Federal Court  Cour fédérale

Date: 20191212

Docket: IMM-2793-19

Citation: 2019 FC 1594

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Toronto, Ontario, December 12, 2019

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

LESLET HENRY

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 Appeal Division [RAD] of the Immigration and Refugee Board of Canada on April 5, 2019, determining that the applicant is not a Convention refugee or a person in need of protection under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] For the following reasons, the application is dismissed.

II. Facts

[3] The applicant is a citizen of Haiti who fears for his life if he must return to his country of citizenship. The applicant is a trained lawyer who practises in human rights law. The applicant is a member of the Organisation du peuple en lutte [OPL], a political party that is in opposition to the Haitian government. Between November 2013 and January 2017, the applicant received numerous death threats, and several attempts were made on his life.

[4] During 2013 and 2014, the applicant was campaigning against the arrest of certain lawyers in Haiti. On November 6, 2013, the applicant participated in a march organized by the Port-au-Prince bar association against the government commissioner after the suspicious arrest of André Michel in October 2013. Since André Michel is a human rights lawyer and a friend of the applicant, the arrest received media coverage due to the suspicious circumstances of the arrest and the status of Mr. Michel as a [TRANSLATION] “fierce opponent of President Michel Martelly” and the [TRANSLATION] “people’s lawyer”. Following the march, the applicant received an anonymous call warning him that his life was in danger because he was campaigning against the government.

[5] On May 14, 2014, the applicant publicly denounced the arrest of another lawyer who had been assaulted and beaten by supporters of the Mouvement Tèt Kale [MTK], a group of former military personnel whose goal is to eliminate opponents of the government. Armed groups associated with then President Michel Martelly and his successor Jovenel Moïse promptly

threatened to kill him. The government's right-hand man and Martelly and Moïse's close friend accused him of being complicit with the political opposition and assaulted him with a gun. The applicant then became a target of one of the members of the elite corps of the Haitian national police who had been hired to carry out physical violence against members of the political opposition. Following this incident, the applicant frequently received threatening phone calls from individuals identifying themselves as supporters of the MTK.

[6] The applicant also claims to have been the victim of an armed attack while he was an election observer for the Haitian presidential election of October 25, 2015, and that he was shot in his right foot during the incident.

[7] In May 2016, a lawyer was murdered near the applicant's law office. According to a media report, the lawyer was hit by three bullets by two armed individuals riding on a motorcycle. The applicant believes that he was the target of the attack and that it was by mistake that another lawyer was killed in his place.

[8] Fearing for his life, the applicant decided to live with his mother for the next two months. He then left Haiti for the United States in October 2016.

[9] On November 20, 2016, the applicant returned to Haiti to exercise his right to vote in the Haitian presidential election held that same day. In the end, the candidate of the Parti haïtien Tèt Kale [PHTK], Jovenel Moïse, won the election.

[10] However, when he got off the plane, the applicant had his passport taken away and was questioned by a representative of the ministry of the interior about his political affiliations and activities outside Haiti. In Haiti, the ministry of the interior is responsible for civil protection and the internal security of the country. The same representative accused him of being an agent of a foreign government.

[11] A few hours after the interrogation, his law firm was set on fire. According to the justice of the peace's report, a wall of the building was hit by three bullets, and most of the furniture was set on fire. Neighbours saw the perpetrators fleeing the scene in an unregistered car. A justice of the peace concluded that the fire was arson. According to the applicant, the fire was started by military men associated with the government. Again, the applicant received several anonymous calls warning him that his life was in danger.

[12] On December 18, 2016, the applicant's car was intercepted by an unregistered van carrying several armed men who tried to attack him. He managed to escape unharmed. A few hours later, shots were fired outside his residence. According to the applicant, the same individuals were responsible for both attacks.

[13] After all of this, the applicant decided to leave Haiti for the United States on January 19, 2017. He then sought political asylum in the United States claiming to be a victim of a series of threats, persecution, harm and mistreatment by the intermediaries of the Haitian president. Having received no response to his claim, the applicant left the United States for Canada seven months later.

[14] The applicant claimed refugee protection in Canada. In his Basis of Claim Form, the applicant summarized all incidents of threats and attempts on his life between November 2013 and January 2017. The applicant alleges that he would face a risk of being killed, tortured or kidnapped, if he returned to Haiti, for his political opinion against the government and his legal work in defence of human rights. He believes that Canada is in a position to provide him with protection from the Haitian government. His claim for refugee protection was sent to the Refugee Protection Division [RPD].

[15] At the RPD hearing, the applicant explained why he fears for his life if he must return to Haiti.

[16] In the end, the RPD determined that the applicant is not a Convention refugee or a person in need of protection.

[17] This determination is based primarily on the lack of credibility of the applicant's testimony. The RPD had doubts about the applicant's credibility. Because of these doubts, the RPD gave no probative value to certain documents and did not believe any of the allegations provided to support the refugee protection claim.

[18] In addition, the RPD concluded that the documentary evidence on the record supports his allegations to the extent that he was a member of the OPL, was a lawyer and participated in a march with other lawyers in November 2013. However, the RPD did not believe that his political affiliation and activities, or his work, would cause him any problems in Haiti. Furthermore, the

panel found that the documentary evidence in the National Documentation Package indicates that political opponents and human rights defenders are no longer subject to political repression.

[19] The applicant appealed this decision to the RAD. In his appeal memorandum, the applicant argues that the RPD erred in its assessment of his credibility and that the RPD did not give sufficient weight to the uncontested aspects of his testimony.

III. RAD decision

[20] The appeal was dismissed by the RAD. According to the RAD, it had two determinative issues: the applicant's credibility, and the RPD's conclusion that political opponents and human rights defenders are no longer subject to repression in Haiti. While the RAD found that the RPD's analysis of credibility was flawed, the RAD concluded that the applicant's behaviour showed that he did not have a fear of persecution in November 2016. The RAD concluded that the events that took place before his departure were not related to his political activities. In addition, the RAD confirmed the RPD's conclusion on the documentary evidence, finding that the documentary evidence indicates that political opponents are no longer targeted in Haiti.

[21] The applicant seeks judicial review of that decision.

IV. Issue

[22] Did the RAD commit a reviewable error in concluding that the applicant failed to establish a link between the incidents he experienced and a risk of political persecution?

V. Standard of review

[23] The parties agree that a reasonableness standard applies in this case. I agree. 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 SCC 9, [2008] 1 SCR 190 at para 47 [*Dunsmuir*]; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 59 [*Khosa*]; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 at para 13).

VI. Preliminary objection

[24] The respondent submits that this Court should dismiss this application for judicial review because the applicant failed to meet the required timelines. The applicant has made no written submissions on this point, nor has he made any oral submissions before me.

[25] The procedural facts are as follows. The RAD decision was rendered on April 5, 2019. The statement of service confirms that notice of this decision and the reasons for the decision were served on the applicant's counsel on April 5, 2019.

[26] Pursuant to subsection 35(2) of the *Refugee Appeal Division Rules*, SOR/2012-257, the applicant is deemed to have been notified of the decision seven days after the day on which it was mailed (April 12, 2019).

[27] Pursuant to paragraph 72(2)(b) of the IRPA, an application for leave and for judicial review must be served and filed within 15 days after the day on which the applicant is notified of or otherwise becomes aware of the matter. In accordance with these provisions, the deadline for filing an application for leave is April 27, 2019 (*Elisme v Canada (Citizenship and Immigration)*, 2019 FC 1306 at para 15).

[28] The application for judicial review was signed and filed with this Court on April 30, 2019, three days after the leave application deadline.

[29] According to the application for judicial review, the applicant appears to have become aware of the RAD decision on April 15, 2019. Yet, there is no affidavit evidence confirming the date the applicant received the decision. However, the applicant states in his affidavit that the decision was sent to him by the RAD on April 5, 2019.

[30] The applicant has made no submissions to me to explain the discrepancy between the dates, and has not attempted to rectify his application. In his written submissions, the applicant did not provide any explanation for the delays. The application for leave and for judicial review was not accompanied by a request for an extension of time.

[31] Therefore, the applicant did not comply with rule 6 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, which provides that a request for an extension of time must be included in the application for leave, and he did not provide any explanation for its omission. The applicant did not make an independent request either.

[32] In a case such as this, the general rule is that the failure to meet the prescribed time limits is sufficient to cause the application for leave to be dismissed (*Chen v Canada (Citizenship and Immigration)*, 2010 FC 899 at paras 31–35). As noted by the Federal Court of Appeal, legal time limits serve the public interest and bring finality to administrative decisions (*Canada v Berhad*, 2005 FCA 267 at para 60).

[33] In the absence of good reasons for the delay (based on the criteria developed in *Grewal v Canada (Minister of Employment and Immigration)*, [1985] 2 FC 263 (CA) and *Canada (Attorney General) v Hennelly*, 1999 CanLII 8190 (FCA), [1999] FCJ No 846 (QL)), the application for judicial review must be dismissed.

VII. Analysis

[34] That being said, I will nevertheless address the more substantive elements of the applicant's claim.

[35] The applicant alleges that the RAD analysis is unreasonable because the RAD relied on a perverse or capricious factual determination regarding testimony.

[36] The applicant submits that the RAD failed to apply the presumption of truth (referred to in *Maldonado v Minister of Employment and Immigration*, [1980] 2 FC 302 (CA)) by disregarding the applicant's testimony on the basis of credibility and plausibility issues. Moreover, the applicant finds the analysis all the more unreasonable because the RAD failed to analyze the documentary evidence on the record.

[37] The respondent argues that the RAD could reasonably conclude that the applicant's alleged fear of persecution was not credible. The respondent argues that the applicant's fear is rather speculative since there is no evidence to link the events he recounts to his political opinion. Furthermore, the respondent contends that it is reasonable to conclude that the applicant's voluntary return to his country of origin is behaviour inconsistent with the subjective fear of persecution and that it undermines his credibility.

a) Credibility versus probative value

[38] Before turning to the arguments advanced by the parties, I believe it is appropriate to distinguish the notion of credibility from that of probative value. As Justice Grammond explained, the notion of credibility refers to whether a source of information is "trustworthy", while the notion of probative value is the measure of the "strength" of "inferences" (*Magonza v Canada (Citizenship and Immigration)*, 2019 FC 14 at paras 16–26 [*Magonza*]). It is important to distinguish between these concepts because "the criteria used to assess credibility and probative value are fundamentally different" (*Magonza* at para 24).

[39] I mention this distinction because the parties and the RAD seem to confuse the two concepts.

[40] The RAD's conclusion was based on six factors. First, the RAD concluded that the evidence did not establish a link between the interrogation by a representative of the ministry of the interior and the subsequent incidents recounted by the applicant. Second, the RAD had concluded that the evidence presented did not allow a conclusion to be drawn as to the cause of

the fire at his law firm. Third, the RAD excluded evidence of several calls from an individual claiming to be associated with the PHTK since the applicant "was not overly concerned by these threats because he took no particular precautions to protect himself or to find shelter from these potential attackers". Fourth, the RAD found that there is a lack of evidence to conclude that there is a connection between the December 18 attack and the applicant's political views. Fifth, the RAD excluded evidence of the shots fired at the applicant's home due to a lack of evidence as to the identity of the attackers and the true target of the attack. Sixth, the RAD concluded that his testimony about his role as an icon of the political opposition lacks credibility because he was never arrested, detained or imprisoned for his political activities and his behaviour following his return to Haiti leaves little evidence that he was concerned for his safety.

[41] While the RAD has analyzed these factors within the context of the applicant's "credibility", the majority of these determinations relate more to the probative value of this evidence. The challenge before the RAD was that the applicant had evidence relating to the events of November 2016 to January 2017 and to his political opinion:

> Relating to the events that took place between November 20, 2016, the date of the appellant's return to Haiti, and January 19, 2017, the date on which he left the country again, the evidence surrounding these events does not establish, on a balance of probabilities, what the cause of it was and specifically whether it was related to the appellant's political opinion or that he was personally targeted.

[42] Similarly, the RAD concluded that the evidence of the attack on November 18 was insufficient because "even if the [applicant's] testimony is credible relating to this incident, there is no evidence that, on that day, the assailants were looking for the [applicant] in particular".

[43] With the exception of the sixth conclusion, the RAD's analysis considered the evidentiary weight given to each part of his fear. For example, the RAD excluded the evidence of the fire since the inference sought by the applicant "was mere speculation on his part, which is however not supported by the evidence on the record". Thus, it must be noted that the RAD did not actually conduct a credibility analysis, but rather took on the task of analyzing the probative value of the evidence.

b) The analysis of the evidence on the record and the RAD's conclusions

[44] I find that the RAD's analysis of the weight of the evidence and its conclusions are not unreasonable.

[45] I must first say that a person's voluntary return to his or her country of origin may well be found to be incompatible with an allegation of fear of persecution in that country (*Milovic v Canada (Citizenship and Immigration)*, 2015 FC 1008 at para 11; *NG v Canada (Citizenship and Immigration)*, 2017 FC 601 at para 20).

[46] The applicant returned from the United States to Haiti in November 2016 to vote in the general elections in that country. I can understand how a person with the applicant's political beliefs would want to exercise his right to vote, but I see nothing unreasonable in the RAD's conclusion that he probably would not have taken the risk of returning to Haiti if he truly believed he was being persecuted.

[47] The applicant claims that the RAD did not analyze and consider the documentary evidence in support of his claim of persecution. The applicant's counsel refers to a series of documents in the National Documentation Package on Haiti which corroborate the applicant's assertion that members of political opposition groups are regularly harassed and persecuted by government supporters.

[48] I see no reason not to accept what is set out in the various documents, but it does not necessarily link the events which the applicant endorsed to his claim of persecution.

[49] In light of the evidence, the RAD concluded that the evidence does not necessarily link the events to the applicant being personally targeted. I see nothing unreasonable in that conclusion.

[50] Mere speculation on the part of the applicant is not sufficient to establish that he faces and will continue to face a risk of persecution and risk to his life if he were to return to Haiti.

VIII. Conclusion

[51] The application for judicial review is therefore dismissed. No question is certified for consideration by the Federal Court of Appeal.

JUDGMENT in IMM-2793-19

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

No question is certified.

"Peter G. Pamel"
Judge

Certified true translation
This 28th day of January 2020.

Michael Palles, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

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