

Case Comment: *Canada (Minister of Citizenship & Immigration) v. Hazimeh*

Edward C. Corrigan, B.A., M.A., LL.B

On April 15, 2009, Mr. Justice Russell of the Federal Court of Canada issued his Reasons for Judgment in *Canada (Minister of Citizenship & Immigration) v. Hazimeh* (2009), 78 Imm. L.R. (3d) 232, 2009 FC 380 (F.C.). The Federal Court overturned a decision of the Immigration Appeal Division which allowed an appeal of a rejected spousal sponsorship application on the basis of recognizing a Lebanese divorce. The Department of Justice applied for judicial review of the decision arguing that the Lebanese divorce should not be recognized.

The *Toronto Sun* newspaper reported that Federal Court Justice James Russell ruled that the talaq divorce is not recognized in Canada: “A talaq divorce has no legal effect in Canada but may have legal effect in jurisdictions which operate under Sharia law,” Russell said.¹

This is an important decision and deals with a complex and confusing issue. The mixing of religious divorce and Lebanese government and religious court procedure is not accustomed in the Western legal tradition. The ruling rejecting the Muslim divorce has the potential to impact many Canadian citizens and permanent residents of Muslim origin. There are more than one million Muslims in Canada, many of whom have “substantial and real connections” to their home country, get married in their home country and get divorced in their home country.

It also has the potential to impact many Canadians and permanent residents of the Jewish, Hindu and Sikh religions who have had religious divorces accepted and registered in their home countries.

At paragraph 63 of the Reasons the Court, Russell J. writes: “That talaq divorce recognized by Lebanon, is not a divorce that Canada recognizes.” This statement of law could be interpreted as rendering every talaq divorce in Lebanon as not being recognized as a legal divorce by Canada and has the potential of affecting thousands of Lebanese Canadians and permanent residents of Canada. This statement potentially could invalidate thousands of Muslim divorces, many already recognized by Canada, and affect many current divorces and sponsorship proceedings.

¹*Toronto Sun*, April 30, 2009.

Case Comment: Canada (Minister of Citizenship & Immigration) v. Hazimeh 187

The writer has one sponsorship appeal where the talaq divorce took place in London, Ontario and was duly recognized and registered by the sponsor's home country. This decision has the effect of rendering the sponsor's divorce invalid and jeopardizing the sponsorship of his spouse. At minimum this statement needs to be clarified if the intent is to limit this decision to this particular fact situation. An explanation as to how the Lebanese documents are deficient and what is required before the Lebanese documents would be recognized as valid documents for a divorce under Canadian law should be included. Given the sparse details given on a Canadian Certificate of Divorce, explanation is needed to show how the Canadian Certificate of Divorce is to be accepted and why the three divorce documents from Lebanon are not to be accepted.

Every country in the Middle East (with the exception of Syria which does allow civil divorce procedures) has only religious divorce proceedings. This includes Israel, Lebanon, Egypt, Saudi Arabia, Iraq, United Arab Emirates, Qatar, Bahrain, Oman, Yemen, Libya, Tunisia, Morocco, Mauritania, Algeria, Sudan, Iran and Turkey. Afghanistan and Pakistan also have religious divorces. In India, family matters and marriage are governed under Hindu law which again is religiously based. Muslims in India and Sikhs in India have similar religious and related civil procedures.

If religious divorces are not recognized, this has the potential to harm the interests of Jewish, Muslim, Sikh and Hindu residents of Canada, who have religious divorces recognized by their respective home countries.

It is also respectfully submitted that divorce in Lebanon is "more than a mere registration." The reasons for rejecting the Islamic divorce in the British Court of Appeal case *Chaudhary v. Chaudhary* (1984), [1985] Fam. Law 26 (Eng. C.A.), can easily be distinguished from the present case. There was more than "bare religious element" in that the religious divorce was reviewed and ratified by the Sharia religious court. A Divorce Order was granted with reasons stated and a Divorce Certificate issued by the Sharia Jaafari Court in Siada. The Certificate of Divorce was issued by the Ministry of the Interior, Republic of Lebanon, and legalized in Beirut on January 2, 2003. None of these proceedings existed in *Chaudhary*.

To quote the Reasons for Decision issued by the Immigration Appeal Division (IAD):

It is apparent from the reasoning of Justice Barnes that the talaq ceremony has no legal import in Canadian law. It is only the formal recognition of the divorce by a foreign tribunal or other state authority having jurisdiction in such matter that is relevant when assessing whether a foreign divorce may be recognized in Canada. Although in the Amin case the talaq did take place in Pakistan, given Justice Barnes' emphasis on the registration of the Divorce with civil authorities, the geographical location of the talaq does not appear to be relevant. If the Lebanese courts recognize the talaq — it having been

witnessed by an authorized representative of the Supreme Shiite Council in Canada — it should not matter where it actually occurred. I would liken the process to a court accepting evidence taken in accordance with its established procedures from an examination for discovery in another country and then relying on that evidence to issue its decision.²

It is respectfully submitted that the IAD Reasons for Decision are based on sound law. The analogy of using an examination of discovery from another country is valid. Another analogy would be using proxy marriage out of the country to create a legal marriage in the country issuing a Marriage Certificate.

The divorce in question was duly considered and registered with the Lebanese authorities and not “merely registered.” However, it is the Federal Court that will adjudicate this issue. I expect that the Government of Lebanon, most Muslims and many others will not agree that the procedure governing the registration of Lebanese divorces is a “mere registration” and not legally valid in Canada.

In this decision the Federal Court of Canada briefly considered the British Court decision *El-Fadl v. El-Fadl* (1999), [2000] 1 F.L.R. 175 (Eng. Fam. Div.). However, this case was not applied nor distinguished. There was no explanation why the exact same “proceedings” which satisfied the British court in *El-Fadl* failed to satisfy the Federal Court of Canada. The British Court in *El-Fadl* accepted the Lebanese Sharia Court actions as “a proceeding” and not “a mere registration” because of the role played by the Sharia Court.” Hughes J held (at 188) that:

Although the Sharia Court has no judicial decision to make whether there is to be divorce or no, what occurred before it with the assembly of the court, judge and clerk, and the duty to record into the register, having taken formal declarations, is properly described as ‘proceedings’ and the local law explicitly requires such proceedings as an integral part of the divorce process.

It was the respondent’s former husband who obtained the religious annulment/divorce from his wife on November 5, 1993, in Toronto, Ontario. This religious divorce was subsequently considered and affirmed, with the consent of both parties, by a duly constituted Lebanese Sharia Court. To quote the Reasons and Decision of the IAD, since the appellant:

was represented by a proxy who signed the official registration of the talaq in 1999, this is clearly not a case where recognition of the divorce would be unfair to either party to the marriage. As well, the public policy concerns with respect to protecting vulnerable Muslim women from unilateral divorces are not apparent in this situation.³

²Canada (Minister of Citizenship & Immigration) v. *Hazimeh*, IAD File Number TA6-07632, Reasons and Decision, pp. 5-6.

³Canada (Minister of Citizenship & Immigration) v. *Hazimeh*, IAD Reasons and Decision, p. 9

Case Comment: Canada (Minister of Citizenship & Immigration) v. Hazimeh 189

The appropriate Lebanese legal documents were then issued. The copy of the Certificate of Divorce was issued by the Government of Lebanon on January 2, 2003.

A second document relating to the divorce appears to be analogous to a Divorce Order and contains the reasons for granting the divorce. The Lebanese Court heard and recorded evidence and registered the divorce in the Sharia Jaafari Religious Court of Siada confirming the divorce and listed the following as reasons for granting the divorce.

The divorce of the above mentioned couple was made irrevocable before me pursuant to religious and legal forms. The spouse has abstained from half of the due dower of non-copulation. The withdrawal has been accepted and the divorce approved.⁴

The reasons are not long but it is obvious that some consideration was given by the Court to the grounds for the divorce/annulment and that evidence to support the above conclusion was presented and reasons were given for granting the divorce. Both parties to the divorce were represented at the proceeding by proxies and consented to the proceedings. Clearly some consideration was given to the facts of the case and the grounds for granting the annulment.

A third official document was issued by the Jaafari Court and signed by two of the court officers. A document described as a Divorce Certificate was submitted to the Immigration Appeal Division and formed part of the court record. This document noted that the talaq divorce took place on November 5, 1993, in Canada, and was registered “before the Jaafari Religious Court of Saida on May 13, 1999, basis #483, register # 456. An Ontario Certificate of Divorce contains much less information.

The Supreme Court of Canada decision of *Schwebel v. Ungar* (1964), [1965] S.C.R. 148 (S.C.C.), which was presented to the Federal Court and recognized a Jewish religious divorce under almost the exact same circumstances, was not applied or distinguished.

The reasons of the Federal Court also did not consider the Citizenship and Immigration Manual *Overseas Processing OP2* “Processing Members of the Family Class.” At paragraph 5.33 which deals with the “*Legality of foreign divorces*” it states as follows:

The *Divorce Act* also preserves common-law rules respecting recognition of foreign divorces. For example, Canadian Courts may recognize foreign divorces when:

— They are issued from a court in a country where neither spouse was ordinarily resident, but where the decree is recognized by the

⁴Lebanese Divorce Document Court Record, p. 132.

law of that country (other than Canada) where one or both were ordinarily resident at the time of the divorce. For example, a party living in California obtains a divorce in Nevada. If California recognizes the Nevada divorce, it is valid in Canada.

— Either party can show that they had a “real and substantial connection” with the foreign jurisdiction at the time of the divorce. Factors that might indicate whether there was a real and substantial” connection would be whether an individual was born in that country, had family there, and regularly travelled there to spend time in the jurisdiction. This could be strengthened further if the individual owned property or conducted business in that other country had the proper jurisdiction to hear the divorce when neither of the parties was ordinarily residing there for a year preceding the divorce action. **If the real and substantial connection is made, and that party obtains a legal divorce in that country, it is valid in Canada. [bold added]**

The *Overseas Processing Manual* is part of the official Citizenship and Immigration guidelines and procedures. As the Manual states: “If the real and substantial connection is made, and that party obtains a legal divorce in that country, it is valid in Canada.”

This issue should be considered as a serious legal question of general importance since the “official” CIC guidelines for evaluating the legality of foreign divorces direct that if the divorce is recognized by another jurisdiction as legal, it should be recognized by Canada. This decision of the Federal Court renders a contrary conclusion. The CIC Manual, while important, is not considered law. However, this discrepancy needs to be addressed.

Lebanon recognized the divorce, so Canada should recognize the divorce according to the official CIC guidelines. There is no distinction made between religious or civil divorces, only that the divorce is recognized by the jurisdiction concerned and should be recognized by Canada.

It is up to the Federal Court to make a final determination on these questions. However, given the importance of the decision that could affect many individuals of the Muslim faith, these questions should be seen as serious issues of legal concern and certified as questions of general legal importance and to be considered by the Federal Court of Appeal.

Case Comment: Canada (Minister of Citizenship & Immigration) v. Hazimeh 191

The Federal Court, after receiving submissions on the matter, certified the following question to be referred to the Federal Court of Appeal:

Is a talaq divorce that took place in Canada, but which has been recognized and registered in Lebanon, a legal or foreign divorce that Canada should recognize under the Divorce Act?⁵

This is an important case and there are a number of serious legal issues of general importance to the Muslim community of Canada and by extension to other groups that have faith-based divorces. This decision of the Federal Court of Canada has the potential to have a major impact on the Canadian Muslim community and also other Canadian religious communities that have religious divorces. The Federal Court of Appeal, and other Canadian courts, need to get it right and consider all the consequences before not recognizing Islamic divorces that are recognized by the legal processes of other countries.

Edward C. Corrigan is Certified as a Specialist in Citizenship and Immigration Law and Immigration and Refugee Protection by the Law Society of Upper Canada. He can be reached at corriganlaw@edcorrigan.ca or at (519) 439-4015.

⁵Canada (Minister of Citizenship & Immigration) v. Hazimeh, Mr. Justice Russell, June 2, 2009, p. 3.