

Federal Court



Cour fédérale

Date: 20090604

Docket: IMM-3068-08

Citation: 2009 FC 586

Ottawa, Ontario, June 4, 2009

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

MOLBERDEENE FREJUSTE

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), for judicial review of a decision of the Immigration and Refugee Board's Refugee Protection Division (RPD or Board), dated May 16, 2008, wherein the applicant was determined to be neither a Convention refugee nor a person in need of protection.

[2] The applicant requests that the decision be set aside and the matter referred to a newly constituted panel for redetermination.

Background

[3] Molberdeene Frejuste (the applicant) is a citizen of Haiti who alleges that she cannot return to her country of origin because (1) she will be harmed by bandits who have previously targeted her due to her association with a former government employee, Martine, and (2) she would be targeted as a single female returnee because of her perceived wealth.

[4] According to the applicant, she met Martine in 1999 when she was a high school student at Métropolitain d’Haïti. Martine worked for the Bureau des contributions in Port-au-Prince and had a “nice car” that she used to drive the applicant to school.

[5] In March 2002, a group of armed bandits ambushed the two women while they were in Martine’s car. They were able to escape because policemen were doing their rounds nearby. After the incident, the applicant never again saw Martine.

[6] Shortly thereafter in April 2002, two men who identified her as Martine’s niece approached the applicant and threatened her. The applicant again managed to escape, this time because a United

Nations helicopter intervened. The applicant did not attend school for the 2003 school year out of fear. In August 2003, she fled Haiti to the United States.

[7] On July 12, 2006, the applicant entered Canada, where she made a refugee claim. Her hearing before the RPD took place on January 31, 2008. In a decision dated May 16, 2008, her application was denied.

Decision under Review

[8] The RPD found that the applicant's claim was full of inconsistencies and implausibilities for which the applicant could offer no reasonable explanation.

[9] The first inconsistency pointed to by the Board was the applicant's relationship with Martine, who was variously described as her friend and her cousin. At the hearing, the applicant stumbled when attempting to explain whether Martine was a cousin through her mother or her father, and could offer very little information about Martine's family. Second, the Board noted that no reference is made in the port of entry notes to the two incidents in 2002 described in the applicant's Personal Information Form (PIF). This was found to be problematic, given that it is precisely these incidents that seem to have been pivotal in her decision to flee Haiti. The Board also noted that the armed individuals who allegedly approached the applicant in April 2002 were described at different times as men wearing black, bandits and political agents. The applicant could offer, in the Board's view, "virtually no details" about her aggressors, nor could she explain the details of her escape with Martine in the first incident.

[10] The Board also observed that although the applicant claimed that Martine had disappeared, she was unable to offer any explanation for the family's failure to contact the police, except to say that the police were corrupt. As to the year the applicant allegedly did not attend classes due to fear, in the port of entry notes it is indicated that she attended classes until August 2003, contrary to her PIF. At page three of the decision, the officer writes:

In one version the claimant fled Haiti because political people were seeking out her friend Martine. In another version bandits attacked the claimant and her cousin Martine, who disappeared without a trace while nobody made any effort to look for her.

The inconsistencies and implausibilities in the claimant's evidence were countless and no reasonable explanations were offered. The panel finds none of these events occurred.

[11] The Board also noted that the applicant did not apply for asylum while in the U.S. The applicant explained that she had received advice not to apply in the U.S.; she was, however, unable to provide the name of the person who advised her. The applicant could not give the name of the town in Haiti to which she fled before leaving the country or the name of place where she allegedly stayed.

[12] Finally, the applicant was unable to provide details of how she left Haiti. She claimed that she had travelled to Miami smuggled in a boat, but could not say from which beach she left, to which port she arrived, or recall the name of the boat. Her explanation that she was not paying attention was found to be implausible. She could not describe the length of the voyage, estimating at the hearing that it might have taken eight to ten days, but declaring in the port of entry notes that she

arrived in the U.S. on August 16, the day after leaving Haiti. The Board concluded at page 4 of the decision:

The panel finds that the claimant was not in La Gonave in hiding and that she did not travel to the United States from La Gonave smuggled inside a boat.

The panel finds that it does not have before it any credible or trustworthy evidence in support of the claimant's claim. The panel finds the claimant failed to establish the subjective element of her claim.

[13] The RPD then turned to consider the applicant's claim under subparagraph 97(1)(b)(ii) of the Act that she was a person in need of protection. The Board took into account the brief report of a UN Consultant, Dr. Cecile Marotte (Marotte Report), regarding the risks faced by Haitians returning after having lived in the North America. While acknowledging the "rampant violence that seems to have taken over Haiti", and that "killings and general crime is on the rise", the Board nonetheless concludes:

In relation to the claimant, the panel does not find that a two-year absence from her country has transformed her to such an extent that she would no longer blend into Haitian society. The claimant has family in Haiti who are there to greet her at the airport and take the necessary precautions. She would be returning to her family home, to the same neighbourhood and environment, and would not be returning to an unfamiliar area.

[14] The Board identified jurisprudence of this Court holding that the perception of wealth does not constitute a particularized risk under section 97 of the Act, nor does it demarcate a particular social group under section 96.

Issues

[15] The applicant raises the following issues:

1. Did the Board err in finding that the applicant did not face an objective risk on account of her personal profile?
2. Did the Board err in finding that the applicant was not credible?
3. Did the Board member err in law by contradicting her own decision in another Haitian refugee claim, rendered less than four months earlier, without providing reasons for the change in her analysis?

Applicant's Submissions

[16] The applicant's chief criticism of the Board's decision is its failure, in her view, to explicitly consider the gender element of the claim. In this regard, the applicant argues that the Board made "four fatal errors" in:

1. Failing to address the 70 pages of documentary evidence demonstrating the widespread gender-based violence in Haiti and the fact that sexual violence in Haiti is "not just a random crime" but a "deliberate weapon of political and social oppression" whose victims are predominantly single women;
2. Failing to provide any reasons for her finding that the applicant does not face personalized risk as a "young, middle-class woman";

3. Overlooking a key element of the applicant's profile, namely the fact that she is a single young woman; and

4. Applying the wrong legal test under section 96, finding that there was insufficient evidence that the applicant "will" be personally targeted, rather than considering whether there was a "serious possibility" or "reasonable chance" that she would be targeted.

Heightened Fear as a Returnee

[17] The applicant argues that she would face a heightened risk as a returnee, basing her argument primarily on her own interpretation of the Marotte Report, which she believes the Board misconstrued. The applicant argues that the Board erred in failing to distinguish *Cius v. Canada (Minister of Citizenship and Immigration)*, [2008] F.C.J. No. 9, wherein the Court upheld the RPD's decision to reject a Haitian man who feared persecution as a returnee because there was insufficient evidence of particularized risk. The applicant contends that the Marotte Report, which presents evidence of particularized risk, dispels the Court's concern in *Cius* above. Moreover, she emphasizes that the applicant in the present instance, in contrast to *Cius* above, is female.

[18] The applicant also raises a number of other objections. For instance, in answer to the Board's statement that the applicant could offer few details about the first attack, the applicant points to her statements at the hearing and argues that the Board appears to have misremembered her testimony. Insufficient attention was also paid to her testimony explaining her failure to approach the authorities after her cousin's disappearance. The applicant further notes that the Board

found that she did not send money back to Haiti to her family. This question was never, however, asked of the applicant and it is therefore not, she contends, based on the evidence.

[19] The applicant notes that the Board erred in stating that she had been away for two years when she was in fact away for five years. This time frame was repeated more than once in the decision and therefore, it is argued, was an important factor in the decision.

Credibility

[20] The applicant observes that the Board doubted her seemingly contradictory claims that Martine was her cousin and her friend. In fact, Martine was both: she was a cousin who the applicant met at a party in 1999 and befriended.

[21] In addressing the apparent inconsistencies, the applicant underscores the fact that the point of entry notes were filled out by an immigration officer, and the PIF was drafted by the applicant herself, without the aid of counsel.

[22] The applicant also points out that she was penalized by the RPD for failing to remember facts linked to events that took place five years earlier, such as the name of the boat she travelled on when she left Haiti and the name of the exact location to which she fled after the 2002 incidents. At paragraph 45 of her memorandum, the applicant argues:

It is submitted that the Applicant provided reasonable explanations for each of these alleged difficulties with her evidence. It is

submitted, with respect, that the Member has rejected the Applicant's testimony on these points because, having come to doubt the Applicant's credibility for the reasons disputed above, she came to view all of her evidence as tainted. In addition, and regardless, even if the Court were to find that some aspects of Ms. Frejuste's testimony were problematic, it is submitted that given the Member's many errors the Court cannot be certain that she would have reached the same conclusion had she considered the Applicant's evidence properly.

Respondent's Submissions

[23] The respondent contends that the determinative issue for the RPD in relation to the section 96 claim was the applicant's lack of credibility, based on contradictions on key elements of her claim as well as implausibilities. The decision therefore warrants deference.

[24] With respect to the section 97 claim, the respondent argues that the fact that some types of crimes are mainly perpetrated against women does not make them personalized risks. In any event, it is submitted, the RPD specifically considered the situation of women in Haiti, and observed that the applicant's single mother and sisters live safely there.

[25] According to the respondent, the RPD also considered the documentary evidence regarding risk factors faced by returnees to Haiti, but concluded that she did not fit the profile of someone at risk, based on the Marotte Report.

Applicant's Reply

[26] In her reply, the applicant observes that the respondent fails in the submissions to directly address a large majority of her arguments:

She rejects that respondent's assertion, made without citing any authority, that the fact that some types of crimes are mainly perpetrated against women does not constitute personalized risk; on the contrary, rape and sexual violence more generally have long been recognized as forms of gender-based persecution.

[27] The applicant notes that she does not share the same profile with her mother and sisters; unlike them, she is a single female returnee. This undermines the analogy drawn by the Board, which seems to suggest that their apparent safety is an indication of her risk.

Applicant's Further Memorandum of Argument

[28] In her further memorandum of argument, the applicant raises a third issue based on the affidavit of Raoul Boulakia. Annexed to the affidavit is a transcription of an oral judgment rendered by the same Board member on March 4, 2008 in a case also involving a single female Haitian returnee.

[29] In that earlier case, the Board member concluded that the claimant was a person in need of protection because she faced a risk of kidnapping and sexual violence if returned to Haiti. At paragraph 7, the applicant writes:

In the present case, the Member in a very short time reversed herself on a central question of fact and law. The Applicant has previously [sic] submitted that the Member's reasons on this issue – consisting entirely of the one sentence cited above – are entirely insufficient. In addition, in light of her previous decision, it was particularly incumbent on the Member to explain her reasoning. It is respectfully submitted that without such an explanation, the decision in the current case has “an aura of arbitrariness” that amounts to a breach of procedural fairness and that constitutes an error of law.

Analysis and Decision

[30] **Issue 1**

Did the Board err in finding that the applicant did not face an objective risk on account of her personal profile?

The applicant claims that the Board erred in its evaluation of the objective risk she would face in Haiti, by failing to take sufficient account of her profile as a single *female* returnee. In *Bouaouni v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. 1540, 2003 FC 1211, Mr. Justice Blanchard explained the nature of the test to be applied under section 97:

41 A claim under section 97 must be evaluated with respect to all the relevant considerations and with a view to the country's human rights record. While the Board must assess the applicant's claim objectively, the analysis must still be individualized. I am satisfied that this interpretation is not only consistent with the United Nations CAT decisions considered above, but is also supported by the wording of paragraph 97(1)(a) of the Act, which refers to persons, "...whose removal ... would subject them personally...". There may well be instances where a refugee claimant, whose identity is not disputed, is found to be not credible with respect to his subjective fear of persecution, but the country conditions are such that the claimant's particular circumstances, make him/her a person in need of protection. It follows that a negative credibility determination, which may be determinative of a refugee claim under s. 96 of the Act, is not necessarily determinative of a claim under subsection

97(1) of the Act. The elements required to establish a claim under section 97 differ from those required under section 96 of the Act where a well-founded fear of persecution to a convention ground must be established. Although the evidentiary basis may well be the same for both claims, it is essential that both claims be considered as separate. A claim under section 97 of the Act requires that the Board apply a different test, namely whether a claimant's removal would subject him personally to the dangers and risks stipulated in paragraphs 97 (1) (a) and (b) of the Act. . . .

[My emphasis]

[31] There are, in my view, essentially two separate categories of risk underlying the applicant's section 97 claim, although she frames them within a single profile: the risk associated with being a returnee who has spent time in North America and is therefore perceived as a person of wealth, and the risk of being a single woman in Haiti. I wish to first deal with the issue of the risk of being a single woman in Haiti.

[32] The applicant's second argument is that the Board failed to take sufficient account that the applicant is a single female returnee. In other words, there is a specific gender dimension to the risk she would face upon return, one that, it is argued, would considerably heighten that risk.

[33] In her decision, the Board member appears to address the gender issue and the returnee issue simultaneously:

The panel has considered the claimant's gender, her age, her socio-economic status, the situation of her family who remains in Haiti and the number of years the claimant has been away.

The claimant's mother and two sisters remain in Haiti and no evidence was advanced that they face any problems. The claimant testified that her father is also there, although her parents separated

when she was small. The claimant testified that her mother was a businesswoman who sold furniture and house wares wholesale. Although she did not live with her father, the claimant was able to confirm that he was a tailor (*couturier*).

The panel finds that the claimant comes from a middle class family who are not members of the *diaspora*.

...

In relation to the claimant, the panel does not find that a two-year absence from her country has transformed her to such an extent that she would no longer blend into Haitian society. The claimant has family in Haiti who are there to greet her at the airport and take the necessary precautions. She would be returning to her family home, to the same neighbourhood and environment, and would not be returning to an unfamiliar area.

...

The claimant's profile as a young, middle-class Haitian woman, in and of itself, is not sufficient to conclude that she will be personally targeted in her country.

[34] Given the applicant's framing of the issue in terms of her status as a returnee who happens to be female, rather than as a returnee and also as a woman in Haiti, it is perhaps not surprising that the Board did not undertake a separate analysis on gender-based grounds. Nonetheless, a separate analysis was warranted. As the documentary evidence reveals, the risk of sexual violence is one widely faced by woman in Haiti, irrespective of whether or not they are returnees. In other words, it is a risk that exists independently of a woman's returnee status, and in this case may have been obscured by the applicant's emphasis on her risk as a returnee who might be targeted because of her perceived wealth.

[35] However, at the hearing the applicant's lawyer explicitly pointed the Board to evidence in the record treating the subject of violence against women, including sexual violence, referring, among others, to a Relief Web article from December 2006 entitled *Violence and Rape Common in Haiti*, and an article in the *Miami Herald* from May 2004 entitled "In Haiti's Chaos, Rape Without Punishment Was Norm". The evidence is replete with examples of the violence confronting Haitian women. According to one report:

In a country where poverty and political instability allow rapists to escape punishment, sexual assault has long been not just a random crime but also a deliberate weapon of political and social oppression.

[. . .]

In recent years, in the absence of law and order in Haiti, women and girls have become easy targets for the gangs that rule the street. "They are terrorizing the population, using rape as a way of regulating communities," says Nadine Puechguirbal, the U.N.'s senior gender advisor to its stabilization mission in Haiti. Gangs have moved into female-headed households where they won't be challenged.

[36] Another article from 2005 entitled "Haitian soldiers, police accused of mass rape" claims that to "punish and terrorize Haitians who speak out for democracy, gang rape is becoming more common". Amnesty International reports that in 2007 "[w]omen and girls continued to be tortured, raped and killed by illegal armed groups and by individuals".

[37] I am of the opinion that the Board erred in failing to include in her reasons a gender-based analysis taking into account the evidence of violence directed at women in Haiti. The application for judicial review must therefore be allowed. The decision of the Board is set aside and the matter is referred to a different panel of the Board for redetermination.

[38] Because of my finding on these issues, I need not deal with the remaining issues.

[39] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

[40] **IT IS ORDERED that** the application for judicial review is allowed and the matter is referred to a different panel of the Board for redetermination.

“John A. O’Keefe”

Judge

ANNEX

Relevant Statutory Provisions

The following provisions of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 are pertinent.

<p>96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,</p> <p>(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or</p> <p>(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.</p> <p>97.(1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally</p> <p>(a) to a danger, believed on substantial grounds to exist, of</p>	<p>96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d’être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :</p> <p>a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;</p> <p>b) soit, si elle n’a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.</p> <p>97.(1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n’a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :</p> <p>a) soit au risque, s’il y a des motifs sérieux de le croire,</p>
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torture within the meaning of Article 1 of the Convention Against Torture; or

d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

(2) A également qualifié de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3068-08

STYLE OF CAUSE: MOLBERDEENE FREJUSTE

- and -

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: February 4, 2009

**REASONS FOR JUDGMENT
AND JUDGMENT OF:** O'KEEFE J.

DATED: June 4, 2009

APPEARANCES:

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Kristina Dragaitis	FOR THE RESPONDENT

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