Federal Court  Cour fédérale

Date: 201200920

Docket: IMM-8307-11

Citation: 2012 FC 1101

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, September 20, 2012

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

RENICE BRAZIER
PAUL HERSKIN DAY
MATT DAY

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] Renice Brazier, as well as her spouse, Paul Herskin Day, are citizens of the Republic of Haiti. Their minor son, Hendrick Matt Day, is a citizen of the United States. They are challenging the decision rendered on October 27, 2011, by Ruth Delisle of the Refugee Protection Division (the panel) that the applicants are neither Convention refugees nor persons in need of protection.

[2] The applicants fled Haiti after the earthquake on January 12, 2010. They had been living in Port-au-Prince; the male applicant was a teacher and the female applicant, a merchant. During the earthquake, the applicants' house was destroyed, the female applicant's store was looted Mr. Day lost his employment when the school where he worked collapsed. In the days following the earthquake, the family put up a tent in the yard of their home. Mr. Day was able to leave Haiti on January 19, 2010, and headed to the United States with their minor son. Ms. Brazier left her country of birth armed with a U.S. visa on February 10, 2010. All three of them arrived together at the Canadian border on February 19, 2010 to claim refugee protection here.

[3] A first Personal Information Form (PIF) was submitted on March 18, 2010 in which Ms. Brazier expressed fear for their health and safety because prisons had been destroyed by the earthquake and, as a consequence, armed kidnappers now roamed about freely. She wrote: [TRANSLATION] "my family and I cannot return to Haiti, because we have lost everything" and their only recourse and hope for survival was to seek refuge in Canada.

[4] On May 2, 2011, their PIF was rewritten. Ms. Brazier declared:

a. Having had to leave after the earthquake [TRANSLATION] "given the humanitarian crisis that ensued, but also as a result of the growing insecurity cased by the crisis";

b. Having been in an enviable position in light of Haiti's socio-economic context as a merchant selling fabrics, cosmetics and cleaning products while her spouse was a teacher. The family's home was protected by a fence surrounding the yard and was monitored by private security at all times.

c. Even before the earthquake the family had already had to take certain measures to ensure their safety, for example, out of fear of the sexual violence [TRANSLATION] "that was prevalent in Haiti" her spouse went to pick her up at the end of the days when she closed her store and her cousin had already been kidnapped and held for ransom.

d. She had travelled to the United States regularly from 2007 to 2010 to visit her relatives; her child was born there in 2008.

e. The family lived in a dangerous neighbourhood, an area rife with supporters of Aristide.

f. The family's profile – middle-class merchant, travelled regularly to the United States where members of her family lived along with a U.S. child, perceived as not supporting the populist Lavalas movement and as being pro-American; in the Haitian context such prejudices [TRANSLATION] "could endanger our lives".

g. She acknowledges [TRANSLATION] "that she was fortunate, until the earthquake, not to have personally experienced violence, other than her cousin's kidnapping. Their safety net was destroyed in the earthquake; the walls of their home collapsed as well as those of the prisons, resulting in a flood of Aristide supporters escaping and venturing into neighbourhoods like theirs. One of the escaped convicts threatened their guard.

h. Following the crisis and growing insecurity, the family fled Haiti, fearing a resurgence in sexual violence with the return of many supporters of the Fanmi Lavalas party to the poorer neighbourhoods.

i. Ms. Brazier concludes [TRANSLATION] "our fear is not only based on our membership in a particular social group, namely that of middle-class persons able to afford a secure

> house and trips to the United States, but also on the basis of political opinions ascribed to them by Lavalas supporters based on this membership in that particular social group .
>
> [Emphasis added.]

II. Impugned decision

[5] The panel's decision does not recognize the applicants as refugees under sections 96 and 97 of the *Immigration and Refugee Protection Act* (S.C. 2001, c. 27) (IRPA). With respect to section 96, the panel relied upon the following factors:

a. The existence of an internal flight alternative. The panel wrote at paragraph 15 of its decision:

> Considering that they had left their relatives to come to Canada, and that they had done the same thing by leaving Gonaïves to settle in Port-au-Prince, the panel asked the claimants whether they could settle in Cap-Haïtien, if they were to return to their country of citizenship. In this regard, the female claimant submitted that her parents had sold everything they had in Gonaïves to settle in Port-au-Prince. The claimants also submitted that the situation was not good outside the capital and that, in ten years, it had not improved. Since the male claimant testified that his father was living in Cap-Haïtien, the panel asked him why he could live there but they could not. The male applicant avoided answering the question by stating that his mother was not in touch with his father. They stated that they could not settle in their province of origin, Gonaïves, either, because they have no relatives or friends and because there is no business there because of tornadoes that swept through.
>
> [Emphasis added.]

b. The panel was aware that Port-au-Prince had been ravaged by the earthquake and that life outside the capital was not ideal. It ruled, at paragraph 25:

> However, with the exception of the insecurity they alluded to, nothing in the evidence submitted showed that the female claimant would be unable to settle with her family in Gonaïves, their place of

> origin, or in Cap-Haïtien, where they have close family, if they were to return to Haiti. The panel determines that the female claimant failed to establish that there is a "serious possibility" of gender-related persecution if she were to return to Gonaïves or Cap-Haïtien or that it would be objectively unreasonable to settle there, considering her particular circumstances.
>
> [Emphasis added.]

c. The applicants' lack of subjective fear. The panel wrote at paragraph 21:

> It has been established in the case law that a delay in leaving the country of persecution, a failure to claim refugee protection in a country that is a signatory to the Convention or a return to the country of persecution significantly undermines a refugee protection claimant's subjective fear. It must be noted that the female claimant did not see fit to leave her country of citizenship permanently, though she had the travel documents that would have enabled her to leave, despite the unenviable situation already present before the earthquake. In fact, the female claimant has an American visa, issued on July 30, 2007, and valid for five years, and she made several trips to the USA before the earthquake. The panel notes the absence of subjective fear in this regard, and is of the opinion that this behaviour is inconsistent with that of a person who fears gender-related persecution and who fears for her life in the Republic of Haiti, because she is perceived to be pro-American.
>
> [Emphasis added.]

d. Possibility of being raped [Emphasis added.] In the panel's opinion, Ms. Brazier had not demonstrated that there was more than a mere possibility that she would face a risk of being raped. She had also not convinced the panel that there was a risk of harm that was sufficiently serious and whose occurrence was more than a mere possibility. The panel was of the following view:

> [26] While the panel is very sympathetic to the victims of this natural disaster, the female claimant's situation is not comparable to that of a vulnerable woman who is alone under a tent in Haiti and who could, because of her particular circumstances, face gender-related persecution.

> [27] The female applicant and her husband submitted that they fear returning to Haiti because of the insecurity there, which has no nexus to one of the Convention grounds. In fact, the claimants stressed that they are more targeted than their fellow citizens because of their social status, which is higher than that of other citizens of their country.
>
> [28] It has been established in the case law that wealthy people or those who are perceived as being wealthy do not constitute a particular social group within the meaning of section 96 of the IRPA. The same holds true for the Haitian diaspora, which does not constitute a particular social group within the meaning of section 96 of the IRPA.
>
> [29] In this case, the evidence revealed that the claimants fear the ongoing crime that is raging in Haiti. It is well established in the case law that being a victim of a criminal act does not constitute a persecution ground under section 96 of the IRPA.
>
> [Emphasis added.]

[6] As to the application of section 97 of the IRPA, the panel was of the view that the applicants' alleged fear was based on the generalized risk in Haiti that is faced generally and indiscriminately by everybody living in that country. The evidence did not show that the applicants would be subject to a risk that is different from that faced by their fellow citizens. The panel added, at paragraph 29:

> It is well established that a generalized risk of criminality, shared by the entire population of a country, does not satisfy the criteria in subsection 97(1) of the IRPA, despite the fact that some individuals may be targeted more often because of their wealth or because they are perceived as being wealthy. The exception under subparagraph 97(1)(*b*)(ii) therefore does not apply to them. The claimants' guard may have been stopped by an individual who demanded five dollars from him, but the panel is of the opinion that this incident does not personalize their risk of return in their country of citizenship. The same applies to the kidnapping of the female claimant's cousin in 2003, considering that the claimants did not have any problems after this incident, and nor have the female claimant's parents or the other

> members of her extended family who have remained in Haiti experienced any problems up to now.

III. The applicants' arguments

[7] The applicants argue that:

a. The panel's finding that there was an IFA is unreasonable because (i) it ignores a number of Refugee Protection Division (RPD) decisions in which it was determined that, given the current circumstances affecting Haiti, there is no internal flight alternative in that country, and (ii) the panel's finding is based on a poor assessment of the evidence.

b. The panel erred in law by failing to rule on one of the grounds of persecution cited, namely, imputed political opinion.

c. Given that the panel had not found that the applicant's testimony was not credible, its finding that there was a lack of subjective fear on the part of the principal applicant was wrong.

d. The panel's finding with regard to Ms. Brazier's objective fear, which was based on gender-related persecution, was unreasonable in light of the documentary evidence.

IV. Analysis and conclusions

[8] Failure to consider a ground for protection is reviewable on a standard of correctness: *Woldesellasie v Canada (Citizenship and Immigration)* 2011 FC 522 at paragraph 34.

[9] Alternately, issues involving the determination of facts are reviewable on a standard of reasonableness.

[10] I have read the transcript of the hearing and considered the submissions of the parties. I will deal with the IFA issue first, as it is determinative according to two decisions of the Federal Court of Appeal, namely, *Rasaratnam v Canada (Minister of Employment and Immigration)*, 1992 1 FC 706 in which Justice Mahoney wrote:

> In my opinion, in finding the IFA, the Board was required to be satisfied, on a balance of probabilities, that there was no serious possibility of the appellant being persecuted in Colombo and that, in all the circumstances including circumstances particular to him, conditions in Colombo were such that it would not be unreasonable for the appellant to seek refuge there.
>
> [Emphasis added.]

[11] There is also Justice Linden's decision in *Thirunavukkarasu v Canada (minister of Employment and Immigration)*, 1994 1 FC 589 in which he stated the following at paragraphs 13 and 14:

> Let me elaborate. It is not a question of whether in normal times the refugee claimant would, on balance, choose to move to a different, safer part of the country after balancing the pros and cons of such a move to see if it is reasonable. Nor is it a matter of whether the other, safer part of the country is more or less appealing to the claimant than a new country. Rather, the question is whether, given the persecution in the claimant's part of the country, it is objectively reasonable to expect him or her to seek safety in a different part of that country before seeking a haven in Canada or elsewhere. Stated another way for clarity, the question to be answered is, would it be unduly harsh to expect this person, who is being persecuted in one part of his country, to move to another less hostile part of the country before seeking refugee status abroad?
>
> An IFA cannot be speculative or theoretical only; it must be a realistic, attainable option. Essentially, this means that the alternative

> place of safety must be realistically accessible to the claimant. Any barriers to getting there should be reasonably surmountable. The claimant cannot be required to encounter great physical danger or to undergo undue hardship in travelling there or in staying there. For example, claimants should not be required to cross battle lines where fighting is going on at great risk to their lives in order to reach a place of safety. Similarly, claimants should not be compelled to hide out in an isolated region of their country, like a cave in the mountains, or in a desert or a jungle, if those are the only areas of internal safety available. But neither is it enough for refugee claimants to say that they do not like the weather in a safe area, or that they have no friends or relatives there, or that they may not be able to find suitable work there. If it is objectively reasonable in these latter cases to live in these places, without fear of persecution, then IFA exists and the claimant is not a refugee.

[12] The transcript of the hearing clearly shows that the panel's finding was entirely reasonable with regard to the inadequacy of the applicants' reasons for their unwillingness to move to Cap-Haïtien. The fact that in other cases the RPD determined that there was no IFA in Haiti is not persuasive. Each case must be examined individually. The facts in the two cases cited by the applicants' counsel (single female claimants) have no bearing on this case, nor does the fact that a UN group had left Cap-Haïtien. The documentary evidence shows that the reasons for that move were quite different from those claimed by the applicants. Although it is not necessary to address the other grounds raised by the applicants, I shall deal with these briefly.

[13] The panel's finding of a lack of subjective fear was not related to the applicants' credibility. It was based on independent facts: the female applicant's delay in leaving Haiti after the earthquake and that fact that she had returned to her native country after her frequent trips to the United States.

[14] The panel did not fail to consider one of the Convention grounds, that is to say, imputed political opinion (see paragraphs 7, 21 and 22).

[15] Lastly, the panel's finding with respect to Ms. Brazier facing a serious possibility of gender-based persecution was related to her return to Cap-Haïtien or Gonaïves. The panel did not make a general finding in that regard.

[16] For all these reasons, this application for judicial review is dismissed.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that this application for judicial review is dismissed. No question of importance was proposed.

"François Lemieux"
Judge

Certified true translation
Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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