**Date: 20090629**

**Docket: IMM-4936-08**

**Citation: 2009 FC 674**

**Ottawa, Ontario, June 29, 2009**

**PRESENT: The Honourable Max M. Teitelbaum**

**BETWEEN:**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Applicant**

**and**

**LOUIS, Mac Edhu**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant is seeking under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) the judicial review of the decision dated September 9, 2008 (decision), by the Refugee Protection Division of the Immigration and Refugee Board (Board), finding the respondent to be a refugee and person in need of protection in accordance with sections 96 and 97 of the Act and allowing his refugee claim.

The facts

[2] A Haitian citizen, the respondent was a police officer in Haiti from June 1995 to October 1997. As part of his duties, on a few occasions he had to arrest what the Board describes as "notorious criminals who had power . . . and people linked to various political parties" (at paragraph 3 of the decision).

[3] Following these various arrests, the respondent testified before the Board, indicating that he was the subject of a number of threats that culminated, at the end of October 1997, in what he described as a [TRANSLATION] "hostage-taking" by an armed gang, from which he was able to escape with the help of one of the gang members. Barely two days later, another armed gang purportedly turned up at his house when he was out. These two events allegedly convinced the respondent of the necessity of leaving Haiti, which he finally did at the end of November on board a commercial ship heading for Miami, Florida.

[4] After having arrived in Miami on November 26, 1997, the respondent waited until February 1998 before filing a refugee claim and used a false identity and a story that was in no way comparable with that put forward today. He allegedly told the American authorities that he had been in the country since May 18, 1994, and apparently failed to mention the fact that he had been a police officer in Haiti.

[5] The respondent explained that he had acted in this way on the advice of a Mr. Thomas, a real estate agent also of Haitian origin who was helping him with his efforts in the United States.

Mr. Thomas allegedly explained to him that Haitian police officers were never allowed as refugees into the United States and that it would be best if he stated that he had arrived in the country in 1994 to benefit from an amnesty program.

[6] In December 1999, the respondent was arrested by the police in Florida for being in possession of a firearm concealed underneath his car seat. He was accused of having concealed a weapon, a charge for which he pleaded guilty and was sentenced to probation of eighteen months, which, according to him, was only nine months in the end.

[7] On May 21, 2001, the respondent's refugee claim was finally denied because he had exhausted all of his grounds for appeal. As of that time, he was under the obligation to leave the territory of the United States. Despite this, the respondent stayed in the United States until November 3, 2006, when he appeared at the Peace Bridge port of entry in Fort Erie and filed the refugee claim that concerns us.

The impugned decision

[8] The Minister raises three reasons that justify why the Board's decision should be set aside and a new hearing should take place before another Board member. First, the Board purportedly erroneously assessed evidence filed by the applicant (Exhibit M-1) that demonstrates, in the opinion of the Minister, that during the period in which the respondent maintains he was a police officer in Haiti, which constitutes a fundamental element of his refugee claim, he was in fact in the United States and not in Haiti.

[9] The Board's assessment in this regard can be found at paragraph 15 of the decision. In short, the Board found the respondent credible and accepted his explanation with regard to the reason why the document in question, which came from the central indexing system of the United States Department of Justice Immigration and Naturalization Service, indicates that he allegedly arrived in the United States via the port of entry of Miami on May 18, 1994, and not in November 1997. Essentially, the respondent explained that he simply offered this date to the American authorities when he filed his refugee claim in February 1998.

[10] Then, the Minister alleges that the Board erred in law and unduly fettered its discretion in failing to give notice to the Minister before or during the hearing of a possible exclusion, as required by subsections 23(1) and (2) of the *Refugee Protection Division Rules*, SOR/2002-228 (Rules), which read as follows:

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| Notice to the Minister of possible exclusion — before a hearing | Avis au ministre avant l'audience d'une exclusion possible |
| 23. (1) If the Division believes, before a hearing begins, that there is a possibility that sections E or F of Article 1 of the Refugee Convention applies to the claim, the Division must notify the Minister in writing and provide any relevant information to the Minister. | 23. (1) Si elle croit, avant l'audience, qu'il y a une possibilité que les sections E ou F de l'article premier de la Convention sur les réfugiés s'appliquent à la demande d'asile, la Section en avise par écrit le ministre et lui transmet les renseignements pertinents. |
| Notice to the Minister of possible exclusion — during a hearing | Avis au ministre pendant l'audience d'une exclusion possible |

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| (2) If the Division believes, at any time during a hearing, that there is a possibility that section E or F of Article 1 of the Refugee Convention applies to the claim, and the Division is of the opinion that the Minister's participation may help in the full and proper hearing of the claim, the Division must notify the Minister in writing and provide the Minister with any relevant information. | (2) Si elle croit, au cours de l'audience, qu'il y a une possibilité que les sections E ou F de l'article premier de la Convention sur les réfugiés s'appliquent à la demande d'asile et qu'elle estime que la participation du ministre peut contribuer à assurer une instruction approfondie de la demande, la Section en avise par écrit le ministre et lui transmet les renseignements pertinents. |

[11] Finally, the Minister claims that the Board erred in law by disregarding its authority to render a decision on issues of exclusion without the participation of the Minister.

Standard of review

[12] It is now well established, pursuant to recent Supreme Court of Canada decisions on this issue (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, (2009), 82 Admin. L.R. (4th) 1), that when there is a question of fact or a question of mixed fact and law, the standard of review that applies is reasonableness. With respect to questions of law, the standard of review is correctness. In addition, *Khosa* indicates that deference must be given to decisions by specialized tribunals.

[13] In the case at bar, the first question raised by the applicant deals with assessing the evidence and the credibility of the respondent with respect to the question of when, exactly, he entered the territory of the United States. This is not a question of law and therefore the standard

of reasonableness applies. It should not be forgotten that, even before the recent Supreme Court of Canada decisions, it was "well established in the case law that considerable deference must be accorded to the Board's decisions on issues of credibility and assessment of the evidence" (*Zavala v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 370, [2009] F.C.J. No. 461 (QL) at paragraph 5).

[14] With respect to the second question, whether the Board erred in failing to give notice to the Minister pursuant to section 23 of the Rules, this is essentially a question of procedural fairness. When there is a breach of obligations of procedural fairness, the Court has no choice but to return the decision to the panel in question (*Rivas v. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2007 CF 317, [2007] A.C.F. No. 436 (QL) at paragraph 23).

[15] Finally, the third question, whether the Board erred by disregarding the fact that it has the authority to render a decision on issues of exclusions without the Minister's participation is a question of law that will be examined according to the standard of correctness.

Analysis

1. Is the Board's finding with respect to the respondent's date of entry into the United States unreasonable?

[16] The applicant is complaining that the Board [TRANSLATION] "erroneously assessed and capriciously set aside Exhibit M-1, failing to give it fair value" (Applicant's Memorandum, at paragraph 19). The respondent submits that the argument submitted by the applicant that it is

impossible that he would have been able to provide a false date of entry to the American authorities which would have been recorded in the central indexing system ignores the fact that in this same file, it is indicated that the information in it was recorded on February 9, 1998, as is indicated by the following “DFO: 02091998”, where DFO means the date the information was filed in the central indexing system.

[17] The applicant’s argument that [TRANSLATION] “such information can only be recorded in the American central indexing system following an examination of the individual at the port of entry upon his arrival in the United States using form I-94” is not supported by the evidence submitted by the applicant. The documents in question, which are schedules D and E to Hélène Exantus’ affidavit, are general documents on the United States/Canada land borders and the various types of visas offered in the United States.

[18] These documents lend no support to the argument made by the applicant and certainly do not lead this Court to find that the Board’s assessment of Exhibit M-1 is unreasonable. Without convincing evidence to support the argument that it is impossible that the date recorded in the indexing system for the respondent’s entry into the United States is false, the Board’s finding, made on the basis of the respondent’s testimony that was found credible, as well as documentary evidence calling into question the validity of this date, cannot be considered unreasonable.

2. Did the Board err in failing to give notice to the Minister of a possible exclusion?

[19] The Court considers that the Board indeed erred in failing to give such notice to the Minister pursuant to subsection 23(1) of the Rules. Subsection 23(1) of the Rules requires that such notice be given when the Board believes, before a hearing begins, that it is possible that a ground for exclusion applies to the refugee claim. Here, the Board believed, before the hearing began, that there was a possible ground for exclusion because the respondent was allegedly convicted of the criminal offence of concealing a weapon.

[20] The respondent himself declared, in somewhat different terms, the fact that he had been convicted of a criminal offence, in his personal information form received by the Board on November 29, 2006. With the filing of Exhibit M-2, the applicant provided more information relating to the offence committed. The transcript of the hearing indicates that the Board questioned, before the hearing, the relevance of these documents:

> [TRANSLATION]
> Because I could not ignore it. I told myself – I asked myself the question: Why did the Minister send this to us; he is not present in the room? I looked at some equivalents. I can tell you that the maximum sentence is five for the equivalent . . . .
>
> [Transcript of the hearing, at page 6]

[21] This leads the Court to find that before the hearing, the Board indeed asked the question, given the filing of Exhibit M-2 by the Minister, of whether the refugee claim could be affected by a ground for exclusion. With a view of this possibility, the Board therefore had the obligation, at that stage, to give notice to the Minister, pursuant to subsection 23(1) of the Rules. This finding is only reinforced by the fact that the Board indeed proceeded to examine the question of

the possible application of a ground for exclusion, but without having previously notified the Minister of its intention to continue in this way:

> [TRANSLATION]
> . . . the panel will definitely ask Ms. Desjardins and starting with Ms. Weston, questions on what he did. Afterwards, I will, in fact I will see during the course of the hearing whether 1F(*b*) can be raised or not. I will divulge this during the course of the hearing.
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> . . .
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> . . . we will start by asking you questions on the document that was filed as M-2, the offence, in fact you pleaded guilty to one charge. We will start with this facet and after that we will go into your story, if need be. And if I have, in the meantime, a decision, in fact, to render or raise – and I am sure that your counsel told you about the possibility of a ground for exclusion, I will let you know.
>
> [Emphasis added, pages 9 and 11 of the transcript of the hearing]

[22] The result reached by the Court in this case is in accordance with the little jurisprudence applying subsection 23(1) of the Rules. In *Kanya v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1677, (2005), 284 F.T.R. 243 Deputy Justice Paul Rouleau dealt with an argument given by the applicant, who tried to obtain a review of the Board's finding that he was not a Convention refugee, stating that the Board had breached the rules of procedural fairness by not advising the opposing party, that is, the Minister, of the possible application of a ground for exclusion.

[23] Justice Rouleau allowed this claim, indicating as follows: "The Board clearly indicated from the outset of the proceedings that there was a "possibility" that 1(F)(b) would apply to the applicant. The hearing should have been adjourned from the outset; the Minister should have

been notified and the applicant should have been given time to prepare for an exclusion determination" (at paragraph 21). Even though in this case the breach of the rules of procedural fairness was relied on to the benefit of the refugee claimant, there is no reason that a breach of the obligations provided for in subsection 23(1) of the Rules cannot be relied on in the same way by the Minister who, according to the wording of this provision, is the true beneficiary of the said obligation.

3. Did the Board err by disregarding the fact that it has the authority to render a decision on issues of exclusion without the participation of the Minister?

[24] Given the Court's findings concerning the breach of procedural fairness rules, this question becomes moot. In addition, the Court is not convinced that it is fair to say that the Board disregarded the fact that it has the authority to render a decision on issues of exclusion without the participation of the Minister. In fact, the Board made a decision in this regard, setting aside the issues of exclusion following an examination of their merits. The fundamental problem is, rather, the fact that the Board indeed continued with this examination without having previously notified the Minister. The Board in this case did not have the authority to make a decision on issues of exclusions, since it did not give written notice to the Minister before the hearing indicating that it believed that there was a possibility that a ground for exclusion applied.

[25] For all of these reasons, the application for judicial review is allowed and the matter is referred to a differently constituted panel of the Refugee Protection Division of the Immigration and Refugee Board.

## JUDGMENT

**THE COURT ORDERS AND ADJUDGES that** the application be allowed and the matter be referred to a differently constituted panel of the Refugee Protection Division of the Immigration and Refugee Board.

It is clearly understood that the decision is totally set aside and must be removed from the record.

No question of general importance was proposed for certification.

"Max M. Teitelbaum"
Deputy Judge

Certified true translation
Janine Anderson, Translator

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-4936-08 |
| **STYLE OF CAUSE:** | MCI v. LOUIS, Mac Edhu |
| **PLACE OF HEARING:** | Montréal, Quebec |
| **DATE OF HEARING:** | May 26, 2009 |
| **REASONS FOR JUDGMENT:** | TEITELBAUM D.J. |
| **DATED:** | June 29, 2009 |

**APPEARANCES:**

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| Odette Desjardins | FOR THE RESPONDENT |

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