

Cour fédérale



Federal Court

**Date: 20160526**

**Docket: IMM-3557-15**

**Citation: 2016 FC 584**

**Ottawa, Ontario, May 26, 2016**

**PRESENT: The Honourable Madam Justice Heneghan**

**BETWEEN:**

**DJENEBA SOW**

**Applicant**

**and**

**MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. INTRODUCTION**

[1] Ms. Djeneba Sow (the “Applicant”) seeks judicial review of a decision of the Immigration and Refugee Board, Refugee Appeal Division (the “RAD”), dated July 17, 2015. In that decision, the RAD confirmed the decision of the Immigration and Refugee Board, Refugee Protection Division (the “RPD”) whereby the Applicant’s claim for protection pursuant to

section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the “Act”) was dismissed.

## II. BACKGROUND

[2] The Applicant sought protection under the Act on the basis of her identity as a citizen of Mauritania who feared being killed or forced into slavery, if returned to her country of nationality. She claimed that she had been enslaved for a seven-year period during which she had been abused and raped by her captors.

[3] The RPD did not believe that the Applicant was credible with respect to her evidence establishing identity. It found that she had not established her identity as a citizen of Mauritania and said the following at paragraph 18 of its decision:

The panel finds that the claimant has not established her personal or national identity and has not made reasonable attempts to do so. In addition, the panel assigned a significant negative credibility inference to the claimant’s testimony in support of her identity and nationality.

[4] Upon her appeal to the RAD, the Applicant sought to introduce new evidence consisting of the following:

- the affidavit of Germaine Ngono, a social worker, dated November 8, 2013;
- the affidavit of Ziah Sumar, an articling student employed by the Applicant’s Counsel, dated November 12, 2013;

- an email from Counsel for the Applicant to the Consulate of Mauritania dated November 1, 2013;
- an email from Counsel for the Applicant to the Consulate of Mauritania date November 11, 2013; and
- the affidavit of Emre Esensoy, law clerk employed by the Applicant's Counsel, dated May 7, 2014.

[5] In conjunction with her efforts to introduce new evidence, the Applicant requested an oral hearing.

### III. THE DECISION OF THE RAD

[6] The RAD addressed itself to subsection 110(4) of the Act. It determined that the first item of new evidence, the affidavit of Germain Ngono, tendered to support the Applicant's identity, was admissible because it purported to address issues that arose during the RPD hearing. However, the RAD assigned this document little evidentiary weight because it did not provide independent evidence to establish the Applicant's identity.

[7] In considering the second item, that is the affidavit of an articling student employed by Counsel for the Applicant, the RAD found that it did not provide evidence to confirm the identity of the Applicant and assigned it very little weight.

[8] The RAD accepted items three and four, that is emails, as new evidence, on the basis that the emails described efforts of the Applicant's Counsel to obtain further information about the identity of the Applicant. At paragraph 29, the RAD expressed its own opinion about the proposed new evidence as follows:

The RAD finds that the proposed new evidence (items one to four) provide evidence of the Appellant's activities to locate her original birth certificate or obtain replacement identity documents. These documents have adduced no persuasive evidence to support the identity of the Appellant. The RAD will consider and address the Appellant's inability to obtain replacement identity documents with "the merits of the appeal" below.

[9] The fifth item, the affidavit of Emre Esensoy, was not admitted as new evidence since the RAD found that the Applicant had not provided an adequate explanation why this document could not have been provided to the RPD.

[10] The RAD proceeded to review its role, in light of the decision of the Federal Court in *Huruglica v. Canada (Minister of Citizenship and Immigration)*, [2014] 4 F.C.R. 811.

[11] The RAD accorded little weight to a photocopy of the Applicant's birth certificate which had been in evidence before the RPD and rejected by that tribunal, as being evidence capable of proving her identity. Ultimately, the RAD concluded that in its review of the record of proceedings before the RPD, including review of an audio recording of the Applicant's hearing, that there was "sufficient evidence to support the RPD's overall determination" and dismissed the appeal.

IV. SUBMISSIONS

A. *The Applicant*

[12] In this application for judicial review, the Applicant argues that the RAD unreasonably determined that she had failed to establish her identity. She submits that the RAD failed to adequately consider her attempts to obtain documentation to establish her identity as required by section 106 of the Act.

[13] Section 106 provides as follows:

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 not, whether they have provided a reasonable explanation for the lack of documentation or have taken reasonable steps to obtain the documentation.

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 justifier la raison et n’a pas pris les mesures voulues pour s’en procurer.

[14] The Applicant submits that the proper application of section 106 requires the RPD to consider first whether there is acceptable documentation to establish identity, and if there is not, to determine if an applicant took reasonable steps to obtain that documentation; see the decisions in *Zheng v. Canada (Citizenship and Immigration)*(2008) 74 Imm. L.R. (3d) 28 (F.C.) at paragraph 14 and *Sow v. Canada (Minister of Citizenship and Immigration)* (2015), 472 F.T.R. 303.

[15] The decision making power of the RAD is set out in subsection 111(1) of the Act which provides as follows:

111 (1) After considering the appeal, the Refugee Appeal Division shall make one of the following decisions:

111 (1) La Section d'appel des réfugiés confirme la décision attaquée, casse la décision et y substitue la décision qui aurait dû être rendue ou renvoie, conformément à ses instructions, l'affaire à la Section de la protection des réfugiés.

(a) confirm the determination of the Refugee Protection Division;

(b) set aside the determination and substitute a determination that, in its opinion, should have been made; or

(c) refer the matter to the Refugee Protection Division for re-determination, giving the directions to the Refugee Protection Division that it considers appropriate.

[16] In my opinion, this provision implicitly authorizes the RAD to exercise certain functions of the RPD depending upon the nature of the issue before the RAD. Since the RAD is mandated to set aside a decision the RPD and substitute its own determination, it can interpret and apply section 106.

[17] The RAD found that it was reasonable to believe that other methods were available to establish her identity but failed to articulate what those methods were. The Applicant argues that

this finding is baseless and arbitrary and amounts to a reviewable error; see the decision in *Sharfi v. Canada (Minister of Citizenship and Immigration)* (2005) 277 F.T.R. 104 (F.C.).

[18] The Applicant also argues that the RAD's independent assessment of the photocopy of her birth certificate and the affidavit of Imam Daouda Sy was unreasonable. According to the Applicant, the RAD made inconsistent findings about the Applicant's reason for photocopying her birth certificate. She further submits that the RAD failed to apply the presumption that a document is presumed to be genuine; see the decision in *Rasheed v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 587.

[19] The Applicant challenges the little weight afforded to the affidavit of Imam Daouda Sy by the RAD. She submits that the affidavit lends credibility to her identity and has value.

[20] The Applicant also argues that the RAD breached procedural fairness by failing to conduct an oral hearing despite the fact that her credibility was a central issue. She submits the RAD made several negative credibility findings without putting those concerns before her.

B. *The Minister of Citizenship and Immigration (the "Respondent")*

[21] The Respondent submits that the standard of review of the RAD's assessment of evidence is reviewable on the standard of reasonableness; see *Sow, supra* and *Singh v. Minister of Citizenship and Immigration*, 2014 FC 1022.

[22] The Respondent argues that the Applicant bore the burden of establishing her identity and the RAD reasonably determined that she did not discharge that burden.

[23] The Respondent submits that the RAD considered the evidence about the Applicant's efforts to obtain documents establishing her identity and found those efforts were not reasonable. Contrary to the Applicant's submissions, the RPD did specify other avenues by which she could obtain identity documents, including contacting government offices in Mauritania. Further, the Respondent contends that the RAD does not need to specify more avenues.

[24] The Respondent argues that the RAD's decision was reasonable because its finding, that the Applicant had not established her identity, was based upon the lack of credible documentation and the lack of credible testimony.

[25] In response to the Applicant's argument that the RAD made inconsistent findings about her birth certificate, the Respondent says paragraph 42 of the decision is a typographical error.

[26] The Respondent submits that the RAD reasonably rejected the photocopy of the birth certificate; see the decisions in *Petlyuchenko v. Minister of Citizenship and Immigration*, 2002 FCT 982 and *Sedov v. Minister of Citizenship and Immigration*, [1999] F.C.J. No. 1667.

[27] Finally, the Respondent argues that no breach of procedural fairness arose from the failure to hold an oral hearing. Section 110(6) of the Act prescribes when the RAD may hold a hearing:



(6) The Refugee Appeal Division may hold a hearing if, in its opinion, there is documentary evidence referred to in subsection (3)	(6) La section peut tenir une audience si elle estime qu'il existe des éléments de preuve documentaire visés au paragraphe (3) qui, à la fois :
(a) that raises a serious issue with respect to the credibility of the person who is the subject of the appeal;	a) soulèvent une question importante en ce qui concerne la crédibilité de la personne en cause;
(b) that is central to the decision with respect to the refugee protection claim; and	b) sont essentiels pour la prise de la décision relative à la demande d'asile;
(c) that, if accepted, would justify allowing or rejecting the refugee protection claim.	c) à supposer qu'ils soient admis, justifieraient que la demande d'asile soit accordée ou refusée, selon le cas.

[28] The Respondent submits that since the Applicant failed to establish her identity, the RAD was not required to consider the merits of her claim, including the credibility of the Applicant.

[29] Subsequent to the hearing of this application for judicial review on February 1, 2016, the Federal Court of Appeal delivered its decision in *Minister of Citizenship and Immigration v. Singh*, 2016 FCA 96. Pursuant to a Direction issued on April 1, 2016, the parties were given the opportunity to comment on the application of that decision to this matter.

[30] The Applicant filed further submissions on April 5, 2016 in which she argued that the decision in *Singh, supra* did not apply to this proceeding as that decision addressed the admission of evidence under section 110(4) of the Act.

[31] The Respondent in a letter dated April 8, 2016 agreed that the *Singh* decision did not have an impact on the present judicial review application.

V. DISCUSSION

[32] The Applicant raises two discrete issues in this application. The first, an issue of procedural fairness, is reviewable on the standard of correctness; see the decision in *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339 at paragraph 43. The second, broadly speaking, applies to the ultimate conclusion of the RAD, that she had failed to establish her identity; that is a question of fact reviewable on the standard of reasonableness; see the decision in *Sow*, *supra* at paragraph 9.

[33] The Applicant's submissions about breach of procedural fairness turn on the refusal of the RAD to convene an oral hearing of her appeal, after it had decided to accept the new evidence presented. The acceptance of new evidence by the RAD does not automatically mean that an oral hearing will be accorded. I referred to subsection 110(6) of the Act, which is set out above.

[34] In my opinion, this provision gives the RAD discretion whether to allow an oral hearing, when it accepts new evidence. Since it has a discretion, it is not obliged to conduct an oral hearing, arguably on the grounds that it is satisfied that it can determine the relevant issue without a hearing.

[35] I am not persuaded that a breach of procedural fairness arose from the RAD's decision to proceed without an oral hearing.

[36] The next question is whether the RAD's ultimate conclusion, that the Applicant had failed to establish her identity with reliable and probative evidence, is reasonable. In my opinion, it is.

[37] The RAD considered the photocopy of the birth certificate presented by the Applicant. In my opinion, the presumption of validity that generally applies to official government documents does not apply to a photocopy of such a document.

[38] I have reviewed the affidavits that were presented by the Applicant. I see no reviewable error in the findings of the RAD that the affidavits were insufficient to overcome the concerns about the Applicant's identity.

[39] While the new evidence presented by the Applicant shows her efforts to obtain further documentation, I am not persuaded that the RAD erred in its assessment of that evidence. In my opinion, the Applicant seeks to have this court re-weigh evidence that was before the RAD, which is not the appropriate role of a reviewing court; see the decision in *Khosa, supra* at paragraph 61.

[40] The jurisprudence is well established that the failure of an applicant to establish his or her identity is fatal to further consideration of a claim for protection; see the decisions in *Rahal v.*

*Canada (Minister of Citizenship & Immigration)*, 2012 FC 319 and *Flores v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1138.

[41] In the result, I am satisfied that no reviewable error has been shown and this application for judicial review is dismissed, there is no question for certification arising.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** this application for judicial review was dismissed, no question for certification arising.

“E. Heneghan”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-3557-15

**STYLE OF CAUSE:** DJENEBA SOW v MINISTER OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** FEBRUARY 1, 2016

**JUDGMENT AND REASONS:** HENEGHAN J.

**DATED:** MAY 26, 2016

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