Date: 20070706

Docket: IMM-338-06

Citation: 2007 FC 720

Ottawa, Ontario, July 6, 2007

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

MARAT MOUMAEV

Applicant

and

SOLICITOR GENERAL FOR CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) for judicial review of the decision of a Pre-Removal Risk Assessment (PRRA) officer, dated January 17, 2006, which refused the applicant's PRRA application.

[2] The applicant requests that the officer's decision be quashed and the matter remitted for redetermination by a different officer.

Background

[3] The applicant, Marat Moumaev, and his son, Rouslan Moumaev, are citizens of Russia and claim to be of Chechen ethnicity. The applicant described his ethnic background and explained the basis for his fear of returning to Russia in his affidavit. The applicant's family was deported from Chechnya in 1944 and as a result, he was born in Kazakhstan. His family returned to Chechnya in 1957, where the applicant lived until he moved to Moscow in 1974. During the Chechen war of 1994 to 1995, Russian citizens of Chechen origin were being arrested and persecuted. The applicant began receiving threatening phone calls and was informed that many of his Chechen friends in Moscow had been beaten by the police, tortured and arrested.

[4] In June 1995, the applicant was stopped by the police for a routine document check. He provided them with his passport, which indicated his Chechen ethnicity, and was immediately taken into custody. He was asked to sign documents accusing other imprisoned Chechens of keeping illegal firearms. He refused to sign the documents, and was beaten by the police. He was warned not to complain about the incident. The applicant and his family later moved to Cyprus with temporary visas, where they remained for four years. The applicant returned to Russia a number of times during this period. He returned in 1998 in order to renew his international passport, and again in 1999, in order to apply for a Canadian visa.

[5] After obtaining a visa, he fled with his son. They arrived in Canada as visitors on October 13, 1999. Their claim for refugee protection was denied on August 7, 2003, because they had failed to establish their Chechen ethnicity. The applicant submitted his internal passport and military book in support of his ethnic identity; however, the original documents were lost by the Immigration and Refugee Board (the Board) when they were taken for forensic testing. Leave for judicial review of the Board's decision was denied on December 17, 2003. The applicant submitted his first PRRA application in March 2003. The PRRA application was rejected on November 3, 2004, due to a lack of evidence establishing the applicant's ethnicity. Leave for judicial review of the first PRRA decision was denied on April 13, 2005.

[6] The applicant's second PRRA application was submitted in December 2005. This application included a newly re-issued birth certificate which had been obtained from his sister. The applicant claimed that his original birth certificate had been destroyed when his family home was bombed during the war in Chechnya. The second PRRA was refused on January 17, 2006, as insufficient new evidence had been provided regarding the applicant's ethnicity. This is the judicial review of the second PRRA decision.

Officer's Reasons

[7] The applicant's PRRA application was rejected because the officer determined that he would not be subjected to a risk of persecution, danger of torture, risk to life or risk of cruel and unusual punishment if he returned to Russia. It was noted that the applicant's previous PRRA had

been refused because he had failed to establish his Chechen ethnicity. The officer noted the applicant's fear of persecution in Russia due to his Chechen ethnicity, and his son's fear pertaining to the fulfillment of military service as a Chechen. The officer found that the affidavits submitted with the application did not establish the applicant's Chechen ethnicity. The affidavit of Lema Atagayev indicated that he met the applicant when he first arrived in Canada, but revealed that he had no independent knowledge of the applicant. Also, the notes attached to the affidavit were in Chechen and no translation was provided. The affidavit of Tokaz Edilov was included to establish the applicant's Chechen language proficiency and ethnicity, however, he had no independent knowledge of the applicant. The affidavit of Baoudin Atiev stated that he had known the applicant for over twenty years. Counsel explained that this affidavit had not been submitted as part of the refugee claim because he could not have anticipated the need for it, given the fact that he had an internal passport identifying him as Chechen. The officer did not find that this explanation was reasonable and held that the affidavit did not constitute new evidence.

[8] The officer concluded that the following documents did not constitute "new evidence" as required under subsection 113(a) of IRPA, as they had either been submitted at the refugee hearing or during the first PRRA, or could have been submitted when the prior applications were made:

- Copies of letters that were submitted with his first PRRA application.
- A workbook which did not state the applicant's ethnicity. The officer did not accept counsel's submission that the applicant could not have been reasonably expected to present the workbook at the refugee hearing, since he had legal representation.

- Photocopies of both the applicant's birth certificate and restored birth certificate. Counsel had submitted that the restored birth certificate had not been reasonably available at the refugee hearing or during the first PRRA. The applicant re-established contact with his sister and discovered that his original birth certificate had been destroyed in his family home during the war. The officer noted that he had not provided evidence of the home's destruction. There was no information as to when he had contacted his sister, which led to the conclusion that she was contacted after his first PRRA was denied.
- A photocopy of his military record book and his internal passport.
- A photocopy of his son's birth certificate (without an explanation as to why the original had not been submitted). The officer did not accept counsel's submission that the applicant had not been informed that the Board wanted his birth certificate or that of his son.
- Photocopies of the international passports of the applicant and his son, which did not indicate their ethnicity.

[9] After reviewing the evidence, the officer concluded that there was insufficient objective evidence to confirm that the applicant was Chechen.

[10] The officer considered the country condition documents submitted by the applicant and found that they were general in nature and did not relate to the specific applicants. The officer was not satisfied that country conditions in Russia had changed to the extent that the applicant would be at risk since the first PRRA decision. The applicant had identified a risk faced by his son, namely, that he would be required to perform military service if returned to Russia. The officer noted that

this information was known to the applicant when the first PRRA was made, and did not constitute evidence of a new risk development which arose since the rejection of the first claim. The application was therefore rejected.

Issues

[11] The applicant submitted the following issue for consideration:

Did the officer err by misinterpreting the test for new evidence under subsection 113(a) of IRPA?

Applicant's Submissions

[12] The applicant submitted that he could now provide substantial evidence in support of his identity. It was submitted that in dismissing evidence on the grounds that it was not new, the officer misinterpreted subsection 113(a) of IRPA. The applicant submitted that this error constituted a denial of natural justice. The applicant noted that with respect to the rejection of new identity evidence, the Court has held in favour of the applicant when he could not have anticipated that identity would be a major issue at the hearing.

[13] The applicant submitted a re-issued birth certificate with his second PRRA, as the original document had been destroyed when his family home was bombed. The applicant attempted to obtain the document following his refugee hearing, but it was only issued after his first PRRA was

denied, and thus constituted new evidence. The applicant noted that Chechnya was a war zone and that requiring evidence of the home's destruction was unreasonable and irrelevant to determining whether the document constituted new evidence.

[14] The applicant submitted that he could not have anticipated that his birth certificate would be a critical document at his refugee hearing since he had provided the Board with his original internal passport, which identified him as Chechen. Since the Board lost the passport before it was forensically tested, it was unreasonable for the applicant to have anticipated the need for his birth certificate. It was submitted that the applicant could not have foreseen that the Board would lose his passport, thereby precluding him from testing it in order to refute the assertion that it was not genuine. The applicant submitted that he rectified the identity issue in the second PRRA, but that his proof was ignored.

[15] The applicant submitted that the officer erred in dismissing the affidavit of Mr. Edilov. It was submitted that the officer erred in ignoring that the affiant was an accredited interpreter and used his expertise to objectively assess the applicant's language proficiency. The applicant submitted that the officer erred in attributing minimal probative value to Mr. Atagayev's affidavit. It was submitted that Mr. Atagayev extensively interviewed the applicant and concluded that he was Chechen. It was submitted that the officer was under a duty to state why he rejected this evidence.

[16] The applicant submitted that the language of subsection 113(a) of IRPA directed officers to look at the individual circumstances of the case before them in deciding whether to accept new

evidence. It was submitted that: (1) the applicant's reasonable explanations about his documents; (2) the unique circumstances of this case involving the Board's loss of his internal passport and military record book; (3) the Board's misinterpretation of the internal passport which resulted in the increased importance of the birth certificates; and (4) the highly probative and credible nature of the new evidence, demonstrate that the officer erred in refusing to accept it as new evidence under the third prong of subsection 113(a) of IRPA.

[17] It was submitted that the scope of subsection 113(a) of IRPA should not be unduly narrowed, given the importance of the PRRA to individuals facing serious risks if removed from Canada (see *Mendez* v. *Canada (Minister of Citizenship and Immigration)* (2005), 42 Imm.L.R. (3d) 130, 2005 FC 111).

[18] While subsection 113(a) limits the acceptance of new evidence to that arising after the previous rejection, the applicant submitted that the officer's focus upon timing, in isolation of other factors, should not unduly fetter the broader discretion given to him under the third prong of the provision. It was submitted that the officer did not consider the applicant's circumstances, such as the Board's actions and mistakes, which severely prejudiced his ability to respond to the allegation that he was not Chechen. Finally, it was submitted that the officer erred in holding that the risk to Rouslan regarding military service was not new, since the documentary evidence in support of this risk post-dated the first PRRA refusal. Thus, it was submitted that this risk should have been considered by the officer.

Respondent's Submissions

[19] The respondent noted that subsection 161(2) of the *Immigration and Refugee Protection Regulations*, S.O.R./2002-227 (the Regulations) placed the burden upon the applicant to demonstrate that the evidence presented was new evidence within the meaning of subsection 113(a) of IRPA. The respondent submitted that the second PRRA was not another refugee hearing, but was held in order to determine whether new risks had developed since the applicant's refugee claim was refused. It was submitted that the applicant failed to show that there were changes in his personal situation or in country conditions which now placed him at risk (see *Kaybaki* v. *Canada (Solicitor General of Canada)*, 2004 FC 32).

[20] The respondent submitted that the applicant was trying to cure the deficiencies in the evidence presented to the Board and PRRA officer which was not the purpose of the second PRRA (see *Kaybaki*, above). It was submitted that the applicant was specifically put on notice by the Board that his Chechen identity was at issue. He was also asked to provide his original birth certificate. It was submitted that the applicant failed to provide a satisfactory explanation for why this information had not been provided earlier. The respondent submitted that the evidence therefore did not constitute new evidence that: (1) arose after the previous rejection; (2) was not reasonably available; or (3) could not have reasonably been anticipated in the circumstances.

[21] The respondent submitted that the officer's PRRA decision should be accorded deference as it involved findings of fact (see *Kaybaki*, above). It was submitted that the applicant failed to

demonstrate that the officer's decision was unreasonable or that the officer had committed an error in law.

Applicant's Reply

[22] The applicant submitted that the respondent misinterpreted the decision in *Kaybaki*. In that case, the applicant submitted a letter confirming his arrest in Turkey and the Court held that the document could have been available and presented in the context of the refugee hearing, therefore the officer should not have considered it. The applicant acknowledged that the PRRA process could not be used to present a case in piece-meal fashion; however, he was specifically chastised by the Board for failing to obtain his birth certificate, and had since procured it with a reasonable explanation as to why it was not available earlier. In addition, in *Mendez* above, the Court held that in a PRRA, the applicant may try to rectify a Board finding through the production of new evidence. Therefore, it was proper for the applicant to attempt to cure the deficiency.

[23] The applicant took issue with the respondent's statement that he was asked to submit his original birth certificate. It was submitted that the respondent was casting aspersions regarding the applicant's credibility without any foundation. The applicant submitted that his affidavit made it clear that the Board's expectation that he was aware of the request was unreasonable.

[24] The applicant submitted that this application for judicial review dealt with an issue of law, being the proper interpretation and application of new evidence in subsection 113(a) of IRPA, and should be reviewed on a correctness standard (see *Kim* v. *Canada (Minister of Citizenship and Immigration)* (2005), 272 F.T.R. 62, 2005 FC 437).

Analysis and Decision

Standard of Review

[25] In *Kim* above, Justice Mosley applied the pragmatic and functional approach to the determination of the appropriate standard of review applicable to the decision of a PRRA officer. Justice Mosely stated the following at paragraph 19 of *Kim*:

> Combining and balancing all of these factors, I conclude that in the judicial review of PRRA decisions the appropriate standard of review for questions of fact should generally be patent unreasonableness, for questions of mixed law and fact, reasonableness *simpliciter*, and for questions of law, correctness. I am fortified in my conclusions by the positions taken by my colleagues in other recent PRRA decisions.

[26] **Issue**

Did the officer err by misinterpreting the test for new evidence under subsection 113(a) of IRPA?

The central issue in this case was the applicant's ethnic identity. His refugee claim and first PRRA were clearly rejected on the basis that he had not established his Chechen ethnicity. The

applicant was therefore aware that establishing his Chechen ethnicity would be central to his second PRRA application.

[27] Pursuant to subsection 113(a) of IPRA, an applicant whose claim to refugee protection has been rejected may present only new evidence that: (1) arose after the rejection; (2) was not reasonably available, or (3) could not reasonably have been expected in the circumstances to have been presented at the time of the rejection. Under section 161 of the Regulations, an applicant may make written submissions in support of their application. These submissions must show that the evidence presented meets the requirements of subsection 113(a) of IRPA.

[28] I have reviewed the evidence provided by the applicant in support of his second PRRA application, as well as his explanations for their admissibility under subsection 113(a) of IRPA. Having also considered the officer's reasons for rejecting the applicant's evidence, in my opinion, there were portions of the evidence which met the requirements for new evidence.

[29] The applicant provided the PRRA officer with a birth certificate which was re-issued on November 26, 2004, and lists his nationality as "Chechen". The officer considered the document as follows:

> The applicant submitted a photocopy of his birth certificate and a photocopy of a "restored" birth certificate which I have reviewed. I find these documents are not new evidence and do not meet the requirements of Section 113(a) of the *Immigration and Refugee Protection Act* as the photocopy of the birth certificate was submitted with the first PRRA application and the "restored" birth certificate, which is a photocopy and contains the same information, does not constitute new evidence.

[30] I would first note that the applicant was never in possession of his original birth certificate while in Canada, nor a photocopy of it, therefore I believe that the officer is mistaken on this point. The photocopy of the restored birth certificate therefore would have contained new information which was relevant to establishing the applicant's identity. The officer noted that the applicant had obtained his restored birth certificate from his sister, and since there was no information as to when he had contacted her, this led to the conclusion that he had contacted her after his first PRRA application was rejected. However, the applicant submitted an affidavit to the PRRA officer which stated the following:

> When I found out at the hearing that they wanted my birth certificate, I started to make efforts to get it. At the time I did not have contact with my brother and sister so I could not ask them to get it for me. Once I re-established contact, I discovered that my original birth certificate had been destroyed when my family's home was bombed during the war in Chechnya. To re-establish contact with them, I had called my mother's sister's daughter (my first cousin), Tamara Kantaeva, who was living in Moscow. She contacted my sister who then went to the archives to have the document re-issued. My birth certificate was re-issued on November 26, 2004. My sister then sent it to me here in Canada.

[31] The applicant's refugee claim was refused in August 2003 and his first PRRA was rejected on November 3, 2004. As noted above, the applicant indicated that he had attempted to re-establish contact with his sister after his refugee hearing in order to obtain his birth certificate. Since his original birth certificate had been destroyed, he had to obtain a re-issued copy. The officer found that the applicant had provided insufficient objective evidence that his family home had been destroyed. In my view, it was unreasonable to penalize the applicant for having failed to obtain objective evidence pertaining to the destruction of a single home during a bombing.

[32] It is important to consider the circumstances of this case in determining whether the re-issued birth certificate can be considered new evidence. The Board lost his original internal passport and military work book. The internal passport indicated that the applicant was of Chechen ethnicity. The applicant stated that his original birth certificate was destroyed when his family home was bombed during the war. When the Board failed to accept that he was of Chechen ethnicity, he tried to re-establish contact with his sister. His affidavit evidence stated that he started this process after his failed refugee hearing, but was only able to get the birth certificate re-issued on November 26, 2004 at which time his sister mailed it to him in Canada. The applicant's first PRRA was refused on November 3, 2004. The re-issued birth certificate was not available until after the first PRRA application was rejected.

[33] I am of the view that based on these facts, the re-issued birth certificate is new evidence within the meaning of subsection 113(a) of IRPA, and should have been considered by the officer. The officer's finding that the re-issued birth certificate did not constitute new evidence was patently unreasonable and must be set aside.

[34] The decision of the officer is therefore set aside and the matter is referred to a different officer for redetermination.

[35] The applicant submitted the following proposed serious questions of general importance for my consideration for certification:

> Given the potential importance a PRRA decision can have and the serious ramifications that can result from a negative assessment;

> what interpretation should PRRA officers apply to section 113(a) in deciding what constitutes “new evidence” that the applicant “could not reasonably have been expected in the circumstances to have presented, at the time of the rejection”?
>
> What is the meaning of the third prong of the definition of “new evidence” found in s. 113(a) of IRPA, namely that the applicant “could not reasonably have been expected in the circumstances to have presented, at the time of the rejection”?

[36] I have reviewed the submissions of counsel and I accept the position put forward by the respondent. Thus, I am not prepared to certify either question.

JUDGMENT

[37] **IT IS ORDERED that** the decision of the PRRA officer is set aside and the matter is referred to a different officer for redetermination.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

The relevant statutory provisions are set out in this section.

The *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.:

112.(1) A person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force or are named in a certificate described in subsection 77(1).	112.(1) La personne se trouvant au Canada et qui n'est pas visée au paragraphe 115(1) peut, conformément aux règlements, demander la protection au ministre si elle est visée par une mesure de renvoi ayant pris effet ou nommée au certificat visé au paragraphe 77(1).
(2) Despite subsection (1), a person may not apply for protection if	(2) Elle n'est pas admise à demander la protection dans les cas suivants:
(a) they are the subject of an authority to proceed issued under section 15 of the Extradition Act;	a) elle est visée par un arrêté introductif d'instance pris au titre de l'article 15 de la Loi sur l'extradition;
(b) they have made a claim to refugee protection that has been determined under paragraph 101(1)(e) to be ineligible;	b) sa demande d'asile a été jugée irrecevable au titre de l'alinéa 101(1)e);
(c) in the case of a person who has not left Canada since the application for protection was rejected, the prescribed period has not expired; or	c) si elle n'a pas quitté le Canada après le rejet de sa demande de protection, le délai prévu par règlement n'a pas expiré;
(d) in the case of a person who has left Canada since the removal order came into force, less than six months have passed since they left Canada	d) dans le cas contraire, six mois ne se sont pas écoulés depuis son départ consécutif soit au rejet de sa demande d'asile ou de protection, soit à

after their claim to refugee protection was determined to be ineligible, abandoned, withdrawn or rejected, or their application for protection was rejected.

un prononcé d'irrecevabilité, de désistement ou de retrait de sa demande d'asile.

(3) Refugee protection may not result from an application for protection if the person

(3) L'asile ne peut être conféré au demandeur dans les cas suivants:

(a) is determined to be inadmissible on grounds of security, violating human or international rights or organized criminality;

a) il est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou criminalité organisée;

(b) is determined to be inadmissible on grounds of serious criminality with respect to a conviction in Canada punished by a term of imprisonment of at least two years or with respect to a conviction outside Canada for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years;

b) il est interdit de territoire pour grande criminalité pour déclaration de culpabilité au Canada punie par un emprisonnement d'au moins deux ans ou pour toute déclaration de culpabilité à l'extérieur du Canada pour une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;

(c) made a claim to refugee protection that was rejected on the basis of section F of Article 1 of the Refugee Convention; or

c) il a été débouté de sa demande d'asile au titre de la section F de l'article premier de la Convention sur les réfugiés;

(d) is named in a certificate referred to in subsection 77(1).

d) il est nommé au certificat visé au paragraphe 77(1).

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 criminality, whether they are a danger to the public in Canada, or

(i) soit du fait que le demandeur interdit de territoire pour grande criminalité constitue un 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

(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.

Canada.

The *Immigration and Refugee Protection Regulations*, S.O.R./2002-227.:

161.(1) A person applying for protection may make written submissions in support of their application and for that purpose may be assisted, at their own expense, by a barrister or solicitor or other counsel.	161.(1) Le demandeur peut présenter des observations écrites pour étayer sa demande de protection et peut, à cette fin, être assisté, à ses frais, par un avocat ou un autre conseil.
(2) A person who makes written submissions must identify the evidence presented that meets the requirements of paragraph 113(a) of the Act and indicate how that evidence relates to them.	(2) Il désigne, dans ses observations écrites, les éléments de preuve qui satisfont aux exigences prévues à l'alinéa 113a) de la Loi et indique dans quelle mesure ils s'appliquent dans son cas.

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

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