

Federal Court



Cour fédérale

**Date: 20230327**

**Docket: IMM-2155-22**

**Citation: 2023 FC 421**

**Montréal, Quebec, March 27, 2023**

**PRESENT: Mr. Justice Gascon**

**BETWEEN:**

**TAHEREH ZAKERI  
SOHRAB TABRIZIAN**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. Overview**

[1] The Applicants, Ms. Tahereh Zakeri and her husband Mr. Sohrab Tabrizian, are citizens of Iran. They are seeking judicial review of a decision rendered on February 7, 2022 [Decision] by the Refugee Appeal Division of the Immigration and Refugee Board of Canada [RAD]. In its Decision, the RAD upheld the Refugee Protection Division's [RPD] decision to refuse the

refugee claim of Ms. Zakeri and Mr. Tabrizian on the basis that they are not Convention refugees nor persons in need of protection pursuant to sections 96 or 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] Ms. Zakeri and Mr. Tabrizian submit that the incompetence of their former lawyer resulted in a breach of their right to procedural fairness and deprived them of their right to a fair process before the RAD. They further claim that the RAD erred in its review of the RPD decision and issued an unreasonable Decision.

[3] For the reasons below, I will grant Ms. Zakeri and Mr. Tabrizian's application for judicial review. After considering the RAD's findings, the evidence presented and the applicable law, I find that, in the circumstances of this case, the egregious incompetence of Ms. Zakeri and Mr. Tabrizian's former counsel resulted in a miscarriage of justice and amounted to a procedural fairness violation. This is sufficient to justify the intervention of this Court, and I must therefore remit the case for reconsideration by a different panel of the RAD. Given this conclusion, I do not have to deal with the other arguments challenging the reasonableness of the Decision.

## **II. Background**

### **A. *The factual context***

[4] Before their arrival in Canada, Ms. Zakeri worked as a lecturer at the University of Tehran while Mr. Tabrizian worked as a mechanical engineer. Ms. Zakeri submits that she fears persecution in Iran because she is a woman. She has allegedly been harassed at work and outside

of work because of her gender and because of her hijab supposedly not worn properly. For his part, Mr. Tabrizian claims that he has been imprisoned for his political activities and banned from leaving the country for ten years.

[5] Ms. Zakeri and Mr. Tabrizian state that their resentment toward the Islamic government led them to convert to Christianity, with the help of their neighbour, Anna.

[6] In January 2020, Ms. Zakeri and Mr. Tabrizian came to Canada and claimed refugee protection. They submit that they fear persecution in their country of citizenship because of their conversion to Christianity, as apostasy is a punishable crime in Iran.

[7] Their former lawyer, Me Louis Nadeau, filed their “basis of claim” forms [BOC] and represented them before the RPD and the RAD. Because Ms. Zakeri and Mr. Tabrizian speak Farsi and have a very limited understanding of the English language, Me Nadeau referred them to Mr. Masud Mikaili, who acted as a translator. Mr. Mikaili prepared the BOC by himself, and assured Ms. Zakeri and Mr. Tabrizian that it was an accurate translation of their narrative.

[8] Before the RPD hearing, Ms. Zakeri noticed errors in the BOC despite her very limited knowledge of the English language, and she notified these errors to Me Nadeau. Among others, she noticed the BOC stated she was a member of a women’s association in Canada, which was not true. Me Nadeau advised that an amended BOC was not necessary, because they would be able to provide clarifications at the RPD hearing.

[9] Before the RPD, the Minister of Citizenship and Immigration [Minister] introduced into evidence twenty-three refugee claims, relating to a total of forty-one claimants, which depicted stories almost identical to the one submitted by Ms. Zakeri and Mr. Tabrizian. For this reason, and because their explanations as to the similarities between these various refugee claims and their own were insufficient, the RPD rejected the claim of Ms. Zakeri and Mr. Tabrizian. The RPD determined that the central elements of their claim lacked credibility, particularly with regard to Ms. Zakeri and Mr. Tabrizian's conversion to Christianity.

**B. *The RAD Decision***

[10] In its Decision, the RAD refused the appeal of the RPD's decision and concluded that Ms. Zakeri and Mr. Tabrizian are not Convention refugees nor persons in need of protection because their allegations of risk were not credible.

[11] The RAD found that the RPD correctly established the similarities between Ms. Zakeri and Mr. Tabrizian's BOCs and the other claimants' narratives, as demonstrated by the Minister. The RAD also found that Ms. Zakeri and Mr. Tabrizian's explanation, namely that Mr. Mikaili used a template to prepare their BOCs, was insufficient to explain the similarities between the personal elements of their narratives and those of the other claimants.

[12] The Decision emphasizes that Ms. Zakeri and Mr. Tabrizian were given enough time to explain the similarities, but that they were unable to do so adequately and convincingly. In any event, said the RAD, the evidence concerning their conversion to Christianity was found to be

vague and insufficient. This evidence would not support some of their allegations, such as the presence of spies in Canada to inform the Iranian government of their conversion.

[13] Finally, the RAD addressed Ms. Zakeri's allegation of fear of persecution due to her gender. The RAD held that the evidence did not support her subjective fear of persecution, as she travelled to European countries after her encounter with the Iranian authorities concerning her hijab not worn properly, but did not attempt to make refugee claims on those trips and voluntarily returned to Iran.

**C. *The standard of review***

[14] Ms. Zakeri and Mr. Tabrizian submit that their allegations regarding their former counsel's incompetence should be reviewed on the correctness standard. On his part, the Minister states that no standard of review is engaged for issues of procedural fairness, as the reviewing court must examine whether the process satisfied the level of fairness required in the circumstances. However, the Minister argues that the standard of reasonableness applies to the remainder of the judicial review.

[15] On the standard of review, I agree with the Minister (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at paras 30–35; *Robert v Canada (Citizenship and Immigration)*, 2022 FC 268 at para 21; *Warrich v Canada (Citizenship and Immigration)*, 2022 FC 76 at para 14).

[16] Reasonableness is the presumptive standard that reviewing courts must apply when conducting a judicial review of the merits of an administrative decision. Reasonableness focuses on the decision made by the administrative decision maker, which encompasses both the reasoning process and the outcome (*Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 83, 87). A reasonable decision is justified with transparent and intelligible reasons that uncover an internally coherent reasoning (*Vavilov* at paras 86, 99). The reviewing court must be knowledgeable of the factual and legal constraints upon the decision maker (*Vavilov* at paras 90, 99), without “reweighing and reassessing the evidence” before it (*Vavilov* at para 125).

[17] On issues of procedural fairness, it has typically been held that correctness is the applicable standard of review for determining whether a decision maker complies with the duty of procedural fairness and the principles of fundamental justice (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Heiltsuk Horizon Maritime Services Ltd v Atlantic Towing Limited*, 2021 FCA 26 at para 107). However, the Federal Court of Appeal has repeatedly held that procedural fairness does not require the application of the usual standards of judicial review (*Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35; *Lipskaia v Canada (Attorney General)*, 2019 FCA 267 at para 14; *Canadian Airport Workers Union v International Association of Machinists and Aerospace Workers*, 2019 FCA 263 at paras 24–25; *Perez v Hull*, 2019 FCA 238 at para 18; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [*CPR*] at para 54). Rather, it is a legal question that must be assessed to determine whether or not the procedure followed by the decision maker met the

standards of fairness and natural justice, having regard to all of the circumstances (*CPR* at para 56; *Huang v Canada (Citizenship and Immigration)*, 2018 FC 940 at paras 51–54). In other words, the process followed by the decision maker must be fair and must offer the affected parties a right to be heard as well as a full and fair opportunity to know the case they have to meet and to respond to it. No deference is owed to administrative decision makers on matters raising procedural fairness concerns.

### **III. Analysis**

[18] The determinative issue in this application for judicial review is the allegation of counsel's incompetence and Ms. Zakeri and Mr. Tabrizian's claim that Me Nadeau's behaviour amounted to a breach of procedural fairness.

[19] The tripartite test to establish a procedural fairness violation resulting from incompetent representation requires an applicant to demonstrate the following: i) prior counsel's acts or omissions constituted incompetence; ii) a miscarriage of justice resulted, in the sense that, but for the alleged conduct, there is a reasonable probability that the result would have been different; and iii) the prior counsel was given a reasonable opportunity to respond (*Rendon Segovia v Canada (Citizenship and Immigration)*, 2020 FC 99 [*Rendon Segovia*] at para 22; *Guadron v Canada (Citizenship and Immigration)*, 2014 FC 1092 at para 11; *Pathinathar v Canada (Citizenship and Immigration)*, 2013 FC 1225 at para 25; *Nagy v Canada (Citizenship and Immigration)*, 2013 FC 640 at para 25). Each of these elements will be considered in turn.

[20] Regarding the first element, Ms. Zakeri and Mr. Tabrizian allege that Me Nadeau was incompetent in leading their case before the RPD and the RAD. Their allegations can be summarized as follows:

- 1) They only met Me Nadeau once before the hearing before the RPD;
- 2) They were referred to Mr. Mikaili who was presented as a translator/assistant, but acted as a lawyer;
- 3) Me Nadeau did not prepare their BOCs himself and did not use Mr. Mikaili as a translator, but deferred the entire preparation of the documents to Mr. Mikaili;
- 4) They were not able to review their narrative before it was submitted to the RPD;
- 5) They were advised they could not amend their narrative before the hearing;
- 6) Me Nadeau did not prepare them for the hearing or omitted to do so, relying on an unsupervised translator/assistant;
- 7) Me Nadeau did not inform them of the extent of the Minister's intervention by not disclosing the evidence or otherwise concealed relevant information;
- 8) Me Nadeau did not tell them that the narrative prepared for their refugee claim was nearly identical to more than 20 other similar claims he had prepared;
- 9) Me Nadeau, willingly or by omission, led them to believe that the Minister was intervening because of the use of similar expressions in translation, or otherwise downplayed the severity of the allegations of fraudulent claims;
- 10) Me Nadeau (and Mr. Mikaili) led them to believe that the Canada Border Services Agency's investigation toward him was ill-founded and the result of a misunderstanding;
- 11) Me Nadeau wrongly advised them on their credibility;



- 12) Me Nadeau failed to submit evidence in support of their claim or otherwise advise them on the evidence;
- 13) Me Nadeau did not properly advise them on the possible grounds for appeal;
- 14) Except for the duration of the hearing, the total amount of time Me Nadeau spent with them is approximately 45 minutes;
- 15) Me Nadeau filed an application for leave and judicial review in this matter without their consent.

[21] I have no hesitation to agree with Ms. Zakeri and Mr. Tabrizian that Me Nadeau's acts and omissions constituted gross and egregious incompetence. Me Nadeau's most striking actions are the following: i) he did not assist in filling out the BOCs and instead left it to the translator, who was not a lawyer even though he acted as if he was; ii) Me Nadeau did not inform Ms. Zakeri and Mr. Tabrizian of the extent of the Minister's intervention and of the extent of the similarities between their narratives and that of other claimants who were also clients of Me Nadeau; iii) Me Nadeau simply told them that their BOCs were similar to other narratives — whereas it was in fact an identical cut and paste from other claims —, and that they had nothing to fear; and iv) Ms. Zakeri and Mr. Tabrizian were advised not to file an amended BOC, because it would negatively impact their credibility, and that they would be able to provide clarifications at the hearing before the RPD.

[22] Taken individually, these missteps may not have been enough to find counsel's incompetence leading to a procedural fairness violation. However, the cumulative effect of all these actions is amply sufficient to establish the incompetence of Me Nadeau. Me Nadeau's legal

representation was not only deficient on certain fronts, but wholly lacking on all aspects of what a client can reasonably expect from a lawyer. In fact, some of Me Nadeau's advices appear to have been self-serving, in order to protect himself from further allegations of professional misconduct. His incompetence, and notably his failure to divulge to Ms. Zakeri and Mr. Tabrizian that their refugee claim was a duplicate of others, directly led the RAD to find inconsistencies in Ms. Zakeri and Mr. Tabrizian's story and to question their credibility. His actions prevented Ms. Zakeri and Mr. Tabrizian from making an informed decision about their refugee claim by distorting the extent of the situation they were in (*El Kaissi v Canada (Citizenship and Immigration)*, 2011 FC 1234 [*El Kaissi*] at paras 17–18).

[23] Turning to the third prong of the test for incompetence of counsel, it is also easily met. Even if Me Nadeau did not provide any response, the evidence shows that Ms. Zakeri and Mr. Tabrizian sent him a notice on May 11, 2022, in compliance with the *Protocol Allegations Against Counsel or Other Authorized Representative in Citizenship, Immigration and Protected Person Cases before the Federal Court*, dated March 7, 2014. Me Nadeau was given an opportunity to respond to the allegations of incompetence, but elected to stay silent.

[24] Whether Me Nadeau's behaviour ultimately amounts to a breach of procedural fairness revolves around the second prong of the test on incompetence of counsel. In order to assess whether a miscarriage of justice resulted from counsel's incompetence, the Court is required to review the Decision to determine whether the outcome would have been different but for the incompetence of the applicant's former counsel (*Tesema v Canada (Citizenship and Immigration)*, 2022 FC 1240 at para 8). In the context of refugee claims, "the incompetence of

counsel will only constitute a breach of natural justice in ‘extraordinary circumstances’” (*Rendon Segovia* at para 22; *Memari v Canada (Citizenship and Immigration)*, 2010 FC 1196 [*Memari*] at para 36).

[25] The Minister argues that there is no breach of procedural fairness stemming from the alleged incompetence of Me Nadeau. He submits that, but for the incompetence of Me Nadeau, there is still insufficient information to explain the similitudes between the various refugee claims that were before the RAD. Even though Ms. Zakeri and Mr. Tabrizian now know the extent of those similarities, says the Minister, they have failed to lay out what would have been the personal elements of their narratives.

[26] I disagree, and I am of the opinion that this case is one of those “extraordinary circumstances” where counsel’s incompetence amounts to a breach of procedural fairness.

[27] Contrary to what the Minister submits, the elements from the BOCs that Ms. Zakeri and Mr. Tabrizian claim to be wrong, namely, Ms. Zakeri’s membership with the women’s association in Canada and the lack of reference to Mr. Tabrizian’s imprisonment due to his political activities, are determinative in the RAD’s credibility findings. At paragraph 24 of the Decision, the RAD clearly says that the inconsistency with the membership of Ms. Zakeri with a women’s association in Canada — an inconsistency which was directly created by Me Nadeau’s incompetence — affected Ms. Zakeri and Mr. Tabrizian’s credibility. The failure of Me Nadeau to assist with the BOCs and his failure to produce an amended BOC when Ms. Zakeri identified errors in her BOC led the RPD, and then the RAD, to find inconsistencies in Ms. Zakeri and

Mr. Tabrizian's stories that were fatal to their case (*El Kaissi* at para 17). Me Nadeau's carelessness undermined Ms. Zakeri and Mr. Tabrizian's credibility right from the start.

[28] Additionally, Ms. Zakeri's response to the RAD's questions on the similarities between the various refugee claims presented by the Minister was a crucial element in the RAD's assessment of credibility (Decision at para 22), but Ms. Zakeri was not ready to answer such questions. She answered exactly what Me Nadeau had told her to answer, which was that Mr. Mikaili used a template. Ms. Zakeri was not able to provide further explanations, because she was simply unaware of the extent of the similarities, and of the fact that Mr. Mikaili literally copied their narratives from other BOCs.

[29] The Minister further argues that, in any case, the evidence as to Ms. Zakeri and Mr. Tabrizian's conversion to Christianity is insufficient. I do not accept this argument and find that it results from a flawed logic for two reasons. First, it is clear from the Decision that the RAD's adverse credibility findings tainted its entire analysis of the evidence. At paragraph 35 of the Decision, the RAD discussed the evidence adduced by Ms. Zakeri and Mr. Tabrizian concerning their Christian baptism here in Canada. It held that [TRANSLATION] "the conclusion that the appellants' narrative is not truly theirs can only affect their overall credibility, including with respect to events that allegedly occurred subsequent to the writing of the narrative". The main element anchoring the RAD's credibility concerns about Ms. Zakeri and Mr. Tabrizian was the evidence on the twenty-three similarly worded refugee claims. As a result, I find that the RAD was blinded by this troubling evidence on dozens of similarly drafted refugee claims and, by building its analysis on this evidence, it deprived Ms. Zakeri and Mr. Tabrizian of a fair process

regarding the treatment of their own claim. I pause to emphasize that Ms. Zakeri and Mr. Tabrizian were innocent victims of Me Nadeau's professional misconduct and stratagem.

[30] Second, the Minister's argument is flawed because Ms. Zakeri and Mr. Tabrizian are not entitled to introduce further evidence concerning their conversion to Christianity for the purposes of these proceedings, except evidence necessary to demonstrate the breach of procedural fairness that resulted from the incompetence of Me Nadeau:

[T]he standard for the introduction of new evidence on judicial review is high. It is trite law that the reasonableness of a decision is only to be evaluated on the basis of the record which is before the decision maker. New evidence may be introduced on judicial review only to demonstrate a breach of procedural fairness or jurisdiction and may not be used to show that a decision was correct on the merits (see Canadian Federation of *Students v National Sciences and Engineering Research Council of Canada* 2008 FC 493 at paragraph 40, *Vennat v Canada (Attorney General)* 2006 FC 1008 at paragraph 44, and *McFadyen v Canada (Attorney General)* 2005 FCA 360 at paragraph 15).

(*Molnar v Canada (Citizenship and Immigration)*, 2012 FC 530 at paragraph 39.)

[31] It is true that Ms. Zakeri and Mr. Tabrizian could have provided more details on their personal story and more support for their asylum claim in the affidavits they filed as part of their application for judicial review. However, their affidavits make it clear that they were caught by surprise by the similarities of the various refugee claims handled by Me Nadeau and that they were totally unaware of Me Nadeau's conduct in that respect. Moreover, I am satisfied that there was enough evidence on the record to demonstrate that their situation was dissimilar to the stories of several other refugee claims submitted by the Minister. For example, the RAD used the RPD's finding that the name of Ms. Zakeri and Mr. Tabrizian's neighbour who introduced them

to Christianity is supposedly repetitive throughout the numerous BOCs submitted by the Minister. However, such finding is not grounded in the evidence on file, as the name “Rita” (and not Anna) used in Ms. Zakeri and Mr. Tabrizian’s BOCs cannot be found anywhere else in the claims submitted in evidence by the Minister. In sum, but for Me Nadeau’s incompetence in handling Ms. Zakeri and Mr. Tabrizian’s BOCs, there is a reasonable probability that their narrative would have been found credible and that the evidence they adduced would have been sufficient to support their refugee claim (*Rendon Segovia* at para 31).

[32] For all of these reasons, I find that the cumulative impact of the prejudice suffered by Ms. Zakeri and Mr. Tabrizian as a result of Me Nadeau’s incompetence was sufficiently serious to compromise the reliability of the Decision (*Memari* at para 64). Therefore, the second prong of the test for counsel’s incompetence is also met. I am therefore satisfied that Ms. Zakeri and Mr. Tabrizian have demonstrated that the incompetence of their former counsel resulted in a procedural fairness violation, thus vitiating the RAD’s conclusions and its denial of their refugee claim.

[33] In light of my conclusion on the breach of procedural fairness, I need not address Ms. Zakeri and Mr. Tabrizian’s other arguments regarding the reasonableness of the Decision.

#### **IV. Conclusion**

[34] For all the reasons detailed above, I conclude that the incompetence of Ms. Zakeri and Mr. Tabrizian’s former counsel resulted in a miscarriage of justice and amounted to a violation of their right to procedural fairness. Since Ms. Zakeri and Mr. Tabrizian were not given a full

and fair opportunity to be heard and to understand the case they had to meet, I must allow this application for judicial review and return the matter to have their application redetermined by a differently constituted panel, in accordance with the Court's reasons.

[35] There are no questions of general importance to be certified.

**JUDGMENT in IMM-2155-22**

**THIS COURT’S JUDGMENT is that:**

1. This application for judicial review is granted, without costs.
2. The Decision of the Refugee Appeal Division [RAD] dated February 7, 2022, rejecting the Applicants’ refugee claim, is set aside and the matter is referred back to a different panel of the RAD for redetermination on the merits, in accordance with the Court’s reasons.
3. No question of general importance is certified.

“Denis Gascon”

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Judge



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

**DOCKET:** IMM-2155-22

**STYLE OF CAUSE:** ZAKERI ET AL. v THE MINISTER OF CITIZENSHIP  
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