

Federal Court



Cour fédérale

**Date: 20240606**

**Docket: IMM-4642-23**

**Citation: 2024 FC 860**

**Toronto, Ontario, June 6, 2024**

**PRESENT: The Honourable Justice Battista**

**BETWEEN:**

**ZAFAR ULLAH KHAN  
SALMA SULTANA**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] This is an application for judicial review of a dismissal of the Applicants' appeal by the Refugee Appeal Division ("RAD"). The primary issue is whether the RAD reasonably interpreted and applied Article 1E of the *United Nations Convention Relating to the Status of Refugees* [*Refugee Convention*] when it decided to exclude the Applicants from a determination of their refugee claims. Article 1E was invoked based on the Applicants' permanent resident status in the United States ("U.S.").

[2] For the reasons below, I have determined that the application should be granted based on the RAD's misapplication of the test for exclusion under Article 1E.

## II. Background

[3] The Applicants are citizens of Pakistan who allege fears of persecution due to their religious membership in the Ahmadi Muslim faith. They were sponsored by one of their American daughters to the U.S. and became U.S. permanent residents on October 16, 2016. Their U.S. permanent resident cards indicate validity until October 26, 2026.

[4] The Applicants came to visit their son in Canada on March 21, 2021. They left the U.S. because their family situation was deteriorating. They lived in the U.S. with their married daughter and her parents-in-law, however, they were threatened with criminal charges and deportation by their daughter's parents-in-law. As a result they came to Canada to be with their adult son, and filed claims for refugee protection on July 3, 2021.

[5] On September 21, 2022, the Refugee Protection Division ("RPD") refused the refugee claims because they were excluded based on Article 1E of the *Refugee Convention*. Article 1E is a clause within the *Refugee Convention* applied to claimants considered not to be in need of refugee protection. It states:

This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

[6] The RPD decision was appealed to the RAD. The RAD's record included a letter from U.S. attorney Daniel Rudnick dated February 27, 2023, which contained important evidence regarding the Applicants' U.S. status. It indicated that:

- Because the Applicants have been continuously outside of the U.S. for more than one year, their U.S. permanent resident cards are invalid and upon return to the U.S. they would be considered arriving aliens applying for admission;
- The Applicants may be paroled into U.S. removal proceedings in a U.S. court to determine if they abandoned their U.S. permanent resident status;
- In the opinion of Mr. Rudnick, they will have difficulty establishing that they did not relinquish their U.S. status and they are likely to be ordered removed from the U.S. to Pakistan.

### III. The RAD decision

[7] The RAD corrected a few errors made by the RPD, but also concluded that the Applicants are excluded based on Article 1E of the *Refugee Convention*.

[8] The RAD correctly set out the three-step assessment for exclusion under Article 1E based on the Federal Court of Appeal's decision in *Canada (Citizenship and Immigration) v Zeng*, 2010 FCA 118 [*Zeng*] at paragraph 28:

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.

[9] Despite correctly stating this test, the RAD focused on whether the Applicants abandoned their U.S. permanent resident status. It stated:

... I find that the RPD should have undertaken an assessment of whether the Appellants, on a balance of probabilities, did or did not abandon [sic] their permanent resident status at the time of the RPD hearing taking into account their length of absence from the USA and the fact that they had left the US to apply for permanent resident status in Canada as refugees.

[RAD decision at para 20]

[10] The RAD determined that the Applicants *prima facie* held U.S. permanent resident status at the time of their RPD hearing. It then embarked upon an assessment of whether their absence from the U.S. would be deemed temporary or if they would be determined to have abandoned their U.S. permanent residence. It did not seriously engage with the evidence from Mr. Rudnick because it determined that it had to make an independent assessment of whether U.S. permanent resident status would be recognized by the U.S. authorities at the time of the Applicants' RPD hearing.

[11] The RAD concluded that the Applicants had U.S. permanent resident status at the time of the RPD hearing based on the factors that would be considered by U.S. authorities assessing abandonment of status. It found that U.S. permanent residents hold similar rights as U.S. nationals and therefore the Applicants were correctly excluded from determinations of their refugee status. As such, it was not necessary to consider their fears of persecution in Pakistan.

#### IV. Issue

[12] In my view, the sole issue is whether the RAD reasonably applied the test for exclusion under Article 1E of the *Refugee Convention*.

V. Analysis

[13] As stated above, I determine that the RAD misapplied the test for exclusion under Article 1E.

[14] The first step of the *Zeng* test is to determine whether claimants have substantially similar status as nationals of a third country. The RAD determined that the existence of the Applicants' permanent resident status in the U.S. at the time of the RPD hearing satisfied that requirement.

[15] In my view, the test of “substantially similar” status to third party nationals necessarily involves a consideration of the vulnerability of a claimant’s status in a third country to removal or revocation. As stated by Justice Anne Mactavish in *Canada (Citizenship and Immigration) v Tajdini*, 2007 FC 227 at paragraph 37:

That said, Ms. Tajdini did not have to establish conclusively, beyond any reasonable doubt, that she had lost her permanent residency status in the US by the time that she entered Canada. Rather, the possibility that the American authorities might no longer recognize Ms. Tajdini’s permanent resident status in the United States had to be taken into account in deciding whether it had been established on a balance of probabilities that she still had status in that country: see *Mahdi v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 1623 (F.C.A.), at [para] 12.

[16] It may be true that the Applicants’ permanent resident status in the U.S. existed at the time of their RPD hearing in the sense that it had not been officially or automatically revoked. However, the Article 1E exclusion test is not simply whether permanent resident status exists for claimants in a third country. The test is whether claimants enjoy “status substantially similar” to nationals of a third country. The *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status* states that this must include “[being] fully protected against deportation or expulsion” (at para 145).

[17] The RAD accepted that the Applicants would have to apply for a Returning Resident Visa because they had been absent from the U.S. for over a year. The RAD also did not challenge expert evidence from Mr. Rudnick that the Applicants will “almost certainly” be deemed to have lost status and they are likely to be ordered removed from the U.S. to Pakistan. The RAD should have assessed whether their U.S. status equated to status substantially similar to U.S. nationals, considering these risks, pursuant to the first step of the *Zeng* test. Instead, the RAD stepped into the shoes of U.S. immigration authorities to conduct an analysis of whether the Applicants would be determined to have abandoned their status. Its prediction about the outcome significantly differed from the evidence before it, and the RAD failed to provide reasonable justification for such a departure.

[18] The RAD’s misapplication of the test for exclusion under Article 1E renders this decision unreasonable.

**JUDGMENT in IMM-4642-23**

**THIS COURT'S JUDGMENT is that:**

1. The application for judicial review is granted.
2. The matter is sent back for reconsideration by a differently constituted panel of the Refugee Appeal Division.
3. There is no question of general importance for certification.

"Michael Battista"  
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Judge

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

**DOCKET:** IMM-4642-23

**STYLE OF CAUSE:** ZAFAR ULLAH KHAN AND SALMA  
SULTANA v THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** JUNE 5, 2024

**JUDGMENT AND REASONS:** BATTISTA J.

**DATED:** JUNE 6, 2024

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