Federal Court Cour fédérale

Date: 20100622

Docket: IMM-5860-09

Citation: 2010 FC 674

Ottawa, Ontario, June 22, 2010

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

LEONIE LAURORE JEAN
APOLINE LAURORE
ONISTE LAURORE

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

<u>REASONS FOR JUDGMENT AND JUDGMENT</u>

I. <u>Preliminary</u>

[1] ... <u>the Haitian diaspora as a whole cannot be considered a [translation] "risk group" and that each case must be considered individually and within [translation] "its own context</u>." He also indicated, however, that the characteristics of members of the diaspora [language and different behaviour in public] make them [translation] "a group apart" that [translation] "stands out" more and is [translation] "targeted more by kidnappers" (UAPC 27 Sept. 2007).

As specified "[i]n correspondence sent to the Research Directorate on 27 September 2007, a legal and human rights expert from the Canadian Cooperation Support Program Unit in Haiti (Unité d'appui au programme de la coopération canadienne à Haïti, UAPC) stated ..."

(*Tanis v. Canada* (*Minister of Citizenship and Immigration*), 2010 FC 420, [2010] F.C.J. No. 501 (QL).

> [2] [8] The authorities are thoroughly reviewed by Mr. Justice Beaudry in *Cius v. Canada* (*Minister of Citizenship and Immigration*), 2008 FC 1, [2008] F.C.J No. 9 (QL). He rejected the argument that people returning to Haiti formed part of a "particular social group" as defined by the Supreme Court of Canada in Canada (*Attorney General) v. Ward*, [1993] 2 S.C.R 689, 20 Imm. L.R. (2d) 85. Thus, Mr. Octave cannot be considered a refugee within the meaning of section 96 of the *Immigration and Refugee Protection Act*.

(*Octave v. Canada* (*Minister of Citizenship and Immigration*), 2009 FC 403, 346 F.T.R. 103).

II. Judicial proceeding

[3] On October 15, 2008, the Refugee Protection Division of the Immigration and Refugee Board (the Board) found that the applicants, two citizens of Haiti and one American citizen, were not "Convention refugees" within the meaning of section 96 of the *Immigration and Refugee Protection Act,* S.C. 2001 c. 27 (IRPA) or "persons in need of protection" within the meaning of section 97 of the IRPA, and accordingly rejected their claims for refugee protection.

[4] This decision was based on the absence of evidence of any personal risk and personalized fear on the part of the applicants.

[5] The applicants challenged the Board's decision by way of an Application for Leave and for Judicial Review under subsection 72(1) of the IRPA.

[6] The application for leave was granted.

III. Preliminary remarks

[7] The principal applicant, Leonie Laurore Jean, discusses a finding of a lack of credibility at paragraphs 8 to 12 of her affidavit. The respondent argues that the Board made no findings with respect to her credibility.

IV. Background

[8] The applicants, a mother and her two daughters, allege that they fear criminality in Haiti: kidnappings and demands for ransom. They fear being targeted specifically because they might be perceived as having greater financial means given that they lived abroad for many years.

[9] In December 1994, the applicants left Haiti for the United States.

[10] Four years later, in 1998, the two applicants from Haiti claimed asylum in the United States. Their claim was allegedly denied in 1999.

[11] On October 18, 2007, the applicants left the United States for Canada.

[12] The refugee claim hearing took place on September 30, 2008, while the applicants were represented by their current counsel.

V. Issues

[13] (1) Does the Board's decision contain irregularities that would warrant this Court's intervention?

(2) More specifically, are the Board's findings regarding the lack of personal risk and personalized fear unreasonable or unfounded in the evidence?

VI. Analysis

Standard of review

[14] The Board's analysis of the applicants' situation under section 96 of the IRPA and of whether there was a connection between their alleged fear and one of the grounds of the Convention relating to the Status of Refugees, adopted on July 28, 1951, by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of December 14, 1950, is reviewable on the standard of reasonableness (*Michaud v. Canada* (*Minister of Citizenship and Immigration*), 2009 FC 886, 351 F.T.R. 290 at paras. 28-29; *Lozandier v. Canada* (*Minister of Citizenship and Immigration*), 2009 FC 770, [2009] F.C.J. No. 931 (QL) at para. 17).

[15] Similarly, the assessment of the applicants' personalized risk under section 97 of the IRPA is reviewable on the standard of reasonableness (*Guerilus v. Canada* (*Minister of Citizenship and Immigration*), 2010 FC 394, [2010] F.C.J. No. 438 (QL) at para. 9; *Saint-Hilaire v. Canada* (*Minister of Citizenship and Immigration*), 2010 FC 178, [2010] FC 178 (QL) at para. 12).

Section 96 of the IRPA is not applicable

[16] The Board stated that section 96 of the IRPA does not apply since the alleged fear of a situation of insecurity and widespread criminality has no connection to a Convention ground (Certified Tribunal Record (CTR) at para. 11).

[17] Section 96 of the IRPA reads as follows:

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;
…	[...]

[18] The Court is in agreement with the respondent's position.

[19] In this case, the evidence and the applicant's testimony clearly showed to the Board that she feared the widespread criminality in Haiti in relation to the fact that she had lived abroad. As the transcript of the hearing indicates:

[TRANSLATION]

> Q.: Ma'am, can you tell me who you are afraid of if you return to your country?
>
> A: Not really, because there are a number of groups. If I return—that's when they kidnap people. So they take people, they take them to another location and they kill them. That's why I don't want to return.
>
> ...
>
> Q.: And why would you be a target?
>
> A.: The mere fact that you're coming from a foreign country, so it's—people will figure out that you're a member of the diaspora. They always want money, so they'll kidnap you. They'll ask for $100,000, $200,000. And if you don't find the $200,000, they will kill you.

(CTR at p. 185: (Transcript (T)).

[20] The Board dismissed the applicants' allegation that they would be targeted as members of the Haitian diaspora, because it is not a particular social group (Tribunal decision at paras. 14-15).

[21] It was for the Board to determine whether the applicants' fear was related to a Convention ground:

> [17] The question of the existence of a connection between the alleged persecution and one of the Convention grounds is mostly a question of fact that therefore falls within the RPD's expertise (Rizkallah, above; *Pour-Shariati v. Canada* (*Minister of Employment and Immigration*) (1997), 215 N.R. 174 (F.C.A.)). Consequently, the RPD was entitled to find that the applicant's fear was not a result of her gender but a result of the fact that she had been the victim of a crime, and it was therefore entitled to deny her claim under section 96 of the IRPA.

(*Lozandier*, above).

[22] Having analyzed the documentary evidence, the Board states that the evidence shows that the entire population is targeted by criminality and that men, women and children can all be victims (Tribunal decision at para. 12).

[23] In fact, that is what the evidence shows:

Groups targeted by kidnappers	**Groupes ciblés par les kidnappeurs**
Sources indicate that kidnappers in Haiti generally act opportunistically (US 9 Jan. 2007, "Overall Crime and Safety Situation"; *The Miami Herald* 2 Nov. 2004) and do not choose their victims according to nationality, race, gender or age (US Fed News 31 Aug 2007; US 9 Jan. 2007, "Overall Crime and Safety Situation"). Anyone who appears to be wealthy risks being a victim of kidnapping for ransom (ibid.; *The Miami Herald* 2 Nov. 2004). However, although all the victims of kidnapping for ransom in 2004 reported by *Country Reports on Human Rights Practices for 2004* were wealthy people (US 28 Feb. 2005, Sec. 1.b), the victims of kidnapping for ransom came from all levels of society in 2005 (ibid. 8 Mar. 2006, Sec. 1.b; AI 23 May 2006) and in 2006 (US 6 Mar. 2007, Sec. 1.b). According to the *Washington Post*, the threat of kidnapping also hangs over	Des sources soulignent que les auteurs d'enlèvements contre rançon en Haïti agissent généralement par opportunisme (États-Unis 9 janv. 2007, « Overall Crime and Safety Situation »; *The Miami Herald* 2 nov. 2004), en ne choisissant pas leurs victimes selon leur nationalité, leur race, leur sexe ou leur âge (US Fed News 31 août 2007; États-Unis 9 janv. 2007, « Overall Crime and Safety Situation »). Toute personne qui semble être riche risque d'être victime d'un enlèvement contre rançon (*ibid.*; *The Miami Herald* 2 nov. 2004). Toutefois, bien qu'en 2004, toutes les victimes d'enlèvement contre rançon signalées par les *Country Reports on Human Rights Practices for 2004* étaient des personnes riches (États-Unis 28 févr. 2005, sect. 1.b), les victimes d'enlèvement contre rançon venaient de toutes les couches de la société en 2005 (*ibid.* 8 mars 2006, sect. 1.b; AI 23 mai 2006) et en 2006 (États-

street vendors …	Unis 6 mars 2007, sect. 1.b). Selon le *Washington Post*, la menace d'enlèvement plane aussi sur les marchands ambulants [...]

(CTR at p. 16: Responses to Information Requests, February 14, 2008; CTR at p. 23: Responses to Information Requests, October 15, 2007).

[24] Moreover, it is well established that fear of criminal harm has no connection to a Convention ground. This is exactly the nature of the applicants' fear in this case. As this Court recently pointed out:

> [14] The violence feared by the applicant arises from general criminal activity in Haiti, and not the discriminatory targeting of women in particular. The harm feared is criminal in nature and has no nexus to the Convention refugee definition. The generalized risk of a situation in a country must be distinguished from the probable risk to a person on the basis of his or her particular circumstances.
>
> [15] At the hearing, the applicant herself admitted that in [translation] "Haiti, everyone is scared" and that women or people like her who travel to Canada are not more likely to be specifically attacked; all Haitians, both men and women, she agrees, fear kidnappings and rape.

(*Soimin v. Canada* (*Minister of Citizenship and Immigration*), 2009 FC 218, [2006] F.C.J. No. 246 (QL)).

[25] Clearly, then, the Board did not err in concluding that the alleged fear had no connection to a Convention ground and that section 96 of the IRPA did not apply.

Section 97 of the IRPA is not applicable

[26] The Board then analyzed the general situation in Haiti. The evidence indicates that insecurity is rampant throughout the country. Having reviewed the documentary evidence, the Board found that the entire population is targeted and that the situation of people who have lived abroad is no different from that of other Haitians with greater financial means. (Tribunal decision at paras. 16-18; CTR at p. 16: Responses to Information Requests, February 14, 2008; CTR at p. 23: Responses to Information Requests, October 15, 2007).

[27] Since the applicants did not submit any evidence showing that they could face a personalized risk that the general public would not, the Board found that the risk was generalized and random (Tribunal decision at para. 22).

[28] As the transcript of the hearing indicates:

[TRANSLATION]

Q.: Okay. So that means that you really don't know who, in the end. It could be anyone.

> A.: Correct. So I don't know who exactly. It could be anyone.
>
> ...
>
> Q.: Are there other things that make you afraid to return to your country?
>
> A.: Other than that, nothing. Because it is really the situation of life there, the fact that there are killings, that they kill people. The fact that they do cruel things to people.
>
> Q.: Okay. So, if I understand correctly, if you were to return to your country today, what you're afraid of is the prevailing situation of insecurity and crime.

A.: Yes.

(Emphasis added.)

(CTR at pp. 185-186: T of the hearing).

[29] There is no doubt that the applicants have no fear of personalized risk.

[30] Therefore, it was completely open to the Board to find that the applicants would not be personally targeted and that, accordingly, section 97 of the IRPA did not apply:

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 [...]

[31] This conclusion was perfectly reasonable and consistent with the teachings of this Court. In fact, as recently stated:

> [21] In short, the risk that the applicant is alleging is a random risk faced generally and indiscriminately by everybody living in her country; it does not target the applicant personally or specifically. The situation that the applicant fears being exposed to does not differ from that of other people living in her country; she is therefore not a person in need of protection, as defined in subparagraph 97(1)(*b*)(*ii*) of the IRPA.
>
> [22] Such a situation does not give rise to a personal risk justifying the protection sought by the applicant. The RPD found that the alleged harm was criminal in nature without any connection to the definition of Convention refugee, and this was a finding that it could legitimately make (*Jeudy v. Canada* (*Minister of Citizenship and Immigration*), 2005 FC 1124; *Cius v. Canada* (*Minister of Citizenship and Immigration*), 2008 FC 1).

> [23] The Court, after analyzing the facts and the impugned decision, finds that the RPD was correct in deciding that the applicant did not establish that she was a person in need of protection under sections 96 and 97 of the IRPA, when this burden of proof was hers to discharge. The Court must therefore respect the RPD's decision (The Court's emphasis).

(*Lozandier*, above; *Guerilus*, above; *Saint-Hilaire*, above; *Prophète v. Canada* (*Minister of Citizenship and Immigration*), 2008 FC 331, 167 A.C.W.S. (3d) 151 at paras. 22-23).

[32] The case law of this Court is clear and consistent that a generalized fear of crime caused by a situation prevailing throughout the country and affecting the entire population is not enough to justify granting the status of person in need of protection.

[33] An applicant must establish that there is a personalized risk based on his or her personal circumstances, which was not done in this case: the applicants did not show that their particular situation would cause a personalized risk, and the documentary evidence does not support their allegations.

[34] In their written submissions, the applicants argue that children are a particular social group and a "group apart", and that it would be unrealistic for the applicant to leave her children behind should she be returned to Haiti. The children were born in 1994 in Haiti and in 1999 in the United States, respectively (CTR at pp. 42 and 54: Personal Information Form (PIF)).

[35] First, the wording of sections 96 and 97 of the IRPA is very clear that the review should be conducted with reference to the applicant's country of nationality.

[36] Therefore, for the child who is an American citizen, the review could not be conducted with reference to Haiti.

[37] Second, it is interesting to note the submissions made by counsel for the applicants during the hearing before the Board:

[TRANSLATION]

Q.: Are you ready to make your submissions?

> ...
>
> A.: I will leave it to your discretion. It is unusual for me to do this, but you see, there is clearly a problem here ...
>
> ...
>
> But in any case, the applicant alleges today that her real fear is of the kidnappers, of general insecurity. And given the case law on this topic, I will not dwell on it any longer. No evidence will be submitted against the United States for—one of the two children is American. The only thing may be—you know—because it was already decided by one of your colleagues, but that was some time ago. And that, despite the case law in *Étienne et compagnie*, this is a case where—and here I'm speaking of the child who was born in Haiti, in other words, Oniste—she arrived in the United States as an infant. Therefore, clearly, she does not remember—she was raised mainly in the United States, plus two years here. The family unit's return to Haiti, the fact that the child is visibly more American than Haitian, probably in her manner of speaking, dressing, etc., could result in the entire family being specifically targeted.
>
> But I will not dwell on this point ...

(CTR at pp. 201-203: Submissions made by counsel at the hearing).

[38] It is clear that the argument regarding the children was submitted to show that the applicants could possibly be more easily identifiable as members of the Haitian diaspora having lived abroad. Age (the applicant is 16 years old) was never alleged before the Board as being a source of fear.

[39] Therefore, the fear has no connection with age and, accordingly, the argument on the basis of children as a particular social group is without merit.

[40] According to the teachings of the Supreme Court of Canada in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, three categories of groups can be recognized as a "particular social group":

> 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 category is included more because of historical intentions, although it is also relevant to anti-discrimination influences, in that one's past is an immutable part of the person.

[41] The applicants submit that the children belong to the first category, i.e. groups defined by an innate or unchangeable characteristic.

[42] On the one hand, the respondent submits that this is an overly broad group that lacks specificity. On the other hand, according to the Larousse dictionary, the word "immuable," or "unchangeable," means:

> [TRANSLATION]
>
> **Unchangable** (adjective)
>
> i. That which, by its nature, is not subject to change and remains the same: unchangeable truths.
>
> ii. That which remains unchanged, does not undergo changes or does not appear to change during a relatively long time: an unchangeable blue sky.
>
> iii. That which does not vary in its opinions, feelings, wishes: to be unchangeable in these convictions.

[43] With all due respect, the age of a person is certainly not unchangeable.

[44] Thus, the applicant's children do not form part of a particular social group.

[45] Neither do the children form part of "a group apart" that could be specifically targeted within the meaning of section 97 of the IRPA. The documentary evidence cited by the applicants does not support this allegation, but rather mentions that some evidence can be used to describe the members of the diaspora and make them more identifiable, but do not personalize the risk for the children. The Court recently analyzed this document as a whole:

> [27] The applicant submits that the panel's analysis was deficient in his case because it erred in relying on *Cius* only, without considering the new evidence demonstrating that members of the Haitian diaspora are indeed exposed to a heightened risk of crime. The applicant cites the National Documentation Package

on Haiti, which was available to the panel that dealt with his case, and in particular document 14.1, which bears the long title of "HTI102610.FE 15 October 2007. Haiti: Whether Haitians who have lived abroad (in the United States or Canada, for example) for a long time (several years) are at risk if they return to their homeland; the kinds of risks they might face; whether their return could represent a threat to members of their families and, if so, what kind of threat their families would face and from whom."

[28] Behind this long title is a brief document that does not support the applicant's claims. Reproduced below is almost the entire content of the document in question, which requires no further comment [emphasis added]:

> The Office of the United Nations High Commissioner for Refugees (UNHCR) in Ottawa responded by letter to a request for information from the Research Directorate regarding the situation of Haitians who return to their country after living abroad for several years (24 Sept. 2007). The UNHCR representative in Canada stated that he had limited information and that he did not know whether such Haitians face any risks simply because they have lived abroad (UN 24 Sept. 2007).
>
> The UNHCR representative indicated that certain categories of people who have lived abroad may face a higher risk of threats and human rights violations, but he did not list them all (*ibid.*). For example, criminals deported to Haiti risk facing human rights abuses as a result of prison conditions and may be subjected to other violations, such as arbitrary or long-term detention (*ibid.*). Stories of Haitians who have lived abroad for a long time and who are kidnapped after returning to their country because they appear to have greater financial means are often reported in the media and by non-governmental organizations (UN 24 Sept. 2007). Also, some people are more likely than others to be targeted upon returning to Haiti because of their involvement in political or other activities (*ibid.*). The risks that a person faces when returning to Haiti depend on that person's political role or past and [translation] "are not necessarily related to that person's status as a Haitian who has lived abroad" (*ibid.*).
>
> In correspondence sent to the Research Directorate on 27 September 2007, a legal and human rights expert from the Canadian Cooperation Support Program Unit in Haiti (Unité d'appui au programme de la coopération canadienne à Haïti, UAPC) stated that the Haitian diaspora as a whole cannot be considered a [translation] "risk group" and that each case must be

> considered individually and within [translation] "its own context." He also indicated, however, that the characteristics of members of the diaspora [language and different behaviour in public] make them [translation] "a group apart" that [translation] "stands out" more and is [translation] "targeted more by kidnappers" (UAPC 27 Sept. 2007).
>
> This issue is addressed in a *Boston Globe* article that indicates that people deported to Haiti by the United States have limited ties with the country and do not speak Creole well, which makes it difficult for them to adapt and in particular [translation] "makes deportees more easily identifiable" (11 Mar. 2007).
>
> In correspondence sent to the Research Directorate on 18 September 2007, an analyst from the International Crisis Group (ICG) indicated that he has not studied the issue in detail and that he is not aware of any specific cases of Haitians who have been at risk following their return after living abroad for several years. However, he also stated that he has heard rumours and stories about such cases (ICG 18 Sept. 2004). He indicated that [translation] "Haitians who return to the country, particularly to Port-au-Prince" face certain risks and that [translation] "those risks are probably lower outside urban areas" (*ibid.*).
>
> Information on whether the return of such people could represent a threat to their families could not be found among the sources consulted by the Research Directorate.
>
> [29] I can identify no error in the panel's reliance on *Prophète* and *Cius* in concluding that the risk of criminality currently faced by the applicant as a member of the Haitian diaspora was a generalized risk. Nothing in above-cited document in the National Documentation Package on Haiti calls this conclusion into question, and, having read this document, I do not see any error made by the panel in this respect.

(*Tanis*, above).

[46] The documentary evidence does not support the conclusion that people who have spent time abroad, whether or not they are minors, are subject to a personalized risk or constitute a group apart.

[47] The Board analyzed the evidence and concluded that **everyone is a target** in Haiti. Analysis of the evidence is the Board's responsibility, and this Court cannot substitute its own opinion at the stage of judicial review:

> [9] It is for the panel to assess the evidence as a whole and to weigh it. Where the determination is reasonable, as is the case here, the Court must not reassess the evidence in a judicial review proceeding (*Singh v. Canada* (*Minister of Citizenship and Immigration*), 2008 FC 408, [2008] F.C.J. No. 547 (QL), at paragraph 17; *Malagon v. Canada* (*Minister of Citizenship and Immigration*), 2008 FC 1068, [2008] F.C.J. No. 1586 (QL), at paragraph 44). (Emphasis added.)

(*Sermot v. Canada* (*Minister of Citizenship and Immigration*), 2009 FC 1105, [2009] F.C.J. No. 1319 (QL)).

[48] There is no reviewable error in this conclusion, and the intervention of this Court is not warranted.

VII. Conclusion

[49] The burden was on the applicants to establish the legitimacy of their refugee claim, which they did not. Nothing in the evidence or testimony established a link between the alleged fear and a Convention ground, or that the applicants would be personally targeted in Haiti. The Board's decision was therefore reasonable. As this Court recently pointed out:

> [15] The fact that the principal applicant alleged many times that she does not want to return to Haiti because the country is generally unsafe is insufficient for her to be considered a refugee under section 96 of the Act or a person in need of protection under section 97 of the Act. The assessment of the applicants' fear must be made in concreto, and not from an abstract and general perspective (Ahmad v. Canada (*Minister of Citizenship and Immigration*), 2004 FC 808, 134 A.C.W.S. (3d) 493 at paragraph 22). With regard to the evidence in the record, the applicant has failed to

> meet her burden of proof to show that she would experience a personalized risk. The panel's conclusion on this point is therefore reasonable.

(*Guerilus*, above).

[50] In view of the above, the application for judicial review of the applicants is dismissed.

JUDGMENT

THE COURT ORDERS that

1. The application for judicial review is dismissed;

2. No serious question of general importance is certified.

"Michel M.J. Shore"
Judge

Certified true translation
Catherine Jones, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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