Federal Court  Cour fédérale

Date: 20191018

Docket: IMM-1408-19

Citation: 2019 FC 1306

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, October 18, 2019

PRESENT: The Honourable Madam Justice Walker

BETWEEN:

CHARVANE ELISME

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant, Charvane Elisme, is seeking judicial review of a decision (the decision) of the Immigration and Refugee Board's Refugee Appeal Division (RAD). The RAD dismissed the applicant's appeal of a decision by the Refugee Protection Division (RPD) and upheld the latter's finding that the applicant was neither a Convention refugee nor a person in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Act*, SC 2001, c 27 (IRPA).

[2] The application for judicial review is brought pursuant to subsection 72(1) of the IRPA.

[3] For the reasons that follow, the application is dismissed.

I. Facts

[4] The applicant is a Haitian citizen. He left Haiti for Brazil on January 20, 2014. He lived in Brazil for two years.

[5] On May 23, 2016, the applicant left Brazil, alleging that he had suffered discrimination. He arrived in the United States on July 29, 2016. Subsequently, the applicant arrived in Canada on August 9, 2017. He made a claim for refugee protection in Canada that same day. The applicant alleges that he fears persecution in Haiti by reason of his political opinion.

[6] The events that led to his claim were as follows. The applicant was treasurer of the Mouvement Organisation Progressiste de la Petite Rivière de l'Artibonite (MOPPA) in 2014. On January 10, 2014, armed criminals sent by the Parti Haïtien Tèt Kale (PHTK) burst into MOPPA headquarters and insisted that it be shut down because members of MOPPA had openly criticized the PHTK government. The applicant opposed the demand to shut down and as a result was hit and threatened with death.

[7] The applicant's claim for refugee protection was heard on May 3, 2018, by the RPD. His claim was rejected on the basis that he was not credible. Moreover, he had failed to establish a fear of returning to Haiti. The applicant appealed this decision to the RAD.

II. Impugned decision

[8] The decision is dated February 4, 2019. The RAD upheld the RPD's decision. First, the RAD set aside the RPD's finding that the applicant lacked credibility. However, it upheld the RPD's finding that the applicant had failed to establish that he would have a current, well-founded fear of persecution were he to return to Haiti.

[9] The RAD noted that the applicant alleged that he would always be targeted by the PHTK in Haiti. At the time of the attack in 2014, he was the only one who opposed their demand, the only one hit and the only one who received death threats. In this regard, the RAD made the following findings:

1. Although the PHTK is still in power, there was a change of president in 2017, and the administration currently in place is not the same as the 2014 administration. Furthermore, there is no evidence that it uses means of coercion. Therefore, nothing in the evidence filed by the claimant or in the objective evidence establishes that the militants who attacked the claimant in 2014 are still working for the PHTK;

2. MOPPA still exists despite the militants' demands. The claimant did not know whether the members had experienced further problems since January 2014. Therefore, "[e]ither the militants have no real coercion power or they lost interest in the organization";

3. Nothing in the evidence establishes that the militants are still looking for the claimant four years later; and

4. The passage of time is a relevant factor suggesting that the militants' interest in the claimant has diminished. Such a length of time without any problems indicates that the appellant does not have a risk profile.

III. Preliminary objection

[10] The respondent submits that the application for leave and for judicial review was filed after the time limit established by the IRPA. The application was filed on March 1, 2019, while the respondent argues that the deadline for filing was February 27, 2019.

[11] According to subsection 35(2) of the *Refugee Appeal Division Rules*, SOR/2012-257 (RAD Rules), the applicant is presumed, absent evidence to the contrary, to have received a copy of the decision seven days after the day on which it was mailed. The respondent's evidence demonstrates that the decision was mailed to the applicant on February 5, 2019. Therefore, pursuant to subsection 35(2), the applicant is presumed to have received a copy of the decision on February 12, 2019.

[12] The applicant then has 15 days to file his application for leave against the RAD's decision (IRPA, paragraph 72(2)(b)), resulting in a deadline of February 27, 2019. The applicant filed the application on March 1, 2019.

[13] At the hearing, the applicant argued that subsection 9(4) of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 (FC Rules) provides that an applicant is deemed to have received the RAD's decision on the tenth day after it was sent by mail, making the deadline March 2, 2019. He also relied on section 54 of the RAD Rules.

[14] In my view, the applicant's reliance on subsection 9(4) of the FC Rules and section 54 of the RAD Rules is misplaced. Subsection 9(4) involves the production of a decision and reasons

after the filing of an application for leave, and in the application, the applicant indicated that he had not yet received the administrative tribunal's written reasons.

[15] The applicable provisions for determining the deadline for filing the application for leave are subsection 35(2) of the RAD Rules and paragraph 72(2)(b) of the IRPA. In accordance with these provisions, the applicant's deadline for filing his application for leave was February 27, 2019. Because the applicant has not provided a satisfactory explanation for the delay in filing his application, I find that it was filed out of time.

IV. Issues

[16] Given that the parties have argued the merits of the application, I will briefly address the two issues raised by the applicant:

1. Did the RAD apply an inappropriate standard of proof in assessing the claim under sections 96 and 97 of the IRPA?

2. Was the RAD's finding with respect to the claimant's fear if he were to return to Haiti unreasonable?

V. Standard of review

[17] The issue of the standard of proof to be applied in assessing the claim under sections 96 and 97 is a question of law reviewable on the standard of correctness (*Paz Ospina v Canada (Citizenship and Immigration)*, 2011 FC 681 at para 25 (*Paz Ospina*); *Sebastiao v Canada (Immigration, Refugees and Citizenship)*, 2016 FC 803 at para 19 (*Sebastiao*)).

[18] The standard of review applicable to the RAD's finding regarding the assessment of fear and the risk upon return is reasonableness because the applicant is challenging the RAD's

findings of fact and findings of mixed fact and law (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35). The standard of reasonableness applies, and the Court's role is to determine whether the decision falls within the "range of possible, acceptable outcomes which are defensible in respect of the facts and law". If "the process and outcome fit comfortably with the principles of justification, transparency and intelligibility", it is not open to this Court to substitute its own view of a preferable outcome (Dunsmuir *v New Brunswick*, 2008 SCC 9 at para 47; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59).

VI. Analysis

1. *Did the RAD apply an inappropriate standard of proof in assessing the claim under sections 96 and 97 of the IRPA?*

[19] The applicant submits that the RAD applied a more rigorous and stringent test in analyzing the objective component of section 96, when the proper test is whether there is a reasonable chance of persecution (*Paz Ospina* at para 23; *Adjei v Canada (Minister of Employment and Immigration)*, [1989] 2 FCR 680 (CA) at paras 5-8 (*Adjei*)). The applicant submits that the RAD relied on the balance of probabilities rule, a higher standard of proof associated with section 97, rather than the reasonable chance of persecution test, a less stringent standard of proof.

[20] The applicant argues that the RAD focused on the concept of risk rather than the concept of fear. Phrases such as "risk of returning to Haiti", "nothing establishes that" and "the appellant does not have a risk profile" indicate that the RAD [TRANSLATION] "applied the test of a major likelihood of risk rather than that of a possible and reasonable fear of persecution". His argument is that the RAD conflated the tests for sections 96 and 97.

[21] The respondent submits that the applicant's argument is based on semantic nuances and a microscopic and incomplete interpretation of the decision. He highlights the distinction between the standard of proof, which is the "balance of probabilities", and the objective test for fear of persecution, which is the "serious possibility" test (*Li v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1 at para 9). The respondent submits that the applicant has not met his burden of establishing, on a balance of probabilities, that there is a serious possibility that he will be persecuted in Haiti.

[22] I find that the RAD did not err. The onus was on the applicant to establish a subjective and objective fear of persecution were he to return to Haiti, in both cases on a balance of probabilities. The two parts of the test are described as follows (*Sebastiao* at para 12):

> [12] The subjective component of this bi-partite test relates to the existence of the fear of persecution in the mind of the refugee claimant; the claimant must be a credible witness with consistent testimony. The objective component requires the applicant to lay an evidentiary foundation that the fear is well-founded, having regard to the objective situation (*Rajudeen v Canada (Minister of Employment and Immigration)*, [1984] FCJ No 601 (FCA) at para 14: *Chan v Canada (Minister of Employment and Immigration)*, [1995] 3 SCR 593 [*Chan*] at paras 128, 133-134).

[23] In other words, the applicant must establish, on a balance of probabilities, that there is a "reasonable chance" or a "serious possibility" of persecution for the purposes of section 96 (*Adjei* at paras 5, 6 and 8).

[24] At the outset of its analysis of the case, the RAD stated that the determinative issue was the risk in Haiti. The RAD found that the applicant had failed to establish "that there is a serious possibility of persecution on a Convention ground or that, on a balance of probabilities, he would

be personally subjected to" one of the risks under section 97 of the IRPA. The fact that the RAD used "Risk of returning to Haiti" as one of the subheadings of its analysis of the objective component of the applicant's fear indicates that there was no confusion. The RAD, in analyzing the risk of returning to Haiti, specifically noted that the onus was on the applicant to establish that there was a serious possibility of persecution if he were to return to Haiti. In my view, the RAD was aware of the difference between the burden of proof and the test itself.

[25] The applicant submits that in finding that he had failed to establish that he would have a well-founded fear were he to return to Haiti, the RAD applied a balance of probabilities test. I disagree. The RAD's decision must be read as a whole (*Aloysious v Canada (Citizenship and Immigration)*, 2019 FC 1050 at para 13). The applicant is placing undue reliance on the specific words used by the RAD in its analysis rather than on the substance of its findings.

[26] When the decision is read as a whole, it is clear that the RAD conducted a thorough analysis of the applicant's objective risk of persecution in Haiti and the issue of whether he had established a serious possibility of persecution. The RAD did not err in considering the objective nature of the applicant's risk of persecution and in finding that he had not met his burden of establishing, on a balance of probabilities, that there is a serious possibility that he would be persecuted were he to return to Haiti.

[27] Moreover, the RAD did not conflate the tests for sections 96 and 97. The RAD correctly stated the tests applicable to each of the two sections in its decision. The facts of this case justified a combined analysis of sections 96 and 97, and the RAD committed no error in

considering the applicant's risk profile (*Debnath v Canada (Citizenship and Immigration)*, 2018 FC 332 at para 35):

> [35] As seen from the jurisprudence set out above, under both s 96 and s 97, an applicant must establish a risk that is both personal and objectively identifiable. While the Officer could certainly have better separated his or her s 96 and s 97 analysis, reading the decision in whole I am not persuaded that the paragraph at issue, as described above, demonstrates that the Officer conflated the s 96 and s 97 tests. While persecution need not be personalized under s 96, as the claimant may demonstrate that their fear is felt by the group in which they are associated within the Convention definition, the claimant's profile must be considered when determining if there is a well-founded risk of persecution.

2. *Was the RAD's finding with respect to the claimant's fear if he were to return to Haiti unreasonable?*

[28] In my view, the RAD's decision is entirely reasonable. Basically, the applicant presented no evidence of his current risk in Haiti, and on that basis the RAD was able to find that he had failed to establish a serious possibility of persecution. The applicant does not have a risk profile because he is not a member of a political party or involved in politics; the PHTK militants stopped looking for him three days after the incident in 2014; MOPPA still exists, and the applicant did not know whether its members had experienced further problems since the 2014 attack; and Haiti's president and administration changed in 2017. Considering these factors as a whole, the RAD's assessment of the applicant's documentary evidence is reasonable, and its findings are transparent and justified. Despite the applicant's detailed arguments, the RAD reasonably assessed the documentary evidence before it.

VII. Conclusion

[29] I find that it was reasonable for the RAD to find that the applicant failed to discharge his burden of demonstrating that there is a serious possibility of persecution if he were to return to Haiti. His application for judicial review is therefore dismissed.

[30] The parties have not submitted any question of general importance for certification, and this case does not give rise to any.

JUDGMENT in IMM-1408-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No question of general importance is certified.

"Elizabeth Walker"
Judge

Certified true translation
This 29th day of October, 2019.

Michael Palles, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

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