Federal Court  Cour fédérale

**Date: 20110614**

**Docket: T-1424-10**

**Citation: 2011 FC 640**

**Ottawa, Ontario, June 14, 2011**

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

**BETWEEN:**

**FERNANDO MARTINEZ-CARO**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant appeals a Citizenship Court decision refusing his application for Canadian citizenship. His appeal is brought pursuant to subsection 14(5) of the *Citizenship Act (R.S., 1985, c. C-29)* (the *Act*), and is governed by the *Federal Courts Rules* pertaining to applications; hence his status as applicant and the Minister's as respondent. The *Act* does not provide for further appeals following a disposition by this Court. For the reasons that follow, this appeal is dismissed.

***Facts***

[2] The applicant is an executive at InMet, a Canadian mining company. Prior to that, he was employed by Ferrovial Agroman Canada Inc., a subsidiary of Ferrovial Agroman S.A., an international construction company. In 1999, while in the employ of Ferrovial, the applicant and his family moved to Canada. They applied for and were granted permanent residency status. They later applied for and were granted citizenship – all except for the applicant. The applicant's wife and his two children are now Canadian citizens. The applicant is not.

[3] In his position at Ferrovial Agroman Canada Inc. the applicant was often required to travel abroad. The Citizenship Judge found that the applicant made the change in employment from Ferrovial to InMet in order to reduce the amount of travel and time away from his family.

[4] The Citizenship Judge applied the decision of this Court in *Re Pourghasemi*, [1993] FCJ No 232 in arriving at his decision not to grant the applicant Canadian citizenship. The Citizenship Judge found that the applicant fell short of the 1,095 days required under the *Act* in order to qualify for citizenship. The applicant had only 689 days of physical presence in Canada. He had been outside Canada for 771 days.

[5] This Court has been asked to determine whether the Citizenship Court erred when it interpreted the definition of residency in subsection 5(1)(c) of the *Act* to mean physical presence in Canada. The provision reads:

| | |
|---|---|
| 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 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: | c) est un résident permanent au sens du paragraphe 2(1) de la *Loi sur l'immigration et la 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; |
| … | … |
| [Emphasis added] | [Notre soulignement] |

[6] In my view, the Citizenship Court did not err.

***The Law***

[7] Since the *Act* received Royal Assent in 1977, three lines of reasoning have emerged with respect to the residency requirement found in subsection 5(1)(c) of the *Act*: the centralized mode of

living test; the so-called six-factor *Koo (Re)* test, which is focused on where the applicant regularly, normally or customarily lives, and the physical presence test, which is focused on whether the applicant's physical presence in Canada meets or exceeds 1,095 days. Justice Sean Harrington succinctly summarised the three schools in *Canada (Minister of Citizenship & Immigration) v Salim*, 2010 FC 975 at para 1:

> According to one school of thought, residence means physical presence. Two others state that in certain circumstances a person satisfies the requirement if here in spirit, but not in body.
>
> …
>
> For over 30 years, we have been plagued with three residency tests or, as some would have it, two tests, the second having two branches.

[8] The divergent jurisprudence arises, in part, from the absence of a definition of *residence* in the *Act* but also, as Justice James O'Reilly observed in *Canada (Minister of Citizenship & Immigration) v Nandre*, 2003 FCT 650, para 10:

> . . .it results in part from the fact that citizenship appeals go no further than the Trial Division of the Federal Court. The unifying and standardizing role of the Federal Court of Appeal is absent in these matters. Without binding authority, individual judges of this Court must determine whether the Act is capable of more than one interpretation and, if so, whether it should be left to citizenship judges to choose one.

[9] This Court has also held that determining whether the residency requirement has been met consists of a two stage inquiry. The first stage contemplates whether the applicant has established a physical residence within Canada. If, and only if this requirement has been met does one proceed to the second stage of the inquiry which contemplates whether the applicant has accumulated 1,095 days (the equivalent of three years) of residency in Canada: *Goudimenko v Canada (Minister of*

*Citizenship & Immigration)*, 2002 FCT 447. Failure to find that there is a residence in Canada ends the matter: *Abbas v Canada (Citizenship and Immigration)*, 2011 FC 145. It is at the second stage of the inquiry where the Court has diverged with respect to interpreting the three year residency requirement.

[10] *Re Papadogiorgakis*, [1978] 2 FC 208 was one of the first cases of this Court to address subsection 5(c)(1) [subsection 5(b) as it then was] of the *Act*. In that case, the applicant had immigrated to Canada from Crete. He attended university in Nova Scotia and established residency with some friends. However, Papadogiorgakis shortly thereafter went to university in the United States, occasionally making trips back to Canada. He divided his place of physical presence between the two countries.

[11] The Citizenship Judge refused Papadogiorgakis's application on the basis that he had not accumulated three years of residency in the four years immediately preceding his application. On appeal, Associate Chief Justice Thurlow held that even though Papadogiorgakis had not accumulated 1,095 days of residence in Canada, because he had "centralized his mode of living in Canada" the three year residency requirement had indeed been met: *Papadogiorgakis*, para 17. Thurlow ACJ allowed the appeal and found that Papadogiorgakis had met the residency requirement.

[12] Thurlow ACJ looked to existing jurisprudence to best understand what could be meant by *residence* because the term was left undefined in the *Act*. He first considered *Blaha v Minister of Citizenship & Immigration*, [1971] FC 521, wherein Pratte J. interpreted residency in the *Act*'s

predecessor; the *Canadian Citizenship Act* (R.S.C. 1970, c. C-19.). Pratte J. likened residence to "place of domicile," holding:

> In my opinion a person is resident in Canada within the meaning of the *Canadian Citizenship Act* only if he is physically present (at least usually) on Canadian territory. I feel that this interpretation is in keeping with the spirit of the Act, which seems to require of the foreigner wishing to acquire Canadian citizenship, not only that he possess certain civic and moral qualifications, and intends to reside in Canada on a permanent basis, but also that he has actually lived in Canada for an appreciable time. Parliament wishes by this means to ensure that Canadian citizenship is granted only to persons who have shown they are capable of becoming a part of our society. (para.11)

[13] Rejecting that opinion, Thurlow ACJ turned to the Supreme Court of Canada's (SCC) articulation of residence under the *Income Tax Act* (1985, c. 1 (5th Supp.)). In *Thomson v Minister of National Revenue*, [1946] SCR 209, the SCC held that:

> . . . in all cases residence. . .is chiefly a matter of the degree to which a person in mind and fact settles into or maintains or centralizes his ordinary mode of living with its accessories in social relations, interests and conveniences at or in the place in question.

[14] It was upon this reasoning that Thurlow ACJ arrived at his decision that Papadogiorgakis had nonetheless met the residency requirement even though he had only 79 days of physical presence in Canada. The *Papadogiorgakis* case would later come to be known as the "centralized mode of living test" and one of the lines of reasoning with respect to the three year residency requirement. It was at that point that the jurisprudence began to diverge.

[15] In my view, the principles that guide the interpretation of the residency provisions of the *Income Tax Act* bear little relation to those that guide the interpretation of residency for the purpose

of citizenship. The statutes are not *in pari materia*, nor can it be said that Parliament was motivated by the same purpose and intent. Residency, for the purpose of taxation, has for its object and purpose the collection of tax revenue. Residency is integrated into tax treaties to ensure both that double taxation is avoided and that tax is not avoided by a taxpayer by claiming to be resident in the opposite country. Similarly, the *Income Tax Act* jurisprudence is focused on distinguishing residents from sojourners from visitors. The *Citizenship Act* on the other hand has, for its object, ensuring that the individual who is granted citizenship understands core elements of Canadian social and political institutions, traditions and values.

[16] In *Koo (Re)*, [1993] 1 FC 286, Reed J. was faced with a similar set of facts as presented in *Papadogiorgakis*. An applicant had been refused citizenship on account of having not met the residency requirement under a quantitative computation. While Reed J. did not allow the appeal, she outlined, in *obiter*, what has come to be known as the six-factor *Koo Re* test. This test constitutes a qualitative assessment of an applicant's Canadian residency to determine whether the citizenship applicant "regularly, normally or customarily lives" in Canada. However, Reed J. did not consider any one of these factors as determinative. Indeed, she held that these six factors were "[q]uestions that can be asked which assist in such a determination of residency…" *Koo Re*, para 10. This case would later come to be known for establishing the so-called "regularly, normally or customarily lives" test and the second line of reasoning.

[17] The third test, referred to as the quantitative test, was articulated in *Re Pourghasemi*. In that case Muldoon J. rejected the qualitative assessments of residency of Thurlow ACJ and Reed J. in *Papadogiorgakis* and *Koo (Re)*. Instead he held that:

> It is clear that the purpose of para. 5(1)(c) is to ensure that everyone who is granted precious Canadian citizenship has become, or at least has been compulsorily presented with the 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. One can observe Canadian society for all its virtues, decadence, values, dangers and freedoms, just as it is. That is little enough time in which to become Canadianized.

[18] Muldoon J. adopted a purposive interpretation of the *Act*, finding that the three year residency requirement mandated in subsection 5(1)(c) required an applicant for citizenship to have accumulated 1,095 days of residency through physical presence in Canada. At paragraph 6 he observed:

> So those who would throw in their lot with Canadians by becoming citizens must first throw in their lot with Canadians by residing among Canadians, in Canada, during three of the preceding four years, in order to Canadianize themselves. It is not something one can do while abroad, for Canadian life and society exist only in Canada and nowhere else.

[19] *Re Pourghasemi* would later come to be known for establishing the so-called physical presence test as the third line of reasoning with respect to the three year residency requirement.

***The Choice of Test***

[20] In *Lam v Canada (Minister of Citizenship & Immigration)*, [1999] FCJ No 410 Justice Allan Lutfy (now Chief Justice) considered the propriety of applying one line of reasoning in a citizenship appeal to the exclusion of the others. Chief Justice Lutfy meticulously addressed a number of issues with respect to the *Act* in determining the propriety of a Citizenship Judge's choice of residency tests; and, at paragraph 14, held:

> Subsection 14(6) of the Act is intended to preclude any appeal from the decision of the Federal Court - Trial Division. As a result, the Court of Appeal has not been called upon to resolve this conflicting case law. Judges of the Trial Division have not been fettered in expressing their own view. In my opinion, it is open to the citizenship judge to adopt either one of the conflicting schools in this Court and, if the facts of the case were properly applied to the principles of the chosen approach, the decision of the citizenship judge would not be wrong. Until now, Federal Court trial judges, presiding over the de novo hearings, have generally felt free to substitute their view of the residency requirement for the one expressed in the decision under appeal. The divergence of views, both in this Court and among citizenship judges, has brought uncertainty to the administration of justice in these matters.

[21] Chief Justice Lutfy's caution about the deleterious impact of conflicting interpretations on the administration of justice remains valid and accurate to this day.

[22] Justice James O'Reilly also placed an important nuance on the relationship between the three tests. In *Nandre*, above. O'Reilly J. held, at paragraph 21:

> I find that the qualitative test set out in *Papadogiorgakis* and elaborated upon in *Koo* should be applied where an applicant has not met the physical test. I should add that I do not regard the qualitative test as one that is easy to meet. A person's connection to Canada would have to be quite strong in order for his or her absences to be considered periods of continuous residency in Canada.

[23] While Justice O'Reilly approved the qualitative test, it is clear from his careful language that physical residency was the primary criteria, particularly given that the Court is being asked to accept that a person outside Canada is nonetheless resident in Canada.

[24] In *Canada (Minister of Citizenship and Immigration) v Takla*, 2009 FC 1120, para 43, Mainville J. (now of the Federal Court of Appeal) followed the qualitative reasoning of *Papadogiorgakis* and *Koo Re* and described the *Koo*-inspired jurisprudence as the dominant test. However, Mainville J. did not reject the *Re Pourghasemi* jurisprudence. Indeed, he held the physical presence test to be most consistent with the language of the statute.

[25] In my view, comity, while highly desirable, does not provide a basis for departing from a conclusion as to the intention of Parliament as expressed in a statute: see to the same effect the decisions of Justice Johanne Gauthier in *Alinaghizadeh v Canada (Citizenship and Immigration)*, 2011 FC 332, Justice Judith Snider in *Sotade v Canada (Citizenship and Immigration)*, 2011 FC 301 and Justice Richard Mosley in *Hao v The Minister of Citizenship and Immigration*, 2011 FC 46.

[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.

***The Interpretation of the Citizenship Act – Literal, Purposive and Contextual Reading***

[27] It is in this context useful to return to the first principles of statutory interpretation. The residence provision found in subsection 5(1)(c) of the *Act* cannot be read in isolation from the surrounding words. It must be read as a whole. In other words, a purposive, contextual and

harmonious interpretation should be given to the legislative provision: *Rizzo & Rizzo Shoes Ltd., Re* [1998] 1 SCR 27, para 21. Again, the provision states:

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

[28] This is precisely what Justice Marc Nadon (now of the Court of Appeal) did in *Chen v Canada (Minister of Citizenship & Immigration)*, 2001 FCT 1229. In *Chen*, Justice Nadon was faced with the question of which was the correct test for a citizenship judge to apply. He held that it was *Pourgahsemi* and rejected both *Papadogiorgakis* and *Koo Re* as not being correct tests, noting:

> That provision exacts that the applicant must have "within the four years immediately preceding the date of his application, accumulated at least three years of residence in Canada ..." Parliament introduces an element of emphasis into the statutory text by enacting "... at least three years of residence in Canada ..." Those emphasized words are unnecessary, except for emphasis. The appellant accumulated less than one year, before the date of his application for citizenship. In drawing a purposive interpretation of the statutory language it should be asked: Why did Parliament prescribe at least 3 years of Canadian residence in the 4 years immediately before applying for citizenship?
>
> It is clear that the purpose of s. 5(1)(c) [of the *Act*] is to insure that everyone who is granted precious Canadian citizenship has become, or at least has been compulsorily presented with the everyday opportunity to become, "Canadianized".

[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.

[30] In construing the statute, the fundamental question, therefore, is, why did Parliament prescribe *at least* three years of residency in the four years preceding the application? The use of the words *at least*, in the *Act* indicates that 1,095 days is the minimum number of days a given citizenship applicant must accumulate. Parliament provided to would-be citizens the flexibility to *accumulate* 1,095 days over the course of four years, or 1,460 days. *Accumulation* by its ordinary meaning, imports a quantitative analysis. A test of *accumulation* is, quite separate and distinct from tests of citizenship based on intention or where one centers ones life. *Intention* cannot be accumulated as the statute dictates nor does the concept of "centralizing ones mode of life" fit well with the quantitative elements of the words *at least*.

[31] Subsection 5 (1.1) has seldom been addressed in considering the definition of residency. It provides:

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| 5 (1.1) Any day during which an applicant for citizenship resided with the applicant's spouse who at the time was a Canadian citizen and was employed outside of Canada in or with the Canadian armed forces or the federal public administration or the public service of a province, otherwise than as a locally engaged person, shall be treated as equivalent to one day of residence in Canada for the purposes of paragraph (1)(c) and subsection 11(1). | 5 (1.1) Est assimilé à un jour de résidence au Canada pour l'application de l'alinéa (1)c) et du paragraphe 11(1) tout jour pendant lequel l'auteur d'une demande de citoyenneté a résidé avec son époux ou conjoint de fait alors que celui-ci était citoyen et était, sans avoir été engagé sur place, au service, à l'étranger, des forces armées canadiennes ou de l'administration publique fédérale ou de celle d'une province. |

The plain reading of subsection 5 (1.1) reinforces the conclusion arising from a reading of the statute as a whole, namely that periods spent outside of Canada, by non-citizens, would not, save in the limited circumstances described, count. Parliament thus expressly contemplated the period of time during which putative citizens could be out of the country and in what circumstances. In my opinion, based on the plain reading of the text the requirement of three-year residence within a four-year period has been expressly designed to allow for one year's physical absence during the four-year period.

[32] Again, returning to the first principle of interpretation, residency signifies presence, not absence, in both official languages. The French version is equally authoritative as the English, and points to the same conclusion as to Parliament's intent.

[33] This interpretation is not new. It has a long antecedence which can be traced back to the decision of Pratte J. in *Blaha*, Nadon J. in *Chen*, and Muldoon J. in *Re Pourghasemi*. It finds its

most recent expression in the decision of this Court in *Sarvarian v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1117, of Justice Mosley in *Hao* and Justice Gauthier in *Alinaghizadeh*.

[34] To conclude on the question of statutory interpretation, I note that Parliament conferred on the Citizenship Court judge the discretion to make recommendations to the Minister of Citizenship that citizenship be granted in cases of exceptional circumstances. The discretion to relieve from any undue hardship or unfairness, such as when an individual was kept out of Canada for reasons beyond their control were thus contemplated and addressed in subsection 5(4), and to read the same discretion into the very definition of residency, is to import, indirectly, that which Parliament has already addressed directly in subsection 5(4). It also, in effect, renders that discretionary power nugatory. Why else would it be necessary to make a recommendation to the Minister if, by the selection of a more lenient standard, citizenship can be conferred?

[35] The conclusion that residency means physical presence, raises, in turn the final question of the standard of review applicable to the definition of residency. In my view, the test is that of correctness.

***Standard of Review***

[36] The interpretation of a statutory provision, as opposed to its application is, generally speaking, a question of law. While it is true that the courts have carved out an exception to the correctness standard in the interpretation of statutes for specialized tribunals interpreting their home statute, this exception does not apply in the context of the discrete question of the interpretation of the definition of residency. However, just as judicial comity does not constitute

a basis for departing from statutory language, the deference accorded specialized administrative tribunals under the doctrine of standard of review cannot be used to circumnavigate what has otherwise been found to be the intention of Parliament. Standard of review is, at its core, an aspect of and exercise in, statutory interpretation, not a free-standing or independent authority to depart from the intention of Parliament expressed in legislation.

[37] The most recent statement of this principle is by the SCC in *Smith v Alliance Pipeline Ltd.*, 2011 SCC 7, where the Court noted that the standard of reasonableness is based on the idea that there may be multiple valid interpretations of a statutory provision and that there is nothing unprincipled with the notion that questions of law, not central to the legal system, could be settled within the framework of the reasonableness standard.

[38] *Smith*, and its predecessors, direct the focus on the nature of the question before the court and whether it can be characterized as a question of broad general importance to the legal system. The question of citizenship is a question of that nature. Who becomes a citizen is of importance not just to the prospective citizens, but to existing citizens as well. All Canadians have an interest in the issue. The legal concept of citizenship is integral to the operation of dozens of federal and provincial statutes, many of which govern access to important social programs, permits or licenses and to conduct or own businesses, or govern access to income security or income support programs. Citizenship has been described by the SCC as "…a very special status that not only incorporates rights and duties but serves a highly important symbolic function as a badge identifying people as members of the Canadian polity." *Law Society British Columbia v Andrews* [1989] 1 SCR 143 at para 78.

[39] Second, the context within which the decision is made is an important criteria and that context includes the nature of the decision maker. Those tribunals to whom deference has been accorded in the interpretation of specialized legal terms, generally speaking, are engaged in policy based questions and are supported by large, permanent staff which are seeking, in the context of their constituent statute, to cope with evolving factual, policy, economic and social factors. There are, in the context of the question of the definition of residency, distinctions between a Citizenship Court judge hearing an application for citizenship and the Canadian Radio-television and Telecommunications Commission (CRTC) or the National Energy Board (NEB) in interpreting its legislation. If we harken back to *Baker v Canada (Minister of Citizenship and Immigration* [1999] 2 SCR 817, which remains instructive to this extent, three of the four key criteria indicative of deference - a privative clause, the existence of specialized knowledge and poly-centric issues - are also absent here.

[40] In *Smith,* the SCC also noted that the statutory language and the absence of any right of appeal reflected a clear intention by Parliament to make the arbitration committee the sole decision maker. The NEB, as an administrative tribunal, charged with managing the interface between economic, social, environmental concerns in a legal framework, stands in contrast in function to that of the Citizenship Court. Moreover, the decision in question was that of an *ad hoc* arbitration committee, and the interpretation it reached accorded with the plain words of the statute, its legislative history, its evident purpose and its statutory context. It was a case about the application of the law, not its definition.

[41] It will be contended, in opposition, that the SCC decision in *Smith* makes clear that our system of law accommodates conflicting interpretations of the same statutory provision, and that the reasoning in this case, is revisionist. But *Smith* is markedly different. It is important to note that in *Smith*, the *ad hoc* committee was interpreting subsection 99(1) of the *National Energy Board Act* (R.S.C., 1985, c. N-7) (*NEBA*) regarding awards for costs attendant upon expropriation hearings. The Court noted that awards for costs are "invariably fact sensitive and generally discretionary." The grant of citizenship, in contrast, is far removed from an award of costs, both in its substance and consequence. Further, the arbitration committees were *ad hoc* and not bound by precedent. As a general proposition, arbitral awards are not considered binding or precendential: see for example, decisions of arbitral panels under the London Court of Arbitration, the International Centre for Settlement of Investment Disputes (ICSID) or the North American Free Trade Agreement (NAFTA) Chapter 11. *Smith* and the issues of the award of costs for an expropriation hearing, thus stand far removed from whether citizenship should be granted.

[42] In assessing whether the question is of importance to the system as a whole, the distinction between the nature of the rights or legal interests involved is critical. As Justice Kathryn Feldman said in *Taub v Investment Dealers Association of Canada*, 2009 ONCA 628, para 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.

[43] It is, in this context, useful to look at what Justice Russell Juriansz said in *Abdoulrab v Ontario (Labour Relations Board)*, 2009 ONCA 491, para 48:

> 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. In such circumstances, the Director suggests, the reviewing court must consider both competing lines of authority and decide which one is reasonable.

The *Citizenship Act* is very much a public statute.

[44] In *Canada (Attorney General) v Mowat*, 2009 FCA 309, the Federal Court of Appeal (FCA) considered these principles in the context of conflicting decisions as to the authority of the Canadian Human Rights Tribunal to award costs. The FCA determined that the Federal Court judge had erred in adopting reasonableness – as opposed to correctness – as the standard of review. The FCA characterized the question as one of public interest and general importance and hence outside of the specialized area of expertise. After referring to the reasons of the Ontario Court of Appeal noted above, Justice Carolyn Layden-Stevenson concluded:

> 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.

[45] To the same effect, Justice Deschamps writing in *Smith*, while concurring in the result, cautions against an overly formalistic approach of the deference to administrative decision

making. Deschamps J. notes that deference on legal questions is exceptional and arises only in consequences of clear legislative intent.

> *Dunsmuir* retained the multi-pronged standard of review analysis, but it also attempted to simplify the analysis by articulating "categories of question" to resolve the standard of review on the basis of precedent. In my view, the jurisprudence makes clear that with respect to an administrative decision-maker's interpretation of its home statute, relative expertise or experience of the decision-maker is critical and cannot be overlooked if deference is to be categorically accorded. As noted by the majority in *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28, [2003] 1 S.C.R. 476, at para. 16, "[d]eference to the decision maker is called for only when it is in some way more expert than the court and the question under consideration is one that falls within the scope of its greater expertise" (citing *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226, at para. 28).
>
> According deference to an administrative decision-maker merely for the reason that it is interpreting its home statute and no constitutional question, centrally important legal question, or question about the limits of its authority *vis-à-vis* another tribunal is incomplete. Such a position is purely formalistic and loses sight of the rationale for according deference to an interpretation of the home statute that has developed in the jurisprudence including *Dunsmuir*, namely, that the legislature has manifested an intent to draw on the relative expertise or experience of the administrative body to resolve the interpretative issues before it. Such intent cannot simply be presumed from the creation of an administrative body by the legislature.

[46] There are other points of distinction between the issues before this Court and those in *Smith*. Citizenship Court judges are unquestionably better situated as triers of fact and assessors of credibility. They are better situated to make the factual determination as to whether the threshold question of the existence of "a residence", has been established. They are unquestionably better situated to determine whether exigent circumstances exist and to make recommendations under subsection 5(4) of the *Act*. These are matters of proof requiring the

production and assessment of evidence and the hearing of testimony. It is in this regard that deference is properly accorded.

[47] There are also other reasons, rooted in broader questions of legal policy, why the question of residency for the purposes of citizenship does not fall within the exceptional category of cases where legal questions are not assessed against a correctness standard.

[48] First, there are no known criteria by which the exercise of discretion to choose between three tests of residency is exercised or governed. It has been said that the choice of test must be reasonable, but that leaves unanswered the question of what is and what is not, an unreasonable choice. It has been said, in some cases, that the only reasonable test is the test that is most favorable to the applicant, which, if correct, means that the Citizenship Court judge has in effect, no discretion at all. The absence of criteria governing the exercise of discretion in the choice of legal test is problematic, as it leads to *ad hoc* decision making and the exercise of discretion unbounded by law.

[49] This, in turn, leads to the second legal policy concern. The discretion to choose one of three legal tests is incompatible with the principle that the law is capable of being discerned. It is integral to the rule of law that the law must be knowable. As it currently stands, lawyers, when asked by their client whether they can be become a citizen can only say that it depends on what test is applied. The supplementary question becomes, of course, well, what determines which test is applied, to which the answer is that it depends on the judge. The very question of the law, and not its application, is in doubt. The latter, the application of law, is the raw material of trials

and motions, barristers and judges. But the law itself should be discernible and not subject to the luck or lack of luck depending which judge is assigned to hear the case. The law must be accessible, and so far as possible, intelligible, clear and predictable. The late Lord Chief Justice Bingham, in his book *The Rule of Law* (England: Penguin Group, 2010, at 39) points to a succinct statement by Lord Diplock:

> Elementary justice or, to use the concept often cited by the European Court [of Justice], the need for legal certainty demands that the rules by which the citizen is to be bound should be ascertainable by him (or more realistically, by a competent lawyer advising him) by reference to identifiable sources that are publicly available.

[50] The law is normative, that is to say that a law must be formulated with sufficient precision to enable a citizen to regulate his conduct, and the content of the law should be accessible to the public. To move from the principle to the pragmatic, how then, does a putative citizen know whether they can leave Canada or not leave Canada in the period of their permanent residency. The answer is that, under the current state of the law, they do not, and cannot know.

[51] Third, identification of the standard of review is, at its core, an exercise in statutory interpretation. Where the intention of Parliament is clear, as it is here, that intention cannot be circumvented by the choice of a deferential standard of review.

[52] In my view therefore, the interpretation of the residency provision of the *Citizenship Act* is subject to the standard of correctness and that residency means physical presence in Canada.

[53] It is my opinion that *Re Pourghasemi* is the interpretation that reflects the true meaning, intent and spirit of subsection 5(1)(c) of the *Act*: *Rizzo,* paras 22 and 41. For this reason it cannot be said that the Citizenship Judge erred in applying the *Re Pourghasemi* test. Furthermore, the Citizenship Judge correctly applied the *Re Pourghasemi* test in determining that a shortfall of 771 days prevented a finding that 1,095 days of physical presence in Canada had been accumulated.

[54] The appeal is dismissed.

[55] There is no order as to costs.

**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that** the appeal is hereby dismissed. There is no order as to costs.

"Donald J. Rennie"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-1424-10 |
| **STYLE OF CAUSE:** | FERNANDO MARTINEZ-CARO v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | Toronto |
| **DATE OF HEARING:** | January 18, 2011 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | RENNIE J. |
| **DATED:** | June 14, 2011 |

**APPEARANCES:**

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| Jane Stewart | FOR THE RESPONDENT |

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