Federal Court  Cour fédérale

Date: 20090708

Docket: IMM-4688-08

Citation: 2009 FC 712

Ottawa, Ontario, July 8, 2009

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

MARAT MOUMAEV
ROUSLAN MOUMAEV

Applicants

and

THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72 (1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of a decision of an Pre-Removal Risk Assessment (PRRA) officer (Officer), dated September 5, 2008 (Decision), refusing the Applicants' application to be deemed Convention refugees or persons in need of protection under sections 96 and 97 of the Act.

BACKGROUND

[2] The Applicants are father and son and both are citizens of Russia. They are of Chechen ethnicity. They resided in Cyprus with temporary status from 1995 to October 1999. In July 1999, they were issued Canadian visitor's visas from the Canadian Embassy in Moscow.

[3] The Applicants came to Canada by air on October 13, 1999 and made refugee claims on October 20, 1999. Their claims were joined together and heard by the Refugee Protection Division (RPD) on August 29, 2002, December 4, 2002 and January 27, 2003. Their refugee claims were denied on July 29, 2003 by the RPD because they had not proven their Chechen identity. The Principal Applicant (Marat) failed to provide his original birth certificate or a reasonable explanation for his failure to do so. The RPD also assessed the Applicants on risk and concluded that Marat was not a credible and trustworthy witness. Judicial review of the RPD decision was denied by the Federal Court on December 17, 2003.

[4] The Applicants applied for their first PRRA in 2004. This was denied on November 31, 2004 on the grounds that they had not proven their Chechen identity. Judicial review of this decision was denied on December 21, 2004.

[5] On January 5, 2005, the Applicants failed to appear for removal. In March 2005, they applied for permanent residence in Canada on Humanitarian and Compassionate (H&C) grounds. This application was approved in January 2008.

[6] In November 2005, Marat was detained on immigration hold and remained there until June 2006. Rouslan was also detained from April-May 2006. The Applicants' second PRRA was submitted in December 2005 and refused on January 17, 2006, because the evidence establishing their ethnic identity was not "new evidence."

[7] Judicial review of the second PRRA decision was allowed on July 6, 2007 and sent back to be re-considered in July 2007. An updated PRRA application was then submitted in July 2007. On August 13, 2007, the Applicants provided further submissions and evidence, including an updated country conditions package, to the PRRA officer.

[8] On January 4, 2008, the Officer granted the Applicants' H&C application. On that same date, the same Officer closed the Applicants' PRRA file, refusing to make a decision on the Applicants' PRRA application.

[9] The Applicants sought judicial review of the Officer's decision to close their PRRA file despite having being granted their H&C application. Their objection was that the Officer had not made a determination of their risk. The Applicants say it is important to them to obtain recognition as Convention refugees or Protected Persons. Leave was granted and the Respondent consented to having the PRRA decision reconsidered by the same Officer who had rendered the H&C application. On September 5, 2008, the reconsideration of the third PRRA application was refused. The Applicants seek judicial review of the third PRRA Decision.

DECISION UNDER REVIEW

[10] The Officer concluded that there was no evidence submitted by the Applicants that was sufficient to establish that they face more than a mere possibility of persecution in Russia. There was also insufficient evidence to establish, on a balance of probabilities, that the Applicants would face a personal risk of torture, risk to life or risk of cruel and unusual treatment or punishment if they were returned to Russia.

[11] The Officer found that an oral hearing was not required as the case did not meet the factors laid out in section 167 of the Regulations. The evidence did not raise any serious issues regarding Marat's credibility but was insufficient to overcome the credibility findings of the RPD.

[12] As regards the risk of mandatory military service that Rouslan would face, the Officer held that this issue had not been raised until the second PRRA application and could have been reasonably raised in front of the RPD or as part of the first PRRA application. An explanation as to why it had not been previously raised was not provided. The Officer found it was not a new development and she did not consider it in her assessment of the third PRRA application.

[13] The Officer noted the credibility findings of the RPD. She discussed the information put forward by Applicants' counsel to counter the concerns of the RPD. The evidence revealed that Marat had made several trips to Moscow after moving to Cyprus in July 1995. The Officer did not feel that the trips had been reasonably explained, or that any new evidence or explanations had been provided outside of what had previously been rejected by the RPD.

[14] The Officer also noted that there was no mention of the trip made by Marat to Chechnya to marry his second wife while he was visiting Russia in July 1999. This is the same trip for which he also received his Canadian visitor's visa. There was no explanation provided as to why the Applicants had not sought international protection during the four years they were in Cyprus. No new evidence or explanations had been raised to contradict the RPD's findings.

[15] Marat provided his workbook in an effort to prove that the Applicants did not go to Cyprus until July 1995. However, the workbook had not been provided at the original hearing; the excuse was that it was in Moscow during the time in question. Marat could, however, have presented the workbook at the hearing that followed in January 2003, but he did not. The Officer did not find that there was sufficient explanation as to why the workbook had not been presented for the initial PRRA application. Therefore, the workbook did not meet the requirements of new evidence.

[16] Despite not meeting the requirements of new evidence, the Officer did consider the workbook in her assessment. The Applicants stated that the last two entries in the workbook confirmed that Marat had worked in Moscow until May 25, 1995. The Officer found an entry noting voluntary termination of Marat's position in Moscow on November 8, 1994. Nothing indicated that he had worked from December 1994 to May 1995 in Moscow. Even if the Officer accepted that the workbook proved that Marat was working in Moscow until May 25, 1995, it still did not place him in Moscow at the time of the alleged persecution, which was June 1995. The Officer found that Marat's workbook and his explanations were insufficient to overcome the RPD's findings in relation to his credibility.

[17] In relation to section 96 of the Act, the Officer held that there was insufficient evidence before her to overcome the RPD's findings on the Applicants' subjective fear.

[18] In relation to risk of torture, risk to life or risk of cruel and unusual treatment or punishment, the Officer found that it was reasonable to conclude that if the Applicants were returned to Russia, (which was not likely since they had received a stay of removal and their application for permanent residence was in the second stage of the two-stage process), based on the evidence, the discrimination the Applicants would experience due to their Chechen ethnicity would be a disproportionate hardship but, on a balance of probabilities, not a risk of torture, risk to life or a risk of cruel and unusual treatment or punishment.

[19] The Officer concluded that the Applicants were neither Convention refugees or persons in need of protection.

ISSUES

[20] The Applicants submit the following issues on this application:

1) The Officer erred in concluding that the issue of the Applicants' Chechen identity was not determinative for the RPD;
2) The Officer breached the Applicants' rights to procedural fairness by refusing to conduct an oral hearing;
3) The Officer failed to consider the new risk of conscription facing Rouslan;
4) The Officer erred in concluding that the Applicants face only hardship and not section 96 and 97 risks in Russia.

STATUTORY PROVISIONS

[21] The following provisions of the Act are applicable in these proceedings:

Convention refugee	**Définition de « réfugié »**
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	**96.** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	*a*) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	*b*) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
Person in need of protection	**Personne à protéger**
97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	**97.** (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

Person in need of protection

Personne à protéger

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

Consideration of application

113. Consideration of an application for protection shall be as follows:

(*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;

(*b*) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required;

(*c*) in the case of an applicant not described in subsection 112(3), consideration shall be on the basis of sections 96 to 98;

(*d*) in the case of an applicant described in subsection 112(3), consideration shall be on the basis of the factors set out in section 97 and

(i) in the case of an applicant for protection who is inadmissible on grounds of serious criminality, whether they are a danger to the public in Canada, or

(ii) in the case of any other applicant, whether the application should be refused because of the nature and severity of acts committed by

Examen de la demande

113. Il est disposé de la demande comme il suit :

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) une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires;

c) s'agissant du demandeur non visé au paragraphe 112(3), sur la base des articles 96 à 98;

d) s'agissant du demandeur visé au paragraphe 112(3), sur la base des éléments mentionnés à l'article 97 et, d'autre part :

(i) soit du fait que le demandeur interdit de territoire pour grande criminalité constitue un danger pour le public au Canada,

(ii) soit, dans le cas de tout autre demandeur, du fait que la demande devrait être rejetée en raison de la nature et de la gravité de ses actes passés ou

the applicant or because of the danger that the applicant constitutes to the security of Canada.	du danger qu'il constitue pour la sécurité du Canada.

[22] The following provision of the *Charter of Rights and Freedoms,* enacted as Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11, is applicable in this proceeding:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.	**7.** Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

STANDARD OF REVIEW

[23] The Respondent submits that the Court may only intervene if a decision was made in a perverse or capricious manner or without regard to the material before the panel. The Respondent submits that the Applicants have not shown that the Officer ignored the evidence, misconstrued evidence or made any perverse or capricious findings.

[24] The Respondent says that the standard of review in this application is reasonableness. However, the Officer's findings warrant considerable deference. The Decision is justified, transparent and intelligible and falls "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See: *Dunsmuir v. New Brunswick* 2008 SCC 9 (*Dunsmuir*) at paragraph 47.

[25] In *Dunsmuir*, the Supreme Court of Canada recognized that, although the reasonableness *simpliciter* and patent unreasonableness standards are theoretically different, "the analytical

problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review": *Dunsmuir* at paragraph 44. Consequently, the Supreme Court of Canada held that the two reasonableness standards should be collapsed into a single form of "reasonableness" review.

[26] The Supreme Court of Canada in *Dunsmuir* also held that the standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[27] The Court in *Fi v. Canada (Minister of Citizenship and Immigration)* 2006 FC 1125 held, at paragraph 6, that the standard of review on a PRRA decision is reasonableness *simpliciter*. However, particular findings of fact should not be disturbed unless made in a perverse or capricious manner or without regards to the evidence before the PRRA officer. Erroneous findings of fact that are made in a "perverse or capricious manner or without regard to the material," are to be reviewed on the patent unreasonableness standard: *Canada (Minister of Citizenship and Immigration) v. Thanabalasingham*, [2004] 3 F.C.R. 523 (F.C.) at paragraph 51; *Powell v. Canada (Minister of Human Resources Development)*, [2000] F.C.J. No. 1008 (F.C.A.); *Mugesera v. Canada (Minister of Citizenship and Immigration)* 2003 FCA 325 at paragraph 25; and *Harb v. Canada (Minister of Citizenship and Immigration)* 2003 FCA 39 at paragraph 18.

[28] *Elezi v. Canada (Minister of Citizenship and Immigration)* 2007 FC 240 provided as follows at paragraph 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.

[29] On issues of credibility, the standard of review, pre *Dunsmuir*, has been patent unreasonableness: *Hou v. Canada (Minister of Citizenship and Immigration)* 2005 FC 1586 at paragraph 13 and *Aguebor v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 732 (F.C.A.) at paragraph 4.

[30] Thus, in light of the Supreme Court of Canada's decision in *Dunsmuir* and the previous jurisprudence of this Court, I find the standard of review applicable to issues (1) and (4) on this application to be reasonableness. When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir* at paragraph 47. Put another way, the Court should only intervene if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[31] The Applicant has also raised a procedural fairness issue for which the standard of review is correctness: *Suresh v. Canada (Minister of Citizenship and Immigration)* 2002 SCC 1.

[32] Issue (3) requires the Court to consider whether the Officer misinterpreted subsection 113(a) against a standard of correctness, and whether the Officer erred in her application of the subsection to the particular facts of the case, which requires a standard of reasonableness.

ARGUMENTS

The Applicants

Chechen identity

[33] The Applicants submit that the Officer erred by finding that the RPD's conclusion that they had not established their Chechen identity was not determinative. The Applicants submit that an applicant's identity is central to a refugee claim. The RPD's concerns about the Applicants' Chechen identity provided the context for the rest of its decision. The Applicants contend that the Officer downplays this finding in order to justify her reliance on the RPD's other credibility findings. However, the Applicants submit that the Officer's emphasis on the independence of these findings is misplaced. Having established their Chechen identity before the PRRA Officer, all of the RPD's credibility findings should have been viewed with suspicion.

Procedural Fairness/Refusing Oral Hearing

[34] The Applicants submit that the Officer's refusal to conduct an oral hearing breached their right to procedural fairness, since the Officer made significant credibility findings throughout the Decision.

[35] The Officer's Decision constitutes a reassessment of the evidence before the RPD and, by reassessing that evidence, the Officer makes her own credibility findings. In making these findings, the Officer examined the refugee hearing transcript and picked out portions of the Applicant's testimony that supported her adverse credibility finding, including parts of the transcript not referred to in the RPD's decision. The Officer rejects explanations given by the Applicants, particularly by the Principal Applicant in his PRRA application, as follows:

1) The Officer compares Marat's submissions with the transcript of the refugee hearing in order to reject the evidence explaining why he returned to Moscow to obtain travel documents;
2) The Officer analyses the transcript evidence, not referred to in the RPD's own reasons, in support of her own concerns about Marat's alleged re-availment;
3) The Officer assesses the new evidence and concludes that, contrary to the RPD's finding, if the Applicants were still in Moscow until July 1995 as they said they were, then they delayed leaving. The Officer disbelieves the Applicants' stated fear of persecution on a new ground.

[36] The Applicants submit that the Officer attempts to characterize their evidence as materially similar to that provided before the RPD in order to rely on the RPD's conclusion regarding the Applicants' subjective fear. The Officer does not, however, simply rely on the RPD's conclusion but reassesses the evidence and makes new credibility findings.

[37] The Officer rejected Marat's explanations with reference only to the evidence at his refugee hearing and his written PRRA submissions. She did not give him an opportunity to address the

Officer's concerns by way of an oral hearing and so breached his right to procedural fairness. See: *Zokai v. Canada (Minister of Citizenship and Immigration)* 2005 FC 1103 at paragraph 12.

New Risk to Principal Applicant's Son

[38] The Applicants also submit that Rouslan faces a new risk if he is returned to Russia because he is now of conscription age and will be required to perform military service. As a Chechen, he faces serious risks of mistreatment in the military. The Applicants allege that the serious mistreatment of Chechens in the Russian military was substantiated by documentary evidence. The Officer refused to consider these new risks as she was of the view that the issue ought to have been raised before the RPD.

[39] The Applicants say that the Officer erred in law by refusing to consider the new risks facing Rouslan. At the time the Applicants made their refugee claim in 1999, Rouslan was only 11 years old. Had the conscription risk been asserted at that time, it would have been considered "speculative and premature" by the RPD. In 2005, at the time of the Applicants' second PRRA application, conscription into the Russian army was a real and immediate prospect, as Rouslan was seventeen years old. It was reasonable for the Applicants to raise that issue at the time of the second PRRA as a new risk.

[40] The Applicants point to some of the objectives of the Act for refugees at subsection 3(2):

(2) The objectives of this Act with respect to refugees are	(2) S'agissant des réfugiés, la présente loi a pour objet :
(*a*) to recognize that the	*a*) de reconnaître que le

refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted;

programme pour les réfugiés vise avant tout à sauver des vies et à protéger les personnes de la persécution;

(*b*) to fulfill Canada's international legal obligations with respect to refugees and affirm Canada's commitment to international efforts to provide assistance to those in need of resettlement;

b) de remplir les obligations en droit international du Canada relatives aux réfugiés et aux personnes déplacées et d'affirmer la volonté du Canada de participer aux efforts de la communauté internationale pour venir en aide aux personnes qui doivent se réinstaller;

(*c*) to grant, as a fundamental expression of Canada's humanitarian ideals, fair consideration to those who come to Canada claiming persecution;

c) de faire bénéficier ceux qui fuient la persécution d'une procédure équitable reflétant les idéaux humanitaires du Canada;

(*d*) to offer safe haven to persons with a well-founded fear of persecution based on race, religion, nationality, political opinion or membership in a particular social group, as well as those at risk of torture or cruel and unusual treatment or punishment;

d) d'offrir l'asile à ceux qui craignent avec raison d'être persécutés du fait de leur race, leur religion, leur nationalité, leurs opinions politiques, leur appartenance à un groupe social en particulier, ainsi qu'à ceux qui risquent la torture ou des traitements ou peines cruels et inusités;

(*e*) to establish fair and efficient procedures that will maintain the integrity of the Canadian refugee protection system, while upholding Canada's respect for the human rights and fundamental freedoms of all human beings;

e) de mettre en place une procédure équitable et efficace qui soit respectueuse, d'une part, de l'intégrité du processus canadien d'asile et, d'autre part, des droits et des libertés fondamentales reconnus à tout être humain;

[41] The Applicants also cite the *Universal Declaration of Human Rights* at article 14.1 which states that "everyone has the right to seek and enjoy in other countries asylum from persecution."

[42] The Applicants also cite and rely upon section 115 of the Act:

115. (1) A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment.	**115.** (1) Ne peut être renvoyée dans un pays où elle risque la persécution du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques, la torture ou des traitements ou peines cruels et inusités, la personne protégée ou la personne dont il est statué que la qualité de réfugié lui a été reconnue par un autre pays vers lequel elle peut être renvoyée.

[43] The Applicants outline the ways in which refugees are treated differently from immigrants under the Act as follows :

1) Section 38(1) of the Act states that foreign nationals are inadmissible on health grounds if, *inter alia*, they "might reasonably be expected to cause excessive demand on health or social services." This ground of inadmissibility, however, does not apply to persons applying for permanent residence as Convention refugees or protected persons;

2) Section 42 of the Act states that foreign nationals are inadmissible if their accompanying (and sometimes non-accompanying) family members are inadmissible. This ground of inadmissibility, however, does not apply to protected persons;

3) Section 63 of the Act gives protected persons (among other specific classes of people) the right to appeal their removal orders to the Immigration Appeal Division;

4) Section 64 of the Act limits the rights of appeal to the Immigration Appeal Division, but not for protected persons;

5) Section 133 of the Act stipulates that protected persons cannot be charged with the offence of using false documentation to come to Canada;

6) Section 50(2) of the *Immigration and Refugee Protection Regulations,* SOR/2002-227 (Regulations) exempts protected persons from the requirement to provide travel documents such as passports when applying for permanent residence, where such documents cannot be obtained;

7) Section 229(2) of the Regulations states that Sections 229(2)(*b*), 300(2)(*b*), 303 (2)(*c*) and 305(2)(*c*) exempt protected persons from paying the processing fees for work, study and temporary resident permits and the right of permanent residence fee.

[44] The Applicants submit that, since the fundamental principle of non-refoulement applies to protected persons in Canada and they are given differential treatment as protected persons under the Act and the Regulations, PRRA applicants are entitled to a determination of their applications. Therefore, Rouslan is entitled to a determination of whether the new risks he faces in Russia warrant a finding that he is a protected person in Canada.

[45] The Applicants submit that the Officer's refusal to consider Rouslan's PRRA application violates section 7 of the *Charter of Rights and Freedoms* (*Charter*) and they cite *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177 at paragraphs 41, 44, 47, 52 and 57:

41…the Act does accord a Convention refugee certain rights which it does not provide to others, namely the right to a determination from the Minister based on proper principles as to whether a permit should issue entitling him to enter and remain in Canada (ss. 4(2) and 37); the right not to be returned to a country where his life or freedom would be threatened (s. 55); and the right to appeal a removal order or a deportation order made against him (ss. 72(2)(a), 72(2)(b) and 72(3)).

…

44 To return to the facts before the Court, it will be recalled that a Convention refugee is by definition [page206] a person who has a well-founded fear of persecution in the country from which he is fleeing. In my view, to deprive him of the avenues open to him under the Act to escape from that fear of persecution must, at the least, impair his right to life, liberty and security of the person in the narrow sense advanced by counsel for the Minister. The question, however, is whether such an impairment constitutes a "deprivation" under s. 7.

…

47…"security of the person" in s. 7 of the Charter should be taken. It seems to me that even if one adopts the narrow approach advocated by counsel for the Minister, "security of the person" must encompass freedom from the threat of physical punishment or suffering as well as freedom from such punishment itself. I note particularly that a Convention refugee has the right under s. 55 of the Act not to "... be removed from Canada to a country where his life or freedom would be threatened...". In my view, the denial of such a right must amount to a deprivation of security of the person within the meaning of s. 7.

…

52 It seems to me that the appellants in this case have an even stronger argument to make than the appellant in Mitchell. At most Mr. Mitchell was entitled to a hearing from the Parole Board concerning the revocation of his parole and a decision from the Board based on proper considerations as to whether to continue his parole or not. He had no statutory right to the parole itself; rather he had a right to proper consideration of whether he was entitled to remain on parole. By way of contrast, if the appellants had been found to be Convention refugees as defined in s. 2(1) of the Immigration Act, 1976 they would have been entitled as a matter of law to the incidents of that status provided for in the Act. Given the potential consequences for the appellants of a denial of that

> status if they are in fact persons with a "well-founded fear of persecution", it seems to me unthinkable that the Charter would not apply to entitle them to fundamental justice in the adjudication of their status.
>
> …
>
> **57** All counsel were agreed that at a minimum the concept of "fundamental justice" as it appears in s. 7 of the Charter includes the notion of procedural fairness articulated by Fauteux C.J. in *Duke v.* [page213] *The Queen*, [1972] S.C.R. 917. At page 923 he said:
>
> > Under s. 2(e) of the Bill of Rights no law of Canada shall be construed or applied so as to deprive him of "a fair hearing in accordance with the principles of fundamental justice". Without attempting to formulate any final definition of those words, I would take them to mean, generally, that the tribunal which adjudicates upon his rights must act fairly, in good faith, without bias and in a judicial temper, and must give to him the opportunity adequately to state his case.

[46] The Applicants submit that by refusing to consider the new risks facing Rouslan, the Officer denied Rouslan “the right to live in Canada with protected person status, which includes a more substantial freedom from the threat of deportation than that enjoyed by immigrants in Canada.”

Hardship and Section 96/97 of the Act

[47] The Applicants further submit that the Officer erred in concluding that they would not face section 97 risks in Russia without considering the Applicants’ evidence that demonstrated the contrary; in particular, they point to the Amnesty International letter which reads as follows:

> Amnesty International considers that Chechens are at risk of serious human rights violations because of the mass human rights associated with the armed conflict. Amnesty International also considers that Chechens are at risk of discriminatory treatment and human rights violations, including arbitrary detention and torture and ill-treatment, throughout the Russian Federation because of their ethnicity.

> Amnesty International considers that there is no evidence of the existence of an internal protection/flight alternative for Chechens anywhere in the Russian Federation for those fleeing the armed conflict. This is the case even for ethnic Chechens who have residence registration in parts of the Russian Federation outside the Chechen Republic, or who have never lived in the Chechen Republic.

[48] The Applicants submit that the above evidence, and other evidence which was not mentioned by the Officer in her Decision, casts doubt on whether an "adequately balanced assessment was conducted" by the Officer. The Applicants cite and rely upon *Castillo v. Canada (Minister of Citizenship and Immigration)* 2004 FC 56 at paragraph 9:

> Where evidence that relates to a central issue is submitted, the burden of explanation increases for the board when it assigns little or no weight to that evidence or when it prefers specific documentary evidence over other documentary evidence.

[49] In failing to consider all of the evidence before her, and evidence that contradicts her conclusions, the Officer committed reviewable errors.

The Respondent

Ethnic Identity

[50] The Respondent submits that it was open to the Officer to rely upon the credibility findings made by the RPD even though the Officer accepted that the Applicants were ethnic Chechens. The RPD made two findings concerning the evidence of the Applicants: (1) that they had not established they were ethnic Chechens; and (2) the Principal Applicant was not a credible or trustworthy witness. The Respondent notes that the RPD identifies these as separate issues. The RPD discusses these issues separately and relies upon different facts and provides a separate analysis for each.

[51] The Respondent says that the first finding was based on the Principal Applicant's failure to produce original documents and the second on the Principal Applicant's evidence, specifically the internal inconsistencies and contradictions within his PIF, and the implausibilities of his evidence.

[52] The Respondent submits that these two matters were dealt with separately by the RPD and that the conclusions concerning one are not determinative of the other. Hence, it was open to the Officer to rely upon the second finding that Marat was not a credible and trustworthy witness in reaching her Decision on the PRRA application.

Oral Hearing

[53] The Respondent submits that the Officer did not reassess the refugee claim but relied upon the credibility findings of the RPD. The Officer found that the new evidence did not address the concerns of the RPD. Therefore, there was no requirement to provide an oral hearing for the Applicants.

[54] The Respondent relies upon section 113(b) of the Act which provides that a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required. Section 167 of the Regulations outlines these prescribed factors as follows:

167. For the purpose of determining whether a hearing is required under paragraph 113(*b*) of the Act, the factors are the following:	167. Pour l'application de l'alinéa 113*b*) de la Loi, les facteurs ci-après servent à décider si la tenue d'une audience est requise :
(*a*) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out	*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 (*c*) whether the evidence, if accepted, would justify allowing the application for protection.	*b*) l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection; *c*) la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection.

[55] The Respondent points out that the Officer noted the following credibility findings in the RPD decision:

1) Inconsistencies concerning whether Marat was in Russia in 1995, when he allegedly experienced persecution. The RPD found that Marat was not in Russia at any time in 1995;
2) Given the context of Chechen and Russian relations, it was implausible that Marat went to the police due to his fears of animosity between the two groups;
3) Marat's return trips to Russia from Cyprus (four times between May 1998 and October 1999) were inconsistent with a subjective fear of returning to Russia.

[56] As regards re-availment, the Officer noted that the explanations offered in the PRRA submissions were materially similar to those before the RPD and that "little new evidence or explanations have been provided outside of those previously provided to, and rejected by, the Board."

[57] The Respondent points out that the RPD raised a concern that Marat had returned to Russia to establish a business, while he told the RPD that he was not seen when he returned to Russia. This

was found to be implausible. In Marat's PRRA submissions, he indicated that he had not understood the question. However, the Officer noted that this explanation was not supported by the evidence provided to the RPD and that it was clear that one of the reasons Marat stated he was returning to Russia was to start a business.

[58] In the Respondent's view, the Officer did not reassess the refugee claim; she weighed the evidence provided (as well as the new explanations) and found that they were not consistent with the evidence from the refugee claim.

[59] The Respondent notes that the Officer considered the evidence of the Applicant's Russian workbook and noted that it was not new evidence because it had been available at the time of the RPD hearing and there was no reasonable explanation as to why it had not been provided earlier. The Officer assessed this evidence, however, and found it did not overcome the finding that Marat was not in Russia at the time of the alleged persecution in June 1995. Therefore, the entries in the workbook did not establish that Marat was working in Moscow until May 25, 1995 and, even if it did, the relevant time was June 1995.

[60] The Respondent submits that the Officer did not introduce new grounds to disbelieve the Applicants' testimony, but supported the findings of the RPD concerning the lack of Marat's subjective fear. The onus was on the Applicants to provide new evidence to overcome the finding of the RPD and, because they failed to do so, the Officer properly relied on this finding in rejecting the PRRA.

[61] The Respondent says that the Officer made no error in assessing the evidence in this manner. The Officer stated that "the evidence has not raised any serious issues regarding the applicant's credibility. The evidence has been found, however, to be insufficient to overcome the credibility findings in the decision of the Board." Hence, there was no requirement for the Officer to hold an oral interview, as the Officer was not making new findings concerning credibility. The factors of section 167 of the Regulations had not been met. See: *Doumbouya v. Canada (Minister of Citizenship and Immigration)* 2007 FC 1187.

No Conscription Risk

[62] Rouslan was born in March 1988 and was 15 at the time the refugee claim was denied, 16 at the time of the first PRRA and 17 at the time of the second PRRA. The Respondent notes that the issue of his risk (due to conscription) was only raised for the first time in the second PRRA. The Officer also noted that this was an issue at the time of the first PRRA. It was open to the Officer to conclude that this was not a new risk development.

Evidence Not Ignored

[63] The Respondent submits that the Officer did not ignore evidence in reaching her Decision concerning the risk to the Applicants as ethnic Chechens. The Officer's assessment of the evidence concerning risk to Chechens was noted as follows:

1) Many articles speak to the conditions in Chechnya but the Applicants had not lived there in many years;
2) The evidence of personal experiences of harm had not been established as credible;

3) Marat has a Slavic appearance and he does not appear Chechen;

4) Documentary evidence refers to random acts of violence against foreigners but Marat's physical appearance would not put him at risk of such measures;

5) There is no mention of incidents occurring to Marat's former or current wife, nor his son in Russia;

6) The Applicants can expect to face a level of discrimination which could amount to disproportionate hardship, but not a risk to torture, risk to life or risk of cruel and unusual treatment or punishment.

[64] The Respondent submits that the Officer did not err by failing to mention the Amnesty International letter which refers to the general situation of Chechens in Russia. The Officer took this evidence into account but it was not specific to the personal situation of the Applicants and did not need to be specifically mentioned in the Decision. See: *Kaba v. Canada (Minister of Citizenship and Immigration)* 2007 FC 647 (*Kaba*).

ANALYSIS

Chechen Identity

[65] The Applicants assert that their Chechen identity was the issue in their RPD claim and the RPD's finding on identity was "essentially an adverse credibility finding" that cannot be separated

from the RPD's other findings. Hence, the PRRA Officer should not have placed such strong reliance on the RPD's credibility findings regarding the Applicants' subjective fear of persecution.

[66] The simple answer to this assertion is that the RPD's findings on Chechen identity and credibility are distinct. This is made clear in the RPD's decision and in the PRRA Officer's Decision. The fact that Chechen identity was established for the purposes of the PRRA Decision does not affect the negative credibility findings of the RPD concerning Marat's evidence.

[67] The Officer made it clear in the Decision that the RPD's credibility findings were stated "separately and independently of its conclusions related to the establishment of the principal applicant's (Chechen) identity."

[68] The Officer relies upon the RPD's findings in relation to Marat's credibility as a witness, specifically on the issues of where he was in the years in question, when his problems started and his trips to Russia while residing in Cyprus. None of the evidence relied upon by the Officer in this part of the Decision related to the Applicants' Chechen identity. Later, when the Officer does address the issue of the Applicants' Chechen identity, she notes that the "lack and/or authenticity of documents regarding their ethnicity was not what the Board decision turned on, nor was it the crux of the credibility findings, which were instead related to implausibilities and inconsistencies in the principal applicant's testimony." The Officer again stresses that "the Board addressed these two issues (identity and credibility) separately and independently in its decision on the applicants' refugee claim.

[69] I can find nothing to support the Applicants' submissions on this point and no reviewable error in this regard.

Procedural Fairness/Refusing Oral Hearing

[70] The Applicants say that the Officer's refusal to conduct an oral hearing breached their right to procedural fairness since the Officer made significant credibility findings throughout the Decision.

[71] A PRRA officer can only consider "new evidence" as prescribed by section 113(b) of the Act. Section 167 of the Regulations outlines the factors to be considered for a hearing under paragraph 113(b) of the Act.

[72] My review of the Decision leads me to conclude that the Applicants' characterization of the Officer's reasoning is incorrect. The Officer did not re-assess the Applicants' refugee claim. She simply weighed the new evidence and the new explanations and found that they did not overcome the problems identified by the RPD. In my view, she did not introduce a new ground to disbelieve the Applicants. Hence, there was nothing to warrant an interview under section 167 of the Regulations. I can find no reviewable error on this point.

Hardship and Section 96/97 of the Act

[73] The Applicants submit that the Officer erred in concluding that the Applicants would not face section 96 persecution and section 97 risks in Russia without considering the Applicants' evidence that demonstrated the contrary, particularly the Amnesty International letter.

[74] The Officer did not need to mention every piece of evidence she considered. If the evidence is not specific to the personal situation of the applicant, it need not be mentioned in the Decision: *Kaba.*

[75] The Officer mentioned the many "articles submitted by counsel [that] speak to the conditions in Chechnya." The Officer notes that they are "not the conditions that the applicants would be returning to," but "feed into some of the anti-Chechen and anti-Caucasus sentiments that are found throughout Russia, as reported in much of the documentary evidence."

[76] The Officer is candid that the country condition reports speak about "discriminatory and xenophobic attitudes…incidents of discrimination, harassment, and violence against religious and ethnic minorities…widespread governmental and societal discrimination as well as racially motivated attacks against ethnic minorities and dark-skinned immigrations." The Officer does not ignore this evidence, but she applies it to the particular circumstances of the Applicants.

[77] The Officer provides a clear assessment of the evidence concerning risks to Chechens. Given this assessment, it is my view that the Officer did not err by failing to specifically mention the Amnesty International letter which refers more generally to the situation of Chechens in Russia. The analysis conducted by the Officer took this evidence into account but, as it was not specific to the personal situation of the Applicants, it did not need to be specifically mentioned in the decision.

[78] At the hearing of this application, the Applicants argued further that the Officer had failed to take the Amnesty International letter into account in considering whether the discrimination referred to in that letter could, on cumulative grounds, have risen to the level of persecution under section 96 of the Act.

[79] The Officer's conclusions on section 96 were that "there was insufficient evidence before me to overcome the Board's findings on the applicant's subjective fear." As the Officer points out, a "well-founded fear of persecution requires both a subjective and objective element." The problem for the Applicants was that they could not establish subjective fear. Hence, I cannot say that the Officer committed a reviewable error by not specifically mentioning cumulative grounds or the Amnesty International letter in relation to persecution under section 96, particularly when this does not appear to be an issue that the Applicants raised with the Officer. The Decision is clear that the Officer considered the risks faced by the Applicants, considered the evidence put forward, and concluded that there was insufficient evidence to overcome the Board's findings on the Applicants' subjective fear of persecution.

New Risk to Rouslan - Conscription

[80] This risk is specifically identified by the Officer as an additional risk put forward by the Applicants. The Officer finds that this is not a new risk development because "this issue could reasonably have been raised at the Board, or in the first PRRA application, and no explanation has been provided as to why it was not previously raised."

[81] As the Respondent points out, Rouslan was born in March 1988 and was 16 years old at the time of the first PRRA and 15 years old at the time of the RPD hearing. I can find no evidence of when Rouslan became subject to conscription. It is not possible for me to say that the Officer's conclusions on this point were unreasonable and do not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. This application is dismissed.

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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DATED:	July 8, 2009

APPEARANCES:

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