Federal Court  Cour fédérale

Date: 20131028

Docket: IMM-6787-12

Citation: 2013 FC 1099

Ottawa, Ontario, October 28, 2013

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

AISSATOU BAH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*, or the Act) of a decision made by the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated July 5, 2012, whereby it was decided that Aissatou Bah was neither a Convention refugee nor a person in need of protection pursuant to sections 96 and 97(1) of the Act. The determinative issues before the Board were the credibility of the Applicant and the lack of subjective fear. For the reasons that follow, the application should be dismissed.

Facts

[2] These are the facts put forward by the Applicant before the Board.

[3] The Applicant is a Guinean citizen of Fula ethnicity. She was born to a conservative father who insisted on traditional Fula customs, including the forced marriage of his daughters to cousins. The Applicant was also subjected to female genital mutilation (FGM) as a child.

[4] After completing her high school, the Applicant managed, with the help of her mother and uncle, to convince her father to allow her to pursue university studies in France. She left Guinea in 2005. She returned to Guinea for a three week visit in April 2011.

[5] One and a half months after the Applicant had returned to France, her father called her and told her he was sick and that she should return home as soon as possible. She left France on July 22, 2011, only to realize her father's illness was a trick to get her back into the country so he could marry her to a 50 year-old distant cousin who already had two wives.

[6] The Applicant was married on July 31, 2011. On August 5, 2011, with the help of her mother, the Applicant fled her husband's home and returned to France. Two days later, she learned that her father was looking for her and would do anything to return her to Guinea.

[7] The Applicant stayed in France for a few days, and then left for Canada on August 15, 2011, with a study permit which had been obtained prior to her visit to Guinea. During her stay in

Canada, she learned that a cousin on her father's side had come to her former place of residence in France looking for her. She claimed refugee status on November 16, 2011.

[8] The Applicant claimed that she fears persecution on the basis of her gender and her status as a victim of FGM. She also claimed that she faces a risk of torture, a risk to her life and a risk of cruel and unusual treatment at the hands of her father and of her husband.

[9] In support of her application to the Board, the Applicant submitted, *inter alia*, a letter from her older sister, a letter from her mother, a marriage certificate ("Jugement supplétif") and a medical report.

The impugned decision

[10] As previously mentioned, the determinative issues before the Board were the credibility of the Applicant and her lack of subjective fear.

[11] First, the Board found it implausible that the Applicant's father, who had allowed his daughter to study abroad for 5 years, would then force her into marriage.

[12] Second, the Board took issue with the Applicant's testimony at the hearing that her mother had fled the family home after she had helped the Applicant flee to France, and that her older sister had left her matrimonial home of ten years and was now living with her mother. The Board noted that, at the hearing, the Applicant first stated that her mother still lived at home, and that her older

sister lived with her husband. The Board also noted that neither the mother's declaration nor the sister's declaration mentioned their leaving their husbands.

[13] Third, with regard to the "Jugement supplétif" attesting the marriage, the Board found it unlikely that the Applicant's father would request such a document nine months after the marriage.

[14] Fourth, the Board drew a negative credibility inference from the fact that, despite fearing forced marriage since she had left Guinea in 2005, the Applicant returned twice to her country (in April and July of 2011) and had not sought refugee protection during the five years she lived in France, and especially during the period after she had fled Guinea in August 2011. The Board also took issue with the fact that the Applicant had waited three months before claiming refugee protection in Canada.

[15] Therefore, the Board did not believe that the Applicant had been forced into marriage.

[16] With regard to the Applicant's allegation that she would face persecution as a member of the group of women who have been victims of FGM, the Board accepted the Applicant's evidence that she had been a victim of FGM, but decided that the documentary evidence and the evidence of the Applicant's two trips to Guinea did not indicate a continuing threat of persecution.

Issues

[17] In his written submissions, counsel for the Applicant argued that the Board had an obligation to consider compelling reasons if a person has been subject to past mistreatment or

torture or persecution as per subsection 108(4) of the *IRPA*. At the hearing, however, counsel resiled from that argument. This was probably a judicious decision, as subsection 108(4) of the Act does not arise on the facts of this case. Subsection 108(4) only comes into play where there has been a finding that a person was a Convention refugee but is no longer so because the conditions that led to that status no longer exist. The change of circumstances required to engage subsection 108(4) is a change in country conditions. In the case at bar, the Board did indeed recognize that the Applicant had been a victim of FGM in the past, which can properly be characterized as persecution. However, the Board had not concluded that the Applicant no longer faced a risk of persecution because of a change in country conditions, but because she had already undergone FGM. This is a change in personal circumstances, not a change in country conditions: *Sow v Canada (MCI)*, 2011 FC 1313.

[18] In my view, therefore, this application raises the following two issues:

i) Did the Board err in failing to consider the cumulative effect of discrimination?

ii) Are the Board's credibility and lack of subjective fear findings reasonable?

Analysis

[19] The Board's conclusion as to whether incidents of discrimination amount to persecution is a question of fact and law which is to be reviewed on the standard of reasonableness: *Qin v Canada (MCI)*, 2012 FC 9 at paras 34-37. As for the second issue, it is well established that the Board's conclusions of credibility are also to be reviewed on the standard of reasonableness; as the Federal Court of Appeal stated in *Aguebor v Canada (Minister of Employment and Immigration)*, [1993]

FCJ No 732 at para 4, "who is in a better position than the Refugee Division to gauge the credibility of an account and to draw the necessary inferences?".

[20] Reasonableness requires that this Court accord the Board significant deference. As long as the Board's decision falls within a range of acceptable outcomes that are defensible in respect of the facts and law, the decision is not subject to this Court's intervention: *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47.

i) Did the Board err in failing to consider the cumulative effect of discrimination?

[21] The Applicant submits that the Board failed to consider the cumulative effect of discrimination, but did not substantiate this argument beyond claiming at the hearing that as a policy matter, the violation of an applicant's human rights requires the Board to consider the cumulative persecution especially when a psychological report establishes that she still suffers from such a violation.

[22] This argument is without merit. Simply put, the obligation to consider whether incidents of discrimination amount to persecution does not arise on the facts of this case, because the Board made no finding that the Applicant had been a victim of discrimination and the Applicant does not claim to have been a victim of discrimination. For the Board to make a finding with respect to the cumulative effect of past incidents, such past incidents must be put in evidence. This was simply not done here.

ii) Are the Board's credibility and lack of subjective fear findings reasonable?

[23] The Applicant argues that the Board made a number of errors. First, the Applicant argues that it was unreasonable to find that because the Applicant went to university her father would not be conservative or religious, given the undisputed fact that the Applicant was a victim of FGM as a child, which is a strong indication of her father's traditional views. Indeed, counsel for the Respondent conceded during the hearing that this is a weak finding and did not strive to defend it.

[24] Second, the Applicant submits that the Board could not draw negative credibility findings from the fact that the Applicant had failed to seek refugee protection during the five years before her second visit to Guinea, as her fear of persecution only materialized on July 31st, 2011, the day of her forced marriage. According to the Applicant, the delay in claiming refugee protection in France is in fact only a delay of a few days between August 5 and August 15, at which point she had already planned to come to Canada to study. With regard to the three month delay in claiming refugee protection in Canada, the Applicant concedes that it is a significant delay, but argues that it is not determinative in this case.

[25] Finally, the Applicant argues that the Board made an erroneous finding of fact when it found it implausible that the Applicant's father would request a marriage certificate nine months after the marriage. On the face of the "Jugement supplétif", it is apparent that it was requested not by the Applicant's father, but by the Applicant's husband.

[26] I agree with the Applicant that the Board made a questionable finding when it faulted the Applicant for failing to seek refugee protection during the five years she lived in France prior to her forced marriage or for having returned to Guinea twice in 2011. Although the Applicant did testify

that she had feared forced marriage since 2005, her fear of persecution only really materialized when she was in fact married by force in 2011. Delay in making a claim can only be relevant from the date as of which an applicant begins to fear persecution: see *Gabeyehu v Canada (MCI)* (1995), 58 ACWS(3d) 1136, [1995] FCJ No 1493.

[27] In my view, however these errors do not invalidate the whole of the Board's findings, as the Board properly made a number of other credibility findings.

[28] First, the Board did not consider only the delay preceding the Applicant's marriage. The Board also concluded that there was an unreasonable delay in claiming refugee status after the Applicant's arrival in Canada. This Court and the Federal Court of Appeal have held that delay in claiming refugee status "is an important factor which the Board is entitled to consider in weighing a claim for refugee status": see e.g. *Espinosa v Canada (MCI)*, 2003 FC 1324 at para 16, and *Garcia v Canada (MCI)*, 2012 FC 412 at paras 19-20, both decisions citing *Heer v. Canada (Minister of Employment and Immigration)*, [1988] F.C.J. No. 330. In the case at bar, the Applicant made a claim for protection three months after her arrival in Canada, explaining that she did not know what to do. The Board considered her explanation, but did not find it reasonable given the Applicant was educated, having obtained a Master's degree in France.

[29] Second, the Board noted a number of inconsistencies and omissions in the Applicant's claim with respect to her mother and her sister, findings which are not challenged by the Applicant. The Board noted that the Applicant said, at the beginning of the hearing, that her mother still lived with her father and that her older sister still lived with her husband. She later stated that her mother left

the home right after the Applicant had escaped. This latter statement was inconsistent with the Applicant's earlier statement and with her Personal Information Form (PIF), wherein the Applicant did not mention that her mother had fled the family home after she had helped the Applicant escape. Although I am mindful that one's PIF is not supposed to be an encyclopaedic recitation of the evidence (see *Feradov v Canada (MCI)*, 2007 FC 101 at paras 18-19), this was not a mere collateral detail. It was information central to the Applicant's claim, the omission of which could properly lead to a negative credibility finding. Not only was the mother's departure not mentioned in the Applicant's narrative, but it was also not mentioned in her mother's written statement of April 5, 2012.

[30] As for the Applicant's older sister, she had apparently left her matrimonial home of more than 10 years, abandoning her three children in order to take refuge by her mother's side. However, her written statement omits this information. Additionally, it does not state she was forced into marriage.

[31] Finally, it is true that the Board made a factual error when it considered that the Applicant's father had requested the "Jugement supplétif". That being said, I agree with the Respondent that this error is immaterial as the concerns raised by the Board regarding the father obtaining this document apply equally to the husband. The Applicant has alleged a fear of both individuals. It is equally unclear why her husband would request this document nine months after the marriage and how it ended up in her maternal uncle's possession.

[32] To summarize, although some of the Board's conclusions are questionable, I am convinced that the remaining findings were properly considered, and that the Board's conclusion falls within the range of reasonable outcomes. The Board's assessment of credibility should be undisturbed where an oral hearing has been held and where the Board has had the advantage of seeing and hearing the witness, unless the Court is satisfied that the Board based its conclusion on irrelevant considerations or that it ignored evidence. That demonstration has not been made.

[33] The Applicant referred this Court to the decision of Justice Gleason in *Mofrad v Canada (MCI)*, 2012 FC 901. In that case, the application was granted because the Board's credibility findings turned "in large part on the erroneous findings" and were "largely based on findings which contradict the evidence", and because the core of the Board's conclusion centered on an unreasonable determination. In the present case, the Board's errors are not so central as to warrant the intervention of this Court.

Conclusion

[34] For all of the above reasons, the application for judicial review is dismissed. No question of general importance has been proposed for certification, and none is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

No question is certified.

"Yves de Montigny"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Micheal Crane	FOR THE APPLICANT
Julie Waldman	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Micheal Crane Barrister and Solicitor Toronto, ON	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT