Federal Court  Cour fédérale

Date: 20130430

Docket: IMM-5029-12

Citation: 2013 FC 450

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, April 30, 2013

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

KHADY KANGHE DIENG
SARAH EZULDA AM JOURSON
KAGNE AMINATA BA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA), of a decision by the Refugee Protection Division of the Immigration and Refugee Board of Canada (the panel) dated April 25, 2012, through which the panel refused to recognize Khady Kanghe Dieng, Kagne Aminata Ba and Sarah Ezulda Amélie

Maria Marly Jourson (the applicants) as Convention refugees under section 96 of the IRPA or persons in need of protection under section 97 of the IRPA.

I. Facts

[2] Kagné Aminiata Ba, 56 years of age, is a citizen of Senegal. She is the mother of the other two applicants.

[3] Khady Kanghe Dieng, 30 years of age, is a citizen of Senegal. She is the principal applicant.

[4] Sarah Ezulda Amélie Maria Marly Jourson, 19 years of age, is a citizen of France. She is the half-sister of Ms. Dieng.

[5] The three applicants lived in France before coming to Canada. They left France on September 27, 2008, and arrived in Canada on September 29, 2008.

[6] Ms. Dieng and Ms. Jourson claimed refugee status on April 21, 2009. Ms. Dieng's application related to Senegal and France, while Ms. Jourson's application only related to France.

[7] Ms. Ba left Canada in October 2008. She came back to Canada on February 4, 2012, and claimed refugee status the same day. Ms. Ba's application only related to Senegal, but after the hearing, the panel found that her application also related to France.

[8] Ms. Ba's application was joined to those of her daughters during a hearing held before the panel on February 7, 2012.

[9] The reasons for the refugee claim are the same for three applicants. They allege that they fear persecution in Senegal and in France because of their political opinions and their membership in a social group. They also allege that they would be exposed to risks to their lives or cruel treatment or punishment if they had to return to France or Senegal.

[10] The applicants stated that they had been persecuted by former high-ranking members of the Wade government in Senegal who could hunt them down in France and kill, attack or kidnap them.

[11] Ms. Ba stated during the hearing that these people bear a grudge because members of her family held positions of authority within the government of Senegal that was in power before the Wade government and that she knew compromising things about the Wade government (which has not been in power since April 2, 2012).

[12] Ms. Ba explained that the day after a meeting between her and President Wade in Canada in 2008, her mother was killed in a hospital in France. Ms. Ba suspected a former minister of the Wade government of being responsible of the murder. Ms. Ba also explained that members of the Wade government sent murderers to kill her when she was living with her daughter in a hotel in Dakar in March 2008 and that her apartment in France was set on fire by his persecutors on December 6, 2010.

[13] The applicants also stated that they feared being circumcised or married by force in Senegal and that they were not sheltered from these dangers, even in France. The applicants explained that a friend from Senegal who had expressed herself publically against circumcision was killed in Paris in February 2008.

II. Impugned decision

[14] The applicants' refugee protection claim was heard by the panel on April 25, 2012. The panel initially determined that Ms. Jourson is a French citizen, that Ms. Dieng and Ms. Ba have permanent resident status in France and that, as a result, none of the applicants can request refugee protection against Senegal because of the exclusion provided under Article 1E of the *Convention Relating to the Status of Refugees* (Convention) and section 98 of the IRPA.

[15] The panel also found that the applicants had no subjective fear of persecution because of the fact that they did not claim refugee status within a reasonable period after fleeing France.

[16] Finally, the panel determined that the applicants had not rebutted the presumption of state protection against France, noting that they had not sufficiently sought to avail themselves of state protection.

III. Issues

[17] There are two issues in this application for judicial review:

a) Did the Panel commit a reviewable error by applying Article 1E of the Convention to the refugee claims of Ms. Dieng and Ms. Ba?

b) Did the Panel commit a reviewable error by rejecting the refugee claims of the three applicants since they failed to show that France could not protect them?

IV. Analysis

[18] Two standards of review apply in respect of the exclusion under Article 1E of the Convention. The correctness standard is used to determine whether the correct legal test was applied and the reasonableness standard is used to ascertain whether the panel correctly applied the legal principles to the facts (*Ramadan v Canada* (*Minister of Citizenship and Immigration*), 2010 FC 1093, at paras 13-14 (available on CanLII). See also *Zeng v Canada* (*Minister of Citizenship and Immigration*), 2010 FCA 118, at para 11, [2011] 4 FCR 3, and *Lu v Canada* (*Minister of Citizenship and Immigration*), 2012 FC 311, at para 20 (available on CanLII).

[19] Article 1E of the Convention states:

This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.	Cette Convention ne sera pas applicable à une personne considérée par les autorités compétentes du pays dans lequel cette personne a établi sa résidence comme ayant les droits et les obligations attachés à la possession de la nationalité de ce pays.

[20] Section 98 of the IRPA provides as follows:

A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.	La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.

[21] The case law has developed a framework to determine whether a person meets the criteria of Article 1E of the Convention. First, the Minister must establish a *prima facie* case that the claimant may return to the third country and enjoy the same rights as its nationals. If that step is met, the burden then shifts and the claimant must show that he or she cannot in fact enjoy the rights of his or her residence status. The rights which the claimant must enjoy for this first step to be achieved include the right to return to the claimant's country of residence, the right to work there, the right to study there and the right to access social services with no restrictions. So that the panel can validly find that the applicant enjoys a status in the third country conferring equivalent rights to those of its citizens, the applicant must enjoy this status at the time that he or she claims refugee protection in Canada and the day on which it is decided. If that is the case, the exclusion under Article 1E of the Convention applies. See *Ramadan*, above, at paras 18-20; *Zeng*, above, at para 13-16; *Lu*, above, at para 24.

[22] In this case, the panel correctly stated the legal principles applicable to paragraphs 10 to 13 of its reasons and its application of these principles to the facts was certainly reasonable.

[23] In her Personal Information Form (PIF), Ms. Dieng stated that she lived in France from September 1988 to September 2008 and that her immigration status in this country from 1999 to her departure for Canada in 2008 was that of permanent resident. During the hearing before the panel she confirmed that she was still a permanent resident in France and that she could return there. In addition, it appears from the documents filed with the panel that Ms. Dieng had a permit to remain in France as a resident, valid from March 23, 2005, to March 22, 2015. She stated during her testimony that she had the right to study, work and receive social services in France. In these

circumstances, it was not unreasonable for the panel to find that Ms. Dieng had the *prima facie* right to go back to live in France and enjoy the same rights as its nationals. Ms. Dieng did not provide any evidence to the contrary, the panel could reasonably find that at the time that she made her refugee claim in Canada and up to the end of the hearing, Ms. Dieng was still recognized by France as a permanent resident of that country and that, as a result, she falls under Article 1E of the Convention.

[24] As for Ms. Ba, she stated during an interview at the point of entry on February 4, 2012, that she obtained French citizenship following her marriage to a French citizen, but does not have the proof. The panel also had a letter from the French Republic dated April 20, 2011, indicating that Ms. Ba had become a French national on November 26, 2011, and asking her to return her residency permit. In her PIF and before the panel, Ms. Ba stated that she was a permanent resident of France, contradicting at the same time the above letter from the French Republic and her own statement at the point of entry. Considering this evidence, it was thus not unreasonable for the panel to find that Ms. Ba was at the very least a permanent resident of France and that she had the *prima facie* right to return there and to exercise the rights equivalent to those of French citizens. Since Ms. Ba did not present any evidence establishing that her residency permit in France had expired and that she could not benefit from her rights under her residency permit in France, it was reasonable for the panel to find that she still had, from the time that she submitted her refugee claim in Canada and up to the end of the hearing, at least permanent resident status and, thus, that she was also referred to in Article 1E of the Convention.

[25] Finally, with respect to Ms. Jourson, there is no doubt that she became a French national because she was born in France. Further, she holds a French passport valid until July 2013 and she submitted before the panel that she is a French citizen. The merit of her application should thus also be assessed in relation to France.

[26] Therefore, it was not unreasonable for the panel to reject the refugee claim of all the applicants in relation to Senegal. However, the applicants argued that Ms. Dieng and Ms. Ba had not been formally excluded when Article 1E of the Convention was applied. It is true that the panel did not mention this exclusion in its general finding or in its notice of decision. Other than the fact that it was not required under subsection 107(1) of the IRPA, which provides that the panel must specify only whether it allows or dismisses the application, referring this application back to a different member of the panel would be completely superfluous and would not be the best use of resources since the application of Article 1E of the Convention cannot be questioned given the evidence on the record.

> (b) Did the Panel commit a reviewable error by rejecting the refugee claim of each of the three applicants as they did not show that France could not protect them?

[27] It is well established that any person having a well-founded fear of persecution should be quick to make a refugee claim as soon as they have arrived in Canada. The late submission of a refugee claim is a factor that the panel can take into account to evaluate the credibility of an applicant with respect to the merit of his or her claim: *Aslam v Canada (Minister of Citizenship and Immigration)*, 2006 FC 189, at paras 25-28, 146 ACWS (3d) 316; *Singh v Canada (Minister of*

Citizenship and Immigration), 2006 FC 743, at para 50, 149 ACWS (3d) 479. The delay in claiming refugee status often reveals a lack of subjective fear of persecution or well-founded fear of persecution, since a person with a reasonable fear will generally make a refugee claim at the first opportunity: *Mejia et al. v Canada (Minister of Citizenship and Immigration)*, 2011 FC 851, at para 14 (available on CanLII); *Semextant v Canada (Minister of Citizenship and Immigration)*, 2009 FC 29, at para 1 and 22 (available on CanLII).

[28] Ms. Dieng and Ms. Jourson waited almost seven months after they arrived in Canada before making a refugee claim and explained their conduct by saying that they knew nothing about this issue and that they felt safe with their tourist visa valid for six months. I find, as the panel did, that this explanation is not satisfactory. Ms. Dieng and Ms. Jourson knew that their residency was authorized for a limited duration and it is reasonable to find that they would have attempted to legalize their status as soon as possible if they truly feared for their lives or their physical integrity. As for Ms. Ba, she made a refugee claim more than three years after coming to Canada in September 2008 with her two daughters. Her explanation that her lawyer had advised her to wait to have documents that they had to obtain by going to Gambia at the Senegal border seems hard to believe. Given these circumstances, the panel could reasonably find that the applicants' failure to make a refugee claim when they arrived in Canada or soon after affects their credibility with respect to their subjective fear of persecution if they were to return to live in France, whether as permanent residents or French citizens.

[29] Moreover, the applicants' fear also had to have an objective basis. In this regard, the first step of the analysis is to assess whether the applicants could be protected from the alleged

persecution by France. As Justice Major recalled in *Chan v Canada (Minister of Employment and Immigration)*, [1995] 3 SCR 593, at para 120 (available on CanLII): "Both the existence of the subjective fear and the fact that the fear is objectively well-founded must be established on a balance of probabilities".

[30] To rebut the presumption of state protection, evidence that is relevant, credible and persuasive of insufficient or non-inexistent protection must be presented, the applicable standard of evidence is the balance of probabilities: *Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 au para 30, [2008] 4 FCR 636; *Guevara v Canada (Minister of Citizenship and Immigration)*, 2012 FC 195, at para 16-18 (available on CanLII). Where a state is in effective control of its territory, has military, police and civil authorities in place, and makes serious efforts to protect its citizens, the mere fact that it is not always successful at doing so will not be enough to rebut the presumption of the existence of state protection: *Canada* (*Minister of Employment and Immigration*) *v Villafranca* (1992), 99 DLR (4th) 334, at para 7, 37 ACWS (3d) 1259 (CA); *Onodi v Canada* (*Minister of Citizenship and Immigration*), 2012 FC 1191, at para 16 (available on CanLII); *Molnar v Canada* (*Minister of Citizenship and Immigration*), 2012 FC 1475, at para 23 (available on CanLII).

[31] While a certain number of problems may exist France in terms of respecting human rights, we cannot seriously call into question the ability of the France's authorities to protect its nationals and all those in its territory. The documentary evidence shows that the police and gendarmes are generally considered to be effective, that judges are independent and impartial and that anyone whose rights or freedoms are violated or infringed upon may apply to a court for remedy. The

documentary evidence also indicates that significant efforts are being made to fight against violence against women, that circumcision is prohibited and that measures exist to protect women against forced marriage. Women are protected against attempts to have them marry against their will. There are also several specialized national and international non-governmental human rights organizations active in France and organizations funded by the government, which may help people who have difficulties with obtaining state protection. The panel noted that if the purpose of these organizations is not to implement state protection, they can guide people in approaching the authorities responsible for implementing protection.

[32] Persons who fear for their life or integrity have the obligation to seek the protection of the authorities in their country, unless it is objectively reasonable not to do so because this protection could not have been ensured: *Soto v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1654, at para 7, 145 ACWS (3d) 136. It must never be forgotten that international law relating to refugees was formulated to back up protection that a State must provide to its nationals. It was meant to come into play only in situations when that protection is unavailable, and then only in certain situations: *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 (available on CanLII).

[33] Further, the panel noted that the applicants sent information to the Commissariat de Colombes several years after the harassment over the telephone had occurred, but had not reported it to the police because their lives were presumably in danger. Not only did they not inform the authorities of their grandmother's murder, but they also did not tell them that their lives had been directly threatened by influential people in Senegal who could easily enter France using diplomatic passports. The applicants also did not establish, on a balance of probabilities, that they would have

put their lives or security in danger if they had taken steps to inform the French authorities of their situation with respect to people that they allegedly fear.

[34] In these circumstances, it was not unreasonable for the panel to find that the applicants' testimony does not constitute relevant, reliable and persuasive evidence leading to a finding that the presumption that the French authorities are able protect their citizens and permanent residents was rebutted. Therefore, the applicants did not demonstrate that their fear of being persecuted, supposing that they are credible, was objective. The panel did not err in refusing to grant them refugee status.

V. Conclusion

[35] For all of the foregoing reasons, the application for judicial review must be dismissed. In closing, I would regret not pointing out the excellence of the written and oral submissions by counsel for the respondent, whose work greatly inspired me in writing these reasons.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is dismissed and no question is certified.

"Yves de Montigny"
Judge

Certified true translation
Catherine Jones, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5029-12
STYLE OF CAUSE:	KHADY KANGHE DIENG ET AL. v MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	January 15, 2013
REASONS FOR JUDGMENT:	Mr. Justice de Montigny
DATED:	April 30, 2013

APPEARANCES:

Luc R. Desmarais	FOR THE APPLICANTS
Normand Lemyre	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Luc R. Desmarais Montréal, Quebec	FOR THE APPLICANTS
William F. Pentney Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT