

Federal Court



Cour fédérale

Date: 20111021

Docket: IMM-3833-10

Citation: 2011 FC 1209

Ottawa, Ontario, October 21, 2011

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

OLEG KOLOSOV

Applicant

and

**MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Oleg Kolosov [the Applicant], seeks judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act], of a decision the Refugee Protection Division of the Immigration and Refugee Board [the Board] dated June 1, 2010, wherein the Board determined that the Applicant is neither a Convention refugee nor a person in need of protection [the Decision].

[2] For the reasons that follow, the application is allowed.

THE FACTS

[3] In 2007, when the relevant events occurred, the Applicant was a twenty-two year old gymnast and a student at a Sports' Academy in Tbilisi, the capital of Georgia. He lived at home in Tbilisi with his parents and his sister. While at school, he met a twenty-one year old fellow student named Nani Mamiani. Her family home was in a region of Georgia called Svanetia. For this reason, while she studied at the Sports' Academy, she stayed with her uncle in Tbilisi.

[4] The Applicant and Nani started dating and eventually she became pregnant.

[5] The Applicant testified that:

- (i) The Applicant knew that Nani's father wanted her to marry a man in Svanetia;
- (ii) The Applicant and Nani knew about birth control but decided they wanted to marry and have a family so they did not use contraceptives;
- (iii) The Applicant learned two days after the fact that Nani had visited a gynaecologist at a Tbilisi hospital and had been advised of her pregnancy.
- (iv) A nurse who worked with the gynaecologist was a neighbour of Nani's uncle and she told him that Nani was pregnant.
- (v) Nani's father and uncle beat her and she divulged the Applicant's name. She was taken home to Svanetia and forced to have an abortion.
- (vi) Nani's father and other relatives visited the Applicant's home in Tbilisi. They shouted threats saying they would kill the Applicant. These threats were overheard by the

Applicant's sister, by one of his friends and by neighbours. The Applicant was not at home when the threats were made.

- (vii) After he was warned of the threats, the Applicant hid with a friend and later at his grandparents' house. Then, in October 2007 he came to Canada with his sport's team when it visited Quebec City. There he claimed asylum.

THE DECISION

[6] The Board found that the Applicant is not a refugee and no issue is taken with that finding.

[7] However, the Board also found that:

- (i) The Applicant is not in need of protection because his account is not credible;
- (ii) The Applicant failed to rebut the presumption of state protection.

[8] The two findings are linked. The Board said "Because I have found the claimant not to be credible, I preferred the information from the country documents to that of the claimant because it is gathered from independent objective human rights organizations with no interest in this or any refugee claim."

THE ISSUES

[9] In my view, the issues are:

- 1) Are the credibility findings reasonable?

2) Is the conclusion about state protection reasonable?

THE STANDARD OF REVIEW

[10] Both credibility and state protection are issues of mixed fact and law and therefore attract the reasonableness standard, see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCC 190 at para. 51.

DISCUSSION

[11] The first negative credibility finding reads as follows:

[...] The claimant stated that Nani went to the hospital because she was feeling unwell and there found out she was pregnant. I do not find this statement to be credible. Nani was, according to the claimant, a university student who knew about birth control but decided not [to] practice it. When she missed having a period, because according to the claimant, she was two months pregnant, it is reasonable that she would suspect that she was pregnant and would seek medical advice on discomfort and illness and perhaps confirmation that she was pregnant. It is not reasonable that she would go to seek medical help simply because she felt ill and not because she thought she was pregnant. Therefore, on a balance of probabilities, I find the claimant not to be credible or a trustworthy witness.

[12] In my view, this conclusion is unreasonable because it does not accurately state the Applicant's evidence. When asked why Nani went to see a gynaecologist, he said that she felt "ill, dizzy and nauseous". He did not say that she felt "unwell". These symptoms plus Nani's decision to visit a gynaecologist make it clear that she thought she was pregnant when she visited the hospital.

[13] For these reasons, the Board's negative credibility finding based on the premise that Nani felt unwell and did not suspect a pregnancy cannot stand.

[14] The Board also found that the Applicant's evidence that the gynaecologist's nurse told Nani's uncle of her pregnancy lacked credibility. However, the Board's discussion of this evidence was unreasonable because it omitted mention of the fact that the nurse was a neighbour of the uncle with whom Nani lived. It is therefore likely that she would have recognized Nani and known her uncle. We cannot be sure why she passed on the news of Nani's pregnancy. She may have been malicious or may have thought it right that the family should know. In either case, because she was a neighbour, it is entirely possible that she told Nani's uncle of her pregnancy.

[15] Dealing with the same issue, the Board also found it unlikely that a nurse would risk breaching patient confidentiality and jeopardize her career by gossiping about Nani. However, in my view, it is unreasonable to decide, without evidence, that our standards relating to patients' privacy rights and professional responsibility apply in Georgia.

CONCLUSIONS

[16] In my view, the first two adverse credibility findings were unreasonable because they were not based on an accurate appreciation of the relevant evidence. The third finding is unreasonable because it imports Canadian values into a setting where they likely do not apply.

[17] Finally, because these credibility findings caused the Tribunal to completely disregard the Applicant's evidence about state protection, the finding on this issue is also unreasonable and cannot stand.

Certified Question for Appeal

[18] No question of general importance was posed for certification pursuant to section 74 of the Act.

JUDGMENT

THIS COURT'S JUDGMENT is that, for the above reasons, the application is allowed and the Applicant's request for protection is sent back for reconsideration by a different Board. All parties may file fresh evidence before the Board hearing the reconsideration.

"Sandra J. Simpson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3833-10

STYLE OF CAUSE: Oleg Kolosov v The Minister of Citizenship and Immigration

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: March 24, 2011

REASONS FOR JUDGMENT: SIMPSON J.

DATED: October 21, 2011

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