

**Date: 20080111**

**Docket: IMM-824-07**

**Citation: 2008 FC 39**

**Ottawa, Ontario, January 11, 2008**

**PRESENT: The Honourable Sean J. Harrington**

**BETWEEN:**

**JOSIAH NYABOGO MASONGO**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR ORDER AND ORDER**

[1] The question in this case is not whether Mr. Masongo is homosexual. Rather, the question is whether Mr. Masongo is perceived by the Kenyan police as being homosexual and at risk of being persecuted therefore.

[2] His claim for refugee status was turned down by the Immigration and Refugee Board. It was of the view that there was insufficient trustworthy evidence to allow it to conclude that Mr. Masongo is gay.

[3] He then sought a pre-removal risk assessment (PRRA) and in accordance with section 113 of the *Immigration and Refugee Protection Act* came up with new evidence; a missive from the Nairobi Divisional Police Headquarters at Muthangari Police Station to the Administrative Chief of the Bureau Estate in Nairobi. The text of the letter reads:

The above named person is a resident of your area Umoja House Estate Hse. No.3B Nairobi.

Josiah Nyaboga Masongo is wanted by police on matters regarding involvement in acts of Homosexuality as alleged. Several attempts by the police to arrest him have been fruitless.

This is to request you to immediately inform or arrest him should he be sighted around your area.

Contact SGT. Ndegwa on Telephone No. 0736 492348. The investigating officer. My circulation signal KP/042/06 addressed to Police Headquarters.

[4] The PRRA officer found that this document was solicited for the purposes of this application and was of low probative value.

[5] This is a judicial review of that decision.

[6] Leaving aside the treatment of this letter, the PRRA analysis is very thoughtful. It was acknowledged that homosexual activity is a crime in Kenya, but that there are few prosecutions. Such prosecutions as there are generally pertain to organizations active in the gay community. The evidence, apart from the letter, did not, in the PRRA officer's opinion, support the proposition that Mr. Masongo's profile would be of interest to the Kenyan authorities. The officer concluded that there was no more than a mere possibility that he would be subjected to persecution if returned to Kenya.

[7] However, the police letter, if true, indicates quite the contrary. It suggests he would be arrested on sight.

[8] The issue is whether the assignment of low probative value to that letter should be set aside. This is not really a matter of weighing evidence, but rather a finding of fact on the officer's part. He found that the "document was solicited for the purposes of the application..." In other words, he found the document was false. In reality he gave it no value. Findings of fact are not disturbed unless patently unreasonable.

[9] The officer noted the letter did not identify the section of the statute Mr. Masongo was suspected of violating, did not indicate the date of the alleged acts of homosexuality, and did not state why he was being sought at that time, approximately three years after the events in question.

[10] However, the document purports to be an internal letter. There is no evidentiary basis for the inference that such letter should cite the section of the criminal statute involved or the date of the alleged offence. Furthermore, what is a "circulation signal"? Is it another document which gives those particulars? It should also be noted that it states that several attempts to arrest Mr. Masongo proved fruitless.

[11] In my opinion, this is not one of those cases where the officer was entitled to discount the document without verification, on the grounds that there was sufficient evidence for doubting its authenticity or that the applicant was not credible (*Gebremichael v. Canada (Minister of Citizenship*

*and Immigration*), 2006 FC 547, [2006] F.C.J. No. 689 at paragraph 29, and the authorities cited therein).

[12] Rather, Mr. Masongo's case is in line with those which have held that a document purportedly issued by a foreign authority is presumed to be valid unless there is evidence to the contrary (*Ramalingam v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 10, 77 A.C.W.S. (3d) 156; *Osipenkov v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 59, 120 A.C.W.S. (3d) 111 and *Sitoo v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1513, [2004] F.C.J. No. 1850).

[13] The officer's reasons do not indicate whether the letter before him purported to be an original or a photocopy. While there may have been no positive obligation to have the document examined by experts, such as the RCMP, we are left with a presumption of validity. The reasons given to doubt authenticity were in the realm of conjecture, not inference drawn from evidence in the record. As such, they were patently unreasonable.

[14] It is well established that a conjecture may be reasonable but is of no legal value as it is a mere guess, as opposed to an inference which is a deduction from the evidence. I refer to *Canada (Minister of Employment and Immigration) v. Satiacum*, 99 N.R. 171, [1989] F.C.J. No. 505 in which Mr. Justice McGuigan, speaking for the Court of Appeal, cited Lord Macmillan in *Jones v. Great Western Railway Co.* (1930), 47 T.L.R. 39 at page 45, 144 L.T. 194 at page 202.

[15] It would have been appropriate to investigate the authenticity of the police letter. It may well be that an investigation would have revealed that the letter was a fake, particularly as counsel for the Minister points out that the address given for Mr. Masongo appears to be incorrect. PRRA officers have means at their disposal and there are times when they should be used (*Myle v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1073, [2007] F.C.J. No. 1389).

**ORDER**

**THIS COURT ORDERS** that for these reasons the application for judicial review is allowed, the decision of the PRRA officer is set aside and the matter is referred back for redetermination by another PRRA officer. There is no serious question of general importance to be certified.

“Sean Harrington”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-824-07

**STYLE OF CAUSE:** JOSIAH NYABOGO MASONGO v.  
THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** January 10, 2008

**REASONS FOR ORDER  
AND ORDER:** HARRINGTON J.

**DATED:** January 11, 2008

**APPEARANCES:**

Mr. Joel Etienne FOR THE APPLICANT

Mr. David Knapp FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Joel Etienne FOR THE APPLICANT  
Barrister & Solicitor  
Toronto, Ontario

John H. Sims, Q.C. FOR THE RESPONDENT  
Deputy Attorney General of Canada