Date: 20070301

Docket: IMM-4055-06

Citation: 2007 FC 240

OTTAWA, ONTARIO, MARCH 1, 2007

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

RODON ELEZI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] Rodon Elezi applied for refugee status after escaping his native country, Albania. After the Refugee Protection Division of the Immigration and Refugee Board (the Board) dismissed his claim, Mr. Elezi applied for a Pre-Removal Risk Assessment (PRRA). On June 20, 2006, a PRRA officer rejected his application. This is a judicial review of the officer's decision.

[2] For a number of reasons to be outlined below, I have decided to grant Mr. Elezi's application, quash the officer's decision and remit the matter back to a different officer.

FACTS

[3] Mr. Elezi, an Albanian citizen, was born in 1975 in Lushnje, Albania. He arrived in Canada on June 21, 2004, and claimed refugee status at the border. He submits that if returned, he will be murdered by extremists as retribution for supporting his town's Democratic Party.

[4] Mr. Elezi's Personal Information Form narrative goes back to his grandfather's 1948 execution by communists for his "anticommunist intellectual ideas". During the Communist Party's reign in power, all of his family's property was confiscated and they were sent to a labour camp in Lushnje. Mr. Elezi and his sister suffered from discrimination during childhood because of their family's political history.

[5] In the early 1990s, Albania's democratic movement gained strength. Mr. Elezi's father and uncle founded the Lushnje Democratic Party branch, and Mr. Elezi became politically involved himself, joining the Youth Democratic Forum in September 1993. At the end of 1996, he also started working as a judicial advisor for the District Council of Lushnje in the Commission for the Return and Compensation of Property of Ex-owners (the Commission). The Commission helped people whose property had been seized by the Communists while they were in power.

[6] In March 1997, Mr. Elezi says extremists burned down his office at the Commission, along with hundreds of files inside containing property documents dating back to 1945. After the fire, Mr. Elezi tried to reconstruct the files so people who had their property stolen could be compensated. But in December 1997, men came to his office and threatened to kill him. After receiving further threats by phone, he decided to go to Greece in January 1998 - but had to go back to Albania after a few weeks because he only had a visa for one month.

[7] In October 2000, Mr. Elezi says the Socialist Party fraudulently won local elections. He says criminal groups helped the party, including one led by a man named Aldo Bare. Several months later, Mr. Elezi was fired from his job and replaced by a member of the Socialist Party. However, he continued to receive threats from people who blamed him for losing property that they had seized illegally in the first place during the communist regime.

[8] In November 2001 Mr. Elezi fled to Italy, but Italian authorities sent him back to Albania two days later. He made continued efforts to leave, and in December 2002, contacted someone to traffic him to Canada. In January 2003, he flew to Ecuador en route to Canada. However, after five months, the trafficker told Mr. Elezi security was too tight to continue on to Canada. Again, he returned to Albania.

[9] The main facts supporting Mr. Elezi's claim relate to the Lushnje election held in October, 2003. In preparing for the election, the Democratic Party appointed Mr. Elezi's father Chairman of the local Electoral Commission. This led to more threats against the family. Those threats were focused on Mr. Elezi, as his sister had emigrated to the U.S. by that time. Socialist Party supporters continually pressured Mr. Elezi's father to help them "win" the election. When he refused to manipulate the election results, they told him they had sources in Albania's Information Agency and police department, and that they would kill his son.

[10] On September 10, 2003, Mr. Elezi was beaten by three men on his way to a Democratic Party demonstration. Before leaving, the men allegedly said: "Say 'hi' to your father by the group, and don't forget that we remember all the bad things you have done to us. This is only the beginning. Next time we will be using these" – and

showed Mr. Elezi their guns. Mr. Elezi says two police officers witnessed the assault and did nothing to help him.

[11] In October 2003, the Democratic candidate, Mr. Kadri Gega, won the election and became mayor of Lushnje. From then on, Mr. Elezi hid in his family's home, and had his family spread rumours that he had already fled the country. He did not actually leave until February 2004, to stay with a friend in Italy for two months. That friend loaned him money and got him a fake Italian passport, which Mr. Elezi used to travel to Canada. On June 19, 2004, Mr. Elezi took a train from Torino to Paris. The next day, he flew to Montreal.

[12] Mr. Elezi says his family still receives threats from criminals, claiming they will murder Mr. Elezi as retribution for his father's failure to help the Socialist Party win the 2003 elections. He says his family believes the threats because the same people tried to murder Mr. Elezi's uncle, Kamber Elezi, in October 1998. His uncle fled to Canada and successfully claimed refugee status here.

[13] The Board rejected Mr. Elezi's refugee claim on October 28, 2004. It made negative findings about his credibility, based on his testimony about his work with the Commission in Albania. It concluded he did not actually work for the Commission, because he could not tell the Board when it had been created, and by which political party. The Board also found he was not a Convention refugee because he lacked subjective fear: he had waited six months to leave after having been attacked, he had transited through several countries where he could have claimed refugee status before arriving in Canada, and he had returned to the same city each time he came back to Albania after trying to flee. Finally, the Board concluded that vengeance is not a ground covered by the Convention, and that the Albanian government was able to protect Mr. Elezi from any threats.

[14] On March 3, 2005, this Court dismissed Mr. Elezi's application for leave to seek judicial review of the Board's decision. He applied for a PRRA, which was denied June 20, 2006. On August 7, 2006, this Court granted a stay of Mr. Elezi's removal order until it decided this application for judicial review.

IMPUGNED DECISION

[15] The PRRA officer concluded that out of 30 documents Mr. Elezi submitted to support his application, he would not consider the first 20 because they were not "new evidence" under subsection 113(a) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the IRPA). The first six documents Mr. Elezi provided were undated, and thus it was impossible to know whether or not they predated the Board's decision. In any event, the officer noted, the facts recounted in these documents were all known to their authors and to Mr. Elezi when he filed his refugee status claim with the Board. Therefore, it was reasonable to expect that Mr. Elezi could have presented them to the Board. As for the other 14 documents, they all predated the Board's decision, so Mr. Elezi should have submitted them earlier.

[16] After excluding all of the above evidence, the officer concluded that organized crime poses a general threat to all Albanians, and so Mr. Elezi's risk was not personalized. Moreover, while documentary evidence shows that Albania's police, judiciary and administrative services suffer from corruption and inefficiency, the country's authorities fight criminality and corruption as best they can. Therefore, Mr. Elezi had not established the absence of state protection.

ISSUES

[17] The applicant has raised a number of issues with respect to the Board's decision. These issues can be reduced to the following four questions:

a) What is the appropriate standard of review?

b) Did the officer err by refusing to accept the 20 documents as "new evidence" under subsection 113(a) of the IRPA?

c) Did the officer err in his analysis of personalized risk?

d) Did the officer err in his analysis of state protection?

[18] Since I have come to the conclusion that the Board made an error in applying subsection 113(a), and because that issue is determinative of the application, it will not be necessary to deal with the third and fourth questions.

ANALYSIS

[19] Before turning to the issues identified in the preceding paragraph, I must say a word about a letter Mr. Elezi submitted in his application for this judicial review. It is written by Mr. Ilir Bano, Deputy of the Albanian Parliament, explaining that many letters in Mr. Elezi's application record are not dated because their authors were simply following Albanian custom. Mr. Elezi says he included Mr. Bano's letter to respond to the PRRA officer's scepticism about the undated letters.

[20] This Court has recognized on numerous occasions that the judicial review of a decision must be based only on the evidence that was before the decision maker: see, for example, *Pandher v. Canada (Minister of Citizenship and Immigration and Minister of Public Safety and Emergency Preparedness)*, 2006 FC 80; *Zolotareva v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1274. I must therefore disregard this document, as it was not part of the record when the PRRA officer made his determination.

a) Standard of review

[21] It is by now well established that the proper standard of review for a PRRA decision, when considered globally and as a whole, is reasonableness: *Figurado v. Canada (Solicitor General)*, 2005 FC 347. While agreeing with this standard, Justice Richard Mosley refined it somewhat in *Kim v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 437. After conducting a pragmatic and functional analysis of the relevant legislative provisions, he concluded, at paragraph 19, 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."

[22] When assessing the issue of new evidence under subsection 113(a), two separate questions must be addressed. The first one is whether the officer erred in interpreting the section itself. This is a question of law, which must be reviewed against a standard of correctness. If he made no mistake interpreting the provision, the Court must still determine whether he erred in his application of the section to the particular facts of this case. This is a question of mixed fact and law, to be reviewed on a standard of reasonableness.

b) Subsection 113(a)

[23] Subsection 113(a) of the IRPA states 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;

[24] Mr. Elezi submits that because the three parts of subsection 113(a) are separated by the word "or", they should be considered three distinct situations in which an applicant can be considered to present "new" evidence. In other words, he argues the test under subsection 113(a) is disjunctive. Applying that notion to this case, he submits the 20 new documents fit within the first branch of subsection 113(a) – "new evidence that arose after the rejection …" Thus, according to Mr. Elezi's submissions, it does not matter whether the evidence was reasonably available at his hearing, or whether he could have presented it earlier.

[25] To support this proposition, Mr. Elezi relies on the case of *Mendez v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 111, in which Justice Douglas Campbell allowed a Mexican claimant's application for judicial review. The new evidence in *Mendez* was documentation from a similarly situated applicant, whose refugee claim had succeeded (the Flores evidence). Mr. Mendez tried to submit the Flores evidence in his PRRA application to prove that, contrary to the Board's conclusion, health care professionals in Mexico discriminated against homosexual men with HIV/AIDS. Justice Campbell found that one letter within the package of evidence was dated after the Board's decision in Mr. Mendez's case. As such, it was an error to treat that letter the same way as the rest of the Flores evidence. He wrote:

> 17. As I expressed during the hearing of the present application, in my opinion,

> the PRRA Officer made an error in the application of s. 113(a) with regard to the letter signed by Mr. Flores. Section 113(a) requires a careful determination on the admissibility of evidence on three available grounds. In my opinion, precision is required in making a finding under this provision since important ramifications follow on the determination of the risk to be experienced by an individual applicant. In my opinion, the PRRA Officer failed to meet this expectation.
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> 18. Mr. Flores' letter of March 17, 2004 clearly post-dates the Refugee Board's decision in the present case. It appears that the PRRA Officer failed to understand this fact by lumping it in with the tendered evidence which pre-dates the Refugee Board's decision. I find that, as a result of this mistake, the PRRA Officer failed to understand, and consequently reach a clear decision on the Applicant's rectification argument of risk.

[26] I am prepared to accept that subsection 113(a) refers to three distinct possibilities and that its three parts must be read disjunctively. If the use of the word "or" is to be given meaning, the three parts of subsection 113(a) must clearly be seen as three separate alternatives. While the first part refers to evidence that postdates the Board's decision, the second and third parts obviously relate to evidence that predates its decision. Only evidence that existed before the Board's negative decision requires an explanation before it can be admitted with a PRRA application. As for evidence that arises after the Board's decision, there is no need for an explanation. The mere fact that it did not exist at the time the decision was reached is sufficient to establish that it could not have been presented earlier to the Board.

[27] That being said, a piece of evidence will not fall within the first category and be characterized as "new" just because it is dated after the Board's decision. If that were the case, a PRRA application could easily be turned into an appeal of the Board's decision. A failed refugee applicant could easily muster "new" affidavits and documentary evidence to counter the Board's findings and bolster his story. This is precisely why the case law has insisted that new evidence relate to new developments, either in country conditions or in the applicant's personal situation, instead of focusing on the date the evidence was produced: see, for example, *Perez v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1379; *Yousef v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 864; *Aivani v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1231.

[28] Justice Mosley heard the exact same argument that Mr. Elezi's counsel makes now in the case *Raza v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1385. Relying on *Mendez*, above, the applicant in *Raza* had submitted that subsection 113(a) provided for the admissibility of three distinct types of new evidence, and that only the second and third types of new evidence called for an explanation why they were not presented to the Board. As for the first type, evidence that arose after the Board's rejection, the applicant argued the only requirement was that it be created after the date of the Board's decision.

[29] Justice Mosley gave short shrift to that argument. He wrote:

> 22. It must be recalled that the role of the PRRA officer is not to revisit the Board's factual and credibility conclusions but to consider the present situation. In assessing "new information" it is not just the date of the document that is important, but whether the information is significant or significantly different than the information previously provided: *Selliah*, above at para. 38. Where "recent" information (i.e. information that post-dates the original decision) merely echoes information previously submitted, it is unlikely to result in a finding that country conditions have changed. The question is whether there is anything of "substance" that is new: *Yousef*, above at para. 27.
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> 23. In the present case, though the evidence of the applicant post-dates the refugee determination in time with respect to the date it was written, nothing in the letter, affidavits or articles is substantially different than the information that was before the Board. As noted by the Officer with respect to the letter and affidavits: they "refer only to the applicants' circumstances which were considered by the Board", "no new risk developments are contained", and they contain "essentially a repetition of the same information". In those circumstances, it was not patently unreasonable of the officer to question why they had not been present before. With respect to the articles in particular, the Officer noted that they were "generalized" and did not "address the

material elements of the present application".

[30] I fully agree with Mr. Justice Mosley's conclusions and I adopt them. The mere fact that a piece of evidence was created after the Board's rejection of a refugee claim will not, in and of itself, suffice to characterize that evidence as "new" for the purposes of subsection 113(a). There are other factors to take into consideration when assessing whether the evidence sought to be introduced arose after the Board's decision. One should not forget that this provision, like the rest of the IRPA, must be construed and applied in a manner that "ensures that decisions taken under this Act are consistent with the *Canadian Charter of Rights and Freedoms*…", and that "complies with international human rights instruments to which Canada is signatory" (paragraphs 3(3)(d) and (f) of the IRPA).

[31] This brings me to the PRRA officer's application of subsection 113(a) to the facts of this case. It is not obvious from a plain reading of the officer's decision that he interpreted subsection 113(a) incorrectly, as his reasons are not very detailed. However, I do believe he applied that section in an unreasonable way, considering the circumstances of this case and the nature of the evidence submitted.

[32] It is relevant, at this stage, to canvass the nature of the evidence that the PRRA officer excluded. Only then will it be possible to fully appreciate the reasonableness of his decision. The undated documents are all letters, accompanied by photocopies of their respective authors' passports.

[33] The first letter is from Mr. Rifat Demiri, a lawyer in Albania and a friend of Mr. Elezi's father. He confirmed that, contrary to the Board's findings, Mr. Elezi did work for the Commission, and that he was beaten and threatened by the "Lushnja Gang". The second and the third letters are from Nikan Gjeci and Altin Kreci, both of whom are Mr. Elezi's friends. They witnessed the beating in September, 2003.

[34] The fourth letter is from Mr. Kadri Gega, the Mayor of Lushnje, who won the local Lushnje elections in October, 2003. He knows Mr. Elezi personally, because they worked together in the Regional Council Executive Staff from 1997 to 2000. He believes Mr. Elezi is not safe anywhere in Albania, and that police cannot protect him.

[35] The fifth letter is from Mr. Ilir Bano, a Deputy in the Parliament of Albania. He personally knows Mr. Elezi because his father was chairman of Mr. Bano's electoral staff. He also writes that Mr. Elezi was attacked on September 10, 2003, and believes police are not able to protect citizens from mafia groups.

[36] The sixth letter is from Mr. Elezi's parents, and it corroborates all the main details of their son's story.

[37] Mr. Elezi also submitted various documents that predated the Board's decision. These include a dentist's note, confirming he had treated Mr. Elezi at home the night of September 2003, and documents from Mr. Elezi's work with the Commission to prove that he had indeed worked there. The PRRA officer similarly

disregarded an article about Emir Dobjani, the Albanian ombudsman. Mr. Elezi provided this document because the Board wrote that he should have contacted an ombudsman before fleeing Albania. The article quoted Mr. Dobjani advocating that certain groups – including people whose lives are threatened because of vengeance – should be able to claim asylum outside of Albania.

[38] All of this evidence is obviously extremely probative, and to a large extent, refutes all of the Board's conclusions against Mr. Elezi. Had he submitted this evidence at his Board hearing, the Board may well have written a very different decision. Yet, these documents do not raise any "new" risks, *per se*. The risks outlined were the same as those Mr. Elezi claimed during his hearing before the Board. Was it then reasonable for the PRRA officer to exclude all these documents on that basis? In my opinion, no.

[39] I believe the PRRA officer should have considered at least some of these documents pursuant to the first branch of subsection 113(a) of the IRPA. First, the letters appear to have been written after the Board's decision. They were notarized after the Board's decision, and the date on the envelopes in which they were sent also postdates the Board's decision. More importantly, however, I think the officer should have admitted the undated letters because they contain information that goes beyond a mere repetition of what was already in front of the Board. Unlike country condition reports and other documentary evidence of a general nature, the six letters that were excluded all directly relate to Mr. Elezi. The letters from his friends are first-hand witness accounts that corroborate his story. Of even more significance are the letters from state officials of the highest rank, which, lend credit to Mr. Elezi's fear of reprisals and to his claim that Albania cannot protect him.

[40] This approach, I hasten to say, appears to be consistent with this Court's findings in both *Mendez*, above, and *Raza,* above. In the latter decision, Justice Mosley went out of his way to distinguish the case before him from *Mendez*, opining that the new evidence in *Mendez* was "central to the applicant's claim as it went to the very heart of the Board's conclusion that he would not be at risk as a HIV-positive gay man in Mexico" (*Raza*, above, at paragraph 18). He added, at paragraph 22, that when assessing "new information", "it is not just the date of the document that is important, but whether the information is significant or significantly different than the information previously provided."

[41] In other words, the nature of the information, its significance for the case, and the credibility of its source, are all factors that can and should be taken into consideration in determining whether it can be considered "new evidence", when it appears to have been created after the Board's decision. In the context of the present case, I believe the information contained in the letters from the Mayor and from the Deputy, at the very least, qualify as "new evidence."

[42] As for the evidence that predated the Board's decision, I am also of the view that the PRRA officer erred in excluding it. However, here I believe the error relates to the second and third branches of subsection 113(a). The dentist's letter, confirming treated Mr. Elezi's injuries on September 10, 2003, was extremely relevant, because that is the day he claims he was attacked. The dentist's letter even notes that Mr. Elezi insisted on being treated at his home – which supports his

submissions about subjective fear. As for the documents emanating from the Commission, they all bear his name and confirm that he did work for the Commission. Finally, the article reporting on the Ombudsman's declaration was also extremely probative because it directly confirms Mr. Elezi's fears and his claim that he could not be protected in Albania.

[43] Not only were all these documents extremely helpful in assessing Mr. Elezi's claim, but he could not reasonably have been expected in the circumstances to have presented them to the Board. After all, the Board's hearing took place only three months after he arrived in Canada, and it does not require a stretch of the imagination to consider that this is not much time to gather that kind of evidence. The same applies, obviously, to the letters coming from the Mayor and the Deputy, if they were to be considered as evidence that arose before the Board's decision. Thus, even though I find that these two letters arose after the Board's rejection, in the alternative I believe they should have qualified as new evidence under the other branches of subsection 113(a).

[44] At the end of the day, I am of the view that it would be unconscionable for this Court not to grant Mr. Elezi a new hearing. Even though he might be at fault for not providing some of the excluded evidence earlier, this should not excuse a PRRA officer from using his discretion to consider such critical, direct evidence. That evidence goes to the very heart of the Board's conclusion, and certainly tends to confirm not only Mr. Elezi's story but also the risk he would be facing were he to be returned to Albania.

[45] If Canada is to respect its international obligations and abide by its *Charter of Rights and Freedoms*, it cannot disregard credible evidence that a person would be at risk if sent back to his or her country of origin on the sole basis that this evidence is technically inadmissible. Such a narrow interpretation of subsection 113(a) would make a mockery of our most fundamental commitments. It would also be incompatible with Parliament's objectives about how the IRPA is meant to be construed and applied. I am therefore in full agreement with Lorne Waldman when he writes, in his book *Immigration Law and Practice* (2nd ed.), at section 4.999:

> Finally, I would argue that the nature of the evidence itself should also be considered. If the evidence is highly probative of the case and is credible evidence, then the officer should generally exercise his or her discretion in favour of receiving the evidence because of the importance of the issues at stake. In the final analysis, if there is credible evidence that a person is at risk of torture, then any attempt to remove the person to that country would be a violation of s. 7. I doubt that any court would countenance removal in those circumstances, even if there were some failure on the part of the applicant to

> obtain the information at an earlier stage
> in the process.

[46] This finding, in and of itself, is sufficient to warrant sending the matter back to a different PRRA officer. Considering the potential impact and material significance of the evidence excluded from the officer's risk assessment, Mr. Elezi deserves the opportunity to have all of the evidence carefully reviewed. There is therefore no useful purpose served in addressing his other arguments, as they are closely intertwined with the facts as they were found.

[47] The applicant urged me to certify a number of questions, some having to do with the interpretation of subsection 113(a), and others related to the interplay between the Board's decision and the PRRA and to the issue of vengeance as a ground for granting refugee status under both sections 96 and 97.

[48] The last two sets of issues clearly do not raise any issue for certification, if only because I have not addressed them in these reasons. As for the questions related to the proper interpretation of subsection 113(a), I note that my colleague Justice Mosley has already certified two questions in *Raza*, above. I would therefore certify the same two questions (#1 and #2) and add two more of my own (#3 and #4):

1. Is "new evidence" for the purposes of s. 113(a) of the IRPA limited to evidence that post-dates and is "substantially different" from the evidence that was before the RPD?

2. Does the standard for the reception of "new evidence" under s. 113(a) of the IRPA require the PRRA Officer to accept any evidence created after the RPD determination, even where that evidence was reasonably available to the applicant or he/she could reasonably have been expected to present it at the refugee hearing?

3. In determining whether evidence has arisen after the Board rejects a refugee claim and is therefore "new," must the PRRA officer look only for new facts or new risks, or can he or she also take into consideration other factors like the nature of the information, its significance for the case, and the credibility of its source?

4. In light of paragraphs 3(3)(d) and (f) of the IRPA, is the PRRA officer precluded from considering personalized evidence that goes to the heart of an applicant's claim and establishes that he would be at risk if returned, when that evidence could conceivably have been presented to the Board?

ORDER

THIS COURT ORDERS that the application for judicial review is granted.

"Yves de Montigny"

Judge