Federal Court Cour fédérale

Date: 20190531

Docket: IMM-2644-18

Citation: 2019 FC 773

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, May 31, 2019

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

MOUDATOU DIALLO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Ms. Moudatou Diallo is applying for judicial review of the decision made by a senior immigration officer on May 8, 2018. This application for judicial review is made under section 72 of the *Immigration and Refugee Protection Act* (SC 2001, c 27) [the Act]. This decision relates to an application that was made to obtain permanent residence in Canada, which was not made from outside the country as required by the Act.

[2] The senior immigration officer (the decision maker) found that the humanitarian and compassionate considerations that the applicant relied on were not sufficient to justify the failure to comply with the normal rules for obtaining permanent residence. I conclude that the decision maker made a decision that is not reviewable because it is neither unreasonable nor subject to review for breach of a rule of procedural fairness.

I. The decision under judicial review

[3] The applicant is now 55 years old. She obtained a visitor visa, issued at the Canadian mission in Dakar, Senegal. However, her country of nationality is Guinea. Ms. Diallo used the visa, which was issued on December 11, 2012, to arrive in Canada as a visitor on February 18, 2013. Less than three weeks later, she tried to enter the United States, but under a false identity. She was detected by American agents, and it seems that an altercation followed. On the same day, she returned to Canada, where this time she refused to cooperate with Canadian authorities and did not identify herself with documents to establish who she was. As a result, she was detained and was not released, under conditions, until 14 days later.

[4] Having claimed refugee status, she is considered a vulnerable person, ensuring that procedural accommodation measures were adopted before the Refugee Protection Division (RPD). Her refugee protection claim to the RPD was rejected on March 4, 2015. On August 18, 2015, her application for judicial review was also dismissed.

[5] An application for permanent residence on humanitarian and compassionate grounds was submitted on January 11, 2016. It is that application which is the subject of the decision of May 8, 2018. The factors for consideration are as follows:

a) The applicant's state of health and the need for medical care;

b) Her establishment in Canada;

c) The risks and adverse conditions in her country of nationality, Guinea, including discrimination on the grounds of ethnic origin, political opinion and gender.

[6] The decision maker reviewed each of these allegations and concluded that the evidence presented was not sufficient to establish them. At the outset in his reasons, the decision maker points out that a decision based on humanitarian and compassionate grounds is an exceptional measure for which the burden rests on the applicant, who must prove that her personal situation is such that the difficulties related to obtaining a permanent resident visa from abroad should not be required, given humanitarian and compassionate considerations.

[7] The decision maker examined the extent of Ms. Diallo's establishment in Canada and notes the limited information that has been provided in this regard. Thus, she makes little mention of her life from before coming to Canada and her ties with her country of origin. She also provides little information about her life in Canada outside of the volunteer work she claims to do. She of course has connections with people here, but the decision maker notes that it would be surprising if there were none after already spending five years in Canada. Thus, the decision maker concludes that there is insufficient evidence to conclude that she has a significant social network in Canada.

[8] From what can be identified, it seems that the majority of her family members have remained in her country of origin. In fact, the applicant's mother and four of her children, as well as her brothers and sisters, are still in Guinea. During her time in Guinea, she was reportedly a relatively prosperous and independent businesswoman, which allowed her to travel to the United States and Europe on many occasions. But even here, the applicant makes little mention of her ties with her country of origin. The decision maker notes the following comment made by the Dakar office when deciding to grant a visa to Ms. Diallo:

> [TRANSLATION]
>
> *. . . Merchant, married with five children: Has several Schengen visas for business and had a three-year visa for the United States. Seems to have travelled a lot,* ***shows quite significant savings in two bank accounts****. Registration documents for her business and car. Several import invoices for her business. A* ***land title****, hotel reservation at $800.*
>
> ***The subject seems to have a good situation in Guinea and has travelled a lot****. The fact that she has no contacts in Canada and no stated reason other than 15 days of tourism bothers me a little, but she shows a good travel history,* ***involvement in trade and several family ties in her country****. On the balance of probabilities, I am satisfied with her reason for returning.*
>
> [In italics and bold in the decision, p 6 of 14.]

[9] The absence of proof of establishment other than a minimum establishment caused the decision maker to dismiss this element, saying that he believes [TRANSLATION] "that her establishment in Canada does not outweigh her establishment in her country of origin" (decision, p 6 of 14).

[10] It is with regard to medical problems that the applicant complains the most in relation to the decision. The decision maker notes that the documents from health practitioners presented to

him are essentially the same as those filed with the RPD, which refused her application; nothing new in this regard. He is satisfied with the summary of the report prepared by the RPD. I will read it out:

> [TRANSLATION]
>
> *(26) The applicant provided psychological reports written by Dr. Devins, Dr. Benes, and Dr. Hersler [sic]. According to Dr. Devins, the applicant has the following diagnostic characteristics: the presence of a schizo-affective, depressive type disorder and the manifestation of a post-traumatic state combined with dissociative symptoms of moderate severity. Dr. Benes diagnosed the applicant with post-traumatic stress disorder with psychotic characteristics. Finally, the applicant was diagnosed by Dr. Hersler [sic] as having an undetermined psychotic disorder, major depressive disorder and post-traumatic stress disorder. . . .*
>
> [In italics in the decision, p 7 of 14.]

[11] In fact, no one questions the applicant's mental health problems. Neither the Minister, nor the RPD, nor the decision maker in this case has any doubt about her health problems. She suffers from depression and other mental health problems.

[12] Moreover, the decision maker seems to place some emphasis on the fact that these difficulties appear to have occurred as a result of her arrest by the U.S. immigration officer while she was trying to enter illegally. But her difficulties are not denied. For example, in a report by Dr. Devins, a psychologist, dated October 19, 2013, he notes that "the treatment she received at the US border crossing no doubt exacerbated her distress and compromised her mental health" (p 3 of 7). In his February 10, 2014 report, Dr. Hershler states that:

> Ms. Diallo has experienced major psychosocial stressors over the last year, including the destruction of her own store in Guinea, the disappearance of a number of her family members (related to political conflict in her country), the rape of her adopted daughter,

> her need to flee the country and seek refuge in Canada and a very traumatic experience at the border between Canada and United States that appears to have been the primary precipitant for her depressive and anxiety symptoms.
>
> [Dr. Hershler's report, pp 3-4 of 5.]

[13] It should be noted that the applicant came to Canada on a visitor visa; it was only after her attempt to enter the United States that she wanted to be recognized as a refugee in Canada. Her claim was rejected. It appears that her desire to visit two of her children residing in the United States was a motivation for her attempt to cross the border in disguise and with a false Canadian passport. Dr. Devins's report states that "[s]eparation from her children is an ongoing source of unhappiness, distress, and deprives her of much-needed love and affection" (p 3 of 6).

[14] The decision maker also highlights the report of the applicant's attending physician, which states the following:

> *She has shown herself to be both compliant and increasingly reliable since initiation of her medication and it is my opinion that she will continue do to so.*
>
> [In italics in the decision, p 9 of 14.]

He states the following in a subsequent report:

> *She continues to present with disorganized thought process at times and it is unclear if this is a symptom of psychosis, versus a language, educational, or cultural barrier, [sic] Currently, my working frame is that my difficulty understanding and following Mr. Diallo [sic] is best understood as a combination of language, cultural or educational barriers. She also faced with ongoing stressors that included limited contact with her children despite a wish to be in contact with them, poverty and uncertainty about her refugee status. . . .*
>
> [In italics in the decision, p 9 of 14.]

This tells the decision maker that he accepts that the applicant suffers from depression, but she is being treated with the prescribed medication. She is able to function and participates in various volunteer activities, takes English classes and visits the mosque on a regular basis. The following is said:

> [TRANSLATION]
> *Apart from taking medication regularly, the medical documentation does not indicate that the applicant is pursuing psychotherapy or any other treatment on a regular basis.*
> [In italics in the decision, p 9 of 14.]

Noting that resources are lacking in Guinea's health sector, the decision maker finds that no documentation has been filed showing that the drugs Ms. Diallo needs, or even health care, will be denied her in Guinea. Care is available.

[15] The decision maker does not see his task as trying to compare health systems. Rather, it is to weigh the evidence to satisfy himself that the applicant can have access to health care since it is available without discrimination in this regard. On the evidence presented, the decision maker states: [TRANSLATION] "*I cannot conclude that Ms. Diallo cannot be treated or have medical follow-up in her country of origin, or that she could not have access to health care*" (decision, p 10 of 14). No evidence, the decision maker says, has been filed that would lead him to conclude that Ms. Diallo cannot be treated in her home country because she would have no access to health care. Ms. Diallo's health situation, even when considered in conjunction with the other factors she raised, is not sufficient for her to benefit from a residence that can only be given in exceptional circumstances.

[16] The applicant submits that if she returns to her country of origin, she will be discriminated against. The decision maker notes that she has submitted some documentation in which there are passages dealing with discrimination against women, domestic violence and limited rights for women in the event of a divorce. But the decision maker cannot make a link between this documentation and the applicant's situation, since she has never experienced discrimination in the past. At the very least, she has not demonstrated otherwise. In fact, some statements to her psychiatrist tend to show the opposite:

> She said that her father had money and she had a relatively nice childhood. She grew up in a city and attended school.
>
> She shared that she used to be a business woman in Guinea who was doing well for herself until she became targeted by the government.
>
> [Decision, p 11 of 14]

In fact, Ms. Diallo studied, she had children and two spouses, and she was a successful businesswoman. This allowed her to travel to Europe, the United States and Canada. For the decision maker, this is not the profile of a person who has been discriminated against. No domestic violence was reported with her first spouse with whom she had four children. Nor were there any problems when she separated from her first husband, which led to a relationship with a second man. For the decision maker, the evidence filed does not allow him to conclude that she has been subjected to any discrimination whatsoever in her country of origin, whether because of her gender, ethnicity or any other reason.

[17] The applicant also alleged that she was the victim of a rape on September 28, 2009, during the violent protests perpetrated that month, which are demonstrated. While Amnesty

International reports that hospitals have provided evidence of assault on women and girls during this period, nothing of the sort is reported by the applicant. However, she claims to have spent two weeks in hospital following a rape during which she was severely beaten. The decision maker notes that no evidence to this effect has been produced, whether photographs, medical reports, police reports, newspaper articles, witness statements or any other relevant evidence.

[18] The evidence about the applicant's political involvement is seen as equally thin. We do not know anything about any political profile she might have. As a result, no weight is given to this claim.

[19] Finally, the applicant claims that her business was burned down in January 2013 and that this act of violence was the result of her membership in the Fulani ethnic group. The decision maker notes that there were incidents of looting and vandalism in May and June 2013. In addition, the applicant has not filed any documentation relating to her business activities. Thus, no conclusive evidence has been filed to show that the business was set on fire in January 2013. Again, the decision maker notes the absence of photographs, police reports, newspaper articles or any other relevant documentation to demonstrate that she would have been targeted for her business.

[20] In the decision maker's view, the applicant had a comfortable life in Guinea. She is a mobile businesswoman who has demonstrated familiarity with immigration procedures (she has given birth twice in the United States and has obtained multiple visas over the years). Ultimately,

[TRANSLATION] “there is nothing in her profile to indicate that she could not apply for permanent residence outside Canada as required by law” (decision, p 13 of 14).

II. Standard of judicial review

[21] The standard of judicial review is not the subject of debate between the parties. The standard of reasonableness applies to an application for judicial review on humanitarian and compassionate grounds (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909 [*Kanthasamy*], para 44). The applicant also claims that the decision maker violated her right to procedural fairness and such a question requires the application of the standard of correctness (*Mission Institution v Khela*, 2014 SCC 24, [2014] 1 SCR 502, para 79).

III. Arguments and analysis

[22] I am very concerned that the applicant may have fallen into the trap of reviewing an administrative decision by conducting a line-by-line treasure hunt for any error (*Communications, Energy and Paperworks Union of Canada, Local 30 v Irving Pulp & Paper Ltd*, 2013 SCC 34, [2013] 2 SCR 458, para 54), as reiterated in *Kanthasamy* by the minority, at paragraph 138. As stated, the decision must be considered as a whole in order to assess its reasonableness. Moreover, merely making allegations is not enough.

[23] The applicant has thus made her mental health the main focus of this judicial review. The applicant emphasizes her depression diagnosis. However, this is not disputed. Similarly, there is no doubt that she must take her medication daily to treat her depression. In fact, it is noted that

she has shown discipline in this regard, which has improved her situation. Essentially, we understand that Ms. Diallo's mental health difficulties are being treated with medication, which allows her to function. It is not reported that she is receiving treatment specific to her case and condition. Both in her original memorandum of fact and law and in her response to the Crown's position, which in any event overlap considerably, the applicant seeks to argue that the decision maker chose not to find in her favour on the issue of her mental health, on grounds of credibility. That being said, in my opinion that is not the case. The applicant's credibility has little to do with her health problems, which were acknowledged anyways. I have already reproduced excerpts from the decision maker's decision and, considered as a whole, his decision concludes that there is insufficient evidence as to the relative seriousness of the applicant's medical situation.

[24] Similarly, the applicant complains that the decision maker relied heavily on the fact that her mental health problems began after her departure from Guinea. This is not my understanding of the decision maker's reasons. He decided the issue of the applicant's mental health on another basis. In the decision, I did not see a reference to the fact that it would have any impact on an application of humanitarian and compassionate considerations if the mental health problems emerged in Canada. Moreover, it would be difficult to see how this would have any relevance to the decision to be made on humanitarian or compassionate considerations.

[25] In fact, the applicant was unable to indicate where to find inaccuracies about the content of the medical reports that the decision maker identified. Thus, contrary to what the applicant claims, the decision maker did not disregard the medical evidence. He considered it and concluded that Ms. Diallo's condition is not serious to the extent required for exemption from the

conditions of the Act. The diagnosis is not contested, and the applicant’s credibility is not at stake. By continuing her treatment, which includes taking medication, the decision maker believes that she will be able to function in Guinean society, as she seems to function in Canada. References to this can be found in the evidence listed. The Court cannot reweigh the evidence on judicial review. However, it has not been demonstrated how this conclusion would be unreasonable in that it would not be one of the possible, acceptable outcomes on the basis of the facts and the law, given that the decision is justified, and the decision-making process is transparent and intelligible.

[26] Ms. Diallo also challenges the availability of care in Guinea if she is to return there. Again, it seems quite clear to me that the applicant disagrees with the decision maker’s conclusion, but this is not what is required to succeed when the standard of review is reasonableness. To be reasonable, it seems to me that there must be some form of balance between a person’s diagnosed medical situation and the availability of care because the need has been established. However, the decision maker concluded that Ms. Diallo’s health situation, which is not denied, is under control and has improved since she has been taking the prescribed medications in a more disciplined manner, as stated by one of the experts that the applicant presented. We are far from the situation in *Jang v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 996, which was cited by the applicant. In that case, the diagnosis in question was a very high risk of attempting suicide, and of being successful in that attempt. On reading the evidence presented by the applicant in this case, we are far from a similar situation.

[27] The applicant would have liked the decision maker to take her mental health into account in his assessment of her establishment in Canada. In my opinion, this argument is worthless because it is not based on any evidence on the record. Anyway, we know too well how the argument would be articulated. As the decision maker said, the applicant chose to be rather talkative about her situation both in Guinea and here in Canada. Nowhere is there a link between a depressive state and settlement in Canada. In fact, the decision maker knew very little about it. It was up to the applicant to discharge this burden. At the time the decision was rendered, she had already spent five years in Canada and, obviously, her establishment here remains minimal, other than the volunteer activities that have been recognized. If the establishment is minimal, it is not possible to say why. Among other things, it is noted that the attending physician says he has difficulty understanding the applicant, but seems to prefer to ascribe this to a [TRANSLATION] "language, educational or cultural barrier" (decision, at p 9 of 14, reproduced in para 14 of these reasons). Difficulties of this kind would certainly explain a limited establishment. In any event, the evidence was virtually non-existent.

[28] The applicant also launched into an argument concerning the difficult situation that could await her in Guinea, in particular by speaking of discrimination against her on the grounds of her political beliefs and her membership in an ethnic community. No convincing evidence was submitted regarding this fear, especially since, as the decision maker notes, it appears that the applicant's past in Guinea was without any real particular difficulty. What is sorely lacking from this aspect of the case, as from the others, is any evidence that the decision is unreasonable within the meaning of administrative law, apart from the fact that the applicant does not like it.

[29] Finally, the applicant submits that the decision maker should have heard her since, in her opinion, her credibility as a witness was at stake. The applicant is not wrong to point out that it is a rule of procedural fairness that a person involved in an administrative process has the right to participate, in a meaningful way, in the exercise leading to an administrative decision. I have no doubt that when the credibility of a participant is at the heart of a decision, and in particular in an application based on humanitarian and compassionate considerations, a hearing where the person could be heard may be necessary.

[30] The applicant argues that the decision is based largely on her credibility. A careful reading of the reasons given by the decision maker does not allow such a conclusion to be accepted. I could not find any basis for the applicant's claim when she writes in paragraph 37 of her memorandum of fact and law that [TRANSLATION] "[i]t is submitted that by making an unfavourable decision largely based on the applicant's credibility. . .". This assertion has not been proven.

[31] In our case, what is lacking is sufficient evidence to support Ms. Diallo's general claims. As I said, her medical situation is not in doubt. Objective evidence has been accepted. This evidence includes the fact that Ms. Diallo is being treated with medication. Similarly, she had the burden of demonstrating her links with Canada, which she chose to do in a minimal way. It is the sufficiency that is lacking in this regard since she has not provided any evidence with respect to her situation in Guinea, nor with respect to her situation in Canada. General claims do not satisfy the burden of proof. It is not the value of the testimony that is challenged; it is the absence of evidence.

IV. Conclusion

[32] It follows that, for the reasons above, the application for judicial review must be dismissed. There is no question meeting section 74 of the Act that must be certified. This is a case that turns on its own facts.

JUDGMENT in IMM-2644-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. No serious question of general importance is certified.

"Yvan Roy"

Judge

Certified true translation
This 17th day of June, 2019.
Michael Palles, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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