Federal Court  Cour fédérale

Date: 20100804

Docket: IMM-6111-09

Citation: 2010 FC 800

Ottawa, Ontario, August 4, 2010

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

WUDASIE AMANYOS ZEMO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] This judicial review concerns a negative PRRA decision where claim of a new risk was asserted and where a negative credibility finding was made without a hearing provided for in section 167 of the *Immigration and Refugee Protection Regulations*.

II. BACKGROUND

[2] The Applicant is a 56 year old woman from Eritrea who had not lived in that country for 25 years. She had lived in the Sudan, Saudi Arabia and the United States. She came to Canada on December 8, 2003 and made a refugee claim at the Port of Entry.

[3] The Refugee Protection Division (RPD) rejected her claim in 2006 concluding that her risk due to membership in the Eritrean Liberation Front (ELF) was not credible. Leave for judicial review was dismissed.

[4] Her PRRA was rejected in 2007 and the Applicant was deported to the United States. She returned in April 2008 and since she could not make another refugee claim, she filed a new PRRA. That PRRA was denied but upon application for judicial review, the Respondent conceded that not all the information on this case had been reviewed by the PRRA office.

[5] A new PRRA application was filed. This judicial review relates to that PRRA. The PRRA application was based on the ELF risk, and her religious affiliation with a church opposed to the current government – both these grounds had previously been rejected.

The Applicant raised a third and new ground of risk – that of a returning asylum seeker. The claim was supported with documentary evidence of the fate of returning asylum seekers - detention and torture.

[6] The PRRA decision acknowledges the new risk raised which the Applicant asserted could not have been raised previously. The Officer states that she would consider all the evidence in light of the new risk.

[7] The Officer concluded that in respect of ELF membership, the RPD's credibility finding and the first PRRA finding cannot be displaced on the basis of the existing record. That part of the PRRA decision is not challenged.

[8] On the issue of religious belief, the Officer challenges the Applicant's claim that she was a member of the Renewal Orthodox Church in Eritrea, that the Orthodox Church (a registered church which she attended in Toronto) is affiliated with the unregistered Renewal Orthodox Church and thus her membership would put her at risk upon return.

[9] The Officer did acknowledge the documentary evidence from reliable sources that members of unregistered churches faced the risk of human rights abuses including imprisonment. However, the Officer held that the Applicant had not submitted sufficient documentary evidence to show that she was a member of a group which faced risk of abuse.

[10] In addressing the new risk, the Officer made the following finding:

> …[T]he Applicant has provided insufficient objective evidence to support that she has the profile that is of interest to the authorities upon return. I also note the evidence that indicates situations where persons seeking to avoid mandatory conscription are detained upon their return. The applicant has not indicated (nor does the objective evidence support) that at the age of 56 and having been out of the

> country prior to the independence of Eritrea, that the applicant faces military service.

III. ANALYSIS

[11] The general rule in respect of PRRA decisions is that they are subject to the standard of review of reasonableness (*Aleziri v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 38). However, the Applicant argues that she was entitled to an oral hearing because there was an adverse credibility finding, and that there was a breach of procedural fairness, issues assessed on a standard of correctness.

A. *Re: Religious Persecution*

[12] The decision on this issue is deficient in a number of areas. The first of which is the failure to address whether the evidence of membership and risk is new. The Officer failed to consider the criterion established in *Raza v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385, which in these circumstances she was obliged to do.

[13] Despite not addressing the “newness of evidence” issue, the Officer appears to have considered it as new and was therefore obliged to consider it reasonably and in a procedurally fair manner.

[14] The new evidence before was that members of unregistered churches were at risk; a matter not considered by the RPD. Pursuant to s. 113 of the *Immigration and Refugee Protection Act*, that new evidence raised the issue of whether a hearing should be held.

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;
(*b*) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required;	*b*) une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires;
(*c*) in the case of an applicant not described in subsection 112(3), consideration shall be on the basis of sections 96 to 98;	*c*) s'agissant du demandeur non visé au paragraphe 112(3), sur la base des articles 96 à 98;
(*d*) in the case of an applicant described in subsection 112(3), consideration shall be on the basis of the factors set out in section 97 and	*d*) s'agissant du demandeur visé au paragraphe 112(3), sur la base des éléments mentionnés à l'article 97 et, d'autre part :
(i) in the case of an applicant for protection who is inadmissible on grounds of serious	(i) soit du fait que le demandeur interdit de territoire pour grande criminalité constitue un

criminality, whether they are a danger to the public in Canada, or	danger pour le public au Canada,
(ii) in the case of any other applicant, whether the application should be refused because of the nature and severity of acts committed by the applicant or because of the danger that the applicant constitutes to the security of Canada.	(ii) soit, dans le cas de tout autre demandeur, du fait que la demande devrait être rejetée en raison de la nature et de la gravité de ses actes passés ou du danger qu'il constitue pour la sécurité du Canada.

[15] In Regulation 167 (being the prescribed factors described in s. 113*(b)*), the Minister is required to consider whether to hold a hearing where there is evidence "that raises a serious issue of the applicant's credibility".

167. For the purpose of determining whether a hearing is required under paragraph 113(*b*) of the Act, the factors are the following:	**167.** Pour l'application de l'alinéa 113*b*) de la Loi, les facteurs ci-après servent à décider si la tenue d'une audience est requise :
(*a*) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act;	*a*) l'existence d'éléments de preuve relatifs aux éléments mentionnés aux articles 96 et 97 de la Loi qui soulèvent une question importante en ce qui concerne la crédibilité du demandeur;
(*b*) whether the evidence is central to the decision with respect to the application for protection; and	*b*) l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection;
(*c*) whether the evidence, if accepted, would justify	*c*) la question de savoir si ces éléments de preuve, à supposer

allowing the application for protection.	qu'ils soient admis, justifieraient que soit accordée la protection.

[16] There is no end of debate surrounding the application of s. 167 of the Regulations and whether a decision deals with sufficiency of evidence versus believability. The term "credibility" itself is loosely used to mean weight, plausibility and/or believability. It is, in the final analysis, the Court's task to sort out what is the real basis of the decision whenever the term credibility is used and whether the decision turns on credibility or sufficiency.

[17] In the present circumstances and reading the decision as a whole, the Officer's decision could only stand if the Applicant's evidence of membership was not believed. There was more than sufficient evidence as to the risk to members of unregistered churches and there was sufficient evidence, if believed, to establish the Applicant's membership in that type of church.

[18] Therefore, the Officer, having decided the issue on credibility, failed to consider whether a hearing should be held. The Applicant is not entitled *per se* to a hearing but the Minister is required to consider whether to have a hearing. In that respect there was an error of law because the Officer never turned her mind to that issue.

Alternatively, if this decision was based on lack of sufficiency, it was unreasonable given the evidence, both objective and subjective.

[19] The issues in this case are similar to the decision in *Tekie v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 27:

> **16** In my view, section 167 becomes operative where credibility is an issue which could result in a negative PRRA decision. The intent of the provision is to allow an Applicant to face any credibility concern which may be put in issue.
>
> **17** The record in this case shows that the Officer had credibility concerns. Although the case was decided principally on the basis of "objective fear", if the Applicant's contentions had been accepted, a positive PRRA would have resulted. The fact that, in the end, the PRRA decision is based on other than credibility does not lessen the right to an oral hearing.

B. *Re: Returning Asylum Seekers*

[20] In addressing this issue, the reasons are plainly deficient. The risk of returning asylum seekers was not raised before the RPD. Indeed the evidence of the existence of that risk suggests that while instances of detention and abuse may have occurred before the RPD hearing, those incidents did not become known broadly until after the RPD decision.

[21] The failure to address the *Raza* test underscores the problem of determining the “newness” of the evidence.

[22] I adopt Justice Mosley’s conclusion in *Wa Kabongo v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 348 at paragraph 13 where he held:

> The applicant asserts that he is precluded from raising his alternative claim in a PRRA as he did not raise it before the Panel. I disagree. PRRA officers may assess risks to claimants on return to their

> countries of origin where the claimed grounds have not previously been raised: *Zenunaj v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1715, [2005] F.C.J. No. 2133. Indeed, as the PRRA officer in that situation would be the first decision maker to assess the newly claimed risk, he or she would be required to review all relevant evidence, not merely that which fits the parameters set out in paragraph 113(*a*) of the IRPA: *Cupid v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 176, [2007] F.C.J. No. 244.

Justice Mosley's comments were more than mere *obiter* or judicial musings as argued by the Respondent.

[23] Aside from failing to consider *Raza*, above, and seeming to act inconsistently with *Wa Kabongo*, above, the PRRA decision is unreasonable in finding the Applicant not likely to be of interest to the government because she did not "fit the profile" in that she would not face military service.

[24] The issue of military service is not determinative of the new risk. The risk is to returning asylum seekers *per se* not because of their avoidance of military service. The injection of military service raises an irrelevant matter which was determinative of the Applicant's case. To do so in this instance was unreasonable and engaged the Officer in an irrelevant consideration.

IV. CONCLUSION

[25] For these reasons, the application for judicial review will be granted, the PRRA decision quashed and the matter returned to the Respondent for a new determination by a different official. Given the result, there is no question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is granted, the PRRA decision is quashed and the matter is to be returned to the Respondent for a new determination by a different official.

"Michael L. Phelan"
Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-6111-09
STYLE OF CAUSE:	WUDASIE AMANYOS ZEMO and THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	July 20, 2010
REASONS FOR JUDGMENT AND JUDGMENT:	Phelan J.
DATED:	August 4, 2010

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