

Federal Court



Cour fédérale

Date: 20120827

Docket: IMM-1325-12

Citation: 2012 FC 1018

Calgary, Alberta, August 27, 2012

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Applicant

and

CARWIN MCKEE MILTIMORE

Respondent

REASONS FOR ORDER AND ORDER

[1] In a tribunal proceeding wherein parties are heard (*viva voce*), listening to each party is not an option but is the very quintessential essence to any oral hearing. That is to ensure that parties will not only have been perceived to be heard but, in fact, will have been heard.

[2] A breach of procedural fairness renders a decision incompatible with the need for natural justice. When an opportunity for cross-examination is not provided, contradictory evidence cannot be said to have been evaluated by a decision-maker.

[3] Therefore, a need exists for judicial review of this decision of the Immigration Appeal Division [IAD], wherein a tribunal member allowed a sponsorship appeal of a Canadian citizen of 59 years of age who had applied to sponsor a wife of 20 years of age from the Philippines after an officer had refused the application due to serious concerns raised regarding the very *bona fide* of the marriage.

[4] Procedural fairness was breached in this case due to the tribunal member's disallowance of cross-examination after examination wherein key testimony could not be cross-examined although the Applicant had expressed a request to do so.

[5] The IAD has the obligation to allow cross-examination of a witness who has given sworn oral evidence at a hearing, if the testimony is considered in making the decision or if the tribunal has previously stated (or indicated its intention by prior action) that such cross-examination would take place.

[6] As was stated by counsel for the Applicant "where the tribunal closely approaches a court process (and is in fact a court of record by statute), where the issues are serious and the impact on the parties is significant, where an oral hearing has been held and a witness has given oral testimony, and where the credibility of the witness and the veracity of the testimony is at issue, cross-examination must be permitted" (*Ke v Canada (Minister of Citizenship and Immigration)*), 2010 FC 45; as specified during the hearing "the rules of procedural fairness do guarantee two parties the right to rebut opposing evidence and to correct or contradict prejudicial statements", *Practice and Procedure before Administrative Tribunals*, Macaulay and Sprague, 2004 Carswell,

2009 Update, page 12-178.7; a similar situation arose “where the duty to allow Mr. Kamtasingh to fully present his case was sacrificed for the desire for administrative efficiency. That is not a permissible trade-off: *Singh v Canada (Minister of Employment and Immigration)*, [1985] 1 SCR 177 at para 70”, *Kamtasingh v Canada (Minister of Citizenship and Immigration)*, 2010 FC 45).

[7] The Applicant’s application for judicial review is granted and the matter is returned for a hearing anew (*de novo*) before a differently constituted panel of the tribunal.

ORDER

THIS COURT ORDERS that the Applicant's application for judicial review be granted and the matter be returned for a hearing anew (*de novo*) before a differently constituted panel of the tribunal. No question for certification.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-1325-12

STYLE OF CAUSE: THE MINISTER OF CITIZENSHIP AND
IMMIGRATION v CARWIN MCKEE MILTIMORE

**JUDICIAL REVIEW HELD VIA VIDEOCONFERENCE ON AUGUST 27, 2012 FROM
CALGARY, ALBERTA AND EDMONTON ALBERTA**

**REASONS FOR ORDER
AND ORDER:** SHORE J.

DATED: August 27, 2012

ORAL AND WRITTEN REPRESENTATIONS BY:

Rick Garvin FOR THE APPLICANT

Raj Sharma FOR THE RESPONDENT

SOLICITORS OF RECORD:

Myles J. Kirvan FOR THE APPLICANT
Deputy Attorney General of Canada
Edmonton, Alberta

Stewart Sharma Harsanyi FOR THE RESPONDENT
Barristers and Solicitors
Calgary, Alberta