Date: 20080328

Docket: IMM-1248-08

Citation: 2008 FC 398

Ottawa, Ontario, March 28, 2008

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

KO KO WIN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

I. Introduction

[1] The Pre-Removal Risk Assessment (PRRA) Officer accepted that the Burmese Junta violently oppresses those it believes are its opponents. The country documentation also clearly supports this fact. The Applicant protested in a very public manner outside the Consulate of an ally of Burma, with a placard and in a group actively condemning the crimes committed by the Burmese regime. The photographs submitted by the Applicant attest to this public demonstration. Given the public nature of this protest, a fact not in dispute, it was unreasonable for the PRRA Officer to decide that the Burmese Junta would not become aware of it. In addition, the PRRA Officer erred in applying a standard of certainty to this issue. He stated: "However, these photos, by themselves,

were not found to be sufficient evidence to establish that he had attracted attention of the authorities of Myanmar and would be subjected to persecution or mistreatment…" (Emphasis added.) (PRRA Decision, pp. 4-5.)

[2] The standard to be used in assessing evidence relating to a *sur place* claim is likelihood, or balance of probabilities. The PRRA Officer ought to have asked himself whether, given the public nature of the Applicant's demonstrations against the government of Burma, it was likely to come to the attention of the Burmese government. The PRRA Officer did not apply this standard and thereby erred in law.

II. Background

[3] The Applicant, Mr. Ko Ko Win, was born on February 16, 1966, in Rangoon Burma, and is a citizen of Burma and of no other country.

[4] The Applicant left Burma on August 5, 2002. The purpose of his travel to Canada was to visit his mother who was in Canada and was ill. The Applicant has a wife, Ms. Aye Aye Myat and four children in Burma. Three of his children are adopted and one is his biological child. Their names are Thura Phyo Aung, Chit Phyo Lin, Chan Phyo Lin and Shun Le Snow, and ages are respectively, 20, 18, 18 and 5. They reside in Rangoon. The Applicant is in regular contact with them over the telephone – some three times per week. He also sends money back for them. He sends this money through an agent in Toronto who then arranges for it to reach his family in Burma.

[5] The Immigration Refugee Board (Board) rejected the Applicant's claim in a decision, dated October 8, 2004. The basis for the claim was the determination that the Applicant was not credible. The Board, held:

> I had numerous credibility concerns that were not resolved in the claimant's favour. The deficiencies in his evidence were more than sufficient to rebut the presumption of truthfulness on his part.

(Board Decision, p. 4.)

[6] The Board recognized that the Applicant was making a *sur place* claim, which was based on the attendance at his residence, in Rangoon, of military intelligence after he was already in Canada. The Applicant alleges that, because of his association with an opponent of the Burmese military Junta, he was subsequently the subject of inquiries by police.

[7] Following the military attacks against the monks and other anti government dissidents in Burma, in 2007, the Applicant participated in demonstrations in Toronto condemning the actions of the Burmese government. He participated in two rallies in Toronto outside the Chinese Consulate. Burma does not have a Consulate in Toronto. China is a close supporter of the Burmese regime. The demonstrations were considered large, including coverage by City TV. The Applicant later saw clips of the demonstrations on television and saw himself in those clips. The Applicant is at risk from these photos and news reports, which is why he finally decided to submit the photos to the PRRA Officer. (Motion Record, pp. 6, 113-116.)

[8] In the photos, the Applicant is holding a placard in the photos which says “The people united will never be defeated.” (Motion Record, above.)

[9] The Burmese Student Organization in Canada is comprised of former Burmese university and high school students who had escaped Burma following the riots of 1988 and lived along the Burmese and Thai border for many years. They are involved in raising awareness in Canada for the crimes of the Burmese Junta. It was with this organization that the Applicant participated in the demonstrations, in September 2007. The Applicant continues to be active with this group. On March 27, 2008, a demonstration was scheduled to take place at Toronto City Hall. The Applicant is actively involved in this process, distributing information in regard to planned demonstrations of dissent. This will be the six month anniversary of the killings of the Monks in Burma. Canadian politicians are also participating and will be present on that day. (Motion Record, pp. 6, 7.)

[10] The Applicant’s removal from Canada to Burma has now been scheduled for Saturday, March 29, 2008.

[11] The Applicant is afraid of returning to Burma. The military regime has brutally abused anyone perceived to be against them. His participation in the demonstrations in Toronto will, in all likelihood, reach the regime. It is believed, by the Burmese community in Canada, that the Burmese government has informers amongst them. In addition, newspapers and television newscasts are monitored. The Applicant believes that, upon his forced return to Burma, he will be interrogated and subjected to torture for the purpose of eliciting information about dissidents in Canada.

The PRRA decision

[12] The PRRA Officer made the following findings:

> The PRRA is a mechanism designed mainly for an applicant to present evidence regarding new risk development either in terms of changes in his personal circumstances or changes in the general country conditions in his home country since the IRB's rejection of his refugee claim, or evidence that was not reasonably available to or could not be reasonably expected from him at the time of the rejection, rather than to appeal the IRB's decision or to request to have his claim reassessed.

[13] The Applicant did not tender sufficient new evidence that, as defined above, would lead the PRRA Officer to conclude differently from the Board:

> The base for the applicant's PRRA application, however, was found to be the same as the ground for his refugee claim and, therefore, was already reviewed by the IRB panel.
>
> …
>
> The applicant tendered in his PRRA application an English translation of a summons, the original of which was attached to his H&C application. Although the summons was issued on May 12, 2005, the document was not considered new evidence as defined earlier for the following reasons.

[14] The PRRA Officer held that this summons was related to the same incident, already reviewed by the Board, which found the Applicant generally lacking in credibility and, specifically, that he fabricated the evidence that the military intelligence is looking to arrest him to bolster his claim. Given this finding, the PRRA Officer then decided that the summons, issued in May 2005, did not constitute "<u>new evidence and would not be further assessed</u>". (Emphasis added.)

[15] The PRRA Officer then considered the photos tendered depicting the Applicant protesting outside the Chinese Consulate in Toronto against the Burmese regime. He then found that the

photos, by themselves, constituted insufficient evidence that the Applicant had attracted attention of the authorities of Myanmar and would be subjected to persecution or mistreatment.

III. Issue

[16] Does the Applicant meet the tripartite test enunciated in *Toth v. Canada (Minister of Employment and Immigration)* (1988), 86 N.R. 302 (F.C.A), that is, has the Applicant demonstrated:

a) a serious issue to be tried;

b) irreparable harm; and

c) the balance of convenience favours the Applicant.

IV. Analysis

Serious Issue

[17] In *Jaouadi v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 587, [2006] F.C.J. No. 753 (QL), Justice Sean Harrington, stated the following with respect to establishing a serious issue at the injunction level:

> [10] Messrs. Justices Sopinka and Cory writing for the Court in *RJR-MacDonald* said at page 348:
>
> > At the first stage, an applicant for interlocutory relief (...) must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits.
>
> [11] Meeting the non-frivolous, non-vexatious test is less onerous than meeting the test for leave in an application for judicial review which requires a fairly arguable case (*Bains v. Canada (Minister of Citizenship and Immigration)* (1990), 109 N.R. 239), and much lower than the onus in a judicial review on the merits which is based on the balance of probabilities.

Issue 1: Did the PRRA Officer apply the wrong test for a determination of new evidence under s. 113 of the *Immigration and Refugee Protection Act,* S.C. 2001, c. 27 (IRPA)?

[18] PRRA Officers are directed on the evidence they are to consider in section 113(a) of the IRPA:

Consideration of application	Examen de la demande
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;

[19] The recent decision of this Court in *Elezi v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 240, [2007] F.C.J. No. 357 (QL), has considered the issue of new evidence and ss. 113(*a*). In that case the PRRA Officer concluded that he would not consider twenty of the thirty documents because they were not "new evidence" under ss. 113(*a*) of the IRPA. In considering this decision, the Court held that the standard to be applied in determining whether the officer erred in interpreting the section itself was one of correctness.

[20] In assessing the meaning of ss. 113(*a*) the Court, in *Elezi*, above, agreed that it was to be read disjunctively as contemplating three distinct scenarios.

> [26] I am prepared to accept that subsection 113(*a*) refers to three distinct possibilities and that its three parts must be read disjunctively… As for evidence that arises after the Board's decision, there is no need for an explanation. The mere fact that it did not exist at the time the decision was reached is sufficient to establish that it could not have been presented earlier to the Board.

[21] The Court did limit the range of what constitutes new evidence and rejected the argument that, merely because the evidence dated after the hearing, it can be considered new. The Court reviewed the case law in the area and held:

> [27] …the case law has insisted that new evidence relate to new developments, either in country conditions or in the applicant's personal situation, instead of focusing on the date the evidence was produced…

[22] In reviewing the evidence and finding it probative and of a nature which refuted the Board's conclusions, the Court, in *Elezi*, accepted that the evidence was new and rejected the argument that evidence had to disclose new risks, *per se*, to qualify as admissible:

> [38] …Had he submitted this evidence at his Board hearing, the Board may well have written a very different decision. Yet, these documents do not raise any "new" risks, *per se*. The risks outlined were the same as those Mr. Elezi claimed during his hearing before the Board. Was it then reasonable for the PRRA officer to exclude all these documents on that basis? In my opinion, no.

[23] In the recent decision of this Court in *Mendez v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 111, [2005] F.C.J. No. 115(QL), the Court quashed a PRRA Officer's decision on the grounds that the Officer had erred in deciding that a letter that had post-dated the Board's decision was not new evidence. The Court stated:

> [17] As I expressed during the hearing of the present application, in my opinion, the PRRA Officer made an error in the application of s.113(*a*) with regard to the letter signed by Mr. Flores. Section 113(*a*) requires a careful determination on the admissibility of evidence on three available grounds. In my opinion, precision is required in making a finding under this provision since important ramifications follow on the determination of the risk to be experienced by an individual applicant. In my opinion, the PRRA Officer failed to meet this expectation.
>
> [18] Mr. Flores' letter of March 17, 2004 clearly post-dates the Refugee Board's decision in the present case. It appears that the PRRA Officer failed to understand this fact by lumping it in with the tendered evidence which pre-dates the Refugee Board's decision…

[24] The Federal Court of Appeal recently pronounced on the meaning of new evidence in *Raza v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 111, [2005] F.C.J. No. 115 (QL):

> [13] As I read paragraph 113(*a*), it is based on the premise that a negative refugee determination by the RPD must be respected by the PRRA officer, unless there is new evidence of facts that might have affected the outcome of the RPD hearing if the evidence had been presented to the RPD. Paragraph 113(*a*) asks a number of questions, some expressly and some by necessary implication, about the proposed new evidence. I summarize those questions as follows:
>
> 1. 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).

[25] The Court of Appeal further held that the evidence cannot be rejected merely because it addresses the same risk issue considered by the Board. The Court added, however, that a PRRA Officer may properly reject such evidence if it cannot prove the relevant facts as of the date of the PRRA application are materially different from the facts as found by the Board. (*Raza*, above.)

[26] In the case at bar, the PRRA Officer did not undertake an 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. The PRRA Officer stated that the summons, dated May 2005, would not be assessed further as it was not new evidence because the alleged grounds for the summons had already been assessed by the Board. The failure of the PRRA Officer

to assess the summons is an error. This summons is 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 Board in Canada had already considered and rejected his claim. This evidence was, therefore, evidence of a new fact which arose after the hearing and fits within the criteria as set out by the Federal Court of Appeal in *Raza*, above. It falls within ss. 5(*b*) above ion that it is evidence of an event which occurred after the hearing. Once admitted and considered, it was open to the PRRA Officer to accord whatever weight he believed appropriate to the summons; however, to completely disregard it, because it was not considered new evidence, is an error in law.

Issue 2: Did the PRRA Officer err in his assessment of evidence that the Applicant was a refugee *sur place*?

[27] A refugee *sur place* is defined in the literature:

> The Convention refugee definition does not distinguish between persons who flee their country in order to avoid the prospect of persecution and those who, while already abroad, determine that they cannot or will not return by reason of the risk of persecution in their state of nationality or origin…
>
> In addition to claims grounded in either new circumstances or a dramatic intensification of pre-existing conditions in the country of origin, a *sur place* claim to refugee status may also be based on the activities of the refugee claimant since leaving her country. International law recognizes that if while abroad an individual expresses views or engages in activities which jeopardize the possibility of safe return to her state, she may be considered a Convention refugee. The key issues are whether the activities abroad are likely to have come to the attention of the authorities in the claimant's country of origin….

(The Law of Refugee Status, James Hathaway, Butterworths, 1991.)

[28] The standard to be applied by the Board in assessing *sur place* claims has been stated by the Federal Court, in *Ejtehadian v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 158, [2007] FCJ No. 214 (QL). Justice Edmond Blanchard held:

> [11] The IRB's articulation of the test in a *sur-place* claim is incorrect. In a refugee *sur-place* claim, credible evidence of a claimant's activities while in Canada that are likely to substantiate any potential harm upon return must be expressly considered by the IRB even if the motivation behind the activities is non-genuine:

[29] The PRRA Officer accepted that the Burmese Junta violently oppresses those it believes are its opponents. The country documentation also clearly supports this fact. The Applicant protested in a very public manner outside the Consulate of an ally of Burma, with a placard and in a group actively condemning the crimes committed by the Burmese regime. The photographs submitted by the Applicant attest to this public demonstration. Given the public nature of this protest, a fact not in dispute, it was unreasonable for the PRRA Officer to decide that the Burmese Junta would not become aware of it. In addition, the PRRA Officer erred in applying a standard of certainty to this issue. He stated: “However, these photos, by themselves, were not found to be sufficient evidence to establish that he had attracted attention of the authorities of Myanmar and would be subjected to persecution or mistreatment…” (Emphasis added.) (Reasons, pp. 4-5.)

[30] The standard to be applied in assessing evidence relating to a *sur place* claim is likelihood, or balance of probabilities. The PRRA Officer ought to have asked himself whether, given the public nature of the Applicant’s demonstrations against the government of Burma, it was likely to come to the attention of the Burmese government. The PRRA Officer did not apply this standard and thereby erred in law.

Issue Three: Standard of Review

[31] In light of the Supreme Court of Canada decision in *Dunsmuir v. New Brunswick*, 2008 SCC 8, the standard of review of a decision of a PRRA Officer, is correctness, and on findings of fact, reasonableness. The standard of patent unreasonableness is no longer of application.

Irreparable harm

[32] Irreparable harm can be established when the Applicant can show that the potential harm is irreparable and not compensable in damages. (*Toth*, above.)

[33] Where an Applicant would face some risk of serious mistreatment, the extent of which has yet to be evaluated, on return to his country, these circumstances amount to irreparable harm. (*Monemi v. Canada (Solicitor General)*, [2005] F.C.J. No. 10 (QL), by Justice James O'Reilly.)

[34] The Applicant has demonstrated that he faces a risk of serious mistreatment if returned to Burma, including the risk of torture and death. This mistreatment would not be compensable in damages. This amounts to irreparable harm.

[35] In the enclosed opinion from Mr. Paul Copeland, noted advocate and authority of human rights in Burma, writes:

> I am aware that Ko Ko Win attended demonstrations in front of the Chinese Consulate in Toronto. I helped organize those demonstrations and other demonstrations in Toronto against the brutal crackdown against the pro-democracy demonstrators in Burma.

> Case law from the United Kingdom, as well as reports from Burma are to the effect that persons who are returned to Burma after making a refugee claim in another country are frequently subject to imprisonment and mistreatment.

(Motion Record, pp. 176.)

[36] It is the Court's determination that Mr. Ko Ko Win is at most significant imminent risk of imprisonment, mistreatment and torture if returned to Burma.

[37] The human rights reports on Burma indicate that failed asylum seekers returned to Burma are at risk of imprisonment, and any dissent is treated harshly including lengthy imprisonment and torture.

[38] The Applicant is at risk of severe mistreatment upon his return to Burma, including possible imprisonment and torture. This arises because of his protest against the Burmese Junta and because he is a failed refugee claimant.

[39] In addition, if the Applicant is deported before this Court considers the outstanding leave application, this application will be rendered moot. The outcome would most significantly constitute irreparable harm to life and limb.

Balance of Convenience

[40] As the Applicant has demonstrated that there is a serious issue in the within application and has also demonstrated irreparable harm, the balance of convenience lies in his favour. (*Membreno-*

Garcia v. Canada (Minister of Employment and Immigration), (1992), 17 Imm. L.R. (2d) 291, at 295, by Justice Barbara Reed.)

[41] While the Respondents have an obligation to expel persons who are subject to a valid removal order, this duty is superceded by legitimate concerns for human safety. (*Monemi*, above.)

VII. Conclusion

[42] The Applicant has met all three branches of the *Toth* test, the execution of his removal is stayed pending the final disposition of the Applicant's PRRA application.

ORDER

THIS COURT ORDERS that the Applicant has met all three branches of the *Toth* test, the execution of his removal be stayed pending the final disposition of the Applicant's PRRA application.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1248-08
STYLE OF CAUSE:	KO KO WIN v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	March 27, 2008 (by Teleconference)
REASONS FOR ORDER AND ORDER:	SHORE J.
DATED:	March 28, 2008

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