

Federal Court



Cour fédérale

Date: 20151117

Docket: IMM-1667-15

Citation: 2015 FC 1284

Toronto, Ontario, November 17, 2015

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

MONIR DARVISHPOUR HASSANKIADEH

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The situation of Christian converts in Iran is grave. They face persecution by the authorities and even punishment by death:

The constitution does not provide for the rights of Muslim citizens to choose, change, or renounce their religious beliefs. The government considers a child born to a Muslim father to be a Muslim and deems conversion from Islam to be apostasy, which is punishable by death. [My emphasis.]

(U.S. Department of State, International Religious Freedom Report for 2014, Iran)

Christians who have converted from Islam are at risk of harm from the state authorities, as they are considered apostates – a criminal offence in Iran. Sharia law does not allow for conversion from Islam to another religion, and it is not possible for an individual person to change their religious affiliation on personal documentation. Christian converts face physical attacks, harassment, surveillance, arrest, detention, as well as torture and ill-treatment in detention. [My emphasis.]

(United Kingdom: Home Office, Country Information and Guidance – Iran: Christians and Christian Converts, December 2014 at section 1.3.3)

[2] Apostasy is punishable by death. Moreover, even if Christians and Christian converts have been released in Iran without having been charged, a danger of persecution still exists for them:

By the time the case goes to court, or the accused may be released without charges, there will have been a substantial risk of ill-treatment or torture while in incarceration. It should not be underestimated what can happen from the time of arrest up until a court hearing.

(Danish Immigration Service, Updated on the Situation for Christian Converts in Iran, June 2014, at part 1.2.2 Iranian legislation and cases against converts)

II. Introduction

[3] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of the decision of a Senior Immigration Officer [Officer], dated February 27, 2015, rejecting the Applicant's pre-removal risk assessment [PRRA] application.

III. Background

[4] The Applicant, Monir Darvishpour Hassankiadeh (age 59), is a citizen of Iran.

[5] The Applicant alleged in front of the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada that she and her daughter converted from Islam to Christianity after her daughter awoke from a coma in 2003 subsequent to her daughter's attempted suicide after she was detained and raped. The Applicant and her daughter attempted, on a number of occasions, to come to Canada after their conversion to Christianity: i) in 2004, the application to obtain visitors visas for her family was rejected; ii) her daughter applied the following summer for a student visa without success; iii) in 2006, a new application to obtain visitors visas for the family was rejected; iv) later in 2006, the Applicant's daughter entered into a marriage with an Iranian-Canadian for the purpose of gaining status in Canada subsequent to having undergone traumatic experiences in Iran.

[6] The Applicant's daughter arrived in Canada in April 2009 on the basis of the fraudulent marriage. Unable to obtain Canadian status through the marriage, the Applicant's daughter filed a refugee claim in May 2010. The Applicant arrived in Canada in January 2011 to visit her older daughter who is both Canadian and Iranian citizen. The Applicant made a claim for refugee protection in October 2011, and her claim was joined to that of her daughter. In a decision dated September 14, 2012, the RPD rejected the Applicant and her daughter's refugee claims finding that the Applicant and her daughter are not genuine converts to Christianity. Specifically, the RPD found the Applicant's testimony was frequently vague, evasive and punctuated by a

theatrical demonstration when speaking of religious matters and that the Applicant's evidence was riddled with inconsistency and contradiction.

[7] In October 2013, the Applicant filed, without the assistance of counsel, an application for PRRA. This first application for PRRA was rejected in May 2014. The Applicant made an application for judicial review to this Court (IMM-5461-14), but the parties settled and agreed that the PRRA application would be reconsidered. The Applicant submitted considerable substantial new evidence with submissions and, after reconsideration, the Officer rejected the Applicant's PRRA application in a decision dated February 27, 2015 [Application].

IV. Decision under Review

[8] In his decision, the Officer found that the Applicant would not be subject to risk of persecution, danger or torture, risk to life or risk of cruel and unusual treatment or punishment if she was to return to Iran. The Officer gave no weight to the new evidence, such as, the affidavits, letters, photographs, country condition documents, and medical report submitted by the Applicant as they did not contradict the findings of the RPD regarding the credibility of the Applicant. Particularly, the Officer found that the Applicant did not submit sufficient evidence that the Applicant's conversion to Christianity in Canada is one of conviction and not one of convenience, this subsequent to affidavits from two pastors and a reverend which the Officer held were only to attest to the Applicant's participation in church activities and not to her motivations. Furthermore, the Officer found that the Applicant had not submitted sufficient evidence to demonstrate that she would be persecuted in Iran. Finally, the Officer found that the Applicant is not at risk of persecution simply because she made a refugee claim in Canada,

noting that at no point during the removal process from Canada, do Iranian authorities or other foreign jurisdictions receive information formally that an individual has made a refugee claim in Canada.

V. Legislation

[9] The following are the relevant legislative provisions of the IRPA:

Convention refugee

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

Person in need of protection

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality,

Définition de « réfugié »

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Personne à protéger

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a

their country of former habitual residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

(2) A également qualifié de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

VI. Position of the Parties

[10] The Applicant submits that the Officer committed several reviewable errors, specifically: the Officer erred in dismissing the expert evidence; he failed to consider the new evidence related to the genuineness of the Applicant's Christian faith and practice; he erred in giving no weight to the affidavit of Pastor Tabiany; he erred in finding that the Applicant is not at risk as a failed refugee claimant; and, that the Officer breached his duty in respect of procedural fairness by refusing to hold an oral hearing.

[11] Conversely, the Respondent submits that the PRRA is not an appeal of the RPD's determination. The Officer further submits that it was reasonable for him to find that the new evidence submitted by the Applicant in support of her PRRA application was not sufficient to contradict the RPD's findings that the Applicant was not credible. According to the Respondent, it was also reasonable for the Officer to give little weight to the expert opinion as the expert opinion relied on facts that were deemed not to be credible by the RPD. The Respondent submits that it was also reasonable for the Officer to reject the affidavits of the pastors and the reverend as they did not address the vague, evasive and contradictory testimony of the Applicant before the RPD; that, especially, in light of the Applicant's testimony that the RPD found to lack credibility in respect of the Applicant's attendance of protestant-Christian church services in Iran, as the RPD concluded that churches are not monitored by the Iranian authorities. Regarding the issue of an oral hearing, the Respondent submits that it is not required. The PRRA officer only holds oral in-person hearings in exceptional cases, and this case did not warrant an oral hearing as all the criteria set out at section 113(b) of the IRPA were not met. Finally, the

Respondent submits that the Officer's findings that the Applicant would not be at risk in Iran due to her refugee claim in Canada is reasonable as the Applicant had not satisfied her burden of proof by establishing a link between her personal circumstances and country conditions in Iran.

VII. Standard of Review

[12] The standard of review of reasonableness is applicable wherein fact and law determinations as well as fact determinations are reached by PRRA Officers (*Nebie v Canada (Minister of Citizenship and Immigration)*, 2015 FC 701).

[13] The determinations of Immigration Officers, such as PRRA decision-makers, in respect of the rights to oral hearings must also be reviewed under the standard of reasonableness as it is a core element of the officers' jurisdiction and is a matter to which the Court owes considerable deference to the officer (*Ndagijimana v Canada (Minister of Citizenship and Immigration)*, 2013 FC 43; *Matano v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1290).

VIII. Analysis

[14] The central issue to be determined by this application for judicial review is whether the Officer's PRRA decision is reasonable. This Court finds, after a careful review of the submissions of the parties as well as a thorough examination of all the evidence, that the Officer's decision is unreasonable.

[15] The purpose of a PRRA is undisputed; it is to allow a person that is subject to a removal order to apply for protection (*Raza v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385 at para 10 [*Raza*]; section 112 of the IRPA). Succinctly, a PRRA application will be granted – subject to restrictions regarding criminality or national security – if at the time of the PRRA application the Applicant meets the definition of a “Convention refugee” at section 96 of the IRPA or the definition of a “person in need of protection” at section 97 of the IRPA (*Raza*, above at para 11; section 112 of the IRPA). A successful PRRA application will have the effect of conferring refugee protection to its applicant (subsection 114(1) of the IRPA).

[16] It is well established that a PRRA is not an appeal mechanism of a negative RPD decision; and, the PRRA Officer must give deference to the RPD’s determination of the claim; however, the Officer must examine whether new facts or evidence have come to light since the RPD’s rejection of the claim:

[50] A PRRA officer is not a quasi-judicial body, nor does he or she have an appellate function when faced with a RPD decision. The PRRA officer is an employee of the Minister, acting within his or her employer's discretion (insofar as it is circumscribed by the Act and the Regulations). The PRRA officer must give deference to the RPD's determination of the claim, to the extent that the facts remain unchanged from the time it had rendered its decision. Instead, the PRRA officer is specifically looking as to whether new evidence has come to light since the RPD's rejection of the claim for determining a risk of persecution, a danger of torture, a risk to life or a risk of cruel and unusual treatment or punishment. The underlying rationale for paragraph 113(a) of the Act is not appellate in nature but rather to assure the claimant has a last chance to have any new risks of refoulement (not previously assessed by the RPD) assessed before removal can take place. [My emphasis.]

(*Singh v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1022 at para 50; see also *Elezi v Canada (Minister of Citizenship and Immigration)*, 2007 FC 240 at para 27)

A. *Country conditions in Iran*

[17] While it is true, in theory, that religious minorities are protected pursuant to the Iranian Constitution, it is not the case in practice. As demonstrated by the objective documentary evidence, it is unequivocal that Christians in Iran have been targeted by the authorities and are at risk of discrimination and are at risk of persecution:

The Iranian Constitution recognises Christians, Jews and Zoroastrians as protected religious minorities. However the state does discriminate against them on the basis of religion or belief, as all laws and regulations are based on unique Shi'a Islamic criteria. It is difficult for many Christians to live freely and openly in Iran. Such discrimination is prevalent throughout Iran.

(United Kingdom: Home Office, Country Information and Guidance – Iran: Christians and Christian Converts, December 2014 at section 1.3.2)

[18] The situation is even more problematic for Christian converts in Iran who face persecution by the authorities and even punishment by death:

The constitution does not provide for the rights of Muslim citizens to choose, change, or renounce their religious beliefs. The government considers a child born to a Muslim father to be a Muslim and deems conversion from Islam to be apostasy, which is punishable by death. [My emphasis.]

(U.S. Department of State, International Religious Freedom Report for 2014, Iran)

Christians who have converted from Islam are at risk of harm from the state authorities, as they are considered apostates – a criminal offence in Iran. Sharia law does not allow for conversion from Islam to another religion, and it is not possible for an individual person to change their religious affiliation on personal documentation. Christian converts face physical attacks, harassment, surveillance, arrest, detention, as well as torture and ill-treatment in detention. [My emphasis.]

(United Kingdom: Home Office, Country Information and Guidance – Iran: Christians and Christian Converts, December 2014 at section 1.3.3)

[19] As problematic as the situation is for Christian converts in Iran, it is trite law that it is insufficient for a PRRA applicant to simply state that there is a risk in Iran, an applicant has to demonstrate that they have a well-founded fear under section 96 of the IRPA or that they established a personalized risk under section 97 of the IRPA.

B. *Faith of the Applicant and rejection of the evidence*

[20] It was unreasonable for the Officer to reject the affidavits of Pastor Siroos Tabiany of Persian Christian Fellowship and Pastor Hany Boghossian of the Well on Bayview as well as of Reverend Terry Thom of St. Matthew's United Church. In his decision, the Officer stated that he relied on the credibility findings of the RPD to determine that the Applicant is a Christian out of convenience rather than of belief. The Officer rejected the affidavits of the Pastors and the Reverend as the affidavits only discussed the Applicant's participation in their churches activities and not her motivations as to why she became a Christian. As a result, the Officer agreed with the conclusion of the RPD that the Applicant is not a genuine Christian and according to the Officer that she simply attends Christian services and events to bolster her claim.

[21] As mentioned previously, while it is true that the Officer owes deference to the findings of the RPD, he has an obligation to examine whether new facts or evidence have come to light demonstrating that new risks have arisen since the RPD's determination. In the present case, the Officer rejected all the affidavits of the Pastors and the Reverend on the basis of the credibility

findings of the RPD that the Applicant is not a genuine Christian; that the affidavits do not speak of the motivations of the Applicant; and, that the assessment of the Pastors and the Reverend may not substitute the assessment of the RPD as they are not trained in assessing the credibility of an individual. It must be recognized that the RPD did not have the new evidence of the several affidavits of members of the clergy from various churches.

[22] This conclusion is problematic for two reasons. Firstly, the Officer had the obligation to assess whether the Applicant is currently a genuine Christian. This determination cannot be made solely on relying on the findings of the RPD as the RPD's findings are based on whether the Applicant genuinely converted to Christianity pre the RPD's determination. As stated in the UNHCR document *Guidelines on International Protection: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*, dated April 28, 2004 [UNHCR Guidelines: Religion-Based Refugee Claims], a conversion post departure may have the effect of creating a *sur place* claim – this is even possible if the decision-maker is not satisfied that the Applicant is a genuine believer:

36. So-called “self-serving” activities do not create a well-founded fear of persecution on a Convention ground in the claimant's country of origin, if the opportunistic nature of such activities will be apparent to all, including the authorities there, and serious adverse consequences would not result if the person were returned. Under all circumstances, however, consideration must be given as to the consequences of return to the country of origin and any potential harm that might justify refugee status or a complementary form of protection. In the event that the claim is found to be self-serving but the claimant nonetheless has a well-founded fear of persecution on return, international protection is required. Where the opportunistic nature of the action is clearly apparent, however, this could weigh heavily in the balance when considering potential durable solutions that may be available in such cases, as well as, for example, the type of residency status. [My emphasis.]

(*UNHCR Guidelines: Religion-Based Refugee Claims* at para 36)

[23] Secondly, the Officer rejected the affidavit of Pastor Tabiany, who the RPD had determined, subsequent to having heard his testimony, that he was credible; however, the Officer found the Pastor is not trained in assessing credibility nor the genuineness of a person's faith, the RPD determined that the Pastor's assessment cannot be substituted for that of the RPD which is required even in such a case. The fact remains that Pastor Tabiany has had the opportunity to interact with the Applicant on a regular basis and assess the genuineness of her faith for years. Based on the RPD's findings that Pastor Tabiany is a credible witness, it cannot be said that his testimony is not substantially significant. Given the foregoing, it was unreasonable to simply reject the affidavit of Pastor Tabiany and not give it any weight. How else but through an assessment by a member of the clergy can one assess motivation in belief, if at all, as this belongs to the realm of belief rather than that of solely fact. It is true that the RPD was not bound by the testimony of the Pastor but that the PRRA still had the obligation to carefully review the information contained in the affidavit by Pastor Tabiany and that of other members of the clergy; and, at the very least, to take that into consideration. The Officer could not simply reject it without carefully reviewing Pastor Tabiany's opinion in respect of the Christian beliefs and activities as described by Pastor Tabiany in his affidavit.

[24] The Court finds that the Officer's decision is unreasonable; the Officer could not rely solely on the findings of the RPD to assess whether the Applicant is currently a genuine Christian due to the Applicant's allegations in clear new objective evidence post-RPD determination. Furthermore, it was unreasonable for the Officer to give no weight to the affidavits of the Pastors and the Reverend, specifically to that of the affidavit of Pastor Tabiany. Finally, as stated in the *UNHCR Guidelines: Religion-Based Refugee Claims*, even if the

Applicant's conversion is, in and of itself, found to be self-serving but that the Applicant does have a well-founded fear of persecution, then international protection is required, recognizing that an Applicant could, nevertheless, suffer persecution due to a recognized, duly confirmed, authentic, formal conversion.

C. *Risk of being discovered*

[25] The Officer found that the Applicant would not be at risk as a result of her refugee claim in Canada if she returns to Iran, as the Applicant is not known to have been implicated in anti-government activities and/or working with any deemed perceived subversive organizations to Iran, which would have come to the attention of the Iranian government. This determination by the Officer is unreasonable as clear, unequivocal, objective documentary evidence suggests otherwise. According to the objective documentary evidence, Iranians who have committed apostasy are carefully monitored by the Iranian authorities:

Church groups are routinely subjected to state monitoring and harassment in Iran. This monitoring takes both open and covert forms. The Ministry of Intelligence, Police or Revolutionary Courts would summon church leaders for questioning and try to coerce them into providing information about church activities, services, education programs and the names and backgrounds of church members. Christians also reported to the ICHRI that intelligence officers told them they were following them and tapping their phones. The information gathered by the Ministry of Intelligence then becomes the basis for arrests, prosecutions and the closure of churches.

(United Kingdom: Home Office, Country Information and Guidance – Iran: Christians and Christian Converts, December 2014 at section 2.6.9)

[26] Apostasy is punishable by death. Moreover, even if Christians and Christian converts have been released in Iran without having been charged, a danger of persecution still exist for them:

By the time the case goes to court, or the accused may be released without charges, there will have been a substantial risk of ill-treatment or torture while in incarceration. It should not be underestimated what can happen from the time of arrest up until a court hearing.

(Danish Immigration Service, Updated on the Situation for Christian Converts in Iran, June 2014, at part 1.2.2 Iranian legislation and cases against converts)

IX. Conclusion

[27] As a result of all of the aforesaid, it was unreasonable for the Officer to find that the Applicant is not, as a failed refugee claimant, in peril if she is to return to Iran and that she would not be at risk if discovered by the authorities as a Christian convert who committed apostasy.

[28] For all the above reasons, the application for judicial review is granted.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be granted.

The file be sent back to a different PRRA officer for assessment anew. There is no serious question of general importance to be certified.

"Michel M.J. Shore"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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