Date: 20081010

Docket: IMM-1248-08

Citation: 2008 FC 1154

Ottawa, Ontario, October 10, 2008

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

KO KO WIN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision rendered on February 4, 2008 by G. Wang, a Pre-Removal Risk Assessment Officer (the PRRA Officer), which rejected the applicant's Pre-Removal Risk Assessment (PRRA) application on the grounds that he would not be subject to risk of persecution, torture, risk to life or risk of cruel and unusual treatment or punishment if returned to his country of nationality or habitual residence, in this case, Myanmar (the impugned decision).

[2] In granting the stay of removal in the within case, Justice Shore provided extensive reasons (*Win v. Canada (Minister of Citizenship and Immigratio*n), [2008] F.C.J. No. 542, 2008 FC 398). The Applicant now invites the Court to follow Justice Shore's reasoning and conclude that:

- The PRRA Officer failed to undertake a proper analysis of credibility, relevance, newness or materiality with respect to the police summons issued for the applicant in May 2005, following the hearing and decision in his refugee case; and

- The PRRA Officer arbitrarily discarded the new evidence tendered by the applicant relating to a *sur place* claim as a result of the applicant's participation in anti-Myanmar government rallies that took place in the aftermath of the government crackdown on the Buddhist monks in September and October 2007.

[3] The grounds of review raised by the applicant are both well founded. Indeed, the above-mentioned errors are determinative and authorize the Application Judge to set aside the impugned decision and to refer the matter back for redetermination. While not bound by reasons issued by the Motion Judge in the course of ascertaining whether a serious issue is raised, and having had the benefit of reading the whole record and of hearing full arguments by the parties, I feel comfortable today endorsing Justice Shore's general comments and reasoning. Accordingly, I will allow the present application.

[4] For the purposes of paragraph 113 (a) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), as this provision has been recently interpreted by this Court and the Federal Court of Appeal, a PRRA Officer should ask itself a number of questions when assessing evidence that is being proffered as being "new".

[5] Despite the contrary suggestion made at the hearing by the respondent's able counsel, I am unable to find in the impugned decision rendered by the PRRA Officer, any clear indication or rationale permitting me to infer that the PRRA Officer applied or even considered the test developed by the Federal Court of Appeal in *Raza v. Canada (Minister of Citizenship and Immigration),* [2007] F.C.J. No. 1632, 2007 FCA 385 (*Raza*).

[6] The relevant questions have been summarized as follows at paragraph 13:

> […]
>
> Credibility: Is the evidence credible, considering its source and the circumstances in which it came into existence? If not, the evidence need not be considered.
>
> 2. Relevance: Is the evidence relevant to the PRRA application, in the sense that it is capable of proving or disproving a fact that is relevant to the claim for protection? If not, the evidence need not be considered.
>
> 3. Newness: Is the evidence new in the sense that it is capable of:
>
> (a) proving the current state of affairs in the country of removal or an event that occurred or a circumstance that arose after the hearing in the RPD, or
> (b) proving a fact that was unknown to the refugee claimant at the time of the RPD hearing, or
> (c) contradicting a finding of fact by the RPD (including a credibility finding)?

If not, the evidence need not be considered.

4. Materiality: Is the evidence material, in the sense that the refugee claim probably would have succeeded if the evidence had been made available to the RPD? If not, the evidence need not be considered.

5. Express statutory conditions:

   (a) If the evidence is capable of proving only an event that occurred or circumstances that arose prior to the RPD hearing, then has the applicant established either that the evidence was not reasonably available to him or her for presentation at the RPD hearing, or that he or she could not reasonably have been expected in the circumstances to have presented the evidence at the RPD hearing? If not, the evidence need not be considered.

   (b) If the evidence is capable of proving an event that occurred or circumstances that arose after the RPD hearing, then the evidence must be considered (unless it is rejected because it is not credible, not relevant, not new or not material).

[7] It is not suggested by the Federal Court of Appeal that the questions listed above must be asked in any particular order, or that in every case the PRRA Officer must ask each question: "What is important is that the PRRA officer must consider all evidence that is presented, unless it is excluded on one of the grounds stated (…) above" (*Raza*, at para. 15). In the case at bar, the PRRA Officer peremptorily decided that the summons dated May 2005 (the new summons), did not qualify as "new evidence" because the alleged grounds for the new summons had already been assessed by the Immigration and Refugee Board, Refugee Protection Division (the RPD).

[8] However, the new summons was evidence of a fact which allegedly occurred in May 2005, that being that the police had appeared at the applicant's residence in Rangoon on a date after the

RPD in Canada had already considered and rejected his claim. This evidence was therefore “new in the sense that it is capable of (…) proving (…) an event that occurred or a circumstance that arose after the hearing in the RPD, or (…) contradicting a finding of fact by the RPD (including a credibility finding)” (third question mentioned in *Raza).* Thus, as stated in *Raza*, “ If the evidence is capable of proving an event that occurred or circumstances that arose after the RPD hearing, then the evidence must be considered (unless it is rejected because it is not credible, not relevant, not new or not material)” (fifth question, paragraph (b) of *Raza*). That said, it was open to the PRRA Officer to accord whatever weight he believed appropriate to the new summons; however to completely disregard it because it was not “new evidence” is a reviewable error in this case.

[9] It is not the role of this Court, in a judicial review application, to reweigh the evidence if it otherwise appears that the PRRA Officer misunderstood or failed to properly apply the applicable test under paragraph 113 (a) of the Act. Indeed, the Application Judge should not assess the evidence on record in order to answer relevant questions which have been left unanswered by the PRRA Officer (such as credibility). To do so would be to second guess the PRRA Officer and usurp the role of this very specialized body. Moreover, I am not satisfied that this is an instance where the Application Judge should exercise its judicial discretion not to set aside a decision because it is likely that a new redetermination or hearing before a different PRRA Officer could only result again in the dismissal of the PRRA application made by the applicant (see *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202). This is so because I have also found that the PRRA Officer arbitrarily discarded other new evidence tendered by the applicant and which directly relates to his refugee *sur place* claim.

[10] With respect to the refugee *sur place* claim made by the applicant, credible evidence of the applicant's political activities while in Canada that are likely to substantiate any potential harm upon return in Myanmar, must be expressly considered even if the motivation behind these activities may be non-genuine (*Ejtehadian v. Canada (Minister of Citizenship and Immigration*), [2007] F.C.J. No. 214, 2007 FC 158 (QL) at para. 11). The standard to be used in assessing evidence related to a *sur place* claim is likelihood, or balance of probabilities (and not certainty, as implied by the PRRA Officer in the impugned decision) (*Win v. Canada (Minister of Citizenship and Immigratio*n), [2008] F.C.J. No. 542 at paras. 2, 29 and 30, 2008 FC 398).

[11] In this regard, I note that the PRRA Officer accepted, as a fact, that the applicant, since his arrival to Canada and after the hearing of the RPD, participated in large public demonstrations against the Myanmar government (which were repeated in numerous cities around the world). Those demonstrations took place in front of the Chinese consulate in Toronto. While several photos had been taken of the applicant participating in same and produced in support of his application, the PRRA Officer nevertheless notes: "However, these photos, by themselves, were not found to be sufficient evidence to establish that [the applicant] had attracted attention of the authorities of Myanmar and would be subjected to persecution or mistreatment…" (emphasis added). This clearly amounts to a reviewable error.

[12] It appears from the tribunal record that the Chinese government is a strong ally of the Myanmar government. Accordingly, it is unreasonable to suggest, as does the respondent in his

memorandum of law, that the applicant must prove that the Chinese consulate officials have themselves taken pictures or videos of the demonstration in Toronto and then forwarded those images to the Myanmar government. In the case at bar, the PRRA Officer simply ought to have asked himself, given the public nature of the applicant's demonstrations against the government of Myanmar, whether it was likely to come to the attention of the Myanmar authorities.

[13] Overall, I find the impugned decision unreasonable. Accordingly, the present application is allowed. The impugned decision is set aside and the matter is referred back for redetermination by another PRRA Officer. Counsel agree that this case does not raise any questions of general importance.

JUDGMENT

THIS COURT ORDERS that the application for judicial review be allowed. The decision rendered by the PRRA Officer on February 4, 2008 is set aside and the matter is referred back for redetermination by another PRRA Officer. No question is certified.

Luc Martineau

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Mr. Ronald Poulton 416-953-9900	FOR THE APPLICANT
Mr. Michael Butterfield 416-954-8227	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Mr. Ronald Poulton Barrister & Solicitor Toronto, Ontario	FOR THE APPLICANT
John H. Sims Deputy Attorney General of Canada Ontario Regional Office	FOR THE RESPONDENT