Federal Court  Cour fédérale

Date: 20191022

Docket: IMM-2247-19

Citation: 2019 FC 1324

Ottawa, Ontario, October 22, 2019

PRESENT: Madam Justice Walker

BETWEEN:

KARIMOU OURY DIALLO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Mr. Karimou Oury Diallo, the Applicant, is a citizen of Guinea. He seeks judicial review of a negative Pre-Removal Risk Assessment (PRRA) decision of a Senior Immigration Officer (Officer) of Immigration, Refugees and Citizenship Canada. This application for judicial review is brought pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA).

[2] The determinative issue in this application is whether the Officer made a veiled credibility finding in the negative PRRA decision (Decision). The Officer made no explicit credibility findings but concluded that Mr. Diallo had provided no evidence of any political involvement in Guinea. The Officer did not explain this conclusion despite Mr. Diallo's PRRA statement in which he detailed his party membership and political activities. For the reasons that follow, I find that the Officer made a determinative veiled credibility finding in the Decision and should have convened an oral hearing to permit Mr. Diallo a fair chance to respond. The application will be allowed.

I. Background

[3] In his narrative in his PRRA application, Mr. Diallo stated that he was politically active in Guinea, first as a member of the Rassemblement du peuple de Guinée (RPG). He later changed party allegiances and joined the rival Union des Forces Démocratiques de Guinée (UFDG).

[4] Mr. Diallo described the events prompting his departure from Guinea in 2013 as follows. The UFDG organized a demonstration in May 2013 during which Mr. Diallo was presented as a spokesperson. A few days after the demonstration, armed security agents (police and soldiers) arrived at his place of business, threatened and beat him, and took his possessions, including €50,000 that belonged to his business partners. Mr. Diallo was arrested, imprisoned, tortured and shot in the leg. He places responsibility for the raid on the RPG. Mr. Diallo was released in November 2013, sought medical attention and fled the country for Guinea-Bissau.

[5] In January 2014, Mr. Diallo left Guinea-Bissau for Brazil. From there, he travelled to the United States via a number of countries, arriving on December 14, 2014. Mr. Diallo applied for

but was denied refugee status in the United States. He was placed in detention for 14 months and was released on supervision. He was required to present himself to US immigration authorities on scheduled dates, which he did until February 2, 2017. At that point, Mr. Diallo was afraid to attend his scheduled meeting because most of his friends were being deported.

[6] Mr. Diallo first arrived in Canada on February 20, 2017. He made a claim for refugee protection but was found ineligible pursuant to paragraph 101(1)(e) of the IRPA as he came to Canada directly from the United States. An exclusion order was issued against Mr. Diallo and he returned to the United States. Mr. Diallo re-entered Canada on April 1, 2018. Although he was once again found ineligible to claim refugee protection, he was eligible for a PRRA. Mr. Diallo submitted his PRRA application on April 18, 2018.

[7] Mr. Diallo fears returning to Guinea because his life has been threatened by both the ruling RPG party and the owners of the €50,000 taken by the armed security agents during the May 2013 raid.

II. Decision under review

[8] The Decision is dated August 27, 2018. The Officer concluded that Mr. Diallo would not be at risk within the meaning of sections 96 and 97 of the IRPA on a return to Guinea. The Officer made three findings in support of this conclusion:

(1) Mr. Diallo had not proven that he was politically active in Guinea or that he was arrested and tortured for this reason, one of the essential elements of his PRRA application. The Officer stated that Mr. Diallo had not submitted "any evidence of his political involvement", nor had he submitted any medical reports confirming his injuries as a result of his imprisonment and torture.

(2) Mr. Diallo would not be at risk because of any alleged prior political involvement. The documentary evidence for Guinea established that the UFDG had developed into an influential opposition political party whose members sit in the National Assembly and hold significant positions within the government. The Officer found that the political climate in Guinea had calmed after the 2018 elections and that it was unlikely that the authorities continued to seek Mr. Diallo in order to kill him in connection with political activities in 2013.

(3) Mr. Diallo had not established the alleged death threats due to the disappearance of the €50,000.

[9] The Officer gave no weight to Mr. Diallo's documentary evidence, which consisted of an attestation from his brother regarding the threats resulting from the theft of the €50,000, the death certificates of Mr. Diallo's father and brother, and various photographs. The Officer found that the attestation did not support Mr. Diallo's story and that the attestation and the death certificates had clearly been modified. The Officer also identified a number of issues with the photographs, namely that none of the individuals pictured were identified or identifiable, and the photographs of the demonstrations were undated and were not accompanied by any explanation.

III. Preliminary Issue – New Evidence

[10] The Respondent argues that Mr. Diallo has attempted to introduce new evidence in this application through his affidavit and the filing of his UFDG membership card. The Respondent states that the affidavit addresses substantive concerns raised by the Officer in the Decision.

[11] It is well established that the evidentiary record on an application for judicial review is restricted to the record before the decision-maker. There are recognized exceptions to the general rule, including the admission of an affidavit that: provides general background information; addresses procedural fairness issues; or, highlights the complete absence of evidence before the administrative decision-maker (*Association of Universities and Colleges of Canada v Canadian*

Copyright Licensing Agency (Access Copyright), 2012 FCA 22 at paras 19-20). None of the exceptions apply here.

[12] I have reviewed Mr. Diallo's affidavit dated April 29, 2019 and agree with the Respondent. I will not consider Mr. Diallo's new evidence, specifically paragraphs 3 and 4 of the affidavit. In addition, I will not consider the UFDG membership card which Mr. Diallo seeks to put before this Court as an Exhibit to his affidavit. Mr. Diallo argues that his affidavit and membership card were submitted in support of his procedural argument that he did not understand the PRRA process and thought he would have an opportunity to provide further documentation. I do not find this argument persuasive. Mr. Diallo cannot supplement his evidence once he has received the Decision. His statement that he did not understand the PRRA process is not sufficient to overcome the general principle that the Decision must be reviewed against the record before the Officer.

IV. Determinative issue and standard of review

[13] The determinative issue before me is whether the Officer made veiled credibility findings in the Decision in respect of Mr. Diallo's evidence. If so, Mr. Diallo argues that the Officer should have convened an oral hearing in accordance with paragraph 113(b) of the IRPA and section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (IRPRs).

[14] Recent authority of this Court supports the conclusion that a PRRA officer's decision as to whether or not to hold an oral hearing involves a question of mixed fact and law and is to be reviewed for reasonableness (*Haji v Canada (Citizenship and Immigration)*, 2018 FC 474 at

paras 6-10; *Boakye v Canada (Citizenship and Immigration)*, 2018 FC 831 at para 16). However, in the present case, the Officer did not consider whether to convene an oral hearing and I find Justice Pentney's analysis in *A.B. v Canada (Citizenship and Immigration)*, 2019 FC 165 (*A.B.*), instructive (see also *Sala Del Rosario v Canada (Citizenship and Immigration)*, 2019 FC 705 at para 11). Justice Pentney stated (*A.B.* at paras 13-14):

> [13] On the facts of the case before me, however, I do not find the application of the usual standard of review analysis to be particularly helpful (see *Huang v Canada (Citizenship and Immigration)*, 2018 FC 940 at paras 52-55 [*Huang*]). Rather, I find it more appropriate to apply the recent guidance of the Federal Court of Appeal in *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69:
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> > [54] A court assessing a procedural fairness argument is required to ask whether the procedure was fair having regard to all of the circumstances, including the *Baker* factors. A reviewing court does that which reviewing courts have done since *Nicholson*; it asks, with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, whether a fair and just process was followed...
>
> [14] In considering this question, the following factors are particularly relevant. The Applicant made a specific and detailed request for an oral hearing, with reference to the factors enumerated in section 167 of the *IRPR*. The Officer, however, made no mention of this nor is there any indication of whether or how these factors were assessed by the Officer. In that sense, there is simply no "decision" to review, beyond the fact that the Officer did not hold a hearing. …

[15] The facts before Justice Pentney differ from those in the present case as, in *A.B.*, the applicant made a detailed request for an oral hearing which was ignored by the PRRA officer in the decision (see, for contrast, *Sallai v Canada (Citizenship and Immigration)*, 2019 FC 446 at paras 19 and 30 (*Sallai*), where Justice Kane canvassed the jurisprudence and reviewed the

PRRA decision for reasonableness, specifically noting that the officer in that case had considered whether to hold an oral hearing). Here, the Officer made no mention of an oral hearing, likely because Mr. Diallo, who was then unrepresented, made no request for one. As in *A.B.*, there is no "decision" for me to review against a reasonableness standard. As a result, I will consider whether Mr. Diallo's PRRA process was fair and just in the absence of an oral hearing.

V. Analysis

[16] The starting point for my analysis is that most PRRA applications are dealt with in writing. Paragraph 113(b) of IRPA provides that "a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required". The prescribed factors are listed in section 167 of the IRPRs:

Hearing – prescribed factors	**Facteurs pour la tenue d'une audience**
167 For the purpose of determining whether a hearing is required under paragraph 113(b) of the Act, the factors are the following:	**167** Pour l'application de l'alinéa 113b) de la Loi, les facteurs ci-après servent à décider si la tenue d'une audience est requise :
(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;	**a)** l'existence d'éléments de preuve relatifs aux éléments mentionnés aux articles 96 et 97 de la Loi qui soulèvent une question importante en ce qui concerne la crédibilité du demandeur;
(b) whether the evidence is central to the decision with respect to the application for protection; and	**b)** l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection;

(c) whether the evidence, if accepted, would justify allowing the application for protection.	**c)** la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection.

[17] In summary, there must be evidence before the officer that raises a serious issue in the credibility of the applicant's evidence regarding their section 96 or 97 refugee claim which may be determinative of the PRRA application. The assessment of whether such evidence is in play is particularly challenging when the officer is said to have made a veiled credibility finding. Often, the officer will have made no explicit adverse credibility finding and will have concluded only that the applicant's evidence is insufficient to establish their claim or alleged risk.

[18] I agree with the Respondent that a decision-maker can weigh the sufficiency of an applicant's evidence without determining its credibility (*Ferguson v Canada (Citizenship and Immigration)*, 2008 FC 1067; *Ahmed* at para 31; *A. B.* at paras 25-27). The question for the Court in each case is whether, on the evidence before the decision-maker, a conclusion as to sufficiency of evidence could reasonably be reached without having to draw adverse conclusions about the applicant's credibility.

[19] The question of credibility involves an assessment of whether the evidence is believable. The question of sufficiency of evidence goes to the "amount" of evidence required to establish a fact or to meet an evidentiary burden. These concepts have been reviewed comprehensively by my colleagues in recent cases (see, for example, *Magonza v Canada (Citizenship and Immigration*), 2019 FC 14 at paras 16-35). The distinction between credibility and sufficiency

was concisely described as follows by Justice Norris *(Ahmed v Canada (Citizenship and Immigration)*, 2018 FC 1207 at para 31 (*Ahmed*)):

> [31] Decision makers who are required to make findings of fact are often required to weigh the evidence presented and, against the backdrop of the burden and standard of proof, determine its sufficiency in relation to the matters in issue. Credibility assessments can be an important consideration when weighing evidence. However, a decision maker can also find evidence to be insufficient without any need to assess its credibility. One useful test in the present context is for the reviewing court to ask whether the factual propositions the evidence is tendered to establish, assuming them to be true, would likely justify granting the application for protection. If they would not, then the PRRA application failed, not because of any sort of credibility finding, but simply because of the insufficiency of the evidence. On the other hand, if the factual propositions the evidence is tendered to establish, assuming them to be true, would likely justify granting the application and, despite this, the application was rejected, this suggests that the decision maker had doubts about the veracity of the evidence.

[20] This Court is often called on to distinguish between a veiled credibility finding and a finding of insufficiency of evidence. In each case, the judge has arrived at their conclusion based on the nature of the evidence in the record and a close examination of the decision in question. For this reason, it is necessary to consider the Decision in some detail (*Haji v Canada (Citizenship and Immigration)*, 2018 FC 474 at para 11).

[21] The critical excerpts from the Decision are as follows:

> The applicant states that he was a prominent political opponent, member of the UFDG and leader of the youth group. When, in this context, following a demonstration for which he was the spokesperson, he was arrested, imprisoned, tortured and shot in the leg.
>
> That being said, the applicant does not submit any evidence of his political involvement. …

> …
>
> The UFDG is therefore an important party and the tensions following the demonstrations of 2011 and 2012 were highly publicized. The applicant, who claims that he was one of the political leaders of the UFDG's youth section, does not submit any evidence supporting his political involvement. In fact, he does not submit any member card, any letter from party members, any proof of his role as a leader of the youth party, nor any communications conducted in this context. The applicant claims that he was imprisoned and tortured and even shot in the leg, but does not submit any medical reports confirming his injuries. In short, the applicant has not proven one of the essential elements of his application, that is to say, that he was someone who was politically involved and imprisoned for that reason. …
>
> …
>
> On the whole, the evidence presented does not demonstrate that the applicant was politically involved. Furthermore, the evidence does not demonstrate that he was arrested and tortured for this reason, nor that his family had to flee Guinea for its protection. In addition, the objective evidence shows that members of the applicant's party continue to represent it as the official opposition and has active members sitting in the Assembly. For all these reasons, I am not satisfied that the applicant is at risk in connection with his political involvement.

[22] The Respondent submits that the Officer considered all of Mr. Diallo's evidence and based the conclusion that there was no evidence of Mr. Diallo's political activity in Guinea solely on the insufficiency of the evidence. I do not agree.

[23] Mr. Diallo's PRRA narrative was before the Officer. In the narrative, Mr. Diallo recounted his involvement with the UFDG in detail, including his leadership role and participation in the May 2013 demonstration. He also described his imprisonment and torture at the hands of government agents. The Officer made no mention of the narrative in the Decision and no reference to any issue of credibility but yet made a categorical finding that Mr. Diallo had

not presented “any evidence of his political involvement”. The Officer could only conclude that there was no evidence of Mr. Diallo’s political involvement if the Officer did not believe the factual assertions made by Mr. Diallo in the PRRA narrative. In so doing, the Officer made a credibility assessment that is not reflected in the Decision: a veiled credibility finding.

[24] The Officer’s choice of language demonstrates the implicit or veiled rejection of Mr. Diallo’s evidence:

> - The applicant, who claims that he was one of the political leaders of the UFDG’s youth section, does not submit any evidence supporting his political involvement.
>
> - The applicant claims that he was imprisoned and tortured and even shot in the leg, but does not submit any medical reports confirming his injuries.

[25] Mr. Diallo’s narrative regarding his political activities in Guinea was central to his PRRA application. The Officer’s rejection of the evidence raised a serious issue as to Mr. Diallo’s credibility. Therefore, the prescribed factors in section 167 of the IRPRs were satisfied.

[26] I find that the Officer should have convened an oral hearing to allow Mr. Diallo to respond to questions regarding his narrative and supporting evidence. The Officer’s failure to do so resulted in a process that was unfair to Mr. Diallo. For this reason, I will allow Mr. Diallo’s application for judicial review. I note also that Mr. Diallo was ineligible to make a claim for refugee protection when he entered Canada from the United States and has not had the opportunity to answer any concerns about his narrative and credibility in a prior oral hearing before the Refugee Protection Division (*A.B.* at para 14). On redetermination, another PRRA

officer will be able to test Mr. Diallo's factual assertions and weigh his responses against his documentary evidence which I acknowledge is sparse.

[27] The Respondent argues that, even if the Officer engaged in a veiled credibility assessment, the Officer's review of the documentary evidence for Guinea was reasonable. The Officer's conclusions that the UFDG is now the opposition party in a period of political calm in Guinea and that its members safely sit in the National Assembly mean that Mr. Diallo would not be at risk on any return to the country even if he was politically active in 2013. Therefore, the Respondent argues that the Officer's refusal of the PRRA application was inevitable.

[28] The fact that the country conditions in Guinea may have changed since Mr. Diallo's departure is not a full answer to whether he will face risk upon a return once his evidence is fairly considered. While the Officer's consideration and explanation of the current political landscape in Guinea was clear and intelligible, Mr. Diallo submits that the Officer failed to consider contradictory country condition evidence. On redetermination, he will have an opportunity to provide submissions regarding the current political situation in Guinea and how that situation impacts his risk of return.

VI. Conclusion

[29] The application is allowed.

[30] No question for certification was proposed by the parties and none arises in this case.

JUDGMENT IN IMM-2247-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. No question of general importance is certified.

"Elizabeth Walker"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Nalini Reddy	FOR THE APPLICANT
Laoura Christodoulides	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Pitblado LLP Barristers and Solicitors Winnipeg, Manitoba	FOR THE APPLICANT
Attorney General of Canada Winnipeg, Manitoba	FOR THE RESPONDENT