

Federal Court



Cour fédérale

Date: 20120619

Docket: IMM-8618-11

Citation: 2012 FC 773

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Montréal, Quebec, June 19, 2012

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

MOUSSA TOURÉ

Applicant

and

**MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The central point of the claim involves the events of September 28, 2009, that took place in Guinea and were characterized as crimes against humanity by the United Nations:

B. Violations of international criminal law

180. Although the question as to whether or not crimes were committed can be finally and conclusively resolved only by a court with the requisite jurisdictional competence, the Commission believes that there is a set of characteristics which

demonstrate that the acts perpetrated on 28 September 2009 were sufficiently serious to justify their qualification as crimes against humanity. . . .

(Report of the United Nations International Commission of Inquiry mandated to establish the facts and circumstances of the events of 28 September 2009 in Guinea [Report of the United Nations Commission of Inquiry] (TR at pages 124-182)).

[2] Another unique feature of this case is the applicant's physical condition, which is confirmed by the medical evidence. He claims that his physical and psychological injuries are a result of abuse suffered in his country of origin.

[3] For the following reasons, this Court is of the view that the decision by the Refugee Protection Division [RPD] is unreasonable; it is not supported by the evidence and was made without regard to the context.

II. Legal proceeding

[4] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], for judicial review of a decision by the RPD dated October 21, 2011, which determined that the applicant is neither a Convention refugee as defined in section 96 of the IRPA nor a person in need of protection under section 97 of the IRPA.

III. Facts

[5] The applicant, Mr. Moussa Touré, is a 27-year old citizen of Guinea. He claims that he fears the red berets and the military regime because he opposed the candidacy of Captain Moussa Dadis Camara in the 2009 presidential elections.

[6] Around the month of August 2009, the applicant joined a grassroots protest movement called the [TRANSLATION] “Dadis must go movement” [MDDP]. He says that he mobilized the young people in his neighbourhood, urging them to participate in demonstrations against Moussa Dadis Camara’s candidacy in the presidential elections.

[7] On September 28, 2009, a peaceful demonstration was organized in Conakry to protest against Moussa Dadis Camara’s candidacy. Talks on the subject were also scheduled to take place in a stadium. The applicant and his friends, Alpha Amadou Diallo and Dem, participated. Everything took place inside the stadium complex.

[8] While the applicant and his friends were listening to the speeches, soldiers and red berets entered the stadium and blocked the exits. The applicant says that they opened fire on the crowd and beat the people with batons. The women were raped and mutilated on the spot. The applicant states that everyone was panicking and attempting to flee.

[9] The applicant alleges that his friend Dem was shot in the head and killed. The applicant managed to crawl towards a gutter with his friend Alpha where he stayed hidden for two hours, witnessing the massacre.

[10] The applicant states that he was driven out by a soldier who fired in the direction of the gutter. The soldiers pulled him out of the gutter, beat him with batons and tied him up.

[11] The applicant says that he was hit on the mouth with a rifle butt and immediately lost a tooth. As the result of a blow to his ears, the applicant found out, in Canada, that his eardrum had been ruptured causing a hearing loss.

[12] The applicant and his friend Alpha were taken by soldiers to camp Alpha Yaya Diallo where they were thrown into a room without food or water for two days.

[13] On September 30, 2009, the applicant was transferred to another room where he lived for a month in degrading and inhuman conditions.

[14] The applicant claims that around October 30, 2009, the soldiers moved him again because of the arrival of United Nations [UN] observers.

[15] The same day, a soldier, who knew the applicant's mother, helped the applicant escape. He took refuge at a cousin's home.

[16] On December 7, 2009, the applicant left Guinea for Canada with a false passport. On January 15, 2010, the applicant claimed refugee protection.

IV. Decision that is the subject of this judicial review

[17] The RPD's decision is based on the applicant's lack of credibility. The RPD highlighted the applicant's lack of cooperation. The RPD stated that he either did not respond directly to the questions or asked that they be rephrased.

[18] Initially, the RPD questioned the applicant's identity, assigning little probative value to the documents that were submitted but stated that, on balance, it was satisfied with the applicant's identity because it was not an expert.

[19] With respect to the applicant's involvement in the MDDP, the RPD relied on the following factors to support its negative credibility finding:

- (a) the applicant lacked spontaneity, and his answers to the RPD's questions were brief whereas he provided more details when questioned by his counsel;
- (b) the applicant's difficulties in answering questions about the exact date he began his involvement with the MDDP;
- (c) the inconsistency between his testimony and his statement in the Personal Information Form [PIF] about the date of a meeting with the young people;
- (d) the applicant improvised his answers;
- (e) the applicant was unable to specify the date of the demonstration where he was seen holding a sign;
- (f) the discrepancy between the testimony and the letter from the law firm of Labile & Moriba that was introduced into evidence regarding the extent of his involvement in the MDDP.

[20] Alternatively, the RPD stated that even if the applicant really was involved in the MDDP, which it did not believe, the fact that this protest movement emerged spontaneously a few weeks before the massacre at the stadium on September 28, 2009, does not support a finding that the

applicant had been identified. Moreover, the RPD did not believe that the MDDP should be considered a political party.

[21] Next, the RPD found that the applicant had not been present at the stadium on September 28, 2009, during the massacre. It came to this conclusion because the applicant was unable to say whether tear gas had been fired despite the fact that he was at the centre of the stadium complex whereas the documentary evidence referred to the presence of tear gas. The RPD also noted that the applicant hesitated before answering the questions.

[22] The RPD did not believe that the applicant had been imprisoned in camp Alpha Yaya Diallo. In this regard, the RPD stated that the applicant's testimony about his escape was not consistent with the written testimony of the applicant's mother. In the RPD's opinion, the applicant tried to close this gap at the hearing. The RPD also stated that the applicant gave a better answer when questioned by his counsel.

[23] The RPD did not believe the applicant when he justified his omission in his PIF regarding the path he took to escape, which he described in more detail at the hearing.

[24] Last, with respect to the medical evidence, because the RPD found that the applicant had not been present when the massacre in the stadium occurred, it disregarded the medical evidence. Thus, it did not believe that the hearing problem was caused by blows from the soldiers. It came to this conclusion by noting that the reports were inconsistent. One stated that he had received a blow to the right ear while the other said that he had been hit on both ears.

[25] The RPD also did not believe that the applicant's post-traumatic syndrome, which was confirmed in a psychological report, resulted from the massacre of September 28, 2009.

[26] The RPD determined that the circumstances in Guinea had not changed but, given its credibility finding, rejected the refugee claim.

VI. Relevant statutory provisions

[27] The following provisions of the IRPA apply to this case:

Convention refugee

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

Person in need of protection

97. (1) A person in need of protection is a person in Canada

Définition de « réfugié »

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques:

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Personne à protéger

97. (1) A qualité de personne à protéger la personne qui se

whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée:

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant:

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins

medical care.

médicaux ou de santé
adéquats.

Person in need of protection

Personne à protéger

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

VI. Positions of the parties

[28] The applicant submits that the RPD's negative credibility finding is not founded. First, the applicant maintains that the RPD did not assign sufficient weight to the handicap his hearing loss represents, which was confirmed by the medical evidence. The applicant contends that the RPD did not take this handicap into consideration as an explanation for the fact that he did not always understand the questions and took a long time to answer.

[29] Moreover, he testified through an interpreter, which made communication more difficult. The applicant submits that the RPD created a tense and unpleasant environment because it was exasperated with the behaviour of the applicant, who frequently asked that the question be repeated. He maintains that he answered all the questions, provided sufficient details and did not contradict himself. In the same vein, he adds that it is normal that he was more at ease answering questions from his counsel than from the RPD.

[30] The applicant criticizes the RPD's unreasonable interpretation of the facts and its use of minor discrepancies between the testimony and the PIF to support its negative credibility finding.

The applicant submits that the RPD did not analyze the evidence adduced by comparing it to the applicant's testimony.

[31] The respondent maintains that the onus is on the applicant to establish a credible link between his personal situation and the evidence. He contends that the RPD acknowledged the applicant's hearing loss at the beginning of the hearing by ensuring that the interpreter was positioned on the side of the less affected ear. Moreover, he argues that the applicant's hearing loss is only partial and that the applicant has hearing aids that overcome his handicap. The respondent submits that this Court must show deference to the RPD, which had the advantage of listening to the applicant. He adds that the applicant was unable to respond to an important element of the refugee claim, i.e. the use of tear gas at the massacre of September 28, 2009. In addition, the inconsistencies raised by the RPD about the applicant's escape are founded and undermined his credibility.

[32] The respondent also submits that the applicant did not object at the hearing in view of the RPD's attitude.

VIII. Analysis

[33] Significant deference is owed to the RPD's findings of fact within its expertise (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708; *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR190).

[34] The RPD's negative decision is based entirely on the applicant's credibility.

The applicant's hearing difficulties

[35] First, this Court finds that the RPD relied on the applicant's numerous hesitations and on the fact that he asked several times that the questions be rephrased. It described the atmosphere of wariness (RPD's decision at paragraph 19). This Court notes that the transcript of the hearing shows that it was difficult for the applicant to give his testimony.

[36] Added to this is the important fact that the applicant had to testify through an interpreter. At first glance, the RPD's finding could be justified. However, this finding becomes meaningless when placed in the context that the RPD referred to at the beginning of the decision.

[37] In fact, the RPD itself recognized that the applicant suffered a hearing loss that was allegedly caused by the trauma he endured during the events of September 28, 2009. The applicant even took out his hearing aid during the hearing. This hearing loss was confirmed by medical reports and certificates.

[38] The RPD acknowledged that "the applicant has some hearing problems, as he submitted medical documents to that effect" (RPD's decision at paragraph 18); however, it does not appear to have fully taken this loss into consideration.

[39] The general report from the PRAIDA clinic, dated February 8, 2010, states as follows:

[TRANSLATION]

Physical examination confirmed a partial hearing loss in the right ear, but the traumatic nature of this loss cannot be confirmed or denied.

(TR at page 122)

[40] In addition, the more specialized audiology report from the audiology service at the Hôpital Général Juif, dated June 9, 2010, provides the following information:

Résultats/Result:

...

Speech recognition: poor at high levels without visual cues bilaterally. (Left) fair and (Right) good with visual cues at high levels.

...

Interprétation/Interpretation & Conclusion: A symmetrical hearing loss, Right > Left. Metz recruitment suggests cochlear etiology bilaterally. His hearing loss is worse than expected for his age bilaterally. [Emphasis added].

(TR at page 107)

[41] Thus, the applicant's hearing difficulties were significant, and it is reasonable to believe, having regard to the evidence, that his hesitations, lack of spontaneity and requests to rephrase that the RPD held against him are explained by his difficulty in hearing the questions asked. Despite the considerable deference owed to the RPD's assessment of evidence, this finding diminishes the RPD's credibility analysis.

Events at the stadium on September 28, 2009

[42] Next, the Court must address the RPD's finding that the applicant did not experience the events of September 28, 2009, which seems to have had a significant impact on the RPD's analytical process.

[43] The RPD questioned the applicant's presence in the stadium on September 28, 2009, because, citing the state of panic, he could not confirm whether tear gas had been fired as the documentary evidence indicated (RPD's decision at paragraph 70).

[44] To better understand the context of the events, it is helpful to refer to the Report of the United Nations' Commission of Inquiry.

[45] This document relates the following facts regarding the beginning of the protest movement:

48. On 27 January 2009, President Moussa Dadis Camara called upon all political parties to submit their governance platforms. In April, the number of political parties mushroomed from 49 to more than 90. The actions of CNDD on the Guinean political scene suggested that it was not ready to be a party to an electoral process. Forces vives began to express concern as to whether Moussa Dadis Camara and CNDD would stand for the elections, which gave rise to considerable tension between it and CNDD. At the same time, public opinion was divided among the "Dadis must stay", "Dadis must go" and "Dadis must step down" camps. By the middle of the year, Forces vives began to mobilize its supporters, while Moussa Dadis Camara undertook a nationwide tour on 24 and 25 September. . . . [Emphasis added].

[46] It also reports in detail the atrocities that occurred that day. From this perspective, it was clearly a question of mass panic, which supports the applicant's allegation:

62. Once inside the stadium, the red berets sprayed the crowd with gunfire. Demonstrators seeking to escape were killed by red berets, gendarmes and Thégboro's gendarmes positioned around the complex. Others were stabbed or beaten inside the stadium and within the complex, and then also systematically robbed by the security forces. Rapes and other acts of sexual violence were committed almost immediately after the red berets had entered the stadium. Dozens of persons attempting to escape through the gates either suffocated or were trampled to death in stampedes, which were compounded by the use of tear gas. Women were taken by red berets from the stadium, and from the Ratoma medical centre, and held as sex slaves for several days in different locations.

63. The violence continued until approximately 2 p.m. The violence had sufficiently abated by 1.30 p.m. for some of the demonstrators to begin leaving their hideouts.

...

(h) Persons killed in crowd stampedes

84. A large number of people suffocated or were trampled to death in crowd stampedes, which were compounded by the use of tear gas. As demonstrators tried to flee the football field, red berets posted outside the main gates opened fire, killing some of them and causing the panicked crowd to retreat back inside the stadium. Several witnesses reported people being crushed to death by the crowd. [Emphasis added].

[47] The International Commission of Inquiry also reported the inhumane, degrading treatment inflicted on individuals who were taken prisoner on September 28, 2009:

124. The former detainees from camp Alpha Yaya Diallo interviewed by the Commission reported that the Thégboro gendarmes guarding them in a room on the second floor, near the commander's office, beat them every day with clubs, pieces of wood, their booted feet and even with their rifle butts.

...

130. Those arrested or put in detention by CMIS or gendarmerie officers generally spent anything from a few hours to two days in custody before being released. However, the larger number of people arrested by the red berets were taken to military camps and held for anything from a few days to a few weeks. One former detainee arrested at the stadium on 28 September reported being held in camp Kundara for 40 days. Some people were held in a succession of detention centres, usually belonging to the same security force. Many accounts indicate that people were held at camp Alpha Yaya Diallo (commander Thégboro's headquarters) and then taken to PM3, where they were kept for several hours or days.

131. Some people were freed only after their relatives had paid substantial sums demanded by the soldiers, police or gendarmes holding the detainees, or only after friends or relatives had intervened. No charges were brought following these arrests. [Emphasis added]

[48] This report provides comprehensive evidence of the events of September 28, 2009, in Guinea, which the RPD did not pay sufficient attention to. In fact, it only used the report to

contradict the applicant's testimony on a specific question, i.e. the presence of tear gas, to which a plausible answer, grounded in the documentary evidence, was put forward.

[49] In this case, the Court observes that the other bases of the RPD's negative decision flow from this unreasonable finding. It is important to point out that "when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact" (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 (QL/Lexis) at paragraph 17).

Medical evidence

[50] Last, the RPD accepted the medical evidence that "the applicant suffers from an adjustment disorder, or even major depression, and is taking medication" (RPD's decision at paragraph 94). Nonetheless, having determined that the applicant was not in the stadium, it did not believe that his psychological condition resulted from those events.

[51] This reasoning is flawed because it is well settled in law that the evidence must be weighed in its context, i.e. in assessing the primary credibility finding, or logically a decision will be rendered that ignores the evidence.

[52] Although it recognized the applicant's precarious psychological condition, the RPD did not, however, include it as testimonial evidence. This report supports the applicant's allegations and directly links his psychological problems to the events he experienced:

[TRANSLATION]

. . . All these problems were caused by the extreme violence that Mr. Touré experienced during a peaceful demonstration on September 28, 2009, in a stadium in Conakry, Guinea, and subsequently in a military camp in the same city. The description of the events of unimaginable violence causes great psychological distress in him; his face is tense and his eyes are dazed. He frequently comes back to three scenes that seem to have marked him for life: to the [TRANSLATION] ‘stadium of September 28’, the death of a young man, shot in the head, whose brain exploded and splattered on him; to the military prison when they spent two days without food, beaten—he lost his hearing—humiliated, crouching in their cells, where he asked a soldier to finish him off because he couldn’t take any more; in his hiding place after he escaped when he found out that the soldiers had gone to his mother’s home looking for him, and he seriously thought about suicide. These scenes and many others caused severe psychological distress and intense suffering, which he still feels and which he refers to by saying that it’s as if he were dead: [TRANSLATION] ‘They’ve already killed me’ he concluded. [Emphasis added].

(TR at page 123)

[53] It is difficult to understand the RPD’s reasoning. It did not question the probative value of the report but nonetheless disregarded it after determining that the applicant had not been at the stadium. This evidence should have been discussed when it decided whether the applicant could have experienced the events at the stadium, not subsequently.

[54] In addition, having accepted the applicant’s precarious psychological condition, it was not logical to find that the applicant was not credible because he was more at ease when questioned by his counsel.

[55] It will certainly never be repeated enough that the RPD is in the best position to assess the testimony of refugee claimants but, in doing so, it must not disregard the evidence (*Ramos v Canada (Minister of Citizenship and Immigration)*, 2011 FC 298).

IX. Conclusion

[56] In light of the foregoing reasons, the Court has no option but to question the RPD's assessment of the applicant's credibility. It did not take into account the significant amount of documentary evidence supporting the applicant's submissions. In addition, as demonstrated, the RPD's treatment of some of the medical evidence was not reasonable.

[57] The RPD appears not to have grasped the context of the case, which was reflected in both the documentary evidence from international bodies and the applicant's physical condition.

[58] From this perspective, the Court finds, moreover, that the discrepancies between the applicant's testimony and his PIF, if any, were minor. Reviewing the case must avoid questioning the smallest detail of the applicant's testimony with "microscopic zeal"; this is not appropriate in this case (*Attakora v Canada (Minister of Employment and Immigration)*, [1989] FCJ No 444 (QL/Lexis)).

[59] Consequently, this Court's intervention is justified. The RPD's decision is set aside, the application for judicial review is allowed, and the case is remitted for reconsideration by a differently constituted panel.

JUDGMENT

THE COURT ORDERS that the applicant's application for judicial review is allowed, and the matter will be remitted for reconsideration by a differently constituted panel. There is no question of general importance to certify.

“Michel M.J. Shore”

Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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