

Federal Court



Cour fédérale

**Date: 20160704**

**Docket: IMM-2639-15**

**Citation: 2016 FC 741**

[ENGLISH TRANSLATION]

**Montréal, Quebec, July 4, 2016**

**PRESENT: The Honourable Madam Justice St-Louis**

**BETWEEN:**

**MAMADOU SALIOU DIALLO  
ALIAS MOHAMED SANOH**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

I. Introduction

[1] The applicant is seeking judicial review of a decision by the Refugee Protection Division [RPD] dated April 24, 2015, upholding the *ex parte* interim confidentiality and scheduling order

(amended) rendered by another RPD member on November 28, 2014, [the Order] and dismissing his claim for refugee protection.

[2] This case raises questions concerning the dismissal of the applicant's claim for refugee protection, the process leading up to the issue of the Order, preparation of the certified record before this Court and the decision as to whether this Court shall maintain the confidentiality of certain documents.

[3] For the reasons set out below, the Court denies the applicant's application for judicial review and orders that certain documents remain confidential.

## II. Certain relevant facts

[4] On September 11, 2011, the applicant arrived in Canada holding a Guinean passport and a Canadian temporary resident visa [TRV] issued in the name of Mohamed Sanoh. He was detained at the airport upon arrival and, when interrogated by a Canada Border Services Agency [CBSA] officer, admitted that his passport was fraudulent, claimed that he was in fact Mamadou Saliou Diallo, a citizen of Guinea, and then made a claim for refugee protection under the latter name.

[5] The applicant based his claim for refugee protection on a fear of persecution due to his political activities in Guinea as a member of the Union des forces démocratiques de la Guinée (Union of Guinea's Democratic Forces) [UFDG].

[6] He remained in detention until October 20, 2011, and the members responsible for reviewing his detention referred to him during that time using the name Mamadou Saliou Diallo.

[7] In response to the applicant's claim for refugee protection before the RPD, the Minister of Public Safety and Emergency Preparedness [Minister] obtained a report from the CBSA [the Report] confirming, among other things, that authentic, but fraudulent, passports had been issued in Guinea and describing the CBSA's investigation techniques. In the interest of protecting the information in the Report, the Minister initiated proceedings with the RPD and this Court to maintain its confidentiality.

[8] On November 28, 2014, on completion of these proceedings conducted *ex parte* in which the applicant consequently did not take part, the RPD issued the Order. The RPD acknowledges that the Report clearly contains information that may be used to identify the individuals under investigation and reveals the CBSA's investigation methods and techniques as well as the research and analysis performed by the CBSA.

[9] The Order provides for the confidentiality of the Report and an affidavit from an information analyst [Affidavit] filed to support the request for confidentiality as well as certain measures relating to the use, disclosure, reproduction or destruction of the Report. The Order provides further that neither the applicant nor his counsel may access, consult or obtain a non-redacted copy of the Affidavit accompanying the Minister's *ex parte* request as it appears in the RPD's record unless the Minister intends to file the Report in support of his intervention in the claim for refugee protection, that it shall be the Minister who transmits the documents to the

applicant and that the Minister shall not then be required to transmit a non-redacted copy of the Affidavit.

[10] The Order provides that it survives and continues to have effect as long as it is not rescinded or amended by another order issued within the jurisdiction of the RPD.

[11] Finally, the Order provides that the applicant shall have seven (7) days to submit his response to the RPD Registry and the Minister.

[12] On January 21, 2015, the Minister filed a notice of intervention in the applicant's case on the grounds that it could undermine the integrity of Canada's Refugee Resettlement Program and requested the issue of a permanent order in place of the Order.

[13] On January 21, 2015, the Minister consequently transmitted the Order to the applicant ahead of the RPD hearing scheduled for February 10, 2015. As provided in the Order, the Minister also transmitted to the applicant at that time the documents found under Exhibit M-8.

[14] Although provided an opportunity to do so, the applicant did not respond to the Order or the Minister's notice of intervention, and the RPD heard the case on February 10, 2015.

[15] Despite his failure to respond, the applicant then objected to the *ex parte* process leading up to the Order. He did not object to maintaining the Report's confidentiality but argued that the *ex parte* process undertaken by the Minister and the fact that the Minister transmitted the RPD's

documents to him demonstrated a bias on the part of the RPD, which had impact on assessment of the applicant's credibility. The applicant did not make any arguments concerning the Affidavit at that time.

[16] On February 16, 2015, having received appropriate permission from the RPD, the applicant made additional submissions in which he addressed the matter of the Minister's intervention and the *ex parte* process leading up to the issue of the Order.

### III. The RPD's decision

[17] On April 24, 2015, the RPD rendered its decision. While the parties received full versions, a redacted copy was placed in the RPD's record in light of the confidential nature of certain information.

[18] As such, in its decision, the RPD first reviewed the specific context of the proceedings undertaken to protect the Report and then concluded that there was no reasonable apprehension of bias in the *ex parte* process, denied the Minister's request to issue a permanent confidentiality order and instead upheld the Order.

[19] To determine whether there was apprehension of bias, the RPD relied on the test set out in *Committee for Justice and Liberty et al. v. National Energy Board et al.*, 1978 1 SCR 369, consequently asking, "What would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude? Would he think that it is more likely than not that the decision maker, whether consciously or unconsciously, would not decide

fairly?” It concluded that there was no reasonable apprehension of bias in light of the mechanisms put in place by the RPD, including the fact that the applicant had had an opportunity to respond.

[20] The RPD then reviewed the applicant’s allegations concerning his claim for refugee protection. It found that the burden to establish the applicant’s true identity fell upon the applicant and noted that at the time of filing his claim, he had no documents other than the fraudulent passport. It observed that the applicant subsequently obtained other documents bearing the name Diallo, these being a Guinean passport issued in 2007, a driver’s licence, a national identity card, a UFDG membership card, two diplomas, a student card and a voter’s card.

[21] The RPD analyzed the first five (5) of the aforementioned documents, noted anomalies in relation to both the documents themselves and the manner in which the applicant claimed to have obtained them from Guinea, and noted the inconsistencies in the applicant’s testimony. Essentially, the RPD found the applicant’s testimony to be laborious and frequently hesitant and his responses too vague to constitute explanations with regard to clearly resolving the anomalies raised. It concluded that the applicant appeared to be keeping to a scenario proposed by an “intermediary” and was not credible.

[22] The RPD concluded that the applicant failed to discharge his burden to establish his identity and concluded that his claim for refugee protection was manifestly unfounded under section 107.1 of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 [IRPA].

IV. Sealing by the Court

[23] On June 5, 2015, the applicant filed an application for leave and judicial review of the RPD's decision concerning the claim for refugee protection. On June 26, 2015, in compliance with the Order, the applicant also filed a motion record asking the Court to order the non-publication and confidentiality of the documents previously subject to the confidentiality order in the applicant's record, to hear the case *in camera* and to order the non-publication of confidential information in the Court's decisions in this case. The Court ordered that all records associated with the Report be sealed to maintain confidentiality.

[24] The Court allowed the applicant's application for judicial review, and the RPD consequently transmitted the certified tribunal record [CTR] to the parties and the Court.

[25] However, the CTR transmitted to the applicant was considerably redacted, and the applicant consequently did not receive all the documents he should have. The parties confirmed nonetheless that they had shared information with one another prior to the hearing before this Court to compensate for this occurrence. The applicant did not object or ask for an adjournment due to this situation, and both at the hearing and on the subsequent conference call, he stated that he was satisfied that he had in hand all necessary documents.

[26] Regardless, at the same hearing before this Court, the applicant's counsel claimed to have learned only then that the RPD and the Court had been provided non-redacted versions of

the Affidavit filed in support of the request for confidentiality to the RPD whereas the applicant had received only a redacted version.

V. Issues

[27] The parties raised the following issues:

- A. Is the RPD's assessment of the applicant's credibility reasonable?
- B. Did the RPD fail to observe principles of natural justice in its handling of the applicant's case by holding an *ex parte* hearing before issuing the Order and by failing to transmit the non-redacted version of the Affidavit to the applicant?
- C. Are there documents or information that should be protected, and if so, which?

VI. Applicant's position

[28] The applicant argues that (1) the RPD rendered an unreasonable decision in its assessment of his credibility; (2) principles of natural justice were not observed in the handling of his case in that (a) the *ex parte* process undertaken by the RPD and leading up to the issue of the Order tainted the assessment of the applicant's credibility and (b) the evidence submitted by the Minister differed from the evidence submitted to the applicant before the RPD and before this Court, since the applicant learned only in court that a non-redacted version of the Affidavit had been disclosed to the RPD and the Court whereas he had never received it; and (3) the Order should be limited to information that might be used to identify other applicants.



[29] The applicant argues that the allegations relating to assessment of his credibility should be reviewed against the reasonableness standard.

[30] In this regard, he argues that (1) his testimony is credible in that all facts he alleges are corroborated by the CBSA's evidence, particularly concerning his fraudulent acquisition of an authentic document; (2) the RPD determined without explanation that his passport from 2007 was not authentic; (3) the RPD accepted that his identity card was not credible after focusing on certain details; and (4) the RPD rejected the authenticity of his diploma in sociology because he did not know the population of Fria.

[31] He maintains that the allegations concerning failure to observe principles of natural justice should be reviewed for correctness. In this regard, he argues that (1) there was reasonable apprehension of bias in that the RPD and the respondent exchanged information without including the applicant; (2) his identity had already been established as part of his detention reviews and the filing of the Report and a declassified American report on Guinea served only to cast doubt in the Minister's favour; (3) the *ex parte* process should not have been approved by the RPD; (4) the RPD was obliged to transmit to him the *ex parte* decision as soon as it was rendered; (5) the decision should have been transmitted by the RPD rather than the Minister; (6) the time frames for responding were insufficient; and (7) the situation shows that the RPD was not transparent and acted in a manner so as to favour the Minister's position.

[32] Finally, in relation to the Affidavit, the applicant argues that the confidentiality provisions set out in the IRPA are not intended to support the filing of documents to which the

party concerned cannot have access. The applicant argues essentially that he did not know that the full version of the Affidavit was available to the RPD, whereas only a redacted version was provided to him, and that the versions filed before the decision maker and the applicant should have been identical.

[33] In this regard, he argues that (1) he had a right to know the nature of the evidence produced against him and to respond to it; (2) the order of this Court of September 29, 2014, did not provide that the respondent submit different versions of the documents to the applicant and the RPD; (3) the RPD took the liberty of sharing communications with the respondent without sharing them with the applicant and refused to respond to the applicant's questions, preferring to let the Minister respond; and (4) the RPD thereby violated principles of fundamental justice in a manner such that the applicant was prevented from making his objections known or submitting arguments, resulting in a breach—if not an abuse—of trust in a tribunal that was supposed to be impartial.

[34] The applicant argues that the fact that he was not provided the entire record while the judge and the respondent obtained their copies directly from the tribunal goes against the most basic legal principles regardless of whether or not he suffered harm. The applicant argues further that the Affidavit should have been redacted in the same manner for the tribunal as for the applicant.

[35] The applicant is now asking the Court to order that a version of the CTR with multiple pages redacted (pages 300, 304, 305, 309, 321 to 323, 325 to 327, 420, 433 to 435, 437 to 439,

494 to 496, 498 to 500, 525, 538 to 540, 542 to 544 and 594) be placed in the public court record such that only information that might be used to identify other applicants is redacted and all other pages are placed in the public court record.

VII. Respondent's position

[36] The respondent states that he agrees with the standards of review proposed by the applicant.

[37] The respondent maintains that the RPD's findings are reasonable. He argues further that (1) it is up to the applicant to submit acceptable documents to establish his identity and that the RPD is free to deny his claim for refugee protection if he cannot successfully establish his identity based upon a preponderance of evidence, which he failed to do; (2) the applicant submitted his driver's licence to establish his identity, which contained multiple indicators of forgery; (3) the identity card submitted by the applicant also contained multiple anomalies, including the changing of the sex from F to M; (4) the applicant hesitated at length before replying to the RPD's questions concerning facts about which he should have personal knowledge; (5) the UFDG membership card submitted by the applicant also contained anomalies; and (6) in light of the anomalies observed over multiple documents, the RPD's conclusion that the applicant is not credible is justified.

[38] The respondent argues that there was no breach of procedural fairness. In this regard, he argues that (1) Justice Bédard of this Court confirmed that the Minister could proceed *ex parte* before the RPD as part of a two-stage process in which the applicants in question would have the

opportunity to be heard before a final determination was made concerning the Minister's request; (2) the Minister made this request and on November 28, 2014, the RPD issued the Order, which provides that the applicant has the opportunity to submit his arguments before the RPD renders a final decision as to sealing the document; (3) the applicant had the opportunity to make arguments and challenge the proceedings followed but failed to take advantage of this opportunity or to request an extension of time from the RPD to this end; (4) the RPD nevertheless allowed the applicant to make oral submissions at the hearing and to make additional written submissions in this regard after the hearing; (5) the Minister observed the applicable time frames and was not required to advise the applicant of his intention to intervene earlier; (6) the RPD provided sufficient reasons to justify dismissing the arguments submitted by the applicant, notably paragraphs 7 through 15 of the reasons for the RPD's decision; and (7) the applicant's argument that the member demonstrated that her independence had been compromised amounts to speculation.

[39] In his additional submissions concerning the Affidavit, the respondent argues that (1) the applicant did not suffer any harm based on the fact that he received a redacted version of the Affidavit; (2) the applicant did not make any effort to obtain the missing documents; and (3) the applicant is raising points that he never raised before the RPD by explaining that his failure to complain in a timely manner was due to his belief that the RPD had received the same version of the documents as he had.

[40] The respondent argues further that the documents transmitted to the applicant indicated that he was being provided a redacted version of the Affidavit and refers the Court to paragraph 23 of the Order confirming this assertion.

[41] The respondent maintains that the applicant did not suffer any harm based on the fact that he was provided a redacted version of the Affidavit since this Affidavit served only to establish that a confidentiality order was required to protect the Report and did not contain any information relevant to the applicant's claim for refugee protection. The respondent argues that (1) a party noting a breach of procedural fairness may not remain silent and await the judicial review before complaining; (2) in the present case, the applicant raises points that he never raised before the RPD; and (3) the Affidavit filed before the RPD was not cited against the applicant but used simply to show why a confidentiality order was required and does not contain any information relevant to the applicant's claim for refugee protection.

[42] The respondent asks the Court to order that the documents subject to the Order remain sealed.

#### VIII. Standard of review

[43] The Court agrees with the parties that the RPD's decision as to credibility must be reviewed on the standard of reasonableness (*Dunsmuir v. New Brunswick*, 2008 SCC 9 [*Dunsmuir*], at paragraph 53; *Khachatourian v. Canada (Citizenship and Immigration)*, 2015 FC 182, at paragraph 29), whereas issues of natural justice and procedural fairness are to be

reviewed for correctness (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 [*Khosa*], at paragraph 43).

IX. Analysis

A. *Assessment of credibility*

[44] The RPD examined the documents and heard the testimony of the applicant. It is not up to this Court to re-evaluate the evidence submitted to the RPD nor to substitute its own assessment of the evidence for that of the RPD. Moreover, the assessment of credibility is an issue of fact concerning which this Court must show deference to the RPD (*Dunsmuir*, at paragraph 47; *Khosa*, at paragraph 59).

[45] In the present case, the Court is satisfied that the inferences drawn by the RPD and the conclusions at which it arrived are supported by the features of the case and the applicant's testimony which, the transcript shows, was indeed laborious and vague. In considering this case, the RPD's decision falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" and is justified in a manner that satisfies the criteria of transparency and intelligibility within the decision-making process (*Dunsmuir*, at paragraph 47), and the applicant has failed to convince the Court of the need to intervene.

[46] In addition, there is no indication that the members responsible for the applicant's detention reviews confirmed the applicant's true identity simply by referring to him by the name he provided to them.

B. *Procedural fairness and natural justice*

(1) Handling of applicant's file before the RPD

[47] The Court is sensitive to the applicant's claims concerning principles of natural justice and procedural fairness.

[48] However, the Court notes that (1) the applicant did not respond to the Order in a timely manner, but the RPD provided him an opportunity to respond *a posteriori*, at which time he did not object to the Order; (2) Justice Bédard, writing for the Court, recognized the RPD's option to proceed *ex parte* as part of a two-stage process, which was done; (3) the request for the Order and the claim for refugee protection were heard by different members, making the apprehension of bias unwarranted; (4) the RPD was able to order the Minister to transmit the Order to the applicant, since this transmission depended on the Minister's decision as to whether to use the Report; (5) the Affidavit was not related to the applicant's claim for refugee protection and instead supported the request for confidentiality of the Report; and (6) the Order specifically states that the RPD has a different version of the Affidavit from the redacted version transmitted to the applicant and his counsel and that only a redacted version of the Affidavit is to be provided to the applicant. As such, it is impossible for the applicant to have learned of this fact only in court.

[49] Moreover, it is important to put into context the breaches cited by the applicant, all relating to the Report and the procedure followed for protecting its confidentiality and limiting its disclosure, notably to protect the CBSA's investigation techniques.

[50] In the present case, the applicant himself admitted, on September 12, 2011, to obtaining and using a fraudulent, but authentic, passport issued under a false identity and to obtaining a TRV to enter Canada under this false identity. The Report confirms what the applicant himself admitted.

[51] The comments of the Federal Court of Appeal in *Uniboard Surfaces Inc. v. Kronotex Fussboden GmbH and Co. KG*, 2006 FCA 398 [*Uniboard*] and reiterated in *Pasco Pla v. Canada (Citizenship and Immigration)*, 2012 FC 560 appear useful. As such, the objective of the duty of procedural fairness “is essentially to ensure that a party is given a meaningful opportunity in a given context to present its case fully and fairly” (*Uniboard*, at paragraph 7). The Federal Court of Appeal advances the following proposition: “in a given context, even though a breach of the duty of procedural fairness or of a statutory requirement has occurred, a court may hold the ultimate view that because of the inconsequential, trivial or mere technical nature of the breach, the relief sought should not be granted” (*Uniboard*, at paragraph 24).

[52] In the present case, the Court is satisfied that the fraudulent factual situation documented in the Report was admitted by the applicant himself upon interception at the airport. The fraud relating to the passport that the applicant used to enter Canada was initially revealed and acknowledged by the applicant himself, and the claims concerning the procedural considerations for the purpose of protecting the Report confirming this fact consequently appear, in the words of the Federal Court of Appeal, inconsequential.



(2) The Affidavit

[53] The Court notes that “if the Officer relies on extrinsic evidence not brought forward by the applicant, the applicant must be given an opportunity to respond to that evidence. That is the minimal duty of procedural fairness” (*Level v. Canada (Public Safety and Emergency Preparedness)*, 2008 FC 227 [*Level*] at paragraph 19). “If the Enforcement Officer is relying on extrinsic evidence, the duty of fairness applies” (*Level*, at paragraph 20).

[54] However, the Court is satisfied that the RPD did not rely on the Affidavit in assessing the applicant’s claim for refugee protection and that the Affidavit was used merely to support the request for confidentiality in respect of the Report. Since the RPD did not base its decision on the extrinsic evidence provided by the Minister, no breach of procedural fairness has occurred.

[55] Moreover, as stated above, according to the very text of the Order transmitted to the applicant, the latter had to know, or should have known, that the RPD had a non-redacted version of the Affidavit and that he had only a redacted version. However, the applicant did not raise this argument before the RPD and raised it before this Court only at the hearing.

C. *Confidentiality of documents*

[56] The Court is satisfied that the circumstances warrant upholding the Order issued by the RPD to protect the confidentiality of the Report and the Affidavit. The Court is aware that this is an exceptional measure that is nonetheless warranted to protect information that may be used to identify the individuals under investigation and to prevent disclosure of the CBSA’s

investigation methods and techniques as well as the research and analysis performed by the CBSA. The salutary effects of the Order outweigh its deleterious effects in light of the significant interest at stake, the nature of the documents and the sensitive information they contain (*Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, at paragraph 53).

D. *Certified questions*

[57] The respondent objects to the certification of the following four (4) questions submitted by the applicant to the Court:

1. Does the IRPA allow the RPD to proceed *ex parte* upon request from the Minister in respect of an interim proceeding concerning a claim for refugee protection?
2. Does the IRPA allow the Federal Court to proceed *ex parte* and issue an interim order concerning an active claim for refugee protection?
3. Can the RPD decline to transmit an interim decision rendered to an applicant's record and transmit it only to the Minister?
4. Does the IRPA allow the Minister to submit documents to the tribunal without transmitting them to the applicant concerning the applicant's claim for refugee protection without breaching the rules of procedural fairness in the Charter?

[58] The Court finds that none of the proposed questions meets the criteria set out in *Canada (Minister of Citizenship and Immigration) v. Liyanagamage*, [1994] FCJ No. 1637, at paragraph 4. More specifically, the Court agrees with the respondent that responding to the questions would not definitively resolve the dispute.

X. Conclusion

[59] Consequently, the application for judicial review is dismissed.

**JUDGMENT**

**THIS COURT ORDERS** that:

1. The application for judicial review is dismissed and no question is certified.
2. The documents subject to the IRB's confidentiality order of November 28, 2014, remain confidential.

“Martine St-Louis”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-2639-15

**STYLE OF CAUSE:** MAMADOU SALIOU DIALLO ALIAS MOHAMED  
SANOH v THE MINISTER OF CITIZENSHIP AND  
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**PLACE OF HEARING:** MONTRÉAL, QUEBEC

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**JUDGMENT AND REASONS:** ST-LOUIS J.

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**APPEARANCES:**

Stéphanie Valois

FOR THE APPLICANT

Suzanne Trudel  
Sébastien Da Sylva  
Sonia Bédard

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Stéphanie Valois  
Montréal, Quebec

FOR THE APPLICANT

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

FOR THE RESPONDENT