

Federal Court



Cour fédérale

**Date: 20180710**

**Docket: IMM-4949-16**

**Citation: 2018 FC 714**

**Ottawa, Ontario, July 10, 2018**

**PRESENT: The Honourable Madam Justice Elliott**

**BETWEEN:**

**NASTRAN YEGANEH, AMITIS KHANJANI**

**Applicants**

**And**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] The Applicants, Nastran Yeganeh and her minor daughter Amitis Khanjani, both citizens of Iran, seek judicial review of a decision made by the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada. The daughter's claim depends entirely on the success of the Applicant mother's claim which is the one to which I will hereafter refer.

[2] The RPD found that the Applicants were neither Convention refugees nor persons in need of protection under sections 96-97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The RPD also found that the claim was manifestly unfounded, precluding an appeal to the Refugee Appeal Division [RAD].

[3] The determinative issue in this review is the finding by the RPD that the Applicant's claim was manifestly unfounded. The linchpin for that determination was a finding by the RPD that, contrary to her claim, the Applicant did not perform a hymenoplasty which is also known as virginity restoration surgery.

[4] For the reasons following, that finding by the RPD was not reasonable. It tainted several other findings and, ultimately, the manifestly unfounded determination. As a result, the entire decision must be set aside and the matter returned to a different panel for redetermination.

## II. Style of Cause Amendment

[5] Although the Respondent is now commonly known as the Minister of Immigration, Refugees and Citizenship its name under statute remains the Minister of Citizenship and Immigration: *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, s 5(2) and *IRPA* s 4(1).

[6] Accordingly, as part of this judgment, the style of cause is amended to reflect the Respondent as the Minister of Citizenship and Immigration.

III. Background

[7] The Applicant is a national of Iran who, at the time of the RPD hearing, had been a licensed midwife for 25 years.

[8] In middle school the Applicant started to believe in Christianity despite being born a Muslim. She eventually began to consider herself a Christian, occasionally attending house churches in person and by Skype.

[9] The Applicant's involvement with Christianity created some difficulties between the Applicant and the Director of the hospital where she worked as a midwife. Eventually she was forced out of work at the hospital. She opened her own midwifery practice in August 2001 as part of a clinic with other medical practitioners.

[10] While the Applicant largely provided midwife services, twice she performed outpatient virginity restoration surgery in her office. The second time this happened, the girl upon whom she would be operating said that she was scared and told the Applicant that she was a Christian. The Applicant then cited a parable from the Bible to comfort her. The surgery was performed by the Applicant on April 17, 2016.

[11] Approximately 10 days later, the Applicant came to Canada for the wedding of her sister. Before leaving Iran the Applicant had received a call from the girl informing her that the girl's family found out about the surgery. Upon learning this, the Applicant did not return to her clinic before departing for Canada.

[12] On May 2, 2016, the girl's brother went to the clinic looking for the Applicant and told staff that he wanted to kill the Applicant. Subsequently the brother came to the Applicant's home and harassed the Applicant's husband. On another visit to the Applicant's husband the girl's brother was accompanied by someone who appeared to be dressed as a member of the Iranian Revolutionary Guard Corps [IRGC]. The Applicant's husband felt unsafe and moved to his mother's house.

[13] After learning of the threats, the Applicant decided to remain in Canada and submitted a refugee claim. She also began attending church in Canada once a week as well as more fully immersing herself in the Christian faith, including deciding to be baptized.

[14] The Applicant fears that if she is returned to Iran she will not be allowed to practice her faith, she would be arrested for performing the virginity restoration, and she could be executed for her conversion.

[15] Shortly before the hearing which was held on September 30, 2016, the Applicant submitted a BOC amendment with new information. Before the end of August, the Applicant had asked her husband to provide a corroborating letter. Her husband then called and asked whether she had converted to Christianity (she had never told him that she was secretly a Christian). On September 23, 2016, the Applicant received a call from her husband telling her that two days earlier he was summoned to the Court House in Tehran. When he arrived, there were two members of the IRGC and a third person in plain clothes who demanded that the Applicant's husband reveal her whereabouts. When he asked them what her crime was, they said she had

converted to Christianity, she proselytized, and was facing a death penalty. When the Applicant's husband denied it, they turned on a voice recording of the Applicant's conversation with the girl in the clinic.

[16] As stated above the RPD heard the Applicant's claim on September 30, 2016 and rendered the decision under review [Decision] on October 28, 2016.

#### IV. Issues and Standard of Review

[17] The Applicant testified in Farsi. The main issue raised by her counsel is that the RPD failed to take into account the statement by the interpreter that there was no English translation for some medical and religious terms. Nonetheless, the RPD made a negative credibility finding against the Applicant for not naming the hymen as the body part involved in the virginity restoration surgery. That finding then led to consequential findings that ultimately resulted in a determination that the Applicant's claim was manifestly unfounded.

[18] There is no dispute that the standard of review of credibility findings by the RPD is reasonableness: *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319 [*Rahal*] at para 22, 213 ACWS (3d) 1003.

[19] Two issues are raised in this matter:

1. Was the RPD's credibility determination reasonable?
2. Was the finding that the claim is manifestly unfounded reasonable?

[20] As I have found that the RPD made unreasonable credibility findings which render the Decision unreasonable it is not necessary to address the second issue.

[21] A decision is reasonable if the decision-making process is justified, transparent, and intelligible, resulting in a determination that falls within the range of possible, acceptable outcomes which are defensible on the facts and law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190 [*Dunsmuir*].

[22] If the reasons, when read as a whole, “allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met”: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708.

#### V. Relevant parts of the Decision

[23] The RPD rejected the Applicant’s claim as manifestly unfounded under section 107.1 of the *IRPA* on the basis that much of the Applicant’s story was false and had been fraudulently invented to advance her refugee claim.

[24] The critical finding of the RPD was that the Applicant never performed a hymenoplasty, including never having performed the one that lead to disclosure of her Christianity.

[25] That finding led to several consequences which the Decision identifies as follows:

[24] As a consequence . . . the panel also finds that the claimant did not recite Bible verses with the alleged young woman before the alleged hymenoplasty. The panel finds that there was no angry member of a woman's family seeking retribution against the claimant, mere days after the claimant arrived in Canada. The panel finds that the claimant's husband was not summoned by the police. The panel finds that Iranian authorities are not looking for this claimant for any reason.

Decision at para 24.

[26] The reason the RPD found the Applicant's claim to have performed a hymenoplasty was not credible was that she could not "name the bodily organ or tissue that she claims to have stitched together . . . which in English is called the hymen": Decision at para 15.

[27] In answer to a question from the RPD, the Applicant confirmed that she had studied anatomy when becoming a midwife. The RPD however found that she "did not possess the basic anatomical knowledge required to give even a simple description of the surgery she alleges having performed": Decision at para 15.

[28] A further comment provided by the RPD was that "[e]ven if . . . this was only the second time she had performed the procedure, it is reasonable to expect [the Applicant] to be able to explain the procedure, and name the relevant anatomy": Decision at para 15.

[29] The RPD then concluded:

[16] Accordingly, the panel finds that the claimant has never performed a hymenoplasty, and that the hymenoplasty the claimant is alleged to have performed on April 17, 2016 did not happen.

VI. Analysis

[30] Significant deference is owed to the credibility findings of the RPD, however sworn testimony of a claimant is also generally presumed to be true in the absence of any contradictions: *Rahal* at paras 42 and 44.

[31] The RPD questioned the Applicant extensively about the procedure but the Decision identifies no contradictions in her testimony about performing the hymenoplasty. In that respect, the presumption that her testimony was true was not displaced.

[32] In addition, the RPD may reject testimony that it finds to be implausible. “However, a finding of implausibility must be rational and must also be duly sensitive to cultural differences”: *Rahal*, at para 44. In this instance it is my view, as set out below, that the finding by the RPD that no hymenoplasty was performed was not based on a rational implausibility, given the Applicant’s testimony and the lack of an English equivalent word for the Farsi medical terms.

[33] The analysis by the RPD hinged on the fact that the word “hymen” was not used by the translator when translating the Applicant’s description of the part of the body involved in the surgery. As previously mentioned, the alleged inability of the Applicant to describe the surgical procedure was a matter of significant importance to the RPD.

[34] The transcript shows that when the RPD tried to pin down the name of the body part involved in the hymenoplasty it specifically asked for the “technical, anatomical term”. When



the interpreter indicated that the Applicant answered “the outer tissue of the vagina” the RPD asked the interpreter whether she had a dictionary. The interpreter’s response was:

No, I do not. I do not know exactly she ... what is she’s talking about. Maybe it is not this kind of word. Maybe it is another word.

[35] At that time the following exchange took place between the RPD and the Applicant:

**Member:** All right. So what I’m asking you to tell me is the anatomical word to describe the ... the area of human tissue that you stitched together in this procedure.

**Claimant:** No. It doesn’t have any other name. It’s the entrance of the vagina and ... yeah, and it’s like a curtain that is coming at the entrance of the vagina under minor labia. Under minor labia. Under there. Like, below the minor labia.

**Member:** Okay. It’s a ... it’s a tissue located under the minor labia. Is that correct?

**Claimant:** I ... under the minor labia is the entrance to the vagina. And that virginity tissue is around the... the wall of the vagina, the two side. Around ...yeah. It’s ... and the... the shape is different from one person to the other. Some ... some of them are flexible, then they expand and they come together after having sex, but some of them, they don’t.

**Member:** Okay. I just ... I just wanted the name. I am just asking for a name. So anything else, then, on the... on that... on that question about anatomy?

**Claimant:** I do not have anything else...

**Member:** Okay.

**Claimant:** ... in my mind right now.

[ellipses in original transcript]

[36] Previously the RPD had questioned the Applicant about the surgical procedure itself. She indicated that it takes approximately two hours. After explaining that a local anaesthetic is used, which she administers, the Applicant described the procedure as follows:

And then we use the thread for the stitches. And ... and then we try to put together the tissues that's been already damaged and fall apart.

[37] As is readily apparent from the foregoing examples, the Applicant correctly described the location of the hymen as being at the entrance to the vagina. She also correctly stated that it is a tissue which is located under the minor labia. The words she used were translated by the interpreter as "curtain" or "virginity curtain." In my view, that language is more descriptive than the technical English language term "hymen" which conveys no information as to the location of the body part in question or its function. It appears though that the RPD wanted a specific, single word to describe the tissue in question.

[38] By rejecting the Applicant's answers about the name of the tissue and the procedure, the RPD implicitly assumed that the word "hymen" exists in Farsi and that the interpreter should have provided "hymen" in the English translation of what the Applicant said in response to the questions by the RPD about the procedure and the name of the tissue or organ it involved.

[39] The transcript shows however that the RPD failed to take into account a very important comment made by the interpreter at the hearing. At one point, the RPD was questioning the Applicant as to what books in the Bible she had read. She named them as "Matar (ph)" and

“Lohah (ph)”. The RPD asked the interpreter if it was possible to translate that answer. The interpreter replied:

No. There is no translation for the medical terms and for religious terms.

[40] That comment by the interpreter is similar to the earlier one referenced above where after confirming that she does not have a dictionary the interpreter says she does not know what the Applicant is talking about and maybe it was another word or not that kind of word. At that time, the RPD should have realized that translating medical terms from Farsi to English was an imprecise exercise. Under those conditions, it was not reasonable for the RPD to determine that the Applicant could not name the body part or describe the procedure. It appears that she was able to do both in her native language.

[41] Harkening back to the principles set out in *Rahal*, there was no inconsistency in the Applicant’s testimony about the hymenoplasty. The basis upon which the RPD concluded that the Applicant did not perform a hymenoplasty is not based on a rational implausibility. The English words provided were the translator’s attempt for the Farsi medical terms the Applicant used, and to which the RPD unreasonably objected.

[42] The outcome is that the hymenoplasty credibility finding by the RPD is unreasonable. Therefore, in this instance, the Decision as a whole is unreasonable and must be set aside, given this finding was the linchpin to the remainder of the Decision.

[43] The Decision is set aside and the Applicant's claim is returned for re-determination by another panel.

VII. Obiter

[44] As a separate matter of caution, I note that the RPD purported to take "judicial notice of the fact that the practice of medicine and related disciplines cannot function if clear and consistent records are not made and kept." That judicial notice resulted in a determination that "[t]he claimant's allegation that it is common in Iran for no records to be kept of medical procedures that do not involve a general anesthetic is not credible.": Decision at para 8.

[45] In arriving at that conclusion based on judicial notice, the RPD misstated the evidence. The Applicant's testimony was not that records were not kept because a general anaesthetic was not used, she did not testify about a general anaesthetic. She did state that a local anesthetic was used. She further testified that this type of procedure was what they called a "stand-up" surgery as the patient left "on her own feet" after the surgery. No clinical records were kept as they are "light surgeries". When the RPD challenged the Applicant by asking whether the entire [medical] industry did not maintain records for outpatient procedures, her response was not specific to the type of anaesthetic used in the surgery, it was only that no records are kept when it is just one visit by a person.

[46] One purpose of judicial notice is to dispense with proof of facts that are uncontroversial or beyond reasonable dispute. The Supreme Court of Canada has said that "the threshold for judicial notice is strict: a court may properly take judicial notice of facts that are either: (1) so

notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy [citations removed]”: *R v Find*, 2001 SCC 32 at para 48, [2001] 1 SCR 863.

[47] The Supreme Court has also stated that the permissible scope of judicial notice varies according to the nature of the issue under consideration; “more stringent proof may be called for of facts that are close to the centre of the controversy between the parties ... as distinguished from background facts at or near the periphery”: *R v Spence*, 2005 SCC 71 at para 60, [2005] 3 SCR 458.

[48] Whether the Applicant performed a medical procedure was at the centre of the controversy being considered by the RPD. Considering that the RPD misapprehended the record-keeping evidence and, given that the Applicant’s explanation was plausible, this was not an appropriate case in which to have taken judicial notice. This is particularly so when the judicial notice applies to professional practices in a foreign country with religious, political and professional systems that generally are very different than those in Canada and of which the RPD did not indicate that it possessed any personal knowledge.

**JUDGMENT IN IMM-4949-16**

**THIS COURT'S JUDGMENT is that:**

1. The name of the Respondent is amended to The Minister of Citizenship and Immigration.
2. The application is allowed and the matter is returned for redetermination by a different panel.
3. No serious question of general importance is certified.

“E. Susan Elliott”  
\_\_\_\_\_  
Judge

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

**DOCKET:** IMM-4949-16

**STYLE OF CAUSE:** NASTARAN YEGANEH, AMITIS KHANJANI v THE  
MINISTER OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** JULY 26, 2017

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