Federal Court  Cour fédérale

Date: 20121030

Docket: IMM-888-12

Citation: 2012 FC 1249

Ottawa, Ontario, October 30, 2012

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

VANESSA MARIE C. PIERRE
JEAN PAUL MILIEN

Applicants

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 of Canada (the Panel) dated December 14, 2011. In that decision, the Panel determined that the applicants were not Convention refugees or persons in need of protection within the meaning of sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act].

[2] The applicants are asking the Court to quash the Panel's decision and to [TRANSLATION] "consider whether the decisions made by Member Sylvie Roy, particularly concerning refugee protection claims of Haitian nationals since her appointment to the Board in Ottawa, are valid and comply with the law, should it be confirmed that there was a breach of procedural fairness or bias on her part".

[3] The respondent consented to the application for judicial review made by Ms. Pierre, given the errors of fact made by the Panel which the Court will return to later on. However, the respondent argued at the hearing that these errors had no impact on the Panel's assessment of Mr. Milien's claim and that the application for judicial review should therefore be dismissed in respect of him.

1. Facts

[4] Mr. Milien (the male applicant or male principal applicant), his spouse and their two daughters are Haitian nationals. He alleges that his problems began in the late 1990s. While he was attending college, he openly voiced his opposition to the Lavalas party while at the same time proclaiming his support for the ideas of Convergence démocratique, the opposition party. Armed bands known as "Chimères", supporters of former president Jean-Bertrand Aristide and his party, Lavalas, then started to persecute him, but the male applicant submits that he did not take their death threats seriously until the presidential election in 2000.

[5] The male applicant states that Lavalas won the 2000 election by fraud. He and his friends organized protests to raise awareness of the government's abuses. That same year, the Chimères tried to murder him for the first time. Some members of this group, whose reputation was known to

the male applicant because he had grown up with them in the same neighbourhood of the town of Martissant, called on him to join their ranks. When the male applicant refused, they vowed to [TRANSLATION] "eliminate" him.

[6] Because of these threats, the male applicant moved to Pétion-Ville. However, his assailants found him and went to his home several times. A friend advised him to leave the country because, according to him, the Chimères could track him down anywhere in Haiti. In 2001, the male applicant left Haiti for Turks and Caicos. However, he returned to Haiti in September 2004 and stayed there until October 2005. During this stay, he married the female applicant.

[7] He returned to his country to celebrate his first wedding anniversary. At a party organized by friends on October 1, 2006, heavily armed Chimères came to his home and tried to burn the house down. On October 11, 2006, the male applicant left Haiti for good to flee his persecutors. On December 23, 2006, his family joined him in Turks and Caicos.

[8] In 2009, during a visit to the United States, the visas of the female applicant and her children were cancelled. U.S. authorities suspected that they were trying to settle illegally in the country. They finally made a claim for refugee protection in Canada on May 23, 2009. The male principal applicant subsequently followed them and filed his own claim a month later, on June 17, 2009.

2. Impugned decision

[9] The applicants' claim was rejected because they were found not to be credible. First of all, the Panel noted that the male principal applicant had never belonged to a political party, although he did openly express his opinions. Next, the Panel found that the applicants had not given a consistent, full and accurate account of their experience. On this point, the Panel noted that the male principal applicant had never mentioned living in Pétion-Ville in his Personal Information Form (PIF), and it did not accept his explanation to the effect that he had simply indicated his various addresses in Haiti [TRANSLATION] "in general terms". At any rate, the Panel added that even if it gave the male applicant the benefit of the doubt on this point, Pétion-Ville is located only 11 or 12 kilometres from Martissant. Considering that the applicant knew his persecutors very well because he had grown up with them in the same neighbourhood, the Panel was of the opinion that it was unlikely that he could have thought he would be safe in a place so close to home.

[10] Moreover, the Panel noted that when the male applicant left Haiti for Turks and Caicos, he had no relatives or employment. The Panel concluded from this that the applicant had probably left his country to look for work rather than to flee his persecutors.

[11] The applicant also alleged that he had lived in Haiti without incident from September 2004 to October 2005, while he was actively looking for employment. However, the same armed group that was after him in 2001 allegedly tried to set his house on fire while he was celebrating his first wedding anniversary, in October 2006. The Panel was of the opinion that the male applicant had fabricated this alleged incident to strengthen his refugee protection claim.

[12] The Panel was also of the view that the fact that the male applicant may have had problems in the past because of his political opinions did not necessarily mean his persecutors would be waiting for him when he returned to Haiti. Even if the male applicant's narrative were credible, the fact remained that he had left Haiti over five years ago and it was doubtful that the Chimères would still be interested in him.

[13] The Panel then reviewed the current situation in Haiti. On the basis of the documentary evidence, the Panel found that the Chimères were no longer being used to suppress political opponents but were now an ordinary criminal organization. According to the Panel, the evidence showed that the Haitian authorities were making considerable efforts to eradicate the problem of organized crime. Consequently, the Panel found that the applicants would at most be subject to the same risk currently faced by all citizens of Haiti, that is, a generalized risk. The applicants did not show any serious possibility of persecution.

[14] Finally, the Panel considered the allegation that the male principal applicant's wife and daughters would be at risk of persecution by reason of their membership in the particular social group of [TRANSLATION] "Haitian women at risk of and fearing persecution". On this point, the documentary evidence was to the effect that rape is widely used by criminals to terrorize the public or as a political weapon. Women under the age of 18 are particularly at risk of sexual violence. However, the Panel remarked that Haitian authorities had been making efforts to address this problem since the earthquake in January 2010.

[15] In the present case, the Panel noted that the three sisters and the mother of the female applicant live in Port-au-Prince. At no time did the female applicant state that a member of her family had been persecuted or ill-treated. In short, the Panel was of the opinion that, given the applicants' profile and their testimony, they had not discharged their burden of establishing the existence of a serious possibility of persecution that would warrant granting them refugee status.

3. Issues

[16] This application for judicial review raises the following issues:

A. Did the Panel breach the principles of natural justice?

B. Did the Panel make a reviewable error in its assessment of the evidence?

C. Did the Panel err in not conducting a separate analysis of the evidence in respect of section 97 of the Act?

D. Did the Panel make an overriding error regarding the facts?

E. Should the question proposed by the applicants be certified?

4. Standard of review

[17] Any question related to the principles of procedural fairness is subject to the correctness standard of review: *Canadian Union of Public Employees (C.U.P.E.) v Ontario (Minister of Labour)*, 2003 SCC 29 at paras 100-104, [2003] 1 SCR 539; *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at para 111, [2006] 3 FCR 392.

[18] Assessing the evidence and determining the facts fall within the expertise of the Panel. Issues 2 and 4 are therefore subject to the reasonableness standard of review (*Cyriaque v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1077 at para 10 (available on CanLII)).

[19] As for the issue of whether the Panel erred in not conducting a separate analysis in respect of section 97 of the Act, this is a pure question of law reviewable on the correctness standard of review (*Plancher v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1283 at para 12, 163 ACWS (3d) 110 [*Plancher*]).

5. Relevant legislation

a. Sections 74 and 97 of the *Immigration and Refugee Protection Act* provide as follows:

DIVISION 8	**SECTION 8**
Judicial Review	**Contrôle judiciaire**
Judicial review	**Demande de contrôle judiciaire**
74. Judicial review is subject to the following provisions:	**74.** Les règles suivantes s'appliquent à la demande de contrôle judiciaire :
…	[…]
(*d*) an appeal to the Federal Court of Appeal may be made only if, in rendering judgment, the judge certifies that a serious question of general importance is involved and states the question.	*d*) le jugement consécutif au contrôle judiciaire n'est susceptible d'appel en Cour d'appel fédérale que si le juge certifie que l'affaire soulève une question grave de portée générale et énonce celle-ci.

PART II

Refugee Protection

Division I

Person in need of protection

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

(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or
(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,
(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,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or

PARTIE II

Protection des réfugiés

Section I

Personne à protéger

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) 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) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(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) 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) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins

medical care.	médicaux ou de santé adéquats.
Person in need of protection	**Personne à protéger**
(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.	(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

6. Analysis

A. *Principles of natural justice*

[21] The applicants raise two arguments for quashing the decision of the Panel as a matter of natural justice. First, they submit that the Panel did not clearly indicate which parts of the testimony it found not to be credible and thus did not provide sufficient reasons for its decision. They argue that the Panel made a finding based on speculation rather than on facts adduced in evidence. However, a close reading of the impugned decision does not give credit to this argument.

[22] The Panel mentioned several items of evidence on which it based its decision to dismiss the claim for refugee protection. First, the Panel found the applicants not to be credible and noted implausibilities and inconsistencies in the testimony of the male principal applicant. For example, his refugee protection claim form and PIF do not indicate that he moved from Martissant to Pétion-Ville sometime around the year 2000, as he alleged at his hearing.

[23] Furthermore, the Panel found it to be implausible that the male applicant could have thought that his persecutors would not find him if he moved to Pétion-Ville, given the short distance

between Martissant and Pétion-Ville. It may well be that, in the specific context of Haiti, the short distance between these two towns does not reflect how far removed from each other they really are. However, no evidence to this effect was submitted to the Panel. The Panel also remarked that the male principal applicant had not run into any problems when he stayed in Haiti from September 2004 to October 2005.

[24] The Panel was entitled to take into account that the male applicant was unemployed when he left Haiti for the first time in 2001, and that he was also without a job the whole time he was back in his country from September 2004 to October 2005, and infer from this that he had probably left Haiti because of financial reasons rather than because of a fear of persecution. Clearly, the Panel could have gone into greater detail in its reasons and presented them in a more structured and coherent manner. But the fact remains that the decision is sufficiently clear to allow the applicants to understand why their claim for refugee protection was rejected.

[25] It is true that the decision's reasonableness turns not only on the outcome, but also on the decision-making process and the intelligibility of the reasons underlying it. However, the Supreme Court of Canada recently noted that the inadequacy of reasons is not a stand-alone basis for setting quashing a decision, and that the reasons must be read together with the outcome so that a reviewing court can determine whether the conclusion is within the range of acceptable outcomes, having regard to the facts and the law: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 14-16, [2011] 3 SCR 708. In the present case, I find that the Court has enough evidence to assess the reasonableness of the decision made by the Panel.

[26] Second, the applicants argue that the Panel's failure to render a decision on the basis of the evidence raises a reasonable apprehension of bias. To determine whether there is such an apprehension, the Court must ask itself "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think it more likely than not that [the Panel], whether consciously or unconsciously, would not decide fairly?" (*Committee for Justice and Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369 at p 394 (available on CanLII)).

[27] An allegation of bias or of a reasonable apprehension of bias is a serious one that calls into question the integrity of the decision-making process. However, the applicants have not provided extensive and persuasive evidence demonstrating that the Panel was indeed biased. It is certainly open to the applicants not to agree with the Panel's assessment of the evidence. But even an erroneously drawn conclusion does not necessarily raise a reasonable apprehension of bias. I therefore find that the applicants' argument is without merit, and there is no reason to believe that the Panel was biased in its assessment of the applicants' file or that there was even an appearance of bias.

B. *Assessment of the evidence*

[28] The applicants submit that the Panel erred in its assessment of the evidence with regard to both their credibility and the existence of adequate state protection.

[29] Regarding the applicants' credibility, it must be noted that the arguments made against the Panel's decision are very brief. Counsel for the applicants essentially argued that the inferences made by the Panel are not based on the evidence and are more akin to speculation. This is plainly not enough to warrant this Court's intervention. As this Court noted in *Chowdhury v Canada (Minister of Citizenship and Immigration)*, 59 ACWS (3d) 949, 32 Imm. L.R. (2d) 250, the applicants must show in what way they think the Panel erred, rather than simply make general, speculative statements. In the present case, no effort was made at such a demonstration; instead, the applicants simply stated that any reasonable person would find them to be credible. Given the deference that this Court must afford to the Panel's findings regarding the applicants' credibility, such a statement is clearly insufficient to conclude that the Panel erred.

[30] Regarding the existence of adequate state protection, the applicants suggest that the Panel ignored the documentary evidence indicating that the Haitian authorities are neither willing nor able to protect their citizens. Although this argument is not without merit, on its own, it is insufficient to cause the Panel's decision to be quashed.

[31] The Panel no doubt had good reason to write that the authorities are making considerable efforts to put an end to the activities of criminal gangs. It is less clear that these efforts have been successful and that the protection afforded by the authorities is adequate. Indeed, the applicants rightly point out that the Panel made no mention of the documentary evidence reporting the authorities' inability to eradicate crime and violence. For example, the documentary evidence mentions the following:

> According to the Head of operations of MINUSTAH for the western region of Port-au-Prince, the chimères do not occupy any particular

> territory, unlike other criminal groups (28 May 2008). The chimères may have become involved with other criminal groups and can therefore be found throughout Haiti (*ibid*.). They are trying to return to Cité-Soleil, despite the presence of international forces (*ibid*.).
>
> Panel Record, p 139

[32] Regarding sexual violence against women, an article dated January 2011 and published by Amnesty International indicates as follows:

> Lack of respect for human rights and entrenched discrimination against women are among the factors that help create an environment in which gender-based violence is more likely. Another key factor in increasing the risk of such violence is the failure to bring those responsible for attacks to justice. In Haiti, those committing these crimes know that the chances of their being brought to justice are slim to non-existent. The prevailing impunity for violence against women is a symptom of the long-term failings of Haiti's justice and law enforcement systems in making the protection of women and girls and investigation and prosecution of these crimes a priority.
>
> Panel Record, p 246

[33] There is no doubt that the Panel erred in ignoring this evidence. Indeed, the Panel had to consider this evidence and explain why it did not accept it: *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 157 FTR 35 at para 17, 83 ACWS (3d) 264. However, this error is not fatal in the circumstances of this case.

[34] First, the Panel did not believe the male applicant's story and rejected his allegations to the effect that he had been persecuted because of his political opinions. This is a decisive finding which, on its own, allowed the Panel to conclude that there was no basis to the male applicant's claim under section 96 of the Act. In this context, there was no need to rule on the protection the Haitian state could offer the male applicant. Moreover, even if we assumed that Mr. Milien was credible,

the Panel found that he would not be targeted by the Chimères or by supporters of the Lavalas Party. In arriving at this conclusion, the Panel considered the passage of time and the documentary evidence establishing that the Chimères are no longer used for political purposes but are instead operating as common criminals for their own gain. Such being the case, the Panel concluded that Mr. Milien would not be more at risk than the general public, a conclusion that it could reasonably draw by relying on the ample case law of this Court: see, for example, *Prophète v Canada (Minister of Citizenship and Immigration)*, 2008 FC 331, 167 ACWS (3d) 151; *Acosta v Canada (Minister of Citizenship and Immigration)*, 2009 FC 213 (available on CanLII); *Perez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 345 (available on CanLII); and *Guifarro v Canada (Minister of Citizenship and Immigration)*, 2011 FC 182 (available on CanLII).

[35] The Court can of course understand that Mr. Milien would not agree with this assessment of the evidence, and that he would have preferred to see the Panel give more weight to the observations of Professor Cécile Marotte, according to which a person having had problems because of his or her political opinions is likely have persecutors waiting for him or her to return. However, it is trite law that it is up to the Panel to weigh the documentary evidence and draw its own conclusions, so long as the Panel considers all of the evidence brought to its attention, which is just what it did in the present case.

C. *Separate analysis under section 97 of the Act*

[36] The applicants allege that the Panel failed to do a separate analysis of their refugee protection claim under section 97 of the Act. This claim has no merit.

[37] The case law of this Court is clear. The Panel is not required to carry out a separate analysis on personal risk in accordance with section 97 of the Act where the claimant is not credible and the documentary evidence does not justify it: see, *inter alia*, *Plancher,* above, at paras 16-17; *Kaur v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1710 at para 16, 150 ACWS (3d) 689. The applicants cannot criticize the Panel on this point because they have not shown that the Panel made an error regarding the basis for the reasons dealing with the lack of credibility. What is more, the Panel implicitly carried out this analysis in finding that the male applicant would not be subjected to a personalized risk, as mentioned in the previous section of the present reasons for judgment.

D. *Error of fact*

[38] The applicants submit that the Panel made significant errors of fact that discredit its decision. At paragraphs 42 and 43, the Panel notes the following facts:

- The female applicant is 38 years old.
- The female applicant has three sisters, aged 50, 48 and 40 years.
- The female applicant received her law degree in Gonaïves in 2003.
- The female applicant's mother lived in Aquin before moving to Port-au-Prince.
- The female applicant never alleged that a member of her family had been persecuted or ill-treated.

[39] However, it turns out that the female applicant was born on April 2, 1978, which means that she was only 33 years old at the time of the hearing. Furthermore, she has no sisters and has never taken law courses or received a law degree. Finally, her mother has always lived in Port-au-Prince.

[40] Counsel for the applicants submitted that the Panel had confused this case with another one that had been pleaded before the same member a few months earlier. Whatever the reason for the factual errors described above, these errors are evident and material and should clearly cause the decision to be quashed, at least insofar as the female applicant's claim is concerned, as counsel for the respondent herself conceded.

[41] But what about Mr. Milien's claim? Counsel for the respondent submitted that these errors had no impact on the assessment of his claim, since the grounds of persecution alleged by the spouses are not the same. It is true that, on their face, the factual errors made by the Panel appear to be inconsequential with regard to the credibility of Mr. Milien's narrative. But can we be sure of this? Is it possible that the Panel confused two cases, but only for one of the two adult applicants? Although plausible, this scenario appears unlikely.

[42] Incidentally, it appears from the Panel's reasons that it examined the applicants' claim from an overall perspective, as it should be, and by taking into account their respective testimonies. This is what emerges from the Panel's reasons, in particular paragraph 45, which reads as follows:

> Considering the claimants' profiles, and considering their testimonies with respect to the elements that led to their fear, the panel is of the opinion that the claimants failed to discharge their burden of establishing that they would face a serious possibility of persecution on one of the Convention grounds should they return to Haiti.

[43] In this context, I think it would be better to quash the Panel's decision in its entirety and refer the whole matter back to a differently constituted panel for reconsideration on the basis of these reasons for judgment. The claim was made by the applicants as a family unit, and that is how

it should be considered. The credibility of the two principal applicants, in particular, must be assessed from an overall perspective, and the errors regarding one of the applicants are necessarily likely to taint this assessment.

E. *Certified question*

[44] The male applicant asked that the following question be certified:

> [TRANSLATION]
> The Federal Court is asked to consider whether the decisions made by Member Sylvie Roy, particularly concerning refugee protection claims of Haitian nationals since her appointment to the Board in Ottawa, are valid and comply with the law, should it be confirmed that there was a breach of procedural fairness or bias on her part.

[45] Whereas the Panel did not breach the principles of natural justice and the applicants have not established bias or even an appearance of bias in their case, this question therefore cannot be accepted for certification.

[46] In any event, the proposed question does not pass the test established by the Federal Court of Appeal for certifying a question pursuant to paragraph 74(*d*) of the Act. Only a serious question of general importance which would be dispositive of an appeal may be certified:

> The corollary of the fact that a question must be dispositive of the appeal is that it must be a question which has been raised and dealt with in the decision below. Otherwise, the certified question is nothing more than a reference of a question to the Court of Appeal. If a question arises on the facts of a case before an applications judge, it is the judge's duty to deal with it. If it does not arise, or if the judge decides that it need not be dealt with, it is not an appropriate question for certification.
>
> *Zazai v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89 at para 12, 9 ACWS (3d) 578.

[47] In the present case, the proposed question suggests reviewing several decisions of Member Sylvie Roy which are not before this Court. The question that the Court is asked to consider in connection with this application for judicial review is not whether Ms. Roy may have erred in other decisions, but is limited to whether she made a reviewable error in assessing the applicants' claim. Accordingly, the question proposed by the applicants is not relevant and would not be dispositive of the appeal from the decision of this Court, since it is not a question which the Court must consider in order to render its decision. It would therefore be inappropriate and incorrect to certify it.

7. Conclusion

[48] For the reasons above, the application for judicial review is allowed. The matter is therefore referred back to a differently constituted panel for reconsideration.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that this application for judicial review be allowed and that the matter be referred back to a differently constituted panel for reconsideration.

No serious question of general importance is certified.

"Yves de Montigny"
Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

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