Federal Court  Cour fédérale

Date: 20111116

Docket: IMM-1493-11

Citation: 2011 FC 1313

Ottawa, Ontario, November 16, 2011

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

KADIATOU SOW
MAIMOUNA SOW
AISSATOU SOW
IBRAHIMA SOW

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of the decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board, dated 27 January 2011 (Decision), which refused the Principal Applicant's application to be deemed a Convention refugee or person in need of protection under sections 96 and 97 of the Act. The claims of the three minor Applicants were

joined with that of the Principal Applicant (Principal Applicant) under Rule 49(1) of the *Refugee Protection Division Rules*, SOR/2002-228 (Rules). The claims of the Minor Applicants were not dependent on that of the Principal Applicant and were determined on different grounds.

BACKGROUND

[2] The Principal Applicant is a citizen of Guinea and the Minor Applicants are all citizens of the United States. The Principal Applicant is married and the mother of six children, three of whom are the Minor Applicants in this case. The Minor Applicants are the Principal Applicant's son, Ibrahima, who is 14 years old, and daughters Maimouna and Aissatou, who are ten and eight years old, respectively. All the Applicants arrived in Canada from France in August of 2008 and made their refugee claim shortly thereafter.

[3] In August 2008, when the Principal Applicant's daughters, Maimouna and Aissatou, were five and seven years old, her husband's family decided they should undergo circumcision (female genital mutilation – FGM). The Principal Applicant's brother-in-law, Mamadou Sow, (Mamadou) came to her house and slapped her twice, saying that she was being disrespectful to him because she would not permit her daughters to undergo FGM. When her husband came home that day, he found her crying and, together, they decided that she would bring her daughters to Canada so that they would be away from his family and not be at risk of FGM.

[4] When she came to Canada, the Principal Applicant's husband remained in Guinea. Her two older daughters and son remain in Guinea with their father. Neither of the two older daughters has undergone FGM.

[5] When she was seven years old, the Principal Applicant suffered FGM. She fears that, if returned to Guinea, her daughters will suffer the same fate. She also fears that she will be hurt or killed by her husband's family if she continues to refuse to force her daughters to undergo FGM. She claimed protection on the basis of her fear of persecution for her political opinion, namely her opposition to FGM and her fear that her daughters will be forced to undergo FGM if they return to Guinea.

DECISION UNDER REVIEW

[6] The hearing into the Applicants' claim for refugee protection was heard on 27 January 2011. A refugee protection officer, the Principal Applicant, her counsel, and an interpreter were present. At the hearing, the RPD considered whether the Applicants were convention refugees within the meaning of subsection 96(1) or persons in need of protection under section 97 of the Act. In oral reasons delivered at the end of the hearing, the RPD found that none of the Applicants were convention refugees or persons in need of protection. As such, their claim for protection was denied.

Convention Refugee

[7] With respect to the Minor Applicants, the RPD found that they had no fear of persecution and faced no risk of torture or cruel or unusual punishment in the United States, which is their country of nationality. On this basis, the RPD rejected the Minor Applicants' claim for protection.

[8] The RPD determined the Principal Applicant's claim on the basis that she had no well-founded fear of persecution in Guinea. Although the RPD accepted the Principal Applicant's testimony that she was assaulted by her brother-in-law for not subjecting her daughters to FGM, the member found that this incident did not amount to persecution. The RPD found that, in order to amount to persecution, the conduct being examined must have a "sustained or systemic" element to it. The RPD found that there was no evidence the Principal Applicant had suffered persecution in the past. One incident does not amount to persecution.

[9] The RPD also found that there was no evidence that the Principal Applicant would be at risk of future persecution. Although she fears that her younger daughters would undergo FGM if returned to Guinea, the RPD found that neither of her two older daughters who remained in Guinea suffered in this way while she was absent. The RPD noted that the Principal Applicant's husband was also opposed to the procedure. The RPD further noted that her husband had not experienced persecution in Guinea for failing to have his daughters undergo FGM. As an opponent of FGM for his daughters, the Principal Applicant's husband was also at risk yet he had not experienced any harm for his beliefs, although he was closer to the source of the alleged persecution – his family – and it would be a more serious offence for him to refuse. Therefore, the RPD concluded, the risk to the Principal Applicant of persecution for opposing FGM for her daughters was low.

[10] In addition, the RPD concluded that if the Principal Applicant were returned to Guinea, her husband would be able to protect her from harm. Because her husband has been able to protect the two daughters who remained in Guinea, he would also be able to protect the Principal Applicant and their younger daughters. The RPD also found that there was no documentary evidence which indicated a risk of persecution in Guinea to parents who oppose FGM.

[11] Based on her husband's ability to protect her in Guinea, the lack of documentary evidence showing persecution of parents who oppose FGM, and the lack of past persecution against her, the RPD found that the Principal Applicant's fear of persecution was not well founded. As such, the RPD found that she was not a convention refugee under section 96 of the Act.

Risk to Life, Cruel and Unusual Treatment or Punishment

[12] The RPD also considered whether the Principal Applicant was eligible for protection under subsection 97(1) of the Act. Because she did not allege a danger of torture, the RPD concluded that she did not meet this aspect of section 97.

[13] The RPD also considered the risk to the Principal Applicant of domestic violence in Guinea, as submitted by counsel. At the hearing, counsel noted that domestic violence against women was prevalent in Guinea, as was FGM, and that rape was sometimes used by the government as a tool of oppression. The RPD found that the Principal Applicant had not alleged any fear of rape, nor did she fear abuse at the hands of her husband. Further, the RPD found that the two daughters the Principal Applicant had left behind in Guinea had not been subjected to FGM. Based on these

findings, the RPD concluded that any risk the Principal Applicant faced was one faced by all Guineans. As such, the RPD found that the Principal Applicant was not a person in need of protection under section 97.

ISSUES

[14] The Applicants raise the following issues:

a. Whether the RPD properly considered the definition of "persecution";

b. Whether the RPD erred in not considering gender-based factors in analysing the Principal Applicant's fear;

c. Whether RPD erred in not considering whether the subsection 108(4) "special circumstances" exception applied.

STATUTORY PROVISIONS

[15] The following provisions of the Act are applicable in this proceeding:

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	*a*) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette

fear, unwilling to avail themself of the protection of each of those countries; or

crainte, ne veut se réclamer de la protection de chacun de ces pays;

Person in Need of Protection

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

Personne à protéger

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 Article 1 of the Convention Against Torture; or

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(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,

(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,

…

…

108. (1) A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a

108. (1) Est rejetée la demande d'asile et le demandeur n'a pas qualité de réfugié ou de personne à protéger dans tel

person in need of protection, in any of the following circumstances:	des cas suivants :
(*e*) the reasons for which the person sought refugee protection have ceased to exist.	*e*) les raisons qui lui ont fait demander l'asile n'existent plus.
(4) Paragraph (1)(*e*) does not apply to a person who establishes that there are compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment.	(4) L'alinéa (1)*e*) ne s'applique pas si le demandeur prouve qu'il y a des raisons impérieuses, tenant à des persécutions, à la torture ou à des traitements ou peines antérieurs, de refuser de se réclamer de la protection du pays qu'il a quitté ou hors duquel il est demeuré.

STANDARD OF REVIEW

[16] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[17] In *Rajudeen v Canada (Minister of Employment and Immigration)*, [1984] FCJ No 601; (1984) 55 NR 129 (cited to NR), the Federal Court of Appeal referred to the Living Webster Encyclopedic Dictionary and held at page 133 that persecution is

> To harass or afflict with repeated acts of cruelty or annoyance; to afflict persistently, to afflict or punish because of particular opinions or adherence to a particular creed or mode of worship.

[18] This definition was followed by Justice Eleanor Dawson in *Tolu v Canada (Minister of Citizenship and Immigration)* 2002 FCT 334 at paragraph 16.

[19] In *Canada(Minister of Citizenship and Immigration) v Hamdan* 2006 FC 290, Justice Johanne Gauthier held at paragraph 17,

> With respect to the mixed question of facts and law as to whether or not specific acts of discrimination amount to persecution, the standard of reasonableness simpliciter applies….

[20] Justice Yvon Pinard followed a similar approach in *Prato v Canada (Minister of Citizenship and Immigration)* 2005 FC 1088 at paragraph 8. The first issue in this case calls into question the RPD's finding that, when Mamadou slapped the Principal Applicant, this did not constitute persecution. This engages the RPD's application of the definition of persecution to the facts before it, so the standard of review on the first issue is reasonableness. (See also *Tolu*, above, at paragraph 15).

[21] Recently, the Supreme Court of Canada in *Smith v Alliance Pipeline Ltd.*, 2011 SCC 7 [*Smith*] held that, where a tribunal is interpreting its enabling statute, that tribunal's interpretation will be subject to the reasonableness standard. (see paragraphs 26-34 and 37). This approach was

followed by Justice Paul Crampton in *Echeverri v Canada (Minister of Citizenship and Immigration)* 2011 FC 390 where he held at paragraph 24 that the standard of review on the applicability of subsection 108(4) is reasonableness. Further, Justice Crampton thoroughly addressed this question in *Alharazim v Canada (Minister of Citizenship and Immigration)* 2010 FC 1044 at paragraphs 16-25 and included that the standard of review on this issue is reasonableness. Justice Richard Boivin also held that the applicability of subsection 108(4) is evaluated on a standard of reasonableness in *S.A. v Canada (Minister of Citizenship and Immigration)* 2010 FC 344 at paragraph 22. I am satisfied that the standard of review on the third issue is reasonableness. See also *Kotorri v Canada (Minister of Citizenship and Immigration)* 2005 FC 1195 at paragraphs 14-23.

[22] The appropriateness of a gender-based analysis in any case is also a question of mixed fact and law and, as such, the second issue will also be analysed on the standard of reasonableness. See *Michel v Canada (Minister of Citizenship and Immigration)* 2010 FC 159 at paragraphs 28 and 37, *Josile v Canada (Minister of Citizenship and Immigration)* 2011 FC 39 at paragraph 8 and *Walcott v Canada (Minister of Citizenship and Immigration)* 2010 FC 505 at paragraphs 18 and 25.

[23] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that

it falls outside the “range of possible, acceptable outcomes which are defensible in respect of the facts and law.”

ARGUMENTS

The Applicants

The RPD Did Not Properly Consider the Definition of Persecution

[24] The Principal Applicant argues that the RPD was wrong to interpret persecution to require more than a single incident of bad treatment. She notes that, although the RPD believed her when she testified that her brother-in-law had hit her, the RPD still concluded that this did not amount to persecution and that there was no objective basis for the Principal Applicant’s fear. She notes that “persecution” is not defined in the Act. In fact, persecution within the context of the Act does not require physical harm. She further submits that persecution may include threats of death. She says that the RPD failed to consider that Mamadou had threatened her and that this could amount to persecution.

The RPD Failed to Address Gender-Based Persecution

[25] The Principal Applicant also argues that the RPD failed to consider whether her experience of FGM when she was seven years old amounted to persecution and, in particular, whether this

amounted to persecution on the basis of her gender. She further argues that the RPD failed to consider whether, if the Principal Applicant was returned to Guinea and her daughters were forced to undergo FGM, this would amount to gender-based persecution of the Principal Applicant. Because the RPD failed to address these issues of persecution, its finding that the Principal Applicant was not a convention refugee was unreasonable.

[26] The Principal Applicant also argues that she is a member of a social group, "women returning to Guinea who have been subjected to FGM as a child and who fear that their children will be subjected to FGM," which group is at risk of persecution in Guinea. The RPD ignored evidence that this group is at risk of persecution and so was unreasonable in finding that she was not a convention refugee. She relies on *Dezemeau v Canada (Minister of Citizenship and Immigration)* 2010 FC 559 for the proposition that where the RPD ignores evidence of the risk of gender-based persecution, the decision must be overturned. The Principal Applicant further argues that *Dezemeau* stands for the proposition that the RPD cannot use a generalized risk of violence to women to negate the risk to a particular woman. She says that because there was evidence that women in Guinea face a risk of domestic violence, FGM, and rape, and she is a woman, it was unreasonable for the RPD to conclude that she was not at risk of persecution.

The RPD Failed to Consider the Subsection 108(4) "Compelling Circumstances" Exception

[27] Paragraph 108(1)(*e*) of the Act operates to exclude from the definition of convention refugee any person who has sought refugee status but is no longer in need of protection because the circumstances which led to the original refugee claim are no longer in place. Subsection 108(4)

provides an exception to the 108(1)(*e*) exclusion for any person who establishes that there are compelling reasons to allow them to claim refugee status against their home country, notwithstanding that the conditions in that country have changed for the better. The Principal Applicant argues that, because there was evidence that she suffered FGM in the past, it was an error for the RPD not to consider whether the subsection 108(4) exception applies to her.

[28] The Principal Applicant argues that, notwithstanding that the RPD found persecution to require a sustained or systematic element, the fact that she suffered FGM in the past shows she suffered persecution in the past. Based on this past persecution, she would have qualified as a convention refugee. She could have been found a convention refugee based on her experience but the fact that she is no longer at risk of FGM – it having happened to her in the past – shows that the circumstances which would have led to a successful refugee claim have changed. Thus, she argues, subsection 108(4) is engaged. She further argues that the psychologists report she provided to the RPD shows that there are compelling reasons why she should be granted refugee protection, even though circumstances have changed and she is no longer at risk of FGM. Because there was evidence before the RPD that she had suffered persecution in the past through experiencing FGM, that she was no longer at risk of persecution through FGM, and was under the care of a psychologist in Canada, it was unreasonable for the RPD not to consider whether this exception applied to her.

The Respondent

The RPD's Interpretation of Persecution was Reasonable

[29] The Respondent argues that, as the RPD found, persecution requires a sustained or systematic element. Justice Judith Snider held in *Sedigheh v Canada (Minister of Citizenship and Immigration)* 2003 FCT 147 that an element of "repetition and relentlessness" is essential to persecution. The Respondent also points to *Ahmad v Canada (Solicitor General)*, [1995] FCJ No 397, (1995) 93 FTR 227 where Justice Max Teitelbaum held at paragraph 23 that

> [T]he occurrences must be serious or systematic enough to amount to a reasonable fear of persecution. The seriousness of an act is certainly a question of fact and of weighing the evidence, as Denault J. observed in *Saddouh, supra*, and as appears in *Ihaddadene v. Canada, supra.* A conclusion that this is not the case following analysis of the evidence as a whole is clearly within the powers of the Refugee Division.

The Applicant has not shown that the RPD made an unreasonable finding when it concluded that the acts she suffered were not persecution.

The RPD's Findings Were Reasonable

[30] The Respondent says that the onus was on the Principal Applicant to establish all of the elements of her claim, including that there is a reasonable chance or serious possibility she will suffer persecution if returned to her country of origin. Given the evidence before the RPD, it was reasonable to conclude that the Principal Applicant had not established a reasonable chance or serious possibility she would suffer persecution. The Respondent notes that there was evidence before the RPD that the Principal Applicant's two daughters had not suffered FGM, in spite of the fact that they remained in Guinea. From this, the RPD inferred that the Principal Applicant's husband was able to protect them from this risk and that, in the future, he would be able to protect their younger daughters as well as the Principal Applicant. Further, it was open to the RPD to find

that, although the Principal Applicant had been slapped by her brother-in-law on one occasion in the past, she was not at risk of future persecution from him and that this single incident did not involve the sustained or systemic element required for persecution.

Gender-Based Analysis

[31] The Respondent argues, contrary to the Applicant's assertion to the contrary, the RPD did consider the risks to the Principal Applicant as a woman and thus engaged in an appropriate gender-based analysis. The RPD considered the evidence before it and arrived at a reasonable conclusion.

Compelling Reasons

[32] Finally, the Respondent argues that the RPD did not commit an error when it did not find that the subsection 108(4) exception applied to the Principal Applicant. Because the Principal Applicant was not found to be a refugee by the RPD, the paragraph 108(1)(*e*) exclusion does not apply; since the 108(1)(*e*) exclusion does not apply, then the subsection 108(4) exception to the exclusion also does not apply.

[33] The Respondent quotes at length from *S.A.*, above, in support of the proposition that "a section 108 analysis is not applicable when a claimant is found not to meet the definition of

Convention refugee or person in need of protection." The Respondent notes that the basis of the Principal Applicant's claim in this case was her fear that her daughters would suffer FGM, not that she would suffer herself. Further, the Principal Applicant would not suffer harm herself if she were returned to Guinea and has, in fact, returned there voluntarily at least once before. There was no evidence which would support a finding that compelling reasons existed to grant the Principal Applicant protection. It was therefore reasonable for the RPD to not consider whether subsection 108(4) applied.

ANALYSIS

[34] The Applicants present a confusing set of facts and arguments. Maimouna and Aissatou are citizens of the USA. The RPD, in paragraph 12 of the Decision, found that they were neither Convention refugees nor persons in need of protection for this very reason. Counsel for the Respondent took the position at the hearing of this application that the girls were assumed to be returning to Guinea with the Principal Applicant and so were included in the RPD's analysis of persecution and risk in Guinea. However, a reading of the Decision reveals that this is clearly not the case. They were excluded from claiming in Canada because they are US citizens and there was no evidence before the RPD that "they fear persecution or face a danger of torture or risk to their lives or to cruel and unusual treatment or punishment in the USA." The Principal Applicant does not question this finding. It is not one of the issues that is raised in this application.

[35] *Canada (Attorney General) v Ward*, [1993] SCJ No 74 at paragraph 88 says that claimants must show a well-founded fear of persecution in all countries where they are nationals. The RPD

found that the Minor Applicants – citizens of the USA - do not have a well founded fear of persecution in the USA, which necessarily excludes them from convention refugee status.

[36] Applicants' counsel indicated at the hearing that it is the two older daughters who remain in Guinea who are threatened and who the Principal Applicant fears will be subjected to FGM. However, at page 13 of the RPD hearing transcript (page 189 of the CTR) the following exchange occurs:

> Member: Right. So, your … the heart of your case I gather is that you are afraid for the mutilation of the two daughters who are travelling with you.
>
> Claimant: Yes.

[37] It is unclear why the RPD would refer to "two" daughters here when, in the Decision, the claims of the three Minor Applicants are rejected because they are citizens of the USA. Ibrahima is a boy and there is nothing to suggest that the Principal Applicant fears on his behalf.

[38] The Principal Applicant also wrote in her PIF:

> Je suis avec elles au Canada avec l'accord de leur père, M. Abdoulaye Sow, pour uniquement sauver leur vie, en les soustrayant des menaces des pratiques traditionelles de mon pays, la Guinée, consistent à la mutilation génitale des filles, du moment qu'elles ont atteint l'age de 5-7 ans au moms [*sic*].

[39] However, I think I have to take counsel's advice that, besides herself, the Principal Applicant's concern over FGM relates to the two older daughters who remain in Guinea.

[40] When the Principal Applicant was asked why she had left the other two girls behind she said "we did not have documents, they could not come."

[41] The following exchange is also important:

> Member: Well, you have two older daughters and they are not circumcised; so why was this such a problem all of a sudden in 2008?
>
> Claimant: They were to do the same thing to those two girls but we have been asked since…to wait until Maimouna gets…be five and then they will do all three together.

[42] In my view, this does not answer the point behind the question because the older girls are 15 and 17 in a country where FGM usually occurs between the ages of five and 14. Maimouna was nine at the time of the hearing.

[43] The Principal Applicant makes it clear in the transcript that she fears for her own safety and "for my kids." She fears that Mamadou will kill her, but there is no suggestion the two older girls will be killed. The fear for them is that they will be mutilated.

[44] Given these two basic fears, and given the accepted evidence that Mamadou once "slapped" the Principal Applicant after her husband left the room to seek out his uncle, that the Principal Applicant experienced FGM herself as a child, and that the husband's family are likely to continue their threats and their pressure in a social context where women are at risk for various reasons, I

cannot say that the RPD read the situation too narrowly and neglected to take these factors into account.

[45] As regards the personal risk to the Principal Applicant (that she would be killed by the brother-in-law or some member of her husbands family), the RPD provides the following reasons for rejecting her claim:

> In light of the evidence before me, if you were to return to Guinea, I am satisfied that your husband could protect you, just as he has protected your older daughters in your absence. I am not persuaded that the threat of reprisal from your brother in law is more than a remote possibility. There is nothing in the documentary evidence to suggest what might happen to parents who oppose circumcision for their daughters. Your husband, who like you opposes it, has not experienced persecution, and he is readily available to the alleged agent of harm. While I am satisfied that you have nexus to the Convention as proposed, based upon the evidence in your particular circumstances I am not persuaded that your fear is well-founded. You are not therefore a Convention refugee.

[46] While it is possible to disagree with this conclusion, I cannot say it falls outside the range posited by *Dunsmuir* and the Court cannot substitute its own opinion for that of the RPD. See *Mugesera v Canada (Minister of Citizenship and Immigration)* 2005 SCC 40 at paragraph 40, *Zhou v Canada (Minister of Citizenship and Immigration)* 2010 FC 186 at paragraph 19, and *Lajqi v Canada (Minister of Citizenship and Immigration)* 2011 FC 759 at paragraph 10.

[47] The Principal Applicant also complains that the RPD looked at this issue too narrowly and failed to examine risk from the perspective of the vulnerability of women in Guinea society. However, the RPD points out that there is "nothing in the documentary evidence to suggest what might happen to parents who oppose circumcision for their daughters." The Principal Applicant is a

parent and she has not suggested to the Court that the RPD is incorrect in its examination of the documentary evidence or that there was evidence that the RPD overlooked, or that the RPD did not conduct itself reasonably in researching this point.

[48] As regards the risk to the older daughters in Guinea, and the Principal Applicant's fears as a result of that risk, the RPD addresses this matter in paragraph 8 of the Decision:

> You have two older daughters, now aged 17 and 15 years. They are not circumcised. Your failure to have them undergo this procedure did not provoke your brother in law, the alleged agent of harm. It is not clear from your testimony why, out of nowhere, he decides to threaten you for failing to have this done. Your husband is also opposed to the procedure. The offence, if any, would reasonably be far more serious for a member of the clan and the clan member's wife. Nothing has happened to your husband, however, since he moved out but the family compound. If the agent of harm were determined to mete vengeance upon opponents to circumcision of female family members, your husband is readily at hand. Nothing in his letter dated December 2010 suggest anything has befallen him at the hands of his eldest brother. More significantly, your two elder daughters have not been circumcised in your absence. With you out of the picture, your brother in law could have circumcised the daughters but has not. There is no evidence to that effect before me.

[49] Once again, it is possible to argue with these findings but I cannot say they fall outside of the *Dunsmuir* range.

[50] In her written submissions the Principal Applicant makes slightly different points and says that the brother-in-law has been threatening the Principal Applicant for some time and the RPD failed to assess whether these threats could amount to persecution.

[51] My reading of the Decision suggests to me that the RPD acknowledged and fully addressed the behaviour of the brother-in-law towards the Principal Applicant and her daughters and explained why this did not establish persecution. There is nothing incorrect or unreasonable about the RPD's conclusions in this regard.

[52] The Principal Applicant also says that the RPD failed to consider whether her forced FGM procedure in the past amounted to persecution on the basis of her gender.

[53] Even if the Principal Applicant's forced FGM amounted to persecution in the past, it is not relevant to an assessment of forward-looking risk because she cannot be subjected to such treatment again if she returns to Guinea, and she did not allege that this is the risk she faces.

[54] She also says that the RPD failed to consider persecution against the Principal Applicant as a result of her daughters being forced to undergo FGM procedures.

[55] In my view, this is precisely what the Decision does deal with from the perspective of both the Principal Applicant and her daughters. The RPD provides a full and reasonable explanation on this point. The two daughters who remain in Guinea, and who are now 17 and 15 years old, have not had to undergo FGM and this did not provoke the brother-in-law. The Minor Applicants are all citizens of the USA by birth and do not face FGM in the USA. All are, in any event, protected in Guinea because the Principal Applicant's husband agrees with her opposition to FGM and there is no evidence that the girls would be subjected to FGM upon return or that the Principal Applicant will be assaulted or persecuted by her brother-in-law or her husband's family.

[56] The Principal Applicant also says that women in Guinea face persecution in many forms including domestic violence, rape and FGM.

[57] The Principal Applicant never alleged that she or her daughters faced domestic violence and/or rape. The fact that other women in Guinea might face domestic violence and rape does not mean that the Principal Applicant and/or her daughters were seeking, or require, protection on this basis.

[58] All in all, there was simply no evidence that the Applicants faced either persecution under section 96 of the Act or risk under section 97 of the Act. The RPD's findings were entirely reasonable in this regard.

[59] The Principal Applicant, however, also raises subsection 108(4) of the Act and says that the RPD erred by failing to analyze whether the Principal Applicant had demonstrated compelling reasons under this subsection.

[60] I think the short answer to this allegation is that subsection 108(4) of the Act does not arise on the facts of this case.

[61] This provision of the Act states as follows:

108. (1) A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection, in any of the following	**108.** (1) Est rejetée la demande d'asile et le demandeur n'a pas qualité de réfugié ou de personne à protéger dans tel des cas suivants :

circumstances:	
…	…
(*e*) the reasons for which the person sought refugee protection have ceased to exist.	*e*) les raisons qui lui ont fait demander l'asile n'existent plus.
…	…
(4) Paragraph (1)(*e*) does not apply to a person who establishes that there are compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment.	(4) L'alinéa (1)*e*) ne s'applique pas si le demandeur prouve qu'il y a des raisons impérieuses, tenant à des persécutions, à la torture ou à des traitements ou peines antérieurs, de refuser de se réclamer de la protection du pays qu'il a quitté ou hors duquel il est demeuré.

[62] Subsection 108(4) only comes into play where there has been a finding that a person was a Convention refugee but is no longer so because the conditions that led to that status no longer exists. As stated in *S.A.*, above, at paragraphs 37-39,

> Subsection 108(4) of the Act provides that refugee status can be conferred on humanitarian grounds to a special and limited category of persons who "have suffered such appalling persecution that their experience alone is a compelling reason not to return them, even though they may no longer have any reason to fear further persecution". In other words, there must have been a determination that the applicants were Convention refugees as contemplated by the statute in order to invoke subsection 108(4) of the Act, and also that the conditions which led to that finding no longer exist.
>
> As noted in *Brovina v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 635, 254 F.T.R. 244 at par. 5:

> "...For the board to embark on a compelling reasons analysis, it must first find that there was a valid refugee (or protected person) claim and that the reasons for the claim have ceased to exist (due to changed country conditions). It is only then that the Board should consider whether the nature of the claimant's experiences in the former country were so appalling that he or she should not be expected to return and put himself or herself under the protection of that state."

In *Martinez v. Canada (Minister of Citizenship and Immigration),* 2006 FC 343, 146 A.C.W.S. (3d) 1052 at par. 19, Justice Simon Noël recently re-affirmed that a section 108 analysis is not applicable when a claimant is found not to meet the definition of Convention refugee or person in need of protection:

> "In my view, sub. 108(4) of the IRPA is not applicable in the present matter. The RPD should not undertake a sub. 108(4) evaluation in every case. It is only when para. 108(1)(e) is invoked by the RPD that a "compelling reasons" assessment should me [sic] made, i.e. when the refugee claimant was found to be a refugee but nevertheless had been denied refugee status given the change of circumstances in the country of origin..." [Emphasis added]

[63] The basis of the Principal Applicant's claim was not her own fear of FGM, but her fear for her daughters. In fact, the Principal Applicant did not claim that she had been persecuted due to the fact that she had undergone female circumcision as a girl. She did not give evidence that it would be very traumatic or difficult for her to return to Guinea given the psychological scars from this event. She had, in fact, returned to Guinea on her own volition on a previous occasion. Given the Principal Applicant's lack of evidence with respect to this matter, the Principal Applicant has failed to demonstrate that the RPD erred with respect to subsection 108(4) of the Act.

[64] The onus remains on Principal Applicant to establish that there are compelling reasons for not returning to the country in which past persecution arose. The Principal Applicant failed to meet this onus in the circumstances. See *Yamba v Canada (Minister of Citizenship and Immigration),* [2000] FCJ No 457 (FCA) at paragraph 4 and *Oprysk v Canada (Minister of Citizenship and Immigration),* 2008 FC 326 at paragraphs 25-31.

[65] The Principal Applicant says that subsection 108(4) is engaged when a refugee claimant demonstrates that they would have been found to be a convention refugee or person in need of protection in the past, but the reasons for which they seek protection have ceased to exist. The cases she relies on *S.A.*, above, *M.C.L. v Canada (Minister of Citizenship and Immigration)* 2010 FC 826, *J.N.J. v Canada (Minister of Public Safety and Emergency Preparedness)* 2010 FC 1088, *Kozyreva v Canada (Minister of Citizenship and Immigration)* 2010 FC 1013, *Cardenas v Canada (Minister of Citizenship and Immigration)* 2010 FC 537, and *Liu v Canada (Minister of Citizenship and Immigration)* 2010 FC 819, all suggest that the RPD must make an explicit finding that the claimant is a convention refugee to engage subsection 108(4). The wording of Justice John O'Keefe at paragraph 41 of *J.N.J.*, above, is typical:

> This requires a clear statement conferring the prior existence of refugee status on the claimant, together with an acknowledgement that the person is no longer a refugee because circumstances have changed.

[66] Also, several other cases point in the same direction. In *Yamba*, above, the Federal Court of Appeal held at paragraph 6 that

> in every case in which the Refugee Division concludes that a claimant has suffered past persecution, but this has been a change of country conditions under paragraph 2(2)(e), the Refugee Division is obligated under subsection 2(3) to consider whether the evidence

> presented establishes that there are "compelling reasons" as contemplated by that subsection. This obligation arises whether or not the claimant expressly invokes subsection 2(3). That being said the evidentiary burden remains on the claimant to adduce the evidence necessary to establish that he or she is entitled to the benefit of that subsection.

Yamba was decided under the old Act, but it has been cited several times when the Court has applied subsection 108(4). It is not enough that a claimant says she has suffered acts which could ground a finding of persecution; the RPD must conclude that those acts occurred and that they constitute persecution.

[67] In this case, the RPD found that the Principal Applicant is not a convention refugee because she did not have a fear of persecution and was not at risk under section 97. The RPD found that being slapped by Mamadou – the Principal Applicant's brother-in-law - did not constitute persecution. The RPD also did not find that she had suffered FGM; it only noted that she alleged she had suffered it. Since the RPD didn't make a specific finding of persecution or risk, subsection 108(4) cannot, in my view, be engaged. It is not enough that, as the Principal Applicant says, FGM "would clearly rise to the level of persecution."

[68] I think it is also important to note that subsection 108(4) is not engaged in this case because there has not been a change in country conditions. In *Kozyreva*, above, at paragraph 19, Justice Zinn held that

> [the] jurisprudence makes it clear that before an officer may embark on a s. 108(4) analysis there must first be a finding that there was a valid refugee or protected person claim and that the reasons for the claim have ceased to exist due to changed country conditions…

[69] The change in circumstances required to engage subsection 108(4) is a change in country conditions, which the Principal Applicant has not argued here. The change in circumstances the she relies on is the fact that she is no longer at risk of FGM, having already undergone the procedure. This is a change in a personal circumstance, not a change in country conditions.

[70] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-1493-11
STYLE OF CAUSE:	SOW et al. - and - THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	September 7, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	HON. MR. JUSTICE RUSSELL
DATED:	November 16, 2011

APPEARANCES:

Dov Maierovitz	**APPLICANT**
Norah Dorcine	**RESPONDENT**

SOLICITORS OF RECORD:

Gertler, Etienne LLP Barristers & Solicitors Toronto, Ontario	**APPLICANT**
Myles J. Kirvan, Q.C. Deputy Attorney General of Canada	**RESPONDENT**