Federal Court  Cour fédérale

Date: 20120921

Docket: IMM-9676-12

Citation: 2012 FC 1105

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, September 21, 2012

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

GENALD SAINTILUS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION
AND
THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

REASONS FOR ORDER AND ORDER

[1] This decision is in response to a motion to stay a removal order scheduled for Monday, September 24, 2012.

[2] The motion is incidental to the applicant's application for leave and judicial review of a decision refusing to grant the applicant a stay.

[3] In addition to a political asylum claim being refused in the Unites States, the case history shows that a political refugee claim (in Canada) was rejected by the Refugee Protection Division (RPD) further to the exclusion of the applicant because of his membership in the Forces Armées d'Haïti (FADH) [Armed Forces of Haiti] and because of his lack of credibility in trying to change his account with evidence that was previously deemed unacceptable.

[4] Earlier proceedings attached no probative value to the documents submitted by the applicant denying his participation in the FADH.

[5] Information with respect to human rights violations were formally confirmed by several known international organizations such as the United Nations Commission on Human Rights, Amnesty International and Human Rights Watch. Each of those organizations confirmed that, between 1991 and 1994—the period when the army took power in Haiti—the army, or the FADH, was characterized as an organization directed to a limited, brutal purpose that committed systemic, brutal violations against the people of Haiti. Those brutal violations included summary executions, enforced disappearances, body disposals, extortion and even pillaging, arson and torture, including the raping of women.

[6] The decision in *Ramirez v Canada (Minister of Employment and Immigration)*, [1992] 2 FC 306, [1992] FCJ No 109 (QL/Lexis) (CA) (at paragraph 16), specified the elements that lead to a presumption of complicity:

> . . . where an organization is principally directed to a limited, brutal purpose, . . . mere membership may by necessity involve personal and knowing participation in persecutorial acts.

[7] Presumption of complicity is verifiable by considering, for analysis purposes, certain key factors according to the testimony and the evidence of the individual concerned:

(a) The applicant voluntarily joined the FADH during the period that was categorized as brutal towards the people of Haiti;

(b) The FADH were defined as an organization directed to a limited, brutal purpose;

(c) The applicant's rank indicates that he was a Corporal;

(d) Knowledge of the atrocities could not have been ignored by the applicant, who would have been a member of the FADH;

(e) The evidence shows that the applicant did not leave, but instead remained a member the FADH during the most problematic period;

(f) Between 1990 and 1994, the applicant was a member of the FADH when the FADH were considered an entity directed at a limited, brutal purpose.

[8] The following was specified in the prior decision by the pre-removal risk assessment (PRRA) officer dated June 20, 2012:

> [TRANSLATION]
>
> Subsection 112(3) IRPA
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> Furthermore, because the applicant is subject to Article 1F(a) of the Convention, he is also subject to paragraph 112(3)(*c*) IRPA. According to paragraph 113(*d*) of the IRPA, when an applicant is subject to subsection 112(3), a PRRA application can only be assessed on the basis of the elements stated in section 97 of the IRPA.
>
> I note that, on March 2, 2012, a 44 report was issued and the applicant was inadmissible under A35(1)(*a*), which reads as follows:

> Subsection 35(1) Violating human or international rights –
> A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for:
>
> (*a*) committing an act outside Canada that constitutes an offence referred to in sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*;
>
> . . .
>
> . . .
>
> The RPD found that the applicant was excluded under Article 1F(a) of the Convention; consequently, the applicant's allegations of risk were not heard. Thus, paragraph 113(*a*) of the IRPA cannot apply and all of the evidence submitted on the record will be taken into consideration in this assessment of section 97 IRPA.
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> In support of his PRRA application, the claimant submitted the following documents:
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> -a document addressed to the Gonaives Trial Court dated October 11, 2011
> -a document from the Haitian National Police entitled [TRANSLATION] "Complaint statement from Ms. Génald Saintilus, née Ludovia Joseph" dated December 18, 2011
> -a document from the Haitian National Police entitled [TRANSLATION] "Complaint" dated February 9, 2012
> -two medical certificates from Clinique du Bon Berger dated November 20, 2011
>
> I note that, in the applicant's written submissions, his representative raised humanitarian and compassionate considerations (establishment, ties, etc.) and referred to unusual and underserved or disproportionate hardship if he were to return to his country of origin. These humanitarian and compassionate considerations are irrelevant and cannot be assessed in the context of a PRRA application. Furthermore, the unusual and underserved or disproportionate hardship test is not the test applied in the assessment of a PRRA application.

(Respondent's Reply Record at pages 17-18.)

[9] With supporting "new evidence" and a willingness to reopen the RPD file because of an alleged failure to observe a principle of natural justice, the applicant did not, nevertheless, rebut the presumptions concerning his complicity within the FADH; therefore, the record shows that the

applicant was heard and that the RPD found that it had serious reasons to think that the applicant was complicit in crimes against humanity.

[10] The Federal Court of Appeal also specified the following in *Wackowski v Canada (Minister of Citizenship and Immigration)*, 2004 FC 280, referring to an excerpt from *Serrahina v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 477, with which the Court of Appeal agrees:

> [12] The Board may reopen the hearing into a refugee claim where an abandonment hearing was conducted in a manner inconsistent with the rules of natural justice: *Serrahina* . . . ; see also Rule 55 (4) of the *Refugee Protection Division Rules*, SOR/2002-228.

[11] As specified by the respondent concerning the new evidence, the Court agrees with the following:

> [TRANSLATION]
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> 42. Furthermore, the applicant filed his PRRA application on January 31, 2012. He had the opportunity, at that time and as time passed, to submit his "new evidence" in support of his PRRA. In fact, the evidence in the file shows that, before October 2011, there was only a Ministry of the Interior and Territorial Communities. It was not until October 18, 2011, that the Minister of the Interior, Territorial Communities and Defence came to be ([28] See Exhibit A at Dominique Toillon's affidavit).
>
> 43. The applicant did not show, since his arrival in Canada, and since at least October 18, 2011, that is was impossible for him to obtain the document and that he tried to contact someone in the Haitian government (for example, a public servant/clerk in the Ministry of the Interior, Territorial Communities and Defence to obtain that evidence.

(Respondent's Reply Record, Respondent's written submissions.)

[12] Also, as a result, further to the applicant's lack of credibility and the listed factors that remain, the conjunctive three-part test in *Toth v Canada (Minister of Employment and Immigration)*

(1988), 86 NR 302 (FCA) was not met for any of the three accepted criteria. (Moreover, if, as stated in the alleged documents that "officially" came from Haiti, the applicant was not part of the FADH, he would not be in danger because of a participation in the FADH that would have never occurred.)

[13] Therefore, for all of these reasons, the Court dismisses the applicant's motion to stay a removal order.

ORDER

THE COURT ORDERS the dismissal of the applicant's motion to stay a removal order.

"Michel M.J. Shore"
Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-9676-12
STYLE OF CAUSE:	GENALD SAINTILUS v THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

MOTION HEARD BY CONFERENCE CALL ON SEPTEMBER 21, 2012, BETWEEN OTTAWA, ONTARIO AND MONTRÉAL, QUEBEC

REASONS FOR ORDER AND ORDER:	SHORE J.
DATED:	September 21, 2012

WRITTEN AND ORAL SUBMISSIONS BY:

Luc R. Desmarais	FOR THE APPLICANT
Lynne Lazaroff	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Luc R. Desmarais Counsel Montréal, Quebec	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT