Koo*, [1992] FCJ No 1107 (QL) (TD) [*Koo*]. In this regard, I am in agreement with Justice Rennie's conclusion that *Papadogiorgakis* and the definition of residency by Justice Thurlow setting out what other courts describe as the "centralized mode of existence" test was the point at which the jurisprudence in this court began to diverge (*Martinez-Caro*, at para 14).

[30] This said, it would appear that a major element of the problem of the divergence in the assorted residency tests stems from early inaccurate interpretations of *Papadogiorgakis*. These cases greatly understated the number of days of physical presence of the applicant Mr. Papadogiorgakis in Canada, besides ignoring the Court's indication that only a very limited and conservative exception would be made to the three-year physical presence residency rule.

[31] The first and most significant mischaracterization of *Papadogiorgakis* is the conclusion that the applicant was found to meet the residency requirements of section 5(1)(*c*) with only 79 days of physical presence in the country. This misstatement starts as early as the *Koo* decision and is

repeated throughout numerous cases, including recent ones such as in *Canada (MCI) v Salim*, 2010 FC 975 at para 12, and *Martinez-Caro*, at para 14.

[32] The same misapprehension of *Papadogiorgakis* appears to have been made at paragraph 5 of *Pourghasemi*: "Even so, the judgment of the former Associate Chief Justice in *Papadogiorgakis* stretches the meaning of paragraph 5(1)(*c*) of the present Citizenship Act almost beyond recognition, if its clear purpose be recognized and invoked." *Pourghasemi*, of course, is the foundational case enunciating the "Canadianization" test.

[33] While recognizing some of the ambiguities in the reasons, a careful examination of *Papadogiorgakis* reveals that Mr. Papadogiorgakis had as many as 921 days in Canada, leaving him only 174 days, about six months, short of the 1,095-day requirement.

[34] Because of the manner that the facts were set out in *Papadogiorgakis*, there is some scope for confusion in the calculation of the number of days the applicant resided in Canada. I set out below portions of its relevant paragraphs with my count of days the applicant was present in Canada [my emphasis throughout].

> [3] [. . .] He entered Canada on a student visa on September 5, 1970, and was admitted for permanent residence on May 13, 1974. [. . .] [H]e established a relationship with a friend and the friend's parents, and in May 1974 moved to their home at Tusket, Nova Scotia. From that time until January of 1978, he had a room in their home. [. . .]

Prior to permanent residence = 1,188 days, September 5, 1970 – December 6, 1973 [September 5, 1970 was Day 248 of 365; December 6, 1973 was Day 340 of 365, so 117 days in 1970 + 365 days in 1971 + 366 days in 1972 + 340 days in 1973].

> [4] The material period for the purposes of his application is from December 6, 1973, to December 6, 1977. In the first part of that period, that is to say, from December 6, 1973, to May 13, 1974, a matter of some 158 days, he was resident in Canada but of this he can count only 79 days towards the three years necessary to meet the requirement, as this was residence before his admission to Canada for permanent residence.

= 79 days, December 6, 1973 – May 13, 1974.

> [5] Between May 13, 1974, and December 6, 1977, he was absent from Canada on a number of occasions. First he attended the university in Massachusetts from January 28, 1976, to mid-June of that year [1976], a period of some four and a half months constituting the university semester. He then returned to Tusket, Nova Scotia, but from July 28 to August 28 [1976] was absent on a vacation.

= 625 days, May 13, 1974 – January 28, 1976 [May 13, 1974 was Day 133 of 365; so 232 days in 1974, 365 days in 1975, and 28 days in 1976].

= About 43 days, mid-June 1976 – July 28, 1976 [June 15, 1976 was Day 167 of 366; July 28, 1976 was Day 210 of 366].

> [6] From early in September to mid-December [1976] and from late January 1977 to August 1977, he again attended the University of Massachusetts but returned to Tusket for the [1976] Christmas

> break. He also returned there on two weekends of each month while attending the university. His only purpose in going to Massachusetts was to pursue his studies and, in fact, he emerged at the end of the period, consisting of some thirteen months in all, with degrees as Master of Business Administration and Master of Hotel, Restaurant and Travel Administration. He was not employed there at any time.

= About 10 days, August 28, 1976 – early in September 1976 [logically, at least five days to make it into September, and likely until the end of the Labour Day weekend on Monday night, September 6, 1976].

= About 40 days, mid-December 1976 – late January 1977 [December 15, 1976 was Day 350 of 366; Monday, January 24, 1977, the beginning of the last full calendar week in that month, was Day 24 of 365].

= About 48 days; four days (two weekends) per month over the course of twelve months, September 1976 to August 1977.

> [8] Between October 4, 1977, and December 3, 1977, he was absent from Canada on a further vacation.

= Up to 73 days, August 1977 to October 4, 1977 [August 1, 1977 was Day 213 of 365; October 4, 1977 was Day 286 of 365].

= 3 days, December 3, 1977 to December 6, 1977.

Total: 79 + 625 + 43 + 10 + 40 + 48 + 73 + 3 equals as many as 921 days, leaving him only 174 days, about six months, short of the 1,095-day requirement.

[35] In fact the 79 days alluded to at para 2 of *Koo* – " [. . .] In the *Papadogiorgakis* case, a student who had been physically present in Canada for only 79 days during the relevant four-year period was determined to have fulfilled the residence requirement" – actually described the 158 days that occurred at the beginning of the four years before the applicant became a permanent resident, which count as half days under the *Act*.

[36] Residency based on no more than 79 days of physical presence in lieu of a statute-decreed 1,095 days constitutes a radical interpretation by any measure in a legal system that traditionally functions inductively and by incremental steps. It also constitutes a radical difference even from 921 days. It is clear, that on the day count alone, Justice Thurlow did not intend to rewrite the statutory residency requirements in this manner.

[37] Secondly, in reconsidering *Papadogiorgakis,* one is struck by the inconsistency of the reference in *Koo* to Justice Thurlow's having found residency in *Papadogiorgakis* based on a mere 79 days of physical presence in Canada and Justice Thurlow's statements at para 15 that his interpretation of the statute "may not differ much from what is embraced by the exception referred to by the words "(at least usually)" in the reasons of Pratte J. [*Blaha v Canada (MCI),* [1971] FC 521, hereinafter "*Blaha*"] but in a close case it may be enough to make the difference between success and failure for an applicant."

[38] I set out the entirety of paragraph 15 of Justice Thurlow's decision because of the importance I attribute to it in ascribing meaning to his conclusions:

> 15 While the statute there under consideration was an income tax law, this discussion appears to me to be general enough to be of some assistance in interpreting the meaning of the words here in question. At the same time, what Pratte J. refers to as the spirit of the citizenship legislation must, I think, be borne in mind. It seems to me that the words "residence" and "resident" in paragraph 5(1)(b) of the new Citizenship Act are not as strictly limited to actual presence in Canada throughout the period as they were in the former statute but 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. This may not differ much from what is embraced by the exception referred to by the words "(at least usually)" in the reasons of Pratte J. but in a close case it may be enough to make the difference between success and failure for an applicant
>
> [Emphasis added]

[39] I interpret Justice Thurlow's statement as establishing a precedent intended to be little different from the interpretation of residency as pronounced in *Blaha* except in a "close case". This interpretation is supported by the fact he refers to similar circumstances before the amendment "where it would make a difference".

[40] Thirdly, in the same paragraph Justice Thurlow also made reference to the fact that residence and resident were "not as strictly limited to actual presence in Canada throughout the period as they were in the former statute". Reading this in context, I interpret to mean Justice Thurlow was indicating that residency was to be strictly construed, but not to the same degree.

[41] Fourthly, I also attach much significance to Justice Thurlow's statement that imputed residency reflects the "reality" of residing in Canada. In describing the need to demonstrate the "reality" of residence, Justice Thurlow has in fact set a very high standard, which is tantamount to conclusive or very persuasive proof, such as was before him that Mr. Papadogiorgakis had conclusively demonstrated the reality of his residence in Canada during his absence. I therefore interpret Justice Thurlow's reference to the reality of residency, in the context of his other statements, as placing strict limits on the capacity of the court to impute the equivalence of physical presence: the Court must be satisfied that the applicant's conduct demonstrates conclusively the reality of the person's equivalence of being resident in Canada for three years, despite his or her absences.

[42] Fifthly, and a point which is highly relevant to the Court's debate whether the residency test should be based on "Canadianization", I point out that Mr. Papadogiorgakis was, by any measure required by the *Act*, thoroughly Canadianized prior to embarking on his studies abroad.

[43] This is clearly established by the facts of *Papadogiorgakis* as found at paragraph 3 of Justice Thurlow's reasons, which I fully cite below:

> [3] The appellant was born in Crete and is now 25 years of age. He is not married and has no family or kin living in Canada. He entered Canada on a student visa on September 5, 1970, and was admitted for permanent residence on May 13, 1974. During that period he attended Acadia University at Wolfville, Nova Scotia. In the first year and a half, he lived in residence at the university, later in a rooming house in Wolfville, and in his third year he shared an apartment at Wolfville along with three other persons. In his fourth year, he lived at Grand Pré, Nova Scotia. During the summer recesses, he worked on a ferry running from Yarmouth, Nova Scotia, to Portland, Maine. In the same period, he established a relationship with a friend and the friend's parents, and in May 1974 moved to

> their home at Tusket, Nova Scotia. From that time until January of 1978, he had a room in their home. He lived there when in Canada and he returned there whenever he had been out of Canada. He paid no rent for the room but contributed to the expenses of the household. He was regarded as one of the family and considered the home to be his Canadian home. Most of his personal property remained there when he was away but at such times the family also made use of the room. Since 1973, he has been a co-owner of a parcel of land nearby.
>
> [Empasis added]

[44] I would submit on these facts that the applicant was considered to have already undergone sufficient *de facto* Canadianization to meet the objectives of the legislation, even if he failed to meet the *de jure* requirements during the relevant application period. Attending and living at a Canadian university for four years, working in Canada, establishing a close relationship and living with a Canadian family, besides always returning to his only home set up in Canada in the intervals between U.S. academic semesters, surely meets what any court could prescribe of as a sufficiently Canadian experience to meet the objectives of section 5(1)(*c*) of the *Act*.

[45] In addition, a young man of limited means investing his savings in property in Canada is singularly different from, for instance, a well-off foreign national buying up a stake in the country as one of several residencies. I submit that this evidence is further indicative of a "real" intention to establish a residence in Canada.

[46] While I recognize that no reference was made by the Court to these latter facts apart from their initial description, I cannot imagine that they did not play a role in Justice Thurlow's conclusion that Mr. Papadogiorgakis had demonstrated the "reality" of establishing a central mode

of residency in Canada. In any event, they make up the underlying facts upon which the *ratio decidendi* of the case is based.

[47] In summary therefore, in *Papadogiorgakis* the Court stated that: (1) it was a modest change to the previous strict interpretation of residency; (2) the applicant had physically resided in Canada during five-sixths, or more than 80 percent, of the three year period required; (3) the applicant had in "reality" resided in Canada for an additional three years before the commencement of his citizenship determination period and had already undergone extensive *de facto* Canadianization; and (4) as well, the applicant led other probative evidence demonstrating what the Court meant by centralizing his ordinary mode of living in Canada, including his total integration into our most Canadian of institutions - those of family and education - before he left for university in the United States.

[48] In determining the precedential value or *ratio decidendi* of a case, I would submit that its starting point is its factual foundation. By that, I mean that if a court seeks to apply a principle from a case, the extent to which new facts may be analogized to those in the precedent is a primary consideration. The greater the distinction between the factual situations, the more tenuous is the precedential value of the case being relied on. This precept applies at every level of the courts, although obviously statements of principle from higher courts provide more latitude for wider application.

[49] In light of the precautionary and limiting statement of Justice Thurlow, it would appear that past case law relying on *Papadogiorgakis* has, in many instances, greatly extended its application to

factual situations beyond its circumstances and its clearly conservative language to cases that it could not even remotely be said to stand for.

[50] Its principles state an initial requirement of a physical presence in Canada of five-sixths of the three-year period. The remaining time required to meet the strictures of the *Act* may be attributed to the applicant only if supported by probative evidence meeting the rigorous standard of demonstrating the reality of a centralized ordinary mode of residency in Canada based on circumstances that are analogous in effect to those in *Papadogiorgakis*.

[51] It is further my respectful view that *Papadogiorgakis* should be followed pursuant to the principles of comity unless a judge is convinced that the prior decision is wrong and can advance cogent reasons in support of this. In this respect, Justice Marc Noel of the Federal Court of Appeal, in *Allergan Inc v Canada (Minister of Health)*, 2012 FCA 308, summarized the principles of comity at paragraph 47 as follows:

> [47] In the Federal Court, the above passage has been referred to as authority for the proposition that while the decisions rendered by colleagues are persuasive and should be given considerable weight, a departure is authorized where a judge is convinced that the prior decision is wrong and can advance cogent reasons in support of this view (*Dela Fuente v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 992 (CanLII), 2005 FC 992, para. 29; *Stone v. Canada (Attorney General)*, 2012 FC 81 (CanLII), 2012 FC 81, para. 12).

D. Extrinsic Evidence on the Purpose of Section 5(1)(c)

[52] In applying an interpretation of *Papadogiorgakis* which imposes a rigorous standard to partially replace the necessity of physical presence to establish residency, it is also appropriate to consider extrinsic evidence on the interpretation of section 5(1)(*c*).

[53] When first faced with the divergence in the lines of reasoning that had developed since *Papadogiorgakis*, Justice Reed in *Koo* examined the House of Commons debate regarding the amendment to the legislation. She concluded that there was little to support a watered-down interpretation of residency; indeed the opposite reasoning was evident. She says at para 7:

> **7** In some decisions it has been suggested that the changes in the Citizenship Act which were made in 1978 [S.C. 1976-77, c. 52, s. 128] lead to the conclusion that Parliament intended that physical presence for the whole three-year period was not required. This is said to be related to the removal from the Act of qualifications based on domicile. I have read the Parliamentary debates and committee proceedings of that period and can find nothing to substantiate that conclusion. Indeed, quite the contrary seems to be the case. The requirement of three-year residence within a four-year period seems to have been designed to allow for one year's physical absence during the four-year period. Certainly, the debates of the period suggest that physical presence in Canada for 1,095 days was contemplated as a minimum. In any event, as has been noted above, the jurisprudence which is now firmly entrenched does not require physical presence for the whole 1,095 days.
>
> [Emphasis added]

[54] I believe it is useful to particularize Justice Reed's comment that the debate suggested three years of physical presence was contemplated as a minimum. For the most part, the comments are recorded in Committee. They indicate that the concern was entirely about reducing the physical

presence requirement from five to three years. The government defended using three years on the basis that communications now made it easier to learn the essentials of being a Canadian citizen. There were also statements that bringing the residency requirement down to three years devalued the meaning of being a Canadian citizen, which would not be appreciated unless earned. Nothing in these debates either from the government side or other parties was to the effect that, beyond lowering the time requirement from five to three years, physical presence in Canada should be otherwise diminished as the test for residency.

[55] The following (from *House of Commons Debates*, 30th Parl, 1st Sess, Nos VI, IX, and X (1975-1976)) is a short description of the nature of the Committee discussions which, as indicated, expressed concern with the reduction of the residency requirement from five to three years.

> The 1977 *Citizenship Act* was introduced as Bill C-20 on October 10, 1974 (page 5983). The Secretary of State, Mr. Faulkner, introduced the second reading on May 21, 1975 (page 5983). Mr. Faulkner commented that one of the changes "which make Bill C-20 a more liberal piece of legislation than the current Citizenship Act" (page 5985), was the reduction of the residence period from five years to three. He explained that the development of highly sophisticated systems of telecommunications linked potential citizens to events across the country and beyond, permitting them to acquire a genuine understanding of Canada faster (page 5985).
>
> Resuming discussion on December 8, 1975, Mr. Epp (Provencher) stated that "All of us should ask ourselves whether we have given immigrants an adequate opportunity to adapt to the Canadian way of life." (Page 9803). He sought a demonstration of the fact that three years was "the time that is necessary for immigrants to adapt socially, economically and culturally." (Page 9804).
>
> Mr. Brewin (Greenwood) stated that "In our view, three years residence in Canada is enough to determine if an applicant has adequate knowledge of Canada, of the responsibilities and privileges of citizens, and of one of the official languages." (Page 9805).

Mr. Gilbert (Broadview) endorsed the reduction to three years because "people who come to Canada have to pay taxes – income tax, sales tax, municipal tax, and so on – so within a very short time [i.e. three years] they should have the full rights, obligations and privileges of a Canadian citizen." (Page 9816).

Mr Friesen (Surrey-White Rock) suggested that "This seems to be the day when everything is instant. [. . .] Now we have moved to instant citizenship; citizenship made easy." (Pages 9822-9823). He argued that if citizenship was a right, "it ought to be a right as soon as they land here" (page 9823), but if it was a privilege, "the host country has a responsibility for establishing criteria for the welfare of both the immigrant, or the applicant, and the host country itself." (Page 9823).

Mr. Knowles (Norfolk-Haldimand) said that many immigrants came from cultures not too dissimilar to that in Canada, referring "particularly to Great Britain, France, or even Germany and other European countries" (page 9825). However, for "immigrants from the Far East" (page 9825), "To expect these people in three years to assimilate a culture which is so different from their own is asking too much." (Page 9825). As well, the people who had had to wait five years for their citizenship would not look kindly on their compatriots who were able to get it after only three years (page 9825). Shortening the wait would depreciate the value of citizenship (page 9825).

Mr. McCain (Carleton-Charlotte) stated that "The purpose of a term of eligibility is obvious." (Page 9829) It was to give the country the time to appraise the individual and decide whether this was "a builder who will add to our structure of Canada." (Page 9829). Five years was not too long to assess this.

When debate resumed on December 10, 1975, Mr. Andre (Calgary Centre) argued that "The thesis the minister proposed is that we live in a modern age with modern communications, and that therefore what took people five years to learn five years ago they can now learn in three years. I suggest that is a very questionable thesis." (Page 9911).

Mr. Scott (Victoria-Haliburton) agreed that five years "is not too long a time for any person to be asked to live in our society and to learn why we are the way we are, and why we place such a high value on our citizenship status." (Page 9912).

> Mr. Ritchie (Dauphin) also opposed the reduction to three years, considering that "If citizenship means anything, surely it has to be earned." (Page 9914). Five years was not too long a time in which to understand Canadian traditions. Immigrants from third world countries, especially, often had no knowledge of the democratic process and wanted to come here and promote Marxism and Communism (page 9915). They were "entirely different from the traditional immigrants of western Europe." (Page 9915). Besides, keeping the period at five years ensured that they would see at least one election before voting themselves (page 9915).
>
> In the final round of discussions, on January 27, 1976, Mr. Prud'homme (Saint-Denis) endorsed the reduction to three years, given that Canada is "a country where communications are so fast, where it is easy for everyone to have a full knowledge of our institutions" (page 10366).
>
> [Emphasis added]

[56] From the foregoing, it is clear that the government never had any concept of a possible residency requirement below three years and had it suggested otherwise, it could not have offered any logical ground for a shorter residency period. I conclude that the extrinsic evidence strongly supports an interpretation of the *Act*, and by that I include Justice Thurlow's reasoning in *Papadogiorgakis*, which holds that exceptional circumstances are required to establish residency in the absence of physical presence less than three years.

E. Recent Reconsideration by Parliament of the Court's Debate on Residency

[57] While not extrinsic evidence of the same nature that can be used to interpret the purpose and thereby the meaning to be given legislation, it is also noteworthy that a 1994 report of the Standing Committee on Citizenship and Immigration [the Committee] (House of Commons, Standing Committee on Citizenship and Immigration, *Canadian Citizenship; A Sense of Belonging* (June

1994) (Chair: Judy Bethel) [*Canadian Citizenship; A Sense of Belonging*]) considered not only section 5(1)(*c*), but the appropriateness of the Federal Court's decisions truncating the requirements of physical presence to establish residency.

[58] The Committee began by noting the divergence in decisions that had occurred in the Federal Court. It thereafter considered the arguments of immigration lawyers and consultants that international business imperatives of their permanent resident clients could not be met if they were continually required to be resident in Canada.

[59] The Committee, after having "considered these arguments carefully" (*Canadian Citizenship; A Sense of Belonging*, at page 11), concluded that the definition of residency in the new *Act* should require "a significant degree of physical presence preceding a citizenship application" (*Canadian Citizenship; A Sense of Belonging*, at page 12). Thereafter, it specifically endorsed the decision in *Re Pourghasemi*, including the passage on Canadianization, saying that this "is not something one can do while abroad, <u>for Canadian life and society exist only in Canada and nowhere else.</u>" [Emphasis in the original.] (*Canadian Citizenship; A Sense of Belonging*, at page 11).

[60] While its recommendations did not lead to legislation changing the residency test, in favour of any test, the Committee did unanimously endorse a rigorous physical presence test for the determination of citizenship residency requirements. The inability of Parliament to resolve this issue may be seen by the fact that no amendment was made to resolve what was clearly an unacceptable situation of having three irreconcilable tests competing with each other and being used regularly to determine residency.

[61] I would respectfully submit that the extrinsic evidence endorses a continuing legislative purpose of section 5(1)(*c*) that would impose either a significant physical residency requirement very nearly approaching three years, or, as the exception to the rule, some other truly analogous circumstance that can stand in for Canadianization, such as was seen in *Papadogiorgakis*, via *de facto* Canadianization

F. Schooling Outside of Canada

[62] Coming back to the present case, the issue going forward is whether there should be an exceptional residency rule for students in immigrant families who have set up their apparent place of residence in Canada at their parent's residence and then leave Canada for a significant amount of time.

[63] If one tries to make the case that the time spent by students who attend universities around the world in those countries that share democratic principles and political and cultural experiences with Canada constitutes Canadianization, then this is to admit that Canada is no different from other countries for the purposes of citizenship or for what it stands for.

[64] I am satisfied that our history and unique circumstances have created a Canadian character and institutions that are significantly distinct and different from those of other countries, including that of our neighbours to the south, despite all that we share with them.

[65] In a comment that I admit may exceed the bounds of judicial notice, I am particularly of the view that the intrinsic values of Canadians based upon attitudes of respect for others and a willingness to accommodate cultural, social and economic challenges to resolve our differences is an essential characteristic of being a Canadian. I am in agreement with Justice Muldoon in *Pourghasemi*, at para 6 that being a Canadian is something that cannot be readily learned, but only experienced by living here because "Canadian life and society exist only in Canada and nowhere else".

[66] As for adult students becoming Canadianized through some process of osmosis by the Canadianization of their parents or family members, while the parents' efforts to adopt Canada as their country is evidence of the determination and support the children will receive to follow in their parents' footsteps, this cannot replace the need for the adult sons and daughters themselves to come into contact and participate with Canadians in their daily lives. Indeed, *Papadogiorgakis* would suggest that living with an established Canadian family is an example of a criterion to demonstrate the "reality" of a centralized mode of residency sufficient to replace the physical absence of actually living here.

[67] In summary, the Judge in this matter did not misdirect itself in attempting to base its decision on Justice Thurlow's analysis in *Papadogiorgakis*. The misapprehension, as I would respectfully describe it, has occurred in many instances in other cases in failing to comprehend the essence of the Court of Appeal Judge's decision. Accordingly, I am satisfied the Respondent has not met the residency requirements of the *Act*, which generally should be in accordance with the

interpretation of *Papadogiorgakis* described in paragraph 49 above and other passages in these reasons to the same effect.

6. Conclusion

[68] The decision of the Judge is set aside as requested by the applicant Minister, to be disposed of by a different panel in accordance with my directions above concluding that the Respondent has not met the residency requirements of the *Citizenship Act*.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is granted.

"Peter Annis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1959-12

STYLE OF CAUSE: THE MINISTER OF CITIZENSHIP AND IMMIGRATION v FATIMA NAVEEN

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JULY 8, 2013

REASONS FOR JUDGMENT AND JUDGMENT: ANNIS J.

DATED: OCTOBER 18, 2013

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