Federal Court  Cour fédérale

Date: 20160303

Docket: IMM-7935-14

Citation: 2016 FC 277

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, March 3, 2016

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

LAMINE YANSANE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Background

[1] Lamine Yansane seeks a judicial review of the respondent's fourth negative decision regarding his second application for a pre-removal risk assessment [PRRA]. His first PRRA application was also dismissed, but this Court dismissed his application for leave and judicial review of that decision.

[2] The applicant is essentially arguing that the decision under review is unreasonable and that the PRRA officer was bound by this Court's earlier conclusions and directions and failed to follow them. For a better understanding of the applicant's arguments, I am attaching to these reasons the Court's two previous decisions.

[3] For the following reasons, the application for judicial review will be allowed and a question of general importance will be certified.

II. Facts

[4] The applicant is a citizen of Guinea and a Muslim of Susu ethnicity, who was born in Boké. He states that his family is very conservative and his father is an imam. The applicant alleges that his life is threatened by his father who accuses him of being an apostate because of his marriage to a Christian woman in 1994 and especially his subsequent conversion to Christianity. The applicant's father allegedly consented to the marriage on the condition that his son's wife convert to Islam after the wedding. Shortly after the wedding, the applicant's father even stood surety for the applicant so that he could purchase land and build a mechanical garage on it.

[5] The applicant and his wife lived in the applicant's family compound for 10 years after their marriage, during which time their three children were born.

[6] However, the applicant affirms that increasing pressure was exerted on his wife so that she would convert to Islam. Given her refusal, the applicant's father purportedly demanded that

he leave his wife and marry a cousin. In 2004, faced with this pressure, the applicant and his family decided to move to Conakry, the capital of Guinea located some 300 kilometres from Boké.

[7] In Conakry, the applicant started attending the Catholic Church with his wife. After hearing rumours about this, the applicant's father went to his house with an uncle on September 15, 2005, beat him with a bat, cursed him and threatened to kill him. On September 26 and 28, 2005, with the assistance of a brother-in-law, the applicant made two complaints to the police.

[8] Following this incident, the applicant first took refuge with his wife's brother's family and then fled Guinea on October 15, 2005. He made a claim for refugee protection in Canada on November 9, 2005. The applicant states that his father issued a fatwa against him to have him killed for dishonouring his family.

[9] On August 15, 2006, the Refugee Protection Division [RPD] dismissed the applicant's claim for refugee protection because of a general lack of credibility. This Court dismissed an application for leave and judicial review of that decision.

[10] Subsequently, the applicant submitted an initial PRRA application for permanent residence on humanitarian and compassionate [H&C] grounds, which was dismissed on November 26, 2007. The application for a judicial review of these decisions was dismissed (the application for leave was granted solely with regard to the H&C application and the judicial

review application of this decision was dismissed by Justice Lagacé in *Yansane v Canada (Citizenship and Immigration)*, 2008 FC 1213).

[11] His first motion for a stay was dismissed, but the applicant was not removed at that time because of difficulty in obtaining the required travel documents.

[12] On November 12, 2008, the applicant submitted a second PRRA application, supported by new evidence, including evidence of his conversion to Christianity and of the fatwa issued by his father against him.

[13] The same PRRA officer reviewed this application and dismissed it. A few months later, a motion for a stay of execution of the removal order made by the applicant was granted by Justice Lemieux of this Court who found that there was a serious issue that the officer possibly ignored the instructions issued by the Federal Court of Appeal in *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 [*Raza*] or that she had possibly erred by giving too little weight to the new evidence filed (*Yansane v Canada (Citizenship and Immigration)*, 2009 FC 75 [*Yansane 1*]).

[14] The judicial review application for the first negative decision regarding the applicant's second PRRA application was allowed by Justice Shore in *Yansane v Canada (Citizenship and Immigration)*, 2009 FC 1242 [*Yansane 2*]. After citing some extracts of *Yansane 1*, where Justice Lemieux repeats the analysis made by Justice Sharlow in *Raza*, Justice Shore stated the following:

> [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).

[15] The matter was therefore returned to the respondent for redetermination and a new negative decision was made by another PRRA officer.

[16] The application for judicial review of this second negative decision on the second PRRA application was the subject of a consent to judgment by the parties and the application for judicial review of the third negative decision was allowed, again by Justice Shore, in an unreported decision of November 20, 2013 (*Yansane v Canada (Citizenship and Immigration)*, IMM-2927-13 [*Yansane 3*], attached). The substance of this decision bears repeating:

> **KNOWING** that, in this specific case, based on a unique set of facts, despite the respondent's thorough submissions and the PRRA Officer's good faith, the Court does not find the decision to be in and of itself reasonable, considering the new evidence that

demonstrates that the peril existing in the past is renewed in the present, revealing that the time that has elapsed does not provide a static situation, but rather one where the danger can be seen again each time;

THEREFORE, the Court is once again of the same view as each of this Court's judges who have previously had before them an application in respect of the applicant;

KNOWING that the four previous decisions, submitted in respect of the applicant, discussed before this Court, were raised again regarding the applicant's present situation, the Court still agrees completely with each of the paragraphs and excerpts of the previous decisions. These decisions should be read in depth knowing that there were orders to give them effect. Furthermore, the most recent evidence in the form of letters before this Court is accepted as valid proof;

WHEREAS, among the ample new and material evidence accepted by this Court under the test applied by the Federal Court of Appeal in *Raza v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385, per Madam Justice Karen Sharlow, the letter from the Archdiocese of Montréal, dated June 13, 2012, still demonstrates the situation that continues to exist for the applicant should he return to his country of origin; this is after reconsideration following evidence submitted to the last PRRA Officer;

REALIZING that, without clear and convincing information from the Canadian Embassy in the applicant's country of origin (or other evidence provided upon request by an authority from the executive branch of the Canadian government) to contradict the evidence in the record, this Court cannot take a different view from the one it has taken from the outset of this case with the evidence before it; that is to say that the Court must have before it clear and convincing assurances from a government authority in the applicant's country of origin about the state of security or possible protection of the applicant in light of the most recent supporting evidence. This type of evidence is necessary to contradict the new evidence in the record, as in some other cases that were before this Court where the Court accepted assurances from the country of origin in question to change its point of view regarding current evidence in the record.

[17] The matter was again returned to the respondent for redetermination and a new PRRA officer dismissed the applicant's application for the fourth time. On June 5, 2015, when the application for judicial review of the fourth negative decision (the one that is the subject of this application) was before the Court, again before Justice Shore, he postponed the hearing of the case and issued the following direction [TRANSLATION]:

> The hearing is postponed until November 2015 to allow both sides the necessary time to study the documents and hard evidence so that, after many attempts, we can have the opportunity to see clearly in this matter.

[18] On June 25, 2015, the respondent informed the Court that he would not [TRANSLATION]: "carry out any verifications with foreign affairs or otherwise … [being] of the opinion that, in a judicial review, the evidence must be limited to what is before the decision maker. Thus, any new evidence obtained after the decision made by the PRRA officer would not be useful."

[19] On November 16, 2016, I heard the application for judicial review of the respondent's fourth negative decision on the applicant's second PRRA application.

III. Impugned decision

[20] When the matter was submitted to the respondent for the fourth time, the applicant was called to appear at a hearing before the PRRA officer, pursuant to paragraph 113(b) of the *Immigration and Refugee Protection Act*, SC 2001 c 27 [IRPA] and section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227. The applicant's second PRRA application was thus dismissed for the fourth time on March 27, 2014.

[21] To begin with, the officer specified that she had [TRANSLATION] "seen fit to meet the applicant prior to following the Court's most recent orders to assess the credibility of his allegations." Following the hearing, she found that the applicant was not generally credible and that the evidence filed was insufficient to resolve the many contradictions and implausibilities in the applicant's narrative. The following are the main contradictions reported by the officer:

> [TRANSLATION]
>
> • With regard to his relationship with his wife, the applicant told a version of the story that was completely different from the one given to the RPD with regard to the number of times he and his wife saw each other before they got married. The applicant also testified that his aunt had seen him leaving the Conakry church and had informed the applicant's father, but the applicant had never mentioned this aunt previously;
>
> • As for his father's opposition to his marriage, some portions of the applicant's testimony contradicted his allegations of persecution. The applicant had lived in the family's compound for 10 years. His father had acted as surety to allow the applicant to purchase land, which was after his marriage to a Catholic. Moreover, contrary to the applicant's testimony, the Koran allows a mixed union of a Muslim man and a Christian woman;
>
> • The applicant contradicted himself about how old he was when his father became an imam and his father's identity card had been visibly altered in the place where his occupation was indicated. As a result of these two points, the PRRA officer did not believe that the applicant's father was indeed an imam;
>
> • The applicant told two different versions of his story about converting to Christianity and had difficulty answering the officer's questions about the various Catholic sacraments, even stating that first communion came before baptism;
>
> • The applicant failed to mention his half brothers and sisters in his application (although he talked about them at the hearing), and also failed to mention his father's former wife who was mentioned in his police complaint, however, in 2005;
>
> • The documentary evidence submitted by the applicant includes numerous anomalies. Neither the original copies nor the

transmission slips were provided, and the evidence was not very credible overall;

• Documentary evidence on country conditions shows that the relations between Christians and Muslims are good among the general public. Many couples display their religious diversity and Christians can freely practise their religion.

IV. Issues

[22] It is not disputed that, for decisions reached by a PRRA officer, the standard of reasonableness applies to findings of fact and findings of mixed fact and law (*Kandel v Canada (Citizenship and Immigration*, 2014 FC 659 at para 17; *Kovacs v Canada (Citizenship and Immigration)*, 2010 FC 1003 at para 46). Since I am of the opinion that the impugned decision is reasonable in itself, when considered without regard to its procedural history, the crucial issue is therefore:

- In the absence of a directed verdict, what is the impact of the Federal Court's findings of fact and directions on an administrative decision–maker called on to make a redetermination?

[23] I will first briefly explain why I am of the opinion that the PRRA officer's decision is inherently reasonable, that is without taking into account the decisions in *Yansane 2* and *Yansane 3* and the direction of June 3, 2015. I will immediately respond to the crucial question.

V. Analysis

A. *Is the PRRA officer's decision inherently reasonable?*

[24] At the end of a nearly three-hour interview, the PRRA officer concluded that the applicant's application was generally not credible. She noted many contradictions and implausibilities, including some of little importance and others of more significance. It is the latter points that, taken as a whole, fully justify the officer's findings.

[25] First, in his claim for refugee protection, the applicant confirmed that he dated his future wife in secret for a three-year period before they married. They saw each other every day during the school holidays and once a month during the school term. He said that he knew his future wife's religion before he started going out with her because she lived in the same neighbourhood as him. The RPD did not believe that the applicant was able to go out with his future wife for three years in his neighbourhood without his father's knowledge whereas his attendance at the church in Conakry, a city of one million inhabitants located 300 kilometres from Boké, had been quickly brought to his father's attention.

[26] The applicant changed his story before the PRRA officer and stated instead that he had gone out with his future wife for only a few months before their marriage, she lived eight kilometres away from him and they had been able to see each other in secret, in discreet locations.

[27] He also added that he remembered that an aunt had seen him at the Conakry church and she had probably informed his father.

[28] It was reasonable for the PRRA officer to conclude that the applicant had adjusted his testimony to respond to the concerns and negative conclusions reached by the RPD.

[29] Moreover, when the officer questioned the applicant about the Catholic Church's various sacraments, he had first answered that he was too nervous to respond. He then listed baptism and first communion and affirmed categorically twice that the first communion always came before the baptism.

[30] Then, the officer brought to the applicant's attention a letter he had allegedly received from the Montréal Catechetical Office inviting him to a confirmation ceremony presided over by Cardinal Jean-Claude Turcotte, on February 25, 2007. The applicant first stated that he had participated in this ceremony and that he was confirmed. However, when confronted with his baptismal certificate (Exhibit 7) which indicates that he was only baptized on April 7, 2007, the applicant stated that he was no longer certain whether he had been confirmed and asked the officer to contact his church for more information. The applicant filed an affidavit in support of his judicial review application and, although he had the opportunity to do so, he did not contradict the officer's findings in this respect.

[31] The officer reviewed all of the documentary evidence and considered it unconvincing.

[32] First, the majority of the original documents and transmission slips were missing. In his affidavit, the applicant indicated only that he was under the impression that he had brought original copies, but he was not categorical about it. During the hearing before the Court, the

counsel for the applicant was also unable to confirm whether the original documents had been submitted to the officer for analysis.

[33] Moreover, the officer noted a number of anomalies. For example, the letterhead of the letter from the Paroisse Sacré-Cœur de Boké parish (Exhibit 19) contained a spelling mistake in the word *paroisse.* The letter from the Conakry Archdiocese dated May 14, 2008, (Exhibit 21) was unsigned and the seal was illegible. The photocopy of the identity card of the applicant's father (Exhibit 1) seemed to have been altered, etc.

[34] All in all, the PRRA officer assessed all of the evidence before her and, in my opinion, if we set aside the Court's previous decisions, her decision is understandable and clear and her conclusions are within the possible, acceptable outcomes which were defensible in respect of the facts and the law.

B. *Impact of the Court's decisions in Yansane 2 and Yansane 3 and of the direction of June 5, 2015*

[35] With regard to the direction of June 5, 2015, I am of the opinion that *Mazhero v Fox*, 2014 FCA 200 applies in this case:

> [19] …By exception, a direction is appropriate where it is required to guide the parties or the Registry in matters of procedure, or to deal with a matter to which the parties have consented or that for other reasons may reasonably be considered not to be controversial. A direction should never be used in place of an order where it is reasonable to consider that a party may wish to appeal.
>
> [20] Having said that, it remains the case that any direction of a judge of this Court or the Federal Court must be respected unless it is set aside or varied. …

[36] Since it is settled that the only admissible evidence in the analysis of an application for judicial review is that which is before the administrative decision-maker, I will cancel the direction issued by the Court on June 3, 2015.

[37] However, that direction, issued by Justice Shore when he was hearing the decision currently under review, helps me to interpret his decisions in *Yansane 2* and *Yansane 3* and confirm his previous analysis of the documentary evidence before the second, third and fourth PRRA officers. He repeats several times that, in his opinion, this evidence should have not only been admitted according to the criteria of the *Raza* judgment, but it is also uncontested. In my opinion, his analysis exceeds the application of criteria for admissibility of new evidence. It contributes to the administration of evidence, that is to say, the determination of its probative value. In *Yansane 3*, Justice Shore indicates that "without clear and convincing information from the Canadian Embassy in the applicant's country of origin (or other evidence provided upon request by an authority from the executive branch of the Canadian government) to contradict the evidence in the record, this Court cannot take a different view from the one it has taken from the outset of this case with the evidence before it."

[38] It is clear that it is not for this Court to administer the evidence in support of a PRRA application. However, when it does so, its findings cannot simply be ignored by a subsequent decision-maker.

[39] The question is not whether I am bound by Justice Shore's findings of fact; the question is instead whether these findings had to be respected by the PRRA officer.

[40] In *Burton v Canada (Citizenship and Immigration)*, 2014 FC 910, Justice Gleason was called on to analyze the decision of a PRRA officer who had found that the applicant did not face a risk in returning to his country. However, in an earlier decision, another PRRA officer had found that there was indeed a risk for the applicant, but that the applicant had not demonstrated that he could not benefit from the protection of his country if he had to return. This first negative decision had been overturned by Justice Mactavish only on the issue of state protection. Justice Gleason stated the following:

> [44] This, however, is not the only reason why the second PRRA decision must be set aside. In addition, the result reached by the second PRRA officer is also unreasonable in light of the facts before the second PRRA officer and in light of the terms of Justice Mactavish's decision in *Burton*.
>
> [45] Because she remitted the matter for redetermination in accordance with her Reasons, and because those Reasons at least implicitly endorsed the risk determination of the first PRRA officer and contemplated that the issue of risk would not be reassessed if circumstances remained unchanged, the second PRRA officer in my view could not depart from the previous risk assessment unless there were new facts or circumstances that could reasonably give rise to a different risk conclusion.
>
> [46] In this regard, it is clear that the second PRRA officer was bound by Justice Mactavish's direction as the principle of *stare decisis* requires administrative tribunals to follow directions given by the reviewing court (see e.g. *Régie des rentes du Québec v Canada Bread Company Ltd*, 2013 SCC 46, [2013] 3 SCR 125 at para 46 and *Canada (Commissioner of Competition) v Superior Propane Inc*, 2003 FCA 53, 223 DLR (4th) 55 at para 54). Thus, unless there were new facts which could have reasonably given rise to a different risk conclusion, the second PRRA officer was required to adopt the same risk conclusion as the first PRRA officer made.

[41] Thus, the PRRA officer was not required to reach the same conclusions as the other PRRA officers on the applicant's application, but Justice Shore's findings of fact and directions

(contained in *Yansane 2* and *Yansane 3* and not the direction of June 3, 2015) had to be followed. I reach this conclusion despite the fact that Justice Shore did not indicate in his order in *Yansane 3* that he was remitting the matter to the respondent for a new determination in accordance with the reasons, or other similar wording. The absence of such a reference in Justice Shore's order does not allow an administrative decision-maker required to redetermine a matter to ignore the reasons, the findings of fact or the directions of this Court.

[42] In these circumstances, I am of the opinion that it was unreasonable for the PRRA officer to ignore the Court's findings of fact regarding the documentary evidence before it and, for this sole reason, the applicant's application for judicial review will be allowed.

C. *Question(s) to be certified*

[43] Even before hearing the case, the applicant submitted the four following questions to the Court for certification:

> [TRANSLATION]
>
> What is the role of the first Federal Court judgment in a new PRRA review? Does the PRRA officer have the right to set aside the Federal Court's findings of fact and law without providing any clear explanations? Should the *stare decisis* doctrine apply?
>
> Should the administrative decision-maker address all the evidence under the *Canadian Charter of Rights and Freedoms*, including previously submitted evidence and without material limitation of the evidence?
>
> Can the administrative decision-maker set aside uncontradicted evidence from the Catholic Church authorities and human rights reports without justification? Can the administrative decision-maker ignore the evidence related to radical Islam and the issue of apostasy?

> Are PRRA officers sufficiently impartial and do they have the necessary independence to render such decisions?

[44] After the hearing, the applicant's counsel sent a letter to the Court asking for the addition of the following question to his list:

> [TRANSLATION]
>
> Is judicial review at the Federal Court an adequate remedy with respect to section 24 of the *Charter of Rights and Freedoms* or our international commitments respecting the need for an effective remedy to avoid violating international law if the well-articulated findings of the Federal Court are not binding on the administrative officer?

[45] None of the questions asked by the applicant, as formulated, is crucial in this case. However, and since I am of the opinion that the decision under review is inherently reasonable, I will certify the question that is material and which may be material for an appeal by the respondent:

- In the absence of a directed verdict, what is the impact of the Federal Court's findings of fact and directions of on an administrative decision-maker called on to make a redetermination?

VI. Conclusion

[46] The application for judicial review is allowed, and a question of general importance is certified.

JUDGMENT

THE COURT'S JUDGMENT is that:

1. The direction issued by the Court dated June 3, 2015, is cancelled;

2. The applicant's application for judicial review is allowed and the matter is remitted to the respondent for redetermination by a different pre-removal risk assessment officer, in accordance with these reasons;

3. The following question is certified:

    - In the absence of a directed verdict, what is the impact of the Federal Court's findings of fact and directions on an administrative decision-maker called on to make a redetermination?

"Jocelyne Gagné"
Judge

Certified true translation
Barbara McClintock, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7935-14
STYLE OF CAUSE:	LAMINE YANSANE v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	NOVEMBER 16, 2015
JUDGMENT AND REASONS:	GAGNÉ J.
DATED:	MARCH 3, 2016

APPEARANCES:

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Sébastien Dasylva	FOR THE RESPONDENT

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William F. Pentney Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT

Date: 20131120

Docket: IMM-2927-13

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, November 20, 2013

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

LAMINE YANSANE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER

WHEREAS this is a response to the application for judicial review in respect of the most recent Pre-removal Risk Assessment (PRRA) decision;

KNOWING that, in this specific case, based on a unique set of facts, despite the respondent's thorough submissions and the PRRA Officer's good faith, the Court does not find the decision to be in and of itself reasonable, considering the new evidence that demonstrates that the peril existing in the past is renewed in the present, revealing that the time that has elapsed does not provide a static situation, but rather one where the danger can be seen again each time;

THEREFORE, the Court is once again of the same view as each of this Court's judges who have previously had before them an application in respect of the applicant;

KNOWING that the four previous decisions, submitted in respect of the applicant, discussed before this Court, were raised again regarding the applicant's present situation, the Court still agrees completely with each of the paragraphs and excerpts of the previous decisions. These decisions should be read in depth knowing that there were orders to give them effect. Furthermore, the most recent evidence in the form of letters before this Court is accepted as valid proof;

WHEREAS, among the ample new and material evidence accepted by this Court under the test applied by the Federal Court of Appeal in *Raza v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385, per Madam Justice Karen Sharlow, the letter from the Archdiocese of Montréal, dated June 13, 2012, still demonstrates the situation that continues to exist for the applicant should he return to his country of origin; this is after reconsideration following evidence submitted to the last PRRA Officer;

REALIZING that, without clear and convincing information from the Canadian Embassy in the applicant's country of origin (or other evidence provided upon request by an authority from the executive branch of the Canadian government) to contradict the evidence in the record, this Court cannot take a different view from the one it has taken from the outset of this case with the evidence before it; that is to say that the Court must have before it clear and convincing assurances from a government authority in the applicant's country of origin about the state of security or possible protection of the applicant in light of the most recent supporting evidence. This type of evidence is necessary to contradict the new evidence in the record, as in

some other cases that were before this Court where the Court accepted assurances from the country of origin in question to change its point of view regarding current evidence in the record;

THE COURT ORDERS AND ADJUDGES that the applicant's application for judicial review is allowed. Accordingly, the Court sets aside the most recent PRRA decision and orders a redetermination by a different officer. No question of general importance for certification arises.

Obiter

It is not the jurisdiction of the Federal Court to decide the applicant's fate. It is for the PRRA Officer to make that decision; it is for the officer who has jurisdiction to decide the case. To contradict the new updated evidence, submitted each time to demonstrate that every time the case is taken up again, the previous peril remains again or is renewed for the future without ceasing to exist. It is for the Canadian Embassy or another entity from the executive branch of the Canadian government to clarify the situation if, indeed, the new evidence could be contradicted. Information from Canadian government sources could make the task of the PRRA Officer and this Court easier if this matter were to come back before the Court.

"Michel M.J. Shore"
Judge

Certified true translation
Daniela Guglietta, Translator

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 reasonable, 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 (CANLII), 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(CanLII).

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 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.
> >
> > 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.
> >
> > 2. 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.]

3. 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.

4. 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 (CanLII), [2009] FCJ 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

[22] 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

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