**Date: 20080630**

**Docket: IMM-4904-07**

**Citation: 2008 FC 819**

**Ottawa, Ontario, June 30, 2008**

**PRESENT: The Honourable Mr. Justice Mandamin**

**BETWEEN:**

**MARIYA TSYHANKO**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] Mariya Tsyhanko (the "Applicant") applies for a judicial review of the decision made by the Refugee Protection Division of the Immigration and Refugee Board ("the Board") issued on November 2, 2007 wherein it was determined that the Applicant was neither a Convention Refugee nor a person in need of protection as per sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "IRPA").

[2] For reasons that follow, I have decided to grant the judicial review.

**Background**

[3] The Applicant is a 20 year old Ukrainian citizen. She makes a refugee claim on the ground that she is a lesbian and has suffered persecution in the Ukraine because of her sexual orientation.

[4] The Applicant began a homosexual relationship with her professor at the University in Lviv where she was studying. In November 2005, the two were caught in a compromising position by another professor who castigated them for being homosexual. Following a report of the incident to the University, the Applicant was informed by the administration that while she would be permitted to complete the academic year, she would not be allowed to re-enroll. Her partner was dismissed from her University teaching position.

[5] News of the Applicant's sexual orientation spread to her hometown of Gorodok, approximately 25 kilometres from Lviv. When the Applicant returned home in January 2006, her family did not permit her to participate in church ceremonies. On the way home from the church, she was attacked by assailants who denounced her homosexuality. Her father, a Greek Orthodox Priest, disowned her and banished her from the family home. The Applicant reported the assault to the police but no action was taken once the police learned the attack was because of her homosexuality.

[6] In March 2006, the Applicant says she began receiving threatening letters because of her sexual orientation. At her mother's suggestion, the Applicant applied for a Canadian visitor's visa to visit relatives. In June 2006, she had a farewell dinner with her partner. The two were later confronted by homophobic attackers, seriously assaulted and hospitalized as a result. The Applicant reported the attack to the police who attended and accompanied her to the hospital. The police became disinterested in pursuing their investigation when they learned of her homosexuality.

[7] The Applicant was hospitalized for five days and had to postpone her June travel plans. The Applicant arrived in Canada in July 2006 and lodged with relatives. The Applicant's intention was to return to the Ukraine. After being unable to contact her partner in the Ukraine, she telephoned her partner's neighbour. The neighbour informed her that her partner had been attacked on July 24th and that she was in the hospital. Her partner later died as a result of the injuries she suffered.

[8] The Applicant made her application for refugee status in August 2006.

**The Decision Under Review**

[9] The Board, while not challenging the Applicant's homosexuality, decided that the Applicant was not credible. In the alternative, the Board found that she was not a Convention refugee or a person in need of protection as she had not exhausted all avenues of state protection and that an internal flight alternative ("IFA") was available.

**Issues**

[10] There are three issues to be considered in this judicial review:

a. Did the Board err in making its credibility findings?

b. Did the Board err in its state protection analysis?

c. Did the Board err in finding that an IFA was available in Kiev?

**Standard of Review**

[11] The Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9 has established that there are now only two standards of review: correctness and reasonableness (*Dunsmuir* at para. 34).

[12] Where questions of fact and credibility are reviewed, the standard of review is reasonableness (*Sukhu v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 427 at para. 15).

[13] State protection is a question of mixed fact and law. As set out in *Dunsmuir*, above, at para. 51, questions of mixed fact and law are to be reviewed on the reasonableness standard. This standard has been applied post-*Dunsmuir* with respect to the issue of state protection (*Zepeda v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 491 at para. 10).

[14] The standard of review with respect to the existence of an IFA is reasonableness (*Huerta v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 586 at para. 14).

[15] In *Dunsmuir*, above, at paragraph 47, the Court stated that reasonableness is concerned with the existence of justification, transparency and intelligibility within the decision-making process. It is also concerned with "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law". Justification requires that a decision be made with regard to the evidence before the decision-maker. A decision cannot be a reasonable one if it is made without regard to the evidence submitted (*Katwaru v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 612 at paras. 18, 22).

**Analysis**

*Credibility*

[16] Even considering the deference afforded to findings of credibility, the Board's findings are not reasonable. The Board accepted that the Applicant was a homosexual but found that the Applicant was not a credible witness. The Board's credibility determination is based on erroneous implausibility findings and on peripheral inconsistencies while implicitly accepting, or not questioning, the central elements of the Applicant's refugee claim.

[17] The Board made two implausibility findings:

- The Applicant testified about her father calling her relatives and telling them she is gay. The Board found it implausible the father would call his relatives to spread his shame.

- The Applicant testified that her mother had also disowned her but it was her mother who suggested that she visit her relatives. The Board also found it implausible the mother financed the trip to Canada since she had no earnings of her own.

[17] The Board's implausibility findings about the father's telling relatives of the Applicant's homosexuality and the mother's providing money for the Applicant's trip to Canada do not meet the standard for implausibility findings. Justice Muldoon in *Valtchev v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 at paras. 6-7, stated:

> Presumption of Truth and Plausibility
>
> **6** The tribunal adverts to the principle from Maldonado v. M.E.I., [1980] 2 F.C 302 (C.A.) at 305, that when a refugee claimant swears to the truth of certain allegations, a presumption is created that those allegations are true unless there are reasons to doubt their truthfulness. But the tribunal does not apply the Maldonado principle to this applicant, and repeatedly disregards his testimony, holding that much of it appears to it to be implausible. Additionally, the tribunal often substitutes its own version of events without evidence to support its conclusions.
>
> **7** A tribunal may make adverse findings of credibility based on the implausibility of an applicant's story provided the inferences drawn can be reasonably said to exist. However, plausibility findings should be made only in the clearest of cases, i.e., if the facts as presented are outside the realm of what could reasonably be expected, or where the documentary evidence demonstrates that the events could not have happened in the manner asserted by the claimant. A tribunal must be careful when rendering a decision based on a lack of plausibility because refugee claimants come from diverse cultures, and actions which appear implausible when judged from Canadian standards might be plausible when considered from within the claimant's milieu. [see L. Waldman, Immigration Law and Practice (Markham, ON: Butterworths, 1992) at 8.22]

[18] The Board offers no evidence to support its speculation that the father's shame over the Applicant's homosexuality would outweigh his outrage. Nor does the Board consider the Applicant's explanation that her mother has authority over the family

finances even if derived from her father's income. The Board's implausibility findings cannot be sustained.

[19] The Board had also based its credibility findings on the following:

- The Applicant informed the Visa Officer in May 2006 that she planned to travel in July but said she bought a ticket for June and later had to postpone it to July because of her hospitalization.
- The Applicant initially informed the Visa Officer (in May) that she was going to visit her father's relatives, while at the Board hearing she testified that she came to Canada to visit her mother's relatives.
- The Applicant testified she obtained a passport in May 2005 "just in case I wanted to leave the country."

[20] In *Mohacsi v. the Minister of Citizenship and Immigration*, 2003 FCT 429, at para. 20, this Court offered guidance on the relationship between peripheral findings of inconsistency and credibility and the core elements of a refugee claim:

> …not every kind of inconsistency or implausibility in a claimant's evidence will reasonably support the Board's negative findings on overall credibility. It would not be proper for the Board to base its findings on an extensive "microscopic" examination of issues irrelevant or peripheral to the claim. Furthermore, the claimant's credibility and the plausibility of her or his testimony should also be assessed in the context of her or his country's conditions and other documentary evidence available to the Board. Minor or peripheral inconsistencies in the claimant's evidence should not lead to a finding of general lack of credibility where documentary evidence supports the plausibility of the claimant's story.

[21] By not discussing the central elements of the Applicant's claim, the Board implicitly accepted them. Specifically, the Board does not challenge that the Applicant

became involved in a homosexual relationship with her professor; that she was twice assaulted because of her homosexuality, once in her home village and once in Lviv; that she reported both assaults to the police and each time the police immediately lost interest once they learned the homophobic reason for the assaults; and that her partner died as a result of an assault shortly after the Applicant left for Canada. An Applicant is presumed to be truthful. Where an applicant offers a reasonable explanation, it requires consideration. It is to be noted that the Applicant provided corroborative evidence concerning her hospitalization after the second assault and also about the death of her partner.

[22] I find the Board's conclusion that the Applicant is not credible because of peripheral inconsistencies while implicitly accepting the main elements of the Applicant's claim to be unreasonable.

*State Protection and Internal Flight Analysis*

[23] The Board found, in the alternative, that the Applicant did not provide clear and convincing proof of the state's inability to protect her. The Board also found that the Applicant had viable flight alternatives (IFA) in Kiev or other large urban centres in the Ukraine.

[24] In this case, having found that the Board erred in its credibility analysis, I also find that the Board committed a reviewable error when it concluded, in the alternative that state protection was available and in the further alternative that there was an IFA

available in Kiev. After not challenging the Applicant's sexual orientation and the persecution suffered as a result, the Board selectively relied on the documentary evidence favouring its conclusion that state protection was available. It was open to the Board to arrive at such a conclusion, but such a conclusion cannot be reasonably arrived at by selectively relying on the documentary evidence while not providing an explanation for discounting the Applicant's testimony regarding her attempt to seek state protection.

[25] Similarly, with respect to its finding that an IFA was available in Kiev, the Board again selectively relied on the documentary evidence without fully addressing the true nature of the Applicant's fear of persecution. The Applicant fears persecution at the hands of ultra-nationalists in general, rather than merely a particular group of ultra-nationalists based in Lviv as set out in the Board's reasons.

**CONCLUSION**

[26] I find the Board's decision on the Applicant's credibility, directed as it is on peripheral inconsistencies rather than central elements of the Applicant's claim, to be unreasonable.

[27] The application for judicial review is granted.

## JUDGMENT

**THIS COURT ORDERS AND ADJUDGES that:**

1. This application for judicial review is granted and the matter is to be returned to a differently composed Board for reconsideration

2. No question of general importance is certified.

"Leonard S. Mandamin"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | IMM-4904-07 |
| **STYLE OF CAUSE:** | MARIYA TSYHANKO v. MCI |
| **PLACE OF HEARING:** | TORONTO |
| **DATE OF HEARING:** | JUNE 16, 2008 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | MANDMIN, J. |
| **DATED:** | JUNE 30, 2008 |

**APPEARANCES:**

| | |
|---|---|
| ANDREW BROUWER | FOR APPLICANT |
| TAMRAT GEBEYEHU | FOR RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| JACKMAN & ASSOCIATES<br>BARRISTERS & SOLICITORS<br>TORONTO, ONTARIO | FOR APPLICANT |
| JOHN H. SIMS, QC<br>TORONTO, ONTARIO | FOR RESPONDENT |