

Federal Court



Cour fédérale

Date: 20190328

Docket: IMM-3068-18

Citation: 2019 FC 355

Ottawa, Ontario, March 28, 2019

PRESENT: The Honourable Mr. Justice Bell

BETWEEN:

BENITO LOUIS

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Defendant

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review of a decision of the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada dated May 25, 2018, wherein it found that the Applicant, Mr. Benito Louis [Mr. Louis] is neither a refugee nor a person in need of protection as contemplated by sections 96 and 97 of the *Immigration and Refugee Protection Act*

SC 2001, c. 27 [IRPA]. The RPD only considered Mr. Louis' claim under paragraph 97(1)(b) of the *IRPA* since it concluded he failed to demonstrate any nexus to a Convention ground for persecution. Although the Applicant is francophone and the RPD hearing took place in the French language, counsel advised the Court that his client wished to proceed in English and that the decision be rendered in English.

I. Summary of Facts as Presented by Mr. Louis

[2] Mr. Louis is a citizen of Haiti and for many years was an employee of Scotiabank in that country. He contends he has been threatened by a gang in Haiti known as "Force 50" since an incident in 2007 wherein he was shot by one of the gang members named Pierre Ernest [Mr. Ernest]. Following the 2007 incident, Mr. Ernest was convicted and incarcerated. Mr. Ernest either escaped or was released from prison, after which he attacked Mr. Louis and his spouse in 2011. In 2012, Mr. Louis and his spouse travelled to the United States where Mrs. Louis gave birth to one of their children. Neither claimed asylum. They both returned voluntarily to Haiti with their newborn child. In 2014, Mr. Louis again went to the United States to accompany his brother who was visiting a friend. Once again, Mr. Louis did not claim asylum.

[3] According to Mr. Louis, Mr. Ernest's pursuit of him and his spouse continued in January 2015, when they were again targeted by members of the Force 50 gang. Following the January 2015 incident, Ms. Louis claimed asylum in Canada after entering via the United States. The RPD rejected her claim. However, a Pre-Removal Risk Assessment Officer granted her protection.

[4] Mr. Louis remained in Haiti where he says he continued to have problems with the gang. In 2015, the police arrested Mr. Ernest again. He was convicted of further offences and sentenced to ten (10) years in prison. Following Mr. Ernest's second incarceration, Mr. Louis received threats via telephone while residing at his brother's house. Mr. Louis says that after 2016, he stayed with various friends and family members, largely living as a "nomad". In 2016, Mr. Louis claims to have received another death threat from Mr. Ernest via telephone and learned once again, that Mr. Ernest was no longer in prison.

[5] In February 2017, his long-time employer, Scotiabank, ceased operations in Haiti. Throughout the period of the alleged persecution, Mr. Louis maintained his full-time job at Scotiabank. Following closure of the bank, Mr. Louis departed Haiti, travelled to the United States and then entered Canada where he claimed asylum.

[6] Mr. Louis suffers from major depression and Post-Traumatic Stress Disorder [PTSD]. An expert report in this regard was considered by the RPD in its evaluation of Mr. Louis' credibility. In addition, Mr. Louis sought to admit an article by Hilary Evans Cameron, a former member of the refugee bar, at the judicial review hearing. That article had not been offered at the RPD hearing.

II. The RPD Decision

[7] Although Mr. Louis claimed, in his Basis of Claim [BOC] form, that "Force 50" was a political party, at his RPD hearing he denied it was a political party. Hence, the reason the RPD based its decision on s. 97 of the IRPA and not s. 96.

[8] The determinative issue for the RPD was Mr. Louis' credibility. The RPD found his testimony vague and sometimes evasive. It noted there were contradictions between the oral testimony and the written narrative. While the RPD recognized that Mr. Louis suffers from depression and PTSD, it concluded the issues related to credibility were not the result of Mr. Louis' state of mental health. According to the RPD, Mr. Louis provided inconsistent evidence regarding material aspects of his claim leading it to make the following conclusions: (1) Mr. Louis' behaviour was inconsistent with that of someone who fears for his life; (2) Mr. Louis' evidence was inconsistent regarding the identity of his persecutor; and (3) his evidence was inconsistent regarding the nature of "Force 50" as a group; namely, whether it was simply a "gang" or a political party.

[9] First, Mr. Louis' history of travel to the United States and subsequent return to Haiti in 2012 and 2014 was inconsistent with someone who feared for his life in Haiti since 2007. The RPD found it unreasonable that Mr. Louis made no attempt to claim protection in the United States before arriving in Canada in 2017. The RPD found the timing of Mr. Louis' departure from Haiti, shortly after his employer, Scotiabank, closed its Haiti operations, to be suspicious. The RPD doubted that Mr. Louis faced persecution if he was able to maintain his job at the bank for 12 years, while simultaneously claiming that he had to live as a "nomad" for a time. The RPD concluded Mr. Louis was living in his own home at all relevant times and had fabricated the allegations that he was being threatened and followed in Haiti.

[10] Second, the RPD noted inconsistencies regarding the identity of the alleged persecutor. When he entered Canada, Mr. Louis stated he did not know the name of his persecutor, but that

his alias was “Gren Sonen.” In the police reports he proffered in support of his claim, he referred to the bandit as “Sonne”, “Sonné”, and “Sonnen.” In the context of his spouse’s PRRA Application, Mr. Louis refers to a “Sonson” and “Sonnen”, but also stated the assailant’s full name, Pierre Ernest. Finally, in numerous documents filed in support of his claim, Sonnen’s full name is again mentioned. Given the above, the RPD drew a negative inference from Mr. Louis’ inability to name the assailant at the time he entered Canada. The RPD drew another negative inference from the fact that Mr. Louis was inconsistent about whether or not “Sonnen” was present at one of the occasions when Mr. Louis says he was threatened by Force 50.

[11] Third, the RPD panel noted an inconsistency between the information contained in Mr. Louis’ BOC, where he stated that Force 50 is a political party led by Michel Wilfrid, and his testimony, wherein he said Force 50 was not a political party and that he did not know a Michel Wilfrid. Given Mr. Louis’ testimony and the lack of any reference in the National Documentation Package to Force 50, the RPD questioned the reliability of documents tendered in support of the claim, including a police report which referred to Force 50 as a political party.

III. Relevant Provisions

[12] Sections 96 and 97 of the *IRPA* are set out in the attached Appendix.

IV. Issues

[13] Mr. Louis raises four (4) issues:

1. Should this Court accept and consider an academic paper on the issue of PTSD that was not before the RPD?
2. Did the RPD err in considering subjective fear to be a relevant consideration in its section 97 of the IRPA analysis?
3. Did the RPD reasonably assess Mr. Louis' credibility, in light of the fact he suffers from PTSD?
4. Did the RPD err in not providing any weight to the police reports?

V. Analysis

A. *Standard of Review*

[14] The parties seem to have operated under the assumption that the reasonableness standard applies to the issues before this Court. While it could be argued that the second issue may attract a correctness standard (*Khoklar v. Canada (Citizenship and Immigration)*, 2018 FC 555, at para. 10; *Sanchez v. Canada (Citizenship and Immigration)*, 2007 FCA 99, at para 9), given my characterization of the RPD's observations on that issue, it is not a matter I am required to address. I will apply the reasonableness standard of review. It is trite law that questions of mixed fact and law as well as the RPD's credibility findings and, more generally, its risk assessment in the refugee context attract deference (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paras. 51, 53, 164 [*Dunsmuir*], *Clermont v. Canada (Citizenship and Immigration)*, 2019 FC 112, at para. 11). In *Dunsmuir*, the Supreme Court instructs that this Court must show deference while determining whether there was justification, transparency and intelligibility within the decision-making process and ensuring that the decision falls within a range of

possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir* at para 47).

B. *Should this Court accept and consider an academic paper on the issue of PTSD that was not before the RPD?*

[15] Mr. Louis requested this Court consider an academic article prepared by Professor Hilary Evans Cameron, a former member of the refugee bar. This article was not before the RPD. The Respondent therefore contends it is improperly before the Court. I agree. Generally, “only the evidentiary record that was before an administrative decision maker is admissible on judicial review”: *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128, at paras. 86-87 [“*Tsleil-Waututh Nation*”]. Exceptions to this general rule are set out in *Tsleil-Waututh Nation*, at paras 97-98, none of those exceptions apply in the circumstances. The article by Professor Cameron is not admitted as evidence on this judicial review. To do otherwise would permit Mr. Louis to bifurcate his case and attempt to “bootstrap” his evidence on judicial review.

C. *Did the RPD err in considering subjective fear to be a relevant consideration?*

[16] Mr. Louis relies on *Li v Canada (MCI)*, 2005 FCA 1 to assert that subjective fear is not a relevant factor for consideration under a section 97 of the IRPA analysis. It follows, according to him, that the RPD acted unreasonably, or incorrectly, when it concluded Mr. Louis was not credible due to a lack of subjective fear.

[17] With respect, I am of the view that Mr. Louis mischaracterizes the RPD’s findings. The RPD did not use the term “subjective fear” in analyzing the risk that Mr. Louis says he faces in

Haiti. Rather, the RPD found that his behaviour was inconsistent with that of someone who, as claimed by him, fears for his life. After reviewing the evidence relating to Mr. Louis' foreign travels and his delay in leaving Haiti, the RPD concluded that "he fabricated his allegations of being threatened in Haiti (whether by telephone or in person), and of being followed in his car, and that no one is looking to harm him there".

[18] Although the RPD's analysis is similar to that which would be employed by a panel considering a Convention refugee's claim of subjective fear, it used this information in its assessment of Mr. Louis' credibility on the path to finding a lack of credibility and lack of proof of risk to return. It was, in my view, appropriate for the RPD to consider the risks alleged by Mr. Louis and consider them in conjunction with all of the other evidence in assessing his credibility. The factors used in the credibility assessment included his several returns to Haiti, the timing of his departure after the loss of his job, the confusion regarding the identity of the agent of persecution and the confusion surrounding the nature of Force 50, among others. The RPD effectively determined that Mr. Louis would not, on a balance of probabilities, be subjected to a danger of torture or face a risk to life or a risk of cruel and unusual treatment or punishment should he be returned to Haiti. This is the proper test under section 97 of the IRPA.

[19] In any claim for protection under section 97 of the IRPA, it is relevant to consider whether or not the risks alleged by the applicant exist in the country in question. In making that determination, it is relevant to consider the applicant's credibility, including his or her behaviour and their motivations for leaving a country.

D. *Was the RPD's assessment of the Applicant's credibility reasonable?*

[20] Mr. Louis contends that sufficient weight was not accorded to the psychiatric report concerning his diagnosis of PTSD and the effects of this diagnosis on the perception of his credibility. That report, referred to by the RPD, reads in part:

Although he was able to review the trauma narrative during the assessment, his voice became very soft and monotone while he was speaking, and the details were fragmented at times, requiring additional clarification. He appeared to be in significant distress while recounting certain memories. During the hearing he may require additional time to compose himself, and as with many persons who have experienced trauma, he may have difficulty remembering specific details at the time of the trauma, such as dates and times. (Certified Tribunal Record, pages 55-56.)

[Emphasis added.]

[21] The concerns raised by the RPD in relation to Mr. Louis' credibility are much more far-reaching than references to dates and times. As mentioned in paragraph 18 above, the RPD drew negative inferences as a result of Mr. Louis' behaviour in leaving Haiti and returning to Haiti, the circumstances surrounding his final departure from Haiti, his failure to seek asylum protection in the United States, contradictions regarding Force 50 and his knowledge of its leadership, among others.

[22] The RPD accepted and afforded considerable weight to the psychiatric report, namely that Mr. Louis demonstrated symptoms of major depression and PTSD. It noted, however, that Mr. Louis "did not merely forget specific dates and times; he provided inconsistent evidence regarding material aspects of his story and provided testimony that was not credible". The RPD did not disregard the medical evidence. The circumstances in this case are distinguishable from those in *Tariel v. Canada (MCI)*, 2018 FC 607, where the RPD failed to consider the medical evidence that a claimant was suffering from PTSD and *Ngombo v. Canada (MCI)*, IMM-1874-

96, where there was a failure to consider a medical report as a possible explanation for weakness in the claimant's testimony. Furthermore, this is not a case where a medical report was afforded no probative value as was the case in *Ameir v. Canada (MCI)*, 2005 FC 876.

E. *Did the RPD err in not providing any weight to the police reports?*

[23] Mr. Louis contends the RPD erred in providing no weight to the police reports, which refer to Force 50 as a political party. The RPD did not ignore the evidence in the police reports. It considered that evidence and rejected it. It is not the role of this Court, on judicial review, to re-evaluate the evidence, particularly in the face of conflicting evidence. In this case, that conflicting evidence came from Mr. Louis and his spouse. The role of resolving conflicts in the evidence rests with the RPD (*Cortes Ruz v. Canada (Citizenship and Immigration)*, 2007 FC 380, at para 8; *Ali v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1449, at para 10).

VI. Conclusion

[24] For the foregoing reasons, I would dismiss the application for judicial review. I find that the decision of the RPD falls within the range of possible acceptable outcomes and meets the requirements of justification, transparency and intelligibility established in the jurisprudence (*Dunsmuir*, at para.47).

JUDGMENT in IMM-3068-18

THIS COURT'S JUDGMENT is that the Application for Judicial Review is dismissed. Neither party proposed a question for certification and none is certified for consideration by the Federal Court of Appeal.

“B. Richard Bell”

Judge

ANNEX

Immigration and Refugee Protection Act, S.C. 2001, c. 27***Loi sur l'immigration et la protection des réfugiés, L.C. 2001, ch. 27*****Convention Refugee****Définition de réfugié**

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,

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) 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

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) 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

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

Person in need of protection**Personne à protéger**

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

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

a) soit au risque, s'il y a des motifs sérieux de le

exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

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

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

(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,

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

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

croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

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

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

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

Person in need of protection

(2) A person in Canada who is a member of a class of persons prescribed by the

Personne à protéger

(2) A également qualité de personne à protéger la personne qui se trouve au

regulations as being in need of protection is also a person in need of protection.

Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3068-18

STYLE OF CAUSE: BENITO LOUIS v. THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: FEBRUARY 6, 2019

JUDGMENT AND REASONS: BELL J.

DATED: MARCH 28, 2019

APPEARANCES:

Ronald Shacter FOR THE APPLICANT

Lorne McClenaghan FOR THE DEFENDANT

SOLICITORS OF RECORD:

Silcoff, Shacter FOR THE APPLICANT
Toronto, Ontario

Attorney General for Canada FOR THE DEFENDANT
Toronto, Ontario