

Federal Court



Cour fédérale

Date: 20141014

Docket: T-1933-13

Citation: 2014 FC 973

Toronto, Ontario, October 14, 2014

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

WILLIAM LEONARDO BOLIVAR

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

ORDER AND REASONS

[1] In the decision presently under review, dated October 31, 2013, the Applicant's application for citizenship was rejected by a Citizenship Judge for the sole reason that he had failed to meet the residency test applied to his application pursuant to s. 5(1)(c) of the *Citizenship Act*, R.S. 1985, c. C-29 (*Act*).

[2] In his application the Applicant gave personal family reasons for failing to be physically present in Canada for 1095 days during the period required by the *Act*. The Applicant's reasons were not taken into consideration by the Citizenship Judge in rejecting the Applicant's application according to the most stringent test for residence as follows:

In deciding whether you satisfy the residence requirement under paragraph 5(1)(c) of the Act, I have chosen to adopt the analytical approach used by the Honourable Mr. Justice Muldoon in *Re Pourghasemi*. In *Pourghasemi*, [1993] F.C.J. No. 232 (T.D.), Muldoon J. considered that it was necessary for a potential citizen to establish that he or she has been physically present in Canada for 1,095 days during the relevant four year period.

[3] Counsel for the Applicant argues that, given the Applicant's evidence that compelling reasons existed for the Applicant's absence from Canada, the Citizenship Judge erred by failing to consider the more flexible approach to the residence requirement as stated in *Re Koo*, [1992] F.C.J. No. 1107 (T.D.).

[4] While it is well established that it was open to the Citizenship Judge to choose which test to apply to the Applicant's application, I find that the decision under review does not conform with the standard set out in *Seiffert v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1072 at paragraphs 16 - 17:

As each case turns on its own merits, I find that no precedent will help me decide whether a denial of justice occurred in the present case. The question to be answered is whether the Applicant, both for himself and the members of his family, had a reasonable opportunity during the interview to persuade the Citizenship Judge that the complex and extensive evidence before him warranted a positive citizenship decision. I have no hesitation in saying that the Applicant was not provided with this opportunity.

It is very clear from the decision rendered, that the written material did not impress the Citizenship Judge sufficiently to give a positive

determination. In such circumstances, it was critically important for the Citizenship Judge to give the Applicant a solid chance to use his powers of persuasion to change his mind. I agree with Counsel for the Applicant that the Citizenship Judge closed the door to this opportunity. Therefore, on the facts of the present case, I find that the failure to accord this meaningful opportunity to be heard is a denial of natural justice.

[5] Thus, in the present case, because the Citizenship Judge applied the test in *Pourghasemi* rather than that in *Koo*, without first considering all the evidence presented by the Applicant, and without providing the Applicant with an opportunity to persuade the Citizenship Judge to apply *Koo* rather than *Pourghasemi*, I find that the decision rendered was in breach of the duty of fairness owed to the Applicant.

[6] As a result, I find the decision under review is made in reviewable error.

ORDER

THIS COURT ORDERS that the decision under review is set aside and the matter is referred back for redetermination.

I make no award as to costs.

“Douglas R. Campbell”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1933-13

STYLE OF CAUSE: WILLIAM LEONARDO BOLIVAR v THE MINISTER
OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: OCTOBER 7, 2014

ORDER AND REASONS BY: CAMPBELL J.

DATED: OCTOBER 14, 2014

APPEARANCES:

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LORNE McCLENEGHAN FOR THE RESPONDENT

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