Federal Court  Cour fédérale

Date: 20091204

Docket: IMM-5584-08

Citation: 2009 FC 1242

Ottawa, Ontario, December 4, 2009

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

LAMINE YANSANE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Preliminary comments

[1] The Federal Court of Appeal has indicated that, when conducting a pre-removal risk assessment (PRRA), the officer must assess any new evidence with regard to the facts on which a refugee claim is based to see if this new evidence changes the situation as it was previously assessed:

> [12] A PRRA application by a failed refugee claimant is not an appeal or reconsideration of the decision of the RPD to reject a claim for refugee protection. Nevertheless, it may require consideration of some or all of the same factual and legal issues as a claim for refugee protection. In such cases there is an obvious risk of wasteful and potentially abusive relitigation. The IRPA mitigates that risk by

limiting the evidence that may be presented to the PRRA officer. The limitation is found in paragraph 113*(a)* of the IRPA, which reads 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;
…	[…] .

(*Raza v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385, 162 A.C.W.S. (3d) 1013).

[2] The narrative is the key and the very source of understanding the nature of the human condition in a decision. No compromise is ever to be made in pursuit of accuracy of key facts in the evidence ….

(*Garcia v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1241).

II. Introduction

[3] This is a case distinguishable on its facts, which are very specific and unique to it.

[4] This is an application for judicial review of a decision by a PRRA officer, dated November 21, 2008, refusing the applicant's second PRRA application. The PRRA officer found that the applicant did not face any risk pursuant to section 96 or 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA).

III. Facts

[5] The applicant, Lamine Yansane, a citizen of Guinea, is a young Muslim of Susu ethnicity. Mr. Yansane is 35 years old, married and the father of three children aged 5, 8 and 11. His wife and three children, as well as his parents and siblings, still live in Guinea.

[6] Mr. Yansane purportedly completed 15 years of schooling in Guinea and obtained a mechanic's certificate in 1993, and apparently worked as a self-employed mechanic from 1994 to 2005 in the capital, Conakry.

[7] Mr. Yansane indicated that his father is a very devout Muslim, is an Imam at the Kasapo mosque and is apparently quite well known in his community.

[8] Mr. Yansane apparently had problems with his family because he had married a Catholic woman with whom he had three children. He had promised his father that he would do everything he could to convert his wife to Islam. His father stood surety for his son's garage in the hope that his son would eventually fulfill his promise. His father apparently did not attend the civil wedding, which was held in 1994. His father purportedly pressured him to leave his wife in order to marry a

Muslim cousin, which he apparently refused to do. He apparently then left to live in Conakry with his wife and children in 2004.

[9] Later, he purportedly began to accompany his wife to church and decided to convert to Christianity, which apparently did not please his family. On September 15, 2005, his father and uncle purportedly visited him and questioned him about rumours that he had been attending church and he apparently admitted that he wanted to convert. According to one element of evidence, which was not contradicted, his brother branded him and his father beat him and warned him that he would suffer the consequences.

[10] He apparently went to the home of his wife's older brother in the commune of Matoto, in Conakry. On September 25, 2005, his wife purportedly warned him that his father and 5 members of the Muslim community had apparently come looking for him at his home and had threatened him. His brother-in-law purportedly explained to him that he should leave the country in order to come to Canada and seek protection. His family went to live with his wife's grandmother for their safety.

[11] He left his country on October 15, 2005, and, after a stop-over in France, arrived in Canada on October 16, 2005, using a false French passport, which was destroyed upon his arrival at the airport. He showed Citizenship and Immigration Canada (CIC) an identity card and a birth certificate.

[12] Since he left, his wife and children have purportedly gone to live with an aunt in a small, isolated village (not named) due to threats from Mr. Yansane's father.

IV. Issue

[13] Is the PRRA officer's decision reasonable?

V. Analysis

[14] The officer wrote that she assigned little weight to the letters of support submitted by Mr. Yansane because they serve Mr. Yansane's interests and are not objective. Letters that clearly describe the risk Mr. Yansane faces in Guinea and which come from people who are familiar with Mr. Yansane's situation should be taken into consideration, with great care, but, nonetheless, reasonably.

[15] The officer used the same reasoning when disregarding the report by the lawyer from Conakry, stating that it is a [TRANSLATION]''self-interested report'' since it was ordered by Mr. Yansane's counsel.

[16] In January 2009, Mr. Yansane was granted a stay by Justice J. François Lemieux. In his decision, he quoted at length from *Raza*, above, on the subject of examining new evidence:

> [17] Justice Sharlow elaborated on her reasoning in the following paragraphs of her reasons:
>
> > [13] As I read paragraph 113(*a*), it is based on the premise that a negative refugee determination by the RPD must be respected by the PRRA officer, unless there is new evidence of facts that might have

affected the outcome of the RPD hearing if the evidence had been presented to the RPD. Paragraph 113(*a*) asks a number of questions, some expressly and some by necessary implication, about the proposed new evidence. I summarize those questions as follows:

1. Credibility: Is the evidence credible, considering its source and the circumstances in which it came into existence? If not, the evidence need not be considered.

2. Relevance: Is the evidence relevant to the PRRA application, in the sense that it is capable of proving or disproving a fact that is relevant to the claim for protection? If not, the evidence need not be considered.

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. [Emphasis added.]

4. Materiality: Is the evidence material, in the sense that the refugee claim probably would have succeeded if the evidence had been made available to the RPD? 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). [Emphasis added.]
>
> [14] The first four questions, relating to credibility, relevance, newness and materiality, are necessarily implied from the purpose of paragraph 113(*a*) within the statutory scheme of the IRPA relating to refugee claims and pre removal risk assessments. The remaining questions are asked expressly by paragraph 113(*a*).
>
> [15] I do not suggest that the questions listed above must be asked in any particular order, or that in every case the PRRA officer must ask each question. What is important is that the PRRA officer must consider all evidence that is presented, unless it is excluded on one of the grounds stated in paragraph [13] above. [Emphasis added.]

[18] At paragraph 17 of her reasons, Justice Sharlow stated the opinion that new evidence in support of a PRRA application cannot be rejected solely because it relates to the same risk, and added:

> [17] However, a PRRA officer may properly reject such evidence if it cannot prove that the relevant facts as of the date of the PRRA application are materially different from the facts as found by the RPD. [Emphasis added.]

(*Yansane v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 75, [2009] F.C.J. No. 78 (QL)).

[17] In his decision to grant a stay, Justice Lemieux decided that there were serious questions of law since the officer had not assessed all of the new evidence. According to the judge's instructions in *Raza*, above, the PRRA officer had no reason to disregard or assign little weight to the new evidence.

[18] The two complaints filed by Mr. Yansane at the police station show that there was little likelihood that any steps would be taken on his behalf. The following passage illustrates this:

> e. Denial of Fair Public Trial
>
> Although the constitution and law provide for the judiciary's independence, judicial authorities routinely deferred to executive authorities in politically sensitive cases. In routine cases, there were reports that authorities accepted bribes in exchange for a specific outcome. Magistrates were civil servants with no assurance of tenure. Because of corruption and nepotism in the judiciary, relatives of influential members of the government often were, in effect, above the law. Judges often did not act independently, and their verdicts were subject to outside interference. The judicial system was plagued by numerous problems, including a shortage of qualified lawyers and magistrates and an outdated and restrictive penal code. In September, to spearhead a national effort to improve the administration of justice, the Ministry of Justice held a national seminar on detention and a training conference for bailiffs (see section 1.d.).
>
> …
>
> Many citizens wary of judicial corruption preferred to rely on traditional systems of justice at the village or urban neighborhood level. Litigants presented their civil cases before a village chief, a neighborhood leader, or a council of "wise men." The dividing line between the formal and informal justice systems was vague, and authorities sometimes referred a case from the formal to the traditional system to ensure compliance by all parties. Similarly, if a case was not resolved to the satisfaction of all parties in the traditional system, it could be referred to the formal system for adjudication. The traditional system discriminated against women in that evidence given by women carried less weight (see section 5).
>
> …
>
> Civil Judicial Procedures and Remedies
> Under the law, there is a judicial procedure for civil matters. In practice, the judiciary was neither independent nor impartial, and decisions were often influenced by bribes and based on political and social status. There were no lawsuits seeking damages for human rights violations. In practice, domestic court orders were not enforced. [Emphasis added.]

(U.S. Department of State report on human rights; Guinea, 2006).

[19] Mr. Yansane was baptized in April 2007. No significant consideration was given to this baptism regarding the risks referred to by Mr. Yansane.

[20] The personal risk was not assessed in a reasonable way. In the applicant's case, changing his religion, apostasy, is punishable by death. Mr. Yansane's father, according to uncontradicted evidence, had threatened his own son with punishment by death when he issued a Fatwa that was proclaimed publicly during official prayers. It appears Mr. Yansane's father had decided to apply the precepts of his tradition. For the PRRA officer, it is not a question of whether or not this is commonly practised in his country of origin. The risk to life comes from Mr Yansane's father, as a public person (the Court refers to uncontradicted evidence from the Archdiocese of Conakry, in a letter dated May 14, 2008).

[21] The risk of persecution is linked principally to the change of religion. The fact that he married a woman of another faith helps explain Mr. Yansane's religious choice and further adds to the risk of persecution. The religious conversion was confirmed by the baptism in Montréal. Mr. Yansane is threatened with death by his father. This element of risk was not considered in the PRRA officer's decision (the Court refers to uncontradicted evidence from the Archdiocese of Montréal, in a letter dated February 27, 2008).

VII. Conclusion

The officer decided that Mr. Yansane had not shown that he would personally be at risk if he returned to Guinea. The risk facing Mr. Yansane is not one that faces all Christians, it is a personal risk, specific to Mr. Yansane since he is the son of a well-known figure, his father, who is calling for

his death by having publicly issued a Fatwa during official prayers. For all of these reasons, a reassessment should be done by a different officer.

JUDGMENT

THE COURT ORDERS that the application for judicial review be allowed; that the PRRA officer's decision be set aside and that the matter be referred back for reassessment by a different officer.

"Michel M.J. Shore"
Judge

Certified true translation

Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5584-08
STYLE OF CAUSE:	LAMINE YANSANE v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	December 1, 2009
REASONS FOR JUDGMENT AND JUDGMENT:	SHORE J.
DATED:	December 4, 2009

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