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Ottawa, Ontario, April 30, 2009

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

ADAMA TAHIRU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction and Background

[1] Counsel for the Minister raises a preliminary objection to the Court hearing the merits these two judicial review applications brought by Adama Tahiru (the Applicant), now 26 years of age and a citizen of Ghana who was born, raised and educated in its capital city of Accra. Counsel for the Minister asserts the Applicant does not come to this Court with clean hands, because, after her application to stay her removal was refused by the Chief Justice of this Court on June 30, 2008, she did not report for her removal but instead went underground. Despite a warrant for her arrest having been issued on July 8, 2008, she has yet to be found. The authorities are still searching for her.

Counsel for the Minister relies on the Federal Court of Appeal's decision in *Canada (Minister of Citizenship and Immigration) v. Kaileshan Thanabalasingham,* 2006 FCA 14 (*Thanabalasingham*) which holds "if satisfied that an applicant has lied, or is otherwise guilty of misconduct, a reviewing court may dismiss the application without proceeding to determine the merits or, even though having found a reviewable error, decline to grant relief". Justice Evans, on behalf of the Federal Court of Appeal, identified several relevant factors which should guide the exercise of the reviewing Court's discretionary powers in the matter. As an aside, the *Thanabalasingham* case was cited with approval by Justice Binnie, for the majority, in its recent decision in *Canada (Citizenship and Immigration v. Khosa),* 2009 SCC 12, at paragraph 40 (*Khosa*).

[2] The Applicant launched these two judicial review applications following two decisions by the same Immigration Officer, Linda Houle (the Officer), who on February 8, 2008 (1) refused her application for permanent resident status on humanitarian and compassionate grounds (the H&C decision – IMM-2099-08) and (2) refused her Pre-Removal Risk Assessment (PRRA) application (the PRRA decision – IMM-2098-08). The Applicant's H&C application alleges the same risks as she expressed in her PRRA application and which she had also expressed to the Refugee Protection Division (the RPD). That fear is two-fold: (1) being compelled by her mother and her tribe to marry, against her wishes, a 50 year old male, Hajj Nasuru, who already had three wives and who had paid her family a substantial amount of money for her hand and (2) coupled with this forced marriage, she would be compelled to undergo a forced Female Genital Circumcision or Mutilation (FGM). As will be noted, the Officer's reasons on the issue of the Applicant's fear of return are substantially the same in both decisions. As a matter of convenience, counsel for the Applicant concentrated on the Officer's reasons for decision in the H&C decision.

[3] The Applicant alleges her mother told her in March 2003 about the arranged marriage and circumcision. The Applicant resisted but her mother was adamant. In June 2003, the Applicant applied to the Canada World Youth Program. She was accepted, obtained a Canadian visitor's visa in August and came to this country on September 19, 2003, went to Halifax then made a refugee claim in Toronto on November 17, 2003 after viewing a video in Halifax about FGM in Ghana.

[4] On April 27, 2004, the RPD rejected her claim for asylum on two grounds: credibility and state protection. The RPD based its credibility findings on contradictory evidence advanced by the Applicant as to which tribe her mother was from, where her parents were born (in Accra or in the Upper East-Northern Region of Ghana where norms and traditions include the practice of FGM, notwithstanding FGM has been illegal in Ghana since 1994), whether her elder sister Zuweratu was in hiding to escape being subjected to FGM on account of a forced marriage espoused by her mother and why her younger sister, who was also married and subsequently divorced, was not subjected to FGM.

[5] The RPD also found "even if the panel had found the claimant's evidence be credible – which is not the case – the panel would still find that the claimant would have been able to avail herself of the protection of the state". The RPD noted FGM has been banned in Ghana since 1994 and there was a special police unit within the police in Ghana called the Women and Juvenile Unit (WAJU), which deals exclusively with women's issues such as spousal abuse and FGM, treated complaints seriously and acted on them. The RPD further noted the Applicant never went to the police to seek protection. The RPD wrote:

> As indicated above, evidence shows that the police in Ghana do prosecute people who practice FGM. WAJU, which is part of the police force, has offices in nine different cities around the country, takes gender related complaints seriously and acts on them. FGM has not been eradicated in Ghana and evidence shows the practice has gone underground since it was banned. Nevertheless, evidence also shows that the state of Ghana is making serious efforts to protect its young citizens from this practice. Case law stipulates that no state can ever offer complete protection to all of its citizens, at all times. State protection does not have to be perfect merely adequate.

[6] The Applicant sought leave to have the RPD's decision judicially reviewed. Leave was denied by a judge of this Court on July 13, 2004.

The decisions under review

[7] As noted, the Applicant's H&C application raised the same risk as in her PRRA application. Officer Houle's analysis is the same for both decisions. The principal argument, raised by counsel for the Applicant in both judicial review applications, focussed on the manner which Officer Houle treated the new evidence which had been put forward by the Applicant in her PRRA application. This argument triggers the application of section 113 of *IRPA* as interpreted recently by the Federal Court of Appeal in *Raza v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385 (*Raza*). It is to be observed that the credibility of the Applicants was not an issue in *Raza*. State protection was determinative.

[8] In support of her PRRA application, the Applicant filed 35 documents. The Officer had to decide whether this documentation constituted new evidence according to the criteria set out in section 113 of *IRPA*, the relevant portions which read:

Immigration and Refugee Protection Act (2001, c. 27)	*Loi sur l'immigration et la protection des réfugiés* (2001, ch. 27)
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;
…	…
(c) in the case of an applicant not described in subsection 112(3), consideration shall be on the basis of sections 96 to 98;	c) s'agissant du demandeur non visé au paragraphe 112(3), sur la base des articles 96 à 98;
…	…
[My emphasis.]	[Je souligne.]

[9] The Officer excluded some documents and admitted several others. No challenge was taken by counsel for the Applicant on the Officer's determinations in this respect.

[10] The following new evidence was crucial to Officer Houle's findings.

(1) The Wadata Foundation letter

[11] A letter from Samuel Doudu undated, received in April 2007 (Exhibit P-9). Mr. Doudu is the Program Coordinator at the Wadata Foundation for Female Welfare and Development in Ghana (the Wadata Foundation). It is based in Accra with a branch in Tamale in the northern region of that

country. A second letter from the Foundation indicated the undated letter had been signed on January 10, 2007 (Exhibit P-12).

[12] The letter from the Wadata Foundation is addressed "To whom it may concern" with the first paragraph reading:

> "We are writing this letter to support Ms. Adama's claim of fear of harm if she were to be returned to Ghana …" We would like to state that our sources from 2005 till 2006 research corroborate with the facts that, force [*sic*] marriages and FGM are still practice [*sic*] by those who follow the customary laws in Ghana especially those in the upper east, upper west northern and some parts of the Brong Ahafo regions of Ghana.

[13] In summary form the letter made these points: (1) the Tchambas, the Kotokoli and other tribes follow customary practices and usually marry off their young girls (as young as 13) to elderly men; (2) polygamy is prevalent amongst these tribes, as is "bride price"; (3) there are laws against FGM in Ghana but "they are negligible and mostly un-enforceable because of the over-riding strength of tribal customs" who are well-established and centuries old; (4) Wadata is aware of several cases of women running away from arranged marriages and FGM but eventually "these girls are almost certain to go back home since there are no save [*sic*] havens or sanctuaries to accommodate them"; (5) because the system rarely creates opportunities for girls "they are most certain to either dependant [*sic*] on their parents or marry early and be provided for by their husbands"; (6) the government lacks the resources to provide protection for women (lack of shelters); (7) the Applicant would not be protected if returned. In particular, Wadata says the police could not protect her because "they are not only influenced by customs than by laws but also because most police men in the communities where these violations are practiced are local people and strongly believe in their tradition and norms of the community …"; (8) "our research also found

that there are no official records of convictions of anyone practicing FGM despite the laws prohibiting them …"; and, (9) Wadata offered the view that if sent back to Ghana by Canada, she would be returned to the northern part of Ghana since "she has broken one of the customary tenets of the tribe and the community".

(2) The three affidavits

[14] Three affidavits, duly sworn, were tendered by the Applicant's counsel and described by the Officer as: (1) one from a friend in Canada, Ms. Aisha Mina Mohamed, dated April 3, 2007 (Exhibit P-7); (2) an affidavit from a cousin in Ghana, Ms. Fauziya, dated February 6, 2007 (Exhibit P-11); and, (3) an affidavit from her brother in Ghana, Mr. Masawudu Tahiru, dated February 13, 2007 (Exhibit P-10), noting that a second letter from her brother, dated May 15, 2007, had been submitted "which explains various discrepancies regarding the dates of his first affidavit" (Exhibit P-14). The two last affidavits are headed: "Affidavit in support of Ms. Adama's decision to stay in Canada" or "Affidavit in support of Ms. Adama's decision not to return to Ghana".

[15] The thrust of Ms. Mohamed's affidavit, who was born in Accra and came to this country as a landed immigrant, is to the following effect: (1) her mother is from the Kotokoli tribe and her father is from the Chamba tribe; (2) her first language is Kotokoli because she was raised by her mother but says she is from the Chamba tribe which is her father's tribe; (3) she believes the Applicant's story about her family and her tribe "which is like mine"; (4) she was circumcised in Ghana; (5) she asserts the Applicant speaks Kotokoli and Chamba; (6) she believes if the Applicant is returned to Ghana, she will be forced to marry and will be circumcised; and, (7) she believes the Applicant is from the Kotokoli tribe because she speaks the language and has a good accent.

[16] Ms. Fauziya is 19 years old, a resident of Accra and from the Chamba tribe: (1) she was circumcised at the age of 17 on November 2004 since "in my tribe a woman cannot marry until she has been circumcised"; her two sisters have been circumcised in the summer of 2005 and she knows seven girls from her village who have undergone the circumcision ritual in November 2006; (2) her cousin Zuweratu (Adama's sister) was recently found in hiding after being on the run for almost ten years; she was brought back to Bawku. The man who paid for her hand "still persists he wants the ritual to go on". Zuweratu was circumcised on December 1, 2006; (3) if the Applicant is forced to return to Ghana, she will have no place to go but to her family because no one will accept her since "everyone now knows that she ran away from an arranged marriage"; (4) if she returns, her family will force her to marry the man who paid for her hand (Iman Nasuru); (5) she spoke to her aunt – the Applicant's mother as recently as in early January 2007; her aunt told her she would do anything to make sure the wedding takes place; (6) she went to school in Accra with the Applicant; (7) her family sent her to the north, her ancestral home, to her husband who had paid for her hand when she was five years old; her husband insisted she be circumcised; (8) she knows the Applicant's story because she is from the same family and tribe; and, (9) the Applicant will not obtain protection from the police; she gave an example.

[17] The Applicant's brother's affidavit, who lives in Accra, states: (1) her mother is from the Chamba tribe while her father was from the Kotokoli tribe; (2) her parents are migrant workers from the upper region of Ghana; (3) "my parents now reside in Accra but still have strong ties to the north. Both our parents' family still lives in the upper region"; (4) he attends a local Arabic and Islamic school in Bawku; (5) his sister Zuweratu, who has been in hiding since 1997, was tracked

down in November 2006, was recently sent back to the north and was circumcised; (6) Hajj Nasuru (the man who paid for the Applicant's hand) is "a powerful man in our village"; (7) Hajj Nasuru was paying for his (the brother's) education but now has stopped; (8) he knows of at least six other girls (between the ages of 8 and 17) who were circumcised in 2005 and 2006; and, (9) he gave another recent example – a week ago – of her sister's friend – age 17 – who experienced the fate the Applicant fears.

[18] The Officer also referred to the submissions, made on her behalf by her counsel, on the impact of this new evidence. Her counsel submitted the RPD doubted she was of the Chamba or Kokotoli tribes and did not believe her parents practiced traditional customs which is why her refugee claim was rejected. He argued before the Officer the new evidence shows the Applicant is from those tribes and that crucially the threats against her are credible. Counsel stated the other major concerns of the RPD were: (1) where her parents were born and states the new evidence supports her testimony before the RPD; and, (2) the whereabouts of her sister who has been recently circumcised as attested in the new evidence. Her counsel also submitted state protection was not effective and the Applicant's life would be at risk in all parts of Ghana.

[19] The Officer first summarized the January 10, 2007 letter from the Wadata Foundation. She described accurately, in the Court's view, the contents of that letter in detail and explained her conclusions on it which were:

> Overall, the letter from Mr. Samuel Ampofo Doudu presents general conditions in Ghana which may affect the Applicant. The author presents information as to what may happen to the Applicant if she returns, but he does not sufficiently demonstrate that she is personally at risk. I am not satisfied that the author of the letter has personal or first-hand knowledge of the Applicant's situation as he does not provide

> details of her particular case, nor does he mention how he has come to be involved in her situation. Additionally, based on the content of the two letters and the dates they were produced, I conclude that they were created specifically for the purposes of the Applicant's PPRA and H&C applications. In consideration of all of these points, I find Documents P-9 and P-12 to be self-serving evidence and grant them little probative value. [My emphasis.]

[20] The Officer then turned to the three affidavits about which she wrote:

> The three documents provide support for the Applicant's allegations. They confirm the Applicant's story that she is at risk of FGM and forced marriage if she returns. The Applicant's cousin in Ghana (Ms. Fauziya) and her brother state that the Applicant's sister Zuweratu, who had been missing for the last ten years, has recently been found and been subjected to FGM and forced marriage. The affidavits support the Applicant's claims that she is a member of the Chamba / Kokotoli tribes and that she will be subject to FGM and forced marriage if she returns. [My emphasis.]

[21] She said Ms. Aisha Mohamed's letter was based on information the Applicant told her. The Officer notes Ms. Mohamed believes the Applicant but found she did not have personal knowledge of the events which occurred to the Applicant and "as such it is hearsay".

[22] In terms of the Applicant's brother's affidavit, the Officer observed he states his sister is at risk because she has been disobedient of the family's wishes, a view which is corroborated by the Applicant's cousin, Ms. Fauziya, who said the Applicant would have no choice but to return to her family because: "No one will accept her since everyone now knows that she is dawda or dirty, a name given to girls who run away from arranged marriages." The Officer added Ms. Fauziya also stated that the police cannot protect the Applicant.

[23] The Officer expressed her view on the three affidavits evidence as follows:

> In these three affidavits, the authors each make a plea for the Applicant to be able to remain in Canada. Additionally, based on the content of the documents and the dates they were produced, I conclude that they were created specifically for the purposes of the Applicant's PRRA and H&C applications. In essence, these documents are simply declarations from the Applicant's friend, her cousin, and her brother and they do not in and of themselves provide objective proof of the allegations. Given that the authors all have some personal relationship with the Applicant, whether friendship or familial, I conclude that they are not objective sources. Given the timing of when the statements were written, the content, and the sources, I conclude that these documents (Documents P-6, P-9/10 and P-13) are self-serving evidence and grant them little probative value. [My emphasis.]

[24] The Officer then went on to consider the current human rights and political conditions in Ghana to "determine if the Applicant's alleged risks are supported by objective evidence". She noted women and female children in Ghana are at risk of human rights violations including violence against them, rape, domestic abuse, trafficking and sexual harassment.

[25] Specifically, she considered the practice of FGM in Ghana, quoting from the most current US DOS report, which confirmed that FGM "remains a serious problem in the three northern regions of the country". The Officer said FGM was more commonly practiced on teenage girls but also on girls preparing for marriage. The Officer stated there have been few prosecutions against people responsible for FGM in 2004.

[26] The Officer also considered the issue of forced marriage, which she summarized as being again a problem in the northern regions of Ghana. She concluded:

> It has been demonstrated that FGM, the associated complications, and forced marriage can be found in Ghana. The question at hand, therefore, is whether the Applicant will be at risk if she returns to Ghana.

[27] She determined the evidence before her led to the conclusion the Applicant and her parents did not have a strong connection with the northern regions of Ghana and to the northern Chamba and Kokotoli tribes. She found the Applicant was raised and educated in Accra and was not a young 18 year old teenager or younger who was at risk. She determined, from her personal profile, she was not satisfied that the Applicant is at risk of FGM and forced marriage.

[28] Moreover, her conclusion on state protection was expressed as follows:

> Considering that the state and all levels of government are actively attempting to discourage the practices, and considering that laws exist in Ghana against both FGM and forced marriage, I also conclude that State protection is available to the Applicant for both FGM and forced marriage.

Analysis

The Standard of Review

[29] In my view, the jurisprudence satisfactorily establishes the following standards of review:

(1) On a review of a PRRA Officer's decision, for questions of law - correctness; for questions of fact since the *Dunsmuir* reform – reasonableness and for mixed questions of fact and law – reasonableness (see Justice Mosley's decision in *Raza v. Canada (Minister of Citizenship and Immigration)*, cited as 2006 FC 1385, endorsed by the Federal Court of Appeal in *Raza*, at paragraph 3 and also Justice de Montigny's decision in *Elezi v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 240). On the issue of state protection, the standard of review is reasonableness (see *Hinzman et al v. the Minister of Citizenship and Immigration*, 2007 FCA 171, at paragraph 38).

(2) For a review of an Officer's H&C decision, the Supreme Court of Canada's most recent decision in *Khosa* points to a reasonableness standard, as had its previous decision in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. *Khosa* focused on whether section 18.1(4)(d) of the *Federal Courts Act*, dealing with a review of decision based on findings of fact, incorporated a legislated standard of review. The Court found it did not because the section in the *Federal Courts Act* only spelled out grounds of review. However, the majority of the Court went on to hold this paragraph "does provide legislative guidance as to the degree of deference owed to the IAD's findings of fact" (see paragraph 3). Justice Binnie, on behalf of the majority, explained what this meant at paragraph 46:

> **46** More generally, it is clear from s. 18.1(4)(d) that Parliament intended administrative fact finding to command a high degree of deference. This is quite consistent with *Dunsmuir*. It provides legislative precision to the reasonableness standard of review of factual issues in cases falling under the *Federal Courts Act*. [My emphasis.]

The teachings in Raza

[30] In *Raza*, Justice Sharlow, for the Federal Court of Appeal, found the purpose of section 112 of *IRPA* to be:

> **10** The purpose of section 112 of the *IRPA* is not disputed. It is explained as follows in the Regulatory Impact Analysis Statement, Canada Gazette, Part II, Vol. 136, Extra (June 14, 2002), at page 274:
>
> > The policy basis for assessing risk prior to removal is found in Canada's domestic and international commitments to the principle of non-refoulement. This principle holds that persons should not be removed from Canada to a country where they would be at risk of persecution,

> torture, risk to life or risk of cruel and unusual treatment or punishment. Such commitments require that risk be reviewed prior to removal.
>
> …
>
> La justification, au niveau des politiques, de l'examen des risques avant renvoi se trouve dans les engagements nationaux et internationaux du Canada en faveur du principe de nonrefoulement. En vertu de ce principe, les demandeurs ne peuvent être renvoyés du Canada dans un pays où ils risqueraient d'être persécutés, torturés, tués ou soumis à des traitements ou peines cruels ou inusités. Ces engagements exigent que les risques soient examinés avant le renvoi.

[31] At paragraph 12, she wrote:

> **12** A PRRA application by a failed refugee claimant is not an appeal or reconsideration of the decision of the RPD to reject a claim for refugee protection. Nevertheless, it may require consideration of some or all of the same factual and legal issues as a claim for refugee protection. In such cases there is an obvious risk of wasteful and potentially abusive relitigation. The IRPA mitigates that risk by limiting the evidence that may be presented to the PRRA officer. The limitation is found in paragraph 113(a) of the IRPA, which reads as follows:
>
> [My emphasis.]
>
> …

[32] She expanded her consideration of the matter at paragraphs 13 to 17 of her reasons:

> **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).

14 The first four questions, relating to credibility, relevance, newness and materiality, are necessarily implied from the purpose of paragraph 113(a) within the statutory scheme of the IRPA relating to refugee claims and pre removal risk assessments. The remaining questions are asked expressly by paragraph 113(a).

15 I do not suggest 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 in paragraph [13] above.

> **16** One of the arguments considered by Justice Mosley in this case is whether a document that came into existence after the RPD hearing is, for that reason alone, "new evidence". He concluded that the newness of documentary evidence cannot be tested solely by the date on which the document was created. I agree. What is important is the event or circumstance sought to be proved by the documentary evidence.
>
> **17** Counsel for Mr. Raza and his family argued that the evidence sought to be presented in support of a PRRA application cannot be rejected solely on the basis that it "addresses the same risk issue" considered by the RPD. I agree. However, a PRRA officer may properly reject such evidence if it cannot prove that the relevant facts as of the date of the PRRA application are materially different from the facts as found by the RPD. [My emphasis.]

[33] Justice Sharlow concluded as follows:

> **18** In this case, Mr. Raza and his family submitted a number of documents in support of their PRRA application. All of the documents were created after the rejection of their claim for refugee protection. The PRRA officer concluded that the information in the documents was essentially a repetition of the same information that was before the RPD. In my view, that conclusion was reasonable. The documents are not capable of establishing that state protection in Pakistan, which had been found by the RPD to be adequate, was no longer adequate as of the date of the PRRA application. Therefore, the proposed new evidence fails at the fourth question listed above. [My emphasis.]

The findings in *Thanabalasingham*

[34] In *Thanabalasingham*, Justice Evans identified the relevant considerations to the exercise of a judge's discretion when faced with a motion to dismiss a judicial review application on account of an Applicant's misconduct. He wrote the following at paragraphs 10 and 11:

> **10** In exercising its discretion, the Court should attempt to strike a balance between, on the one hand, maintaining the integrity of and preventing the abuse of judicial and administrative processes, and, on the other, the public interest in ensuring the lawful conduct of government and the protection of fundamental human rights. The factors to be taken into account in this exercise include: the seriousness of the applicant's misconduct and the extent to which it undermines the proceeding in question, the need to deter others from similar conduct, the nature of

> the alleged administrative unlawfulness and the apparent strength of the case, the importance of the individual rights affected and the likely impact upon the applicant if the administrative action impugned is allowed to stand.
>
> **11** These factors are not intended to be exhaustive, nor are all necessarily relevant in every case. While this discretion must be exercised on a judicial basis, an appellate court should not lightly interfere with a judge's exercise of the broad discretion afforded by public law proceedings and remedies. Nonetheless, I have concluded in this case that the Judge erred in the exercise of his discretion by failing to take account of the remedy provided to Mr. Thanabalasingham by his right to appeal to the IAD against his removal and the relevance of that appeal to an assessment of the consequences if the Minister's opinion stands. [My emphasis.]

[35] Justice Evans answered the certified question by saying "that a consideration of the consequences of not determining the merits of an application for judicial review is within the Judge's overall discretion with respect to the hearing of the application and the grant of relief."

[36] In terms of remedy under *IRPA*, it is useful to recall what Justice Sharlow said at paragraphs 7 and 8 of *Raza*:

> **7** Once the leave application was dismissed, there was no procedure available to Mr. Raza and his family to challenge the decision of the RPD to reject their claim for refugee protection on the basis of a finding of adequate state protection. There is no statutory right of appeal. Subsection 55(1) of the *Refugee Protection Division Rules* (SOR/2002-228) provides for a refugee protection claim to be reopened after it has been decided, but the Federal Court has held that this applies only if the application to reopen is based on an allegation that there was a failure to observe a principle of natural justice (see, for example, *Ali v. Canada (Minister of Citizenship and Immigration*), [2004] F.C.J. No. 1394, 2004 FC 1153, *Lakhani v. Canada (Minister of Citizenship and Immigration*), [2006] F.C.J. No. 768, 2006 FC 612).
>
> **8** After the RPD rejected the claim of Mr. Raza and his family for refugee protection, they became the subjects of a removal order. Prior to their removal date, they made a PRRA application under subsection 112(1) of the *IRPA*, as they were entitled to do. The removal order was stayed pending the determination of the PRRA application (section 232 of the *Immigration Regulations*, SOR/2002-227).

The holdings in *Baron*

[37] Recently, the Federal Court of Appeal, in *Baron v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 (March 13, 2009), touched upon the misconduct of Applicants not showing up at the airport for the family's removal to Argentina which required the Canada Border Services Agency to issue a warrant. In their case, the arrest warrant was successfully executed. Justice Nadon wrote the following at pages 63 to 65 of his reasons:

> **63** It is important to note that in concluding that a deferral was not warranted in the circumstances before her, the enforcement officer emphasized the fact that the appellants had failed to report for their pre-removal interviews of January 21, 2006. The enforcement officer also emphasized the fact that it had been necessary to issue warrants against the appellants, which were executed in March and July of 2006. She could also have emphasized the fact that the appellants, in order to delay their removal scheduled for January 18, 2007, had undertaken to leave the country with their children on February 15, 2007, which undertaking they failed to respect. The enforcement officer could have also considered relevant the fact that the departure orders made against the appellants at the time they filed their refugee claims had become effective on May 30, 2002.
>
> **64** Events of this type, i.e. where persons fail to comply with the requirements of the Act or act in a way so as to prevent the enforcement thereof, should always be high on the list of relevant factors considered by an enforcement officer. It is worth repeating what this Court said at paragraph 19 of its Reasons in *Legault, supra*. Although the issue before the Court in *Legault, supra*, pertained to the exercise of discretion in the context of an H&C application, the words of Décary J.A. are entirely apposite to the exercise of discretion by an enforcement officer:
>
> > [19] In short, the *Immigration Act* and the Canadian immigration policy are founded on the idea that whoever comes to Canada with the intention of settling must be of good faith and comply to the letter with the requirements both in form and substance of the Act. Whoever enters Canada illegally contributes to falsifying the immigration plan and policy and gives himself priority over those who do respect the requirements of the Act. The Minister, who is responsible for the application of the policy and the Act, is definitely authorized to refuse the exception requested by a person who has established the existence of humanitarian and compassionate grounds, if he believes, for example, that the circumstances surrounding his entry and stay in Canada discredit him or create a precedent susceptible of encouraging illegal entry in Canada. In this sense, the Minister is at liberty to take into consideration

> the fact that the humanitarian and compassionate grounds that a person claims are the result of his own actions.
>
> [Emphasis added]
>
> **65** Thus, if the conduct of the person seeking a deferral of his or her removal either discredits him or creates a precedent which encourages others to act in a similar way, it is entirely open to the enforcement officer to take those facts into consideration in determining whether deferral ought to be granted. Neither enforcement officers nor the courts, for that matter, should encourage or reward persons who do not have "clean hands". [My emphasis.]

The Applicant's case

[38] Counsel for the Applicant raised the following arguments which, as mentioned before, focus on the Officer's treatment of the new evidence and in particular the affidavits.

[39] First, he submitted the Officer erred in the characterization of the new evidence as self-serving, interested, not objective or specifically created for the applications and that its rejection is untenable particularly in the context of *Raza* where the new evidence can be used to contradict the findings of the RPD which is the case here. According to him, the new evidence establishes the link between the Applicant and the family's tribe in northern Ghana. The significance of the link is corroborated by the Wadata letter: (1) FGM is practiced by her parents' tribes; (2) the ban against FGM is not enforced in the north; (3) tribes track those who run away; and, (4) the Applicant cannot obtain protection because she violated customary law.

[40] Second, the reasons for rejecting the Wadata letter are unreasonable. Wadata had first hand knowledge of the situation in the north because it was based on its own research. The Officer found the new evidence was created specifically for the H&C and the PRRA applications is a crucial error. To hold that an Applicant cannot develop evidence and submit it for the purpose of proving

one's claim is at the heart of the refugee process; it is necessarily "interested" evidence because it comes from the Applicant or those who know her circumstances. How do you prove personalized risk, he asks? Alternatively, he argues the reasons advanced are inadequate and/or misconceived in the refugee context. Counsel for the Applicant relies upon the following cases:

1) *Cardenas v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 242;

2) *Coitinho v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1037, at paragraphs 7 and 8;

3) *Bakcheev v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 202;

4) *Perea v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 432; and,

5) *Barahona v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1270.

[41] Third, he argues the Officer erred on the issue of state protection: state protection must be effective; the documentary evidence and the new evidence establish that it was not effective. He relies on *Gerson Alejandr Perez Burgos et al v. the Minister of Citizenship and Immigration*, 2006 FC 1537.

[42] Fourth, he argued the Officer erred in her analysis of undue hardship in the H&C context. He urged upon me the fact that the Applicant had submitted evidence that women in general in

Ghana face hardship: they are second class citizens and their life in that country is extremely difficult.

Conclusions

[43] The conclusions I reach in this case result from my exercise of the discretionary power identified in *Thanabalasingham* and the factors which Justice Evans set out in that case amplified by what Justice Nadon said in *Baron*. In this case, a balance must be struck between maintaining the integrity of the immigration process and the purpose of provisions in IRPA which mandate, according protection or alleviating hardship in specified circumstances. In my view, the two most important factors at play in this case are: (1) the seriousness of her misconduct and the extent it undermines the processes established by Parliament in IRPA; and, (2) the need to deter others from similar conduct balanced with the strength of the Applicant's case and the importance of the Applicant's right to be free from threat of a forced marriage and FGM.

[44] There can be no question the failure of the Applicant to report for her removal after the Chief Justice of this Court refused her stay application against removal is very serious as it shows disregard for a decision of this Court and undermines the administrative process prevalent for voluntary reporting for removal for otherwise all persons scheduled for removal would have to be detained prior to removal. The need to deter such conduct is essential. The application of these factors favours the remedy sought by the Minister's counsel, namely outright dismissal of the applications without consideration on the merits. However, these factors of serious breach and need for deterrence must be balanced against the strength of her case and the impact on the Applicant, depending on the strength of her case, if her applications are dismissed without further review by this Court. Because of the nature of her fear – forced marriage and FGM – I have considered the

merits of her case. For the reasons that follow, I consider that the applications before me have no substantial strength.

[45] Having said this, I agree with counsel for the Applicant that, under *Raza*, provided the evidence tendered in the PRRA process qualifies as new evidence, such evidence may establish facts which contradict the findings of the RPD. I also agree with him that it would be unfair to give little or no weight to admissible PRRA new evidence simply by its being labelled as self serving, interested or the purpose for which such evidence was created or tendered. The jurisprudence establishes more is needed.

[46] In this respect, I found very useful the analysis and the cases referred to in a document on self-serving evidence published by the Immigration and Refugee Board.

[47] That document refers to many cases where this Court upheld tribunal findings that little weight be given to self serving evidence crafted to influence the outcome of the claim. (See for example:

(1) *Huang v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 901, at paragraphs 10 and 11;

(2) *Rana v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1389, at paragraph 13;

(3) *Villalba v. Canada (Minister of Citizenship and Immigration)*, [1994] F.C.J. No. 1552, at paragraph 3;

(4) *Ali v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1155, at paragraph 5;

(5) *Grozdev v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 983, at paragraph 6;

(6) *Hussain v. Canada (Minister of Employment and Immigration)*, [1995] F.C.J. No. 480;

(7) *Ghazvini v. Canada (Minister of Citizenship and Immigration)*, [1994] F.C.J. No. 1550, at paragraphs 8 and 9; and,

(8) *Waheed v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 466.)

[48] These cases are to the effect cogent reasons must be provided for discounting or giving little or no weight to tendered evidence, such conclusion must be reasonable and made taking account all of the evidence before the decision maker. In this respect, Justice MacKay's reasons in *Huang*, above are on point.

[49] In the present case, the purpose of the new evidence was to establish the link between the Applicant and her parents' tribes in the Northern part of Ghana and this to overcome the findings of the RPD who did not believe her story. Specifically, the RPD did not believe her parents were from the north and that her sister Zuweratu had gone into hiding.

[50] The Officer concluded on a review of all of the evidence before her, the new evidence did not support a strong connection between the Applicant, her parents and the northern tribes. Considering all of the evidence before her, including the documentary evidence on where and who was likely to be threatened by a forced marriage and FGM, against her personal profile, she concluded no PRRA risks and no undue hardship upon return.

[51] As previously mentioned, the new evidence in this case must establish the Applicant's linkage to her parents' northern tribes. That new evidence must blunt, so to speak, the evidence before the RPD. Officer Houle specifically referred to the written answer the Applicant included in her H&C application dated January 20, 2008 that her parents were born in Accra (Certified Tribunal Record, page 196) and when filled her application for the Canadian visa in 2003, she indicated her sister Zuweratu was living in Accra.

[52] In the circumstances, these two fundamental facts contradicted the new evidence contained in the three affidavits and were more consistent with the RPD's findings. Moreover, in terms of the Wadata letter, based on the evidence before her, the Officer determined that the letter did not provide any evidence of the Applicant and her parents' link to the north. In short, the Wadata letter

assumed a northern connection. This finding was reasonably open to the Officer on the evidence before her.

[53] I conclude, based on the totality of the evidence before the Officer, in the light of her findings and taking into account Justice Binnie's comment in *Khosa*, at paragraph 46, the Officer did not err in giving little or no weight to the new evidence and that her overall finding of no risk was reasonable.

[54] The RPD made a finding on the availability of state protection in Ghana. The Applicant did not approach the authorities for protection. The availability of state protection must be based on the particular facts of a particular case (see *Arellano v. Minister of Citizenship and Immigration*, 2006 FC 1265). I note the Officer's finding on protection. I further note the rulings of this Court on the availability of state protection in Ghana on account of a threat of FGM (see *Salifu v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 14 and *Kwayisi v. the Minister of Citizenship and Immigration*, 2005 FC 533). Even if there had been a threat to the Applicant of a forced marriage and FGM, it would have been objectively unreasonable for the Applicant who lives in Accra not to have sought the protection of her home authorities (*Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, at pages 724 – 725). This was the Chief Justice's reasoning when in dismissing the stay he found no irreparable harm to the Applicant if returned to Accra.

[55] Exercising the discretion I have, under the *Thanabalasingham* case, balancing the factors identified by Justice Evans and having concluded no substantial merit to the Applicant's fear, I would dismiss both applications.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the judicial reviews sought by the Applicant in IMM-2098-08 and in IMM-2099-08 are each dismissed. No certified question arises.

A copy of these reasons for judgment and judgment are to be placed in each Court file.

"François Lemieux"

_____

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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