Federal Court  Cour fédérale

Date: 20121002

Docket: IMM-8406-11

Citation: 2012 FC 1167

Ottawa, Ontario, October 2, 2012

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

MICHAEL-MARY NNABUIKE OZOMMA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (Act) for judicial review of the decision of a Senior Immigration Officer (Officer), dated 28 October 2011 (Decision), which rejected the Applicant's Pre-Removal Risk Assessment (PRRA).

BACKGROUND

[2] The Applicant is a 28-year-old citizen of Nigeria. He is subject to a removal order, which Justice Sean Harington stayed on 28 November 2011 pending the outcome of this application.

[3] The Applicant lived in the United States of America (USA) from 1999 until 2008, when he was deported to Nigeria. He fled Nigeria to Canada in December 2008 and arrived in Canada on 16 February 2009. The Applicant claimed refugee protection on 18 February 2009. The RPD heard his claim on 5 May 2010 and rejected it the same day. It found the Applicant was excluded by Article 1F(b) of the *Convention Relating to the Status of Refugees* (Convention) from claiming refugee status. While he was in the USA, the Applicant was convicted of several offences, including robbery and sexual assault. These were serious, non-political crimes which precluded his claim for protection. The RPD refused his claim on that basis.

[4] After his refugee claim was refused, the Applicant applied for a PRRA. He made written submissions on 18 February 2011. These submissions include a copy of the Personal Information Form (PIF) the Applicant had submitted to support his refugee claim. In his written submissions, the Applicant said his credibility was central to the determination of his PRRA, so he asked the Officer for an oral hearing.

[5] The Applicant asserted three grounds of risk in his PRRA. First, he faced prosecution in Nigeria for bringing Nigeria into disrepute based on his convictions in the USA. Second, he faced prosecution in Nigeria because he had escaped from prison there before he went to the USA. After his escape from prison, the Nigerian authorities sought to arrest him and were still looking for him. Third, the Applicant faced prosecution in Nigeria because he is a member of the Movement for the

Actualization of the Sovereign State of Biafra (MASSOB), a group dedicated to creating an independent state for Igbo people in Nigeria. Prosecution on any one of these three grounds would mean he would be incarcerated in Nigeria, where conditions are terrible in prisons.

[6] The Officer considered the Applicant's request for a hearing and the merits of his PRRA application on 28 October 2011. She refused both requests the same day.

DECISION UNDER REVIEW

[7] The Decision in this case consists of the letter the Officer sent to the Applicant on 28 October 2011 and the completed PRRA decision template.

Hearing Request

[8] The Officer rejected the Applicant's request for an oral hearing because the factors set out in section 167 of the *Immigration and Refugee Protection Regulations* SOR 2002-227 (Regulations) were not met.

Preliminary Issues

[9] Before considering the merits of the PRRA, the Officer noted the RPD had not assessed the merits of the Applicant's refugee claim. Section 113 of the Act allowed her to consider all the evidence he had put before both her and the RPD. The Officer also found the Applicant's claim fell under paragraph 112(3)(*c*) of the Act because the RPD had rejected his claim under Article 1F(b) of the Convention. Therefore, subsection 113(d) required the Officer to consider only section 97 of the Act.

Merits of the PRRA

[10] The Officer rejected the Applicant's PRRA because he did not face a risk to his life, a risk of cruel and unusual treatment or punishment, or a risk of torture if he returned to Nigeria.

[11] The Applicant alleged the Nigerian authorities had issued an arrest warrant for him based on his membership in MASSOB. He also said that going to prison in Nigeria amounted to cruel and unusual treatment or punishment and this would put his life at risk. The Officer found the Applicant was not a member of MASSOB because he had not provided any evidence to prove he was a member. His statements in the written submissions were insufficient to establish his membership and the associated risk. The Officer referred to the Immigration and Refugee Board's Response to Information Request (RIR) NGA103196.FE, which said that MASSOB had been banned in Nigeria in 2001 and that members faced arrest and detention. The Officer also pointed to a report from the United States' Department of State, the *Country Report for Nigeria (2009)*, which said that MASSOB members who are arrested and do not have money or influence to bribe their way out of prison remain in detention.

[12] The Applicant was not at risk in Nigeria because he was not being sought by the authorities there. He said the authorities in Nigeria were after him, but he did not provide any objective evidence to corroborate this allegation. The Applicant's testimony was not enough to convince the Officer the Nigerian authorities wanted to arrest him.

[13] The Officer gave little weight to a report from Amnesty International, *Nigeria: Prisoners' Rights Systemically Flouted*, because the Applicant had not provided evidence that he had been or

would be incarcerated. The Applicant had not provided probative material evidence to corroborate his allegations and his testimony alone was not sufficient.

[14] Although the evidence suggested Nigeria faces problems with violence, any risk to the Applicant from violence was faced by the rest of the population as well. The government apparatus in Nigeria had not broken down entirely.

[15] The Officer concluded there was no credible basis to establish the risk the Applicant alleged. He had provided little evidence other than his own statements that he had been in prison or had escaped from prison.

ISSUES

[16] The Applicant raises the following issues in this proceeding:

a. Whether the Officer breached his right to procedural fairness by not conducting an interview;

b. Whether the Decision was reasonable;

c. Whether the Officer's reasons were adequate.

STANDARD OF REVIEW

[17] The Supreme Court of Canada in *Dunsmuir v New Brunswick* 2008 SCC 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the

reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[18] On the first issue, the Officer's conclusion that the factors in section 167 of the Regulations were not met is an issue of mixed fact and law. Accordingly, the standard of review is reasonableness. See *Dunsmuir*, above, at paragraph 53. Whether the process as a whole was fair is subject to the correctness standard. See *Matano v Canada (Minister of Citizenship and Immigration)* 2010 FC 1290 at paragraph 11.

[19] The second issue in this case will be analysed on the reasonableness standard. In *Figurado v Canada (Solicitor General)* 2005 FC 347, Justice Luc Martineau held at paragraph 51 that the standard of review applicable to a PRRA decision was reasonableness simpliciter. Justice Yves de Montigny followed *Figurado* in *Lai v Canada (Minister of Citizenship and Immigration)* 2007 FC 361, but noted at paragraph 55 that the standard must be adjusted according to the question being decided. In this case, the Officer was called on to decide whether the Applicant faced a risk under section 97, which is clearly an issue to be evaluated on the reasonableness standard. See *Kaleja v Canada (Minister of Citizenship and Immigration)* 2010 FC 252, and *Guerilus v Canada (Minister of Citizenship and Immigration)* 2010 FC 394.

[20] In *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)* 2011 SCC 62 the Supreme Court of Canada held at paragraph 14 that the adequacy of reasons is not a stand-alone basis for quashing a decision. Rather, "the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes." The adequacy of the Officer's reasons will be analysed along with the reasonableness of the Decision as a whole.

[21] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47, and *Canada (Minister of Citizenship and Immigration) v Khosa* 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

STATUTORY PROVISIONS

[22] The following provisions of the Act are applicable in this proceeding:

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	**97.** (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	*a*) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;
(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	*b*) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
(i) the person is unable or, because of that risk, unwilling to avail themself of the	(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

protection of that country,	
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,	(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
[…]	[…]
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).
[…]	[...]
(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 :
[…]	[…]
(c) made a claim to refugee protection that was rejected on the basis of section F of	c) il a été débouté de sa demande d'asile au titre de la section F de l'article premier

Article 1 of the Refugee Convention;	de la Convention sur les réfugiés;
[…]	[…]
113. Consideration of an application for protection shall be as follows:	**113**. Il est disposé de la demande comme il suit:
[…]	[…]
(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;
[…]	[…]
(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 :
[…]	[…]
(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.

[23] The following provisions of the Regulations are also applicable in this proceeding:

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 allowing the application for protection.	c) la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection.

ARGUMENTS

The Applicant

Breach of Procedural Fairness

[24] The Applicant says that his case is one of the exceptional cases in which an oral hearing was required to assess his credibility and determine his PRRA. His testimony, which has never been found not credible, was entitled to the presumption of truthfulness established by *Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 (FCA). In *Cho v Canada (Minister of Citizenship and Immigration)* 2010 FC 1299, Justice Danièle Tremblay-Lamer held at paragraph 29 that

> Furthermore, I note that because the Board refused to hear the applicant's refugee claim, the applicant has never had his credibility assessed in the context of an oral hearing. The Supreme Court of Canada in Singh, above at para. 20, indicated that, "where a serious issue of credibility is involved, fundamental justice requires that credibility be determined on the basis of an oral hearing." For these reasons, in failing to grant the applicant's request for an oral hearing,

> I find that the PRRA officer breached the duty of procedural fairness that was owed to the applicant.

[25] The Officer was obligated to hold a hearing to assess the Applicant's credibility because all the factors in section 167 of the Regulations were met.

167(a) – Serious Issue of Credibility

[26] The Officer concluded that, although the Applicant said that Nigerian authorities are looking for him, the lack of an arrest warrant or other corroborating document meant he had not shown he faced a risk in Nigeria. In a similar situation, Justice Harrington said in *S.A. v Canada (Minister of Citizenship and Immigration)* 2010 FC 549 at paragraph 20 that:

> In my view, the PRRA officer could not have made the decision he did unless he did not believe the claimant. That lack of belief is inherent in his analysis (*Liban v. Canada (Minister of Citizenship and Immigration*), 2008 FC 1252, 76 Imm. L.R. (3d) 227). It seems extraordinary that S.A.'s story was not subjected to an oral examination.

See also *Zokai v Canada (Minister of Citizenship and Immigration)* 2005 FC 1103 at paragraph 12.

[27] The Officer said that "[in] the absence of any probative, material evidence to corroborate his allegation, I find his statement to be insufficient in order to establish that he is a member of MASSOB and that he will be persecuted by Nigerian authorities upon return to Nigeria." The Officer did not find any inconsistencies in the Applicant's story of membership in MASSOB, his description of conditions in Nigerian prisons, or his story about his escape from prison. The Applicant's evidence was uncontradicted, which means the Officer was required to assess his credibility. As Justice James O'Reilly said in *Liban v Canada (Minister of Citizenship and Immigration)* 2008 FC 1252 at paragraph 14:

> In my view, when the officer stated that there was "insufficient objective evidence" supporting Mr. Liban's assertions, he was really saying that he disbelieved Mr. Liban and, only if Mr. Liban had presented objective evidence corroborating his assertions, would the officer have believed them. To my mind, these findings are conclusions about Mr. Liban's credibility. They were central to his application. If the officer had believed Mr. Liban, the officer, in light of the documentary evidence he accepted, would likely have found that Mr. Liban was at risk.

[28] The Applicant declared that the information in his PIF was complete, true, and correct. As such, his story of arrest, detention, and escape in Nigeria was a sworn statement which was entitled to the presumption of truthfulness.

[29] There was no distinction between the Applicant's credibility and the sufficiency of the evidence in this case. The Officer was therefore obligated to allow the Applicant the opportunity to address the lack of corroborating documents in an interview. See *Amarapala v Canada (Minister of Citizenship and Immigration)* 2004 FC 12. There was no valid reason to doubt the Applicant's credibility, so the absence of corroborating documents was not a valid reason to deny his claim. It was also not demonstrated that the Applicant would be able to obtain an arrest warrant or other type of corroborating document from the Nigerian Government.

167(b) – Evidence of Central Relevance

[30] The Applicant's story was central to the determination of his PRRA: he said he was a member of MASSOB and had escaped from prison. These assertions were crucial to the Decision and depended on the Applicant's credibility.

167(c) – Evidence Justifies Accepting the PRRA

[31] Had the Officer accepted the Applicant's assertion that the Nigerian authorities were looking for him and would detain him, this would have justified accepting his PRRA. She referred to evidence supporting the Applicant's assertion that conditions in Nigerian prisons are deplorable. Imprisonment in Nigeria would amount to cruel and unusual treatment or punishment regardless of the legal basis for it. If the Applicant's story is true, he is at risk under section 97, so his PRRA would have to be accepted.

Decision Unreasonable

[32] The Officer also unreasonably refused the Applicant's PRRA because he did not produce corroborating documents. In *Ahortor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 705, Justice Max Teitelbaum said, at paragraph 45, that

> The Board appears to have erred in finding the Applicant not credible because he was not able to provide documentary evidence corroborating his claims. As in Attakora, supra, where the F.C.A. held that the applicant was not required to provide medical reports to substantiate his claim of injury, similarly here the Applicant is not expected to produce copies of an arresting report. This failure to offer documentation of the arrest, while a correct finding of fact, cannot be related to the applicant's credibility, in the absence of evidence to contradict the allegations.

[33] There was no evidence to contradict the Applicant's story, so it was an error to require him to produce corroborating documents.

Reasons Inadequate

[34] The reasons show the Officer cloaked her negative credibility finding in the sufficiency of the evidence. As Justice Elizabeth Heneghan held in *L.Y.B. v Canada (Minister of Citizenship and Immigration)* 2009 FC 1167 at paragraph 21, this is a reviewable error. The Applicant cannot tell from the reasons whether or not the Officer accepted the truth of his story. For this reason, the reasons are inadequate.

The Respondents

[35] The Respondents say the Officer was not obligated to call the Applicant for an interview, so there was no breach of procedural fairness. It was reasonable for the Officer to conclude that the Applicant's statements in his PIF were an insufficient basis on which to grant him protection.

No Breach of Procedural Fairness

[36] The Officer's decision not to hold a hearing was discretionary and is subject to the reasonableness standard. Section 167 of the Regulations guides officers in the exercise of their discretion under subsection 113(b). In this case, the requirements of section 167 were not met, so there was no obligation to hold a hearing.

[37] The Officer assessed the PRRA on the basis of the sufficiency of the evidence, not the Applicant's credibility. She rejected his claim that he was a member of MASSOB and was wanted by the Nigerian authorities because he did not provide corroborating evidence to support it. This was a reasonable conclusion. In *Pulaku v Canada (Minister of Citizenship and Immigration)* 2011 FC 1048, Justice David Near upheld a PRRA officer's decision not to hold an interview when the

only evidence available was Pulaku's testimony. Justice Near pointed out that "The Applicant only presented his subjective belief that a blood feud existed, and this was not sufficient to convince the Officer given the other documentary evidence."

[38] Where a PRRA is determined on the sufficiency of the evidence, there is no need to conduct an oral hearing. A PRRA officer may reject assertions which are not supported by corroborating evidence. See *Ferguson v Canada (Minister of Citizenship and Immigration)* 2008 FC 1067 at paragraph 27, *I.I. v Canada (Minister of Citizenship and Immigration)* 2009 FC 892 at paragraphs 20 to 24 and *Manickavasagar v Canada (Minister of Citizenship and Immigration)* 2012 FC 429 at paragraphs 28 to 31. It was open to the Officer to require corroborating evidence to support the Applicant's story. It was also open to the Officer to find the Applicant's sworn statements in his PIF were insufficient to prove the facts in issue. See *I.I.*, above at paragraphs 20 to 24.

[39] The Applicant is not entitled to an oral hearing simply because the RPD did not assess the risk he faces. The absence of a risk assessment by the RPD is not one of the factors listed in section 167 of the Regulations. Further, the Court has held that a PRRA officer is not required to hold an oral hearing where the RPD did not assess credibility.

[40] *Pulaku*, *I.I.*, and *Manickavasagar* show that the lack of corroborating evidence does not mean that an oral hearing is required to assess credibility. This goes to a PRRA applicant's failure to produce enough evidence to prove the facts in issue. If the Court held that a lack of corroborating evidence always requires an oral hearing, PRRA applicants would be motivated to submit bare applications to trigger the hearing requirement. This would be contrary to Parliament's expressed intent to limit oral hearings in PRRA applications to exceptional cases.

Decision Reasonable

[41] It was open to the Officer to take the lack of corroborating evidence into account and conclude that the Applicant's PRRA should be rejected. *Ahortor*, above, is distinguishable because there was evidence in that case which suggested it was unreasonable to expect Ahortor to produce a copy of an arrest report. There was no such evidence before the Officer in the instant case. The Applicant simply failed to meet the onus on him to prove his case.

Reasons Adequate

[42] The Officer set out her findings of fact and the evidence on which those findings were based. She also addressed the major points in issue when she said the Decision was based on the sufficiency of the evidence rather than credibility. *Newfoundland Nurses*, above, establishes, the adequacy of reasons is not an aspect of procedural fairness but is part of the reasonableness inquiry.

ANALYSIS

[43] This is one of those cases where the jurisprudence of the Court, ostensibly at least, appears to point in different directions. The Applicant says that the Officer's decision, purportedly based upon insufficiency of evidence, is a cloaked credibility finding that satisfied the criteria in section 167, and so required an oral interview with the Applicant or reasons for not granting such an interview.

[44] The Applicant says that the evidence in his PRRA submissions — i.e. his PIF narrative from two years before — attracts the presumption of truthfulness established in *Maldonado*, above, so

that by requiring more objective evidence to corroborate what he said about the risks he faces in Nigeria the RPD had to disbelieve what he said in his PIF and his PIF declaration.

[45] The Applicant places his case on the same footing as *Cho*, above, where Justice Tremblay-Lamer had the following to say on point at paragraph 29:

> Furthermore, I note that because the Board refused to hear the applicant's refugee claim, the applicant has never had his credibility assessed in the context of an oral hearing. The Supreme Court of Canada in *Singh*, above at para. 20, indicated that, "where a serious issue of credibility is involved, fundamental justice requires that credibility be determined on the basis of an oral hearing." For these reasons, in failing to grant the applicant's request for an oral hearing, I find that the PRRA officer breached the duty of procedural fairness that was owed to the applicant.

[46] Similar things were said by Justice Harrington in *S.A.*, above, at paragraph 20:

> In my view, the PRRA officer could not have made the decision he did unless he did not believe the claimant. That lack of belief is inherent in his analysis (*Liban v. Canada (Minister of Citizenship and Immigration*), 2008 FC 1252, 76 Imm. L.R. (3d) 227). It seems extraordinary that S.A.'s story was not subjected to an oral examination.

[47] Further support for the Applicant's case is found in *Zokai*, above, at paragraph 12, where Justice Michael Kelen said:

> Furthermore, it is clear, despite the respondent's submissions to the contrary, that credibility was central to the negative PRRA decision. In refusing to accord weight to the applicant's story without corroborating evidence, the PRRA Officer, in effect, concluded that the applicant was not credible. In my view, given these credibility concerns, it was incumbent on the Officer to consider the request for an oral hearing and to provide reasons for refusing to grant the request. The Officer's failure to do so in this case constitutes a breach of procedural fairness. Moreover, in view of the special circumstances of this case with respect to credibility, the Court is of the view that a hearing is appropriate.

[48] Justice O'Reilly took a similar position in *Liban*, above:

> In my view, when the officer stated that there was "insufficient objective evidence" supporting Mr. Liban's assertions, he was really saying that he disbelieved Mr. Liban and, only if Mr. Liban had presented objective evidence corroborating his assertions, would the officer have believed them. To my mind, these findings are conclusions about Mr. Liban's credibility. They were central to his application. If the officer had believed Mr. Liban, the officer, in light of the documentary evidence he accepted, would likely have found that Mr. Liban was at risk.

[49] There are also cases going the other way, and which suggest that evidence can be weighed for sufficiency without the need for a credibility finding. Justice Russel Zinn provided a full discussion of how this might occur in *Ferguson*, above, at paragraphs 16 to 28 and 32 to 34:

> Counsel for both parties appeared to be of the same mind that, in the words of Respondent counsel, there is no principled approach to the issue of credibility versus sufficiency of evidence to be gleaned from these authorities. I do not share that view. Most of the cases to which the Court was referred were determined on the particular facts of the decision under review. In each instance the Court was required to make a determination as to whether, in the decision under review, "there is evidence that raises a serious issue of the applicant's credibility", to use the words of section 167 of the Regulations. That, in turn, required an examination of the evidence before the officer and the officer's assessment of that evidence. I accept the submission of Applicant's counsel that the Court must look beyond the express wording of the officer's decision to determine whether, in fact, the applicant's credibility was in issue.
>
> In my view, the approach to be taken by both the officer and this Court, sitting in review, is to be guided by the principles set out by the Federal Court of Appeal in *Carrillo v. Canada (Minister of Citizenship and Immigration)*, [2008] F.C.J. No. 399.
>
> Ms. Carrillo is a citizen of Mexico who sought refugee protection in Canada. She claimed that she had been abused by her common-law spouse and that her spouse's brother, a police officer, had helped her spouse find her when she hid after the beating. The principal issue before the Immigration and Refugee Protection Board was whether state protection was available to Ms. Carrillo in

Mexico. Her refugee claim was dismissed by the Board. It found that she was not a credible or trustworthy witness with respect to her efforts to seek state protection in Mexico. Further, the Board held that had it found her to be credible, she had nonetheless failed to rebut the presumption of state protection with clear and convincing evidence. The Federal Court set aside that decision on the basis that the Board imposed too high a standard of proof on Ms. Carrillo regarding the lack of state protection. An appeal to the Federal Court of Appeal was allowed.

The Court of Appeal, in the course of its reasons, engaged in a detailed and informative discussion of the concepts of burden of proof, standard of proof, and quality of the evidence necessary to meet the burden of proof, all of which I find to be very useful in the present case and which, in my view, ought to be kept in mind by PRRA officers when considering applications.

In every proceeding, whether judicial or administrative, one party has the burden of proof. Where the existence of a particular fact is at issue, uncertainty is resolved by asking whether or not the burden has been discharged with respect to that fact. This was eloquently stated by Lord Hoffmann in *In re B (Children) (FC)*, [2008] UKHL 35 at paragraph 2:

> If a legal rule requires a fact to be proved (a "fact in issue"), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened.

In PRRA applications, it is the applicant who bears the burden of proof: *Bayavuge v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 111.

The standard of proof in civil matters and in administrative processes is the balance of probabilities. In this PRRA application the Applicant must prove, on a balance of probabilities, that she would be subject to risk of persecution, danger of torture, risk to

life or risk of cruel and unusual treatment or punishment if returned to Jamaica. That is proved by presenting evidence to the officer. In this respect the Applicant also has an evidentiary burden. The Applicant has the burden of presenting evidence of each of the facts that has to be proved. One of those facts involves her sexual orientation. As will be discussed below, I hold that she did present some evidence of her sexual orientation and thus can be said to have met her evidentiary burden -- she presented evidence of each material fact in issue.

As the Court of Appeal pointed out in *Carrillo* not all evidence is of the same quality. Accordingly, while an applicant may have met the evidentiary burden because evidence of each essential fact has been presented, he may not have met the legal burden because the evidence presented does not prove the facts required on the balance of probabilities. The legal burden of proof is met, in this case, when the Applicant proves to the officer, on the balance of probabilities, that she is lesbian.

The determination of whether the evidence presented meets the legal burden will depend very much on the weight given to the evidence that has been presented.

When a PRRA applicant offers evidence, in either oral or documentary form, the officer may engage in two separate assessments of that evidence. First, he may assess whether the evidence is credible. When there is a finding that the evidence is not credible, it is in truth a finding that the source of the evidence is not reliable. Findings of credibility may be made on the basis that previous statements of the witness contradict or are inconsistent with the evidence now being offered (see for example *Karimi*, above), or because the witness failed to tender this important evidence at an earlier opportunity, thus bringing into question whether it is a recent fabrication (see for example *Sidhu v. Canada* [2004] F.C.J. No. 30, 2004 FC 39). Documentary evidence may also be found to be unreliable because its author is not credible. Self-serving reports may fall into this category. In either case, the trier of fact may assign little or no weight to the evidence offered based on its reliability, and hold that the legal standard has not been met.

If the trier of fact finds that the evidence is credible, then an assessment must be made as to the weight that is to be given to it. It is not only evidence that has passed the test of reliability that may be assessed for weight. It 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. 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.

Evidence tendered by a witness with a personal interest in the matter may also be examined for its weight before considering its credibility because typically this sort of evidence requires corroboration if it is to have probative value. If there is no corroboration, then it may be unnecessary to assess its credibility as its weight will not meet the legal burden of proving the fact on the balance of probabilities. When the trier of fact assesses the evidence in this manner he or she is not making a determination based on the credibility of the person providing the evidence; rather, the trier of fact is simply saying the evidence that has been tendered does not have sufficient probative value, either on its own or coupled with the other tendered evidence, to establish on the balance of probability, the fact for which it has been tendered. That, in my view, is the assessment the officer made in this case.

The only evidence presented concerning Ms. Ferguson's sexual orientation was a statement of her former counsel. There was no supporting or corroborative evidence tendered. The officer found that her former counsel's statement was not probative. The Applicant raises two questions: "Was that, in effect, a finding of credibility?" and "Was it a reasonable assessment?".

[…]

When, as here, the fact asserted is critical to the PRRA application, it was open to the officer to require more evidence to satisfy the legal burden. Had the statement been affirmed by the Applicant in a sworn affidavit submitted with her application, it would have been deserving of somewhat greater weight than it was given. Had it been supported by other corroborative evidence such as evidence from her lesbian partner(s), public statements, and the like, it would have attracted even more weight.

The weight the trier of fact gives evidence tendered in a proceeding is not a science. Persons may weigh evidence differently but there is a reasonable range of weight within which the assessment of the evidence's weight should fall. Deference must be given to PRRA officers in their assessment of the

> probative value of evidence before them. If it falls within the range of reasonableness, it should not be disturbed. In my view the weight given counsel's statement in this matter falls within that range.
>
> It is also my view that there is nothing in the officer's decision under review which would indicate that any part of it was based on the Applicant's credibility. The officer neither believes nor disbelieves that the Applicant is lesbian -- he is unconvinced. He states that there is insufficient objective evidence to establish that she is lesbian. In short, he found that there was some evidence -- the statement of counsel -- but that it was insufficient to prove, on the balance of probabilities, that Ms. Ferguson was lesbian. In my view, that determination does not bring into question the Applicant's credibility.

[50] Justice Leonard Mandamin took a similar approach in *Manickavasagar*, above, at paragraphs 25 and 28 to 31:

> The Applicant submits that the Officer disbelieved the Applicant's account of past mistreatment because the Applicant had not provided documentary evidence to corroborate the mistreatment notwithstanding the Officer did not expressly say he disbelieved the Applicant. The Applicant argues the Officer made a negative credibility finding without explicitly stating that the Applicant was not credible. The Applicant submits that the Officer failed to contact the Applicant to provide him with an opportunity to clarify his fears in light of this disbelief.
>
> […]
>
> In this case, the Applicant did not provide documentary evidence corroborating his account of mistreatment by Sri Lankan officials. This is not a case as in *Alimard* where the credibility of the Applicant's supporting evidence was questioned - there simply was no evidence other than the Applicant's statements.
>
> The lack of corroborating documentary evidence did not bring the Applicant's credibility into issue. Instead, the absence of corroborating documentary evidence goes to the weight of the Applicant's statements. In *Ahmad v Canada (Minister of Citizenship & Immigration*), 2012 FC 89 at paras 37-39 Justice Scott addressed this question and stated:

> [37] The applicant argues that the PRRA officer made credibility findings when assessing the evidence that was presented before her. The applicant relies on *Zokai* to support this argument. A close review of the disputed decision leads this Court to find that the evidence adduced was assessed by the officer in a manner in which it was open to her to do. In *Al Mansuri*, this Court held that "the officer did not deny the PRRA application on the basis of Mr. Al Mansuri's credibility. Rather, the officer found that the objective evidence with respect to country conditions did not support a finding of a danger of torture, or a risk to life, or a risk of cruel or unusual treatment or punishment. That finding is a matter distinct from Mr. Al Mansuri's personal credibility" (see *Al Mansuri* at para 43). The officer clearly made findings in regard to the probative value of the objective evidence adduced and not with regard to its credibility.
>
> [38] It has been clearly established that, in the context of a PRRA application, an oral hearing is the exception. Moreover, serious credibility issues must be central to the PRRA application in order to trigger the holding of an oral hearing. In reading the officer's decision, it is clear that no such serious issue of credibility was found to exist.
>
> [39] The officer did not breach her duty of procedural fairness. As in *Yousef v Canada (Minister of Citizenship and Immigration)*, 2006 FC 864 (CanLII), 2006 FC 864, [2006] FCJ No 1101 (QL) at para 36, "the PRRA officer's decision was based on the insufficiency of the evidence submitted by the applicant in support of his contention that he faced new or heightened risks if he returned to his country of nationality]". Finally, and equally important, it is clear that the criteria set out in section 167 of the *IRPR* were not met by the applicant.
>
> [Emphasis added]

I agree with Justice Scott's analysis and would adopt his reasoning. In this case, the credibility of the Applicant was not an issue for the

> Officer. Rather, the Officer did not disbelieve the Applicant's evidence but instead treated it as having less weight in the absence of supporting documentary evidence.
>
> I would conclude that the Officer was not required to provide the Applicant with an oral interview because the factors in section 167 were not satisfied.

[51] Justice Michel Beaudry specifically referred to *Ferguson*, in *I.I.*, above, when he had to deal with this difficult distinction at paragraphs 18 to 21 and 24:

> The Applicant argues that the PRRA officer's evaluation of the evidence was unreasonable because an individual cannot provide objective evidence of his sexual orientation. In advancing this argument, the Applicant seems to be holding that the personal statement was sufficient evidence to prove on the balance of probabilities that the Applicant is homosexual.
>
> Two recent cases of this Court, *Ferguson v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1067, 74 IMM. L.R. (3d) 306, [2008] F.C.J. No 1308 (QL) and *Parchment* above, have dealt with similar issues and are heavily relied upon by the Respondents. Both of those cases dealt with a woman who had made a claim that she could not be returned based on sexual orientation. In both, she provided an unsupported statement that she was lesbian in support of her claim.
>
> Evidence tendered by a witness with a personal interest in the case can be evaluated based on the weight that it will be given and typically will require corroborative evidence to have probative value (*Ferguson* at paragraph 27). It is open to the PRRA officer to require such corroborative evidence to satisfy the legal burden; particularly when the fact is one that is central to the application (*Ferguson* at paragraph 32). In *Ferguson*, it is suggested that such corroborative evidence could include a sworn statement by a partner and evidence of public statements (at paragraph 32). One must remember that evidence must have sufficient probative value. It will have sufficient probative value when "it convinces the trier of fact" (*Carillo v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, [2008] 4 F.C.R. 636 at paragraph 30). Furthermore, the officer had to consider all of the other factors in the case in making the determination (*Parchment* at paragraph 28).

> The statement in this case was sworn, unlike those in *Parchment* and *Ferguson*, which does give it more weight. However, no other evidence was provided by the Applicant. It is obvious, in reading the reasons, that the PRRA officer was not convinced by the evidence presented that the Applicant is homosexual. The PRRA officer had to consider the other factors in the case including the Applicant's immigration history, his relationships while in Canada and the previous statements made in immigration interviews.
>
> […]
>
> The Court is of the opinion that the determinative issue in the case at bar was the probative value of the evidence and not credibility. It was also open for the officer to take into account the Applicant's immigration history and heterosexual relationships in Canada in determining if the Applicant had discharged his burden towards his claim of homosexuality.

[52] I am sure that it is possible to find factual distinctions in each of these cases that had a lot to do with the final determination in each. However, the cases can be reconciled. Officers can only avoid credibility findings and decide applications on the basis of sufficiency of evidence if their decisions show that, credibility aside, what the applicant has to say is not sufficient, on the applicable standard of proof, to show that he or she faces a risk under either section 96 or section 97. In other words, it has to be a situation where a credibility finding is not necessary in order to decide the probative value of evidence so that, whether or not an applicant is being truthful, their evidence is not sufficient to establish persecution or a section 97 risk. In such a situation, it is not procedurally unfair to refuse to hold an oral hearing.

[53] In the present case, the Applicant provided, along with his counsel's submissions, his 2009 PIF narrative and his declaration saying that the information provided was true and correct and that the "declaration has the same force and effect as if made under oath."

[54] The relevant part of the PIF has some detail but it is general and vague regarding the forward-looking risk he claims to face. He has been imprisoned in the past and humiliated under Decree 33, but he managed to escape. He fears that the Lagos state government is looking for him so that they can enforce Decree 33 against him. He also says the Nigerian government has information that he is a MASSOB. I accept that the Applicant is entitled to the presumption of truthfulness in this context.

[55] However, without disbelieving the Applicant as to what has happened to him and other people in the past, the evidence before the Officer was vague and speculative as to what might happen to him on return to Nigeria.

[56] The Officer is not obligated under section 167 to provide applicants with an interview so that they can supplement their evidence. The onus was upon the Applicant to provide sufficient evidence to convince the PRRA officer that he faces forward-looking risk in accordance with the applicable standard of proof. The Applicant in this case had every opportunity to do this.

[57] The Applicant was represented by counsel and fully aware that the Officer might also look at sufficiency issues. There was nothing to prevent the Applicant from addressing those issues in his submissions and explaining, for instance, why he had not provided even one piece of objective, corroborative evidence to support his forward-looking claim.

[58] In reviewing the application, the Officer concluded that it was deficient in a way that did not require a credibility assessment. She showed herself to be fully alive to the distinction in the Decision itself. Having reviewed the evidence in the PIF, I am satisfied that, on the facts of this case, the Officer was reasonably able to assess the PRRA application without disbelieving the

Applicant's own evidence. That evidence is just too vague and speculative about forward-looking risk to discharge the standard of proof applicable in this situation. The Applicant, knowing full well that his evidence was a concern, and represented by counsel alive to the credibility/sufficiency line of cases in this Court, chose not to address those sufficiency issues in his application. That being the case, I do not think there is any basis on these facts for allegations of procedural unfairness, a cloaked credibility decision, or an unreasonable conclusion by the Officer that an interview was not required.

[59] The Applicant himself appears to have recognized that his "cloaked credibility" argument cannot be sustained because he has, following the judicial review hearing before me, brought a motion to place corroborative evidence before me and to now make a judicial review argument based upon procedural unfairness as a result of counsel's incompetence. I have considered that motion at the same time as this judicial review application and my conclusion is that the Applicant has not established procedural unfairness based upon counsel's incompetence.

[60] This issue would have been obvious to Applicant's counsel after reading the Respondents' written submissions filed and served long before the hearing. The Court has no explanation as to why counsel's alleged incompetence was not raised or addressed in materials filed prior to the hearing.

[61] In effect, counsel is saying that, following the hearing of this matter, he now realizes that he could also have addressed the Officer's concerns about the sufficiency of evidence by submitting further documentation that he thinks would have provided corroborative weight to the Applicant's own evidence. In my view, the Applicant and counsel are now all but conceding that the Decision is based upon the insufficiency of evidence and not upon credibility. If the Decision was based upon

credibility, there would be no need for counsel to now say that he was incompetent for not providing further corroborative evidence. What we now have, in effect, is a new, post-hearing application based upon counsel's alleged incompetence and its consequences for procedural fairness. There are numerous problems associated with this new position.

[62] The Applicant himself makes no allegations of incompetence and there is no evidence that substantiation of counsel's incompetence has occurred through a complaint to the law society. Also, the Applicant continues to use his present counsel. All the Court has is an assertion by counsel himself in his written arguments for the motion that he believes himself to have been incompetent because there are other things he believes he could have done as part of the PRRA application. In effect then, on the incompetence issue, we have counsel attempting to give evidence by way of argument in a motion where he remains counsel for the Applicant. Rule 82 makes it clear that a solicitor cannot both depose to an affidavit and present argument to the court based on that affidavit except with leave of the court. Counsel has not sworn an affidavit in this case but is attempting to give evidence on his own incompetence by way of argument. Even though Rule 82 may not, strictly speaking, have been breached, the rationale behind the rule that counsel should not both give evidence and present argument based upon that evidence has been breached.

[63] In addition, the reality is that the Applicant is seeking leave to amend his application and to file additional materials long after the time for doing so has expired. He has not requested an extension of time and he has not addressed the facts and the jurisprudence required for an extension of time.

[64] Perhaps the Applicant is aware of these problems, which is why he has simply brought a motion that refers to no governing rule (other than Rule 369). The problem with this approach, of

course, is that the Applicant has never obtained leave to argue in judicial review the procedural unfairness argument based upon incompetence. He is bringing up a new ground of review (a new application really) that has never been considered at the leave stage.

[65] Counsel for the Applicant relies upon *Muotoh v Canada (Minister of Citizenship and Immigration)* 2005 FC 1599 (Can LII), 2005 ACWS (3d) 314, but in that case, the applicant submitted his PRRA with a statement that written submissions and new evidence would be forthcoming. By the time the PRRA was heard three months later nothing had been provided. It was accepted by the court that this was incompetence; however, paragraph 20 of *Muotoh* indicates that the respondent never disputed this, choosing instead to argue that the errors did not result in prejudice to the applicant. In the same vein, incompetence was accepted by the court, but given little attention, because it was the issue of prejudice that was determinative. Justice Pierre Blais said, at paragraph 22:

> I find that it was not enough for the applicant merely to say that his right to be heard was infringed simply because his counsel failed to make the proper submissions. The applicant had the onus of proving that an error occurred and that the chances of that error causing a significant prejudice were probable. The applicant succeeded in illustrating his former counsel's incompetence, but he failed to demonstrate the likelihood of that incompetence causing significant prejudice.

[66] In the present case I am not convinced that the Applicant has established either incompetence or prejudice.

[67] It is worth remembering in the present case that Justice Harrington granted a stay of removal on the basis of the Applicant's credibility argument and, in my judicial review on that argument, I have acknowledged that there is jurisprudence to support such an argument provided there is a

factual basis. It just so happens that, on the facts as I see them, I think the Officer was not making a veiled credibility finding. So I see nothing inherently wrong or incompetent in Applicant's counsel having decided that the issue would be credibility and requesting an interview from the PRRA officer based upon that assessment.

[68] With hindsight, counsel now feels he could have done more. I do not think that counsel's faulting himself on behalf of his client for not doing more can, without more, be accepted by the Court as a basis for a finding of procedural unfairness. I simply have no acceptable evidence of incompetence that gives rise to procedural unfairness. The Applicant has not demonstrated with convincing evidence that his counsel's acts or omissions fell outside the wide range of reasonable professional assistance. The wisdom of hindsight is not sufficient. See *R v GDB*, 2000 SCC 22 at paragraph 27.

[69] It is also generally accepted in this Court that an applicant must suffer the consequences of counsel's conduct. See, for example, *Bi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 293 at paragraph 32.

[70] Out of an abundance of caution, I have also reviewed the documentation which the Applicant now seeks to introduce to establish that he is at risk if returned to Nigeria so that counsel was incompetent not to bring this documentation to the attention of the PRRA Officer. As the Respondents point out, the MASSOB identification card was already before the Court and could have been raised at the judicial review hearing. Counsel knew about this because it was part of the Respondents' record for the stay motion. The letter of recommendation of November 24, 2008 provides no first-hand knowledge and no factual details about dangers and threats to the Applicant. The source of this information is the Applicant himself so that this letter cannot be objective

corroboration. The letter of support from Monsignor Ugo Prince just says the parish "accommodated" the Applicant. It provides no corroboration of what the Applicant may have experienced in the past or, more importantly, any section 96 persecution or section 97 risk he may face in the future. The country documentation is about general difficulties in Nigeria. None of it refers to the Applicant or establishes a personal risk. Even the This Day report of June 5, 2008, does not speak to the present situation and it does not place the Applicant at personal risk if returned to Nigeria. None of this supports incompetence by counsel and resulting procedural unfairness.

[71] In my view, on the facts available to me in the motion and the judicial review application, I do not think that the Applicant has met the heavy burden of showing that counsel's conduct met the performance and prejudice components required by the jurisprudence:

> The incompetence of counsel will only constitute a breach of natural justice in "extraordinary circumstances."… With respect to the performance component, at a minimum, "the incompetence or negligence of the applicant's representative [must be] sufficiently specific and clearly supported by the evidence."… With respect to the prejudice component, the Court must be satisfied that a miscarriage of justice resulted. Consistent with the extraordinary nature of this ground of challenge, the performance component must be exceptional and the miscarriage of justice component must be manifested in procedural unfairness, the reliability of the trial result having been compromised, or another readily apparent form.
>
> *Shirvan v Canada (MCI)*, 2005 FC 1509 at para 20; *R v GDB*, 2000 SCC 22, at paras 26-9; *Memari v Canada (MCI)* 2010 FC 1196 at paras 33-6.

[72] In my view, these are the only points of substance raised by the Applicant and there is no reviewable error.

Certification

[73] The Applicant proposes the following question for certification:

> When an application for a pre-removal risk assessment is made by a person whose credibility has not yet been assessed in a refugee hearing, is there a presumption that a sworn written statement made by the applicant should be taken to be credible unless there is a good reason to doubt the statement, as in *Maldonado v Canada (Minister of Employment and Immigration)* [1980] 2 FC 302? If so, is there any difference in the application of the presumption from the manner in which it is applied during refugee hearings?

[74] In my view, this question is not appropriate for certification because it would not be dispositive of any appeal. See *Zazai v Canada (Minister of Citizenship and Immigration)* 2004 FCA 89 at paragraphs 11 and 12. I have found the Officer did not need to deal with credibility on the facts of this case because she found the evidence the Applicant put forward was insufficient to establish the risk he claimed to face in the future. Whether the Officer was under an obligation to apply the presumption of truthfulness to the Applicant's declaration has no bearing on the outcome of this case. An answer to the proposed question would not be dispositive of an appeal, so I decline to certify it.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-8406-11
STYLE OF CAUSE:	**MICHAEL-MARY NNABUIKE OZOMMA**
	- and -
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PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	July 10, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	HON. MR. JUSTICE RUSSELL
DATED:	October 2, 2012

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