

Federal Court



Cour fédérale

**Date: 20180213**

**Docket: IMM-1786-17**

**Citation: 2018 FC 166**

**Ottawa, Ontario, February 13, 2018**

**PRESENT: The Honourable Mr. Justice LeBlanc**

**BETWEEN:**

**LESNOR AUGUSTIN**

**Applicant**

**and**

**MINISTER OF CITIZENSHIP  
AND IMMIGRATION CANADA**

**Respondent**

**JUDGMENT AND REASONS**

**I. Introduction**

[1] This is an application for judicial review of a decision of the Immigration and Refugee Board of Canada, Refugee Protection Division [RPD], dated March 27, 2017, concluding that the Applicant is neither a Convention refugee nor a person in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

## II. Background

[2] The Applicant is a citizen of Haiti. He has a wife and two children. He fled Haiti, alone, on August 27, 2016, and went to the United States [US]. He entered Canada on January 6, 2017, and made his claim for refugee protection at the port of entry. He alleged fearing persecution from an individual by the name of Eustache St-Lot who used to be the head of a government-run organization, the “Bureau de Monétisation des Programmes d’Aide au Développement” [BMPAD].

[3] The Applicant claims that Mr. St-Lot holds him responsible for his demise as head of that organization and ensuing prison term after the Applicant denounced a scheme whereby companies under contract with the BMPAD, in order to have their contracts renewed, paid money into a fund intended to be distributed by the BMPAD to local politicians. At the time, the Applicant was employed by one of these companies, JL Transport, as Chief Executive Officer. He says that this bribe scheme was revealed by Mr. St-Lot at a meeting held in June 2015 with the representatives of the companies under contract with the BMPAD. In response to Mr. St-Lot’s request for such payments, the Applicant claims he spoke out against corruption and declared that the company he worked for would not contribute as the money was clearly a bribe. He also indicated that he would inform the media.

[4] Approximately two weeks after the meeting, a local radio station ran a report about the corruption within the BMPAD and mentioned Mr. St-Lot by name. The Applicant claims that from that point on, he received threatening phone calls and text messages which intensified in

May and June 2016 and culminated in physical attacks on June 27 and August 21, 2016, that he believes were ordered by Mr. St-Lot. He also claims having suffered a leg injury in July 2016 while walking in a crowded area, which his doctors indicated was likely a gun-shot wound. He says he thought that this was just a coincidental accident up until the August attack at which point he realized that this was not an accident at all.

[5] The Applicant left Haiti one week after the August attack after making sure that his family would be taken care of in his absence.

[6] The RPD found a number of problems with the Applicant's claim. First, it found that the Applicant's failure to seek protection in the US, without a reasonable explanation for not doing so, showed a lack of subjective fear. Then, the RPD held that the Applicant lacked credibility as there were important omissions in his Basis of Claim form [BOC] with regard to the nature of the threats that were made against him. In particular, the RPD noted that contrary to the Applicant's testimony, the BOC made no mention of death threats and drew no direct link between Mr. St-Lot and the August attack. The RPD was also dissatisfied with the Applicant's explanation as to why the report from the "Juge de Paix" regarding the August 2016 attack made no mention of death threats, or with his explanation of why St. Lot, after having lost his job as head of the BMPAD and his incarceration, could continue to pose a serious risk to him.

[7] The Applicant takes issue with the RPD decision on a number of grounds. First, he contends that the RPD was overzealous, microscopic and exaggerated in its credibility assessment. In particular, he objects to the RPD referring to "numerous contradictions" between

oral and written testimony while only providing two examples which demonstrate no such contradiction as his BOC: (i) stated he was told by his agents of persecution that “he better behave for [his and his] family’s sake” which, according to him, could only be interpreted as a threat against his life and the lives of his wife and children, and (ii) established a direct link between the August attack and Mr. St-Lot where it states he was accused by his attackers of being “responsible for getting the big boss fired.”

[8] Second, the Applicant submits that the RPD unreasonably assessed the “Juge de la Paix” report relating to the August incident when it concluded that the report made no mention of death threats when in fact it did. Third, he argues that it was unreasonable for the RPD to conclude that Mr. St-Lot was no longer a threat to him because he no longer holds public office and spent some time in prison. According to the Applicant, this finding was made without regard to the country documentation which shows a widespread culture of revenge in Haiti and which also shows that the risk of revenge can persist for several years, even after the original threat dies. The Applicant adds that this evidence indicates that someone like Mr. St-Lot would continue to pose a threat to him because he is the type of person that authorities would continue to be intimidated by.

[9] Fourth, the Applicant contends that the RPD should not have drawn a negative inference from his failure to claim protection in the US. He says that the delay in claiming protection should be characterized as less than 4 months because part of his time in the US was spent waiting at a shelter in Buffalo. Furthermore, he claims that the Safe Third Country Agreement

explicitly allowed him to enter Canada via the US since he has a close family member here in Canada.

[10] Finally, the Applicant argues that the RPD breached its duty of procedural fairness when it drew a negative inference from the delay in leaving Haiti after having stated at the hearing that this was no longer a live issue.

### III. Issues and Standard of Review

[11] This case raises two issues:

- a. Is the RPD decision reasonable?
- b. Was the duty of fairness owed to the Applicant violated by the RPD?

[12] There is no dispute between the parties that the standard of review applicable to the first issue is reasonableness and that the standard of correctness applies to the second (*Abd v Canada (Citizenship and Immigration)*, 2017 FC 374 at para 13; *Santillan v Canada (Citizenship and Immigration)*, 2011 FC 1297 at paras 24-25).

[13] Although I note some issues with the RPD decision, I find that when it is considered as a whole, it falls within the range of possible, acceptable outcomes and is compliant with the rules of procedural fairness.

IV. Analysis

A. *The RPD Decision is Reasonable*

[14] The RPD found that neither the Applicant nor the threat posed by Mr. St-Lot were credible. Credibility findings are factual findings to which a high degree of deference is owed. It has long been established with regards to the RPD's plausibility or credibility findings that as long as the inferences drawn are not so unreasonable as to warrant intervention, they are not reviewable unless the applicant can show that they could not have reasonably been drawn (*Aguebor v Canada (Minister of Employment & Immigration)*, [1993] FCJ No 732, 160 NR 315, at paras 3-4; *Qasem v Canada (Minister of Citizenship and Immigration)*, [2002] FCJ No 1618, 2002 FCT 1182 at paras 42-46).

[15] In the present case, with the exception of the RPD's error in its assessment of the report of the "Juge de Paix," the Applicant did not convince me that the RPD's credibility findings could not be reasonably drawn.

[16] The Respondent admits that the RPD erred in finding that the report of the "Juge de Paix" makes no reference to death threats. However, I am inclined to agree with the Respondent that the fact that the report makes such a mention does not explain other omissions and inconsistencies in the Applicant's evidence. In particular, as pointed out by the Respondent, the transcript of the hearing shows that the RPD was concerned with the omission of death threats allegedly made during the August 2016 attack whereas the report only makes reference to the threats made over the phone well before this incident. I also agree with Respondent that the

Applicant's testimony appears to have evolved to respond to the RPD's error as the Applicant provided an explanation as to why the death threats were not included at all in said report.

[17] I am satisfied too that it was reasonable for the RPD to draw a negative inference from the fact that the Applicant made no mention in his BOC of the death threats he received for over a year through phone calls and text messages. The Applicant explains that the life-threatening nature of these threats is implicit from what his BOC states (“[you] better behave for [your] and [your] family’s sake”). The problem is that this explanation was not put before the RPD. The fact is that the BOC does not clearly indicate a death threat in relation to these phone calls and text messages. It was therefore reasonably open to the RPD, in my view, to draw a negative inference from that important omission.

[18] It was also reasonably open to the RPD to find that the Applicant had failed to provide a satisfactory explanation as to how Mr. St-Lot continued to present a threat given that he no longer held a position of power and had been incarcerated because of corruption. In particular, it was reasonably open to the RPD to dismiss the Applicant's explanation that Mr. St-Lot would nevertheless continue to present a threat for him as he was close to Haiti's Minister of Finance at the time, Wilson Labeau. The RPD noted in this regard that there was no evidence that Mr. St-Lot and Mr. Labeau were friends and that the Applicant was unable to refute a newspaper article suggesting that these two gentlemen were at loggerheads for having contradicted each other in their testimony before a government anti-corruption commission.

[19] As the Respondent correctly points out, the RPD did not question Mr. St-Lot's desire to pursue the Applicant but rather his capacity to do so. I see no reason to interfere with this finding. I note in this regard that there is no evidence on record that the Applicant's wife and children, who are presumably still residing in Haiti, have been harassed, importuned or otherwise threatened by Mr. St-Lot or his henchmen since the Applicant left Haiti in late August 2016, despite indications in the BOC that his family was also at risk and the Applicant's contention that Mr. St-Lot is still capable of exerting influence.

[20] In sum, I am satisfied that despite its error regarding the absence of any mention of death threats in the "Juge de Paix" report, the RPD's overall credibility findings stand scrutiny on a reasonableness standard of review.

[21] I am also satisfied that it was open to the RPD to draw a negative inference as to the Applicant's alleged subjective fear from his delay in claiming refugee protection. In *Espinosa v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1324 at paras 16-17 [*Espinosa*], the Court found that the inability to provide a satisfactory reason for such the delay could lead to that delay taking on a decisive role (*Espinosa* at paras 16-17). The Applicant claims that he took all that time to make his refugee claim because he was "researching" how to seek protection in Canada. However, as the RPD noted, his evidence in that regard was lacking and imprecise as he was unable to identify with any degree of precision the Canadian government's websites he had visited in the course of his research.



[22] The Applicant cites *Pissareva v Canada (Minister of Citizenship and Immigration)* ([2000] FCJ No 2001 at para 27 [*Pissareva*]) in support of his argument that a failure to claim in the US is only one relevant factor. In that case, the Court held that passing through a country that is a signatory of the Refugee Convention without quickly claiming refugee status was a relevant factor in assessing the claimant's subjective fear (*Pissareva* at para 27). However the Court's final conclusions do not support the Applicant's argument. In *Pissareva*, the applicants were in New York for a month before coming to Canada and the Court concluded that the RPD's finding that the delay in claiming refugee protection indicated a lack of subjective fear was not unreasonable.

[23] The Applicant also argued, citing *Gyawali v Canada (Minister of Citizenship and Immigration)* (2003 FC 1122 [*Gyawali*]), that given that he had a valid status the whole time he was in the US, he was never under any threat of removal by the US authorities. The Applicant's case can be distinguished from the case in *Gyawali* where the applicant in that case fled Nepal fearing persecution, but came to Canada with a valid student permit and had applied for permanent residence. It was only when his family was no longer able to support his studies that the threat of returning materialized and he submitted a claim. In the present case, the Applicant was in the US legally, but nothing indicates that he had more than a short term visa, nor one that permitted him to work or study, the threat of needing to return was therefore more imminent for the Applicant upon arriving in the US than it was for the applicant in *Gyawali* who could reasonably expect to be able to stay in Canada for many years as a temporary or permanent resident.

[24] Therefore, I see no reason to interfere with the RPD's finding regarding the Applicant's delay in claiming refugee protection or to interfere with its decision as a whole.

[25] It is important to note at this point that the Court's role when assessing the reasonableness of the decision of an administrative decision maker is not to review the evidence and substitute its own findings for those of the decision maker. The issue therefore is not whether the assessment of the evidence that was before the RPD could have led to a different outcome. This is immaterial (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 67; *Amri v Canada (Citizenship and Immigration)*, 2009 FC 925 at para 4). The issue before the Court was whether the RPD decision, when considered as a whole, fell within a range of possible, acceptable outcomes. I have concluded that it does.

B. *The Procedural Fairness Issue*

[26] The Applicant claims that the RPD breached the duty of procedural fairness it owed to him by drawing a negative inference from the time between when he was threatened and when he left Haiti after having indicated at the hearing that delay in leaving Haiti was "off the table" as it had not been explored.

[27] However, it is clear from the RPD decision that delay in leaving Haiti was one of three factors leading the RPD to determine that the Applicant lacked credibility with regard to his subjective fear, the other two being the delay of more than four months in coming to Canada and seeking refugee protection and in his failure to make such a claim in the US. This raises the issue

of the materiality of the RPD's error in referring to delay in leaving in its decision despite the assurances to the contrary given at the hearing.

[28] The Applicant cites *Ali v Canada (Minister of Citizenship and Immigration)* (2001 FCT 405 [*Ali*]), to support his argument that this amounts to a breach of procedural fairness. In *Ali*, the applicant was informed both before and during the hearing "that the issues to be considered were credibility, personal identity, destruction of documents, internal flight alternative, and state protection" (*Ali*, at para 8) but never that delay in claiming was an issue. Given that delay in claiming was considered one of the factors undermining the applicant's alleged fear of persecution, the Court found that the applicant had been denied the opportunity to answer the case against her and that a breach of procedural fairness had consequently occurred.

[29] However, the Court also concluded in *Ali* that while a breach of natural justice had occurred, there were abundant other reasons to conclude that the applicant did not have a genuine fear of persecution and dismissed the judicial review. I believe that this is also the case in the present matter. At paragraph 9 of its decision, the RPD found that "[t]he failure of the claimant to claim in the United States is an important factor in assessing the alleged subjective fear of the claimant." This point was elaborated upon at paragraph 11 of the decision. Between the reliance on the facts that the Applicant did not claim protection in the US and the delay between leaving Haiti and claiming refugee status in Canada, the delay in leaving Haiti does not appear to have been determinative.

[30] Although the present case does technically suffer from a breach of procedural fairness, I find that it would be reasonable to do as this Court did in *Ali* and dismiss the case given that there were several other reasons supporting the RPD's conclusion that the Applicant had not adequately demonstrated a subjective fear.

[31] Neither party proposed a question for certification. I am satisfied in any event that this case raises no issue of general importance.

**JUDGMENT in IMM-1786-17**

**THIS COURT'S JUDGMENT is that:**

1. The judicial review application is dismissed;
2. No question is certified.

“René LeBlanc”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-1786-17

**STYLE OF CAUSE:** LESNOR AUGUSTIN v MINISTER OF CITIZENSHIP  
AND IMMIGRATION CANADA

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** NOVEMBER 1, 2017

**JUDGMENT AND REASONS:** LEBLANC J.

**DATED:** FEBRUARY 12, 2018

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