Federal Court  Cour fédérale

Date: 20111025

Docket: IMM-1149-11

Citation: 2011 FC 1222

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, October 25, 2011

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

Massiene BARTHELEMY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by the Refugee Protection Division (RPD or panel) of the Immigration and Refugee Board dated January 17, 2011, that Massiene Barthelemy (applicant) is not a Convention refugee or a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA).

[2] After examining the file submitted by the applicant and the written and oral submissions by the parties, I find that the application for judicial review must be dismissed. Despite the sympathy one may feel for Ms. Barthelemy, it was reasonable for the panel to find that her subjective fear did not meet the test in section 96 of the IRPA and that she had not established a personalized risk on the ground that she is a single woman.

I. The facts

[3] Ms. Barthelemy is a Haitian citizen and 66 years of age. From 1977 to 2000, she was a street vendor; she then opened a small grocery store in 2001. On May 29, 2005, while she and her daughter-in-law were preparing to open her business, they were attacked by bandits; the bandits robbed the applicant and shot and seriously injured her daughter-in-law. After this incident, the applicant left her house to live with a friend along her children until she left for Canada.

[4] In the written account accompanying her Personal Information Form (PIF), the applicant stated that she had tried to start working again three months after the incident, but quickly realized that she was no longer able to because of her constant stress and anxiety due to the idea that the bandits could come back to mistreat or kill her. She then said that she stopped all operations.

[5] However, in reply to question 7 of her PIF regarding her professional experience, the applicant wrote that she had owned a grocery store until August 2, 2009, with a short three-month interruption following the incident on May 29, 2005.

[6] After informing one of her daughters, now a Canadian citizen, of her constant fear and anxiety, her daughter suggested that her mother come visit her in order to forget about the bandits who had attacked her. The applicant therefore arrived in Canada on May 12, 2009.

[7] Ms. Barthelemy had travelled to Canada on three previous occasions, in January 1999, in August 1999 and in September 2000. It should also be noted that her daughter submitted a sponsorship undertaking application in favour of the applicant with the Quebec Ministère des Relations avec les citoyens et de l'Immigration, an application that was refused on February 12, 2002.

[8] After she arrived in Canada, the applicant stated that she had received a phone call from her son on August 1, 2009, telling her that her business had been vandalized, that bandits had stolen everything on the premises and that the residence where she had lived before moving in with her friend in 2005 had been ransacked. It is at that moment that she apparently made the decision to remain in Canada. She claimed refugee protection on October 9, 2009.

II. Impugned decision

[9] First, the panel noted that the applicant's testimony was credible, if somewhat confused with respect to both dates and events. The panel also indicated that it may be more suitable to process the file on humanitarian and compassionate grounds.

[10] With respect to section 96 of the IRPA, the panel found that there was no reason to believe that the crimes committed in 2005 and 2009 were connected and based on the applicant's gender.

During the attack committed in 2005, neither the applicant nor her daughter-in-law was the subject of sexual assault. The bandits had been content with shooting at their victims and fleeing with the money. Consequently, the applicant cannot be considered a Convention refugee on the basis of her membership in the particular social group of women.

[11] Regarding the claim based on section 97 of the IRPA, the RPD examined the applicant's alleged fear of the Chimères. Relying on the documentary evidence, the panel noted that the Chimères, known as the enforcement arm of the Lavalas party, no longer exist. Consequently, the panel believed that the applicant fears bandits in general, not a group with a political agenda.

[12] The panel also stated that the applicant had stopped operating her business in August 2005 and had not been a victim of any attack between May 2005 and the time when she left for Canada, in May 2009. With respect to the looting of her business and house in August 2009, the panel emphasized that this was a "crime of opportunity" in that those premises were, for all intents and purposes, abandoned and emptied of any valuable objects.

[13] Subsequently, the RPD reviewed the documentary evidence and found that Haitian women are indeed at risk of being victims of rape, but that, in most cases, these crimes are committed in the domestic context. Given the applicant's age and the fact that she can count on protection by her children (including an adult son), the panel found it unlikely, on a balance of probabilities, that she would be attacked by bandits and rapists. Regarding rapes outside the domestic context, they are generally a secondary crime to that of kidnapping for ransom. In that context, the panel was of the opinion that the applicant was no more a target for bandits than any other person in Haiti.

[14] Finally, the panel assessed the documentary evidence that Haitians who have lived abroad for a long time run more of a risk if they return to the country because they are perceived as wealthy. First, the panel relied on the jurisprudence of this Court that members of the Haitian diaspora do not form a social group as such. It is true that certain people are easier to find because of, namely, their participation in political activities or their past (this is the case for, among others, criminals deported back to Haiti). However, the Haitian diaspora cannot be considered a group at risk as a whole, and each case must be considered individually. The applicant is not a known person in Haiti, she is comfortable in the Creole language and some of her family members still live in Haiti. Under these circumstances, the panel found that she would be capable of reintegrating into Haitian society without undue personal risk.

III. Issue

[15] The applicant raised a number of arguments against the RPD's decision. The two most important ones can be summarized as follows:

a. Did the panel err by not considering all of the applicant's personal characteristics for the purposes of section 96?
b. Did the panel err by not taking into account all of the documentary evidence on the danger the applicant would face upon her return to Haiti after living in Canada for several years?

IV. Analysis

A. *Did the panel err in its assessment of the claim based on section 96?*

[16] There is no question that the panel's findings challenged by the applicant in essence raise questions of fact or questions of mixed fact and law, and that they must therefore be reviewed on the

standard of reasonableness. It follows that the Court will intervene only if the panel's decision falls outside the range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[17] First, the applicant alleged that the panel erred in fact by finding that she had stopped operating her business in August 2005 instead of in August 2009. However, as previously mentioned, there is clearly a discrepancy in the PIF submitted by the applicant between the answer she gave to question 7 and the account she annexed in reply to question 31. This gap between the two versions of her account was not resolved during the hearing. Under these circumstances, the panel was entitled to side with the applicant's narrative as opposed to her list of jobs. Counsel for the applicant was unable to establish why the version of the facts accepted by the panel was unreasonable. In any case, the panel's choice is immaterial regarding the risk the applicant would face if she were to return: in either case, she would no longer be considered a shopkeeper insofar as she apparently ceased operations at least from the time she left for Canada.

[18] Furthermore, the applicant argues that the panel did not consider her particular characteristics before finding that her subjective fear was based not on gender, but rather on criminal acts. The panel wrote the following in that respect:

> [11] . . . The claimant also stated that she felt vulnerable as she did not have a husband. The file is based on the claimant's story of two attacks by the Chimères – one in May 2005 and one in August 2009. The Tribunal does not find a link between these two crimes and does not view either crime as gender-related and thus related to the *Convention*. The file will be analysed according to Section 97(1) of the *Act*. The motivation behind the 2005 attack on the claimant and her daughter-in-law is not possible to determine. There is no reason to believe that the attack was a crime because of her gender. Neither

> woman was the victim of a sexual aggression. The bandits took the money, shot at the women and left.

[19] This analysis by the panel seems completely reasonable to me and relies on the facts before the panel. Nothing in the evidence makes it possible to establish that the applicant was targeted because of her gender or even because she is a widow and would therefore be more vulnerable. In fact, there is every reason to believe that the first attack was motivated solely by the robbery; furthermore, the applicant was not even present in Haiti when her abandoned business was targeted by vandalism. Under these circumstances, it was open to the panel to find that the criminal offences on which the applicant relies to state that she was a victim of persecution could just as easily have been committed against a man. It is settled law that a fear of criminal assaults does not constitute, in itself, persecution linked to one of the five Convention grounds. For women to be recognized as a particular social group, the evidence must prove that they are subject to severe violations of their fundamental human rights because of their gender (see Lorne Waldman, *The Definition of Convention Refugee*, Markham, Ontario: Butterworth, 2001, at paragraph 8.288). That is not the case here.

[20] The same finding applies to the applicant's claim based on her membership in the Haitian diaspora and to the risk if she were to return. The RPD was correct in finding that this was not a case of a particular social group for the purposes of section 96 and that fear of persecution based on this characteristic had no nexus to one of the five Convention grounds (see, among others, the two decisions cited by the RPD on this point, namely *Prophète v. The Minister of Citizenship and Immigration*, 2008 FC 331, at paragraphs 20-21, 167 A.C.W.S. (3d) 151 and *Cius v. The Minister of*

Citizenship and Immigration, 2008 FC 1 at paragraph 23, [2008] F.C.J. No. 9 (QL); see also: *Soimin v. The Minister of Citizenship and Immigration*, 2009 FC 218, [2009] F.C.J. No. 246 (QL)).

[21] Once again, the question of whether a protection claim can be connected to one of the grounds for persecution set out in the Convention is purely factual and is within the expertise of the RPD. This Court must show great deference to decisions by the RPD in this area, and none of the arguments presented by the applicant warrant the review of the decision that is the subject of this application for judicial review.

B. *Did the panel err in its assessment of the refugee claim based on section 97?*

[22] The panel also had reason to find that the risk alleged by the applicant as a woman and a member of the Haitian diaspora also did not meet the requirements of section 97 of the IRPA. It is true that, in accordance with this provision, the risk must be assessed in light of the applicant's personal situation; however, the applicant did not establish a personalized and prospective risk before the RPD.

[23] First, regarding the risk the applicant would allegedly face as a member of the Haitian diaspora, the panel was correct in finding that that was not a personalized risk. Justice Luc Martineau wrote the following in *Charles et al. v. The Minister of Citizenship and Immigration*, 2009 FC 233, [2009] F.C.J. No. 277 (QL):

> [7] . . . the Court concludes that the applicants' claim with regard to them being at greater risk if returned to Haiti because of a general perception as to their enrichment upon return from abroad was also reasonably dismissed by the Board since section 97 requires personalized risk . . . .

[24] The panel acknowledged that, if the Haitian diaspora as a whole cannot be considered a risk group, each case nevertheless has to be considered individually and within its own context. Relying on the documentary evidence, the panel indicated, namely, that the lack of familiarity with the local customs and language could make a person more easily identifiable and make them a target for potential kidnappers. The panel then assessed the applicant's personal situation and stated the following:

> [26] The hearing was translated into Creole and clearly the claimant is only comfortable in her native language. She left Haiti approximately two years ago and therefore, is familiar and comfortable with the customs of her country. The claimant had a small business selling groceries which she managed from 1977 to 2005 when she was attacked. She has not operated a business since August 2005. She was not a well- known political person, public figure, and certainly not a criminal. The Tribunal finds that she would be capable of reintegrating into Haitian society without undue personal risk although she has lived outside the country for a period of time. The claimant has three family members living in Port-au-Prince.

[25] This passage testifies to the panel's assessment of the applicant's personal situation, and the applicant failed to demonstrate a flaw in this reasoning. With respect to the prospective risk alleged by the applicant if she were to return to Haiti as a single woman, it was also correct for the panel to reject this. Relying on the documentary evidence, the panel noted that most acts of sexual violence occur in a domestic context, a situation the applicant is unlikely to face given her age and the fact that she could be protected by her two daughters and adult son in Haiti.

[26] The applicant attacked this last finding by arguing that the panel did not consider her personal situation and extensively cited Justice Martineau's decision in *Josile v. The Minister of*

Citizenship and Immigration, 2011 FC 39, [2011] F.C.J. N0. 63 (QL) in support of her submission. However, a close reading of that decision shows that the reasons why the application for judicial review was allowed in that matter do not apply here. After finding that Haitian women are generally at risk of being victims of violence and sexual assault because of their membership in that group, Justice Martineau criticized the RPD for not considering the circumstances and particular situation of the applicant to find whether there was more than a mere possibility of her being at risk of being a victim of that harm in Haiti in the context of its analysis based on section 96.

[27] In this case, the panel explicitly considered the applicant's personal situation to assess, on a balance of probabilities, whether her removal would subject her to the danger and threats under section 97 of the IRPA. In fact, the panel not only assessed recent evidence regarding the objective situation in Haiti since the earthquake in January 2010, but it was precisely in taking into account the fact that the applicant would live with family members (and, namely, an adult son who would constitute a male presence) that it found that there was a lack of personalized risk in her case.

[28] Consequently, *Josile*, above, cannot be of any help to the applicant. Given the evidence in the record, it was reasonable for the panel to find that the applicant would not personally face a risk not shared by other citizens in Haiti. Once again, this was a question of fact for which this Court must show great deference. The fact that the applicant is not in agreement with this finding is not sufficient to warrant the intervention of the Court. It could very well be, as the RPD emphasized, that this case gives rise to humanitarian and compassionate grounds, but the assessment of such grounds cannot be done in the framework of a claim based on sections 96 and 97 of the IRPA.

[29] In light of the foregoing, this application for judicial review must be dismissed. Neither party proposed a question for me to certify, and none will be certified.

JUDGMENT

THE COURT ORDERS that the application for judicial review is dismissed. No question for certification arises.

"Yves de Montigny"
Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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