

Federal Court



Cour fédérale

Date: 20190923

Docket: IMM-1195-19

Citation: 2019 FC 1197

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, September 23, 2019

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

WILSIN HOMAIRE

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of a decision rendered by the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada on January 11, 2019, which found that the applicant is neither a Convention refugee nor a person in need of protection within the meaning of sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] The applicant is a citizen of Haiti born on January 13, 2000. In his Basis of Claim [BOC] Form, he alleged that there was a risk of persecution because of his uncle's political opinions following an armed attack against his uncle by a political opposition group in Port-au-Prince. The applicant lived with his uncle from 2010 until his departure from Haiti. The applicant also claimed that he was a person in need of protection because of the risk that he would be recruited by "gangs" in Haiti.

[3] The RPD found that the applicant is neither a Convention refugee nor a person in need of protection. The RPD essentially concluded that the applicant did not meet the criteria set out in sections 96 and 97 of the IRPA since the applicant did not establish that he would be exposed to a risk of persecution because of his relationship or that this risk was personalized in nature.

[4] Before the Court, the applicant alleges that the RPD's decision is unreasonable because it failed to analyze both of the BOC Forms submitted by the applicant and to consider *Chairperson Guideline 3: Child Refugee Claimants: Procedural and Evidentiary Issues* [Guideline No. 3].

[5] For the following reasons, the Court's intervention is not warranted in this case, and the application for judicial review is dismissed.

II. Facts

[6] On March 30, 2017, the applicant initially filed a joint claim for refugee protection together with his two cousins and his aunt. On May 2, 2018, at the applicant's request, the RPD separated his file from his cousins' files because the basis for their respective claims was

different. His aunt withdrew her claim and claimed asylum in the United States. After the claims had been split up and his aunt's claim had been withdrawn, the applicant filed an amended BOC Form on June 11, 2018.

[7] The applicant was only 17 years old when the initial BOC Form was filed on March 30, 2017, but he was 18 years old when his amended BOC Form was filed on June 11, 2018.

[8] According to the applicant's amended BOC Form, he was raised by a single mother because his father left them in 2002 when the applicant was very young. His mother moved to L'Asile in the south of Haiti, where she became involved with a man named "Wesley", who worked in the political sector for a deputy. The family moved into a home purchased by Wesley. The relationship between Wesley and the applicant's mother deteriorated when Wesley became aggressive towards the applicant and his mother.

[9] In November 2009, Wesley fled the home when three armed men came looking for him; apparently, he had spent his boss's money for his own purposes. The men came to the house and, since they did not find Wesley, they threatened to torture the applicant and his mother if they did not pay Wesley's debts. The applicant was 9 years old at the time.

[10] In early January 2010, the applicant's mother brought him to the home of his aunt, Dieulita Homère, in Martissant, a neighbourhood in Port-au-Prince. After the 2010 earthquake in

Haiti, the applicant lost contact with his mother and lived with his aunt, his uncle Enel Augustin and his cousins, in their home in Martissant.

[11] In May 2013, armed masked men entered their home and destroyed the property, while looking for Enel. According to the applicant, his uncle supported the government of President Martelly, while the assailants were associated with an opposition group. The armed men returned on a regular basis to look for his uncle. One month later, the men sexually assaulted Dieulita and indicated that they wanted to use her as bait to find Enel. They said that they would find Dieulita if she decided to flee.

[12] In December 2014, the family left Haiti for the United States. Dieulita and Enel were granted asylum, but the applicant's asylum claim was rejected because he was not their child. Later, while the applicant was living in Boston, Enel and Dieulita separated.

[13] On March 18, 2017, the applicant arrived in Canada with his two cousins and Dieulita. They believed that they would all be deported from the United States by the new U.S. administration. The applicant alleges that they fear persecution in Haiti because the armed men want to kill Enel. According to the applicant, these men believe that the applicant is Enel's son because they lived together in the same home in Port-au-Prince.

[14] The RPD initially held a hearing on June 26, 2018. However, the RPD member recused himself because a member of his family had been appointed to a position within the Haitian government. The RPD therefore held a *de novo* hearing on December 18, 2018, during which the

applicant stated that his mother was currently living in Brazil as a permanent resident and that his father was living in Guadeloupe. When the member asked him why the men would look for him if he returned to Haiti five years after he had left that country, the applicant responded as follows:

... Because it's – because [Enel] betrayed them and they really, like, want to get revenge on him. So they said, "If we can never get revenge on him, we'll get revenge on you and your aunt." Like, they will kill all of us or torture all of us.

III. RPD Decision

[15] In a decision dated January 11, 2019, the RPD found that the applicant is not a Convention refugee or a person in need of protection. In its analysis of the merits of the claim, the RPD first made the following comments regarding the applicant's credibility:

With respect to credibility, the panel has concerns because there appears to be important gaps in the claimant's knowledge, the claimant was often vague, and the panel found that the claimant tried to mislead the panel, mixing facts and events that were indicated in his Basis of Claim Form (BOC).

However, when analysing the claimant's testimony, the panel takes into consideration that the claimant is an 18 year-old young man, who was only 13 years old when the events that he alleged occurred, forced him to leave Haiti. The tribunal found that, given his young age, he could not be expected to recall in detail the alleged events, nor explain the inconsistencies and contradictions in the testimony provided.

The panel has also taken in consideration that the claimant is a young educated person who has just finished his high school in Ottawa and who is preparing to enter college.

[16] The RPD then analyzed the applicant's risk of persecution in relation to his uncle's political opinion under section 96 of the IRPA. It concluded that the applicant did not credibly

establish that there was a reasonable possibility of persecution because of his family ties. The RPD first noted a number of inconsistencies in the applicant's statements. For example, in his second BOC Form, the applicant only mentioned that the armed men had attacked his aunt and assaulted her, while at the hearing, the applicant claimed that the men had also attacked his cousins and him. When confronted with this inconsistency, the applicant responded that his initial BOC Form had focused more on his aunt's story rather than on his own.

[17] The RPD noted that the applicant's aunt had already withdrawn her refugee protection claim when the BOC Form was amended. The RPD found that the allegation that the applicant had been attacked by the men who had been looking for his uncle was also an embellishment that undermined the applicant's credibility concerning future risk of persecution.

[18] The RPD also expressed a number of doubts about the allegation that the applicant would be persecuted by the men who had been looking for his uncle. In particular, the RPD found that there was no evidence on the record to demonstrate that the applicant had the profile of someone who would be targeted for political reasons because he had never participated in political life and his uncle had left Haiti in 2013. The RPD noted that the armed men had few means of identifying the applicant: a photo of the applicant (at age 13) and his name (his family name is not the same as his uncle's). The RPD also pointed out that the applicant had stated that he did not know the identity of the criminals who had targeted his uncle. It also noted that those targeted by revenge attacks are generally political supporters and that such a risk diminishes with the passage of time and inunction of the geographical distance.

[19] With respect to the applicant's claims under section 97 of the IRPA, the RPD essentially concluded that his fear of being a victim of gangs was speculative in nature, since the applicant had never been threatened by a gang in the past and did not know whether his 20-year-old cousin, who lives in Haiti, had been targeted by such threats. Based on sub-paragraph 97(1)(b)(ii) of the IRPA, the RPD established that this risk was generalized, rather than personalized. In Haiti, the risk of extreme violence committed by criminal gangs is very widespread, and therefore the risk to which the applicant would be exposed is no worse than the risk to which the entire population is exposed. The RPD concluded that the applicant may be exposed to a higher risk because of his age, but that this was a generalized risk for part of the Haitian population.

IV. Issues and standard of review

[20] This matter raises three issues:

- (1) Did the RPD commit a reviewable error by relying exclusively on the second BOC Form, rather than on both BOC Forms?
- (2) In terms of procedural fairness, did the RPD commit a reviewable error by failing to follow Guideline No. 3 in considering the risk of persecution?
- (3) Was the RPD's decision reasonable?

[21] The first and third issues concern questions of mixed fact and law and are therefore reviewable on the standard of reasonableness (*Olusola v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 46 at para 6). The Court must therefore determine whether the conclusions are rational and whether they fall within a range of possible acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190 at para 47 [*Dunsmuir*]; *Canada (Citizenship and Immigration) v Khosa*, [2009] 1 SCR 339 at

para 59 [*Khosa*]; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, [2011] 3 SCR 708 at para 13).

[22] The second issue raises questions of natural justice and procedural fairness. It is trite law that the appropriate standard of review for such issues is that of correctness (*Khosa* at para 43).

V. Analysis

Preliminary comments

[23] Before addressing the merits of this matter, it is important to make some brief preliminary remarks. On June 20, 2019, after the applicant was granted leave for judicial review, the applicant's cousin, Bethyna Homère, filed an affidavit in support of his application for judicial review. This affidavit is not admissible, because it seeks to introduce facts that were not before the RPD (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 19). There are some exceptions to this rule, but I do not see how they could apply in this case. Accordingly, the affidavit is struck in its entirety.

- (1) Did the RPD commit a reviewable error by relying exclusively on the second BOC Form, rather than on both BOC Forms?

[24] The applicant alleges that the RPD should have taken the first BOC Form into consideration in addition to the second. The first BOC Form was completed in 2017, when the applicant was 17 years old, while the second was completed in 2018, when he was 18 years old.

Therefore, according to the applicant, the RPD erred in failing to consider the record in its entirety.

[25] I do not accept this argument. The RPD focused on the second BOC Form (filed in June 2018), but the information contained in the first BOC Form (filed in May 2017) was fully integrated into the second BOC Form. The applicant's first BOC Form is a less detailed version of the second and does not contain any additional useful information. Therefore, the RPD did in fact analyze the content of the first BOC Form. The applicant failed to successfully demonstrate why this analysis was flawed. I also note that the applicant took advantage of the second change offered by the second BOC Form and added a complete narrative, which did not exist in the first.

- (2) In terms of procedural fairness, did the RPD commit a reviewable error by failing to follow Guideline No. 3 in considering the risk of persecution?

[26] The applicant contends that the RPD erred in failing to consider Guideline No. 3. In the applicant's opinion, the RPD should have assessed the link between the applicant's age and his fear of persecution in Haiti, and simply mentioning the Guideline was not sufficient. According to the applicant, his age is relevant because he was a minor at the time of the incidents that prompted his refugee protection claim.

[27] The respondent argues that the RPD explicitly considered the applicant's age at the time of the alleged incidents as well as his level of education. The respondent acknowledges that the RPD raised credibility problems, but that it had also highlighted the insufficient evidence filed by the applicant to meet the criteria set out in sections 96 and 97 of the IRPA. The respondent points out that the applicant was 18 years old when he filed his refugee protection claim.

[28] In this regard, the RPD did not commit a reviewable error. The Guideline provides instructions for adapting the procedure for minor claimants. In this case, the applicant had reached the age of majority when he filed his refugee protection claim and at the time of the hearings at issue here. Accordingly, the RPD had no obligation to apply the Guideline in this case. In any event, failing to mention Guideline No. 3 cannot, in and of itself, make up for the gaps in the applicant's evidence (*Nsimba v Canada (Citizenship and Immigration)*, 2019 FC 542 at para 17; *Moffat v Canada (Citizenship and Immigration)*, 2019 FC 896 at paras 16-18). I will also note that the applicant bears the burden of putting his "best foot forward" (*Abdullahi v Canada (Citizenship and Immigration)*, 2016 FC 260 at para 16). Therefore, it is not for the RPD to improve the refugee protection claim record beyond its legal and constitutional obligations.

[29] Upon reviewing the transcripts of the hearing, the RPD's reasons and the evidence on the record, I do not agree with the applicant's contention that the RPD was not sensitive to his age or that it gave undue weight to his testimony. The RPD explicitly considered the applicant's age at the time of the alleged incidents and at the hearing, but found that there were problems concerning the applicant's credibility and insufficient evidence to support his claims based on sections 96 and 97 of the IRPA. I fail to see how the Guideline would have impacted these findings.

(3) Was the RPD's decision reasonable?

[30] The applicant alleges that the RPD's findings that the applicant is not a refugee or a person in need of protection are unreasonable. In this regard, the applicant maintains that it was not necessary to demonstrate that he had actually suffered persecution in the past; he only needed

to demonstrate that his fear resulted from reprehensible acts committed or likely to be committed against members of a group to which he belongs. According to the applicant, a document in the National Documentation Package [NDP] indicates that a gang could find a victim even after a period of ten years has elapsed. The applicant also claims that the RPD did not provide sufficient reasons for its decision.

[31] The respondent, for his part, maintains that the RPD's decision is reasonable. The decision sets out the reasons why the applicant was not credible as regards the allegations that formed the basis of his claim, specifically, that he would be threatened because of his uncle's political allegiances or that he would be at risk of being recruited by gangs in Haiti. The RPD even gave the applicant several opportunities to dispel its concerns regarding the lack of evidence of persecution or risk and its analysis took the applicant's explanations into account. According to the respondent, the risk related to gangs invoked by the applicant is essentially generalized.

[32] In my view, the RPD reasonably concluded that the applicant is neither a Convention refugee nor a person in need of protection.

[33] First, the RPD's findings that the applicant is not at risk as a result of his uncle's political opinions are reasonable. The applicant is correct to point out that it is not necessary to show evidence of persecution in the past to establish a reasonable fear of persecution under section 96 of the IRPA (*Salibian v Canada (Minister of Employment and Immigration)*, [1990] 3 FC 250 (CA) at paras 17–19; *Arocha v Canada (Citizenship and Immigration)*, 2019 FC 468 at paras 12–

13, 22–24). However, the RPD did not impose the burden of proving that he had been persecuted in the past. On the contrary, the RPD concluded that the applicant “has not credibly established that, on a balance of probabilities, there is a serious possibility of the claimant being persecuted in any part of Haiti to which he might flee based upon his membership in a particular social group (family)” [Emphasis added.].

[34] In response to the RPD’s questions concerning the possibility of the armed men being able to track him down, the applicant essentially indicated that they had a photo of him and that they knew his name. In this regard, the RPD noted that the applicant’s appearance had changed significantly since the incidents and that he did not have the same family name as his uncle. The RPD could reasonably conclude that having a photo of the applicant at age 13 was not sufficient to establish a reasonable fear of persecution. The RPD also reasonably concluded that the five years that had elapsed since the incidents in question raised serious doubts about whether the agents of persecution would still be interested in going after the applicant.

[35] I also note the applicant’s argument that the document included in the NDP is not very clear on this point. However, the RPD’s findings remain reasonable. It is important to understand that the RPD had already noted that the applicant did not know who the men were or who they worked for. The RPD did not have any evidence of the political importance of the group with which the agents of persecution were affiliated. In this context, the RPD’s finding that the applicant did not have a reasonable fear of persecution, based on the insufficient evidence and the lengthy period of time since his departure from Haiti, fell within a range of possible acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir* at para 47).

[36] Furthermore, even though the applicant's failure to indicate that he had been attacked by the criminals in his BOC Form (which only mentioned their violence towards his aunt) should probably not be viewed as a determinative factor, the RPD could reasonably consider this element, along with the general gaps in the applicant's evidence, to conclude that he did not have a reasonable fear of persecution in Haiti.

[37] The applicant also invokes the risk of being recruited by gangs. In his oral arguments, the applicant tries to equate the risk of being attacked by political gangs to the risk of being recruited by criminal gangs. On this point, it is important to distinguish between political gangs (who were allegedly still looking for his uncle) and criminal gangs since they have different goals, and their possible impacts on the applicant also differ.

[38] The generalized risk of being recruited by gangs was analyzed by the RPD, and it concluded that this risk was not personalized in nature such that it would fall under section 97 of the IRPA. All the risks raised by the applicant in this regard are essentially consequences of the economic situation and overt crime in Haiti. The applicant did not demonstrate why he was at risk of personally being targeted by criminals or gangs in Haiti. It can therefore be concluded that the alleged risk is rather speculative and demographic in nature.

[39] The Federal Court has repeatedly concluded that the generalized risk of being a victim of crime is not a reason that can lead to a finding that a refugee protection claimant is a person in need of protection within the meaning of section 97 of the IRPA, unless the claimant can demonstrate that he or she will be targeted for a particular reason (*Salazar v Canada (Citizenship*

and Immigration), 2018 FC 83 at para 65; *Prophète v Canada (Citizenship and Immigration)*, 2008 FC 331 at paras 14–23). The RPD’s findings in this regard were therefore reasonable.

VI. Conclusion

[40] For these reasons, the RPD’s decision was reasonable. The application for judicial review is dismissed. The parties did not submit any question to be certified.

JUDGMENT in Docket IMM-1195-19

THIS COURT'S JUDGMENT IS that:

1. The application for judicial review is dismissed;
2. No question is certified.

“Peter G. Pamel”

Judge

Certified true translation
This 21st day of October 2019

Margarita Gorbounova, Reviser

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1195-19

STYLE OF CAUSE: WILSIN HOMAIRE v THE MINISTER OF
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