Federal Court  Cour fédérale

Date: 20150925

Docket: IMM-7863-14

Citation: 2015 FC 1115

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, September 25, 2015

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

ASSITAN KEITA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Preliminary Remarks

[1] Tribunals benefit from a presumption of impartiality and, as such, any allegation of bias must be supported by concrete evidence and cannot be raised lightly (*Panov v Canada (Minister of Citizenship and Immigration)*, 2015 FC 716 at para 20 [*Panov*]; *Arthur v Canada (Attorney General)*, 2001 FCA 223, [2001] FCJ 1091 at para 8 [*Arthur*]). It was in *Committee for Justice and Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369 [*Committee for Justice and*

Liberty], that the Supreme Court defined the applicable test for determining apprehension of bias:

> [40] [T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. [T]hat test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude.
>
> *Committee for Justice and Liberty*, above, at para 40.

[2] The identity of a refugee claimant is vital to any refugee protection claim and if a claimant fails to establish his identity to the satisfaction of the Refugee Protection Division [RPD], the RPD may draw a negative conclusion as to his credibility (*Matingou-Testie v Canada (Minister of Citizenship and Immigration)*, 2012 FC 389 at para 2 [*Matingou-Testie*]; section 106 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]).

II. Introduction

[3] This is an application for leave and for judicial review under subsection 72(1) of the IRPA from a decision of the RPD of the Immigration and Refugee Board [IRB], dated May 15, 2014, finding that the applicant was neither a refugee nor a person in need of protection within the meaning of sections 96 and 97 of the IRPA.

III. Facts

[4] The, Assitan Keita, is a 21-year old citizen of Mali from the village of Sinzani. Her family is Malinké, a caste group of the Masseren dynasty.

[5] According to the applicant, her father has a great deal of control over his daughters. When the applicant was only seven years old, her father promised her in marriage to an older man who already had two women as wives.

[6] When she was 13 years old, the applicant fell in love with a boy who was Griot, which is a lower caste than Malinké. When her father was apprised of this relationship, he purportedly beat the applicant several times.

[7] In order to facilitate the marriage of the applicant to the older man, the applicant and her father went to the police station in Batala to obtain a national identity card for the applicant.

[8] The applicant's mother, who wished to help her daughter flee Mali, applied for a visa in the applicant's name by filing false documents (airplane tickets, passport and attendance certificate application). The applicant fled Mali with false documents on April 2, 2012, and arrived in Canada on April 3, 2012. A claim for refugee protection was filed on June 3, 2012.

IV. Decision

[9] The decision that is subject to judicial review is that of the RPD, dated May 15, 2014, in which the RPD refused to recognize the applicant as a refugee or person in need of protection within the meaning of sections 96 and 97 of the IRPA, following the RPD's determination that it was not satisfied as to the identity of the applicant.

[10] At the hearing, the applicant acknowledged that the visa she had obtained as well as the airline tickets she had presented when she made her claim for refugee protection were false; however, she testified under oath that her national identity card and passport – which had been seized by immigration services when she claimed refugee protection in Canada (Applicant's Memorandum, para 17) – were genuine. Only her national identity card was presented at the hearing to confirm her identity.

[11] During the hearing, the RPD raised a number of irregularities with regard to her national identity card: the date of issuance had been corrected by hand; the applicant's fingerprints were missing; and the applicant had been described as being "the son of". The RPD was not satisfied with the explanations given by the applicant at the hearing to the effect that fingerprints were not required of minors and errors were a common occurrence in Mali. Unsatisfied as to the applicant's identity, the RPD did not examine the remaining parts of the applicant's claim for refugee protection.

V. Issues

[12] The Court considers that the application raises the following issues:

1) Was the RPD's decision that the applicant had failed to establish her identity, on a balance of probabilities, reasonable?
2) Did the RPD member breach his duty of impartiality?

VI. Statutory provisions

[13] The following statutory provisions of the IRPA and *Refugee Protection Division Rules*, SOR/2012-256 [Rules] apply:

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

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 themself of the protection of that country,

(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,

(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.

Credibility

106. The Refugee Protection Division must take into account, with respect to the credibility of a claimant, whether the claimant possesses acceptable documentation establishing identity, and if

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 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.

Crédibilité

106. La Section de la protection des réfugiés prend en compte, s'agissant de crédibilité, le fait que, n'étant pas muni de papiers d'identité acceptables, le demandeur ne peut raisonnablement en

not, whether they have provided a reasonable explanation for the lack of documentation or have taken reasonable steps to obtain the documentation.	justifier la raison et n'a pas pris les mesures voulues pour s'en procurer.
Documents	**Documents**
11. The claimant must provide acceptable documents establishing their identity and other elements of the claim. A claimant who does not provide acceptable documents must explain why they did not provide the documents and what steps they took to obtain them.	**11**. Le demandeur d'asile transmet des documents acceptables qui permettent d'établir son identité et les autres éléments de sa demande d'asile. S'il ne peut le faire, il en donne la raison et indique quelles mesures il a prises pour se procurer de tels documents.

VII. Parties' positions

[14] First, the applicant argues that the member's decision that she had failed to establish her identity was unreasonable, unfounded and arbitrary. In particular, the applicant submits that during her testimony before the RPD she had provided explanations with regard to irregularities raised by the RPD about her national identity card. Furthermore, she had declared under oath that the national identity card was genuine; and, she had described the circumstances under which she had obtained the national identity card. The applicant further argues that the RPD disregarded other documents provided at the hearing and failed to consider other evidence raised during her testimony.

[15] Subsidiarily, the applicant contends that the RPD member cast doubt on his impartiality by asking that the applicant's counsel clearly state her "objection" if she wanted to make an objection. The member dismissed all of her objections; and issued his decision immediately after

counsel for the applicant had made her submissions. The applicant submits that members must, at all times, be above reproach and objective, and they must show the most basic courtesy and politeness (*Hernandez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 179 at para 44 [*Hernandez*]; *Guemarche v Canada (Minister of Citizenship and Immigration)*, 2004 FC 870). According to the applicant, the member had been the subject of a judicial review in a previous decision, *Saint-Eustache v Canada (Minister of Citizenship and Immigration)*, 2012 FC 511 [*Saint-Eustache*]. Although the case law recognizes that allegations of bias must be raised at the earliest opportunity, the applicant argues that in *Munoz v Canada (Minister of Citizenship and Immigration)*, 2012 FC 227, the Court nonetheless allowed that application for judicial review on grounds of bias.

[16] For its part, the respondent maintains that the issue of identity is a fundamental element in a refugee claim and that, where the RPD is not satisfied, on a balance of probabilities, as to the identity of an applicant, it is fatal to the success of a refugee claim (*Bhuiyan v Canada (Minister of Citizenship and Immigration)*, 2003 FCPI 290 at para 10; *Najam v Canada (Minister of Citizenship and Immigration)*, 2004 FC 425 at para 16). The respondent submits that the RPD has wide discretionary latitude with respect to assessing the probative value of evidence of the identity of a claimant (*Yogeswaran v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 48; *Yogorajah v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1318). The respondent asserts that given the material insufficiencies that cast doubt on the probative value of the national identity card, and the fact that no other trustworthy piece of identification was submitted by the applicant, the member's decision was reasonable.

[17] As to the issue of bias, the respondent argues that such allegations must be supported by serious and substantial evidence (*Arthur*, above at pp 349-350). Thus, the respondent maintains that the applicant's allegations are not supported by the evidence, but rather, consist of mere impressions, and that the member had only commented to counsel for the applicant with regard to the conduct and smooth functioning of the hearing. The case law of this Court clearly affirms that the RPD may render its decision from the bench if additional deliberations are not necessary (*Eslami v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No. 1007 (FC), upheld on appeal [2001] FCJ No. 117 (FCA); *Stapleton v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1320 at para 30 [*Stapleton*]).

VIII. Standard of review

[18] Issues of identity and of credibility are questions of fact that are reviewable on a reasonableness standard (*Selvarasu v Canada (Citizenship and Immigration)*, 2015 FC 849; *Diallo v Canada (Minister of Citizenship and Immigration)*, 2014 FC 471; *Aguebor v Canada (Minister of Employment and Immigration)*, (1993), 160 NR 315 (FCA)). The RPD's decision is reasonable if it is justifiable, transparent and intelligible, and if it falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

[19] Otherwise, the case law has consistently held that allegations of bias on the part of a member raise issues of procedural fairness that are reviewable on a correctness standard (*Panov*, above; *Saint-Eustache*, above).

IX. Analysis

[20] This is a judicial review of a decision made by the same member.

A. *Identity of Ms. Keita*

[21] A refugee claimant bears the onus of establishing their identity, on a balance of probabilities, by providing acceptable documents confirming their identity (Rule 11 of the Rules; *Su v Canada (Minister of Citizenship and Immigration)*, 2012 FC 743; *Malambu v Canada (Minister of Citizenship and Immigration)*, 2015 FC 763). A claimant's identity is vital to any claim for refugee protection and a failure to establish identity on the part of a claimant to the RPD's satisfaction may lead it to draw a negative conclusion as to his credibility (*Matingou-Testie*, above, at para 2; section 106 of the IRPA). When making identity findings, the RPD must take into account the totality of the evidence relevant to the identity of the refugee claimant before it (*Yang v Canada (Minister of Citizenship and Immigration)*, 2009 FC 681 at para 6). It is important to recall that the issue of identity is at the very core of the RPD's expertise and that this Court should be circumspect with respect to identity findings made by it (*Toure v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1189 at paras 31-32; *Rahal v Canada (Minister of Citizenship and Immigration)*, 2012 FC 319 at para 48).

[22] At the hearing, the applicant admitted that only the national identity card was genuine and that all of the other documentation in the record was false.

[23] From the start of the hearing, the member expressed doubts about the national identity card and clearly set out the reasons why he believed the national identity card had been falsified:

> [TRANSLATION]
>
> And the original of your identity card, here we can see that the date of issuance of the national identity card has been altered, written over, for starters. In addition, we notice that your real identification photo on it has been stapled to (inaudible). And lastly, this identity card is issued, signed by the commander – commander of a search brigade. It describes you as being the son of, rather than the daughter of; it stated that you were N-É [born] instead of N-É-E [born—but with the appropriate feminine "e" ending].
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> (Hearing Report, Assitan Keita, MB2-03291, May 15, 2014 at p 6)

[24] Later on, the member questioned the applicant about each irregularity in order to allow her the opportunity to fully explain herself. The member asked the applicant whether she had other documents that could establish her identity, as he was still unsatisfied. The applicant was unable to provide further documentation, admitting that only the national identity card was genuine. The RPD did not take the applicant's passport into consideration in light of the fact that the national identity card had been used to obtain that passport.

[25] The RPD's decision that the applicant had failed to establish her identity to its satisfaction was therefore reasonable, given that the RPD considered the totality of the evidence adduced at the hearing, the applicant's testimony, and the explanations provided by her.

B. *Member's bias*

[26] Tribunals benefit from a presumption of impartiality, thus, any allegation of bias must be supported by concrete evidence and cannot be raised lightly (*Panov*, above, at para 20; *Arthur*, above, at para 8). It was in *Committee for Justice and Liberty*, above at para 40, that the Supreme Court set out the applicable test to determine whether there is a reasonable apprehension of bias:

> [40] [T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. [T]hat test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude.

[27] It should be noted that a person alleging an apprehension of bias needs only to demonstrate, on a balance of probabilities, the existence of an appearance of bias (*Panov*, above, at para 19; *Cipak v Canada (Minister of Citizenship and Immigration)*, 2014 FC 453 at para 33). However, when a person alleges an appearance of bias on the part of a member, they must raise that apprehension at the earliest opportunity in order to allow the decision maker to recuse themselves, if necessary. The failure to meet that test generally amounts to an implied waiver of the right to invoke bias in subsequent proceedings (*Andrade v Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 FC 1007 at para 25; *Jerome v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1419 at para 18 [*Jerome*].

[28] A case very similar to the matter in issue here, wherein the applicant alleged an appearance of bias, was dismissed owing to the fact that the applicant had failed to raise the argument of bias at the earliest opportunity (see *Jerome*, above, at para 18). Nevertheless, the Court shall still proceed with the analysis of bias.

[29] RPD members play an essential role in Canada's refugee system. Given this essential role, "members must, at all times, be above reproach and objective, especially because, in practice, this is often a claimant's only opportunity to be heard in person" (*Hernandez*, above at para 44).

[30] At the hearing before the RPD, counsel for the applicant and the member had exchanges that were not always harmonious (see, in particular, pp 19-22, 31-32, 51-53 and 55-56 of the Hearing Report). In his decision, the member made comments specifically about the conduct of the applicant.

> [7] The panel asked counsel for the claimant to make her submissions at the end of the hearing. Rather than focusing on objective factors drawn from an analysis of the case, all her submissions consisted of reminding the member that he was not qualified to analyze documents, that he did not have legal expertise and that he was nothing but a mere member.
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> (RPD decision, dated May 15, 2014, at para 7)

[31] In light of the circumstances and the facts that arise from the case, the member's conduct was appropriate and showed objectivity towards the applicant. His behaviour towards the applicant was acceptable. Upon reading the Hearing Report, the member began by asking counsel to raise her objections in accordance with her professional code of conduct, to which counsel twice replied that [TRANSLATION] "this is the first time a member has asked me to do that" (Hearing Report, p 21). Furthermore, counsel interrupted the member a number of times. Next, when the member twice rejected objections made by the applicant's counsel, she laughed at the member's decision, stating [TRANSLATION] "What a surprise" (Hearing Report, p 32). Later, counsel for the applicant reminded the member at the hearing that he [TRANSLATION] "had no legal expertise" (Hearing Report, p 52). Lastly, when the member issued his decision and pointed out that counsel for the applicant had made comments that showed "what little consideration she held for the IRB", she responded "It's not the IRB. It's you." (Hearing Report, p 55).

[32] The conduct of the RPD member does not amount to an apprehension of bias. This Court acknowledges that although the conduct of members is not always ideal in certain circumstances, this does not mean that it was biased:

> [19] I acknowledge that the transcript shows that there were some sharp exchanges between the Applicant's counsel and the Member. However, these particular exchanges were not between the Member and the Applicant and did not take place until well into the hearing. At no time did the Member ask an inappropriate question or address a negative remark to the Applicant. In the presence of the exchanges between counsel and the Member, I do not doubt that everyone in the room felt uncomfortable. However, the fact that the Applicant may have felt uncomfortable – or even intimidated – does not amount to bias.
>
> [22] In addition, a well-informed person would likely appreciate that counsel for the Applicant must bear some responsibility for the difficulties that arose during the hearing. On at least two occasions prior to the mid-hearing conference, the Member asked counsel to be more respectful: First, after counsel refused the Member's request that he stop repeating questions, and again after counsel interrupted the Member when she sought to clarify an aspect of the Applicant's evidence (see CTR at 330-331, 346-347). <u>While the Member clearly allowed her frustration with counsel to show in her body language, her tone of voice and certain of her remarks to counsel, her conduct, although possibly intemperate and regrettable, does not amount to a reasonable apprehension of bias</u>. [Emphasis added.]
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> (*Ramirez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 809)

[33] As for the applicant's argument that the decision maker was biased even before hearing the case, it is without basis. To the extent that the member considered the allegations and the evidence in the record, "the brevity of a decision maker's deliberations [does not] establish *per se* that the decision maker was biased prior to [considering] the evidence and arguments of either party." (*Blanco v Canada (Minister of Citizenship and Immigration)*, 2010 FC 280 at para 11; *Stapleton*, above, at para 30).

X. Conclusion

[34] The Court finds the RPD's decision to be reasonable. Accordingly, the application for judicial review is dismissed.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review be dismissed. There is no question of general importance to certify.

"Michel M.J. Shore"

Judge

Certified true translation
Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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