Federal Court Cour fédérale

Date: 20100217

Docket: IMM-2927-09

Citation: 2010 FC 159

Ottawa, Ontario, February 17, 2010

PRESENT: The Honourable Mr. Justice Crampton

BETWEEN:

BEATRICE JEAN GILLES MICHEL
and
MAC ANTOINE JEAN GILLES

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an application for judicial review of a decision (the "Decision"), dated May 5, 2009, of the Immigration and Refugee Board (Refugee Protection Division) (the "Board") by Board Member Marc Gobeil (the "Board Member").

[2] In the Decision, the Board concluded that the Applicants are not Convention refugees or persons in need of protection within the meaning of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, (the "IRPA"), ss. 96 and 97, respectively.

[3] For the reasons that follow, the Decision is set aside and the Applicants' claims are remitted to the Board for reconsideration by a differently constituted panel.

I. Background

[4] The Applicants, Mac Antoine Jean Gilles and Beatrice Jean Gilles Michel, are citizens of Haiti. Married in 2005, they are members of the "middle-class" population of that country, a minority group of people who apparently have a conspicuous ability to own a house, own a car and to travel abroad.

[5] The Applicants allege that they cannot return to Haiti due to fear of persecution by gangs, specifically the "Chimères" and former members of the military who are supporters of former President Aristide. Those gangs and former members of the military are alleged to persecute persons who are perceived to be wealthy and, for that reason, pro-American supporters of the current government. Those gangs are also alleged to persecute females, primarily through rape.

[6] The Applicants lived in a suburb of Port-au-Prince and commuted to work in that city. In their submissions to the Board and this Court, they described a number of incidents that occurred between May 2007 and November 2008 which provided the basis for their claims to having a well founded fear of persecution by reason of their perceived political opinions. Those same incidents are also relied upon as providing the basis for the Applicants' claims that they would likely be subjected to a risk to their life or a risk of cruel and unusual treatment or punishment if they were forced to return to Haiti.

[7] The Board found the Applicants' testimony regarding the incidents to be credible.

[8] The first such incident occurred when the Applicants were driving to work in May of 2007. Their car was hit by bullets from unknown assailants. The Applicants, who managed to escape unharmed from their assailants, did not report this incident to the police because they believed that some police officers have links to gangs and that complaining to them would not serve any useful purpose.

[9] The second incident occurred in August 2007, upon the Applicants' return from a vacation. As they were leaving the airport in Port-au-Prince, some unidentified men demanded money from them, intimidated them and insulted them as being "bourgeois" and "pro-American." To the Applicants' surprise, they also called the male applicant by name and appeared to know him. Two days later their car was again shot at while they returned home from work. The Applicants reported both of these incidents to the police. However, no action was taken by the police.

[10] On January 21, 2008, the Applicants were shot at once again as they drove near their home. The Applicants also reported this incident to the police. Notwithstanding that the police confirmed that the Applicants' vehicle had been hit by bullets, the police failed to take any action. As a result, the Applicants moved in with M. Jean Gilles' mother out of fear.

[11] On February 12, 2008, the Applicants received a phone-call from a neighbour who reported hearing noises emanating from the Applicants' home. Two days later M. Jean Gilles returned to

investigate and found that their home had been looted and ransacked. There were also bullet holes in the walls of the home, including in the bedroom.

[12] As a result of the foregoing incidents, the Applicants fled Haiti on February 16, 2008.

[13] In November 2008, M. Jean Gilles' mother received a series of threatening telephone calls from one or more unidentified callers who demanded to know M. Jean Gilles' whereabouts and who threatened to harm her and the other members of the family who lived with her. As a result of those telephone calls, M. Jean Gilles' mother, along with her daughters and two grand-children, moved to a rural area of Haiti.

[14] In his testimony before the Board, M. Jean Gilles stated a number of times that he did not know specifically why he had been targeted. Based on what was said to him as he was leaving the airport in August 2007, he stated that he believed he was targeted because he is perceived to be a relatively wealthy middle-class Haitian who has travelled, specifically to the United States, and is perceived to be "pro-American," and therefore a supporter of the current government. He further testified repeatedly that he believed that the above-mentioned incidents were not random, but rather that his assailants had specifically targeted and waited for him at the airport and the other locations where he was shot at, all of which were near his home.

[15] M. Jean Gilles testified that the Chimères believe that the U.S. government played a role in the over-throwing and exile of the former president. He further testified that people of his socio-economic group are also subjected to violence at the hands of those who were demilitarized after the

first coup of Aristide, in the early 1990s. He alleged that the latter persons seek to destabilize the country as part of a campaign to generate support for the reconstitution of the military.

[16] Mme Jean Gilles Michel gave little testimony in addition to that of her husband. In short, she claimed to fear being (i) killed by the persons who shot at them and attacked their home; and (ii) raped by those persons or others because she is a woman, a member of the middle class and had travelled to the U.S. She confirmed that she had never been raped or otherwise attacked and that she has no political affiliations.

II. Relevant Legislation

[17] Sections 96 and 97 of the IRPA state as follows:

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	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

English	French
return to that country.	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 provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
(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.

III. Decision Under Review

[18] The Board found the Applicants' testimony regarding the incidents to be credible. Among other things, that testimony was supported by two police reports regarding the incidents that occurred on January 21, 2008 and February 12, 2008.

[19] However, the Board rejected the Applicants' claims for refugee status under s. 96 of the IRPA as well as their claim for protection under s. 97 of the IRPA.

[20] The Board's discussion of the Applicants' s. 96 claims began with a paragraph that focused on the Applicants' testimony regarding (i) their middle class, "petite bourgeoisie," status in Haiti, and (ii) their lack of knowledge of their tormentors in Haiti. There was no reference in that paragraph to the Applicants' testimony regarding their belief that they may have been targeted because of their perceived political opinions, i.e., because they were perceived by their assailants to be pro-American and therefore supporters of the current government.

[21] At the outset of the next paragraph of its Decision, the Board expressed its conclusion that the Applicants' fears of persecution are based solely on their wealth, as opposed to any of the Convention categories set forth in s. 96. Relying on the Supreme Court of Canada's decision in *Canada (Attorney General) v. Ward*, [1993] S.C.J. No. 74, [1993] 2 S. C. R. 689, and on this Court's decision in *Cius v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1, [2008] F.C.J. No. 9, the Board stated that wealth cannot form the basis of any "social group" contemplated by s. 96. Applying the framework set forth at para. 70 of *Ward*, above, the Board concluded:

> First, wealth is not an innate or unchangeable characteristic. Moreover, wealthy persons and persons who are perceived to be wealthy in Haiti are not associated with each other by reasons so fundamental to their dignity that they should not be forced to forsake that association. The Applicants have not furnished any evidence to demonstrate that in Haiti, persons considered to be wealthy are marginalized or subjected to discriminatory treatment. These persons are, however, targeted more frequently by criminal activity. This feared prejudice is criminal in nature. However, being targeted by criminal activity is not sufficient to constitute a "social group" within the meaning of s. 96 of the IRPA, because the protection afforded by the Convention Relating to the Status of Refugees is based on discriminatory considerations, and not on concerns relating to criminality. (*Translation.*)

[22] The Board then turned to Mme Jean Gilles Michel's fear of persecution based on her gender. After noting that Mme Jean Gilles Michel feared being raped upon her return to Haiti and that she had presented an enormous amount of evidence demonstrating widespread criminality and rape in Haiti, the Board quoted four paragraphs from the decisions of each of the Board and this Court in *Soimin v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 218, [2009] F.C.J. No. 246. In that case, the Board rejected the applicant's gender-based refugee claim on the basis that the evidence demonstrated that both women and men in Haiti are vulnerable to being victims of criminal gangs, that "everyone is afraid" of being attacked by the gangs, and that such attacks are

not particularly targeted at women or at people who travel to Canada. Based on the evidence that was submitted in that case, this Court found the Board's decision to have been reasonable and therefore merited deference.

[23] After quoting the above-mentioned passages from *Soimin*, above, the Board then simply concluded that Mme Jean Gilles Michel had not demonstrated that she would have a well founded fear of persecution based on a social group consisting of "women" if she returned to Haiti. The Board did not discuss any of the specific evidence placed before it by Mme Jean Gilles Michel, nor did it specifically address her submission that the Supreme Court of Canada had recognized in *Ward*, above, at paragraph 70, that a "social group" as contemplated by what is now s. 96 of the IRPA can be based on gender.

[24] The Board then turned to the Applicants' s. 97 claim and stated that it is necessary to distinguish between the generalized risks associated with a prevailing situation in a country and the risk that a person faces by reason of his or her personalized circumstances.

[25] Relying on this Court's decisions in *Prophète v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 331, [2008] F.C.J. No. 415 and *Cius v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1, [2008] F.C.J. No. 9, the Board observed that the risk to which the Applicants feared being exposed if forced to return to Haiti is no different from the risk that the average person must face in that country. The Board noted that according to the written evidence, criminality and kidnapping in particular are at the heart of the situation of insecurity in Haiti, and

that the Police have not always managed to achieve a level of competence necessary to maintain security in that country.

[26] The Board then simply concluded, without discussing the evidence that the Applicants had submitted regarding their personalized risks in Haiti, that the risk they would face if they were required to return to Haiti would not be different from that which is faced by the rest of the Haitian population. Put differently, the Board concluded that the Applicants had not established that it is more likely than not that they would face a risk contemplated by ss. 97(1) of the IRPA.

IV. Issues

[27] The Applicants seek judicial review of the Decision on the following grounds:

a) The Board erred by failing to recognize the significance of the testimony, documentary evidence and submissions that were provided to the Board; and

b) The Board erred by failing to reconcile its Decision with the Board Member's own reasoning in another recent case, and by instead relying on an unpublished decision made by another Board Member, which had not been disclosed to the Applicants.

V. Standard of Review

[28] The questions of fact and of mixed fact and law that are at issue in this case are reviewable on a standard of reasonableness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; and *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 53). However, the question of procedural fairness that has been

raised is reviewable on a standard of correctness (*Dunsmuir*, above at paras. 79 and 87; and *Khosa*, above, at paragraph 43).

[29] In *Khosa*, at para. 59, reasonableness was articulated by Justice Ian Binnie as follows:

> Where the reasonableness standard applies, it requires deference. Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47). There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of *justification*, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome. (Emphasis added)

[30] With respect to the "justification" aspect of reasonableness, Justice Binnie, stated, at para. 63:

> […]
> *Dunsmuir* thus reinforces in the context of adjudicative tribunals the importance of reasons, which constitute the primary form of accountability of the decision maker to the applicant, to the public and to a reviewing court. Although the *Dunsmuir* majority refers with approval to the proposition that an appropriate degree of deference "requires of the courts 'not submission but a respectful attention to the reasons offered or which could be offered in support of a decision'" (para. 48 (emphasis added)), I do not think the reference to reasons which "could be offered" (but were not) should be taken as diluting the importance of giving proper reasons for an administrative decision, as stated in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 43. *Baker* itself was concerned with an application on "humanitarian and compassionate grounds" for relief from a removal order.

VI. Analysis

A. *Failure to Recognize the Significance of the Testimony, Documentary Evidence and Submissions That Were Provided to the Board*

[31] In this case, the Applicants' claims to refugee status under s. 96 of the IRPA rested on their claims to having a well founded fear of persecution based on: (i) their perceived political opinions, as members of the middle class who are perceived to be pro-American supporters of the current government; (ii) their membership in the social group of middle class returnees to Haiti from North America; and, (iii) in the case of Mme Jean Gilles Michel, her membership in the social group of women, particularly middle class women who have travelled to the United States.

[32] In rejecting each of these claims, the Board failed to mention, let alone discuss, the most important evidence submitted by the Applicants in support of their claims, notwithstanding that it had found the Applicants to be credible. This evidence included:

a) the fact that the unidentified men who approached them in August 2007 as they were leaving the airport after returning from the U.S. called the male applicant by name, appeared to know him, and called the Applicants "pro-American";

b) documentary support for the Applicants' claim that middle-class Haitians are generally perceived as being pro-American supporters of the current government, and opponents of former President Aristide;

c) documentary support for the Applicants' claim that middle-class Haitians returning from North America face a particular risk of being kidnapped and, in case of women, raped; and

d) documentary support for Mme Jean Gilles Michel's claim that women are specifically targeted for rape, especially when they are middle class returnees from North America.

[33] In addition, the Board failed to specifically address the argument made on behalf of Mme Jean Gilles Michel to the effect that *Ward,* above, explicitly recognized that gender can provide the basis for a "social group" as contemplated by what is now s. 96 of the IRPA. Indeed, the Board also failed to discuss in any meaningful way the Chairperson's Guideline 4, entitled *Women Refugee Claimants Fearing Gender-Related Persecution*, issued pursuant to section 65(3) of the IRPA. Among other things, that Guideline states (at page 8): "**Gender is an innate characteristic and, therefore, women may form a particular social group within the Convention refugee definition.** The relevant assessment is whether the claimant, as a woman, has a well-founded fear of persecution in her country of nationality by reason of her membership in this group." (Emphasis in original. Footnote omitted.) The Board simply noted that it had examined Mme Jean Gilles Michel's claim in conformity with that Guideline.

[34] Moreover, in rejecting the Applicants' claims to being persons in need of protection under s. 97 of the IRPA, the Board failed to mention the evidence adduced by the Applicants in support of their claim that they had been personally targeted and that they therefore would face personalized risks to their lives and a risk of cruel and unusual treatment if forced to return to Haiti. This evidence included:

a) the fact that the unidentified men who approached them in August 2007 as they were leaving the airport after returning from the U.S. called the male applicant by name, appeared to know him, and called the applicants "pro-American";

b) the fact that in November 2008 Mr. Jean Gilles' mother received a series of threatening telephone calls from one or more unidentified callers who demanded to know Mr. Jean Gilles' whereabouts and who threatened to harm her and the other members of the family who lived with her;

c) the fact that on February 12, 2008 the Applicants' house was looted, ransacked and damaged by bullets in several rooms;

d) the fact that the Applicants were shot at three times near their home; and

e) M. Jean Gilles' testimony that he believed that he and his wife had been specifically targeted and waited for by the persons who shot at them, looted their home, and waited for them at the airport.

[35] In the cases cited by the Board in support of its determination regarding the Applicant's s.97 claim, there does not appear to have been similar evidence of personalized targeting. (See *Cius*, above, and *Prophète v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 331, [2008] F.C.J. No. 415, *aff'd*, 2009 FCA 31.)

[36] The Board's failure to give reasons that addressed the most important evidence adduced in support the Applicants' claims under ss. 96 and 97 of the IRPA, and that failed to address a critical legal argument made in support of Mme Jean Gilles Michel's claim that she has a well founded fear of persecution based on her gender, renders the Board's Decision unreasonable (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817 at para. 73; and *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] S.C.J. No. 3 at paras. 37 to 39).

[37] With respect to the above-mentioned legal argument, the Board should have specifically addressed whether there was documentary or other evidence before it as to the generalized persecution of women in Haiti. In addition, the Board ought to have considered whether the evidence supported Mme Jean Gilles Michel's claim that women in Haiti, as well as those returning to Haiti from aboard, constituted particular social groups (*Bastien v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 982, [2008] F.C.J. No. 1218 at para. 12).

[38] In contrast to the decision that was reviewed in *Khosa*, above, the reasons of the Board in this case did not "disclose with clarity the considerations in support of both points of view, and the reasons for the disagreement as to outcome." (*Khosa*, at paragraph 64)

[39] The Board therefore failed to reasonably justify its Decision (*Dunsmuir*, above at para. 47; and *Khosa*, at paragraph 63) and brought itself within the scope of s. 18.1(4)(d) of the *Federal Courts Act*, R.S.C. 1985, C.F-7 (the "Act"), by reaching its Decision "without regard for the material before it."

[40] A long line of decisions of this Court and the Federal Court of Appeal have consistently held that the Board need not refer to every piece of evidence submitted in the case, but where significant and important evidence exists it must be addressed. (See, for example, the various cases discussed by in *Canada (Minister of Citizenship and Immigration) v. Ryjkov*, 2005 FC 1540, [2005] F.C.J. No. 1925; and *Ahmed v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1076, [2004] F.C.J. No. 1296, at paras. 13 to 15. More recent cases include *Surajnarain*

v. Canada (Minister of Citizenship and Immigration), 2008 FC 1165, [2008] F.C.J. No. 1451 at paras. 6 and 7; and *Uluk v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 122, [2009] F.C.J. No. 149 at paras. 16 and 32).

[41] As Justice John M. Evans observed in *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35, [1998] F.C.J. No. 1425, "the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact 'without regard to the evidence'," as contemplated by s. 18.1(4)(d) of the Act.

[42] Had the Board discussed the aforementioned evidence and the legal argument based on *Ward,* above, and still reached the same conclusions after justifying why it had done so, its Decision may very well have been reasonable. However, its failure to discuss that evidence and that legal argument and then to justify why it had nevertheless rejected the Applicants' claims under ss. 96 and 97 of the IRPA was fatal.

B. *Failure to Reconcile the Board Member's Decision With His Own Reasoning in Another Recent Case, and Instead Relying on an Unpublished Decision Made by Another Board Member, Which Had Not Been Disclosed to the Applicant.*

(1) The Board Member's Decision in a Recent Case

[43] This Court has consistently held that each decision by the Board turns on its own particular facts and evidence. (See, for example*, Cius*, above*; Rahmatizedeh v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 578; *Sellathurai v. Canada (Minister of Citizenship and Immigration*), 2003 FC 1235, [2003] F.C.J. No. 1630; *Marinova v. Canada (Minister of Citizenship and Immigration*), 2001 FCT 178, [2001] F.C.J. No. 345; and *Casetellanos v. Canada (Solicitor General*), [1994] F.C.J. No. 1926, [1995] 2 F.C. 190.) Accordingly, the Applicants'argument that the Board Member committed an error in failing to reconcile his Decision with his own reasoning in another case, where he would have had different facts evidence before him, is rejected.

(2) Reliance on an Important Unreported Decision

[44] As noted at paragraphs 22 and 23 above, the decisions of the Court and the Board in *Soimin,* above, appear to have played a critical role in the Board's determination to reject Mme Jean Gilles Michel's claim to having a well founded fear of persecution based on membership in the social group of women, particularly middle class women who have travelled to North America. The Board's lengthy excerpts from those decisions accounted for virtually all of the Board's treatment of that claim.

[45] The Court accepts the Applicants' argument that had they been given the opportunity to address that case, particularly the Board's decision which apparently had not previously been made public, they may very well have (i) been able to distinguish it from the facts and evidence that were before the Board in this case, and thereby, (ii) influenced the ultimate conclusion reached by the Board regarding Mme Jean Gilles Michel's claim.

[46] In these circumstances, it was an error for the Board to have failed to provide the Applicants with an opportunity to address the decisions of the Board and this Court in *Soimin*, above.

VII. Conclusion

[47] The application for judicial review will be allowed, the Decision dismissing the Applicants' claims to be recognized as Convention refugees set aside, and the matter remitted to a differently constituted panel of the Board. There is no question for certification.

ORDER

THIS COURT ORDERS that this application for judicial review is granted. The Decision dismissing the Applicants' claims to be recognized as Convention refugees is set aside and the matter is remitted to a differently constituted panel of the Board to determine, according to law and in light of the foregoing reasons, whether the Applicants are Convention refugees within the meaning of s. 96 of the IRPA and/or are persons in need of protection within the meaning of s. 97 of the IRPA.

"Paul S. Crampton"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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