

Federal Court



Cour fédérale

**Date: 20100611**

**Docket: IMM-5165-09**

**Citation: 2010 FC 637**

**Ottawa, Ontario, June 11, 2010**

**BETWEEN:**

**BANOUC DINARIAN**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR ORDER**

**GIBSON D. J.**

**Introduction**

[1] These reasons follow the hearing at Toronto on the 19th of May, 2010 of an application for judicial review of a decision of a Member (the “Member”) of the Refugee Protection Division (the “RPD”) of the Immigration and Refugee Board determining that the Applicant is not a Convention refugee and not a person in need of like protection in Canada. The decision under review is dated the 30<sup>th</sup> of September, 2009.

## **Background**

[2] The Applicant is a citizen of Iran from the municipality of Yazd in that country. She is a Zoroastrian. The rights of Zoroastrians and, generally speaking, other religious minorities, had been respected in Iran under the reign of Mohamed Reza Shah. That situation changed with the ascendancy of the Khomeini regime for Zoroastrians in general and for the Applicant and her family members in particular.

[3] The Applicant's husband was a successful businessman. He owned several businesses. The Applicant herself was a teacher. On the 14<sup>th</sup> of September, 1992, the Applicant was advised by authorities that her husband had died of a heart attack while he was on a business trip. The Applicant's husband was only 48 years of age at that time.

[4] The Applicant's husband was buried in a Zoroastrian cemetery, in accordance with Zoroastrian tradition, the next day. The day after the burial, the Applicant received a telephone call advising her that soldiers were digging up her husband's grave. She rushed to the cemetery. Soldiers advised her that her husband was Muslim and had to be re-buried in a Muslim cemetery. She was assaulted when she attempted too prevent the soldiers from removing her husband's body from his grave. The same day, Iranian authorities seized two of the Applicant's husband's businesses. Under Iranian law, no one but a Muslim was entitled to succeed to a Muslim's estate.

[5] The Applicant complained to authorities without success. Some two weeks later she went back to authorities to follow-up on her complaint. She was arrested, imprisoned and questioned

about her late husband's properties. She was told to hand over the deeds to the properties. With the help of a relative, she was released the next day.

[6] The Applicant was frightened and upset by her experiences following her husband's death and decided to leave her home in Yazd. She moved to Malat where she stayed with friends for a brief interval. There, she noticed that she was being watched by regime officials. She was approached by the Revolutionary Guard four or five times. The Revolutionary Guards demanded that she hand over the deeds to her late husband's properties. The Revolutionary Guards threatened to sexually assault her and her daughter if she did not comply.

[7] The Applicant quit her job and fled to Tehran with the aid of her brother-in-law, a prominent businessman in Iran who was also a Zoroastrian and who, sometime later, was forced to leave Iran. At one time when he returned to Iran, he was scheduled to be executed but he was able to escape. Despite her brother-in-law's difficulties, the Applicant and her daughter were able to live in Tehran in a property that he owned there.

[8] For a period of time, the Applicant was able to live in relative peace in Tehran. She travelled out of Iran periodically to spend time with her sister and her sister's family. She also travelled to Spain to stay with her brother-in-law who had aided her and who was by this time a citizen of the United Kingdom and a resident of Spain who had business interests in both countries.

[9] On a visit to Spain in 2000 that lasted over a number of months, the Applicant was issued a residency card valid until November 2003. On a later visit to Spain, the validity of her residency card was extended to the 10<sup>th</sup> of October, 2008.

[10] Following the Applicant's return to Iran in October, 2003, her brother-in-law was murdered. The Applicant suspected that he died at the hands of Iranian agents. Thereafter, she returned to Spain only for one day, in November of 2005, to be interviewed by the police. Following that very short visit, she travelled to the United Kingdom. The Applicant no longer had any interest in returning to Spain. She either cancelled her residency card for Spain, or allowed it to expire.

[11] Shortly after the murder of the Applicant's brother-in-law, Iranian officials began again to harass the Applicant in Tehran, once again seeking property deeds. She received threatening phone calls demanding property deeds. She continuously observed suspicious people either at her door or observing the building in which she lived. In September of 2004, the Applicant undertook a visit to her sister, now the widow of her late brother-in-law, in Canada who had status in this country as well as in England. Concerned about her children who remained in Iran, she returned to Iran in November 2004. Harassment recommenced.

[12] In March of 2006, while walking home after picking up her grandson at school, she was followed by two men, one of whom she recognized as one of the soldiers who had dug up her husband's grave many years before. She started to run with her grandson. She and her grandson were chased. The Applicant fell and broke her wrist and sustained bruises to her face and shoulders. A crowd gathered. The two men who had been pursuing the Applicant and her grandson disappeared. Harassment continued.

[13] In July of 2006, the Applicant travelled to meet her sister in the United Kingdom. She learned that in her absence things were getting worse in Iran. She received a summons to appear in

court at her residence in Iran. Her son and daughter were attempting to make arrangements to leave Iran.

[14] In all of the circumstances, the Applicant came to Canada with her sister rather than return to Iran. Her Convention refugee claim in Canada followed.

### **The Decision Under Review**

[15] The RPD acknowledged that the Applicant's claim to protection was based on her religion, her family affiliation and her perceived political opinion. It determined that the outcome of her claim turned on what it described as her lack of subjective fear and her engagement in "country" or "asylum" shopping. It noted that the Applicant had ... "left and returned to Iran at least 10 times after the constant harassment began." It discounted her explanation that the presence of her surviving adult children, and at least one grandchild, in Iran outweighed her fear, particularly when combined with the periods when the harassment that she experienced abated. It dismissed her unwillingness to rely on her residency card for Spain despite the fact that her brother-in-law, her sole family connection in Spain, had been murdered there. It dismissed the Applicant's reliance on the encounter that she alleged she and her grandson had on the streets of Tehran, that led to her fall and her injury, an event that the RPD described as the "precipitating event that caused the [Applicant] to leave Iran", as a story lacking credibility.

[16] The RPD made no mention in its reasons of the service at her home of a summons requiring her to appear in court. It made no reference to the cumulative impact over a number of years of the harassment that the Applicant suffered and with respect to which her credibility was questioned only regarding the "precipitating event". Finally, it gave no consideration whatsoever to the

Applicant's increasing age, she was born in 1945, and the impact that this might have had on her resilience to the continuing harassment that she endured.

[17] The Member concluded:

I have found the claimant [here the Applicant] to be country shopping, to lack subjective fear and to lack credibility. Therefore, I find there is not a serious possibility or reasonable chance that the claimant would face persecution for a Convention ground, if she returns to Iran. Therefore, the claimant is not a Convention refugee.

The Panel then turned its mind to whether the claimant would be subject personally to a risk to her life, or to cruel and unusual treatment or punishment, or whether there are substantial grounds to believe that she would be subject personally to a danger of torture, if she returns to Iran. Based on the above analysis, on a balance of probabilities, I find there is no such risk.

[18] The RPD's reference in the foregoing quotation to a lack of credibility on the part of the Applicant related only to the incident that it described as the "precipitating event".

### **The Issues**

[19] Counsel for the Applicant described the issues on this application for judicial review in the following terms in the Memorandum of Fact and Law filed on behalf of the Applicant:

- a. Did the [RPD] breach the principles of natural justice by telling the Applicant Spain was not an issue, and then finding that the Applicant should have claimed refugee status in Spain?
- b. Did the [RPD] make unreasonable findings of fact by ignoring and misconstruing evidence?
- c. Did the [RPD] err in law because, having made no adverse finding of credibility with respect to virtually all the key aspects of the claim save the 2006 incident, it erred by rejecting the claim based upon subjective fear?

d. Did the [RPD] err in law because it failed to consider when assessing the delay in making the claim the fact that the Applicant received information that the authorities were still pursuing her and that there was a summons for her, which caused her to make the claim?

[20] There is, of course, in addition to the foregoing issues, as on any application for judicial review such as this, the issue of standard of review. In what follows I will turn to that issue first.

### **Analysis**

#### *a) Standard of Review*

[21] The standard of review of a decision such as that here under review, absent a pure question of law or a breach of procedural fairness or natural justice, is “reasonableness”. Where the reasonableness standard applies, 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 ... (*Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paragraph [47]).

The standard of review on a pure question of law, particularly such a question that involves a law not within the particular expertise of the decision-maker, or of a breach of procedural fairness or natural justice, is “correctness”.

[22] Counsel for the Applicant urged that there was here a breach of procedural fairness or natural justice in that, at a pre-hearing conference that preceded the actual hearing of the Applicant’s claim, the RPD assured the Applicant and counsel that they did not need to address the question of the Applicant failing to make a claim for Convention refugee status or like protection in Spain when she had the opportunity to do so and nonetheless went on to include the Applicant’s status in Spain

at one stage following her brother-in-law's murder in reaching its conclusion regarding country or asylum shopping. For two reasons, I reject this submission. First, the position of the RPD at the pre-hearing conference, particularly relating to the issue of a claim in Spain, was not entirely clear. Indeed, I regard it as not having been so clear as to entitle the Applicant and her counsel to refrain at hearing from making submissions on that subject. Further, since the RPD's references in its reasons to a claim in Spain were both misguided and vague, particularly having regard to its more extensive comments on country or asylum shopping regarding the Applicant's sojourns in the United Kingdom and in Canada, I am satisfied that they were not central to the RPD's decision. In the circumstances, in what follows, I will analyze the decision against a standard of reasonableness.

*b) Ignoring or Misconstruing Evidence and the Adverse Credibility Finding*

[23] In *Bobrik v. Canada (Minister of Citizenship and Immigration)* 85 F.T.R. 13, Justice Tremblay-Lamer wrote at paragraphs 23 and 24 of her Reasons:

The Board [then the predecessor to the RPD] clearly stated that it was not considering evidence of persecution that occurred before the female Applicant returned from her trip to Canada. While the Applicants may not have had a well-founded fear of persecution at that point, the cumulative nature of the attacks and racial slurs should have been taken into account when assessing the well-foundedness of their fear following the trip. The following episodes display a pattern of discrimination and harassment: [there follows a list of 9 forms of "discrimination and harassment"].

These incidents occurred systematically over a period of two and one half years. The aggregate of these hostile acts was enough, in my view, to create a well-founded fear of persecution.

[24] On the facts of this matter, the Applicant, even leaving aside the single act of harassment that the RPD determined to be not credible, experienced a pattern of harassment extending from 1992 to 2006, albeit with some periods of relative calm and peace. In the years following the



murder of her brother-in-law, the intensity of the harassment increased to the point of service by mail on the Applicant, in her absence, of a summons to appear in court, an element of the pattern of harassment not even mentioned by the RPD in its reasons.

[25] The RPD simply failed to consider the impact that the aggregate of these hostile acts might have had on the Applicant and, in particular, whether that impact might have been sufficient to create a subjectively well-founded fear of persecution leading ultimately to a breaking-point for the Applicant and to her ultimate decision to claim Convention refugee status or like protection in Canada at a time when she had the opportunity to do so and notwithstanding the fact that she had earlier had similar opportunities and had failed to avail herself of them. I earlier referred to the Applicant's increasing age and potential provided by that reality for a loss of resilience. Any such loss of resilience, when combined with knowledge of the summons to appear, might well have been sufficient to justify the claim under consideration.

### **Conclusion**

[26] For the foregoing brief reasons, against a standard of review of reasonableness, I am satisfied that the RPD erred in a reviewable manner in deciding as it did. In the result, this application for judicial review will be allowed.

### **Certification of a Question**

[27] At the close of hearing, I reserved my decision. Counsel for the Applicant advised the Court that this matter raised no question for certification. I am inclined to agree. This matter would appear to turn almost entirely on its unique facts. That being said, counsel for the Respondent

requested an opportunity to review my reasons before taking a position on certification of a question. I agreed to provide such an opportunity.

[28] These reasons will issue without an accompanying order. Counsel for the Respondent will have five (5) working days from the date of the reasons to file and serve any submissions on certification of a question. Thereafter, if counsel for the Respondent proposes a question, counsel for the Applicant will have three (3) working days to serve and file any response. Once again thereafter, the Court will consider any submissions received and issue an order giving effect to these reasons.

“Frederick E. Gibson”

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Deputy Judge

Ottawa, Ontario  
June 11, 2010

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

**DOCKET:** IMM-5165-09

**STYLE OF CAUSE:** BANOU DINARIAN v. THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** May 19, 2010

**REASONS FOR ORDER:** Gibson D. J.

**DATED:** June 11, 2010

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