Federal Court  Cour fédérale

Date: 20210429

Docket: IMM-7361-19

Citation: 2021 FC 379

[ENGLISH TRANSLATION REVISED BY THE AUTHOR]

Ottawa, Ontario, April 29, 2021

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

FATOUMATA BINTA LY
UMAR FATIMA NIANE
MOHAMMED ALIOU NIANE

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Ms. Ly, accompanied by her two sons and two daughters, claimed refugee protection. She alleges that her in-laws in Guinea wish to submit her daughters to female genital mutilation, to which she is strenuously opposed. Her daughters' claims were accepted, but hers and those of her two sons were refused, because if the daughters remain in Canada, Ms. Ly would not face a

risk if she returned to her country. I consider this decision unreasonable, because the facts underpinning Ms. Ly's claim and those of her daughters are inextricably linked. However, it was reasonably to refuse her sons' claims because there is nothing in the evidence to establish fear of persecution in relation to them.

I. Background

[2] Ms. Ly and her husband, Mr. Niame, are citizens of Guinea. After marrying, the couple settled in Luanda, Angola. Ms. Ly and Mr. Niame had three children, Mohammed, Khadija and Umar. Mr. Niame also obtained custody of two daughters from his second marriage, Harissatou and Zeynab, after his divorce. Ms. Ly would have in fact acted as a mother to these children. All of the children except Harissatou, who is not a party to these proceedings, were born in Angola and have Angolan citizenship.

[3] In 2013, Ms. Ly was informed of her in-laws' intention to submit her three daughters to female genital mutilation. She objected strenuously. Specifically, in 2015, Ms. Ly and Mr. Niame refused to send their three daughters to spend the school holidays with Mr. Niame's family in Guinea. Because of this refusal, Mr. Niame was subjected to family pressure, especially from his father, who was financing his business. Ms. Ly was subjected to accusations and threats by her father-in-law.

[4] In June 2016, three of Mr. Niame's brothers came to Luanda. They assaulted Mr. Niame and abducted Harissatou. Ms. Ly and her other children were not home at the time. Subsequently, caught between conflicting loyalties to his wife and family, Mr. Niame refused to

do anything to protect Harissatou and forbade Ms. Ly to file a complaint with the police. Ms. Ly decided to hide her other children and prepare to flee.

[5] Ms. Ly and her four children who are applicants in these proceedings entered Canada on July 1, 2016, and claimed for refugee protection. In November 2016, Mr. Niame attempted to enter Canada to retrieve his children and bring them to Guinea. However, he was declared inadmissible on grounds of misrepresentation.

[6] The Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB] refused the claims of Ms. Ly and her children, finding that she was not credible and that the identities of Mohammed and Zeynab had not been established. The RPD based these findings on the fact that Ms. Ly had initially lied about Zeynab's parentage, only to admit later that Zeynab was not her biological daughter but rather the daughter of Mr. Niame's second wife. The RPD also identified a number of contradictions in Ms. Ly's testimony.

[7] The Refugee Appeal Division [RAD] of the IRB allowed Ms. Ly's appeal in part. It accepted Ms. Ly's explanations for her misrepresentations about Zeynab's parentage. It also reviewed in detail the contradictions on which the RPD had based its finding that Ms. Ly's account was not credible. Considering the evidence as a whole, the RAD held that there were insufficient grounds to rebut the presumption of truthfulness. Therefore, it found that Ms. Ly's testimony was credible.

[8] However, the RAD held that the facts admitted in evidence justified granting refugee status only to Khadija and Zeynab, as they were the ones threatened with female genital mutilation. As for the two sons, Mohammed and Umar, the sole allegation is that Ms. Ly's in-laws could force them to work rather than pursue their studies, which does not constitute persecution. Regarding Ms. Ly's personal situation, the RAD made the following comments:

> Likewise, the only harm that Ms. Ly testified to for herself was that she feared that her in-laws would make her life difficult and that they would convince her husband to get a second wife. I note in particular that Ms. Ly did not allege, either in her BoC or her testimony, that her in-laws would seek retribution against her for protecting her daughters in such a way that might make her a Convention refugee or person in need of protection. Therefore, there is insufficient evidence to establish that Ms. Ly is either a Convention refugee or a person in need of protection.

[9] Ms. Ly and her two sons are now seeking judicial review of the RAD's decision.

II. Analysis

[10] I consider the RAD's decision unreasonable with respect to Ms. Ly, but not with respect to Mohammed and Umar. To understand why, it is necessary to explain how the principle of family unity is applied in Canadian refugee law. I will then demonstrate how Ms. Ly's claim is inextricably linked to those of her daughters.

A. *The principle of family unity*

[11] International refugee law includes a principle of family unity. The *Handbook on Procedures and Criteria for Determining Refugee Status* prepared by the United Nations High Commissioner for Refugees [UNHCR] provides the following explanation:

> 181. Beginning with the Universal Declaration of Human Rights, which states that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State", most international instruments dealing with human rights contain similar provisions for the protection of the unit of a family.
>
> 182. The Final Act of the Conference that adopted the 1951 Convention:
>
> > Recommends Governments to take the necessary measures for the protection of the refugee's family, especially with a view to:
> >
> > (1) Ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country;
> >
> > (2) The protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption.
>
> 183. The 1951 Convention does not incorporate the principle of family unity in the definition of the term refugee. The above-mentioned Recommendation in the Final Act of the Conference is, however, observed by the majority of States, whether or not parties to the 1951 Convention or to the 1967 Protocol.
>
> 184. If the head of a family meets the criteria of the definition, his dependants are normally granted refugee status according to the principle of family unity. It is obvious, however, that formal refugee status should not be granted to a dependant if this is incompatible with his personal legal status. Thus, a dependant member of a refugee family may be a national of the country of asylum or of another country, and may enjoy that country's protection. To grant him refugee status in such circumstances would not be called for.

[12] I also note that Article 9, paragraph 1, of the *Convention on the Rights of the Child*, CTS 1992/3, to which Canada is a party, states the following:

> States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent

> authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.

[13] In Canadian law, the principle of family unity is not taken into account at the time of refugee status determination. This means that a grant of refugee status does not, by itself, entitle the other members of the same family to refugee status. In other words, each family member must establish the right to refugee status individually: *Casetellanos v Canada (Solicitor General)*, [1995] 2 FC 190 (TD) at 199–202; *Bromberg v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 939, at paragraph 39; *Canada (Citizenship and Immigration) v Ali Khan*, 2005 FC 398, at paragraph 11; *Garcia Garcia v Canada (Citizenship and Immigration)*, 2010 FC 847, at paragraph 15; *Jawad v Canada (Citizenship and Immigration)*, 2012 FC 1035, at paragraphs 10–12; *Chavez Carrillo v Canada (Citizenship and Immigration)*, 2012 FC 1228, at paragraph 15; *Nazari v Canada (Citizenship and Immigration)*, 2017 FC 561, at paragraph 20; *Douillard v Canada (Citizenship and Immigration)*, 2019 FC 390 at paragraphs 24–32. This also appears to be consistent with paragraphs 183 and 184 of the UNHCR Handbook, cited above.

[14] The principle of family unity is incorporated into Canadian law by different means. A person who has obtained refugee status may include family members in their application for permanent residence: *Immigration and Refugee Protection Regulations*, SOR/2002-227, sections 1(3), 2 and 176. Eligible family members are the spouse or common-law partner, a dependent child or a dependent child of the dependent child, but not the parents of the person who has obtained refugee status. When a person cannot rely on these provisions of the Regulations, it is possible to make an application based on humanitarian and compassionate

considerations, pursuant to section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. Several of the decisions mentioned above allude to these possibilities.

[15] In certain cases, however, a child's claim is inextricably linked to that of a parent. It is therefore unreasonable to analyze them separately or to grant refugee status to one but not the other. This does not flow from the principle of family unity, but rather from the circumstances of each case. For examples of such situations, see *Sadiq v Canada (Citizenship and Immigration)*, 2020 FC 267 [*Sadiq*]; *Zheng v Canada (Citizenship and Immigration)*, 2011 FC 181 [*Zheng*]; *Mohamoud v Canada (Citizenship and Immigration)*, 2015 FC 1408 [*Mohamoud*]. The reasons for which the claims are inextricably linked may vary from one case to another. Because of the manner in which this case was presented to me, I am unable to provide an exhaustive definition.

B. *Is the RAD's decision reasonable?*

[16] I find that the RAD's decision with respect to Ms. Ly is unreasonable because it ignores the fact that her claim is inextricably linked with those of her daughters. The decision is also unreasonable because it does not take into account the evidence regarding the risk that Ms. Ly would face if she were to return to Angola or Guinea, even without her daughters. However, the RAD's decision with respect to Mohammed and Umar is reasonable.

(1) The claims are inextricably linked

[17] While the RAD did not state this explicitly, the premise underlying its reasons is that Ms. Ly can return to Angola or Guinea and leave her daughters in Canada. This premise is

unreasonable. The RAD must conclude that Ms. Ly's claim and those of her daughters are inextricably linked.

[18] It defies the most basic common sense to believe that Ms. Ly will leave her children alone in Canada to return to her country. Recall that Khadija and Zeynab are currently 10 years old. While each of the three claims must be considered separately, the review must rest on an assumption that the three of them travel together: *Zheng*, at paragraphs 32 and 36; *Mohamoud*, at paragraphs 28–29. Conducting a separate analysis does not mean projecting oneself into an unreal world in which we can separate the mother from her daughters.

[19] Article 9 of the *Convention on the Rights of the Child* may be used to interpret the provisions of IRPA, and the definition of refugee status in particular: *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at paragraph 76, [2018] 2 FCR 229. Article 9 means, at the very least, that when assessing whether there is a well-founded fear of persecution, one cannot start from the premise that children will be separated from their parents.

[20] The question that the RAD should have asked itself, therefore, is the following: If Ms. Ly and her daughters were to return together to Angola or Guinea, would each of them have a well-founded fear of persecution? From this perspective, the situations of the mother and her daughters are inextricably linked, since their fear of persecution arises from the same source, namely, the husband's family's determination to subject Khadija et Zeynab to female genital mutilation and that this threat has serious, albeit different, effects on all three of them, especially given Ms. Ly's fierce opposition to the procedure. The RAD should therefore have analyzed

their situation jointly: *Sadiq*, at paragraph 29; *Mohamoud*, at paragraphs 25–26; UNHCR, *Guidance Note on Refugee Claims relating to Female Genital Mutilation* (2009), at paragraph 11.

[21] I note here that the above analysis does not amount to incorporating humanitarian and compassionate considerations or the concept of the best interests of the child into the definition of refugee status. It is simply a matter of assessing the claim in the real world rather than in a hypothetical world. For example, this case is distinct from the situation of a failed refugee claimant who has a Canadian child. In that case, neither the parent nor the child faces a risk if the child accompanies the parent to the latter's country of origin.

(2) The risk faced by Ms. Ly if she were to return

[22] The above is sufficient to dispose of the application for judicial review. I would nevertheless like to add that the RAD's decision is also unreasonable because of the way in which it assessed the risk that Ms. Ly would face if she were to return to Guinea or Angola alone. The RAD's only comment on this point is that Ms. Ly did not allege that her in-laws would seek revenge against her for her attempt to protect her daughters.

[23] With respect, the RAD should have considered all of the evidence and asked itself what could be reasonably inferred from it. What the evidence shows is that Ms. Ly's in-laws were adamant about subjecting her daughters to female genital mutilation and unrelenting in their efforts. They did not hesitate to employ violent means, including forcible confinement, to achieve their objective. Furthermore, even if she were to return to Angola or Guinea, there is

every indication that Ms. Ly would maintain legal custody of her children, which would bring her under pressure from her in-laws to bring them back to Angola or Guinea. Based on these facts, the RAD should have asked itself whether Ms. Ly had a well-founded fear of persecution in the event of a return to one of the two countries. As for the alleged insufficiency of her testimony, I note that nobody informed Ms. Ly that the questions regarding her fear applied to the scenario of her return to Angola or Guinea without her daughters.

[24] Moreover, the RAD's conclusions that no internal flight alternative or state protection is available to Khadija and Zeynab in all likelihood apply to Ms. Ly as well.

(3) Mohammed's and Umar's claims

[25] However, the RAD's decision regarding the two boys is reasonable. Because female genital mutilation constitutes a form of gender-related persecution, they are not personally at risk. There is no evidence indicating that they opposed the treatment with which their sisters are threatened or that their father's family is targeting them for this reason or has threatened them with reprisals. The fact that they might be forced to work for their father's business rather than pursue their studies does not constitute persecution.

[26] Their claims are not inextricably linked to that of their mother. Because they themselves are not at risk, the separate analysis of their claims will not result in a situation in which they would find themselves remaining in Canada without their mother.

[27] The RAD's decision with respect to them is therefore reasonable, as it is based on the evidence and on a reasoned justification consistent with the relevant legal principles. As I explained above, there are other means by which Mohammed and Umar may obtain the right to live in Canada.

III. Conclusion

[28] The application for judicial review will be allowed with respect to Ms. Ly because the RAD's decision is unreasonable in her case. However, the application will be dismissed with respect to Umar and Mohammed because the RAD's decision regarding them is reasonable.

JUDGMENT in IMM-7361-19

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is allowed with respect to Fatoumata Binta Ly, and the matter returned to the Refugee Appeal Division for redetermination.
2. The application for judicial review is dismissed with respect to Umar Fatima Niane and Mohammed Aliou Niane.
3. No question is certified.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7361-19
STYLE OF CAUSE:	FATOUMATA BINTA LY, UMAR FATIMA NIANE AND MOHAMMED ALIOU NIANE v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	VIA VIDEOCONFERENCE BETWEEN MONTRÉAL, QUÉBEC, AND OTTAWA, ONTARIO
DATE OF HEARING:	APRIL 22, 2021
JUDGMENT AND REASONS:	GRAMMOND J.
DATED:	APRIL 29, 2021

APPEARANCES:

Odette Desjardins	FOR THE APPLICANTS
Margarita Tzavelakos	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Odette Desjardins Barrister and Solicitor Montréal, Quebec	FOR THE APPLICANTS
Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT