

Federal Court



Cour fédérale

Date: 20110204

Docket: IMM-2789-10

Citation: 2011 FC 131

Ottawa, Ontario, February 4, 2011

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

SHAHIN KASHANI AGHDAM

Applicant

and

**THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Shahin Kashani Aghdam seeks an order of *mandamus* compelling the Minister of Public Safety and Emergency Preparedness to make a decision in relation to her application for Ministerial relief. For the reasons that follow, I am satisfied that *mandamus* should issue.

Background

[2] Ms. Aghdam is an Iranian citizen who arrived in Canada in 1986. She claimed refugee protection and her claim was subsequently determined to have a credible basis through the refugee “backlog” program.

[3] In 1992, Ms. Aghdam applied for permanent residence. She was interviewed by the Canadian Security Intelligence Service in 1993 and again in 1996 with respect to her membership in the Mujahedin-e-Khalq (or “MEK”) - an organization now on the list of entities associated with terrorism maintained by Public Safety Canada.

[4] Ms. Aghdam was advised in 2000 that her application for permanent residence could be refused because of her membership in the MEK. She attended an interview with an immigration officer in 2001. Ms. Aghdam says that the purpose of the interview was to decide whether she should be granted Ministerial relief, and that the Court should consider her application for Ministerial relief to have been filed in 2001, in assessing whether there has been an undue delay in this matter.

[5] I do not agree that 2001 is the relevant date to consider in determining whether *mandamus* should issue. The relevant date is January, 2005.

[6] In coming to this conclusion, I note that there is no application for Ministerial relief from Ms. Aghdam in the certified tribunal record from 2001. Ms. Aghdam did file a written application for Ministerial relief under subsection 34(2) of the *Immigration and Refugee Protection Act* in 2005.

One wonders why she would have done this, if she believed that she already had an application for Ministerial relief outstanding from 2001.

[7] Moreover, the interview notes that she relies on to say that the clock should start ticking in 2001 expressly state that she was ineligible for Ministerial relief under the old *Immigration Act*. Ms. Aghdam was provided with these notes at the time of the 2001 interview.

[8] Ms. Aghdam was interviewed in February of 2005 with respect to her application for Ministerial relief. On September 10, 2008, she was provided with a copy of the Canadian Border Service Agency's briefing note to the Minister of Public Safety and Emergency Preparedness recommending that her request be refused.

[9] Ms. Aghdam provided responding submissions two weeks later. Despite several requests from Ms. Aghdam over the intervening two and a half years, no decision has been made in relation to her application.

[10] Shortly after Ms. Aghdam commenced her application for *mandamus*, she was advised that she would be provided with a "fairness disclosure" package containing a revised Ministerial relief recommendation. This was provided to her earlier this week. She has 15 days to respond to it, after which a final recommendation will be made to the Minister.

[11] Ms. Aghdam has been living in Canada for 25 years, without permanent residence status. She states that the uncertainty has been extremely stressful for her, and has also had a negative

impact on her ability to access health care benefits. This is a particular concern for Ms. Aghdam, as she has been diagnosed with breast cancer and also suffers from diabetes.

[12] The respondent has not provided an affidavit explaining the reasons for the delay in this matter.

The Legal Test

[13] As the Federal Court of Appeal noted in *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742, in order to be entitled to *mandamus*, an applicant must establish that:

1. There is a public legal duty to act;
2. The duty must be owed to the applicant;
3. There is a clear right to the performance of that duty, in particular:
 - a) The applicant must have satisfied all conditions precedent giving rise to the duty; and
 - b) There was a prior demand for performance of the duty, a reasonable time to comply with the demand, and a subsequent refusal which can be either expressed or implied, e.g. unreasonable delay;
- [...]
4. There is no other adequate remedy;
5. The order sought will be of some practical value or effect;
6. The Court finds no equitable bar to the relief sought; and
7. On a balance of convenience, an order in the nature of *mandamus* should issue.

[14] In *Conille v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 F.C. 33, [1999] F.C.J. No. 1553 (T.D.) three considerations were identified as relevant to the question of whether a delay is unreasonable. These are:

- 1) The delay in question has been longer than the nature of the process required, *prima facie*;
- 2) Neither the applicant nor her counsel is responsible for the delay;
- 3) The authority responsible for the delay has not provided satisfactory justification.

Analysis

[15] I am satisfied that the test has been met in this case.

[16] Ms. Aghdam's application for Ministerial relief has now been outstanding for six years. The issue is whether Ms. Aghdam has satisfied the Minister that it would not be detrimental to the national interest to grant her relief from the inadmissibility finding arising from her past involvement with the MEK. There is no suggestion that there is any ongoing security investigation with respect to Ms. Aghdam's involvement with the MEK that is holding things up. Rather, it appears that the delays are due to administrative challenges within the Government.

[17] I am satisfied that the delay in processing Ms. Aghdam's application for Ministerial relief has become unreasonable. She had satisfied all conditions precedent giving rise to the duty prior to commencing her application for *mandamus*. The fact that her application appears to have prompted some recent action on her file should not disentitle her to relief.

[18] Consequently, an Order will go directing the Minister of Public Safety and Emergency Preparedness to make a decision in relation to Ms. Aghdam's application for Ministerial relief within 120 days of receipt of Ms. Aghdam's submissions responding to the "fairness disclosure" package provided to her this week.

Costs

[19] Ms. Aghdam seeks her costs of this application, which she estimates at \$6,500, inclusive of HST and disbursements. Costs are not ordinarily awarded in immigration proceedings in this Court. Rule 22 of the *Federal Courts Immigration and Refugee Protection Rules* provides that “No costs shall be awarded to or payable by any party in respect of an application for leave, an application for judicial review or an appeal under these Rules unless the Court, for special reasons, so orders”.

[20] This Court has found there to be special reasons where, for example, one party has acted in a manner that may be characterized as unfair, oppressive, improper or actuated by bad faith: see *Manivannan v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1392, [2008] F.C.J. No. 1754, at para. 51. That is not the situation here. There is no evidence of any misconduct on the part of the respondent that would justify such an order. Moreover, counsel for the respondent has been very helpful in moving this matter forward.

[21] However, this Court has also considered undue delay in processing a claim to be a “special reason” which would justify an award of costs: see, for example, *Manivannan*, above, at para. 60; *Singh v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 544, [2005] F.C.J. No. 669, at para. 24; *Ben-Musa v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 764, [2005] F.C.J. No. 942, at para. 36.

[22] I am satisfied that special reasons exist in this case justifying an award of costs in Ms. Aghdam’s favour. That said, there has been no conduct in this matter that requires the sanction of an

award of costs on a substantial indemnity or solicitor-client basis. In the exercise of my discretion, I fix Ms. Aghdam's costs at \$3,500, inclusive of HST and disbursements.

[23] I agree with the parties that there is no serious question of general importance for certification in this case.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

The application is granted, with costs fixed at \$3,500. The Minister shall make a decision with respect to Ms. Aghdam's application for Ministerial relief within 120 days of the receipt of Ms. Aghdam's submissions responding to the "fairness disclosure" package.

"Anne Mactavish"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2789-10

STYLE OF CAUSE: SHAHIN KASHANI AGHDAM v.
THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: February 2, 2011

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

DATED: February 4, 2011

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