

Federal Court



Cour fédérale

Date: 20141217

Docket: IMM-1858-14

Citation: 2014 FC 1228

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, December 17, 2014

Present: The Honourable Mr. Justice Harrington

BETWEEN:

**KADE DIARRA
FELICITE MARIAM THEA
MAURICE MAMADI THEA**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] Ms. Diarra, the principal applicant, is a citizen of the Republic of Guinea. She arrived in Canada in April 2009. A few weeks later, she gave birth to her daughter Jeannette. Over the following months, her children Maurice and Félicité each came to join her. The principal applicant and the children then made a refugee claim. The Refugee Protection Division rejected

their request on the ground of Ms. Diarra's lack of credibility. Their pre-removal risk assessment was also rejected.

[2] This is the judicial review of the decision of an immigration officer dismissing the applicants' application for permanent residence, in Canada, for humanitarian and compassionate considerations.

[3] Paragraph 25(1) of the *Immigration and Refugee Protection Act* allows a person who does not meet the eligibility criteria to make an application for permanent residence from inside Canada if she can demonstrate that she will face unusual and undeserved or disproportionate hardship if it is required that the request be made outside Canada. This is an exceptional measure.

[4] If Ms. Diarra had no children, it goes without saying that this Court would have no hesitation to dismiss this application. However, the humanitarian and compassionate considerations must be directed to the principal applicant's two daughters: Félicité, 13 years old, born in the United States and Jeannette, 5 years old, born in Canada. Neither of them can be sent to Guinea. What kind of life would Félicité lead if she were sent back to the United States without her mother? And what kind of life would Jeannette lead if she lived in Canada without her mother?

[5] The principal applicant raised her fear of the threat of female circumcision for her two daughters if they were in Guinea with her. The decision-maker recognized the possibility, but

minimized the seriousness of it, at least in part, on the ground of Ms. Diarra's lack of credibility. She is Muslim. She alleges that her father is a radical imam. She married a Christian man. This marriage causes great difficulties within the family.

[6] Nevertheless, the uncontradicted evidence of the conditions in the country indicates that more than 90% of women are victims of female circumcision. Although it is forbidden, female circumcision is practiced both in Muslim and Christian communities across the country.

[7] Ms. Diarra is faced with an impossible choice—either she returns to Guinea and leaves her children in Canada and the United States, or she brings them with her to Guinea where her daughters risk female circumcision and where the three children would have trouble integrating into a culture that they do not know. It would be reasonable to conclude, on a balance of probabilities, that Félicité and Jeannette would be victims of female genital mutilation if they accompanied their mother to Guinea.

[8] A recent decision regarding an application for permanent residence for humanitarian and compassionate considerations is that of Justice Diner in *Bautista v Canada (Citizenship and Immigration)*, 2014 FC 1008. He points out at paragraph 22:

Regarding parental “choice”, it was simply never a credible possibility that this single mother would abandon her daughter in Canada, no more than any responsible parent would abandon their child thousands of miles away.

[9] He also quoted case law supporting the position that “the child’s best interests was remaining with the primary caregiver”, see para 24. In this case, Ms. Diarra is the primary caregiver. The children’s father still lives in Guinea.

[10] In his decision, the immigration officer refers to the *Mission Report* prepared by the French, Belgian and Swiss governments. He points out that: [TRANSLATION] "... according to a recent report consulted, health experts have noted a decrease in the prevalence rate of female genital mutilation in the last few years." However, the same report notes that:

[TRANSLATION]

According to a demographic and health survey conducted in 2005, the prevalence rate of female genital mutilation (FGM) is of 96% in Guinea. Without a more recent study, no new figures are available.

[11] In the circumstances, the analysis of the best interest of the children directly affected was not done in accordance with paragraph 25(1) of the *Immigration and Refugee Protection Act*.

The decision was not reasonable.

JUDGMENT

FOR THESE REASONS;

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is allowed.
2. This matter is referred back to a new immigration officer for redetermination.
3. There is no serious question of general importance to certify.

"Sean Harrington"

Judge

Certified true translation

Catherine Jones, Translator

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1858-14

STYLE OF CAUSE: KADE DIARRA ET AL v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: MONTRÉAL, QUEBEC

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APPEARANCES:

Anne Castonguay
Myriam Roy-L'Écuyer, articling
student

FOR THE APPLICANTS

Edith Savard

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Stewart Istvanffy Law Firm
Montréal, Quebec

FOR THE APPLICANTS

William F. Pentney
Deputy Attorney General of Canada
Montréal, Quebec

FOR THE RESPONDENT