

Date: 20080118

Docket: IMM-2564-07

Citation: 2008 FC 64

Ottawa, Ontario, January 18, 2008

PRESENT: THE HONOURABLE MR. JUSTICE SIMON NOËL

BETWEEN:

SEDA AMIRAGOVA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application under section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) for judicial review of a decision, dated May 3, 2007, of a three-member panel of the Refugee Protection Division (RPD) following a *de novo* hearing. Although it granted refugee status to the applicant's daughter, Goar Manvelyan, a Russian citizen, the RPD denied refugee protection to the applicant in the same decision, ruling that she could return to her home country of Armenia.

I. Issue

[2] The single decisive issue worthy of the Court's attention is the following:

Did the RPD err in fact or in law when it found that the applicant was not credible?

[3] The Court finds that the RPD's decision was based on an erroneous finding of fact made in a capricious manner and without regard to the material before it. The RPD determined that the applicant was not credible, despite having acknowledged the applicant's credibility earlier in the same decision. That is a fatal contradiction for the purposes of this case.

II. Judicial History

[4] On November 29, 2005, the first RPD panel rejected the applicant's and her daughter's refugee protection claim on the basis that they could easily return to live in Armenia.

[5] On July 17, 2006, in *Amiragova v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 882, [2006] F.C.J. No. 1116 (QL), Mr. Justice Max Teitelbaum allowed the application for judicial review, noting that the RPD's reasons were inadequate. The decision dated November 29, 2005 was set aside and the applicants' claim was referred back to the RPD for rehearing and redetermination before a differently constituted panel.

[6] The *de novo* hearing was held on February 20, 2007. The decision for which judicial review is now sought was rendered on May 3, 2007 by a three-member panel.

III. Factual Background

[7] The applicant was born in Georgia in 1950 to a very wealthy family. After the rise of the “fanatical Georgian nationalist” movement, she left her country of birth in early 1980 and went to Armenia. That same year, she married the well-known composer, Gaik Manvelyan, and became an Armenian citizen. In 1983, their daughter was born.

[8] The applicant submits that since the collapse of the Soviet Union in 1991, the mafia has taken control throughout the former Soviet bloc countries. On June 23, 1991, the applicant’s father was killed by the mafia, and Gaik Manvelyan’s family fell victim to mafia extortion. For that reason, the family left Armenia in 1993 and settled in Russia. Only the father and daughter obtained Russian citizenship.

[9] The era of attacks by fanatical Russian nationalists and skinheads against people of Caucasian origin reached its peak in the early 2000s, and the applicant and her family were not spared. First, on August 8, 2004, Miss Goar and her friend were attacked by a group of Russian youths who called them filthy Armenians. Their attackers nearly raped them and threatened to kill them. The police did not take any action, even though the attackers were identified. Next, on October 5, 2004, the applicant’s husband was also violently assaulted on the street and died at the scene from a heart attack brought on by the brutal assault. Finally,

just a few weeks after her husband's death, the applicant was severely beaten by three fanatical Russian nationalists, leaving her with permanent physical and psychological scars.

[10] No action whatsoever was taken in respect of their complaints to the Russian authorities. Mother and daughter then decided, in October 2004, to leave Russia. On April 26, 2005, they obtained a Canadian visa and arrived in Canada on June 28, 2005. They immediately claimed refugee protection.

[11] The applicant also stated in her testimony that her brother was a victim of the mafia in Armenia. He also fled to Russia, where he was treated in the same way as all other people of Caucasian origin. He returned to Armenia in October 2004 and was killed by the mafia two months later. Fearing for her own life, the applicant did not attend his funeral.

[12] In support of her refugee claim, the applicant submitted a report to the RPD from Municipal Hospital #36 in Moscow, dated June 2, 2005, noting the applicant's diagnosis after the October 2004 attack as follows: "Osteochondrosis of the spine and dislocation of the L1 spinal vertebra."

[13] Furthermore, a psychological report prepared on January 22, 2006 by psychologist David L.N. Woodbury, following two treatment sessions with the applicant, concluded as follows on page 12:

**Conclusion:
The trauma**

Ms Amiragova's suffering can be directly ascribed to the cumulative stress she experienced because of the following reported traumatic incidents:

- xenophobic tensions leading to escape from Georgia to Armenia
- murder of father by "mafia"
- extortion by mafia
- escape to Moscow
- anti-caucasian xenophobia in Moscow, incidents of harassment of self, husband and daughter
- husband's death
- attack, resulting in spinal fracture, and eight month's hospitalization
- chronic anxiety and agoraphobia
- flight to Canada
- refusal of first refugee claim
- prospect of second Hearing

Recommendations:

While the determination of Ms. Amiragova's status as a refugee is, of course, the responsibility of Immigration officials, I make the following, purely therapeutic recommendations, taking into account the clinical literature on PTSD, especially when complicated by the presence of agoraphobia:

- A two-pronged treatment strategy including medication and psychotherapy is most effective.
- A prerequisite of effective therapeutic intervention is that the victim must perceive her environment as SAFE. This perceived safety could only be found far from her aggressor.

It is therefore my professional clinical opinion that Ms. Amiragova's psychological state would greatly improve if she were allowed to remain in Canada where she can establish a new life, she can get the help she needs, and she can begin the recovery process.

IV. Decision Under Review

[14] Rejecting the applicant's refugee claim, the three-member panel of the RPD concluded as follows:

[TRANSLATION]

Secondly, since the panel has rejected Ms. Seda Amirogova's claim on the basis that she is not credible and, above all, that she can return to Armenia, the same determination must apply to the grounds of the threat to life and the risk of cruel and unusual treatment.

[...]

[15] Yet the RPD had previously made the following comment about the applicants' credibility:

[TRANSLATION]

"In closing, the panel wishes to emphasize that the applicants testified about their story directly and without any exaggeration. No contradictions were found in the applicants' testimony.

[...]"

[16] This glaring contradiction is inexplicable. The Court cannot share the respondent's opinion that the RPD [TRANSLATION] "committed a clerical error in the wording of its reasons." If this is in fact a clerical error, it is an extraordinary one and cannot be explained away in this manner. The RPD's main finding is that the applicant is not credible.

[17] Credibility is the most important thing any of us has. It is earned and maintained through our life history, our actions and our words. Losing our credibility affects the very core of our reputation. For persons seeking refugee protection, credibility lies at the very heart of their claim. To declare this claimant not to be credible despite the fact that the

evidence indicates she is credible does serious damage to her claim. She deserves better.
Such a contradiction is patently unreasonable.

[18] The basic principles necessary for determining credibility, as jurist Lorne Waldman states in *Immigration Law and Practice*, Looseleaf, 2nd ed. vol. 1 (Toronto: Butterworths, 2007) at pages 8-58, were set out in the decision *Rosta v. Thiel*, [1986] N.S.J. No. 555 in paragraphs 18, 19 and 20 :

18 In considering the evidence presented along with the documentation, the matter of credibility comes to the forefront. Credibility in matters such as this usually concerns the assessment or weighing of the evidence of witnesses. The issue of credibility is one of fact. It cannot in reality be determined by following a set of rules that it is suggested, have the force of law. In fact, a person or witness could be one of good credit or character but nonetheless be mistaken. Their memory could be faulty. I have assessed the credibility in the light of observing the witnesses, the manner in which they answered the questions put to them, both by their own counsel and counsel on cross-examination. I have watched their demeanour on the witness stand. I have taken into consideration the tones of their voice and the method in which they answered questions. I have also considered their actions and reactions on the stand while being questioned. I have also taken into consideration their ability to recall the evidence.

19 The matter of credibility and a method I accept as practical is set forth by Mr. Justice O'Halloran in a decision of the British Columbia Court of Appeal in the case of *Faryna v. Choray*, [1952] 2 D.L.R. 354, where he says at page 357:

"The credibility of interested witnesses, particularly in the cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency

with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a court satisfactorily appraise the testimony of quick minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skillful exaggeration with partial suppression of the truth."

20 I also agree with the views put forth by Justice Haynes in *R. v. Hawke* (1975), 3 O.R. (2d) 210, particularly at page 224 where he said as follows:

"The most satisfactory judicial test of truth lies in its harmony or its lack of harmony with the preponderance of probabilities disclosed by the facts and circumstances in the conditions of the particular case ..."

[19] It is difficult to apply these principles in this case because the RPD says merely, [TRANSLATION] "Secondly, since the panel has rejected Ms. Seda Amirogova's claim on the basis that she is not credible and, above all, that she can return to Armenia, the same determination must apply to the grounds of the threat to life and the risk of cruel and unusual treatment." Upon reading the preceding paragraphs, it is impossible to understand how such a finding was made. On the contrary, two paragraphs before, the RPD's statements flatly contradict their negative credibility finding concerning the applicant:

[TRANSLATION]
In closing, the panel would like emphasize that the applicants testified about their story directly and without any exaggeration. No contradictions were found in the applicants' testimony.

[20] Either the applicant is credible or she is not. There is simply no room for contradiction in this regard in an RPD decision: the claimant's reputation hangs in the balance. If the contradiction was a clerical error, it cannot, in all fairness, be explained away as a mere clerical error. It is imperative that a differently constituted RPD panel rehear the case in its entirety.

[21] The parties were invited to submit a certified question; they did not.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES THAT:

- the application for judicial review be allowed;
- the decision from May 3, 2007 be set aside and the claim be referred back for rehearing and redetermination by a differently constituted panel;
- there is no question to be certified.

“Simon Noël”

Judge

Certified true translation

Stefan Winfield, Translation

FEDERAL COURT
SOLICITORS OF RECORD

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