Federal Court  Cour fédérale

Date: 20100819

Docket: IMM-5950-09

Citation: 2010 FC 826

Ottawa, Ontario, August 19, 2010

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

MARIE CLAUDE LUC

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant is seeking judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, (the Act) of a decision by the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated November 9, 2009, wherein the Board refused to grant the applicant refugee protection status pursuant to sections 96 and 97 of the Act.

Factual Background

[2] The applicant is a young woman who is a citizen of Haiti. She made an asylum claim in the United States, which was denied in 2005 and then subsequently made a refugee claim in Canada based on her membership to a particular group, namely that of women from Haiti who have been raped and who have reported the rape to the authorities. The applicant also claimed to be a person in need of protection as she claims to face a risk to her life or cruel and unusual punishment should she be returned to Haiti.

[3] In 2003, the applicant's mother's home business was robbed. Five days later, the perpetrators came back, demanded more money and gang raped the applicant.

[4] The applicant denounced the perpetrators to the Justice of the Peace for her Commune. Afterwards, the applicant went into hiding until her mother met a smuggler who organized her passage to the United States. The United States denied her claim for asylum in 2005. The applicant entered Canada in 2007 and made a claim for protection.

Impugned decision

[5] Although the Board member accepted the applicant's identity and found that she was sexually assaulted in 2003, the Board refused the application on the grounds that the applicant's story was not credible, that no personalized risk of harm was established and that the applicant did not face a well-founded fear of persecution.

[6] The Board member noted several inconsistencies in the evidence before it, which affected the applicant's credibility. First, the Board was sceptical that the applicant had really seen her attacker on the street in a major city located 45 minutes away, a few days after her attack and that her friend identified him to her.

[7] Secondly, the Board member found it was unclear if the applicant went into hiding after the assault and for how long, since the assault occurred on August 2, 2003. The applicant arrived in the United States by boat on August 8, 2003. The Board member suggested that the boat ride is a few days at a minimum.

[8] Thirdly, the Board member found it was peculiar that the applicant recognized her attacker and identified him to the police, but that his name was never mentioned in the police report. Furthermore, the Board member found the applicant to be evasive and vague in the way she described the events. However, the Board member noted in her decision that she considered the Chairperson's *Gender Guidelines* and found them very instructive with respect to the reluctance of victims of sexual assault to offer accurate and detailed testimony.

[9] In the Board member's view, the applicant was the victim of a brutal crime, but there was insufficient evidence that the perpetrators would remember the applicant, pursue her and harm her once more, if she would return to Haiti.

[10] The Board member also noted that the applicant's mother and sister remained in their house in the same town in which the applicant was assaulted and that neither had been victimized since her departure or questioned about her whereabouts.

[11] The Board member recognized that the documentary evidence regarding the country's conditions confirms that gang activity, kidnappings, assault and rape, among other crimes, are rampant. However, the Board concluded that the applicant did not face a more personalized risk than any other Haitian who has been victimized.

[12] The Board member also referred to the decision *Soimin v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 218, [2009] F.C.J. No. 246, in which the Federal Court determined that women facing sexual violence in Haiti did not qualify for protection because their fear or risk is shared by everyone in the country.

[13] Finally, the Board member referred to the case *Prophète v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 331, [2008] F.C.J. No. 415, at para. 23, in which this Court decided that all Haitians are at risk of becoming victims of violence in addition to making a distinction between personalized risk and generalized risk. The Board member consequently concluded that the applicant was facing a generalized risk and refused the application.

Issues

[14] The following issues are raised in this application:

a. *Did the Board err in failing to consider that the applicant is part of a particular social group, namely that of women from Haiti who have been raped and who have reported the rape to the authorities, thereby failing to properly analyze her claim under s. 96 of the Act?*

b. *Did the Board provide an adequate analysis and reasons to support its decision?*

c. *Did the Board fail to analyze whether the applicant's "brutal" and "harrowing ordeal" amounted to compelling reasons as defined under s. 108 (4) of the Act?*

Relevant provisions

[15] The following provisions of the Act are applicable in these proceedings:

Convention refugee	Définition de « réfugié »
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	**96.** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	*a*) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	*b*) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Person in need of protection	Personne à protéger
97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	**97.** (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	*a*) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;
(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	*b*) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,	(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,	(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to	(iv) la menace ou le risque ne résulte pas de l'incapacité du

provide adequate health or medical care.	pays de fournir des soins médicaux ou de santé adéquats.
Person in need of protection	Personne à protéger
(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection	(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.
Rejection	Rejet
108. (1) A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection, in any of the following circumstances:	**108.** (1) Est rejetée la demande d'asile et le demandeur n'a pas qualité de réfugié ou de personne à protéger dans tel des cas suivants :
…	[…]
(*e*) the reasons for which the person sought refugee protection have ceased to exist.	*e*) les raisons qui lui ont fait demander l'asile n'existent plus.
…	[…]
Exception	Exception
(4) Paragraph (1)(*e*) does not apply to a person who establishes that there are compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution,	(4) L'alinéa (1)*e*) ne s'applique pas si le demandeur prouve qu'il y a des raisons impérieuses, tenant à des persécutions, à la torture ou à des traitements ou peines antérieurs, de refuser de se réclamer de la protection du pays qu'il a quitté ou hors duquel il est demeuré.

> torture, treatment or
> punishment.

Standard of review

[16] Prior to *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the standard of patent unreasonableness was applied to credibility findings: *Mejia v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 354, [2009] F.C.J. No. 438 (Q.L.) at para. 24, see also *Perera v. Canada (Minister of Citizenship and Immigration)* 2005 FC 1069, [2005] F.C.J. No. 1337. The Court will only intervene with a credibility finding if the Board based its decision on an erroneous finding of fact made in a perverse or capricious manner or if it made its decision without regard to the material before it (*Aguebor v. Canada (Minister of Employment and Immigration)* (F.C.A.), (1993) F.C.J. No. 732, 160 N.R. 315, 42 A.C.W.S. (3d) 886).

[17] In light of *Dunsmuir*, the Court in *Mejia*, *supra*, concluded that the appropriate standard of review for credibility findings is reasonableness. According to the Supreme Court of Canada, when reviewing a decision on the reasonableness standard, the Court should be concerned with justification, transparency and intelligibility within the decision-making process. The outcome must be defensible in respect of the facts and the law, and should fall within a range of possible and acceptable outcomes (*Dunsmuir* at para. 47).

[18] In *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] S.C.J. No. 12, the Supreme Court of Canada found that considerable deference is owed to a tribunal's

findings and that it is not the role of the Court to re-weigh the evidence where Parliament has granted the authority to make a decision on a salient issue to the tribunal.

[19] Concerning the first question, this Court determined in *Vaval v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 160, [2007] F.C.J. No. 227, at para. 7, that « …The existence of a nexus between the alleged persecution and one of the five grounds listed in the definition of "Convention refugee" under section 96 of the IRPA [*Immigration and Refugee Protection Act*] is principally a question of mixed fact and law…». This issue is therefore reviewable on the standard of reasonableness.

[20] As for the second question, it is well established that the issue of whether reasons are adequate is an issue of procedural fairness reviewable on a standard of correctness (*Andryanov v. Canada (Minister of Citizenship and Immigration)* 2007 FC 186, [2007] F.C.J. No. 272, at para. 15; *Jang v. Canada (Minister of Citizenship and Immigration*, 2004 FC 486, [2004] F.C.J. No. 600, at para. 9; *Adu v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 565, [2005] F.C.J. No. 693, at para. 9), *Level (litigation guardian) v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 227, [2008] F.C.J. 297 at para. 9.

[21] In addition, oral decisions are not in and of themselves problematic. Procedural fairness requires that decision-makers provide adequate reasons to justify their decisions. In *VIA Rail Canada Inc. v. National Transportation Agency et al.*, (C.A.), [2001] 2 F.C. 25, [2000] F.C.J. No. 1685, the Federal Court of Appeal explained the obligation to provide adequate reasons at para. 22:

> [22] The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion. Rather, the decision-maker must set out its findings of fact and the principal evidence upon which those findings were based. The reasons must address the major points in issue. The reasoning process followed by the decision-maker must be set out and must reflect consideration of the main relevant factors.

[22] Finally, with respect to the third question as to whether the Board erred by failing to consider the "compelling reasons" exception, this Court decided in *Decka v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 822, [2005] F.C.J. No. 1029, at para. 5, that:

> [5] … the appropriate standard of review when considering whether a Board should have applied the compelling reasons analysis is correctness. Review of the content of the analysis, had it occurred, would have been on the standard of reasonableness simpliciter: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982.

Analysis

a. Did the Board err in failing to consider that the applicant is part of a particular social group, namely that of women from Haiti who have been raped and who have reported the rape to the authorities, thereby failing to properly analyze her claim under s. 96 of the Act?

[23] With regards to the basis of the applicant's refugee claim, there is recent jurisprudence from this Court supporting a finding of a reviewable error where the Board fails to include a gender-based analysis in its assessment of the evidence of violence directed at women in Haiti (see *Michel v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 159, [2010] F.C.J. No. 184, from paras. 31 to 42, and *Frejuste v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 586, [2009] F.C.J. No. 831, at para. 37, wherein the Court held that the Board's failure to address the

70 pages of documentary evidence demonstrating the widespread gender-based violence in Haiti constituted a reviewable error).

[24] In the case at bar, the applicant argues that the Board appeared to dismiss the claim on lack of nexus. The issue in the present case is not whether the Board was reasonable in determining that the applicant was not a member of a particular social group. In fact, the Board accepted that the applicant was a member of a social group by acknowledging that she had been brutally sexually assaulted and that she had reported it to the authorities. Rather, the issue in this case is whether the Board erred by considering that the applicant did not have a well-founded fear of persecution and was rather facing a risk of general criminality.

[25] While it has been established that "a finding of generality does not prohibit a finding of persecution on the basis of one of the Convention grounds" (see *Dezameau v. Canada (Minister of Citizenship and Immigration)* 2010 FC 559, [2010] F.C.J. No. 710, at para. 23), in the case at bar, the Board member did in fact analyze the evidence related to a nexus, but came to the conclusion that there was insufficient evidence as to a well-founded fear of persecution.

[26] Indeed, it is not quite clear what the applicant fears. The Court believes it was reasonable for the Board to note that her mother and sister remained in the same house after the assault and have never been victimized or threatened or approached since. The Board also mentioned that there is no evidence to suggest that the perpetrators would remember the applicant, that they would be interested in pursuing her or wish to harm her again. In fact, they would not be aware that she

reported them since the police report does not mention any names. The Board then concluded that she was not being personally persecuted and therefore, the only thing she could fear is the general criminality and violence in Haiti. In fact, the applicant admitted this herself in her PIF when she mentions the following:

> In fact, since Aristide was forced into exile on February 29, 2004, the country has been dominated by ruthless, lawless people: they kidnap people and demand ransoms. I would undoubtedly be targeted by them should I return to Haiti after being away for more than four years.
>
> (Applicant's Record at p. 98)

[27] In addition, the Board member was sensitive to the applicant's situation. The Board member recognized the applicant as being a victim of a very brutal crime. However, victims of crime do not automatically qualify as having a well-founded fear of persecution. Consequently, it was reasonable for the Board, in these circumstances, to refer to the *Soimin* decision.

[28] Thus, given the lack of evidence pertaining to her alleged fear of persecution, this Court is of the opinion that the Board's decision is reasonable.

b. Did the Board provide an adequate analysis and reasons to support its decision?

[29] The applicant alleges that the Board did not provide an adequate analysis and reasons to support its decision. This Court does not agree with the applicant. In fact, the Board made a separate legal analysis of s. 96 and s. 97 as it was required to do so. In *Kandiah v. Canada (Minister of*

Citizenship and Immigration), 2005 FC 181, [2005] F.C.J. No. 275, at para. 18, this Court examined the legal tests required for both sections:

> [18] …The elements required to establish a claim under section 97 of the Act differ from those required under section 96 of the Act where a well-founded fear of persecution tied to a Convention ground must be established. Although the evidentiary basis may well be the same for both claims, it is essential that both claims be considered separately. A claim under section 97 of the Act requires that the Board apply a different test, namely whether a claimant's removal would subject him personally to the dangers and risks stipulated in paragraphs 97(1)(*a*) and (*b*) of the Act.

[30] More particularly, the Board analyzed, from para. 7 to 11 of the decision, the evidence and the testimony before it to determine if the applicant had a well-founded fear of persecution (s. 96 of the Act). From para. 12 to 15, the Board consequently did the same in order to determine if the applicant would face a risk of danger, torture or cruel treatment if she would return to Haiti (s. 97 of the Act).

[31] The Court therefore agrees with the respondent and concludes that there was no breach of procedural fairness by the Board.

c. Did the Board fail to analyze whether the applicant's "brutal" and "harrowing ordeal" amounted to compelling reasons as defined under s. 108 (4) of the Act?

[32] Section 108(4) of the Act allows the Board to grant refugee protection in cases where the applicant faced appalling past persecution despite the fact that the original reasons for seeking protection no longer exist. However, this is limited to a small minority of claimants. Case law regarding this issue have determined that two conditions must be met before the Board is required to

consider whether there are sufficient compelling reasons to grant refugee status: 1) the claimant must establish that, at some point in time, they would have met the decision of a Convention refugee or a person in need of protection; and 2) there must be a determination that the person no longer meets the definition of a Convention refugee or a person in need of protection because of a change in circumstances (see *Brovina v. Canada (Minister of Citizenship and Immigration.)*, 2004 FC 635, [2004] F.C.J. No. 771; *Nadjat v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 302, [2006] F.C.J. No. 478); *Decka v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 822, [2005] F.C.J. No. 1029).

[33] Despite the applicant's arguments, the Court is of the opinion that the Board was not required to consider whether there were compelling reasons to grant refugee protection according to this exception provision because the Board never found that the applicant was a Convention refugee or a person in need of protection, therefore not fulfilling the two conditions required.

[34] Thus, the Court does not believe that the Board erred by failing to consider whether there were sufficient compelling reasons to grant the applicant refugee protection in light of the absence of past persecution and change of circumstances.

[35] For these reasons, the application for judicial review is denied.

[36] Counsel for the applicant suggested the two following proposed questions for certification :

1. " Is the Refugee Protection Division of the Immigration and Refugee Board required to conduct an independent analysis pursuant to section 108(4) once evidence is adduced indicating the claimant suffered previous persecution, torture, treatment or punishment that is compelling or otherwise analogous or synonymous with treatment that can be characterized as "brutal", "atrocious", or "appalling" ?

2. "Is a refugee claimant required to expressly request the RPD's consideration pursuant to s. 108(4) to benefit from the "compelling reasons" provision in the Act?"

[37] The law is clear on the issue raised by the applicant's two proposed certified questions and it has been determined that two conditions must be met before the Board is required to consider whether there are sufficient compelling reasons to grant refugee status: the applicant must establish that, at some point, she would have been found to be a Convention refugee or a person in need of protection and a determination that she no longer meets the definition of a Convention refugee or a person in need of protection because of a change in circumstances (*Decka, Nadjat*).

[38] With respect to the applicant's second proposed question for certification, it is clear that it is not a dispositive issue in the case at bar. Absent evidence that the applicant met the definition of a Convention refugee or a person in need of protection and that there was a change in circumstances, there was no requirement in the case at bar for the Board to consider s. 108(4), whether raised or not by the applicant.

[39] This Court is therefore of the view that the questions proposed for certification do not raise any issues of general importance. Accordingly, they shall not be certified.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This judicial review be denied.

2. No serious question of general importance is certified.

"Richard Boivin
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5950-09
STYLE OF CAUSE:	MARIE CLAUDE LUC v. MCI
PLACE OF HEARING:	Calgary, Alberta
DATE OF HEARING:	July 14, 2010
REASONS FOR JUDGMENT:	BOIVIN J.
DATED:	August 19, 2010

APPEARANCES:

Raj Sharma	FOR THE APPLICANT
Camille Audain	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Sharma Harsanyi Calgary, Alberta	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT