

Federal Court



Cour fédérale

Date: 20090731

Docket: IMM-5662-08

Citation: 2009 FC 771

Montréal, Quebec, July 31, 2009

PRESENT: The Honourable Maurice E. Lagacé

BETWEEN:

**Irllande ACCÉLUS ÉLISMÉ
Randy Fabrice ACCÉLUS
Mackenson ACCÉLUS
Herby ACCÉLUS**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The principal applicant, Irllande Accélus Élismé (applicant) and her sons Randy Fabrice, Mackenson and Herby, all four Haitian citizens, are seeking, under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act), judicial review of the decision dated December 9, 2008, by the Refugee Protection Division of the Immigration and Refugee Board (panel) refusing to recognize them as “refugees” or “persons in need of protection” as defined in

sections 96 and 97 of the Act and, consequently, denying their refugee claim on the principal ground that the panel found that their account lacked credibility.

II. Facts

[2] On July 6, 2006, individuals allegedly burst into the applicant's house in the middle of the night, raping her in front of her children and then taking all of the merchandise from her business that she kept at home.

[3] On September 7, 2006, the applicant was purportedly kidnapped by these same persons and then released in exchange for a ransom. During her confinement, she was apparently raped again.

[4] Furthermore, the applicant claims that, on December 1, 2006, the same persons followed her son to school to kidnap him.

[5] The applicant left Haiti on December 20, 2006, with her children, for the United States, and arrived in Canada on December 29, 2006, when she claimed refugee protection.

III. Issue

[6] This proceeding raises only one question:

Did the panel base its negative decision with respect to the applicant's credibility on erroneous findings of fact made in a perverse or capricious manner without regard for the

material before it with the result that its decision was unreasonable?

IV. Analysis

A. *Standard of judicial review*

[7] The panel's decision is mainly based on the applicant's lack of credibility. It is well established that assessing the credibility of witnesses falls within its jurisdiction, and that a panel such as this has the necessary expertise to analyze and assess the facts, which in turn enables it to assess the claimant's credibility and subjective fear of persecution (*Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1425 (T.D.) (QL), at paragraph 14).

[8] In an application for judicial review on questions of credibility, the standard of reasonableness should be applied, as defined in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. Thus, the Court must show great deference since it is normally the panel's responsibility to assess the applicant's testimony and therefore credibility.

B. *Credibility*

[9] In her personal information form (PIF), the applicant stated that while she was sleeping on the night of July 6, 2006, with her children, [TRANSLATION] "armed men broke down the door to [her] house, and . . . came into [her] house . . . fired several gunshots into the walls . . . the gangsters invaded the house . . . pointed their weapons at [her], they forced [her] to disrobe in front of [her] children, they raped [her] and they took off with all of [her] merchandise." She [TRANSLATION] "contacted police who took note of the situation."

[10] The applicant produced, to corroborate her account of the event, the statement by a magistrate from the *Tribunal de paix section sud de Port-au-Prince* (Peace Tribunal of Port-au-Prince, South Section), who declared that he knew the applicant, and that he went to her home on July 7 to obtain her version of the facts and take note of the state of the premises. His report, under the seal of the Peace Tribunal, reads as follows:

[TRANSLATION]

Today seventh day of the month of Jly 2006, 202ndyear of Independence.-

We Mr. Bruno Leriche, Justice of the Peace for the South section of Port-au-Prince, Judicial Police Officer, adjunct of the government of this jurisdiction, assisted by our clerk Mr. Joseph Wilson FLEURY.-

At the verbal request of Jean Yves Despinas, owner, residing and domiciled in Port-au-Prince, identified as Nif.003-247-481-2 for this current fiscal year, we went to #36 Edmond Paul lane to take note of the home of Irlande Elisme Accelus victim of criminal acts committed by armed individuals, accompanied by rape committed on the same lady mentioned above in the presence of her children MACKENSON, HERBY, FABRICE, ROUDY and to record official report. Having arrived we in fact note the house ransacked by gangsters, the walls have bullet holes, the white and red entrance doors to the house in the direction of the rising sun are broken and on the ground, searches inside the said house took place. We also note the children traumatized, given that this situation happened in their presence. The physical observation finished, the person requesting our presence gave us this following statement.-

Magistrate, this lady victim of rape is my friend all of these gangster acts that you have just noted are done in the presence of the whole family, the lady and her children, Mackenson, Herby, Roudy, Fabrice. This morning, it was around 2 in the morning when armed individuals stormed inside the house, they forced down the door and went in, they fired shots and as you noted the walls are smashed in, violent sexual assaults. I followed the action closely despite the fact that I was traumatized, I had the courage to call upon the Tribunal to call the Justice of the Peace to make a report. That is all I can say.

Required to sign, which he did.-

Jean Yves Despinas.-

We hereby believe we have record and close this report, this day,
month and year with all advantages thereto pertaining.-

(signed)

JOSEPH WILSON FLEURY, Mr. Bruno Leriche, Justice of the
Peace.-

[Translator's note:

The French version was reproduced with all of the punctuation and
spelling errors; emphasis added.

The English version (translation) includes the punctuation and
spelling errors to the extent possible; emphasis added.]

[11] The applicant also produced a medical certificate from the Haiti State University Hospital stating that she was admitted to emergency on July 8, 2006, due to a very acute and painful vaginal infection resulting from sexual assaults and attacks.

[12] The panel sifted through the report reproduced above, compared it with the applicant's statements in her PIF and with her son Mackenson's testimony to find that "[s]everal of the female claimant's statements concerning key facts in her claim for refugee protection were contradicted either by the female claimant herself or by the testimony of her son Mackenson", and "does not correspond to the information in the documents submitted by the female claimant." (Emphasis added.) The panel's analysis led it to make the following finding:

The panel does not believe that the female claimant was assaulted or robbed at home in July 2006. The panel therefore assigns no weight to the statement submitted in a bundle as Exhibit A-2. It also assigns no weight to the medical certificate submitted as Exhibit A-2 since it

does not believe that the female claimant was assaulted and raped in July 2006.

[13] However, the panel is forgetting that the report reproduced above was not written, dictated or signed by the applicant. In fact, the report certifies that the justice of the peace went to the applicant's house at the request of a certain Jean Yves Despinas, one of the applicant's friends. Furthermore, the report indicates that the justice of the peace's clerk recorded the version of the facts reported by Mr. Despinas and asked him to sign it. Nowhere in this report do we find the applicant's version of events or her signature. How do we contradict the applicant's account with a statement that is not hers?

[14] Now, we will see how this report is contradictory to the applicant's account.

[15] In her PIF, the applicant stated that the July assault in her home took place [TRANSLATION] "in front of the children", without naming them, while in the report relating the version of one of the applicant's friends who knows the family indicates that the assault took place "in the presence of the whole family, the lady and her children, Mackenson, Herby, Roudy, Fabrice". (Emphasis added.)

[16] How can we say that the applicant is contradicting the version reported to the justice of peace by a friend when there is no evidence that this friend witnessed the incident? Why not see that this version is the friend's and not the applicant's?

[17] However, as of the beginning of the hearing, always consistent with her version, the applicant wanted to clarify that the version of the incident given in the report was inaccurate: in fact, contrary to what it indicates, her son Mackenson was not present because he was on vacation in the United States, which he confirms. Far from contradicting his mother on this matter, Mackenson says the same thing. If the names of the applicant's three children appear in the transcript, this is perhaps only because the friend, who did not witness the incident, but who reported what the applicant has always maintained, that she was assaulted [TRANSLATION] "in front of the children", understood that the three children, who he says he knows by name, were all present. Certainly, this was never the applicant's version. She clarified at the hearing that, in recounting having been assaulted [TRANSLATION] "in front of the children", she meant to say [TRANSLATION] "in front of the children who were present", that is, Randy Fabrice and Herby; this did not result in a contradiction, but was rather a clarification.

[18] Furthermore, the panel criticized the applicant for the fact that the report indicates the names of four children, that is, "Mackenson, Herby, Roudy, Fabrice", while the applicant only declared three in her PIF. It also noted, against her, the fact that the child's name "Randy" does not appear in the names of the children given by the friend to the justice of the peace.

[19] However, if the panel had better analyzed the report prepared by the justice of the peace, it could not have failed to notice a dozen spelling errors and forty or so punctuation mistakes. In doing this, it would have been able to better assess the applicant's explanations when she stated that the name "Roudy" was misspelled by the clerk to the official document who should have written

“Randy” as stated by the applicant from the beginning. The mistake is all the more obvious at the paragraph of the transcript starting with the word [TRANSLATION] “Magistrate”, when the name “Roudy” is followed by that of “Fabrice”. Contrary to the panel’s finding, the comma added between the names “Roudy” and “Fabrice” does not necessarily indicate a fourth child; on the contrary, this comma is in all likelihood one of the numerous punctuation errors in the transcript, with the result that the name of the third child should read, were it not for the clerk’s writing errors, “Randy Fabrice”, which is what the applicant has said from the beginning.

[20] It is true that the justice of the peace’s transcript does not address the applicant’s merchandise stolen during the July 2006 incident. Maybe the friend who made the statement to the justice of the peace did not mention it, in which case this omission does not mean that the theft did not occur as the panel suggests. One thing for certain, and given that this statement did not come from the applicant, it is difficult to criticize her for this omission, which is nevertheless what the panel did.

[21] Moreover, the panel glossed over important facts noted by the justice of the peace at the location of the incident, shortly after it occurred: a ransacked house, walls riddled with bullet holes, the exterior doors smashed and on the ground and traumatized children, facts that independently corroborate the applicant’s account.

[22] The Court recognizes that, in matters of assessing an applicant’s credibility, it must normally accord deference to the panel; if its findings are reasonable, intervention is not warranted. However,

the panel's decision must objectively rely on the evidence; it should not make it arbitrarily on the basis of erroneous findings of fact, taken from minor details and in ignorance of or as the result of misinterpreting important evidence presented (*Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100, at paragraph 38).

[23] In this case, the panel, without just cause, disregarded evidence found by the panel itself to be "key facts" of the refugee claim; it was splitting hairs when it assessed the justice of the peace's report, to the point of being overzealous by looking for contradictions, then in questioning the applicant at the hearing in a manner aimed at undermining her credibility at all costs.

[24] However, by not looking at the big picture, the panel failed to take into account evidence which, if better analyzed, could have nevertheless corroborated the applicant's account. With a more detailed and objective analysis of the report and the medical certificate disregarded without just cause, the panel would have been able to make a different finding with respect to the applicant's credibility.

[25] The Court therefore finds that the errors contained in the justice of the peace's report cannot be set up against the applicant and serve to contradict the version of facts provided in her PIF and in her testimony before the panel. The panel committed an unreasonable error in finding as it did with respect to the applicant's credibility, to the point of rejecting out of hand, without just cause, the medical certificate that could nevertheless corroborate her version to a certain extent.

[26] Given this finding, the Court is of the opinion that it is not useful to rule on the subjective and objective fear cited by the applicant in support of her refugee claim, or on the question of general insecurity that prevails in Haiti and is discussed in the decision. Suffice it to say that the analysis of the fear cited by the applicant would have been different if the panel had better weighed the evidence that could corroborate her credibility, and did not disregard out of hand a medical certificate that could corroborate the July 2006 assault cited by the applicant in her refugee claim.

V. Conclusion

[27] The Court is therefore of the opinion that the panel's finding with respect to the applicant's credibility was unreasonable and thus the application for judicial review will be allowed.

[28] No question of general importance was proposed or merits being proposed; no question will therefore be certified.

JUDGMENT

FOR THESE REASONS, THE COURT:

ALLOWS the application for judicial review;

SETS ASIDE the decision dated December 9, 2008; and

REFERS the matter to a differently constituted panel of the Board for redetermination.

“Maurice E. Lagacé”

Deputy Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5662-08

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**REASONS FOR JUDGMENT
AND JUDGMENT:** LAGACÉ D.J.

DATED: July 31, 2009

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