Date: 20090514

Docket: IMM-2182-09

Citation: 2009 FC 500

Ottawa, Ontario, May 14, 2009

Present: The Honourable Mr. Justice Shore

BETWEEN:

ALLEN ROBIN FOINDING

Applicant

and

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

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

I. Preamble

[1] [8] . . . This Court has held that where an applicant's account was found not to be credible by the Refugee Division, this account cannot serve as a basis for an argument supporting irreparable harm in a stay application . . . (Emphasis added.)

(*Akyol v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 931, 124 A.C.W.S. (3d) 1119; also, *Singh v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 145, 137 A.C.W.S. (3d) 156, at paragraph 14).

[2] However, in his Pre-Removal Risk Assessment (PRRA) application, the applicant made the same submissions as those presented before the Refugee Protection Division (RPD).

[3] It is established that, following a negative decision by the RPD on the ground of credibility, as in the present case, an applicant may not simply attempt to present additional evidence in order to corroborate allegations already found to be not credible. Thus, the applicant may not attempt to "remedy" the lacuna with additional evidence that should have been presented previously, that is, before the RPD (*Bhallu v. Canada (Solicitor General)*, 2004 FC 1324, 134 A.C.W.S. (3d) 471).

II. Introduction

[4] This is an application for a stay of enforcement of the applicant's removal to Cameroon, scheduled for May 15, 2009. The present application for a stay is combined with an Application for Leave and for Judicial Review (ALJR) against the decision to deny his application for a Pre-Removal Risk Assessment (PRRA).

III. Preliminary note

[5] In the present application, the applicant's allegations of both a serious issue and irreparable harm are based on a single document: a wanted notice. In fact, according to paragraph 11 of the applicant's affidavit, the wanted notice is the only evidence in support of his allegation of irreparable harm. However, the Court notes that the applicant **failed to file the wanted notice**.

[6] The application for a stay should be dismissed on this ground alone since, in the absence of that document, the applicant cannot establish that his allegations are founded in any way.

[7] That said, in order to ensure transparency and the proper processing of this application, the respondents decided to file the wanted notice (Exhibit B of the affidavit of Dominique Toillon).

IV. Facts

Student visa and illegal status

[8] The applicant, Allen Robin Foinding, 20, is a citizen of Cameroon.

[9] He arrived in Canada on September 3, 2004, with a student permit that was valid until September 5, 2005 and allowed him to study at Collège Lasalle.

[10] Mr. Foinding remained in Canada **with no legal status from September 5, 2005 until December 11, 2006**, on which date he claimed refugee protection.

Refugee protection claim

[11] Thus, Mr. Foinding claimed refugee protection **more than two years** after arriving in Canada.

[12] On December 21, 2007, the RPD denied Mr. Foinding's refugee protection claim on the ground of lack of credibility. The RPD decision is based on numerous contradictions, inconsistencies and omissions, as well as conduct by the applicant that is inconsistent with the conduct of someone who claims to be persecuted or threatened in his country.

[13] The RPD considered the applicant's delay in leaving his country after the alleged events cited in support of his claim, as well as his two-year delay in claiming refugee protection after arriving in Canada (RPD decision).

[14] On April 3, 2008, the Federal Court dismissed the ALJR against the RPD decision.

PRRA application

[15] On July 25, 2008, Mr. Foinding filed a PRRA application, making the same submissions as those presented before the RPD (applicant's file (AF), at pages 36 to 49).

[16] On January 28, 2009, Mr. Foinding's PRRA application was denied.

Departure notice

[17] At the March 31, 2009, interview with the enforcement officer, Mr. Foinding asked to be given until May 15, 2009 to leave the country, in order to sell his personal effects and complete his semester of study at Collège Lasalle; **that time was granted to him**. Mr. Foinding agreed with the officer that he would leave Canada on May 15, 2009, (Exhibit C of the affidavit of Dominique Toillon, at page 17 of the respondents' file).

[18] On March 31, 2009, a departure notice for May 15, 2009, was given to Mr. Foinding personally (Exhibit P-4 of the applicant's affidavit, at page 51 of his file).

V. Analysis

[19] In order to obtain a stay of his removal, the applicant must establish that he meets the tests set out in the Federal Court of Appeal's decision in *Toth v. Canada (Minister of Employment and Immigration)* (1988), 86 N.R. 302, 11 A.C.W.S. (3d) 440 (F.C.A.):

a. the serious issue test;

b. the irreparable harm test; and

c. the balance of convenience test.

[20] All three tests must be met in order for this Court to allow the application for a stay. If a single test is not met, this Court cannot grant the stay.

A. Serious issue

[21] The PRRA officer was required to assess only new facts arising after the RPD had denied the refugee protection claim (paragraph 113(*a*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA)).

[22] However, in his PRRA application, Mr. Foinding made the same submissions as those presented before the RPD.

[23] It is settled law that following a negative decision by the RPD on the ground of credibility, as in the present case, an applicant may not simply attempt to present additional evidence in order to corroborate allegations already found to be not credible. Thus, Mr. Foinding may not attempt to "remedy" the lacuna with additional evidence that should have been presented previously, that is, before the RPD (*Bhallu*, above).

[24] As the PRRA officer stated in his reasons, the only evidence that was not presented before the RPD is a wanted notice issued in Douala, Cameroon, and dated January 26, 2006, that is, **before the RPD decision** dated December 21, 2007.

[25] The Court refers to the Federal Court of Appeal's decision in *Raza v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385, 162 A.C.W.S. (3d) 1013, confirming that the PRRA officer must consider all "new" evidence presented, unless it is excluded on **one** of the following grounds: (1) credibility; (2) relevance; (3) newness; (4) materiality; or (5) express statutory conditions:

> [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 accessible ou, s'ils l'étaient, qu'il n'était pas raisonnable, in les circonstances, de s'attendre à ce qu'il les ait présentés au moment du rejet;
. . .	. . .

[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.

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).

[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.

[16] One of the arguments considered by Justice Mosley in this case is whether a document that came into existence after the RPD hearing is, for that reason alone, “new evidence”. He concluded that the newness of documentary evidence cannot be tested solely by the date on which the document was created. I agree. What is important is the event or circumstance sought to be proved by the documentary evidence.

> [17] Counsel for Mr. Raza and his family argued that the evidence sought to be presented in support of a PRRA application cannot be rejected solely on the basis that it "addresses the same risk issue" considered by the RPD. I agree. 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.

(Also, *Mujib v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1027, 169 A.C.W.S. (3d) 850).

[26] Clearly, in *Raza*, the lack of importance attached to the date of the document concerned has to do, rather, with evidence dated after the RPD decision. Obviously, when the document is dated before the RPD decision, it necessarily refers to an event or circumstances preceding the hearing of the refugee protection claim. In this case, explanations from Mr. Foinding are required.

[27] Here, the PRRA officer considered the wanted notice, **dated before the RPD decision**, but excluded it as new evidence within the meaning of paragraph 113(*a*) under point 5(a) set out in *Raza*, that is, because Mr. Foinding did not explain why that evidence was not available to be presented at the RPD hearing or why it could not reasonably be expected to be presented at the RPD hearing. This exclusion is entirely in accordance with the case law.

[28] In this regard, the Court refers to a decision dated after the Federal Court of Appeal's decision in *Raza*. In *Abdollahzadeh v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1310, 325 F.T.R. 226, at paragraphs 16 and 26 to 28, the PRRA officer excluded, as here, certain evidence **dated before the RPD decision**, because the applicant had not established that the

documents concerned were not reasonably available or that she could not reasonably have been expected in the circumstances to present them before the RPD.

[29] The decision of this Court in *Bengabo v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 186, is directly applicable to the present case:

> [22] As regards the notice of escape, it was reasonable for the officer to give it no probative value. In *Elezi*, above, Justice Yves de Montigny stated that evidence that existed before the IRB's negative decision requires an explanation before it can be admitted with a PRRA application:
>
> > [26] I am prepared to accept that paragraph 113(*a*) refers to three distinct possibilities and that its three parts must be read disjunctively. If the use of the word "or" is to be given meaning, the three parts of paragraph 113(*a*) must clearly be seen as three separate alternatives. While the first part refers to evidence that postdates the Board's decision, the second and third parts obviously relate to evidence that predates its decision. Only evidence that existed before the Board's negative decision requires an explanation before it can be admitted with a PRRA application. As for evidence that arises after the Board's decision, there is no need for an explanation. The mere fact that it did not exist at the time the decision was reached is sufficient to establish that it could not have been presented earlier to the Board.
>
> [23] The officer identified [TRANSLATION] "one of them [the two documents submitted]" as predating the IRB decision (Decision at page 4). If Mr. Bengabo believes that the notice of escape meets the requirements of the second or third categories of evidence described at paragraph 113(*a*) of the IRPA, it is up to him to provide explanations. It is up to the officer to assess the explanations in light of the circumstances in the case. In this case, Mr. Bengabo did not give any explanations. It was therefore open to the officer to conclude that Mr. Bengabo did not discharge his burden of explaining why the notice of escape was not submitted to the IRB.

[30] In *Selduz v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 361, at paragraphs 15 to 17 and 21 to 24, it was held that where evidence predating the RPD decision has

not been presented before the RPD, and where the PRRA officer is not satisfied with the applicant's explanations in this regard, the officer must state so in his or her reasons.

[31] Here, the PRRA officer **clearly explains in his reasons** that Mr. Foinding provided **no explanation** as to the source of that evidence or why it was not produced before the RPD. The PRRA officer therefore concluded that Mr. Foinding had not discharged his burden of establishing why that evidence was not previously available, in accordance with section 113 of the IRPA and point 5(a) set out in *Raza* (PRRA decision, at page 32 of the applicant's file).

[32] With regard to the present application for a stay, Mr. Foinding explains, at paragraph 9 of his affidavit, the circumstances surrounding the fact that he did not produce that evidence before the RPD. **However, he does not allege in any way that he provided those same explanations to the PRRA officer**. On the contrary, Mr. Foinding merely alleges: [TRANSLATION] "**I believed that the PRRA officer had understood that I was providing that document at that time because it was impossible for me to obtain it earlier.**" But why???? (applicant's affidavit, at paragraph 9). As well, the submissions in the PRRA application are an exact copy of the account submitted at the RPD hearing, and no explanation was provided for the failure to present the wanted notice before the RPD, **even though Mr. Foinding was already represented by counsel of record**.

[33] Thus, according to the PRRA officer's reasons, Mr. Foinding's affidavit and the submissions in the PRRA application, it is clear that Mr. Foinding **never** provided the officer with **any explanation** of why he did not present that evidence before the RPD.

[34] In *Elezi* v. *Canada (Minister of Citizenship and Immigration)*, 2007 FC 240, [2008] 1 F.C.R. 365, on which Mr. Foinding bases his whole argument regarding a serious issue, de Montigny J. notes that when evidence is **dated before the RPD decision**, as in the present case, explanations from the applicant are required for that evidence to be admissible in the context of a PRRA application. What distinguishes *Elezi* from the present case is that, in the particular circumstances of that case, it was determined that there were reasons excusing the fact that those documents had not been presented before the RPD. As well, it must be noted that *Elezi* predates the Federal Court of Appeal's decision in *Raza*, above.

[35] Here, then, it is clear that the PRRA officer was not unaware of that evidence in the PRRA application but validly excluded it on the ground of the express statutory conditions set out it paragraph 113(*a*) and in accordance with point 5(a) set out by the Federal Court of Appeal in *Raza*, above. Since that evidence predated the RPD decision and since no explanation was given as to why it was not submitted at the RPD hearing, the officer reasonably concluded that it **did not constitute new evidence within the meaning of paragraph 113(*a*) of the IRPA.** Accordingly, the PRRA officer **was not required to take that evidence into account** in assessing Mr. Foinding's PRRA application.

[36] According to paragraph 15 of *Raza*, all of the evidence presented must be considered, unless it is excluded on **one** of the grounds set out in paragraph 13 of that decision. Clearly, then, **any one of the five grounds is sufficient** to exclude evidence as new evidence within the meaning of paragraph 113(*a*).

[37] In the present case, therefore, since the PRRA officer excluded the wanted notice under point 5(a), he was not required to express an opinion on the four other grounds.

[38] Nor is it accurate to allege, as does Mr. Foinding, that the decision would probably have been different if the RPD had considered the wanted notice. In this regard, the Court refers to the respondents' arguments at paragraph 21 of their submissions regarding the credibility, probative value and relevance of that document in the context of the account given before the RPD and in the PRRA application. Thus, although the PRRA officer was not required to consider the other grounds for excluding that evidence, it appears that he could also have rejected the evidence under point 1 set out in *Raza*, namely credibility, or under point 3, materiality.

[39] As noted below in the section on irreparable harm, that document alone certainly cannot offset the numerous credibility issues raised by the RPD in its reasons.

[40] The RPD considered Mr. Foinding to be not credible because of contradictions, inconsistencies and omissions with regard to the **two crucial events** in his account, that is, the visit by soldiers to his school and his abduction by the secret service. As well, the RPD did not believe in

Mr. Foinding's political involvement in the Cercle réuni because he was **unable to provide the smallest detail in this regard**. The RPD also considered the conduct of Mr. Foinding, who waited **27 months after arriving in Canada** before claiming refugee protection, to be inconsistent with a fear of persecution or a risk to his life. Thus it has not been established in any way that that document could have changed the outcome of the RPD decision.

[41] For all these reasons, the officer's assessment of the wanted notice is reasonable and consistent with this Court's decisions.

[42] With regard to the general situation in Cameroon:

- Mr. Foinding failed to produce the documentary evidence to which he refers at paragraph 9 of his written submissions;
- since the wanted notice was excluded from the evidence and the RPD considered the risk to him to be not credible, Mr. Foinding has not established any nexus between that general evidence on Cameroon and his personal situation.

[43] In this case, Mr. Foinding has established no grounds for believing that the PRRA decision was unreasonable. Therefore, no serious issue has been raised.

B. Irreparable harm

[44] With regard to irreparable harm, Mr. Foinding's only allegation is found at paragraph 11 of his affidavit, where he alleges that the wanted notice establishes that he is being sought by the police in his country and that, as a result, he would be tortured and subjected to inhuman and degrading treatment.

[45] In this regard, Mr. Foinding did not consider it appropriate to file the wanted notice in support of his allegation of irreparable harm in the context of the present application for a stay.

[46] As well, this Court doubts the relevance and the reliability of that document filed in support of his written submissions alleging irreparable harm:

- the mother's name indicated on the wanted notice does not correspond in any way to the name of Mr. Foinding's mother as stated on his Personal Information Form (PIF) (page 10 of the applicant's file);
- Mr. Foinding alleges that the events behind the wanted notice occurred in 2002-2003. Thus it is odd that the wanted notice would have been issued only in 2006;
- that document indicates an event number (CNI No. 105 667 148) referring specifically to December 8, 2004 in Douala, but Mr. Foinding had already been in Canada since September 3, 2004;
- the offences cited are [TRANSLATION] "incitement to revolt, disturbing the peace, and destruction of property", which do not correspond in any way to the submissions made

before the RPD and in the PRRA application with regard to the alleged theft of documents from his father's office that led to his problems with the secret service in his country;

- in itself, that document does not establish in any way that Mr. Foinding will be subjected to inhuman treatment constituting irreparable harm.

[47] These various points show that that document cannot establish irreparable harm, as Mr. Foinding has attempted to do.

[48] As well, the harm alleged by Mr. Foinding consists of the same facts submitted at the RPD hearing, which were considered to be not credible. In addition, those same facts were reviewed by the Federal Court, which dismissed the ALJR against the RPD decision.

[49] Furthermore, Mr. Foinding submitted those same facts in support of his PRRA application; the PRRA officer, too, after considering the RPD's analysis and conducting his own analysis of the evidence before him, concluded that Mr. Foinding had not established that he would be personally at risk in Cameroon.

[50] It is well established that risks alleged before both the RPD and the PRRA officer, and found to be neither credible nor satisfactory, cannot constitute irreparable harm. In this regard, the Court refers to the following decisions:

> [18] Simply alleging that the persons will suffer the harm they have claimed in their PRRA applications is not sufficient for the purposes of the test. I first note that the vast majority of the affected persons have received the benefit of a number of risk assessments. Prior to the PRRA decisions, in all cases, the affected persons have been party to earlier processes under the IRPA . . . (Emphasis added.)

(*Nalliah v. Canada (Solicitor General)*, 2004 FC 1649, [2005] 3 F.C.R. 210).

> [8] . . . This Court has held that where an applicant's account was found not to be credible by the Refugee Division, this account cannot serve as a basis for an argument supporting irreparable harm in a stay application . . . (Emphasis added.)

(*Akyol*, above; also, *Singh*, above).

[51] It is clear that the RPD did not believe the facts behind the wanted notice at all. Therefore, if no credence was given to Mr. Foinding's political involvement, the visit by the soldiers, his abduction and his whole story, how can one now believe that he is being sought for events that were not believed?

[52] Thus, Mr. Foinding has not succeeded in establishing the existence of irreparable harm. The onus is on the refugee protection claimant whose claim has been rejected by the RPD to establish that that person's country conditions or personal circumstances have changed since the RPD decision to the extent that the claimant, whom the RPD found not to be at risk, is now at risk. Mr. Foinding did not discharge this onus for the purposes of the PRRA application, nor has he

met the irreparable harm test (*Cupid v. Canada (Minister of Citizenship and Immigration),* 2007 FC 176, 155 A.C.W.S. (3d) 396, at paragraph 4).

[53] With regard to the arguments based on the general documentary evidence on Cameroon:

- that documentary evidence was not filed in support of this application;
- since the alleged harm is based directly on the wanted notice that cannot be considered credible, Mr. Foinding has not established in any way that he will actually be arrested on arrival in his country, and still less that he will be detained by the authorities; thus, Mr. Foinding has not succeeded in establishing a nexus between the general evidence on Cameroon and his personal situation;
- moreover, a wanted notice in itself does not represent a risk to life or safety.

[54] For all these reasons, Mr. Foinding has not met the irreparable harm test.

C. Balance of convenience

[55] The balance of convenience test favours the respondents, since Mr. Foinding has established neither the existence of a serious issue, in any of the three proceedings, nor that of irreparable harm (*Morris* v. *M.C.I.*, IMM-301-97, January 24, 1997 (F.C.)).

[56] As well, subsection 48(2) of the IRPA requires the respondents to enforce a removal order as soon as is reasonably practicable.

[57] The Federal Court of Appeal has confirmed that, in applying the balance of convenience test, the concept of the public interest must be taken into consideration. Moreover, it has confirmed that the fact that since arriving in Canada a claimant has availed himself of several forms of recourse, all with adverse results, may be taken into consideration in assessing the balance of convenience (*Selliah v. Canada (Minister of Citizenship and Immigration),* 2004 FCA 261, 132 A.C.W.S. (3d) 547, at paragraphs 21 and 22).

[58] Accordingly, the balance of convenience favours the public interest in ensuring that the immigration process contemplated by the IRPA follows its course.

VI. Conclusion

[59] For all the above reasons, Mr. Foinding has not met the requirements set out in the case law for obtaining a judicial stay. The application for a stay of enforcement is therefore dismissed.

JUDGMENT

THE COURT ORDERS that the application for a stay of enforcement be dismissed.

"Michel M. J. Shore"
Judge

Certified true translation
Brian McCordick, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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