Federal Court  Cour fédérale

Date: 20090602

Docket: T-2211-07

Citation: 2009 FC 575

Toronto, Ontario, June 2, 2009

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

MUNIRA NOORUDDIN FEERASTA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an appeal under section 21 of the *Federal Court Act,* R.S., 1985, c. F-7 (Federal Act), subsection 14(5) of the *Citizenship Act,* R.S., 1985, c. C-29 (Act) and Rule 300(c) of the *Federal Court Rules,* SOR/98-106 (Rules) of the decision of a Citizenship Judge (Judge), dated October 26, 2007 (Decision), approving the Respondent's application for Canadian Citizenship.

BACKGROUND

[2] The Respondent and her husband landed in Canada on July 25, 2001. They currently reside in Mississauga, Ontario. Her husband arrived under the EN2 category and entered Canada as an investor. He is a computer expert with no degrees. The Respondent's husband makes an extensive income managing investments in Canada and Pakistan. The Respondent's lifestyle benefits from a portion of her father-in-law's assets which her husband manages.

[3] The Respondent assists her husband with phone calls, emails, meeting partners, and checking out investments of commercial rental buildings. She is unable to describe the properties her husband owns as he "takes care of everything she needs."

[4] The Respondent does not drive. She had an accident in Pakistan and ran over someone on a motorcycle. She never wanted to drive again. Her husband always accompanies her shopping and on errands etc.

[5] The Respondent's two children attend a British School in Pakistan. They have been to Canada a few times, but mostly take trips in December and the summer time. The Respondent's husband moved around as a youth and could not cope with the change. He does not want to move his children and wants to give them stability so they can focus on their schooling. The Respondent's

husband is inclined to bring the children to Canada for university but high school in Canada is “not an attractive choice.”

[6] After the Respondent and her husband’s arrival in 2001, they purchased after one year.

[7] The Respondent became a permanent resident in Canada on July 25, 2001 and applied for Canadian citizenship on June 26, 2006. In the four years preceding the date of her application for citizenship, the Respondent’s absences totalled 425 days outside of Canada and 1035 days in Canada. The Respondent initially claimed 1097 days. She alleges that her citizenship application was prepared by a secretary at her husband’s investment company, Barney River Investments. She failed to note several of the Respondent’s absences from Canada.

[8] The Respondent’s citizenship application was granted on October 26, 2007, with the Judge finding that all of the requirements were met, including the residency requirements under section 5(1)(c) of the Act.

[9] A motion was brought by the Respondent for an Order striking the Applicant’s Record for non-compliance with Rule 309 of the Rules (filing the Applicant Record without the order or reasons of which the application is made). The motion was dismissed by Prothonotary Milczynski on June 16, 2008.

DECISION UNDER REVIEW

[10] The Judge noted that the Respondent had overlapping passports because she wanted a computerized passport and took advantage of having one made in Pakistan. The Respondent was uncertain why the passports overlapped. The Judge found that it was not a deliberate act that was calculated to deceive.

[11] The Judge also noted that the Respondent came to Canada for the "purposes of security".

[12] In relation to *Re: Koo*, [1993] 1 F.C. 286 (F.C.T.D.) the judge concluded as follows::

- Pattern of absences—continuous but short
- Where are applicant's immediate family? Here and there-split
- Returning home or visiting? Both returning home, but again, on this question, I would say both—he has one foot there and one here
- Shortfall? 110 days; significant
- Is visiting abroad temporary? Yes, the trips were short, for purposes of visiting or quick business trips
- Quality of connection to Canada-more substantial? –split-depends on how much disclosure has been provided. Connection is substantial, in terms of wife here and substantial investments here during the relevant period. It is not possible to determine from the evidence his assets and commitments abroad. In the narrow window of the relevant period, what can be seen is a couple of Applicants who, given the extensive period, what can be seen is a couple of Applicants who, given the extensive evidence, in particular bank and credit card statements, there can be no doubt of the time spent and investments made in this country. The quality of connection can only be counted as substantial. I say, this, in spite of the fact that their children are educated abroad. On the balance of probabilities, given the evidence presented, the Applicants meet the requirements of citizenship.

ISSUES

[13] The Applicant submits the following issues on this application:

a. Did the Judge err in finding the Respondent to have met the residency requirement under section 5(1)(*c*) of the Act?

b. Did the Judge ignore relevant factors in determining whether the Respondent had misrepresented their absences from Canada?

STATUTORY PROVISIONS

[14] The following provisions of the Act are applicable to this application:

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 :
(*a*) makes application for citizenship;	*a*) en fait la demande;
(*b*) is eighteen years of age or over;	*b*) est âgée d'au moins dix-huit ans;
(*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	(i) un demi-jour pour chaque jour de résidence au Canada avant son

his lawful admission to Canada for permanent residence the person shall be deemed to have accumulated one-half of a day of residence, and

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;

(*d*) has an adequate knowledge of one of the official languages of Canada;

d) a une connaissance suffisante de l'une des langues officielles du Canada;

(*e*) has an adequate knowledge of Canada and of the responsibilities and privileges of citizenship; and

e) a une connaissance suffisante du Canada et des responsabilités et avantages conférés par la citoyenneté;

(*f*) is not under a removal order and is not the subject of a declaration by the Governor in Council made pursuant to section 20.

f) n'est pas sous le coup d'une mesure de renvoi et n'est pas visée par une déclaration du gouverneur en conseil faite en application de l'article 20.

29. (1) For the purposes of this section, "certificate" means a certificate of citizenship, a certificate of naturalization or a certificate of renunciation.

29. (1) Au présent article, «certificat » s'entend du certificat de citoyenneté, de celui de naturalisation ou de celui de répudiation.

Offences and punishment

Infractions et peines

(2) A person who

(2) Commet une infraction et encourt, sur déclaration de culpabilité par procédure sommaire, une amende maximale de mille dollars et un emprisonnement maximal d'un an, ou l'une de ces peines, quiconque :

(*a*) for any of the purposes of this Act makes any false representation, commits fraud or knowingly conceals any material circumstances,

a) dans le cadre de la présente loi, fait une fausse déclaration, commet une fraude ou dissimule intentionnellement des faits essentiels;

(*b*) obtains or uses a certificate of another person in order to personate that other person,	*b*) obtient ou utilise le certificat d'une autre personne en vue de se faire passer pour elle;
(*c*) knowingly permits his certificate to be used by another person to personate himself, or	*c*) permet sciemment que son certificat soit utilisé par une autre personne pour se faire passer pour lui;
(*d*) traffics in certificates or has in his possession any certificate for the purpose of trafficking, is guilty of an offence and liable on summary conviction to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding one year or to both.	*d*) fait le trafic de certificats ou en a en sa possession à cette intention.

[15] The following provisions of the Rules are applicable to this application:

Application	Application
300. This Part applies to	**300.** La présente partie s'applique :
(*a*) applications for judicial review of administrative action, including applications under section 18.1 or 28 of the Act, unless the Court directs under subsection 18.4(2) of the Act that the application be treated and proceeded with as an action;	*a*) aux demandes de contrôle judiciaire de mesures administratives, y compris les demandes présentées en vertu des articles 18.1 ou 28 de la Loi, à moins que la Cour n'ordonne, en vertu du paragraphe 18.4(2) de la Loi, de les instruire comme des actions;
(*b*) proceedings required or permitted by or under an Act of Parliament to be brought by application, motion, originating notice of motion, originating summons or petition or to be determined in a summary way, other than applications under subsection 33(1) of the *Marine Liability Act*;	*b*) aux instances engagées sous le régime d'une loi fédérale ou d'un texte d'application de celle-ci qui en prévoit ou en autorise l'introduction par voie de demande, de requête, d'avis de requête introductif d'instance, d'assignation introductive d'instance ou de pétition, ou le règlement par procédure sommaire, à l'exception des demandes faites en vertu du paragraphe 33(1) de la *Loi sur la*

	responsabilité en matière maritime;
(*c*) appeals under subsection 14(5) of the *Citizenship Act*;	*c*) aux appels interjetés en vertu du paragraphe 14(5) de la *Loi sur la citoyenneté*;
(*d*) appeals under section 56 of the *Trade-marks Act*;	*d*) aux appels interjetés en vertu de l'article 56 de la *Loi sur les marques de commerce*;
(*e*) references from a tribunal under rule 320;	*e*) aux renvois d'un office fédéral en vertu de la règle 320;
(*f*) requests under the Commercial Arbitration Code brought pursuant to subsection 324(1);	*f*) aux demandes présentées en vertu du Code d'arbitrage commercial qui sont visées au paragraphe 324(1);
(*g*) proceedings transferred to the Court under subsection 3(3) or 5(3) of the *Divorce Act*; and	*g*) aux actions renvoyées à la Cour en vertu des paragraphes 3(3) ou 5(3) de la *Loi sur le divorce*;
(*h*) applications for registration, recognition or enforcement of a foreign judgment brought under rules 327 to 334.	*h*) aux demandes pour l'enregistrement, la reconnaissance ou l'exécution d'un jugement étranger visées aux règles 327 à 334.

[16] The following provisions of the Citizenship and Immigration Canada, *Citizenship Policy Manual CP5: Residence* (citizenship policy manual) are applicable to this application:

5.9 B - Exceptional circumstances	**5.9 B - Circonstances exceptionnelles**
In accordance with established case law, an applicant may be absent from Canada and still maintain residence for citizenship purposes in certain exceptional circumstances.	D'après la jurisprudence, le demandeur peut être absent du Canada et conserver son statut de résident aux fins de la citoyenneté dans certains cas exceptionnels.
To cite Mr. Justice Pinard in the Mui case:	Comme le précisait M. le juge Pinard dans la décision *Mui* :

I agree in principle with some decisions of this Court which, given special or exceptional circumstances, do not require physical presence in Canada for the entire 1095 days. However, it is my view, that an extended absence from Canada during the minimum period of time, albeit temporary, as in the present case, is contrary to the purpose of the residency requirements of the Act. Indeed, the Act already allows a person who has been lawfully admitted to Canada for permanent residence not to reside in Canada during one of the four years immediately preceding the date of that person's application for Canadian citizenship. [Emphasis added]

Je suis d'accord, en principe, avec une certaine jurisprudence qui précise que le demandeur n'est pas tenu d'avoir été physiquement au Canada pendant les 1 095 jours et ce, **dans des cas spéciaux et exceptionnels**. Cependant, à mon avis, une absence trop longue du Canada, bien que temporaire, durant la période minimale, comme c'est le cas en l'espèce, est contraire aux exigences de la résidence établies dans la Loi. En fait, la Loi permet déjà à une personne admise légalement au Canada pour fins de résidence permanente de ne pas résider au Canada durant une des quatre années qui précèdent immédiatement la date à laquelle elle a présenté sa demande de citoyenneté. [Nos soulignés]

Even the early Federal Court decisions on residence recognized that absences from Canada should generally be for special and temporary purposes. The Associate Chief Justice Thurlow, in the much-cited Papadogiorgakis decision, seemed to view that actual presence in Canada was required, except for short vacations or other temporary absences such as pursuing a course of study abroad (and always returning home at school breaks).

Même les décisions antérieures de la Cour fédérale sur la résidence reconnaissent que des absences du Canada devraient généralement être pour des fins spéciales et temporaires. Le juge en chef adjoint Thurlow, dans la décision *Papadogiorgakis*, souvent citée, semblait dire que la présence réelle au Canada était requise, sauf pour de brèves vacances ou d'autres absences temporaires comme pour suivre un cours à l'étranger (mais en revenant toujours à la maison durant les congés scolaires).

In assessing whether the absences of an applicant fall within the allowable exceptions, use the following six questions as the determinative test. These questions are those set out by Madame Justice Reed in the Koo decision. For each question, an example is given of a circumstance

Pour évaluer si les absences d'un demandeur sont conformes aux exceptions admissibles, il faut se poser les six questions suivantes qui constituent le critère déterminant. Ces questions ont été établies par Mme le juge Reed dans la décision *Koo*. Pour chaque question, on donne

that may allow the applicant to meet the residence requirement.

un exemple de circonstance qui permet au demandeur de satisfaire à l'exigence concernant la résidence.

1. Was the individual physically present in Canada for a long period prior to recent absences which occurred immediately before the application for citizenship?
Example of an allowable exception: an applicant lived here for 3 years before leaving Canada for a period of several months. The applicant then returns here to permanently live in Canada and files a citizenship application at that time.

1. La personne était-elle réellement présente au Canada pendant une longue période avant ses absences récentes qui se sont produites immédiatement avant la présentation de la demande de citoyenneté?
Exemple d'une exception admissible : le demandeur a vécu ici pendant trois ans avant de quitter le Canada pour plusieurs mois. Il revient ensuite au Canada pour y vivre en permanence et présente une demande de citoyenneté à ce moment-là.

2. Where are the applicant’s immediate family and dependents (and extended family) resident?
Example of an allowable exception: an applicant leaves Canada for several days each month, but her mother-in-law, her husband and her children all continue to live in Canada while she is outside of the country.

2. Où résident les personnes à charge et les membres de la famille immédiate du demandeur (et de la famille élargie)?
Exemple d'une exception admissible : la personne quitte le Canada pendant plusieurs jours chaque mois, mais sa belle-mère, son mari et ses enfants continuent de vivre au Canada pendant qu'elle est à l'extérieur du pays.

3. Does the pattern of physical presence in Canada indicate a returning home or merely visiting the country?
Example of an allowable exception: an applicant leaves Canada each month for 7 or 10 days, but stays abroad at hotels where the applicant conducts business or at the home of someone the applicant is visiting. The applicant always returns to Canada at a home owned or rented by the applicant.

3. Les présences réelles du demandeur au Canada semblent-elles indiquer qu'il rentre chez lui ou qu'il revient au pays simplement en visite?
Exemple d'une exception admissible : le demandeur quitte le Canada tous les mois pendant sept à dix jours, mais demeure à l’hôtel à l'étranger pour y mener des affaires ou chez quelqu'un à qui il rend visite. Le demandeur revient toujours au Canada à un domicile qui lui appartient ou qu'il loue.

4. What is the extent of the physical absences - if an applicant is only a few days short of the 1,095 total it is easier to find deemed residence than if those absences are extensive.
Example of an allowable exception: an applicant was physically present in Canada the vast majority of the time, despite repeated absences.

4. Quelle est la durée des absences réelles – s'il ne manque que quelques jours au demandeur pour atteindre le total de 1 095, il est plus facile de conclure à une résidence présumée que si ses absences étaient prolongées.
Exemple d'une exception admissible : le demandeur était effectivement présent au Canada la grande majorité du temps, en dépit d'absences répétées.

5. Is the physical absence caused by a clearly temporary situation such as employment as a missionary abroad, following a course of study abroad as a student, accepting temporary employment abroad, accompanying a spouse who has accepted temporary employment abroad?
Example of an allowable exception: the applicant obtains permanent residence in Canada and is offered a job here. After beginning his employment here, she is asked by her employer to serve abroad for one year to help manage an important business venture. The applicant then returns here after the assignment is completed to resume her work in Canada.

5. L'absence réelle est-elle attribuable à une situation de toute évidence temporaire, comme avoir un emploi de missionnaire à l'étranger, y suivre un cours dans un établissement d'enseignement, accepter un emploi temporaire à l'étranger, accompagner un conjoint qui a accepté un emploi temporaire à l'étranger?
Exemple d'une exception admissible : l'intéressée obtient la résidence permanente au Canada et on lui offre un emploi ici. Elle commence à travailler au Canada, puis son employeur lui demande d'aller à l'étranger pour un an afin de participer à la gestion d'une importante entreprise commerciale. Elle revient au Canada après son affectation pour y reprendre ses fonctions.

6. What is the quality of the connection with Canada: is it more substantial than that which exists with any other country?
Example of an allowable exception: an applicant has been spending a few months abroad, each year, to look after his elderly parents. When in Canada, however, the applicant is involved in his work and business ventures. He also is involved with community organizations and the vast majority of his personal contacts (professional and

6. De quelle qualité sont les rapports du demandeur avec le Canada; sont-ils plus solides que ceux qu'il entretient avec un autre pays?
Exemple d'une exception admissible : le demandeur passe quelques mois à l'étranger, chaque année, pour s'occuper de ses parents âgés. Lorsqu'il est au Canada, cependant, il travaille et s'occupe de ses affaires. Il est également actif auprès d'organismes communautaires et la plupart de ses contacts personnels

social) are people who live here in Canada. Finally, the applicant pays income tax in Canada and in no other country.	(professionnels et sociaux) se font avec des personnes qui vivent ici au Canada.
In applying this test to an application, you must decide whether the absences of the applicant fall within the types of exceptional circumstances. If the absences do not fall within these exceptional circumstances, you must refer the citizenship judge's complete file on the applicant to Case Management Branch for possible appeal by the Minister. Include your analysis of why the applicant does not appear to meet the residence requirement. Keep in mind that the delay within which an appeal can be filed is 60 days. Cases must therefore be referred on a timely basis, or the Minister will lose the right of appeal (see Chapter 8, "Appeals", for the procedure to follow).	Enfin, le demandeur paie des impôts sur le revenu uniquement au Canada. Si vous appliquez le critère de ces 6 questions à une demande, vous devez décider si les absences du demandeur rentrent dans la catégorie des circonstances exceptionnelles. Si tel n'est pas le cas, vous devez renvoyer le dossier complet de la décision du juge de la citoyenneté concernant le demandeur à la Direction générale du règlement des cas pour un appel possible du Ministre. Il faut inclure votre analyse des motifs pour lesquels le demandeur ne semble pas répondre au critère de résidence. N'oubliez pas que le délai d'appel est de 60 jours. Les cas doivent donc être déférés en temps opportun, sinon le Ministre perdra son droit d'appel (voir au chapitre 8, « Appels »-, la procédure à suivre).

STANDARD OF REVIEW

[17] The Applicant submits that the question of whether a person has met the residency requirements under the Act is a question of mixed law and fact, so the appropriate standard of review is reasonableness: *Dunsmuir v. New Brunswick* 2008 SCC 9 at paragraphs 44, 47, 48 and 53; *Canada (Minister of Citizenship and Immigration) v. Mueller* 2005 FC 227 at paragraph 4; *Canada (Minister of Citizenship and Immigration) v. Wall* 2005 FC 110 at paragraph 21; *Zeng v. Canada (Minister of Citizenship and Immigration)* 2004 FC 1752 at paragraph 7-10; *Chen v. Canada*

(Minister of Citizenship and Immigration) 2004 FC 1693 at paragraph 5l *Rasaei v. Canada (Minister of Citizenship and Immigration)* 2004 FC 1688 at paragraph 4 and *Gunnarsson v. Canada (Minister of Citizenship and Immigration)* 2004 FC 1592 at paragraphs 18-22.

[18] The Respondent points out that the standard of review applicable to this application was discussed in *Haj-Kamali v. Canada (Minister of Citizenship and Immigration)* 2007 FC 102, which states at paragraphs 7-10 as follows:

> **7** Both parties accept that the standard of review for pure factual findings of the Citizenship Court (e.g. the duration of Mr. Haj-Kamali's absences from Canada) is patent unreasonableness. This is in accordance with a number of authorities from this Court and I would specifically adopt the analysis by Justice Richard Mosley in *Huang v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1078, 2005 FC 861, where he held in paragraph 10:
>
> > [10] However, for purely factual findings the respondent submits the standard should be patent unreasonableness. The Citizenship Judge as the finder of fact has access to the original documents and an opportunity to discuss the relevant facts with the applicant. On citizenship appeals, this Court is a Court of appeal and should not disturb the findings unless they are patently unreasonable or demonstrate palpable and overriding error: Housen v. Nikolaisen, [2002] 2 S.C.R. 235.
>
> **8** The application of the facts to the law concerning residency under the Act is, of course, a matter of mixed fact and law for which the standard of review is reasonableness *simpliciter*. Here I adopt the analysis of Justice Mosley in *Zeng v. Canada (Minister of Citizenship and Immigration)* [2004] F.C.J. No. 2134, 2004 FC 1752 where he held at paragraphs 9 and 10 as follows:
>
> > 9 Applying a pragmatic and functional analysis to the review of the decisions of citizenship judges respecting the residency requirement of the Act, several judges of this court have recently concluded that a more appropriate standard would be reasonableness simpliciter: *Chen v.*

> *Canada (Minister of Citizenship and Immigration)* 2004 FC 1693, [2004] F.C.J. No. 2069; *Rasaei v. Canada (Minister of Citizenship and Immigration)* 2004 FC 1688, [2004] F.C.J. No. 2051; *Gunnarson v. Canada (Minister of Citizenship and Immigration)* 2004 FC 1592, [2004] F.C.J. No. 1913; *Canada (Minister of Citizenship and Immigration) v. Chen* 2004 FC 848, [2004] F.C.J. No. 1040; *Canada (Minister of Citizenship and Immigration) v. Fu* 2004 FC 60, [2004] F.C.J. No. 88; *Canada (Minister of Citizenship and Immigration) v. Chang* 2003 FC 1472, [2003] F.C.J. No. 1871.
>
> 10 I agree that the question of whether a person has met the residency requirement under the Act is a question of mixed law and fact and that Citizenship Judges are owed some deference by virtue of their special degree of knowledge and experience. Accordingly, I accept that the appropriate standard of review is reasonableness simpliciter and that, as stated by Snider J. in *Chen*, supra at paragraph 5, "as long as there is a demonstrated understanding of the case law and appreciation of the facts and their application to the statutory test, deference should be shown."

9 It was argued on behalf of Mr. Haj-Kamali that the Citizenship Court made two principal errors in its assessment of his application for citizenship. The first of these was a factual error in the calculation of Mr. Haj-Kamali's absences from Canada. It was submitted that this error led the Court to overstate the duration of Mr. Haj-Kamali's absences by 136 days out of the shortfall of 307 days which the Court found were necessary to satisfy the strict numerical threshold for residency.

10 The second error attributed to the Citizenship Court concerned its adoption and application of the legal test for residency under s.5(1) of the Act. Mr. Haj-Kamali contends that, had the Citizenship Court not made an erroneous finding with respect to the time he remained outside of Canada, it might have concluded that he had met the statutory residency requirement. This issue necessarily turns on which of the tests for determining residency was used by the Citizenship Court in assessing Mr. Haj-Kamali's application. If the Citizenship Court adopted the strict or literal approach for residency as reflected in decisions like *Re Pourghasemi* (1993), 62 F.T.R. 122, [1993] F.C.J. No. 232, the alleged factual error by the Citizenship Court would be of no legal

> significance. This would be so because Mr. Haj-Kamali would still not have established an actual physical presence in Canada for 1,075 days within the four years preceding his citizenship application. On the other hand, if the Citizenship Court adopted one of the more flexible or liberal tests for residency as reflected in cases like *Re Koo*, above, and *Re Papadogiorgakis*, above, it is argued that its alleged factual error might have made a difference to the outcome of the case.

[19] The Respondent submits that the standard of review should be reasonableness *simpliciter*, as the error alleged is not one of law, but rather mixed law and fact. In light of *Dunsmuir*, however, it should be the reasonableness standard.

[20] In *Dunsmuir*, the Supreme Court of Canada recognized that, although the reasonableness *simpliciter* and patent unreasonableness standards are theoretically different, "the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review": *Dunsmuir* at paragraph 44. Consequently, the Supreme Court of Canada held that the two reasonableness standards should be collapsed into a single form of "reasonableness" review.

[21] The Supreme Court of Canada in *Dunsmuir* also held that the standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[22] Thus, in light of the Supreme Court of Canada's decision in *Dunsmuir* and the previous jurisprudence of this Court, I find the standard of review applicable to the issues raised to be reasonableness. When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir* at paragraph 47. Put another way, the Court should only intervene if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

ARGUMENTS

The Applicant

[23] The Applicant submits that the Respondent does not meet the requisite number of days of residence. The Judge also failed to take into account that the Respondent made significant misrepresentations in relation to absences from Canada, which is an offence under the Act. The Applicant alleges that the Judge failed to properly apply the *Koo* residency test to determine whether, despite the Respondent's shortfalls, the Respondent had established that Canada was the country where she regularly, normally and customarily lived. The Applicant submits that the Respondent failed to meet all of the six criteria specified in *Koo*. Therefore, the Judge erred and unreasonably found the Respondent to have met the residency requirements.

Undeclared Absences

[24] The Applicant submits that the Judge clearly erred in law in failing to consider the Respondent's violations or section 29(2)(a) of the Act, which makes it an offence to make false representations, commit fraud and knowingly conceal material circumstances. In this case, the Respondent signed an application that did not have a complete list of her absences and listed her children's residence as Canada. In submissions to the Judge, the Respondent stated that a secretary at her husband's investment firm had filled out the forms for her and her husband. However, the Applicant alleges that the Respondent signed her application and did not have the secretary complete section 12 of the application (where an applicant is required to indicate whether someone has assisted them on the application). Hence, she made misrepresentations. The Judge's failure to deal with the misrepresentations constitutes an error of law.

The Residency Requirement and the *Koo* Test

[25] The Applicant also submits that the Judge did not act in accordance with the law in approving the Respondent's application for citizenship and in finding her to have satisfied section 5(1)(c) of the Act, which requires that those applying for citizenship establish "the accumulation of at least three years of residence in Canada, within the four years immediately preceding the date of the application."

[26] The allowance of one year's absence during the four-year period under section 5(1)(c) of the Act creates an inference that attendance in Canada during the other three years must be substantial: *Pourghasemi (Re)*, [1993] F.C.J. No. 232 (F.C.T.D.) at paragraph 6 and *Re Koo*.

[27] The Applicant cites and relies upon *Pourghasemi (Re)* at paragraphs 3 and 6:

> **3** It is clear that the purpose of paragraph 5(1)(c) 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". 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. If a citizenship candidate misses that qualifying experience, then Canadian citizenship can be conferred, in effect, on a person who is still a foreigner in experience, social adaptation, and often in thought and outlook. If the criterion be applied to some citizenship candidates, it ought to apply to all. So, indeed, it was applied by Madam Justice Reed in Re Koo, T-20-92, on December 3, 1992 [Please see [1992] F.C.J. No. 1107.], in different factual circumstances, of course.
>
> …
>
> **6** 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.

[28] The Applicant submits that this Court has interpreted the test for residency in different ways. However, the Court has held that no particular approach needs to be followed in *Canada (Minister*

of Citizenship and Immigration) v. Mindich, [1999] F.C.J. No. 978 (F.C.T.D.) at paragraph 9. See also: *Akan v. Canada (Minister of Citizenship and Immigration*, [1999] F.C.J. No. 991 (F.C.T.D.) at paragraphs 9 and 14.

[29] The Applicant submits that the most regularly applied version of the test is set out in *Koo*, which determines whether, despite the fact that an applicant's physical presence in Canada may fall short of the required 3 years, he or she has established that Canada is a country where he/she "regularly, normally or customarily lives." The Applicant submits that the Judge erred in concluding that the Respondent met the requirements of section 5(1)(*a*) of the Act for falling short of the required 1, 095 days required to obtain citizenship.

***Koo* Test Findings Unreasonable**

[30] The Applicant also submits that the Judge erred in law in concluding that the Respondent qualified for citizenship. The application was approved on the basis of the *Koo* test. The Applicant submits that the Judge's reasoning is "scant" and the conclusions that he reached were not reasonable given the nature of the evidence before him. Due to the Respondent's shortfall in the required amount of days in Canada, the Judge was required to consider the six factors specified in *Koo* to determine whether Canada is the country where the Respondent regularly, normally or customarily lives. The Applicant states that the Judge's analysis is inadequate.

Where are the Respondent's immediate family and dependants (and extended family) resident?

[31] The Respondent's immediate family, namely her children, do not reside in Canada and are being schooled in Pakistan. The Judge noted that the Respondent's children live and are schooled in Pakistan but that the Respondent claims they were home schooled in Canada and study abroad. The Judge also noted that the children are not educated in Canada because their grandfather wants them schooled in Pakistan. There is no firm plan to have the children reside in or attend school in Canada. The Respondent's husband stated that he did not want to move his children around and wanted to keep them focused. The Respondent's immediate family residences are split between Canada and Pakistan and, therefore, they are not a strong indicator as to residence.

Does the pattern of physical presence in Canada indicate a returning home or merely visiting the country?

[32] The Applicant alleges that the Respondent is using Canada not as a permanent residence but as a stopover for business interests and health care. The Judge indicated that the family seems to have one foot in Canada and the other in Pakistan. The Judge erred in his analysis related to *Koo*. This factor does not weigh in the Respondent's favour.

What is the extent of the physical absences from Canada—if an applicant is only a few days short of the 1, 095 day total is it easier to find deemed residence than if those absences are extensive?

[33] The Applicant submits that the Judge thought the Respondent's short fall in the days present in Canada during the relevant period was significant.

Is the physical absence caused by a clearly temporary situation such as employment as a missionary, following a course of study abroad as a student,

> **accepting temporary employment abroad or accompanying a spouse who has accepted employment abroad?**

[34] The Applicant submits that the Judge did not properly address this factor to determine whether the Respondent's absences from Canada were temporary in nature or should be treated as residence within Canada. The reasons only indicate that the Respondent's absences from Canada were "continuous but short." The Applicant submits that this is not an accurate description of the absences. While some of the absences were for a short period of time (7-15 days), many were for extensive periods of time ranging from 33-119 days. The two-word analysis is inadequate, given the concerns with respect to overlapping passports, undeclared absences and the length and frequency of absences over the period prior to applying for citizenship.

[35] The Applicant submits that the Respondent's absences from Canada cannot be described as temporary in nature. Based on the Judge's notes, no thought was given to this factor. The Applicant cites section 5.9(b) of the citizenship policy manual which states that a judge must determine if the physical absence is caused by a clearly temporary situation. The situation of the Respondent not meeting the residence requirements, is not a temporary situation given the fact that she has little intention of bringing her children to reside with her in Canada. The Applicant alleges that Canada is "merely a place to stop and do business and not to establish themselves permanently."

[36] The Applicant cites and relies upon *Re Leung v. Canada (Minister of Citizenship and Immigration)*, [1991] F.C.J. No. 160 (*Re Leung)* at paragraph 32:

> I believe it is fair to say that she is very hard-working and versatile and alert to business opportunities in the public relations field

> wherever they may be found. The nature of her activities in promoting closer ties between the Chinese and Canada of necessity requires spending much time in the Orient. Many Canadian citizens, whether Canadian born or naturalized must spend a large part of their time abroad in connection with their businesses, and this is their choice. An applicant for citizenship, however, does not have such freedom because of the provisions of section 5(1) of the Act.

[37] The Applicant also cites and relies upon *Re Hsu,* [1999] F.C.J. No. 578 (F.C.T.D.) at paragraph 31:

> **31** Mr. Hsu's counsel made much of the fact that Mr. Hsu always intended to return to Canada because his family and children were here and that he had sold his house and brought all personal belongings to Canada. Intention alone is not sufficient. Residence is also a matter of objective fact.

[38] The Applicant says that an intention to stay in Canada or return to Canada is not sufficient and the Respondent must establish that Canada is her principal abode. This was made clear in *Re Leung* at paragraphs 37-38:

> **37** I have no doubt that with the increased development of her business in Canada since the 1988 citizenship application, and conversely the diminution of her activities in Hong Kong, Applicant will spend more time in Canada, nor do I have any doubt that it is her intention to make Canada her home. If she applies again in two years she will by then most probably have the necessary residential requirements, but at present I believe the law must be applied.
>
> **37** It is tempting to say as I and others have in the past that she will make such a desirable citizen that she should be granted citizenship now without being required to wait; but that would be failing to apply the law on the facts of this case. There is fortunately no immigration problem. She remains a landed immigrant and there is little doubt that her returning resident visas will continue to be renewed, so she will not be seriously inconvenienced in her work or her life, nor prevented from making necessary business departures from the country as required from time to time. To attain citizenship however she must cease to have an ambivalent relationship with

> Canada and establish that her principal abode is here by spending more time here than on visits to the Orient in connection with her Canadian business activities as a public relations consultant here.

What is the quality of the connection with Canada: is it more substantial than that which exists in any other country?

[39] The Applicant submits that the Judge took no time to review the materials, which raises serious questions about the Respondent's connection and ties to Canada. When the credit card statements and bank statements are examined, they leave very significant doubt as to the time the Respondent would have been in Canada. Maintaining a home and having bills debited from your account on a monthly basis does not, in the Applicant's submission, demonstrate time in the country or a connection. The Applicant notes the following about the Respondent's financial information:

a. The CIBC personal bank accounts indicate that most of the transactions are for fees, pre-authorized debits, cheques, interest, telephone transfers, internet transfers and a scant number of deposits. None of these transactions require someone to be present in Canada;

b. There are only 10 examples of actual transactions that would have required the Respondents to have actually been present in Canada to have occurred and these transactions took place during the relevant 4 year (June 2002-June 2006) period prior to applying for citizenship;

c. For the Respondent's Royal Bank accounts there are only 8 transactions that would have required his presence in Canada during the relevant period;

d. The business accounts are not an indicator of a substantial connection on the part of the Respondents as any employee could have conducted the transactions on the part

of the business and there is no evidence that the Respondent was involved. She knew little of her husband's business or investment interests and this would not be an indicator of a quality connection to Canada on her part;

e. Finally, when reviewing the credit card activity it is clear that a regular amount of the activity is on-line or overseas. As well, this is a questionable demonstration of residence as the statements were not provided for all months during the relevant period.

[40] The Applicant submits that the Judge erred in finding a substantial and qualitative connection to Canada on the basis of the financial information. The Judge did not review any of the documents individually and so ignored the material evidence: *Canada (Minister of Citizenship and Immigration) v. Rahman,* [2006] I.A.D.D. No. 1454 (IRB)*; Koo; Pourghasemi; Dai v. Canada (Minister of Citizenship and Immigration),* [1999] F.C.J. No. 1033 (F.C.T.D.) at paragraphs 13-14; *Hsu* at paragraph 30 and *Agha (Re),* [1999] F.C.J. No. 577 (F.C.T.D.).

[41] The Applicant concludes by stating that the Judge failed to take into account that the Respondent made significant misrepresentations in relation to absences from Canada and committed an offence under the Act. The Judge failed to properly apply the *Koo* residency test to determine whether, despite this shortfall, the Respondent had established that Canada is the country where she regularly, normally or customarily lived. The Applicant submits that the Respondent failed to meet all of the six criteria specified in *Koo.* The Judge erred and unreasonably found the Respondent to have met the residency requirements. Therefore, the appeal should be allowed.

The Respondent

[42] The Respondent submits that the findings as to whether or not the Respondent is a person described in section 29(2)(*a*) of the Act is a finding of fact, which is within the Judge's jurisdiction to make. It was clear from the reasons that the Judge was satisfied with the Respondent's explanation of the discrepancies in her application. Therefore, the Judge did not err in this regard.

[43] The Respondent notes that the Decision is reasonable and the Applicant is simply dissatisfied with the outcome. The Judge, in the Respondent's view, gave full consideration to the relevant facts and arrived at a reasonable Decision which was within the Judge's jurisdiction to make. The Applicant has failed to demonstrate an error in this aspect as well.

[44] The Respondent says that the Act should be interpreted liberally as per *Canada (Secretary of State) v. Man*, [1986] F.C.J. No. 499 (F.C.T.D.) which states as follows at paragraph 7:

> …I must keep in mind that in accordance with the dictum of Walsh J. in the matter of Re Kleifges (1978), 84 D.L.R. (3d) 183, the provisions of the Citizenship Act should be given a liberal interpretation especially when, as in so many cases, an applicant would otherwise make an excellent citizen…

[45] The Respondent states that such a liberal interpretation has been supported by the Court since *Re Papadogiorgakis*, [1978] 2 F.C. 208 (F.C.T.D.) at 214, which is still applied: *Ho (Re)*, [1997] F.C.J. No. 1747 (F.C.T.D.).

[46] The Respondent also cites and relies upon *Canada (Secretary of State) v. Abi-Zeid*, [1983] F.C.J. No. 67 (F.C.T.D.) at paragraph 4 that:

> The fundamental principles which emerge from decisions in this area are that it is not necessary to be physically and continuously present in Canada throughout the required period. However, a person who is physically absent must first, before his absence, have established residence in Canada, and must then in some way continue his residence in Canada while he is absent abroad.

[47] The Respondent notes that this Court has found that, in the correct circumstances, a person's residency may be established for a short period of time (even a four day period could suffice) where the family unit has otherwise established residence: *Re Cheung*, [1990] F.C.J. No. 11 (F.C.T.D.) and *Lau (Re)*, [1990] F.C.J. No. 143 (F.C.T.D.).

[48] The Respondent points out that the Decision was within the purview of the Judge to make and that the only requirements were that reasons be provided and the Judge identify that he applied the test. The Respondent again relies on *Haj-Kamali* at paragraphs 10-16.

[49] The Respondent notes that the Judge did provide reasons and identified the *Koo* test. The Respondent cites and relies upon *Canada (Minister of Citizenship and Immigration) v. Yan* 2004 FC 864 (F.C.) at paragraph 9:

> **9** This Court has set out a number of different residency tests with respect to subsection 5(1)(c) of the Act. In this case, the Citizenship Judge applied the test in Koo, supra, wherein Madam Justice Reed set out a flexible six-part test for residency, that is not dependent solely on how many days an applicant has been physically present in Canada. At paragraph 10, Reed J. states:
>
> > The conclusion I draw from the jurisprudence is that the test is whether it can be said that Canada is the place where

> the applicant "regularly, normally or customarily lives". Another formulation of the same test is whether Canada is the country in which he or she has centralized his or her mode of existence. Questions that can be asked which assist in such a determination are:
>
> > (1) was the individual physically present in Canada for a long period prior to recent absences which occurred immediately before the application for citizenship?
> >
> > (2) where are the applicant's immediate family and dependents (and extended family) resident?
> >
> > (3) does the pattern of physical presence in Canada indicate a returning home or merely visiting the country?
> >
> > (4) what is the extent of the physical absences - if an applicant is only a few days short of the 1,095-day total it is easier to find deemed residence than if those absences are extensive?
> >
> > (5) is the physical absence caused by a clearly temporary situation such as employment as a missionary abroad, following a course of study abroad as a student, accepting temporary employment abroad, accompanying a spouse who has accepted employment abroad?
> >
> > (6) what is the quality of the connection with Canada: is it more substantial than that which exists with any other country?

[50] The Respondent concludes by stating that the Judge applied the *Koo* test properly and the Decision should stand as reasonable and correct in law.

ANALYSIS

[51] First of all, I am satisfied that, when the Decision as a whole is read, the Citizenship Judge investigated the undeclared absences and concluded, on the facts, that honest mistakes had been made that did not amount to misrepresentations under subsection 29(2)(*a*) of the *Citizenship Act.* This was a reasonable conclusion and the Court should not interfere on this ground.

[52] Where the Decision is problematic is in the assessment of the *Koo* factors and the reasoning used to reach the ultimate conclusion that the Applicant qualified for citizenship.

[53] The main problem is that the reasons and the notes are too scant and the connections between the evidence and the conclusions are not discernable. In fact, it is sometimes difficult to ascertain what the Judge's conclusions on some of the factors are. The end result is that it is entirely unclear if material evidence was overlooked and how, in the end, the Judge assessed the *Koo* factors to determine that the Applicant had centralized her existence in Canada.

[54] In applying the *Koo* test, the Citizenship Judge appears to have committed several errors that render the Decision unreasonable. The principal errors are as follows:

a. The evidence does not support the conclusion that the Respondent's immediate family and dependants are "Here and there – spirit." The immediate family are in Pakistan and appear to live there almost exclusively;

b. The Judge decided that the Respondent's absences from Canada were "continuous but short," while the evidence is clear that some of the absences were lengthy in nature. The Judge does not really address the length or true nature of the absences;

c. The Judge based his assessment of the quality of connection to Canada on bank and credit card statements as well as investments in Canada while admitting that "it is not possible to determine from the evidence her assets and commitments abroad." This suggests that a full and proper assessment of this factor was not done;

d. It is difficult to see how the evidence suggests a pattern of physical presence in Canada that indicates a returning home. The Judge said that "she has one foot there and one here."

[55] In the end, the Decision as written does not create the impression that the Judge properly addressed the *Koo* factors before arriving at his final conclusion. I am not saying that the Applicant does not qualify for citizenship, but a full and proper assessment needs to be done that reasonably satisfies the governing jurisprudence.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application is allowed, The Decision of the Citizenship Judge is set aside and the matter is returned for reconsideration by a different Citizenship Judge.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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