Date: 20061219

Docket: IMM-7565-05

Citation: 2006 FC 1521

Ottawa, Ontario, December 19, 2006

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

KOUAMI KOMAHE

Applicant

and

MINISTER OF CITIZENSHIP

AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant brings this application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, 2001, c. 27 (the Act), of the negative Pre-Removal Risk Assessment (PRRA) decision by Ms. Sharon Nester, PRRA Officer, dated November 2, 2005.

ISSUES

[2] The issues raised in this application can be summarized as follows:

a) Did the PRRA Officer err in law by finding that the newly submitted evidence was inadmissible by virtue of paragraph 113(*a*) of the Act?

b) Did the PRRA Officer commit a patently unreasonable error when she concluded, in the alternative, that the evidence held little weight?

c) Did the PRRA Officer err by not holding a hearing, pursuant to s. 113(*b*) of the Act and s. 167 of the *Immigration and Refugee Protection Regulations* SOR/2002-227 (the Regulations)?

[3] The answer to the first two questions is positive. It is not necessary to answer the third question. Consequently, the application for judicial review shall be allowed.

BACKGROUND

[4] The Applicant was born on November 16, 1968 in Lomé, Togo. He participated as a member of an opposition political party, CAR (Comité d'action pour le renouveau).

[5] He arrived in Canada for the World Youth Day Conference in Toronto on July 21, 2002 and claimed refugee status after the conference, from Winnipeg, Manitoba, on August 8, 2002.

[6] The Applicant stated that he feared for his life not only because of his political activities as a member of CAR but more specifically because he signed an online petition on June 9, 2002, asking the international community to impose sanctions against the military regime of Togo. The Applicant states that on that same day, he received two menacing telephone calls. As a result, he fled his home without notice to anyone, including his pregnant wife and found refuge in the home of Father Paul Koumako, located in Aneho, about 45 km from Lomé.

[7] That night, the Applicant's wife was beaten by men who came to their home looking for the Applicant. She was hospitalized at the Centre Hospitalier Universitaire de Tokoin-Lomé, from June 10 to 18, 2002. She was again attacked on August 21, 2002, when she was unable to disclose her husband's whereabouts. The Applicant therefore believes that he cannot go back to Togo because if those who want him could beat his wife because they want to get hold of him, it meant that he could be tortured or killed if they got him.

[8] The Applicant's refugee claim was heard by teleconference in Calgary, Alberta, on November 7, 2003 and a decision rejecting his claim was rendered by Mr. Michel Faure on February 13, 2004. The Board found that the Applicant lacked credibility in that he fabricated his story about his political activities. The Applicant applied to the Federal Court for leave and judicial review of this decision. On June 25, 2004, the Court dismissed this application.

[9] On May 5, 2004, the Applicant made a PRRA application in Winnipeg, Manitoba, in which he makes reference to the risks of harm to his life that he would face if returned to Togo. The Applicant believes he would be visited with the same treatment reserved for failed refugee claimants and opponents of the military regime who are forced to return to Togo. In particular, the Applicant's narrative draws attention to the forced return of the soldier Kpabré, on March 11, 2004, after his asylum application was rejected by the Netherlands. This soldier was met by the regime's police who tortured and threw him in prison where he has been denied visits from representatives of a Human Rights organization.

[10] In support of his PRRA application, the Applicant provided the following documents:

a) "Brigade des Recherches - Convocation" (the Summons from the Investigations Squad), dated December 15, 2003: a one page photocopy of the original document, requesting the presence of the Applicant's mother, Madame Akouavi Amou, at a specific address in Lomé;

b) "Fiche d'Identification Pour L'Arrestation de L'Individu Recherché Par La Brigade Des Recherches," (Identification Record for the Arrest of the Wanted Individual by the Investigations Squad), dated December 26, 2003: a one-page photocopy of the original document, giving his personal/biographical information and the reasons for his arrest (raisons politiques);

c) "Avis de Recherche" (Wanted Notice), dated August 23, 2002: a two-page photocopy of the original document which contains the names of 48 wanted persons. The Applicant's name (No. 31) figures on page two, along with his photograph (third row, third column). The public is asked to report these individuals who are wanted for political reasons to the nearest police station. This Wanted Notice is under the signature of "Le Chef du Centre de Traitement et de Recherche";

d) The Identity Card of Assimou Laza: a photocopy of the original ID Card. Gendarme Laza, the cousin of Father Koumako and the man who allegedly assisted the Applicant in his departure from Lomé, was responsible for locating, photocopying and forwarding the first three documents in the list of new evidence submitted in the PRRA application;

e) The Bill of Lading from EMS, Ghana Post Company Limited, for the documents which were couriered to the Applicant: a photocopy of the original, which showed that the documents were sent to the Applicant, by Father Koumako on May 7, 200 (the last digit being illegible);

f) An internet copy of a "Diastode" Article, dated May 14, 2004: an article about the imprisonment of a Togolese refugee claimant, who after being denied refugee status in the Netherlands, was deported to Togo and put into jail. According to a relative of the refugee claimant, a visit to the detainee by a human rights organization was denied by the authorities.

[11] The Applicant also submitted a PRRA narrative with the newly submitted evidence, explaining why the documents were relevant and how he had come to obtain them. Of particular importance to this case is the following passage, which describes how he became aware of the "Identification Record for the Arrest" and the "Wanted Notice"(p. 36 of the Tribunal Record):

> En Février 2004, le père Koumako m'informa que son cousin Mr Laza, le gendarme, a trouvé des dossiers troublants sur moi. Mr Laza a dit au Père qu'il fera tout pour faire la copie des dossiers. En Mai 2004, le Père m'informa que Mr Laza a pu faire la copie et je lui ai demande (sic) de me les envoyer. Le Père m'a envoyé : […]
>
> [My own translation]
> In February 2004, Father Koumako informed me that his cousin Mr. Laza, the gendarme, had found disturbing files on me. Mr. Laza told the Father that he would do everything [he could] to make a copy of the files. In May 2004, the Father informed me that Mr. Laza had made the cop(ies), and I asked him to send them to me. The Father sent me: [the narrative goes on to describe the "Identification Record for the Arrest," the "Wanted Notice" and Gendarme Laza's "Identity Card."]

[12] By letter dated November 2, 2005, the PRRA Officer notified the Applicant that his PRRA application was rejected. It is this decision that forms the basis of the present application for judicial review.

DECISION UNDER REVIEW

[13] Under the section of her decision, entitled "PRRA Analysis," the PRRA Officer noted that she was mandated to consider only new evidence that arose after the rejection of the refugee claim or that was not reasonably available or not reasonably expected to have been presented before the Refugee Protection Board (RPD) before they rendered their negative decision on June 25, 2004. Actually, the decision was rendered on February 13, 2004.

[14] The PRRA Officer remarked that the PRRA narrative was undated, and then summarized its contents. Importantly, the above translated portion of the narrative describing the new evidence and explaining how the Applicant had come to receive it was omitted in the PRRA Officer's summary.

The PRRA Officer described the new documents submitted by the Applicant and concluded as follows:

> 1. The Wanted Notice of August 23, 2002, pre-dated the RPD hearing of November 7, 2003.
>
> 2. The Identification Record for the Arrest, dated December 26, 2003, pre-dated the RPD negative decision on February 2004.

> 3. There was no evidence to support that these documents could not have been reasonably made available for submission by the applicant at the time of the rejection of his refugee claim by the RPD.
> 4. Given their importance, one would expect that they would have been obtained and submitted to the RPD.
>
> 5. Gendarme Laza could have sent them to the Applicant via Father Koumako in time for the RPD Hearing.

[15] The PRRA Officer then reasoned that even if these documents could have been obtained within the parameters of paragraph 113(*a*), she would have afforded them "little weight" in establishing that he is wanted in Togo by the authorities, because:

> 1. The photos in the Wanted Notice were of very poor quality to the extent of not being able to discern the shape of the head or the facial features; it was not possible to identify the applicant from this photo;
>
> 2. There was an error in the spelling of "Quelle" as "Qu'elle" on the "Identification Record for the Arrest;"
>
> 3. The "Identification Record for the Arrest" is stated on page one to be: #345BR/RY/03Y, while on the "Summons from the Investigation Squad," a hand-written "No. 4345" is written at the top of the page.

[16] The PRRA Officer went on to consider the "Summons" document and determined that this document also pre-dated the Board's decision, and found that there was no evidence to support that this document would not have been reasonably available to the Applicant at the time of his refugee claim rejection. Furthermore, due to an apparent inconsistency between the number hand-written at the top of the page of the Summons document, and a number found on the Identification Record of the Arrest, the PRRA Officer accorded this document "little weight" in establishing that the applicant is wanted in Togo by authorities.

[17] With respect to the Bill of Lading, the PRRA Officer inferred from its inclusion that "Father Paul [Koumako] is knowledgeable as to how to send mail quickly and therefore it is reasonable to expect that he could have sent these documents to the Applicant before the RPD made its decision."

[18] The PRRA Officer then considered the "Diastode" article. As it was dated May 14, 2004 and "therefore was not reasonably available to him before the rejection

of the Board in February 2004, [it] therefore meets the definition of new evidence under A113(*a*)." In examining the case of the refugee claimant profiled in the news article, the PRRA Officer determined that the Applicant was not a person similarly situated and stated as follows (p. 10 of the Tribunal Record):

> […] The RPD found that he lacked credibility as a member of the political party CAR. He has provided no further evidence to support this allegation.

[19] The failed refugee claimant in the article on the other hand, became well known before he left Togo, due to his "recalcitrant behaviour within the police force" and also because he deserted his job.

[20] The PRRA Officer then canvassed a variety of public news sources and found that "the most recent publicly available evidence shows that on a balance of probabilities, ordinary Togolese Citizen refugee returnees would not face harm and that there would not be a serious possibility that this applicant would find himself personally situated to be targeted by government authorities."

[21] In assessing the general country conditions, the PRRA Officer noted that circumstances were improving in Togo, and the government had taken steps towards guaranteeing free and fair elections. The Applicant had not provided any evidence that he was in fact threatened as a result of his involvement with a political party or would be threatened merely because he is a returned refugee.

PERTINENT LEGISLATION

[22] The process for accepting fresh evidence during a PRRA application is set out in section 113 of the Act. The relevant portions of this section are as follows:

113. Consideration of an application for protection shall be as follows:	**113.** Il est disposé de la demande comme il suit :
(a) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection;	a) le demandeur d'asile débouté ne peut présenter que des éléments de preuve survenus depuis le rejet ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'il n'était pas raisonnable, dans les circonstances, de s'attendre à ce qu'il les ait présentés au moment du rejet;
(b) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is	b) une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs

required;[. . .]

réglementaires;

[. . .]

[23] The applicable passages from Regulations include the following:

Submissions

161. (1) A person applying for protection may make written submissions in support of their application and for that purpose may be assisted, at their own expense, by a barrister or solicitor or other counsel.

Observations

161. (1) Le demandeur peut présenter des observations écrites pour étayer sa demande de protection et peut, à cette fin, être assisté, à ses frais, par un avocat ou un autre conseil.

New evidence

(2) A person who makes written submissions must identify the evidence presented that meets the requirements of paragraph 113(a) of the Act and indicate how that evidence relates to them.

Hearing — prescribed factors

167. For the purpose of determining whether a hearing is required under paragraph 113(b) of the Act, the factors are the following:

(a) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out

Nouveaux éléments de preuve

(2) Il désigne, dans ses observations écrites, les éléments de preuve qui satisfont aux exigences prévues à l'alinéa 113a) de la Loi et indique dans quelle mesure ils s'appliquent dans son cas.

Facteurs pour la tenue d'une audience

167. Pour l'application de l'alinéa 113b) de la Loi, les facteurs ci-après servent à décider si la tenue d'une audience est requise :

a) l'existence d'éléments de preuve relatifs aux éléments mentionnés aux articles 96 et 97 de la Loi qui soulèvent une

in sections 96 and 97 of the Act;	question importante en ce qui concerne la crédibilité du demandeur;
(b) whether the evidence is central to the decision with respect to the application for protection; and	b) l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection;
(c) whether the evidence, if accepted, would justify allowing the application for protection.	c) la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection.

ANALYSIS

Standard of Review

[24] This case deals with multiple issues, each requiring a separate analysis of the applicable standard of review within the context of a PRRA Officer's decision. My colleague Justice Eleanor Dawson has considered a case involving several issues and I defer to her excellent summarization of the various standards of review at paragraphs 23 and 24 of the decision in *Demirovic v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1560 (T.D.), 2005 FC 1284, which state as follows:

> 23 As to the appropriate standard of review to be applied to a decision of a PRRA officer, in *Kim v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 540 (T.D.) at paragraph 19, Mr. Justice Mosley, after conducting a pragmatic and functional analysis, concluded that "the appropriate standard of review for questions of fact should generally be patent unreasonableness, for questions of mixed law and fact, reasonableness simpliciter, and for questions of law, correctness". Mr. Justice Mosley also endorsed the finding of Mr. Justice Martineau in *Figurado v. Canada (Solicitor General)*, [2005] F.C.J. No. 458 (T.D.) at paragraph 51, that the appropriate standard of review for the decision of a PRRA officer is reasonableness simpliciter when the decision is considered "globally and as a whole". This jurisprudence was followed by Madam Justice Layden-

> Stevenson in *Nadarajah v. Canada (Solicitor General)*, [2005] F.C.J. No. 895 (T.D.) at paragraph 13. For the reasons given by my colleagues, I accept this to be an accurate statement of the applicable standard of review.
>
> 24 When applying the standard of review of reasonableness simpliciter, a reviewing Court is to inquire into whether the decision is supported by reasons that are, in turn, supported by a proper evidentiary basis. An unreasonable decision is one that, in the main, is not supported by reasons that can stand up to a "somewhat probing examination"; the reviewing court must be satisfied that the conclusions drawn from the evidence are logically valid. (See: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at paragraph 56). A decision will be unreasonable "only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived". *(See: Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247 at paragraph 55). A decision may satisfy the standard of review if supported by a tenable explanation, even if the explanation is not one that the reviewing court finds compelling.

[25] I shall refer then only briefly to the applicable standard of review as I address each of the issues.

1. *Did the PRRA Officer err in law by finding that the newly submitted evidence was inadmissible by virtue of paragraph 113(a) of the Act?*

[26] The PRRA Officer was called upon to interpret paragraph 113(*a*) and apply it to the fresh evidence submitted by the Applicant. As such, this is a question of mixed law and fact; requiring a standard of review of reasonableness simpliciter. In other words, I should not intervene in the impugned decision unless I am satisfied that the conclusions of the PRRA Officer are logically valid.

[27] Counsel for the Applicant argues that the conclusions of the PRRA Officer were illogical and therefore invalid. In particular, he states that the evidence before the officer was that the Applicant learned of the documents for the first time in February 2004. The date of the negative Board decision was February 13, 2004. Therefore, the call in which the Applicant learned of the documents was either immediately before or immediately after the Board decision. Because the documents were sent after the decision of the Refugee Protection Division, the Applicant could not possibly have submitted the documents in advance of the decision.

[28] Furthermore, given the closeness of the date of the decision to the date of the call, the statement of the PRRA Officer about reasonable availability could not have been directed to the Applicant. Obviously, if the Applicant learned of the documents for the first time after the decision was made, there was nothing he could

have done before the Board decision to make the documents available to the Board. The PRRA Officer has therefore imposed a reasonableness standard on someone else, indeed on Father Koumako and Gendarme Laza and not on the Applicant. The Officer erred in law by using the test of reasonable availability to gauge the reasonableness of the behaviour of third parties rather than the Applicant.

[29] The Respondent is of the view that it was reasonable of the PRRA Officer to expect that the Applicant would have sought out as much evidence as possible in support of his claim from Father Koumako and Gendarme Laza. The Applicant presented no evidence at all to the PRRA officer to indicate that he had advised Father Paul or Gendarme Laza about his need for documents in support of his claim prior to the RPD decision.

[30] Consequently, if there were evidence that the Applicant had attempted to obtain information in support of his claim from Father Koumako and Gendarme Laza prior to the RPD decision, then the documents could have been properly considered as "new evidence." However, having placed no evidence whatsoever before the PRRA Officer that he could not reasonably have obtained the documents prior to the RPD decision, it was reasonable for the Officer to conclude that the documents were not "new evidence."

[31] The Regulations impose an obligation upon the Applicant to explain why the evidence submitted with the PRRA application qualifies as "new evidence." In his *Immigration Law and Practice*, 2d ed. at p. 9-327, Lorne Waldman notes:

> Subsection 161(2) of the Regulations requires that the person specify in his or her submissions which evidence meets the requirements of ss. 113(a) of the Act. As a result, when the person makes submissions, he or she must also explain why the evidence adduced meets the requirements of ss.113(a), i.e., why it is either new evidence or evidence that could not have been reasonably available, or evidence that the claimant could not have been expected to adduce in the circumstances of the case.

[32] Thus, a burden does exist for the Applicant who chooses to submit new evidence in a PRRA application. Although the Respondent argues that the Applicant did not meet this burden, and thus the PRRA Officer was justified in dismissing the evidence, I do not agree. The Applicant did make submissions as to why the evidence was not available at the RPD hearing:

> [My own translation]
> In February 2004, Father Koumako informed me that his cousin Mr. Laza, the gendarme, had found disturbing files on me. Mr. Laza told the Father that he would do everything [he could] to make a copy of the files. In May 2004, the Father informed me that Mr. Laza had made the cop(ies), and I asked him to send

> them to me. The Father sent me: [the narrative goes on to describe the "Identification Record for the Arrest," the "Wanted Notice" and Gendarme Laza's "Identity Card."]

[33] The Applicant clearly states that neither he nor Father Koumako knew of the documents until February 2004. Furthermore, letters from Father Koumako were submitted by the claimant as part of his disclosure package for the Board hearing. Page 68 of the Tribunal Record indicates that documents #3 and #4 were letters from the Father. Indeed, these letters were even mentioned in the last paragraph of the Board's decision at page 66 of the Tribunal Record.

[34] Moreover, pages 68 and 69 of the Tribunal Record indicate that the Applicant submitted almost 40 documents to support his application for refugee status at the RPD hearing, including hospital reports (documenting the attacks on his wife, nephew and niece) his CAR identity card, an attestation from his friend who introduced him to the party, confirming that he was a CAR party member, etc. The Respondent's argument on this issue would be more persuasive in a situation where the Applicant had done little to produce corroborating evidence at the hearing, and was truly using the PRRA process as another kick at the can for his refugee determination.

[35] Here, the facts indicate that the Applicant was quite diligent in securing information to support his refugee claim and only submitted the new evidence because he learned about the existence of the documents too late to bring it before the RPD Board. Given the potential importance a PRRA decision can have and the serious ramifications that can result from a negative assessment, it seems inappropriate to apply an extremely strict interpretation of paragraph 113(*a*) in order to exclude evidence that might ground a person's claim for protection. That is why I find that the conclusions of the PRRA Officer on this issue are reviewable.

2. *Did the PRRA Officer commit a patently unreasonable error when she concluded, in the alternative, that the evidence held little weight because they were not credible?*

[36] The applicable standard of review in this necessary fact based weighing of the new documents is that of patent unreasonableness. Moreover, the PRRA Officer expressed reservations about the credibility of these new documents. Consequently, this Court will not intervene unless I am satisfied that based on the evidence before her, it was open to the PRRA Officer to conclude as she did. This point was reiterated by my colleague, Justice Yvon Pinard in *Bilquees v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 157, [2004] F.C.J. No. 205 (T.D.) (QL) at paragraph 7:

> The PRRA officer found, like the panel that preceded her, that the applicants were not credible. The evaluation of credibility is a question of fact and this Court cannot substitute its decision for that of the PRRA officer unless the applicant can show that the decision was based on an erroneous finding of fact that she made in a perverse or capricious manner or without regard for

> the material before her (see paragraph 18.1(4)(d) of the Federal Court Act, R.S.C. 1985, c. F-7). The PRRA officer has specialised knowledge and the authority to assess the evidence as long as her inferences are not unreasonable (*Aguebor v. Canada (M.E.I.)* (1993), 160 N.R. 315 (F.C.A.)) and her reasons are set out in clear and unmistakable terms (*Hilo v. Canada* (M.E.I.) (1991), 15 Imm.L.R. (2d) 199 (F.C.A.)).

[37] Applied to the decision under review, the PRRA Officer accorded little or no weight to each of the three new documents because they were in essence not credible. Counsel for the Applicant argues that this is patently unreasonable in that the PRRA Officer, in the alternative, stated that of the first two documents showing that the Applicant was wanted by the authorities would be granted “little weight” in establishing that the Applicant was wanted by the authorities in Togo.

[38] Although the Officer put her findings in terms of weight, in reality, this was a credibility finding. The Wanted Notice (document # 1) has the name and photo of the Applicant, and states that he and others are wanted for political reasons. The Identification Record for the Arrest (document #2) has the name of the Applicant, his date of birth, his place of birth, the name of his parents, his profession, and his place of residence. It states that the person concerned is wanted for political reasons. Finally, the Applicant argues that all the personal information found in the Identification Record is consistent with the personal information found in his PIF. Thus, the possibility of the Identification Record and the PIF referring to different people is not realistic.

[39] The Respondent does not deal with this question except with respect to the issue of the oral hearing. I find the PRRA Officer’s dismissals of the documents are somewhat superficial. I give here only two examples: in the “Identification Record for the Arrest", the Officer noted an error in the spelling of the French word "Qu’elle" instead of “Quelle". In another instance, the Officer mentioned that the Identification Record for Arrest started by "#345...", while on another document provided by the Applicant, it showed a handwritten and circled number of "No 4345". This microscopic analysis is patently unreasonable.

3. *Did the PRRA Officer err by not holding a hearing, pursuant to ss. 113(b) of the Act and s. 167 of the Regulations?*

[40] As the Court stated at paragraph 3 above, it is not necessary to answer this question.

[41] The Applicant proposes the following question for certification:

> Does the phrase "reasonably available" in section 113(1) of the Immigration and Refugee Protection Act 113(a) mean reasonably available to the applicant because of what the applicant could reasonably have done or can it mean reasonably available to the

> applicant or someone other than the applicant because of what someone other than the applicant could reasonably have done?

[42] The Respondent is opposed to the certification of the question.

[43] The Court agrees with the Respondent when it argues that the question does not transcend the interests of the immediate parties to this litigation.

JUDGMENT

THE COURT ORDERS that

1. The application for judicial review is allowed and the matter is sent back to be re-determined before a different PRRA Officer.

2. No question is certified.

"Michel Beaudry"

Judge