Date: 20090909

Docket: IMM-1385-09

Citation: 2009 FC 886

Ottawa, Ontario, September 9, 2009

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

LOUIS-JACQUES MICHAUD

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated March 6, 2009 concluding that the applicant, a Haitian citizen, is not a Convention refugee or a person in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA).

FACTS

[2] The thirty-two (32) year old applicant arrived in Canada in September 2007 seeking refugee protection because of an alleged fear of persecution for reasons of his membership in a particular social group and his political opinion, and as a person in need of protection.

[3] The applicant states that he began supporting former President Jean-Bertrand Aristide and his political party, *Fanmi Lavalas,* in 1990. His support included handing out flyers and putting up flyers in advance of the Haitian elections which were held in December 1990. Aristide won that election and was inaugurated as President on February 1991 but his government was overthrown and he was forced into exile by a military coup d'ètat at the end of September 1991. The applicant states that following the coup, former Aristide supporters were violently persecuted by armed gangs of *attachés* or *zenglendos*. The applicant states he was not personally persecuted at the time because he was only 14 years old.

[4] The applicant resumed his pro-Aristide political activities upon Aristide's return to Haiti in October 1994. He states that he handed out flyers and put up posters in support of Aristide in Port-Au-Prince before the 1995 election. The applicant states in his PIF that he attended general community meetings of *Famni Lavalas* party with two of his friends who were known to be active party members.

[5] In August 1997 the applicant and his two friends were violently attacked by a group of five FRAPH (Front for the Advancement and Progress of Haiti) members while walking in Port-Au-Prince. The applicant was beaten and asked at gun point whether he was a member of *Famni Lavalas* and if he knew the addresses of his two friends that managed to escape. He was left lying on a road after he refused to disclose any information.

[6] After the assault the applicant fled to his parents' home in Aquin and later to a rural and mountainous town called Bellvue to stay with his grandmother.

[7] In mid September 1998 the applicant returned to his uncle's house in Port-Au-Prince. On September 25, 1998 an armed group of *zenglendos* invaded the house, stole or destroyed its contents, interrogated the applicant on the whereabouts of his two friends, and fatally shot his uncle after the applicant failed to disclose the information that they requested.

[8] The applicant subsequently fled Haiti by boat on October 7, 1998 to St. Thomas. From St. Thomas the applicant made his way to the U.S. where he applied for asylum. His U.S. claim was ultimately denied but he continued to live in the U.S. without status until 2007. During his stay in the U.S. he married a U.S. citizen.

[9] On September 11, 2007 the applicant entered Canada and commenced his refugee claim.

Decision under review

[10] On March 6, 2006, the Board concluded that the applicant was not a Convention refugee or a person in need of protection.

[11] In the decision, the Board specifically accepted the credibility of the applicant.

[12] The Board's decision was based on the determination that the applicant is not a Convention refugee because his fear has no nexus to any of the grounds in the Convention refugee definition.

[13] The Board held that the applicant is not a person in need of protection because on a balance of probabilities he does not personally face risks to life or cruel and unusual punishment not faced by the general population, and there are no substantial grounds to believe that his removal to Haiti would subject him personally to a danger of torture.

[14] The Board reviewed the criteria for refugee protection under s. 96 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 which requires a nexus to one of the five (5) grounds in the *United Nations Convention relating to the Status of Refugees* (Refugee Convention). The Board relied on *Cius v. Canada (MCI)*, 2008 F.C. 1, where Mr. Justice Beaudry held that failed asylum claimants from Haiti were not a particular social group in denying that aspect of the applicant's claim.

[15] The Board determined that the applicant's well founded fear could not be by reason of his political opinion because the group he was associated with has over the years ceased to be an

effective tool of “political repression”, and has become a common criminal gang (Board Reasons, page 2).

[16] The Board next analyzed the applicant’s s. 97 of the IRPA claim to be considered a person in need of protection. The Board considered whether Haitian returnees and the applicant specifically would face personalized risks upon return.

[17] The Board noted that the applicant asserted that he is a person in need of protection because “his removal to Haiti would subject him to being kidnapped or killed, as the *zenglendos* are still active in Haiti (Board reasons, page 3)”.

[18] The Board held that the fear of the *zenglendos* was not a personalized fear but rather a fear of generalized criminal violence because the *zenglendos*, in the applicant’s own words, were “the same as the *Chimères*” in that they rob, murder, and kidnap for ransom. The Board noted that Haiti has extremely high levels of generalized violence because of the collapse of civil society and the absence of the rule of law.

[19] The Board referred to Federal Court case law in assessing the personalized risk to the applicant upon return. The Board referred to *Prophète v. Canada (MCI),* 2008 FC 331, 70 Imm. L.R. (3d) 128 at para. 23, aff’d 2009 FCA 31, 78 Imm. L.R. (3d) 163, per Madam Justice Tremblay-Lamer where it was held that “the risk feared in Haiti was a generalized risk faced by all citizens of Haiti. “While a specific number of individuals may be targeted more frequently because of their

wealth, all Haitians are at risk of becoming the victims of violence." [see also *Cius*, *supra*, per Mr. Justice Beaudry at para. 25]

[20] The Board adopted the Court's reasoning in *Cius*, *supra*, where the Court considered that the risk of kidnapping as a result of perception of wealth was criminal in nature and bore no nexus to the grounds in the Refugee Convention.

[21] The Board considered but rejected the applicant's expert evidence regarding the distinguishing features of Haitian returnees, finding that the risk faced by the applicant is a risk faced by all in Haiti.

[22] The applicant submitted to the Board the Court's decision in *Surajnarain v. Canada (MCI)*, 2008 FC 1165, per Madam Justice Dawson where at para. 11 she held that "a claim for protection, whether advanced under section 96 or section 97 of the Act, requires that a claimant establish a risk that is both personal and objectively identifiable. That, however, does not mean that the risk or risks feared are not shared by other persons who are similarly situated." The Board noted the *obiter* nature of the court's comments and nevertheless concluded that the evidence and testimony show that the risks faced by the applicant upon return are faced by the general population in Haiti.

LEGISLATION

[23] I reproduce s. 96 of the IRPA for convenience:

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 themself 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.

[24] I reproduce s. 97 of IRPA for convenience:

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, of torture within the meaning of Article 1 of the Convention Against Torture; or	*a*) soit au risque, s'il y a des motifs sérieux de le 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 themself 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,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

ISSUES

[25] The applicant raised three (3) issues with regard to the Board decision:

a. Did the Board err in fact and in law in rejecting the Applicant's claim for refugee protection as a "Convention refugee" under s. 96 of the IRPA based on his political opinions and activities, in that it misunderstood the evidence and misunderstood this basis of his claim?

b. Did the Board err in fact and in law in rejecting the Applicant's claim for refugee protection as a "person in need of protection" under s. 97 of the IRPA in that it did not adequately analyze the risks to which the Applicant would be faced if returned to Haiti?

c. Did the Board member err in law by contradicting his own decision in another Haitian refugee claim, rendered the same day as the Applicant's?

[26] I have reformulated the list of issues as follows:

1. Is the applicant a Convention Refugee under s. 96 of the IRPA?

2. Is the applicant facing a personalized risk as Haitian returnee in accordance with s. 97 of the IRPA?

3. Did the Board member breach the duty of fairness by reaching a contradictory decision on another refugee claim rendered on the same day as the applicant's decision?

STANDARD OF REVIEW

[27] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, 372 N.R. 1, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of [deference] to be accorded with regard to a particular category of question."

[28] The first issue relates to questions of fact or mixed law and fact. In the past, this meant that such findings would only be set aside if found to be patently unreasonable: see *Aguebor v. Canada (Minister of Citizenship and Immigration)* (1993), 160 N.R. 315 (F.C.A.). However, as a result of the Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9 (QL), it is clear that the standard of patent unreasonableness has been eliminated, and that reviewing courts must confine their analysis to two standards of review, those of reasonableness and

correctness. Accordingly, the deference to be accorded to the Board's factual findings mandates that the issues in question be reviewed on a standard of reasonableness.

[29] This standard has been previously applied in a number of decisions of this Court: see *Pillhuaman v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 748, 149 A.C.W.S. (3d) 660; *Chaudhary v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 68, 136 A.C.W.S. (3d) 913. Accordingly, the standard of review on the first issue is reasonableness. In determining whether the Board's findings were reasonable, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." (*Dunsmuir v. New Brunswick*, 2008 SCC 9, 372 N.R. 1 at para.47).

[30] The second issue, whether Haitian returnees are a particular social group because of the perception of wealth, has previously been held to be a pure question of law [*Cius, supra*, at para. 22; *Prophète v. Canada (MCI)*, 2008 FC 331, 70 Imm. L.R. (3d) 128, aff'd by 2009 FCA 31, 78 Imm. L.R. (3d) 163 at para. 11 (whether the perception of wealth constitutes a particularized risk under s. 97 of IRPA)].

[31] However, on further appeal in *Prophète*, the Federal Court of Appeal declined to answer the certified question that arose from the judicial review trial decision because it was too broad and required an individualized inquiry (see: *Prophète v. Canada (MCI)*, 2009 FCA 31, para. 7). Justice Gauthier ~~J.~~ subsequently held that the decision of the Federal Court of Appeal in *Prophète*

"…clearly indicates that the issue is not one of pure law but turns rather on the application of the section to the particular facts of a case that cannot be considered in a general way" (see: *Acosta v. Canada (MCI)*, 2009 FC 213, [2009] F.C.J. No. 270 (QL), Mr. Justice Gauthier at para. 11). I see no reason to depart from Justice Gauthier's view. The standard of review for the second issue is reasonableness.

[32] The third issue touches upon procedural fairness and as such is reviewable on a correctness standard (see *Baker v. Canada (MCI)*, [1999] 2 S.C.R. 817; *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2006] 3 F.C.R. 392; *Council of Canadians with Disabilities v. Via Rail Canada Inc.*, [2007] 1 S.C.R. 650).

ANALYSIS

Issue No. 1: Is the applicant a Convention Refugee under s. 96 of the IRPA?

[33] The applicant submits that the Board misunderstood the basis of the applicant's claim. The Board held that the applicant's fear was not by reason of his political opinion because the *Famni Lavalas*, or Chimères as the more violent elements of the group later became known, has ceased to be dedicated to "political repression" since the ouster of President Aristide in 2004, and is now engaged in common criminal activity (Exhibit R/A-4, Response to Information Request (RIR), Number: HTI102854.FE, 3 June 2008). According to the Board, any persecution the applicant may therefore be subject to by reason of his affiliation with this group is therefore related to crime, and not politics.

[34] Upon careful reading of the Board's decision, I am satisfied that the Board did not misunderstand the basis of this claim. The Board simply said that because of the applicant's past membership in *Lavalas,* the applicant should not fear persecution because of his political beliefs because this group no longer exists. Moreover, even if the Board had misunderstood the basis of the claim, this is not a material error on the basis of the evidence. The applicant's membership in a now defunct political organization, considering that the applicant was a low profile member of the organization, cannot support a well-founded fear of persecution because of the applicant's past membership in the political organization. While the evidence is that some high profile members of the *Lavalas* movement are still political prisoners in Haiti, and high-profile members of *Lavalas* suffered political persecution in the past, there is no evidence supporting the applicant's contention that he would be subject to persecution because of his past political membership and beliefs. Based on this evidence, I find that the Board's conclusion was reasonably open to it.

Issue No. 2: Is the applicant facing a personalized risk as Haitian returnee in accordance with s. 97 of the IRPA?

[35] The applicant submits that he will be subject to personalized risk as a Haitian returnee because of the perception that he may be wealthy.

[36] The applicant argues in his Further Memorandum of Argument at paragraphs 9 to 17 that the Board failed to properly apply the recent jurisprudence on the application of s. 97 of IRPA in light of his being a Haitian returnee.

[37] The Board stated the issue at page 3 in its decision as follows:

> … the question which remains is would the claimant's removal to Haiti subject him personally to a risk to his life, or to a risk of cruel and unusual treatment or punishment, or whether the risk is one that is faced by the general population of Haiti.

[38] The parties at the hearing before the Court, and the Court itself, had difficulty making sense of this Board decision. However, the Court is satisfied that the last two paragraphs of the decision make clear that the Board found that the risk to the claimant as a Haitian returnee will not be different than that of the general population of Haiti, where all the people are facing a serious risk of violence. In reaching this decision, the Board relied on the Federal Court cases *Prophète* and *Cius*, and quoted with approval from *Cius*, *supra* per Mr. Justice Beaudry at paragraph 25 of that decision:

> 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.

The Board rejected the *obiter* reasoning in *Surajnariain*, *supra*.

[39] The Board also referred to the expert report presented by the applicant. The Report by Dr. Cecile Marotte, Ph.D. a social scientist with expertise in Haiti stated that Haitian returnees are subject to a greater risk of violence than the general population. At page 4 in the decision, the Board held:

> The panel considered Dr. Marotte's Report and finds that again the fear faced by the claimant in Haiti, is one faced by all and is not a personalized fear.

The Board then held:

> In light of the claimant's testimony during the hearing and in light of the evidence discussed above, the panel concludes that the risk that the claimant incurs if he returns to his country, will not be different from that of the general population of Haiti, where all are facing a dramatic situation. In other words, the claimant has not established that it is more likely than not, that if he return to live in his country of origin, he would be at risk within the meaning of Article 97(1)(a) and 97(1)(b)(ii) of IRPA. *(sic)*

[40] In *Hardat Ramotar et al. v. The Minister of Citizenship and Immigration*, 2009 FC 362, [2009] F.C.J. No. 472 (QL) at para. 31, I considered the same issue with respect to Guyana. In that case, a Guyanese family feared that they would be targeted as "returnees" to Guyana because they would be perceived as different and having more wealth. Like Haiti, crime is rampant against those perceived to be wealthy. I held that all Indo-Guyanese face the same threat of crime upon their return from Canada to Guyana, and a finding otherwise would "open the floodgates" in that all Indo-Guyanese who overstay their legal status in Canada, and file an H&C application on the basis that they face a likelihood of "hardship" or personalized risk if returned to their home country, would have a pass to stay in Canada. At paragraph 31 I held:

> ¶31. All Indo-Guyanese face the same threat of crime upon their return from Canada to Guyana. Accordingly, it was reasonably open to the immigration officer to decide that the applicants would not fact "unusual or disproportionate hardship" compared to all Indo-Guyanese sent home from Canada after a failed refugee claim. An H&C finding otherwise, would "open the floodgates" as submitted by the respondent, in that all Indo-Guyanese would overstay their legal status in Canada, and file an H&C application on the basis that

> they face a likelihood of "hardship" if returned to their home country due to the prevalence of crime against the Indo-Guyanese in Guyana.

[41] The same principle applies to returning Haitians. All returning Haitians face the same personalized risk. In fact, on the evidence that risk is no greater than the risk of all other Haitians perceived to be relatively wealthy.

Issue No. 3: Did the Board member breach the duty of fairness by reaching a contradictory decision on another refugee claim rendered on the same day as the applicant's?

[42] The Board member in this case rendered his decision on March 6, 2009. On the same day, the Board member rendered a seemingly contradictory decision with respect to another Haitian refugee claimant (RPD file No. TA7-06842), and accepted the evidence of Dr. Marotte, the same expert on Haitian returnees which the Board rejected in the case before me.

[43] The applicant argues in his Further Memorandum of Argument at paragraphs 18 to 20 that the Board member breached the duty of fairness by contradicting himself on the same issue without providing adequate reasons.

The Contradictory Decision

~~[44]~~ The claimant in TA7-06842 was a university student at Port-au-Prince who was perceived to be involved with the Democratic Convergence Party of Haiti. The claimant suffered persecution at the hands of *Chimères-Lavalas* members who followed him throughout the island. The claimant left

Haiti and came to Canada in 2007 after his grandmother was violently attacked by *Chimères-Lavalas* members who were looking for the claimant.

[45] The Board found the claimant credible and held that he was a person in need of protection in accordance with s. 97 of the IRPA.

[46] The Board considered the report of Dr. Marotte that Haitian returnees are easily distinguishable and criminally targeted upon return to Haiti, and the Federal Court decisions of *Cius*, *Prophète*, and *Surajnarain*. The Board also noted that the documentary evidence did not contradict the claimant's oral testimony at the hearing.

[47] The Board concluded that:

> Ayant considéré la jurisprudence susmentionnée et après avoir considéré le rapport du Dr Marotte, le tribunal estime, selon la prépondérance des probabilités, *que le demandeur est personnellement exposé à un risque auquel ne sont pas exposés tous les citoyens du pays, en ce que ce ne sont pas tous les citoyens d'Haïti qui revient de l'Amérique du Nord, mais seulement un groupe déterminé.* Le tribunal estime donc, selon la prépondérance des probabilités, que si le demandeur devait retourner en Haïti, il serait personnellement soumis a une menace a sa vie [underlined in the original, emphasis added].

This translation, as agreed at the hearing, is as follows:

> After considering the jurisprudence and the report of Dr. Marotte, the tribunal concludes that on the balance of probabilities the claimant will be personally exposed to a risk to which all other citizens of Haiti are not exposed to, in that not all of the citizens of Haiti are returnees from North America, but rather one determined group.

[48] The decision in TA7-06842 appears to come to a different conclusion on the question of whether Haitian returnees from North America are a distinct social group that requires protection under s. 97 of the IRPA.

Breach of the Duty of fairness

[49] With respect to TA7-06842 which appears to contradict the Board's decision in the case at bar, this case is either in error, or the Board member found, but did not adequately explain, that the other claimant was more likely to be exposed to a personalized risk because of his previous and recent experience with the armed gangs than the applicant in the case at bar.

[50] There is no legal requirement to explain a Board member's departure from a previous Board decision where the profile of the claimants is dramatically different (*Woods v. Canada (MCI)*, 2008 FC 262, 165 A.C.W.S. (3d) 508, per Mr. Justice Gibson at para. 25). Neither is there a need to explain the departure where there were differences in the findings of credibility (*Cius*, *supra*, per Mr. Justice Beaudry at paras. 35-36).

[51] The Board considered the same documentary evidence and case law in both cases. In the case at bar, the Board declined to follow Dr. Marotte's report and held that the risk to applicant was generalized. I repeat the Board's finding:

> Counsel for the claimant presented a report by Dr. Marotte, claiming that Haitian returnees whose refugee claims are denied by the Immigration and Refugee Board (IRB) are easily distinguishable from the general population and, as such, can be at risk of kidnapping and/or other types of violence, as there is a presumption of wealth). The panel considered Dr Marotte's report and finds that

> again the *fear faced by the claimant* in Haiti, is one faced by all and is not a personalized fear.
>
> In light of the claimant's testimony during the hearing and in light of the evidence discussed above, the panel concludes that the risk that the claimant incurs if he returns to his country will not be different from that of the general population of Haiti, where are all facing a dramatic situation. In other words, the claimant has not established that it is more likely than not, that if he returned to live in his country of origin, he would be at risk within the meaning of Article 97(1)(a) and 97(1)(b)(ii) of the *IRPA* [emphasis added].

[52] The two decisions may be justifiable on the basis that the Board expressly relied on the applicant's circumstances. However, the Board did not provide adequate or sufficient reasons.

[53] I am satisfied that even if the Board had explained the contradiction between the two cases, the result in the applicant's case would have been the same. This is one of the cases described by Professor Wade in *Mobile Oil Canada Ltd. v. Canada Newfoundland Offshore Petroleum Board* [1994] 1 S.C.R. 202, per Mr. Justice Iacobucci at para. 53, where the "demerits of the claim are such that it would in any case be hopeless" to remit them back for redermination because of the "involvement of a particular kind of legal question which has an inevitable answer" (*Mobile Oil*, at para. 52). As I explained above, Haitian returnees face the same risk of violence and crime as other Haitians perceived to be wealthy.

[54] For these reasons, this application for judicial review must be dismissed.

CERTIFIED QUESTION

[55] Both parties advised the Court that this case does not raise a serious question of general importance which ought to be certified for an appeal. The Court agrees.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

This application for judicial review is dismissed.

"Michael A. Kelen"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-1385-09
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