

Federal Court



Cour fédérale

Date: 20150710

Docket: IMM-7741-14

Citation: 2015 FC 852

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, July 10, 2015

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

ROUGUIATOU KAKÉ

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Preliminary remarks

[1] The Court adopts the reasoning of Justice Simon Noël in *Saeedi v Canada (Minister of Citizenship and Immigration)*, 2013 FC 146 at para 30 [*Saeedi*]:

[30] The RPD's conclusion that the Applicant's allegations lack plausibility is unreasonable for the following reasons. The duty to provide reasons for negative credibility findings becomes particularly important when non-credibility determinations are based on perceived implausibilities in the Applicant's story. As stated by this

Court in *Santos v Canada (Minister of Citizenship and Immigration)*, 2004 FC 937 at para 15, 37 Imm LR (3d) 241, the RPD is required to clearly explain the rationales behind its implausibility findings and they should be based on the evidence before it:

[15] It is clear that plausibility findings are subject to the same deference as credibility findings, that being patent unreasonableness: see *Aguebor v. Canada (Minister of Employment and Immigration)* (1993), 160 N.R. 315 (F.C.A.). However, as stressed in *Valtchev, supra*, plausibility findings involve a distinct reasoning process from findings of credibility and can be influenced by cultural assumptions or misunderstandings. Therefore, implausibility determinations must be based on clear evidence, as well as a clear rationalization process supporting the Board's inferences, and should refer to relevant evidence which could potentially refute such conclusions. The cautions set out in both *Valtchev, supra*, and *Leung v. Canada (Minister of Employment and Immigration)*, (1994), 81 F.T.R. 303 are worth keeping in mind in the Court's review of plausibility conclusions.

[Emphasis added.]

II. Introduction

[2] The applicant is seeking judicial review of a decision by the Refugee Protection Division [RPD] dated October 17, 2014, rejecting her claim for refugee protection under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[3] The applicant claims a fear of persecution, kidnapping and torture if she were to return to Guinea, her country of citizenship.

III. Factual background

[4] The applicant is a 24 year-old woman who was born in the Faranah prefecture, in Guinea. Since the age of three, the applicant has lived under the guardianship of her aunt, Binta Kaké in Conakry.

[5] At the request of her father, the applicant was circumcised when she was five years old despite the lack of consent from her guardian.

[6] In 2007, when she was 17 years old, the applicant learned that her father had given away her sister Safiatou in marriage to a merchant who was over 50 years old, named ElHadji Amadou Kaba [Mr. Kaba]. After Safiatou fled to avoid the marriage, the applicant's father declared his intention of giving away the applicant in marriage to Mr. Kaba in the event he was unable to find Safiatou, which Ms. Kaké firmly opposed.

[7] On March 29, 2011, accompanied by his friend, the applicant's father showed up at Ms. Kaké's home while the applicant was at university, with the intention of taking her back to Faranah to marry her off to Mr. Kaba.

[8] Ms. Kaké then contacted the applicant to warn her of the danger that awaited her. The applicant stayed with her boyfriend Badra Ali in the days that followed.

[9] On April 7, 2011, on her aunt's recommendation, the applicant left Guinea for Bénin and arrived at her friend Binta Diallo's place four days later.

[10] On May 15, 2011, the applicant's father and another man showed up at Binta Diallo's place looking for the applicant. The two men beat the applicant, grabbed her and forcibly removed her, bringing her to Mr. Kaba's home in Faranah.

[11] Mr. Kaba held the applicant captive in a locked room for several days, during which she was sexually assaulted numerous times.

[12] One day, after having abused the applicant, Mr. Kaba left the room where the applicant was being held captive, accidentally leaving his cellular telephone and some clothes. The applicant took the cellular telephone and was able to contact her boyfriend, Badra Ali. She then found some money in an item of Mr. Kaba's clothing, took it and escaped through a window she managed to break.

[13] After having met up with her boyfriend in Conakry, the applicant left Guinea the same day and travelled to Canada with a man named François, with the help of her boyfriend and Ms. Kaké.

[14] The applicant arrived in Canada on May 29, 2011, and claimed refugee protection in Montréal the following day.

[15] On May 7, 2014, a brief hearing was held before the RPD during which the Minister presented the applicant with the death notice of one Elhadji Amadou Kaba published on the

website of Radio-Kankan. The applicant stated that she did not recognize the man in the photo accompanying the death notice.

[16] On August 19, 2014, the applicant filed new evidence, including an individual life certificate issued by the civil status officer of the urban commune of Faranah in the name of ElHadj Amadou Kaba, in order to confirm that Mr. Kaba was alive (Individual life certificate dated May 29, 2014, Applicant's Record, at page 42).

[17] On August 25, 2014, a second hearing was held before the RPD.

IV. RPD decision

[18] On October 17, 2014, the RPD rejected the applicant's refugee protection claim, concluding that the applicant did not meet the definition of "Convention refugee" or that of "person in need of protection" under sections 96 and 97 of the IRPA.

[19] First, in its reasons, the RPD concluded that the applicant's testimony was not credible with respect to certain key elements of her claim for refugee protection.

[20] The RPD found that the applicant would not face a risk of persecution if she were to return to Guinea because her agent of persecution was deceased.

[21] The RPD accepted the evidence submitted by the Minister according to which the applicant's agent of persecution, Mr. Kaba, had died on April 13, 2013, even though that

evidence indicates that Mr. Kaba was in Kankan rather than Faranah. At the same time, the RPD dismissed the individual life certificate from the Director of civil status civil submitted by the applicant as well as the photo that accompanied it, while noting however, that it was difficult to make links between the photos filed by the applicant and by the Minister respectively.

[22] Then, the RPD examined the applicant's allegations regarding the sexual violence she had been a victim of. The RPD concluded that the applicant had not suffered repeated sexual assaults by Mr. Kaba and that the applicant's statement in that regard was "clearly exaggerated". In addition, the RPD drew a negative inference regarding the applicant's credibility from the fact that she had not sought help from or made a complaint to the police.

[23] The RPD identified a number of inconsistencies in the applicant's narrative. First, the RPD noted that the applicant testified that she had not been married, but that she indicated in her Personal Information Form [PIF] that she had been married to Mr. Kaba on May 18, 2011. Second, the RPD observed that the applicant indicated having arrived in Faranah on May 18, 2011, when she had indicated May 15, 2011, in her PIF. From this fact, the RPD concluded that the applicant had neither been married to Mr. Kaba, nor had she been held captive by him.

[24] In addition, the RPD determined that it was unlikely that the applicant's father would have waited nearly four years before proceeding with the forced marriage of the applicant to Mr. Kaba. Accordingly, the RPD did not believe that the applicant's father had contributed to the persecution of his daughter.

[25] Further, the RPD assigned no probative value to the evidence adduced by the applicant in support of her narrative. First, the RPD examined evidence related to the state of the applicant's health from the Movement Against Rape and Incest [MCVI]. In its report, it states that the applicant was subject to a forced marriage and that she was in need of medical care as a result of the serious consequences of the assaults and excision she had suffered. The report also indicates that the applicant was a prisoner of Mr. Kaba, that he sexually assaulted her daily, several times, while verbally abusing her in the process (MCVI report dated February 17, 2014, Certified Tribunal Record, at pages 121 to 128).

[26] However, the RPD gave no probative value to the MCVI report because it related facts reported by the applicant, which the RPD had already determined were not credible.

[27] Lastly, the RPD dismissed letters filed by the applicant in support of her allegations. The RPD gave no probative value to the letters from Ms. Kaké, nor to the one from Binta Diallo, as the signatures on the letters were identical. In addition, the RPD assigned no probative value to the letter from the applicant's friend, Aichata Sylla, on the ground that no proof of her identity had been submitted.

V. Legislative provisions

[28] The following provisions of the IRPA are relevant to determining refugee status:

Convention refugee

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality,

Définition de « réfugié »

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,

membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(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.

Person in need of protection

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

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

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

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

(ii) the risk would be faced by the person in every part of

de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

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) 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.

Personne à protéger

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

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

(ii) elle y est exposée en tout lieu de ce pays alors que

that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(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.

d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(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) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

(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.

VI. Issues

[29] The key issues in this application for judicial review centre on the reasonableness of the RPD's findings regarding the credibility of the applicant and the application of the *Chairperson's Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution* by the RPD [Guideline 4] (*Uyгур v Canada (Minister of Citizenship and Immigration)*, 2013 FC 752; *Dunsmuir v New Brunswick*, [2008] SCJ No 9 [*Dunsmuir*]).

VII. Analysis

[30] For the reasons that follow, the application must be allowed in order for the applicant's refugee protection claim to be determined by a differently constituted panel.

A. *RPD's credibility findings*

[31] Due to its fact finding expertise, the RPD has broad discretion with regard to assessing credibility, evidence and making findings of fact in refugee claims, to which the Court must show deference (*Ahmadzai v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1025 at para 23).

[32] In the decision under review, the RPD summarized its credibility findings at paragraph 38 of its reasons:

[T]he panel finds that the claimant is not credible on the matter of her primary agent of persecution, Elhadji Amadou Kaba, still being alive. The panel also does not believe, considering a major contradiction, that the claimant was forced to marry this man, Kaba, or that she stayed with him in Faranah, or therefore that she was the victim of rape and assault by him, especially since it is inconsistent that the claimant's father waited nearly four years to act on his marriage plan. Furthermore, the claimant made no attempt to seek help or to file a complaint. Finally, the panel grants no probative value to the documents meant to corroborate that Kaba is alive, to the letters filed by the claimant, or to the medical report that recounts the claimant's version of the facts.

(RPD decision, Certified Tribunal Record, at p. 11)

[33] The intervention of the Court with regard to the RPD's decision is required in three respects.

[34] First, the RPD indicated that it "does not believe that the claimant experienced repeated rapes by Elhadji Amadou Kaba, because it is of the opinion, first of all, that her statement is clearly exaggerated (raped two or three times a day) and, above all, the panel does not believe that the claimant was married to Kaba as she stated, or that she was held captive by this man, as

indicated earlier, especially since she did not seek help and did not file a complaint” (RPD decision, Certified Tribunal Record, at p 10).

[35] To begin with, it was unreasonable for the RPD to conclude that the applicant’s statement about the frequency of the sexual assaults she suffered was “clearly exaggerated” without providing an explanation for such a finding in its reasons. As the Supreme Court of Canada wrote, “[r]easons . . . foster better decision making by ensuring that issues and reasoning are well articulated and, therefore, more carefully thought out” (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] SCJ 39 at para 39). The RPD provided no evidence or grounds that would point to any inherent logic in support of its position.

[36] Furthermore, the RPD’s credibility findings regarding the sexual assaults suffered by the applicant point to a failure to take into account Guideline 4, in particular with regard to the applicant’s reluctance to ask for help from, or file a complaint with, the police.

[37] The case law holds that although Guideline 4 is not binding, the RPD must nonetheless apply the principles enshrined in Guideline 4 in a meaningful way (*A.M.E. v Canada (Minister of Citizenship and Immigration)*, 2011 FC 444 [*A.M.E.*]). It is not sufficient for the RPD to simply say that Guideline 4 was applied (*Yoon v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1017 at para 5; *Odia v Canada (Minister of Citizenship and Immigration)*, 2014 FC 663 at para 18).

[38] Guideline 4 acknowledges the difficulty for women in relaying certain traumas, including sexual abuse, and requires that decision-makers show a certain amount of sensibility to this reality (*A.M.E.*, above at para 9).

[39] At C.2 of Guideline 4 it states:

When considering whether it is objectively unreasonable for the claimant not to have sought the protection of the state, the decision-maker should consider, among other relevant factors, the social, cultural, religious, and economic context in which the claimant finds herself. If, for example, a woman has suffered gender-related persecution in the form of rape, she may be ostracized from her community for seeking protection from the state. Decision-makers should consider this type of information when determining if the claimant should reasonably have sought state protection.

[40] In this case, the RPD draws a negative inference from the fact that the applicant did not seek to file a complaint after the sexual assaults, but without addressing the explanations provided by the applicant with respect to that aspect of her narrative.

[41] Although the RPD indicated having applied Guideline 4 in its assessment of the applicant's testimony and evidence, the analysis conducted by the RPD leads the Court to conclude that these guiding principles were not reasonably applied.

[42] In short, the Court is of the view that the RPD's finding with regard to the "clearly exaggerated" nature of the applicant's narrative about the sexual assaults she endured does not meet the reasonableness criteria established in *Dunsmuir*, above.

[43] Second, the RPD made an implausibility finding by concluding that “it is surprising that her father, who promised her to Kaba in 2007 and who tried to bring her back in 2008, waited until 2011 to act on this plan” without providing any basis upon which to support its conclusion (RPD decision, Certified Tribunal Record, at p. 9). However, the evidence shows that the applicant consistently provided explanations for the delay between the initial proposal to marry the applicant’s sister in Kaba and the applicant’s kidnapping four years later.

[44] The Court adopts the reasoning employed by Justice Noël in *Saeedi*, above:

[30] The RPD’s conclusion that the Applicant’s allegations lack plausibility is unreasonable for the following reasons. The duty to provide reasons for negative credibility findings becomes particularly important when non-credibility determinations are based on perceived implausibilities in the Applicant's story. As stated by this Court in *Santos v Canada (Minister of Citizenship and Immigration)*, 2004 FC 937 at para 15, 37 Imm LR (3d) 241, the RPD is required to clearly explain the rationales behind its implausibility findings and they should be based on the evidence before it:

[15] It is clear that plausibility findings are subject to the same deference as credibility findings, that being patent unreasonableness: see *Aguebor v. Canada (Minister of Employment and Immigration)* (1993), 160 N.R. 315 (F.C.A.). However, as stressed in *Valtchev, supra*, plausibility findings involve a distinct reasoning process from findings of credibility and can be influenced by cultural assumptions or misunderstandings. Therefore, implausibility determinations must be based on clear evidence, as well as a clear rationalization process supporting the Board's inferences, and should refer to relevant evidence which could potentially refute such conclusions. The cautions set out in both *Valtchev, supra*, and *Leung v. Canada (Minister of Employment and Immigration)*, (1994), 81 F.T.R. 303 are worth keeping in mind in the Court's review of plausibility conclusions.

[Emphasis added.]

[45] In short, the Court finds that it was unreasonable for the RPD to have concluded that the applicant's father had not contributed to the applicant's persecution.

[46] Third, the Court agrees with the position of the applicant that the RPD unreasonably concluded that Mr. Kaba was deceased.

[47] The issue as to whether Mr. Kaba was deceased or living was vigorously disputed by the parties, who held opposing views on the matter.

[48] In its decision, the RPD accepted the death notice of one Amadou Kaba published on Radio-Kankan's website filed by the Minister (Article dated April 13, 2013, "*Elhadji Amadou Kaba dit YESS n'est plus*", Certified Tribunal Record, at p 215) while dismissing any evidence to the contrary filed by the applicant to the effect that this same man was still living, by means of an individual life certificate issued by the Director of Civil Status, in Guinea.

[49] At the hearing, when confronted with the death notice presented by the Minister, the applicant declared that this individual was not her agent of persecution. The RPD dismissed this assertion by the applicant on the ground that she had not succeeded in demonstrating that Mr. Kaba was still alive, despite the ambiguities in the evidence to that effect, which, moreover, had been acknowledged by the RPD.

[50] The Court finds that the particular circumstances of the case show that evidence as to whether the applicant's persecutor is dead or alive is not necessarily mutually exclusive; the

existence of the death certificate submitted by the Minister does not, in itself, preclude the possibility that the individual named El Hadj Amadou Kaba, identified on the individual life certificate submitted by the applicant, is alive.

[51] Although the RPD has discretion to dismiss evidence it finds to be insufficient, the rationale that underlies the acceptance of the Minister's exhibit, which is of a somewhat less official nature (Radio-Kankan's website) than the individual certificate of life issued by the Guinean authorities submitted by the applicant, evinces a lack of transparency.

[52] Consequently, following a thorough review of the Certified Tribunal Record, including the RPD's reasons, the hearing transcript and the submissions of the parties, the Court finds that the RPD's findings regarding the applicant's credibility and implausibility of some of her statements are unreasonable with regard to the evidence as a whole (*Ramos v Canada (Minister of Citizenship and Immigration)*, 2011 FC 298 at para 7).

B. *Reasonable apprehension of bias*

[53] The applicant argues that the RPD raised a reasonable apprehension of bias by having proceeded with a biased analysis.

[54] However, the Court finds that the applicable test developed by the Supreme Court of Canada in *Committee for Justice and Liberty v Canada (National Energy Board)*, [1976] SCJ 118, has not been met.

[55] Furthermore, the Court agrees with the respondent's argument that the issues regarding reasonable apprehension of bias and breaches of procedural fairness were not raised in a timely manner before the RPD and that, as a result, the applicant is precluded from raising these issues on judicial review (*Cortes v Canada (Minister of Citizenship and Immigration)*, 2015 FC 516 at para 32; *Abedalaziz v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1066 at para 34).

VIII. Conclusion

[56] In light of the foregoing, the Court allows the application for judicial review.

[57] Although this Federal Court judgment may not necessarily lead to a positive decision by the RPD, a specialized study by the Immigration and Refugee Board will at least provide an opportunity to make a determination on the authenticity of the evidence; it will also allow for the matter to be reviewed in its entirety in a specialized manner based on the expertise of the panel in analyzing and thus providing adequate reasons for findings on the credibility of the testimony and on the probative value of the evidence as a whole with the help of the guidelines set out in Guideline 4.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that this application for judicial review be allowed and that the matter be referred back for redetermination by a differently constituted panel. No question is certified.

“Michel M.J. Shore”

Judge

Certified true translation
Sebastian Desbarats, Translator

FEDERAL COURT
SOLICITORS OF RECORD

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STYLE OF CAUSE: ROUGUIATOU KAKÉ v THE MINISTER OF
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DATED: JULY 10, 2015

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