

Federal Court



Cour fédérale

Date: 20180612

Docket: IMM-5231-17

Citation: 2018 FC 612

[ENGLISH TRANSLATION REVISED BY THE AUTHOR]

Ottawa, Ontario, June 12, 2018

PRESENT: Mr. Justice Grammond

BETWEEN:

JEAN DUNESSE THELUSMA

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] Mr. Thelusma, a citizen of Haiti, is claiming refugee status in Canada. He says that his father was murdered because of his political involvement and that he himself had been threatened with death after he filed a complaint about this murder. He left Haiti in 2011 and lived in the United States until June 2017, when he arrived in Canada.

[2] On November 7, 2017, the Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB] denied his refugee claim. The RPD held that Mr. Thelusma was not credible and that his claim had no credible basis. The main reason given by the RPD in support of this finding is that Mr. Thelusma had not specified the name of the political party his father belonged to in his refugee claim. The RPD also found that Mr. Thelusma had contradicted himself regarding the circumstances surrounding the complaint he filed. Lastly, the RPD stated that Mr. Thelusma's credibility was tarnished by the fact that he had been unable to clearly state why he had made a refugee claim in the United States.

[3] I find that the RPD made an unreasonable decision by relying on relatively minor elements to completely negate the applicant's credibility and state that his claim had no credible basis.

I. Credibility findings

[4] To understand why the RPD's findings regarding Mr. Thelusma's credibility were unreasonable, it is necessary to begin with a description of the circumstances under which the hearing was conducted.

[5] Mr. Thelusma's mother tongue is Creole. He learned English while he was living in the United States but speaks little French. Therefore, he required an interpreter. However, this interpreter was not present in the RPD hearing room. Rather, the interpreter was on the telephone. The hearing transcript reveals frequent misunderstandings related to difficulties in translation. The member, who clearly understood Creole, had to correct the interpreter's

translation of Mr. Thelusma's statements on more than one occasion. Moreover, Mr. Thelusma's counsel noted that the responses translated by the interpreter seemed much shorter than what Mr. Thelusma had said in Creole. The interpreter simply answered that Mr. Thelusma was repeating himself.

[6] The following excerpt of the transcript gives a good idea of the general atmosphere of the hearing:

[TRANSLATION] BY THE PRESIDING MEMBER (to the claimant)

So when did it happen, when did your father die?

BY THE CLAIMANT (to the presiding member)

Are you talking about the day he died, Sir?

BY THE INTERPRETER (to the presiding member)

Hello?

BY THE PRESIDING MEMBER (to the claimant)

Your father's death, you can interpret it however you like.

BY COUNSEL (to the presiding member)

I didn't hear what he said.

BY THE CLAIMANT (to the presiding member)

So he says he did not understand the question, Sir.

BY THE PRESIDING MEMBER (to the claimant)

When did your father die?

BY THE CLAIMANT (to the presiding member)

November 23, 2011.

BY THE PRESIDING MEMBER (to the claimant)

Why do you say November 23, 2011? Why do you say – why are you sure that it was on November 23, 2011?

BY THE CLAIMANT (to the presiding member)

I am a little confused, Sir. It was on November 23, 2010.

...

[7] Therefore, when analyzing Mr. Thelusma's testimony, we must be cautious about jumping to conclusions and consider that what might appear to be a contradiction or hesitation might simply be explained by problems with translation.

A. *Mr. Thelusma's father's membership in a political party*

[8] First of all, I find that the RPD could not reasonably conclude that Mr. Thelusma lacks credibility because he was unable to name the political party with which his father associated.

(1) The conduct of the hearing and the RPD's decision

[9] On his Basis of Claim [BOC] Form, Mr. Thelusma affirmed that his father was a supporter of a politician named Jean Renel Sénatus, who was an opponent of another politician named Jude Destiné. At the hearing before the RPD, the member questioned Mr. Thelusma about the political party to which his father belonged. While Mr. Thelusma mentioned the names of Mr. Sénatus and Mr. Destiné, the member made the following statements:

[TRANSLATION] BY THE PRESIDING MEMBER (to the claimant)

That is why I asked you is Jude Destiné a party or is Jean Renel Sénatus a party? What is it?

BY THE CLAIMANT (to the presiding member)

Well, they were each part of a different political party. So they were face to face, always fighting each other.

BY THE PRESIDING MEMBER (to the claimant)

There you go again, you're proving my point. You have yet to deliver, you're not answering the question.

But which party is it, Sir? Which party is it?

The basis of your account, and I read it, the basis of this – of your account is that your father was a member of a political party. You never indicated which party it was.

...

[10] Mr. Thelusma then mentioned that Mr. Sénatus was a “Zokiki.” Interpreting this statement as being the name of a political party, the member expressed his incredulity in the following exchange:

[TRANSLATION] BY THE CLAIMANT (to the presiding member)

Ah, the name of the party is Zokiki and up until now, Mr. Sénatus is senator and it is still the same name.

BY THE PRESIDING MEMBER (to the claimant)

Sir, give me proof that there is a party in Haiti, a political party called Zokiki.

BY THE CLAIMANT (to the presiding member)

You can do a Google search and you will see the Zokiki party.

BY THE PRESIDING MEMBER (to the claimant)

Sir, it's not my job to do your research for you. You need to show me that there is a political party in Haiti called Zokiki and Jean Renel Sénatus is the party – the leader, is that what you are saying? Jean Renel Sénatus is the leader of the Zokiki party, is that right?

...

BY THE CLAIMANT (to the presiding member)

So the omission stems from the fact that I omitted to indicate Zokiki or Unity, even though I named the representative of those two parties. I failed to say it exactly like that, but by indicating Jean Renel Sénatus or Jude Destiné, one could understand what I meant.

[11] The member then stated his conclusions in no uncertain terms:

[TRANSLATION] BY THE PRESIDING MEMBER (to the claimant)

Sir, you tell me in your account, I will read it to show you the severity of this omission and inconsistency.

“In 2010” – I am reading your account here – “in 2010, my father was the vice-president of a political party in Haiti. He was still providing information to – and commissions for the leader, Jean Renel Sénatus. This party’s rival is the leader Jude Destiné.”

So, you want me to believe that your father was killed because he was vice-president of a party that you never mentioned in your BOC.

[12] The RPD’s decision reflects the member’s comments. In substance, the RPD states that the existence of the political party with which his father was affiliated was at the centre of Mr. Thelusma’s refugee claim. The RPD is of the view that Mr. Thelusma should have mentioned the name of this political party in his claim and testimony. Moreover, the RPD indicated that the National Documentation Package for Haiti does not mention the existence of a political party named “Zokiki.”

(2) Information available on Mr. Sénatus’s affiliation

[13] The National Documentation Package on Haiti, which is maintained by the IRB Research Directorate, contains two documents that establish that Mr. Sénatus is indeed a Haitian politician,

elected to the Senate in 2015 (<http://psephos.adam-carr.net/countries/h/haiti/haiti2015senate.txt>; <http://www.oas.org/documents/eng/press/Informe-Final-Haiti-CP-2017-ENG.pdf>). One of these documents indicates that Mr. Sénatus labelled himself as a member of the “LIDE” party. He is apparently the only candidate who ran as a member of that party during the Senate elections of 2015.

[14] This information was available to the RPD at the time of the hearing.

(3) The relevance of the name of the political party

[15] What is the impact of this information on the RPD’s assessment of Mr. Thelusma’s credibility? In substance, the RPD required that Mr. Thelusma know the name of the political party with which his father was affiliated in 2010. Because he did not know it, the RPD concluded that his account was not credible. While such an inference might be justifiable in a Canadian context, I find it to be unreasonable in a Haitian context (*Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776, at paragraphs 6 to 8).

[16] One of the documents in the National Documentation Package on Haiti is a study conducted in December 2016 by the Office français de protection des réfugiés et apatrides [French Office for the Protection of Refugees and Stateless Persons] on the main political parties of Haiti. This study immediately points out that Haitian political parties are [TRANSLATION] “countless and volatile.” Thus,

[TRANSLATION] In May 2013, the newspaper *Le Nouvelliste* published a list of 121 parties recognized by the Department of Justice. Professor Franklin Midy counted 144 registered parties, 41

of which had a Creole name. According to him, a large number of them are parties dedicated to the service of one family or one sole leader, while others operate as private limited companies.

(Source: https://www.ofpra.gouv.fr/sites/default/files/atoms/files/1612_hti_partis_politiques_0.pdf, page 3, references omitted)

[17] Moreover, this study states that the leaders or candidates have a weak allegiance to their party. They often change parties from one election to the next. Furthermore, this study does not mention a party named “LIDE” in the list of the main parties currently represented in political institutions or among those who participated in the presidential elections in 2006, 2010-2011 and 2015-2016. The only deduction one could reasonably make from all this is that Mr. Sénatus is not associated with one of the main political parties in Haiti and that the party he represented in 2015 is probably a fringe party.

[18] What can we conclude from all this? In 2010, when Mr. Thelusma was 20 or 21 years old, was he expected to know the name of Mr. Sénatus’s party, with whom his father collaborated? The evidence does not show which political party it was. All we know is that five years later, Mr. Sénatus ran for a rather marginal party. Did that party exist in 2010? Was Mr. Sénatus affiliated with it at that time? We cannot make assumptions. Under the circumstances, it is perfectly normal that Mr. Thelusma decided to describe his father’s political involvement by referring to the name of the candidate he supported rather than by naming a political party.

[19] Does the fact that Mr. Thelusma answered [TRANSLATION] “he’s a Zokiki” after the member asked the name of Mr. Sénatus’s political party several times make Mr. Thelusma not credible? I think not. We need to keep in mind the problems with translation that affected the

hearing. It is possible that the concept of political party was mistranslated. It is also possible that when faced with the member's obvious impatience, Mr. Thelusma instinctively uttered a word that, to him, described Mr. Sénatus's political identity.

[20] In short, in my view, it was impossible to find that Mr. Thelusma was not credible on the sole basis that he was unable to name the political party with which his father was associated or because he gave the name "Zokiki" in response to the member's questions. The RPD's decision in that regard was unreasonable.

B. *The "contradiction" regarding the filing of a complaint*

[21] The RPD also mentioned that Mr. Thelusma contradicted himself regarding the complaint he allegedly filed against his father's murderers. With respect, I have difficulty understanding the RPD's explanations on the matter.

[22] Immediately after his father was murdered, Mr. Thelusma filed a complaint with a justice of the peace. He provided the RPD with a copy of the minutes prepared by the justice of the peace. He does not know the names of the people who murdered his father, and the minutes do not mention them. He claims that afterward he received threats from five people as a result of filing this complaint. He also does not know the identity of those people.

[23] Under the circumstances, I do not see how the RPD could reproach Mr. Thelusma for not knowing whom he had filed the complaint against.

C. *The reason for the refugee claim in the United States*

[24] The RPD also criticized Mr. Thelusma for being unable to clearly state why he had filed a refugee claim in the United States. The transcript reveals a rather confused exchange on the matter. Once again, we need to remember that the member's questions might not have been accurately translated and that Mr. Thelusma might not have understood that the member wished to know the reasons given in support of the refugee claim filed in the United States. In response, Mr. Thelusma described the circumstances of his arrival in the United States, his imprisonment by immigration authorities and the fact that they allowed him to make a refugee claim. He pointed out that he made this claim in prison, with only the help of his fellow inmates, who did not speak Creole.

[25] I do not think we can say that Mr. Thelusma's responses were contradictory or inconsistent.

D. *Summary*

[26] It is true that the role of the RPD is to, among other things, test the credibility of refugee claimants to ascertain the truth of the facts given in support of their claim. This process is particularly important because claimants' testimonies are often, by necessity, the main, if not the only, evidence in support of their fear of persecution.

[27] However, this fact-checking process cannot be based solely on the member's preconceived expectations of knowledge of certain very specific facts. In this case, the RPD's

decision is based almost entirely on Mr. Thelusma's inability to name the political party Mr. Sénatus belonged to in 2010. In light of what we know about the dynamics of political parties in Haiti, it was completely unreasonable to require Mr. Thelusma to answer this question and to dismiss his refugee claim for that reason alone.

II. Reasonable apprehension of bias

[28] Mr. Thelusma also argues that the RPD member's conduct during the hearing gave rise to a reasonable apprehension of bias.

[29] Like judges, administrative decision-makers must be impartial. They must also conduct themselves in a manner that demonstrates to the parties and the public that they are not biased. It is often said, in that regard, that justice must not merely be done but also be seen to be done.

[30] This fundamental requirement is reflected in a long chain of Supreme Court decisions, the most recent being *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25, [2015] 2 SCR 282 [*Francophone School Board*]. In that decision, Justice Abella stated that there is a strong presumption of judicial impartiality and that there is correspondingly high burden on the party alleging bias by the judge (at paragraphs 25-26). To describe the content of the impartiality requirement, she quoted the words of Justice Cameron of the South African Constitutional Court:

Impartiality is that quality of open-minded readiness to persuasion — without unfitting adherence to either party or to the Judge's own predilections, preconceptions and personal views — that is the keystone of a civilised system of adjudication.

(*Francophone School Board*, at paragraph 35)

[31] Counsel for the respondent countered that Mr. Thelusma should have immediately complained about the member's conduct and asked him to recuse himself. Since he did not do so, he would now be precluded from alleging that the member was biased. Indeed, the Federal Court of Appeal and our Court have held that a person who alleges bias on the part of an administrative decision-maker must normally do so at the first opportunity (*Bassila v Canada*, 2003 FCA 276, at paragraph 10; *Korki v Canada*, 2011 FCA 287, at paragraph 9; *Aloulou v Canada (Citizenship and Immigration)*, 2014 FC 1236, at paragraph 32; *Diallo v Canada (Citizenship and Immigration)*, 2015 FC 401, at paragraph 14).

[32] In this case, a parallel can be drawn between the member's comments, of which I have cited several excerpts, and the conduct that gave rise to reasonable apprehension of bias in the *Francophone School Board* decision. However, considering that the member's conduct led to a substantively unreasonable decision, it is not necessary for me to address the issue or, in particular, to decide whether the circumstances warranted making an exception to the normal rule that the issue should have been raised before the member.

[33] Nevertheless, I think it is worth noting that the excerpts of the hearing quoted above are not a model to be followed. RPD members should be respectful to claimants even though they must test their credibility.

III. Conclusion

[34] We do not know whether Mr. Thelusma's account is truthful and whether he is rightly claiming refugee protection. What we do know is that the hearing before the RPD did not allow

him to present the reasons why he fears persecution. The member's findings regarding Mr. Thelusma's credibility were based on details. He did not assess Mr. Thelusma's account as a whole. A new hearing is therefore necessary to ensure a fair determination of the issues.

[35] For these reasons, the application for judicial review is allowed, and the case is referred to a different RPD member for redetermination.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed;
2. The case is referred back to a different RPD member for redetermination;
3. No question is certified.

“Sébastien Grammond”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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