Date: 20091007

Docket: IMM-1373-09

Citation: 2009 FC 1014

Ottawa, Ontario, October 7, 2009

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

KAYVAN GHARGHI

Applicant

and

THE MINISTER OF
CITIZENSHIP AND IMMIGRATION and
THE MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by a Pre-Removal Risk Assessment (PRRA) Officer dated February 12, 2009, that the applicant cannot base his PRRA on risk related to his Christian religion because the applicant has not provided sufficient evidence why he could not reasonably have been expected to have presented this evidence before the Refugee Board when he made his refugee claim for fear of persecution related to his political beliefs.

[2] The evidence established that the applicant was practicing Christianity in Iran before he arrived in Canada. The applicant did not base his claim before the Refugee Board on apostasy, the renunciation of his Muslim belief or faith, which is a crime in Iran. Moreover, the evidence demonstrated that the applicant did not proselytize Christianity in Iran, and does not do so now in Canada.

[3] In the Court's Judgment, it was reasonably open to the PRRA Officer to conclude that the evidence about the applicant's Christian religion is not an event that occurred or a circumstance that arose after the Refugee Board hearing, and the applicant has not presented a reasonable explanation why evidence of his conversion to Christianity could have been presented at the Refugee Board hearing. Accordingly, the PRRA Office reasonably found that this evidence does not meet the requirements of subsection 113(a) of PRRA, and therefore cannot be considered by the PRRA Officer as new evidence.

FACTS

[4] The 35 year old applicant is a citizen of Iran. He arrived in Canada on December 25, 2002 at which time he claimed refugee protection.

[5] The basis for the applicant's claim for refugee protection was fear of political persecution for having written anti-regime or anti-clergy poems. The applicant also "ticked-off" religion as one of the bases for his refugee claim, and told the POE officer that religion was one reason for seeking refugee status.

[6] However, the applicant did not base his claim for refugee protection before the Board on his fear of religious persecution for having converted to Christianity from Islam. The applicant stated at page 19 of his Personal Information Form (the PIF):

> …From time to time I returned to Ahwas to visit my parents and met with Hamid. Hamid talked to me about Christianity; as much as I learned, in my heart I feel I am a Christian, *but this is not the reason which made me flee Iran* (emphasis added).

The applicant noted at page 19 of his PIF that his father was later told by Iranian authorities that his friend Hamid disclosed the applicant's religious conversion to Christianity to Iranian investigators:

> … After my father was released, he informed me that I was being accused by the sepah of being anti-revolutionary, anti-clergy leadership, active in an anti-revolutionary group who were the enemy of Islam. Sepah told my father, Hamid was arrested, he was accused to have used his job at the supermarket as a cover for his political activities; Sepah told my father, Hamid had confessed to my political activities and had confessed to my being an infidel, a non-believer, and being against Islam and the Prophet. My father was told I was a Mortad, corrupt on earth. My father was told I had insulted the Imam, Islam, and the foundation of Islam. My father was told I should be executed.

[7] However, on July 26, 2004, the Refugee Protection Division of the Immigration and Refugee Board (the Board) concluded that the applicant was not a Convention refugee or person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the IRPA) because of political persecution. The Board found the applicant to be untrustworthy and without credibility based on the inconsistencies in his testimony and PIF.

[8] Leave to judicially review the Board's decision was denied by order of this Court on November 16, 2004.

[9] The applicant subsequently applied for a PRRA.

Decision under review

[10] On September 9, 2008, the applicant initiated a PRRA application, wherein he argued that due to his religious background, namely his conversion from Islam to Christianity; he would face arrest, detention, torture, and possibly even death if forced to Iran.

[11] Before the PRRA Officer, the applicant submitted that although born to Muslim parents, as an adult he began to practice Christianity and later adopted it as his religion. In support of his application the applicant provided four new affidavits sworn by:

1. the applicant himself,
2. Hossein Aznavehzadeh,
3. Vida Shahsavar, and
4. Beren Yousef.

[12] In his affidavit, the applicant described his birth to a Muslim family in Iran and his conversion to Christianity after meeting a friend named Hamid. The applicant attended 12 underground Christian church meetings in Iran before leaving for Canada.

[13] The affidavit of Hossein Aznavehzadeh, the interpreter who helped the applicant complete the PIF, refers generally to his knowledge of the fate of Iranian returnees to Iran, particularly failed refugee claimants who escaped because of their conversion to Christianity. This affidavit also deposes that:

> … When completing the PIF and at the time of having his Port of Entry interview the Applicant consistently indicated that he follows the Christian religion;
>
> …
>
> 6. The applicant's Christian religion was not pursued as a basis of his claim to Convention refugee status as the Applicant indicated that the government was unaware of his adoption of the Christian religion and he therefore did not encounter any difficulty of this *(sic)*;

[14] The affidavits of Vida Shahsavar and Beren Yousef confirm the applicant's attendance at a Christian church while in Canada and his belief in Christianity, as well as their beliefs of the risk to the applicant should he be removed back to Iran.

[15] The PRRA Officer accepted the applicant's evidence which supported his claim to secretly practicing Christianity in Iran and in Canada under a low profile.

[16] The PRRA Officer referred to *Kaybaki v. Canada (Minister of Citizenship and Immigration),* 2004 FC 32, where it was held that the purpose of a PRRA is not to reargue issues that were before the Board at a refugee hearing, but rather to assess new risk developments between the hearing and the removal date. The PRRA Officer states at page five of the decision that the

applicant should have submitted evidence to the Board regarding the risk of religious persecution, and having failed to do that, his submissions cannot be accepted as new evidence:

> …The applicant had opportunity to put forth this risk at his refugee hearing. He indicated in his PIF that he was a Christian. He was represented by legal counsel at his refugee hearing. *He does not indicate why now he fears persecution because of his religion when he was a Christian in Iran*. The applicant has provided insufficient evidence of why he could not reasonably have been expected in the circumstances to have presented this risk at his refugee hearing. *Therefore I am not considering this risk as well as the supporting documentary evidence as new evidence*. I find this evidence does not meet the requirements of 113 *(sic)* of the Immigration and Refugee Protection Act (emphasis added).

[17] The PRRA Officer accepted as new evidence a translation of an Iranian Court summons and an Investigation Sheet along with a photocopy of the original dated May 5, 2009. The PRRA officer assigned little weight because the same credibility concerns that the Board noted with respect to the first summons were applicable to the second summons. The applicant did not address the credibility concerns regarding the summons, namely by failing to supply the name and address of who received the document, how it was received, and when. The applicant was unable to provide the envelope in which the document arrived or explain why a summons arrived six years after the last summons.

[18] The PRRA Officer acknowledged that the documentation counsel submitted in relation to the human rights conditions in Iran demonstrated that they were "far from favourable". Nevertheless, the PRRA Officer concluded at page six of the decision that the information provided by counsel "did not overcome the credibility issues the RPD panel had":

> …however the information in these documents are personal to the applicant. The information would affect every citizen and resident of Iran. They do not overcome the credibility issues the RPD panel had.

[19] On this basis the PRRA Officer rejected the applicant's application. It is this decision that the applicant seeks to have judicially reviewed.

LEGISLATION

[20] The Court will reproduce sections 96 and 97 of IRPA for ease of reference:

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, (*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 (*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.	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*) 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*) 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.

[21] Section 97 of IRPA:

97. (1) A person in need of	97. (1) A qualité de personne à

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

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

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

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

(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,

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

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

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

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

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

[22] Section 112(1) of IRPA allows persons subject to a removal order to apply to the Minister for protection:

112. (1) A person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force or are named in a certificate described in subsection 77(1). …	112. (1) La personne se trouvant au Canada et qui n’est pas visée au paragraphe 115(1) peut, conformément aux règlements, demander la protection au ministre si elle est visée par une mesure de renvoi ayant pris effet ou nommée au certificat visé au paragraphe 77(1). …

[23] Section 113(a) of IRPA allows a PRRA applicant to present only evidence that arose after the rejection of the refugee claim:

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] Subsection 161(2) of the IRPR requires the applicant to identify 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.	(2) Il désigne, dans ses observations écrites, les éléments de preuve qui satisfont aux exigences prévues à l'alinéa 113*a*) de la Loi et indique dans quelle mesure ils s'appliquent dans son cas.

ISSUES

[25] The applicant raises the following issues in his submissions:

i. Did the Officer act unreasonably in excluding the new risk of religious persecution and the supporting evidence under subsection 113(a) of IRPA?

ii. Did the Officer ignore, assign an unreasonably low value, or misapprehend relevant evidence with regard to the risk of religious persecution of the applicant in Iran?

iii. Did the Officer err in finding that the risk to applicant was not personalized under s. 97 (1)(b) of IRPA?

STANDARD OF REVIEW

[26] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, 372 N.R. 1, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of (deference) to be accorded with regard to a particular category of question (see *also Khosa v. Canada (MCI)*, 2009 SCC 12, per Justice Binnie at para. 53)."

[27] The issues raised by the applicant concern the reasonableness of the PRRA Officer's decision and whether the Officer had proper regard to all the evidence when reaching a decision. It

is clear as a result of *Dunsmuir* and *Khosa*, that such factors are to be reviewed on a standard of reasonableness: see *Christopher v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 964, *Ramanathan v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 843 and *Erdogu v. Canada (Minister of Citizenship and Immigratio)*, 2008 FC 407, [2008] F.C.J. No. 546 (QL).

[28] In reviewing the Officer's decision using a standard of reasonableness, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." (*Dunsmuir*, *supra* at paragraph 47, *Khosa*, *supra*, at para. 59).

ANALYSIS

Issue No. 1: Did the Officer act unreasonably in excluding the new risk of religious persecution and the supporting evidence under subsection 113(a) of IRPA?

[29] The applicant submits that the PRRA Officer erred in refusing to admit evidence of religious persecution on the ground that it did not relate to a new risk since the Board hearing.

[30] In *Kaybaki*, *supra*, I held at para. 11 that a PRRA application only assesses developments that arise after the Board hearing. In *Kaybaki* this meant that the PRRA Officer could not have admitted a lawyer's letter, which was reasonably available at the time of the Board hearing, which confirmed the arrest of the applicant.

[31] In *Raza v. Canada (MCI)*, 2007 FCA 385, Justice Sharlow articulated at para. 13 the test that PRRA Officers must to apply when determining whether evidence submitted is "new evidence" under s. 113(a):

> ¶13.
> …
>
> 3. Newness: Is the evidence new in the sense that it is capable of:
>
> > (a) proving the current state of affairs in the country of removal or an event that occurred or a circumstance that arose after the hearing in the RPD, or
> >
> > (b) proving a fact that was unknown to the refugee claimant at the time of the RPD hearing, or
> >
> > (c) contradicting a finding of fact by the RPD (including a credibility finding)? If not, the evidence need not be considered.
>
> …
>
> 5. Express statutory conditions:
>
> (a) If the evidence is capable of proving only an event that occurred or circumstances that arose prior to the RPD hearing, then has the applicant established either that the evidence was not reasonably available to him or her for presentation at the RPD hearing, or that he or she could not reasonably have been expected in the circumstances to have presented the evidence at the RPD hearing? If not, the evidence need not be considered.
>
> (b) If the evidence is capable of proving an event that occurred or circumstances that arose after the RPD hearing, then the evidence must be considered (unless it is rejected because it is not credible, not relevant, not new or not material).

[32] Justice Snider elaborated on the application of subsection 113 (a) in *Cupid v. Canada (MCI)*, 2007 FC 176, where she held at para. 4 that the onus is on the applicant to show that the

applicant, who was deemed to be not at risk by Board, is now at risk as a result of a change in country conditions or personal circumstances.

[33] The respondent submits that the failure of the applicant to present evidence of religious persecution at the Board hearing is sufficient to allow the Officer to reasonably exclude such evidence in the absence of an explanation of why he could not present this evidence of risk at the Board. The Court is urged to respect the rulings in *Kaybaki*, *supra* and *Cupid*, *supra*, that emphasize that the applicant has the onus of showing that new developments have occurred since the hearing.

[34] In this case the applicant failed to pursue his claim for religious persecution before the Refugee Board based on his opinion that he needed prior persecution to be able to present this claim, and that his counsel at the time believed his claim for fear of political persecution would succeed. Having chosen that legal tactic, the applicant must live with the consequences barring a serious charge of professional incompetence backed by sufficient corroborating evidence (*Vieira v. Canada (MPSED)*, 2007 FC 326, per Justice Shore at para. 29). The evidence relating to the applicant's open Christian practices in Canada would have been available to Board since the applicant was in Canada for almost two years before his hearing. Moreover, the applicant had attended 12 underground Christian church meetings in Iraq before he fled.

[35] It was reasonably open to the PRRA Officer to determine that the evidence of the applicant's Christianity was not new evidence that occurred or arose after the hearing before the Refugee Board or was unknown to the refugee claimant at the time of the Refugee Board hearing.

Moreover, the PRRA Officer could reasonably find that the circumstances do not excuse the applicant not presenting this evidence before the Refugee Board, and the applicant cannot now base a PRRA application on this evidence.

Other Issues

[36] In view of the Court's finding, the remaining two issues are not probative and do not have to be considered by the Court.

[37] Accordingly, the application must be dismissed.

CERTIFIED QUESTION

[38] Both parties, after discussion in open Court, advised the Court that this case does not raise a serious question of general importance which ought to be certified for an appeal. The Court agrees.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

The application for judicial review is dismissed.

"Michael A. Kelen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1373-09
STYLE OF CAUSE:	KAYVAN GHARGHI v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
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APPEARANCES:

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