Federal Court  Cour fédérale

Date: 20130404

Docket: IMM-3775-12

Citation: 2013 FC 316

Ottawa, Ontario, April 4, 2013

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

GUENSON BAZELAIS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The applicant seeks judicial review of a decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board stating that he is not a Convention refugee or a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 [IRPA]. The applicant challenges the RPD's finding that he was not a Convention refugee or a person in need of protection because he should, as a Haitian civil servant, have sought

state protection; and argues that the RPD failed to analyze his fear of persecution in light of his evidence that his persecutors have influence in the Haitian government.

II. Judicial procedure

[2] This is an application under subsection 72(1) of the IRPA for judicial review of the decision of the RPD, dated February 23, 2012.

III. Facts

[3] The applicant, Guenson Bazelais, is a citizen of Haiti, born in 1973.

[4] The applicant alleges that, since April 2000, he has held various positions with the Ministry of Justice and Public Security in Haiti [Haitian MJPS], most recently the position of Coordonnateur de l'Unité Informatique [Coordonnateur].

[5] The Applicant claims that he designed three approved projects (valued at $1,047,000.00 USD) for the expenditure of funds allocated to the Haitian MJPS.

[6] In March 2010, the Applicant claims that he refused to award one of these projects to an unqualified company in a conflict of interest position.

[7] According to the Applicant, the Chief of Cabinet of the Haitian MJPS [Chief] and another member of the Cabinet of the Haitian MJPS [Cabinet Member] threatened to discredit the Applicant

to the Minister of Justice and Public Security of Haiti [Minister of JPS in Haiti], have him sent to prison, and kill him unless he cooperated.

[8] In April 2010, the Applicant claims that his car was vandalized four times. The Applicant's chauffeur allegedly told the Applicant that these acts of vandalism were ordered by the Cabinet Member and that, if he continued to work at the Haitian MJPS and to oppose the Chief and the Cabinet Member, he would be killed.

[9] In May 2010, the Applicant claims that he was unlawfully detained by an employee of the Haitian MJPS linked to the Cabinet Member.

[10] On June 2, 2010, the Applicant claims that he had a heated discussion with the Minister of JPS in Haiti regarding an email exchange between the Minister of JPS and Spanish authorities. The Applicant submitted translated copies of these emails [Spanish Emails] to the RPD (Certified Tribunal Record (CTR) at pp 151 – 160).

[11] On August 24, 2010, the Applicant entered Canada as a visitor.

[12] On August 26, 2010, the Applicant learned he had been dismissed from his position.

[13] Later, the Applicant claims he received a letter, dated August 24, 2010, and signed by the Minister of JPS in Haiti [Minister's Letter] informing him that he had been dismissed of his duties as Coordonnateur for grave misconduct because he sent an email containing erroneous information

to the prejudice of the Haitian government. The Applicant claims that he will be considered a traitor as a consequence of the Minister's Letter and that it gives "carte blanche" to any Haitian to murder him.

[14] On October 5, 2010, the Applicant claimed refugee protection.

IV. Decision under review

[15] The RPD found that the Applicant's testimony to be direct, detailed, and spontaneous. It was satisfied that the Applicant had a good understanding of the Haitian civil service and was a Haitian civil servant.

[16] The RPD did not, however, accept the Applicant's allegations that he would be persecuted in Haiti. Since the RPD concluded that the Applicant had not established that he had been dismissed entirely from the Haitian public service, it concluded that the Applicant should have – but did not – seek state protection.

[17] The RPD did not accept that Applicant was dismissed from the Haitian civil service entirely, even if he was dismissed from the post of Coordonnateur. According to the RPD, the Applicant did not present evidence that he was dismissed from the Haitian civil service in accordance with Article 236.2 of the Haitian Constitution, which provides:

> The civil service is a career. No official may be hired except by competition or by meeting other conditions prescribed by the Constitution and by law, nor may he be dismissed except for causes specifically determined by law. Dismissals must in all cases be ruled upon by the Court of Administrative Disputes (CTR at p.186).

Since the Applicant did not establish that his dismissal had been ruled upon by a court of administrative disputes, the RPD did not believe he was dismissed entirely from the Haitian civil service. In support, the RPD stated that the Applicant did not respond satisfactorily to questioning as to whether he pursued any available recourse for his alleged dismissal or whether his dismissal from the position he last held with the Haitian MJPS prevented him from working anywhere in the Haitian civil service. In the RPD's view, the Applicant's evidence on corruption in Haiti did not respond to this question, nor did submissions on the meaning of terms used in the Minister's Letter. The RPD noted Article 237 of Haiti's Constitution, which provides that "Les Fonctionnaires de carrière n'appartiennent pas à un service public déterminé mais à la Fonction Publique qui les met à la disposition des divers Organismes de l'État" [Career service officials are not members of any particular Government agency but are members of the civil service, which makes them available to the various Government agencies] (CTR at p 186). From this, the RPD inferred that the Applicant could work in another civil service notwithstanding his dismissal from the post of Coordonnateur.

[18] Nor did the RPD accept that the Applicant would be persecuted in Haiti because he was considered a traitor for communicating erroneous information to Spanish authorities. In the RPD's view, the Applicant was exaggerating his situation to support his claim for refugee protection. The Applicant, it reasoned, would not be considered a traitor since he was not dismissed entirely from the Haitian civil service.

[19] The RPD did not dispute the authenticity of the Applicant's documentary evidence on the Minister of JPS in Haiti, general corruption in Haiti, relationships between political gangs and

political authorities, and deception by persons implicated in the regimes of Presidents Préval and Aristide.

[20] Nevertheless, the RPD could not be persuaded that the Applicant would be considered a traitor on the basis of the Spanish emails. The content of the Spanish emails (which discussed the attendance of the Minister of JPS at a conference in Spain) did not suggest that the Applicant would be considered a traitor on their basis. Moreover, the RPD found that the Spanish Emails did not substantiate the Applicant's claim that he had actually intervened in the exchange of these emails. The panel speculated that there were other factors reflecting the reality of the Applicant's situation that he, intentionally or unintentionally, did not communicate.

[21] While the RPD accepted that Haiti is plagued by poverty, deception, and corruption, it found that the documentation presented by the Applicant illustrated that the judicial system in Haiti remain secure. According to the RPD, the documentary evidence also showed that the treatment of state agents continued to proceed according to legal and regulatory measures on accountability of ministers, notably the laws on civil service and the rights and obligations of officials. The RPD noted legislation providing that officials had rights to state protection against attack, threat, and other injury.

[22] The RPD also reasoned that the Applicant was obliged to seek state protection because the Minister of JPS had resigned in response to accusations brought before the Haitian Senate. The RPD noted that the very person who the Applicant alleged to be a persecutor – the Minister of JPS – was himself before state institutions for acts of wrongdoing and collusion in fraud. It was insufficient, in

the view of the RPD, for the Applicant to argue that he had no obligation to seek state protection simply on the basis that the Minister's Letter would condemn him to persecution by all state agents.

[23] The RPD also found the Applicant's fear of persecution by the MJPS Chief and the Cabinet Member did not warrant refugee protection because his risk was a risk of criminality. According to the RPD, persons fearing persecution on the basis of criminality do not belong to a particular social group under section 96 of the IRPA.

[24] The RPD also found that, if his claim that the Chief and Cabinet Member would target him for persecution was true, the Applicant would have access to state protection. The RPD reasoned that the Applicant's documentation demonstrated that he would, as a civil servant, have been able to seek state protection complying with Haiti's general legislation on civil servants. In the absence of supporting evidence, the RPD did not accept the Applicant's argument that state protection would remain to unavailable because the Chief, Cabinet Member, and the Minister of JPS continued to influence government affairs, notwithstanding the regime change. In the RPD's view, the removal of President Préval and the Minister of JPS from office and the accusations against the latter were sufficient to dispose of this argument.

V. Issues

[25] (1) Are the RPD's credibility findings reasonable?

(2) Is the RPD's analysis of objective fear reasonable?

(3) Is the RPD's state protection analysis reasonable?

VI. Relevant legislative provisions

[26] The following legislative provisions of the IRPA are relevant:

Convention refugee	**Définition de « réfugié »**
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.
Person in need of protection	**Personne à protéger**
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	*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

Convention Against Torture; or	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.
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.

VII. Position of the parties

[27] The Applicant argues that it would be objectively unreasonable to expect him to seek state protection because it would not reasonably been forthcoming to him. According to the Applicant, the state protection finding did not consider that his alleged persecutors continue to have influence in Haiti. Since high-ranking state agents were his persecutors, the Applicant submits that he rebutted the presumption of state protection.

[28] The Applicant also submits that the RPD's state protection finding was unreasonable given the country condition evidence. The Applicant cites that state security in Haiti is problematic, corruption is rife despite remedial initiatives, government continues to be seen as a means to personal enrichment, and the justice system and effectiveness of Haitian police are paralyzed in the wake of the Haitian earthquake of 2010.

[29] The Applicant submits that the RPD made vague and ambiguous credibility findings and that credibility is not at issue in this Application. The Applicant stresses that the RPD found his testimony direct and detailed and his documentation credible.

[30] Nevertheless, the Applicant submits that the conclusion that he was not dismissed from the Haitian civil service entirely but only from the position of Coordonnateur is an implicit and unreasonable credibility finding. In his view, the RPD arrived at this inference without considering that his dismissal implicitly identified him as a traitor, endangering his life. The RPD's finding, the Applicant argues, that he exaggerated the consequences of the Minister's Letter is unfounded

speculation and its discussion of persecution by the Chief and the Cabinet Member is also an implicit credibility finding.

[31] The Applicant submits that his allegations are presumed to be true unless there are reasons to doubt their truthfulness. While the Applicant recognizes that deference is owing to the RPD's credibility findings, he argues that its credibility findings on him are based on secondary details and erroneous findings of fact made in a perverse or capricious manner, without regard to the material before it. The Applicant further assails the RPD's credibility findings on the basis that they were couched in vague and general terms. According to the Applicant, the RPD must justify its credibility findings with specific and clear reference to the evidence, avoid basing its credibility findings on a microscopic evaluation of peripheral issues, and view its credibility findings from the social and cultural perspective of applicants.

[32] Finally, the Applicant argues that the RPD's reasons are inadequate and that the RPD did not assess his objective fear of persecution in light of his particular circumstances.

[33] The Respondent argues that it was reasonable to conclude that the Applicant's claims were not credible given the documentation and that the RPD may prefer documentary evidence to an applicant's testimony. It was reasonable to conclude the Applicant was not dismissed entirely from the Haitian civil service given: (i) the language of the Minister's Letter; (ii) the absence of evidence of dismissal according to the provision regarding the dismissal of civil servants under Article 236.2 of the Haiti's constitution; and, (iii) the language of the letters initially appointing the Applicant to his position in the Haitian MJPS. As for the Applicant's claim that he would be considered a traitor

as a result of the Minister's Letter, the Respondent submits that nothing in the documentation supported this allegation. According to the Respondent, the Spanish emails did not support this position since they do not demonstrate that the Applicant intervened in the email exchange between the Minister of JPS and the Spanish authorities.

[34] In the Respondent's view, it was also reasonable to conclude that state protection was available to the Applicant. The Respondent argues that the various protections available to civil servants support the RPD's state protection finding.

[35] The Respondent also submits that the RPD's reasons are complete, clear, and precise.

VIII. Analysis

Standard of Review

[36] The standard of reasonableness applies to the RPD's assessment of an applicant's well-founded fear of persecution, available state protections, and credibility (Csonka v Canada (Minister of Citizenship and Immigration), 2012 FC 1056).

[37] Where the standard of reasonableness applies, the Court may only intervene if the RPD's reasons are not "justified, transparent or intelligible". To satisfy this standard, a decision must also fall in the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (Dunsmuir v New Brunswick, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

[38] The Applicant's challenge to the adequacy of the RPD's reasons is not sustainable. In *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708, the Supreme Court of Canada held that, where reasons are given, challenges to the reasoning or result are addressed in the reasonability analysis. Newfoundland and Labrador Nurses' Union states that "reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of reasonable outcomes" (para 14). Reviewing courts may not "substitute [their] own reasons" but may "look to the record for the purpose of assessing the reasonableness of the outcome" (para 15).

(1) Are the RPD's credibility findings reasonable?

[39] The RPD's credibility finding on the Applicant's account of his criminal targeting by the Chief and Cabinet Member is not reasonable.

[40] In *Hilo v Canada* (Minister of Employment and Immigration), [1991] FCJ No 228 (QL/Lexis), the Federal Court of Appeal held that a negative credibility finding must be expressed in "clear and unmistakable terms" (para 6). The RPD's treatment of the Applicant's account of his persecution by the Chief and the Cabinet Member is not a clear and unmistakable credibility finding:

> [20] Par ailleurs, le tribunal estime que le demandeur, durant son témoignage et dans les documents qu'il a présentés, a surtout démontré qu'il avait en face de lui, si toutefois son histoire était véridique, certes, des individus ayant occupé des fonctions de haut rang dans le cadre d'une administration bien précise, mais qui ne sont autres que des criminels souhaitant s'attaquer à sa personne pour avoir été frustrés, si toutefois l'histoire racontée par le demandeur était véridique, d'avoir accès à un marché public, ce que le demandeur ne leur a pas permis d'obtenir. [...] [La Cour souligne].

This falls far short of being clear and unmistakable. First, the RPD's analysis (as the Federal Court of Appeal put it in Hilo, above) "cast[s] a nebulous cloud" (para 6) over the Applicant's testimony without making any actual credibility finding. Second, the RPD's vague and ambiguous credibility analysis does not allow this Court to evaluate the reasons for which the RPD presumably did not believe that the Applicant was persecuted by the Chief and Cabinet Member. It is a long-standing principle of this Court that an applicant's sworn allegations are presumed true unless there are reasons to doubt their truthfulness (*Maldonado v Canada (Minister of Employment and Immigration*), [1980] 2 FC 302 (FCA) at para 5). The corollary is that, while the RPD need not summarize all aspects of a claim, it must "justify its credibility findings with specific and clear reference to the evidence" (Leung v Canada (Minister of Employment and Immigration) (1994), 81 FTR 303 at para 14).

[41] The proposition that the RPD's credibility analysis must be clear, unmistakable, and justified with specific and clear reference to the evidence is consistent with *Newfoundland and Labrador Nurses' Union*. While *Newfoundland and Labrador Nurses' Union*, above, requires this Court to "look to the record for the purpose of assessing the reasonableness of the outcome" (para 15), a reviewing court is not positioned to evaluate an applicant's testimony. On judicial review, a court cannot discern an applicant's demeanour from a tribunal record to determine if the RPD's analysis falls in the range of acceptable, possible outcomes. Nor, moreover, should this Court justify the RPD's credibility findings on the basis of potential inconsistencies and implausibilities in the tribunal record that the RPD did not itself identify. In *Canada (Attorney General) v Kane*, 2012 SCC 64, the Supreme Court of Canada held that a reviewing Court could not draw a finding of fact from the record that the administrative decision-maker below did not make.

The Court stated that the reviewing court "erred by effectively undertaking its own assessment of the record and attributing [a motive for the employment decision of a respondent] that the Tribunal did not find. It was not appropriate for the Federal Court of Appeal, on a judicial review, to intervene in the Tribunal's decision to this extent" (para 9). Similarly, this Court is not prepared to undertake a separate credibility analysis that the RPD did not itself make.

[42] The RPD's decision also lacks a general credibility finding that could justify a negative credibility assessment of the Applicant's claim of criminal victimization. The RPD's conclusion that the Applicant could not credibly establish a serious possibility of risk is not a clear, unmistakable, or justified credibility analysis: "Consequently, the panel concludes that the claimant did not credibly establish a serious possibility of persecution on any of the Convention grounds" (para 19). First, this passage follows the RPD's substantive discussion of the Applicant's well-founded objective fear, not a discussion of whether the RPD believed the Applicant. This belies the conclusion that the RPD's comments at paragraph 19 of its decision constitute a credibility analysis. Second, the RPD's credibility assessment, even if one accepts that paragraph 19 is a credibility assessment, remains unjustified by specific and clear reference to the evidence.

(2) Is the RPD's analysis of objective fear reasonable?

[43] This Court agrees that the RPD's objective fear analysis, in respect of his claim that he was criminally targeted by the Chief and Cabinet Member, is unreasonable.

[44] The RPD concluded that the Applicant's criminal victimization did not constitute a ground for refugee protection because victims of criminality are not a particular social group under section 96 of the IRPA. The RPD was reasonable to find that fear of criminal victimization does not constitute a Convention ground (*Olvera v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1048 at para 34).

[45] Nevertheless, the RPD's decision was unreasonable for failing to consider whether the criminal victimization of the Applicant made him a person in need of protection within the meaning of section 97 of the IRPA notwithstanding its section 96 analysis. Although failing to conduct a section 97 analysis after a section 96 analysis is not always necessarily fatal, it may be required if the circumstances dictate (*Brovina v Canada (Minister of Citizenship and Immigration)*, 2004 FC 635, 254 FTR 244 at para 17-18).

[46] The Applicant's circumstances as a victim of criminal victimization required a section 97 analysis The Applicant could not satisfy the section 96 analysis because, as a victim of criminality, he was not a member of a particular social group under the test set out by the Supreme Court of Canada in *Canada (Attorney General) v Ward*, [1993] 2 SCR 689. Whether the Applicant could be categorized as a member of a particular social group does not speak to whether he was nonetheless a person whose removal would, under section 97 of the IRPA, subject him personally to a risk to his life or to a risk of cruel and unusual treatment or punishment.

[47] This Court has found that persons targeted by criminal violence may fall within the scope of section 97 of the IRPA (*Portillo v Canada (Minister of Citizenship and Immigration)*, 2012 FC 678.

In *Portillo*, Justice Mary Gleason proposed the following test for determining if a victim of crime faces a sufficiently personal risk to engage section 97: (i) assess whether the claimant "faces an ongoing or future risk", considering the nature and basis for the risk; and, (ii) compare the risk to that "faced by a significant group in the country to determine whether the risks are of the same nature and degree" (para 40-41).

(3) Is the RPD's state protection analysis reasonable?

[48] In respect of the Applicant's account of his criminal victimization by the Chief and Cabinet Minister, this Court also finds the RPD's state protection finding unreasonable.

[49] It was unreasonable for the RPD to infer that the Applicant had sufficient state protection from legislative protections available to civil servants without considering whether those protections are effective. The RPD placed great weight on a legislative provision providing that officials have the right to state protection from attacks, threats, and other injuries (CTR at p 187). In *Kovacs v Canada (Minister of Citizenship and Immigration)*, 2010 CF 1003, however, this Court held that state protection must be effective, even if a country's legislation demonstrates a willingness to protect its citizens (para 66). Country condition evidence that was part of the National Documentation Package before the RPD suggests that, since the earthquake in January 2010, the Haitian judiciary and police have become paralyzed (Response to Information Request, HTI103346.E, dated 16 February 2010).

[50] Having found that the RPD's credibility, risk, and state protection analysis of the Applicant's allegation that he is a target of criminal violence was not reasonable, it is not necessary to consider the RPD's findings with respect to the Applicant's allegation that he will be considered a traitor on the basis of the Minister's Letter.

IX. Conclusion

[51] For all of the above reasons, the Applicant's application for judicial review is granted.

JUDGMENT

THIS COURT'S JUDGMENT is that Applicant's application for judicial review be granted and the matter be returned for determination anew (*de novo*) by a differently constituted panel. No question of general importance for certification.

Michel M.J. Shore
Judge

FEDERAL COURT

COUNSEL OF RECORD

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