

**Date: 20070213**

**Docket: IMM-3959-06**

**Citation: 2007 FC 162**

**Ottawa, Ontario, the 13th day of February 2007**

**PRESENT: THE HONOURABLE MR. JUSTICE SIMON NOËL**

**BETWEEN:**

**GAELE SOLIMAN**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) of a decision delivered on June 6, 2006 by the Refugee Protection Division (RPD) of the Immigration and Refugee Board (IRB) that Gaelle Soliman (the applicant), citizen of Haiti, was neither a “refugee” within the meaning of section 96 of the IRPA nor a “person in need of protection” under section 97 of the IRPA.

I. Facts

[2] The applicant's mother, Ms. Daniella Bernardin, arrived in Canada on November 29, 2005 and claimed refugee status on December 21, 2005, claiming fear of persecution in Haiti by reason of her political opinions. Ms. Bernardin's claim for refugee protection was based on the fact that she had worked as a recording secretary at a Cap-Haïtien radio and television station. On February 23, 2004, opponents of Aristide took over the radio station to broadcast anti-Aristide statements. From that time, Ms. Bernardin was perceived to be a member of the anti-Aristide movement, and she received death threats. On September 15, 2005, Ms. Bernardin was kidnapped by armed men, who raped and beat her and pulled out one of her teeth. A ransom was demanded for her release. Once the ransom had been paid, Ms. Bernardin was released and she left Haiti for Canada.

[3] The applicant, Ms. Bernardin's daughter, arrived in Canada on September 6, 2005 as a tourist and claimed, on that date, that she intended to return to Haiti. However, on December 21, 2005, she and her mother made a joint claim for refugee protection in Canada. The applicant's claim was based on the fact that she fears persecution for reasons of membership in a particular social group, namely, the "family". The applicant allegedly fears being persecuted if she returns to Haiti based on the fact her mother was kidnapped and believed to be anti-Aristide; as the eldest daughter in the family, she would suffer the same fate if she returned to Haiti.

[4] On June 6, 2006, the RPD found that Ms. Bernardin was a “Convention refugee” under section 96 of the IRPA. However, in the same decision, the RPD found that the applicant was neither a Convention refugee nor a “person in need of protection” under section 97 of the IRPA.

## II. Issues

- (1) Did the RPD err in deciding that the applicant was neither a Convention refugee nor a “person in need of protection” under section 97 of the IRPA?

### I. Analysis

- (1) Did the RPD err in deciding that the applicant was neither a Convention refugee nor a “person in need of protection” under section 97 of the IRPA?

[5] Section 96 of the IRPA is clear. To be considered a Convention refugee, a refugee claimant must have a well-founded fear “...of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion”. The existence of a nexus between the alleged persecution and one of the five grounds listed in the definition of “Convention refugee” under section 96 of the IRPA is principally a question of mixed fact and law. Mr. Justice Blanchard in *La Hoz v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 762, [2005] F.C.J. No. 940 (QL), following a pragmatic and functional analysis, found that the appropriate standard of

review for such an issue is reasonableness *simpliciter*. At paragraph 44 of *La Hoz, supra*, Blanchard

J. states the following:

After reviewing the criteria of the pragmatic and functional analysis, I find that, with respect to determining whether there is a nexus between a refugee claim and the persecution grounds under section 96 of the Act, the appropriate standard of review is reasonableness *simpliciter*. This was Gibson J.'s finding in *Jayesekara v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1014.

[6] The applicant argues that her fears of persecution if she returns to Haiti are related to her membership in the social group of the family because she fears persecution by reason of her mother's employment. The applicant also argues that she is a "person in need of protection" under section 97 of the IRPA. The RPD did not agree and found that the actual harm feared by the applicant was a risk face generally by the population of Haiti.

[7] The RPD decision was delivered orally. Oral decisions are not in and of themselves problematic. That being said, procedural fairness requires that decision-makers provide adequate reasons to justify their decisions. In *VIA Rail Canada Inc. v. National Transport Agency et al.*, [2001] 2 F.C. 25 (C.A.), [2000] F.C.J. No. 1685, the Federal Court of Appeal explained the obligation to provide adequate reasons at paragraph 22:

[22] The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion.... Rather, the decision-maker must set out its findings of fact and the principal evidence upon which those findings were based.... The reasons must address the major points in issue. The reasoning process followed by the decision-maker must be set out...and must reflect consideration of the main relevant factors....

This case was cited with approval by Mr. Justice Pinard in *Zarghami v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 151, [2006] F.C.J. No. 215 (QL), to explain the obligation

on the IRB to provide adequate reasons. Based on *VIA Rail Canada Inc.*, *supra*, and *Zarghami*, *supra*, the RPD in this case had a duty to set out its findings of fact and the principal evidence upon which those findings were based.

[8] With regard to the analysis involving section 96 of the IRPA, the RPD's decision limited itself to a narrow summary of the applicant's factual situation. No references to the grounds in section 96 of the IRPA that applied to the applicant were made in the oral decision, reported in writing. Furthermore, there was no legal reasoning evident in that decision that would allow the reader to identify the process of the RPD used to find that the applicant's fears of persecution if she returned to Haiti were not related to her membership in the particular social group of the family. The fact that the decision in this case was an oral decision, reported in writing, does not justify the absence of legal reasoning or the lack of an analysis applying the evidence and the facts to the relevant legislative provisions.

[9] As for the decision that the applicant is not a "person in need of protection" under section 97 of the IRPA, the RPD limited itself to stating the law. No references to the facts were made to contextualize the legal process followed. In *Anthonimuthu v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 141, [2005] F.C.J. No. 162 (QL), Mr. Justice De Montigny states the following at paragraphs 51 and 52:

[51] The Applicant also contends that the Refugee Division erred in not assessing her claim under section 97 of the IRPA, taking it for granted that she must fail on the grounds of a risk to like [sic] or to a risk of cruel and unusual treatment or punishment and danger to torture if she could not establish a well-founded fear of persecution. The Court has repeated on a number of occasions that the analysis

under section 97 is different from the analysis required under section 96 and that claims made under both sections therefore warrant separate treatment. The Court said, in *Bouaouni, supra*, at paragraph 41:

It follows that a negative credibility determination, which may be determinative of a refugee claim under s. 96 of the Act, is not necessarily determinative of a claim under subsection 97(1) of the Act. The elements required to establish a claim under section 97 differ from those required under section 96 of the Act where a well-founded [sic] fear of persecution to a convention [sic] ground must be established. Although the evidentiary basis may well be the same for both claims, it is essential that both claims be considered as separate.

[52] The only circumstance in which the Refugee Division may dispense with a separate section 97 analysis is where there is absolutely no evidence that could support a claim that a person is in need of protection: *Solimanian, supra*, at paragraph 22.

[Emphasis added.]

[10] I am in complete agreement with De Montigny J.'s observations. In this case, the RPD had a duty to justify its finding that the principal applicant was not a "person in need of protection" within the meaning of section 97 of the IRPA in order not to breach the principles of procedural fairness. This was not done; the decision of the RPD did not in any way show the legal reasoning followed to come to the conclusion that the applicant was not a "person in need of protection" under section 97 of the IRPA. I repeat, the fact that the decision in this case was an oral decision, reported in writing, does not justify the absence of legal reasoning or the lack of an analysis applying the evidence and the facts to the relevant legislative provisions.

[11] The appropriate standard of review for issues of procedural fairness is correctness (*Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2005] F.C.J. No. 2056 (QL)). Since the duty of procedural fairness to provide adequate reasons was breached in this case, I set aside the RPD decision and refer the matter for rehearing.



V. Conclusion

[12] Based on the foregoing reasons, the intervention of the Court is warranted, and the application for judicial review is allowed.

[13] The parties were invited to submit a question to be certified but none was submitted.



**JUDGMENT**

**THE COURT ORDERS THAT:**

- The application for judicial review be allowed in part and the matter be referred to another member of the RPD to address the issue of law arising from the applicability of sections 96 and 97 of the IRPA.
- There is no question to be certified.

**“Simon Noël”**  
\_\_\_\_\_  
**Judge**

Certified true translation  
Gwendolyn May, LLB

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

**DOCKET:** IMM-3959-06

**STYLE OF CAUSE:** GAELLE SOLIMAN v. THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** Montréal, Quebec

**DATE OF HEARING:** February 8, 2007

**REASONS FOR JUDGMENT BY:** The Honourable Mr. Justice Simon Noël

**DATED:** February 13, 2007

**APPEARANCES:**

Stéphanie Valois FOR THE APPLICANT

Patricia Nobl FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Stéphanie Valois FOR THE APPLICANT  
407 Saint Laurent, Room 300  
Montréal, Quebec H2Y 2Y5

Patricia Nobl FOR THE RESPONDENT  
**Department of Justice**  
Quebec Regional Office  
Guy Favreau Complex  
200 René-Lévesque Blvd. West  
East Tower, 9th Floor  
Montréal, Quebec H2Z 1X4