Federal Court  Cour fédérale

Date: 20110629

Docket: IMM-5528-10

Citation: 2011 FC 796

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, June 29, 2011

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

Marie Nicole OCEAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] This is an application for judicial review, submitted in accordance with subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act), by Marie Nicole Ocean (applicant), who is seeking to have the decision dated August 18, 2010, by the Refugee Protection Division of the Immigration and Refugee Board (panel) set aside. The panel found that the applicant, a citizen of Haiti, is not a Convention refugee or a person in need of protection under

sections 96 and 97 of the Act. Her refugee claim was based on her political opinion and her membership in a particular social group.

[2] Counsel for the applicant raises one ground only against the panel's decision. He argues that it erred in law in its analysis of section 96 by attaching to this section elements specific to section 97. He cited before the panel the recent decision of the Justice Yvon Pinard in *Dezameau v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 559, to convince it that the applicant met the requirements of the Convention, since she had a reasonable fear of persecution in Haiti as a member of a particular social group: women returning to Haiti after a prolonged absence abroad and fearing being raped by Haitian men. Before this Court, counsel for the applicant adds the recent decision by Justice Luc Martineau in *Josile v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 39.

II. Panel's decision

[3] The panel found the applicant to be credible except on an issue of no significance in this case, that is, the date of her departure for the United States in fear of members of the Corps d'intervention et du maintien de l'ordre (CIMO) [response and public order force]. She lived in that country from August 8, 1999, to March 6, 2008, the date she arrived in Canada.

[4] After questioning the applicant on the nature of her fear of the CIMO members, the panel found that her testimony "shows that the claimant's fear is based on crime, pure and simple" and reiterated that the case law "has consistently established that crime victims do not constitute a particular social group", relying on the Federal Court of Appeal's decision in *Klinko v. Canada (Minister of Citizenship and Immigration)*, [2000] 3 F.C. 327.

[5] In reply to the panel's question on what she would fear if she were to return to Haiti today, the applicant stated the following:

> . . . the situation in Haiti has gone from bad to worse since she left. Women receive no protection, they are raped, and should she return, people would know that she was not from Haiti and could demand money from her. She stated that she is afraid of what happens in the street and added that there is no sanitation and that people are living in tents on the street. She stated that her children, who were living in luxury—these are her own words—could not get used to living without electricity, without doctors and without good schools. The panel pointed out to her that people are not living in tents in every part of the country, for example in Jérémie. The claimant stated that she does not know that place, but that everyone sleeps in tents because they are afraid there will be another earthquake.
>
> [Emphasis added.]

[6] In this testimony, the panel determined the following:

> . . . her claim, as she has expressed it, cannot reasonably be said to have any nexus to the Convention, and what she is demanding cannot make her a person in need of protection; the insecurity, the lack of infrastructure and the lack of electricity are the predominant characteristics of the generalized, indiscriminate poverty that the most disadvantaged members of that society are subjected to, as are some groups that could be considered relatively affluent.

Considering the reasons raised by the applicant, the panel found that they could not be considered persecution within the meaning of *Adjei v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 680 (C.A.).

[7] The panel then moved on to its analysis of section 97 of the Act, which is unnecessary to summarize here because the applicant has not challenged the panel's findings in that respect.

[8] The panel examined the argument before it concerning *Dezameau*, above, which, according to the panel:

> . . . states that Haitian women who allege a fear of persecution because of the violence in the country are members of a particular social group within the meaning of section 96 of the IRPA because rape, within the meaning of Canadian case law, is a gender-based crime. While setting out this principle in his decision, Justice Pinard specified the following at paragraph 29:
>
> > This is not to say that membership in a particular social group is sufficient to result in a finding of persecution.
> >
> > [Emphasis added.]

[9] The panel therefore continued with its analysis as follows:

> [18] In the panel's opinion, this makes it clear that mere membership in a particular social group cannot by itself result in a finding of persecution within the meaning of *Adjei* [footnote omitted]. It is therefore clearly the claimant's responsibility to provide evidence that there are serious reasons for considering that she could be persecuted within the meaning of section 96 of the IRPA on a Convention ground. The Honourable Justice also added the following, at paragraph 29 of *Dezameau*:
>
> > The evidence provided by the applicant must still satisfy the Board that there is a risk of harm that is sufficiently serious and whose occurrence is "more than a mere possibility".

[10] In applying *Dezameau*, the panel specified and found the following:

> . . . the claimant was very clear in establishing her fear of persecution: she stated explicitly that she fears everyone—the people in the streets—and also the CIMO members . . . . She further stated that she did not want her children to endure hardships that they are not used to, unlike in their current living arrangements . . . .
>
> [20] Consequently, the panel is of the opinion that, notwithstanding the arguments raised by counsel for the claimant, the claimant did not credibly establish in her testimony that she has a fear of persecution based on the violence against women in Haiti.

> She mainly expressed a fear of returning to the country because of the difficult living conditions stemming from the poverty and underdevelopment of Haiti, conditions that are faced by all levels of society in third-world countries like Haiti.

III. Analysis

[11] It is settled case law that (1) a panel's interpretation of sections 96 and 97 of the Act is subject to the standard of correctness and (2) for questions of fact and questions of mixed fact and law, the standard is reasonableness.

[12] I concur with the approach of Justice Pinard in *Dezameau*, above, and Justice Martineau in *Josile*, above. In these two cases, like the one before the Court, the issue was whether the panel had erred in law in its consideration of section 96 of the Act.

[13] In *Dezameau*, the social group identified was Haitian women returning to Haiti after a prolonged absence from that country and fearing becoming a target for criminal gangs, kidnappers and potential rapists because of their gender. At paragraph 41, Justice Pinard stated the following:

> For all the above reasons, I find that the Board erred in law finding that a general risk of harm precluded the applicant's claim of persecution. The Board further erred, in law and with respect to the facts, in finding that rape is not a gender-related risk in Haiti or that rape is a general risk faced by all Haitians. Finally, the Board did not consider the applicant's risk of rape due to her membership in the social group she alleged: women returning to Haiti from North America.

[14] In other words, the panel used its finding on the existence of a widespread risk of violence to rebut the statement that there is a nexus between the social group to which the applicant belongs and the risk of rape.

[15] Justice Pinard also stated the following:

> [29] This is not to say that membership in a particular social group is sufficient to result in a finding of persecution. The evidence provided by the applicant must still satisfy the Board that there is a risk of harm that is sufficiently serious and whose occurrence is "more than a mere possibility ".

[16] Justice Martineau stated the following at paragraph 36 of *Josile*:

> . . . Had the Board accepted that a risk of rape is grounded in the applicant's membership in a particular social group, then the inquiry should have resulted in a determination of whether there is "more than a mere possibility" that the applicant risks suffering this harm in Haiti.

If the response had been "yes", the next step would have been to determine whether the state was able to protect her.

[17] Counsel for the respondent claims that the argument raised by the applicant is moot in that there was no basis in the evidence before the panel to support the claims made before this Court. I agree with her for the following reasons.

[18] In this case, the panel did not err in law like those in *Dezimeau* and *Josile*. The panel accepted the principles stated in these two judgments. More specifically, it did not transfer its reasoning concerning section 97 to section 96. What the panel found was that the basis or the heart of the applicant's claim under section 96 was not her fear of persecution because she belongs to a particular social group, that of Haitian women returning to that country after a prolonged absence and fearing being raped because of their gender. The basis of her fear of return concerned a fear of a

different nature. My reading of the hearing transcript in this case confirms that the panel's decision on this point was reasonable.

[19] I believe that the panel's finding is similar to that which was before Justice James O'Reilly in *Frederic v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 1100, in which he held the following, at paragraph 11:

> I would also note that, while the issues raised in this case are difficult and merit, in appropriate circumstances, serious scrutiny both by the Board and this Court, this is not an apt case to analyze them thoroughly. As mentioned, the proposition that a woman's fear of sexual violence could form the basis of a refugee claim was not the main thrust of Ms. Frederic's application. Accordingly, the evidence before the Board was not as extensive as one might otherwise have expected, and the submissions on the point were not as detailed as they might have been in a case in which the issue was central to the claim.

[20] For the above-mentioned reasons, this application for judicial review is dismissed.

[21] No question of general importance was proposed.

JUDGMENT

The application for judicial review of the decision dated August 18, 2010, by the Refugee Protection Division of the Immigration and Refugee Board is dismissed.

"François Lemieux"
Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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