

Date: 20070213

Docket: IMM-3863-06

Citation: 2007 FC 160

Ottawa, Ontario, the 13th day of February 2007

PRESENT: THE HONOURABLE MR. JUSTICE SIMON NOËL

BETWEEN:

**MARGARETH VAVAL
MELISSA PIERRE**

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) of a decision delivered on May 29, 2006 by the Refugee Protection Division (RPD) of the Immigration and Refugee Board (IRB) that Margareth Vaval (principal applicant) and her daughter Melissa Pierre, both citizens of Haiti, were neither “refugees” within the meaning of section 96 of the IRPA nor “persons in need of protection” under section 97 of the IRPA.

I. Facts

[2] The principal applicant, a teacher, set up a foodstuffs business. The applicant claimed that, as owner of this business, she met opponents of the existing regime.

[3] On July 7, 2005, she was allegedly the victim of a kidnapping attempt. She filed a complaint with the police, but her efforts were in vain. Moreover, a police officer advised her to cease contact with the opponents.

[4] On July 9, 2005, the principal applicant received an anonymous call threatening her again. On this date, she learned that armed men had broken into her business, ransacked everything and murdered her sister, despite the fact that the police station was only a few doors down from her business.

[5] On July 15, 2005, the applicant's husband disappeared.

[6] On July 18, 2005, the principal applicant was allegedly threatened by an individual on her way to work. Consequently, the applicant decided to leave Haiti temporarily, leaving the task of finding her husband to her family.

II. Issues

- (1) Did the RPD err in deciding that the applicants are neither Convention refugees nor persons in need of protection under section 97 of the IRPA?
- (2) Did the RPD err in not considering the issue of state protection or the problems that women in Haiti face?

III. Analysis

- (1) Did the RPD err in deciding that the applicants are neither Convention refugees nor persons in need of protection under section 97 of the IRPA?

[7] Section 96 of the IRPA is clear. To be considered a Convention refugee, a refugee claimant must have a well-founded fear "...of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion". The existence of a nexus between the alleged persecution and one of the five grounds listed in the definition of "Convention refugee" under section 96 of the IRPA is principally a question of mixed fact and law. Mr. Justice Blanchard in *La Hoz v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 762, [2005] F.C.J. No. 940 (QL), following a pragmatic and functional analysis, found that the appropriate standard of review for such an issue is reasonableness *simpliciter*. At paragraph 44 of *La Hoz, supra*, Blanchard J. states the following:

After reviewing the criteria of the pragmatic and functional analysis, I find that, with respect to determining whether there is a nexus between a refugee claim and the persecution grounds under section 96 of the Act, the appropriate standard of review is reasonableness *simpliciter*. This was Gibson J.'s finding in *Jayesekara v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1014.

[8] The principal applicant argues that the acts to which she was subjected in Haiti and her fears if she returned to Haiti are political in nature because, in the context of her business, she did business with opponents of the existing regime. The RPD did not agree and found that these acts and her fears if she returned to Haiti are not related to her political opinion, but rather because she has money, or is believed to have money. In other words, the RDP found that there was no nexus between the fears alleged by the principal applicant and the five grounds set out in the Convention. The RPD also found that the principal applicant was not a person in need of protection under section 97 of the IRPA.

[9] The RPD decision was delivered orally. Oral decisions are not in and of themselves problematic. That being said, procedural fairness requires that decision-makers provide adequate reasons to justify their decisions. In *VIA Rail Canada Inc. v. National Transport Agency et al.*, [2001] 2 F.C. 25 (C.A.), [2000] F.C.J. No. 1685, the Federal Court of Appeal explained the obligation to provide adequate reasons at paragraph 22:

[22] The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion.... Rather, the decision-maker must set out its findings of fact and the principal evidence upon which those findings were based.... The reasons must address the major points in issue. The reasoning process followed by the decision-maker must be set out...and must reflect consideration of the main relevant factors....

This case was cited with approval by Mr. Justice Pinard in *Zarghami v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 151, [2006] F.C.J. No. 215 (QL), to explain the obligation on the IRB to provide adequate reasons. Based on *VIA Rail Canada Inc.*, *supra*, and *Zarghami*, *supra*, the RPD in this case had a duty to set out its findings of fact and the principal evidence upon which those findings were based.

[10] With regard to the analysis involving section 96 of the IRPA, the RPD's decision appears to meet the duty of procedural fairness to provide adequate reasons. However, the analysis of section 97 of the IRPA leaves something to be desired. I will explain.

[11] In this case, the RPD, by limiting itself to stating the law, raises an issue of procedural fairness. No references to the facts were made to contextualize the legal process followed. In *Anthoimuthu v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 141, [2005] F.C.J. No. 162 (QL), Mr. Justice De Montigny states the following at paragraphs 51 and 52:

[51] The Applicant also contends that the Refugee Division erred in not assessing her claim under section 97 of the IRPA, taking it for granted that she must fail on the grounds of a risk to like [sic] or to a risk of cruel and unusual treatment or punishment and danger to torture if she could not establish a well-founded fear of persecution. The Court has repeated on a number of occasions that the analysis under section 97 is different from the analysis required under section 96 and that claims made under both sections therefore warrant separate treatment. The Court said, in *Bouaouni, supra*, at paragraph 41:

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-founder [sic] fear of persecution to a convention [sic] 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.

[52] The only circumstance in which the Refugee Division may dispense with a separate section 97 analysis is where there is absolutely no evidence that could support a claim that a person is in need of protection: *Solimanian, supra*, at paragraph 22.

[Emphasis added.]

[12] I am in complete agreement with De Montigny J.'s observations. In this case, the RPD had a duty to justify its finding that the principal applicant was not a "person in need of protection" within the meaning of section 97 of the IRPA in order not to breach the principles of procedural fairness. This was not done: the decision of the RPD did not in any way show the legal reasoning followed to come to the conclusion that the applicant was not a "person in need of protection" under section 97 of the IRPA. The fact that the decision in this case was an oral decision, reported in writing, does not justify the absence of legal reasoning or the lack of an analysis applying the evidence and the facts to the relevant legislative provisions. It seems to me that the RPD assumed that its analysis of section 96 of the IRPA automatically applied to section 97. These are separate issues of law that must be treated differently. This was not the case in the analysis of section 97 of the IRPA.

[13] The appropriate standard of review for issues of procedural fairness is correctness (*Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2005] F.C.J. No. 2056 (QL)). Since the duty of procedural fairness to provide adequate reasons was breached in this case, I set aside in part the decision of the RPD and refer the matter for a rehearing addressing the applicability of section 97 of the IRPA to determine if the applicants are "persons in need of protection". It is therefore not necessary to address the second issue.

V. Conclusion

[14] Based on the foregoing reasons, the Court's intervention is warranted in this case, and the application for judicial review is allowed in part.

[15] The parties were invited to submit a question to be certified but none was submitted.

JUDGMENT

THE COURT ORDERS THAT:

- The application for judicial review be allowed in part and the matter be referred to another member of the RPD to address the issue of law arising from the applicability of section 97 of the IRPA.
- There is no question to be certified.

“Simon Noël”

Judge

Certified true translation
Gwendolyn May, LLB

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3863-06

STYLE OF CAUSE: MARARETH VAVEL ET AL. v. MCI

PLACE OF HEARING: Montréal

DATE OF HEARING: February 6, 2007

REASONS FOR JUDGMENT BY: The Honourable Mr. Justice Simon Noël

DATED: February 13, 2007

APPEARANCES:

Éveline Fiset FOR THE APPLICANTS

Suzon Létourneau FOR THE RESPONDENT

SOLICITORS OF RECORD:

ÉVELINE FISET FOR THE APPLICANTS
477 St. François-Xavier
Room 308
Montréal, Quebec H2Y 2T2
514-904-0048
514-904-0281 (fax)

SUZON LÉTOURNEAU FOR THE RESPONDENT
Department of Justice
Quebec Regional Office
Guy Favreau Complex
200 René-Lévesque Blvd. West
East Tower, 5th Floor
Montréal, Quebec
514-283-6379
514-496-7876 (fax)

