Federal Court  Cour fédérale

Date: 20200506

Docket: IMM-1248-19

Citation: 2020 FC 595

Ottawa, Ontario, May 6, 2020

PRESENT: Mr. Justice McHaffie

BETWEEN:

THOMAS OPPONG NTI

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Thomas Nti claims that the man who usurped the throne of his royal family in Ghana has killed a dozen of his male relatives. He claims that if he is returned to Ghana, he would be the only male heir to the throne, and he too would be killed. Mr. Nti applied for a Pre-Removal Risk Assessment (PRRA) on this basis.

[2] A PRRA officer dismissed Mr. Nti's application. The PRRA officer gave "little weight" to each of the letters filed in support of Mr. Nti's application due to a lack of corroboration and some discrepancies in the documents. They also found that Mr. Nti could refuse the chieftaincy, leaving the usurper no reason to target him, and that, if he did not refuse it, he could access state protection in Ghana if needed.

[3] I agree with Mr. Nti that the PRRA officer's decision was unreasonable. While not making any adverse findings regarding the credibility of Mr. Nti or the supporting letters he filed, the PRRA officer nonetheless gave the documents "little weight" on grounds that addressed the authenticity of those documents. It was unreasonable for the PRRA officer to avoid making a credibility finding while still purporting to accord evidence "little weight" based on what are effectively credibility grounds.

[4] The PRRA officer's treatment of the documentary evidence also tainted their assessment of the adequacy of state protection, as they gave no consideration to the evidence of multiple killings in Mr. Nti's family when concluding that the police could adequately protect him. Further, the PRRA officer erroneously focused on the existence of police oversight bodies to counter the significant evidence of police inadequacy in Ghana. Each of these flaws rendered the PRRA officer's state protection analysis unreasonable.

[5] The application for judicial review is therefore granted and Mr. Nti's PRRA application is remitted for redetermination.

II. Issues and Standard of Review

[6] The concerns at the heart of Mr. Nti's application for judicial review are the following:

A. Did the officer unreasonably assign little weight to each of the letters filed to support Mr. Nti's PRRA application?

B. Did the officer misapprehend the nature of Mr. Nti's risk in Ghana?

C. Was the officer's assessment of state protection in Ghana unreasonable?

[7] Each of these issues requires the application of the reasonableness standard of review: *Benko v Canada (Citizenship and Immigration)*, 2017 FC 1032 at para 15. The parties agree that this standard applies, and this selection is consistent with the Supreme Court of Canada's decision in *Vavilov*, decided after this hearing was argued: *Canada (Minister of Immigration and Citizenship) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25.

III. Analysis

A. *The PRRA Officer Unreasonably Assigned "Little Weight" to the Evidence*

[8] The PRRA officer assigned "little weight" to each of nine letters, two burial permits, and a statement by Mr. Nti. Mr. Nti challenges each of these assessments. Assessment of the weight to give evidence is fundamental to the fact-finding function of an administrative tribunal. It necessarily involves the exercise of judgment. The Court on judicial review of such an assessment is not to substitute its own judgment, but only intervene where the finding was made

unreasonably, that is to say without regard to the evidence or for unjustified reasons: *Benko* at paras 21–23. To assess whether this has occurred, the evidence must be considered in its factual and procedural context.

(1) Mr. Nti's PRRA application

[9] Mr. Nti is a member of the second of four royal houses of the Mansen Royal Family in Wamfie, a town in the Brong Ahafo region of Ghana. Tradition has it that the chieftaincy of the family is to rotate sequentially among the four houses. When the Chief, a member of the first house, died in 1980, a member of Mr. Nti's house was to take the throne. However, a member of the third house named Ansu Agyei inserted himself into the role of Chief. Mr. Nti claims Ansu Agyei has since killed many male members of the Second Royal House and others who oppose or threaten his chieftaincy. This included Mr. Nti's father, who was killed in 1989, an event that led Mr. Nti to flee Ghana.

[10] Mr. Nti has been in Canada since 1992. His refugee protection claim at the time was unsuccessful as he failed to prove his identity. He did not report for removal and his whereabouts were unknown to authorities until his arrest by Canada Border Services Agency in 2013. He then applied for a PRRA pursuant to section 112 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. A PRRA allows a person who is subject to a removal order to apply for protection, despite a previous unsuccessful refugee claim: *IRPA*, s 112; *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 at paras 8–10. Assuming there are no issues of criminality or national security, an applicant who meets the definition of "Convention refugee" in section 96 of the *IRPA* or the definition of "person in need of protection" in section 97 of the

IRPA at the time of their PRRA application will be conferred refugee protection: *IRPA*, ss 113(*c*), 114(1); *Raza* at para 11.

[11] The officer reviewing Mr. Nti's 2013 PRRA application accepted that Mr. Nti's family was involved in a chieftaincy dispute and that several members of his family had been killed, but refused the application based on the availability of state protection in Ghana and the potential to relocate to Accra.

[12] Mr. Nti applied for a further PRRA in 2018, which is the subject of this application. In accordance with subsection 113(*a*) of the *IRPA*, that application stood to be decided on the basis of evidence arising since the 2013 rejection. During the intervening years, Mr. Nti was in immigration detention in Canada, as he refused to sign a travel document application for Ghana. His own evidence regarding recent occurrences in Ghana was thus necessarily the result of information received from contacts, friends and relatives in Ghana and elsewhere. Some of those individuals wrote letters setting out their information, which were filed in support of Mr. Nti's PRRA application.

[13] Mr. Nti's 2018 PRRA application was supported by his affidavit; his birth certificate; the burial permits of two of his cousins, who died on the same day in July 2014; evidence of conditions in Ghana; and six supporting letters:

- a December 2013 letter from a friend, indicating that Mr. Nti's uncle and his two sons were killed in October 2013;

- two letters from the Paramount Chief of the Dormaa Traditional Area: the first from early 2014 describing the chieftaincy dispute and the death of Mr. Nti's father, brother, two uncles and six cousins, and the second from 2015 stating that the death of one of his uncles and two of his cousins made Mr. Nti the legitimate heir to the Mansen throne, again referring to the deaths of other family members, and also describing the deaths of two further cousins (those mentioned in the burial permits), who were killed by arson;

- a 2015 letter from a Kingmaker from the Traditional Area, who was himself living in fear in Ivory Coast, confirming the death of Mr. Nti's uncle and two sons, and asserting that Ansu Agyei's hit men continue to target male members of the Second Royal House;

- a 2017 letter from his mother, written with assistance and signed with a thumbprint since she cannot write in English, indicating that he would be killed if he returns to Ghana because of the chieftaincy dispute and describing some of the ongoing disputes in Wamfie; and

- a 2017 letter from a member of the "Concern Citizens of Wamfie," a citizens' group opposed to some of Ansu Agyei's alleged corruption, describing the chieftaincy dispute and the threat to Mr. Nti should he return.

[14] Mr. Nti's PRRA application was refused in 2018, but after Mr. Nti challenged that refusal, the Minister agreed that it would be redetermined. Before that redetermination, Mr. Nti filed another affidavit, updated country condition evidence, and three further supporting letters:

- two from the same member of Concern Citizens of Wamfie, from November and December 2018 respectively, which indicated that Ansu Agyei had been responsible for

burning down Mr. Nti's family home where his mother was staying, that his photo was pasted on a public notice board, and that the police escorted Ansu Agyei on a visit to Wamfie, showing police support for him; and

- one from a journalist, who described his research in the region regarding the chieftaincy dispute, and discussions with royal family members and community members, which included references to Mr. Nti's claim to the throne and the burning of his home.

(2) The PRRA officer's evidentiary findings

[15] The PRRA officer made six separate findings giving the evidence "little weight," which collectively covered the nine letters described above, the burial permits, and a statement from Mr. Nti's affidavit:

- the letters from the friend, the Paramount Chief and the Kingmaker were all given little weight since (a) they were not accompanied by identification to establish the identity of the authors; (b) there were no stamped envelopes to show where the letters were from; and (c) although speaking to at least seven murders, they were not accompanied by any police reports or news reports;

- the two burial permits of the cousins said to have been killed by arson were given little weight since they were issued the same day the men died and were buried, and because there was "little on file that was presented identifying the cause of death or any investigation into the deaths of these men";

- the letter from Mr. Nti's mother was given little weight since she could not read or write in English so could not understand what was written in the letter;

- the three letters from the member of Concern Citizens of Wamfie were given little weight because his middle name was spelled differently than it appeared on his Electoral Commission identity card and, in one case, with an apparent typographical error in the name, and because they were not accompanied by any stamped envelopes indicating their origin;

- the journalism student's letter was given little weight because the author did not include any "journalism credentials" or the completed project he was working on, and because it was not accompanied by any form of identification; and

- Mr. Nti's statement that his family home was burned down as a result of arson set by Ansu Agyei's men was given little weight as it was not accompanied by supporting documentation like a police or fire department report.

[16] Having reached these conclusions, the PRRA officer found that there was "little evidence" to support Mr. Nti's claim that he will be persecuted by Ansu Agyei. I agree with the Minister that this statement can be reasonably taken to be a conclusion that Mr. Nti had filed insufficient evidence to establish his refugee claim.

[17] I also agree that the PRRA officer made no findings of credibility. Mr. Nti insists that his evidence was accepted as credible, pointing to the PRRA officer's acceptance that he is from the Mansen Royal Family, may be selected to succeed the former candidate for Chief, and that

Ansu Agyei "somehow inserted himself into the role of chief." The Minister concedes that no adverse credibility findings were made. Thus, the question is: was it reasonable for the PRRA officer to accord the evidence "little weight" having effectively accepted it as credible?

[18] The answer to that question lies in both the nature of the evidence being assessed by the officer and the reasons given for discounting it. While each of the officer's evidentiary findings is expressed as giving the evidence "little weight," the findings can be viewed as being of two different natures: those going to the authenticity of the evidence and those going to its probative value. Mr. Nti's challenge to those findings requires consideration of the relationship between concepts of weight, credibility, probative value, and sufficiency of evidence.

(3) Weight, credibility, probative value, sufficiency

[19] Justice Grammond of this Court helpfully reviewed these concepts and their interplay in *Magonza v Canada (Citizenship and Immigration)*, 2019 FC 14. Given the completeness of that discussion, it need not be repeated here. By way of summary, Justice Grammond describes the weight of evidence as being a function of its credibility (its trustworthiness) and its probative value (its capacity to establish the fact in issue): *Magonza* at paras 16–31. He suggests that "a decision-maker cannot reach a conclusion regarding weight without having previously assessed credibility or probative value or both" *Magonza* at para 29. Having assessed the weight to be given to evidence on this basis, the trier of fact assesses whether the evidence collectively is sufficient to meet the applicable burden: *Magonza* at paras 32–35.

[20] The Minister, however points to Justice Zinn's statement in *Ferguson* that "[i]t is open to the trier of fact, in considering the evidence, to move immediately to an assessment of weight or probative value without considering whether it is credible": *Ferguson v Canada (Citizenship and Immigration)*, 2008 FC 1067 at para 26; *Herman v Canada (Citizenship and Immigration)*, 2010 FC 629 at para 17. This statement might initially appear to be in conflict with Justice Grammond's statement in *Magonza* that a conclusion about weight cannot be reached without assessing credibility. However, read in context, I do not believe it is. Justice Zinn went on to note the circumstances in which it is appropriate to "move immediately to an assessment of weight" without making a credibility determination:

> Invariably this occurs when the trier of fact is of the view that the answer to the first question is irrelevant because the evidence is to be given little or no weight, even if it is found to be reliable evidence. For example, evidence of third parties who have no means of independently verifying the facts to which they testify is likely to be ascribed little weight, whether it is credible or not.
>
> [Emphasis added.]

[21] In other words, evidence that has little probative value may be entitled to little weight even assuming it to be credible, which may obviate the need to undertake the credibility assessment: *Ferguson* at paras 26–27; *Zdraviak v Canada (Citizenship and Immigration)*, 2017 FC 305 at para 18. I certainly do not take Justice Grammond's statement in *Magonza* to mean that a decision-maker must assess credibility even if that assessment is irrelevant to the ultimate determination of weight: *Magonza* at paras 29–31. Nor do I take Justice Zinn's statement in *Ferguson* to mean that a decision-maker may jump to an assessment of weight without assessing credibility in cases where the evidence is probative on its face. The answer to the credibility question is not "irrelevant" in such cases: *Ferguson* at para 26. The same is true of

Justice Kane's statement in *Sallai*, relied on by the Minister, that a decision-maker may conclude that a sworn statement is insufficient even if its credibility is not doubted: *Sallai v Canada (Citizenship and Immigration)*, 2019 FC 446 at paras 51–57.

[22] This is consistent with the decision of Justice Norris in *Osikoya*, referred to by both Justice Grammond and Mr. Nti: *Osikoya v Canada (Citizenship and Immigration)*, 2018 FC 720; *Magonza* at paras 30–31. There, Justice Norris addressed a supporting letter that on its face, "could only have high probative value," since it described first-hand observations of events that corroborated the applicant's claim for protection. In such a case, the question of weight turned on the letter's authenticity, and the letter "is either authentic or it is not": *Osikoya* at para 51. Justice Norris found it unreasonable to give the letter "minimal weight" without a finding as to its authenticity: *Osikoya* at paras 51–53. In doing so, he repeated the observation of Justice Mactavish, then of this Court, on which Mr. Nti also relies, that "[d]ecision-makers should not cast aspersions on the authenticity of a document, and then endeavour to hedge their bets by giving the document 'little weight'": *Sitnikova v Canada (Citizenship and Immigration)*, 2017 FC 1082 at para 20 [*Sitnikova #2*]; see also *Oranye v Canada (Citizenship and Immigration)*, 2018 FC 390 at para 27.

[23] I note in passing that I cannot accept the Minister's contention that Justice Norris' analysis in *Osikoya* is *obiter* since he had already found other reviewable errors. Justice Norris was clear that the decision was unreasonable was because it relied on the three findings determined to be unreasonable, including the finding regarding the corroborative letter: *Osikoya*

at paras 62–63. In any event, I find the reasoning to be persuasive, and consistent with *Sitnikova #2*, *Oranye*, *Ferguson*, *Magonza* and *Sallai*.

[24] From the foregoing, one can see that the weight to be given to evidence may depend on the credibility of that evidence, its probative value, or some combination of the two. The nature of a "weight" finding is of particular relevance in the procedural context of a PRRA. This is because a PRRA application takes place in writing, unless "there is evidence that raises a serious issue of the applicant's credibility" that is central to the decision and that would, if accepted, justify allowing the application: *IRPA*, s 113(*b*); *Immigration and Refugee Protection Regulations*, SOR/2002-227, s 167. If those requirements are met, there is an obligation to hold an oral hearing: *Sallai* at paras 45–46. As Justice Kane noted in *Sallai*, this has resulted in a "great deal of jurisprudence" on the characterization of PRRA officers' findings: *Sallai* at paras 47–52.

[25] I note that Mr. Nti does not argue as a matter of procedural fairness that an oral hearing should have been held because the PRRA officer made veiled credibility findings. To the contrary, Mr. Nti asserts his evidence was believed. In my view, while it may be procedurally unfair to make credibility findings in a PRRA without conducting an oral hearing, it is also unreasonable to avoid credibility findings—and thus a determination of whether an oral hearing needs to be held—by simply assigning "little weight" to evidence for reasons that go to credibility and authenticity.

(4) The PRRA officer's findings regarding the corroborative letters were unreasonable

[26] As seen in the discussion above, evidence that is, on its face, of low probative value may be given little weight regardless of its credibility. In my view, the burial certificates, which attest only to the deaths of Mr. Nti's cousins and not to the cause of death, might fall in this category, particularly when considered alone. They are not themselves very probative of the claim that Mr. Nti faces potential persecution at the hands of Ansu Agyei, although they are at least corroborative of the statement that those cousins died.

[27] With respect to Mr. Nti's statement regarding the burning of his family home, this statement, as with all of his statements regarding recent events in Ghana, was necessarily made on the basis of information he received from third parties, as he was in immigration detention in Canada at the relevant times. His evidence is thus the evidence of someone who has "no means of independently verifying the facts to which they testify," which may be ascribed limited weight in the absence of corroboration, whether it is credible or not: *Ferguson* at para 26. The PRRA officer's conclusion that Mr. Nti's evidence on this issue would be given little weight in the absence of corroboration was not itself unreasonable.

[28] In this regard, the situation is different than that in *Durrani v Canada (Citizenship and Immigration)*, 2014 FC 167, on which Mr. Nti relies. There, the applicant gave evidence of matters in her direct knowledge, namely the threats she received from the man whose arranged marriage she refused. In that context, Justice Zinn relied on the *Maldonado* principle to conclude that it was unreasonable to require documentary corroboration of the applicant's statement absent

an adverse credibility finding: *Durrani* at paras 2–6; *Maldonado v Minister of Employment and Immigration*, [1980] 2 FC 302 (CA) at p 305. I do not believe that *Durrani* can be applied equally to an applicant's evidence that merely repeats unsworn statements from third parties.

[29] The PRRA officer's treatment of the corroborative letters, however, was unreasonable. These letters spoke to the authors' knowledge of highly probative matters, notably the murder of numerous individuals in Mr. Nti's family. In each case, the PRRA officer raised issues that could only go to the authenticity of the letters: the absence of identification or envelopes, the fact that photocopies were provided, and misspellings. Yet the PRRA officer did not find the documents inauthentic, a finding that would impugn the credibility of both the documents and—given his statements regarding the authors and their letters—Mr. Nti, arguably triggering an obligation to hold a hearing. Rather, in the words of Justice Mactavish, the PRRA officer "cast aspersions" on the authenticity of the documents, then endeavoured to "hedge their bets by giving the document 'little weight'": *Sitnikova #2* at para 20.

[30] These findings were central to the PRRA officer's conclusions that the supporting letters of the friend, the Paramount Chief, the Kingmaker, the Concern Citizens of Wamfie member, and the journalism student were to be given "little weight." These letters in turn constituted the predominant portion of the supporting and corroborating evidence filed by Mr. Nti. I therefore find these errors sufficient to render the PRRA officer's assessment of the evidence unreasonable, without needing to address Mr. Nti's arguments regarding the PRRA officer's assessment of his mother's letter or the contention that the PRRA officer discounted the evidence

on the basis of what it did not say rather than what it said, contrary to the reasoning in *Sitnikova v Canada (Citizenship and Immigration)*, 2016 FC 464 at paras 22–24 [*Sitnikova #1*].

[31] As noted above, the PRRA officer ultimately found that there was "little evidence to support [Mr. Nti's] claim that he will be persecuted by Ansu Agyei." This conclusion was reached only after finding that the evidence that did support the claim should be given little weight. The conclusion cannot stand in light of the unreasonableness of the finding.

B. *The PRRA Officer Misapprehended the Nature of the Risk to Mr. Nti*

[32] The PRRA officer relied on a Response to Information Request (RIR) that quoted a professor as saying that "one is free to accept or refuse a chieftaincy position in any part of Ghana." Based on this evidence, the PRRA officer concluded that Mr. Nti "can refuse the chieftaincy and by doing so, there would be no reason for Ansu Agyei to target him."

[33] I agree with Mr. Nti that this statement misapprehended the nature of the risk that Mr. Nti alleged. Mr. Nti asserted that his fear of Ansu Agyei arose before becoming next in line for the throne, and that family members and supporters were killed even though they were not the heir apparent. In such circumstances, it seems an oversimplification to assume that refusing the chieftaincy would settle any issue.

[34] However, I also agree with the Minister that this issue was ultimately immaterial, since the PRRA officer's finding that that there was adequate state protection was premised on Mr. Nti not turning down the chieftaincy. I therefore conclude that the PRRA officer's misapprehension

of the nature of Mr. Nti's claim in this regard had no impact on the reasonableness of the decision as a whole.

C. *The PRRA Officer's Determination on State Protection was Unreasonable*

[35] The PRRA officer reviewed the country condition evidence relating to the availability and adequacy of state protection. This included the RIR referenced above, which addressed state protection available for those involved in Ghanaian chieftaincy disputes. The PRRA officer referred to evidence that Ghana was in effective control of its security forces, and found that there was no clear and convincing evidence of the state's unwillingness or inability to provide protection.

[36] Mr. Nti challenges two aspects of the PRRA officer's conclusion on state protection. First, he argues that the PRRA officer improperly relied on state efforts to improve protection, including anti-corruption measures, rather than on the operational adequacy of state protection. Second, he argues that the PRRA officer failed to consider the evidence that as many as 15 members of Mr. Nti's family and supporters had been killed, including a dozen male members of the Second Royal House and five since the last PRRA determination, in assessing whether there would be adequate state protection for Mr. Nti in Ghana.

[37] I agree that the PRRA officer's state protection analysis was unreasonable. The PRRA officer highlighted a number of pieces of evidence that showed reports of excessive use of force by police, police brutality, corruption and extortion, delays in prosecuting suspects, police collaboration with criminals, and a "widespread public perception of police ineptitude." Yet, to

counter this, the PRRA officer cited only the existence of entities tasked with investigating claims of excessive force, human rights abuses and police misconduct. The PRRA officer undertook no assessment of the operational impact of such measures on the ability of Ghanaian police to protect someone in Mr. Nti's position, which is the relevant inquiry: *Lakatos v Canada (Citizenship and Immigration)*, 2018 FC 367 at paras 21, 26. I agree with Mr. Nti that the existence of oversight bodies that do not have a mandate to protect citizens, but only to investigate complaints against police, does not counteract evidence of the inadequacy of police protection: *Katinszki v Canada (Citizenship and Immigration)*, 2012 FC 1326 at paras 14–15, quoting *Zepeda v Canada (Citizenship and Immigration)*, 2008 FC 491 at paras 24–25. The PRRA officer undertook no analysis of how such bodies affected the operational ability of the police in Ghana, particularly in light of the evidence of ineffectiveness they cited.

[38] The PRRA officer also gave no apparent consideration to the evidence that the alleged persecutor had been able to arrange for the murder of numerous individuals while still having the support of the local police. Such evidence would clearly be relevant to the question of whether the police could provide adequate state protection at an operational level, yet it was not discussed by the PRRA officer. If this was because the PRRA officer had already given that evidence "little weight," then the unreasonableness of that finding must be taken to render the state protection finding similarly unreasonable. If not, and the PRRA officer was purporting to assess the adequacy of state protection assuming that the primary claim of persecution had been established, then making that assessment without considering the evidence of the specific danger faced by Mr. Nti would be equally unreasonable.

IV. Conclusion

[39] The PRRA officer unreasonably discounted corroborative evidence filed by Mr. Nti on authenticity grounds but without making credibility findings. They also conducted an unreasonable analysis of the existence of adequate state protection. I therefore find the decision as a whole to be unreasonable. The decision is set aside and Mr. Nti's PRRA application returned for redetermination by different officer.

[40] I agree with the parties that no questions for certification arise in the matter.

JUDGMENT IN IMM-1248-19

THIS COURT'S JUDGMENT is that

1. The application is allowed. Mr. Nti's application for a Pre-Removal Risk Assessment is returned for redetermination by a different officer.

"Nicholas McHaffie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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