

Federal Court



Cour fédérale

**Date: 20160218**

**Docket: IMM-3425-15**

**Citation: 2016 FC 225**

**Toronto, Ontario, February 18, 2016**

**PRESENT: The Honourable Mr. Justice Shore**

**BETWEEN:**

**ALI ASGHAR GHAMOOSHI &  
LEILA SALIMIPOURBANI &  
MAHDIS GHAMOOSHI Through  
His Litigation Guardian  
LEILA SALIMIPOURBANI &  
MAHDIEH GHAMOOSHI Through  
Her Litigation Guardian  
LEILA SALIMIPOURBANI**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. Overview**

[7] ... It is significant that throughout history and even modern history: e.g. Christians of various denominations, Jews, Moslems, Buddhists, Hindus and Baha'is have been killed for their beliefs without necessarily even having had deep knowledge, or even any knowledge, of their religions, other than adherence to their faith.

Many died for their faiths but, according to the annals of history, did not live according to their faiths; yet, that did not stop their slaughter. Therefore, it is important to view the evidence in this case such as provided by the specific church in question and additional evidence therefrom that was provided.

(As explained by the undersigned in *Oraminejad v Canada (Minister of Citizenship and Immigration)*, 2011 FC 997)

[2] Assessing the credibility of the refugee claimant is intrinsic to the function of an administrative tribunal. A certain level of deference is owed to the first instance tribunal's findings of fact to protect its primary function of weighing testimony. In some circumstances, however, this Court must intervene where it appears that, upon reviewing the entire record, the findings on the crux of the claim are unsupported by all the evidence, which forms a whole on its own by these nuances:

[1] A decision cannot be rendered in a vacuum without considering the person who is before a first-instance tribunal. Without taking into context all testimony, evidence, both subjective and objective (country of origin condition evidence) and understanding the clear nuances that form threads to comprehending a case, a first-instance tribunal may have heard a case but not necessarily have listened to it ...

(*Oraminejad*, above).

(*El Aoudie v MCI*, 2012 FC 450 at paragraph 2 as per the undersigned therein).

## II. Introduction

[1] The Applicants seek judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision rendered by the Refugee Appeal Division [RAD] of the Immigration and Refugee Board of Canada, wherein the RAD upheld a decision of the Refugee Protection Division [RPD] that the Applicants are neither Convention refugees nor persons in need of protection under sections 96 and 97 of the IRPA. It is also duly

noted that the present case had been before the RAD once before, wherein the Respondent agreed to have the matter considered anew by the RAD. Thus, this is the second decision of the RAD in regard to the Applicants, as the first decision of the RAD had been set aside in order for the matter to be considered anew as per agreement of the Respondent.

### III. Background

[2] The Applicants, Leila Salimipourbani (age 35) [Principal Applicant], Ali Asghar Ghamooshi (age 47) [together, Adult Applicants], and their children Mahdieh Ghamooshi (age 14) and Mahdis Ghamooshi (age 11), are citizens of Iran; and, are alleged Christian converts.

[3] The Applicants alleged that in August 2012, during their family vacation in Greece, the Applicants met two Iranian Christian converts, Mina and Ali. In September 2012, on their return to Iran, the Adult Applicants, attracted to the virtues of Christianity, attended at Mina and Ali's home their first Christian meeting. Thereafter, the Adult Applicants attended the meetings on a monthly basis.

[4] In March 2013, the Applicants went to London, England, for family vacations. Upon their return to Iran, the Adult Applicants allege having been detained for approximately eight hours; and, interrogated in regard to the purpose of their trip to London and as to whether they had attended at any demonstration while in England.

[5] On July 7, 2013, the Applicants traveled to Canada for family vacations. On August 8, 2013, the Applicants, while still in Canada, received a call from the Principal Applicant's mother

informing them that their Christian friends, Mina and Ali, had been arrested at an underground church meeting; and, that the Sepah-e Pasdaran-e Enqelab-e Eslami (also known as the Army of the Guardians of the Islamic Revolution) went to the Applicants' home and seized their Farsi bible and computer.

[6] On August 9, 2013, the Applicants sought refugee status in Canada. The Applicants, further to addressing and applying for status, began to attend church in Canada subsequent to having filed their refugee claims. The Applicants were then officially baptized shortly before their hearing before the RPD.

[7] In a decision dated November 13, 2013, the RPD held that the Applicants are neither Convention refugees nor persons in need of protection; as the RPD did not find the Applicants' narrative credible; and, also determined that their behavior was inconsistent with that of individuals who are genuine converts to Christianity. The RPD further rejected their *sur place* claim.

[8] The Applicants appealed the RPD's decision before the RAD. In a decision dated March 10, 2014, the RAD dismissed the appeal. The Applicants sought judicial review of that decision (see IMM-2617-14). Upon consent from the Respondent, an order, dated March 30, 2015, granted judicial review and the matter was remitted to the RAD for determination anew by a differently constituted panel.

[9] In a decision dated June 30, 2015, the RAD upheld the RPD's determination that the Applicants are neither Convention refugees nor persons in need of protection.

#### IV. Impugned Decision

[10] As a preliminary matter, the RAD refused to admit a letter, as well as a one-page document, as new evidence by relying on rule 29 of the *Refugee Appeal Division Rules*, SOR/2012-257. The RAD further rejected the Applicants' application for an oral hearing as the RAD did not accept the newly admitted evidence (see section 110 of the IRPA). The RAD confirmed RPD's determination that the Applicants lacked credibility; and, determined that their behavior is inconsistent with that of individuals who are genuine Christian converts. The RAD held that although the credibility concerns of the RPD may not individually, as such, be a basis for a denial of refugee protection, cumulatively, due to the numerous concerns, there is a sufficient basis for finding that the Applicants are not credible witnesses and are not deserving of Canada's protection.

[11] With regard to the Applicants *sur place* claim, the RAD held that the RPD failed to consider the risk of the Applicants being considered apostates by Iranian authorities; and, whether their conversion to Christianity may have come to the attention of Iranian authorities. The RAD held that given the lack of genuineness of their conversion to Christianity, the Applicants would not practice Christianity if they were to return to Iran. Furthermore, as a result of the Applicants not practicing Christianity upon their return to Iran, the RAD held that the Applicants would not be perceived as apostates by the Iranian authorities.

V. Issues

1. Did the RAD err in upholding the RPD's credibility findings?
2. Did the RAD err in law by not remitting the matter back to the RPD or by not providing reasons as to why it did not remit the matter?

VI. Legislation

[12] The following is the relevant legislative provision from the IRPA:

**Decision**

**111** (1) After considering the appeal, the Refugee Appeal Division shall make one of the following decisions:

(a) confirm the determination of the Refugee Protection Division;

(b) set aside the determination and substitute a determination that, in its opinion, should have been made; or

(c) refer the matter to the Refugee Protection Division for re-determination, giving the directions to the Refugee Protection Division that it considers appropriate.

**Décision**

**111** (1) La Section d'appel des réfugiés confirme la décision attaquée, casse la décision et y substitue la décision qui aurait dû être rendue ou renvoie, conformément à ses instructions, l'affaire à la Section de la protection des réfugiés.

VII. Position of the Parties

[13] The Applicants submit that the RAD committed an error of law by failing to remit the matter to the RPD, or to provide reasons as to why it did not do so, after it recognized that the RPD failed to consider the risks that the Applicants may face as apostates. Secondly, the RAD erred by upholding RPD's findings of credibility.

[14] Conversely, the Respondent submits that the RAD could, pursuant to paragraph 111(1)(b) of the IRPA substitute RPD's determination of *sur place* claim; and, that the RAD reasonably determined that the Applicants were neither Convention refugees nor persons in need of protection. Secondly, the RAD reasonably held that the Applicants lacked credibility.

VIII. Standard of Review

[15] The RAD's decision to uphold the RPD's credibility findings, and the RAD's determination on the *sur place* claims must be reviewed under the standard of reasonableness. The standard of correctness applies as to whether the RAD could substitute its determination to that of the RPD on the *sur place* claims as opposed to remitting the matter to the RPD (*Li v Canada (Minister of Citizenship and Immigration)*, 2015 FC 840).

IX. Analysis

A. *Credibility findings*

[16] The RAD, as per the jurisprudence of its mandate, was meant to review all the evidence in the RPD's record and conduct its own independent assessment of the refugee claim, bearing in mind that deference is owed in areas wherein the RPD assesses credibility findings (*Huruglica v Canada (Minister of Citizenship and Immigration)*, 2014 FC 799 [*Huruglica*]). This, the RAD did not do.

[17] As the RAD did not conduct a thorough examination of the record nor that of the submissions of the parties, the Court finds that it was unreasonable for the RAD to affirm the RPD's credibility findings. Although deference is owed by the RAD to the RPD regarding credibility findings, the RAD unreasonably held that, cumulatively, the RPD could find that the Applicants lacked credibility, as the Applicants' behavior was not consistent with that of people who are genuine converts to Christianity. Belief may often not be recognized as in depth of knowledge of religion, as adherents to religions may be adherents but not, necessarily, scholars of their religion, nor, are all adherents, necessarily, devout to the degree that would be considered significantly committed to adherence by which a decision-maker or a tribunal would state its opinion on the depth of such belief of applicants as ensuring genuineness of religious belief; yet due to perception in certain contexts of country conditions such individuals are nevertheless persecuted.



B. *Sur place claim*

[18] The Applicants submit that the RAD, having recognized that the RPD failed to adequately consider the Applicants' jeopardy in respect of its perception of their Christianity (reference is made to the United Nations High Commission for Refugees, Guidelines Booklet in respect of the criteria and interpretation of the Refugee Convention as to "perception" of the persecutors, themselves, and not of the perception of others), in the context of Iran and its authorities, in the framework of documentary evidence concerning the treatment of apostates in Iran (as an orbiter reflection, it is recalled how belief was treated by notorious Inquisitions, whether called by this or other designations, during the course of history). Reference is made to the Applicants' Record, RAD's Decision at para 45, p 16). The RAD erred by failing to remit the matter to the RPD or to provide reasons as to why that was not done in the context of both notice to the Applicants and explanation of credibility concerns thereon. This argument of the Applicants is, therefore, accepted.

[19] The Court notes that, in the present case, the RAD had a paper review in a matter of grave potential consequences to the Applicants, whereas, the case would appear to require the actual presence of the Applicants to conduct an "independent assessment of the Applicants". This, the RAD did not do. The Applicants were not present in a matter that essentially required their presence. Therefore, the Court does not consider that the RAD conducted "an independent assessment of the Applicants".

[47] Unlike judicial review, the RAD, pursuant to subsection 111(1)(b), may substitute the determination which "in its opinion, should have been made". One precondition of exercising this power is that the RAD must conduct an independent assessment of

the application in order to arrive at its own opinion. It is not necessary, in order to trigger this remedial power, that the RAD must find error on some standard of review basis.

(*Huruglica*, above at para 47)

[20] This Court, in reading paragraph 111(1)(b) of the IRPA, has stated that the RAD, in and of itself, cannot raise a new issue, not determined by the RPD without further notice to the parties (*Ojarikre v Canada (Minister of Citizenship and Immigration)*, 2015 FC 896; *Jianzhu v Canada (Minister of Citizenship and Immigration)*, 2015 FC 551 [*Jianzhu*]). As such, it would be unreasonable for the RAD to independently decide on a *sur place* claim where the RPD did not make a determination on the matter (*Jianzhu*, above at para 12). As a result in view of the circumstances, it was incumbent on the RAD to give notice to the Applicants as to the RAD's undisclosed credibility concerns in respect of the Applicants.

[21] In the present case, the RAD did in fact assess from a wholly different perspective whether the Applicants should be granted refugee status on the basis of their *sur place* claim; however, that should not have been done without the presence of the Applicants in this regard. Therefore, the RAD's determination, with regard to the *sur place* claim, is unreasonable as the RAD did not base its assessment on the whole of the evidence in an independent assessment of the Applicants. It was an error not to give notice to the Applicants; and, thus, for the Applicants not to appear before the RAD under the circumstances of the entirety of the evidence. In the circumstances, the RAD was not able without the presence of the Applicants to verify its credibility concerns without such presence.

X. Conclusion

[22] Consequently, the application for judicial review is granted.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application for judicial review be granted. The entire matter is to be sent to the RAD for determination anew by a differently constituted panel. There is no serious question of general importance to be certified.

"Michel M.J. Shore"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-3425-15

**STYLE OF CAUSE:** ALI ASGHAR GHAMOOSHI & LEILA  
SALIMIPOURBANI & MAHDIS GHAMOOSHI Through  
His Litigation Guardian LEILA SALIMIPOURBANI &  
MAHDIEH GHAMOOSHI Through Her Litigation  
Guardian LEILA SALIMIPOURBANI v THE MINISTER  
OF CITIZENSHIP AND IMMIGRATION

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**DATED:** FEBRUARY 18, 2016

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