

Federal Court



Cour fédérale

Date: 20120625

Docket: IMM-8278-11

Citation: 2012 FC 805

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, June 25, 2012

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

AZIZA MAHAMAT NOUR

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an application for judicial review pursuant to subsection 72(1) de la *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA), from a decision of the Immigration and Refugee

Board (IRB), dated September 20, 2011, denying the claim for refugee protection made by Aziza Mahamat Nour (A. Nour).

[2] At the time of the hearing, A. Nour was 13 years old and was represented by Robert Naylor of the Praid group under Guideline 3 on Child Refugee Claimants, in addition to being represented by counsel.

[3] For the foregoing reasons, this application for judicial review will be allowed.

II. Facts

[4] A. Nour was born on June 6, 1997, in N'Djamena, Chad.

[5] A. Nour was born out of wedlock and, because this was considered shameful, her biological mother, Zara Adoum Djarma, left her daughter, at the age of three months, in the care of her sister, Fatime Adoum. Fatime Adoum's name appears on A. Nour's birth certificate as her biological mother.

[6] In January 2003, Ms. Adoum left Chad for Canada and applied for refugee status. Her claim for refugee status was accepted in February 2004. A. Nour was then left in the care of her uncle, Abouna Djarma.

[7] In May 2008, her uncle arranged for A. Nour to be married and collected part of the dowry. As a consequence of this, a female circumcision was set for November 12, 2008.

[8] Ms. Adoum learned of this and asked her daughter Assadya to try and convince her uncle to change his mind about the marriage and female circumcision. Assadya was unable to persuade her uncle but did manage to obtain a passport and a French visa for A. Nour.

[9] On November 11, 2008, A. Nour left Chad with the help of her adopted sister Assadya.

[10] In France, A. Nour obtained a visa for the United States on November 28, 2008.

[11] She arrived in Canada on January 6, 2009, and immediately claimed refugee protection.

III. Legislation

[12] Sections 96 and 97 of the IRPA set out the following:

Convention refugee

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,

(a) is outside each of their

Définition de « réfugié »

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) soit se trouve hors de

countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Person in need of protection

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

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

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

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

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

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

country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

(2) A également qualifié de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

IV. Issues and standard of review

A. Issues

1. *Did the IRB err by failing to consider IRB Guidelines 3 and 4 in its assessment of the credibility of A. Nour's testimony?*

2. *Did the IRB err by concluding that the testimony of the members of A. Nour's family was not credible?*

B. Standard of review

[13] The assessment of a claimant's credibility as well as the plausibility of their account is within the expertise of the IRB. In *Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 at paragraph 4, the Federal Court of Appeal held that:

[4] There is no longer any doubt that the Refugee Division, which is a specialized tribunal, has complete jurisdiction to determine the plausibility of testimony: who is in a better position than the Refugee Division to gauge the credibility of an account and to draw the necessary inferences? As long as the inferences drawn by the tribunal are not so unreasonable as to warrant our intervention, its findings are not open to judicial review... .

[14] In *Hernandez v Canada (Minister of Citizenship and Immigration)*, 2009 FC 106, Justice Phelan writes, at paragraph 13, that “[w]here the Guidelines are used as part of the assessment of credibility, they become subsumed in the standard of review of reasonableness as applied to credibility findings” (see *Owochei v Canada (Minister of Citizenship and Immigration)*, 2012 FC 140; see also *Plaisimond v Canada (Minister of Citizenship and Immigration)*, 2010 FC 998 at paragraph 32 and *Higbogun v Canada (Minister of Citizenship and Immigration)*, 2010 FC 445 at paragraph 22 (*Higbogun*)).

[15] According to the Supreme Court of Canada, “[a] court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (see *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47 (*Dunsmuir*)).

V. Positions of the parties

A. A. Nour’s position

[16] A. Nour contends that the IRB failed to consider the IRB Guidelines in its assessment of her testimony. Guideline 3 on Child Refugee Claimants requires that the IRB exercise caution when assessing the testimony of a child, according to A. Nour. She claims that the IRB focused on a few minor details instead of properly assessing her testimony as a whole.

[17] A. Nour further notes that the IRB disregarded Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution.

[18] The IRB determined that the testimony of A. Nour’s aunt was implausible. However, according to A. Nour, “plausibility findings should be made only in the clearest of cases, i.e., if the facts as presented are outside the realm of what could reasonably be expected, or where the

documentary evidence demonstrates that the events could not have happened in the manner asserted by the claimant” (see *Valtchev v Canada (Minister of Citizenship and Immigration)*, [2001] FCJ No 1131 at paragraph 7).

[19] A. Nour submits that the IRB erred by concluding that “the story of the forced marriage is nothing more than a fabrication” (see the IRB decision at paragraph 25). She further emphasized that the IRB erred in its analysis by failing to take into account the real reasons for her claim for refugee protection. She is therefore seeking the Court’s intervention.

B. Respondent’s position

[20] The respondent asserts that the IRB, far from dwelling on the minor details of A. Nour’s refugee claim, uncovered significant inconsistencies that go to the heart of A. Nour’s claim.

[21] Furthermore, the respondent notes that Guideline 3 on Child Refugee Claimants specifies the applicable procedural rules in cases of refugee claims made by children, in keeping with Canada’s international obligations. The IRB Guidelines on children also distinguish between accompanied and unaccompanied children.

[22] The respondent points out that A. Nour is in the accompanied child category.

[23] The Guidelines further state that:

The best interests of the child principle has been recognized by the international community as a fundamental human right of a child. In

the context of these Guidelines, this right applies to the process to be followed by the CRDD. *The question to be asked when determining the appropriate process for the claim of a child is what procedure is in the best interests of this child?* With respect to the merits of the child's claim, all of the elements of the Convention refugee definition must be satisfied.

[24] Given that A. Nour attended the hearing, the IRB can take the testimony of other members of her family into consideration. Thus, the IRB can assess the testimony of members of A. Nour's family. Accordingly, it can also draw inferences as to their credibility and explain its reasons for rejecting their testimony.

[25] Guideline 4 applies to women refugee claimants fearing gender-related persecution. According to the respondent, it is well established that a failure to mention the Guidelines is not fatal (see *Ayub v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1411 at paragraph 19; and *Kaur v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1066).

[26] The purpose of the Guideline is to assist the IRB in determining refugee claims based on gender-related persecution. The respondent argues that the Guideline cannot serve to make up for shortcomings in the evidence presented in support of a refugee claim.

[27] The respondent further submits that it was open to the IRB to find that the members of A. Nour's family lacked credibility. It is within the expertise of the IRB to assess whether a person's testimony is reasonable or not (see *Tofan v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1011 at paragraph 11). In this regard, the respondent refers to *Packiyathanar v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1557 at paragraph 9, which states that "[i]t is

well established that the [IRB] may base its decision on the applicant's behaviour at the hearing, their aptitude to answer questions in an honest and clear manner, the coherence and uniformity of the answers in order to appreciate their credibility, and that such findings with regard to the quality of the testimony should be the object of a significant judicial reserve".

[28] The respondent asserts that the IRB's findings are justified, transparent and intelligible, and that they fall within a range of possible, acceptable outcomes in the circumstances (see *Dunsmuir*, above at paragraph 47).

VI. Analysis

1. Did the IRB err by failing to consider IRB Guidelines 3 and 4 in its assessment of the credibility of A. Nour's testimony?

[29] With respect to the assessment of evidence, the Guideline on Child Refugee Claimants states the following:

The (RPD) is not bound by the technical rules of evidence and may base its determination on any evidence it considers credible or trustworthy. When assessing the evidence presented in support of the refugee claim of a child, the panel should take note of the following:

1. If the child has given oral testimony, then the weight to be given to the testimony must be assessed. In determining the weight to be given, the panel should consider the opportunity the child had for observation, the capacity of the child to observe accurately and to express what he or she has observed, and the ability of the child to remember the facts observed. These factors may be influenced by the age, gender and cultural background of the child, as well as other factors such as fear, memory difficulties, post-traumatic

stress disorder and the child's perception of the process at the (RPD).

2. A child claimant may not be able to express a subjective fear of persecution in the same manner as an adult claimant. Therefore, it may be necessary to put more weight on the objective rather than the subjective elements of the claim. The Federal Court of Canada (Appeal Division) has said the following on this issue:

I am loath to believe that a refugee status claim could be dismissed solely on the ground that as the claimant is a young child he or she was incapable of experiencing fear the reasons for which clearly exist in objective terms.

3. When assessing the evidence presented in the claim of a child refugee claimant, the panel may encounter gaps in the evidence. For example: a child may indicate that men in uniforms came to the house but not know what type of uniforms they were wearing or a child may not know the political views of his or her family. The child may, due to age, gender, cultural background or other circumstances, be unable to present evidence concerning every fact in support of the claim. In these situations, the panel should consider whether it is able to infer the details of the claim from the evidence presented.

[30] A careful reading of A. Nour's testimony shows that the IRB did not apply Guideline 3 with respect to assessing evidence. The member made erroneous findings regarding A. Nour's written account.

[31] The decision states that "[c]ontrary to what is stated in her written account, where she says that she was not able to go to school because her uncle forbade it, at the hearing she stated that she had not gone to school because there were no schools in Mondo" (see IRB decision at paragraph 12). In her Personal Information Form (PIF), A. Nour stated that [TRANSLATION] "from that point on, her uncle Abouna Djarma took her out of school. In his opinion, girls should not go to school ... so she was prevented from going to school and was kept at home to do household chores (see

Tribunal Record at page 20). She then mentioned that she had moved to Mondo with her uncle because of the violence in N'Djamena (see Tribunal Record at page 20). At the hearing, the member asked her if she had attended school in Mondo:

[TRANSLATION]

Q. She's your friend, ah yes, that's right. So. O.K. You were living with your uncle in Mondo?

R. Yes.

Q. And you found out from Fatimé, your friend, that your uncle wanted to arrange for you to be married to Mister...

R. Moussaye.

Q. Who?

R. Moussaye.

Q. Moussaye?

R. Yes.

Q. O.K. Were you going to school at that time?

R. No.

Q. You weren't going to school?

R. No, I wasn't going to school.

Q. Wait. You weren't going to school because it was during a school break or because you hadn't been going to school?

R. There aren't any schools in Mondo.

Q. There aren't any schools in Mondo. So, you had never gone to school?

R. No, I... I had been to school.

Q. O.K., so then explain this to me: where did you go to school if there were no schools in Mondo?

R. In N'Djamena.

Q. O.K. When did you move to Mondo?

R. It was during... during the war

Q. Approximately when was that?

R. When the rebels came to make war in the capital.
(see transcript of the hearing on May 10, 2011, at pages 180 and 181
of the Tribunal Record)

[32] It appears from the transcript that A. Nour's testimony is consistent with the account in her PIF. A. Nour states in her PIF that her uncle had taken her out of school in N'Djamena and that following the conflict between the rebels and the Chadian authorities, she and her uncle had moved to Mondo, where there weren't any schools.

[33] With regard to the forced marriage, the member writes that A. Nour "... [gives] two versions of the story. In the first, she said that Assadya had told her of the forced marriage arranged by her uncle when they had left the village of Mondo to go to France. In the second version, towards the end of her testimony, she said that she had learned about the arrangement for her forced marriage when she had arrived in Canada" (see panel's decision at paragraph 13).

[34] At the hearing, A. Nour stated the following with regard to the events surrounding the forced marriage:

[TRANSLATION]

Q. But the marriage, how did you find out about it?

R. Assadya told me.

Q. When did she tell you?

R. After we got out of Mondo.

Q. Where's that?

R. It's in Chad.

...

Q. The marriage, you found out about it when?

R. Assadya told me... When we came here, it was Assadya who gave me more information.

Q. Your marriage, you found out about it here?

R. No, in Chad, but when I came here, I was given more details.

Q. So, we're talking about Chad. When did you find out the arranged marriage to this Mr. Moussaye?

R. I don't know the date.

Q. Approximately when?

R. Before I came here.

(see transcript of the hearing on May 10, 2011, at pages 176, 182 and 183 of the Tribunal Record)

[35] A. Nour mentioned that Assadya had told her the news when they left Chad for France. She also stated that Assadya had given her more detailed information about the marriage when she arrived in Canada. On reading the transcript of the hearing, it is clear that there were not two different versions, but rather, one single and consistent version.

[36] As in *Dong v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1151 at paragraph 6, the Court finds that “[i]t is obvious that, in the rendering of the reasons quoted, the [IRB] gave absolutely no weight to the fact that, at the time the events occurred, the Applicant was a

mere youth, and at the time the Applicant testified, she was a young person ... [T]he depth and breadth of the explanations the Applicant gave should have given the [IRB] pause for making strong and unsubstantiated credibility findings”.

[37] The Court, in *Higbogun v Canada (Minister of Citizenship and Immigration)*, 2010 FC 445 at paragraphs 55 to 58, wrote the following with respect to Guideline 4:

[55] Based on the Federal Court jurisprudence available and the Gender Guidelines themselves, there does not seem to be a need for an identifiable objective trigger in order to bring the Guidelines into play.

[56] Rather, it seems that the Guidelines should be considered in the context of the allegation contained in the claim. Accordingly, one must consider the nature and grounds of the persecution feared by the Applicant to determine whether it is appropriate to consider the Guidelines in the context of the claim: see the Guidelines at 2(A), *Determining the Nature and Grounds of the Persecution*.

[57] Federal Court jurisprudence has held that the Guidelines ought to be considered by members of a tribunal in "appropriate cases". see *Fouchong v Canada (Secretary of State)*, [1994] FCJ No. 1727. Such cases include when an applicant's claim is based on a gender-related fear of persecution.

[58] In *Griffith v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 1142, Justice Campbell found that the Gender guidelines suggest that "to assess the actions of a woman subjected to domestic violence, special knowledge is an essential tool to use in reaching a fair and correct judgment.". Accordingly, Justice Campbell held that it is

It is incumbent on panel members to exhibit the knowledge require, and to apply it in an understanding and sensitive manner when deciding domestic violence issues in order to provide a fair result and avoid the risk of reviewable error in reaching findings of fact, the most important being the finding respecting the claimant's credibility.

In summary, it appears that whether the Guidelines ought to be considered in a particular case is determined by the nature of the Applicant's claim and her alleged fear of persecution.

[38] The IRB is not required to consider the Guidelines in its decision since the claim was not founded on Guideline 4. However, "Refugee ... Division Members are expected to follow the Guidelines unless there are compelling or exceptional reasons for adopting a different analysis" (see *Khon v Canada (Minister of Citizenship and Immigration)*, 2004 FC 143 at paragraph 19).

[39] In this case, the IRB ought to have considered the Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution. It appears from its decision that the IRB neither mentioned nor even considered these guidelines on women refugee claimants. In *Sy v Canada (Minister of Citizenship and Immigration)*, 2005 FC 379 at paragraph 14, the Court wrote:

[14] Although the Gender Guidelines are not binding on the Board, they must be considered in appropriate cases (*Fouchong v Canada (Secretary of State)* (1994), 88 F.T.R. 37 at paras 10-11 (F.C.T.D.); *Khon v Canada (Minister of Citizenship and Immigration)* 2004 FC 143 at para 18 (F.C.)). The Guidelines provide some assistance on how to assess credibility in certain cases and set out some examples of the types of credibility considerations that a panel might encounter ...

[40] For the purposes of this application, the Court has reproduced the relevant excerpts from Guideline 4 on Women Refugee Claimants Fearing Gender-Related Persecution:

B. ASSESSING THE FEARED HARM

Claims involving gender-related fear of persecution often fall quite comfortably within one of the five grounds of the Convention refugee definition. The difficulty sometimes lies in establishing whether the various forms of prejudicial treatment or sanctions imposed on women making such claims come within the scope of the concept of "persecution".

CONSIDERATIONS

FACTORS

The circumstances which give rise to women's fear of persecution are often unique to women. The existing bank of jurisprudence on the meaning of persecution is based, for the most part, on the experiences of male claimants. Aside from a few cases of rape, the definition has not been widely applied to female-specific experiences, such as infanticide, genital mutilation, bride-burning, forced marriage, domestic violence, forced abortion or compulsory sterilization.

[41] Leaving aside the fact that the IRB did not assess A. Nour's testimony in light of Guideline 3 on Child Refugee Claimants, and that, even though the definition of "persecution" of women refugee claimants "has not been widely applied to female-specific experiences ...genital mutilation, ...forced marriage, ...", the member ought to have at least applied Part B of Guideline 4 to gauge the plausibility of A. Nour's narrative. In this regard, the Court noted in *Diallo v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1450 at paragraph 32 (FC), that:

[32] The Chairperson's Gender Guidelines recognize that cross-cultural misunderstandings can come into play when gender-based claims are assessed by the Board. In order to minimize the risk of this happening, members are alerted to the effect that social, cultural, traditional and religious norms can have on the testimony of those claiming to fear gender-based persecution.

[42] In this case, the member ought to have explained her reasons for failing to consider the IRB Guidelines. It is apparent from reading the decision that she did not assess A. Nour's testimony in light of Guideline 4. This is especially true given that the member seemed much more preoccupied by a belief "that the case before it involves the use of some dubious tactics by this supposed, improvised family living here in Canada" (see IRB decision at paragraph 7).

2. Did the IRB err by concluding that the testimony of the members of A. Nour's family was not credible?

[43] The IRB made negative findings with respect to the credibility of the members of A. Nour's family. It is clear that assessing the credibility of the family members of a child refugee claimant is within the expertise of the IRB. It can therefore draw negative inferences with regard to their credibility. But its findings must be reasonable and must fall within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law (see *Dunsmuir*, above, at paragraph 47).

[44] The Court finds that the member attributes far too much significance to a few contradictions in the family members' testimony. Her fixation "on the details of what [A. Nour] stated to be [her] story caused [the member] to forget the substance of the facts on which [A. Nour] based [her] claim" (see *Djama v Canada (Minister of Employment and Immigration)*, [1992] FCJ No 531).

[45] Given the sheer number of errors committed by the IRB in this case, the Court finds that the decision is unreasonable and the matter must be returned for reconsideration.

VII. Conclusion

[46] The IRB did not assess A. Nour's narrative in light of the applicable Guidelines in this case. The sheer number of errors committed by the IRB with respect to A. Nour's credibility and that of

the members of her family renders the decision unreasonable. Thus, the matter is to be referred back for reconsideration before a different member of the IRB.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is allowed and the matter is to be referred back for reconsideration before a different member of the IRB; and
2. There is no question of general interest to certify.

“André F.J. Scott”

Judge

Certified true translation
Sebastian Desbarats, Translator

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-8278-11

STYLE OF CAUSE: AZIZA MAHAMAT NOUR
v
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AND IMMIGRATION

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: May 29, 2012

**REASONS FOR JUDGMENT
AND JUDGMENT:** SCOTT J.

DATED: June 25, 2012

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