Date: 20090415

Docket: IMM-4052-08

Citation: 2009 FC 381

Ottawa, Ontario, April 15, 2009

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

BUCHUNG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72 (1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of a decision of an Pre-Removal Risk Assessment (PRRA) officer (Officer), dated July 18, 2008 (Decision) refusing the Applicant's application to be deemed a Convention refugee or person in need of protection under section 96 and section 97 of the Act.

BACKGROUND

[2] The Applicant is a citizen of the People's Republic of China (PRC). He was born in the Tibet Autonomous Region (TAR), also called the Xizang Autonomous Region.

[3] The Applicant entered the United States in July 2002. His US asylum claim was denied in 2003. On February 5, 2005, the Applicant entered Canada from the US and made a claim for refugee protection at the Fort Erie Port of Entry. On December 23, 2005, his claim was denied. Leave for judicial review to the Federal Court of Canada was also denied on July 11, 2006.

[4] The Applicant alleges that, if returned to Tibet, he has a well-founded fear of persecution and would be exposed to serious risks because of his race and nationality. The Applicant is Tibetan and Buddhist and says that he cannot seek state protection because the state is the agent of persecution.

[5] On September 10, 2008, the Applicant was advised that his removal to the United States was scheduled for October 2, 2008. On September 15, 2008, the Applicant filed an application for leave and for judicial review of the PRRA Decision.

[6] The Applicant was granted a stay of his removal by Justice O'Reilly on October 1, 2008.

DECISION UNDER REVIEW

[7] The Officer found that the Applicant would not be subject to risk of persecution, danger of torture, risk to life or risk of cruel and unusual treatment or punishment if returned to his country of nationality or habitual residence.

New Evidence

[8] The Officer found that the risks submitted by the Applicant were based on the same allegations he had made in his refugee claim. The Officer noted that a PRRA application is not an appeal of a negative refugee decision made by the Refugee Protection Division (RPD), but an assessment based on new facts or evidence which demonstrate that the person is now at risk of persecution, torture, risk to life or risk of cruel and unusual treatment or punishment.

[9] The Officer cited the original refugee decision which was rejected and denied leave by the Federal Court. The Officer referred to section 113(a) of the Act which deals with new evidence, and then listed the evidence submitted by the Applicant. This included several documents to support his Tibetan nationality.

[10] The Applicant submitted that his refugee card and the documents pertaining to his father (a copy of his father's Chinese identity card) were new evidence that he could not have been expected to have presented at his refugee hearing due to his mental state at the time and his depression. The

Officer found that the Applicant or his counsel could have submitted these documents at any time during the process but they had not done so. The date of issue on the Applicant's refugee card was 2051/10/29. The Officer did not accept these documents as new evidence and they were not considered in the PRRA assessment.

[11] The Applicant also submitted a completed admittance sheet from the Bellevue Hospital Centre in New York, dated on October 11, 2003. This evidence predated the Applicant's refugee decision. The Applicant explained that this had not been submitted as evidence at the refugee hearing because he had not received psychiatric treatment due to the psychiatrist's waiting list. The Officer did not find this to be a reasonable explanation and noted that no reason was indicated on the document for the Applicant's visit. The Officer gave this document low probative value because it did not add to the information concerning personal risk, or enlighten the Officer on any new risks that the Applicant might face.

[12] The Applicant also submitted a copy of a letter from the friend who had taken him to Bellevue Hospital on October 11, 2003. This letter was written before the Applicant's refugee hearing on March 9, 2006. The Officer found there was no reasonable explanation as to why the letter had not been submitted at the refugee hearing. Hence, the Officer gave the letter little weight because it failed to add to the claims of risk put forward in the application. It was also written by someone who was not disinterested in the outcome of the assessment.

[13] The Applicant also submitted a copy of assessment notes from his second visit with Dr. Gerald Devins, the psychologist who saw him at his office in Thornhill, Ontario. The second interview with Dr. Devins was on March 9, 2007. The Officer considered the report but noted that the source for the information in the report was the Applicant himself. The Officer found that the report was based on hearsay because Dr. Devins had not been a witness to the events. The Officer accepted the diagnosis as offered by Dr. Devins, but gave little weight to the explanation of its cause.

[14] A copy of a Certificate of Residency in Nepal from the Nepalese Consulate General in Toronto, dated August 10, 2006 and a copy of a letter from the Embassy of Nepal in Washington, D.C. dated June 27, 2007 were also filed by the Applicant. The Officer found that, while the documents post-dated the Applicant's refugee hearing, they were based on information to which the Applicant had access before that hearing. The Applicant did not explain why he could not reasonably have requested, obtained and presented these letters at his refugee hearing. Hence, the Officer gave these letters a low probative value.

[15] The Officer noted that the Applicant had submitted numerous articles regarding country conditions in Tibet. The Officer found that this evidence related to conditions faced by the general population or described specific events and conditions faced by persons who were not similarly situated to the Applicant. The Applicant had provided no objective documentary evidence to support that his profile was similar to those persons currently at risk of persecution or harm in Tibet.

Current Country Conditions

[16] The Officer referred to and discussed the current country conditions in Tibet. She concluded that the evidence before her did not support that the Applicant had participated in political demonstrations or that he had joined any religious organization while in Canada. While the documentary evidence stated that the Government of China continues to forcibly suppress any activities that advocate Tibetan independence, the Applicant had not provided evidence to show that he was engaged in such activities. The main group at risk are active political dissidents and the Applicant had not proved that he had a profile that would interest the Chinese government.

[17] The Officer also noted that the evidence did not support any involvement by the Applicant in a religious party in Tibet or Canada, and that the evidence did not support that the Applicant would face a personalized risk in Tibet on this ground. The objective evidence supported a conclusion that China had effective control of its territory and continued to pursue important criminal and judicial reforms. The Applicant's past treatment did not warrant protection in Canada and, in light of the documentary evidence regarding country conditions and his personal circumstances, it was not indicative of a forward-looking risk.

[18] The Officer concluded that the Applicant faced less than a mere possibility of persecution. There were also no substantial grounds to believe that the Applicant faced a danger of torture, or a risk to life or a risk of cruel and unusual treatment or punishment due to the state's inability to provide protection. The application did not meet the requirements of sections 96 and 97 of the Act.

ISSUES

[19] The Applicant raises the following issues for review:

1) Did the Officer misconstrue the evidence before her with respect to the outcome of the Applicant's request for a passport from the representative of the Government of Nepal in North America?

2) Did the Officer fail to understand that dates set out in the Applicant's documents were in accordance with the Tibetan calendar and not the Gregorian calendar, and did she make an error of fact which affected her assessment of the credibility of the Applicant?

3) Did the Officer err in her determination of what constituted new evidence before her?

4) Did the Officer fail to consider the evidence and arguments made in the submissions of the Applicant's PRRA counsel that the Applicant's mental state precluded him from diligently pursuing his case?

5) Did the Officer err in that she purported to agree with the RPD as to the Applicant's nationality, but nevertheless conducted an analysis of personalized risk on the basis that he was a citizen of the PRC of Tibetan origin?

6) Did the Officer err in construing the country condition evidence before her?

STATUTORY PROVISIONS

[20] The following provisions of the Act are applicable in these proceedings:

Convention refugee	**Définition de « réfugié »**
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	**96.** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	*a*) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	*b*) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
Person in need of protection	**Personne à protéger**
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	**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

subject them personally

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 protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(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.

Person in need of protection

Personne à protéger

(2) A person in Canada who is a member of a class of persons prescribed by the regulations

(2) A également qualité de personne à protéger la personne qui se trouve au

as being in need of protection is also a person in need of protection.

Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

Consideration of application

113. Consideration of an application for protection shall be as follows:

(*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;

(*b*) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required;

(*c*) in the case of an applicant not described in subsection 112(3), consideration shall be on the basis of sections 96 to 98;

(*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

(i) in the case of an applicant for protection who is

Examen de la demande

113. Il est disposé de la demande comme il suit :

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;

b) une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires;

c) s'agissant du demandeur non visé au paragraphe 112(3), sur la base des articles 96 à 98;

d) s'agissant du demandeur visé au paragraphe 112(3), sur la base des éléments mentionnés à l'article 97 et, d'autre part :

(i) soit du fait que le demandeur interdit de territoire

inadmissible on grounds of serious criminality, whether they are a danger to the public in Canada, or	pour grande criminalité constitue un danger pour le public au Canada,
(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.

[21] The following provision of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 is applicable in this proceeding:

New evidence	**Nouveaux éléments de preuve**
161(2) A person who makes written submissions must identify the evidence presented that meets the requirements of paragraph 113(*a*) of the Act and indicate how that evidence relates to them.	**161(2)** Il désigne, dans ses observations écrites, les éléments de preuve qui satisfont aux exigences prévues à l'alinéa 113*a*) de la Loi et indique dans quelle mesure ils s'appliquent dans son cas.

STANDARD OF REVIEW

[22] In *Dunsmuir v. New Brunswick*, 2008 SCC 9 (*Dunsmuir*), the Supreme Court of Canada recognized that, although the reasonableness *simpliciter* and patent unreasonableness standards are theoretically different, "the analytical problems that arise in trying to apply the different standards

undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review": *Dunsmuir* at paragraph 44. Consequently, the Supreme Court of Canada held that the two reasonableness standards should be collapsed into a single form of "reasonableness" review.

[23] The Supreme Court of Canada in *Dunsmuir* also held that the standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the 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.

[24] In *Fi v. Canada (Minister of Citizenship and Immigration)* 2006 FC 1125 at paragraph 6 the Court held that the standard of review for a PRRA decision is reasonableness *simpliciter*. However, particular findings of fact should not be disturbed unless made in a perverse or capricious manner or without regards to the evidence before the PRRA officer.

[25] *Elezi v. Canada (Minister of Citizenship and Immigration)* 2007 FC 240 at paragraph 22 (*Elezi*) provides as follows:

> When assessing the issue of new evidence under subsection 113(a), two separate questions must be addressed. The first one is whether the officer erred in interpreting the section itself. This is a question of law, which must be reviewed against a standard of correctness. If he made no mistake interpreting the provision, the Court must still determine whether he erred in his application of the section to the particular facts of this case. This is a question of mixed fact and law, to be reviewed on a standard of reasonableness.

[26] Thus, in light of the Supreme Court of Canada's decision in *Dunsmuir* and the previous jurisprudence of this Court, I find the standard of review applicable to the issues on this application to be reasonableness, with the exception of whether the Officer erred in interpreting subsection 113(a) (Issue #3). 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": *Dunsmuir* at paragraph 47. Put another way, the Court should only intervene 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."

ARGUMENT

The Applicant

Nationality

[27] The Applicant submits that the Officer erred in law and that she misconstrued the evidence that was before her. The original RPD decision focused on the Applicant's national identity and concluded that he had not established that he was a "national of Tibet." The Applicant submits that, on his PRRA application, he submitted various documents which established his identity as a Tibetan national. The evidence was not silent on the passport issue; the letter he submitted from the Embassy of Nepal in Washington was a response to his passport application and provided as follows:

> Mr. Buchung, according to documents submitted by him to this Embassy, was registered as a Tibetan refugee in Nepal and is not entitled to get any type of Nepalese Passport from the Nepalese government authorities. According to Passport Act and Regulation of Nepal, only Nepali Citizens would be eligible for Nepalese Passport.

[28] The Applicant says that the Officer was wrong to conclude "that the evidence is silent as to whether he was issued a Nepali passport." The Officer had in her possession not merely evidence that the Applicant was not a citizen of Nepal, but a definitive determination on this issue by the only pertinent decision-maker: the Government of Nepal. The Applicant cites page 57 in *The Law of Refugee Status* (Butterworths Law: Toronto, 1993) by James Hathaway for the following:

> In these cases of conflict between the claimant's assertion and the corroborative evidence of nationality, primary regard should be had to the characterization of the claimant's status by the country whose travel document the individual holds, or which was her immediate point of departure for the asylum state. Because international law allows each state to determine for itself those persons who are its nationals, a nationality cannot be attributed to a refugee claimant where the authorities of that state take a contrary position.

[29] The Applicant submits that the Officer had information before her that was definitive with respect to the very issue which led the RPD to render a negative refugee decision. The Applicant notes that the Officer also objected to the letter from the Embassy of Nepal on the grounds that it was based on information provided by the Applicant. The Applicant points out that: it is (1) inevitable that information with respect to a passport application will be based at least in part on information provided by an applicant; (2) it is not known that the Embassy of Nepal did not conduct investigations of its own in Nepal or elsewhere; and (3) the determination by the Embassy was authoritative pursuant to norms of international jurisprudence.

[30] The Applicant concludes on this issue that the Officer recognized the significance of the letter from the Embassy of Nepal and that it was a definitive determination of the Applicant's national identity. Hence, it is reasonable to assume that the Decision might have been different had the Officer taken this factor into account.

Tibetan Calendar

[31] The Applicant submits that the Officer might also have made a different decision had she recognized that the dates appearing on the face of the Applicant's refugee card were not rendered in accordance with the Gregorian calendar.

[32] The Officer was of the view that the date in the document was suspect because it did not conform to a plausible date in the Gregorian calendar. However, the Applicant states that the relevant date is January 24, 1995 in the Gregorian calendar (as evidenced in the Applicant's certificate of Residency in Nepal, which bears the same date).

[33] The Applicant submits that the Officer erred in her construction and/or interpretation of the document. If she had recognized the date as coming from the Nepalese calendar, she might have determined that the document was authentic.

New Evidence

[34] The Officer took the position that certain evidence before her on the PRRA application was not “new evidence” and that it could have been reasonably submitted at the refugee hearing. The Applicant submits that, in order to evaluate this assertion, it is necessary to revisit the circumstances of the original hearing. There were extensive post-hearing submissions made in respect of identity, citizenship in Nepal, citizenship in Indian and the discrimination and danger to Tibetans living in Nepal.

[35] The RPD failed to exercise its jurisdiction and failed to assess the Applicant’s claim against any country whatsoever since the Applicant failed to establish his identity. However, the Applicant contends that counsel provided extensive argument in respect to the situation of ethnic Tibetans in Nepal, yet the RPD did not consider that evidence.

[36] Counsel on a refugee claim can entertain reasonable expectations with respect to the documentary evidence which should have been acceptable proof of the material aspects of the claim. However, if adequate notice is given of an issue, counsel can consider alternative means of establishing an issue that may not have been contemplated.

[37] The Applicant submits that his counsel did not have adequate and express notice that more information was required in relation to identity, as counsel did not have notice that the RPD was

contemplating a finding that the Applicant was not a citizen of Nepal. The documents the Applicant submitted were reasonable and ample, if not exhaustive.

Mental State of Applicant

[38] The Applicant says that the Officer failed to provide adequate reasons for rejecting his former counsel's argument that he was unable to pursue his case diligently because of his mental health. The Applicant submits that the Officer erred in law and misconstrued the evidence before her.

[39] The Applicant submits that the evolution of section 113 of the Act in the case law supports the admission of evidence which is highly probative of risk of harm, or which establishes a material fact: *Elezi v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 422 (*Elezi*). The Applicant cites and relies upon paragraphs 34-37 of the *Elezi* decision:

> **34** The second reason for according little probative value to the declarations was because they discussed facts that the Board had already rejected for lacking credibility. In the recent Federal Court of Appeal case of *Raza v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385, [2007] F.C.J. No. 1632 (QL), dealing with the admission of new evidence in a PRRA application, Justice Sharlow asserted, at paragraph 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. [...]

She further stated that in the context of qualifying evidence as new, it is pertinent to ask: "Is the evidence new in the sense that it is capable of [...] contradicting a finding of fact by the RPD [...]".

35 In my opinion, the foregoing passage is instructive. While the PRRA process is not an appeal from a Board decision, there would be no point in admitting new evidence capable of contradicting a finding of fact by the Board, if it then could be given little probative value for the very reason that it was admitted. Thus, where new evidence is admitted that contradicts the Board's previous findings of fact, the evidence cannot be discounted solely because it contradicts prior conclusions, rather the capacity of the new evidence to temper those findings for the purposes of the present PRRA analysis must be evaluated.

36 The officer also discounted the evidence because no "good reason" had been provided as to why the declarations were not submitted before the Board. In my view, this is not a relevant consideration. By accepting the declarations as new evidence pursuant to s.113(a) of the Act, the officer also implicitly accepts that the applicant had a valid reason for not submitting these declarations to the Board. Indeed, as noted in the previous *Elezi* decision:

> [...] the Board's hearing took place only three months after he arrived in Canada, and it does not require a stretch of the imagination to consider that this is not much time to gather that kind of evidence. The same applies, obviously, to the letters coming from the Mayor and the Deputy, if they were to be considered as evidence that arose before the Board's decision. (*Elezi*, *supra*, at para. 43)

37 Given the importance of these declarations in proving the inability of the state to offer protection to Mr. Elezi, it was incumbent upon the PRRA officer to take into account relevant factors in conducting his assessment. I am of the view that in taking into consideration irrelevant factors in assessing the declarations provided, the PRRA officer committed a reviewable error.

Analysis of Personalized Risk

[40] The Applicant submits that the Officer erred in law because it cannot be determined from her Decision whether she accepted that the Applicant was a national of China of Tibetan origin. The Applicant alleges that the Decision is incoherent and the Officer purports to endorse the RPD's decision that he had not adequately shown that he was a citizen of China by rejecting any new evidence on this issue. However, the Officer's analysis of risk assumes he will return to China. For the Decision to stand, the Applicant submits it must be clear whether the Officer accepted or rejected his nationality as a citizen of the PRC of Tibetan origin.

Country Conditions

[41] The Applicant further submits that counsel advanced arguments and references to the country information to support his claim to be at risk as a Tibetan. Since the Applicant is a follower of the Dalai Lama, the Applicant holds religious beliefs that are construed as political by the Chinese government and are suppressed for that reason. The Applicant will have no freedom to practice his religion in China. However, the Officer found that the Applicant's profile did not put him at risk. The Officer erred in this regard because the country information does not state that a high-profile is needed to be a Tibetan at risk. The evidence supports the Applicant's claim that his profile puts him at risk in Tibet.

[42] Hence, the Officer erred in ignoring or misconstruing the evidence on this point. Counsel made it clear in submissions that the Applicant had participated in peaceful demonstrations for a free Tibet in Nepal, the United States and Canada.

[43] The Officer rejected the Applicant's country condition documentation, but still goes into an analysis of the documents. The documentary evidence was rejected simply because it came from the Applicant.

[44] The Applicant only needed to show that he had more then a mere possibility of persecution. There was an abundance of evidence before the Officer to show that an ordinary Tibetan who practices Buddhism, and who believes in an independent Tibet, is at risk. A Tibetan refugee claimant need not be a monk or a high-profile activist in order to establish risk of serious harm.

[45] The Officer ignored or misconstrued the evidence with respect to the lack of religious freedom in Tibet. The Applicant is a practicing Buddhist and the evidence is clear that there has been a severe crackdown on Buddhists. This evidence was directly related to the situation of the Applicant. The Officer was in error when she stated that there was no evidence that the Applicant had been involved in a "religious party" in Canada.

[46] The Officer also erred in finding that the current religious climate pertaining to Tibetans and followers of the Dalai Lama is a condition faced by the general population, and in her appraisal of the nature of control exerted by the Chinese state. The evidence supports the proposition that the

Chinese state is in control of its territory and that the state is authoritarian and oppressive. The criminal and judicial reforms referred to in the documentation are not relevant to the case at bar.

[47] The Applicant says he cannot be faulted for not having approached the agents of his alleged persecution earlier to establish his national identity by demanding that they issue him a passport. To have done so at the time of his original hearing could have resulted in a finding that he was seeking to avail himself of the protection of either China or Nepal.

The Respondent

Evidence Not Misconstrued

[48] The Respondent submits that the Officer understood the nature of the letter from the Embassy of Nepal and afforded it low probative value. Had the Officer not understood the potential import of the letter, she would not have concluded that the letter should have been before the RPD, nor would she have considered whether the non-disclosure of the letter to the RPD had been adequately explained.

[49] Contrary to the Applicant's submission, the Officer did not accept the Applicant's failure to present the letter at his refugee hearing; hence, the letter did not need to be considered and the Decision could not have been different: *Raza v. Canada (Minister of Citizenship and Immigration)* 2007 FCA 385 at paragraph 13. Even if the Officer had decided that, based on the documents, the Applicant was not a citizen of Nepal, it would not have been determinative of his identity.

Nepalese Calendar

[50] The Respondent states that the Applicant did not provide any explanation to the Officer for the disparity between the alleged date of receipt and what appeared to be an erroneous date on the refugee identity card. Nor was there an equivalent date of issue supplied for the card. It was reasonable for the Officer to find that a document dated 2051 was not a new document and should have been submitted for the original refugee hearing.

Evidence was Not New and Explanation was Not Reasonable

[51] The Respondent submits that *Raza* identifies a number of questions to be asked by an Officer in determining whether evidence meets the criteria set out in paragraph 113(a) of the Act. The Officer did not err in this regard because the identity documents submitted by the Applicant to the Officer, including those obtained after his hearing was concluded, could have been obtained and presented to the RPD prior to a decision being rendered. The Applicant's explanation that he did not adduce the evidence because of depression or on the advice of others is not persuasive.

[52] The Respondent concludes on this issue that since the evidence was not new and could have been submitted at the original refugee hearing, and the Applicant's explanations were not persuasive, the Officer's finding that the evidence was not new was reasonable.

Country Conditions

[53] The Respondent submits that the Officer's consideration of the country conditions in PRC for Tibetans was reasonable. The Applicant made express submissions regarding the country conditions in Tibet. The Officer's consideration of those submissions and other publicly available evidence was responsive to the Applicant's application and was not unreasonable. The Officer's findings were reasonable and fully supported by the evidence before her. There was no evidence before the Officer that the Applicant participated in any protests before the Chinese consulate or elsewhere and he did not swear to practicing his religion in Canada.

ANALYSIS

[54] First of all, I agree with the Applicant's assessment of the Officer's analysis of current country conditions. As the Applicant points out, the Officer makes errors of fact, is not responsive to the basis of the Applicant's claim, rejects the Applicant's evidence for no apparent reason, and makes findings related to risks faced by the general population, main groups, religious parties and China's effective control of its territory and its pursuit of criminal and judicial reforms that are difficult to comprehend given the Applicant's claim to be at risk as a Tibetan Buddhist who is a follower of the Dalai Lama.

[55] There is no need to analyze these errors in detail because the Decision stands or falls on the issue of identity.

[56] The RPD had rejected the Applicant's refugee claim because he failed to produce sufficient credible documents and evidence to establish his identity as a national of Tibet, PRC. Hence, the problem for the Applicant at the PRRA stage was to establish his identity so that risk could be assessed.

[57] The Officer concluded that the additional evidence put forward by the Applicant on identity was not something he could consider because it was not "new evidence" within the meaning of section 113(a) of the Act and/or it had low probative value.

[58] In *Raza*, the Federal Court of Appeal provided guidance concerning section 113(a) for PRRA applications:

> 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.

[59] In the present case, the Officer addressed a series of documents that the Applicant offered as new evidence of his identity.

Application for a Nepali Passport

[60] The Applicant said that he completed an application for a Nepali Passport in order to confirm that he would not be issued one because he is not a citizen of Nepal.

[61] The Officer rejected this piece of evidence as follows: "I note that the passport application was completed on 14 February 2007; to date, 18 July 2008, the evidence is silent as to whether he was issued a Nepali passport."

[62] As the Applicant points out, the evidence was not "silent" on this issue. There was a letter from the Embassy of Nepal in Washington, D.C. dated June 27, 2007. The evidence suggests that this letter was provided to the Niagara Falls PRRA office by fax on July 1, 2007. The letter read as follows:

> Mr. Buchung, according to documents submitted by him to this Embassy, was registered as a Tibetan refugee in Nepal and is not entitled to get any type of Nepalese Passport from the Nepalese government authorities. According to Passport Act and Regulation of Nepal only Nepali citizens would be eligible for Nepalese Passport.

[63] This letter provides evidence that the Applicant "was registered as a Tibetan refugee in Nepal" and that he is "not entitled to get any type of Nepalese Passport from the Nepalese government authorities." The letter also makes it clear that if the Applicant were a Nepali citizen he

would be eligible for a Nepalese Passport. So this is cogent evidence that the Embassy of Nepal does not regard the Applicant as a Nepali citizen.

[64] The Respondent says that the Embassy letter does not establish the Applicant's identity; it merely establishes that he is not a Nepali citizen. Also, given what was before the RPD, the Respondent says that this letter is not definitive evidence to justify a different conclusion.

[65] The letter may not be definitive; but it is material and highly persuasive. One of the conclusions of the RPD was that "it is reasonable to accept the claimant who alleges that his travel to the USA originated from Kathmandu, on a balance of probabilities, is a citizen of Nepal and the bases for the USA ordering him deported to Nepal."

[66] The letter from the Nepalese Embassy appears to me to be new evidence in the sense that it is capable of "contradicting a finding of fact by the RPD (including a credibility finding)."

[67] The Officer appears to be of the view that "the evidence is silent as to whether he was issued a Nepali passport." In other words, the Embassy letter is not rejected because it was something that the "applicant or his counsel could have reasonably submitted … at any time during these processes," which is one of the Officer's stated reasons for rejecting the Applicant's Nepalese Refugee Card, a copy of his father's Chinese identity card, and a copy of his spouse's Registration certificate; it is simply not taken into account.

[68] As regards this document, I have to conclude that the Officer overlooked or completely misinterpreted the Embassy letter.

[69] Having come to this conclusion, I think this is a reviewable error that justifies reconsideration. Had the Officer recognized and considered the full impact of the Embassy letter, he might well have come to a different conclusion on the identity issue.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. This application is allowed and the matter is returned for reconsideration by a different officer;

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-4052-08
STYLE OF CAUSE:	BUCHUNG
	APPLICANT
	- and -
	THE MINISTER OF CITIZENSHIP AND IMMIGRATION
	RESPONDENT
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	MARCH 24, 2009
REASONS FOR :	HON. MR. JUSTICE RUSSELL
DATED:	April 15, 2009

APPEARANCES:

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