Date: 20080208

Docket: IMM-1293-07

Citation: 2008 FC 168

Ottawa, Ontario, February 8, 2008

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

TARIQ AMIN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review by Tariq Amin from a decision by the Immigration Appeal Division of the Immigration and Refugee Board (Board). The only issue raised is whether the Board erred by finding that Mr. Amin had failed to establish the existence of a legally valid Pakistani divorce which would have permitted him to sponsor his spouse from a second marriage to immigrate to Canada.

I. Background

[2] There is little factual controversy in this proceeding. It is the legal significance of the facts that is in issue.

[3] Mr. Amin was first married in Pakistan in 1989. Thereafter, he successfully sponsored his first wife as a permanent resident to Canada. In 1993, Mr. Amin's first marriage was purportedly dissolved in Pakistan in accordance with the Islamic pronouncement of talaq. The record contains a notarized Divorce Deed dated October 1993 signed by Mr. Amin which asserts the dissolution of this marriage by the following declaration:

> 1. That the executant and the said Mst. Nazish Nayyar cannot live any more as husband and wife within the limits of Almighty Allah as above stated.
>
> 2. That the executant hereby divorce his wife namely Mst. Nazish Nayyar daughter of Nayyar Ali Khan, thrice:
>
> > 'I hereby pronounce Talaq (divorce) upon above named Mst. Nazish Nayyar daughter of Nayyar Ali Khan thrice in presence of witness'
>
> and she is no more wife and she is 'Harram' on me. The said Mst. Nazish Nayyar is free to contract marriage after the expiry of 'Iddat' period.
>
> 3. That the executant reserves his right to claim the custody of her minor children at any time.

[4] It is perhaps noteworthy that the above Divorce Deed refers to the fact that Mr. Amin was then residing in "America" and it is undisputed that his wife was living in Canada. It is also

undisputed that Mr. Amin's declaration of divorce was not registered under the Muslim Family Laws Ordinance (1961) until 2005.

[5] Mr. Amin remarried in Pakistan on March 15, 2002. When Mr. Amin attempted to sponsor his new wife as a permanent resident to Canada, a question was raised regarding the 1993 divorce and further evidence was requested to confirm that it was legally valid in Pakistan. Mr. Amin then petitioned the Lahore High Court in Rawalpindi seeking a declaration with respect to the effectiveness of his 1993 divorce declaration and the lawfulness of his 2002 remarriage. The Court resolved the issue in the following way:

> 9. In the instant case, respondent No. 2 Tariq Amin contracted Nikah with the petitioner on 15.3.2002 after about eight and a half years of Talaaq pronounced by him to his first wife Mst. Nazish Nayyar on 11.10.1993. So, even though respondent No. 2 had not given a notice to the Chairman, the divorce dated 11.10.1993 became effective in Shariah after expiry of 90 days on 11.1.1994, and the marriage contracted thereafter between the petitioner Mst. Aisha Tariq and respondent No. 2 Tariq Ameen, it is held, is valid marriage.

[6] Notwithstanding this declaration, Mr. Amin’s sponsorship application was refused. The visa officer who declined the application did so for the following reasons:

> As per local family laws, in order to be legally accepted, a divorce must be registered with a local arbitration council and a certificate must be issued from the local arbitration council confirming the details of divorce, i.e. the case number, date of issuance and the date when the divorce became effective or court orders should be issued from a family court, i.e. from a family judge.
>
> Your sponsor was previously married to Nazish Nayyar. The divorce certificate which you submitted for your sponsor's previous marriage states that notice for divorce was served to the arbitration

> council on April 30, 2005 and the decision was made on July 30, 2005. As a procedural fairness you were requested to submit court orders from a family court regarding the date when the divorce became effective. I have reviewed the court orders submitted. The court orders are not clear and only refer to your marriage with the sponsor, whereas, our request was to submit court orders confirming the date of divorce between sponsor and his first spouse. You were requested again as per our letter dated March 28, 2006 to submit court orders. Your lawyer's response however, does not address the issue of divorce between sponsor and his first spouse and does not confirm a date when divorce took place. I am therefore not satisfied that this is not a case of bigamy and that your sponsor was legally free to marry you at the time of your marriage with sponsor.

[7] On May 31, 2006, Mr. Amin initiated an appeal from the visa officer's decision but the Board was also not satisfied that his 1993 divorce was legally valid. The Board's decision was as follows:

> [14] With respect to the legal validity of the appellant's divorce, the panel notes that the Lahore High Court was at pains, first to pronounce only with respect to the appellant's second marriage; and second with respect to the validity of that second marriage according to Sharia as opposed to the Pakistan Family Law Ordinance Act.
>
> [15] This distinction is key because it clarifies the focus of that Court's concern. In the panel's view, the Lahore High Court was primarily concerned with the validity of the second marriage, under Islamic law and was less concerned with the legal validity of the divorce under the Pakistan Family Law Ordinance. The judge quotes, with approval, the following paragraph from Allah Dad:
>
> > "… even if it is assumed that section 7 of the Family Laws Ordinance is a good law, the same cannot affect the validity of a marriage contracted according to Shariah…'
>
> And further,
>
> > "It is now evident that a notice of Talaq to the Chairman is not mandatory under the Injunctions of

> Islam and any divorce pronounced or written by husband cannot be ineffective or invalid in Shariah merely because its notice has not been given to the Chairman…"

[16] The Pakistan judge then went on to declare the appellant's second marriage valid in Shariah.

[17] Thus, it would seem that in relation to the Islamic law, the appellant's second marriage is valid in Pakistan, even though his divorce from his previous wife did not comply with the statutory requirement and thus under the Pakistan Family Law Ordinance, was void and of no effect. It is clear from the judge's declaration that the judge was not pronouncing the validity of the marriage under the Pakistan Family Law Ordinance.

[18] The panel is of the view that under the Pakistan Family Law Ordinance, upon marrying the applicant on the 15th March 2002, the appellant would have two wives, his divorce not being in conformity with section 7 of that Law. This is a circumstance that Canadian law recognises as bigamy.

[19] The Canadian Immigration scheme does not contemplate such a circumstance. Section 117(9)(c)(i) sets out the applicable statutory provision as follows:

> (9) **Excluded relationships** 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.

[20] Section 2 of the *Regulations* is clear in its definition of marriage that "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."

> [21] The appellant's counsel argues that in light of the pronouncement of the Lahore Court, a Canadian court should also recognise the divorce as taking effect as of the 11th January 1994. The panel does not agree with this position as there was no evidence before the panel that Canadian courts recognise Shariah law or prefer Shariah to the Pakistani statutory regime. The panel is of the view that what is required of the appellant; given his failure to establish that Canadian Courts would recognise a divorce pronounced according to Shariah law; is for him to establish clearly and without equivocation that in the absence of registration with a local arbitration council, his divorce was legally valid, under the applicable Pakistan Law and that he had the capacity to marry the applicant when he purported to do so on the 15th March 2002. In light of the above analysis, the panel finds that the appellant has failed to do so.
>
> [Footnotes omitted. Emphasis original]

II. Issues

[8] Did the Board err by failing to recognize the legal validity of Mr. Amin's talaq divorce?

III. Analysis

[9] The issue before the visa officer and subsequently before the Board was whether it had been proven that Mr. Amin's 1993 Islamic divorce was one which would be recognized for all purposes in Canada. The Board was not satisfied that that point had been clearly established on the evidence tendered. For the sake of argument, I am prepared to accept that this is an issue of mixed fact and law which should be reviewed on a standard of reasonableness: see *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 S.C.R. 84 at para. 26 and *Khosa v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 24 at para. 12.

[10] In order for Mr. Amin to sponsor his wife as a permanent resident, it was necessary for him to prove that his first marriage had been legally dissolved. This is a precondition to a family class sponsorship because of the requirement in section 117(9)(c) of the *Immigration and Refugee Protection Regulations*, SOR-2002/227, that the sponsor of a spouse not be, at the time of sponsorship, married to another person. Accordingly, for Canadian immigration purposes, polygamous marriages are not recognized.

[11] The evidence put forward by Mr. Amin to establish the fact of a valid Pakistani divorce was found by the Board to be equivocal and, indeed, it was.

[12] The declaration given by the Pakistan High Court in Lahore is far from conclusive on this point and, in my view, the Board was correct in its appraisal of that decision. Judge Paracha seems to have been quite deliberate in pronouncing that Mr. Amin's 1993 talaq divorce was "effective in Shariah" and, therefore, his second marriage was valid. However, other portions of that decision noted that Mr. Amin's talaq divorce was not registered under the Muslim Family Law Ordinance (1961) until July 30, 2005 and became effective on that date. While these observations appear somewhat incongruent, they may well be reconciled by the fact that polygamous marriage is accepted under Shariah law or, as it was put in Mr. Amin's pleading to the Court:

> That according to law as well as Islam the defendant No. 1 was free to contract marriage with the plaintiff on the date when he contracted marriage with the plaintiff because after expiry of 90 days a male is free to contract second marriage, even otherwise Qur'am Sunnah has given a right to contract four marriages at one time whereas in the peculiar circumstances of the case contracted second marriage with the plaintiff after divorce of his first wife, thus he was legally free to contract marriage with plaintiff on the said date.

[13] What is left unanswered in the evidence is whether Mr. Amin's failure to comply with the dictates of the Muslim Family Law Ordinance (1961) rendered his 1993 talaq divorce invalid for other than religious purposes in Pakistan. On the face of that Ordinance, it is apparent that a talaq form of divorce is not "effective until the expiration of ninety days from the day on which notice… is delivered to the Chairman" of the Arbitration Council. This point is confirmed in the Divorce Certificate issued by the Arbitration Council to Mr. Amin and which clearly stated that the 1993 divorce was made effective only on July 30, 2005. That Certificate goes on to state that "[t]he parties are now at liberty to marry according to Muslim family law 1961". I would add to this that there is considerable judicial authority from England which recognizes the significance of the statutory scheme for legally validating a talaq divorce in Pakistan. In *Quazi v. Quazi*, [1979] 3 All E.R. 897 at page 917; [1980] A.C. 744 (H.L.) at page 825, Lord Scarman made the point as follows:

> The divorce became under Pakistan law effective not, as under the classic Islamic law, on pronouncement of talaq but on the expiry of ninety days, unless revoked, from the notice in writing to the chairman of the union committee. That this is the law of Pakistan brooks of no doubt.

Also see: *Fatima v. Secretary of State for the Home Department*, [1986] 2 All E.R. 32 (H.L.) per Lord Ackmer at pages 35-36.

[14] In the face of the above pronouncements, and notwithstanding Ms. Lee's capable arguments, the Board's conclusion that Mr. Amin had not proven the legal validity in Pakistan of his 1993 religious divorce was reasonable and therefore unimpeachable on judicial review.

[15] It was argued on behalf of Mr. Amin that there is Canadian jurisprudence which has recognized the legal validity of foreign religious divorces and that the Board erred by failing to apply that authority.

[16] Mr. Amin relies upon the Supreme Court of Canada decision in *Schwebel v. Ungar*, [1965] S.C.R. 148, 48 D.L.R. (2d) 644 where the Court seems to have recognized the validity in Canada of a Jewish rabbinical divorce. There are, however, differences between the circumstances of that case and those which arise here. 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 is no indication given that any Israeli statutory requirements were not met and, indeed, this seems to have been the only available means of obtaining a divorce in Israel at that time. Furthermore, the Court concluded its decision with the following note of caution with respect to its precedential value:

> The Court of Appeal of Ontario has treated these singular circumstances as constituting an exception to the general rule to which I have just referred. In the course of his reasons for judgment Mr. Justice Mackay has thoroughly and accurately summarized and discussed the authorities bearing on this difficult question and it would in my view be superfluous for me to retrace the ground which he has covered so well. I adopt his reasoning in this regard and agree with his conclusion that, for the limited purpose of resolving the difficulty created by the peculiar facts of this case, the governing consideration is the status of the respondent under the law of her domicile at the time of her second marriage and not the means whereby she secured that status.

[17] Ms. Lee also cited the Immigration Appeal Division decision in *Bhatti v. Canada (Minister of Citizenship and Immigration)* [2003] I.A.D.D. No. 519, where the Board recognized a talaq divorce for the purposes of a family class sponsorship.

[18] The problem with the *Bhatti* decision is that it does not clearly indicate whether the talaq divorce in issue there had been registered in accordance with the Muslin Family Law Ordinance (1961). On one reading, the decision suggests that statutory compliance had been met in that case as can be seen from the following passage:

> 7 In support of his position, the appellant provided a letter from lawyer in Pakistan, a Statutory Declaration and opinion letters from two family law lawyers in Toronto. The divorce deed executed in June 1996 is an extra-judicial divorce in that it is a talaq or a divorce under Muslin law. The letter from Samina Khan, who is a lawyer practicing before the High Court in Islamabad and who acted for the appellant with respect to his 1996 divorce, states that divorce in Pakistan is governed by the Muslim Family Law Ordinance, 1961. The Muslim Family Law Ordinance, 1961 recognizes the talaq form of divorce. In the lawyer's view, the appellant's divorce deed met the substantive and procedural requirements of the law.
>
> [Footnotes omitted]

[19] There are statements in the *Bhatti*, above, decision which are difficult to accept. For instance, the Board interpreted section 22(1) of the *Divorce Act*, R.S.C. 1985 c. 3 (2nd. Supp.), requiring that a foreign divorce be granted "by a tribunal or other authority having jurisdiction", as being met by an extra-judicial divorce such as the Muslim talaq. As far as I can tell from the record before me and from relevant legal authorities, the pronouncement of talaq is nothing more than a unilateral declaration of divorce made by the husband, usually in the presence of witnesses, and

sometimes recorded in a private divorce deed. Such a process is clearly insufficient to fulfill the requirements of section 22(1) of the Divorce Act and, to the extent that the *Bhatti* decision suggests otherwise, it is, with respect, wrong: see *Chaudhary v. Chaudhary*, [1984] 3 All E.R. 1017 (Brit. C.A.).

[20] I would add that, for the purpose of applying domestic law, I have serious reservations about the appropriateness of recognizing extra-judicial divorces of the sort in issue here. The obvious intent of section 22(1) of the Divorce Act was to require that some form of adjudicative or official oversight be present before Canada will recognize a foreign divorce. This requirement would be fulfilled by the process dictated by the Muslin Family Law Ordinance (1961): see *Quazi*, above, at page 917 (All E.R.), page 825 (A.C.); and *Chaudhary*, above, at page 1025. The obvious purpose of such oversight is to address important public policy issues which can arise out of the domestic recognition of informal or religiously-based divorces. Many of those concerns were identified in the following passage from *Chaudhary*, above, at pages 1031 and 1032:

> The essentials of the bare talaq are, as I understand it, merely the private recital of verbal formula in front of witnesses who may or may not have been specially assembled by the husband for the purpose and whose only qualification is that, presumably, they can see and hear. It may be, as it was in this case, pronounced in the temple. It may be, as it was here, reinforced by a written document containing such information, accurate or inaccurate, as the husband cares to insert in it. But what brings about the divorce is the pronouncement before witnesses and that alone. Thus in its essential elements it lacks any formality other than ritual performance; it lacks any necessary element of publicity; it lacks the invocation of the assistance or involvement of any organ of, or recognised by, the state in any capacity at all, even it merely that of registering or recording what has been done. Thus, though the public consequences are very different, the essential procedure differs very little from any other private act such as the execution of a will and is akin to the purely

> consensual type of divorce recognised in some states of the Far East (see eg *Ratanachai v Ratanachai* (1960) Times, 4 June, *Varanand v Varanand* (1964) 108 SJ 693 and Lee v Lau [1964] 2 All ER 248, [1967] P 14).
>
> In my judgment, and looking at the 1971 Act alone, such an act cannot properly be described as a 'proceeding" in any ordinary sense of the word, still less a 'proceeding' in what must, for the reasons given above, be the restrictive sense of the word as used in the Act.
>
> …
>
> However, even if I am wrong in the view that I take on this point, I agree entirely with the judge's decision on the second point, namely that to recognise the bare talaq divorce in the instant case as effective here would be manifestly contrary to public policy.
>
> [Per Oliver LJ]

[21] The common law principles which provide for recognition of foreign divorces extend beyond the need for there to be a real and substantial connection to the place of the divorce and include an overarching requirement for due process and fairness. This point was made by Lord Pearce in *Indyka v. Indyka*, [1969] 1 A.C. 33 (H.L.) in the following passage at page 88:

> I think, however, that our courts should reserve to themselves the right to refuse a recognition of those decrees which offend our notions of genuine divorce. They have done so when decrees offend against substantial justice, and this, of course, includes a decree obtained by fraud. But I think it also includes or should include decrees where a wife has gone abroad in order to obtain a divorce and where a divorce can be said not to be genuine according to our notions of divorce.

[22] This essential point was also made by Justice J. E. Fichaud in *Orabi v. El Qaourd*, 2005 NSCA 28, 12 R.F.L. (6th) 296, where the Court was asked to give recognition to a divorce

declaration issued to the husband by a Shariite Canonical Council in Jordan. After a thorough review of the common law concerning the recognition of foreign divorces, Justice Fichaud stated:

> 18 Mr. El Qaoud knew where Ms. Orabi resided. Yet Mr. El Qaoud did not serve Ms. Orabi with notice of the divorce proceeding. This was not a case where the respondent was difficult to locate, avoiding service, or subject to an order for substituted service. The Jordanian tribunal granted the divorce apparently without requiring any proof that Ms. Orabi had been served with notice. In December, 2002, Ms. Orabi received her couriered divorce decree, issued by a tribunal before which there was no role for her participation, in a country to which she had no connection, after a proceeding of which she received no notice. This divorce decree would affect her status and corollary relief. This violates the principles of natural justice. I would deny recognition of the Revocable Divorce Document on that ground.

[23] The same concerns that were evident to the Courts in *Orabi*, above, *Chaudhary*, above, and *Indyka*, above, arise in this case. In the result, I do not agree that the apparently unilateral, extra-judicial declaration of divorce made by Mr. Amin in Pakistan in 1993 is a form of divorce which meets Canadian notions of genuine divorce and it cannot be recognized here.

[24] It was also argued on behalf of Mr. Amin that the failure by the Board to consider whether his 1993 divorce could, by virtue of section 22(3) of the Divorce Act, be recognized at common law was an error; in particular, it was contended that the Board erred by failing to determine whether Mr. Amin or his first wife had a real and substantial connection to Pakistan which could support the 1993 divorce.

[25] It seems to me that the real and substantial connection test does not arise until a foreign divorce has been determined in Canada to be legally valid in the place where it was granted and is also a divorce obtained by a process that is consistent with Canadian notions of fairness and in harmony with Canadian public policy. In other words, this is not a test by which the legal frailties of a foreign, extra-judicial divorce will be overcome. The real and substantial connection requirement is, rather, a further prerequisite to the Canadian recognition of a foreign divorce to prevent forum shopping and similar problems: see *Indyka*, above, per Lord Pearson at pages 111-112.

[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.

[27] Counsel for the Applicant indicated that there were certain religious impediments to Mr. Amin remarrying his wife in Pakistan as a means of overcoming the refusal of his sponsorship application. While that may be so, there should be no impediment to a civil remarriage in Canada and presumably Mr. Amin's wife would be granted at least a visitor's visa to enter Canada for that purpose.

[28] Having regard to the foregoing, Mr. Amin's application for judicial review is dismissed.

[29] The parties did request an opportunity to propose a certified question and I will allow ten days for that purpose. If the Applicant proposes a certified question within that time, I will allow the Respondent a further three days to respond.

JUDGMENT

THIS COURT ADJUDGES that this application for judicial review is dismissed.

" R. L. Barnes "
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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