

Federal Court



Cour fédérale

Date: 20120731

Docket: IMM-8357-11

Citation: 2012 FC 957

Vancouver, British Columbia, July 31, 2012

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

RENADI GERGEDAVA

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Renadi Gergedava sought refugee protection in Canada claiming to fear persecution in his native Georgia because of his sexual orientation. The Refugee Protection Division of the Immigration and Refugee Board refused Mr. Gergedava's claim, finding his story of persecution not to be credible and that he was not, in fact, a homosexual.

[2] Mr. Gergedava asserts that the Board erred in making findings of fact without regard to the evidence before it and in relying upon assumptions or preconceptions in determining that he is not gay.

[3] For the reasons that follow, I have concluded that a number of the Board's factual findings were indeed unreasonable, with the result that the application for judicial review will be granted.

The Lack of Documentary Evidence from Georgia

[4] The Board based its finding that Mr. Gergedava had not established that he had been involved in two same-sex relationships prior to leaving Georgia in part upon his failure to produce any objective documentary evidence with respect to either relationship.

[5] According to Mr. Gergedava, his sexual relationship with his childhood friend, Tengo, had ended when the relationship was discovered by Tengo's father. The father beat the two young men and threatened to kill them both, claiming that Mr. Gergedava had ruined Tengo's family. When Mr. Gergedava's neighbours heard about the relationship they threatened Mr. Gergedava and his mother, forcing them to move to another city approximately 200 kilometres away.

[6] Mr. Gergedava's mother then allegedly pressured him into getting married so that he would "be a 'normal' man".

[7] After his marriage, Mr. Gergedava had his second gay relationship with a man by the name of Tamaz. This relationship ended when a group of men broke into Tamaz' apartment and beat the

two men very badly. Shortly thereafter, Mr. Gergedava learned that Tamaz had been murdered, likely by his own relatives or neighbours.

[8] The Board noted that Mr. Gergedava's mother had provided him with some corroborative documents for his refugee claim, but that no documents had been provided to corroborate either of his two same-sex relationships. In particular, the Board noted that Mr. Gergedava's mother had not been able to locate a death certificate for Tamaz, and that she had never tried to contact Tamaz' family in order to get documents.

[9] This finding was unreasonable.

[10] As Justice Russell observed in *Ogunrinde v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 760, "the acts and behaviours which establish a claimant's homosexuality are inherently private": at para. 42. As a result, there are often inherent difficulties in proving that a refugee claimant has engaged in same-sex sexual activities.

[11] Moreover, the evidence before the Board in this case was that Mr. Gergedava's mother was mortified by her son's behaviour, and his family had been stigmatized as a result of his conduct. Tamaz' family was enraged to discover that Mr. Gergedava was engaged in a sexual relationship with Tamaz. Indeed, Mr. Gergedava testified that Tamaz had likely been killed by his relatives for having dishonoured the family.

[12] In these circumstances, it was simply unreasonable for the Board to have expected Mr. Gergedava's mother to have approached a family who blamed Mr. Gergedava for having brought great shame to their family in order to obtain documents to support his Canadian refugee claim.

Mr. Gergedava's Wife's Actions

[13] The Board drew two negative credibility inferences against Mr. Gergedava based on conduct attributed to his wife.

[14] Mr. Gergedava did not seek medical attention after he and Tamaz were beaten, even though he says that his nose was broken and he was badly bruised. He explained that going to a doctor would have led to the police being called. Mr. Gergedava could not tell the police what had really happened to him, as this would require him to reveal his homosexuality. While Mr. Gergedava admitted that he lied to his wife about what had happened to him, he says that he did not want to lie to the police.

[15] The Board found that it was not credible that Mr. Gergedava's wife would not have insisted that he get medical care if he was as badly injured as he had claimed. There was, however, no evidence before the Board as to whether Mr. Gergedava's wife did or did not encourage him to get medical help. The issue simply did not arise. The absence of any evidentiary foundation for the Board's finding in this regard renders this finding unreasonable.

[16] The Board found that Mr. Gergedava's claim was further undermined by the fact that Mr. Gergedava was still legally married to his wife. Mr. Gergedava's wife was allegedly furious when she discovered his homosexuality, and her father had threatened to kill Mr. Gergedava. Her failure to divorce Mr. Gergedava led the Board to question the veracity of his entire claim.

[17] There was, however, no evidence before the Board with respect to family law in Georgia, whether it was even possible for a wife to obtain a divorce on the basis of a husband's homosexuality, and whether a woman can get a divorce on an *ex parte* basis. There was, however, evidence before the Board that Georgian society was religious and deeply conservative. The Board's finding in this regard thus lacked an evidentiary foundation and failed to take relevant evidence into account, thereby rendering it unreasonable.

The Evidence of Mr. Gergedava's Former Employer

[18] The Board also did not accept that after coming to Canada, Mr. Gergedava had been romantically involved with a co-worker by the name of Carlos. The Board discounted an affidavit provided by Mr. Gergedava's former employer which confirmed that his two employees had been engaged in a same-sex relationship. One of the reasons given by the Board for discounting the affidavit was that the former employer had not produced any employment records proving that Carlos actually existed.

[19] Given that by the time that he swore his affidavit, Mr. Gergedava's employer had sold his interest in the business and no longer had any association with the company, it was unreasonable for

the Board to assume that he would have ready access to the employment records of his former employees.

The Evidence of Mr. Gergedava's Landlady

[20] The Board also chose to give little weight to an affidavit sworn by Mr. Gergedava's landlady, which confirmed that Mr. Gergedava was indeed gay. The Board identified the landlady being the wife of "the agent" who helped Mr. Gergedava when he arrived in Canada. It is, moreover, apparent from the questions posed by the Board member at Mr. Gergedava's refugee hearing that the member understood "the agent" to have potentially been involved in the smuggling of illegal aliens, including Mr. Gergedava, into Canada.

[21] Because of what it described as "the investment" of "the agent" and his wife in Mr. Gergedava's refugee claim, the Board chose to give the evidence of the landlady little weight.

[22] Leaving aside the question of whether a refugee claimant can properly be described as an "illegal alien", the difficulty with this finding is that there was no evidence before the Board that the person who met Mr. Gergedava at the Vancouver airport was indeed involved in people smuggling or that he had been involved in any way in getting Mr. Gergedava into Canada. He could just as easily have been a member of the Georgian community in Vancouver who had agreed to assist a compatriot newly arrived in Canada.

Conclusion

[23] While the Board had a number of other reasons for finding that Mr. Gergedava's story was not credible, the cumulative effect of the errors identified above is to render the Board's decision unreasonable.

[24] As a consequence, the application for judicial review is allowed. I agree with the parties that the case does not raise a question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is allowed, and the matter is remitted to a differently constituted panel for re-determination; and
2. No serious question of general importance is certified.

“Anne Mactavish”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-8357-11

STYLE OF CAUSE: RENADI GERGEDAVA v. THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Vancouver, British Columbia

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**REASONS FOR JUDGMENT
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