Federal Court  Cour fédérale

Date: 20090513

Docket: IMM-3257-08

Citation: 2009 FC 490

[ENGLISH TRANSLATION]

Ottawa, Ontario, May 13, 2009

PRESENT: The Honourable Mr. Justice Orville Frenette

BETWEEN:

Charles Gérard PLACIDE

Applicant

and

THE MINISTER OF IMMIGRATION AND CITIZENSHIP
and
THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR ORDER AND ORDER

[1] The applicant filed an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the IRPA), against a decision made on July 15, 2008 by the delegate of the Minister of Citizenship and Immigration, who rejected the

applicant's claim for protection under subsection 112(3) of the IRPA as a person who is inadmissible due to serious criminality and who is a danger to Canada.

Summary of facts and proceedings

[2] The applicant, a Haitian citizen who was born in that country, arrived in Canada on August 14, 1983, at age 20.

[3] In Canada, he was found guilty of 44 criminal offences that were committed between 1986 and 2005.

[4] On November 16, 2007, in response to an application for a pre-removal risk assessment (PRRA), the officer found that the applicant's life would be at risk or he could suffer cruel and unusual treatment or punishment if he were returned to Haiti.

[5] On July 15, 2008, the delegate of the Minister rejected the applicant's claim for protection under subsection 112(3) of the IRPA.

[6] In a well-reasoned decision, the delegate analyzed the applicant's history and criminal record and the publicly available international documentation cited by the PRRA officer in her decision from November 16, 2007. The delegate of the Minister considered the documentation filed by counsel for the applicant on the situation in Haiti, including the updates on that situation that she sent on March 27, June 19, and June 20, 2008. The delegate also accessed other documents that are publicly accessible to everyone, covering the period from 2001 to 2008.

The issue

[7] On July 15, 2008, the delegate of the Minister, in a reasoned 33-page decision, detailed the reasons that showed why the applicant's application was rejected as a person who is inadmissible due to serious criminality. According to the balance of probabilities and despite the applicant's criminal record, the delegate decided that if the applicant were to return to Haiti, he would not be subject to torture or exposed to a risk to his life or to a risk of cruel and unusual treatment or punishment. He also found that the applicant was a current and future danger to the public safety of Canada. The delegate of the Minister considered various public documents, including a report from the U.S. Department of State, published on March 11, 2008.

[8] On July 22, 2008, the applicant filed an application for leave and judicial review against the aforementioned decision. The hearing was set for April 15, 2009.

[9] On April 14, 2009, counsel for the applicant sent the Court a missive accompanied by a document, which she described as "new evidence": a report that she had ordered in another case (that of Nicolas Joseph), prepared on March 23, 2009 by Ms. Michelle Karshan, a citizen of the United States who spent nine years in Haiti (until 2004). She describes herself as an "expert" and heads a non-profit organization dedicated to helping criminalized persons who are deported to Haiti.

[10] Counsel for the respondent vigorously attacked the filing and consideration of that document for various basic and procedural reasons.

The legislation

[11] The relevant sections of the IRPA are as follows:

112. (3) Refugee protection may not result from an application for protection if the person

(*a*) is determined to be inadmissible on grounds of security, violating human or international rights or organized criminality;

(*b*) is determined to be inadmissible on grounds of serious criminality with respect to a conviction in Canada punished by a term of imprisonment of at least two years or with respect to a conviction outside Canada for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years;

(*c*) made a claim to refugee protection that was rejected on the basis of section F of Article 1 of the Refugee Convention; or

(*d*) is named in a certificate referred to in subsection 77(1).

112. (3) L'asile ne peut être conféré au demandeur dans les cas suivants :

a) il est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou criminalité organisée;

b) il est interdit de territoire pour grande criminalité pour déclaration de culpabilité au Canada punie par un emprisonnement d'au moins deux ans ou pour toute déclaration de culpabilité à l'extérieur du Canada pour une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;

c) il a été débouté de sa demande d'asile au titre de la section F de l'article premier de la Convention sur les réfugiés;

d) il est nommé au certificat visé au paragraphe 77(1).

113. Consideration of an application for protection shall be as follows:

(*a*) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection;

(*b*) a hearing may be held if the Minister, on the basis of prescribed factors, is of the

113. Il est disposé de la demande comme il suit :

a) le demandeur d'asile débouté ne peut présenter que des éléments de preuve survenus depuis le rejet ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'il n'était pas raisonnable, dans les circonstances, de s'attendre à ce qu'il les ait présentés au moment du rejet;

b) une audience peut être tenue si le ministre l'estime requis compte tenu des

opinion that a hearing is required;

(*c*) in the case of an applicant not described in subsection 112(3), consideration shall be on the basis of sections 96 to 98;

(*d*) in the case of an applicant described in subsection 112(3), consideration shall be on the basis of the factors set out in section 97 and

(i) in the case of an applicant for protection who is inadmissible on grounds of serious criminality, whether they are a danger to the public in Canada, or

(ii) in the case of any other applicant, whether the application should be refused because of the nature and severity of acts committed by the applicant or because of the danger that the applicant constitutes to the security of Canada.

114. (1) A decision to allow the application for protection has

(*a*) in the case of an applicant not described in subsection 112(3), the effect of conferring refugee protection; and

(*b*) in the case of an applicant described in subsection 112(3), the effect of staying the removal order with respect to a country or place in respect of which the applicant was determined to be in need of protection.

(2) If the Minister is of the opinion that the circumstances surrounding a stay of the enforcement of a removal order have changed, the Minister may re-examine, in accordance with paragraph 113(*d*) and the regulations, the grounds on which the application was allowed and may cancel the stay.

(3) If the Minister is of the opinion that a

facteurs réglementaires;

c) s'agissant du demandeur non visé au paragraphe 112(3), sur la base des articles 96 à 98;

d) s'agissant du demandeur visé au paragraphe 112(3), sur la base des éléments mentionnés à l'article 97 et, d'autre part :

(i) soit du fait que le demandeur interdit de territoire pour grande criminalité constitue un danger pour le public au Canada,

(ii) soit, dans le cas de tout autre demandeur, du fait que la demande devrait être rejetée en raison de la nature et de la gravité de ses actes passés ou du danger qu'il constitue pour la sécurité du Canada.

114. (1) La décision accordant la demande de protection a pour effet de conférer l'asile au demandeur; toutefois, elle a pour effet, s'agissant de celui visé au paragraphe 112(3), de surseoir, pour le pays ou le lieu en cause, à la mesure de renvoi le visant.

(2) Le ministre peut révoquer le sursis s'il estime, après examen, sur la base de l'alinéa 113*d*) et conformément aux règlements, des motifs qui l'ont justifié, que les circonstances l'ayant amené ont changé.

(3) Le ministre peut annuler la décision ayant accordé la demande de protection s'il estime qu'elle découle de présentations erronées sur un fait important quant à un objet pertinent, ou de réticence sur ce fait.

(4) La décision portant annulation emporte nullité de la décision initiale et la demande de protection est réputée avoir été rejetée.

decision to allow an application for protection was obtained as a result of directly or indirectly misrepresenting or withholding material facts on a relevant matter, the Minister may vacate the decision.

(4) If a decision is vacated under subsection (3), it is nullified and the application for protection is deemed to have been rejected.

115. (1) A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment.

(2) Subsection (1) does not apply in the case of a person

(*a*) who is inadmissible on grounds of serious criminality and who constitutes, in the opinion of the Minister, a danger to the public in Canada; or

(*b*) who is inadmissible on grounds of security, violating human or international rights or organized criminality if, in the opinion of the Minister, the person should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada.

(3) A person, after a determination under paragraph 101(1)(*e*) that the person's claim is ineligible, is to be sent to the country from which the person came to Canada, but may be sent to another country if that country is designated under subsection 102(1) or if the country from which the person came to Canada

115. (1) Ne peut être renvoyée dans un pays où elle risque la persécution du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques, la torture ou des traitements ou peines cruels et inusités, la personne protégée ou la personne dont il est statué que la qualité de réfugié lui a été reconnue par un autre pays vers lequel elle peut être renvoyée.

(2) Le paragraphe (1) ne s'applique pas à l'interdit de territoire :

a) pour grande criminalité qui, selon le ministre, constitue un danger pour le public au Canada;

b) pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou criminalité organisée si, selon le ministre, il ne devrait pas être présent au Canada en raison soit de la nature et de la gravité de ses actes passés, soit du danger qu'il constitue pour la sécurité du Canada.

(3) Une personne ne peut, après prononcé d'irrecevabilité au titre de l'alinéa 101(1)*e*), être renvoyée que vers le pays d'où elle est arrivée au Canada sauf si le pays vers lequel elle sera renvoyée a été désigné au titre du paragraphe 102(1) ou que sa demande d'asile a

été rejetée dans le pays d'où elle est arrivée au Canada.

has rejected their claim for refugee protection.

The conditions for accepting new evidence

[12] Right from the start, it should be remembered that in order to reverse administrative decision, case law states that the Court may only examine the evidence that was adduced before the initial decision-maker (*Isomi v. Minister of Citizenship and Immigration*, 2006 FC 1394; *OAA (Ontario Association of Architects) v. AATO (Assn. of Architectural Technologists of Ontario)*, [2003] 1 F.C. 331 (F.C.A.)).

[13] New or extrinsic evidence can be allowed when the tribunal has committed a jurisdictional error or violated the rules of procedural fairness (*McFadyen v. Canada (Attorney General)*, 2005 FCA 360, 341 N.R. 345).

[14] The conditions for accepting new evidence result from the application of section 113 of the IRPA (*above*). Case law has stated the conditions that can justify re-opening a debate due to such new evidence (*Raza v. Minister of Citizenship and Immigration*, 2007 FCA 385; *Her Majesty the Queen v. Canadian Council for Refugees et al.*, 2008 FCA 171; *Mujib v. Minister for Citizenship and Immigration*, 2008 FC 1027; *Yansane v. Minister of Citizenship and Immigration*, 2008 FC 1213).

[15] According to Sharlow J.A. in *Raza*, above, the most important conditions are: 1) the relevance of the evidence. Is the evidence relevant for establishing or denying an essential fact to be

considered in the decision? 2) the credibility of the evidence. Is the evidence credible, considering its source and the circumstances in which it came into existence? 3) the newness of the evidence. Did the evidence exist before the decision? 4) the diligence of the parties in presenting evidence. Were the parties diligent in obtaining and presenting evidence before the decision? And 5), the materiality of the evidence: would the presence of such evidence have supported a different decision?

The relevance of the evidence

[16] In a case such as the one before us, regarding the risk of returning to Haiti, does the evidence depict a different situation than what the tribunal had during its decision? In its decision, the delegate of the Minister referred to the PRRA officer's decision and to the documentation on file that shows the situation and the risk of returning to Haiti: the report from Alternative Chance, an organization established in the United States that works for persons deported to Haiti (2007) and the two documents from the U.S. Department of State filed by counsel for the applicant: *2006 Country Reports on Human Rights Practices – Haiti* (March 6, 2007) and *2007 Country Reports on Human Rights Practices – Haiti* (March 11, 2008). Those documents show the serious problems that exist in Haiti and particularly those facing Haitians with lengthy criminal records when they return to their country of origin, including arrest and detention. Those reports indicate that the United Nations, the Red Cross and other international organizations help criminals who are deported to Haiti and that conditions improved somewhat in 2008. The delegate of the Minister discussed the arguments from counsel for the applicant, along with the documentation that she cited (pages 16 to 19 of the decision) and the general documentation (pages 19 to 26).

[17] In particular, he referred to Country Reports from 2007, which stated that repatriated citizens with criminal records are generally detained for a period lasting up to two weeks. The 2008 report, which was published on February 25, 2009, repeated that same finding.

[18] In my view, the "report" at issue that bears the date March 23, 2009 shows that Ms. Karshan reported and commented on the situation in Haiti for the same periods that are covered by the documentation that the delegate of the Minister considered during his decision. She writes that she investigated matters regarding Haiti in 2006-2007 and until January 2008. She refers to the situation in Haiti as revealed by the documentation and her investigation since 2001. Ms. Karshan concluded her report in the following terms:

> Further, Mr. Joseph will be at risk of execution because of the intense campaign waged by the Haitian Government, without basis, which targets Criminal Deportees and puts Mr. Joseph at risk of being lynched once in the community.
>
> Further, I believe based on my various meetings, observations and research, as well as my meeting with the Police Chief who is a member of the three member commission overseeing Criminal Deportees and is charged with processing and detaining Criminal Deportees upon arrival, that the police will receive and review files, including the criminal history of respondent and the original police complaint and the original indictment, and that the police will also access and view various database information online relating to Mr. Joseph. Further, I believe that Mr. Joseph will be held in illegal police custody.
>
> Therefore, it is my opinion that if Mr. Joseph is deported to Haiti he will more likely than not be subjected to severe physical and mental pain and suffering that will be intentionally inflicted by Haiti's police and government officials, and at the very least acquiesced to and consented to by administrators of the Government of Haiti such as in the Ministry of Justice, Ministry of Interior, the Immigration department, and the police etc. who would have custody and physical control of Respondent (said custody being illegal under Haitian law and ruled as illegal by Haiti's own courts in 2006) and that said torture will be for the purpose of making conditions particularly

> harsh and inhumane in order to further a pervasive and widespread extortion campaign to extract an illegally gotten sum of U.S. monies from the Respondent in exchange for a promise for liberation from a police station holding cell.
>
> I believe for all the aforesaid reasons that Mr. Joseph, if placed in police custody in a police station holding cell, will be more vulnerable and more threatened and more likely than not will suffer gross persecution, mental and life-threatening physical harm or death because of his serious medical conditions.
>
> Finally, I believe that Mr. Joseph will specifically be targeted and be more vulnerable to torture and extortion efforts because the Haitian government will intentionally withhold medical care or medications and will deliberately seek to exploit his grave medical condition by making his condition in illegal detention worse in an effort to gain monies through extortion.
>
> I believe that based on all the above stated reasons, Mr. Joseph's applications for relief from removal to Haiti should be granted.

[19] An analysis of the documents at issue reveals that this is a partial or non-objective opinion, like that of a lawyer's arguments in a litigation. It does not add anything new to the debate that has not already been considered by the delegate of the Minister based on the evidence and the general documentation for the period ending July 15, 2008.

[20] In addition, this type of document does not meet the essential conditions that are required for being considered as new evidence and considered after the decision that was made, because 1) the document does not have any new facts regarding conditions in Haiti and the return of citizens with a criminal record to the country; 2) there was no valid explanation that justified not filing the document before the decision; 3) the document does not have an objective and impartial opinion; and 4) it does not meet the credibility and materiality criteria (see *Mustafa v. Minister of Citizenship and Immigration*, 2009 FC 361, at paragraphs 22 to 24).

Conclusion

[21] For all of those reasons, the Court orders that the report by Ms. Karshan, from March 23, 2009 and submitted on record in this case, is inadmissible as evidence and must be set aside in the analysis of the decision that was made.

ORDER

The respondent's objection to the production and consideration of the report by Ms. Michelle Karshan on March 23, 2009, is allowed and the document must be rejected from the record.

"Orville Frenette"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	Charles Gérard PLACIDE v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
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