Federal Court  Cour fédérale

Date: 20220218

Docket: IMM-1707-21

Citation: 2022 FC 214

Ottawa, Ontario, February 18, 2022

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

SHAZIA ZAHID
MUHAMMAD NEHAAL
MUHAMMAD RAAHIM

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants, a mother and her two adult children, seek refugee status. They have been denied their asylum claim by the Refugee Protection Division (RPD) and by the Refugee Appeal Division (RAD). They now seek the judicial review of the RAD decision, pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 [IRPA or the ACT]

[2] This case concerns residents of Pakistan who allege being the victims of religious persecution following their conversion to Shia Islam. The conversion would have followed the divorce of Shazia Zahid from her husband.

I. The facts

[3] The facts as alleged in this case stem from the narrative of the Principal Applicant, Mrs. Shazia Zahid. The events happened in rapid succession and can be summarized thusly:

- the Principal Applicant completed her Bachelor studies in 1996;
- she married Mr. Muhammed Zahid Qureshi in July 1997; the couple had two sons, the co-Applicants in this case. The Principal Applicant and her husband were both Sunnites;
- the couple separated in August 2015; the divorce was concluded in March 2017. The two sons stayed originally with their father. The Principal Applicant started working as a taxi driver;
- in March 2017, the Principal Applicant met two classmates she had not seen in a long time. Both are Shia Muslims and the Principal Applicant was introduced to Shia Islam. At the time, the Principal Applicant was rather lonesome and depressed; it seems that she found solace in the Shia community. She converted from Sunni Islam to Shia Islam later that same year, on October 20, 2017. In the mean time, in July 2017, the former husband remarried;
- four months after their mother had converted to Shia Islam, the two sons, the Co-Defendants, left their father and joined their mother where she lived. That was in February 2018. They then converted to Shia Islam, seven months later, on September 21, 2018;
- followed harassment against the two Co-Defendants by Sunni youngsters in the neighborhood: they called their new victims “Kafirs” and apostates;

- according to the Principal Applicant's narrative, things deteriorated quickly; five weeks after the Co-Defendants' conversion, the Applicants received the visit of the prayer leader of the local Sunni Mosque and his wife, on October 29, 2018; they were threatened with repercussions for having converted to Shia Islam. One week later, on November 2, 2018, the Principal Applicant received a call from, or on behalf of, a terrorist organization, designated as Lashkar-e-Jhangvi, threatening to kill the Applicants; they had to abandon the Shia faith;
- advising the police did not bring about any improvement as the police declared itself unable to help. Two days after the first threatening call, there was a second call about having complained to the police and demanding 500,000 rupees in repentance;
- six days later, on November 10, 2018, there was an attempt to kidnap the male Applicants. Thereafter, the Applicants moved and went into hiding. They came to Canada on valid Canadian visas on December 3. In the meantime, neighbours reported that masked men were looking for them; a Fatwa letter calling for their death for having insulted the Sunni faith was distributed;
- after their arrival in Canada, the Applicants were advised that the police were looking for them following a complaint from a Sunni Mosque prayer leader. Moreover, Lashkar-e-Jhangvi terrorist organization threatened to kill them.

II. The RPD and RAD Decisions

[4] It is obviously the RAD decision that can be the subject of a judicial review application. However, a brief overview of the RPD decision brings context that can be of assistance.

[5] Basically, both administrative tribunals saw the credibility of the Principal Applicant as being the determinative issue and they did not accept the Principal Applicant's story. For the RPD, the triggering event in the saga was the Principal Applicant's separation, and then divorce from her husband.

[6] However, there were some inconsistencies which rendered the evidence less credible in the view of the RPD. It concluded that the addresses appearing on Schedule A of immigration form IMM 5669 of the Applicants showed that the three Applicants stayed at the same address from March 2014 to February 2018, thereby contradicting the account of the Principal Applicant who claimed to have been living by herself until her sons joined her in February 2018. The burden on the shoulders of the Principal Applicant to demonstrate that she left her husband and sons as claimed was never discharged. Here is the chain of events as found by the RPD:

> [7] The principal claimant's separation from her husband was a determinative issue in these claims. The principal claimant did not meet the burden that lies upon her to establish that in 2015, she separated from her ex-husband, for the following reasons. The principal claimant alleged that following their separation in August 2015, her ex-husband kept the children with him, while she was obliged to move to another address alone. The principal claimant alleged that the separation from her children, combined with the routine and boredom in her life after she moved from her family's house, emotionally affected her. It was this allegedly unpleasant new situation in her life, after she separated from her children, that led the principal claimant to the company of her Shia friends, as she alleged, eventually leading to her and to her children' decision to convert to the Shia faith and the alleged persecution from the Sunni extremist elements.
>
> (RPD decision, para 7)

Obviously, the RPD found that the syllogism was considerably affected if the issue of the divorce followed by disruption of family life and adherence to Shia Islam cannot be sustained.

[7] The explanation (there must have been a mix up in the pages of Schedule A) did not satisfy the RPD. The copy of the same document presented at the hearing by the Principal Applicant had obviously been altered in different spots (RPD decision, paras 12 to 15). There

was never an articulated reason that came from the Applicants; the only explanation was, there must have been a mistake. That led the RPD to conclude:

> [23] As it is stated above, the principal claimant's address of residence is a determinative issue to the claims because, she allegedly converted from the Sunni to the Shia faith after she moved from the address she resided with her ex-husband and her children, in August 2015. According to her declarations at the Immigration Schedule A form submitted to the Canadian immigration authorities, during the years she alleged being separated from her children, the principal claimant resided with them at the same address. The claimants' contradictory statements, for which they did not provide a satisfactory explanation leads the panel to the finding that they are not credible witnesses. Consequently, the panel finds, on a balance of probabilities that the claimants were not credible when they alleged that they converted to the Shia faith, under the alleged circumstances.
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> (RPD decision, para 23)

[8] And there was more. The National Identity Card of the Principal Applicant, issued in September 2018, shortly before the Applicants came to Canada, bears the name of the Principal Applicant's husband in the space described as "Husband Name Muhammed Zahid Qureshi." Eighteen months after the divorce is said to have been finalized, and more than three years since separation, the National Identity Card just renewed bears the same name as the Principal Applicant's husband. The explanation that she did not think of changing it was not considered to be a reasonable explanation by the RPD. The RAD did not disagree with the RPD.

[9] One may suggest that the uncertainty around the divorce situation may have been resolved before the RPD by simply filing the appropriate judgment/certificate. In fact, the issue was broached before the RPD. The Principal Applicant refused to file it, even though it was

stated that the certificate was at home. Indeed the RPD invited the Applicants to file it later. To no avails.

[10] Counsel who appeared for the Applicants before the RPD was replaced before the RAD. Before the RAD, it was argued on behalf of the Applicants that the difficulties encountered with the residential address of the Principal Applicant were just not sufficient to find that the conversion as being not credible. Furthermore, said the new counsel, the divorce certificate shows that there was a divorce. However, the RAD notes that there is no such certificate as part of the record, as the Principal Applicant refused to file it, claiming that it had nothing to do with a refugee claim.

[11] The RAD finds that the Applicants did not specifically challenge the conclusion reached by the RPD about the residential address. Furthermore, one needs to add the Identity Card issue and the absence of a divorce certificate. The RAD concludes:

> [34] Je ne suis pas d'accord avec cette soumission. La SPR estime que les allégations de conversions et de persécutions des appelants ne sont justement pas crédibles en raison des contradictions mentionnées plus haut. Je suis d'avis que la SPR n'a pas erré à ce sujet. Il me paraît correct de conclure que la conversion religieuse des appelants et la persécution qui s'en serait suivie ne sont pas crédibles si le fondement de la conversion alléguée, soit la séparation et le divorce de l'appelante, n'est pas crédible.
>
> [Je souligne.]
>
> [TRANSLATION] [34] I do not agree with this argument. The RPD is of the view that the appellants' allegations of conversions and persecutions are not credible because of the contradictions stated above. I am of the opinion that the RPD did not err in this matter. I consider it correct to find that the appellants' religious conversion and the persecution that was to have ensued are not credible if the

> basis of the alleged conversion, being the female appellant's separation and divorce, is not credible.
>
> [Emphasis added.]

[12] Finally, the RAD specifically concluded that letters filed in support of the Applicants were not credible either. Again the RAD noted that this had not been specifically raised about the RPD decision. The documents refer to allegations already found not credible. Having reviewed the said documents (C-1 to C-5), it is very unlikely that the first three constitute anything other than hearsay, in that they recount events they could not have witnessed for a large part. Their probative value would at any rate be minimal, and it did not have any impact on the issues raised (addresses, identity cards, divorce certificate).

III. Argument and analysis

[13] The Applicants raise two issues on the judicial review:

- the RAD failed to conduct any "assessment whatsoever of the applicants' heartfelt and detailed testimony about their conversion and subsequent religious persecution", putting instead its focus on microscopic elements;
- the matter could have been resolved by considering the divorce certificate. The Applicants seem to rely on the affidavit of their second counsel, the counsel who appeared before the RAD. Before the Court on judicial review appeared, on behalf of the Applicants, a third counsel.

A. *The decision was unreasonable*

[14] As I understand it, the Applicants do not deny the inconsistencies around the residential address of the Principal Applicant during the period of time following the alleged separation and divorce, and around her Identity Card which continues to identify her husband as the person she was married to in November 2018. Hence, in spite of the evidence which tends to show the non-existence of a divorce, the Applicants argue that concerns about the alleged divorce constitute somehow microscopic focus on the RAD's part. That is surprising in view of the story told by the Principal Applicant that it is her divorce that triggered events leading to her religious conversion and the threats she claimed she received. This is not microscopic or a minor inconsistency. In fact, the new counsel before the RAD sought to use a divorce certificate he mistakenly thought was already part of the record.

[15] In the view of the Applicants, it was not reasonable to rely only on that inconsistency and not consider the rest of the evidence. For that proposition, the Applicants rely heavily on *Esquivel v Canada (Citizenship and Immigration)*, 2017 FC 290 [*Esquivel*]. In fact for that proposition to survive, they have to argue that the inconsistency in *Esquivel* is the equivalent of the inconsistency in this case.

[16] With respect, I fail to see how *Esquivel* is of assistance to the Applicants. *Esquivel* relates to one inconsistency not being sufficient to impugn the whole of the evidence presented. In that case, the inconsistency amounts to the travel itinerary being dated two days before the attack which triggered the decision to flee Peru for Canada, where asylum was claimed.

[17] The inconsistency in *Esquivel* was very minor. Such minor inconsistency is not deserving of resulting in the rejection of the evidence as a whole. Such is not the situation in the case under review. Here, the predicate to the conversion to Shia Islam is that the Principal Applicant divorced her husband, which resulted in her living alone and depressed: from there, Mrs. Zahid is "driven" to her conversion. Whether or not there was a divorce is not a mere inconsistency according to the RAD, but rather a *sine qua non*, the trigger which generates the events that ensue: it finds that the alleged conversion, which results in persecution of a religious nature is itself the result of the divorce through a chain of events that are inexorably tied together. In effect, without the divorce there is on this record no explanation for converting suddenly to the Shia faith. On judicial review, the Court takes the evidence as it is, not how it could or should have been. The Applicants had to address squarely the issue of the reasonableness of the syllogism presented by the RAD; according to it, if there is not enough evidence of a divorce in the first place, the house of cards falls flat.

[18] The burden is on the Applicants to show that the decision is unreasonable (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], at para 100). The hallmarks of unreasonableness are justification, transparency and intelligibility: it has not been shown how the decision lacks on that account. It is internally rational. The majority in *Vavilov* says that "(t)o be reasonable, a decision must be based on reasoning that is both rational and logical" (para 102). It has not been alleged that there are clear logical fallacies, circular reasoning, false dilemmas, unfounded generalizations or an absurd premise in the reasoning followed by the RAD.

[19] The Applicants contend that corroborative evidence cannot be discounted as done by the RPD and the RAD. But first, the Applicants must satisfy the decision maker that there is indeed corroborative evidence. In the case at bar, there are two affidavits from former classmates with whom it is alleged there was a reconnection in 2017: they are both Shia believers. I have read their affidavits repeatedly and could not find the corroboration, as it is known in our law. When I questioned counsel for the Applicants on this judicial review, she contended that corroboration did not have to be as strict in refugee law as in other areas of the common law. I would find that position to be untenable. It would seem to me that corroboration must have one meaning. If the concept does not fit our understanding of corroboration in law, it is something else. When considering corroboration, one is looking for independent evidence that tends to support the facts submitted. Instead of that, the affidavits merely repeat to the point of making it difficult to ascertain what is not hearsay. That is not corroboration. The same is true of the " To whom it may concern document" which is only a collection of information coming from unknown sources, and cannot be from the author of the document who did not witness what is listed in that document.

[20] The difficulties with the existence of a divorce are significant; the existence of a divorce was critical to the allegation of persecution. It follows that the RPD did not have to accept that documentary evidence (*Eije v Canada (Citizenship and Immigration)*, 2021 FC 500). This evidence is insufficient to remedy the significant credibility concerns concerning the religious conversions. I accept that corroborative evidence ought to be considered before a finding on credibility is arrived at. However, corroboration is required for the proposition to apply. In my view, there was no such corroboration here.

B. *Violation of principle of natural justice*

[21] The Applicants also argued that they suffered a violation of natural justice. This has to do with the divorce certificate that was never produced in this case.

[22] It appears that the Applicants consider the principle of natural justice violated in this case is the failure of representation. That failure is because the divorce certificate was not produced before the administrative tribunals. That argument is unsustainable.

[23] First, the Principal Applicant made a conscious decision not to file before the RPD the said certificate. She testified to that effect; moreover, the RPD left the door open for the Applicants to file the document after the conclusion of the hearing. That was not done. There must have been tactical or strategic considerations at play. Counsel for the Applicants on judicial review suggested that an inadvertent or honest mistake may suffice; there is no need to find that counsel was incompetent to argue violation of natural justice. She claims to find support for that argument in *Osagie v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1368 [*Osagie*] and *Sinnaia v Minister of Citizenship and Immigration*, 2008 FC 1405 [*Sinnaia*]. In these two cases, the inadvertent errors were providing the wrong address for service, appearing late for a hearing, and misstating a crucial fact in pre-removal risk assessment (PRRA) submissions.

[24] I have my doubts about the precedential value of these cases. If they do not include the incompetence of counsel, it is difficult to see how on judicial review a superior court could

intervene. Indeed, in *Osagie*, the Court referred to *Verna Gogol v Her Majesty the Queen*, [2000] 2 CTC 302; 2000 DTC 6168, a tax case, and a binding decision of the Federal Court of Appeal, where the Court denied a remedy because the sloppy work from counsel did not rise to "extraordinary" incompetence:

> **3** The second ground, that of the denial of natural justice because of the incompetence of the applicant's counsel, has not persuaded us either. While certainly some sloppy work was done, the evidence did not indicate such "extraordinary" incompetence, to use Justice Rothstein's language in the *Huynh* case, as would warrant this Court's intervention. The Tax Court Judge was not made aware of any "extraordinary" incompetence of counsel during the hearing. The so-called errors made by the lawyer, chosen by the applicant, were mainly technical ones, none of which prevented the applicant from receiving a fair hearing, from testifying on her own on behalf and from calling a witness to give evidence on her behalf.
>
> [Emphasis added.]

Incompetence of counsel seems to be a prerequisite. As for *Sinnaia*, it is unclear whether the court found incompetence, but ruled in favour of Ms. Sinnaia.

[25] Be that as it may, our case cannot be governed by this case law. It is true that the Applicants have not argued incompetence concerning their two previous counsel. They claim honest mistake and inadvertence. But they cannot argue inadvertence or honest mistake because there is none. Before the RPD, there is no question that the decision not to file the divorce certificate cannot be an error or an honest mistake: it was a choice made for whatever reason. But it was a choice. If the Applicants are content that counsel was not incompetent, which is evidently the position they take, they made a choice as was confirmed by the Principal Applicant

who testified before the RPD and stated that the certificate had nothing to do with her refugee claim.

[26] The counsel for the Applicants before the RAD filed an affidavit in this Court in which he concedes that he made a mistake in assuming that the divorce certificate was before the Refugee Protection Division. It is somewhat surprising given that the hearing before the RPD considered at some length the divorce certificate issue. At any rate, the concession made is of no moment as the decision of the Applicants before the RPD to do without the divorce certificate cannot be remedied easily before the RAD, or the reviewing court.

[27] In their written case before this Court, it is contended that "(h)ad former counsel not been under this assumption, he would very likely have submitted the divorce certificate as potential new evidence before the RAD" (Applicants' further memorandum, para 38). Given the circumstances of this case, that would have been allowing the Applicants to split their case, deciding first not to submit the evidence before the body responsible to hear the evidence, and then turning around, once unsuccessful before the RPD, to try something else.

[28] More importantly, that would have required that the Applicants satisfy the test for the introduction of new evidence. As IRPA makes abundantly clear, appeals before the RAD proceed without hearings, on the basis of the record assembled before the RPD (ss 110(3)). It is subsection 110(4) which governs the admissibility of new evidence:

Evidence that may be presented	**Éléments de preuve admissibles**
(4) On appeal, the person who is the subject of the appeal	**(4)** Dans le cadre de l'appel, la personne en cause ne peut

may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.	présenter que des éléments de preuve survenus depuis le rejet de sa demande ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'elle n'aurait pas normalement présentés, dans les circonstances, au moment du rejet.

[29] As can be seen, the Applicants cannot qualify under any of the three possibilities offered by subsection 110(4): the certificate was in existence well before the rejection of their claim, it was reasonably available since the Principal Applicant claimed to be in possession of it, and it was the Applicants' conscious choice not to present it.

[30] The Applicants suggested that the certificate could have been presented because of its relevance. Such suggestion is however faced with a formidable obstacle: the Court of Appeal decision in *Singh v Canada (Citizenship and Immigration)*, 2016 FCA 96; [2016] 4 FCR 230 [*Singh*].

[31] *Singh* is the first appellate decision interpreting subsection 110(4) (para 2). The Court of Appeal unequivocally found that was inescapable that new evidence proffered by a litigant had to meet the requirement of subsection 110(4). The Court wrote:

> [34] There is no doubt that the explicit conditions set out in subsection 110(4) have to be met. Accordingly, only the following evidence is admissible:
>
> - Evidence that arose after the rejection of the claim;
> - Evidence that was not reasonably available; or

> • Evidence that was reasonably available, but that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.
>
> [35] These conditions appear to me to be inescapable and would leave no room for discretion on the part of the RAD. In the first place, the very wording of subsection 110(4) specifies that the person who is the subject of the appeal "may present only" (« ne peut présenter ») evidence that falls into one of these three categories, thereby excluding any other evidence. Second, one should not lose sight of the fact that this provision departs from the general principle according to which the RAD proceeds without a hearing, on the basis of the RPD's record (s. 110(3)) and must for that reason be narrowly interpreted. Indeed, the judge seems to agree with this approach, insofar as she states that the respondent "was required to establish that he could not have reasonably been expected to provide the newly submitted documents at his RPD hearing" (para. 47). If she ultimately sides with him, it is because his request to file this new evidence fell squarely, in her view, within the scope of subsection 110(4), "and it met its explicit criteria" (para. 62)
>
> [Emphasis added.]

That means that the divorce certificate in this case could not have been admissible because it could not satisfy any of three prongs of subsection 110(4).

[32] Counsel for the Applicants suggested that the implied condition of admissibility identified in the context of PRRA (pre-removal risk assessment) applications are applicable to subsection 110(4). These conditions, developed in *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 [*Raza*], are explained at paragraphs 13 to 15 of the judgment. Summarily, they are credibility, relevance, newness, materiality, and express statutory conditions. Counsel argues that the certificate meets the conditions of relevance and materiality.

[33] If fact, the argument must imply that the conditions said to exist by necessary implication as per *Raza* can replace the statutory conditions of subsection 110(4), thus enlarging the scope of admissibility.

[34] That approach was explicitly rejected by the Court of Appeal in *Singh*. It found that it was not possible to argue that "the RAD may take into account the probative value and credibility of evidence in order to counteract the requirements of subsection 110(4)" (*Singh*, para 36). The Court went on to find that the implied conditions of *Raza* applied in the context of subsection 110(4), but they do not substitute for the statutory conditions. In fact, they constitute further restrictions on the admissibility of new evidence on appeal before the RAD (para 49). The Court states at paragraph 50:

> [50] As the Supreme Court noted in Palmer, a well-established judicial principle exists whereby the evidence and issues must be introduced exhaustively and dealt with at trial in criminal matters or at first instance in civil matters. As a case progresses, the issues in the matter must normally be further narrowed; the effect of introducing new evidence would be rather to expand the scope of the debate. This is what the RAD aptly highlighted at paragraph 20 of its reasons:
>
> > On this topic, it should be noted that the fact that evidence corroborates facts, contradicts RPD findings or clarifies evidence before the RPD does not make it "new evidence" within the meaning of subsection 110(4) of the Act. If that were the case, refugee protection claimants could split their evidence and present evidence before the RAD at the appeal stage that could have been presented at the start, before the RPD. In my opinion, this is exactly what subsection 110(4) of the Act seeks to prohibit.
> >
> > [Footnotes omitted]
>
> [Emphasis added.]

[35] The Court of Appeal repeats on a number of occasions that the requirements of subsection 110(4) cannot be set aside (para 53, 55). At paragraph 54, the Court states that "(t)he role of the RAD is not to provide the opportunity to complete a deficient record submitted before the RPD, but to allow for errors of fact, errors in law or mixed errors of fact and law to be corrected." Strategic or tactical reasons for omitting to proffer evidence cannot allow a litigant to split its case. The Court summarizes helpfully some findings at paragraph 63:

> [63] However, subsection 110(4) is not written in an ambiguous manner and does not grant any discretion to the RAD. As mentioned above (see paragraph 34, 35 and 38 above), the admissibility of fresh evidence before the RAD is subject to strict criteria and neither the wording of the subsection nor the broader framework of the section it falls under could give the impression that Parliament intended to grant the RAD the discretion to disregard the conditions carefully set out therein. Moreover, this approach complies perfectly with this Court's decision in *Raza*. The criteria set out in that decision regarding paragraph 113(a), which, moreover, are not necessarily cumulative, do not replace explicit legal conditions; rather they add to those conditions to the extent that they are "necessarily implied" from the purpose of the provision, to reiterate this Court's words at paragraph 14 of *Raza*. Otherwise, this would mean ignoring the conditions set out at subsection 110(4) and then delving into a balancing exercise between Charter values and the objectives sought by Parliament. In the absence of a direct challenge to this legislation, it should be given effect and the RAD has no choice but to comply with its requirements.
>
> [Emphasis added.]

[36] It follows that there was no violation of natural justice through the actions of counsel representing the Applicants.

IV. Conclusion

[37] The judicial review application is dismissed. No serious question of general importance was submitted by the parties. Thus no such question is certified by the Court.

JUDGMENT in IMM-1707-21

THIS COURT'S JUDGMENT is that:

1. The judicial review application is dismissed.

2. There is no question to be certified.

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1707-21
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