

Federal Court



Cour fédérale

Date: 20221026

Docket: IMM-8875-21

Citation: 2022 FC 1468

[ENGLISH TRANSLATION]

Ottawa, Ontario, October 26, 2022

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

YOUSSOUPHA GAYE

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Mr. Youssoupha Gaye, a citizen of Senegal, is seeking judicial review of a decision by the Refugee Protection Division [RPD] made on November 8, 2021, which found that Mr. Gaye was not a Convention refugee or a person in need of protection within the meaning

of sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act]. The RPD determined that the refugee claim had no credible basis under subsection 107(2) of the Act.

[2] In its decision, the RPD noted inconsistencies and omissions in Mr. Gaye's testimony about the persecution that he alleged to have suffered at the hands of his father and his uncles and concluded that there was no evidence of it. The RPD also concluded that Mr. Gaye had no subjective fear, given his delay in claiming refugee protection.

[3] Mr. Gaye alleges that the RPD drew unreasonable inferences from his testimony concerning family persecution. He claims that, on the basis of those inferences, the RPD concluded that his testimony was inconsistent with respect to that key element of his claim, making the RPD's conclusion about his total lack of credibility unreasonable.

[4] For the following reasons, I agree with Mr. Gaye and conclude that this application for a judicial review should be allowed.

II. Facts and underlying decision

[5] Mr. Gaye, a member of a Muslim family, alleges that he was persecuted by his father and three uncles due to his passion for music that, in their opinion, is contrary to the Muslim religion and reserved for the géwél caste, the caste of singers in Senegal. As a youth, while he was living with his aunt, his father would come to visit him each week and would see his son's love for music and allegedly used force to prevent him from pursuing that path. Mr. Gaye alleges that, in 2010, as he was leaving a rehearsal, his father was waiting for him with three of his uncles and

allegedly beat him so he could no longer play music; he had a broken right arm and stitches on his forehead. In 2011, following that incident, his father took him to the daara, a Quranic school that imposes strict discipline, from which he ran away in 2015. In 2016, after several months with no fixed address, he met some percussionists and joined their band. In December 2017, Mr. Gaye came to Canada with that band to go on tour and stayed here permanently. On May 11, 2020, Mr. Gaye claimed refugee protection, fearing abuse by his family if he were to return to Senegal.

[6] The RPD concluded that the hearing revealed a major inconsistency in Mr. Gaye's testimony, between the reasons for the alleged persecution and the statements made on his Basis of Claim Form [BOC Form]. The RPD noted that, on his BOC Form, Mr. Gaye had described his father as a Muslim traditionalist, a disciple of religious leader Serigne Touba, and hostile to the idea of his son playing music because he [TRANSLATION] "is not a géwél". The RPD concluded that that portrayal of his father was confirmed by Mr. Gaye in his oral testimony at the hearing, that of a head of family who was hostile to any nonconformism, disappointed by his son who allegedly brought shame to him and who dishonoured the entire family by playing music, thus straying from the straight and narrow.

[7] However, the RPD determined that that portrayal of the father, a guardian of Muslim orthodoxy, a disciple of the Mourides, was in question because Mr. Guay's parents had him educated, from a young age, in a Catholic elementary school and in a private secular high school. The RPD thus held that the evidence in the record that Mr. Gaye's father had his son educated somewhere other than a Muslim school was not consistent with the image portrayed of him and

was a major inconsistency with Mr. Gaye's portrayal of his father, and the reasons for his fear. The RPD noted that Mr. Gaye's father sent his son to the daara between 2011 and 2015 solely to straighten him out. The RPD noted that, to explain that inconsistency, Mr. Gaye argued that Catholic schools are better and adjusted his testimony by adding that the Catholic school in question accepted both Muslims and Catholics. Mr. Gaye also added that, during vacations, he went to Touba to study the Quran.

[8] The RPD dismissed those explanations, finding them to be insufficient and unreasonable. On the one hand, it found it to be unreasonable that a guardian of Muslim orthodoxy, a disciple of Serigne Touba, would educate his son at a Catholic or private secular school. Moreover, the RPD concluded that sending his son to such schools because they are better was a sign of open-mindedness, contrary to the image of a closed man opposed to anything that was against the Muslim religion. The RPD also determined that Mr. Gaye's explanations that his father made him study the Quran during vacations and that the Catholic school where he was enrolled was open to both Catholics and Muslims, did not explain why a Muslim who was a guardian of Muslim orthodoxy would choose to educate his children in Catholic and private schools rather than Quranic schools. The RPD concluded that, given the applicant's portrayal of his father, it was reasonable to expect that he would educate his son in a Quranic school, and that sending his son to a school other than a Quranic school confirmed the open-mindedness of Mr. Gaye's father. The RPD thus concluded that the lack of a reasonable explanation for the inconsistency between the portrayal of the father and the applicant's education in Catholic and private secular schools undermined Mr. Gaye's allegation that his father beat him because he was straying from religious and Muslim precepts by pursuing music.

III. Issues and standard of review

[9] This application for judicial review raises only one issue: is the member's decision reasonable? More specifically, did the RPD reasonably conclude that there was no credible basis for Mr. Gaye's claim?

[10] The standard of review applicable to the RPD's conclusions is that of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17 [*Vavilov*]). The role of the Court is to determine whether the decision as a whole is reasonable, that is, whether it is based on “an internally coherent and rational chain of analysis” and whether the decision as a whole is transparent, intelligible and justified (*Vavilov* at paras 85–86).

IV. Analysis

[11] Mr. Gaye alleges that he did not say anywhere in his BOC Form that his father was a disciple of Muslim orthodoxy and that he was against other religions or against studying in a Catholic or secular school. Mr. Gaye contends that, as recognized by the RPD, he stated in his BOC Form and in his oral testimony at the hearing that his father is a Mouride Muslim, a disciple of Serigne Touba, and is hostile to the idea of his son playing music because he is not a géwél. He submits that the RPD relied on its own hypothesis, describing his father as a [TRANSLATION] “guardian of Muslim orthodoxy” and saying that it was unreasonable that he would educate his son in a Catholic or private secular school.

[12] Mr. Gaye submits that the RPD had no evidence of this and that, on the contrary, the documentary evidence available indicates that Senegal is a country of religious tolerance where

the Catholic and Muslim religions coexist in peace. Mr. Gaye submits that the RPD's inference that his education in a Catholic school was a sign of his father's open-mindedness is neither valid nor relevant in this case, as his father's hostility is towards music. He argues that there is a difference between being hostile to music and educating his son in a Catholic school, and that it was unreasonable for the RPD to identify a major inconsistency between these two elements, leading it to conclude that it undermined the credibility of his allegation of persecution.

[13] In my view, the RPD's decision does not leave enough room for the subtleties that exist in each religion and that define the precepts of conformity with religious dogma. Mr. Gaye notes that he never alleged that his father was an orthodox Muslim who refused to have him study at a Catholic school. Here, the RPD simply jumped to that conclusion, even though Mr. Gaye's allegation was only that his father, obviously being orthodox, did not want him to play music.

[14] It is true that the claimant can avoid any persecution simply by renouncing playing music—there is no protected right to play music—but that is not why the RPD dismissed his claim. To make matters worse, the RPD raised the issues of the credibility of the claim to a situation that gives rise to the application of subsection 107(2) of the Act. However, the threshold is very high for the RPD to reach such a decision on any refugee claim (*Rahaman v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 89, [2002] 2 FC 537 at para 19, 27–30, 51 and 52; *Mahdi v Canada (Citizenship and Immigration)*, 2016 FC 218 at para 10). Mr. Gaye submits that, although his claim was in fact denied on grounds of credibility or insufficiency, it did not meet the threshold set in subsection 107(2) of the Act.

[15] In determining whether a subsection 107(2) finding is unreasonable, this Court applies the test set out in *Ramón Levario v Canada (Citizenship and Immigration)*, 2012 FC 314:

[18] The threshold for a finding that there is no credible basis for the claim is a high one, as set out in Rahaman, at para 51:

[...] As I have attempted to demonstrate, subs. 69.1(9.1) requires the Board to examine all the evidence and to conclude that the claim has no credible basis only when there is no trustworthy or credible evidence that could support a recognition of the claim.

[19] Thus, if there is any credible or trustworthy evidence that could support a positive determination the Board cannot find there is no credible basis for the claim, even if, ultimately, the Board finds that the claim has not been established on a balance of probabilities.

[16] That threshold is due to the particularly serious consequences of the decision for Mr. Gaye, namely the inability to appeal to the RAD (paragraph 110(2)(c) of the Act; *Alyafi v Canada (Citizenship and Immigration)*, 2014 FC 952 at para 13), thus depriving him of the stay of enforcement of the removal order—which is automatic unless there is a designation by the Minister as referred to in subsection 109.1(1) of the Act—pending the outcome of the judicial review (subsection 231(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227; *Pournaminivas v Canada (Citizenship and Immigration)* 2015 FC 1099 at para 9).

[17] The respondent, the Minister of Citizenship and Immigration [Minister], claims that the inferences made by the RPD were the result of Mr. Gaye's own portrayal of his father. The Minister may be right; however, that portrayal, possibly of an intolerant man, is related only to Mr. Gaye's practice of music. At no time did the RPD ask Mr. Gaye why his father, an orthodox Muslim, would allow his son to attend a private Catholic school. It simply jumped to the

conclusion that a Muslim father who would allow his son to attend a Catholic school must have an open mind in his application of the principles that guide his religious practice, without giving any explanations in support of that conclusion. Moreover, the RPD considered that such a conclusion, which in my view is unintelligible because it leaves no room for nuance in the expression of religious beliefs, was inconsistent with the closed image portrayed by Mr. Gaye, thus making his testimony non-credible. That consideration, combined with other elements of his story that reasonably undermined his allegation that his father abused him because he was playing music, led the RPD to conclude that there was no credible basis for his claim and to dismiss it under subsection 107(2) of the Act.

[18] In my view, without any motivation to follow the RPD's reasoning, given that the image of intolerance portrayed by Mr. Gaye seemed to be related solely to music, such a conclusion is untenable. As it is not clear to what extent that conclusion by the RPD weighed in its ultimate decision to determine that Mr. Gaye's refugee protection claim had no credible basis under subsection 107(2) of the Act, and given the seriousness of such a determination, I find that the decision itself is not reasonable.

V. Conclusion

[19] The application for judicial review is allowed.

JUDGMENT in IMM-8875-21

THIS COURT’S JUDGMENT is as follows:

1. The application for judicial review is allowed.
2. The RPD decision dated November 8, 2021, is quashed and the matter is returned for reconsideration by a differently constituted panel.
3. There is no question for certification.

“Peter G. Pamel”

Judge

Certified true translation
Vincent Mar

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-8875-21

STYLE OF CAUSE: YOUSSEUPHA GAYE v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: HEARD BY VIDEOCONFERENCE

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