Federal Court  Cour fédérale

Date: 20110128

Docket: T-1073-10

Citation: 2011 FC 46

Ottawa, Ontario, January 28, 2011

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

TINGMEI HAO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The issue in this case is whether, in considering an application for Canadian citizenship, the Citizenship Judge erred in applying one of several tests for determining the residency requirements that have been previously approved by this Court. Recently, some judges of this Court have adopted the view that just one of these tests should prevail. This would, undoubtedly, avoid inconsistency in the administration of the statute. Should an appeal from the Citizenship Judge's decision be granted when the judge chose to apply one test over another and the decision is not otherwise unreasonable?

BACKGROUND

[2] This is an appeal pursuant to section 14(5) of the *Citizenship Act*, R.S.C. 1985, c. C-29 of the decision made on May 18, 2010 by Citizenship Judge, Robert D. Watt, refusing the applicant's application for citizenship. Such appeals proceed by way of application based on the record before the citizenship judge and are governed by the *Federal Courts Rules* pertaining to applications: Rule 300 (c); *Canada (Minister of Citizenship and Immigration) v. Wang*, 2009 FC 1290, Imm. L.R. (3d) 184. There are no further appeals from decisions of this Court. If the matter is not sent back for redetermination, an unsuccessful applicant who meets the statutory criteria may reapply.

[3] The applicant, a citizen of China, arrived in Canada with her parents as a permanent resident on February 3, 2003 when she was 13 years of age. In the subsequent six years, she was repeatedly absent from Canada for prolonged periods of time, the first beginning just 17 days after her arrival. During her absences, the applicant visited relatives and attended high school in China. She attended a secondary school in Vancouver, BC from September 2004 through October 2006 and completed grades 10 and 11 there. For much of 2007, the applicant was in China. During that time she finished high school in her hometown of Tianjin. Returning to Canada, she pursued post-secondary education and applied for citizenship on January 3, 2009. A hearing was conducted before the Citizenship Judge on March 31, 2010. The applicant was informed of the judge's decision and reasons in a letter dated May 18, 2010.

DECISION UNDER APPEAL:

[4] The Citizenship Judge used the period between January 3, 2005 and January 3, 2009 to calculate the applicant's residency in Canada.

[5] The Citizenship Judge noted that he relied on the analytical approach of Justice Francis Muldoon in *Re Pourghasemi* (1993), 62 F.T.R. 122, 19 Imm. L.R. (2d) 259, in which it was deemed necessary for a potential citizen to establish that he or she has been physically present in the country for a total of 1095 days during the four years preceding the application for citizenship.

[6] The Citizenship Judge calculated that the application showed a presence in Canada of 972 days with a shortfall of 123 days from the 1095 that would amount to three of the preceding four years. He concluded that the applicant's frequent travel to China to visit family, including a terminally ill grandfather, or to undertake and complete high school studies, prevented the applicant from meeting the minimum requirement for physical presence in Canada. He therefore concluded that Ms. Hao did not meet the requirements for citizenship as stipulated in paragraph 5(1)(c) of the *Citizenship Act*.

[7] Citizenship Judge Watt considered that the object and purpose of paragraph 5(1)(c), as discussed in *Pourghasemi*, is to ensure that individuals seeking citizenship become "Canadianized" by "rubbing elbows" with Canadians in the normal routine of everyday living. Being present in the country for this period of time would allow the applicant to observe and grow accustomed to Canadian society and to its values. Not to have such experiences would effectively allow a person

"who is still a foreigner in experience, social adaptation, and often in thought and outlook" to be granted citizenship.

[8] On the information available to him, the Citizenship Judge also determined that this was not a case to make a favourable recommendation for a discretionary grant of citizenship under subsections 5(4) and 15(1) of the *Act*. In his view, there were "inadequate circumstances of special and unusual hardship or services of an exceptional value to Canada" to warrant such a recommendation. This discretionary determination was not challenged on this application.

ISSUE:

[9] As noted above, the sole issue on this application, apart from the question of costs, is as follows:

> Is there one correct test to be used by a citizenship judge in determining whether the applicant met the residence requirement under subsection 5(1)(c) of the *Citizenship Act*?

RELEVANT STATUTORY PROVISONS:

[10] Section 5(1)(c) sets out the method of calculating the length of residence, for permanent residents seeking citizenship, but does not define the term:

Grant of citizenship	Attribution de la citoyenneté
5. (1) The Minister shall grant citizenship to any person who	**5.** (1) Le ministre attribue la citoyenneté à toute personne qui, à la fois :
[…]	[…]
(*c*) is a permanent resident within the meaning of subsection 2(1) of the	*c*) est un résident permanent au sens du paragraphe 2(1) de la *Loi sur l'immigration et la*

Immigration and Refugee Protection Act, and has, within the four years immediately preceding the date of his or her application, accumulated at least three years of residence in Canada calculated in the following manner:	*protection des réfugiés* et a, dans les quatre ans qui ont précédé la date de sa demande, résidé au Canada pendant au moins trois ans en tout, la durée de sa résidence étant calculée de la manière suivante :
(i) for every day during which the person was resident in Canada before his lawful admission to Canada for permanent residence the person shall be deemed to have accumulated one-half of a day of residence, and	(i) un demi-jour pour chaque jour de résidence au Canada avant son admission à titre de résident permanent,
(ii) for every day during which the person was resident in Canada after his lawful admission to Canada for permanent residence the person shall be deemed to have accumulated one day of residence	(ii) un jour pour chaque jour de résidence au Canada après son admission à titre de résident permanent

ANALYSIS:

[11] The parties agree that the overall standard of review to be applied in an appeal from a citizenship decision is reasonableness. The weight of Federal Court jurisprudence, both prior to and subsequent to the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, supports that conclusion. See for example: *Chen v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 85 at para. 6; *Canada (Minister of Citizenship & Immigration) v. Ryan*, 2009 FC 1159 at paras. 13-16.

[12] Justice James Russell described the consensus in *Pourzand v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 395, 71 Imm. L.R. (3d) 289 at paras. 19-20:

> [19] There has been general consensus in the jurisprudence of this Court that the applicable standard of review for a citizenship judge's determination of whether an applicant meets the residency requirement, which is a question of mixed fact and law, is reasonableness *simpliciter* (*Canada (Minister of Citizenship and Immigration) v. Chang*, 2003 FC 1472; *Rizvi v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1641; *Chen v. Canada (Minister of Citizenship and Immigration*), 2006 FC 85; *Zhao v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1536). In light of the Supreme Court of Canada's recent decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9 [Dunsmuir], wherein the Court collapsed this standard and the patent unreasonableness standards into one standard of reasonableness, I find that the applicable standard of review as regards the Citizenship Judge's determination of whether the Applicant met the residency requirement is reasonableness.
>
> [20] With respect to the alleged factual errors, a number of pre-Dunsmuir authorities from this Court held that the patent unreasonableness standard was to be applied to a citizenship judge's findings of fact. Considerable deference is owed to citizenship judges' findings of fact, as they have access to the original documents and an opportunity to discuss the relevant facts with the applicant. Thus, applying Dunsmuir, these findings are also reviewable on a reasonableness standard. I note, however, that even if the patent unreasonableness standard had been applied when reviewing the Citizenship Judge's findings of fact in the present case, my findings would have been the same.

[13] While there has been and continues to be general agreement that the standard of review of a citizenship decision is reasonableness, judges of this Court have disagreed as to how the residency requirement was to be interpreted. This stems in part from the fact that the *Federal Courts Rules* formerly required that these appeals be heard *de novo* rather than by application. Thus, it was

necessary, prior to changes in the *Rules*, for a judge of this Court hearing an appeal from a citizenship judge's decision to make a fresh determination as to whether the statutory requirements had been met by the claimant. In so doing, the Court had to determine what was meant by "resident" ("résidence") in paragraph 5(1)(c) of the *Act*. With the change in the *Rules* to treat these appeals as applications, to set aside a decision of a citizenship judge requires a finding of reviewable error: *Canada (Ministre de la Citoyenneté et de l'immigration) v. Tovbin* (2000) 10 Imm. L.R. (3d) 306, 190 F.T.R. 102.

[14] The interpretation of the residency requirement which may be described as the most generous to an applicant who has not been physically present in Canada for three of the preceding four years is that exemplified by Associate Chief Justice Arthur Thurlow's decision in *Papadogiorgakis (Re)*, [1978] 2 F.C. 208. There it was held that a person with an established home in Canada can leave for extended periods and still be regarded as a resident of Canada. In Associate Chief Justice Thurlow's opinion, the question to be determined is whether the person has centralized his or her mode of living in Canada through social relations and other interests. It is the quality of the attachment to Canada, rather than the number of days actually spent here, that is important to those who subscribe to this view.

[15] A narrower interpretation of the legislation is reflected in Justice Muldoon's decisions in *Pourghasemi (Re)*, above, and *Harry (Re)* (1998), 144 F.T.R. 141, 77 A.C.W.S. (3d) 933. Justice Muldoon held that the wording of the *Act* is clear. It requires a physical presence in Canada for three years in the four years prior to the application. Justice Muldoon felt strongly that the Court should not adopt an interpretation inconsistent with the plain language of the statute to

accommodate applicants who were not prepared to spend three out of four years in the country prior to claiming citizenship.

[16] Occupying what may be characterized as the middle ground is Justice Barbara Reed's analysis in *Koo (Re)* (1992), 59 F.T.R. 27, 19 Imm. L.R. (2d) 1. Justice Reed accepted Associate Chief Justice Thurlow's view in *Papadogiorgakis* that persons may have centralized their existence in Canada without being physically present for three out of the four years. Justice Reed set out six, non-exhaustive questions to determine whether the person regularly, normally or customarily lived in Canada during the preceding four years.

[17] The "centralized existence test" assessed by Justice Reed's six questions has come to be the preferred standard used by citizenship judges to determine whether an applicant has satisfied the residence requirement. Justice James O'Reilly described the test in *Canada (Minister of Citizenship and Immigration) v. Nandre*, 2003 FCT 650, 234 F.T.R. 245, at paragraph 21 as a qualitative standard to be applied when a person has not met the physical test. In his view, the connection to Canada would have to be quite strong for absences to be considered periods of continued residency.

[18] This qualitative assessment appears to have been encouraged by the Minister by, among other things, providing standardized forms for the citizenship judges which set out the six *Koo* questions as factors to be considered in making the residency determination.

[19] While it is sometimes said that there are three tests of residence, there are effectively only two: strict physical presence or residency as determined by the *Koo* qualitative factors.

[20] Notwithstanding the dominance of the *Koo* test and the change in the manner in which these appeals are heard, the use of the physical presence standard to determine residence has continued to be accepted by this Court. Justice Allan Lutfy (now Chief Justice), considered the matter after a change in the Court's *Rules* to treat these appeals as an application rather than a *de novo* hearing. In *Lam v. Canada (Minister of Citizenship & Immigration)* (1999), 164 F.T.R. 177, 87 A.C.W.S. (3d) 432, Justice Lutfy held that it was open to the citizenship judge to adopt either of the conflicting interpretations represented by the *Koo* test or by *Pourghasemi*, so long as the judge properly applied the principles of the chosen approach to the facts of the case.

[21] When *Lam* was decided, legislative proposals to amend the *Citizenship Act* were before Parliament in Bill C-63. If adopted in the form tabled, Bill C-63 would have expressly required that physical presence serve as the test of residence. Justice Lutfy considered that the conflict in the jurisprudence would presumably be resolved when Bill C-63 was enacted. In the interim, he reasoned, it was not appropriate for judges on appeal to substitute their different opinions of the residency requirement for those of the citizenship judges. He considered that deference was owed to the special knowledge and experience of the citizenship judge, particularly "during this period of transition". That is, until the proposed amendments were adopted by Parliament.

[22] As it turned out, Bill C-63 was not enacted. However, similar proposals are once again before Parliament in the form of Bill C-37, *An Act to Amend the Citizenship Act* (2010), introduced on June 10, 2010. Bill C-37 remains at the first reading stage as of the date of writing.

[23] This Court has, until recently, consistently followed the position stated in *Lam.* See for example: *Canada (Minister of Citizenship and Immigration) v. Wall*, 2005 FC 110, 45 Imm. L.R. (3d) 32; *Canada (Minister of Citizenship and Immigration) v. Zhou*, 2008 FC 939; *Canada (Minister of Citizenship and Immigration) v. Ntilivamunda*, 2008 FC 1081; *Canada (Minister of Citizenship and Immigration) v. Jeizan* 2010 FC 323.

[24] The determination of residency by citizenship judges has involved a two stage process. A threshold determination is made as to whether residence has been established in Canada. If it has not been established, the matter ends. If residence has been established, the second stage requires a determination as to whether the applicant's residency satisfies the statutorily prescribed number of days. It has remained open to citizenship judges to choose either of the two jurisprudential schools represented by *Pourghasemi* and *Papadogiorgakis/Koo* in making that determination so long as they reasonably applied their preferred interpretation of the statute to the facts of the application before them.

[25] I note that this situation attracted expressions of concern from the Court. Indeed, Justice Muldoon recognized that the conflicting interpretations of the residency requirement created what he described at paragraph 22 of *Harry*, as a "scandalous incertitude in the law". In *Lin v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 346, 21 Imm. L.R. (3d) 104 at paragraph 19, Justice Eleanor Dawson (now of the Federal Court of Appeal) was moved to comment that "[t]here can be no more than one correct interpretation of paragraph 5 (1) (c)". She echoed the comments of Justice Marc Nadon, as he then was, in *Chen v. Canada (Minister of Citizenship and Immigration)* 2001 FCT 1229, 17 Imm. L.R. (3d) 222, "that justice and fairness will no longer be achieved by the

approach suggested in *Lam, supra*". The situation, Justice Dawson stated at paragraph 21, "can only be remedied by Parliament clearly expressing its will with respect to the residence requirement".

[26] Absent Parliamentary action in the interim, the *status quo* in this regard has recently been called into question.

[27] In *Canada (Minister of Citizenship & Immigration) v. Takla*, 2009 FC 1120, 359 F.T.R. 248, Justice Robert Mainville (now of the Federal Court of Appeal) conducted a thorough analysis of the jurisprudence relating to the standard to be applied in an appeal from a citizenship judge's decision. He concluded, at paragraphs 38 and 39 of his reasons, that the characteristics of the reasonableness standard were particularly applicable in this context but that the Court owed only a qualified deference to a citizenship judge's determination of compliance with the residence requirement. Justice Mainville considered that it was now appropriate to settle on one interpretation of paragraph 5(1)(c): that the centralized mode of living in Canada test established in *Koo*, above, and the six questions set out therein for analytical purposes, should become the only test of residency.

[28] In comments at paragraphs 41 and 47 of his reasons in *Takla*, Justice Mainville indicates that on a plain reading of the legislation he would have preferred the physical presence test required by the *Pourghasemi* interpretation. I agree with Justice Mainville that this interpretation appears to be what Parliament intended when it enacted paragraph 5(1)(c) and provided that a person need not be actually resident in Canada for one of the four years prior to the application. A reasonable inference from a reading of the *Act* as a whole is that Parliament intended a one year period to be

sufficient to accommodate an applicant's necessary absences while he or she was establishing residency in this country.

[29] Notwithstanding his reading of the legislation, Justice Mainville thought it necessary to resolve the continuing divergence of views as to the correct interpretation of the statute in favour of the *Koo* test. He did so, Justice Mainville explained, because *Koo* had become the preferred standard and because it was preferable to promote a uniform approach to the interpretation and application of statutory language. In support of the latter conclusion, Justice Mainville cited *Attorney General of Canada v. Mowat*, 2009 FCA 309, 312 D.L.R. (4th) 294, appeal to the Supreme Court of Canada reserved (December 13, 2010) [2009] S.C.C.A. No. 545 (QL).

[30] *Mowat* is one of several cases that have addressed the issue of consistency in administrative decision making following the decision of the Supreme Court of Canada in *Dunsmuir*, above.

[31] Prior to *Dunsmuir*, the prevailing view in the jurisprudence appeared to be that where the standard of review was not correctness, the Courts should not intervene to resolve inconsistencies in a tribunal's interpretation of its enabling statute. A lack of unanimity was considered to be the price to pay for the decision-making freedom and independence given to tribunal members: *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756 at para. 94; *Essex County Roman Catholic Board v. Ontario English Catholic Teachers' Association* (2001), 56 O.R. (3d) 85 at paras. 29 and 30 (C.A.); *National Steel Car Ltd. v. United Steelworkers of America, Local 7135* (2006), 278 D.L.R. (4th) 345, 218 O.A.C. 207 at para. 31 (C.A.); *Hydro*

Ottawa Ltd. v. I.B.E.W., Local 636 (2007), 85 O.R. (3d) 727 at para. 59 (C.A.); *Ottawa Police Assn. v. Ottawa Police Services Board* (2008), 233 O.A.C. 51 at para. 30.

[32] A refinement of this approach in the cases was that judicial interference was warranted where operational conflicts made it impossible to follow inconsistent decisions: *British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd.*, [1995] 2 S.C.R. 739 at para 53; *Chapman v. Canada (Minister of National Revenue M.N.R.)*, 2002 FCT 655, 221 F.T.R. 126.

[33] Following *Dunsmuir*, several courts have suggested that in applying the reasonableness standard, there should be a different approach to the determination of whether deference is owed to administrative decision makers who differ in their interpretations of the applicable legal principles. In *Abdoulrab v. Ontario (Labour Relations Board)*, 2009 ONCA 491, 95 Admin. L.R. (4th) 121 at paragraph 48, while the decision did not turn on the question, Justice Russell Juriansz of the Ontario Court of Appeal offered the following observations:

> From a common sense perspective, it is difficult to accept that two truly contradictory interpretations of the same statutory provision can both be upheld as reasonable. If two interpretations of the same statutory provision are truly contradictory, it is difficult to envisage that they both would fall within the range of acceptable outcomes. More importantly, it seems incompatible with the rule of law that two contradictory interpretations of the same provision of a public statute, by which citizens order their lives, could both be accepted as reasonable.

[34] Justice Kathryn Feldman of the same Court expressed similar views in *Taub v. Investment Dealers Association of Canada*, 2009 ONCA 628, 311 D.L.R. (4th) 389. She stated, at paragraph 67:

> I agree with Juriansz J.A. that it accords with the rule of law that a public statute that applies equally to all affected citizens should have a universally accepted

> interpretation. It follows that where a statutory tribunal has interpreted its home statute as a matter of law, the fact that on appeal or judicial review the standard of review is reasonableness does not change the precedential effect of the decision for the tribunal. Whether a court has had the opportunity to declare the decision to be correct according to judicially applicable principles should not affect its precedential status. As in *Abdoulrab*, it is not necessary to decide the issue in this case.

[35] Justice Feldman characterized the changing view of the concept of deference in the following terms at paragraph 24 of her reasons in *Taub*:

> It has been said that where the standard of review is not correctness, on issues within its expertise an administrative tribunal has "the right to be wrong": e.g. Air Canada v. International Assn. of Machinists and Aerospace Workers, [1978] O.J. No. 1053 (Div. Ct.), at para. 11. In my view, Dunsmuir has made it clear that if this was ever true, it no longer is. Where there is a question that is reviewable on the reasonableness standard, a decision that is found to be unreasonable will in virtually every case for that reason be wrong. If a decision deserves deference because of the process by which it was reached and because the result is a reasonable one, then it will not be wrong. As I stated above, the administrative law concept of deference is not accorded on the basis of deference to an exercise of quasi-judicial discretion, but on the basis of respect for an experienced decision-maker with particular expertise who has engaged in a process and reached an outcome that has been demonstrated to warrant that deference.

[36] These statements in *Abdoulrab* and *Taub* were cited with approval by the Federal Court of Appeal in M*owat*. *Mowat* concerned a determination by the Canadian Human Rights Tribunal that it had the authority to award costs to a successful complainant. The question had not been answered consistently by the Tribunal and had been the subject of diverse opinions in the Federal Court. The Court of Appeal found, at paragraphs 47-51, that the application judge erred in choosing reasonableness as the standard of review. Because of the public interest mandate of the Tribunal and the public interest nature of the legislation, the issue was a general question of law of central importance to the legal system as a whole. It was also one that was outside the specialized area of the Tribunal’s expertise. Thus, it called for the application of the correctness standard. Applying that

standard and generally recognized principles of statutory interpretation, the Court of Appeal found that the *Canadian Human Rights Act* did not empower the Tribunal to award costs.

[37] At paragraph 45 of *Mowat*, citing the comments from the Ontario Court of Appeal decisions reproduced above, Justice Carolyn Layden-Stevenson, for the Court, noted that:

> There is much to be said for the argument that where there are two conflicting lines of authority interpreting the same statutory provision, even if each on its own could be found to be reasonable, it would not be reasonable for a court to uphold both.

But *Mowat* was not decided on this basis. The Court of Appeal, applying the correctness standard, found that the tribunal had erred in its interpretation of the governing statute. As Justice Layden-Stevenson noted at paragraph 97, quoting from *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board),* [2006] 1 S.C.R. 140 at para. 51, the "mandate of the court is to determine and apply the intention of Parliament without crossing the line between judicial interpretation and legislative drafting".

[38] In this case, it has not been argued that the citizenship judge's interpretation of the legislation calls for the application of the correctness standard and a finding that the Citizenship Judge's interpretation was wrong in law. Indeed it would have been difficult for the applicant to assert that proposition given Justice Mainville's remarks in *Takla* and those of several other judges of this Court, that a plain reading of the statute supports the physical presence interpretation.

[39] I would have had difficulty finding that the question at issue is one of general law that is of central importance to the legal system as a whole and outside the adjudicator's specialized area of

expertise: *Dunsmuir*, above, at para. 60. In my view, the combination of an expert tribunal and a question of law within that tribunal's expected range of expertise should result in deference, even in the face of a statutory right of appeal.

[40] It was argued in this case that there are several considerations which favour a finding that the decision was unreasonable. These include the fact that the transition referred to in *Lam,* above, has not come to pass as Parliament has failed to deal with the issue and it is no longer reasonable to adhere to the strict interpretation. Moreover, the inconsistent interpretations of the residency requirement used by citizenship judges result in uncertainty in the application of the law to individual claimants.

[41] I agree that these are important considerations and that the reasoning in the *obiter* comments in *Abdoulrab, Taub* and *Mowat* cited above is compelling. It is preferable from an administrative law perspective that the interpretation of provisions in a statute governing the interests of individuals be consistent. However, is that a question for the Court or for Parliament to resolve?

[42] The reasoning in *Takla* that the *Koo* test should be the sole standard has been endorsed in several subsequent decisions of this Court: *Canada (Minister of Citizenship and Immigration) v. Elzubair*, 2010 FC 298; *Canada (Minister of Citizenship and Immigration) v. Cobos*, 2010 FC 903; *Canada (Minister of Citizenship and Immigration) v. Salim*, 2010 FC 975; *Canada (The Minister of Citizenship and Immigration) v. Emmanuel Manas*, 2010 FC 1056; *Canada (Ministre de la Citoyenneté & de l'Immigration) c. Abou-Zahra*, 2010 FC 1073; *Dedaj v. Canada (Minister of*

Citizenship and Immigration), 2010 FC 777; *Ghaedi v. Canada (Minister of Citizenship and Immigration)* 2011 FC 85.

[43] The physical presence interpretation had been applied by the citizenship judges in *Manas*, *Dedaj* and *Ghaedi*. In *Manas* and *Dedaj* that was found to be unreasonable. In *Ghaedi*, Justice Robert Barnes reviewed the decision on the correctness standard. In *Cobos*, as in *Takla*, the citizenship judge had applied the *Koo* framework. The determinative issue in those cases was whether the questions had been answered reasonably. In *Elzubair, Salim* and *Abou-Zahra*, it was not clear from the Citizenship Judges' reasons which test they had chosen to apply.

[44] In *Dachan v. Canada (Minister of Citizenship and Immigration),* 2010 FC 538, Justice Luc Martineau took note of *Takla* and *Elzubair* without making a finding as to whether the Federal Court should prefer one test over another. Neither party had raised the question of whether a single consolidated and contextual approach should be adopted. The issue in *Dachan* was whether the factual finding that the applicant had not established her presence in Canada for a minimum of 1095 days was reasonable.

[45] In *Savarian v. Canada (Minister of Citizenship and Immigration),* 2010 FC 1117, Justice Yvon Pinard noted the decisions that held that physical presence for the full 1095 days was not required. In his view, actual presence in Canada remains the most relevant and crucial factor to be taken into account for establishing whether or not a person was "resident" in Canada within the meaning of the provision. To allow a period of absence longer than the one year in four is contrary

to the sprit of the Act, he considered. Accordingly, Justice Pinard dismissed an appeal from a citizenship judge's decision that applied the *Pourghasemi* interpretation.

[46] In another decision, *Shubeilat c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2010 CF 1260, Justice Michel Shore endorsed the position that it is up to the citizenship judge to determine the correct test to apply, including the stricter test of physical presence set out in *Pourghasemi*. Justice Shore upheld the reasonableness of the Citizenship Judge's finding that the applicant had not been physically present in the country for the required 1095 days.

[47] Justice Anne Mactavish also upheld the discretion of a citizenship judge to apply any of the alternative tests in *Cardin v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 29 at paragraph 18. In the particular circumstances of that case, however, she found that it was unreasonable for the citizenship judge to apply the physical presence standard as the applicant had already established a deep and long-standing connection to Canada. Justice Mactavish endorsed the views expressed by Justice Dawson in *Lin*, above, that this was an area of the law that cries out for legislative reform.

[48] I am unable to find that the underlying decision in this case was unreasonable. It is apparent from the record that the Citizenship Judge carefully considered the facts of the application. From his notes to file, it is clear that he took care in interviewing the applicant to explore her attachment to this country and her reasons for her absences during the four year period prior to the application. He wrote thorough reasons for the decision that meet the standard of sufficiency. But for the applicant's

preference for an interpretation of the residency requirement that is more favourable to her personal circumstances, the merits of the decision have not been questioned. Moreover, this is not a case where I would find that residency had been established in the particular factual circumstances and the application of the physical presence test was unreasonable, as in *Cardin*, above.

[49] In the interests of judicial comity, I have considered whether I should follow the analysis of my colleagues who favour the *Koo* test. The principle of judicial comity recognizes that decisions of the Court should be consistent so as to provide litigants with a certain degree of predictability: *Abbott Laboratories v. Canada (Minister of Health)*, 2006 FC 120, reversed on appeal on other grounds: 2007 FCA 73, 361 N.R. 90. I note that Justice Barnes in *Ghaedi*, above, declined to apply the principle in this context, albeit in reference to the *Lam* line of authority.

[50] I agree that it would be preferable to have consistency in the test applied to determine residency but several judges of this Court, including myself, have found that the physical presence interpretation is appropriate on a plain reading of the statute. And this Court, for over 11 years, has deferred to decisions by citizenship judges to choose that interpretation over the alternative as a reasonable exercise of their discretion. While the inconsistent application of the law is unfortunate, it can not be said that every example of that inconsistency in this context is unreasonable. If the situation is “scandalous” as Justice Muldoon suggested many years ago in *Harry*, it remains for Parliament to correct the problem.

[51] The appeal is dismissed. In the circumstances, while costs were requested I do not consider it appropriate to award them.

JUDGMENT

IT IS THE JUDGMENT OF THIS COURT that the appeal from the decision of a Citizenship Judge denying the applicant's application for citizenship under paragraph 5(1)(c) of the *Citizenship Act*, R.S.C. 1985, c. C-29, is dismissed. No costs are awarded.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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