**Date: 20091119**

**Docket: IMM-1816-09**

**Citation: 2009 FC 1170**

**Ottawa, Ontario, this 19th day of November 2009**

**Before: The Honourable Mr. Justice Pinard**

**BETWEEN:**

**Marie Nerlande MARCELIN GABRIEL**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review by the refugee claimant pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, (the "Act") of the decision of the Refugee Protection Division of the Immigration and Refugee Board (the "Board"), rendered March 18, 2009. The Board found that the applicant was neither a refugee nor a person in need of protection. The Board denied the section 96 claim because there was not a sufficient nexus between the persecution feared and the Convention ground. The Board denied the section 97 claim because it found the risk of persecution was a generalized risk of becoming the target of criminal activity faced by all Haitians.

* * * * * * * *

[2] Marie Nerlande Marcelin Gabriel (the “applicant”) is a thirty-three year old citizen of Haiti. Her daughter, Keisha Dorrine is a citizen of the United States (the “U.S.”). The applicant fled Haiti for the United States in 1994. The reason for leaving Haiti was that two of her uncles were involved in “Militant”, a political organization that campaigned against Aristide’s government. The Lavalas Party supported Aristide’s regime. In 1992 the Lavalas Party began targeting their opponents in the “Militant”. The applicant’s whole family was a target, despite the fact that the uncles had fled. One evening her family was shot at and a woman hiding with them died. Shortly after, the applicant and her mother moved to Cabaret and her brother was kidnapped by Lavalas members. In 1994 she fled Haiti for the U.S. but her mother stayed behind. She was reunited with her brother who had successfully claimed refugee status in the U.S. Her uncles who were the principal targets of the Lavalas Party also successfully claimed refugee status and were living in the U.S. She has another brother who lives in St. Martin.

[3] Two years after arriving in the U.S., she applied for asylum but was rejected because she did not show up for the scheduled hearing. She explained to the Board that she was moving at the time and did not receive the hearing notice. She lived in the U.S. without status until 2007. She also married an American citizen in 2007 (it is not clear what the current status of her relationship is). On March 27, 2007 she arrived in Canada with her American born daughter and claimed refugee protection.

[4] She claims protection on the grounds of her membership in a particular social group (her maternal family, specifically her two political uncles) and imputed political opinion. She alleges that she is afraid to go back to Haiti because she could be kidnapped, tortured and/or killed by members of the Lavalas Party.

[5] Her claim was heard by the Board on February 10, 2009 and rejected on March 18, 2009.

* * * * * * * *

[6] In its section 96 analysis, the Board held that the applicant did not supply a credible basis for her fear of persecution seventeen years after she fled Haiti. The targets of past persecution were her uncles. She was not involved in politics at the time she fled. Her mother has been living safely in Haiti until recently and has not been targeted for revenge by the Lavalas Party. Furthermore, the Lavalas Party is no longer a coherent organization and so it is not presently in a position to be an agent of persecution.

[7] The Board also determined that the applicant's behaviour, while living in the United States, was not consistent with a fear for her life. The tribunal supplied two specific examples. First, the applicant delayed two years before claiming asylum in the United States notwithstanding available information on how to proceed with the refugee process. Second, her claim was declared abandoned

due to her failure to ensure that the U.S. Immigration authorities had her current contact information.

[8] The Board found that the applicant did not discharge her burden to show a well-founded fear of persecution pursuant to section 96 of the Act.

[9] In its section 97 analysis, the Board concluded as follows:

> [22] The Tribunal finds that the principal claimant would face a generalized risk should she return to Haiti; a risk shared by the population in general. […] As a Haitian expatriate, the principal claimant might be perceived as being wealthy by criminal elements but this is a risk faced by a segment of the total Haitian population, indigenous and returnee, who are perceived as rich. No evidence was adduced to establish that the principal claimant would face a "particularized risk" or a specific threat directed at her as an individual upon her return.

* * * * * * * *

[10] In *Prophète v. Minister of Citizenship and Immigration*, 2008 FC 331, this Court, at paragraph 11, held that interpretation of section 97 of the Act is a pure question of law, reviewable on the standard of correctness. However, the question certified in that decision was declined by the Federal Court of Appeal on the basis that "[t]he examination of a claim under subsection 97(1) of the Act necessitates an individualized inquiry" (*Prophète v. Minister of Citizenship and Immigration*, 2009 FCA 31, at paragraph 7). This reason has since been interpreted by my colleague Justice Johanne Gauthier as "clearly" indicative that the inquiry under 97 is not one of pure law

(*Acosta v. Minister of Citizenship and Immigration*, 2009 FC 213). Accordingly, the appropriate standard of review is reasonableness because the issue is one of mixed fact and law (*Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, at paragraph 53). Thus, if the decision falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and law it is reasonable (*Dunsmuir*, at paragraph 47).

Did the Board err when it interpreted section 97 of the Act?

[11] The applicant argues that this Court should find the Board's decision unreasonable for the following two reasons: first, based on *Surajnarain v. Minister of Citizenship and Immigration*, 2008 FC 1165, it erred in interpreting the legal concept "particularized" risk to the circumstances of the applicant; and second, it ignored documentary evidence that gave evidence of the "particularized" risk facing the applicant and contradicted the Board's conclusion.

[12] A section 97 risk does not require a nexus between the fear and Convention grounds (*Cius v. Minister of Citizenship and Immigration*, 2008 FC 1, at paragraph 23). The Board rejected the applicant's claim of persecution on the grounds of imputed political opinion. However, in respect of the section 97 analysis, the applicable subgroup the applicant claimed put her at risk of persecution was the Haitian Diaspora, a perceived wealthy class of people.

[13] The evidence necessary to establish a claim under section 97 differs from section 96 of the Act. When considering a section 97 claim the Board must decide "whether the claimant's removal

would subject him personally to the dangers and risks stipulated in paragraphs 97(1)(*a*) and (*b*) of the Act" (*Odetoyinbo v. Minister of Citizenship and Immigration*, 2009 FC 501, paragraph 7).

[14] In *Prophète*, *supra*, the Court held that the applicant must demonstrate a "personal" risk to persecution; the Federal Court of Appeal specifically noted that the section 97 interpretation involves a personalized analysis of the applicant.

[15] However, Justice Eleanor Dawson in *Surajnarain*, *supra*, appears to be recalibrating the focus of the section 97 analysis. Instead of considering if the evidence demonstrates sufficient personal circumstances to link an applicant to the persecution feared, the inquiry should focus on whether the risk is indiscriminate or random. If it is not a random risk, it is a particularized risk to the applicant. Justice Dawson's comments are made in *obiter dicta*. At paragraph 17, she rejects the argument that the applicants be required to demonstrate a direct link between themselves (as individuals) and the risk:

> [t]he threat is <u>not restricted to a risk personalized to an individual</u>; it includes risks faced by individuals that may be shared by others who are similarly situated. […] <u>Any risk that would apply to all residents or citizens</u> of the country of origin <u>cannot result in a positive decision</u> under this Regulation.
>
> (My emphasis.)

Thus, she accepts that a personalized risk can be that which is particularized to the circumstances of an applicant and those similarly situated. Membership, then, to a targeted subgroup is seemingly sufficient to constitute a personal risk.

[16] To follow Justice Dawson's analysis, provided in *obiter*, would be a departure from the dominant interpretation of section 97. The risk is restricted to instances where the applicant can satisfy the Board of an individual connection to the risk.

[17] The respondent argues that the Board applied the dominant interpretation of section 97 and that it is not an error in law for the Board to express disagreement with a comment of a Federal Court judge made in *obiter dicta*. I agree (see *Canada (Commissioner of Competition) v. Superior Propane Inc.*, [2003] 3 F.C. 529 (C.A.)).

[18] In *Carias v. Minister of Citizenship and Immigration*, 2007 FC 602, Justice John O'Keefe explained that a person in need of protection is a person whose removal to their home country would subject them personally to a risk to their life or to cruel and unusual treatment or punishment "if the risk would be faced by the person in every part of that country and is not faced generally by other individuals in that country" (at paragraph 24).

[19] In *Cius*, *supra*, Justice Michel Beaudry found that a high risk that a person will be targeted as a victim of crime is not a particularized risk. The applicant in that case was a Haitian man who alleged a fear of armed gangs in Haiti who are known to target Haitians who have been abroad, foreigners, and anyone who they perceive to have wealth. Justice Beaudry found that the applicant was the subject of general violence, which was the fallout of criminal activity across the country. He further noted that people who are perceived of as wealthy are "not marginalized in Haiti" but rather they are more frequently the targets of criminal activity than the rest of the population (at paragraph 18). The documentary evidence provided clear support of widespread crime in Haiti of which all

citizens are at risk. This is the only case to suggest that the person asserting a personal risk belong to a category of persons who are marginalized. Cruel and unusual punishment or torture can be targeted at persons who are not marginalized in society. Risk to persecution and marginalization are two different concepts.

[20] A generalized risk need not be one experienced by every citizen. A subgroup can face a generalized risk. This was clear to Madam Justice Judith Snider in *Osorio v. Minister of Citizenship and Immigration*, 2005 FC 1459. The Court was asked to consider parents in Colombia as a specific group that is targeted as victims of crime, specifically, child abduction. The Court noted that the category of "parents" is significantly broad and the risk is a widespread or prevalent risk for all Colombian parents (at paragraph 25). The applicants in that case could not personalize the risk beyond membership to that subgroup and this did not satisfy the Court. Thus, a generalized risk could be one experienced by a subset of a nation's population thus, membership in that category is not sufficient to personalize the risk.

[21] Similarly in *Carias*, *supra*, Justice O'Keefe held, at paragraph 25 that the wealthy class of people in Honduras is a "large group of people" and the applicants had to satisfy the Board that "they would be personally subjected to a risk that was not generally faced by others in Honduras". Thus, given its size, an association with the wealthy class was not sufficiently personal.

[22] Most recently, in *Charles v. Minister of Citizenship and Immigration*, 2009 FC 233, Justice Luc Martineau curtly dismissed that applicant's claim that he will be at a greater risk if returned to Haiti because of a general perception that those who return from abroad are wealthy. It was

dismissed because there was no "personal" risk noted as required by *Prophète* or *Carias, supra* (see also *Philomena Innocent c. Le ministre de la Citoyenneté et de l'Immigration*, 2009 CF 1019; *Michaud v. Minister of Citizenship and Immigration*, 2009 FC 886; and *Octave v. Minister of Citizenship and Immigration*, 2009 FC 403).

[23] While I appreciate the approach taken in *obiter* by Justice Dawson in *Surajnarain, supra*, it is clearly not the analysis taken by this Court for determining section 97 claims. The risk must be particularized to the personal circumstances of the claimant.

[24] In any event, the documentary evidence available to the Board indicates that the risk that a person will be targeted for crime is heightened not just due to their perceived wealth but also relates to their political activity.

Did the Board ignore documentary evidence that contradicted its conclusion that the applicant does not face a particular threat upon her return to Haiti?

[25] The Board explicitly accepted that the applicant might be perceived as being wealthy by criminal elements as an expatriate. It did not specifically mention the documentary evidence supporting its conclusion but nor is it required to do so. There is a presumption that the Board has considered all the evidence (*Cepeda-Gutierrez v. Canada (M.C.I.)*, 157 F.T.R. 35). The applicant submits that there is a document which contradicts the Board's finding that she does not face a particularized risk.

[26] The document that the applicant argues that the Board ignored, and the applicant claims contains equivocally supportive evidence of her particularized risk, states that:

> . . . 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".
>
> In correspondence sent to the Research Directorate on 27 September 2007, a legal and human rights expert from the Canadian Support Program Unit in Haiti (Unité d'appui au programme de la coopération canadienne à Haiti, 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, 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).

[27] As clearly set out by this document, it was reasonable for the Board to conclude that membership in the Haitian Diaspora was not sufficient to attract the personal risk the applicant argues she faces. The alleged contradiction is contained within the same document that the Board likely relied on for finding that as a member of the expatriate subgroup of the population the applicant is likely to be perceived of as wealthy. From that same document, also relevant to determining her risk to be targeted by criminal elements is the applicant's political role in the past. The Board did not ignore relevant evidence before it. The Board is entitled to weigh the evidence before it: the Board's decision was reasonable.

* * * * * * * *

[28] For all the above reasons, the application for judicial review will be dismissed.

[29] The applicant submits the following question for certification, alleging that it "can be resolved independent of a particular fact pattern":

> In order to avoid the application of the risk "not faced generally by other individuals" clause of section 97(1)(b)(ii) of the *Immigration and Refugee Protection Act* [IRPA], is it sufficient for a person seeking protection to establish that the risk they face is not indiscriminate or random but rather related to their personal circumstances?

[30] For his part, the respondent submits that the question should not be certified as it would not be determinative of the appeal. The respondent specifies that the issue is simply not raised by the facts of this case. I agree. In so doing, I adopt the reasoning contained in paragraphs 4 to 10 of the respondent's "Response to Proposed Question for Certification" (document 11).

[31] Accordingly, there is no certification.

**JUDGMENT**

The application for judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board, rendered on March 18, 2009, is dismissed.

"Yvon Pinard"
Judge

**FEDERAL COURT**

**NAME OF COUNSEL AND SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | IMM-1816-09 |
| **STYLE OF CAUSE:** | Marie Nerlande MARCELIN GABRIEL v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | Montréal, Quebec |
| **DATE OF HEARING:** | October 14, 2009 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | Pinard J. |
| **DATED:** | November 19, 2009 |

**APPEARANCES:**

| | |
|---|---|
| Mr. Jared Will | FOR THE APPLICANT |
| Mr. Sebastien Dasylva | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Jared Will<br>Montréal, Quebec | FOR THE APPLICANT |
| John H. Sims, Q.C.<br>Deputy Attorney General of Canada | FOR THE RESPONDENT |