Date: 20090105

Docket: IMM-2181-08

Citation: 2009 FC 5

Ottawa, Ontario, January 5, 2009

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

EMMANUEL LALANE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The applicant had to establish a connection between the conditions in his country and his personal situation, which he did not do in this case. As Mr. Justice Michel Beaudry noted in *Ould v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 83, 161 A.C.W.S. (3d) 960, citing with approval the following excerpt from *Jarada v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 409, [2005] F.C.J. No. 506 (QL) at paragraph 21:

> That said, the assessment of the applicant's potential risk of being persecuted if he were sent back to his country must be individualized. The fact that the documentary evidence shows that the human rights situation in a country is problematic does not necessarily mean there is a risk to a given individual (*Ahmad v. M.C.I.*, [2004] F.C.J. No. 995 (F.C.); *Gonulcan v. M.C.I.*, [2004] F.C.J. No. 486 (F.C.); *Rahim v. M.C.I.*, [2005] F.C.J. No. 18 (F.C.)). [Emphasis added.]

[2] The mere fact that the authorities in charge decided not to remove Haitian nationals who are in Canada does not create any presumption of an individualized risk for the applicant (*Nkitabungi v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 331, 169 A.C.W.S. (3d) at paragraph 12, by Mr. Justice Luc Martineau; also, *Mpula v. Canada (Citizenship and Immigration)*, 2007 FC 456, 160 A.C.W.S. (3d) 334 at paragraph 31, by Mr. Justice Maurice Lagacé).

[3] It must be noted that under subsection 230(3) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations), the stay of a removal order does not apply to, among others, persons who are inadmissible on grounds of serious criminality or criminality under paragraph 36(1)(*a*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) (Enforcement Manual (ENF) 10, page 21: Exhibit "A" - Affidavit of Dominique Toillon).

II. Judicial procedure

[4] This is an application for judicial review of a decision of a Pre-Removal Risk Assessment (PRRA) officer, dated April 21, 2008, dismissing the applicant's application.

III. Facts

[5] The applicant, Emmanuel Lalane, is a citizen of Haiti.

[6] Mr. Lalane became a permanent resident of Canada in 1990.

[7] From 2003 to 2007 Mr. Lalane was convicted of assault, breach of probation, conspiracy to import narcotics, importing narcotics, possession of narcotics for the purpose of trafficking and possession of prohibited substances.

[8] In June 2007, a section 44 report was issued under paragraph 36(1)(*a*) of the IRPA - "Inadmissibility on grounds of serious criminality".

[9] In 2008 Mr. Lalane submitted his PRRA application, arguing that he was at risk in Haiti. In the reasons for his decision, the officer went over each of the allegations made by Mr. Lalane:

> [TRANSLATION]
>
> *- "If I return after 17 years, I will not be treated like the others"*
> *- "I was in the army, now there is no more army, now there is a revolt of the former military personnel, therefore I do not think I will be well perceived by them"*
> *- "There are . . . criminal gangs that rule the roost in Haiti . . . they will think that I am bringing money with me. . . . they may think that I will be taking their jobs"*
> *- "Kidnappings are widespread in Haiti and it is not infrequent for a foreigner to be kidnapped . . ."*
> *- "When gangs are concerned, they will think that I will take over their territory and will see me as a potential rival. In addition, I do not have any house or any close family in Haiti"*
> *-"In such a context of insecurity and anarchy, I could not earn my living in any way"*
> *-"I am the father of two young children and since I have been incarcerated my spouse has lost a lot of weight because she must physically support the children and do without my economic support"*
> *-"I wear a pacemaker . . . In Haiti, care by a competent cardiologist and instruments for the replacement of batteries do not exist according to the standards in Canada"*

IV. Impugned decision

[10] The PRRA officer noted that because Mr. Lalane's case came under subsection 112(3) of the IRPA, the risk assessment could only be conducted under section 97 of the IRPA.

[11] After having assessed all the evidence on record, the PRRA officer dismissed the applicant's application for protection for the following reasons:

- The applicant's allegations concerning his pacemaker and his state of health are not relevant to a PRRA application because they are excluded under subparagraph 97(1)(*b*)(iv) of the IRPA;
- The applicant did not submit any evidence concerning military personnel or his participation in the army;
- The applicant did not show that the Haitian authorities were interested in him or that they were aware of his criminal record in Canada. The evidence submitted was insufficient to establish the existence of a risk because of his criminal past;
- The documentary sources consulted do not show that the fact of being deported or of having lived abroad is a risk for the applicant;
- The PRRA officer concluded that the applicant did not establish that his situation was different from that of other Haitian citizens. The sources and the evidence submitted do not show a possibility that he is personally at risk in this country.

[12] Mr. Lalane is relying on the following grounds in his application for a review of the PRRA decision:

- The PRRA officer did not consider and did not comment on the fact that Haiti is on the list of moratorium countries;
- The PRRA officer disregarded the evidence submitted by Mr. Lalane;
- The PRRA officer engaged in a selective reading of the documentary evidence;
- The PRRA officer misinterpreted the risks alleged by Mr. Lalane;
- The PRRA officer considered documents without having advised Mr. Lalane and without allowing him to comment on the content.

V. Issue

[13] Did the PRRA officer err in fact or in law to such an extent that his decision is unreasonable?

VI. Analysis

New evidence subsequent to the decision

[14] The four exhibits filed as exhibits "A", "B", "C" and "D" to the affidavit of Gilberte Charles (the applicant's spouse) constitute new evidence.

[15] Several facts mentioned in this affidavit are new evidence in themselves because this affidavit was not submitted to the PRRA officer.

[16] Exhibits "A", "B", "C" and "D" annexed to this affidavit are new evidence because they were not submitted to the PRRA officer. The affidavit of Dominique Toillon shows unequivocally that these four exhibits had not in any way been filed in the record.

[17] What is even more obvious is that Exhibit "B" is dated May 22, 2008, and Exhibit "C" is dated May 6, 2008, that is to say, after the PRRA decision dated April 21, 2008.

[18] There is no doubt that the documents annexed to the affidavit of Ms. Charles cannot be considered by this Court as they had not been before the PRRA officer at the time the decision was rendered.

[19] In addition, it is clear that, by this affidavit, Mr. Lalane is mainly trying to respond to the concerns raised by the PRRA officer in his decision by adding information or by clarifying information that he had already mentioned in his application based on humanitarian and compassionate considerations (H&C). In this way, Mr. Lalane is trying to submit new evidence to the Court.

[20] However, it is well established that in the context of a judicial review, this Court cannot consider evidence that was not before the decision-maker (*Mijatovic v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 685, 149 A.C.W.S. (3d) 290 at paragraph 22).

Moratorium

[21] It must be clearly understood that the temporary suspension of removals to a given country is a process that is quite distinct from that of a PRRA application.

[22] As mentioned in ENF 10, section 11.2, a temporary suspension of removal will be imposed where return to a specific country or place presents a generalized risk that the Minister of Public Safety and Emergency Preparedness considers dangerous and unsafe to the entire general civilian population of that country or place. Individualized risk is different from generalized risk and is assessed during examination by the Immigration and Refugee Board (IRB), examination of the H&C considerations or during the PRRA.

[23] In fact, Chapter PP3 of the Citizenship and Immigration Canada (CIC) Manual on processing PRRA applications specifically provides that a risk identified in a PRRA application must be an individualized risk and that the two processes are quite different. The following is mentioned in section 10.6:

10.6 The risk must not be faced generally – Generalized oppression All grounds for protection involve a demonstration that the risk be characterized as personal and objectively identifiable. These risks may in fact be shared by other persons who are similarly situated. The Act does provide for protection in cases of generalized oppression: a stay of removal to particular countries may be decided upon by the PS Minister where whole populations are at risk, according to factors set out in the regulations. The application for protection, by contrast, is meant to deal with an allegation of personal risk . . .	**10.6 Le risque ne doit pas être généralisé – oppression généralisée** Tous les motifs de protection doivent se manifester par un risque qui est personnel et objectif. Ces risques peuvent, en fait, être le lot d'autres personnes se trouvant dans une situation semblable. La *Loi* offre une protection dans le cas d'une oppression généralisée : le ministre de la Sécurité publique peut appliquer une suspension des renvois vers certains pays dans lesquels la population entière est à risque, en vertu des facteurs prévus par le *Règlement.* Par contre, la demande de protection concerne les allégations d'un risque personnel […]

[24] It must be noted that under subsection 230(3) of the Regulations, the stay of a removal order does not apply to, among others, persons who are inadmissible on grounds of serious criminality or criminality under paragraph 36(1)(*a*) of the IRPA (ENF 10, page 21: Exhibit "A" - Affidavit of Dominique Toillon).

[25] Accordingly, the general documentary evidence on Haiti and the fact that Haiti is a country subject to a temporary suspension of removals (TSR) does not in any way relieve Mr. Lalane from establishing the existence of an individualized risk in the event he returns to Haiti.

[26] The mere fact that the authorities in charge decided not to remove Haitian nationals who are in Canada does not create any presumption of an individualized risk for Mr. Lalane. In a recent decision, *Nkitabungi*, *supra*, although concerning H&C matters, Mr. Justice Martineau made the following comments:

> [12] . . . Moreover, the fact that the relevant authorities have decided not to return to DRC all Congolese citizens in Canada without legal status does not create a presumption of undue or disproportionate hardship as learned counsel for the applicant argues. In fact, every H&C application case is a specific case. With regard to this, I note that in *Mathewa v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 914, it was found that a moratorium on removals to DRC does not in and of itself prevent an application made on humanitarian and compassionate grounds from being denied.

(Also *Mpula*, *supra*).

[27] Chapter PP3 of the Citizenship and Immigration Canada Manual concerning PRRA assessments specifically mentions the following: "The risk must not be faced generally – Generalized Oppression". Otherwise, any national from a country in difficulty would be entitled to a positive assessment of his or her PRRA application, no matter what his or her personal situation may be. This is not the goal or objective of a PRRA application.

[28] The general documentary evidence on Haiti cannot in itself establish the merits of an application for protection. Mr. Lalane had to establish a connection between the present situation in his country and his personal situation. The following was mentioned in *Hussain v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 719, 149 A.C.W.S. (3d) 303:

> [12] It is also a well-recognized principle that it is insufficient simply to refer to country conditions in general without linking such conditions to the personalized situations of an applicant (see for example, *Dreta* v. *Canada* (*The Minister of Citizenship and Immigration*) 2005 FC 1239 and *Nazaire* v. *Canada(Minister of Citizenship and Immigration)*[2006] F.C. 416).

(Also: *Jarada v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 409, [2005] F.C.J. No. 506 (QL); *Ould*, *supra*; *Kaba v. Canada (Minister of Citizenship and Immigration*), 2006 FC 1113, 167 A.C.W.S. (3d) 961).

[29] In this case, it is clear from the officer's decision that he considered the difficult conditions in the country in question (Decision at page 7, paragraph 3). The officer assessed the conditions in the country, admitted that the situation remained volatile and concluded that Mr. Lalane was not personally at risk in that country. The following is his conclusion on this point in the last paragraph at page 8 of his decision:

> [TRANSLATION]
>
> In spite of this situation, I consider that the applicant did not show that his situation was different from that of other Haitian citizens. Accordingly, I consider that the sources and the evidence submitted do not show the possibility that he would be personally at risk in this country.

[30] In conclusion, the issue to be decided by the officer was not to determine when or where Mr. Lalane would be removed, but to determine if there were serious reasons for believing that if he

returned to his country of origin, Mr. Lalane would be personally subject to a risk of torture, a risk to his life or a risk of cruel and unusual treatment or punishment within the meaning of section 97 of the IRPA.

[31] The fact that Mr. Lalane did not show that he was personally at risk reasonably led the officer to conclude the following: [TRANSLATION] "I am of the opinion that Mr. Lalane did not show there were serious grounds for believing that he would be personally subject to a risk of torture, a risk to his life or a risk of cruel and unusual treatment or punishment within the meaning of section 97 of the *Immigration and Refugee Protection Act*" (Decision at page 8, last paragraph).

[32] The officer did not specifically mention the moratorium in his decision but this is not an error. A PRRA decision and the eventual enforcement of a removal order are two completely different things.

Evidence

[33] Mr. Lalane is alleging that the officer failed to consider the documents submitted in evidence to show that he had been a permanent resident of Canada for 18 years. He submits that these two documents support his allegations to the effect that he fears being subject to arbitrary detention by the controlling forces considering his loss of residency and being abducted for ransom because he has family abroad. Mr. Lalane argued the same thing with regard to the fact that he had obtained his degree in civil engineering, thereby showing that he had been in the army.

[34] However, Mr. Lalane had to explain to the PRRA officer how the documents in question support his allegations. He did not do so in this case. Mr. Lalane's written submissions do not mention anything on this point.

[35] It is trite law that the applicant has the onus of submitting all the relevant facts in support of his or her application. As the Court noted in *Owusu*, "since applicants have the onus of establishing the facts on which their claim rests, they omit pertinent information from their written submissions at their peril" (*Raji v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 653, 158 A.C.W.S. (3d) 464 at paragraph 10; *Owusu v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38, [2004] F.C.R. 635 at paragraph 8).

[36] The immigration officer considered these documents, which were rather more relevant for his H&C application than for the analysis of his PRRA application (*Selliah v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 872, 132 A.C.W.S. (3d) 548; *Selliah v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 160, 139 A.C.W.S. (3d) 348; *Youssef v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 864, 296 F.T.R. 182; *Tuhin v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 22, 167 A.C.W.S. (3d) 574 at paragraph 4).

Selective reading of the documentary evidence

[37] Mr. Lalane is alleging that the officer engaged in an extremely selective reading of the documentary evidence concerning Haiti.

[38] However, Mr. Lalane did not specify what documentary evidence and what relevant excerpts would support his fear.

[39] According to Mr. Lalane's submission, the officer could not conclude that there was no risk to his life, considering the generalized risk in Haiti and the regulatory stay of the enforcement of removal orders to that country imposed by the Minister. In other words, Mr. Lalane is of the opinion that the officer's decision is unreasonable considering the temporary suspension of removals to Haiti imposed by Canada, which, according to him, is an explicit acknowledgement that it is too dangerous to return to Haiti. According to Mr. Lalane, the officer could not deny that he was personally exposed to a generalized risk prevalent in Haiti.

[40] As regards the general situation prevailing in Haiti, as described in detail by the respondent, Mr. Lalane had to establish a connection between the conditions in his country and his personal situation, which he did not do in this case. As Mr. Justice Michel Beaudry noted in *Ould, supra*, at paragraph 21, citing with approval the following excerpt from *Jarada, supra*, at paragraph 28:

> That said, the assessment of the applicant's potential risk of being persecuted if he were sent back to his country must be individualized. The fact that the documentary evidence shows that the human rights situation in a country is problematic does not necessarily mean there is a risk to a given individual (*Ahmad v. M.C.I.*, [2004] F.C.J. No. 995 (F.C.); *Gonulcan v. M.C.I.*, [2004] F.C.J. No. 486 (F.C.); *Rahim v. M.C.I.*, [2005] F.C.J. No. 18 (F.C.)). [Emphasis added.]

Procedural fairness

[41] Finally, Mr. Lalane submits that the fact the officer considered documents without having advised him and without allowing him to comment on their content is an error in law that is patently unreasonable.

[42] However, in *Chen v. Canada (Minister of Citizenship and Immigration),* 2002 FCT 266, 218 F.T.R. 12, which cited *Mancia v. Canada (Minister of Citizenship and Immigration*), [1998] 3 F.C. 461, 79 A.C.W.S. (3d) 769, defining the notion of extrinsic evidence, this Court clearly specified that fairness does not require the disclosure of non-extrinsic evidence, such as general country conditions reports, that are available to the applicant before he or she files submissions:

> [33] The broad principle I take from *Mancia* is as follows. Extrinsic evidence must be disclosed to an applicant. Fairness, however, will not require the disclosure of non-extrinsic evidence, such as general country conditions reports, unless it was made available after the applicant filed her submissions and it satisfies the other criteria articulated in that case.
>
> [34] In my view, both of these "rules" share a single underlying rationale. Fairness requires that documents, reports, or opinions of which the applicant is not aware, nor deemed to be aware, must be disclosed.
>
> [35] The underlying rationale for the rule established in *Mancia*, in my opinion, survives *Haghighi* and *Bhagwandass*. The principle of those cases, generally stated, is that the duty of fairness requires disclosure of a document, report or opinion, if it is required to provide the individual with a meaningful opportunity to fully and fairly present her case to the decision maker.
>
> [36] Therefore, while it is clear that the distinction between extrinsic and non-extrinsic evidence is no longer determinative of whether the duty of fairness requires disclosure, the rationale behind the rule in *Mancia* remains. I arrive at this conclusion because even in recent jurisprudence, applying the post-*Baker* framework for defining the duty of fairness, the overriding concern with respect to disclosure is whether the document, opinion, or report is one of which the individual is aware or deemed to be aware.
>
> . . .

> [44] . . . However, I am not satisfied that the principles of fairness as enunciated in *Baker*, *Haghighi* and *Bhagwandass* extend so far as to require disclosure in the circumstances of this case. In other words, the PCDO was not obligated to disclose publicly available documents describing general country conditions of which the applicant is deemed to have been aware in advance of rendering her decision. [Emphasis added.]

[43] In this case, the documents consulted by the officer, the references to which appear at the end of his notes on record, are public documents or sites that described the general situation in Haiti. All of this evidence was available to Mr. Lalane before he made his submissions.

[44] Therefore, the officer was not required to disclose this evidence that was available to the public and that Mr. Lalane was presumed to know.

VII. Conclusion

[45] Mr. Lalane did not submit any factors that would lead this Court to find that the decision was unreasonable.

[46] The application for judicial review is dismissed.

JUDGMENT

THE COURT ORDERS that

1. The application for judicial review is dismissed;

2. No serious question of general importance is certified.

"Michel M.J. Shore"
Judge

Certified true translation
Susan Deichert, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2181-08
STYLE OF CAUSE:	EMMANUEL LALANE v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	December 17, 2008
REASONS FOR JUDGMENT AND JUDGMENT:	SHORE J.
DATED:	January 5, 2009

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