Date: 20060314

Docket: IMM-2697-05

Citation: 2006 FC 331

Ottawa, Ontario, March 14, 2006

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

PETER KANAYOCHUKWU OMEKAM

Applicant

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) for judicial review of a decision by an immigration officer, dated February 10, 2005, rejecting the applicant's Pre-Removal Risk Assessment (PRRA) application.

[2] The applicant seeks an order quashing the immigration officer's decision and remitting the matter for redetermination by a different immigration officer.

Background

[3] The applicant is a citizen of Nigeria. He came to Canada in August 2000 and claimed refugee protection, alleging persecution at the hands of Muslim fundamentalists because he is a Christian. The Refugee Protection Division (RPD) of the Immigration and Refugee Board rejected the claim on November 22, 2001, finding that the applicant's story was not credible, and even if it were credible, an internal flight alternative (IFA) was available in Benin City or Lagos which defeated his claim. The applicant applied for leave to commence judicial review of the negative refugee determination, but leave was denied by this Court.

[4] Following the negative decision of the RPD, the applicant filed an application for consideration under the Post-Determination Refugee Claimants in Canada (PDRCC) class. This was refused due to the late filing of the application.

[5] On July 22, 2004, the applicant filed a PRRA application. The applicant submitted that he faced a personal risk of persecution in Nigeria at the hands of Muslims, due to his Christian beliefs and practices. The applicant submitted that he had

no IFA given that the Muslim fundamentalist presence is not confined to the north but is increasingly being felt throughout Nigeria. The applicant also submitted medical evidence that he suffers from a permanent physical disability as well as post-traumatic stress disorder and depression, and that deportation to Nigeria would deprive him of effective medical treatment and likely trigger a suicide attempt.

[6] On February 10, 2005, the immigration officer rejected the applicant's PRRA application on the basis that the applicant had a viable IFA in Benin City and 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. This is the judicial review of that decision.

Reasons for the Decision

[7] The immigration officer began by noting the applicant's immigration history, including the events in Nigeria occurring between 1996 and 2000 that caused him to seek refugee protection. The immigration officer stated that the applicant's persecution began in 1996 when he was detained by security forces on fabricated accusations of involvement in the human rights movement. During his detention, the applicant was tortured and his right knee was fractured, causing a permanent physical disability in the form of a limp. The main events supporting his claim for refugee protection occurred in

2000 when religious riots erupted in Kaduna, leaving many Christians dead. The applicant's pregnant wife was killed by a group of Muslims, and the applicant's store and car were burned.

[8] The immigration officer decided to admit as new evidence all evidence submitted for both the applicant's PRRA application and PDRCC application, because the applicant's negative refugee determination pre-dated the implementation of IRPA such that section 97 of IRPA was never considered.

[9] The immigration officer held that the totality of the evidence presented in the applicant's PDRCC application was sufficient to respond to the RPD's adverse credibility findings. On a balance of probabilities, the immigration officer found that the applicant's story was credible.

[10] However, the immigration officer determined that the applicant had not adequately refuted the possibility of an IFA in either Lagos or Benin City. The applicant's evidence was mainly directed at establishing a picture of similarly situated persons to support the applicant's allegation of risk if he were to return to Kaduna. The evidence did not address whether Lagos or Benin City is a viable IFA. The applicant stated that the people who targeted him in Kaduna are well-connected with the corridors of power in Nigeria and could reach him anywhere in Nigeria, but the immigration

officer found that there was insufficient evidence to support this statement. Moreover, the applicant did not demonstrate that his friends or family have continued to be harassed.

[11] The immigration officer stated that the evidence presented in the applicant's PRRA application revealed that while religious tensions are still present in Nigeria, they are concentrated in the middle-belt and north of Nigeria. There was no mention in the evidence of the situation in Edo and Lagos states where Lagos and Benin City are located.

[12] The immigration officer referred to counsel's submissions that the Muslim fundamentalist presence is not confined to the north, but is being increasingly felt throughout Nigeria and police are taking a hands-off approach. In support of this submission, the applicant provided documentation of an assault on his sister who lives in Benin City. The immigration officer decided to give these documents little weight, as the assailants and the reason for the attack were unknown, and thus, there was insufficient evidence to demonstrate that the assault occurred due to religious motivations or the familial relationship to the applicant.

[13] The immigration officer considered documentation of the religious composition of the Nigerian population which indicated that the south has a Christian majority while

the north has a Muslim majority. It was found that religious conflicts are concentrated in the north, particularly where states have incorporated Sharia law. The immigration officer stated that Nigeria is a federal republic where the states are given a high degree of autonomy, and as such, it would be logical to assume that states in the south would cater to their largely Christian majority.

[14] The immigration officer inferred from the documentary evidence that Edo was a predominantly Christian state. Benin City, the capital of that state, was not referred to in any documentation as having religious conflict. The immigration officer also noted that the applicant's family, including his adopted son, reside in Benin City, and consequently, they would be able to provide a network of support to the applicant if he were to relocate to Nigeria. The immigration officer concluded that Benin City constituted a reasonable IFA for the applicant.

[15] In addition, the immigration officer considered the evidence of the applicant's frail mental state and physical disability. The immigration officer noted that there was a psychological assessment by Dr. Pilowsky, dated August 6, 2004, which indicated that the applicant's psychological state is very vulnerable and recommended that the applicant be prescribed antidepressants and seek counselling at the Canadian Centre for Victims of Torture. The doctor was of the opinion that the state of medical care in Nigeria is not adequate for the applicant's needs and an order for removal to Nigeria

would likely trigger another suicide attempt. There was also a letter from Dr. Watkins, dated December 10, 2002, which stated that the applicant had been receiving treatment for depression, anxiety and headaches since July 2002. The immigration officer noted that this letter was over two years old, and there was no recent evidence that the applicant was seeking ongoing treatment. The immigration officer stated that therefore, she would give the letter from Dr. Watkins little weight.

[16] The immigration officer also noted that there was no evidence that the applicant was acting on the recommendations of Dr. Pilowsky, nor was there evidence to support the applicant's allegation of a suicide attempt. The immigration officer stated that according to section 97 of IRPA, the inability of a country to provide adequate health or medical care does not constitute a risk that would define a person as a person in need of protection. The immigration officer found that the applicant's evidence did not demonstrate that medical care was being administrated in a persecutory way in Nigeria such that he or similarly situated persons were being systematically targeted by the state. The immigration officer therefore attached little probative value to the assessment provided by Dr. Pilowsky or the documentary evidence on the state of mental health care in Nigeria.

[17] With respect to the evidence of the applicant's knee injury sustained while he was detained and tortured by pro-Muslim authorities, the immigration officer noted that

during the dictatorial regime of General Sani Abacha, many people were abused by the security forces and many rights were suppressed. However, the immigration officer stated that there has been a change in country conditions since 1996 including a conversion to a democratic form of government, and there was insufficient evidence to demonstrate that the state would persecute the applicant either for a pro-democratic political opinion or his religious orientation.

[18] The immigration officer concluded that the applicant had a viable IFA in Benin City, and as such, the applicant did not meet the definition of a Convention refugee or person in need of protection within the meaning of sections 96 and 97 of IRPA.

Issues

[19] The applicant submitted the following issues for consideration in his memorandum:

1. Did the immigration officer err in relation to the IFA in failing to consider medical evidence entirely or in finding medical evidence of low probative value; and did the immigration officer fail to consider other relevant factors?

2. Did the immigration officer err in failing to consider the issue of compelling reasons?

3. Did the immigration officer err in law in relation to the test for the threshold of risk (standard of proof) under section 96 of IRPA?

4. Did the immigration officer deny the applicant procedural fairness by improperly relying on extrinsic evidence?

[20] I will summarize the parties' submissions under the following headings:

A. Internal Flight Alternative;

B. Compelling Reasons;

C. Standard of Proof; and

D. Extrinsic Evidence.

Applicant's Submissions

[21] *A. Internal Flight Alternative*

The applicant submitted that the officer erred in finding a viable IFA without considering the medical evidence of the applicant's precarious mental state. It was submitted that the medical evidence was considered only in regard to section 97 of IRPA, when it was directly relevant to section 96 and the availability of an IFA. The applicant submitted that whether a given factor is relevant to the determination that a proposed IFA is "objectively reasonable" is an issue that transcends the particular facts of a given case, and as such, the appropriate standard of review is correctness (see *Ranganathan* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 4 F.C. 269 at

paragraph 41 (T.D.) (reversed on appeal, [2001] 2 F.C. 164 (C.A.), but not on this point)). The applicant submitted that a relevant factor for the IFA is the claimant's health, as well as the capacity of the claimant to re-establish him or herself, and in this case, the medical evidence established that the applicant's coping abilities have plummeted.

[22] *B. Compelling Reasons*

The applicant submitted that the immigration officer did not discuss the issue of compelling reasons under subsection 108(4) of IRPA. It was submitted that the officer found a change in circumstances in Nigeria (see officer's notes to file at page 9 of the tribunal record) and had noted that the RPD had considered compelling reasons in the applicant's refugee determination (see officer's notes to file at page 5 of the tribunal record). It was submitted that the failure to consider compelling reasons was a fatal error (see *Mir* v. *Canada (Minister of Citizenship and Immigration)* 2005 FC 205).

[23] The applicant submitted that if a claimant has suffered torture, then that by its very nature constitutes compelling reasons not to seek state protection. It was submitted that particularly vulnerable persons have a lower burden to establish persecution, torture, risk to life or a risk of cruel and unusual treatment or punishment or danger of torture.

[24] *C. Standard of Proof*

The applicant submitted that the immigration officer applied the incorrect standard of proof under section 96 of IRPA. The applicant cited from the cases of *Alam* v. *Canada (Minister of Citizenship and Immigration)*, 2005 FC 4 at paragraphs 6 to 11, and *Begollari* v. *Canada (Minister of Citizenship and Immigration)*, 2004 FC 1340 at paragraphs 17 and 21. It was submitted that the immigration officer set the threshold too high when the officer stated that:

> Though it is recognized that the security forces still commit some human rights abuses in Nigeria, there is insufficient evidence to demonstrate that the state would persecute the applicant either for a pro-democratic political opinion or due to his religious orientation.

[25] *D. Extrinsic Evidence*

The applicant submitted that the officer's finding of an IFA is based almost entirely on documentary evidence that was published after the filing of the applicant's PRRA application and submissions. It was submitted that the immigration officer failed to respect the rule in the decisions of *Bhagwandass* v. *Canada (Minister of Citizenship and Immigration)*, 2001 FCA 49 and *Mancia* v. *Canada (Minister of Citizenship and Immigration)*, [1998] 3 F.C. 461 (C.A.) at paragraphs 27 to 29. The applicant further referred to the decision of *Selliah* v. *Canada (Minister of Citizenship and Immigration)*, 2004 FC 872 at paragraphs 28 to 29, where the Court found that fairness dictates that documentary evidence that becomes available after the filing of the applicant's

submissions should be disclosed to the applicant where it is novel and significant and may affect the decision.

Respondent's Submissions

[26] *A. Internal Flight Alternative*

The respondent submitted that the applicable standard of review in respect of a finding as to the availability of an IFA is patent unreasonableness (see *Sarker* v. *Canada (Minister of Citizenship and Immigration)*, 2005 FC 353 at paragraph 7). The respondent submitted that the applicant has failed to set out concrete evidence that it was not reasonable for him to seek out an IFA in the circumstances (see *Ranganathan* v. *Canada (Minister of Citizenship and Immigration*, [2001] 2 F.C. 164 at paragraph 15 (C.A.)).

[27] The respondent submitted that there is no reviewable error in the immigration officer's findings of fact which pertain to the weight to be accorded the medical information regarding the applicant. It was submitted that findings of fact of a PRRA decision are reviewable on a standard of patent unreasonableness (see *Nadarajah* v. *Canada (Solicitor General)*, 2005 FC 713 at paragraph 13). It was submitted that other than Dr. Pilowsky's assessment made at the request of the applicant's previous counsel in July 2004, there is no evidence to suggest that the applicant is vulnerable due to his mental status.

[28] *B. Compelling Reasons*

The respondent submitted that the compelling reasons exception under subsection 108(4) of IRPA does not apply where the applicant has not been found to be a Convention refugee or person in need of protection (see *Naivelt* v. *Canada (Minister of Citizenship and Immigration)*, 2004 FC 1261). It was submitted that where an IFA is found to exist, a claimant is not a refugee or a person in need of protection (see *Rasaratnam* v. *Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 706 (C.A.)). Therefore, there is no need to consider the possibility of the compelling reasons exception where an IFA has been identified. The respondent submitted that both the RPD and the PRRA officer found that the applicant had an IFA in Benin City or Lagos or predominantly Christian areas.

[29] The respondent submitted that there are two objectives relating to the compelling reasons exception: to recognize the legitimacy of the psychological hardship that would be faced by an applicant, and to protect victims of past mistreatment from harm at the hands of private citizens, whose attitudes may not have reformed in tandem with the political structure (see *Suleiman* v. *Canada (Minister of Citizenship and Immigration)*, 2004 FC 1125 at paragraph 13). It was submitted that the latter objective is entirely countered by the finding of a viable IFA.

[30] The respondent submitted that, assuming past persecution is proven, it is clear from the wording of subsection 108(4) of IRPA that the compelling reasons exception applies only where the applicant left due to such previous persecution, torture, treatment or punishment. In this case, the applicant did not leave after his mistreatment in 1996, but continued residing in Kaduna for another four years. The respondent submitted that it is doubtful that the compelling reasons exception applies in circumstances where the historical change or cessation of conditions occurred during the time that the applicant continued to reside in Nigeria.

[31] *C. Standard of Proof*

The respondent submitted that given the immigration officer's finding that an IFA was available, the threshold for the disputed standard of proof was not engaged as the IFA negatives the applicant's risk of persecution upon his return (see *Brovina* v. *Canada (Minister of Citizenship and Immigration)*, 2004 FC 635 at paragraph 11). It was submitted that in cases where an IFA is found to apply, the decision-maker is not even required to make a finding as to whether an applicant faces a risk of persecution if returned (see *Sarker*, above, at paragraph 7). The respondent submitted that it follows from this that the standard of proof for determining prospective risk upon return is irrelevant, provided that there is no reviewable error in respect of the IFA finding. It was thus submitted that the use of the term "would" in relation to a finding of prospective risk in the applicant's home area is of no moment in this decision.

[32] *D. Extrinsic Evidence*

The respondent acknowledged that at least some of the documents referenced by the immigration officer post-date the application's submissions. It was submitted that these documents are entirely consistent with the documents submitted by the applicant, and apparently consistent with the determination made in November 2001 by the RPD. The immigration officer concluded that the majority of anti-Christian conflict occurs in the north of Nigeria where states have adopted Sharia law.

[33] The respondent submitted that even where a document post-dates the applicant's submissions, there is no duty to provide this document to the applicant if the information concerning country conditions is publicly available and is the same as that existing at the time of the submissions (see *Nadarajah*, above, at paragraphs 19 to 20). The respondent submitted that the only specific reference to a post-hearing document in the PRRA decision apart from the foregoing, is the Background Note: Nigeria, published by the US Department of State in January 2005 (see officer's notes to file at page 9 of the tribunal record). The respondent submitted that this document is relied upon by the immigration officer as an historical account of political events in Nigeria which pre-date the applicant's departure from Nigeria. The document therefore cannot be described as extrinsic evidence despite its date.

[34] The respondent submitted that the Federal Court of Appeal in *Mancia* v. *Canada (Minister of Citizenship and Immigration)*, [1998] 3 F.C. 461 at paragraph 26 set out the test for the requirement of a PRRA officer to provide notice to the applicant in respect of changes in country conditions. It was submitted that the decision in *Mancia* refers to changes which post-date the applicant's submissions, and not historical changes. It was submitted that an applicant is deemed to know what type of evidence of general country conditions that the immigration officer will be relying on (see *Mancia* at paragraph 22).

Analysis and Decision

[35] **Issue 1**

Did the immigration officer err in relation to the IFA in failing to consider medical evidence entirely or in finding medical evidence of low probative value; and did the immigration officer fail to consider other relevant factors?

The principal reason for refusing the applicant's PRRA application was that there was a viable IFA in the south of Nigeria, specifically in Benin City, where the applicant's family, including his adopted son, reside.

[36] The two-pronged test for establishing an IFA was aptly summarized by Justice Mosley in *Kumar* v. *Canada (Minister of Citizenship and Immigration)*, 2004 FC 601 at paragraph 20:

> In order for the Board to find that a viable and safe IFA exists for the applicant, the following two-pronged test, as established and applied in *Rasaratnam* v. *Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 706 (C.A.) and *Thirunaukkarasu*, *supra*, must be applied:
>
> (1) the Board must be satisfied on a balance of probabilities that there is no serious possibility of the claimant being persecuted in the proposed IFA; and
>
> (2) conditions in the proposed IFA must be such that it would not be unreasonable, upon consideration of all the circumstances, including consideration of a claimant's personal circumstances, for the claimant to seek refuge there.

[37] The applicant's medical evidence was relevant to the second part of the test, namely, whether the conditions in the proposed IFA were such that it would be unreasonable for the applicant to seek refuge there. The applicant submitted that the immigration officer only considered the medical evidence in relation to section 97 of IRPA (person in need of protection), but did not consider it in relation to section 96 of IRPA (well-founded fear of persecution, including the issue of the IFA). For ease of reference, I will reproduce the relevant portion of the immigration officer's notes to file here:

> The applicant also makes the argument that he is in a fragile mental state. In support of this, the applicant has provided a psychological assessment conducted by Dr. Pilowsky and the letter from his psychotherapist. The applicant has also provided documentation on the inadequate state of mental health care in Nigeria.
>
> The assessment from Dr. Pilowsky dated August 6, 2004 reveals that the applicant's psychological state is very vulnerable and that, in the doctor's opinion, a return to Nigeria may trigger yet another suicide attempt. She believes that the state of medical care in Nigeria is not adequate enough to provide the applicant with the care he needs. She

> states that she is recommending that the applicant be prescribed antidepressants-anxyolitics and that he seeks counselling at the Canadian Centre for Victims of Torture.
>
> It is noted that, according to the letter dated December 10, 2002 from Dr. D. Watkins, the applicant was seeking treatment for his depression, anxiety, and headaches from July 2, 2002 until at least December 2002. However, the letter is now over two years old. Besides the psychological assessment by Dr. Pilowsky, there is no other evidence that the applicant is seeking any type of on-going counselling or medication. As such I give the letter from Dr. Watkins little weight.
>
> As noted above, there is no indication that the applicant has sought counselling at the Centre for Victims of Torture or any other counselling in the past two years. There is also no indication that the applicant has been prescribed and is currently taking the medication recommended by Dr. Pilowsky. In reference to the applicant's suicide attempt it is noted that the applicant provides no objective documentary evidence to support this allegation which he shared with Dr. Pilowsky. Finally, it is noted that, according to Section 97 of IRPA, the inability of a country to provide adequate health or medical care does not constitute a risk that would define a person as a person in need of protection. The applicant has provided insufficient documentary evidence to demonstrate that the lack of medical care is being administered in a persecutory way whereby he or similarly situated people are being systematically targeted by the state. As such, I give the assessment provided by Dr. Pilowsky little probative value. In addition, I give little weight to the articles on the state of medical (specifically mental) care in Nigeria.

[38] There was evidence before the immigration officer that there are considerable deficiencies in the provision of mental health care in Nigeria. For example, the article submitted by the applicant from the Journal of Mental Health Policy and Economics, dated April 5, 2002, stated that in Nigeria, "virtually no mental health services are being provided at the PHC [Public Health Care] levels in the two local government areas studied. Current training is not effective and virtually none

of what was learnt appears to be used by PHC workers in the field." The applicant also submitted the medical opinion of Dr. Pilowsky concerning his vulnerable mental state, which stated:

> It was made clear during the interview that Mr. Omekan's suffering in Nigeria was not only physical, but also emotional and spiritual. If forced to return to a place that he associates with the experiences that he endured in the past, it is likely that Mr. Omekam would undergo severe psychological damage. The denial of his refugee claim has plummeted his coping abilities to a point that Mr. Omekam's psychological state is very vulnerable, and he is at high risk of committing suicide. A deportation order, in my opinion, could likely trigger another suicide attempt. Moreover, it was made evident that psychological treatment is not an alternative in his country because he associates Nigeria itself with potential harassment. Also, the state of medical care in Nigeria is reportedly deplorable and Mr. Omekam would not be able to receive proper treatment, if any at all. This is an extremely grave matter because Mr. Omekam's PTSD [Post-Traumatic Stress Disorder] and severe depression can only ameliorate with professional treatment. To help him deal with his condition, I have written a letter to Mr. Omekam's physician recommending that the patient be prescribed antidepressant-anxyolitics, and I have advised Mr. Omekam to seek counselling at the Canadian Centre for Victims of Torture.

[39] Given the foregoing evidence, the immigration officer should have considered whether conditions in the proposed IFA were such that it was reasonable in the circumstances, including the applicant's personal circumstances, for the applicant to seek refuge in Nigeria. The immigration officer referred to the evidence of the applicant's psychological state and found it to be of little probative value because the applicant had not provided corroborating evidence that he had attempted to commit suicide as alleged in the doctor's note or was acting on the doctor's recommendations and seeking ongoing treatment. In my view, it was patently unreasonable for the immigration officer to discount the weight of the medical evidence on the basis of those

considerations. It is unrealistic to require that a suicide attempt be “documented”; the evidence from a doctor or therapist who interviews a patient may be the only objective evidence concerning a suicide attempt. Also, it is not reasonable to expect the applicant to follow up on every doctor’s recommendation that was contained in a report when the applicant had, in fact, sought and obtained medical treatment. Dr. Watkins had provided evidence that the applicant had been seeking treatment for depression, anxiety and headaches, two years ago, and Dr. Pilowsky more recently confirmed that the applicant had been taking medication, but had discontinued one of his medications, Effexor, because of the side effects.

[40] Furthermore, the immigration officer attached little weight to the evidence of the state of mental health care in Nigeria because the evidence did not demonstrate that health care is being administered in a persecutory way. However, the provision of health care in a persecutory fashion is a different issue altogether from the issue of whether there is a viable IFA. The immigration officer did not consider whether or not it is reasonable for the applicant to seek refuge in the proposed IFA in light of the evidence of the problems with mental health care in Nigeria and the applicant’s precarious psychological state. The immigration officer should have considered that question in determining whether the IFA is a viable option for the applicant.

[41] It is therefore my view that the immigration officer made a reviewable error by failing to consider the medical evidence under the second part of the test for a proposed IFA.

[42] Because of my finding on Issue 1, I need not deal with the other issues raised by the applicant.

[43] The applicant’s application for judicial review is therefore allowed and the matter is remitted to a different immigration officer for redetermination.

[44] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

[45] **IT IS ORDERED that** the application for judicial review is allowed and the matter is remitted to a different immigration officer for redetermination.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

The relevant provisions of IRPA governing an application for protection are set out below.

112. (1) A person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force or are named in a certificate described in subsection 77(1).	112. (1) La personne se trouvant au Canada et qui n'est pas visée au paragraphe 115(1) peut, conformément aux règlements, demander la protection au ministre si elle est visée par une mesure de renvoi ayant pris effet ou nommée au certificat visé au paragraphe 77(1).
(2) Despite subsection (1), a person may not apply for protection if	(2) Elle n'est pas admise à demander la protection dans les cas suivants:
(a) they are the subject of an authority to proceed issued under section 15 of the Extradition Act;	a) elle est visée par un arrêté introductif d'instance pris au titre de l'article 15 de la Loi sur l'extradition;
(b) they have made a claim to refugee protection that has been determined under paragraph 101(1)(e) to be ineligible;	b) sa demande d'asile a été jugée irrecevable au titre de l'alinéa 101(1)e);
(c) in the case of a person who has not left Canada since the application for protection was rejected, the prescribed period has not expired; or	c) si elle n'a pas quitté le Canada après le rejet de sa demande de protection, le délai prévu par règlement n'a pas expiré;

(d) in the case of a person who has left Canada since the removal order came into force, less than six months have passed since they left Canada after their claim to refugee protection was determined to be ineligible, abandoned, withdrawn or rejected, or their application for protection was rejected.

d) dans le cas contraire, six mois ne se sont pas écoulés depuis son départ consécutif soit au rejet de sa demande d'asile ou de protection, soit à un prononcé d'irrecevabilité, de désistement ou de retrait de sa demande d'asile.

(3) Refugee protection may not result from an application for protection if the person

(3) L'asile ne peut être conféré au demandeur dans les cas suivants:

(a) is determined to be inadmissible on grounds of security, violating human or international rights or organized criminality;

a) il est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou criminalité organisée;

(b) is determined to be inadmissible on grounds of serious criminality with respect to a conviction in Canada punished by a term of imprisonment of at least two years or with respect to a conviction outside Canada for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years;

b) il est interdit de territoire pour grande criminalité pour déclaration de culpabilité au Canada punie par un emprisonnement d'au moins deux ans ou pour toute déclaration de culpabilité à l'extérieur du Canada pour une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;

(c) made a claim to refugee protection that was rejected on the basis of section F of Article

c) il a été débouté de sa demande d'asile au titre de la section F de l'article premier de

1 of the Refugee Convention; or	la Convention sur les réfugiés;
(d) is named in a certificate referred to in subsection 77(1).	d) il est nommé au certificat visé au paragraphe 77(1).
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;
(b) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required;	b) une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires;
(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;
(d) in the case of an applicant described in subsection 112(3), consideration shall be on the basis of the factors set out in section 97 and	d) s'agissant du demandeur visé au paragraphe 112(3), sur la base des éléments mentionnés à l'article 97 et, d'autre part:
(i) in the case of an applicant for protection who is inadmissible on grounds of	(i) soit du fait que le demandeur interdit de territoire pour grande criminalité constitue un danger

serious criminality, whether they are a danger to the public in Canada, or

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.

114. (1) A decision to allow the application for protection has

(a) in the case of an applicant not described in subsection 112(3), the effect of conferring refugee protection; and

(b) in the case of an applicant described in subsection 112(3), the effect of staying the removal order with respect to a country or place in respect of which the applicant was determined to be in need of protection.

114. (1) La décision accordant la demande de protection a pour effet de conférer l'asile au demandeur; toutefois, elle a pour effet, s'agissant de celui visé au paragraphe 112(3), de surseoir, pour le pays ou le lieu en cause, à la mesure de renvoi le visant.

(2) If the Minister is of the opinion that the circumstances surrounding a stay of the enforcement of a removal order have changed, the Minister may re-examine, in accordance with paragraph 113(d) and the regulations, the grounds on which the application was allowed and may cancel the

(2) Le ministre peut révoquer le sursis s'il estime, après examen, sur la base de l'alinéa 113d) et conformément aux règlements, des motifs qui l'ont justifié, que les circonstances l'ayant amené ont changé.

stay.

(3) If the Minister is of the opinion that a decision to allow an application for protection was obtained as a result of directly or indirectly misrepresenting or withholding material facts on a relevant matter, the Minister may vacate the decision.	(3) Le ministre peut annuler la décision ayant accordé la demande de protection s'il estime qu'elle découle de présentations erronées sur un fait important quant à un objet pertinent, ou de réticence sur ce fait.
(4) If a decision is vacated under subsection (3), it is nullified and the application for protection is deemed to have been rejected.	(4) La décision portant annulation emporte nullité de la décision initiale et la demande de protection est réputée avoir été rejetée.

Consideration of an application for protection is made on the basis of sections 96 to 98 of IRPA.

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.

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée:

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant:

(i) the person is unable or, because of that risk, unwilling to avail themself of the 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

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles

accepted international standards, and	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.
(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.	(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.
98. A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.	98. La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.

Section 108 sets out the compelling reasons exception.

108. (1) A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection, in any of the following circumstances:	108. (1) Est rejetée la demande d'asile et le demandeur n'a pas qualité de réfugié ou de personne à protéger dans tel des cas suivants:
(a) the person has voluntarily reavailed themself of the protection of their country of nationality;	a) il se réclame de nouveau et volontairement de la protection du pays dont il a la nationalité;
(b) the person has voluntarily	b) il recouvre volontairement sa

reacquired their nationality;

nationalité;

(c) the person has acquired a new nationality and enjoys the protection of the country of that new nationality;

c) il acquiert une nouvelle nationalité et jouit de la protection du pays de sa nouvelle nationalité;

(d) the person has voluntarily become re-established in the country that the person left or remained outside of and in respect of which the person claimed refugee protection in Canada; or

d) il retourne volontairement s'établir dans le pays qu'il a quitté ou hors duquel il est demeuré et en raison duquel il a demandé l'asile au Canada;

(e) the reasons for which the person sought refugee protection have ceased to exist.

e) les raisons qui lui ont fait demander l'asile n'existent plus.

(2) On application by the Minister, the Refugee Protection Division may determine that refugee protection referred to in subsection 95(1) has ceased for any of the reasons described in subsection (1).

(2) L'asile visé au paragraphe 95(1) est perdu, à la demande du ministre, sur constat par la Section de protection des réfugiés, de tels des faits mentionnés au paragraphe (1).

(3) If the application is allowed, the claim of the person is deemed to be rejected.

(3) Le constat est assimilé au rejet de la demande d'asile.

(4) Paragraph (1)(e) does not apply to a person who establishes that there are compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country

(4) L'alinéa (1)e) ne s'applique pas si le demandeur prouve qu'il y a des raisons impérieuses, tenant à des persécutions, à la torture ou à des traitements ou peines antérieurs, de refuser de se réclamer de la protection du pays qu'il a quitté ou hors

which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment.	duquel il est demeuré.

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-2697-05
STYLE OF CAUSE:	PETER KANAYOCHUKWU OMEKAM - and - THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	March 1, 2006
REASONS FOR JUDGMENT AND JUDGMENT OF:	O'KEEFE J.
DATED:	March 14, 2006

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