Federal Court  Cour fédérale

Date: 20100428

Docket: IMM-4492-09

Citation: 2010 FC 465

Ottawa, Ontario, April 28, 2010

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

NINO KEDELASHVILI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, a citizen of Georgia, seeks protection in Canada on the basis of her fear of her ex-employer. She alleges that, because of her opposition to the appointment of an individual in her government department, her sister was arrested and charged with corruption and the Applicant was demoted and physically attacked by co-workers.

[2] In a decision, dated August 20, 2009, a panel of the Refugee Protection Division of the Immigration and Refugee Board (the Board) determined that the Applicant was not a Convention

refugee or person in need of protection. The Applicant seeks to overturn that decision, submitting that the Board committed three reviewable errors:

1. Having regard to the Board's lack of a credibility finding, it was unreasonable of the Board to conclude that the Applicant would experience no greater harm than would other members of the general population;

2. The Board applied an incorrect test for a determination under s. 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, when it stated that "[o]n a balance of probabilities, I find that she would not face any torture or cruel and unusual treatment should she return"; and

3. Given the Board's own evidence regarding corruption within the legal system of Georgia, it was unreasonable of the Board to rely on the participation of the Applicant in the legal system with respect to her sister's conviction as evidence that protection of her own government is available to her.

[3] For the reasons that follow, I will allow this judicial review.

[4] I begin by noting that the Board's decision is extremely brief. The entirety of the Applicant's case is disposed of in seven bulleted points. While the essence of the Applicant's claim

is accurately set out, I believe that the Board, in its analysis, fails to explain the rationale of its decision. As noted by Justice Binnie in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 47:

> In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process.

[5] It appears that the Board did not believe part of the Applicant's story when it states that "[n]ever reporting nor identifying her alleged assailants to police raises a question regarding the credibility of her description of the alleged assault" [emphasis added]. A number of the Board's conclusions appear to follow from this vague statement about credibility. For example, I believe (although it is not entirely clear) that the Board uses this finding as support for its conclusion that "[s]hould she return to Georgia today, she would experience no greater harm than would other members of the general population".

[6] The problem is that the Board never directly states that it does not believe all or a portion of the Applicant's story. As is well-established in the jurisprudence, the Board is under a duty to give its reasons for casting doubt upon a claimant's credibility in clear and unmistakable terms (*Hilo v. Canada (Minister of Employment and Immigration)* (1991), 130 N.R. 236, 15 Imm. L.R. (2d) 199 (F.C.A.)).

[7] The Board's lack of a clear conclusion on credibility does not meet the requirements for reasonableness. The Board has failed to provide the reader or this Court with justification, transparency or intelligibility in its decision. On this basis alone, the application may be allowed.

[8] The Applicant further asserts that the Board applied an incorrect test for its s. 97 analysis. In its final bullet, the Board states that "[o]n balance of probabilities, I find she would not face any torture or cruel and unusual treatment."

[9] Under s. 97 of IRPA, a person is in need of Canada's protection if their return would subject them personally to a risk to their life or to a risk of cruel and unusual treatment or punishment. The Respondent argues that the omission of the two words "risk of" is not a substantive error. If I could look elsewhere in the decision to confirm that the Board truly understood its mandate under s. 97, I might have been able to conclude that this was an oversight or clerical error. In this case, beyond the one bullet, there is no other portion of the decision that considers the operation of s. 97. Accordingly, I conclude that the Board erred.

[10] Thirdly, the Applicant argues that the Board erred in its analysis of state protection and failed to have regard to any of its own documents describing the degree of corruption in the government and the judicial system. Once again, there is very little in the decision to assist the Court. The bullet dealing with state protection states that:

> Before seeking international protection, a claimant must seek the protection of her own government or provide evidence that it is not available. The claimant did neither and, in fact, participated with the legal system of Georgia with respect to her sister's conviction under its laws.

[11] In these two sentences – which are the sum of the analysis on state protection – the Board appears to tie the Applicant's participation in the legal system of Georgia during her sister's trial to the availability of state protection. I find this very confusing. It certainly does nothing to address the

Applicant's concern (as described in the Board's own documentary evidence) of corruption in state authorities.

[12] In conclusion, the decision does not demonstrate the necessary justification, transparency and intelligibility within the decision-making process. Accordingly, this decision will be quashed.

[13] Neither party proposes a question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is allowed, the decision of the Board is quashed and the matter is sent back for re-determination by a different panel of the Board; and

2. No question of general importance is certified.

"Judith A. Snider"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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