Federal Court  Cour fédérale

Date: 20091204

Docket: IMM-2233-09

Citation: 2009 FC 1245

Ottawa, Ontario, December 4, 2009

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

JOSUE PETERLEE MESIDOR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Preliminary

[1] The Refugee Protection Division of the Immigration and Refugee Board (the Board) was validly entitled to rely on the applicant's conduct at the hearing in assessing his credibility, as the Federal Court of Appeal reiterated in *Chen v. Canada (Minister of Citizenship and Immigration)* (1999), 240 N.R. 376 (F.C.A.), 87 A.C.W.S. (3d) 1182:

> [7] The point here is that the witness whose credibility was questioned by the Refugee Division was seen and heard by that body as triers of fact. As other triers of fact, they enjoyed unique advantages in coming to their findings and especially so in making findings upon an assessment of the witness's credibility. The peculiar role of triers of fact in assessing the credibility of a witness has been

remarked upon by the courts through the years. Lord Shaw did so in *Clarke v. Edinburgh Tramway Company* as follows:

> In Courts of justice in the ordinary case things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of an appellate Court? In my opinion, the duty of an appellate Court in those circumstances is for each Judge of it to put to himself, as I now do in this case, the question, Am I - who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the Judge who heard and tried the case - in a position, not having those privileges, to come to a clear conclusion that the Judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the Judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

[Emphasis added.]

II. Introduction

[2] This is an application for judicial review of a decision by the Board dated April 6, 2009, that the applicant is not a “Convention refugee” or a “person in need of protection” under sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA).

III. Facts

[3] The applicant, Josue Peterlee Mesidor, is basing his refugee protection claim on the fact that he was allegedly a friend of Charles David, a soccer coach at the university he attended, as well as on the fact that he would be perceived as wealthy, having lived abroad (in the United States and Canada).

[4] The incident leading to Mr. Mesidor's departure purportedly occurred on February 27, 2004, during which Lavalas' Chimères allegedly went to Les Cayes from Port-au-Prince to cause a violent upheaval. They were purportedly looking for Mr. David. After receiving information on Mr. Mesidor, they allegedly went to his house, but the Front de Résistance [resistance force] protecting his neighbourhood apparently saved him.

IV. Impugned decision

[5] The Board rejected Mr. Mesidor's claim after finding that his testimony was not credible.

[6] The Board also found that Mr. Mesidor had not established a personalized risk because of the fact that he could be perceived as being wealthy.

V. Issue

[7] Is the Board's decision reasonable?

VI. Analysis

[8] The Court agrees with the respondent that the decision is well-founded in fact and in law and that Mr. Mesidor's application for judicial review should be dismissed.

A. Lack of credibility

1) No reasonable explanation for the applicant's failure to file a claim in the United States during his stay from July 19, 2004, to February 2007

[9] The Board was entitled to rely on Mr. Mesidor's failure to claim protection from American authorities during his long stay in that country.

[10] In addition, the Board was entitled to not believe Mr. Mesidor's explanations that a lawyer in the United States allegedly told him that he was too young (the applicant was born on December 18, 1984) to file a claim. Mr. Mesidor could have validated this information with his close relatives who are American citizens or check on the Internet.

[11] In *Assadi v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 331 (QL), 70 A.C.W.S. (3d) 892, Justice Max Teitelbaum decided that the failure to immediately claim international protection can impugn a claimant's credibility even with regard to events in his or her country of origin.

[12] In addition, the courts have consistently held that a claimant's delay in filing a refugee claim can justify the rejection of a refugee claim in a case where this delay was not satisfactorily explained.

[13] For example, in *Espinosa v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1324, 127 A.C.W.S. (3d) 329, Justice Paul Rouleau determined the following:

> [17] The Board states correctly that while the delay is generally not a determinative factor in a refugee claim, there are circumstances where the delay can be such that it assumes a decisive role; what is fatal to the applicant's claim is his inability to provide any satisfactory explanation for the delay.

(Also, *Duarte v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 988, 125 A.C.W.S. 137; *Singh v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 181, 146 A.C.W.S. (3d) 325; *Ayub v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1411, 134 A.C.W.S. (3d) 485).

[14] In *Singh v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 743, 149 A.C.W.S. (3d) 479, Justice Teitelbaum dismissed the judicial review on the basis of unexplained delays:

> [49] The case law on the issue of delay is clear. Very recently, i.e. on April 3, 2006, in *Bhandal v. MCI*, [2006] F.C.J. No. 527, 2006 FC 426, I decided that a delay was sufficient to dismiss an application for judicial review, relying on earlier case law.
>
> . . .
>
> [55] It is not patently unreasonable that the RPD determined that the applicant was not a credible witness.

[15] Recently, these principles were reiterated in *Semextant v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 29, [2009] F.C.J. No. 20 (QL):

> [23] In the present case, Ms. Semextant did not provide a reasonable explanation for the delay. The Board was, therefore, justified to conclude as it did on a lack of subjective fear (*Sainnéus*, above).
>
> [24] Consequently, there was no error on the part of the Board in concluding that Ms. Semextant's behaviour, in and of itself, undermined the credibility of her testimony.

[25] The Board, therefore, was in a position to reject Ms. Semextant's claim for refugee protection, simply, on the basis of incompatible conduct with a "subjective fear":

> [8] There are many ways to make determinations in matters of credibility. In assessing the reliability of the applicant's testimony the Board may consider, for example, vagueness, hesitation, inconsistencies, contradictions and demeanour (*Ezi-Ashi v. Canada (Secretary of State)* [1994] F.C.J. No. 401, at paragraph 4). In *El Balazi v. Canada (Minister of Citizenship and Immigration)* 2006 FC 38, [2006] F.C.J. No. 80, at paragraph 6, Mr. Justice Yvon Pinard states that even in some circumstances, the applicant's conduct may be enough to deny a refugee claim:
>
> > The respondent correctly says that the IRB may take into account a claimant's conduct when assessing his or her statements and actions, and that in certain circumstances a claimant's conduct may be sufficient, in itself, to dismiss a refugee claim (*Huerta v. Minister of Employment and Immigration* (March 17, 1993), A-448-91, *Ilie v. Minister of Citizenship and Immigration* (November 22, 1994), IMM-462-94 and *Riadinskaia v. Minister of Citizenship and Immigration* (January 12, 2001), IMM-4881-99). [Emphasis added].

(*Biachi v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 589, 152 A.C.W.S. (3d) 498).

2) Conduct at the hearing

[16] In *Gjergo v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 303, 131 A.C.W.S. (3d) 508, Justice Sean Harrington reiterated the following:

> [22] . . . This Court has previously held that the panel may take into account the demeanor of an applicant during his testimony. When the witness has difficulty giving adequate and direct answers, the panel may make a negative credibility finding. . . .

(Also, *Tong v. Canada (Secretary of State)*, [1994] F.C.J. No. 479 (QL), 47 A.C.W.S. (3d) 678).

3) Fear because of relationship with Mr. David

[17] It was not unreasonable for the Board to find that there was no ground for believing that Mr. Mesidor, who left Haiti in July 2004, would be targeted if he returned to Haiti because of his relationship with Mr. David.

[18] Mr. Mesidor claims that he clarified his relationship with Mr. David and that his testimony was not inconsistent with that of Mr. David's spouse, Micheline Lachance, who was found credible by the Board (Applicant's Memorandum at paragraphs 22 and 23).

[19] The fact that the Board found Ms. Lachance's testimony credible regarding the circumstances in which she and her spouse purportedly knew Mr. Mesidor is not sufficient to establish that he would be at risk if he returned to Haiti.

[20] In his memorandum, Mr. Mesidor claimed that Ms. Lachance testified that she believed that he would be targeted if he returned to Haiti because of his relationship with her spouse. She apparently added that two students had purportedly been targeted and fled the country (Applicant's Memorandum at paragraph 12).

[21] These allegations by Mr. Mesidor should be disregarded. The reasons for the Board's decision do not indicate that Ms. Lachance apparently testified about the danger to Mr. Mesidor if he returned or the fact that two students had allegedly been targeted.

[22] Furthermore, Mr. Mesidor's affidavit does not mention any of these elements (Applicant's Record (AR) at paragraphs 17-19).

[23] Mr. Mesidor also alleges that Ms. Lachance also apparently mentioned that her spouse was still in danger in Haiti and that he ensured his safety and that of their son with bodyguards and an armoured car (Applicant's Memorandum at paragraph 13).

[24] The reasons for the Board's decision indicate the following regarding Mr. David's situation in Haiti:

> Ms. Lachance testified that her husband is now the director of the Chambre d'Arbitrage et de Conciliation [arbitration and conciliation chamber] of Haiti. He never left the country because he has a prestigious position and earns a very good salary. However, he required a bodyguard because of the security issues in Haiti. Ms. Lachance mentioned that her 15 year old son lives with his father and that he is attending high school there.

B. Generalized risk

[25] The Board was validly entitled to reject Mr. Mesidor's submissions that he was afraid of being kidnapped because he could be considered wealthy after living many years in the United States and Canada.

[26] The Board was entitled to rely on document 14.1 of the National Documentation Package on Haiti as well as on Mr. Mesidor's particular situation to find that he would not be personally targeted if he were to return to Haiti.

[27] In accordance with subparagraph 97(1)(*b*)(ii) of the IRPA, Mr. Mesidor must present evidence of a personalized risk to himself. Protection is limited to those who face a specific risk not faced generally by others in the same country.

[28] Furthermore, it is well established in the case law that the assessment of the applicant's potential risk must be personalized and that the general situation of a country does not mean there is a risk to a given individual:

> [28] That said, the assessment of the applicant's potential risk of being persecuted if he were sent back to his country must be individualized. The fact that the documentary evidence shows that the human rights situation in a country is problematic does not necessarily mean there is a risk to a given individual. . . .

(*Jarada v. Canada (Minister of Citizenship and Immigration*, 2005 FC 409, [2005] F.C.J. No. 506 (QL)).

[29] In *Charles v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 233, [2009] F.C.J. No. 277 (QL), the Court determined that the Board did not commit any error in finding that there was no personalized risk:

> [7] Finally, the Court concludes that the applicants' claim with regard to them being at greater risk if returned to Haiti because of a general perception as to their enrichment upon return from abroad was also reasonably dismissed by the Board since section 97 requires personalized risk (*Carias v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 602; *Prophète v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 331; aff'd 2009 FCA 31).

VII. Conclusion

[30] Mr. Mesidor did not demonstrate that the Board's decision is unreasonable or that it does not fall as a whole within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[31] For all of these reasons, Mr. Mesidor's application for judicial review is dismissed.

JUDGMENT

THE COURT ORDERS that

1. the application for judicial review be dismissed;

2. no serious question of general importance be certified.

"Michel M.J. Shore"
Judge

Certified true translation
Susan Deichert, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

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