Federal Court  Cour fédérale

Date: 20110216

Docket: IMM-3069-10

Citation: 2011 FC 189

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, February 16, 2011

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

MYRLINE ALEXANDRE-DUBOIS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review submitted by the applicant, a citizen of Haiti, in accordance with subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act). A lawyer by profession, Ms. Alexandre-Dubois is alleging that her life is in danger because an unhappy former client is seeking revenge on her and uttering threats. The Immigration and Refugee Board (Board) found that the applicant was not credible and that she was not a "Convention refugee" or a "person in need of protection". For the following reasons, I am of the opinion that the application for judicial review of this decision must be allowed.

I. The facts

[2] The applicant is claiming that she went to see a leader of a criminal gang (known as Jean Jean) in prison with her boss. When they informed him that they would be focussing on a sentence reduction rather than an acquittal, the accused disagreed. He removed her from his case and promised to make her pay dearly for her impertinence, convinced that he had enough power to buy his acquittal. Less than a year later (in July 2007), the lawyer for whom she worked informed her that Jean Jean had escaped from prison.

[3] The applicant apparently immediately left Haiti for the United States. When she believed that Jean Jean had calmed down or "had let it go", she returned to Haiti in October 2007. Despite the fact that she had relocated far from where she had been living, the applicant claims that Jean Jean found her because her apartment was ransacked on October 21, 2008. The next day (or a few days later, according to different versions of her account), unidentified individuals shot at the applicant's car while she and her husband were returning from visiting her sister. After losing control of the vehicle she was driving and crashing into a wall, the applicant and her husband allegedly fled on foot and went to the home of the applicant's godmother.

[4] After this attack, she called a justice of the peace to come to the site to make a report. She told the justice of the peace what had happened, but did not mention her fear of Jean Jean. Instead, she said that she did not know why she had been the victim of such an attack.

[5] The applicant also asserted that she had received a telephone call from a woman named Martine who stated that she had been kidnapped and beaten by bandits who believed they were dealing with the applicant (Martine apparently looked a lot like the applicant). Martine purportedly told her that the bandits wanted to kill her; having been beaten to death, Martine allegedly died of her injuries.

[6] These incidents convinced the applicant that Jean Jean was not the kind of person to abandon his objective of attacking her, so she left Haiti for the United States on October 23, 2008, before arriving in Canada on November 13, 2008.

II. Impugned decision

[7] After briefly stating these facts, the Board found that the applicant is not a "Convention refugee" or a "person in need of protection" in accordance with paragraph 97(1)(*a*) or (*b*) of the Act.

[8] The Board member mentioned at the outset that he had some difficulty with Ms. Alexandre-Dubois' testimony, and expressed his surprise that she and her husband had been able to escape unharmed after the shots that were fired in their direction as they were coming back from visiting the applicant's sister.

[9] The Board member also reproduced the report written by the justice of the peace, and was surprised that the applicant had not mentioned her fear of Jean Jean. According to him, this undermined the subjective fear she claimed to have, not to mention that she went back to Haiti after

having lived in the United States for a few months in 2007. As the applicant was not able to explain this contradiction, she was found to be not credible and her claim was rejected on this basis.

III. Issues

[10] The applicant's counsel raised several arguments against the Board's decision. In my opinion, three issues must be examined:

a. Is the Board's decision with respect to the applicant's credibility reasonable?

b. Did the Board properly consider the evidence in the record?

c. Did the Board breach procedural fairness by providing insufficient reasons in support of its decision?

IV. Analysis

[11] Before examining the above-mentioned issues, the applicable standard of review warrants brief consideration. There is no doubt that the Board's findings with respect to the applicant's credibility are subject to the standard of reasonableness. This means that the Court will intervene only in the event that the Board's decision is based on an erroneous finding of fact, made in a perverse or capricious manner, or without regard for the material presented: *Dunsmuir v. New Brunswick*, 2008 SCC 9, at paras. 47-50; *Lin v. Canada (M.C.I.)*, 2008 FC 698, at para. 11; *Ramirez Bernal v. Canada (M.C.I.)*, 2009 FC 1007, at para. 24.

[12] The same can be said for the issue of whether or not the Board failed to consider relevant evidence: *Zhang v. Canada (M.C.I.)*, 2009 FC 787, at para. 5; *Ortiz Garcia v. Canada (M.C.I.)*, 2010 FC 804, at para. 9.

[13] Finally, the case law is consistent that procedural fairness issues are subject to the standard of correctness: *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29; *Andryanov v. Canada (M.C.I.)*, 2007 FC 186; *Weekes v. Canada (M.C.I.)*, 2008 FC 293, at para. 17.

A. *Is the Board's decision with respect to the applicant's credibility reasonable?*

[14] The applicant submitted that the Board's finding with respect to her credibility was not reasonable in that the Board member merely noted that "[t]here were some problems with the claimant's testimony", without any further explanation. I agree with her.

[15] The Board is obviously in a better position than this Court to rule on the credibility of a refugee claimant. However, it must still, even minimally, explain the reasons that led it to find whether a person is credible or not. In this case, the Board did not elaborate on the problems presented by the applicant's testimony and merely reproduced a part of the statement gathered by the justice of the peace without any further comment.

[16] The only explanation provided by the Board member for refusing to believe the applicant's testimony can be found in the following section in his reasons on the fear of persecution. In this respect, the Board member saw a contradiction between the statement made by the applicant to the justice of the peace, that is, that she was unaware of the reasons why the criminals shot at their vehicle, and the applicant's subsequent statements that Jean Jean was purportedly behind this incident.

[17] Before coming to the conclusion that these two versions were contradictory, the Board member had to assess the explanation provided by the applicant. Contrary to what the Board member wrote, the applicant had explained during the hearing that she had not wanted to unduly complicate the situation when filing her report with the justice of the peace. This explanation deserved to be considered, especially since the credibility and probative value of a piece of evidence or testimony must be assessed by taking into account what is known about the conditions that can prevail in the refugee claimant's country of origin. Because there is no explanation as to the reasons why the Board member found that the applicant was not credible, his decision cannot be considered reasonable.

[18] In his memorandum, the respondent's counsel raised several inconsistencies between the affidavit submitted by the applicant in support of her application for judicial review, on the one hand, and her testimony during the hearing, her Personal Information Form (PIF) and other documents submitted into evidence, on the other hand. It is true that this affidavit raises more questions than it answers, and that the applicant's account is not without ambiguity. However, this is not the issue. In the context of an application for judicial review, it is the Board member's decision (and reasons) that is under review; the Court cannot consider additional arguments that could have been raised in support of the decision in order to assess reasonableness; nor is it entitled to consider an *ex post facto* rationalization of this decision to assess its validity.

B. *Did the Board properly consider the evidence in the record?*

[19] The applicant also submitted that the Board failed to consider all of the evidence before it, instead concentrating on the shots purportedly fired at the applicant and her husband while on the road. In her PIF and during the hearing, the applicant nevertheless testified to other incidents she had been the victim of (home break-ins, threats) and filed documents (photographs of Martine and a police report) in support of her account.

[20] Once again, I am of the opinion that the Board member erred in his treatment of the evidence. It is true, as argued by the respondent, that the Board was not required to explicitly refer to all of the evidence filed by the applicant and that a presumption exists that all of the evidence was considered unless there is a clear and convincing demonstration to the contrary. However, the fact remains that it was required to refer to it, if only briefly, insofar as this evidence could substantiate the applicant's account. Mentioning the theft the applicant was a victim of and the phone call from Martine in the account of the facts was not sufficient. The Board member had to show that he had considered these elements in his analysis of the claim submitted by the applicant, which he did not do. This omission seriously taints the reasonableness of his reasons.

C. *Did the Board breach procedural fairness by providing insufficient reasons in support of its decision?*

[21] Section 169 of the Act provides that reasons must be given when the Refugee Protection Division makes a decision in which a refugee claim is rejected. In the words of Justice Evans of the Federal Court of Appeal in *Via Rail Canada Inc. v. National Transportation Agency*, [2001] 2 FC 25, at para. 21, "[t]he duty to give reasons is only fulfilled if the reasons provided are adequate".

While acknowledging that the adequacy of the reasons may vary in light of the circumstances of each case, he added the following (at para. 22):

> The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion. Rather, the decision-maker must set out its findings of fact and the principal evidence upon which those findings were based. The reasons must address the major points in issue. The reasoning process followed by the decision-maker must be set out and must reflect consideration of the main relevant factors.

[22] There is no doubt in my mind that the Board's reasons in this case are not consistent with the standard required by the principles of procedural fairness. First, I note that the Board member failed to analyze the various elements required by a claim based on sections 96 and 97 of the Act. Not only did he not address a number of pieces of evidence submitted by the applicant or explain why she was found to be not credible, as mentioned above, he also did not address the objective fear of persecution. Nevertheless, it is well established that section 96 of the Act could apply even when a person is found to be not credible in that the person can argue an objective fear of persecution that could arise from, in this case, the applicant's profession as a lawyer. If the Board member wanted rule out this possibility with the fact that the risk faced by the applicant was generalized and stemmed from the rampant crime occurring in Haiti, he had to specify this.

[23] Furthermore, the Board member does not really distinguish between the applicant's credibility and her subjective fear. In the only paragraph that can really serve as reasons, he starts by stating that the applicant's subjective fear is not sufficient to establish a nexus to one of the Convention grounds, relying on the fact that she left Haiti for a few months to study English in the United States before going home. He also added that she "was subsequently able to solidify her

fear", but that she denied the existence of the source of her fear in her statement to the justice of the peace. He found that the applicant's testimony could not be substantiated. This reasoning, which is seven lines long, is confusing to say the least and certainly does not enable the principal party involved (not to mention this Court) to understand the true reasons behind the Board member's decision. That is a serious breach of the principles of procedural fairness, which would in itself warrant the Court's intervention.

[24] For all of these reasons, the application for judicial review must be allowed. Neither party proposed a question of general importance for me to certify, and none is stated.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review be allowed. No question of general importance is certified.

"Yves de Montigny"
Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3069-10
STYLE OF CAUSE:	Myrline Alexandre-Dubois v. MCI
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	February 7, 2010
REASONS FOR JUDGMENT AND JUDGMENT:	de MONTIGNY J.
DATED:	February 16, 2011

APPEARANCES:

Jean Auberto Juste	FOR THE APPLICANT
Marie-Josée Montreuil	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Jean Auberto Juste Ottawa, Ontario	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT