

Federal Court



Cour fédérale

**Date: 20121204**

**Docket: IMM-2944-12**

**Citation: 2012 FC 1419**

**Ottawa, Ontario, December 4, 2012**

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

**BETWEEN:**

**TERENTIY KORNIENKO**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] It is a well-known fact that homosexuals are the frequent targets of discrimination and abuse in many parts of the world. It is therefore not surprising that some of them seek the relative safety of Canada by applying for refugee status. That was the basis of Terentiy Kornienko's refugee claim when he appeared before the Refugee Protection Division of the Immigration and Refugee Board (Board) at Toronto, Ontario on February 22, 2012. The Board rejected Mr. Kornienko's claim because it did not believe he was a homosexual and it is from that decision that this application arises.

[2] The Board had several concerns about Mr. Kornienko's credibility. It faulted him for failing to bring his relevant medical records before leaving the Ukraine, and drew an adverse inference on the basis that no reasonable person would leave behind such important corroborating evidence. The Board also found Mr. Kornienko's medical documentation to be unreliable in part because it was "highly unlikely that the police would go to the extent of obtaining a 'forensic doctor expert of the higher category' to conduct this higher level of medical examination to benefit a gay person, against whom the police have shown disdain and scorn". The Board dismissed Mr. Kornienko's explanation that the police assisted him in this way because he insisted on it. This appears to be an implausibility finding because there is no evidence underpinning it.

[3] One of the Board's principal justifications for not believing that Mr. Kornienko was gay is set out in the following passages from its decision:

[11] The claimant has been in Canada for almost three years. Upon questioning, he testified that he has not had any gay relationship and is not currently in a homosexual relationship for the time he has been in Canada, except for two isolated homosexual encounters in the summer of 2010 with Victor Kutalov. When asked why he has not been involved in a gay relationship given his activities in the 519 community centre and his participation in the 2010 and 2011 gay parades, his explanation was that, "I did not want anymore to have sexual experience with anybody else. Nobody attracted me anymore other than Victor to the point of having a gay relationship other than Victor." Although the lack of promiscuity may not be determinative of the claimant's sexual orientation, I am not inclined to believe that if the claimant is truly gay, he has lost all his interest in having a gay relationship because of Victor, with whom he had a brief and casual homosexual encounter for 2 days almost two years ago. I am also not persuaded that given his exposure to the gay community for more than two years he has not found another "Victor," if he were truly gay. Based on common sense and reason, I draw an adverse credibility finding on his

testimony. On a balance of probabilities, the claimant is not what he claims to be.

...

His oral testimony of lack of interest in having a gay relationship after his very brief and casual encounter with Victor, and given his exposure to the gay community for the last two years, although not determinative of his sexual orientation, is highly suspect, if he were truly a gay person

...

The photos he submitted showing him and Nikolay Sokolov do not prove his being gay. The letter from the 519 community centre and his pictures at the gay parades have little probative value as anyone, including non-gays, can be part of the 519 community centre and the gay parades.

It is readily apparent from these passages that the Board believed that gay men are promiscuous and that anyone who is not sexually active is unlikely to be “truly gay”. This, of course, is a form of stereotyping that the Board has sometimes resorted to in dismissing claims like this one. In light of this Court’s jurisprudence it is surprising that any member of the Board would harbour such an ill informed view: see *Essa v Canada*, 2011 FC 1493 at paras 30 – 31, [2011] FCJ no 1819, *Herrera v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1233 at para 12, [2005] FCJ no 1499, *Menaj v Canada*, 2008 FC 611 at para 17, [2008] FCJ no 754, *Kravchenko v Canada*, 2005 FC 387 at para 6, [2005] FCJ no 479, *Trembliuk v Canada*, 2003 FC 1264 at para 8, [2003] FCJ no 1590, *Dosmakova v Canada*, 2007 FC 1357 at para 12, [2007] FCJ no 1742. This is clearly a reviewable error that goes to the heart of the Board’s credibility finding and dictates that the Board’s decision be set aside.

[4] I accept Respondent's counsel's point that there were credibility issues arising out of Mr. Kornienko's testimony, but for the most part the Board's reasons do not refer to that evidence. I am not inclined to look to the record to supplement the Board's reasons in the face of what the Board chose to rely upon. It is one thing to supplement a set of reasons that lack detail, and quite another to use that approach to overcome an obviously flawed conclusion based on an improper stereotype.

[5] I would add that the Board's criticism of Mr. Kornienko's failure to bring his medical records with him is unwarranted. Many refugee claimants come to Canada without their corroborating documents only to obtain them later. The failure to provide highly corroborative evidence can be a basis for drawing an adverse credibility inference. But a failure to travel with this evidence is so common, and this is such a microscopic detail, that it should not be used as a basis for an adverse credibility finding.

[6] The Board's further finding that it was unlikely that the police would assist Mr. Kornienko in the preparation of a forensic medical report is equally unsound. As noted above, this is a plausibility conclusion. It is unsound because it is not beyond the range of reasonable possibilities that the Ukrainian police would actually do what was required of them notwithstanding their personal views.

[7] For the foregoing reasons, this application is allowed. The matter must be re-determined on the merits by a different decision-maker. Neither party proposed a certified question and no issue of general importance arises from these reasons.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** this application for judicial review is allowed with the matter to be re-determined on the merits by a different decision-maker.

"R.L. Barnes"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-2944-12

**STYLE OF CAUSE:** KORNIENKO v MCI

**PLACE OF HEARING:** Toronto, ON

**DATE OF HEARING:** November 29, 2012

**REASONS FOR JUDGMENT:** BARNES J.

**DATED:** December 4, 2012

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