Date: 20060925

Docket: IMM-289-06

Citation: 2006 FC 1113

BETWEEN:

DIENE KABA and
FATOUMATA KABA

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT

PINARD J.

[1] This is an application for judicial review of a decision of Citizenship and Immigration Canada (CIC), dated December 16, 2005, denying the applicants' application for protection pursuant to a pre-removal risk assessment (PRRA).

I. The facts

[2] The principal applicant, Diene Kaba (the applicant), and her daughter, likewise an applicant in this proceeding, are citizens of Guinea. The applicant alleges that she has been in

fear of her husband, for herself and her daughter, for many years, since 1993 and more particularly since February 20, 2001.

[3] In January 1992, the applicant married Karou Kaba, the father of her daughter. All three left to live in Gabon in March 1992.

[4] While she was living in Gabon, the applicant made numerous trips to African countries and she also stayed in the United States from November 23 to December 1, 1996.

[5] On February 20, 2001, the applicant alleges, her husband made arrangements to carry out an excision of their daughter. However, the applicant managed to return in time and to flee with her daughter.

[6] In February 2001, the applicant travelled to France without her daughter, although she was already in possession of the necessary documents to leave Gabon with her.

[7] Following this stay in France, the applicant returned to Gabon to rejoin her husband and her daughter, who had stayed with her father.

[8] On April 2, 2001, the applicant obtained a Canadian visa issued in Libreville.

[9] On May 25, 2001, she left Gabon together with her daughter. They arrived in Canada on May 27, 2001, after travelling via Morocco and France.

[10] Upon her arrival in Canada, the applicant filed a refugee claim for her and her daughter of minor age, alleging that she feared her polygamous husband who was mistreating her and who wanted the excision of his daughter.

[11] On September 17, 2002, the Refugee Protection Division (the RPD) delivered a negative decision, denying the applicants status as refugees and as persons in need of protection. The RPD found a lack of credibility in the story as alleged, and a lack of subjective fear.

[12] In October 2002, an application for leave and for judicial review of this negative decision of the RPD was filed in this Court. This application for leave and for judicial review was dismissed on February 3, 2003.

[13] On March 3, 2003, the Case Processing Centre in Vegreville received the applicants' application for a visa waiver on humanitarian and compassionate grounds (HC).

[14] On December 16, 2005, the HC application was denied. The applicant filed an application for leave and for judicial review of this decision (IMM-290-06).

[15] However, on December 16, 2005, after the date for removal of the applicants from Canada had been set for February 28, 2006, the officer rejected the PRRA application that is the subject of this application for leave and for judicial review.

[16] On February 22, 2006, the applicants served a motion for a stay of their removal from Canada. This motion was joined with the two applications for leave and for judicial review filed by the applicants in opposition to the decisions concerning their PRRA application and their HC application.

[17] On February 27, 2006, a hearing was held on the motion to stay. After hearing from both parties, Blais J. dismissed the motion to stay. He found that the applicants had failed to demonstrate that they would suffer irreparable harm should they be returned to their country of origin.

II. Analysis

A. *Violation of natural justice*

[18] According to the applicant, the letters of Mr. Karou Kaba and the uncle Kabine were determinative of the application for protection since they confirmed a number of things she was arguing. The letter from her husband, Karou Kaba, demands that their daughter Fatoumata become a [TRANSLATION] “true Muslim” (i.e. excised), and confirms that the applicant runs the risk of serious and even deadly reprisals should he see her again. The letter from the uncle Kabine confirms both Mr. Karou Kaba’s threats against the applicant and the fact that the

applicant was beaten previously by her husband, as well as Mr. Karou Kaba's intention to excise his daughter.

[19] The applicant argues that by relying on questions of credibility, the officer decided not to assign any probative force to these two important documents, to the detriment of the applicant's right to a hearing.

[20] Also according to the applicant, the PRRA officer, in her HC decision, repeats the reasons given by the IRB for finding that she lacked credibility and refusing her refugee claim. In doing so, the officer questions the credibility of the applicant's entire story without even receiving her for an interview to clarify the so-called contradictions or inconsistencies that are alleged.

[21] The applicant argues that the necessity that refugee claimants be given a hearing by the decision-maker on questions of credibility and findings of fact was determined earlier by the Supreme Court of Canada in *Singh et al. v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, at page 231:

> There are additional reasons why the appellants ought to have been given an oral hearing. They are mentioned in the following submission with which I agree:
>
> > The Appellants submit that although "fundamental justice" will not require an oral hearing in every case, where life or liberty may depend on findings of fact and credibility, and it may in these cases, the opportunity to make written submissions, even if coupled with an opportunity to reply

> in writing to allegations of fact and law against interest, would be insufficient.

[22] According to the applicant, the failure to grant a hearing to the claimant conflicts with the principles of fundamental justice set down in section 7 of the *Canadian Charter of Rights and Freedoms*. Paragraph 113(*b*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) states that a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required, and section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations) states that the factors used for the purpose of determining whether a hearing is required are:

> (a) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act;
>
> (b) whether the evidence is central to the decision with respect to the application for protection; and
>
> (c) whether the evidence, if accepted, would justify allowing the application for protection.

[23] The applicant argues, therefore, that this violation of the right to be heard is unwarranted in light of the fact that the removal decision and the denial of the PRRA and HC applications have serious consequences on the security, integrity and life of the applicants.

[24] In my opinion, the reasons given for the PRRA decision are consistent with the requirements of the Act and the Regulations. In accordance with the requirements of paragraph 113(*a*) of the Act, the officer did analyze the "fresh" evidence submitted by the applicant in

support of the PRRA application, but she concluded that the applicant, following the RPD's rejection of the refugee claim, had not adduced any new credible evidence supporting the allegations of personal risk and capable of overriding the negative conclusion drawn by the RPD.

[25] The duty of fairness on the officer is determined by paragraph 113(*b*) of the Act and section 167 of the Regulations. The tests in section 167 are conjunctive, so if the applicant's situation fails to meet one test, no hearing will be held. As it was stated in *Bhallu v. Solicitor General of Canada*, 2004 FC 1324:

> . . . Hearings within the context of PRRA applications are held only in exceptional cases, when all the circumstances listed in section 167 of the Regulations are met.

[26] Furthermore, the officer did not simply discredit these documents owing to the applicant's lack of credibility, as she contends.

[27] It is worth noting, at this point, some salient and undisputed facts that emerge from the applicant's file:

- The applicant alleges that her daughter will necessarily be a victim of excision, although the facts in evidence show that she herself, aged 29, lived in Guinea during her youth and did not undergo excision in her country because her mother always objected to it.

- The applicant, who had lived in Gabon with her husband and daughter since 1992, made a number of trips to various countries without her daughter accompanying her, notwithstanding the alleged fear of her husband.

[28] In this case the applicant failed to fulfill the conditions set out in section 167 of the Regulations and consequently the PRRA officer had no need to summon her to an interview (see

Abdou v. Solicitor General of Canada, 2004 FC 752; *Kim v. Minister of Citizenship and Immigration*, 2003 FCTD 321; *Allel v. Minister of Citizenship and Immigration*, 2003 FCTD 533 and *Sylla v. Minister of Citizenship and Immigration*, 2004 FC 475).

[29] In these circumstances, the applicant's allegation that the officer erred in not granting her a hearing because of the doubts about her credibility is erroneous. Even if the officer made findings of credibility, her decision is based primarily on the insufficiency of the evidence submitted by the applicant to discharge her onus of establishing that she and/or her daughter personally incurred any risks of return such as those covered in sections 96 and 97 of the Act should they return to Guinea.

[30] Moreover, the right to a hearing is not absolute: a process for reviewing an application that does not entail any physical encounter between the decision-maker and the litigant is nevertheless consistent with the principles of natural justice if the applicant is able to present all of his or her arguments (see, *inter alia*, *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653; *Charkaoui v. Minister of Citizenship and Immigration*, 2005 FC 1670; *Younis v. Solicitor General of Canada*, 2004 FC 266; and *Sylla v. Minister of Citizenship and Immigration*, *supra*).

B. *Apprehension of bias*

[31] The applicant maintains that the HC decision and the PRRA decision were made by the same officer, Hélène Dostie, on December 16, 2005. Thus, the applicant argues, there is a

reasonable apprehension of bias in regard to the HC and PRRA decisions. This very question of law was recently certified as follows in *Oshurova v. Minister of Citizenship and Immigration*, 2005 FC 1321:

> Is there an appearance of bias in this case because the same officer decided the application for visa exemption on humanitarian and compassionate grounds as well as the PRRA application?

[32] The applicant cites paragraph 2(e) of the *Canadian Bill of Rights*, which provides that everyone has the right to a fair hearing. The principles of fundamental justice in section 7 of the *Canadian Charter of Rights and Freedoms* likewise guarantee respect of impartiality.

[33] The applicant argues that Gibson J., in *Say v. Solicitor General*, 2005 FC 739, held that the question of independence of the PRRA officer is a serious question of law and he certified the following question:

> Did the Pre-Removal Risk Assessment Unit, under the Canada Border Services Agency, possess the requisite degree of institutional independence such that natural justice and fundamental justice were respected?

[34] However, in *Uzkar v. Minister of Citizenship and Immigration*, 2005 FC 1734, the same argument was raised in a motion to stay attacking two decisions, an HC and a PRRA. My colleague Rouleau J. rejected this argument and stated that the judges of this Court have consistently held that decisions made by the same officer do not create an appearance of bias:

> [18] With respect to the applicant's claim regarding the lack of objectivity on the part of the officer responsible for assessing the exemption on humanitarian grounds and also responsible for the

> pre-removal risk assessment, the Court has ruled on this subject on numerous occasions.
>
> [19] The principle stated in *Monemi v. Canada (Minister of Citizenship and Immigration* [2004] F.C.J. No. 2004 was confirmed in *Malekzai v. Canada (Minister of Citizenship and Immigration)* (2004), 256 F.T.R. 199, where O'Keefe J. stated the following:
>
> > Furthermore, the respondent contends that immigration officers can and do perform various statutory obligations under IRPA. This Court, in *Zolotareva v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1596 (QL), 2003 FC 1274, held that enforcement officers have the authority to make H & C determinations and in *Haddad v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 579 (QL), 2003 FCT 405, that exercising one type of function does not disqualify an immigration officer from exercising another function. These cases, according to the respondent, undermine the applicant's argument that strict barriers or separation must be maintained between various statutory decision-makers and that a failure to do so in the War Crimes Unit raises the spectre of unfairness.

[35] In each of these cases, *Oshurova* and *Say*, *supra*, this Court held that there was no appearance of bias because the same officer had dealt with the HC application and the PRRA application. It is true that the Court certified a question in this regard in each of these cases, but that was because the cases were dealing with special circumstances. In *Oshurova*, it appears from reading the decision that the impugned PRRA decision had been made on September 28, 2004. The Court was concerned by the allegations of institutional bias pertaining to the time when the PRRA program was governed by the Canada Border Services Agency. The same observation applies to the decision of Gibson J. in *Say*, where the impugned decision had been made on January 22, 2004.

[36] I agree with the respondent, therefore, that *Oshurova* and *Say* addressed special circumstances and are inapplicable to this case.

[37] In my opinion, this Court has already clearly determined that there is no apprehension of bias in the fact that the HC decision and the PRRA decision were made by the same officer.

C. *Failure to assess the alleged apprehension in regard to the particular situation of the applicant*

[38] The applicant argues that her apprehension of persecution was reasonable owing to the combined effect of the fact that she is a female victim of violence and abuse by her husband, the lack of state protection in Guinea, the lack of family support in Guinea and the fact that she refuses to have her daughter excised, contrary to tradition and the orders of her husband. The applicant argues that the PRRA officer failed to examine the cumulative impact of all these factors, which put the applicant at risk in her country of citizenship.

[39] In my opinion, the applicant's allegations in this regard concerning the lack of state protection and family support are general in nature; she does not refer to any significant evidence in this regard. Moreover, the documents in the file show that the principal applicant has several brothers and sisters who are still living in Guinea.

[40] Concerning the RPD's guidelines, the applicant herself rightly emphasized that these guidelines do not have force of law and were conceived for the particular context of refugee claims and the hearing of such claims by the RPD. The guidelines are issued by the chairperson of the RPD under section 159 of the Act and apply only to the RPD. So the applicant cannot correctly argue that the officer conducting the examination of the PRRA application should have applied these RPD guidelines and so indicated in her reasons.

[41] Incidentally, a reading of the RPD reasons indicates that the Division did in fact consider these guidelines in the context of the applicant's hearing on her refugee claim before concluding that her account had no credibility whatsoever.

D. *Personalized risk*

[42] According to the applicant, the officer erred in law in finding that the applicants had to prove they were personally targeted irrespective of the reasonableness of their fear based on the risks to members of a particular social group, namely women.

[43] However, contrary to the applicant's submissions, the documentary evidence on a country is insufficient in itself to warrant an assessment of the risks of positive return since the risk must be personal (*Jarada v. Minister of Citizenship and Immigration*, 2005 FC 409, *Rizkallah v. Canada (M.E.I.)*, 156 N.R. 1 and *Sedarat v. Minister of Citizenship and Immigration*, 2006 FC 805). According to *Moussaoui v. Minister of Citizenship and Immigration*, 2004 FC 133, at paragraph 33:

> . . . Section 97 provides that the applicant must be subject personally ". . . to a risk to [his] life or to a risk of cruel and unusual treatment or punishment if . . . 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 . . . ".

[44] As the officer noted in her reasons, although the practice of excision is common in Guinea, this in itself is not sufficient to produce a favourable determination. The applicant had to establish a connection between the present situation in her country and her own and/or her daughter's personal situation. The PRRA officer was simply not satisfied that the applicant had established that connection and was not persuaded that the child would personally be at risk in Guinea.

E. *The best interest of the minor child Fatoumata*

[45] The applicant argues that the Court's intervention in this case is warranted because the PRRA and HC decisions overlook the special situation of the young Fatoumata, who is said to be at risk of being subjected to excision in Guinea. Furthermore, it is argued, the officer did not give the necessary attention and sensitivity to Fatoumata's interest in remaining in Canada, a country in which she has become integrated and where she is sheltered from excision (*Ek v. Minister of Citizenship and Immigration*, 2003 FCTD 526).

[46] The applicant argues that it is also in the best interest of the child Fatoumata not to return to an unhealthy family environment in which her polygamous father would sexually abuse and assault her mother as in the past.

[47] In my opinion, it is clear from the PRRA decision that the officer considered the best interest of Fatoumata. Indeed, the main reason alleged in support of the PRRA application was precisely the risk of Fatoumata's excision and the officer analyzed this in a full and detailed way in light of all the factors and the evidence as a whole that was submitted.

[48] It was clear from the evidence submitted to the officer that the applicant, who is 29 years old and lived in Guinea during her youth, did not suffer excision in her country because her mother consistently objected to it. Moreover, the evidence showed that the applicant, who had lived in Gabon with her husband and her daughter since 1992, had made a number of trips to

various countries without her daughter accompanying her, notwithstanding the alleged fear of her husband.

[49] In the context of the analysis of the PRRA application, the officer had to determine whether the applicant had discharged her onus to establish that she and her daughter personally incurred risks such as those contemplated in sections 96 and 97 of the Act should they return to Guinea, and that is what she did.

[50] In my opinion, the officer made no error and adequately considered the best interest of Fatoumata.

F. *Failure to consider a new aspect of the fear of return*

[51] The applicant argues, lastly, that the letter from her sister, Kankou Kaba, added a new element of risk, namely, her fear of persecution as a member of the Kaba family and as a person charged by the authorities with financing the overthrow of the president from outside the country. This aspect of the fear of return is entirely new and was not cited at the IRB-RPD hearing, so the officer completely ignored it.

[52] The applicant cannot criticize the officer, of course, for failing to consider and analyze an element of risk that she had not even alleged in her PRRA application. In this regard, too, the officer did not err.

III. Conclusion

[53] For all of these reasons, no reviewable error has been demonstrated and the application for judicial review is dismissed.

"Yvon Pinard"

Judge

Ottawa, Ontario
September 25, 2006

Certified true translation

Brian McCordick, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-289-06
STYLE OF CAUSE:	DIENE KABA and FATOUMATA KABA v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	August 23, 2006
REASONS FOR JUDGMENT BY:	Pinard J.
DATED:	September 25, 2006

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Date: 20060925

Docket: IMM-289-06

Ottawa, Ontario, the 25th day of September 2006

Present: Mr. Justice Pinard

BETWEEN:

DIENE KABA and
FATOUMATA KABA

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

JUDGMENT

The application for judicial review of a decision of Citizenship and Immigration Canada, dated December 16, 2005, denying the applicants' application for protection pursuant to a pre-removal risk assessment, is dismissed.

"Yvon Pinard"
Judge

Certified true translation

Brian McCordick, Translator