Federal Court  Cour fédérale

Date: 20131205

Docket: IMM-1967-13

Citation: 2013 FC 1221

Ottawa, Ontario, December 5, 2013

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

MARY EFUA GYARCHIE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] for judicial review of a decision of a Senior Immigration Officer [Officer], dated 5 February 2013 [Decision], rejecting the Applicant's Pre-Removal Risk Assessment [PRRA] application.

BACKGROUND

[2] The Applicant is a 58-year-old citizen of Ghana who first came to Canada in September 2009 on a student visa. She left her home in Ghana in 2003 after suffering abuse from her husband. The Applicant says that she was physically and psychologically abused after her husband was appointed to a sub-chief position in his tribe and took a second wife in order to father legitimate heirs, since the Applicant is from a different tribe. This created rivalry and tension in the household, culminating in threats and violence toward the Applicant, including an incident where her husband stabbed her in the arm with a kitchen knife. The Applicant says she reported this to the police, but received no help since they regarded it as a purely domestic matter.

[3] After leaving Ghana, the Applicant spent several years working as a nurse in Jamaica. She returned to Ghana briefly in 2007, staying with her father. She says that she had to cut her trip to Ghana short because of a frightening encounter with her estranged husband. He came to her father's house, accused her of being a witch and casting a spell that caused his second wife to be infertile, and demanded she attend a shrine where an oracle would publicly confirm her witchcraft and perform an exorcism. The Applicant says her husband slapped her twice on the face, and she once again complained to police, who again refused to help and counselled her to seek help if she was indeed a witch. She says she feared for her life and fled back to Jamaica, spending five weeks in the United States on the return trip.

[4] The Applicant came to Canada in September 2009 to study midwifery, but delayed her program of study due to emotional strain following the death of her father in November 2009. She did not return to Ghana for the funeral, as she claims she still feared for her life. The delay in her

studies made it necessary to seek an extension of her student visa, which was refused in July 2010. The Applicant says she sought advice from a lawyer because she feared returning to Ghana, and was advised to file a refugee claim. The Applicant claims she was not previously aware of this possibility, believing that refugee protection was only available for political dissidents or those fleeing civil wars, not those fleeing domestic violence.

[5] The Applicant filed an application for refugee protection in August 2010. The Refugee Protection Division of the Immigration and Refugee Board [RPD or Board] denied this application in October 2011, finding that the Applicant's failure to claim protection earlier, including in Jamaica or the United States, cast doubt on whether she had a subjective fear for her life and safety. The RPD also found that she had not taken all of the necessary steps to seek state protection, which it found likely would have been available to her. The Board did not think it was reasonable that a university educated person who had experience with immigration authorities in three countries would be unaware of the possibility of claiming refugee protection in the circumstances she alleged, and that this diminished the credibility of her claim.

[6] The Applicant filed a request to re-open this decision in August 2012, which was refused in November 2012. That decision is the subject of a separate application for judicial review that has been granted leave by this Court and is to be heard separately (Court File IMM-11928-12).

[7] The Applicant filed her humanitarian and compassionate [H&C] application in October 2011, following the refusal of her refugee claim. She filed a PRRA application after she

became eligible to do so in October 2012. This followed a stay of a removal order against her issued by this Court September 7, 2012. The H&C and PRRA applications were both considered and refused by the same Officer in February 2013. The Applicant filed judicial review applications regarding both decisions, but later discontinued the application regarding the H&C decision.

[8] Central to the Applicant's arguments before this Court is the claim that she received incompetent advice and assistance regarding her refugee application and hearing from a lawyer whose licence has since been suspended by the law society. She claims that in addition to providing incompetent advice regarding the preparation and evidence required for that hearing, this lawyer:

- Advised her that she did not need to retain new counsel following his licence suspension because all of the necessary preparations had been done, and this advice caused her to tell the Board that she was prepared to proceed without counsel; and
- Continued to provide her with "shadow" advice following his licence suspension, including preparing a judicial review application regarding the Board's denial of her refugee claim, which was prepared incompetently and in a self-serving manner, and was dismissed by the Court.

[9] After realizing that her interests had been prejudiced through incompetent representation, the Applicant sought out new counsel, applied for a re-opening of her refugee application and filed a judicial review application when this was refused, obtained a stay of removal proceedings against her, supplemented the record in support of her H&C and PRRA applications, and filed applications for judicial review regarding the H&C and PRRA decisions.

DECISION UNDER REVIEW

[10] The Applicant received a letter dated 5 February 2013 informing her of the Officer's rejection of her PRRA application. This was a form letter, indicating only that it was determined that she "would not be subject to risk of persecution, danger of torture, risk to life or risk of cruel and unusual treatment or punishment" if returned to Ghana.

[11] The Officer's "Notes to file", also dated 5 February 2013, provide further elaboration on the reasons for the Decision. The Officer noted that the Applicant's refugee claim was based on an alleged fear of persecution in Ghana "due to her membership in a particular social group, namely women victims of domestic violence." The Officer also noted that the Applicant was asked at the outset of her RPD hearing whether she was aware of her former counsel's licence suspension, and whether she had made attempts to retain new counsel, and that she stated she was prepared to proceed without the assistance of counsel. The Officer found that "[t]he determinative issues in the applicant's [refugee] claim were the credibility of the applicant, the subjective component of the fear, and the availability of adequate state protection in Ghana." The Officer then noted section 113 of the Act, which provides that a person in the Applicant's circumstances may only present "new evidence" as part of the PRRA application. The Officer then proceeded to examine the evidence presented by the Applicant.

[12] The Officer found that the Applicant's statutory declaration dated 13 January 2013 restated essentially the same information that was provided to the RPD, and did not provide new evidence regarding material elements of the Applicant's personal circumstances or rebut the RPD's findings.

The Officer found that the information in the declaration regarding continuing threats from the Applicant's husband, which was based on information received from her sons in Ghana, was "unverifiable," and that there was insufficient evidence of any first-hand knowledge by the Applicant of any continuing threats.

[13] The Officer found that declarations from the Applicant's sons, in which they described continuing threats from their father toward the Applicant, merely restated information that was known to the RPD and did not provide new evidence regarding material elements of the Applicant's personal circumstances or rebut the findings of the RPD. Furthermore, the information in the declarations was unverifiable and came from sources that were not disinterested in the outcome, and therefore had minimal probative value. In addition, this information did not demonstrate that state protection would be unavailable to the applicant in Ghana.

[14] The Officer found that a statutory declaration from the Applicant's step-brother, Bernard Kennedy Otoo, restated essentially the same information that the Applicant provided to the RPD, and did not provide new evidence regarding the Applicant's circumstances or rebut the findings of the RPD. Mr. Otoo's statement that the Applicant's husband came to her family in September 2012 demanding that they "produce" her and stating that he would go to any length to find and deal with her was found to be unverifiable and to have minimal probative value. It also did not demonstrate that state protection would be unavailable to the applicant in Ghana. Similarly, declarations and letters provided by friends of the Applicant were found to merely restate information that the Applicant had provided to the RPD. In addition, none of these declarants had first-hand knowledge

regarding the information they provided. As such, these documents did not provide new evidence of risk developments and their probative value was minimal.

[15] The Officer found that the January 11, 2013 psychological assessment written by Lynne Jenkins, M. Ed., C. Psych, essentially restated the same information the Applicant provided to the RPD, but did elaborate further on symptoms experienced by the Applicant. The Officer noted the report's observations that: the Applicant's symptoms may indicate post traumatic stress or at the very least significant trauma; the Applicant's mood appeared depressed and her self-esteem low; the type of trauma the Applicant has experienced requires specific interventions by trained professionals that are available to the Applicant in Canada; and the author was deeply concerned that if the Applicant were returned to Ghana, her level of lethality would be significant and her quality of life would likely deteriorate, significantly impairing any possibility for recovery. The Officer found that it was appropriate to assess the weight to be assigned to these findings based on factors such as the length, frequency and extent of the treatment relationship between the medical expert and the Applicant, and therefore assigned them "low weight". The Officer stated that, having carefully considered the report, it did not present new evidence regarding material elements of the Applicant's personal circumstances or rebut the findings of the RPD.

[16] With respect to documentary evidence submitted by the Applicant regarding country conditions in Ghana, and in particular evidence relating to domestic violence and the treatment of suspected witches, the Officer found that while the majority of articles post-dated the refugee hearing, they did not provide new evidence or rebut the findings of the RPD.

[17] The Officer acknowledged the "disciplinary concerns" regarding the Applicant's former counsel, but found that the RPD Member had dealt with this issue at the outset of the hearing, and that the documents provided did not show that the hearing was negatively impacted or that the RPD Member failed to ensure that the Applicant was prepared to proceed without counsel. The documents submitted did not provide new evidence or rebut the findings of the RPD.

[18] Finally, the Officer considered the 2011 U.S. Department of State Human Rights Report for Ghana, which the Officer considered to be an impartial and well-researched comprehensive summary. The Officer found that it did not show that "there has been a significant change in country condition in Ghana" since the RPD decision that could put the Applicant at risk as defined in section 96 or section 97 of the Act. Thus, the Officer did not find that the Applicant faced more than a mere possibility of persecution, or that it was more likely than not that she would be subjected to torture or be at risk of cruel and unusual treatment or punishment if returned to Ghana.

[19] On 19 February 2013, the Applicant's counsel sent supplementary materials, including written arguments, an additional declaration from a friend of the Applicant, and a report by the Human Rights Advocacy Centre regarding domestic violence, spousal murders and "rival killings" in Ghana. Counsel requested that this material be considered as part of the PRRA decision, and if a negative PRRA decision had already been made, that it be reconsidered in light of them. The Officer added a memorandum to the file on 22 February 2013 stating that these new submissions had been considered and the original Decision remained unchanged.

ISSUES

[20] This application raises the following issues:

a. Was the Officer's rejection of the PRRA application unreasonable?

b. Did the Officer make the Decision without due regard to the evidence, and in particular the purported new evidence presented by the Applicant?

c. Is the incompetence of counsel at the RPD stage sufficient reason to regard evidence as "new" in the sense that it was not reasonably available to the Applicant during the refugee determination?

d. Did the Officer fail to conduct a proper state protection analysis?

STANDARD OF REVIEW

[21] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48 [*Agraira*].

[22] The parties agree that, absent an error in procedural fairness, the standard when reviewing a PRRA decision is reasonableness: *Jainul Shaikh v Canada (Minister of Citizenship and*

Immigration), 2012 FC 1318 at para 16 [*Shaikh*]; *Cunningham v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 636 at para 15. I agree that reasonableness is the appropriate standard of review in this case.

[23] 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." See *Dunsmuir*, above, at para 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59. Put another way, the Court should intervene only 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."

STATUTORY PROVISIONS

[24] The following provisions of the Act, as applicable on the date of the PRRA decision, are relevant to these proceedings:

Conferral of refugee protection	**Asile**
95. (1) Refugee protection is conferred on a person when	95. (1) L'asile est la protection conférée à toute personne dès lors que, selon le cas :
[…]	[…]
(b) the Board determines the person to be a Convention refugee or a person in need of	*b)* la Commission lui reconnaît la qualité de réfugié au sens de la Convention ou celle de

protection; or

(c) except in the case of a person described in subsection 112(3), the Minister allows an application for protection.

[…]

Convention refugee

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.

Person in need of protection

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

personne à protéger;

c) le ministre accorde la demande de protection, sauf si la personne est visée au paragraphe 112(3).

[…]

Définition de « réfugié »

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.

Personne à protéger

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.
[…]	[…]
Application for protection	**Demande de protection**
112. (1) A person in Canada, other than a person referred to	112. (1) La personne se trouvant au Canada et qui n'est

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).	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).
[…]	[…]
Consideration of application	**Examen de la demande**
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;
[…]	[…]
(c) in the case of an applicant not described in subsection 112(3), consideration shall be on the basis of sections 96 to 98;	*c)* s'agissant du demandeur non visé au paragraphe 112(3), sur la base des articles 96 à 98;
[…]	[…]

ARGUMENT

Applicant

[25] The Applicant argues that she faces a serious risk of gender-based violence in multiple forms if returned to Ghana, and that the Officer's refusal of her PRRA application was thus unreasonable. She says she will face continued abuse from her husband, and is at risk of being killed for being a witch, of being subjected to cruel, ritualistic abuse to remove her 'magic', and being banished from society as a witch, and that there was sufficient evidence in front of the Officer to substantiate these risks.

Assessment of the Evidence

[26] The Applicant argues that the Officer failed to properly consider new evidence submitted in support of her PRRA application, and denied her application without regard to that evidence. She argues that she presented evidence of risks that post-dated her refugee claim, and evidence that was not reasonably available to her at the time of that claim due to incompetent legal advice, both of which meet the definition of "new evidence" as set out in section 113 of the Act and interpreted in the jurisprudence.

[27] While the PRRA application was based on the same risk grounds alleged in the Applicant's refugee claim, significant new evidence was submitted for the PRRA regarding those grounds, including evidence to rebut the findings of the RPD regarding credibility, subjective fear and state protection. This included a psychological assessment to address subjective fear, corroborating statements regarding new and old threats to address credibility, and updated country conditions to address state protection. While the Respondent relies on *Raza v Canada (Minister of Citizenship*

and Immigration), 2006 FC 1385 [*Raza FC*] in support of the view that new evidence must be "significant or significantly different from the information previously provided," the Court in *Raza FC* also explained that the question facing the officer was whether there was any evidence of substance that was new. Unlike in *Raza FC*, the Applicant here presented significant new evidence on the determinative issues, and argued that it should be considered under subsection 113*(a)* of the Act.

[28] With respect to credibility, the Applicant presented nine statements from friends and family, some of whom had direct experience of the facts alleged in her claim. In addition, the psychological assessment report of Lynne Jenkins observed that in her professional experience as Director of a large counselling department, women who flee their homelands due to gender-related violence often do not know that this constitutes refugee status, regardless of their level of education. The Officer gave this evidence little weight because it "did not rebut the findings of the RPD," did not come from "disinterested parties," or was "unverifiable." However, the jurisprudence states that evidence should not be disbelieved simply because it comes from an interested party, particularly in refugee protection cases where the risk must be personal to the claimant: *Shaikh*, above; *Mata Diaz v Canada (Minister of Citizenship and Immigration)*, 2010 FC 319 at para 37. The Applicant also cites *Lainez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 914 at paras 40-42 and *Begashaw v Canada (Minister of Citizenship and Immigration)*, 2009 FC 462 at para 46, where the Court found that it is an error for a PRRA officer to reject psychological evidence without basis.

[29] The Applicant says the assessment report of Lynne Jenkins was directly relevant to the RPD's finding that the Applicant did not behave in a manner consistent with her alleged fear. The

assessment stated that "[the Applicant's] fear cannot be underestimated." The Officer assigned low weight to this assessment and found that it did not present new evidence and did not rebut the findings of the RPD. Instead of dismissing this evidence, the Officer should have addressed whether the issue of subjective fear was overcome in the PRRA and, if not, why not. In addition, the RPD's credibility findings were inextricably tied to its findings on subjective fear, making this evidence directly relevant to the issue of credibility.

[30] The Respondent's argument on this evidence – that it merely shows that the psychologist believed the Applicant's story while the RPD did not – misses the point. The Applicant presented evidence from an expert on gender-based violence stating that her actions were consistent with a subjective fear. This evidence was not before the RPD and meets the criteria of new evidence under subsection 113*(a)* of the Act. If the Officer intended to exclude it, he or she should have explained why, instead of simply stating without explanation that it did not rebut the findings of the RPD.

[31] The Applicant submits that subsection 113*(a)* of the Act requires a two-step analysis. The Officer must first determine whether each piece of purported new evidence is actually new and admissible, and must then assess the weight to be assigned to it: *De Silva v Canada (Minister of Citizenship and Immigration)*, 2008 FC 827 at para 7. The Applicant argues that this case is similar to *Ayach v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1023 [*Ayach*], where the Court found an officer's conclusion regarding state protection to be unreasonable because the officer dismissed purported new evidence in a single sentence without an express finding that it was not new evidence, and without considering its credibility, relevance, newness or materiality as directed by *Raza v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385 [*Raza FCA*]

at para 13. This amounted to a failure to have regard to the evidence put forward, and was the determinative issue in overturning the decision: *Ayach*, above, at para 34.

[32] The Applicant presented detailed information regarding the improper representation she received throughout her refugee claim. This demonstrated that the evidence presented in the PRRA application was not reasonably available to her at the time of the refugee hearing, and was therefore new evidence. Despite this, the Officer dismissed much of the evidence as restating facts that were already before the RPD, and failed to note the facts that were not before the RPD. There is no merit in the Respondent's argument that the Applicant's failure to inform the RPD of her former counsel's incompetent advise or to raise it in her first judicial review application regarding the RPD decision should bar her from raising it here. An applicant for judicial review on the basis of ineffective counsel is not required to present this evidence to the RPD (*Galyas v Canada (Minister of Citizenship and Immigration)*, 2013 FC 250), and the Applicant explained in her PRRA application that the suspended lawyer continued to provide shadow advice regarding the application for judicial review of the RPD's decision.

State Protection Analysis

[33] The Applicant also argues that the Officer failed to conduct a proper state protection analysis, in particular by failing to consider the treatment of women accused of being witches. The RPD's state protection analysis did not consider this identifiable group, despite the fact that the Applicant raised the issue of being an accused witch. Instead, the analysis was based solely on women experiencing domestic violence. It was therefore incumbent upon the PRRA Officer, with the benefit of the enhanced record provided, to conduct a fulsome analysis: *Ayach*, above, at para 9.

Instead, the Officer's state protection analysis was limited to a review of the U.S. Department of State Human Rights Report for Ghana, and a conclusion that it did not show that "there has been a significant change in country condition in Ghana which could put the applicant at risk as defined in section 96 or 97 of [the Act] since the decision of the RPD."

Respondent

[34] According to the Respondent, the Officer reasonably concluded that the Applicant had failed to provide any information or evidence that was not before the RPD when it denied the Applicant's refugee claim. After reviewing the latest country conditions documents, the Officer reasonably found that the RPD's state protection finding for individuals in the Applicant's situation remained valid.

Assessment of the Evidence

[35] The Respondent argues that the Officer made no error in assessing the evidence. The Officer correctly noted that, as someone whose claim for protection had been heard and rejected by the RPD, the Applicant bore the burden of presenting information that was materially different from what the RPD considered and rejected; that is, information that was "significant or significantly different than the information previously provided": *Raza FC*, above at para 22. The Officer properly concluded that the purported new evidence simply echoed the information that the RPD had heard and held to be unconvincing. It did not satisfy the new evidence requirement. This proper conclusion makes any other alleged errors in considering that evidence immaterial.

[36] The Applicant's contention that her psychologist's report overcomes the RPD's finding regarding subjective fear has no merit. The fact that, unlike the RPD, the psychologist believed her explanation as to why she did not seek refugee protection at the first opportunity does not qualify as evidence of subjective fear. The psychologist's belief does not displace the RPD's factual finding.

[37] The Applicant's claim that the Officer failed to consider the impact of the improper representation she received is likewise without merit. It is undisputed that the Applicant chose to proceed with the hearing in the absence of counsel. As to the Applicant's claim that her former counsel advised her that there was no need to retain new counsel for her refugee hearing because the necessary preparation had already been done, it was incumbent upon the Applicant to inform the RPD of this, in which case an adjournment would likely have been granted. Her failure to put this evidence before the first tribunal, or to raise it in her judicial review application regarding the refugee determination, ought to defeat her claim that the Officer failed to consider it.

[38] Finally, the RPD found the Applicant not to be credible. This finding was not premised on lack of support from other witnesses, and the presentation of corroborating statements in the form of statutory declarations from the Applicant's friends and relatives does not require the Officer to reach a different finding than the RPD.

State Protection Analysis

[39] The Respondent argues there is no merit in the Applicant's submission that the Officer failed to conduct a proper state protection analysis by failing to consider the treatment of women accused of being witches in Ghana.

[40] The question of whether there is adequate protection for this group of women is one that falls squarely within the ambit of the RPD. There is no evidence that it was raised by the Applicant as part of her refugee claim, and it was not open to her to raise this new ground for protection in her PRRA application. Alternatively, if she did raise it before the RPD and they failed to deal with it, she ought to have challenged that failure on judicial review. In either case, the Officer's failure to address that specific issue does not constitute a reviewable error.

[41] The *Ayach* case referred to by the Applicant is distinguishable. There, the Court faulted the PRRA officer for simply dismissing a letter submitted after the rejection of the refugee claim without performing the required assessment of whether it met the criteria for new evidence: *Ayach*, above, at para 7. This was the determinative issue. Justice Snider then commented in *obiter* that the availability of state protection could have been determinative had the officer conducted such an analysis. Since the RPD in *Ayach* made no finding about state protection, it stands to reason that the officer in that case would have had to conduct a state protection analysis if it became relevant to the outcome. Here, by contrast, the RPD provided a detailed analysis of the availability of state protection, and the Applicant does not seem to fault that analysis. In view of the RPD's conclusive finding, it was proper for the Officer to simply consider whether there had been any changes in

country conditions since that decision. Having found there had not been, it was reasonable for the Officer to conclude that state protection would be available to the Applicant.

ANALYSIS

[42] Notwithstanding some of the arguments and allegations contained in the Respondent's written submissions, the Respondent confirmed to the Court that the position on the state protection issue is essentially as follows:

a. The RPD dealt with the risks associated with the witchcraft accusations in its Reasons and Decision of October 17, 2011;

b. The PRRA Officer did not exclude the documentary evidence regarding country conditions in Ghana, and in particular evidence regarding domestic violence and the treatment of accused witches, under subsection 113*(a)* of the Act or under the Federal Court of Appeal decision in *Raza FCA*. Rather, after considering the articles in question the Officer concluded that they did not change "material aspects of the applicant's personal circumstances and they do not rebut the findings of the RPD"; and

c. Given the state protection analysis of the RPD, the PRRA Officer's findings and conclusions on the documentation dealing with the treatment of witches were reasonable.

[43] In my view, if the documentary evidence about the treatment of witches was not excluded by subsection 113*(a)* of the Act and *Raza FCA*, then the Officer's treatment of this evidence in his or her state protection analysis was both inadequate and unreasonable.

[44] The RPD only mentions witchcraft at paragraphs 2 and 8 of its decision, in conjunction with the violence of the Applicant's spouse who accused her of being a witch. There is no discussion in the RPD's state protection analysis of the general dangers in Ghana of being accused of witchcraft, nor does the RPD refer to or deal with this risk in its section 96 and section 97 analysis. It is difficult to say, then, that the RPD took any position on witchcraft in its decision, apart from its mention in the context of violence and risk from the Applicant's husband.

[45] Like the PRRA Officer, I too have reviewed the articles on witchcraft submitted by the Applicant. For example, here is an excerpt from the article submitted from the *ThinkAfrica Press* called "Exorcising Witchcraft in Ghana," dated 10 November 2011 by James Wan:

> Witchcraft in Ghana is a very real phenomenon. It displaces people from their homes, it breaks up families and it destroys lives. Those believed to be responsible for causing illness and misfortune are often tortured, killed or expelled from their villages.
>
> Yaba Badoe's powerful and heart-rending documentary *The Witches of Gambaga*, screened in London as part of Film Africa 2011, examines the lives of some of the accused witches who have sought refuge in perhaps Ghana's oldest and most famous witches' camp of Gambaga. Filmed over the course of five years and told largely by the women themselves, the documentary highlights the plight of some of the true victims of witchcraft beliefs. Salmata was attacked and run out of her village after she was blamed for her stepson getting ill; Amina was threatened and exiled when her brother died suddenly; Asara, a successful trader, was accused of being a witch after an outbreak of meningitis in her town.
>
> The women of Gambaga, often victims of violence at the hands of their erstwhile neighbours, live under the protective custody of the village chief, the Gambarrana, a stern figure whose role sits somewhat uneasily between exploiter and philanthropist. They exist in often abject living conditions as they work for the Gambarrana to pay their dues, isolated from their families, psychologically if not physically traumatised, and miles from the lives they once knew.

Fly away home

"This practice [of accusing and exiling 'witches'] has become an indictment on the conscience of our society," argued Hajia Hawawu Boya Gariba, deputy minister for women and children's affairs, at a conference held in Accra in September.

"The labelling of some of our kinsmen and women as witches and wizards and banishing them into camps where they live in inhuman and deplorable conditions is a violation of their fundamental human rights," she continued. The conference, entitled "Towards Banning 'Witches' Camps", called for new legislation to outlaw witchcraft accusations, the abolition of witches' camps and the reintegration of current outcasts into their home communities.

As witnessed in *The Witches of Gambaga*, however, repatriation is far from a simple process. In the film, we see two accused witches returning to their home villages after decades in exile. Despite having previously been educated, prepared and convinced by local activists to allow the return of the elderly women, the town chiefs on the day are reluctant to uphold their agreement. They finally agree to allow the women to stay, but only on the conditions that the women do not go near the market, do not have any interaction with children and keep away from village celebrations and gatherings. Akwasi Osei, chief psychiatrist in Ghana's national health service, explained: "Right now if you [repatriate accused witches] you can be sure they will be lynched when they go back home."

In fact, certain activists are calling not for the abolition of sanctuaries but for more of them, improved living conditions within those sanctuaries and assistance for 'witches' not in returning home but in learning a trade to provide them with an income while in the camps.

Believe it or not

Both of these viewpoints are, however, notably limited in scope and unambitious in vision. They address certain symptoms of the problem but not its root. Indeed, even identifying a single 'root' of the problem is impossible.

Ideas of witchcraft permeate society and are inextricably woven into the social fabric of Ghanaian life. Beliefs in the power of sorcery and juju are deeply infused into the Ghanaian psyche through popular stories and myths, frequent newspaper reports of accusations and confessions, the lyrics of songs, films, plays, fear-mongering commercials and the sermons of charismatic religious leaders.

> Convincing people of the spuriousness of superstitions when those superstitions form a fundamental part of the lens through which reality itself is experienced is no mean feat. Beliefs in witchcraft not only fill in the gap left by a lack of education and information but can coexist with and even underpin believers' informed understandings of issues. During Evans-Pritchard's seminal ethnographic study of the Azande, a grain storage collapsed, killing two people. When Evans-Pritchard pointed out that the tragedy was caused by termites, the Azande people replied "of course, but why were those two sitting under it at that particular moment?" When things seem to fall apart for no reason, some blame straightforward 'bad luck', some wonder what their mysterious God is up to and some blame the invisible hand of witchcraft. And when juju spells fail to work or protect, believers do not rethink nature and reality but point to shoddy workmanship or subpar materials.
>
> Even some victims of false accusations come to believe themselves to be guilty – in *The Witches of Gambaga*, one accused woman insisted "in the same way fire burns, I am a witch". And some commentators campaigning on behalf of accused witches speak from a humanitarian perspective, but not one which discounts superstitions; rather, they assert the need "to mount a campaign to educate the populace not to maltreat those accused of witchcraft, *as they may not necessarily be so*" [emphasis added].

[46] The Applicant's submissions to the PRRA Officer emphasize the separate nature of this risk apart from the risk of domestic violence from the Applicant's husband and ask the Officer to review the articles submitted on point and assess the risk. According to the Respondent, the Officer did not exclude the articles but assessed them in light of the RPD decision and concluded that they did not rebut the findings of the RPD.

[47] First of all, I think it is clear from the RPD decision that the focus was domestic violence from the husband and not the stigma and risk of persecution and violence that the Applicant would face in Ghana as a result of being accused of witchcraft. So if, as the Respondent alleges, the RPD

dealt with this risk of persecution, it provided no findings, reasons or conclusions on point that could be used by the PRRA Officer or against which the new evidence on witchcraft could be assessed. I think it would be inaccurate and unfair to accept that this risk is dealt with under a general state protection analysis by the RPD that never refers to it.

[48] Of course, it could be argued that the articles on witchcraft are not "new evidence" under subsection 113*(a)* of the Act and *Raza FCA*, above, and so could not be part of the PRRA Officer's state protection analysis. But this is not the position taken by the Respondent in the hearing before me. The Respondent's position is that the Officer assessed the articles as new evidence in order to determine whether they displaced the RPD findings. The Applicant agrees. I cannot say this is an unreasonable interpretation of the Decision.

[49] That being so, I have to agree with the Applicant that the Officer's state protection analysis does not deal adequately with the witchcraft issue. The Officer does not even say what the findings of the RPD were on this issue. So it is impossible to understand why the articles do not rebut those findings. The final general conclusion – which relies upon the 2011 U.S. Department of State Human Rights Report for Ghana – that there has been no significant change in country conditions since the RPD decision that could put the Applicant at risk as defined in sections 96 or 97 of the Act, does not suffice. We have no explanation from the Officer as to what the RPD's findings were on the stigma and risk of persecution and violence in Ghana as a result of being accused of witchcraft. The only accusations of witchcraft mentioned in the RPD decision are accusations made by the husband, and that decision only provides findings and reasons with regards to the

personalized risk which the Applicant faces from her estranged common-law partner. It does not address the risk she may face from others as a woman accused of witchcraft in Ghana.

[50] On the credibility and subjective fear issues, I agree with the Applicant that the Officer seems to have missed the point of the Jenkin's Report. Apart from information derived from the Applicant, Lynne Jenkins gives attributed evidence about how women victims of domestic abuse feel shame and "shame is often a significant barrier to trauma survivors seeking help." This is a significant point in relation to the RPD findings regarding delays in seeking refugee protection. The Jenkin's Report states:

> The research literature supports the claim that disclosures tend to be made later rather than sooner as trauma survivors tend to have pronounced avoidance reactions.

[51] This evidence is not derived from the Applicant. It comes from reputable sources and goes to the issue of why the Applicant delayed in making a refugee claim, as well as her assertion that she was not even aware that refugee protection was available to someone in her position. This is new evidence that was not before the RPD. It was considered by the Officer, but the independent evidentiary aspects of the report and their implications for the inferences that can be drawn based on the Applicant's actions are not adequately addressed. The implications of the following evidence for the RPD's findings on credibility and subjective fear should have been considered in full:

> In a study of immigrant women from Nigeria and Ghana who had experienced intimate partner violence ("IPV"), Ogusiji et al discovered two (2) themes (Ogunsiji, Wilkes, Jackson & Peters, 2011). The first was "suffering in silence" and the second theme was "reluctance to seek help." The researchers also picked up another subtheme of "suffering and smiling" or pretending that all was well. The researchers argue it is important to understand cultural barriers that can impede immigrant women's ability to seek out and receive

appropriate support and intervention and provide opportunities for women to disclose experiences of IPV. The cultural barrier that these women experienced had to do with migrating to another country where they did not have their accustomed informal network of extended family members which hindered them from disclosing their abuse history and seeking help. These women reported that their reluctance in seeking help also had to do with their perception that reporting such abuse would have severe consequences. The women in this research study did not draw on the resources available to them as abused women. According to the authors of the study, their determination in this regard is supported by extant literature that suggests migrant minority women are particularly vulnerable in relation to seeking assistance and accessing services in the context of IPV.

…

I have witnessed over the course of my career in the violence against women sector that the movement, migration, or scattering of women away from their established or ancestral homeland as a result of gender related violence is not something that is done with the knowledge that such gender related violence constitutes refugee status. In my professional experience as a Director of a large counselling department, I have observed that this knowledge is something that is more often than not accidentally stumbled upon by immigrant women whether a woman has no formal education to speak of or is highly educated. What I have observed that is consistent in diaspora narratives is that women refugees tend to experience persecution differently than men. Their persecution is more likely to happen in the private sphere and the idea that violence against women is a private matter is still promulgated globally despite the gains made in countries like Canada and the United States in recent years to educate the public in an attempt to create a cultural shift in such thinking. Even in Canada sexist attitudes still stubbornly persist. Domestic violence as a ground for asylum is not commonly known in the population I have counselled and/or interviewed for reports to the IRB. The women I have supported tended to believe that a refugee was someone who was persecuted based on their participation in the public sphere where their political beliefs landed them in trouble with the state. According to Mary, she believed that claimants could only seek refugee status if they had faced political persecution or they were fleeing a war zone or disaster. Her assumption is not without merit given the definition of refugee in Section 96 of the *Immigration and Refugee Protection Act*. According to Mary, if she had known that as a victim of domestic

> violence she qualified for refugee status, she would then have asked for refuge when she entered the United States.

[52] The Officer is unreasonable when he or she says that "Ms. Jenkins restates essentially the same information which the Applicant provided to the RPD; however, she does elaborate further on symptoms experienced by the Applicant." As the passages quoted above show, Ms. Jenkins does much more than this. She draws upon objective studies and surveys about how abused women typically behave in trauma situations, and why this could have relevance to the Applicant's delays in dealing with abuse and in claiming refugee protection. The Officer realized this and attempted to dismiss it in the following fashion:

> I acknowledge Ms. Jenkins concerns regarding the response to woman [*sic*] abuse in Ghana; however, she has not provided objective evidence to show that she has first-hand knowledge regarding the treatment of domestic abuse victims in Ghana or that she has expertise in the medical field in Ghana which would lead her to conclude that the applicant would not be able to access trauma-informed therapeutic modalities in Ghana.

[53] Ms. Jenkins' evidence is based upon her experience working as a director of a large counselling department that deals with immigrant women fleeing domestic violence and, *inter alia*, upon a study of immigrant women from Nigeria and Ghana who have experienced intimate partner violence in a context where social and cultural barriers can cause abused women to suffer in silence and impede their ability to seek out and receive appropriate support and intervention when it comes to immigrating to another country. It was unreasonable for the Officer to discount this evidence because Ms. Jenkins does not have first-hand knowledge regarding the treatment of domestic abuse victims in Ghana or expertise in the medical field in Ghana. Raising the evidentiary bar this high, or

requiring medical knowledge in Ghana, simply places abused women at a further disadvantage and becomes part of the problem outlined and documented in the Report:

> In a content analysis research paper, Ortz-Barreda et al (2011) conclude that there are many barriers that vulnerable women world-wide must face in order to gain access to services and that policy makers consider the special and cultural needs as well as circumstances of these women.

[54] In the present case, I think the Officer might have considered possible barriers to the Applicant's obtaining evidence from someone who has expertise in the medical field in Ghana.

[55] Ms. Jenkins is someone with what appears to be a deep, wide and thoughtful professional experience with women who immigrate because of domestic and cultural violence. She also refers to what appear to be reputable studies by people doing active research in the field. I do not know why this evidence should have low weight and why it should have been so minimized when considering whether it could have rebutted the findings of the RPD regarding the Applicant's delay in claiming refugee protection and the issues of credibility and subjective fear.

[56] The Applicant raises other issues but, in my view, it is not necessary to go further. Based upon the reasons given above, the Applicant has convinced me that the Decision is unreasonable and the matter needs to be reconsidered.

[57] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is allowed. The Decision is quashed and the matter is referred back for reconsideration by a different Officer.

2. There is no question for certification.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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