Federal Court  Cour fédérale

Date: 20220920

Docket: IMM-2753-21

Citation: 2022 FC 1306

Ottawa, Ontario, September 20, 2022

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

MOHAMMED ESSA NANJI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision of the Immigration Appeal Division [IAD] of the Immigration and Refugee Board of Canada appealing the decision of a visa officer denying the Applicant's application to sponsor his spouse for permanent residence in Canada.

Background

[2] The Applicant, Mohammed Essa Nanji (the Appellant before the IAD), is a 50-year-old naturalized citizen of Canada. He sought to sponsor his current wife, Rehana Kausar (the Applicant before the IAD) [Spouse], who is a citizen of Pakistan, for permanent residence in Canada. This is the Applicant's third marriage.

[3] In 2002, the Applicant married his first wife in India. He claims that the marriage was a religious marriage and was not registered with the government. Further, he claims that in 2004 he and his first wife were divorced by verbal agreement in front of a Qazi in Mumbai, on the consent of both parties. The Applicant married his second wife in August 2006. His second wife obtained a judgement of divorce from the Family Court in Mumbai dated October 30, 2013 [Divorce Order].

[4] On January 23, 2015, the Applicant married his third wife. He filed a sponsorship application in July 2015. That application was refused in June 2017 on the basis that the Spouse was not a member of the family class because the Applicant was the spouse of another person (his first wife) at the time he and his Spouse married. A second sponsorship application was filed by the Applicant on February 11, 2019. On March 9, 2020, a procedural fairness letter was sent to the Applicant requesting, among other things, further information and documentation of his divorce from his first wife. The Applicant responded to the procedural fairness letter on March 27, 2020, submitting that his first marriage was not legally valid in India and, therefore, he was not able to obtain a legal divorce. The Applicant's second sponsorship application was denied on

September 30, 2020 on the basis that the Applicant had failed to establish that he was divorced from his first wife at the time he married his Spouse.

[5] The Applicant appealed to the IAD. On November 23, 2020, the Applicant provided the IAD with a copy of a divorce certificate issued on November 11, 2020 by the Office of the Chief Qazi of Kausa, Mumra, Davla, Thane [Divorce Certificate]. By decision dated March 30, 2021, the IAD denied the Applicant's appeal. That decision is the subject of this application for judicial review.

Decision Under Review

[6] The IAD found that the Applicant's divorce from his first wife was not legal under Canadian law. His first divorce was verbal Islamic divorce by *khula*, which is valid in India since registration of the divorce with civil authorities is not mandatory. However, it found that the lack of judicial or other state oversight of the divorce rendered it invalid in Canada. Therefore, the Applicant was not free to marry his Spouse under Canadian law and their marriage is not legally valid. This meant that the Spouse is not a member of the family class.

[7] The IAD also declined the Applicant's alternate request that the IAD exercise its discretion to consider a "*Tabesh* conversion" (*Tabesh v Canada (Citizenship and Immigration)*, 2004 CanLII 76104 (CA IRB)) on the basis that a *Tabesh* conversion is not appropriate because the applicant was the spouse of another person when the marriage to their sponsor took place.

[8] The IAD held that the Spouse is not a member of the family class and was therefore inadmissible pursuant to subsection 11(1) of the *IRPA* and dismissed the appeal.

Issues and Standard of Review

[9] The sole issue in the matter is whether the IAD's decision was reasonable.

[10] The parties submit, and I agree, that review of the merits of the IAD's decision attracts the reasonableness standard of review (*Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 23, 25 [*Vavilov*]). Applying this standard, the reviewing court asks whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision (*Vavilov* at para 99).

Relevant Legislation

Immigration and Refugee Protection Act, SC 2001, c. 27

> Family reunification
>
> 12 (1) A foreign national may be selected as a member of the family class on the basis of their relationship as the spouse, common-law partner, child, parent or other prescribed family member of a Canadian citizen or permanent resident.
>
> Sponsorship of foreign nationals
>
> 13 (1) A Canadian citizen or permanent resident, or a group of Canadian citizens or permanent residents, a corporation incorporated under a law of Canada or of a province or an unincorporated organization or association under federal or provincial law — or any combination of them — may sponsor a foreign national, subject to the regulations.
>
> Right to appeal — visa refusal of family class

63 (1) A person who has filed in the prescribed manner an application to sponsor a foreign national as a member of the family class may appeal to the Immigration Appeal Division against a decision not to issue the foreign national a permanent resident visa.

Immigration and Refugee Protection Regulations, SOR/2002-227 [*IRP Regulations*]

Definition of *family member*

1(3) For the purposes of the Act, other than section 12 and paragraph 38(2)(d), and for the purposes of these Regulations, other than paragraph 7.1(3)(a) and sections 159.1 and 159.5, *family member* in respect of a person means

(a) the spouse or common-law partner of the person;

…

2…

conjugal partner means, in relation to a sponsor, a foreign national residing outside Canada who is in a conjugal relationship with the sponsor and has been in that relationship for a period of at least one year.

marriage, in respect of a marriage that took place outside Canada, means a marriage that is valid both under the laws of the jurisdiction where it took place and under Canadian law.

…

116 For the purposes of subsection 12(1) of the Act, the family class is hereby prescribed as a class of persons who may become permanent residents on the basis of the requirements of this Division.

Member

117 (1) A foreign national is a member of the family class if, with respect to a sponsor, the foreign national is

(a) the sponsor’s spouse, common-law partner or conjugal partner;

…

Excluded relationships

(9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if

…

(c) the foreign national is the sponsor's spouse and

(i) the sponsor or the foreign national was, at the time of their marriage, the spouse of another person, or

…

Divorce Act

2(1) In this Act,

…

competent authority means, except as otherwise provided, a tribunal or other entity in a country other than Canada, or a subdivision of such a country, that has the authority to make a decision under their law respecting any subject matter that could be dealt with under this Act;

…

Recognition of foreign divorce

22 (1) A divorce granted, on or after the coming into force of this Act, by a competent authority shall be recognized for the purpose of determining the marital status in Canada of any person, if either former spouse was habitually resident in the country or subdivision of the competent authority for at least one year immediately preceding the commencement of proceedings for the divorce.

Recognition of foreign divorce

(2) A divorce granted after July 1, 1968 by a competent authority, on the basis of the domicile of the wife in the country or subdivision of the competent authority, determined as if she were unmarried and, if she was a minor, as if she had attained the age of majority, shall be recognized for the purpose of determining the marital status in Canada of any person.

Other recognition rules preserved

> (3) Nothing in this section abrogates or derogates from any other rule of law respecting the recognition of divorces granted otherwise than under this Act.

Analysis

Applicant's Position

[11] The Applicant submits that the IAD's decision is unreasonable because it is contradictory and internally inconsistent. The IAD stated that Shariah law applied to both the Applicant's first marriage and divorce under *The Muslim Personal Law (Shariat) Application Act, 1937*, a law of India. Therefore, no formal registration of the marriage or divorce with a civil authority was required in order to be recognized in India. The IAD also stated that the Applicant's Shariah divorce from his first wife would not be recognized in Canada because it lacked recognition by a foreign tribunal or state authority. The Applicant submits that while the IAD recognized the marriage without documentation because it was recognized as valid in India, it unreasonably refused to accept the validity of the divorce on the same basis. Further, if formal recognition was required of both the marriage and the divorce, then the Applicant's first marriage was technically not legally valid. Accordingly, it was not necessary for him to provide further evidence of the laws of India concerning his religious marriage. However, the Applicant argues that the IAD unreasonably refused to accept this submission.

[12] The Applicant also submits that section 22 of the *Divorce Act* does not require that a divorce only be recognized on the basis of documentation from a tribunal or government authority. The IAD acknowledged that there is civil authority in India to recognize unregistered marriages or divorces. Therefore, the Applicant does not need to provide evidence of such formal

recognition, such as from a court or government office, for his divorce to be legally valid. In that regard, the Applicant submits that the IAD's reading of *Amin v Canada (Citizenship and Immigration)*, 2008 FC 168 [*Amin*] is unreasonably narrow. Further, he submits that he provided an affidavit from a lawyer stating their inability to obtain a certificate of divorce from the courts (the 100 Rupee affidavit of Aisha Shaikh affirmed on June 30, 2018 [Shaikh Affidavit]), as well as a certificate of divorce from a religious official (the Divorce Certificate). According to him, the IAD failed to consider the specific facts of his case and unreasonably rejected the validity of his divorce.

[13] The Applicant also submits that his refusal was based on the formal validity of his (current) marriage, thereby creating a duty on the IAD to grant a *Tabesh* conversion, that is to consider whether his Spouse could alternatively be sponsored as either a conjugal or common-law partner. As the IAD did not accept his first divorce to be valid, then it should also have considered his first marriage not to be valid. On that basis, the Applicant was not married to his first wife when he married his Spouse and should not be considered the spouse of another person during his 6-year relationship with his Spouse. In his view, it was accordingly unreasonable for the IAD not to exercise its discretion to convert the application to a conjugal analysis.

Respondent's Position

[14] The Respondent submits that the IAD did not err in finding that the Applicant's divorce by verbal agreement was not legal under Canadian law. The IAD found that a key factor in determining whether a divorce will be recognized under section 22 of the *Divorce Act* is whether there is formal recognition of the divorce by a foreign tribunal or other state authority. In the

absence of such evidence, it was open to the IAD to find that the Applicant had not shown that his divorce was legally valid. Contrary to the Applicant's submission, *Amin* supports the IAD's finding with respect to the importance of official oversight of a divorce in order for it to be valid in Canada (citing *Amin* at para 20).

[15] The Respondent submits that the IAD considered the Shaikh Affidavit, in which a lawyer in India stated that she could not obtain the divorce documentation from the government offices or court of law due to the lapse of time. Nor did the Affidavit provide details of the applicable law of India. Accordingly, it was open to the IAD to find the Affidavit insufficient to establish that the Applicant cannot obtain official documentation concerning his marriage or his divorce. As to the Divorce Certificate, the Respondent submits that the IAD reasonably found that this did not establish the legality of the Applicant's divorce in Canada as it was issued by a religious office and not a state or judicial authority.

[16] The Respondent submits that while the Applicant asserted that his first marriage was not legal in India, the IAD noted that Shariah law applied to both the Applicant's marriage and divorce and, therefore, formal registration with a civil authority was not required for them to be recognized in India. Without evidence as to the laws of India pertaining to his religious marriage or divorce, it was open to the IAD to find that the available evidence indicated that the Applicant was legally married to his first wife and that he had not established that he would be unable to obtain divorce documents from a government authority due to the manner of his first marriage.

[17] The Respondent submits that the *Tabesh* conversion is not available where the sponsor was the spouse of another person at the time of their marriage (*Tabesh* at para 25). While within the IAD there is divided opinion regarding the authority to make a *Tabesh* conversion (citing *Tang v Canada (Citizenship and Immigration)*, 2015 FC 973 [*Tang*] at para 32 as well as various IAD decisions), the IAD reasonably found that it was not appropriate to exercise its discretion to effect a *Tabesh* conversion where section 117(9)(*c*)(i) of the *IRP Regulations* applies.

Analysis

[18] At issue before both the visa officer and the IAD was whether the Applicant had established that his divorce from his first wife was legally valid in Canada and, accordingly, whether his marriage to his Spouse was legally valid in Canada.

[19] By way of background, I note that the procedural fairness letter issued to the Applicant's Spouse advised that the visa officer had concerns, among other things, about the validity of the Spouse's marriage to the Applicant. This concern arose because, based on the submitted documents (the Shaikh Affidavit), the Applicant's divorce from his first wife may not have taken place or been valid for Canadian immigration purposes at the time the Spouse married the Applicant.

[20] The Shaikh Affidavit states that the Applicant and his first wife married and divorced (by consent) in accordance with the customs, rites and rituals prevailing in the Islamic religion amongst Muslims in India. The Affidavit states that the affiant tried to obtain the declaration of divorce from the "Hon'ble Court of Law". However, as the marriage was solemnized per the

customs, rites and rituals prevailing amongst Muslims, the affiant was unable to get a Marriage Registration Certificate in “any of the Government Department”. Since the Applicant and his first wife divorced by mutual consent and out of Court, the affiant could not get a declaration of divorce from any Court of Law within the respective jurisdiction and more particularly at the Hon’ble Family Court, at Bandra, Mumbai. The affiant states that she personally visited “the respective Government Offices” and Court of Law but no document in respect of the Applicant and his first wife’s divorce “is available on their records due to the lapse of time”.

[21] In response to the procedural fairness letter, the Applicant’s immigration consultant submitted that India requires all marriages to be registered in order to be considered a valid marriage but that the Applicant and his first wife did not complete that process. Instead they married “within the Islamic laws and regulations and divorced similarly”. The immigration consultant stated that there was no record that the marriage was registered. Since the Applicant and his first wife “were not legally married,” they could not obtain a legal divorce. The Applicant’s first marriage “was not registered or legal”. The immigration consultant attached an unsigned and unsworn statement of fact from the Applicant dated March 27, 2020, in support of this position.

[22] Subsequently, in support of the Applicant’s appeal to the IAD, the Applicant’s immigration consultant submitted the Divorce Certificate. This was issued based on the request of the Applicant through his advocate, Aisha Shaikh, who provided the same Affidavit in support of that request, as well as a November 5, 2020, letter from the Applicant. The Divorce Certificate

notes that the Shaikh Affidavit confirmed that the Divorce Certificate was not available on the records of the concerned authorities due to lapse of time.

[23] The IAD found that the Shaikh Affidavit set out the affiant's unsuccessful attempts on behalf of the Applicant to obtain a divorce certificate from the courts and government offices. Further, it found that the marriage was "in accordance with the customs, rites and rituals prevailing in Islamic religion amongst Muslim[s]" and that the divorce by mutual consent was also completed "as per the Muslim customs prevailing in India at the relevant time". The IAD stated that the affidavit did not elaborate on the applicable laws in India and that there was no expert opinion letter. The IAD also noted that counsel for the Applicant submitted in a letter to the visa officer (in fact, this would appear to have been the response to the procedural fairness letter from the Applicant's the immigration consultant) that the Applicant's first marriage was not legal in India and, therefore, he was unable to obtain a divorce. However, the IAD noted that his counsel provided no legal analysis to support that the Applicant's first marriage was not legal in India and, therefore, that the Applicant was unable to obtain a divorce. Further, the IAD found that the submission was incorrect because Shariah law applied to both the marriage and the divorce under *The Muslim Personal Law (Shariat) Application Act, 1937.* Therefore, no formal registration with a civil authority of the marriage or divorce was required either of them to be recognized in India.

[24] In other words, the IAD found that the Applicant had not provided sufficient evidence to support his argument at his first marriage was not legally valid in India and, for that reason, he was unable obtain a legal divorce.

[25] In that regard, it is of note that the Shaikh Affidavit does not suggest that the first marriage was not legally valid in India. In fact, the Affidavit does not identify any applicable laws of India, nor does it indicate if any such laws officially recognize religious marriages (and divorces) as valid in India without necessity of registration or other steps. Nor does the Affidavit explain why the affiant would seek a declaration of divorce from a court or government office if it was already known that the marriage and divorce had been solely religious in nature. The Affidavit also states that the affiant personally visited the "respective government offices" (which are not identified in the Affidavit) and the court, but that no documentation in respect to the divorce was available "due to a lapse of time". This seems to contradict the vague inference that documentation was not available because the marriage and divorce were religious in nature and therefore were not documented by the state or other authority. Significantly, the Affidavit does not explain whether or not the state or other authority will provide official confirmation of religious marriages or divorces if requested to do so.

[26] In my view, based on the evidence before it, the IAD did not err in finding that the Applicant had not established that his first marriage was not legally valid in India, thereby precluding him from obtaining a legal divorce in India as had been asserted by this immigration consultant.

[27] While the IAD found that no formal registration of the marriage or divorce with a civil authority was required for them to be recognized in India, this does not support the Applicant's argument that the IAD's reasons are contradictory. The Applicant appears to conflate the recognition of the validity of his marriage and divorce in India with their validity in Canada

when, in fact, the former does not guarantee the latter. The IAD accepted that both the first marriage and divorce were valid in India. This meant that the IAD did not accept the Applicant's submission that his first marriage was not legally valid in India. Moreover, the IAD's concern was with the verbal divorce. That is, while the divorce may have been valid in India, this did not address whether it was valid under Canadian law.

[28] Thus, the IAD next considered whether the Applicant's divorce was legally valid in Canada. This is because section 117(9)(*c*)(i) of the *IRP Regulations* precludes the sponsor of a spouse from being married to another person at the time of sponsorship. Polygamous marriages are not recognized under Canadian law.

[29] The IAD relied on *Amin* to support the view that courts have found that it is the formal recognition of the divorce by a foreign tribunal or other state authority that is relevant when assessing whether a divorce will be recognized in Canada under section 22 of the *Divorce Act*. The Applicant submits that the IAD's reading of *Amin* was unreasonably narrow, and that the IAD recognized unregistered marriages and divorces are recognized in India. The Applicant submits that, therefore, formal recognition from a court or government office is not necessary. Further, that he provided both the Shaikh Affidavit and the Divorce Certificate as evidence in support of his appeal.

[30] I note that in *Amin*, the issue was whether the IAD had erred by finding the applicant had failed to establish the existence of a legally valid divorce, which would have permitted him to sponsor his spouse from a second marriage.

[31] In *Amin*, this Court found a declaration given by the Pakistan High Court was deliberate in pronouncing that the applicant's 1993 *talaq* divorce was effective in Shariah law and, therefore, his second marriage was valid. However, other portions of that decision noted that the applicant's *talaq* divorce was not registered under the Muslim Family Law Ordinance (1961) until July 30, 2005, and became effective on that date. The Court noted that while these observations appeared somewhat incongruent, they might be reconciled by the fact that polygamous marriage is accepted under Shariah law.

[32] What was left unanswered in the evidence was whether the applicant's failure to comply with the Muslim Family Law Ordinance (1961) rendered his 1993 *talaq* divorce invalid for other than religious purposes in Pakistan. The Court noted that on the face of that Ordinance, it was apparent that a *talaq* form of divorce was not effective until the expiration of ninety days from the day on which notice was delivered to the Chairman of the Arbitration Council. This was confirmed in the Divorce Certificate issued by the Arbitration Council to the Applicant, which clearly stated that the 1993 divorce was made effective only on July 30, 2005. That Certificate went on to state that "[t]he parties are now at liberty to marry according to Muslim family law 1961". The Court in *Amin* found that the IAD's finding that the Applicant had not proven the legal validity in Pakistan of his 1993 divorce was reasonable.

[33] The Court also noted that, for the purpose of applying domestic law, it had serious reservations about the appropriateness of recognizing extra-judicial divorces such as the *talaq*. The obvious intent of subsection 22(1) of the *Divorce Act* was to require that some form of adjudicative or official oversight be present before Canada would recognize a foreign divorce. In

the matter before it, that requirement would have been fulfilled by the process dictated by the Muslin Family Law Ordinance (1961). The Court stated that the obvious purpose of such oversight is to address important public policy issues that can arise out of the domestic recognition of informal or religious-based divorces (at para 20).

[34] The Court in *Amin* also distinguished *Schwebel v Ungar*, [1965] SCR 148 [*Schwebel*]. The Court stated that, in that case, the Supreme Court seemed to have recognized the validity of a Jewish rabbinical divorce in Canada on the basis that the evidence in *Schwebel* was to the effect that such a religious divorce was formally conducted before a Rabbi and was recognized by the State of Israel. There was no indication that any Israeli statutory requirements were not met and this process seemed to have been the only available means of obtaining a divorce in Israel at the time.

[35] The Court in *Amin* concluded:

> [26] It follows from the above that, for the purposes of section 117(9)(c) of the *Immigration and Refugee Protection Regulations*, Mr. Amin's first marriage was not effectively dissolved until 2005 when the requirements of the Muslin Family Law Ordinance 1961 were met. Because, under Canadian law, Mr. Amin was still married to his first wife when he married for a second time, his application to sponsor his second wife was statutorily barred. The after-acquired 2005 divorce decree does not overcome this statutory impediment: see *Canada (Minister of Citizenship and Immigration) v. Subala*, (1997) 134 F.T.R. 298, 73 A.W.C.S. (3d) 315.

[36] In the matter before me, and unlike in *Amin*, the Applicant did not put forward any evidence from a court or other government authority to support that his divorce from his first wife was effective. Nor do I agree with the Applicant's submission that his case is nearly

factually identical to *Schwebel*, because the Applicant provided no evidence to the IAD to establish that his religious divorce was recognized by the state or that religious divorce was the only means of obtaining a divorce. Indeed, the Divorce Order from his second marriage would seem to suggest otherwise.

[37] In this matter, the IAD found that while the Applicant's divorce was valid *in India* since registration of the divorce with civil authorities is not mandatory, the lack of judicial or other state oversight of the divorce rendered it invalid *in Canada*. While the Applicant submits that the IAD too narrowly interpreted *Amin* and section 22 of the *Divorce Act*, in the absence of any evidence as to the relationship between religious marriages and divorces and the laws of the state of India – that is, whether the state can officially recognize and document religious marriages or divorces or whether the state officially recognizes documentation issued by other specified entities – the IAD reasonably found that the Applicant's divorce from his first wife would not be recognized under Canadian law as it lacks recognition by a foreign tribunal or state authority.

[38] Contrary to the Applicant's submission, the IAD did consider the Divorce Certificate. It found that the document was issued by a religious official, not by a state or judicial authority. While the Divorce Certificate supported the Applicant's contention that he obtained a verbal Islamic divorce by *khula* (or mutual consent) in 2004, this did not resolve the legality of his divorce in Canada. As indicated above, the IAD found that the Applicant's Shariah divorce from his first wife would not be recognized in Canada because it lacks formal recognition of a divorce by a foreign tribunal or other state authority. I would add that the Divorce Certificate appears to be based on the Applicant's submissions and explicitly refers to the statement in the Shaikh

Affidavit that no documentation was available in court of government records due to the lapse of time.

[39] I also note that the 2012 Divorce Order pertaining to the Applicant's second marriage indicates the second marriage was "solemnized as per Muslim rites and customs" and that his second wife had produced a Marriage Certificate and a copy of Nikahnama. In his evidence presented to the IAD, the Applicant does not explain the nature of his second marriage or why his second wife was able to provide this documentation and obtain a Divorce Order under the *The Dissolution of Muslim Marriage Act, 1939* but he was not able to provide a similar court order with respect to the divorce of his first marriage. As the IAD recognized, the onus was on the Applicant to establish that he was not married to his first wife when he married his Spouse.

[40] The 2012 Divorce Order also indicates that the Applicant suppressed his previous marriage from his second wife and that she became aware of it when she came across a notice sent by his first wife, at which point the Applicant acknowledged that he would need to obtain a divorce from his first wife. The evidence in the record also does not explain this information in relation to the Applicant's claim to have obtained a divorce from his first wife in 2004, which would have been prior to his second marriage in 2006.

[41] Given the evidence before it, the IAD's conclusion that the Applicant's religious divorce in India was not valid under Canadian law was reasonable. The Applicant simply failed to provide sufficient evidence to support either that his first marriage was not valid in India, or that the circumstances of his divorce from his first wife would also support his divorce as legally

valid in Canada. In the result, the IAD reasonably found that the Applicant's marriage to his Spouse was not valid under Canadian law and the Spouse is not a member of the family class, and is therefore inadmissible under subsection 11(1) of the *IRPA*.

[42] The Applicant also asserts that the IAD erred by failing to consider or grant a *Tabesh* conversion. In *Tabesh*, the IAD found that if a person applies to be sponsored as a member of the family class and is refused based on the formal validity of the marriage, it is incumbent to consider whether the person could alternatively be sponsored either as a conjugal or common-law partner.

[43] As Justice Fothergill stated in *Tang*:

> [32] The "Tabesh conversion" is a creation of the IAD. It appears to be derived from s 67(2) of the IRPA, which states that where the IAD allows an appeal it may set aside the original decision and substitute the determination that "in its opinion, should have been made". However, opinion is divided among members of the IAD regarding its authority to make such a conversion (*Rahimi v Canada (Minister of Citizenship and Immigration)*, 2014 CarswellNat 6113 (Imm. and Ref. Bd. (App. Div.))). Even where the authority is believed to exist, the decision to permit such a conversion is wholly discretionary (*Shahabi v Canada (Minister of Citizenship and Immigration)*, 2006 CarswellNat 6397 (Imm. and Ref. Bd. (App. Div.))).
>
> [33] Assuming, without deciding, that the IAD had a duty to consider an alternative category of relationship under s 117(1)(a) of the Regulations, the onus was on Mr. Tang to provide sufficient credible evidence in support of his request (*Oladipo v Canada (Minister of Citizenship and Immigration)*, 2008 FC 366 at para 24). The IAD was not required to invite additional submissions regarding the possible existence of a conjugal relationship once it found that the formal requirements of a marriage under Vietnamese law had not been met.

[44] As in *Tang*, I will assume, without deciding, that the IAD has the authority and discretion to make a *Tabesh* conversion. In the matter before me, I agree with the Respondent that once the IAD determined the Applicant had failed to establish that he was validly divorced from his first wife and, therefore, that he was not free to marry his Spouse under Canadian law and that his Spouse was accordingly expressly excluded as a member of the family class under section 117(9)(*c*)(i) of the *IRPA*, it was open to the IAD to refuse to exercise its discretion to convert the appeal to a conjugal sponsorship.

JUDGMENT IN IMM-2753-21

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed;

2. There shall be no order as to costs; and

3. No question of general importance for certification was proposed or arises.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2753-21
STYLE OF CAUSE:	MOHAMMED ESSA NANJI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	BY VIDEOCONFERENCE USING ZOOM
DATE OF HEARING:	SEPTEMBER 14, 2022
JUDGMENT AND REASONS:	STRICKLAND J.
DATED:	SEPTEMBER 20, 2022

APPEARANCES:

Allen Chao-Ho Chang	FOR THE APPLICANT
Amy King	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Barrister and Solicitor North York, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT