

**Date: 20071221**

**Docket: IMM-727-07**

**Citation: 2007 FC 1357**

**Ottawa, Ontario, December 21, 2007**

**PRESENT: The Honourable Madam Justice Dawson**

**BETWEEN:**

**SOFYA DOSMAKOVA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] Sofya Dosmakova is a citizen of Kazakhstan who claimed refugee protection on the basis of her sexual orientation and her religious beliefs as a Muslim who became a member of the Russian Orthodox Christian Church. Her claim was dismissed because the Refugee Protection Division of the Immigration and Refugee Board (Board) found her to be lacking in credibility and to have tendered false documents to the Board.

[2] This application for judicial review of that decision is allowed because, in reaching its conclusion as to Ms. Dosmakova's credibility, the Board breached the duty of fairness owed to Ms. Dosmakova and made a number of findings that were patently unreasonable.

[3] The breach of procedural fairness arises out of difficulties encountered during a portion of the hearing with respect to the quality of interpretation provided to Ms. Dosmakova.

[4] At the start of the hearing, the presiding member began questioning Ms. Dosmakova. The first area of questioning concerned the claim to protection advanced on the ground of religious conversion. Early on in the questioning, it became apparent that the interpreter struggled with religious terms such as "Lent". The interpreter also confused the distinction between a church and a mosque.

[5] Then, the following transpired:

**CLAIMANT:** Yes, in mosques. Yes, it's only masses read only in Arabic language.

**PRESIDING MEMBER:** One would not call an Islamic service a mass.

**INTERPRETER:** Again this is my mistake, but I don't really know what would be the word for it.

**PRESIDING MEMBER:** Okay. Counsel?

**COUNSEL:** Yes?

**PRESIDING MEMBER:** Do you want to have a little meeting?

**COUNSEL:** We can have a quick talk.

**INTERPRETER:** If you need to change some – get somebody else, please. I'm not good enough.

**COUNSEL:** Give us a couple of minutes, if you don't mind?

**PRESIDING MEMBER:** Yes, would you?

**COUNSEL:** Just the two of you step out for a minute.

**PRESIDING MEMBER:** Both of you would you please?

**COUNSEL:** You can take your water.

**PRESIDING MEMBER:** Since half of her claim is based on religion, if the interpreter – my concern is the interpreter doesn't know ---

**COUNSEL:** The interpreter has problems with the religious concepts and obviously – I've had many hearings with this interpreter and she's a very good interpreter.

**PRESIDING MEMBER:** Yes, she is.

**COUNSEL:** But obviously, and she knows it, the religious terms are foreign to her and the distinctions and the importance of what is a church, what is a mosque, what is a sermon, it's not something that she understands.

**PRESIDING MEMBER:** Yes.

**COUNSEL:** But there are two ways to think about this. In my opinion, at the end of the day when you decide this claim, the religious aspect is an also; it's not a main variant, I wouldn't even call it half.

**PRESIDING MEMBER:** Okay.

**COUNSEL:** It's a real, real sideline. I don't think one could argue that a convert in Kazakhstan would be persecuted or would have life endangerment based on her conversation from Islam. It's not Iran we're talking about here.

**PRESIDING MEMBER:** No.

**COUNSEL:** So, here, if indeed there is a basis for persecution, it has to be from the sexual orientation, it's not from the religious side.

**PRESIDING MEMBER:** Okay.

**COUNSEL:** So, I'm wondering whether we should maybe put this part aside for the time being ---

**PRESIDING MEMBER:** All right.

**COUNSEL:** --- and let's get into, what to me, is the main part of the claim for which this interpreter will be fine, I suspect.

**PRESIDING MEMBER:** Yes. She's an excellent interpreter and ---

**COUNSEL:** I would hate to get another person. It's also not fair to the interpreter. I like her and I know that she's trying. She understands that she's inadequate to this and she's the first one to say to us, "If you need somebody else, I will not be offended."

**PRESIDING MEMBER:** Yes. Yes.

**COUNSEL:** But I wonder whether we really do need to switch.

**PRESIDING MEMBER:** Well, let's take a look at the sexual orientation, then, and ---

**COUNSEL:** Yeah, that's the heart of the claim and that's where the real credibility is.

**PRESIDING MEMBER:** Okay.

**COUNSEL:** It is what it is. I mean, out of curiosity, though, I know nothing about this religious part either. What is this prayer that you're relating to?

**PRESIDING MEMBER:** The Creed.

**COUNSEL:** What's the Creed?

**PRESIDING MEMBER:** It's a prayer that says I believe in God, the Father Almighty, that type of thing. It's slightly different in each of the Christian religions, but it's said at almost every service, and in his son, Jesus Christ ---

**COUNSEL:** And we have a problem right now, because it appears to us that this claimant doesn't know it, but we have to ask ourselves

does she not know it? Well, perhaps she doesn't understand because the interpreter is not ---

**PRESIDING MEMBER:** Exactly, yes.

**COUNSEL:** --- sufficient here. So, why don't we just leave this area, and if we need to come back to it, then we can decide about getting another interpreter, because we may not need to. [emphasis added]

[6] When Ms. Dosmakova was asked to return to the hearing, the presiding member gave her the following explanation:

**PRESIDING MEMBER:** [...]

While you were out of the room, your counsel and I discussed the fact that the interpreter is not really cognizant of religions and what may be involved in a religious service. However, your counsel believes that the heart of the claim is your sexual orientation and that your conversation to the Orthodox Church is quite a bit less important.

**CLAIMANT:** Yes, Mrs. [N] helped me to come to that.

**PRESIDING MEMBER:** Yes. So, we're going to continue with this interpreter, who will have no problem with that, and we'll leave the religious aspect of it alone for now.<sup>1</sup> [emphasis added]

[7] Thus, it can be seen that the presiding member agreed that the religious aspect of Ms. Dosmakova's claim would be left "alone for now", and acknowledged to Ms. Dosmakova's then counsel that Ms. Dosmakova's inability to explain the elements of her new faith could be the result of faulty interpretation.

[8] In that circumstance, the duty of fairness the Board owed to Ms. Dosmakova was breached when the Board relied upon Ms. Dosmakova's inability to explain her faith to conclude in its

reasons that Ms. Dosmakova knew almost nothing about her new faith and that she was not to be a practicing member of the Russian Orthodox Church.

[9] The Board then relied upon that finding and the "rampant corruption endemic in Kazakhstan" to give no weight to Ms. Dosmakova's baptismal certificate. However, the documentary evidence cited by the Board in support of this finding was silent with respect to the existence of forged or fraudulent documents in Kazakhstan. The evidence spoke instead of top-level government corruption, kickbacks, and election fraud.

[10] It was patently unreasonable for the Board to dismiss the baptismal certificate on this basis.

[11] The Board also made two implausibility findings with respect to Ms. Dosmakova's evidence about her sexual orientation. Those findings were as follows:

The claimant was asked questions with respect to her sexual orientation. The claimant acknowledged that in Kazakhstan there is a negative attitude towards homosexuality, that it was a reason for jail at the time of the Soviet Union, that now, while there is a law against it, it is considered the most horrible sin and that gay people hide and lesbians are not talked about. The claimant was asked when she realized about her sexual orientation. She replied that it was only when her sexual relationship with N began. While this is unusual, it is possible. But things must be probably so, not just possibly so. On a balance of probabilities, I find that most homosexual people have some realization with respect to their sexual orientation when they begin to explore their sexuality in their teens or early twenties, even if they suppress it, hide it or fail to acknowledge it. On reflection in later life, they are cognizant of this perhaps latent sexual orientation. This was not the case with the claimant. She found out about her lesbian sexual orientation only when she began such a relationship. The claimant stated in her PIF that she was happy with her husband, although she was surrounded by women. While this is not determinative, it adds to the claimant's lack of credibility.

The claimant testified that she and N were friends from 1994 and that in 2000 she and N became lovers and N. moved in with her to facilitate her trip to work. The claimant was asked how she felt about her discovery. She replied that she felt happiness and sexually satisfied, that she was happy about it and had no regrets. I do not accept this as credible. The claimant was a fifty-six-year-old woman, living in a society which she stated was homophobic. This departure from her previous life style was drastic. On a balance of probabilities, I find that the claimant, if she suddenly discovered that she was a lesbian in such circumstances, her emotional reaction is not in harmony with the preponderance of probabilities which a reasonable and informed person would expect. On a balance of probabilities, even if the claimant does not regret her relationship with N, it is reasonable to expect that she would express some misgivings with respect to her initial feelings. Therefore, on a balance of probabilities, I find the claimant not to be a credible or a trustworthy witness.

[12] This Court has repeatedly warned that implausibility findings cannot be made on the basis of stereotypical attitudes or projected behavior that is unsupported by the evidence. See, for example, *Boteanu v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 424; *Slim v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 879; *Herrera v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1499; and *Kamau v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1505.

[13] In the present case, I conclude that there is no evidence in the record to establish the probability of the attitudes and the behavior that the Board expected of Ms. Dosmakova. The Board's two implausibility findings set out above are thus unsupported by the evidence and are patently unreasonable.

[14] The Board went on to find Ms. Dosmakova not to be a credible or trustworthy witness because she failed to explain how her "alleged lesbian relationship became known to others" and

because she speculated that the police learned she was a lesbian by questioning her neighbors.

These findings are problematic because the Board does not explain how it is that Ms. Dosmakova was supposed to know how others acquired their knowledge or suspicions.

[15] Additionally, Ms. Dosmakova testified that:

- she and her partner lived together;
- they went everywhere together, including visiting relatives together;
- they spent all their spare time together, including going to church and spending holidays together; and
- they were at a party where they sat, ate, and talked together and, once they started living together, people started questioning their relationship.

[16] Given this evidence and the difficulty usually inherent in learning how others acquired certain knowledge, it was patently unreasonable for the Board to conclude that Ms. Dosmakova was incredible because she failed to explain how her relationship became known to others.

[17] The Board gave no weight to two medical reports tendered by Ms. Dosmakova to corroborate her evidence as to a beating that she received. The Board concluded that they were false documents because of the endemic corruption in Kazakhstan<sup>2</sup> and because the reports did not use "the language that a reasonable and informed person would expect in a medical report allegedly from doctors, even allowing for cultural differences." Examples cited by the Board included that one report referred to a "closed fracture of the right shoulder bone" (the panel expected the doctor to



use the medical term for the shoulder bone) while the other stated that "[s]he has been sick since March 2005 after she received bodily injuries".

[18] The Board also gave no weight to, and found to be false, a police report about the beating that Ms. Dosmakova said she received. The report was again discounted because it lacked "professional language to the point that it lacks all credibility." The Board cited the following example from the report: "Yes, really a fact of attack on you and beating by unidentified persons of Asian origin in the daytime in the above area took place."

[19] These reports were all tendered in the Kazakh language, with attached translations. Unfortunately, the Board did not raise its concerns about these documents during the hearing, which would have allowed Ms. Dosmakova to submit, as she did on this application, that the language used was that of the translator and not the actual authors of the documents. Had the Board raised its concerns during the hearing, it would also have allowed the Board to ask the interpreter at the hearing to provide her translation of the documents to see, for example, whether the medical term for shoulder bone was in fact used in the medical report.

[20] In my view, it was unfair and patently unreasonable for the Board to reject these documents without allowing Ms. Dosmakova to address its concerns.

[21] These errors go to the heart of the Board's decision with respect to credibility, and I am not satisfied that the Board would have come to the same conclusion had it not made such errors. For that reason, the application for judicial review is allowed.

[22] Ms. Dosmakova submits that special reasons exist in this case that justify an award of costs in her favor. She says that the Minister unnecessarily prolonged the proceeding by failing to consent to her claim for relief, and that such consent ought to have been forthcoming in light of the clear breaches of procedural fairness.

[23] In my view, the Minister's submissions were not so devoid of merit that I can conclude that she improperly prolonged this proceeding. Particularly, the Minister argued that Ms. Dosmakova, through the actions of her then counsel, had waived any right to complain about the quality of interpretation as that impacted upon the fairness of the entire hearing. However, that is not an issue that I had to decide given my view of this case. In the result, no costs are awarded.

[24] Counsel posed no question for certification on the issues that I have decided, and I agree that no question arises on this record.

## **JUDGMENT**

### **THIS COURT ORDERS AND ADJUDGES that:**

1. The application for judicial review is allowed and the decision of the Refugee Protection Division of the Immigration and Refugee Board dated January 23, 2007, is hereby set aside.
2. This matter is remitted for redetermination by a differently constituted panel of the Refugee Protection Division.

“Eleanor R. Dawson”

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Judge

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1. For completeness, I observe that Ms. Dosmakova’s testimony at the hearing before the Board did not support her then counsel's view that the religious aspect of her claim was not significant. This is evidenced by the following exchange, which occurred immediately following the presiding member’s advice that the religious aspect of the claim would be left "alone for now":

**COUNSEL:** If you will allow me to ask one question, just to wrap up that area, it may help.

**PRESIDING MEMBER:** Okay.

**COUNSEL:** Ms. Dosmakova, hypothetically speaking – listen to my question and tell me what your opinion is – let’s say that you were not lesbian, hypothetically, you and [N] are simply good friends, not lovers, and you and your friend go to the church and you become baptized. Do you think that you would suffer persecution and beatings and have – do you think your life would be in danger simply from having practiced the Christian religion in Kazakhstan?

**CLAIMANT:** You know what? I have to say that I have, I received phone calls that were – they were saying to take off the crucif (sic).

**COUNSEL:** The cross.

**INTERPRETER:** Cross.

**COUNSEL:** Ms. Dosmakova, please listen to the question. It requires a yes or no answer. Do you think your conversion and attendance at the church would be enough in itself to cause you to be persecuted in your country, to fear for your life?

**CLAIMANT:** I think it wouldn't be enough ---

**COUNSEL:** Thank you. That's all I asked. So, you will agree with me that without the element of the non-traditional sexual orientation, you may have problems, but they wouldn't be life threatening?

**CLAIMANT:** It wouldn't be as bad as it was what happened to me. They would hate me ---

**COUNSEL:** Excuse me. Madam, listen to my questions and answer them only. Do you understand? I asked you a question. It's a simple question. Do you think that your life would be in danger, your life ---

**CLAIMANT:** Yes.

**COUNSEL:** No, no, no. For your religious practices?

**CLAIMANT:** Yes.

**COUNSEL:** I don't think she understands. I think I will leave it for the time being.

2. The Board referred to the same documentary evidence to support this conclusion as is discussed at paragraph 9 above.

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

**DOCKET:** IMM-727-07

**STYLE OF CAUSE:** SOFYA DOSMAKOVA, Applicant

and

THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION, Respondent

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** DECEMBER 5, 2007

**REASONS FOR JUDGMENT  
AND JUDGMENT:** DAWSON, J.

**DATED:** DECEMBER 21, 2007

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