

Federal Court



Cour fédérale

Date: 20150303

Docket: IMM-5050-14

Citation: 2015 FC 264

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, March 3, 2015

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

ALEX CHERY

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Preliminary

[1] Following a thorough review of the Certified Tribunal Record, including the hearing transcript, the submissions of the parties and the reasons of the Refugee Protection Division [RPD], the Court finds that, with regard to the evidence as a whole (*Ramos v Canada (Minister*

of Citizenship and Immigration), 2011 FC 298 at para 7 [*Ramos*]), the RPD's assessment of the applicant's credibility is unreasonable.

[2] In its assessment of the applicant's credibility and subjective fear, the RPD should have given weight to the applicant's political opinion and involvement in his community, which go to the heart of his claim, and to the central importance of the attack that occurred on January 15, 2014, which was the factor that precipitated his flight.

II. Introduction

[3] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of a decision of the RPD dated June 3, 2014, in which it was determined that the applicant was not a Convention refugee or a person in need of protection under sections 96 and 97 of the IRPA.

III. Facts

[4] The applicant, aged 45, is a citizen of Haiti, a novelist and a lawyer by profession since 2012.

[5] He is the coordinator of the non-governmental organization SipoHaiti, which has provided assistance to the citizens of Limbé since the earthquake in January 2010. He is also vice-president and secretary of the Front pour le développement de Limbé [FRONDEL], an

organization established to [TRANSLATION] “promote the development and social integration of all citizens in Limbé and Bas-de-Limbé” (applicant’s narrative, Tribunal Record, at p 25).

[6] The applicant claims that he was persecuted by Gaby Silencieux, deputy commissioner for the electoral district of Limbé and Bas-Limbé, and his associates, known as the Cent Hommes. The applicant states he was persecuted for his involvement in SipoHaiti and FRONDEL and for his role as the representative of the family of Arnaud Saint-Amour, who he says was murdered by Mr. Silencieux and his associates.

[7] The applicant claims that Mr. Silencieux and the Cent Hommes perceive him as a threat to their power.

[8] On July 23, 2012, the applicant petitioned human rights organizations and members of civil society to press the police to execute warrants for the arrest of Gaby Silencieux and his associates for their crimes.

[9] On July 30, 2013, the applicant published an article in the Haitian newspaper *Cap-Express* condemning a meeting attended by the President of Haiti, deputy commissioner Gaby Silencieux and a deputy named Frantzy Louis. On August 17 of that same year, the applicant also posted to social media a piece entitled [TRANSLATION] “Arnaud Jean Robert Saint-Amour murdered by Limbé deputy commissioner Gaby Silencieux: when will justice be done?”

[10] On September 8, 2013, the applicant was threatened and physically assaulted on the public square in Limbé by an associate of Gaby Silencieux. The next day, the applicant reported the incident, filing a complaint at the registry of the public prosecutor's office in Cap-Haïtien.

[11] On September 19, 2013, the applicant was attacked by two individuals on a public bus between Cap-Haïtien and Limbé. When he disembarked from the bus, a third individual pointed a revolver at him. The applicant managed to flee and filed a complaint with the police.

[12] On January 15, 2014, the applicant was assaulted and threatened at Carrefour Gros Chaudière by two individuals, one of whom tried to kill him with a piece of iron. The applicant managed to escape and filed a complaint with the police the next day.

[13] On the evening of the January 15 attack, the applicant and his family took refuge at the home of a friend in Plaine du Nord. On January 23, 2014, he left Haiti for the United States and arrived in Canada one month later.

[14] A hearing was held before the RPD on May 7, 2014.

IV. Impugned decision

[15] It appears from its reasons that the RPD based its decision on the following five credibility findings.

- i. Incorrect date on the complaint of September 9, 2013: The applicant alleges that he filed a complaint with police the day after he was threatened on the public square in

- Limbé on September 8 of that year. However, the complaint is dated September 6, 2013. When asked about the inconsistency, the applicant explained that it was the result of an inadvertent error. He had used a word processing template dated September 6, 2013, and had forgotten to enter the correct date. The RPD rejected this explanation, observing that the applicant, who is an experienced lawyer, should understand the importance of checking the dates of documents. The RPD further found that the document contained insufficient details on the incident.
- ii. Altercation on the bus on September 19, 2013: The RPD found that there was a contradiction in the applicant's testimony on the attack he suffered on a bus on September 19, 2013, specifically concerning the source of the blows received by the applicant.
 - iii. Complaint filed following the incident of September 19, 2013: The RPD notes that the complaint concerning the incident of September 19 also refers to a second incident that occurred on September 23, 2013. According to the applicant, the incident on September 23 was not linked to that of September 19 or to his persecutors. The RPD finds it unlikely that a police officer included two unrelated incidents in a single complaint. The RPD further observes that, if such were the case, it would have been unreasonable for the applicant to sign such an ambiguous complaint.
 - iv. Applicant's subjective fear: The RPD finds that the applicant's actions following the incident of September 19, 2013, and the fact that he continued working and living at the same places are inconsistent with his alleged fear.

- v. Applicant's failure to claim refugee protection in the United States: The RPD draws a negative inference from the applicant's failure to seek refugee protection in the United States and rejects his explanation on that point.

[16] Lastly, the RPD finds that the applicant did not establish that he faces a serious possibility of persecution on a Convention ground or that he would be personally subjected to a danger of torture, to a risk to his life or to a risk of cruel and unusual treatment or punishment should he return to Haiti.

V. Issue

[17] Is the RPD's decision with respect to the applicant's credibility reasonable?

VI. Statutory provisions

Convention refugee

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,

(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

(b) not having a country of nationality, is outside the

Définition de réfugié

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 :

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;

b) soit, si elle n'a pas de nationalité et se trouve hors du

country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

Person in need of protection

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

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

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

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

(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,

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

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

pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Personne à protéger

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 :

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

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

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

(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) 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) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins

medical care.

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 qualité 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.

VII. Arguments of the parties

A. *Applicant's arguments*

[18] The applicant cites numerous errors made by the RPD in its assessment of the evidence and of the applicant's credibility that he characterizes as unreasonable (*Maldonado v Canada (Minister of Employment of Immigration)*, [1980] 2 FC 302; *Jamil v Canada (Minister of Citizenship and Immigration)*, 2006 FC 792, at paras 24-27).

(1) Incorrect date on the complaint of September 9, 2013

[19] First, the applicant claims that it was unreasonable for the RPD to reject his explanation of the incorrect date appearing on the complaint of September 9. In his view, this typographical error is not implausible or fatal to the document's credibility. As is apparent from the official stamps on it, not only was the complaint accepted by the registry, it also resulted in judicial proceedings.

[20] It was also unreasonable for the RPD to reproach the applicant for committing such an error in view of his experience as a lawyer. The applicant submits that he has practised law since 2012 and that he is not an experienced lawyer, as the RPD claims.

(2) Altercation on the bus on September 19, 2013

[21] The applicant contends that the RPD's finding respecting the event of September 19, 2013, is unreasonable. He testified in a consistent manner, stating that he had received two blows and that he was unable to determine which of the two men had administered the first or the second blow since they were outside his field of vision.

(3) Two events included in a single complaint

[22] The applicant claims that the RPD's finding that the complaint concerning the incidents of September 19 and 23, 2013, is of no probative value is unreasonable.

[23] The explanation that the applicant provided, that the officer saw fit to include two incidents in a single complaint because the dates of those incidents were close to each other, was reasonable. The applicant submits that a complaint is not required under Haitian law to be made in any particular form and that the RPD interpreted the document based on North American logic.

(4) Applicant's subjective fear

[24] The applicant then claims that the RPD unreasonably drew a negative inference with respect to his subjective fear by finding that he had continued his normal activities following the incident on September 19, 2013.

[25] In the applicant's view, the RPD erred in concluding that the applicant's alleged fear arose on September 19, 2013, rather than on January 15, 2014.

[26] The applicant testified that the attack on January 15, 2014, convinced him to leave his country because it made him fear for his safety and for his life. He testified that he had viewed the September 19 attack as an act of intimidation designed to discourage him from continuing to work at SipoHaiti and FRONDEL and from acting in the matter of Arnaud Saint-Amour.

(5) Full analysis of evidence adduced by the applicant

[27] The applicant then asserts that the RPD erred by failing to analyze key documentary evidence that would corroborate crucial elements of his alleged fear. He characterizes the RPD's analysis of his credibility as [TRANSLATION] "hasty", as though the [TRANSLATION] "very essence of his claim for refugee protection had not been reviewed by the Board member" (applicant's memorandum, at para 3.53). The applicant contends that there is an obvious discrepancy between his actual account and his account as portrayed by the RPD.

[28] In the applicant's view, the onus was on the RPD to assess the evidence and to determine its probative value.

(6) Applicant's failure to claim refugee protection in the United States

[29] Lastly, the applicant contends that he spent 31 days at his friend's home before arriving in Canada to claim refugee protection. He argues that he provided a reasonable explanation for that delay. However, the RPD accepted only part of the explanation provided by the applicant.

B. *Respondent's arguments*

[30] The respondent contends that the RPD's decision is reasonable. It is for the RPD to assess the probative value of the documents entered into evidence by the applicant.

[31] In the respondent's view, it was open to the RPD to assign no probative value to the complaint filed on September 9, 2013, because it contained a dating error. It was also open to the RPD to conclude that the explanations provided by the applicant on the matter were unreasonable.

[32] In the respondent's view, the RPD could consider the fact that the applicant did not claim refugee protection in the United States, even though it is a country that could offer international protection. It could also conclude that the applicant's actions were inconsistent with those of a person who fears persecution.

[33] It was also open to the RPD to draw a negative inference from the applicant's decision to continue working and living in the same places despite the threats he had received.

[34] Furthermore, the applicant's delay in claiming refugee protection following the incident of September 19, 2013, is a significant factor to consider in the context of his claim for refugee protection.

[35] Lastly, the respondent contends that it is not for the Court to reassess the explanations the applicant provided (*Chen v Canada (Minister of Citizenship and Immigration)*, 2005 FC 767 at para 24; *Kabir v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 907 at para 5). As a specialized tribunal, the RPD is in the best position to assess a refugee protection claimant's testimony and the credibility of the claimant's statements in the context of the evidence as a whole (*Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732; *He v Canada (Minister of Employment and Immigration)*, [1994] FCJ No 1107; *Sidhu v Canada (Minister of Citizenship and Immigration)*, [2002] FCJ No 1355).

VIII. Analysis

[36] The Court concurs with the parties' position that the standard applicable to determinations of fact and of mixed fact and law is the standard of reasonableness (*Dunsmuir v New Brunswick*, [2008] SCC 9, at paras 47 and 53).

[37] Following a thorough review of the Certified Tribunal Record, including the hearing transcript, the submissions of the parties and the RPD's reasons, the Court finds that, with regard

to the evidence as a whole (*Ramos v Canada (Minister of Citizenship and Immigration)*, 2011 FC 298 at para 7 [*Ramos*]), the RPD's assessment of the applicant's credibility is unreasonable.

[38] First, the applicant contends that the RPD failed to note the central importance of the attack he suffered on January 15, 2014. He argues that it was this event that precipitated his departure from Haiti. The Court finds that the applicant's claim is supported by the evidence on the record, as appears from the applicant's statements in his Basis of Claim (BOC) form, in his narrative and at the hearing.

[39] More specifically, in response to question 2(f) of his BOC form ("Why did you leave at that time and not sooner, or at a later time?"), the applicant states, [TRANSLATION] "I was assaulted on January 15, and I left Haiti on January 23, 2014. That was the nearest date for which I could find a ticket for the United States of America" (applicant's BOC form, Tribunal Record, at p 14).

[40] Then, in response to question 2(h), the applicant stated that [TRANSLATION] "[a]fter the physical assault on Wednesday, January 15, 2014, [he] was forced to leave the country eight days later to save [his] life" (applicant's BOC form, Tribunal Record, at p 15).

[41] In response to question 2(d) of his BOC form, the applicant states that, on the evening of the incident of January 15, 2014, he spent the night with his family at the home of a friend in Plaine du Nord and that he filed a complaint with the police the next day. The applicant left for Port-au-Prince the following day (applicant's BOC form, Tribunal Record, at p 14).

[42] In addition, at the hearing, in response to the RPD's question, [TRANSLATION] "[I] would like to know when you decided to leave your country", the applicant said, [TRANSLATION] "I decided to leave Haiti after being assaulted, and, on January 15 [inaudible], two bandits who were in the pay of the deputy commissioner" (transcript of the RPD hearing, Tribunal Record, at p 409).

[43] Lastly, the applicant stated that, out of fear, he and his family have not returned to their house since January 15, 2014 (transcript of the RPD hearing, Tribunal Record, at p 475).

[44] However, the RPD views the incident of September 19, 2013, as the factor that triggered the applicant's fear, leading it to draw a negative inference from the applicant's actions of continuing to work and live in the same places following the incident in which he was involved.

[45] The Court finds that the RPD's conclusions on this point are not supported by the evidence. The incidents of January 15, 2014, and the actions the applicant took to flee his country the next day should have been considered and weighed by the RPD in its assessment of the applicant's credibility and subjective fear.

[46] Furthermore, it appears from its reasons that the RPD failed to consider in its analysis the decisive role of the applicant's political opinion, whether actual or imputed, under section 96 of the IRPA.

[47] It appears from the evidence that the applicant's political opinion is central to his alleged fear, considering his duties and involvement in SipoHaiti and FRONDEL, the articles that he published in the newspaper *Cap-Express* and in social media, and his involvement in the Arnaud Saint-Amour matter.

[48] The applicant's involvement in his community clearly goes to the core of his refugee claim.

[49] More specifically, the applicant testified at the hearing that he considered himself to be [TRANSLATION] "politically active" and that he was perceived as such in his community and by his persecutors (transcript of the RPD hearing, Tribunal Record, at pp 496 and 498).

[50] An article published in *Cap-Express*, dated August 10, 2013, confirms that the applicant suffered [TRANSLATION] "repeated instances of intimidation and death threats" following the publication of his first petition to human rights organizations condemning the assassination of Arnaud Saint-Amour (Tribunal Record, at p 241).

[51] The evidence on the record also demonstrates the criminal activities of the applicant's principal persecutor, Gaby Silencieux (see the articles that appeared at Radiovision2000haiti.net: [TRANSLATION] "Gaby Silencieux transported by official vehicle to investigating judge's office Wednesday" and [TRANSLATION] "Gaby Silencieux, a crook promoted to deputy commissioner of Limbé, says Ketly Julien", Tribunal Record, at pp 244 and 245).

[52] Furthermore, in an interview with the Canada Border Services Agency [CBSA], on February 25, 2014, in response to the question [TRANSLATION] “Why are you seeking refugee protection in Canada?” the applicant stated, [TRANSLATION] “[B]ecause I feel I will not be safe and will be under pressure in Haiti because the person involved in the Arnaud Jean Robert Saint-Amour case is the deputy commissioner of the commune of Limbé, representing the President of Haiti, and he will be a candidate for the Chamber of Deputies in the next election” (CBSA interview notes, Tribunal Record, at p 89).

[53] Lastly, the documentary evidence in the RPD record indicates that Haiti suffers from [TRANSLATION] “chronic corruption” in the various branches of its government and a lack of respect for the rule of law, exacerbated by a failing judiciary (*Haiti 2013 Human Rights Report*, Tribunal Record, at p 351; see also *Report of the independent expert on the situation of human rights in Haiti*, Michel Forst, Tribunal Record, at p 363).

[54] In light of the foregoing, the RPD’s credibility findings are based on an erroneous interpretation of the evidence, which was not considered in part, thus warranting the Court’s intervention.

[55] The Court finds that the RPD’s decision is unreasonable.

IX. Conclusion

[56] The application for judicial review is allowed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review be allowed and that the matter be referred back for redetermination by a differently constituted panel. There is no question of general importance to be certified.

“Michel M.J. Shore”

Judge

Certified true translation
Johanna Kratz, Translator

FEDERAL COURT
SOLICITORS OF RECORD

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AND JUDGMENT BY:** SHORE J.

DATED: MARCH 3, 2015

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