Date: 20080107

Docket: IMM-406-07

Citation: 2008 FC 1

Ottawa, Ontario, January 7, 2008

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

LIGENE CIUS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72 (1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated November 20, 2006. The Board concluded that the applicant was neither a Convention refugee nor a person in need of protection, pursuant to sections 96 and 97 of the Act.

ISSUES

[2] The applicant raises five issues in the instant case. I would slightly reframe the issues as follows:

a) Did the Board err by determining that Haitian returnees cannot constitute a particular social group as required by section 96 of the Act?

b) Did the Board err by determining that the applicant did not face a particularized risk under section 97, and is therefore not a person in need of protection?

c) Did the Board err by claiming that he had "specialized knowledge" of the facts?

d) Did the Board err by failing to consider any documentary evidence presented to him, or similar decisions made by fellow Board members?

e) Did the Board member's conduct at the hearing raise a reasonable apprehension of bias?

FACTUAL BACKGROUND

[3] The applicant is a citizen of Haiti. In 1992 he became involved in an organization performing community work called "Coopérative Communautaire de Dame Marie" (Cocodama), founded in 1987. The applicant also worked as a cabinet maker, and in 1998 he opened his own store.

[4] February 21, 1999, members of Cocodama set fire to his store, because the applicant sold his products for a lower price than the members of the organization. He therefore left Haiti on February 23, 1999, and fled to the United States.

[5] While in the United States, the applicant claimed refugee status but was rejected in 2001. He learned it was possible to seek asylum in Canada and came here on May 15, 2006.

[6] In addition to his fears based on the incident with Cocodama, the applicant claims that he fears the Chimères, armed gangs, and other criminals in Haiti who target Haitians who have been abroad, foreigners, and anyone who they perceive to have wealth.

DECISION UNDER REVIEW

[7] The Board delivered its reasons orally, refusing the applicant's claim because he was not found to be credible. The Board made the following negative credibility findings:

a) The applicant testified that he was asked by Cocodama to close his shop in March 1998. However, he also stated that his store did not open until April 1998. He was unable to explain this contradiction to the satisfaction of the Board.

b) The applicant stated that his problems began in 1998, while in his U.S. refugee claim he stated that his problems began in September 1991. Further, the Board found that the substance of his claim in the United States was different from the one made in Canada. The Board did not accept his explanation that the person who filled out the application form on his behalf in the United States did not understand Creole well enough. The member did not believe that he would have allowed the form to be submitted without knowing its contents.

c) The Board did not believe that the members of Cocodama would pursue the applicant across the whole country if he sought refuge elsewhere than in Port-de-Paix, where he brought his family after his business was destroyed. The members of Cocodama simply wanted him to close his business, and that he could have continued to work as a cabinet

maker elsewhere without the risk if being killed or threatened. The Board also did not believe that Cocodama would still be looking for him if he returned to his country of origin.

d) The Board drew a negative inference from the fact that the applicant withdrew political opinion as a ground upon which he feared persecution. In essence, the applicant claim was solely based on the fact that he lived abroad.

[8] The Board also rejected the claim on the ground that the applicant was not a member of a particular social group for the purposes of section 96, and would not be subject to any particularized risk for the purposes of section 97.

[9] Before making an application for judicial review of the case, the applicant sought to have the hearing reopened, on the grounds that the member's behaviour at the hearing had violated his right to natural justice. The applicant objected to the failure of the Board to follow the decision of the Supreme Court of Canada in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, as well as the Board's reliance on "specialized knowledge" without allowing the applicant the opportunity to present evidence to the contrary.

[10] The Board provided written reasons for rejecting the reopening request, stating that the only reason for which the Board may reopen its enquiry is a violation of natural justice. No violation was found in the present case.

RELEVANT LEGISLATION

[11] *Immigration and Refugee Protection Act*, 2001, c. 27.

170. The Refugee Protection Division, in any proceeding before it, (i) may take notice of any facts that may be judicially noticed, any other generally recognized facts and any information or opinion that is within its specialized knowledge.	**170.** Dans toute affaire dont elle est saisie, la Section de la protection des réfugiés : i) peut admettre d'office les faits admissibles en justice et les faits généralement reconnus et les renseignements ou opinions qui sont du ressort de sa spécialisation.

[12] *Refugee Protection Division Rules*, SOR/2002-228.

18. Before using any information or opinion that is within its specialized knowledge, the Division must notify the claimant or protected person, and the Minister if the Minister is present at the hearing, and give them a chance to	**18.** Avant d'utiliser un renseignement ou une opinion qui est du ressort de sa spécialisation, la Section en avise le demandeur d'asile ou la personne protégée et le ministre — si celui-ci est présent à l'audience — et leur donne la possibilité de :
(a) make representations on the reliability and use of the information or opinion; and	a) faire des observations sur la fiabilité et l'utilisation du renseignement ou de l'opinion;
(b) give evidence in support of their representations.	b) fournir des éléments de preuve à l'appui de leurs observations.

ANALYSIS

Did the Board err by determining that Haitian returnees cannot constitute a particular social group as required by section 96 of the Act?

[13] Whether Haitian citizens who return to Haiti after a stay abroad constitute a particular social group is a pure question of law, and is reviewable on the standard of correctness (*Singh v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 977 (QL), 2007 FC 732 at para. 20.

[14] The applicant submits that Haitians returning to their home country are part of a particular social group, namely Haitian returnees. People returning to Haiti are at particular risk of kidnapping and other forms of violence because the "Chimères" and street gangs target people from whom they believe they will successfully extort a ransom. In making this argument, the applicant relies on the definition of "particular social group" adopted by the Supreme Court of Canada in *Ward,* above. The relevant passage is the following (at para. 70):

> The meaning assigned to "particular social group" in the Act should take into account the general underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative. The tests proposed in *Mayers, supra*, *Cheung, supra*, and *Matter of Acosta, supra*, provide a good working rule to achieve this result. They identify three possible categories:
>
> > (1) groups defined by an innate or unchangeable characteristic;
> >
> > (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and
> >
> > (3) groups associated by a former voluntary status, unalterable due to its historical permanence.
>
> The first category would embrace individuals fearing persecution on such bases as gender, linguistic background and sexual orientation, while the second would encompass, for example, human rights activists. The third branch is included more because of historical intentions, although it is also relevant to the anti-discrimination influences, in that one's past is an immutable part of the person.

[15] Counsel for the applicant relies on the very last sentence of this quote and makes a persuasive submission that the fact of having travelled or sought asylum in another country is an immutable part of a person's past, and therefore the applicant is part of a group defined by an innate characteristic.

[16] The respondent, on the other hand, would simply qualify the proposed group as people who are perceived to be wealthy.

[17] While I appreciate the additional dimension that the applicant has brought to the submission by arguing that a person's past cannot be changed, I cannot accept the applicant's argument. The passage from *Ward, above* relied upon by the applicant, is discussed in the context of social groups being limited and informed by anti-discrimination notions. The Supreme Court also writes in *Ward,* above at para. 64:

> […] In distilling the contents of the head of "particular social group", therefore, it is appropriate to find inspiration in discrimination concepts. Hathaway, *supra*, at pp. 135-36, explains that the anti-discrimination influence in refugee law is justified on the basis of those sought to be protected thereby:
>
> > The early refugee accords did not articulate this notion of disfranchisement or breakdown of basic membership rights, since refugees were defined simply by specific national, political, and religious categories, including anti-Communist Russians, Turkish Armenians, Jews from Germany, and others. The de facto uniting criterion, however, was the shared marginalization of the groups in their states of origin, with consequent inability to vindicate their basic human rights at home. These early refugees

> were not merely suffering persons, but were moreover persons whose position was fundamentally at odds with the power structure in their home state. It was the lack of a meaningful stake in the governance of their own society which distinguished them from others, and which gave legitimacy to their desire to seek protection abroad.

[18] The violence to which the applicant might be subject is generalized. It is the fallout of criminal activity, and not the targeting of a particular group in a discriminatory fashion. As a group, people who are perceived to be wealthy are not marginalized in Haiti; rather they are more frequent targets of criminal activity. The perception of wealth is insufficient to sustain the position that Haitian returnees constitute a social group.

[19] The harm feared is criminal in nature, and has no nexus to the Convention refugee definition. In a recent decision *Étienne v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 99 (QL), 2007 FC 64, Justice Shore dealt with the argument that wealth constitutes a particular social group:

> [15] Mr. Étienne's allegation, that the Board erred when it determined, that his claim provided no nexus to a Convention ground as required under section 96 of IRPA, is unfounded. The Board was justified in concluding that gaining wealth or winning a lottery does not constitute membership in a particular social group.
>
> [16] In *Moali de Sanchez v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 183, [2001] F.C.J. No. 375, Justice Yvon Pinard rejected the extended interpretation of the concept of a social group:
>
> > [6] I also find that the RD's second conclusion is free of error. In *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, the Supreme Court of Canada

> rejected the extended interpretation of the concept of a social group. The status of a landed proprietor does not in any way fall within the "general underlying themes of the defence of human rights and anti-discrimination" (*Ward, supra*, at 739) and is not a "characteristic of personhood not alterable by conscious action and in some cases not alterable except on the basis of unacceptable costs" (*Ward, supra*, at 738). The tribunal also referred to *Wilcox v. Canada (Minister of Employment and Immigration)*, November 2, 1993, [1993] F.C.J. No. 1157, A-1282-92, in which Reed J. found as follows at paras. [3]:
>
> I interpret the Tribunal's decision as finding that there was no evidence that the Peruvian upper middle class is subject to any greater level of (what the Tribunal referred to as) depredation than others in Peruvian society generally. I interpret the Tribunal's decision as finding that the Sendero Luminosa are raining terror on everyone in Peru. While the type of danger which the applicants fear (extortion) may only be operative against the rich, this does not mean that the applicants have been or will be subject to persecution in the convention refugee sense. [Emphasis added]

[20] It is clear from the Court's reference to *Ward,* above, that the protection afforded under the Convention is intended to provide protection on the grounds of human rights and anti-discrimination considerations, and not general criminality.

[21] It is my opinion that the Board did not err on this question, and that people returning to Haiti after a stay abroad do not constitute a particular social group within the meaning of section 96 of the Act.

Did the Board err by determining that the applicant did not face a particularized risk under section 97, and is therefore not a person in need of protection?

[22] Whether or not the Board erred in determining that the perception of wealth does not constitute a particularized risk under section 97 of the Act is a pure question of law, and should, as above be determined according to the standard of correctness.

[23] It is my opinion that the Board did not err by determining that the applicant did not face a particularized risk upon his return. Because section 97 does not require a nexus between the fear and Convention grounds, it may appear to be a more promising route by which the applicant may be granted asylum. However, as discussed above, the risk faced by the applicant is generalized. The risk of violence is one which every person in Haiti faces. The documentary evidence submitted in support of this case indicates that there is a serious risk to the personal safety of all in Haiti. The United Nations High Commissioner for Refugees (UNHCR) has recommended the suspension of forced returns to Haiti.

[24] The Travel Reports issued by Foreign Affairs and International Trade Canada, as of May 31, 2006, contained the following warnings:

> La situation est dangereuse et imprévisible. Les enlèvements et les détournements de voiture sont fréquents en Haïti. La grande majorité des victimes sont des gens d’affaires haïtiens. Cependant, des ressortissants étrangers, dont des Canadiens, ont été visés, ainsi que des missionnaires, des travailleurs de l’aide humanitaire et des enfants. Les personnes ayant des intérêts commerciaux en Haïti semblent être les principales cibles.
> […]

> La criminalité est endémique dans tout le pays, mais surtout dans les grands centres comme le centre-ville de Port-au-Prince et de Gonaïves, où sévissent des gangs armés extrêmement dangereux.

[25] While the documentary evidence establishes serious risks associated with living or traveling in Haiti, the evidence indicates that the upheaval faced by Haitian citizens is generalized. There is no mention that there is a particular risk to Haitian returnees, nor is there mention that Haitian returnees are perceived to possess wealth. Granted that this premise is unsubstantiated by the applicant, it is my opinion that there are insufficient grounds to find that Haitian returnees face a particularized threat of violence.

[26] In light of the volatile conditions in Haiti, it is a matter of government policy to protect Haitian citizens from a general threat of criminality. Following the Recommendations on the treatment of Haitian asylum-seekers, issued by UNHCR on February 26, 2004, Citizenship and Immigration Canada has issued a Temporary Suspension of Removals to Haiti, until conditions improve.

Did the Board err by claiming that he had "specialized knowledge" of the facts?

[27] The requirements when relying of specialized knowledge are outlined in section 170 of the act and at Rule 18. In the instant case, the applicant submits that the Board member relied on specialized knowledge without giving required notice, and that he erred by taking notice of information which could not be treated as specialized.

[28] The objectionable passage reads as follows:

> […] D'autant plus qu'il est de la connaissance spécialisée de ce tribunal qu'en Haïti on enlève peu importe le statut social de la personne qui est enlevée. En effet, en Haïti, il y aurait autant sinon plus d'enlèvements à Cité Soleil que partout ailleurs.

[29] The respondent submits that the Board's finding that individuals of all social backgrounds are kidnapped in Haiti and the finding that the slum of Cité Soleil is one of the most dangerous parts of the country are not truly based on specialized knowledge. The respondent submits that the Board based the statement on documentary evidence provided by the applicant, and the description of the knowledge as "specialized" is an unfortunate mischaracterization. In support of this submission the respondent cites four excerpts from the documentary evidence contained in the applicant's record in which Cité Soleil is mentioned, and characterized by the violent acts which have occurred there. The respondent cites *Qu v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 124 (QL), 2006 FC 107 as a precedent in which the Court found that information was wrongly labeled to be specialized knowledge, but that the mischaracterization was immaterial.

[30] I agree with the respondent's submissions on this point. In my opinion, the reference to specialized knowledge was simply a mischaracterization and the applicant certainly had the opportunity to take notice of facts which he submitted himself.

[31] This mischaracterization appears to be a result of the lack of precision which can sometimes result from rendering a decision by means of oral reasons. Justice Martineau recently warned that

decisions rendered orally can sometimes be clumsy (*Gutierrez v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1192, [2007] F.C.J. No. 1537 (QL)):

> [13] En terminant, je note que les motifs du commissaire Lapommeray ont été prononcés de vive voix à l'audition. Ceci comporte bien entendu le risque d'un débat éventuel devant cette Cour sur le sens exact à donner à certaines formulations qui peuvent être quelque peu boiteuses dans les motifs oraux. […]

[32] In any case, the error is immaterial and does not reach the threshold of a reviewable error.

Did the Board err by failing to consider any documentary evidence presented to him, or similar decisions made by fellow Board members?

[33] The applicant submits that the reasons made no mention of the documentary evidence. Generally, failure to consider the evidence constitutes a patently unreasonable error. However, I can find no indication that the Board failed to consider the evidence before him. The Board is presumed to have considered all of the evidence on the record, and is not obligated to address each piece of evidence in the reasons (*Woolaston v. Canada (Minister of Manpower and Immigration)*, [1973] S.C.R. 102; *Hassan v. Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 946 (F.C.A.) (QL)). A review of the documentary evidence, when compared with the conclusions of the Board on the first two issues, convinces me that the evidence was considered by the Board.

[34] The applicant further submits that the Board erred by failing to consider the decisions of other Board members on cases with similar facts, which arrived at opposite conclusions regarding objective conditions. The applicant includes in the record three previous decisions of the Board in

which Haitian claimants are found to be at risk on the ground that they are returning to Haiti from abroad. In support of the argument, the applicant cites the recent decision by this Court in *Siddiqui v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 9 (QL), 2007 FC 6, in which Justice Phelan writes:

> [15] In the Board's detailed reasoning as to why it accepted the Respondent's conclusion of reasonable grounds to believe and in its review of the documentary evidence, it makes no reference to the reasoning in the *Memon* case or explain on what basis it differed from the *Memon* case.
> . . .
>
> [17] There is no strict legal requirement that the Board members must follow the factual findings of another member. This is particularly so where there is one of the "reasonableness" standards in play -- reasonable people can reasonably disagree.
>
> [18] What undermines the Board's decision is the failure to address the contradictory finding in the *Memon* decision. It may well be that the member disagreed with the findings in *Memon* and may have had good sustainable reasons for so doing. However, the Applicant is entitled, as a matter of fairness and the rendering of a full decision, to an explanation of why this particular member, reviewing the same documents on the same issue, could reach a different conclusion.
>
> [19] The failure to explain the basis for the different conclusion undermines the integrity of Board decisions and gives them an aura of arbitrariness which is no doubt not intended nor is it acceptable.
> [Emphasis added]

[35] In response, the respondent submits that the Board is not bound by decisions made by another panel. I agree. Although it would have been preferable to distinguish these cases with the present one, I think that it is for each Board member to make its decision based on the evidence before her or him. In the case at bar, the Board assessed the applicant's story and found him not credible due to inconsistencies, implausibilities and incoherence in his claim.

[36] Therefore, the Board's failure to make reference to the other decisions is immaterial.

Did the Board member's conduct in the hearing raise a reasonable apprehension of bias?

[37] Finally the applicant submits that the conduct of the Board member at the hearing, in combination with his reasons, raise a reasonable apprehension of bias. The contentious part of the hearing is reproduced below (the Board member questioning, and counsel for the applicant responding, Tribunal record, pages 156 and 157):

> Q. Alors, vous êtes en train de me dire qu'une personne qui… c'est immuable que la personne en question doit sortir de son pays?
>
> R. Non non ce n'est pas ce que j'ai dit. J'ai dit le fait qu'il est sorti de son pays et le fait qu'il soit déjà sorti de son pays est immuable.
>
> \- Ah bon.
>
> R. C'est une caractéristique maintenant qui fait partie de la personne.
>
> \- Ah bon.
>
> Q. Et le, le fait qu'il doit être remis à son pays est aussi immuable?

[38] The applicant submits that by questioning whether it was innate in the applicant to want to leave Haiti was sarcastic and pejorative. By asking whether it is innate to the applicant that he is going to be sent back the Board member showed that he had a closed mind.

[39] The respondent submits that by not raising the issue at the hearing, the applicant has waived his right to argue bias on judicial review. In the alternative, the respondent submits that the record does not reveal a reasonable apprehension of bias.

[40] The test that must be satisfied in order to establish a reasonable apprehension of bias is as follows: would an informed person viewing the matter realistically and practically and having thought the matter through, think it more likely than not that the decision-maker would unconsciously or consciously decide an issue unfairly (*Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 at 636).

[41] It is my opinion that the applicant did not waive his right to raise the question of apprehension of bias in the instant case. The Court has found that an apprehension of bias must be raised at the earliest practicable opportunity (*Benitez v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 631 (QL), 2006 FC 461 at paragraph 220; *Uppal v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 455 (QL), 2006 FC 338 at paragraph 52; *Mohammadian v. Canada (Minister of Citizenship and Immigration)*, [2000] 3 F.C. 371 (T.D.) aff'd., [2001] 4 F.C. 85 (C.A.)).

[42] It is sufficient that the applicant raised the question of bias before this Court. It would be overly burdensome to require the applicant to raise the issue of bias of the Board member at the time of the hearing, which in this case was under an hour in duration. Further, in *Benitez*, above, Justice Mosley writes:

> [222] I wish to stress, however, that the operation of the doctrine of waiver does not preclude an applicant from arguing that the manner in which the hearing was conducted breached the duty of fairness by reason of, for example, badgering cross-examination as was found in *Herrera*, if that ground is otherwise properly before the Court.

[43] We are clearly in the presence of an argument that the duty of fairness was breached by the manner in which the hearing was conducted.

[44] I will therefore proceed to the respondent's second argument. After having read the transcript thoroughly, I conclude that there is no reasonable apprehension of bias in the present case. Without having the audio transcript, it is difficult for me to say if the comments of the Board member were unprofessional or inappropriate. Therefore, I am not convinced that they would indicate that he was unable of deciding the issue fairly. It is always an obligation by the Board to evaluate each case on its own merits, and avoid making comments that could so much as be perceived as biased.

[45] For the reasons above, the application for judicial review will be dismissed.

[46] The applicant proposed the following two questions for certification:

> 1. Can a characteristic which is in part defined by a group's life experience be an unchangeable characteristic defining it as a social group?
>
> 2. Does the principle of collegiality create a reasonable expectation that a member of the Immigration and Refugee Board, Refugee Protection Division should consider reasons for decision issued by his colleagues on an issue he is to determine, if these reasons have been put before him and relied on by a refugee claimant?

[47] The respondent objects to the certification of the proposed questions. I agree with the respondent. These questions do not raise a serious issue of general importance and do not transcend the case at bar.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed. No question is certified.

"Michel Beaudry"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

Raoul Boulakia	FOR APPLICANT
John Provart	FOR RESPONDENT

SOLICITORS OF RECORD:

Raoul Boulakia Toronto, Ontario	FOR APPLICANT
John Sims, Q.C. Deputy Attorney General of Canada Toronto, Ontario	FOR RESPONDENT