

Federal Court



Cour fédérale

Date: 20110509

Docket: IMM-6269-10

Citation: 2011 FC 535

Ottawa, Ontario, May 9, 2011

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

**NESLY OLTIME, ELIANISE OLTIME,
NADINE GERANDA OLTIME**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Background

[1] The Applicants are citizens of Haiti who seek protection in Canada. The Principal Applicant is Ms. Elianise Oltimé. Nesley Oltimé and Nadine Oltimé are the Principal Applicant's sister and brother. The Applicants have not lived in Haiti since 1998, having spent several years in the Bahamas and the United States. They allegedly fear returning to Haiti because of the political

opinions of their mother, because of their gender and because of the risk of kidnapping and persecution of Haitian exiles returning to Haiti.

[2] In a decision dated October 6, 2010, a panel of the Immigration and Refugee Board, Refugee Protection Division (the Board) determined that the Applicants were neither Convention refugees, pursuant to s. 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA), nor persons in need of protection pursuant to s. 97 of IRPA. Briefly stated, the Board found that:

- the Principal Applicant's allegation of rape in 1998 and her sister's allegation of "sexual touching" were not credible;

- the Applicants did not establish a subjective component of their fear, based on their failure to claim protection in the United States during a lengthy stay in that country;
and

- the Applicants do not face a personalized risk of torture or to life or cruel and unusual treatment or punishment upon return to Haiti.

II. Issues

[3] The Applicants argue that the decision should be quashed, raising the following issues:

1. Did the Board err by failing to properly consider the Applicants' claims under section 96 of the IRPA?
2. Did the Board err in concluding that the Applicants lacked subjective fear?
3. Did the Board err in concluding that the Applicants were not persons in need of protection?

III. Standard of Review

[4] The Applicants are questioning the findings of the Board. The applicable standard of review for each of the issues raised by the Applicants is reasonableness.

IV. Analysis

[5] Either of the Board's findings in respect of the s. 96 claim - lack of credibility and lack of subjective fear - is, if reasonable, determinative of the s. 96 aspect of the Applicants' claim. It is well-established in the case law that questions of credibility and subjective fear are determinative of

a claim under s. 96. In *Ghasemian v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1266, the Court clearly stated:

The absence of a subjective fear is fatal to a claim under s. 96 of the Act. Once the Board found that the applicant had failed to establish such a fear, there was no need for it to comment on the evidence presented to establish the objective element of her claim for that reason.

[6] Moreover, a central issue in determining the existence of subjective fear may be the claimants' delay in claiming, or failure to claim, refugee status either in Canada or elsewhere.

[7] In the present case, only the two female applicants alleged incidents of past persecution and the Board assessed these claims and concluded that the allegations were not credible. The male applicant relied on the incidents of persecution experienced by his sisters to give credence to his own claim. Once the Board concluded that the incidents alleged by the female applicants were not credible, there was no basis upon which any of the claims under s. 96 could stand. Since the Board did not believe that the incidents occurred, there was no basis upon which the female applicants could assert that they experienced gender persecution. Similarly, if the incidents did not occur, there was no evidence to establish that any of the applicants were at risk because of their relationship to their mother, nor was there evidence to establish that the male applicant would be persecuted as the brother of his sisters. Thus, the Board's credibility finding went to the heart of the s. 96 claim of all three applicants, and this finding was determinative of the claim.

[8] The question that remains is whether the Board's finding of lack of credibility was reasonable. In my view, it was. During oral testimony, neither the Principal Applicant nor her sister was able to provide further details about the alleged sexual assaults. There was no medical or

psychological evidence. Even considering the gender-related aspect of their allegations and the ages of the Applicants, the lack of credibility finding was reasonably open to the Board on the record before it.

[9] Despite the fact that credibility would have been determinative, the Board also found that the Applicants had not demonstrated subjective fear. The Board noted the Applicants' failure to claim in the United States during the lengthy times that they were there. The Board also considered their explanations for failing to claim in the United States. In my view, the Board's conclusion that the Applicants had not provided a satisfactory explanation for the delay was reasonable.

[10] As part of their s. 97 claim, the Applicants submitted, in their amended Personal Information Forms (PIFs) and during their oral testimony that they were at risk of kidnapping as returning members of the "Haitian Diaspora". Further, the female Applicants claim that, as women, they face an increased risk of gender violence.

[11] The Applicants assert that the Board did not consider all aspects of the s. 97 risk that they would face if returned to Haiti. Specifically, the Applicants submit that the Board failed to consider the risk to the Applicants from the association with their mother (who had allegedly been an outspoken critic of the political regime, at one time) or the risk to the female Applicants because of their gender.

[12] In my view, the Board did not ignore the claimed risks.

[13] With respect to the risk as members of the Haitian Diaspora, the Board referred to credible documentary evidence that the risks to persons returning to Haiti depended on their political past or other activities. The Board then explained why the Applicants did not fit such a profile. In that explanation, the Board considered the situation of the mother. As noted by the Board, their mother has not lived or been seen in Haiti since 1998. Any risk because of this past association is highly speculative.

[14] With respect to the risk of the two female Applicants, the Board referred to documentary evidence that stated that “an equal proportion of men and women are victims of attack”. While this is small comfort to those who must live in Haiti, the point is that the Board was not unreasonable in concluding that the risk faced by the Applicants, in this case, did not meet the requirements of s. 97. Specifically, the fear faced by all three of the Applicants is one that is faced generally by individuals in Haiti.

V. Conclusion

[15] For these reasons, the application for judicial review will be dismissed.

[16] Neither party proposed a question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that :

1. The application for judicial review is dismissed; and
2. No question of general importance is certified.

“Judith A. Snider”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6269-10

STYLE OF CAUSE: NESLEY OLTIME, ELIANISE OLTIME and
NADINE GERANDA OLTIME v.
THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

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**REASONS FOR JUDGMENT
AND JUDGMENT:** SNIDER J.

DATED: MAY 9, 2011

APPEARANCES:

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