

Date: 20081201

Docket: T-507-08

Citation: 2008 FC 1340

Ottawa, Ontario, December 1, 2008

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

GERHARD BANMAN

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Banman appeals the decision of Citizenship Judge Michel C. Simard, dated February 14, 2008, rejecting his application to Register and Retain Canadian Citizenship and refusing to make a recommendation to the Governor in Council under subsection 5(4) of the *Citizenship Act*, to grant him citizenship in order to alleviate special and unusual hardship.

[2] Mr. Banman is a person who is described in section 8 of the *Citizenship Act*, as he was born outside of Canada to a person (or persons) who is entitled to Canadian citizenship under subsection 3(1)(b) or 3(1)(e) of the Act. Under section 8 of the Act, if Mr. Banman wished to retain his citizenship he was required to make application to Register and Retain his Canadian Citizenship before attaining the age of 28.

[3] Mr. Banman was born August 13, 1978, in Mexico, and thus he turned 28 on August 13, 2006. He filed his application for Retention and Registration of Canadian Citizenship on January 10, 2007 - some five months after his 28th birthday. The Citizenship Judge held that on the date of application Mr. Banman had ceased to be a Canadian citizen and thus could not, on the date of application, retain his citizenship, as it no longer existed.

[4] The Citizenship Judge also considered whether it would be appropriate for him to make a recommendation to the Governor in Council under subsection 5(4) of the Act. That provision provides that "in order to alleviate cases of special and unusual hardship or to reward services of an exceptional value to Canada ... the Governor in Council may, in his discretion, direct the Minister to grant citizenship to any person and, where such a direction is made, the Minister shall forthwith grant citizenship to the person named in that direction".

[5] The Citizenship Judge, incorrectly in his decision, indicated that under subsection 5(4) he was to consider whether to make a recommendation to grant citizenship in order to alleviate special and unusual hardship "despite failure to meet [the] residency requirement". Counsel for the

Minister advised Mr. Banman and the Court, at the hearing of this matter, that the Minister would consent to an Order to have the matter of a recommendation under subsection 5(4) being sent back for redetermination by different citizenship judge.

[6] At the hearing of this appeal, and after ruling that the new evidence contained in the affidavit of Mr. Banman would not be considered on this application as it was not evidence before the Citizenship Judge, and in light of the offer of the Minister to allow the appeal on the ground that it be sent back for redetermination under subsection 5(4) of the Act, Mr. Banman advised the Court that he wished to accept the Minister's offer, and that he would consent to such an Order. In all of the circumstances, the Court will issue an Order, on consent; however, I wish to add my own comments concerning the matter of the subsection 5(4) reconsideration.

[7] Mr. Banman provided little, if any, evidence which would have warranted a recommendation under subsection 5(4) in his original application. That is not to say that there is not evidence available to support such a recommendation – far from it. His failure to provide such evidence with his application is largely, if not entirely, because the form provided by the Respondent contains no indication that such a recommendation is possible nor any suggestion that the applicant submit such evidence. In *Huynh v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1838, 2003 FC 1431, Justice Harrington considered a similar fact situation involving Ms. Huynh. He wrote:

The forms do not specifically state that she is entitled to bring material which would at least give rise to a consideration of humanitarian issues. The imperfections of the forms were noted by Gibson J. in *Maharatnam v. Canada (Minister of Citizenship and*

Immigration), [2000] F.C.J. 405. He said, and I agree, that since most applicants appear before a Citizenship Judge without counsel, and are likely to be unfamiliar with the existence of humanitarian and compassionate discretion, in the interest of fairness, it might be useful to include a brief notice regarding the existence of discretion in the NOTICE TO APPEAR".

[8] In this instance, as there was no oral hearing, a Notice to Appear never issued. It is presumed that applicants under the Act know the law and its requirements; however, as the Minister provides a form to persons making applications to retain citizenship, fairness suggests that the form should indicate that there exists the possibility of a recommendation under subsection 5(4) of the Act if the application is otherwise rejected. Alternatively, in circumstances such as exist here where the application is rejected because it was filed late, the Citizenship Judge, in the interests of fairness, might consider advising the applicant that there exists the potential for reinstatement of citizenship under subsection 5(4) of the Act and asking the applicant if he or she has any information they wish the Citizenship Judge to weigh when considering whether to make a recommendation. Such a course seems to me to be fairer than simply ruling whether to make such a recommendation when there is no relevant information before the Citizenship Judge.

[9] As indicated previously, Mr. Banman did provide evidence that was not before the Citizenship Judge, that should weigh heavily in his favour in considering whether to make a recommendation under subsection 5(4) of the Act. In particular, the Court notes that Mr. Banman has resided in Canada continuously since about the age of 2 ½ when his parents relocated their family back to Canada. He attended school in Ontario, obtaining an Honours Science Degree and subsequently a BScPharm from the University of Toronto. He presently works as a Clinical

Pharmacist/Pharmacy Meditech Consultant with St. Mary's General Hospital in Kitchener, Ontario. He is married to a Canadian and has three Canadian born children. He made the application immediately upon learning that it was required, in his circumstances, if he was to retain his Canadian citizenship. In short, he has lived most of his life in Canada, has been and continues to be a contributor to this country, and he wishes to be a Canadian citizen. He asserted in his affidavit that the loss of his citizenship has caused serious emotional distress to both his family and himself.

[10] The evidence provided indicates that pharmacists are in short supply in Canada and that they are essential to the health care system that serves its citizens. In *Re Naber-Sykes*, [1986] 3 F.C. 434, Justice Walsh characterized loss of employment and the deprivation to Canada of highly qualified citizens as factors going to hardship. I agree. In this case, the potential deprivation to Canada of a qualified pharmacist such as Mr. Banman, would be truly regrettable and not in the best interests of the citizens of this country.

[11] In the circumstances, Mr. Banman will be permitted an opportunity to provide whatever evidence he considers relevant in support of a reconsideration of a recommendation under subsection 5(4) of the Act. While the decision as to whether to make a recommendation to the Governor in Council rests solely with the Citizenship Judge, I would urge that he or she consider the factors noted above when considering whether to make a recommendation under subsection 5(4) of the Act.

[12] For all of these reasons this appeal is allowed and the decision of Citizenship Simard refusing to make a recommendation under subsection 5(4) of the Act is set aside and will be remitted to another Citizenship Judge for a redetermination, and Mr. Banman will be permitted to file additional material to support his claim that such a recommendation is warranted in his circumstances.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the appeal is allowed and the decision of Citizenship Simard refusing to make a recommendation under subsection 5(4) of the *Citizenship Act* is set aside and will be remitted to another Citizenship Judge for a redetermination, and Mr. Banman will be permitted to file additional material to support his claim that such a recommendation is warranted in his circumstances.

“Russel W. Zinn”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-507-08

STYLE OF CAUSE: GERHARD BANMAN v. THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Kitchener, Ontario

DATE OF HEARING: November 26, 2008

**REASONS FOR JUDGMENT
AND JUDGMENT:** ZINN J.

DATED: December 1, 2008

APPEARANCES:

Gerhard Banman

APPLICANT/
ON HIS OWN BEHALF

A. Leena Jaakkimanen

FOR THE RESPONDENT

SOLICITORS OF RECORD:

N/A

SELF-REPRESENTED
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