Federal Court  Cour fédérale

Date: 20160722

Docket: T-1892-15

Citation: 2016 FC 852

Ottawa, Ontario, July 22, 2016

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

GINA PATRICIA NICOLA SAMAROO

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Respondent, Ms. Gina Patricia Nicola Samaroo, became a permanent resident of Canada on December 22, 2005, along with her husband and two children. She also has a third child who was born in Canada. Ms. Samaroo applied for Canadian citizenship on February 1, 2012 and subsequently appeared for a hearing before a citizenship judge. The judge issued a decision dated October 6, 2015, in which he concluded that Ms. Samaroo met the residency

requirements for Canadian citizenship under section 5(1)(c) of the *Citizenship Act*, RSC 1985, c-29 [the Act]. The Minister of Citizenship and Immigration applied for judicial review of this decision.

[2] For the reasons that follow, this application is allowed. The judge applied the residency test described by Justice Muldoon in *Pourghasemi, (Re)*: [1993] FCJ No 232 [*Pourghasemi*], which requires an applicant to establish that he or she has been physically present in Canada for 1095 days during the four year period preceding the application. However, even when the judge's reasons are examined in combination with the record before him, it is not possible to understand how he reached the conclusion that Ms. Samaroo had been physically present for the required number of days. The decision is therefore unreasonable and must be set aside.

II. Background

[3] As Ms. Samaroo applied for citizenship on February 1, 2012, she was required to prove that she resided in Canada for at least 1095 days in the preceding four years from February 1, 2008 to February 1, 2012 [the Relevant Period]. Her application declared her absences from Canada during the Relevant Period, and she subsequently completed a Residence Questionnaire which declared the same absences. An officer of Citizenship and Immigration Canada then completed a File Preparation and Analysis Template [the FPAT], noting that Ms. Samaroo had reported 343 days of absence in the Relevant Period, for a declared physical presence of 1117 days.

[4] The officer performed an analysis of her passport and records of entries to Canada contained in an Integrated Customs Enforcement System [ICES] report issued by the Canada Border Service Agency and concluded there were a number of slight discrepancies in her absence declarations. These increased Ms. Samaroo's days of absence to at least 351 and reduced her physical presence to 1109 days. The officer also noted undeclared entries in the ICES report which reduced her physical presence further but, as there were no corresponding foreign entry stamps in her passport, the total number of absence days was unknown. Based on two undeclared airport entries and Ms. Samaroo's pattern of declared absences being always longer than 10 days, the Officer concluded that Ms. Samaroo's physical presence was likely below 1095 days. The case was therefore referred to a citizenship judge for consideration.

III. Impugned Decision

[5] The judge noted in his decision that Ms. Samaroo did not declare a shortfall of days of physical presence in Canada but that there were concerns about her credibility. He referred to her declaration of 1117 days of presence and the officer's recalculation bringing the total of days in Canada to 1109 days. The judge also referred to there being undeclared stamps that could further lower the days of physical presence. Following a recitation of some of the documentary evidence represented by Ms. Samaroo, the judge performed his analysis, which is contained in the following two paragraphs:

> "[9] During the hearing I addressed most of the concerns. The applicant was forthcoming and credible. She addressed all the concerns presented to her providing me with a credible

> explanation. She also presented after the hearing more academic records for her children (now in file).
>
> [10] Most importantly, I have no elements to dispute the number of days of physical presence in Canada declared by the applicant. All absences declared in the application and RQ during the relevant period are not disputed by the documentation presented. In fact, they confirm what the applicant has declared."

[6] The judge then referred to the residency test prescribed in *Pourghasemi* and found on a balance of probabilities that Ms. Samaroo had demonstrated that she resided in Canada for the number of days she claimed to reside in Canada and therefore met the residence requirement under section 5(1)(c) of the Act.

IV. Issues and Standard of Review

[7] The issue raised by the Minister is whether the Judge's finding that Ms. Samaroo met the residency test for Canadian citizenship is reasonable. The parties agree, and I concur, that the applicable standard of review is reasonableness.

V. Analysis

[8] The Minister's position is that the judge reached conclusions about Ms. Samaroo's physical presence in Canada that are unsupported by the evidence and that his reasons fail to provide sufficient justification for the decision. The judge concluded that Ms. Samaroo was

"forthcoming and credible" and that she "addressed all the concerns presented to her" but did not refer to any explanations that she had provided. The Minister also argues that the judge's conclusion that the declared absences were not disputed by the documentation did not address the officer's concerns about undeclared entries to Canada.

[9] Ms. Samaroo takes the position that the judge's decision is reasonable, noting that he identified that there were undeclared stamps that could lower the days of physical presence and later concluded that all the concerns presented to the Respondent had been addressed with a credible explanation. She argues that the judge's conclusion that she had met the residence requirement was based on this credibility finding, that the decision is entitled to deference, and that it falls within the range of possible and acceptable outcomes and should be upheld as reasonable.

[10] The difficulty with Ms. Samaroo's position is that there is nothing in the decision itself or the record before the judge from which it can be determined how a positive credibility finding assisted the judge in concluding that Ms. Samaroo had spent the required number of days in Canada.

[11] The judge chose to apply the *Pourghasemi* test, which involves a strict counting of days of physical presence during the Relevant Period. The Minister took issue with the fact that the judge relied on the officer's calculation of 1109 days of physical presence. I do not consider that approach to be an error. In the absence of any basis to doubt the accuracy of the officer's calculation, I have no difficulty with the judge adopting that calculation rather than duplicating

the same mathematics. However, the officer's calculation of 1109 days of presence was derived from the absences Ms. Samaroo had declared, and the officer expressly raised concern about additional undeclared absences, evident from the ICES report, which would further reduce this number of days. My decision to allow this application for judicial review is based on the judge's failure to address this concern.

[12] Ms. Samaroo and her husband own a security company in Trinidad, which they visit to check on their business. They have also created a company in Canada which sells security and defence products. The evidence in the record before the judge, which Ms. Samaroo also canvassed in considerable detail in her submissions to the Court, indicates that the Samaroos' businesses are successful and the Canadian government is a customer of the Canadian company. The Court can understand how the judge may have concluded that Mr. Samaroo and her companies are well regarded and that she is a credible witness. While the basis for the judge's finding that Ms. Samaroo was forthcoming and credible is not found in the decision, I have no difficulty taking the record into account to assist in considering whether the decision is reasonable (see *Canada (Minister of Citizenship and Immigration) v Abdulghafoor*, 2015 FC 1020 at para 18). The portions of the record canvassed in Ms. Samaroo's argument do assist in supporting the reasonableness of the judge's credibility finding.

[13] However, this credibility finding does not assist the Court in understanding how the judge addressed the concern about the undeclared absences that were evident from the ICES report. Nor has Ms. Samaroo referred the Court to anything in the record which assists with such an understanding. The officer's FPAT identified four undeclared entries to Canada evident from the

ICES report. Two of these entries, on July 8, 2011 and August 27, 2011 were by car, and the other two, on October 18, 2008 and June 5, 2010, were airport entries. The officer stated that the July 8, 2011 entry was of no concern, as the entry date corresponded with a United States stamp on the same date, presumably indicating a day trip. That left three undeclared absences to be addressed by the judge.

[14] In an affidavit filed in support of her position in this judicial review application, Ms. Samaroo deposes that, during the hearing before the judge, he asked about her two entries into Canada from Buffalo, and she told the judge that these involved same day shopping trips and visiting her nephews in the Buffalo, New York area. The Minister did not take issue with Ms. Samaroo's reliance on this affidavit. There is no transcript of the hearing before the judge, and there is precedent for a citizenship applicant, in responding to an application for judicial review of the citizenship decision, offering affidavit evidence to explain the evidence the judge considered (see *Canada (Minister of Citizenship and Immigration) v Goo*, 2015 FC 1363 at para 43). Her affidavit assists in understanding how the judge might have concluded that the two undeclared entries by car on July 8, 2011 and August 27, 2011 (one of which had already been identified by the officer as not raising a concern) did not reduce Ms. Samaroo's physical presence below the required 1095 days.

[15] However, Ms. Samaroo's affidavit does not refer to any evidence provided to the judge to address concern about the undeclared airport entries on October 18, 2008 and June 5, 2010. At the judicial review hearing, Ms. Samaroo's counsel pointed out that the record before the judge included her passport which contains a stamp showing entry into Trinidad and Tobago on

October 7, 2008, representing an additional 11 days of absence from Canada between that departure and the October 18, 2008 return. Her counsel advised that there is nothing in the record that indicates when Ms. Samaroo departed Canada before the June 5, 2010 entry.

[16] The officer calculated Ms. Samaroo to have 1109 days of physical presence in Canada, before accounting for the undeclared entries. This is 14 days in excess of the required 1095 days. Subtracting the 11 days of additional absence in October 2008 results in only 3 days in excess of the requirement, without yet accounting for the undeclared June 5, 2010 entry. There does not appear to be any evidence which would have assisted the judge in determining the impact of the absence leading up to the June 5, 2010 entry. It is also noteworthy that the undeclared absence of 11 days in October 2008 is consistent with the officer's observation that Ms. Samaroo had a pattern of absences longer than 10 days.

[17] It is simply not possible to conclude from the decision, or from the decision combined with the record and Ms. Samaroo's own evidence in this judicial review application, whether or how the judge addressed the undeclared absences in reaching his conclusion that the residence requirement had been met. If the record contained evidence on this issue, which could reasonably have been relied on by the judge in reaching his decision, then his credibility finding would assist in supporting the decision as within the range of possible and acceptable outcomes. However, in the absence of any evidence from which the judge could have reached this conclusion, it is not possible to uphold his finding as reasonable.

[18] I note that in argument Ms. Samaroo referred to her written submissions to the judge as stating that, although she and her husband travel frequently, they have been carefully working toward the required 1095 days in Canada and, when they finally accrued the required days, they then applied for citizenship. She argues that this statement, combined with the credibility finding, is sufficient to uphold the decision. I disagree, as this statement contains no detail as to how Ms. Samaroo concluded she had accrued 1095 days. Given the undeclared entries explained above, the judge's decision cannot be upheld based on this statement, particularly in the absence of any indication in the decision that the judge was relying on this statement in reaching his conclusion.

[19] For these reasons, the Minister's application for judicial review is allowed, and Ms. Samaroo's citizenship application is to be redetermined by another decision-maker.

[20] Neither party proposed a question of general importance for certification for appeal, and none is stated.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is for judicial review is allowed and the matter is referred to a different decision-maker for redetermination. No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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