Federal Court  Cour fédérale

Date: 20111031

Docket: IMM-877-11

Citation: 2011 FC 1236

Ottawa, Ontario, October 31, 2011

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

AZADEH SADEGHI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of the decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board, dated 24 January 2011 (Decision), which refused the Applicant's application to be deemed a Convention refugee or person in need of protection under sections 96 and 97 of the Act

BACKGROUND

[2] The Applicant is a citizen of Iran. She and her family are non-religious.

[3] In 2004, she was held-up at the roadside by members of the Islamic Guidance Patrol Unit 110 (IGP). She was ordered to get out of the car, hit in the face with a walkie-talkie by Colonel Safania, and ordered to report to IGP headquarters. When she reported the next day, she was held for several hours. During this time, Colonel Safania sexually propositioned her and some female members of IGP questioned her. She was eventually released, but had to pay a fine and sign some kind of undertaking.

[4] Some time later, between late 2005 and early 2006, the Applicant organized a mixed dinner party. After the party, several of the party-goers were questioned by the Harasat – a security unit which monitors students' behaviour – and revealed that it was the Applicant who had organized the party. She was summoned by the Harasat and forced to sign a document saying that she would voluntarily quit university. When the Applicant's father found out that she had left school, he was furious and would not let her out of the house for some time.

[5] In 2006 the Applicant met a young man called Riyaz whose mother was Baha'i. After Riyaz and the Applicant went to a party, which was raided by the IGP, the Applicant was accused by Colonel Safania of being Baha'i. She said she was not Baha'i. After the raid, the Applicant was required to attend court, which she did, and was fined by the authorities for her activities.

[6] In December 2007 or January 2008 the Applicant's sister, a permanent resident of Canada, applied for a work visa for the Applicant to come to Canada. The visa was denied.

[7] Also, in May 2007, the Applicant met another man in Iran called Sami. Sami had been expelled from university for political activities but he said he was no longer politically active. In July 2007, Sami was arrested. On 23 July 2007, the Applicant was summoned to the Shiraz Intelligence Ministry. She went with her father. After this visit with the authorities, the Applicant was required to sign an undertaking that she would report to the Intelligence Ministry whenever required. At this time, she saw Colonel Safania at the ministry. She had noticed him following her in his car. After this meeting at the Intelligence Ministry, her father was again furious and forced the Applicant to quit her job.

[8] In October or November 2007, the Applicant was called back to the Intelligence Ministry. Colonel Safania threatened to destroy her life if she was not nice to him. He also said she could be expected to be called into the Intelligence Ministry again.

[9] Through a low-level contact in the Disciplinary Forces, the Applicant's father discovered that the Applicant was not blacklisted from leaving Iran, but that she was at risk of being summarily arrested. To get her out of the country, the father arranged a marriage to Ebrahim, a Kuwaiti man who was 21 years her senior. Forced into marriage, the Applicant left her home in Iran for that of her new husband in Kuwait.

[10] After she left Iran, the Applicant's father was arrested and detained for 24 hours by government agents. The agents interrogated him, and asked where his daughter was and who she was with. Because of this event, the Applicant felt she could not return to Iran and went through with the marriage to Ebrahim.

[11] After they were married on 19 March 2008, Ebrahim sent the Applicant to the USA, intending to follow after her once he had sorted out issues with his business. She arrived in the USA in August 2008 on a visitor's visa. After living in the USA for a short time, the Applicant told her husband she wanted a divorce. He told her that he would not permit the divorce unless she abandoned her marriage portion of 5000 Kuwaiti Dinars.

[12] After living in the USA with her maternal aunt and her aunt's husband for five and a half months, the Applicant was asked to leave their home. She travelled to Florida, where she lived with her maternal uncle and his wife for three more months. She was asked to leave her uncle's home and so she returned to her maternal aunt's and contacted her sister. Near the expiry date of her visitor's visa, the Applicant asked several immigration lawyers in the USA how she could stay there. One told her that she could regularize her status by marrying; others told her that a refugee claim would be impossible because she had residence status in Kuwait.

[13] Although she investigated the possibility of regularizing her status in the USA, the Applicant did not claim refugee status while she was there. When her visitor's visa expired on 6 February 2009, she was arrested by the American authorities as an over-stay. She was later released.

She came to Canada and made her refugee claim 1 June 2009, nearly four months after her status in the USA had expired.

[14] On her entry into Canada, the Applicant was interviewed and the interviewing officer filled out form IMM 5611, the Claim for Refugee Protection. An interpreter was present for this interview. The Applicant also signed an acknowledgement on the form that said she understood its contents and that any portions she did not understand had been explained to her. According to the form, the Applicant fears persecution from Unit 110 (the IGP) in Iran and in Kuwait she fears persecution from her husband, Ebrahim.

[15] The RPD conducted its hearing on 21 January 2011. At the hearing, the Applicant was represented by counsel. By consent, the hearing initially proceeded without an interpreter, because the interpreter was delayed in arriving. When the interpreter arrived, the hearing continued with his assistance. At the hearing, the evidence before the RPD consisted of the Applicant's identity documents (Birth Certificate, Driver's Licence, ID Card, Pre-university School Diploma, University Degree, and Passport), the National Document Packages for Iran and Kuwait, form IMM 5611, the Applicant's Personal Information Form (PIF), and the testimony of the Applicant. The Applicant's counsel did not ask her any questions after the RPD questioned her. Following the admission of evidence, counsel made oral submissions.

DECISION UNDER REVIEW

Credibility

[16] The RPD rendered its Decision on 24 January 2011. The Applicant's identity was proven by her passport so the only issue for the RPD was whether she had a well-founded fear of persecution.

[17] The only evidence before the RPD going to matters other than the Applicant's identity was her testimony and the National Documentation Packages for Kuwait and Iran. The Decision turned on the Applicant's credibility. The RPD found that the Applicant was not credible for several reasons.

[18] First, the RPD found the Applicant was not credible because of discrepancies between the information in form IMM 5611 and the Applicant's PIF. The RPD noted that, in form IMM 5611, she related the 2004 incident involving Colonel Safania, where she was hit in the face with a walkie-talkie. The Applicant said in form IMM 5611 that she had been riding in the car with her sister. When relating the same incident in her PIF, she wrote that she had been riding in the car with her friend. In addition, the Applicant indicated in form IMM 5611 that the incident occurred in 2003, while in her PIF she wrote that the incident had occurred in the autumn of 2004.

[19] At the hearing, the PRD invited the Applicant to explain these inconsistencies. She confirmed that the walkie-talkie incident had occurred in 2004 and that the person who had been riding with her was her friend, Maha. The Applicant suggested at the hearing that the error in the date and identity of the person riding with her was the result of an error in translation. Counsel at the

hearing noted that form IMM 5611 had not been translated back to her, though the RPD noted that there was an interpreter present when the form had been filled out and that the Applicant had signed the acknowledgment on the form. Based on the inconsistencies in the date of the event and the identity of the person riding with her, the RPD drew an adverse inference of credibility.

[20] The RPD also based its assessment of the Applicant's credibility on other differences in content between form IMM 5611 and her PIF. The RPD noted that, while the walkie-talkie incident and the events of the following day were present in both forms, the narrative section of the PIF contained a much longer and more detailed account of incidents the Applicant had suffered while in Iran. The RPD rejected the Applicant's explanation for the lack of detail in form IMM 5611 that the immigration officer had told her to keep her answers short. The RPD concluded that the additional events in the PIF narrative were embellishments, and so drew a further adverse inference of credibility.

[21] The Applicant's credibility was not assisted by the lack of documentary evidence before the RPD. Although she provided documents attesting to her identity, which the RPD accepted, she did not provide documentary evidence of the arrests and interrogations she said she experienced. The RPD did not draw a negative inference from this lack of evidence; it noted, however, that the Applicant had not taken the opportunity to shore up her credibility with evidence supporting her story.

[22] The RPD rejected the Applicant's assertion that she fears her father in Iran and that he would force her to marry another man if she were divorced because it found that she was not

credible. The RPD did not accept that her father would force her into a second marriage, even though she testified that she would do anything he told her to. The RPD also found the Applicant's explanation of why she had married Ebrahim was not credible.

Subjective Fear of Persecution

[23] The RPD found that the Applicant's assertion of subjective fear of persecution in Iran was not credible. This finding was based on the fact that the Applicant did not file a claim for protection during the entire nine months she had lived in the USA. The RPD did not accept the Applicant's explanation for the delay, that she had been told by lawyers in the USA that her claim would not be successful because of her Kuwait residence status, or because she was married. The RPD found it implausible that she had been given such advice. The RPD also rejected the Applicant's assertion that she did not file a claim for protection in the USA after her visa expired because her sister, a permanent resident in Canada, had to contact a Canadian lawyer for advice. The RPD said that it would not take four months to obtain advice about coming to Canada to claim refugee status.

[24] The RPD also found that the Applicant's alleged fear of persecution not credible because, during the four-month period in which she was illegally in the USA, she was subject to detention and removal and yet did not attempt to secure her status. Had she truly feared persecution, she would have regularized her status immediately. The RPD noted that, even after her Kuwaiti residency expired, which she claimed was a bar to her making a refugee claim in the USA, she still did not attempt to seek refugee protection there.

[25] The RPD noted that counsel at the hearing asserted that gender claims were less likely to be accepted in the USA than in Canada. The RPD, however, rejected this as an explanation for the Applicant's delay in filing a claim in the USA, as the Applicant herself did not raise this issue in her testimony or in either of the forms she filled out. Subjective fear is concerned with the Applicant's own internal thoughts and motivations, so the RPD rejected counsel's evidence as an explanation for the Applicant's failure to file claim in the USA because she did not know that gender-based claims were less likely to be accepted.

Other Motivation

[26] The RPD was also concerned that the Applicant had applied for visas to come to Canada on three separate occasions and was rejected each time. The RPD concluded that the Applicant's motivation for coming to Canada was not her fear of persecution but her desire to live in Canada.

ISSUES

[27] The Applicant raises the following issues:

a. Whether the RPD's credibility findings based on the inconsistencies between her PIF and form IMM 5611 were reasonable;

b. Whether the RPD's findings regarding the failure to claim protection in the USA were reasonable.

STATUTORY PROVISIONS

[28] The following provisions of the Act are applicable in these proceedings:

Convention refugee	**Définition de « réfugié »**
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,	**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*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	*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*) 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.	*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.
Person in Need of Protection	**Personne à protéger**
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, their country of former habitual residence, would subject them personally	**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 pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

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

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

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

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

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

(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,

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

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

(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 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

(2) A également qualité 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.

STANDARD OF REVIEW

[29] The Supreme Court of Canada in *Dunsmuir v New Brunswick,* 2008 SCC 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[30] Assessment of the evidence and findings of credibility are areas within the RPD's areas of expertise and are, therefore, deserving of deference. They are reviewable on a standard of reasonableness. See *Ched v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1338 at paragraphs 9 and 11, *Yener v Canada (Minister of Citizenship and Immigration)*, 2008 FC 372 at paragraph 28 and *Mugu v Canada (Minister of Citizenship and Immigration)*, 2009 FC 384 at paragraph 33. The standard of review applicable to the first issue is reasonableness.

[31] In *Correira v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1060, Justice John O'Keefe found that a finding of delay was reviewable on the reasonableness *simpliciter* standard. Further, Justice Robert Barnes found that a finding of delay was a question of fact to be evaluated on the patent unreasonableness standard in *Mesikano v Canada (Minister of Citizenship and Immigration)*, 2007 FC 922. As the Supreme Court of Canada collapsed these two standards into a single reasonableness standard in *Dunsmuir*, above, at paragraph 45, the standard of review with respect to the second issue is reasonableness.

[32] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law.

ARGUMENTS

The Applicant

[33] The Applicant argues that the RPD erred when it based its findings on inconsistencies between form IMM 5611 and her PIF. She says that the inconsistencies arose because of an error in translation at the time that form IMM 5611 was completed. Because form IMM 5611 was not translated back to her at the time it was completed, any findings based on such inconsistencies are unreasonable. Since the RPD based its negative credibility findings upon inconsistencies between the two documents, those findings must also be unreasonable. The Decision is unreasonable because it is based on unreasonable findings.

[34] The Applicant also argues that the RPD committed an error when it found that there was no explanation for her failure to claim refugee status in the USA. Her failure to file a claim in the USA does not show a lack of subjective fear because it was true that a claim in the USA would likely not

succeed. The advice she received from the American lawyers that her claim for refugee status would not likely succeed was good advice, so this fully explains her failure to file a claim while she was in the USA. Her failure to file a claim in the USA was objectively reasonable, given that gender-based claims such as hers are unlikely to succeed there. Since her failure to file in the USA was reasonable, it was unreasonable for the RPD to conclude that she did not have a subjective fear of persecution based on a failure to file.

[35] The Applicant asserts that the issue of the relative success of gender-based claims in the USA relative to Canada was before the RPD, but it failed to consider this evidence. Counsel at the hearing raised this issue in her oral submissions and the RPD had an academic article before it on gender-based asylum claims in the USA.

The Applicant's Further Memorandum of Argument

[36] The Applicant further argues that her counsel's submissions on the treatment of gender-based claims in the USA should have been considered by the RPD as evidence that was before it. She relies on *Ferguson v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1067, at paragraph 29 where Justice Russel Zinn said that:

> Legal counsel are officers of the court with well established duties and responsibilities, including the responsibility not to misstate facts or mislead. In my view, statements of fact made by counsel may constitute evidence in informal proceedings such as a PRRA application and they may be given weight. In these instances, counsel is not a witness, it is counsel's client that is the effective witness – counsel is merely making a statement on the client's behalf.

[37] The exchange between Applicant's counsel and the RPD member at the hearing on the success of gender-based claims in the USA was evidence that should have been considered by the RPD. The RPD failed to consider this evidence so its Decision is unreasonable.

The Respondent

[38] The Respondent says that the findings of the RPD were reasonable on the evidence before it and should not be disturbed. There were inconsistencies between the two forms and there was no documentary evidence to corroborate the incidents described in the Applicant's PIF. It was reasonable for the RPD to draw an adverse inference of credibility based on these inconsistencies.

[39] The Respondent also argues that the RPD did consider the success of gender-based claims in the USA and the evidence arising out of the exchange between counsel and the member, but there was no expert evidence before the RPD on this issue. The conclusion of the RPD concerning the legal advice the Applicant received was reasonable. Further, since the Applicant did not adequately explain her failure to file a refugee claim while she was in the USA, it was reasonable for the RPD to find that this was fatal to her claim in Canada. All the conclusions made by the RPD were based on the evidence before it and were reasonable, so they should not be disturbed.

ANALYSIS

[40] Given the background to this case and, in particular, the Applicant's tardiness and lack of effort in seeking protection in the USA and Canada, I can certainly understand the RPD's doubts

about the Applicant's lack of subjective fear, and I would not intervene in this matter except for the following two reasons which, in my view, render the decision unsafe and unreasonable and require that the matter be returned for reconsideration.

[41] First of all, the RPD makes a specific finding that the contents of form IMM 5611 were not translated back to the Applicant. The RPD then relies upon discrepancies between form IMM 5611 and the Applicant's PIF narrative as part of its general negative finding on credibility:

> However, given that there are two significant inconsistencies, the fact that the claimant also indicated that a mistake could be an explanation, and other difficulties, noted below, with the Port of Entry information and the claimant's credibility generally, the Panel does not accept the claimant's explanation. From these substantial indirect inconsistencies the Panel makes a negative inference as to credibility.

[42] The Applicant explained that discrepancies were possibly the result of some mistake in translation but, of course, because she did not have form IMM 5611 translated back to her for confirmation at the material time, she could say nothing more than this.

[43] Form IMM 5611 was not prepared by the Applicant or anyone acting for her so that, because it was not translated back to her, she had no opportunity to indicate whether the document was truly reflective of what she had to say. She also conceded that there were parts of her narrative that she did not make part of form IMM 5611 because the interviewing officer told her to keep her response short. It is also significant, I think, that the document itself instructs applicants to keep their answers short. The form states "Please answer in a few words. You will have the opportunity to explain all the facts related to your claim to the Immigration and Refugee board of Canada."

[44] The Respondent concedes that if the finding that form IMM 5611 was not translated back to the Applicant was the only basis for the Decision, then there would be grounds for complaint. The Respondent argues, however, that other findings of the RPD result in a global negative credibility finding that supports the lack of subjective fear ground for refusing the claim.

[45] My reading of the Decision, however, and in particular paragraph 19, suggests to me that the "two significant inconsistencies" that arise from the discrepancies between the PIF narrative and form IMM 5611, as well as the finding on "embellishment" set out in paragraph 21 of the Decision, are very much part of the grounds for the general negative credibility finding. That being the case, I think the Court cannot ignore the fact that form IMM 5611 was not translated back to the Applicant and that she was not given an opportunity to confirm that it accurately reflected her claim.

[46] I believe that, on the facts of this case, it was unreasonable for the RPD to rely upon and use the inconsistencies and "embellishments" against the Applicant when she was not given the opportunity to know whether form IMM 5611 accurately described her position. As Justice Michael Phelan pointed out in *Xu v Canada (Minister of Citizenship and Immigration)*, 2007 FC 274 at paragraph 14:

> I will not conclude that the CIC has an absolute obligation to read back interview notes to ensure accuracy. There may be good reason for not doing so including having spontaneous rather than tailored responses. However, in not having some form of objective record of what was actually said in the interview, the process is open to attack. In a world of digitalized recording, it might be possible to avoid these types of issues completely.

[47] In addition, I do not think the finding of a lack of subjective fear can support the whole Decision. As this court has pointed out, subjective fear is required for section 96 persecution but not

for section 97 risk. See *Li v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1, [2005] FCJ No 1 at paragraphs 31-33, *Guerra v Canada (Minister of Citizenship and Immigration)*, 2011 FC 319, at paragraph 6 and *Shah v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1121, at paragraph 16.

[48] In my view, after finding a lack of subjective fear, the RPD does not then go on to deal with section 97 risk.

[49] The Respondent argues that, in effect, section 97 risk is dealt with in paragraph 35 of the Decision where the RPD looks at forward-looking risk at the hands of the Applicant's father and her position as a divorced woman in Iran. What is left out of account, however, is the risk from the authorities in Iran that is clearly a significant part of the Applicant's narrative and her fear of return. This omission also renders the Decision unreasonable. See *Bouaouni v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1211 at paragraph 41, *Gnanasekaram v Canada (Minister of Citizenship and Immigration)* 2007 FC 297 at paragraph 10, *Kandiah v Canada (Minister of Citizenship and Immigration)*, 2005 FC 181 at paragraphs 14-18, and *Amare v Canada (Minister of Citizenship and Immigration)*, 2008 FC 228 at paragraphs 9 and 10.

[50] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is allowed. The decision is quashed and the matter returned for reconsideration by a differently constituted RPD.
2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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