

Federal Court



Cour fédérale

Date: 20130215

Docket: IMM-1197-12

Citation: 2013 FC 167

Ottawa, Ontario, February 15, 2013

PRESENT: The Honourable Madam Justice Gleason

BETWEEN:

MONTCAMENE DESIRE

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant is a citizen of Haiti. She left Haiti in 1997 and lived for a number of years in the United States, both before and after her claim for refugee status was denied in that country. She then came to Canada in 2009 and made a refugee claim upon arrival. As a single woman, she claims to fear being raped if she were to be returned to Haiti, due to the prevalence of sexual violence against women in that country.

[2] In a decision dated January 12, 2012 the Refugee Protection Division of the Immigration and Refugee Board [the RPD or the Board] rejected the applicant's claim, finding that she was neither a refugee, within the meaning of section 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA or the Act], nor a person in need of protection within the meaning of section 97 of the Act. In the present application for judicial review, the applicant seeks to have the Board's decision set aside.

[3] The applicant raises three separate errors on the part of the Board. She argues first that the Board erred in finding her to not fit the profile of those at risk for rape. She asserts that at least some of the documentary evidence established that all women are at risk of rape in Haiti and that the Board erred in confining its analysis to a review of the more recent country documentation, some of which indicated that such risk is prevalent for those who are young and living in a tent or a refugee camp. Second, she asserts that the Board erred in failing to mention and apply *Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution*, Guidelines issued by the Chairperson pursuant to Section 65(3) of the Immigration Act [the Gender Guidelines]. Finally, she argues that the Board's findings were perverse because it found the applicant to possibly face a heightened risk of kidnapping and assault, but neglected to consider that the country documentation recognizes that women who are kidnapped are often raped. In this regard, the most recent U.S. Department of State for Human Rights Report before the RPD stated that "kidnappers often raped their female abductees" and a newspaper article before the Board also indicated that "almost half of women kidnapped had been raped".

[4] The respondent, for its part, argues that there was evidence before the Board which supported its determination that the applicant did not fit the profile of those at risk of rape: the applicant is a middle-aged woman of some means, with family, and could live with her family in Fonds-Parisien and thus would not be forced to live in a tent or a refugee camp. The respondent argues that the RPD's finding on this point is accordingly reasonable. With respect to the applicant's second argument, the respondent submits that, contrary to what the applicant asserts, the Board was sensitive to the requirements of the Gender Guidelines and did recognize that rape constitutes gender-related persecution under section 96 of the IRPA but simply found that the applicant had not established that there was an objective basis for her fear of rape as she lacked the profile of those for whom rape is more than a mere possibility in Haiti. The respondent asserts in this regard that it is not necessary for the Board to specifically mention the Gender Guidelines in a decision as long as it applies the principles mandated by the Guidelines. Finally, the respondent argues that the finding that the applicant is at risk of kidnapping and assault does not conflict with the finding that the applicant lacks the profile of a woman who might be at risk of rape. The respondent relies on *Soimin v Canada*, 2009 FC 218 in support of the argument that a woman who fears kidnapping in Haiti does not meet the definition of a Convention Refugee as the risk of kidnapping is one of general criminality.

[5] While the first and second grounds advanced by the applicant do not warrant intervention, I agree with the applicant that the Board's findings regarding the risk of kidnapping and characterization of this risk as one of mere criminality constitutes a reviewable error warranting intervention.

[6] In this regard, the Board first recognised in its decision that rape constitutes gender-based persecution, within the meaning of s. 96 of the IRPA. This recognition is in accordance with several decisions of this Court, including, notably, three relatively recent cases involving Haiti: *Josile v Canada (Minister of Citizenship and Immigration)*, 2011 FC 39 at para 33 [*Josile*]; *Dezameau v Canada (Minister of Citizenship and Immigration)*, 2010 FC 559 at paras 23, 26 [*Dezameau*]; and *Frejuste v Canada (Minister of Citizenship and Immigration)*, 2009 FC 586 at paras 34-37. The recognition of rape as a gender-based crime is likewise mandated by the decision of the Supreme Court of Canada in *R v Osolin*, [1993] 4 SCR 595, [1993] SCJ No 135 where Justice Cory, in majority, stated:

It cannot be forgotten that a sexual assault is very different from other assaults. It is true that it, like all the other forms of assault, is an act of violence. Yet it is something more than a simple act of violence. Sexual assault is in the vast majority of cases gender based. It is an assault upon human dignity and constitutes a denial of any concept of equality for women.

[7] After recognizing that the probability of being raped amounts to persecution under section 96 of the IRPA, and determining that the applicant did not face such risk, the RPD went on to qualify her risk as being one of “the possibility of assault and kidnapping.” It then continued by stating, “the jurisprudence holds that this does not constitute a ‘personalized risk’” and dismissed the risk of kidnapping under section 97 of the IRPA as a generalized risk.

[8] What the RPD failed to do, however, was to assess whether or not the risk of kidnapping might constitute gender-based persecution under section 96 of the Act. This analysis was necessary on the facts of this case because there was evidence before the Board which indicated that women are disproportionately at risk of rape if kidnapped in Haiti, including documents submitted by the

applicant in her submissions to the Board. In my view, it was necessary for the Board to assess this evidence, and weigh it along with the other evidence regarding risk of rape in its analysis. This does not necessarily mean, however, that the applicant's claim must succeed. Rather, the Board must properly assess it. In light of the evidence before the RPD, its finding that the applicant was not at risk of rape but was at risk of being kidnapped cannot live together, and its conclusion, without further explanation, is therefore perverse. It is the evidence of the link between rape and kidnapping which distinguishes this case from *Soimin* as there, unlike here, there does not appear to have been evidence regarding the likelihood of kidnapping victims being raped.

[9] Thus, for these reasons, the Board's decision must be set aside and the matter remitted for reconsideration. No question for certification arises in this matter, as my decision turns squarely on the reasoning advanced by the Board in this case.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review of the RPD's Decision is granted;
2. The RPD's Decision is set aside;
3. The applicant's refugee claim is remitted to the RPD for re-determination by a differently constituted panel of the Board;
4. No question of general importance is certified; and
5. There is no order as to costs.

"Mary J.L. Gleason"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-1197-12

STYLE OF CAUSE: *Montcamene Desire v The Minister of Citizenship and Immigration*

PLACE OF HEARING: Ottawa, Ontario

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**REASONS FOR JUDGMENT
AND JUDGMENT:** GLEASON J.

DATED: February 15, 2013

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