Federal Court  Cour fédérale

Date: 20180501

Docket: IMM-3714-17

Citation: 2018 FC 466

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, May 1, 2018

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

MARGARETTE DUVERSIN
and JOANNA MICHEL

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] Joanna Michel and her mother, Margarette Duversin (the parties have asked that the style of cause be amended in order to correct the spelling of the applicant's name) are seeking judicial review of a decision by the Refugee Protection Division [RPD or panel] rejecting their refugee

claim. This case primarily involves the RPD's application of the *Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution* [Guidelines 4] and the risks of kidnapping and rape that young Haitian women face upon returning to their country.

II. Facts

[2] Ms. Michel alleges to be a member of the Alternative League for Haitian Progress and Emancipation (Ligue alternative pour le progrès et l'émancipation haïtienne) [LAPEH]. Following the presidential elections of November 20, 2016, supporters of the Fanmi Lavalas party wanted to avenge their party's defeat through violent acts against their political adversaries, including LAPEH members.

[3] On December 13, 2016, while the applicants were travelling by car, three men on motorcycles allegedly began following them, signalling them to stop their vehicle and threatening them with firearms. The applicants were able to get away by heading to an intersection where police were directing traffic. Seeing this, the three men apparently sped up and rode off [TRANSLATION] "straight ahead." On December 18, 2016, two men on motorcycles allegedly again followed the applicants, who were able to flee once more.

[4] Shortly after these incidents, the applicants allege that they began receiving anonymous phone calls two or three times a month, during which they were threatened with kidnapping, rape and murder.

[5] On February 27, 2017, at around 11:00 p.m., they apparently heard gunshots outside their residence; some bullets reportedly struck the walls of their house. The applicants filed a complaint the next day with a justice of the peace and with the central directorate of the judicial police. From then on, they apparently stopped sleeping at their house, preferring to stay with friends.

[6] Although they had decided to leave Haiti following the events of February 27, they did not leave until April 10 for the United States, from where they entered Canada and filed their refugee claim.

III. Impugned decision

[7] The RPD found that the applicants are not Convention refugees nor persons in need of protection within the meaning of sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The main reasons cited by the RPD are the applicants' lack of credibility, contradictions among the various versions of their account, and behaviour that is inconsistent with what would be reasonable to expect from individuals who fear for their lives in their country.

[8] The first contradiction in the applicants' testimony concerned the event on December 13, 2016. During the hearing of their claim, they stated that they had evaded three men on motorcycles because the men turned around when they saw the police officers. However, in their narrative, they indicated that the three men rode off [TRANSLATION] "straight ahead." The applicants were unable to provide an explanation when confronted with this contradiction. The

RPD notes that the mother added that there had been a demonstration by supporters of the Fanmi Lavalas party that day; her daughter contradicted her. The only explanation provided by Ms. Michel was that her mother is [TRANSLATION] "old and confused" (Ms. Duversin is 60 years old). The RPD was rather of the view that it could be expected that the applicants would not contradict each other and that their version during the hearing would be the same as the one provided in their narrative.

[9] The RPD confronted the applicants about the fact that, during their interview at the point of entry into Canada, they were completely silent about Ms. Michel's political activities. They stated that they did not know the people who were following them, nor those who had fired shots at their house. In their Basis of Claim [BOC] Form and during the hearing, they stated that they were being persecuted by supporters of the Fanmi Lavalas party because of Ms. Michel's political activities.

[10] Ms. Michel's only explanation was to state that she and her mother were stressed during the initial interview. The panel was not satisfied with that explanation and stated that it expected some consistency when asking the claimants why they are seeking refugee protection. They are expected to provide all the information about the individuals persecuting them.

[11] It was during the hearing that Ms. Michel confirmed for the first time that she had filed a complaint with the authorities on December 18, 2016; the applicants' narrative completely omitted this fact. Ms. Michel explained that she wanted to limit her narrative to essential information and complete her testimony at the hearing. Once again, the panel was not satisfied

with this explanation and expects such relevant information to be included in the BOC, especially since the question is specifically asked on the form.

[12] The panel also confronted the applicants about the fact that, even though they no longer slept in their house after the events of February 27, 2017, they returned there every day and spent the day there. They explained that, during the day, they were accompanied by men who acted as protection to deter potential assailants. The panel did not accept this explanation because this information was not included in the narrative and because such behaviour was inconsistent with that of individuals who fear for their lives.

[13] The panel also found it strange that Ms. Michel did not ask for help from the leaders of her political party and that she had not even informed them of the difficulties she was facing. Nor did the panel accept the explanation that doing so would not have helped.

[14] The applicants stated in their narrative that they had decided to leave Haiti after the incident on February 27, 2017. They were confronted with the fact that they had not left until April 10, 2017. The panel noted that people fearing for their lives would normally leave as quickly as possible. During the hearing, the applicants explained that they did not have the means to leave sooner. However, in their BOC, they explained that it was because they could not find a flight that suited both of them before that date.

[15] The panel added that the documents filed in support of their claim were insufficient to make their testimonies credible. The panel noted that the police certificate dated March 3, 2017,

does not mention the event on December 13 nor the shots fired on February 27. The panel was also of the view that the excerpts from the minutes of the peace court registry and the article from a local newspaper are inconsistent regarding the chronology of events. Yet, at the beginning of the hearing, Ms. Michel stated that the information in the documentary evidence was true, complete and accurate, and that she had checked the information.

[16] Lastly, the panel carried out a brief analysis to determine whether the applicants would face a serious risk of gender-related persecution if they were to return to Haiti. It found that the applicants had not demonstrated a risk of this type of persecution.

IV. Issues and standard of review

[17] In their memorandum, the applicants raise three issues, the first two of which concern an alleged breach of the principles of natural justice based on having questioned the [TRANSLATION] "elderly person" first and the admissibility of a letter from a psychologist that was not at the RPD's disposal. These first two issues can be expressed as follows:

A. *Was there a breach of the principles of procedural fairness?*

B. *Is the new psychological evidence concerning applicant Duversin admissible?*

[18] However, at the hearing, the emphasis was instead placed on the third issue raised by the applicants, which is twofold:

C. *Did the RPD properly apply Guidelines 4?*

D. *Did the RPD carry out a proper analysis of the risks of kidnapping and rape that Ms. Michel would face if she were to return to Haiti?*

[19] The standard of review that applies to the RPD's findings on a refugee claimant's credibility is that of reasonableness (*Kamau v. Canada (Citizenship and Immigration)*, 2016 FC 413 at paragraph 23).

[20] The standard that applies to the issue of natural justice, which I will analyze summarily, is that of correctness (*Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69 (see paragraphs 36–38 and 56).

V. Analysis

A. *Was there a breach of the principles of procedural fairness?*

[21] The applicants argue that the RPD should not have questioned Ms. Duversin first since she is an [TRANSLATION] "elderly and vulnerable" person and was only accompanying her daughter, who is the principal applicant. They add that the RPD should have ceased its questioning when it noticed that Ms. Duversin was contradicting her daughter and when Ms. Michel interjected to explain that her mother was elderly and confused. They allege that this amounts to a breach by the RPD of its duty to act fairly.

[22] First, I am of the view that a person who is 60 years old is not [TRANSLATION] "elderly and vulnerable" unless they are affected by some kind of limitation or illness, which a refugee claimant has the burden of proving before the RPD.

[23] Furthermore, Ms. Duversin, like her daughter, is a refugee claimant and a direct witness to all the events at the heart of their refugee claim. The RPD is the master of the proceedings before it and of its handling of the evidence, and it was perfectly permissible for it to begin its questioning with either of the refugee claimants. The applicants have cited no authority to argue to the contrary. Rule 10 of the *Refugee Protection Division Rules*, SOR/2012-256, and the *Chairperson Guidelines 7: Concerning Preparation and Conduct of a Hearing in the Refugee Protection Division* refer only to the order in which the various intervenors/counsel may question the refugee claimant(s). The RPD's Claimant's Guide states that witnesses are questioned after the claimant(s). In this case, Ms. Duversin is a refugee claimant and not simply a witness.

[24] With regard to the criticism of the RPD for not having ceased its questioning when it noticed that the mother was contradicting the daughter, it is true that this Court has previously found that the RPD must cease questioning a claimant who is obviously incoherent (*FAM v. Canada (Citizenship and Immigration)*, 2013 FC 574). However, in *FAM*, counsel for the applicant had made a request prior to the hearing for procedural accommodations for the applicant given that he was a vulnerable person. The applicant had also undergone a conclusive psychological evaluation before the hearing. In this case, no request for accommodations was filed with the tribunal.

[25] Furthermore, since it is for the RPD to determine the truthfulness of the facts alleged, the credibility of the claimants and the basis of each refugee claim submitted to it, it would be quite incongruous to ask it to cease questioning once it notes contradictions in the evidence.

[26] Added to this is the fact that it is settled law that, where there is a breach of the principles of procedural fairness, the issue must be raised at the earliest opportunity. A "failure to object at the hearing amounts to an implied waiver of any perceived breach of procedural fairness or natural justice that may have occurred" (*Kamara v. Canada (Citizenship and Immigration)*, 2007 FC 448 at paragraph 26). The applicants raised no objection as to the order of questioning by the RPD, and they did not ask the panel to adjourn the hearing.

[27] In my view, there was no breach of the principles of procedural fairness.

B. *Is the new psychological evidence concerning applicant Duversin admissible?*

[28] In general, the evidentiary record submitted to the Court is limited to that which was before the RPD: "[t]he essential purpose of judicial review is the review of decisions, not the determination, by trial *de novo*, of questions that were not adequately canvassed in evidence at the tribunal or trial court" (*Gitxsan Treaty Society v. Hospital Employees' Union*, [2000] 1 FC 135 (FCA) at pages 144–145, as cited in *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paragraph 19). Some exceptions exist, for example: "where the evidence provides context, is filed to support an allegation of breach of procedural fairness by the decision-maker, or where it is filed to demonstrate the absence of evidence" (*Majdalani v. Canada (Citizenship and Immigration)*, 2015 FC 294 at paragraph 20). Although this is not an exhaustive list, I do not find that the applicants' new evidence is any exception to the general rule.

[29] But there is more. Even if the letter from the psychologist who met with the applicants were admitted, its probative value would be very limited. The psychologist essentially writes that the applicants told her about the events underlying their refugee claim and that Ms. Michel mentioned to her that Ms. Duversin was having nightmares and that [TRANSLATION] "she forgets everything, because of the problems." The only opinion stated by the psychologist is that the difficulties the applicants report are consistent with post-traumatic stress disorder. This is not proof that the events occurred nor even that Ms. Duversin has any kind of memory problem.

C. *Did the RPD properly apply Guidelines 4?*

[30] Guidelines 4 state that, in the case of a gender-related refugee claim, the RPD must be particularly sensitive to female claimants' difficulty in testifying. However, the guidelines are not intended to serve as a cure for all deficiencies in the applicant's claim or evidence, even if she cites a fear of gender-related persecution in support of her refugee claim (*Karanja v. Canada (Citizenship and Immigration)*, 2006 FC 574 at paragraph 5). The onus is on the applicant to establish the merit of her refugee claim. Guidelines 4 cannot corroborate any evidence of gender-related persecution in themselves (*Newton v. Canada (Minister of Citizenship and Immigration)*, (2002) 182 FTR 294 (QL) at paragraph 18). They merely dictate the attitude and open-mindedness that immigration officers must demonstrate when dealing with such allegations of persecution. In other words, Guidelines 4 were enacted to ensure that administrative decision-makers consider all the issues with empathy.

[31] I am of the view that, in this case, the panel took Guidelines 4 into consideration, but that, ultimately, it made a number of adverse findings about the applicants' credibility. It did not

believe the narrative on which their refugee claim is based and, in light of the various contradictions noted, it was open to the panel to find as it did.

D. *Did the RPD carry out a proper analysis of the risks of kidnapping and rape that Ms. Michel would face if she were to return to Haiti?*

[32] During the hearing of the case, counsel for the applicants placed a great deal of emphasis on the fact that the RPD's analysis of the risk of gender-related persecution that Ms. Michel would face if she were to return to Haiti was insufficient. This issue, which the RPD analyzed [TRANSLATION] "in a residual manner" was the subject of just one paragraph, which I will reproduce in full:

> [TRANSLATION]
>
> [29] Lastly, the panel analyzed, in a residual manner, whether the applicants would face a serious risk of gender-related persecution in the event of their return to Haiti. However, particularly given that it does not believe their allegations, the panel finds that they have not demonstrated such a risk of persecution. They have not faced these kinds of problems in the past and, even though the past does not guarantee the future, the documentary evidence does not state that all Haitian women or women returning to Haiti face a serious risk of persecution. Moreover, nothing shows that the claimants lack sufficient connections in Haiti that could dissuade potential perpetrators from harming them, or at least connections that could reduce the possibility of such attacks below the level of serious risk. On the contrary, according to the applicants' testimonies and the responses they gave to question 5 on their BOC, they would benefit in particular from a circle of friends and family members, including several men.

[33] First, the RPD likely considers this issue to be "residual" because this ground of persecution is not specifically alleged in support of the applicants' refugee claim. They allege that they fear persecution by political opponents.

[34] Nevertheless, in *Canada (Attorney General) v. Ward*, [1993] 2 SCR 689, the Supreme Court of Canada notes, at page 745, that "it is not the duty of a claimant to identify the reasons for the persecution. It is for the examiner to decide whether the Convention definition is met" (see also *Aleaf v. Canada (Citizenship and Immigration)*, 2015 FC 445 at paragraph 37). Since the applicants indicated in question 2(b) of their BOC that they feared being kidnapped, raped and killed by political adversaries, and they filed reliable documentary evidence showing that Haitian women regularly face sexual violence, I am of the view that the RPD was required to conduct this analysis. The RPD was required to consider whether Ms. Michel faced a serious risk of persecution if she were to return to the country, based on the fact that she is a young, single woman who has spent a prolonged period of time abroad. This risk cannot be denied simply because she herself has not experienced similar persecution in the past (*Dezameau v. Canada (Citizenship and Immigration)*, 2010 FC 559 at paragraph 26; *Josile v. Canada (Citizenship and Immigration)*, 2011 FC 39 at paragraph 23; *Desire v. Canada (Citizenship and Immigration)*, 2013 FC 167 at paragraph 8). It is true that the situation has changed in Haiti since the earthquake in January 2010—the Court's decision in *Dezameau* was delivered just four months after the events—but I am of the view that the RPD failed to conduct its analysis in order to determine whether, in Ms. Michel's case, the risk of kidnapping and rape constitutes a serious risk of gender-related persecution under section 96 of the IRPA. This analysis should be separate from that which led the RPD to reject, for lack of credibility, their refugee claim based on section 97 of the Act.

[35] At the end of the hearing, counsel for the applicants asked the Court to certify the following question:

> Can an assumption of the lack of sexual violence experienced in the past and reflecting gender inequalities be applied in a vacuum to the evidence and the law that demonstrate the contrary with respect to the conditions in the refugee claimant's country of nationality?

[36] First, if I understand this question correctly, it is attempting to reverse the burden of proof in the context of a refugee claim. The onus is always on the claimant to prove the facts alleged.

[37] Furthermore, if the only question is to determine the impact of a lack of past sexual violence experienced by a refugee claimant on an analysis of persecution under section 96 of the IRPA, it has already been answered in the consistent case law of this Court referred to in these reasons.

[38] Therefore, there is no need to certify the proposed question.

VI. Conclusion

[39] I would therefore allow the application for judicial review and refer the case back to the RPD so that it can complete its analysis, under section 96 of the IRPA, of the risk of gender-related persecution that Ms. Michel would face if she were to return to Haiti. No question of general importance is certified.

JUDGMENT in IMM-3714-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed;
2. The case is referred back to the Refugee Protection Division so that it can complete its analysis, under section 96 of the *Immigration and Refugee Protection Act*, of the risk of gender-related persecution that the applicant Joanna Michel would face if she were to return to Haiti;
3. The style of cause is amended to correct the spelling of the applicant's name so that it reads Margarette Duversin;
4. No question of general importance is certified.

"Jocelyne Gagné"
Judge

Certified true translation
This 17th day of October 2019

Lionbridge

FEDERAL COURT

SOLICITORS OF RECORD

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