

Date: 20091218

Docket: IMM-2838-09

Citation: 2009 FC 1292

Ottawa, Ontario, December 18, 2009

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

ANNA UKLEINA

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR ORDER AND ORDER

[1] Anna Ivanovna Ukleina is a citizen of Azerbaijan. She is a 72 year old widow who happens to have a daughter living in Canada.

[2] Two events are at the core of her refugee claim. As a member of the Helsinki Citizens' Assembly she demonstrated with others against fraudulent parliamentary elections. The demonstration was dispersed by violent police action. She was beaten and had to seek medical attention.

[3] Six months later, in May 2006, she visited a hospitalized victim of police violence. Upon leaving the hospital she was accosted by two policemen, beaten, forced inside a police car and driven to the station where she was held for four hours. She was only released after being forced to sign a document promising to end her association with the Helsinki Citizens' Assembly.

[4] If she were to be believed, the Panel of the Refugee Protection Division (RPD) of the Immigration and Refugee Board of Canada, which heard her claim, would have had to give serious consideration as to whether she was a United Nations refugee who had a well-founded fear of persecution in Azerbaijan for reasons of political opinion, or whether she was otherwise a person in need of international protection, the whole as contemplated by sections 96 and 97 of the *Immigration and Refugee Protection Act*.

[5] As it was, the Panel concluded that the whole story was a fabrication and that her desire to live in Canada was not motivated by fear but rather by a wish to seek a better life. That is not a ground for refugee protection.

[6] This is a judicial review of that decision. For the reasons that follow, I hold that the Panel's decision was unreasonable and that Mrs. Ukleina's claim must be sent back to a new RPD Panel for a fresh determination.

[7] The standard of review which applies to findings of fact, including credibility, is reasonableness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Canada*

(Citizenship and Immigration) v. Khosa, 2009 SCC 12, [2009] 1 S.C.R. 339). As per para. 47 of *Dunsmuir* and para. 59 of *Khosa*, the reasonableness standard of review requires deference. The Court is not to impose its own view of the situation but rather is to determine if the decision under review came within “a range of possible, acceptable outcomes which are defensible in respect of the facts and law”.

[8] It has been long established, however, that findings of fact based on speculation are inherently unreasonable. The key facts found in this case fall within the realm of speculation. They were not reasonable inferences drawn from established facts.

[9] The first key element of Mrs. Ukleina’s claim is that she was injured during a protest rally in November 2005. As noted by the Panel:

The claimant submitted in evidence a medical note to corroborate her alleged beating by police at the demonstration in November 2005. The panel notes that the medical note does not allude to the cause of injury to her head, scratches and wound to the right elbow and determines, on a balance of probabilities, that this note was manufactured in an attempt to embellish her claim. The panel places no weight on this evidence.

[10] On what basis did the Panel decide that a medical report from Azerbaijan ought to state the cause of the injury? There is no basis to assume that the injury occurred in the presence of the medical doctor. There could be any number of reasons why Mrs. Ukleina suffered the injuries she did. Failure to state a cause, which in any event would have been hearsay, cannot possibly lead to the inference that the report is a forgery.

[11] Turning now to the visit to the hospital in May 2006, this is what the Panel had to say:

The claimant was asked how the police would know who she was visiting at the hospital, to which the claimant responded that she concluded that the police were following her. The claimant was asked why the police would be following her, to which the claimant had no reasonable explanation, other than she later came to that conclusion after being detained and the police had stated that she was against the government. The panel finds it not credible that, on a balance of probabilities, the claimant, who, according to testimony, was unknown to the victim and in serious condition, as well as being a news item and of interest to the government, would be allowed access to the patient. It would be reasonable to expect that if the police were following the claimant and were opposed to the victim being visited, on a balance of probabilities, the claimant would have been prevented the visit. The panel finds this evidence untrustworthy and not credible.

[12] A question along the lines of why do you think someone else knew something is fraught with danger. It invites speculation. Mrs. Ukleina's evidence was very clear. She did not know why the police knew she was at the hospital. She was invited to speculate and did so. She speculated that she may have been followed. She could also have speculated that the patient was being monitored by the police. The Panel then built on this speculation by adding another of its own. If she were being followed by the police, why would she have been allowed into the hospital room in the first place?

[13] There is absolutely no basis in fact to permit the Panel to come to the conclusion that the evidence was untrustworthy.

[14] The distinction between conjecture and inference is most important. As stated by Lord Macmillan in *Jones v. Great Western Railway Co.* (1930), 47 T.L.R. 38 (H.L.) at page 45:

The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible, but is of no legal value, for its essence is that it is a mere guess. An inference in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof.

[15] A number of other criticisms could be levied against the Panel which engaged in a microscopic examination of peripheral points, but in light of the above it is not necessary to do so.

[16] A desire on Mrs. Ukleina's part to live with her daughter does not exclude the possibility that she is also a refugee. If she fears persecution in Azerbaijan, would she not prefer to live with or near a family member, rather than in a country of strangers?

ORDER

FOR REASONS GIVEN, THIS COURT ORDERS that the application for judicial review is granted. The matter is referred back to the Refugee Protection Division of the Immigration and Refugee Protection Board for a fresh determination by a different panel. There is no serious question to certify.

“Sean Harrington”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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