Federal Court		Cour fédérale

Date: 20091216

Docket: IMM-2258-09

Citation: 2009 FC 1281

Ottawa, Ontario, December 16, 2009

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

NELSON NDEREVA NJERU

Applicant

and

THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72 (1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of the negative decision of the Applicant's Pre-Removal Risk Assessment, dated March 27, 2009 (Decision), which refused the Applicant's application to be deemed a Convention refugee or person in need of protection under section 97 of the Act.

BACKGROUND

[2] The Applicant is a citizen of Kenya.

[3] The Applicant purchased land that had been inherited by his father and uncle. He paid the purchase price to his cousin, Zabed. However, Zabed continued to live on the land without paying rent to the Applicant.

[4] In 2004, Zabed offered to purchase the land from the Applicant. The Applicant agreed and transferred the land title. The Applicant trusted his cousin would pay him the money owed. Zabed, however, did not pay in full for the land but claimed nonetheless that he was the owner.

[5] With the help of two friends, the Applicant tricked his cousin into signing an agreement acknowledging that he owed the Applicant money. Zabed had the Applicant's family homes burned when he learned of this deception, and also threatened the Applicant's life.

[6] The Applicant hired a lawyer who wrote a demand letter to Zabed. Shortly thereafter, the Applicant and his spouse were attacked by a family member and five other unknown individuals. The Applicant was hospitalized for two weeks as a result of this attack. The Applicant's wife was raped in the attack. Shortly thereafter, she fled to Mexico where she continues to reside.

[7] After the attack, the Applicant approached the police for help but was told that they would not intervene because it was a family matter. The Applicant obtained a visa to run in a marathon in Canada in May, 2006. He requested refugee protection in June of the same year.

[8] The RPD rejected his refugee claim on the basis that the Applicant could eliminate the risk he faced by no longer pursuing the land dispute with his cousin. The RPD noted that the Applicant and his cousin were taking part "in a personal vendetta," which was not protected under section 97 or section 96. Furthermore, the RPD found that because of the Applicant's cousin's role on the Special Forces in the Kenyan police, if he had wanted to locate the Applicant while the Applicant remained in Kenya, he would have been able to do so.

[9] Accordingly, the RPD found that the Applicant was not a person in need of protection as per sections 97(1)(*a*) and (*b*) of the Act or a Convention refugee in accordance with section 96 of the Act.

[10] The Applicant applied for judicial review of the RPD decision, but his application was denied in March of 2008. The Applicant made a PRRA application in October of 2008.

DECISION UNDER REVIEW

[11] The PRRA Officer acknowledged the deficiencies that the Applicant alleged in the RPD decision, but concluded that "the PRRA application is not the proper forum in which to contest the

RPD's findings." The Officer cited and relied on *Kabayaki v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 32, [2004] F.C.J. No. 27 in finding that "the PRRA application cannot be allowed to become a second refugee hearing. The PRRA process is to assess new risk development between the hearing and the removal date."

[12] The Officer acknowledged the documentation provided by the Applicant with regard to the death of his friends but found "insufficient evidence to indicate that the death of these two individuals was connected with the applicant's land dispute." Moreover, he determined that "even if there was sufficient objective evidence to connect the incidents to the applicant's dispute, I find insufficient evidence to overcome the RPD's finding that the applicant's fear of persecution stems from a personal vendetta."

[13] The Officer also considered the doctor's evidence that suggests the Applicant could be experiencing psychological post-traumatic effects, but determined that "there is insufficient conclusive evidence to indicate the applicant is currently suffering from Post-traumatic Stress Disorder and/or is currently seeking ongoing treatment."

[14] With regard to state protection, the Officer concluded that the Applicant had not proven that he had exhausted all avenues of redress available in his country of nationality. Accordingly, he had not proven that state protection was not available to him.

[15] The Officer also examined steps taken by the government of Kenya to minimize police abuse, including the establishment of a special police squad. Moreover, the Officer noted that the government had arrested and charged some officers with corruption and murder.

[16] The Officer found that there was no more than a mere possibility of persecution pursuant to section 96 of the Act, and that the Applicant would likely not be at risk of torture, risk to life or risk of cruel and unusual treatment or punishment pursuant to section 97.

ISSUES

[17] The Applicant submits the following issues in this application:

1. Did the Officer ignore evidence, selectively rely on evidence, or misunderstand and mischaracterize evidence before him?
2. Did the Officer err by suggesting that the Applicant will not benefit from protection if his fear stems from a personal vendetta which is not a refugee ground?
3. Did the Officer apply the wrong test for new evidence and improperly reject the Applicant's new evidence?
4. Did the Officer err in concluding that state protection was available to the Applicant?

STATUTORY PROVISIONS

[18] The following provisions of the Act are applicable in these proceedings:

Convention refugee	**Définition de « réfugié »**
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	**96.** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	*a*) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	*b*) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
Person in need of protection	**Personne à protéger**
97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would	**97.** (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel

subject them personally

elle avait sa résidence habituelle, exposée :

(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

Person in need of protection

Personne à protéger

(2) A person in Canada who is a member of a class of persons prescribed by the regulations

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait

as being in need of protection is also a person in need of protection.	partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

STANDARD OF REVIEW

[19] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the Supreme Court of Canada recognized that, although the reasonableness *simpliciter* and patent unreasonableness standards are theoretically different, "the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review (*Dunsmuir* at paragraph 44). Consequently, the Supreme Court of Canada held that the two reasonableness standards should be collapsed into a single form of "reasonableness" review.

[20] The Supreme Court of Canada in *Dunsmuir* also held that the standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[21] In reviewing the Officer's consideration and treatment of evidence, the appropriate standard of review is reasonableness. See, for example, *Y.Z. v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 749, [2009] F.C.J. No. 904 at paragraph 22.

[22] Reasonableness is also the appropriate standard when reviewing the Board's consideration of state protection. See *Guzman v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 490, [2008] F.C.J. No. 624. Questions of fact also attract a standard of reasonableness (*Dunsmuir* at paragraph 51). Thus, in considering whether or not the Board relied on erroneous findings of fact, a standard of reasonableness will apply.

[23] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at paragraph 47). Put another way, the Court should only intervene if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[24] The Applicant has also raised the issue of the application of the wrong legal test. A standard of correctness is appropriate in determining whether the correct legal test was applied. See *Dunsmuir*, and *Golesorkhi v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 511, [2008] F.C.J. No. 637 at paragraph 8. Similarly, a standard of correctness will apply in determining

whether or not a section 97 determination requires a nexus to a Convention Refugee ground, since this is an issue of the required composition of a legal test.

ARGUMENTS

The Applicant

Evidential errors

[25] The Applicant submits that the Officer ignored, misunderstood, mischaracterized and selectively relied on his evidence.

[26] The Officer relied heavily on the findings of the RPD, which determined that the Applicant would not be at risk pursuant to section 97. Although it acknowledged the fraudulent behaviour of Zabed, the RPD found that the Applicant could avoid harm by stopping his pursuit of the matter.

[27] In relying on this finding, the Officer failed to recognize that there was new evidence before him that Zabed was seeking the Applicant despite his absence from Kenya, as noted in letters from the Applicant's family. The documentary evidence showed that Zabed had threatened to kill the Applicant two years after his flight from Kenya. Moreover, the Applicant had provided evidence that his friends, who had aided him in tricking his cousin, had been murdered after being asked about the Applicant's whereabouts.

[28] This evidence was not available at the time of the RPD hearing, and as a result was not before the RPD. The Applicant submits that the Officer either misinterpreted or ignored this evidence when he concluded that "I have been presented with insufficient objective evidence to indicate that the death of these two individuals was connected with the applicant's land dispute."

[29] This evidence demonstrates not only the murders of the Applicant's friends, but also continuing threats against the Applicant. Indeed, these letters make it clear that he was still being threatened years after his flight from Kenya. This is contrary to the RPD's suggestion that the threat would dissipate with the passage of time and the Applicant's ceasing to pursue the land dispute.

[30] Moreover, these letters clearly connect the murder of these people to the Applicant's land-ownership situation. Accordingly, the Officer's finding of insufficient evidence is unreasonable. The evidence showed that the Applicant's friend was "commanded either to produce [the Applicant] or get his life terminated." He was then murdered. The second person murdered was a witness to the land transfer who had also been questioned in regard to the Applicant's whereabouts prior to his murder. No evidence existed that showed these statements to be false. However, the Officer determined that insufficient evidence was before him.

[31] If the Officer had wanted to reject these letters as lacking credibility, he should have provided a reason for the rejection. See *Bagri v. Canada (Minister of Citizenship and Immigration)*(1999), 168 F.T.R. 283, [1999] F.C.J. No. 784 and *Hilo v. Canada (Minister of Employment and Immigration)* (1991), 130 N.R. 236, 15 Imm. L.R. (2d) 199.

[32] Because the Officer did not reject these letters as not being credible, he was not entitled to ignore their content and their relevance. See *Cepeda-Gutierrez v. Minister of Citizenship and Immigration)*(1998), 157 F.T.R. 35, [1998] F.C.J. No. 1425 at paragraphs 16 and 17. Indeed, according to paragraph 17 of *Cepeda*, "the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact 'without regard to the evidence.'"

[33] The Applicant submits that the evidence ignored in this case was fundamental to the risk he faced. Moreover, had the RPD been aware of this evidence, they may well have come to a different conclusion.

[34] The Applicant submits that the Officer also erred in misconstruing the medical evidence before him. For instance, the Officer dismissed the psychological report on the basis that further tests would have to be conducted to determine if the Applicant suffered from depression, including symptoms of PTSD; however, the doctor's diagnosis was that the Applicant suffered from major depression including symptoms of PTSD. The Officer ignored this diagnosis. This is an error, since a "medical report must be considered for what it did say. On its face it supports the Applicant's evidence, and does not contradict it": *Bagri*, *supra*.

Personal vendetta

[35] The Applicant submits that the Officer erred by finding that "even if there was sufficient objective evidence to connect the incidents to the applicant's dispute, I find insufficient evidence to overcome the RPD's finding that the applicant's fear of persecution stems from a personal vendetta." Although section 96 requires a nexus to Convention Refugee grounds, the Applicant contends that section 97 includes situations where no nexus exists, but where the removal of a person will result in exposure to death, torture or inhumane treatment.

[36] The Applicant submits that removing him to face death or torture because such a risk comes from a personal vendetta breaches the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, and international human rights obligations.

Wrong test for new evidence

[37] The Applicant also submits that the Officer erred in determining that his decision was limited to the examination of "new risks." The Officer is allowed to consider new evidence of an already existing risk which demonstrates the continuity of this risk. Section 113(a) of the Act directs the Officer as to what evidence he can consider: "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."

[38] The Applicant submits that this contemplates three different possibilities that should be read disjunctively. See *Elezi v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 240, 310 F.T.R. 59 at paragraph 26. The Applicant contends that "new evidence" does not necessarily relate to the date of the evidence. Rather, new evidence relates to new developments in the Applicant's situation or country conditions. See *Elezi*, at paragraph 27.

[39] The Federal Court of Appeal has listed the factors for the admission of new evidence under section 113(a), including credibility, relevance, newness, materiality and express statutory conditions. See *Raza v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385, 289 D.L.R. (4^{th}) 675 at paragraph 13.

[40] The Applicant submits that the Officer erred in his treatment of the letters. He did not undertake an analysis of any of the *Raza* factors. Rather, the Officer decided that a new risk was not raised by this evidence. Although these letters did not raise a new risk, they demonstrated a continuing risk to the Applicant. The Applicant contends that the Officer erred in relying on *Kabayaki* without then considering the evidentiary test set out by the Federal Court of Appeal in *Raza*.

[41] In addition, *Raza* has made it clear that a PRRA officer can reconsider the Board's factual findings and credibility conclusions. Indeed "a PRRA is not limited to assessing risk on the basis of changes in circumstances arising after the hearing in the RPD. The PRRA Officer must also consider whether the new evidence is capable of contradicting a finding of fact by the RPD,

including a credibility finding." See *Sanchez v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 101, 79 Imm. L.R. (3d) 12. See also *Win v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1154, [2008] F.C.J. No. 1434.

[42] The Applicant submits that new evidence was placed before the Officer that demonstrated new grounds of risk for him and which directly contradicted the analysis undertaken by the RPD as to whether the risk he faces could dissipate over the passage of time and if he ceases to pursue the debt owed by his cousin.

[43] The Officer rejected the Applicant's evidence because he determined it was not of probative value, not because it consisted of unsworn letters written by interested parties as claimed by the Respondent. The Officer neglected to provide valid reasons for rejecting this evidence.

State protection

[44] Finally, the Applicant submits that the Officer erred in his analysis of state protection. Justice Campbell determined in *Garcia v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 79, 308 F.T.R. 54 at paragraph 15 that in considering whether or not a state has made serious efforts to protect its citizens, a contextual analysis must occur which includes not only the legislative framework, but also the capacity and effectiveness of the state's protective framework.

[45] The Applicant submits that the Officer undertook no meaningful contextual analysis or application of the law with regard to state protection.

[46] Furthermore, the Officer did not address the fact that the Applicant had sought help from the police on numerous occasions. As such, the Officer erred in law by ignoring relevant evidence and by making conclusions that were contrary to the evidence before him.

The Respondent

[47] The Respondent says that the rejection of the PRRA application occurred as a result of the Applicant's failure to prove, on a balance of probabilities, that he faces risk upon his return to Kenya. The Applicant simply provided unsworn letters from his family that alleged Zabed was still seeking him. As such, the Officer committed no error in finding insufficient new evidence of prospective risks.

[48] The Respondent submits that the Officer did not err in determining that the Applicant's fear of persecution stemmed from a personal vendetta, which precludes a section 96 claim. See, for example, *Kang v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1128, [2005] F.C.J. No. 1400 at paragraph 10 and *Starcevic v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1370, [2008] F.C.J. No. 1748 at paragraph 10.

[49] Moreover, the fact that the perpetrator is also a government official does not bring a personal vendetta within the scope of persecution based on a Convention ground. See *Mia v. Canada (Minister of Citizenship and Immigration),* 2000 Canlii 14882 (FC) at paragraphs 14-18.

State Protection

[50] The Respondent contends that effective protection is too high a standard with regard to state protection. The appropriate test is to determine whether or not the protection is adequate. The Respondent submits that to require otherwise places the burden on the decision-maker to establish state protection. See, for example, *Samuel v. Canada (Minister of Citizenship and Immigration),* 2008 FC 762, [2008] F.C.J. No. 946 at paragraphs 10 and 13.

[51] The Respondent also contends that the Officer reviewed the contrary evidence before making a determination that the Applicant had failed to rebut the presumption of state protection. Accordingly, no error was committed. See *Florea v. Canada (Minister of Employment and Immigration),* [1993] F.C.J. No. 598 at paragraph 1 and *Hassan v. Canada (Minister of Employment and Immigration)*(1992), 147 N.R. 317 (FCA).

No new evidence of risks

[52] In conclusion, the Respondent submits that the Applicant simply repeated risks that had been rejected by the RPD and the Court in dismissing leave rather than adducing new evidence of

risks. In addition, the Respondent contends that many of the documents submitted by the Applicant were properly rejected because they did not meet the test for new evidence. Rather, they simply confirmed facts that had been accepted by the RPD prior to its rejection of the Applicant's refugee claim. Accordingly, no reviewable error occurred.

[53] The Applicant also failed to adduce evidence of sufficient probative value to support his claims of prospective risk. Rather, he submitted letters that were unsworn and written by interested parties. The Court has accepted that such evidence is deficient. See, for example, *Ferguson v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1067, 74 Imm. L.R. (3d) 306 at paragraph 27. Moreover, deference is owed to the Officer's risk assessment and weighing of the evidence, and a decision should not be disturbed if it falls within the range of reasonableness.

[54] The Officer properly reviewed the Applicant's documents and determined that the unsworn letters from family members were insufficient to prove a prospective risk.

ANALYSIS

[55] The RPD found that "[b]ased on a balance of probabilities, the Panel is unable to conclude that the claimant is facing a risk that is recognized or protected by section 97 of the IRPA."

[56] The RPD also found that “a personal vendetta cannot be ground for refugee status. Accordingly, the Panel finds that the claimant’s fear of his cousin(s) has no nexus to any of the grounds in the convention refugee definition found at section 96 of the IRPA.”

[57] It is clear that the RPD found that the risks faced by the Applicant (which it calls a “personal vendetta”) cannot be connected to a ground of persecution under section 96. What is less clear is whether the RPD found that the risks faced by the Applicant, or a personal vendetta, cannot qualify for protection under section 97.

[58] On the one hand the RPD says “the claimant’s personal choice to continue to pursue ownership or payment for the disputed land regardless of the fact that it may result in ongoing harm to himself, is a personal vendetta and not protected by section 97 of IRPA.”

[59] On the other hand, the RPD goes on to refer to the burden of proof required under section 97(1)(*a*) and (*b*) as though it is doing a section 97 analysis of risk and then concludes that “the Panel is of the view that the claimant is able to eliminate any risk he is facing based on a change in his own behavior.”

[60] In the end, the RPD appears to be saying that the risks faced by the Applicant are also excluded under section 97 because: (a) a personal vendetta is not a risk under section 97; and (b) on a balance of probabilities the Applicant has not shown he faces risk under section 97. I take it that

this is what the RPD means when it says that "the Panel is unable to conclude that the claimant is facing a risk that is recognized or protected by section 97 of the IRPA."

[61] In the PRRA Officer's Decision there is a finding of "insufficient evidence to overcome the RPD's finding that the applicant's fear of persecution stems from a personal vendetta."

[62] Although it is not entirely clear, I take it that the Officer is saying that there continues to be no section 96 nexus because the Applicant is still engaged in a personal vendetta.

[63] As regards section 97, there appears to be no specific finding by the Officer that the risks faced by the Applicant are not recognized under this section. Furthermore, the analysis in the Decision appears to assume that they are recognized under section 97 because the Officer provides a state protection analysis which would not be necessary if there was no section 97 risk.

[64] The Officer does not explain why he has taken a different approach from the RPD with regard to section 97.

[65] Additional confusion occurs at the conclusion of the Decision where the Officer appears to say that he has done both a section 96 and section 97 analysis:

> After careful review of the case before me, country conditions and taking into consideration the personal circumstances of the applicant, I conclude that the applicant faces no more than a mere possibility of persecution as described in section 96 of the IRPA and I find that the applicant would not likely be at risk of torture, risk to life, or risk or

> cruel and unusual treatment or punishment pursuant to section 97 of the IRPA if returned to Kenya.

[66] In any event, the new evidence and new risks brought forward by the Applicant have demonstrated a risk beyond any personal vendetta that may have existed in the past, even if "personal vendetta" is an accurate characterization of what has occurred in this situation.

[67] The Applicant has been in Canada since May 25, 2006 and he has not been pursuing a dispute with his cousin since his arrival in Canada. He brought forward new evidence to show that his cousin – a member of an elite police force in Kenya – has continued to pursue him, has killed his friends and intends to kill the Applicant.

[68] The Officer appears to accept this is new evidence and proceeds to assess it:

> Documents 5 and 6 confirm the death of two individuals. The counsel notes that one of the individuals was a witness to the land transfer agreement between the applicant and his cousin and suspects the death was related to the applicant's land dispute. The other individual was the applicant's best friend. The death of this friend was conveyed in a letter from the applicant's sister. In the letter she notes the individual was shot by gangsters pretending to be the police who were questioning the individual of the whereabouts of the applicant.
>
> I have been presented with insufficient objective evidence to indicate that the death of these two individuals was connected with the applicant's land dispute. However, even, if there was sufficient objective evidence to connect the incidents to the applicant's dispute, I find insufficient evidence to overcome the RPD's finding that the applicant's fear of persecution stems from a personal vendetta.

[69] The Officer accepts this evidence. He does not question its credibility. Nor does he express reservations about its source. All he says is that it is “insufficient objective evidence to indicate that the deaths of these two individuals was connected with the applicant’s land dispute.”

[70] This conclusion is unreasonable in two ways. First of all, the Officer ignores the fact that this evidence, which post-dates the RPD hearing, does not just address the two murders; it also proves that threats have been made against the Applicant that could be carried out if he returns. The Officer appears to ignore, or totally overlooks, this crucial factor in evidence that he has accepted. This issue is very important because the RPD had based its decision, at least in part, on its own speculative view that the threats from the cousin would dissipate over time. However, the evidence proves that this has not occurred.

[71] Secondly, the letters connect the murder of the two men in Kenya to the Applicant. As regards the Applicant’s best friend who was murdered, the evidence shows that several men entered his home and he was commanded to either produce the Applicant or be killed. After delaying, he was shot dead. The second victim was a witness to the land transfer who was also questioned about the Applicant’s whereabouts before his death. There was no reason to discount these letters as not being connected to the dispute between the Applicant and his cousin or, more importantly, to the prospective risks that the Applicant faces if he is returned.

[72] Similar problems occur with the medical evidence and the Officer’s conclusion that “although the two assessments indicated refer to features of Post-traumatic Stress Disorder there is

insufficient conclusive evidence to indicate the applicant is currently suffering from Post-traumatic Stress Disorder and/or is currently seeking ongoing treatment."

[73] What the Officer fails to note is that the doctor provides a diagnosis that the Applicant suffers major depression featuring symptoms of PTSD. In other words, the Officer rejects the medical evidence for what it does not say and completely ignores what it does say that is relevant to the Applicant's case. See *Bagri*, *supra*, at paragraph 11.

[74] All of these problems might be disregarded if the Officer's state protection analysis could be accepted. That analysis is short and merely provides as follows:

> The counsel refers to the case of Ward v. Canada in the submissions and notes that "Although in his situation, the agent of persection (*sic*) is not the state, Mr. Njeru has grounds for seeking protection." The counsel notes that the security forces commit arbitrary or unlawful killings, but the government only takes limited action in enforcing the law.
>
> In the case of Ward v. Canada the Supreme Court of Canada confirmed, that the state is presumed caopable (*sic*) of protection its citizens, therefore, the applicant must provide "clear and convincing confirmation" of the states inability or unwillingness to protect him. The onus is on the applicant to show that he has exhausted all avenues of redress available in the country of nationality. The applicant in this case has not done so.
>
> Whilst I acknowledge that impunity is a serious problem in Kenya as noted in the 2008 U.S. Department of State Country Report on Human Rights in Kenya, I not also that the report indicates that the government took some steps to curb police abuse during the year. These steps included the establishment of a special police squad that included undercover detectives whose mandate was to combat corruption involving police during traffic stops. The government

> arrested and charged some officers with various offenses, including corruption and murder.

[75] All we have is a bare statement that the Applicant has not exhausted all avenues of redress in Kenya. This is woefully inadequate as an analysis of the state protection issues, particularly in a country such as Kenya where, as even the Officer admits, "impunity is a serious problem" and where the rule of law does not prevail. The words of Justice Tremblay-Lamer in *Zepeda v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 491, [2008] F.C.J. No. 625 (Q.L.) at paragraph 20 are instructive here:

> Accordingly, decision-makers must engage in a full assessment of the evidence placed before them suggesting that [the country of origin], while willing to protect, may be unable to do so. This assessment should include the context of the country of origin in general, all the steps that the applicants did in fact take, and their interaction with the authorities.

[76] Nothing even approaching such an analysis occurred in the present case. After acknowledging that impunity is a serious problem in Kenya, the Officer appears to think it can be ignored because "the government took some steps to curb police abuse during the year." We are never told why the Officer thinks that taking "some steps" to combat corruption means that "impunity" has become any less of a problem in Kenya.

[77] There are other problems with the Decision, but the above are fundamental and render it entirely unreasonable. The Court can have no confidence that the Officer has truly addressed the situation faced by the Applicant and the conditions of impunity that exist in Kenya.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application is allowed. The Decision is quashed. The matter is returned for reconsideration by a different Officer.
2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2258-09
STYLE OF CAUSE:	NELSON NDEREVA NJERU **v.** THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	November 5, 2009
REASONS FOR Judgment and Judgment:	RUSSELL J.
DATED:	December 16, 2009

APPEARANCES:

Hadayt Nazami	FOR THE APPLICANT
Ada Mok	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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