

Federal Court



Cour fédérale

Date: 20171201

Docket: IMM-2110-17

Citation: 2017 FC 1081

Ottawa, Ontario, December 1, 2017

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

OXANA SITNIKOVA

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] Oxana Sitnikova is a Russian citizen who sought refugee protection in Canada based upon the risk that she claimed to face in Russia as a result of her sexual orientation.

Ms. Sitnikova claimed to be at risk from the father of a former lover, who was a powerful police official who continues to seek her out in order to harm her for having been sexually involved with his daughter.

[2] The Refugee Protection Division of the Immigration and Refugee Board rejected Ms. Sitnikova's refugee claim, finding that much of her evidence was not credible, and that she had not established that she was in fact a lesbian.

[3] Ms. Sitnikova subsequently filed an application for permanent residence on humanitarian and compassionate grounds, as well as an application for a Pre-removal Risk Assessment. Both of these applications were refused. These reasons relate to Ms. Sitnikova's application for judicial review of the negative H&C application.

[4] Ms. Sitnikova submits that the Officer erred in discounting the evidence that she provided to establish that she was a lesbian, and in his treatment of the evidence regarding her mental health.

[5] For the reasons that follow, I have concluded that Ms. Sitnikova's application for judicial review should be granted.

I. Background

[6] This is the third time that Ms. Sitnikova's H&C application has been considered. Her application for judicial review of the first refusal of her H&C application was settled out of court, and the second refusal was quashed on judicial review by Justice Zinn: *Sitnikova v. Canada (Citizenship and Immigration)*, 2016 FC 464, 45 Imm. L.R. (4th) 298 (*Sitnikova* #1).

[7] The only documentary evidence that Ms. Sitnikova provided to the Refugee Protection Division to confirm her sexual orientation was a letter from a woman she claimed to have dated in Canada, a photograph of the couple eating dinner, and a letter from the 519 Church Street Community Centre confirming that Ms. Sitnikova attended an LGBTQ refugee support group.

The RPD was not satisfied that this evidence was sufficient to overcome its concerns with respect to her credibility.

[8] Ms. Sitnikova produced a number of additional documents in support of her H&C application in an effort to establish that she was a lesbian. These included two letters from a different woman, with whom Ms. Sitnikova had been involved in a two-year, live-in relationship in Canada, as well as letters from two former girlfriends and a gay male friend, all of whom were still living in Russia. Ms. Sitnikova also provided statements from her mother, sister and neighbours of her mother's in Russia, all of whom confirmed incidents of police harassment, allegedly at the behest of the father of Ms. Sitnikova's former girlfriend.

[9] Ms. Sitnikova also submitted dental x-rays that she says corroborated her claim that her tooth was broken during a beating that she suffered in Russia on account of her sexual orientation. Finally, Ms. Sitnikova provided the Officer with medical evidence relating to her current mental health.

[10] The Immigration Officer considering Ms. Sitnikova's H&C application accepted that members of the LGBTQ community are currently at risk of persecution in Russia. The Officer was not, however, satisfied that Ms. Sitnikova was a lesbian.

[11] In coming to this conclusion, the Officer ascribed little weight to the letters and statements from Ms. Sitnikova's family and friends, much of which was proffered to confirm that Ms. Sitnikova was indeed a lesbian. This led the Officer to conclude that this evidence was insufficient to overcome the Refugee Protection Division's negative credibility concerns.

[12] Having concluded that Ms. Sitnikova had not established that she was a lesbian, the Officer found that it had not been demonstrated that she would face hardship in Russia by reason of her sexual orientation, and her application for H&C relief was refused.

II. Analysis

[13] Before addressing the issues raised by Ms. Sitnikova, I would start my analysis by noting that this Court has previously commented on the inherent difficulty of proving one's sexual orientation, given that the acts and behaviours that would establish an individual's homosexuality are inherently private: *Ogunrinde v. Canada (Public Safety and Emergency Preparedness)*, 2012 FC 760 at para. 42, 413 F.T.R. 211.

A. The Officer's Treatment of the Letters from Ms. Sitnikova's Family and Friends

[14] I understand the parties to agree that the weight to be ascribed to evidence in the H&C context is subject to review on the reasonableness standard. I agree: *Thandal v. Canada (Citizenship and Immigration)*, 2008 FC 489 at para. 7, [2008] F.C.J. No. 623.

[15] Ms. Sitnikova asserts that the refusal of her H&C application was unreasonable, in part, because the Officer erred by discounting the probative value of letters provided by her family, friends and neighbours on the basis that these individuals were close to her. She contends that the Officer erred in choosing to give little weight to this evidence simply because it came from individuals who may have been inclined to support her. This is especially true, she says, where, as here, the evidence in issue is of a personal nature, and could thus not be expected to have come from disinterested strangers.

[16] The Minister points to various short-comings in the documentary evidence, including the fact that none of the witness statements were taken under oath, and some of the documents were lacking in detail. As Justice Zinn noted in *Sitnikova #1*, these could be valid reasons for a decision-maker to give less weight to documentary evidence in some cases: at para. 26. However, while similar concerns were voiced by the Officer in relation to the PRRA decision, these were not the reasons cited by the Officer in this case for discounting the probative value of the documentary evidence produced by Ms. Sitnikova in relation to her H&C application.

[17] In choosing to give little weight to the letters and statements provided to establish her sexual orientation, the Officer noted in the H&C decision that “all the writers [were] close family or friends” of Ms. Sitnikova’s. Because of this, the Officer found that this evidence was insufficient to overcome the Refugee Protection Division’s credibility concerns. This was the sum total of the reasons cited by the Officer in the H&C decision for discounting the probative value of this evidence.

[18] It is clear from the jurisprudence that evidence should not be ignored *solely* because it comes from individuals who are connected to the person concerned: see for example, *Kanto v. Canada (Citizenship and Immigration)*, 2014 FC 628 at para. 16, [2014] F.C.J. No. 689; *Ugalde v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 458 at paras. 26-28, [2011] F.C.J. No. 647; *Gilani v. Canada (Citizenship and Immigration)*, 2013 FC 243 at paras. 26-28, [2013] F.C.J. No. 240. Having failed to cite any other reason for ascribing little weight to the documentary evidence, the Officer’s conclusion that this evidence was insufficient to establish that Ms. Sitnikova was indeed a lesbian was unreasonable.

[19] The Officer also stated that little weight would be given to evidence that related to incidents of harassment and threats to Ms. Sitnikova's family in Russia that occurred after her refugee hearing because all of the writers were close family or friends of Ms. Sitnikova's. However, while the handwritten letter from the three neighbours of Ms. Sitnikova's mother confirms that they had known Ms. Sitnikova's family for some time, there is nothing in the record to suggest that Ms. Sitnikova's mother's neighbours were close friends of either Ms. Sitnikova or her family.

[20] While these findings are sufficient to dispose of this application, I will also deal briefly with the Officer's treatment of the medical evidence, as this evidence will have to be addressed in the re-determination of Ms. Sitnikova's H&C application.

B. *The H&C Officer's Treatment of the Psychological Evidence*

[21] In support of her application for humanitarian and compassionate relief, Ms. Sitnikova provided the Officer with psychiatric assessments from 2012 and 2015. The 2012 psychiatric report stated that Ms. Sitnikova suffered from complex post-traumatic stress disorder, as well as depression characterized by anxiety and suicidal ideation. This report also found that Ms. Sitnikova required treatment with antidepressants, cognitive behavioural therapy, and interpersonal therapy. It concluded that Ms. Sitnikova would suffer irreversible psychological and emotional damage if she were required to return to Russia, and that she would face a serious risk of suicide.

[22] The 2015 psychiatric report stated that Ms. Sitnikova's clinical condition had deteriorated significantly since she had been told that she was not going to be permitted to stay in Canada. The psychiatrist further stated that she was concerned about Ms. Sitnikova's psychiatric state,

given her extreme hopelessness and multiple risk factors for suicide. The doctor further stated that in her current condition, Ms. Sitnikova was unable to execute basic daily activities, and that it would be highly unlikely that she would be able to advocate for herself in Russia in order to access mental health care there. The doctor concluded that if Ms. Sitnikova was forced to return to Russia, she would be “at serious risk of psychological collapse and suicide”.

[23] The Officer noted that the 2012 psychiatric assessment stated that Ms. Sitnikova required intensive treatment in order for her to be able to regain her mental health, and that the psychiatrist had indicated in her 2015 report that she would be making arrangements to monitor Ms. Sitnikova’s condition. However, the Officer noted that no evidence had been provided to show that Ms. Sitnikova was receiving ongoing treatment. The Officer further stated that although there is less support available in Russia than in Canada for those requiring care for mental health conditions, medical care would be available to Ms. Sitnikova in Russia.

[24] The Officer also noted that Ms. Sitnikova had provided evidence (presumably the photographs in the record) “showing her as happy and active in her community”. The Officer concluded his analysis of the psychiatric evidence by stating that “[i]f there are any safety issues related to the Applicant’s removal from Canada, the Removals Officer will address them”.

[25] The duty of Officers considering mental health evidence in the context of H&C applications was canvassed by the Supreme Court of Canada in *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 S.C.R. 909. There the Supreme Court found that once an H&C Officer accepted a psychiatric diagnosis, it is unreasonable for the Officer to discount a psychiatric report because an individual did not seek follow-up treatment

for the mental health concerns identified in the report. However, that is precisely what happened here.

[26] While noting that the psychiatrist's diagnoses were based on information obtained from Ms. Sitnikova, the Officer did not question the validity of the psychiatrist's diagnoses. The Officer then discounted the probative value of the psychiatric evidence because Ms. Sitnikova had failed to seek follow-up treatment for the mental health concerns that had been identified by her psychiatrist. This was contrary to the teachings of the Supreme Court in *Kanhasamy*, and was thus unreasonable.

[27] The reasonableness of the Officer's finding is, moreover, undermined by the fact that Ms. Sitnikova stated that she had in fact been receiving treatment from Dr. Stern at Unison Health and Community Services, a fact which was supported by a brief letter from Dr. Stern dated June 14, 2016.

[28] Finally, without expressly rejecting the psychiatrist's opinion, the Officer minimized the significance of the psychiatric evidence relating to the effect that removal could have on Ms. Sitnikova's mental health condition, observing that "it is normal to suffer from anxiety and depression during times of uncertainty". The Officer appears to have discounted the psychiatrist's opinion that Ms. Sitnikova was at risk of psychological collapse and suicide if she were returned to Russia on the basis that "that concern is based on [Ms. Sitnikova's] statements made during an assessment that took place as a result of a referral by her lawyer", and because there was no evidence before the Officer to show that Ms. Sitnikova had sought further treatment from the doctor. The Officer then left it to a Removals Officer to address "any safety issues" that might arise in conjunction with Ms. Sitnikova's removal from Canada.

[29] However, the Supreme Court made it clear in *Kanhasamy* that where, as here, an Officer does not reject a psychiatric diagnosis, the Officer must consider evidence as to the effect that removal from Canada would have on the mental health of an individual: at para. 48.

[30] The fact that Ms. Sitnikova's mental health would likely worsen if she were to be removed to Russia was clearly a relevant consideration that had to be addressed, regardless of whether treatment would be available to Ms. Sitnikova in Russia for her psychiatric conditions: *Kanhasamy* above at para. 48.

III. Conclusion

[31] For these reasons, the application for judicial review is allowed. I agree with the parties that the case is fact-specific and does not raise a question that is suitable for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed and the matter is remitted to a different Immigration Officer for re-determination.

"Anne L. Mactavish"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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