

Federal Court



Cour fédérale

Date: 20211130

Docket: IMM-3255-20

Citation: 2021 FC 1324

Ottawa, Ontario, November 30, 2021

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

**SALIMATA ZAIA DIALLO
NOGAYE ZAIA CISSE
MOUHAMED CISSE
CHEIKH AHMED TIDIANE CISSE
FATOU KINE CISSE**

Applicants

and

**THE MINISTER OF
CITIZENSHIP AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Principal Applicant, Ms. Salimata Zaia Diallo, and her four children, two girls and two boys ranging in age from six to 16 [collectively, the Applicants], are citizens of Senegal. Ms. Diallo states she fears that her ex-husband and his family will subject her two daughters (the

eldest and youngest of her children) to Female Genital Mutilation [FGM]. She also fears her ex-husband's abuse.

[2] The Refugee Protection Division [RPD] rejected the Applicants' claim. The Applicants apply under section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] for judicial review of the RPD's July 6, 2020 decision, submitting that (1) the RPD's credibility assessment was unreasonable; and (2) the RPD erred in finding the Applicants had failed to displace the presumption of state protection.

[3] For the reasons that follow, I am unable to conclude that the RPD erred in finding that the Applicants had failed to rebut the presumption of state protection. The RPD's state protection finding is determinative. The Application is dismissed.

II. Background

[4] Ms. Diallo married her first husband in August 2004. In 2006, nine months after the birth of their first daughter, she reports that her husband referred to their daughter's future FGM. Ms. Diallo objected, but her husband stated that the procedure would be carried out and that he was already engaged in discussions with his parents. The issue of FGM arose again many months later during a dinner with Ms. Diallo's in-laws. Ms. Diallo reports that she stated she would never allow her daughter to go through FGM and that her ex-husband stated women were not the ones to decide. Ms. Diallo also reports her ex-husband physically and psychologically abused her during their marriage.

[5] Ms. Diallo states she spoke with her family about her mistreatment and her desire for a divorce in January 2013, but her family convinced her to remain in her marriage and seek forgiveness from her ex-husband in accordance with tradition. Ms. Diallo registered a complaint about her husband with the police after a particularly violent assault in September 2015, but they took no action. Ms. Diallo solidified her decision to obtain a divorce in November 2015 and, following the initial hearing before the divorce tribunal, her husband proposed an amicable divorce. Ms. Diallo agreed and the divorce was granted in April 2016, with Ms. Diallo being granted sole custody of the children. Ms. Diallo's husband would occasionally spend unsupervised time with the children on weekends.

[6] After Ms. Diallo married her second husband in March 2018, her ex-husband stopped speaking with her and she was informed by a member of his family that an FGM ceremony was being prepared for her daughters. Ms. Diallo made up an excuse to prevent her ex-husband from seeing their children after this, but he threatened to take her to court and demand full custody. Ms. Diallo reports she began to receive threatening phone calls from her ex-husband about their daughters' FGM. Fearing her ex-husband would "take [her] children away," she filed a police report in June 2018 and a summons was issued. Having obtained visas to visit the United States, Ms. Diallo left Senegal with her children in July 2018 and entered Canada on September 7, 2018.

III. Decision under Review

[7] In rejecting the claim, the RPD found that Ms. Diallo's actions during and following the end of her marriage were inconsistent with a subjective fear of persecution and undermined her credibility. For example, the RPD found that providing her ex-husband unsupervised access to

the children on weekends after the divorce was inconsistent with her reported fear and drew a negative inference. The RPD also concluded there was insufficient evidence to demonstrate a forward-looking risk of domestic violence, noting Ms. Diallo had not reported suffering physical abuse at the hands of her ex-husband since their divorce in 2016 and noting she was no longer reliant on him. The RPD acknowledged photographs depicting injuries Ms. Diallo reported were inflicted by her ex-husband during their marriage but found the photos alone insufficient to support her claim. The RPD also noted the lack of documentary evidence supporting the claim, including the police reports relating to the complaints initiated in 2015 and 2018 and medical reports regarding Ms. Diallo's injuries. Post-hearing submissions detailed unsuccessful efforts to obtain the police report relating to the 2015 incident, but the RPD noted this explanation failed to address why this evidence was not sought prior to the hearing and did not address the failure to produce documentation relating to the 2018 police complaint or a medical report. The RPD concluded the failure to produce this documentation undermined the Applicants' overall credibility.

[8] In addressing the question of state protection, the RPD considered the state of law in Senegal as it relates to FGM and domestic violence and state efforts to eliminate the practice of FGM. In considering the effectiveness of state protection, the RPD relied on Ms. Diallo's profile, her conduct and her experiences with prior police complaints to conclude Ms. Diallo had failed to rebut the presumption of state protection.

IV. Improper Affidavit

[9] The Respondent submits that Ms. Diallo's affidavit improperly contains opinion and argument. In written submissions, the Respondent sought to have paragraphs 16, 19, 23-24, 26-30 and 33-39 struck. The Respondent submits that the remaining affidavit says nothing of substance, it cannot support the Application and on this basis alone, the Application should be dismissed.

[10] An affidavit's purpose is to adduce facts relevant to the dispute without gloss or explanation. The Court may strike an affidavit or portions of an affidavit containing opinion, argument or legal conclusions (*Canada (Attorney General) v Quadrini*, 2010 FCA 47 at para 18). Ms. Diallo's affidavit does contain opinion, makes arguments and expresses legal conclusions.

[11] In the course of oral submissions, counsel for the Respondent withdrew the objection to paragraphs 33 and 34 of the affidavit. Paragraph 34 as well as paragraph 27 simply recount Ms. Diallo's circumstances. They are properly included in the affidavit.

[12] However, paragraphs 16, 19, 23-24, 28-30, 33 and 36-39 all reflect impermissible opinion, argument or legal conclusions. Paragraphs 12, 22, 25 and 32 of the affidavit, not identified by the Respondent, also consist of opinion or argument. Paragraphs 12, 16, 19, 22-25, 28-30, 32-33 and 36-39 of Ms. Diallo's affidavit are struck.

[13] Although a significant portion of Ms. Diallo's affidavit has been struck, a basic recitation of the facts is found in the remaining paragraphs. Ms. Diallo's Basis of Claim form and documentation submitted to the RPD remain before the Court as exhibits to the affidavit. The Certified Tribunal Record is also before me. I am satisfied that the essential facts necessary to the determination of the Application remain and striking improper portions of Ms. Diallo's affidavit is not fatal to the Application (*Emuze v Canada (Citizenship and Immigration)*, 2021 FC 894 at para 13).

V. Analysis

[14] The parties submit, and I agree, the issues raised in this Application are to be reviewed against the presumptive standard of reasonableness. A reasonable decision is one that is "based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker." (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 85)

[15] Much of the written submissions and oral argument in this matter focussed on the RPD's credibility analysis and the conclusions it reached in respect of Ms. Diallo's actions within the context of an abusive relationship. Counsel for Ms. Diallo drew the Court's attention to *R v Lavallee*, [1990] 1 SCR 852, 108 NR 321 and the *Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution* in submitting that the RPD failed to consider Ms. Diallo's actions from the perspective of an abused woman in a patriarchal, conservative and religious society.

[16] I believe there to be some merit in these submissions, and the views behind them are of “extreme importance in general” (*Torales Bolanos v Canada (Citizenship and Immigration)*, 2011 FC 388 at para 53 [*Tolares Bolanos*]). However, the RPD made a second determinative finding that the Applicants had failed to displace the presumption of state protection in Senegal. I am unable to find the RPD’s credibility analysis influenced its state protection assessment. Accordingly, the state protection determination “stands alone and justifies the Decision.” (*Torales Bolanos* at para 70)

[17] Where a claimant seeks to rebut the presumption of adequate state protection, the claimant bears an evidentiary and a legal burden. The claimant must first introduce evidence of inadequate state protection and then must demonstrate that the evidence establishes, on a balance of probabilities, that state protection is inadequate (*Flores Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 at paras 17-20 [*Flores Carrillo*]). Reliable evidence alone will not satisfy a claimant’s legal burden; the evidence must also have sufficient probative value to satisfy the standard of proof (*Flores Carillo* at paras 28 -30).

[18] In this instance, Ms. Diallo submits that she satisfied her legal burden through personal and country condition evidence. She claims she filed two police complaints that were not taken seriously and that the documentary evidence showed police generally do not intervene in domestic disputes, FGM is still practiced in Senegal and in 2018-2019 no FGM cases were prosecuted. She also relies on evidence indicating her ex-husband’s uncle’s position as a police commissioner in Dakar is probative to the issue and the RPD’s failure to address this evidence also undermines the reasonableness of the RPD’s decision.

[19] In considering state protection, the RPD noted FGM was criminalized in Senegal in 1999 and penalties range from six months to five years of imprisonment. The RPD also noted Senegal had introduced a national action plan to eliminate the practice of FGM by 2030, that the federal government organized workshops across the country to encourage the application of the anti-FGM laws and multiple non-governmental organizations also work within the country to eradicate the practice.

[20] The RPD also found the documentary evidence showed state protection was available to victims of gender-based violence, albeit not perfectly effective or evenly accessible throughout the country. The RPD found the “evidence suggests that there are mechanisms in place to assist Senegalese women facing domestic abuse and FGM.” The RPD acknowledged that laws aimed at protecting the rights and interests of women are not always enforced.

[21] In addressing the effectiveness of state efforts, the RPD noted Ms. Diallo had testified she was able to prevent her ex-husband from having FGM performed on their daughters by threatening to report him to the police. The RPD found this demonstrated that both Ms. Diallo and her ex-husband believed state protection was likely effective.

[22] The RPD further noted the police had received Ms. Diallo’s 2015 domestic violence complaint and received and responded to her 2018 police complaint by issuing a summons for her ex-husband. The RPD also noted Ms. Diallo’s divorce proceedings had resulted in her receiving full custody of her children and child support payments. The RPD acknowledged the limited police response to her complaints, but found the evidence indicated she took no

additional steps to follow-up on her initial complaints, report her ex-husband to another authority or take advantage of services offered by non-governmental organizations.

[23] In the context of country condition evidence, the RPD then considered Ms. Diallo's profile as a well-educated woman who lived in the country's urban capital and was employed on a full-time basis. The RPD found the evidence indicated the majority of woman in Senegal are economically active and the law provides for maternity leave and prohibits gender discrimination. The RPD acknowledged the country condition evidence indicated striking differences between rural and urban areas but noted Ms. Diallo is from Dakar, the urban capital of Senegal. The RPD found the evidence indicated she would be able to access state protection from gender-based violence.

[24] It is clear the RPD considered and addressed the evidence relied on to rebut the presumption of state protection but concluded it was insufficient to satisfy Ms. Diallo's legal burden. Although Ms. Diallo understandably disagrees with the RPD's conclusion, it is one reasonably available to the RPD and is supported by a coherent and rational chain of analysis.

[25] The RPD did not address the evidence that Ms. Diallo's ex-husband's uncle was employed as a police commissioner in Senegal. I note Ms. Diallo first raised this evidence in the course of her testimony before the RPD in the context of the RPD's consideration of an internal flight alternative [IFA] to explain why she believed she might be tracked and located in another part of the country. A news report submitted to the RPD post-hearing reflects the uncle's appointment. Ms. Diallo's post-hearing written submissions address this evidence, but only in

relation to the availability of an IFA. It is not referenced in the state protection submissions.

There is no evidence to indicate the uncle has previously used his position for personal advantage or to improperly influence the actions of government authorities, nor is any general country condition evidence relating to police corruption referenced.

[26] Although it would have been preferable had the RPD addressed the evidence that Ms. Diallo's ex-husband's uncle was employed as a police commissioner in Senegal, I am unable to conclude the failure to do so, in light of the context in which the issue arose and was argued, renders the RPD's state protection finding unreasonable. That the reasons do not address all the arguments a reviewing judge would have preferred is not on its own a basis to set the decision aside (*Vavilov* at para 91, citing *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16).

VI. Conclusion

[27] The Application is dismissed. The parties have not identified a question of general importance for certification, and none arises.

JUDGMENT IN IMM-3255-20

THIS COURT'S JUDGMENT is that:

1. Paragraphs 12, 16, 19, 22-25, 28-30, 32-33 and 36-39 of Ms. Diallo's affidavit, sworn August 25, 2020, are struck;
2. The Application is dismissed; and
3. No question is certified.

"Patrick Gleeson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3255-20

STYLE OF CAUSE: SALIMATA ZAIA DIALLO, NOGAYE ZAIA CISSE,
MOUHAMED CISSE, CHEIKH AHMED TIDIANE
CISSE, FATOU KINE CISSE v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: BY VIDEOCONFERENCE

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JUDGMENT AND REASONS: GLEESON J.

DATED: NOVEMBER 30, 2021

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