Date: 20090123

Docket: IMM-5584-08

Citation: 2009 FC 75

BETWEEN:

LAMINE YANSANE

Applicant

and

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

Respondents

REASONS FOR ORDER

LEMIEUX J.

[1] These are the reasons for the stay of the removal of Lamine Yansane, aged 35, a citizen of Guinea, scheduled for January 9, 2009, that I granted on January 8, 2009. His application for a stay was filed with an application for leave and judicial review of the decision of a pre-removal risk assessment officer (PRRA officer) dated November 21, 2008, refusing his second PRRA application, which was made on November 12, 2008.

Overview

[2] The applicant arrived in Canada on October 16, 2005 with a false French passport and claimed refugee protection. He is afraid of his father, an Imam at a mosque in Boké, Guinea, and his

Muslim family, because of his marriage to a Catholic woman (who is still in Guinea with their three children) and his intention to convert, which he has now done: he was baptised in Montréal on April 7, 2007.

[3] On August 15, 2006, the Refugee Protection Division (RPD) found him not to be credible. His application for leave and judicial review was dismissed by me on January 9, 2007. The RPD based its finding that he was not credible on a number of factors, including:

- His vague and imprecise answers as to when he had decided to convert to Catholicism in Guinea;

- Inconsistencies or implausibilities: (1) the fact that during his [TRANSLATION] "courtship" of his fiancée he was not reported; (2) the fact that his family apparently agreed to him marrying his fiancée in a civil ceremony in 1994 with the applicant's promise that he would convert her to Islam within two years; and (3) the fact that the applicant and his family were able to live in the same concession as his father in Boké for 10 years (from September 1994, the date of the marriage, to 2004, the date when the applicant and his family went to live in Conakry) without his wife converting to Islam;

- The failure to declare in his personal information form (PIF) the fact that two complaints against his father had been filed with the police.

[4] His first PRRA application was refused on November 26, 2007, and an application for leave and judicial review of that decision was dismissed by a judge of this Court on June 20, 2008.

[5] Also on November 26, 2007, an immigration officer, who was also the PRRA officer in the case before us, refused his application for permanent residence on humanitarian and compassionate grounds. The application for an exemption was based on his integration into Canadian society and the same risks as he had identified in his PRRA application.

[6] His removal to Guinea was scheduled for March 4, 2008, pursuant to the negative decisions referred to above; he applied for a stay, together with an application for leave regarding the refusal of his application for permanent residence on humanitarian and compassionate grounds (exemption decision); that application was dismissed, but his removal was postponed because a travel document had not yet been issued by the Guinean authorities.

[7] In the interim, on July 18, 2008, a judge of this Court gave leave to seek judicial review of the exemption decision. On November 4, 2008, my colleague Mr. Justice Lagacé dismissed that application.

[8] On October 29, 2008, the Embassy of Guinea issued him a travel document valid for six months. As noted, the applicant made his second PRRA application on November 12, 2008, and it was refused on November 21, 2008 by the same officer who had refused his first PRRA application.

Impugned Decision

[9] The decision made by the PRRA officer (the officer), like all PRRA decisions, in fact, is composed of two parts: yes or no answers to the questions on the decision form, and the decision-maker's explanation of why the answer is yes or no. Under the heading "New Evidence (Section 113(a) of the IRPA)", the officer checked "yes" to the questions "New evidence that arose after the rejection" and "Evidence that was not reasonably available", and "no" to the question of whether, if it was available, the applicant could not reasonably have been expected in the circumstances to have presented it at the time of the rejection. She answered "yes" to the question "Is there new evidence?"

[10] She said that she had [TRANSLATION] "regard to the documents and evidence submitted after the PRRA decision on November 26, 2007, the other evidence having been considered and a negative decision made". She described certain new evidence, including:

> [TRANSLATION] In support of his application, the applicant produced several letters of support: from the *Archdiocese of Conakry*, from *Sacré-Cœur parish in Boké*, from the *Archdiocese of Montréal*, from the *Mission communautaire de Montréal*, from his brother, a report from the law office of *Maurice Lamey Kamano*, a lawyer in Guinea, to the Court, and also an article from the National Post in Canada dated June 4, 2008, concerning the applicant. The documents are dated 2008, except for the letter from his brother, which his dated July 2007. [Emphasis added.]

[11] The officer assessed the new evidence as follows:

> [TRANSLATION]
> (1) Letters of support
>
> I note that many of the documents submitted in support are letters of support from friends and family members, to which I assign little weight, given that they serve the applicant's interests and are not objective. A number of letters from various Christian bodies relate to his integration into Canadian society, his stay of removal,

the seriousness of his religious practice in Canada and the danger he faces in his country. These aspects were considered in the previous pre-removal risk assessment and his application for exemption from permanent resident visa requirements, and the two applications to the Federal Court were dismissed in 2008, confirming that the two decisions were in accordance with natural justice. [Emphasis added.]

(2) Report from the lawyer in Conakry dated May 12, 2008

Regarding the report by a lawyer in Conakry dated May 12, 2008, the lawyer made inquiries at the request of Stewart Istvanffy, the applicant's representative. An inquiry was made to Father Apollinaire of the Sacré-Cœur parish in Boké, Guinea, who was unable to contact the applicant's father because he did not want to speak to him. He said that he met with the father of Mariama, the applicant's wife, and other Muslims who gave their opinions about the case and in general, and feared for the applicant's safety. I note that the lawyer stated in his letter:

> … since Lamine married his daughter, things have been horrible for everybody, and specifically for the young couple, who are living in hell …

I assign little weight to this biased report, which essentially reiterates the same evidence as the evidence already found by the IRB not to be credible. [Emphasis added.]

(3) Article in the National Post

Regarding the article by Graeme Hamilton published in the National Post on June 4, 2008, entitled "No faith in conversion", although the applicant did not state that he would be targeted because of the media coverage in Canada, I will consider the impact of this situation on his return to Guinea. The article summarizes the same points as were alleged in the refugee protection application: the rejection by the IRB on the ground that he was not credible, the same report prepared by a law firm in Guinea, submitted with the PRRA application, the baptism in Montréal, a petition with 300 names supporting the applicant (which is not in the file), the comments by Mr. Istvanffy about the fact that he will be persecuted if he returns to Guinea. The 300-name petition that is not in the file would add nothing important to the applicant's application.

I note that in this case, as in the case of numerous unsuccessful applicants who are about to be removed from Canada, the use of the media is a common strategy in order to be found to be a refugee *sur place* and thus avoid removal. This article states the opinion of a journalist who reiterates the evidence already considered, and on which even the Federal Court has already ruled. I am of the opinion that the media coverage in a newspaper in Canada will have little impact on the return of the applicant, who received a travel document from the Guinean authorities in October 2008, valid for six months, to return to that country. I assign little weight to the

> newspaper article, as I am already aware of the evidence referred to in it and I consider it to have been written at his lawyer's request to serve the interests of the applicant. [Emphasis added.]

[12] Before moving on to our analysis, it is useful to note the nature and content of certain new evidence accepted by the officer:

(1) The letter from the Sacré-Cœur parish in Boké, dated May 4, 2008, was written by the curate of the parish. He states that he knows the applicant and is aware of his problems with his father, who [TRANSLATION] "is an Imam who is widely recognized as an influential authority who was not happy about this act [the civil marriage between the applicant and his wife Mariama Kalabone], which dishonours and betrays him". He says that the father "threatened his son" and when the dispute between them "heated up", the applicant and his family chose to go and live in Conakry. He says:

> [TRANSLATION] I am surprised to learn that YANSANE Lamine has to return to Guinea. Knowing this man [the father] in Boké, I attest that he will carry out these death threats against [his son] if he returns to Guinea. El hadj Aboubacar [the father] is one of the fundamentalists who do not accept their children changing religion: they are born, live and die Muslims. [Emphasis added.]

(2) The letter from the Archdiocese of Conakry, dated May 14, 2008, was from the Diocesan Chancellor, who certifies that:

> [TRANSLATION] His conversion apparently drew heated reaction in his Muslim family.
>
> For his peace and safety, he apparently left Guinea and sought refuge in Canada, thereby retaining his Catholic faith.

> It is unthinkable to Muslims for someone to convert to Christianity; and a Christian is generally treated like a "Kafir", the equivalent of Satan.
>
> It is impossible to protect Mr. YANSANE: we are dealing with a private matter, and a family matter.
>
> I provide this attestation for all legal uses and purposes.
> [Emphasis added.]

(3) The article in the National Post was published on June 4, 2008, and recounts Mr. Yansane's story; it was written by Graeme Hamilton. The relevant passage is as follows:

> In an interview from Guinea, his father, El Hadj Aboubacar Yansane, warned his son to stay away. "If he stays Catholic, he can never come back here," the father, an imam in the town of Boke, told the National Post. "I am a Muslim, and if he has become Catholic, he should stay over there. I don't even want to see him…. He knows what will happen. It would be dangerous for him to come back to Boke." [Emphasis added.]

(4) The report of Mr. Kone's inquiries is dated May 12, 2008. He traveled to Boké to make inquiries. Mr. Kone met the curate of Sacré-Coeur parish, Mariama Kalabone's father, Imam Solmah and another person who did not want to give a name, and an Imam in Conakry. They all corroborated the risk to the applicant if he returned to Guinea. Mr. Kone added:

> [TRANSLATION] We have seen the case of another son of an Imam, Mr. BAIDE, who became a Christian and a candidate for the priesthood; his life also was threatened by his father. The Church in Guinea found that it had to move him away from his parents by sending him to Rome, Italy, where he completed his religious studies and is currently a priest in the Society of Jesus.
>
> More serious is the fact that the Guinean authorities (police and judicial) provide no protection for victims of these situations. If reports are made to them, they often consider that these are family matters and the family should

> resolve them internally. That attitude is not surprising, given the fact that the Guinean population is 90% Muslim and that the directors of these various services are themselves Muslim. [Emphasis added.]

(5) The letter from the brother states that the applicant's father has issued a fatwa against him.

Analysis

[13] The decisions of this Court are clear on the law: in order for a stay to be granted, an applicant must establish each of the three following factors: (1) the existence of a serious question or questions raised by the decision to which the stay application relates; (2) that the applicant will suffer irreparable harm if the stay is not granted; and (3) that the balance of convenience favours the applicant rather than the Ministers (see the decision of the Supreme Court of Canada in *R.J.R. - Macdonald Inc. v. Attorney General of Canada*, [1994] 1 S.C.R. 311 (*R.J.R. – Macdonald*) and the decision of the Federal Court of Appeal in *Toth v. Canada (Minister of Employment and Immigration)*, (1988) 86 N.R. 302 (*Toth*)).

[14] Before continuing the analysis, it will be worthwhile here to refer to certain principles stated in the decision of the Federal Court of Appeal in *Raza* ***v****. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385, *per* Madam Justice Sharlow, in which the Court analyzed the basic principles of the PRRA program and how new evidence under subsection 113(a) of the *Immigration and Refugee Protection Act* (IRPA), which reads as follows, is to be addressed:

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;

[15] Justice Sharlow's reasons were written in English and have not been officially translated.

[16] Justice Sharlow acknowledged that a PRRA is not an appeal from a decision of the RPD, but qualified that statement by writing, at paragraph 12:

> [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: [Emphasis added.]
>
> … …

[17] Justice Sharlow elaborated on her reasoning in the following paragraphs of her reasons:

> [13] As I read paragraph 113(*a*), it is based on the premise that a negative refugee determination by the RPD must be respected by the PRRA officer, unless there is new evidence of facts that might have affected the outcome of the RPD hearing if the evidence had been presented to the RPD. Paragraph 113(*a*) asks a number of questions, some expressly and some by necessary implication, about the proposed new evidence. I summarize those questions as follows:
>
> 1. Credibility: Is the evidence credible, considering its source and the circumstances in which it came into existence? If not, the evidence need not be considered.

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

3. Newness: Is the evidence new in the sense that it is capable of:

   (a) proving the current state of affairs in the country of removal or an event that occurred or a circumstance that arose after the hearing in the RPD, or

   (b) proving a fact that was unknown to the refugee claimant at the time of the RPD hearing, or

   (c) contradicting a finding of fact by the RPD (including a credibility finding)?

   If not, the evidence need not be considered. [Emphasis added.]

4. Materiality: Is the evidence material, in the sense that the refugee claim probably would have succeeded if the evidence had been made available to the RPD? If not, the evidence need not be considered.

5. Express statutory conditions:

   (a) If the evidence is capable of proving only an event that occurred or circumstances that arose prior to the RPD hearing, then has the applicant established either that the evidence was not reasonably available to him or her for presentation at the RPD hearing, or that he or she could not reasonably have been expected in the circumstances to have presented the evidence at the RPD hearing? If not, the evidence need not be considered.

   (b) If the evidence is capable of proving an event that occurred or circumstances that arose after the RPD hearing, then the evidence must be considered (unless it is rejected because it is not credible, not relevant, not new or not material). [Emphasis added.]

[14] The first four questions, relating to credibility, relevance, newness and materiality, are necessarily implied from the purpose of paragraph 113(*a*) within the statutory scheme of the IRPA relating to refugee claims and pre removal risk assessments. The remaining questions are asked expressly by paragraph 113(*a*).

[15] I do not suggest that the questions listed above must be asked in any particular order, or that in every case the PRRA officer must ask each question. What is important is that the PRRA officer must consider all evidence that is presented, unless it is excluded on one of the grounds stated in paragraph [13] above. [Emphasis added.]

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

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

[19] Justice Sharlow concluded:

> [18] In this case, Mr. Raza and his family submitted a number of documents in support of their PRRA application. All of the documents were created after the rejection of their claim for refugee protection. The PRRA officer concluded that the information in the documents was essentially a repetition of the same information that was before the RPD. In my view, that conclusion was reasonable. The documents are not capable of establishing that state protection in Pakistan, which had been found by the RPD to be adequate, was no longer adequate as of the date of the PRRA application. Therefore, the proposed new evidence fails at the fourth question listed above. [Emphasis added.]

[20] I will now do the necessary analysis.

(a) Serious Questions

[21] In *R.J.R. - Macdonald Inc.*, *supra*, Justices Sopinka and Cory wrote:

> **49** What then are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case. The decision of a lower court judge on the merits of the *Charter* claim is a relevant but not necessarily conclusive indication that the issues raised in an appeal are serious: see *Metropolitan Stores*, *supra*, at p. 150. Similarly, a decision by an appellate court to grant leave on the merits indicates that serious questions are raised, but a refusal of leave in a case which raises the same issues cannot automatically be taken as an indication of the lack of strength of the merits.
>
> **50** Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the

> opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable. [Emphasis added.]

[22] In that decision, the judges stated that there were two exceptions to the general rule that a judge should not engage in an extensive review of the merits. Those two exceptions are not applicable in this case.

[23] I find that the applicant has established the existence of the following serious questions:

1. Did the officer comply with the instructions regarding new evidence set out in *Raza*, *supra*?

2. Did the officer err in law in her assessment of the new evidence by assigning only very little weight to the new evidence referred to in paragraph 10 above, on the ground that: (1) it served the applicant's interests [letters of support (see *Perea v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 432, at paragraph 7)]; (2) it had already been considered [letters from the curate in Boké and from the Archdiocese]; (3) the report by Mr. Kone carried little weight because he was retained by the applicant's counsel in Canada [the Kone report]; or (4) it related to the same allegations as were made in his refugee protection claim [the National Post article]?

3. Did the officer refuse to consider, or disregard, the new evidence relating to state protection noted in the Kone report and in the letter from the Diocesan Chancellor, as well as the example similar to the applicant's case of the person who went into exile, cited in the Kone report?

4. Did the officer minimize the importance of the letters from Catholic authorities in Guinea when she considered them to be simply letters of support?

(b) Irreparable Harm

[24] I find that the applicant has established that he would suffer irreparable harm if the stay is not granted, based on the simple fact that his life is in danger if he returns to Guinea.

(c) Balance of Convenience

[25] The balance of convenience favours the applicant, who has established that there are several serious questions and that he would suffer irreparable harm.

[26] For these reasons, the stay is granted.

"François Lemieux"

_____
Judge

Ottawa, Ontario
January 23, 2009

Certified true translation
Brian McCordick, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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