

Federal Court Decisions

Mohammady v. Canada (Citizenship and Immigration)

Court (s) Database: Federal Court Decisions

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Citation: 2008 FC 277

Ottawa, Ontario, February 29, 2008

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

SOMAYEH MOHAMMADY

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

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I. Introduction

[1] Ms. Somayeh Mohammady (the “Applicant”) seeks judicial review of the decision of the Immigration and Refugee Board, Immigration Appeal Division (the “IAD”), dated September 19, 2006. In that decision, the Board dismissed the Applicant’s appeal from the decision of a Visa Officer refusing the issuance of a travel document on the grounds that the

Applicant had failed to comply with the residence requirements set out in section 28 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the “Act”) and further, that there were insufficient grounds for the exercise of discretion on humanitarian and compassionate grounds to overcome the breach of the residency requirements.

[2] The Applicant does not challenge the legal validity of the Visa Officer’s decision that she did not comply with the residency requirements set out in section 28 of the Act. The subject of this application is the failure of the Visa Officer to positively exercise the discretion to make a decision on humanitarian and compassionate grounds.

II. Background

[3] The Applicant, an Iranian citizen, entered Canada in 1994, as a Convention refugee, together with her family.

[4] In the summer of 1997, the Applicant left Canada and after travelling to the United States, arrived at Ashraf City in Iraq where she took up residence at Camp Ashraf. Camp Ashraf was a military camp for the Mujahedin e Khalq (People’s Mujahedin) (the “MEK”).

[5] The Applicant’s parents contacted Canadian authorities in 2004, seeking assistance in order to communicate with their daughter. The Applicant had initially come in contact with the MEK while living in Toronto with her family. According to the testimony of her father before the IAD, the family had attended at the Mujahedin center and participated in its activities. The Applicant’s father testified that he thought that Camp Ashraf in Iraq offered a one-month seminar program for students and that he thought the Applicant would return after that period. He did not contact Canadian authorities when she did not return after one month and indeed, sent the Applicant’s brother to the camp in 1999.

[6] One of the Applicant’s fraternal aunts had been a member of the MEK at Camp Ashraf; she was killed in combat in 1988.

[7] The Applicant's brother testified before the IAD and said that he had been detained at the camp. He defected from the MEK to the American Military Camp at Ashraf and returned to Canada in December 2004.

[8] The Applicant's father did not seek assistance from the Canadian authorities, concerning communication with his daughter until 2004.

[9] The IAD found the father's evidence, that he was unaware of human rights abuses at the Camp before that time, to be credible. The IAD also accepted evidence that the Applicant's parents made visits overseas beginning in 2002 and efforts from 2003 onward to visit the children at Camp Ashraf, in order to facilitate their return to Canada.

[10] The Applicant testified before the IAD via teleconference. She testified that she had voluntarily joined the MEK and that she wished to remain with them.

[11] The Applicant argues that the IAD erred, in assessing her appeal on humanitarian and compassionate grounds, by ignoring the evidence as to her intentions with respect to her sojourn at Camp Ashraf and further, by ignoring specific documentation that supported the evidence of witnesses before the IAD that she failed to then return to Canada within the required period because she was held against her will at Camp Ashraf.

[12] The Respondent submits that the IAD properly considered the evidence before it, including the evidence of the Applicant. He argues that there is no evidence that the Applicant was subject to mind control or was unable to exercise free will in deciding to leave the Camp. He submits that the Applicant's own evidence is the best indicator of her intentions and in her evidence before the IAD, she said that she wished to stay in the Camp.

[13] Furthermore, the Respondent notes that insofar as a psychological assessment of the Applicant is concerned, there is no evidence that this could not be conducted at the Camp.

III. Discussion and Disposition

[14] The first matter to be addressed is the applicable standard of review to be established following a pragmatic and functional analysis. The factors to be considered in that regard are the presence or absence of a privative clause; the expertise of the tribunal; the purpose of the legislation; and the nature of the question.

[15] The Act does not contain a privative clause and judicial review is available if leave is granted pursuant to subsection 72(1) of the Act. The first factor is neutral.

[16] The IAD is a specialized tribunal, authorized under the Act to decide questions of fact and law. Its decisions attract a high degree of deference.

[17] The purpose of the Act is to regulate the admission into Canada of immigrants and persons in need of protection, as well as to maintain the security of Canadian society. This involves consideration and balancing of many interests that may conflict with each other. Decisions made in a polycentric context tend to attract judicial deference.

[18] Finally, there is the nature of the question in issue. Here, the Applicant is challenging the IAD's refusal to positively exercise its discretion on humanitarian and compassionate grounds. A decision involving the exercise of a statutory discretion, on humanitarian and compassionate grounds, often attracts greater deference.

[19] Upon balancing the four factors, I conclude that the applicable standard of review in this case is reasonableness *simpliciter*. The test for meeting this standard is whether the decision of the IAD can withstand a somewhat probing examination; see *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247 at paragraph 46.

[20] Upon weighing the evidence submitted, including the evidence of the Applicant, her father and her brother, the IAD found that the Applicant failed to establish an evidentiary basis

to justify the positive exercise of discretion on humanitarian and compassionate grounds. In particular, the IAD noted that, according to her own evidence, the Applicant wished to remain at Camp Ashraf. The Applicant was 17 years old when she went to Camp Ashraf. She was 25 at the time that she testified before the IAD. In my opinion, she was of an age to express her intentions and she did so.

[21] Contrary to the Applicant's submissions, the IAD did not ignore the evidence that was presented. It was open to the IAD to put greater weight on the evidence of the Applicant herself than on the documentary evidence that was tendered. I see no basis for judicial intervention in this case and the application for judicial review is dismissed. There is no question for certification arising.

JUDGMENT

The application for judicial view is dismissed. There is no question for certification arising.

"E. Heneghan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:

IMM-5403-06

STYLE OF CAUSE:

SOMAYEH MOHAMMADY v. THE MINISTER
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