Federal Court  Cour fédérale

Date: 20140514

Docket: T-1811-13

Citation: 2014 FC 473

Toronto, Ontario, May 14, 2014

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

SEGUNDA MANUELA MERA

Respondent

JUDGMENT AND REASONS

[1] The Minister of Citizenship and Immigration appeals from a decision of a Citizenship Judge approving Segunda Manuela Mera's application for Canadian citizenship. For the reasons that follow, I have concluded that the appeal must be allowed.

I. Background

[2] Ms. Mera is an 82 year old permanent resident of Canada who is originally from Ecuador. She has four daughters living in Canada, and three sons who live in Ecuador. She lives with one of her daughters while she is in Canada, and owns her own home in Ecuador.

[3] Ms. Mera filed her citizenship application on August 7, 2005. Thus the relevant four-year period for assessing her residence was from August 7, 2005 until August 7, 2009.

[4] Ms. Mera indicated on her citizenship application that she was absent from Canada for four trips totalling 542 days, and that she was physically present in Canada for approximately 918 days during the relevant period.

[5] On September 11, 2013, Ms. Mera attended before a Citizenship Judge, following which the Judge requested a copy of her Entry and Exit report (an "ICES report") from the Canada Border Services Agency. The ICES report essentially confirmed Ms. Mera's evidence regarding her travels outside of Canada, although it did not record a brief trip to Mexico in 2008. This omission was not material to the decision of the Citizenship Judge, nor is it material to the outcome of this appeal.

[6] According to Ms. Mera, her last trip outside Canada commenced on July 25, 2009, although the Citizenship Judge erroneously found that her last trip had commenced on January 21, 2010.

[7] The Citizenship Judge approved Ms. Mera's application on September 12, 2013. Considering all of the evidence, including Ms. Mera's "pattern of … absences" and her testimony, he concluded that she "was actually living and was physically present in Canada on the number of days sufficient to comply with the *Citizenship Act*."

II. Analysis

[8] To be entitled to Canadian citizenship, an applicant must demonstrate that he or she has been resident in Canada for three out of the four years immediately preceding the application for citizenship.

[9] The jurisprudence of this Court has recognized three tests that may be used in determining whether an applicant has met the residency requirements of the *Citizenship Act*, R.S.C. 1985, c. C-29.

[10] The first is the physical presence test established by this Court in *Re Pourghasemi* [1993] F.C.J. No. 232. This test only asks whether the applicant has been physically present in this country for a total of three years out of four, or a minimum of 1095 days.

[11] The second test is that articulated in *Re Papadogiorgakis*, [1978] 2 F.C. 208; [1978] F.C.J. No. 31. This is a less stringent test in that it looks at whether an applicant has an established residence and strong attachment to Canada, even if he or she has been temporarily absent away from Canada.

[12] The third test is one often used in citizenship cases. This is the so-called "Koo" test, established in *Re Koo*, [1993] 1 F.C. 286, [1992] F.C.J. No. 1107. The Koo test looks at residence as being the place where one "regularly, normally or customarily lives" or has "centralized his or her mode of existence". Re Koo identifies six factors that are to be considered in assessing whether this test has been met. These include:

(1) physical presence in Canada for a long period prior to recent absences;

(2) whether immediate family and dependants are resident;

(3) whether the pattern of physical presence in Canada indicates a returning home or just visiting;

(4) the extent of physical absences;

(5) whether physical absence is caused by a clearly temporary situation; and

(6) the quality of the connection to Canada.

[13] It is not clear from a review of the Citizenship Judge's brief reasons which test he applied in coming to the conclusion that Ms. Mera met the residency requirements of the *Citizenship Act*. As a result, the decision lacks the justification, transparency and intelligibility required of a reasonable decision. Nor is it possible to ascertain from the Citizenship Judge's reasons whether the decision falls within the range of possible acceptable outcomes that would be defensible in light of the facts and the law: see *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47, [2008] 1 S.C.R. 190.

[14] In finding that Ms. Mera met the residency requirement of the *Act*, the Citizenship Judge states that he was satisfied that Ms. Mera "was actually living and was physically present in Canada on the number of days sufficient to comply with the *Citizenship Act*". This language suggests that he used the *Re Pourghasemi* physical presence test.

[15] If that is so, the finding that Ms. Mera had satisfied the requirements of the physical presence test is perverse, given that the Judge had specifically found as a fact that Ms. Mera had only been physically present in Canada for 922 days during the relevant period, making her 173 days short of the requisite 1095 days.

[16] If, as Ms. Mera suggests, the Citizenship Judge intended to apply the one of the more qualitative tests for residency, he failed to explain how he arrived at the conclusion that she had established residency in Canada. There is no indication that he considered the fact that Ms. Mera continues to own a home in Ecuador, and that she does not own a home in Canada. While this is by no means determinative of the issue of residency, they are relevant considerations that did have to be addressed in determining whether Ms. Mera had established residency in Canada.

[17] Nor did the Citizenship Judge consider a number of the *Re Koo* factors in order to determine where Ms. Mera "regularly, normally or customarily lives" or had "centralized her mode of existence".

[18] For example, no consideration appears to have been given to whether Ms. Mera's physical presence in Canada indicates that she was returning home to Canada after her lengthy

trips to Ecuador, or whether she was just visiting Canada from her home in Ecuador. Nor was any attempt made to determine whether her connection to Canada was more substantial than her connection to Ecuador, in light of her substantial ties to both countries.

[19] Having failed to properly apply any of the three recognized tests for residency, it follows that the Citizenship Judge's conclusion that Ms. Mera had established residence in Canada was unreasonable.

III. Conclusion

[20] As a result, the Minister's appeal is allowed, without costs. The Citizenship Judge's September 12, 2013 decision is set aside. The matter is remitted to a different Citizenship Judge for re-determination in accordance with one of the recognized tests for residency.

[21] As was noted by counsel for the Minister, it is also open to Ms. Mera to make a fresh application for citizenship. This would have the effect of creating a different residency period for her new application. In light of information provided by Ms. Mera's counsel at the hearing of the appeal, it appears that she may well satisfy the physical presence test for this more recent four year period.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The Minister's appeal is allowed, without costs.

2. Ms. Mera's application for Canadian citizenship is remitted to a different Citizenship Judge for re-determination in accordance with one of the recognized tests for residency.

"Anne L. Mactavish"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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