

Cour fédérale



Federal Court

Date: 20191122

Docket: IMM-1993-19

Citation: 2019 FC 1461

[ENGLISH TRANSLATION]

Ottawa, Ontario, November 22, 2019

PRESENT: The Honourable Mr. Justice Bell

BETWEEN:

RODRIGUE ETIENNE

Applicant

and

**MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This case concerns an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of the decision rendered on March 5, 2019 by a member of the Refugee Appeal Division [RAD]. The RAD refused the

applicant's claim for refugee protection, thereby affirming the decision of the Refugee Protection Division [RPD] dated May 28, 2018, finding that the applicant was neither a Convention refugee nor a person in need of protection pursuant to subsection 111(1) of the *IRPA*. For the reasons that follow, I dismiss the application for judicial review.

II. Relevant Facts

[2] The applicant is a citizen of Haiti. In his Basis of Claim [BOC] form, he claims that in 1988, when he was five years old, his parents were murdered because they were supporters of politician Mr. Leslie Manigat. As a result, the applicant went to live on a farm with other orphans. He never had an opportunity to go to school and is therefore illiterate.

[3] In March 2011, Mr. Manigat's wife became a presidential candidate. During the election period, unknown armed individuals entered the applicant's neighbourhood and asked him for whom he was going to vote. The applicant did not disclose that he wanted to vote for Ms. Manigat, but the unknown individuals nonetheless threatened him, telling him that if he did not vote for their candidate, Mr. Martelly, he would have to leave the country. After having received this threat, the applicant alleges that he and his wife went into hiding.

[4] Then, in December 2011, the unknown individuals tracked down the applicant, attacked him with a knife, and told him he would have to leave the country because he didn't vote for President Martelly. The applicant thus lived in the United States from 2012 to 2017 and entered Canada on August 12, 2017. He did not seek asylum in the United States or in the two other countries he traveled through before arriving there.

[5] In view ~~light~~ of the foregoing, the applicant claimed before both the RPD and the RAD that he could not return to his country because he would be killed by those same individuals or by the same group of individuals who had attacked him in 2011.

III. Previous Decisions

[6] The RPD rejected the applicant's claim because it did not find him to be credible. The RPD noted it had taken into consideration the comments made by the applicant's representative that the applicant was dyslexic and had very little education. However, it found the applicant's testimony was not credible with regard to key elements of his refugee protection claim. In particular, there were inconsistencies as to when he went into hiding and with regard to his parents' death.

[7] For its part, the RAD concluded "the RPD erred in its assessment of [the applicant's] credibility, but the credibility assessment [was] ultimately not a determinative factor in this appeal." Rather, the determinative issue was the following: "if we assume that [the applicant's] story is complete and correct, the determinative issue in this case is whether he would be at risk should he return to his country some eight years later according to the documentary evidence." The RAD answered this in the negative, concluding that the RPD ought to have analyzed the alleged facts as they were, with respect to the documentary evidence on conditions in Haiti, and that this would have been determinative of the appeal. In so doing, the RAD found that the allegation with respect to the culture of vengeance in Haiti was too general, given that the applicant indicated that he did not know the individuals who had attacked him eight years earlier; he was not politically involved at the time he was attacked, nor is he to this day; and he did not

indicate that his son and wife, who remain in Haiti, have been targeted because of him since his departure. Accordingly, the RAD determined the applicant had not provided sufficient evidence that the interest of the party in power's supporters to go after him would have lasted beyond the date of his departure from Haiti.

[8] In addition, the applicant's assertion that he could be targeted by criminals if he were to return to Haiti because he is an expatriate was also too general. After having reviewed the documentary evidence, the RAD determined that while Haiti has a very high crime rate, it takes on a number of different forms, in several regions, and for a variety of reasons. The risk of becoming a victim of crime in Haiti is therefore a generalized one. Even if there is an increased possibility of the applicant becoming a victim of crime as a result of being perceived as a fortunate individual who has lived abroad for a long time, it does not mean the risk is more than generalized.

[9] For those reasons, the RAD rejected the applicant's appeal and confirmed he was neither a Convention refugee nor a person in need of protection pursuant to subsection 111(1) of the *IRPA*.

IV. Issues

[10] The following issues arise in this matter:

1. Did the RAD breach its duty of natural justice or procedural fairness by basing its decision on a new set of arguments to reject the applicant's claim, without providing him with an opportunity to respond?

2. Did the RAD err in determining there was no serious possibility of the applicant being persecuted if he was to return to Haiti and thus rejecting his refugee claim?

V. Analysis

- (1) Did the RAD breach its duty of natural justice or procedural fairness by basing its decision on a new set of arguments to reject the applicant's claim, without providing him with an opportunity to respond?

[11] Issues of procedural fairness, as in this case, are reviewable on a correctness standard (*Mission Institution v Khela*, 2014 SCC 24 at para 79, [2014] 1 SCR 502; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43, [2009] 1 SCR 339 [*Khosa*]).

[12] In my view, this question must be answered in the negative. Although the RAD rejected the applicant's claim for a different reason than that of the RPD, namely that there was no risk to the applicant should he return to Haiti, that question was one of the applicant's grounds of appeal to the RAD. Accordingly, the applicant knew it was in issue and it was therefore not a [TRANSLATION] "new question", as he alleges. It was in fact a question he himself put forward. He cannot then say it was a question to which he did not have an opportunity to respond.

[13] According to *Kwakwa v Canada (Minister of Citizenship and Immigration)*, 2016 FC 600 at para 25, 45 Imm LR (4th) 263, a "new question" is:

a question which constitutes a new ground or reasoning on which a decision-maker relies, other than the grounds of appeal raised by the applicant, to support the valid or erroneous nature of the decision appealed from.

That is not the case here. In this case, one of the applicant's grounds of appeal before the RAD was that [TRANSLATION] "[t]he panel committed an unreasonable error in law in finding that there was insufficient evidence with which to establish, on a balance of probabilities, that the applicant risks being persecuted." The RAD also listed this in the "Grounds of appeal" section of its reasons at paragraph 11. Furthermore, the applicant submitted a number of articles about the situation in Haiti in support of his appeal regarding vengeance exacted by gangs or by other organized crime entities; political parties and activities in Haiti; and the security situation in Haiti, including criminality and the measures taken by the government and other actors to combat it. This differs from *Ojarikre v Canada (Minister of Citizenship and Immigration)*, 2015 FC 896, 37 Imm LR (4th) 56, wherein the Court found that the RAD had erred in determining the appeal based on a ground that was neither in the RPD's decision nor in the applicant's memorandum to the RAD. Here, the question in dispute had been put before the RAD by the applicant. It is therefore evident he was aware of this question, given that he himself had raised it.

[14] The Court of Appeal has previously held that where the RAD finds that an error has been committed by the RPD, it may carry out its own analysis of the record and either confirm or set aside the decision on another basis. The RAD may only refer the matter back for redetermination by the RPD if it finds it cannot make a final decision without hearing the evidence presented to the RPD (*Canada (Minister of Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at paras 72, 73, 78, 103, 39 Imm LR (4th) 185 [*Huruglica*]).

[15] In this case, the RAD did not have to consider the applicant's credibility. It found it could decide the matter based on the evidence because even if the applicant's narrative had been accepted as being true, it was not enough to establish, on a balance of probabilities, that the applicant faced a personalized risk if he were to return to Haiti. According to *Huruglica*, it is open to the RAD to decide the matter based on another ground than that of the RPD if it is able to make a final decision based on its own analysis of the record. That was the case here.

- (2) Did the RAD err in determining there was no serious possibility of the applicant being persecuted if he was to return to Haiti and thus rejecting his refugee claim?

[16] The issue as to whether an applicant would face a risk of persecution or a personalized risk should he return to his country of origin for the purposes of applying sections 96 and 97 of the *IRPA* is a question of mixed fact and law, which is reviewable on a reasonableness standard (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 51, [2008] 1 SCR 190 [*Dunsmuir*]; *Ali v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1231 at para 12; *Correa v Canada (Minister of Citizenship and Immigration)*, 2014 FC 252 at para 19, 23 Imm LR (4th) 193).

When reviewing a decision on a reasonableness standard, the analysis will be concerned with the existence of justification, transparency and intelligibility within the decision-making process as well as with whether the decision falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at para 47; *Khosa* at para 59).

[17] The RAD's decision is reasonable. It falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and law, and there is justification, transparency, and intelligibility in the following explanations for refusing the applicant's claim.

The RAD agreed there were instances of violent crime motivated by long-held desires for vengeance among armed groups and gangs in Haiti, and that armed gangs were often affiliated with political parties. Nevertheless, it determined the applicant's allegation with regard to this culture was too general to establish that he would face a risk if he were to return to his country of origin some eight years after the incident that gave rise to his claim. In addition, the RAD was not satisfied the threats directed at the applicant were related to his support for a particular political party, given that he had no political role at the time. Furthermore, even if the assailants had mentioned the murder of his parents as an additional threat, the political party they supported did not exist at that time. To conclude its analysis of this argument advanced by the applicant, the RAD noted there was little information on the treatment received by members of the political party the applicant supported.

[18] As far as the potential risk the applicant would face as an expatriate, once again, the RAD's decision was reasonable. It concluded, based on the documentary evidence, that criminality in Haiti takes on a number of forms for multiple reasons. Thus, even if the applicant's status as an expatriate could increase the likelihood of him becoming a victim of crime, it does not mean his risk was more than a generalized one. The RAD determined criminality in Haiti is a complicated matter and can affect all Haitians for a variety of reasons. In the circumstances, the RAD found the applicant had not met the burden that rested upon him. This was a reasonable conclusion to have drawn, and the decision-making process used to make that determination was justified, transparent, and intelligible.

VI. Conclusion

[19] For all of these reasons, the RAD's decision rejecting the applicant's refugee claim and finding he was neither a Convention refugee nor a person in need of protection pursuant to subsection 111(1) of the *IRPA* is reasonable. The application for judicial review is dismissed. Neither party proposed a question to be certified for consideration by the Federal Court of Appeal, nor does any question arise in the circumstances.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed without costs. There is no certified question for consideration by the Federal Court of Appeal.

Judge

“B. Richard Bell”

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Immigration and Refugee Protection Act, SC 2001, c 27

Loi sur l'immigration et la protection des réfugiés, LC 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 exist,

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

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

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,

(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 qualifié 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.

FEDERAL COURT
SOLICITORS OF RECORD

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