

IN THE MATTER OF BETHANY LANAE SMITH v. MINISTER OF CITIZENSHIP AND IMMIGRATION

Summary: The Court grants the application for judicial review brought by the applicant, an American citizen and homosexual member of the United States Army, which she deserted. Her claim for refugee protection was rejected by the Refugee Protection Division (RPD). She alleges she fears persecution by colleagues and superiors in the Army because of her sexual orientation and that she would be personally subject to risk to her life and of cruel and unusual punishment if returned to the US.

The RPD erred in its finding in regard of the availability of state protection. Its heavy reliance on the Federal Court of Appeal decision in *Hinzman v. Canada (Minister of Citizenship and Immigration)* was unjustified. That case was based on the conscientious objector status while the applicant's case mainly concerns her sexual orientation. The RPD did not appropriately assess the evidence in respect of her attempt to seek protection and in regard of the treatment of homosexuals in the US Army. The RPD also erred in failing to determine if the Uniform Code of Military Justice (UCMJ) is a law of general application. The RPD had the obligation to assess whether the UCMJ is a discriminatory law or whether it would be applied to the applicant in a discriminatory fashion.

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