

CANADA / JUDGMENT

## VB9-05736

## COURT

Refugee Appeal Division

## DECIDED

10 January 2020

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RAD File / Dossier de la SAR : VB9-05736

VB9-05737 / VB9-05738 / VB9-05739

Private Proceeding / Huis clos

Reasons and decision ? Motifs et décision

Persons who are the subject of the appeal

XXXX XXXX XXXX XXXX XXXXXXXX XXXX XXXX XXXXXXXX XXXX XXXX XXXXXXXX XXXX  
XXXX

Personnes en cause

Appeal considered / heard at

Toronto, ON

Appel instruit / entendu à

Date of decision

January 10, 2020

Date de la décision

Panel

J. Lourenço

Tribunal

Counsel for the persons who are the subject of the appeal

Dean D. Pietrantonio

Conseil des personnes en cause

Designated representative

XXXX XXXX XXXX XXXX

Représentant(e) désigné(e)

Counsel for the Minister

N/A

Conseil du ministre

REASONS FOR DECISION

## OVERVIEW

- [1] XXXX XXXX XXXX XXXX (Principal Appellant), XXXX XXXX XXXX (Adult Associate Appellant), XXXX XXXX XXXX and XXXX XXXX XXXX (Minor Associate Appellants) are Kurdish and are citizens of Iraq. They appealed a decision of the Refugee Protection Division (RPD), dated July 3, 2019, rejecting their claims for refugee protection. The Appellants allege they face persecution from their families on the basis of the Principal Appellant's religious conversion and their marriage. The Principal Appellant also alleges he faces persecution due to his previous work with the XXXX government in Iraq. The determinative issue in this case for the RPD was the viability of an internal flight alternative (IFA).
- [2] I agree with the Appellants that the RPD erred in its IFA analysis. For the reasons that follow, their appeal is allowed and I find that they are Convention refugees.

## BACKGROUND

- [3] The Principal Appellant alleges that he was raised in the Kakai faith and is a member of the Hawari tribe. He alleges that he worked for the XXXX government in Iraq as an XXXX and received threats because of this work. He alleges that he obtained permanent residence in the United States (U.S.) and lived in the U.S for some time before returning to Iraq. While in the United States, the Principal Appellant alleges that he converted to Islam. He alleges that he met his wife (the Adult Associate Appellant) when he returned to Iraq and they married despite the disapproval of their families. The Principal Appellant alleges that his family disapproved of his marriage and threatened him.
- [4] The Principal Appellant alleges he returned to the U.S for some time to maintain his status but was told it would be a long process to sponsor his wife. He renounced his American Permanent residence as a requirement for a job at the XXXX XXXX in Iraq. The Appellants moved to two other cities in Kurdistan to try and avoid detection. They allege that despite moving frequently, they were located by the Principal Appellant's family in XXXX and XXXX. They allege that they fled Iraq after the birth of their youngest child, travelling to the United States and then Canada.

- [5] The Minister intervened in writing before the RPD, arguing that the Appellants' history in the U.S undermined their credibility. The RPD found that the Appellants' allegations were credible. However, the RPD rejected their claims as it found they have a viable IFA in Dohuk. The RPD heard evidence about the Principal Appellant's status in the U.S, but did not raise exclusion under Article 1E as an issue and made no determination on whether the Principal Appellant would be excluded.

## ROLE OF THE REFUGEE APPEAL DIVISION

- [6] The Refugee Appeal Division (RAD) reviews decisions of the RPD on a standard of correctness after conducting an independent assessment of the evidence before it. The exception to this rule is where the RPD enjoys a meaningful advantage in the assessment and weighing of oral testimony heard, which in particular cases, attracts deference. Unless specifically stated below, I have applied a correctness standard.<sup>1</sup>

## ANALYSIS

### Appellants' arguments

- [7] The Appellants argue that the RPD acted unfairly by not raising the issue of IFA with the Principal Appellant during his testimony. The Appellants also argue that the RPD failed to properly assess their future risk and misapprehended their evidence. The Appellants also argue that the RPD erred in its IFA analysis by failing to properly consider the risk the Appellants face in Dohuk. They further argue that the RPD failed to properly consider the objective evidence which would render Dohuk unreasonable as an IFA.

## NEW EVIDENCE

- [8] Section 110(4) of the IRPA<sup>2</sup> sets out that an appellant may only present evidence that arose after the rejection of their claim, or that was not reasonably available, or that they could not reasonably have been expected in the circumstances to have presented at the time of the rejection. Where evidence meets the requirements of section 110(4), the RAD will then go on to consider the factors affirmed by the Federal Court of Appeal in Singh.<sup>3</sup>
- [9] The Appellants have submitted a number of documents as new evidence with their appeal. They have submitted an affidavit from the Principal Appellant, three news articles about honour killings and an item from the update National Documentation Package (NDP) for Iraq. They are arguing that this evidence meets the requirements of section 110 (4) and are seeking to have it considered in their appeal.

**The Affidavit will not be admitted, procedural fairness not breached**

- [10] The affidavit submitted as new evidence is from the Principal Appellant and outlines the reasons why he feels that the Appellants do not have a viable IFA in Dohuk. I find that the affidavit submitted by the Appellants do not meet the requirements set out in 110 (4) of the IRPA. The content of the affidavit is not new as it relates to the reasons that the Appellants allege they cannot safely relocate to Dohuk. This issue was raised to the Appellants at the hearing by the RPD and the Adult Associate Appellant was directly questioned about the family's ability to relocate. The Appellants argue that the RPD did not ask the Principal Appellant these questions and that this amounted to a breach of procedural fairness.
- [11] I am not persuaded by the Appellants' argument. I find that the Principal Appellant was aware that IFA was being considered as the RPD identified that at the outset of the second sitting. While the RPD asked the questions about IFA primarily to the Adult Associate Appellant, nothing prevented Counsel from asking the Principal Appellant about the viability of the IFA. Also, counsel could have asked to recall the Principal Appellant as a witness after the Adult Associate Appellant testified to illicit more information. Similarly, it was open to counsel to raise this issue before the RPD and ask that the questions be asked to the Principal Appellant instead of his wife. I find that the RPD did not breach procedural fairness in its questioning of the Appellants regarding their ability to relocate to Dohuk. I would also note that much of the content of the affidavit regarding the requirements to move within Kurdistan is reflected in the NDP and therefore is not new. For reasons I will outline, I find that the RPD failed to consider this objective evidence and I will consider it for the appeal.
- [12] I find that it would be reasonable to expect that the Appellants would have provided this information to the RPD as they were aware that Dohuk was being considered as a possible IFA location. I find that this evidence was reasonably available to the Appellants before the rejection of their claim as some of the information is about their family and the rest is reflected in the objective evidence that was before the RPD. The burden is on claimants to establish their allegations before the RPD. The Court has held:

... that the Applicant must put her best foot forward before the RPD, and present all the evidence that is available at the time, whether aware of it or not, unless there is an aspect of injustice arising from unexpected new facts, or old facts that no reasonable amount of due diligence could have turned up. It is not intended to be a tune-up procedure for the RAD that upon learning in deficiencies in the Applicant's case, additional evidence that could have been presented to the RPD may be presented as new evidence before the RAD.

[13] In other words, responding to an inadequacy identified by the RPD in a party's case cannot be a legitimate foundation for the party to claim that had she known about the deficiency she could have presented better evidence that was always in existence from persons that could have been called, in this case from her cousin. This would make the RPD process a monumental waste of time, which is surely not Parliament's intention in providing appeal rights.<sup>4</sup>

[14] Therefore, I find that this affidavit does not meet the requirements of 110 (4) of IRPA. As such, I will not go on to assess the factors affirmed by the Federal Court of Appeal in Singh.

The news articles will not be accepted on appeal.

[15] The news articles submitted by the Appellants as new evidence are dated between January and April 2019. The Appellants RPD hearing was held in October and December 2018, however, the claim was not rejected until July 2019. In considering the statutory requirements for new evidence, I find that these articles are not new as they did not arise after the rejection of the Appellants' claim. I would also note that the general content of the articles is not new, as the objective evidence also establishes that honour killings occur in Iraq.

[16] There is nothing to suggest that these articles were not available before the rejection, as they are published online and are publicly available. They could have been submitted by the Appellants to the RPD as post hearing evidence. I find that since the articles relate to the Appellants' central allegation that honour killings occur frequently in Iraq, they could have been reasonably expected to provide them to the RPD. As the articles do not meet the criteria in section 110 (4) of IRPA, I will not go on to consider the factors in Singh.

New NDP document will be considered.

[17] The Appellants have disclosed a document from the updated NDP for Iraq. I will not apply the test in 110 (4) to this document as I am guided by the Immigration and Refugee Board's (IRB) policy on NDPs.<sup>5</sup> This policy sets out that the RPD and the RAD will consider the most recent NDP in assessing forward-looking risk. As such, I will consider this document.

IFA

The RPD erred in its analysis of the first prong.

[18] The RPD did not make any negative credibility findings about the Appellants' evidence and accepted that the events occurred as alleged. In assessing the risk the Appellants face in the IFA, the RPD considered three possible agents of persecution; Islamic extremists, the Hawari tribe and the Principal Appellant's family. In my independent review of the evidence, I find that the risk posed by the Principal Appellant's family is determinative and therefore, I will focus my analysis on this agent of persecution.

- [19] The RPD concluded that the Principal Appellant's family did not have the means to locate the Appellants in Dohuk. The RPD noted that the Principal Appellant's brothers were unable to locate them while they lived in Kurdistan, despite their positions with the Peshmerga. The RPD found that the Principal Appellant's brother XXXX, only located the Appellants after a member of the Hawari tribe encountered the Principal Appellant by chance. The RPD acknowledged that the Appellants allege XXXX XXXX then confronted the Principal Appellant and his wife but the RPD found that there was insufficient evidence to conclude that the principal Appellant's family would have the means and motivation to locate the Appellants in Dohuk.
- [20] The Appellants argue that the RPD misconstrued the Appellants' evidence XXXX XXXX locating them. They argue that while the RPD mentions the confrontation with both Adult Appellants in its overview, it fails to consider the incident with the Adult Associate Appellant in its analysis. Further, the Appellants argue that the RPD failed to consider the incident in XXXX 2017 when a group of men attended the Appellants' housing complex looking for the Principal Appellant. They argue that this series of events demonstrates that the Principal Appellant's family does in fact have the means and motivation to locate the Appellants in Dohuk.
- [21] The Appellants also argue that the RPD failed to consider that during the time that they avoided detection they were living in hiding. They argue that they cannot reasonably be expected to live in hiding in the proposed IFA. Further, the Appellants argue that the RPD failed to consider the objective evidence that honour killings were prevalent in the proposed IFA.
- [22] I have independently reviewed the record and I agree with the Appellants that the RPD erred in its assessment of the risk the Appellants face in Dohuk. I agree that the RPD erred in its analysis of the Principal Appellant's family's means and motivation to locate the Appellants. The RPD failed to consider all three incidents in its analysis, despite finding that the Appellants allegations were credible. I find that the record credibly establishes that the Principal Appellant's family was motivated and able to locate the Appellants in XXXX. While I agree with the RPD that a chance encounter with a member of the tribe may have led XXXX to discovering the Appellants were in XXXX, his actions after he learned of this, show he is willing and capable of locating and threatening them. I also find that the evidence in the NDP establishes that there is an objective basis to the Appellants' fears about honor killings. As noted in the evidence, families who perceive that their honour has been tarnished may seek retribution for many years.<sup>6</sup> As such, I find that there is a forward-looking risk at the hands of the Principal Appellant's family.
- [23] I also find that the RPD erred by not properly considering the objective evidence about the process of relocating within Kurdistan, specifically to Dohuk. The RPD accepted the Appellants' allegation that the Principal Appellant's brothers' work for the Peshmerga in Kurdistan. However, the RPD failed to consider the objective evidence about how the Appellants would be required to interact with the security agencies to relocate to Dohuk.

The objective evidence sets out that while Kurds can move and settle within Iraqi Kurdistan, they are subject to restrictions. In order for them to relocate and settle they require permission from the Asayish office, which is tied to the security forces and the Peshmerga. The Appellants would also be subject to various checkpoints to enter Dohuk which would involve security screening.<sup>7</sup>

- [24] These restrictions and requirements for security screening would bring the Appellants' to the attention of security forces, including the Peshmerga where the Principal Appellant's brothers work. The objective evidence also establishes that the Peshmerga is highly organized and effective and can locate individuals of interest in all of Iraqi Kurdistan.<sup>8</sup> I find that this would allow the Principal Appellant's brothers to locate the Appellants. Given their anger about the Appellants' marriage and the religious conversion of the Principal Appellant, as well as the threats XXXX has made, I find that the Appellants continue to face harm from them. I also find in light of the objective evidence about the long-lasting risk of honour killings in similar situations, I find that the Appellants face a serious possibility of persecution in Dohuk. Given that the IFA fails on the first prong, I will not assess the second prong of the test.

### State Protection

- [25] In considering the effectiveness and availability of state protection, I find that the Appellants could not avail themselves to the protection of the state. In the Appellants' case, the Principal Appellants brothers, who are agents of persecution, all work for the Peshmerga. Therefore, I find that the Appellants would be at heightened risk if they approached the state for protection. Further, the objective evidence sets out that although there are laws criminalizing honour crimes, they remain prevalent in the region. Further, law enforcement is often sympathetic to the families and under the influence of the tribes in the region.<sup>9</sup> As such, enforcement of the law is inadequate. Therefore, I find that the Appellants do not have access to adequate state protection.

### Exclusion under Article 1E

The Principal Appellant is not excluded.

- [26] The issue of the Principal Appellant's possible exclusion under Article 1E of the Convention is not raised by the RPD and is not mentioned in its reasons, likely as it found that the IFA was the determinative issue in the claims. Given that I have found that the Appellants do not have a viable IFA in Dohuk, I must decide if the Principal Appellant is excluded given that he previously held permanent residence in the United States.

- [27] In Shamlou<sup>10</sup>, the Court determined that the Board must conduct an analysis of the basic rights enjoyed by a refugee claimant in determining the applicability of Article 1E. The four basic rights set out by the court are: the right of return to the country of residence, the right to work freely without restrictions, the right to study, and full access to social services in the country of residence.
- [28] In the Principal Appellant's case, it is clear that he held status that was substantially similar to that of U.S Nationals. The Principal Appellant received a special immigrant visa on the basis of his work with XXXX XXXX XXXX Iraq. He testified that this visa allowed him to obtain a green card, and work within the United States. The evidence about this program also establishes that individuals can obtain social services, including applying for relocation funds.
- [29] The record also clearly establishes that the Principal Appellant lost his permanent residence status in the United States. As part of a job application to work at the XXXX XXXX in Iraq, the Principal Appellant was required to relinquish his green card. Although the Principal Appellant did not ultimately work for the XXXX, the evidence establishes that he was shortlisted for the role and this was a requirement for his prospective employment.
- [30] The Principal Appellant also testified that he had made inquiries into sponsoring his wife the Adult Associate Appellant to come to the United States. He testified that he was advised that the process would be lengthy, taking as long as five years. The Principal Appellant testified that he was worried about leaving his wife alone in Iraq given the difficulties they had faced and the fear he had that his family might harm her. I find that the Principal Appellant's testimony on this was credible and supported by the documentary evidence.
- [31] The Federal court of Appeal has held that when such status is lost by refugee claimants an analysis of the reasons for the loss must occur. In Zeng the Court held:

Considering all relevant factors to the date of the hearing, does the claimant have status, substantially similar to that of its nationals, in the third country? If the answer is yes, the claimant is excluded. If the answer is no, the next question is whether the claimant previously had such status and lost it, or had access to such status and failed to acquire it. If the answer is no, the claimant is not excluded under Article 1E. If the answer is yes, the RPD must consider and balance various factors. These include, but are not limited to, the reason for the loss of status (voluntary or involuntary), whether the claimant could return to the third country, the risk the claimant would face in the home country, Canada's international obligations, and any other relevant facts.<sup>11</sup>

- [32] In looking at these factors, I find that although the Principal Appellant voluntarily relinquished his status in the U.S, he had compelling reasons to do so. Given that he has credibility established that he and his wife feared his family would harm them and that it would a lengthy process to bring her to the U.S, I find it reasonable that he undertook efforts to return to Iraq and reunite with her. I also accept that the Principal Appellant was required to relinquish his status to pursue employment at the XXXX XXXX. In view of his

circumstances at the time, including his desire to reunite and protect his wife, I find that this was justified.

[33] Further, turning to whether he could return to the third country, I find that there is nothing to suggest that he could return to the U.S on a permanent basis. I must also consider the risk that the Principal Appellant would face in Iraq. For the reasons I have outlined, I find that he faces a serious possibility of persecution. In light of weighing these factors, I find that the Principal Appellant is not excluded under Article 1E of the convention.

## CONCLUSION

[34] The appeal is allowed. Pursuant to section 111(1)(b) of the Immigration and Refugee Protection Act (IRPA), the RAD sets aside the determination of the RPD and substitutes its own determination that the Appellants are Convention refugees.

(signed)

"J. Lourenço"

J. Lourenço

January 10, 2020

Date

1 Canada (Citizenship and Immigration) v. Huruglica, [2016] 4 FCR 157, 2016 FCA 93, at para 103.

2 Immigration and Refugee Protection Act, S.C. 2001, c. 27, as amended.

3 Canada (Citizenship and Immigration) v. Singh, [2016] 4 FCR 230, 2016 FCA 96

4 Abdullahi v. Canada (Citizenship and Immigration), [2016] FC 260

5 Immigration and Refugee Board, <https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/national-documentation-packages.aspx#6>

6 Exhibit RPD-1, RPD Record, Exhibit 6.2

7 National Documentation Package, Iraq, 30 April 2018, tab 1.18: The Kurdistan Region of Iraq (KRI): Access, Possibility of Protection, Security and Humanitarian Situation. Report from Fact Finding Mission to Erbil, the Kurdistan Region of Iraq (KRI) and Beirut, Lebanon, 26 September to 6 October 2015. Denmark. Danish Immigration Service. April 2016. Pg 15-23

8 National Documentation Package, Iraq, 30 April 2018, tab 1.18: The Kurdistan Region of Iraq (KRI): Access, Possibility of Protection, Security and Humanitarian Situation. Report from Fact Finding Mission to Erbil, the Kurdistan Region of Iraq (KRI) and Beirut, Lebanon, 26 September to 6 October 2015. Denmark. Danish Immigration Service. April 2016. Pg 38

9 National Documentation Package, Iraq, 30 April 2018, tab 1.16: Country Policy and Information Note. Iraq: Kurdish 'honour' crimes. Version 1.0. United Kingdom. Home Office. August 2017.

10 Shamlou, Pasha v. M.C.I. (F.C.T.D., no. IMM-4967-94), Teitelbaum, November 15, 1995, (1995), 32 Imm. L.R. (2d) 135 (F.C.T.D.).

11 Canada (Citizenship and Immigration) v. Zeng, [2010] FCA 118

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Immigration and Refugee

Board of Canada

Refugee Appeal Division

Commission de l'immigration

et du statut de réfugié du Canada

Section d'appel des réfugiés

RAD.25.02 (April 04, 2019)

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