Federal Court  Cour fédérale

Date: 20100419

Docket: IMM-3125-09

Citation: 2010 FC 420

Ottawa, Ontario, April 19, 2010

Present: The Honourable Mr. Justice Mainville

BETWEEN:

SERGE BRAZARD TANIS

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] This is an application for judicial review pursuant to sections 72 and following of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), filed by Serge Brazard Tanis against a decision of the Refugee Protection Division (the panel) of the Immigration and Refugee Board, bearing number TA7-15505 and rendered on May 5, 2009.

[2] The application for judicial review shall be dismissed for the reasons below.

Background

[3] The applicant is a 60-year-old Haitian citizen who left Haiti by boat in 1992 for the United States Virgin Islands to file a claim for asylum with the American authorities. He then left the Islands to work on the North American continent, specifically, in Denver, Colorado.

[4] The applicant states that he worked in the construction industry in Haiti and that he was involved in a community group with close ties to the Lavalas party, although he was not a member. After President Aristide's departure in 1991, several Lavalas opponents made life difficult for the members of that movement. The applicant states that in 1992, he was informed that the anti-Lavalas group was searching for him. When he learned this, he went into hiding. Later, his brother was arrested, one of his colleagues was assassinated, and his house was burned down. He said that, like many dissidents under the new regime, he fled by sea in May 1992 to the United States Virgin Islands to claim asylum there.

[5] After the American authorities rejected his claim for asylum in 2006, on the basis that he lacked credibility, they ordered him to leave the country. The applicant therefore decided to come to Canada on December 24, 2007, to file a new claim for refugee protection with the Canadian authorities.

[6] The applicant also submits that he would be at risk as a member of the Haitian diaspora if he were to return to Haiti. He argues that as a member of the Haitian diaspora, he would be perceived as wealthy, and thus would be vulnerable to extortion attempts upon his return. The applicant states that his niece, to whom he sent money, was assassinated in Haiti in 2006.

The panel's decision

[7] The panel did not recognize the applicant as a Convention refugee given that the persecution he claimed to fear in Haiti was related to events linked to the Aristide government that had taken place 15 years before, and given that the dangerous political situation in Haiti to which he was referring had since changed considerably.

[8] The panel concluded that the applicant now feared returning to Haiti because he would be perceived as wealthy and would be a target for kidnappers. After considering the decisions in *Prophète v. Canada (Citizenship and Immigration)*, 2008 FC 331, *Prophète v. Canada (Citizenship and Immigration)*, 2009 FCA 31, and *Cius v. Canada (Citizenship and Immigration)*, 2008 FC 1, the panel was of the view that the harm feared by the refugee protection claimant was not one of the five grounds set out in the Convention refugee definition. Moreover, the panel did not believe that the refugee protection claimant would be personally subjected to a danger of torture, a risk to his life or to cruel and unusual treatment or punishment.

The applicant's position

[9] The applicant submits that the panel misunderstood the *Prophète* and *Cius* decisions, which require an analysis of the circumstances on a case-by-case basis to determine whether a refugee protection claimant faces a serious risk; this analysis was not carried out in his case.

[10] The applicant submits that the panel ignored the evidence filed with respect to his niece who was assassinated in Haiti. He also submits that his past political activities in Haiti would render him subject to heightened danger in the event of his return.

[11] The applicant adds that, in *Cius*, there was no documentary evidence before the panel regarding the particular risks faced by Haitians who return to their country. The applicant argues that, in this case, the documentary evidence establishes that they do face a heightened risk.

The Minister's position

[12] The Minister submits that because the persecution referred to by the applicant took place about 15 years ago, and given the significant political changes that have since taken place in Haiti, it was reasonable for the panel to conclude that the applicant's fear of persecution based on those past political events was no longer well founded.

[13] The Minister also submits that the applicant had admitted during his testimony before the panel that the risk that the applicant would be a victim of crime if he returned to Haiti was generalized. Moreover, because the applicant's political activities in Haiti were minor and occurred more than 15 years ago, it is not reasonable for the applicant now to claim that he would face a heightened risk due to these past activities. Finally, the death of the applicant's niece is certainly evidence in support of the state of crime in Haiti, but it does not demonstrate that the applicant himself faces a particularized risk not faced by Haitians in general.

[14] As for the applicant's claim that *Cius* does not apply to his case in light of the absence of documentary evidence regarding the particular risks faced by Haitians who return to the country, the Minister submits that a similar argument was rejected by Mr. Justice Mosley in his recent decision in *Saint-Hilaire v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 178.

The standard of review

[15] The only questions raised by this case are questions of fact and credibility. The applicable standard of review is the standard of reasonableness, according to the principles established by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, at para. 53, and *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339, at para. 46.

[16] I note that the recent decisions of this Court on the standard applicable to the section 97 analysis also confirm that it is to be reviewed on a standard of reasonableness: *Acosta v. Canada (Citizenship and Immigration)*, 2009 FC 213; *Michaud v. Canada (Citizenship and Immigration)*, 2009 FC 886; *Innocent v. Canada (Citizenship and Immigration)*, 2009 FC 1019, at paras. 36 and 37; *Marcelin Gabriel v. Canada (Citizenship and Immigration)*, 2009 FC 1170, at para. 10; *Saint-Hilaire v. Canada (Citizenship and Immigration)*, 2010 FC 178, at para. 12.

Analysis

[17] It was reasonable for the panel to conclude that the applicant could not reasonably fear former Haitian soldiers on the basis of events that took place more than 15 years ago, given that the political situation in Haiti has changed considerably in the meantime. However, it is not this

conclusion by the panel that is the principal focus of the applicant's challenge, but rather its conclusion regarding the risk he would face as a member of the Haitian diaspora.

[18] The panel recognizes that civil society in Haiti has all but collapsed and that the rule of law is, to a large extent, systematically absent; it also recognizes that the country's human rights record is poor and that there has been a rash of kidnappings. Nevertheless, in this case, the panel correctly framed the issue before it, namely, whether returning the applicant to Haiti would personally subject him to a risk not faced by the Haitian population generally. This is the proper question to ask in the circumstances of this case in light of the *Prophète* decisions, *supra*, which I analyzed at length in my decision in *Innocent v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1019 (*Innocent*).

[19] In *Prophète v. Canada (Citizenship and Immigration)*, 2008 FC 331, a Haitian businessman claimed to be a person in need of protection on the basis that persons who are or who are perceived to be wealthy in Haiti face a greater risk of violent crime than the general population, even after accounting for the generalized risk of violent crime in Haiti. Madam Justice Tremblay-Lamer refused to recognize the status of person in need of protection in that case for the following reasons:

> [18] The difficulty in analyzing personalized risk in situations of generalized human rights violations, civil war, and failed states lies in determining the dividing line between a risk that is "personalized" and one that is "general". Under these circumstances, the Court may be faced with applicant who has been targeted in the past and who may be targeted in the future but whose risk situation is similar to a segment of the larger population. Thus, the Court is faced with an individual who may have a personalized risk, but one that is shared by many other individuals.

> [19] Recently, the term "generally" [at subparagraph 97(1)(*b*)(ii) of the Act] was interpreted in a manner that may include segments of the larger population, as well as *all* residents or citizens of a given country. In *Osorio v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1459, [2005] F.C.J. No. 1792 (QL). In that case, the applicant asserted that if he and his young Canadian born son were returned to Colombia it would constitute indirect cruel and unusual treatment/punishment because of the psychological stress that he would experience as a parent worrying about his child's welfare in that country. At paras. 24 and 26 Snider J. stated:
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> > [24] It seems to me that common sense must determine the meaning of s. 97(1)(*b*)(ii) . . .
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> > [26] Further, I can see nothing in s. 97(1)(*b*)(ii) that requires the Board to interpret "generally" as applying to all citizens. The word "generally" is commonly used to mean "prevalent" or "wide-spread". Parliament deliberately chose to include the word "generally" in s. 97(1)(*b*)(ii), thereby leaving to the Board the issue of deciding whether a particular group meets the definition. Provided that its conclusion is reasonable, as it is here, I see no need to intervene. [Emphasis added.]
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> . . .
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> [23] Based on the recent jurisprudence of this Court, I am of the view that the applicant does not face a personalized risk that is not faced generally by other individuals in or from Haiti. The risk of all forms of criminality is general and felt by all Haitians. While a specific number of individuals may be targeted more frequently because of their wealth, all Haitians are at risk of becoming the victims of violence.

[20] In *Prophète*, Madam Justice Tremblay-Lamer invited the Federal Court of Appeal to consider the following issue:

> Where the population of a country faces a generalized risk of crime, does the limitation of section 97(1)(*b*)(ii) of the IRPA apply to a subgroup of individuals who face a significantly heightened risk of such crime?

[21] In its decision dated February 4, 2009, in *Prophète v. Canada (Citizenship and Immigration)*, 2009 FCA 31, the Federal Court of Appeal declined to answer the certified question on the basis that it was too broad. The Court nevertheless noted that there was evidence on record allowing Madam Justice Tremblay-Lamer to reach the conclusion she did:

> [7] The examination of a claim under subsection 97(1) of the Act necessitates an individualized inquiry, which is to be conducted on the basis of the evidence adduced by a claimant "in the context of a *present* or *prospective* risk" for him (*Sanchez v. Canada (Minister of Citizenship and Immigration*), 2007 FCA 99 at paragraph 15) (emphasis in the original). As drafted, the certified question is too broad.
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> [8] Taking into consideration the broader federal scheme of which section 97 is a part, answering the certified question in a factual vacuum would, depending on the circumstances of each case, result in unduly narrowing or widening the scope of subparagraph 97(1)(*b*)(ii) of the Act.
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> [9] For these reasons, we decline to answer the certified question.
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> [10] In the case at bar (*Prophète v. Canada (Citizenship and Immigration*), 2008 FC 331), there was evidence on record allowing the Applications Judge to conclude:
>
> > [23] . . . that the applicant does not face a personalized risk that is not faced generally by other individuals in or from Haiti. The risk of all forms of criminality is general and felt by all Haitians. While a specific number of individuals may be targeted more frequently because of their wealth, all Haitians are at risk of becoming the victims of violence.

[22] Thus, as I pointed out in *Innocent*, consideration of an application for protected person status under subsection 97(1)(*b*)(ii) of the Act requires an individualized assessment in the context of existing and prospective risks faced by the applicant. This assessment is based on the particular facts of each case.

[23] The requisite analysis includes not only an analysis of the personalized risk faced by the person in question, but also a separate analysis of the risk faced by other individuals from the country in question. The objective of these analyses is to determine, in each particular case, based on the evidence available, whether the personalized risk faced by the applicant exists “in every part of that country and is not faced generally by other individuals in or from that country”.

[24] I also held in *Innocent* that a textual analysis of subparagraph 97(1)(*b*)(ii) of the Act and a pragmatic and functional approach to applying this subparagraph show that the analysis of the risk faced by other individuals from the country in question is not necessarily limited to an analysis of the risk faced by the entire population but may also include an analysis of the risk faced by only one segment of the population, to the extent that the particular circumstances of each case justify this approach in light of the objectives of the Act and its section 97.

[25] These various analyses are essentially factual and must be carried out on a case-by-case basis. To the extent that these analyses and the conclusions based thereon are reasonable, the Court will not intervene on judicial review of such a decision by the Refugee Protection Division of the Immigration and Refugee Board.

[26] In this case, the panel concluded that the applicant likely faced a risk that he would be the victim of crime if he were to return to Haiti, but that this was a generalized risk faced by the Haitian population. The panel, citing *Cius*, rejected the applicant’s submission that members of the Haitian diaspora are perceived to be wealthier than the rest of the population, making them

more attractive to wrongdoers and therefore placing them at greater risk. In *Cius*, Mr. Justice Beaudry found that Haitian repatriates did not face a particularized risk of violence, but rather a risk of general criminality in Haiti.

[27] The applicant submits that the panel's analysis was deficient in his case because it erred in relying on *Cius* only, without considering the new evidence demonstrating that members of the Haitian diaspora are indeed exposed to a heightened risk of crime. The applicant cites the National Documentation Package on Haiti, which was available to the panel that dealt with his case, and in particular document 14.1, which bears the long title of "HTI102610.FE 15 October 2007. Haiti: Whether Haitians who have lived abroad (in the United States or Canada, for example) for a long time (several years) are at risk if they return to their homeland; the kinds of risks they might face; whether their return could represent a threat to members of their families and, if so, what kind of threat their families would face and from whom".

[28] Behind this long title is a brief document that does not support the applicant's claims. Reproduced below is almost the entire content of the document in question, which requires no further comment [emphasis added]:

> The Office of the United Nations High Commissioner for Refugees (UNHCR) in Ottawa responded by letter to a request for information from the Research Directorate regarding the situation of Haitians who return to their country after living abroad for several years (24 Sept. 2007). The UNHCR representative in Canada stated that he had limited information and that he did not know whether such Haitians face any risks simply because they have lived abroad (UN 24 Sept. 2007).
>
> The UNHCR representative indicated that certain categories of people who have lived abroad may face a higher risk of threats and human rights violations, but he did not list them all (*ibid.*). For

example, criminals deported to Haiti risk facing human rights abuses as a result of prison conditions and may be subjected to other violations, such as arbitrary or long-term detention (*ibid.*). Stories of Haitians who have lived abroad for a long time and who are kidnapped after returning to their country because they appear to have greater financial means are often reported in the media and by non-governmental organizations (UN 24 Sept. 2007). Also, some people are more likely than others to be targeted upon returning to Haiti because of their involvement in political or other activities (*ibid.*). The risks that a person faces when returning to Haiti depend on that person's political role or past and [translation] "are not necessarily related to that person's status as a Haitian who has lived abroad" (*ibid.*).

In correspondence sent to the Research Directorate on 27 September 2007, a legal and human rights expert from the Canadian Cooperation Support Program Unit in Haiti (Unité d'appui au programme de la coopération canadienne à Haïti, UAPC) stated that the Haitian diaspora as a whole cannot be considered a [translation] "risk group" and that each case must be considered individually and within [translation] "its own context." He also indicated, however, that the characteristics of members of the diaspora [language and different behaviour in public] make them [translation] "a group apart" that [translation] "stands out" more and is [translation] "targeted more by kidnappers" (UAPC 27 Sept. 2007).

This issue is addressed in a *Boston Globe* article that indicates that people deported to Haiti by the United States have limited ties with the country and do not speak Creole well, which makes it difficult for them to adapt and in particular [translation] "makes deportees more easily identifiable" (11 Mar. 2007).

In correspondence sent to the Research Directorate on 18 September 2007, an analyst from the International Crisis Group (ICG) indicated that he has not studied the issue in detail and that he is not aware of any specific cases of Haitians who have been at risk following their return after living abroad for several years. However, he also stated that he has heard rumours and stories about such cases (ICG 18 Sept. 2004). He indicated that [translation] "Haitians who return to the country, particularly to Port-au-Prince" face certain risks and that [translation] "those risks are probably lower outside urban areas" (*ibid.*).

> Information on whether the return of such people could represent a threat to their families could not be found among the sources consulted by the Research Directorate.

[29] I can identify no error in the panel's reliance on *Prophète* and *Cius* in concluding that the risk of criminality currently faced by the applicant as a member of the Haitian diaspora was a generalized risk. Nothing in above-cited document in the National Documentation Package on Haiti calls this conclusion into question, and, having read this document, I do not see any error made by the panel in this respect.

[30] I also note that the applicant's situation resembles that considered by Mr. Justice Mosley in *Saint-Hilaire v. Canada (Citizenship and Immigration)*, 2010 FC 178.

[31] The applicant also submits that he can establish a personalized risk in this case in light of the assassination of his niece and his past political activities. However, the panel did not consider the applicant's past political activities to represent a particularized risk given the 15-year period that has since elapsed. This conclusion is reasonable, as it falls within the possible, acceptable outcomes which are defensible in respect of the facts and the law. Moreover, the applicant's contention that his niece was assassinated demonstrates, at most, the state of generalized crime that is rampant in Haiti and not a particular risk that the applicant would face if he returned there.

[32] In conclusion, the application for judicial review is dismissed.

[33] The parties posed no question for certification pursuant to paragraph 74(*d*) of the Act, and no question is certified.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review be dismissed.

"Robert M. Mainville"
Judge

Certified true translation
Francie Gow, BCL, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Philip Varickanickal Toronto, Ontario	FOR THE APPLICANT
Tamrat Gebeyehu Toronto, Ontario	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Joel Etienne Toronto, Ontario	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT