Date: 20070813

Docket: IMM-342-07

Citation: 2007 FC 835

OTTAWA, Ontario, August 13, 2007

PRESENT: The Honourable Max M. Teitelbaum

BETWEEN:

NADIATH RADJI
LEYLA APITHY

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of an immigration officer (the "Officer"), dated December 14, 2006, wherein the Officer determined that the applicants would not be at risk if returned to the principal applicant's country of nationality. The applicants are also contesting in a separate application to this Court the H&C decision rendered by the same immigration officer on the same date.

[2] Nadiath Radji, the principal applicant, is a citizen of Benin. Her daughter Leyla Apithy, a citizen of the United States, is the other applicant. The principal applicant is a Muslim. She fears her

family because they allegedly tried to force her into a marriage and because of the fact that she had a Christian boyfriend. In 2002, the applicant followed her boyfriend to the U.S. While in the U.S. the applicant became pregnant. Shortly thereafter the applicant and her boyfriend began having problems and the applicant moved alone to Chicago where she gave birth to her daughter. Several months after the birth, the applicant left with her daughter for Benin. She alleged that while in Benin her mother threatened to poison her and her daughter. As a result of this incident the applicants returned to the U.S. They arrived in Canada from the United States on January 6, 2004 and claimed refugee status upon arrival. In a decision dated October 7, 2004, the Refugee Determination Division of the Immigration and Refugee Board (the "Refugee Board") denied the applicants' claim on the grounds that the principal applicant was not credible and had no subjective fear.

[3] The applicants made a motion for a stay of removal but this motion was refused on January 31, 2007 by Mr. Justice Shore. Shortly after learning that she was to be removed from Canada the primary applicant was hospitalized due to concerns about her mental health. Consequently, the applicants were not removed and remained in Canada. They filed an appeal of the decision not to grant a stay of the removal order which was quashed by the Federal Court of Appeal for lack of jurisdiction in an order dated April 18, 2007

THE DECISION UNDER REVIEW

[4] The applicant submitted letters to support her allegations of risk. One letter is from the primary applicant's sister and the other four letters are from health care professionals who treated

the applicant at the Clinique Santé Accueil du CLSC, Côté-des-neiges. The Officer concluded that none of the letters submitted was evidence to support the applicant's allegations of risk.

[5] The Officer went on to find that there is no proof in the applicant's file confirming her claim that she had a relationship with a Christian man nor is there any proof that her family is Muslim. Moreover, the Officer noted that *The International Religious Freedom Report 2006* indicates that in Benin it is not uncommon for members of the same family to have different faiths.

[6] The Officer then went on to consider whether the primary applicant's daughter would be at risk of physical violence and female genital mutilation in Benin. She noted that the applicant had provided no evidence to support these allegations. The Officer noted that the documentary evidence indicates that there is a law which prohibits female genital mutilation but that in practice the government has not succeeded in completing eradicating the practice. According to the documentary evidence approximately 17% of women in Benin have been subjected to female genital mutilation and that 70% of women from the Bariba, Yoa-Lokpa and Peul ethnic groups are subjected to it. The Officer noted that the applicant is not from one of these groups and concluded that the primary applicant had not established that her daughter is at risk of female genital mutilation.

[7] In making her determination, the Officer relied on a number of documents which she obtained from the internet and which were not disclosed to the applicants.

ISSUE

[8] Did the Officer violate the applicant's right to procedural fairness by unilaterally consulting and relying upon documentation found on the Internet which the applicants were not given a chance to respond to?

ANALYSIS

[9] An analysis for the appropriate standard of review is not required as the Court will not defer to a decision if it is determined that the administrative decision-maker failed to provide procedural fairness (*C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 53).

[10] The applicant submits that the Officer did not provide the applicants the opportunity to respond to information taken from websites which are not listed in the binders available at the Immigration and Refugee Board (IRB) Documentation Centre. These documents were taken from the following Internet sites:

- WiLDAF/FeDDAF – Afrique de l'Ouest: Femme Droit et Développement en Afrique
- Association des Femmes Juristes au Bénin
- Benin Development Gateway, and
- Inter Press Service Agency, the document from this site is an article entitled "Droits-Bénin: un ancien praticien abandonne l'excision et veut sensibiliser les réticents"

[11] The applicants submit that this Court has held that unilateral use of the Internet is unfair (*Zamora v. Minister of Citizenship and Immigration*, 2004 FC 1414 and *Fi v. Minister of Citizenship and Immigration*, [2006] FC 1125). They further argue that the test for whether extrinsic

evidence should have been disclosed as set out in *Mancia v. Minister of Citizenship and Immigration*, [1998] 3 F.C. 461 (C.A.), has not been met.

[12] The Federal Court of Appeal in *Mancia* held:

> ¶ 22 These decisions are based, it seems to me, on the two following propositions. First, an applicant is deemed to know from his past experience with the refugee process what type of evidence of general country conditions the immigration officer will be relying on and where to find that evidence; consequently, fairness does not dictate that he be informed of what is available to him in documentation centres. Secondly, where the immigration officer intends to rely on evidence which is not normally found, or was not available at the time the applicant filed his submissions, in documentation centres, fairness dictates that the applicant be informed of any novel and significant information which evidences a change in the general country conditions that may affect the disposition of the case.
>
> ¶ 23 To reach that conclusion, which in my view is the correct one, regard has been given, as mandated by the caselaw, to a) the nature of the proceeding and the rules under which the decision-maker is acting, b) the context of the proceeding and c) the nature of the documents at issue in such proceedings.
>
> […]
>
> ¶ 27 I would therefore answer the certified question as follows, it being understood that each case will have to be decided according to its own circumstances and it being assumed that the documents at issue in a given case are of a nature such as that described above:
>
> > a) with respect to documents relied upon from public sources in relation to general country conditions which were available and accessible at Documentation Centres at the time submissions were made by an applicant, fairness does not require the Post Claims Determination Officer to disclose them in advance of determining the matter;
> >
> > b) with respect to documents relied upon from public sources in relation to general country conditions which became available and accessible after the filing of an applicant's submissions, fairness requires disclosure by the Post Claims Determination Officer where they are novel and significant and where they evidence changes in the general country conditions that may affect the decision.

[13] In the present case, none of the documents were available at the IRB Documentation Centres although a document produced by WiLDAF/FeDDAF is listed on the Exhibits List of the Benin Kit available at the IRB Documentation Centre and I find that information on this organization's website was available to the applicants (Affidavit of Jordan Topp, applicants' record at page 36). With respect to the remaining documents, it is not clear whether the documents were available and accessible on the internet at the time the applicants made their PRRA submissions. An additional problem is that the parties do not appear to even agree on the date of the applicants' latest submissions. Relying on *Fi* and *Zamora*, the applicants submit that whether the documents were available before or after their last submissions is not relevant since disclosure is always required where the documents are taken from the internet. In *Zamora* at paragraphs 17 and 18, the Court referred to the test in *Mancia* and stated:

> Neither MacKay J., nor the Court of Appeal, addressed the issue of the internet. I cannot believe an applicant can anticipate what documents the officer may retrieve from the internet, some of which may be of doubtful validity, when there are over a million to choose from!
>
> The documents in question were not standard documents such as Human Rights Watch, Amnesty International or country reports issued under governmental authority, but rather the result of specific research on the internet carried out by the PRRA officer. That research, including such documents she may have found were beneficial to Mr. Aguilar Zamora, should have been disclosed and he should have been given an opportunity to respond.

[14] I agree with the Court's finding in *Zamora*. To expect an applicant to find every possible document available on the internet that might pertain to conditions in his or her country of nationality is unreasonable.

[15] In its written submissions, the respondent cited a number of cases where the Court held that documents upon which an officer relied on and that were, at the time the applicant made his submissions, available online but not at the IRB's Documentation Centre do not have to be disclosed. These cases are distinguishable from the present case. In *Guzman v. Minister of Citizenship and Immigration*, 2004 FC 838, the documents in questions were country reports from the U.S. Department of State and IRB research papers and were available at the IRB Documentation Centre. In *Garcia v. Minister of Citizenship and Immigration*, [2006] F.C.J. No. 394 (QL), the documents in question were from the U.S. Department of State, Amnesty International, the IRB and Encarta Encyclopaedia. In *Rasiah v. Minister of Citizenship and Immigration*, [2004] F.C.J. No. 1476 (QL), the documentary evidence in question was of a personal nature. In my view, none of these cases are similar to the present case where the Officer relied on documents taken from websites which are not generally consulted in immigration decisions. Therefore, where an immigration officer relies on a document from a non-standard site, i.e. a site not regularly cited in the IRB National Documentation Packages such as Amnesty International or the U.S. Department of State, there is a duty to disclose these documents to the applicant provided that they are novel and significant and that they evidence changes in country conditions that may affect the decision. In other words, where a document is taken from a non-standard website and is not available at the IRB Documentation Centre then the question of whether the document was available before the latest

submissions of the applicants is not relevant. In my view, this finding it not inconsistent with the Court of Appeal's decision in *Mancia*, because the Court held that each case will have to be decided according to its own circumstances and that consideration must be given to the nature of the documents at issue in such proceedings.

[16] The applicants submit that *Mancia* did not specifically deal with the use of the internet and that the Court's decisions in *Fi* and *Zamora* have altered the test as it is set out in *Mancia* such that the "novel and significant" and "evidence changes in the general country conditions that may affect the decision" portion of the test is no longer required. The applicants submit that the law as it stands is as follows: where an Officer relied on extrinsic documents drawn from the Internet that were not available at the IRB Documentation Centres at the time of the applicant's submissions, fairness requires disclosure of those documents if the Officer relies thereupon in rendering a decision.

[17] I do not agree with this submission. The Court in *Zamora* did, in fact, apply the "novel and significant" portion of the *Mancia* test. At paragraph 18, the Court held:

> The documents in question were not standard documents such as Human Rights Watch, Amnesty International or country reports issued under governmental authority, but rather the result of specific research on the internet carried out by the PRRA officer. That research, including such documents she may have found were beneficial to Mr. Aguilar Zamora, should have been disclosed and he should have been given an opportunity to respond. <u>It cannot be said with any confidence that the documents were not novel, or significant.</u>
>
> (emphasis added)

[18] The applicants have provided no compelling argument as to why this part of the test should be no longer applied and I can think of no reason to discard this requirement.

[19] The applicants submit that the information from the non-disclosed sites are clearly significant as it constitutes the basis for the Officer's conclusions concerning the risks faced by children born out of wedlock, state protection available to women and girls in Benin, the ascendancy of women's rights in Benin and the risks associated with forced marriage. The applicants also submit that the documents demonstrate a change in country conditions, specifically the rise of women's rights as a protection against both female genital mutilation and forced marriage.

[20] The respondent submits that the applicants have not shown that these sources indicate a change in country conditions. Moreover, the respondent submits that the contested sources were not primary sources that the Officer used to support her conclusions and that the sources are not significant or determinative with respect to the overall decision.

[21] The WiLDAF site indicates that there is increased awareness about women's rights, including the issues of forced marriage and violence against women. Similarly, the Association des Femmes Juristes site indicates that there have been improvements with respect to forced marriage. The information on these two sites is not significant since the same information is contained within a document which was disclosed to the applicants, the Freedom House Report 2006. The Inter Press Services Agency article indicates that attitudes towards female genital mutilation are changing. This

same information is contained within the 2005 U.S. Department of State Report and the IRB Response to Request for Information, BEN41835.F, both of which were available to the applicants through IRB Documentation Centres. The final document is from the Benin Development Gateway Site and contains general information about the health care situation in Benin. The information is not relevant to any of the issues addressed in the PRRA and nowhere in her decision did the Officer refer specifically to this document. I suspect it was unintentionally included because the Officer considered it in her assessment of the applicants' H&C application an application which was done at the same time as the PRRA file. I conclude that none of the documents is significant or evidences changes in country conditions and, consequently, the Officer was not required to disclose them.

[22] This application for judicial review is dismissed.

[23] The applicants filed the following question for certification in both IMM-342-07 and IMM-343-07:

> "Under what condition does the unilateral consultation of the Internet by an Immigration Office rendering decision on an humanitarian and compassionate application or a pre-removal risk assessment application constitute a violation of procedural fairness, where unilateral consultation of the Internet is understood to signify the consultation of documents found on the Internet without providing the applicant(s) an opportunity to comment thereupon?"

[24] Without repeating what the respondent states in its written submissions of July 31, 2007, I agree with the respondent as to why the above question need not be certified.

[25] I am satisfied that the proposed question is not determinative of the present issues as, even if the officer considered documents obtained from the Internet, the officer's decision clearly show why she refused the H & C application.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed.

"Max M. Teitelbaum"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-342-07
STYLE OF CAUSE:	NADIATH RADJI, LEYLA APITHY v. MCI
PLACE OF HEARING:	Montreal, Qc
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REASONS FOR JUDGMENT :	Honourable Max M. Teitelbaum
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