Date: 20080609

Docket: IMM-3832-07

Citation: 2008 FC 717

Ottawa, Ontario, June 9, 2008

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

SOHAIL SYED RIZVI,
ANNE SOHAIL RIZVI,
MIKAELEH SOHAIL RIZVI

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction and background

[1] The Rizvi family, all citizens of Pakistan, challenge, in this judicial review application, the August 7, 2007 decision of a pre-removal risk assessment (PRRA) officer (the tribunal) rejecting their applications they be found at risk in Pakistan from Islamic extremists because they are Christians. The father Sohail Syed Rizvi, age 68, was born of parents with different religions: his father was Muslim and his mother a Christian; he was baptized a Christian. Under Islamic law as

the son of a Muslim, he is considered a Muslim. The mother Anne Sohail Rizvi, age 66, is a Catholic and their daughter Mikaeleh, age 37 was raised as a Christian.

[2] Mr. and Mrs. Rizvi were born in 1940 and in 1941 in India and presumably became citizens of Pakistan after the creation of that state in 1947 upon the partition of British India. Their daughter was born in Karachi in 1971.

[3] The Rizvi family came to Canada in 2002 directly from Dubai where they had resided since 1978 when Mr. Rizvi found work there. In 2000 he turned 60 which is the retirement age for ex-pats and, as a result, he indicated he could no longer reside there because he did not meet the residency requirements.

[4] The family made a refugee claim which was dismissed on September 14, 2004, leave to appeal refused by a judge of this Court. In dismissing their refugee claim, the Refugee Protection Division (RPD) found the father and daughter not to be of Christian faith essentially because they had identified themselves in their Pakistani passports as members of Islam; Mr. Rizvi had also identified himself at work as a Muslim and his evidence was he never attended mass or took confession in Dubai and his religious attendance in Canada sparse. As for the daughter, the RPD cited her minimal contact with two Roman Catholic organizations in this country and her evidence she does not practice that faith here. The RPD acknowledged the documentary evidence mentioned incidents of violence against Christians and Christian churches but concluded these incidents were isolated and not widespread. It concluded there was less than a mere possibility "that the family will face serious harm if they return to Pakistan as a result of the mother being a Christian and father and

daughter being Muslims." In late May 2006, they were advised they were eligible to apply for a pre-removal risk assessment. They took advantage of that procedure.

The tribunal's decision

[5] The tribunal first reviewed the RPD's findings and determined in their PRRA applications the applicants alleged the same risk if returned to Pakistan: persecution on account of their Christian faith. The tribunal then ruled: "As this risk has been assessed by the RPD, only new evidence of this risk will be considered in this application."

[6] The tribunal then reviewed two documents it considered as new evidence:

- A letter from the pastor of a Toronto church "which states that the family worships at the church several times a week"; and

- The amended Pakistani passports, obtained from the Pakistani consulate in Toronto, for the father and daughter "which now identifies their religion as Christians". In fact, his daughter obtained a new passport. The consulate returned Mr. Rizvi's old passport with Islam struck out and Christian substituted. Both religions are clearly legible in his passport.

[7] Assessing the new documentary evidence, the tribunal ruled:

> I have considered that the applicants changed their passports and started regularly attending church in Toronto only after the RPD decision, which specifically addressed these two issues. In consideration of the timing of these events and their

> relation to the RPD's findings, I assign the letter and passports little weight in establishing that the applicants face risk in Pakistan due to their Christian faith. [Emphasis mine.]

[8] The tribunal then stated it had considered the internet articles submitted by the applicants and said it "accepts that the government and police have been criticized for not taking action against attacks on Christians and their property" adding it had also considered the 2006 US State Department's International Religious Freedom Report which reveals government efforts aimed at improving the treatment of religious minorities in Pakistan quoting it:

> During the reporting period, the Government maintained its public calls for religious tolerance, worked with moderate religious leaders to organize programs on sectarian harmony and interfaith understanding, maintained its ban on and actively attempted to curb the activities of sectarian and terrorist organizations, implemented a registration scheme for Islamic religious schools known as madrassahs, and proceeded with reform of the public education curriculum designed to end the teaching of religious intolerance.

[9] The tribunal also referred to that US DOS report as stating Christians had claimed there were 4 million of its members there, that 70 percent of English-speaking Catholics worshipped regularly and the Catholic diocese of Karachi estimated 120 thousand lived in that city.

[10] The tribunal also said it had considered Mr. Rizvi's stated risk he will be killed because of the change of religion on his passport and noted "according to the International Religious Freedom Report [of US DOS for 2006] there is no law against apostasy in Pakistan." [Emphasis mine.]

[11] The tribunal concluded its consideration of the applicants' separate submissions and of its independent research "it has not established that the applicants face a personal and forward-looking risk of persecution, risk of torture, risk to life or risk of cruel and unusual treatment or punishment in

Pakistan. Having said this, the tribunal stated it considered country conditions to determine if they were Convention refugees or persons in need of protection and this time referring to the 2006 US DOS Country Report on Human Rights Practices in Pakistan finding "the government's human rights record remained poor" but concluding:

> While I acknowledge problems such as restrictions on freedom of religion and violence against women, there is insufficient evidence before me to conclude that the applicants would be personally at risk of these or other human rights problems in Pakistan. Accordingly, I do not find that the applicants would face more than a mere possibility of persecution, nor do not find it likely that the applicants would face a risk of torture, risk to life, or a risk of cruel and unusual treatment or punishment should they return to Pakistan. [Emphasis mine.]

The issues raised by the applicants

[12] The applicants raised the following issues:

1. The tribunal erred in law in failing to consider the risk that would be faced by the applicants if they were returned to Pakistan and failed to consider the evidence properly before them.

2. The tribunal erred in law and breached the principles of natural justice in not holding a hearing pursuant to the provisions of subsection 113(b) of the *Act*.

3. The tribunal made an erroneous finding of fact and law when it determined the applicants were not at risk to life if returned to Pakistan.

[13] The first issue raised focuses on what the applicants say is the failure of the tribunal to consider the real capacity of Pakistan to protect Christians and simply noted the government's good intentions and further compounded its error by Christians would be protected by their numbers. The applicants say the tribunal ignored the voluminous evidence on religious violence permeating Pakistan. The applicants rely on *Mitchell v. Canada (Minister of Citizenship and Immigration)*, (2006) 51 Imm. L.R. (3d) 159 and *Kaur v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1491.

[14] The second issue relates to the tribunal's decision to give little weight to the two pieces of new evidence: the letter from the pastor and their amended passports because of their timing and relation to the RPD findings. The applicants argue that while the tribunal frames its finding in terms of assigning of weight, in fact, it made a credibility finding. They say that as this new evidence could have lead to a positive decision and is central to it and where the tribunal finds those documents not credible, the requirements of section 167 of the *Immigration and Refugee Protection Regulations* (the *Regulations*) are met in that both the Regulations [and additionally] procedural fairness at common law demanded a hearing be held citing *Tekie v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 27; *Liyanage v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1045; *Zokai v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1103 and *Shafi v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 714.

[15] With respect to the final issue, the applicants argue the tribunal erred in fact and law in finding that the applicants are not at risk relying on my colleague Justice Mandamin's decision of October 3, 2007 in *Rizvi v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1017 which

stayed the applicants' removal pending the determination of this judicial review application. The applicants say the tribunal found comfort in the fact there was no law against apostasy in Pakistan based on the 2006 US DOS International Religious Freedom Report yet one year later the 2007 US DOS International Religious Freedom Report mentions at page 213 that "a convert from Islam becomes an apostate and is eligible for the death penalty". [Emphasis mine.]

Analysis

(a) The standard of review

[16] The Supreme Court of Canada in its recent decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9 reformed the law on the standard of review of decisions by administrative decision makers. There are no longer three standards of review but only two as the result of the collapsing of the patently unreasonable standard into the reasonableness standard which must also accommodate certain issues of law in certain circumstances previously handled under the correctness standard which remains in place.

[17] In that case, the Supreme Court of Canada was dealing with a provincially appointed decision maker and, as a consequence, it did not consider the impact of paragraph 18.1(4)(d) of the *Federal Courts Act* which provides this Court may set aside a decision of a federal administrative decision maker if the decision was based "on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the evidence before it". The jurisprudence makes it clear this statutory provision is analogous to the patently unreasonable standard of review and is confined to findings of fact.

[18] In *Dunsmuir*, above the Supreme Court of Canada also ruled at paragraph 57 it was unnecessary for a Court to engage in a separate standard of review analysis for each case when the standard of review on the relevant questions had been settled by the jurisprudence.

[19] On this basis, the first issue raised by the applicants relates to the adequacy of state protection. The Federal Court of Appeal in *Hinzman v. Canada (Minister of Citizenship and Immigration),* 2007 FCA 171 decided this issue was reviewable on the standard of reasonableness.

[20] The second issue raised by the applicants involves the proper interpretation of section 167 of the *Immigration and Refugee Protection Regulations* (the *Regulations*) and is reviewable on the correctness standard (see *Tekie v. Canada (Minister of Citizenship and Immigration),* 2005 FC 27).

[21] The final issue raised by the applicants is a question of fact reviewable on the basis of paragraph 18.1(4)(d) of the *Federal Courts Act*, a breach of which would clearly make that decision unreasonable.

(b) Discussion and conclusions

[22] I do not accept counsel for the applicants' submission the tribunal did not deal with the issue of state protection in Pakistan. The tribunal's consideration of state protection in this case was very brief but the record is before the Court "as a check on the Board's conclusions" and for this proposition I refer to the Supreme Court of Canada's decision in *Boulis v. Canada (Minister of Manpower and Immigration),* [1974] S.C.R. 875 at page 885.

[23] The applicants have the burden of rebutting the presumption Pakistan is incapable of providing adequate state protection to Christians; perfect state protection is not the standard. Sometimes state protection is ineffective (see *Canada (Minister of Citizenship and Immigration) v. Olah*, 2002 FCT 595 and, in particular, the Federal Court of Appeal's recent decision in *The Minister of Citizenship and Immigration v. Carrillo*, 2008 FCA 94 where Justice Létourneau made it clear "local failures to provide effective policing do not amount to a lack of state protection" i.e. inadequate state protection).

[24] I agree with counsel for the applicants, state protection is not adequate if a government does nothing to assure it except to express its good intentions to provide it. However, I do not agree with her the extract cited by the tribunal can simply be characterized as an expression of a pious hope on the part of the government of Pakistan. That extract from the US DOS reflects concrete steps taken by the government of Pakistan to curb the activities of sectarian organizations.

[25] The tribunal indicated in its decision it had considered the internet articles submitted by the applicants. I also reviewed the certified tribunal record (CTR) in this respect. I agree with the tribunal those internet articles do not establish the government of Pakistan is incapable of providing state protection. Those articles demonstrate sporadic and unanticipated acts of violence against religious minorities including Christians.

[26] I cannot accept counsel for the applicants' second submission to the effect the tribunal's ruling on the weight to be given to the two documents of new evidence is a disguised credibility ruling. As I see it, the tribunal did not reject the new evidence on grounds it was not credible. It

accepted the new evidence as being genuine and reliable. What it did to, however, is to assess that evidence as to what weight should be given to it i.e. what was its probative value which is its task.

[27] The third issue is more difficult but the facts are clear:

1. There is no doubt the tribunal relied upon the 2006 US DOS International Religious Freedom Report for the proposition in its reasons "there is no law against apostasy in Pakistan". The extract from the 2006 US DOS report is to be found in the certified tribunal record, at page 21. The full sentence reads: "there was no law against apostasy; however, societal pressure against conversion from Islam was so strong that any conversion almost certainly would take place in secret".

2. My colleague Justice Mandamin, on the stay application in this case, he decided on October 3, 2007 had before him the 2007 US DOS International Religious Freedom Report. That report was released on September 14, 2007 and, therefore, was not available to and not before the tribunal whose decision is dated August 7, 2007. It contained the following statement to be found at applicants' record, volume 1, page 231, the full sentence being: "In addition, a convert from Islam becomes an apostate and is eligible for the death penalty." Justice Mandamin picked up on that statement to conclude the PRRA officer in this case had performed an inadequate risk assessment because the PRRA officer did not properly turn his mind to the risk the applicant father and daughter would be subject to as a result of being seen as converting or re-converting from the Muslim to the Christian faith. He ruled the risk to the applicant

father and daughter would be materially different if they were seen as apostates than it would be if they are seen as always having been Christians.

3. The applicants' record was filed with the Court on October 18, 2007. Counsel for the applicants quoted extensively from Justice Mandamin's stay decision in support of the proposition the tribunal had made an erroneous finding of fact and law.

4. Counsel for the respondent then filed its memorandum of fact and law opposing the grant of leave and chose not to deal with the issue raised by the applicants in terms of what Justice Mandamin had decided. Furthermore, counsel for the respondent did not file a supplementary memorandum after leave was granted. The matter was left to oral argument before the Court.

[28] The difficulty with this case is the tribunal cannot be faulted for the conclusion it reached that, at the time of the decision, there was no apostasy law on the books in Pakistan. The material before Justice Mandamin shows that an *Apostasy Act* was introduced in the Parliament of Pakistan in 2006.

[29] The jurisprudence on this point is clear to the effect the record before a reviewing court on a judicial review application cannot be expanded beyond the evidentiary record which was before the tribunal; it must be the same subject to two exceptions not present in this case, namely, where issues of jurisdiction or natural justice are before a reviewing Court. That point was not before Justice Mandamin. The matter before him was a stay proceeding and not a judicial review proceeding. For

the proposition that fresh evidence may only be adduced on judicial review in exceptional circumstances, I refer to the Federal Court of Appeal's decision in *Gitxsan Treaty Society v. Hospital Employees' Union (C.A.)*, [2000] 1 F.C. 135; *Bekker v. Canada*, 2004 FCA 186; *Singh v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 69 and *Rafieyan v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 727.

[30] In the circumstances, the third argument raised by counsel for the applicants must be rejected.

[31] However, the applicants are not without a remedy. They are entitled to raise the issue of the new apostasy law (if it is on the books) in a new PRRA application on the basis of changed country conditions. They are also entitled to raise the issue whether the applicants would be considered as apostates according to sharia law and, if so, what impact such a fact would have on their risk of return to Pakistan. I note Mr. Rizvi had raised this issue with the officer (see, CTR, page 135).

[32] The nature and purpose of a pre-removal risk assessment is settled by the jurisprudence of this Court. A pre-removal risk assessment is not an appeal from a negative decision of a refugee protection tribunal. Its purpose is to evaluate new evidence showing that the situation, particularly in terms of country conditions, which existed at the time of a negative refugee protection decision has changed. Moreover, the concept of a second or multiple PRRA applications is contemplated by section 165 of the *Regulations* and this notion has been endorsed by my colleagues (see for example *Orozco v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1426 citing *Kouka v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1236).

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this judicial review application is dismissed without prejudice to the applicants to file a new PRRA application raising the issue of apostasy. No certified question arises from this decision.

"François Lemieux"

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Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

Wennie Lee	FOR THE APPLICANTS
Angela Marinos	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lee & Company / Barristers North York, Ontario	FOR THE APPLICANTS
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT