Federal Court  Cour fédérale

Date: 20161018

Docket: IMM-5287-15

Citation: 2016 FC 1157

Ottawa, Ontario, October 18, 2016

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

ASSIYA FADIGA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is a judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act], of a November 2, 2015 decision by an Immigration Officer (the Officer) rejecting the Applicant's Pre-Removal Risk Assessment (PRRA) application.

[2] The Applicant argues that the Officer erred in his treatment of the corroborative evidence and in reaching the negative credibility findings.

[3] A review of the Officer's decision reveals no reviewable error and, as such, the application is dismissed.

I. Background

[4] The Applicant is a citizen of Guinea. She alleges that in 2007 she became pregnant from relations with a Christian man outside of wedlock. Her Muslim family considered this to be dishonourable and allegedly forced her to marry an older man. She had a second child from this relationship but it passed away after less than one month following a forced excision. She also alleges mistreatment and death threats from her husband. She alleges a fear of persecution from her aunt and uncle (her adoptive parents) and her husband.

[5] In January 2013, the Applicant left Guinea for Canada using a false passport. After the minister intervened, it was determined that the Applicant had made requests for temporary visas in the United States in 2007 and Paris, France in 2009 using a different name and with different dates of birth. The Refugee Protection Division (RPD) rejected her claim on November 8, 2013. It found that she had not established her identity and that her claim suffered from serious credibility deficiencies.

II. The Impugned Decision

[6] The Applicant's PRRA application sought to rebut the RPD's credibility findings on her original claim and to raise two new sources of risk: first, she has become pregnant, from a man who is not her husband, while in Canada; and second, she would be at risk of contracting the Ebola virus upon her return to Guinea. The Officer gave little weight to the new evidence filed by the Applicant and rejected her PRRA application.

III. Issues

[7] This application raises the issue of whether the Officer's rejection of the new evidence and its assessment was reasonable.

IV. Standard of Review

[8] The standard of reasonableness applies to the weighing of evidence by the Officer. The Court will not intervene unless the credibility analysis falls outside the range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

V. Analysis

[9] The Applicant submits three arguments: 1) that the Officer erred in dismissing the Applicant's sister's affidavit; 2) that the Officer erred in dismissing the expert report; and 3) that the Officer erred in reaching a negative finding on credibility without conducting an oral hearing.

A. *The Applicant's Sister's Affidavit*

[10] The Applicant submits that the Officer's dismissal of the Applicant's sister's affidavit was unreasonable. First, the Officer erred by relying on the RPD's negative credibility findings to discredit this new evidence. Second, it improperly found that the evidence was self-serving as it came from the Applicant's sister. Evidence cannot be discounted because it comes from relatives or friends, especially when they are in the best position to corroborate certain events (*Abusaninah v Canada (Citizenship and Immigration)*, 2015 FC 234, at paras 38-42). Furthermore, the Applicant argues that the Officer's other grounds for discrediting the affidavit, notably its poor quality, are unfounded.

[11] There are several valid grounds raised by the Officer upon which to reject the sister's declaration, or conversely, to give it little weight. First, her declaration principally contains evidence that could have been made available to the RPD and it raises the same issues that were before the RPD. With respect to the authentication of the document (that the document is what it is purported to be), given that the Applicant could not establish her identity before the RPD or the Officer, the same disability applies to the identification of the sister and her affidavit. Indeed,

at the hearing, Applicant's counsel stated his understanding that the affidavit was intended to establish her identity.

[12] Similarly, the Officer did not err in pointing out other problems with the affidavit's authentication due to the absence of any evidence as to how the affidavit came into the Applicant's possession, the illegibility of some parts of it, and errors in some of the dates contained in it. The document itself is unreliable regardless of its contents.

[13] The Officer also raised substantive problems with the statements found in the affidavit: their being in large part reiterations of allegations already judged not to be credible by the RPD; their not being corroborated by other objective evidence; and the author being a member of the Applicant's family. For all these reasons, the Officer concluded that it was "une preuve intéressée", which the Applicant has translated to mean "self-serving".

[14] There is also no error in giving reduced weight to evidence from the sister of an Applicant. When decision-makers in immigration matters make reference to "self-serving" evidence, this usually relates, for the most part, to the obvious partiality that family members have for each other's well-being normally resulting in a significant reduction in the weight attributed to their evidence. This can be mitigated if the document is corroborated by other objective evidence, or is rehabilitated by persuasive testimony before the decision-maker.

[15] The evidence is also self-serving in the sense that this term bears in the law of evidence as the declarant receives some benefit from the result. The best example is the situation where

the supporting documents authored by a party are declared inadmissible in civil proceedings because the evidence is said to be self-serving. In immigration matters, a reasonable apprehension may arise of some potential benefit to the corroborating family member from the Applicant obtaining permanent resident status in Canada. This would include such advantages as sponsorship possibilities, assistance in an application for permanent residency, or future financial assistance from the better economic situation of a successful applicant presented in Canada. I find that it is not unreasonable to attribute some degree of personal interest to the sister from the circumstances in this matter. However, partiality is usually the nub of the issue in terms of the reliability of evidence from family members.

[16] The real problem, however, is that the sister's declaration is obviously hearsay, constituting an out-of-court statement where the deponent is not subject to cross-examination. In most other truth-seeking legal processes in Canada, the declaration of the sister would likely not be admissible due to the hearsay rule.

[17] This distinguishes the current circumstance with the one in *Maldonado v Canada (Employment and Immigration)*, [1980] 2 FC 302 [*Maldonado*]. In that case, the Applicant was before the RPD and had the benefit of doubt concerning her evidence unless proven otherwise. The main distinction is that in other truth-seeking legal processes in Canada, normally what the principal party testifies to, is corroborated by other available reliable evidence to bolster its weight. *Maldonado* is not really an exception to ordinary evidence rules whereby persons testifying are considered to be telling the truth until proven otherwise. But the point is that the *Maldonado* principle applies only to an applicant whose evidence may be tested for reliability.

[18] For hearsay evidence to be admissible, the evidence would normally have to comply with the requirements of the "principled approach" by establishing its necessity and reliability: *R v Khan*, [1990] 2 SCR 531. These requirements balance the interests of justice while maintaining the reliability of the evidence in order to ensure the integrity of the truth-seeking legal process. Regardless of necessity, the requirement to demonstrate the reliability of the evidence remains as a separate factor. See for example the summary of these requirements from *R v Khelawon*, [2006] 2 SCR 787, in The Law of Evidence in Canada, Sopinka, Lederman & Bryant [Sopinka], 4th edition, page 265 at para 6.92 as follows:

> When the optimal test of contemporaneous cross-examination is not possible, rather than simply losing the value of the evidence, it becomes necessary in the interests of justice to consider whether it should nonetheless be admitted in its hearsay form. The criterion of reliability is about ensuring the integrity of the trial process. Although needed, the evidence will not be received unless it is sufficiently reliable to overcome the dangers arising from the difficulty in testing it.
>
> [Emphasis added]

[19] It has been recognized that exceptions to the hearsay rule are necessary in immigration law because witnesses living abroad are not available for examination. However, the common sense requirement remains to ensure that the reliability principle has been complied with. Otherwise, the integrity of the truth-finding functions of immigration administrative tribunals will be undermined.

[20] The fact that the statement is sworn or attested to be true has very little or no bearing on the document's reliability. It is assumed that witnesses will tell the truth. An oath will not

prevent dishonest persons from misrepresenting the truth and is not necessary for honest deponents. The truth-seeking function of hearings is to test for dishonesty and to determine the reliability of the evidence. The purpose of swearing to the truth is for its deterrent effect as a basis for a possible charge of perjury. This has no application for statements made outside of Canada or, for that matter, for applicants intentionally lying in immigration matters.

[21] The Applicant in this case, as with applicants in many other cases, is critical of the Officer diminishing the weight of evidence from her sister on the grounds that it is "self-serving". From my comments above, the Court recognizes that the term is somewhat confusing, but nevertheless probably appropriate as the catchall term to describe an outcome of diminished reliability of a family member's evidence.

[22] The justification for permitting out-of-court evidence of family members is on the basis of necessity. In these situations, there is no other source of information available to corroborate an applicant's narrative. Family members may be witnesses to the conduct complained of or involved in events, such as in this case of going to the police. In these cases, they may be the only persons who can provide the evidence in the sworn statements. See for example the recent decision in *Shilongo v Canada (Citizenship and Immigration)*, 2015 FC 86, at para 29 as follows:

> [29] Part of that finding was based on the Officer's view that the sworn statements could not be trusted because they were from the Applicant's family members. In my view, that was unreasonable. Although it is often better for such evidence to be corroborated (*Ferguson v Canada (Citizenship and Immigration*), 2008 FC 1067 (CanLII) at para 27, 74 Imm LR (3d) 306), it was still sworn testimony, and it is difficult to know what other evidence could reasonably be expected in a situation like this. After all, a threat such as that alleged would never have been made to someone

> completely uninterested in the Applicant's life, and if the sworn statements are true then the Applicant's mother and brother were the only witnesses; there could be no evidence of the incident of which they are not the ultimate source. As Mr. Justice Russel Zinn observed in a similar situation in *Rendon Ochoa v Canada (Citizenship and Immigration)*, 2010 FC 1105 (CanLII) at para 10, 93 Imm LR (3d) 113, they were "uniquely placed to provide evidence and are indeed the only people who could properly provide the evidence that is sworn to in their statements."

[23] With respect, the rationale described in this and other similar cases cited by the Applicant, speaks only to the necessity requirement. There is no consideration of the overriding reliability requirement. If the Applicant does not have sufficient evidence to support her case in the first instance, it is the Court's view that this cannot be a ground to give other insufficient reliable evidence more weight in order to establish an unreliable factual conclusion. Reliability must be an independent factor from that of necessity. Otherwise, the result would be to lower the threshold required to prove a fact, or a conclusion of mixed fact and law, below that of a probability or likelihood.

[24] It would be preferable if decision-makers described the deficiencies of out-of-court evidence from partial or interested witness in terms relating to its reliability, thereby requiring the weight attributed to the evidence to be reduced to some described extent. This task completed, the officer then may weigh the out-of-court evidence against the remaining evidence in the matter to determine its effect on the outcome of the decision.

[25] Courts reviewing these cases, on the other hand, should not view an officer's decision to diminish the weight placed on evidence described as "self-serving" when uncorroborated as an incorrect attribution of weight to the evidence or a reviewable ground to overturn the decision.

With respect, stated in this way the issue becomes merely one of semantics. There is an unavoidable reliability issue in respect of any out-of-court evidence, and it is usually significantly increased when its source is a family member or another person with an interest in the outcome.

[26] Necessity often gets the evidence admitted in immigration matters without the need to demonstrate its reliability. This is already a bonus for the Applicant in comparison with other truth-seeking legal processes in Canada, where the statement would likely be rejected out of hand. If corroborated by some objective evidence, the statement can be attributed more weight. I am of the view that *Ferguson v Canada (Citizenship and Immigration)*, 2008 FC 1067 properly states the law that unless such evidence is corroborated, it has little value (at para 27).

[27] Moreover, in sending the matter back for a review on this basis, there is a problem concerning what weight the Officer should attribute to it. Are such statements from family members to have the same probative value as statements made in a hearing that are subject to cross-examination? Are they in fact, to have more probative value than statements made by the Applicant, because the probative value of his or her evidence can be diminished by questioning during the hearing, while the out-of-court statements are to be taken at face value? Does the Officer avoid the problem by saying a reduced weight is attributed to the evidence, without qualifying how much weight is to be discounted? The bottom line is that one cannot pump up reliability by necessity. The value of the evidence is what it is, and nothing else, unless helped out by other evidence or probative considerations.

[28] In this matter, the Officer pointed out problems in relation to the authentication of the document and substantive qualitative issues relating to the circumstances of the author and the corroboration of its contents. There were also problems with the Applicant's identity referred to by the Officer. The Officer accorded little weight to the document and found that it was not possible to arrive at a conclusion on its source and reliability. It logically follows from these conclusions that the Officer found that the sister's declaration did not affect the Applicant's negative credibility assessment or alter the evaluation of risk from that determined by the RPD. I find no reviewable error in this analysis, or its conclusions relating to the sister's statement.

B. *The Expert Report*

[29] The Applicant submits that the Officer erred by not accepting the opinions expressed in the expert's report. She argues that its conclusions should have been accepted regardless of the fact that the report's underlying assumptions were discredited by the RPD or the fact that the expert was not a witness to the events related in her report. In particular, it is alleged that the Officer ignored the report's key findings concerning the perilous situation the Applicant would face upon retuning to Guinea having given birth out of wedlock to children in Canada and in Guinea, findings which the Applicant alleges are undisputed.

[30] The expert describes her qualifications gained over 10 years of residency work in various African countries including Guinea, focusing primarily on religion, politics, civil conflict and violence in these countries. No *Curriculum vitae* was attached to the expert opinion. In the immigration and refugee law context, there is no formal process for vetting and qualifying

someone as an expert, as practised in other areas of law as a safeguard to ensure that the person possesses the expertise claimed and can speak to the specific issues before the decision-maker.

[31] In this case, the expert offered opinions with respect to adultery being seen as an extremely serious form of crime in these societies, being subject to severe punishment by flogging and possibly even death by stoning. She also gave evidence on civil marriages not being considered proper or legitimate forms of marriage and the consequences of being pregnant out of wedlock in these communities. Her opinions extended to issues of domestic rape and violence against women, described as being common, in addition to the practice of female genital mutilation, although illegal still being extremely widespread. She also considered the Applicant's account of past abuse concluding that it was credible and entirely consistent with her knowledge of social practices and the status of women in Guinea. She similarly stated that upon returning to her home country, the Applicant would be seen as an adulteress, punished violently, and subject to extreme social ostracism.

[32] There are normally limitations on, or at least concerns about experts opining on the ultimate issue, or determinative issues to be decided by the decision-maker: see Sopinka, *supra* at para 12.150. The underlying view is that an expert should not be able to usurp the functions of the trier of fact. In addition, opinion evidence must be necessary, in the sense that it provides information which is likely to be outside the experience or knowledge of the decision-maker. The Sopinka text, *supra*, describes this point at para 12.59 as follows:

> In *R v. Mohan*, ([1994] 2 SCR 9) the Supreme Court held that opinion evidence must be necessary in the sense that it provides information "which is likely to be outside the experience or

> knowledge of a judge or jury". Thus, expert evidence must be necessary to assist the fact-finder to appreciate the facts due to their technical nature, or to form a correct judgment on a matter ordinary persons are unlikely to do so without the assistance of persons with special knowledge.

[33] In this matter, the expert is proffering evidence on issues central to the decision and in matters where the Officer would normally rely upon country condition documentation. She cites almost no documentation in support of her opinions. Moreover, she offers an opinion as to the credibility of the Applicant's account of her treatment prior to leaving Guinea and the near certainty of abusive treatment on return there.

[34] It is trite law that the Court owes much deference to the decisions of immigration administrative decision-makers because of their acknowledged expertise in the subject matter risk of refoulement that they deal with on a daily basis. Immigration officers follow a process adopted in conformity with directions from the Courts by which they evaluate risk situations following the established practice of consulting and citing country condition documentation compiled from a broad spectrum of reliable and independent sources as the objective foundation for their decisions.

[35] Reflecting on the duties of immigration officers and the manner whereby they discharge their functions, it would appear to the Court that accepting the expert's opinions in this matter would tend to usurp the Officer's statutory duties on matters that are not outside his experience or knowledge. This is not a case where an expert opinion is necessary to assist the Officer in appreciating the facts due to their technical nature or in forming a correct judgment. In addition, as seen here, recourse to an expert introduces subjective opinions where concerns arise about the

partiality and self-serving nature affecting forensic witnesses paid to provide assistance to a party by the opinions they offer the Court. This is in contradiction to a well-established process whereby independent and reliable documentary sources are consulted by officers trained and having an extensive expertise in the field to consider objective country condition evidence and apply it to determine the risk on refoulement of the applicant.

[36] In these circumstances, I conclude that the Officer did not erred in exercising his discretion to deny the admissibility of the expert report as unnecessary and tending to usurp his statutory functions.

[37] The Officer, however, admitted the report and thereafter critiqued it on various grounds. The Officer pointed out inconsistencies with the country condition documentation, such as that marriage between persons of different religions is common and generally well accepted in Guinea. He also noted an absence of any particular risk or danger in the documentation towards women bearing children outside of marriage, whether it related to persecution, ostracism or corporal punishment. The Officer cites other reports from the objective documentation that violent forced marriages have become a marginal phenomenon, being almost non-existent except in rural areas. He also noted the large number of associations springing up to defend the rights of women in Guinea. From his review of objective documentation, the Officer concluded that while there are difficulties with state protection in Guinea, the protection is considered adequate for the purposes of the Applicant. He also referred back to the essential problem that her narrative was rejected as not being credible, meaning that her personal situation and identity remained unknown for the specific application of the risk factors described in the documentation.

[38] In summary, I can find no reviewable error in the Officer preferring an analysis based upon objective country condition documentation in accordance with the practices of immigration officers, as opposed to the opinions of an expert opining on the same subject matter.

VI. Conclusion

[39] The application is dismissed and no question is certified for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed and no question is certified for appeal.

"Peter Annis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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