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FEDERAL COURT

Between:

M K. D

Applicant

and

THE MINISTER OF CITIZENSHIP & IMMIGRATION

Respondent

MEMORANDUM OF LAW AND ARGUMENT

PART I - FACTS

1. The Applicant [or "Mr. D"] was born on xx/xx/xxxx, in Karachi Pakistan. He is a citizen of Pakistan. He lives in xx, Alberta and operates a restaurant establishment.
2. The Applicant fled Pakistan in April 1996. The Applicant is a Mohajir - a term which refers to individuals who migrated from India to Pakistan during the partition of India in 1947. Due to his ethnicity, the Applicant faced discrimination during his time in Pakistan, and because of his experience he joined the All Pakistan Mohajir Student Organization (APMSO) in August 19, 1985 and continued his membership until August 1989.
3. Later, Mr. D became a member of the Mohajir Qumi Movement (MQM). He was a member of the MQM party in Pakistan between 1990 and 1996.

4. After arriving Canada Mr. D submitted a claim for Refugee Protection. His claim was accepted, and Mr. D was deemed a Convention Refugee on July 23, 1997. During the hearing there were no issues as to his membership with the MQM party.
5. Subsequent to the positive determination of the Immigration and Refugee Board, Mr. D was interviewed on May 12, 1998 by the Canadian Security and Intelligence Service [hereinafter CSIS]. Mr. D was asked questions regarding his problems in Pakistan as well as his travel to Canada. Mr. D indicated his duties with MQM included bringing issues of concern from the general membership to district and regional councillors. Mr. D also advised that during elections he helped prepare membership and voter lists, and helped set up campaign offices. Mr. D also clearly advised that he had never taken part in demonstrations or was ever involved in any sort of military, weapons, or explosives training and had no knowledge of any such activities. Mr. D advised that he had never witnessed acts of violence by the MQM/ALTAF of which he was a member.
6. Mr. D does not have a criminal record in Pakistan, Japan, or in Canada.
7. Mr. D had advised during his interview that the overall purpose of the MQM was to publicize the plight of the Mohajir population in Pakistan.
8. In response to a privacy request made by his previous counsel, CIC provided certain documents including a report dated February 1, 1999 prepared by the Canadian Security Intelligence Service [hereinafter the CSIS Report] and a memorandum from Alain Drouin A/Director, Security Review Case Management Branch NHQ to Rob Vineberg

Director of Citizenship and Immigration (Prairies and NWT Region) dated July 26, 2001 [hereinafter the Security Memorandum]. Neither document supports any finding that Mr. D is inadmissible to Canada.

9. The CSIS Report indicates that Mr. D was “cooperative and forthcoming...”
10. The Security Memorandum indicates that

“His political history, first with the AMPSO and later with the MQM in Pakistan, indicates that he is very involved with the cause of the Mohajirs, however, **nothing indicates he has personally been involved in violent or terrorist activities.**”
[emphasis added]
11. Following the positive determination of the Immigration Refugee Board with respect to his Refugee Claim, Mr. D applied for Permanent Residence in September of 1997. Mr. D received correspondence from the Case Processing Centre in Vegreville Alberta [hereinafter CPC Vegreville] dated October 9, 1997 that acknowledged receipt of his application for Permanent Residence Status. In that correspondence it was stated that a final decision would be made within 10 months when all requirements were met.
12. Mr. D next received correspondence from CPC Vegreville dated January 9, 1998 requesting a police certificate from Japan given his residence there. A Japanese police certificate was provided to CPC Vegreville for review. Mr. D then received correspondence from CPC Vegreville dated April 17, 2000. At that time CIC requested additional information including work, employment, and address history as well as

list of any organizations or associations of which Mr. D had been a member.

13. On April 20, 2000 Mr. D completed a Request for Information requesting an update as to the status of his permanent resident application. Mr. D made some more requests dated April 27, 2000 and June 11, 2000. CIC's reply to the request from the information dated April 20, 2000 indicated

your application is not being dealt with in this office, therefore I am unable to give you a response to your question. You should fax your questions to the Case Processing Centre in Vegreville at 780-632-8101 which is the office that has your file.

14. The Applicant then received correspondence from CPC Vegreville dated June 28, 2000 indicating that finalizing an application for permanent residence from within Canada usually takes 12-18 month from the date the immigration application is approved. The correspondence indicated that in his case approval of the application was granted on October 9, 1997. The correspondence also indicated a review of his file indicated that his application was in order and no further action was required on his part at that time.
15. The Applicant then received correspondence from CPC Vegreville dated October 18, 2000 which indicated that in order to continue processing his application additional information was required. The correspondence requested that Mr. D provide a set of fingerprints.
16. In addition to his own requests, Mr. D instructed his counsel to continue to make requests regarding the status of his file. His counsel

provided correspondence to CIC on December 5, 2001 requesting an update as to the status of his application.

17. On December 12, 2001 his counsel received correspondence from Mr. R O, an immigration officer in Calgary. That correspondence indicated:

Further to your fax of 5 December 2001, please be advised that Mr. D's application for landing should be finalized within the next 1-2 months.

18. Notwithstanding Mr. O's correspondence indicating the imminent finalization of his application, his counsel had to again provide correspondence to CIC dated March 21, 2002. CIC's response was hand written at the bottom of the correspondence which indicated:

Response: File still under review re: security.
No date can be provided at this time for completion of file.

19. His counsel again provided correspondence to CIC dated July 30, 2002 requesting an update as to the status of his application. His counsel noted in his correspondence that the application for permanent residence has been pending "for about five years". Again CIC's response was noted at the bottom of his counsel's correspondence:

Response: Decision expected to be made in the next 1-3 months.
[Signed] R O

20. His counsel then provided correspondence dated December 5, 2005, and March 20, 2006 requesting an update as to the status of the file.

21. Mr. D have been advised by his counsel and believe the same to be true that he received correspondence dated March 24, 2006 from Mr. R O indicating that Mr. D may be inadmissible under section 34 of the *Immigration and Refugee Protection Act* due to his membership in the MQM party, and that his case would be referred to an inadmissibility hearing. Mr. O advised that such a hearing would be scheduled “this year” [2006].
22. To date, no such admissibility hearing has been scheduled.
23. Mr. D retained new counsel in July 2006. Since that time his counsel has repeatedly requested that some action take place on his file. Correspondence from his counsel is included in the index of documents provided by CIC in lieu of a written decision or reasons. Correspondence was sent by his counsel dated July 19, 2006, July 31, 2006, August 10,2006, and August 31,2006.
24. Exhibit B to Mr. D’s Affidavit includes documents pertaining to his application for permanent residence.
25. During a telephone conference with Immigration officer/Enforcement Officer M D, it was advised that Ms. D received Enforcement Officer R O’s caseload this summer that included Mr. D’s file. Ms. D also indicated that she required specific training to deal with his file and that she could not provide a time frame as to when she would receive the requisite or appropriate training. She also advised that she could not provide a time frame as when she would be able to familiarize herself with Mr. D’s particular case.

26. After waiting almost ten years to have his application finalized, Mr. D requested that his counsel file the Application for Leave and Judicial review requesting Mandamus.
27. The index of documents prepared by Immigration Officer Natalie Holden included a note to file in response to this Application for Leave and Judicial review requesting Mandamus. The "Note to File" indicated that on November 15, 2006 (conveniently, a date subsequent to the filing of the Application for Leave and Judicial review requesting Mandamus, filed on November 2, 2006) Mr. D's file was apparently transferred from the Canada Border Services Agency to Citizenship and Immigration Canada and the file has been placed in the CIC inventory to be shortly reviewed.
28. The Applicant has been advised on numerous previous occasions by CIC that some action would be imminently taking place on his file, or that the file would, in essence, be "shortly reviewed".
29. In light of the previous representations, Mr. D does not believe that CIC will process or meaningfully act on his application without direction from the Federal Court of Canada.
30. To date, Mr. D has not been provided an opportunity to address CIC's concerns. Mr. D is available to respond to any allegation and will respond to any attempt by CIC to establish that he is inadmissible to Canada. CIC has been unable to provide the Applicant with any reliable information as to when he can expect a resolution in his case. Mr. D simply wishes for the opportunity to address the allegations made so that he may become a permanent residence of Canada.

31. Mr. D feels aggrieved that inordinate delay and prejudice has resulted to his application for permanent residence, notwithstanding CIC's own Security Memorandum indicating that "nothing indicates he has personally been involved in violent or terrorist activities".

PART II - ISSUES

- I. Have the Respondent and his officers failed or refused to fulfill their duty to process the Applicant's application for permanent residence in a timely manner?
- II. Is the delay in processing the Applicant's application for permanent residence unreasonable?
- III. If so, is an order in the nature of *mandamus* the appropriate remedy?

PART III - LAW AND ARGUMENT

Statutory Framework

32. Section 21(2) of the *Immigration and Refugee Protection Act* (IRPA) states:

Protected Person - Except in the case of a person described in subsection 112(3) or a person who is a member of a prescribed class of persons, a person whose application for protection has been finally determined by the Board to be a Convention refugee or to be a person in need of protection, or a person whose application for protection has been allowed by the Minister, becomes, subject to any federal-provincial agreement referred to in subsection 9(1), a permanent resident if the officer is satisfied that they have made their application in accordance with the regulations and that are not

inadmissible on any ground referred to in section 34 or 35, subsection 36(1) or section 37 or 38.¹

33. Regulation 347 (1) of the *Immigration and Refugee Protection Regulations* (IRPR) states :

Application for Landing - Convention Refugees - If landing was not granted before the coming into force of this section, an application for landing submitted under section 46.04 of the former Act is an application to remain in Canada as a permanent resident under subsection 21(2) of the *Immigration and Refugee Protection Act*.²

34. Section 34 of IRPA states:

34. (1) A permanent resident or a foreign national is inadmissible on security grounds for

(a) engaging in an act of espionage or an act of subversion against a democratic government, institution or process as they are understood in Canada;

(b) engaging in or instigating the subversion by force of any government;

(c) engaging in terrorism;

(d) being a danger to the security of Canada;

(e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or

(f) being a member of an organization that there are reasonable grounds to believe engages, has

¹ Section 21(2) of the *Immigration and Refugee Protection Act*.

² Regulation 347(1) of the *Immigration and Refugee Protection Regulations*

engaged or will engage in acts referred to in paragraph (a), (b) or (c).

2) The matters referred to in subsection (1) do not constitute inadmissibility in respect of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest.

35. Section 44(1) of IRPA states:

Preparation of Report - An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.³

The Test for *Mandamus*

36. In *Khalil*⁴, the Federal Court of Appeal relied on the Court's decision in *Apotex*. The Court in *Khalil* stated that *mandamus* was a discretionary and equitable remedy which would be granted only in the following conditions precedent were met:

1. There is a public duty to act;
2. The duty must be owed to the applicant;
3. There is a clear right to performance of that duty, in particular:
 1. the applicant has satisfied all conditions precedent giving rise to the duty;
 2. there was a prior demand for performance of the duty; a reasonable time to comply with the demand; and a

³ Section 44(1) of the *Immigration and Refugee Protection Act*.

⁴ *Khalil v. Canada (Secretary of State)* (C.A.) [1999] 4 F.C. 661 [1999] F.C.J. No. 1093

subsequent refusal which can be either expressed or implied, e.g. unreasonable delay; and

3. There is no other adequate remedy.
 4. The "balance of convenience" favours the Applicant.
37. In *Conille*⁵, the Madam Justice Tremblay-Lamer set out three requirements that must be met if a delay is to be considered unreasonable:
1. The delay in question has been longer than the nature of the process required, prima facie;
 2. The applicant and his counsel are not responsible for the delay;
 3. The authority responsible for the delay has not provided satisfactory justification.

It is respectfully submitted that the Applicant has satisfied all aspects of this test.

Public duty to Act and Duty owed to Applicant

38. Pursuant to section 11 of IRPA, it is submitted that there is no doubt that the Respondent has a public duty to process the Applicant's application for permanent residence. Section 11(1) states:

Application before entering Canada - A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document shall be issued if, **following an examination**, the officer is satisfied that the

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Jean Conille v. (Canada) Minister of Citizenship and Immigration Trial Division, Tremblay-Lamer J.

foreign national is not inadmissible and meets the requirements of this Act. [emphasis added]

39. Section 25 of IRPA allows the Minister to grant an exemption to the requirement that the Applicant apply for permanent residence from outside Canada.
40. Thus, the Applicant has the right, after being granted status as a Protected Person, to apply for permanent residence in Canada. The Respondent, it is submitted, has a duty to examine the Applicant's application for permanent residence and either admit the Applicant as a Permanent Resident or refuse the application. The Respondent, it is submitted, has failed to carry out his duty.
41. Because it is the Applicant making the application for permanent residence, it is submitted that the duty to act is owed to the Applicant.

Clear Right to Performance

42. It is submitted that the Applicant has satisfied all conditions precedent giving rise to the Respondent's duty. He has filed all required applications, provided all required documents, completed medical examinations, and paid all required processing fees. When requested to do so, he has appeared for interviews with Immigration authorities and complied with all of their requests for information.
43. In addition, the Applicant, both on his own volition and through his counsel, has made repeated requests for information on the Applicant's application. The Applicant, after being informed that there was a belief he was inadmissible pursuant to section 34 of IRPA, has also made requests for the specifics of the allegations being made

against him so that he could respond to these allegations. The Applicant's counsel sent numerous letters to Mr. R O and Ms. M D, the Immigration Officers in charge of the Applicant's file.

44. It is submitted that the Applicant has made clear and repeated demands to the Respondent to fulfill his duty. It is further submitted that the Respondent has been provided with ample time and opportunity - a period of almost 10 years – to fulfill its duty. It is further submitted that the lack of response to the Applicant's repeated inquiries is a clear indication that the Respondent is refusing to act in this case.

Unreasonable delay

45. It is submitted that there has been an unreasonable delay in the processing of the Applicant's application for permanent residence. This delay is unreasonable not only because of the length of time that has ensued since the application was first submitted but is also unreasonable because there is no satisfactory justification for this delay.
46. The Applicant's permanent residence application was submitted in September 1997. Since then the Applicant has been informed that the Respondent and his delegates believe the Applicant **may** be inadmissible. However, neither the Respondent, nor his delegates, have taken any steps whatsoever to carry out their statutory duty to investigate the matter
47. The Respondent's delegates have repeatedly stated that they are processing the Applicant's application for permanent residence. They

have even gone so far as to state that a decision will be made shortly, or within a period of months. However, there is simply no action on the part of the Respondent to move the processing of the Application for Permanent Residence along.

48. It is further submitted that the Respondent has failed to provide any satisfactory justification for the delay. There is a clear indication that the Applicant is suspected of being inadmissible pursuant to s.34 of IRPA. However, there is no evidence on file to indicate that this is true. The CSIS Report and the Security Memorandum are the only documents that detail any allegations of inadmissibility, and the Security Memorandum clearly states that there is no evidence indicating the Applicant has engaged in violence or terrorism.
49. The Applicant has not received **any** opportunity to satisfy the Respondent that he is not inadmissible (though the burden of proof rests with the Minister).
50. The Applicant, in his Application for Leave and Judicial Review, stated that he had not received written reasons from the Respondent. The Respondent was provided an opportunity, pursuant to Rule 9(2) of the *Federal Court Immigration and Refugee Protection Rules*. The Respondent did not provide reasons. Rather, it simply sent notice that there since no decision was made, there were no reasons to provide. The failure on the part of the Respondent to provide any reasons for its inaction, it is submitted, underscores the inadequacy of any justification for the delay in processing the Applicant's application.

51. It is submitted that the Respondent has failed to provide any satisfactory justification for the delay in processing the Applicant's application.
52. In *Baksh*⁶ the Federal Court issued a writ of *mandamus* after a four year delay in processing an application for permanent residence made on humanitarian and compassionate grounds. In that case, the Respondent had argued the delay was justified because the Immigration Officer was awaiting the results of a risk assessment. The Court found this to be an unsatisfactory justification. It stated:

This cannot be accepted as an explanation for the delay. **In the final analysis the Respondent is responsible for all aspects of the process required to render a decision on an H&C application, as defined and understood in the above noted Respondent's public guidelines, and to do so within a reasonable time-frame.** If there is no reasonable explanation for the delay in obtaining the risk assessment, and none is given, and fault for the delay lies with those responsible in conducting the risk assessment, responsibility for that fault must ultimately be accepted by the Respondent. **It is the Respondent who has the means to correct any administrative shortcomings in the processing of such applications.** [emphasis added]

53. It is submitted that the reasoning in *Baksh* is equally applicable in the instant case. The Respondent, it is submitted, must accept responsibility for the delay in processing the Applicant's application. It

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Baksh v. Canada (Minister of Citizenship and Immigration) [2004] F.C.J. No. 1281

is to the Respondent that this application was made and it is the Respondent who owes a duty to the applicant.

54. The Applicant, if it submitted, has a right to have a decision made regarding his application for permanent residence. The Respondent, if it submitted, has a duty to provide a full and fair review of this application. As part of this duty, the Respondent must examine any inadmissibility issues. It is respectfully submitted that any inadmissibility concerns ought to have been resolved given the date of the CSIS Report and the Security Memorandum, neither of which indicate that the Applicant is inadmissible. It should be noted that the CSIS Report was prepared in 1999 and the Security Memorandum in 2001.
55. The Applicant has repeatedly been advised that his application for permanent residence will be processed. He has repeatedly requested the opportunity to prove that he is not inadmissible. He has been also been told that a hearing into his inadmissibility will be held this year (2006). However, it has been more than 9 years since his Application for Permanent Residence was submitted and nothing has been done. It is clear that the delay in processing his application is associated with security concerns that the Respondent may have. However, it is unacceptable for the Applicant to be left in a legal limbo without permanent status in Canada. This, if it submitted, is unacceptable.
56. In *Mohamed*⁷, the Applicant had waited four years for his permanent residence application to be processed. The Respondent indicated

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Mohamed v. Canada (Minister of Citizenship and Immigration) [2000] F.C.J. No. 1677

that the delay in processing was due to security concerns raised in his application. The Court ruled that delay was unreasonable. It stated:

In the present case, despite the very able argument of counsel for the Minister, I am unable to accept that the delay has not been longer than the nature of the process prima facie required. I draw this conclusion from the fact that in July of 1999 Mr. Mohamed was told that the security review in his case would require a further period of six months to one year to process. While this was an estimate, it has been exceeded without any explanation provided as to why the estimate proved to be inaccurate.

Nor do I accept that the statement, it appears that most of the delays associated with processing his application for landing have to do with security concerns, constitutes a satisfactory justification for the fact that after more than four years Mr. Mohamed's application for landing remains extant.

57. It is submitted that the reasoning in *Mohamed* applies to the instant case. The Respondent keeps promising to either finalize the Application or to send it to an inadmissibility hearing. The Respondent then fails to carry through with his promises. It is submitted that a 9 plus year time period is more than sufficient for the Respondent to carry out his statutory duty to process the Applicant's Application for Permanent Residence.

No other adequate remedy

58. It is submitted that a writ of *mandamus* is the only adequate remedy available to the Applicant. Without such a writ the Applicant will be required to continue to wait for an indefinite period for the processing

of his application. A writ of *mandamus* will ensure that the Respondent begins the process of fulfilling the duty owed to the Applicant. Thus, there will be practical value to the Applicant. It is further submitted that, given all of the above, the balance of convenience favours the Applicant and the issuance of an order in the nature of *mandamus*.

PART IV - ORDER REQUESTED

59. It is respectfully requested that this Honourable Court grant an Order in the nature of *Mandamus* directing the respondent to fully process, consider and grant or deny the subject Application for Permanent Residence for landing forthwith or within such further period of time as, in the opinion of this Court, may be reasonable and in accordance with law.

PART V - LIST OF AUTHORITIES

Khalil v. Canada (Secretary of State) (C.A.) [1999] 4 F.C. 661 [1999] F.C.J. No. 1093

Jean Conille v. (Canada) Minister of Citizenship and Immigration Trial Division, Tremblay-Lamer J.

Bakhsh v. Canada (Minister of Citizenship and Immigration) [2004] F.C.J. No. 1281

Mohamed v. Canada (Minister of Citizenship and Immigration) [2000] F.C.J. No. 1677

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated this day of,

Solicitors for the Applicant

Per: _____

RAJ SHARMA

REGISTRY NO. IMM--

FEDERAL COURT

BETWEEN:

M K. D

Applicant

- and -

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

**MEMORANDUM OF LAW AND
ARGUMENT**

Attention: RAJ SHARMA

Phone:

Fax:

File: