Federal Court  Cour fédérale

Date: 20091124

Docket: IMM-1231-09

Citation: 2009 FC 1204

Ottawa, Ontario, November 24, 2009

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

ANTOINE DAVID CHAMPAGNE
JEAN ABRAHAM CHAMPAGNE
JEAN JACQUELIN SAINTELUS

Applicants

and

THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72 (1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of a decision by the Refugee Protection Division of the Immigration and Refugee Board (Board), dated February 24, 2009 (Decision), which refused the Applicants' application to be deemed Convention refugees or persons in need of protection under sections 96 and 97 of the Act.

BACKGROUND

[2] The Applicants are Antoine David Champagne, his brother Jean Abraham Champagne and their nephew Jean Jacquelin Saintelus. They are citizens of Haiti who fear persecution because they turned against Aristide and because of their membership in a particular social group, that is, their family.

[3] The Applicants' fear is based on the murder of Antoine David's and Jean Abraham's sister, the murder of Jean Jacquelin's father, and persecution experienced by the Applicants themselves.

[4] Antoine David, Jean Abraham and their siblings left Haiti in 2001 and made refugee claims in the United States. These claims were rejected, so the claimants continued to live without status in the United States. One of their siblings, Pierre Etienn, was deported back to Haiti. Antoine David and Jean Abraham, who remained in the United States, then fled to Canada and applied for refugee protection.

[5] Meanwhile, Jean Jacquelin was raised by a relative in Haiti since his mother had fled to the United States in 2001 with Antoine David and Jean Abraham. His mother died suddenly in 2007. Jean Jacquelin obtained a visa to the United States to attend her funeral, after which he went to Canada to claim refugee status with his uncles.

DECISION UNDER REVIEW

[6] The Board determined that the Applicants were not Convention refugees based on their political opinion and "their fear as *returnees* from a sojourn in the United States" (emphasis in original).

[7] The Board considered the evidence and representations which included the Applicants' testimony, supporting documentary evidence, country condition documents and submissions of counsel and the Tribunal Officer.

[8] The Board noted that Jean Abraham had been convicted of forgery in the United States and sentenced to community service. However, the Board found that there was no reason to notify the Minister of this incident based on the gravity of the crime and the sentence that was imposed by the Court in New York.

[9] The Board noted that Jean Abraham and Antoine David fled Haiti nine years after the murder of their political activist sister, which was the event that precipitated their flight from Haiti.

[10] The Board noted that Aristide is no longer in power. René Préval won the 2006 election. The Board determined that, because of this change in circumstances, there was no serious possibility of the Applicants being at risk upon their return to Haiti.

[11] The Board found that the Applicants did not belong to a particular social group, since being a returnee is not related to discrimination. Accordingly, the Board did not accept that the Applicants were members of a particular social group because they were returnees.

[12] The Applicants feared imprisonment upon their return to Haiti. However, documentary evidence examined by the Board showed that the Applicants would likely only be detained if they had a criminal record in Haiti. While the Board was unaware whether or not any of the Applicants had a criminal record in Haiti, it determined that, if they did, it was Haiti's prerogative to apply its own law. Moreover, two of the three Applicants were not criminal deportees. As such, their detention and arrest was unlikely.

[13] The Board also noted the lack of management of criminal records in Haiti because of which the Haitian police were unlikely to have any reason to detain the Applicants, or to have any knowledge of Jean Abraham's criminal record in the United States.

[14] The Board found that the issue of prison conditions in Haiti was a general problem, and that no indication existed that such conditions were intended to target any particular group of people.

[15] Moreover, the Board noted the change of circumstances in Haiti, because of which Aristide was no longer in power. Accordingly, it found that, on a balance of probabilities, there was no longer an agent of harm.

[16] The Board found that although Antoine David's brother, Pierre Etienn, lives in hiding due to fear of kidnapping, kidnapping was a common problem in Haiti which rose to the level of generalized violence. The Board was also unconvinced that the Applicants would be targeted due to their comparative wealth, since "all Haitians are at risk of becoming the victims of violence." Due to the generalized harm they faced upon return, the Applicants were determined not be persons in need of protection under section 96 of the Act. Nor were the Applicants persons in need of protection pursuant to section 97 of the Act.

ISSUES

[17] The Applicants submit the following issues on this application:

1. Whether the Board erred by failing to have regard to the totality of the evidence before it;
2. Whether the Board violated natural justice, or otherwise erred in law, by excluding evidence which contradicted its assumptions.

STATUTORY PROVISIONS

[18] The following provisions of the Act are applicable in these proceedings:

Convention refugee	Définition de « réfugié »

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 themself of the protection of each of those countries; or

(*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

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

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

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

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

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

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

(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,

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

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

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

Person in need of protection

Personne à protéger

(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.

STANDARD OF REVIEW

[19] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the Supreme Court of Canada recognized that, although the reasonableness *simpliciter* and patent unreasonableness standards are theoretically different, "the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review" (*Dunsmuir* at paragraph 44). Consequently, the Supreme Court of Canada held that the two reasonableness standards should be collapsed into a single form of "reasonableness" review.

[20] The Supreme Court of Canada in *Dunsmuir* also held that the standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[21] In *Diagana v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 330, 63 Imm. L.R. (3d) 135, the Court determined that the appropriate standard of review with regard to the consideration and analysis of the totality of the evidence before the RPD was patent unreasonableness. Based on the changes made by the Supreme Court in *Dunsmuir*, the appropriate standard of review for this question in the current case is reasonableness.

[22] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir* at paragraph 47. Put another way, the Court should only intervene if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[23] The Applicants have also brought an issue to the Court regarding procedural fairness. Correctness is the appropriate standard for the review of issues involving procedural fairness and natural justice. See *Dunsmuir* at paragraphs 126-129. As such, in considering whether the Board breached natural justice by excluding evidence that contradicted its assumptions, the appropriate standard is one of correctness.

ARGUMENTS

The Applicants

The Board failed to consider the totality of the evidence

[24] The Applicants submit that the Board failed to accurately comprehend the basis of their claim, since it determined that the brothers fled Haiti because of the murder of their sister. Rather, the siblings were targeted because they actively opposed the Lavalas party. Jean Abraham had actively campaigned for a member of a political party who was abducted. Consequently, Jean

Abraham was persecuted by Lavalas supporters and his family was threatened. Because of the Applicants' sister, the Lavalas party already viewed the family as anti-Aristide. However, it was Jean Abraham's activism in 2001 which led to the Applicants' need to flee Haiti.

[25] The Board did not consider many of the pertinent facts of the Applicants' story. This error clearly impacted the Board's Decision, since the Board rejected the Applicants' politically-based claims in part on the grounds that much time had passed since their sister's murder. While the Board considered that Aristide is no longer in power, it also made reference to "17 years" and the "course of time" in its reasons. Thus, the Board's assessment of the Applicants' current risk of persecution was influenced by its incorrect assumption that no political incidents have occurred within the past 17 years.

[26] Not having regard for the totality of the evidence is an error of law. See *Toro v. Canada (Minister of Employment and Immigration)*, [1981] 1 F.C. 652, [1980] F.C.J. No. 192. A claim in which the basic facts have been misconstrued should be set aside. Indeed, the Court has held that misconstruing evidence that forms the basis of the claim is a fundamental error. See *Adamjee v. Canada (Minister of Citizenship Immigration)*, [1997] F.C.J. No. 1815. Moreover, a failure to mention facts that are a basis for the claim also constitutes a reviewable error. *Fainshtein v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 941. The Applicants cite and rely on many cases in which a decision has been set aside based on a misapprehension of the facts. See, for example, *Mbiya v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1001 and *Thambirasa v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 205.

[27] Similarly, the Applicants suggest that the Board's failure to appreciate the incidents culminating in their flight from Haiti is sufficient to justify quashing the Board's Decision. This error would have affected the Board's perception of the case.

[28] Furthermore, the Board erred in presuming that the murder of the Applicants' sister and Jean Abragan's persecution occurred while Aristide was in power. This fundamental error affected the Board's finding of a "change in circumstances" that was held to greatly diminish the Applicants' risk upon return to Haiti. Rather, the sister was murdered after Aristide had been deposed in a coup. After this coup, violence was perpetrated by the military against Aristide supporters, but recriminatory violence also occurred by Lavalas members against those who opposed Aristide. Indeed, the Applicants' belief is that their sister was murdered by Lavalas supporters angered by Aristide's loss of power.

[29] Similarly, the Applicants' persecution occurred at the hands of Lavalas members while René Préval was president. The Lavalas supporters were not acting as official agents of the government, although Préval was a member of the Lavalas at this time.

[30] Years later, René Préval is again the President of Haiti, and again Lavalas militants are able to commit violence without fear of punishment. This violence is committed by gangs loyal to the Lavalas, not by government officials. The Applicants submit that there is little difference between the current situation in Haiti and the situation in the year 2000. Consequently, it is difficult to understand how the Board determined that a material change of circumstances had occurred.

[31] The Board failed to understand that Préval was in office in 1992. This error shows that the Board did not understand the material facts at issue. Accordingly, the Board could not have made a reasonable assessment as to whether or not a material change in circumstances has occurred.

[32] Furthermore, the Board failed to understand who the agents of persecution were in this instance. The Applicants never feared official political persecution, but rather civilian militants. It was civilian militants who murdered their sister and persecuted them. The Board, however, found that there was no longer an agent of persecution since the Lavalas party was not in power. The Applicants submit that whether this was intended as a legal assumption or a statement of fact, it is in error. The Federal Court of Appeal in *Rajudeen v. Canada (Minister of Employment and Immigration)* (1984), 55 N.R. 129, [1984] F.C.J. No. 601 held that non-state actors can be agents of persecution. In the alternative, if the Board intended its finding to be a statement of fact, it was not a reasonable assumption based on the evidence before the Board.

[33] The Board also erred in its examination of the documentary evidence with regard to criminal deportees. The documentary evidence submitted by the Tribunal Officer stated that, although the Haitian police have a poor system for organizing their own records, the government is concerned with the possibility that Haitian deportees from the United States may have a criminal record, so it holds the deportees while verifying this with the government of the United States. Because of the egregious conditions in detention, some deportees die during this process. Thus, while the Board made reference to a relevant document, it failed to understand and apply what the document said. This error amounts to a failure to consider the totality of the evidence. Moreover, citing a document

but ignoring what it says is an error of law. See *Hassanzadeh-Oskoi v. Canada (Minister of Employment and Immigration)*(1993), 65 F.T.R. 113, [1993] F.C.J. No. 644.

[34] The Board found that such detentions were "generalized violence," and not targeted at deportees. However, this finding is contradicted in the report ostensibly relied on by the Board. The Applicants submit that this constitutes a reviewable error.

[35] The Applicants also submit that the Board made numerous errors in this case, some of which were immaterial. Others, however, such as not having knowledge of who was in power in Haiti in 1992 or 2000, constitute material errors and directly affect the analysis undertaken by the Board.

[36] The Board erred by using the findings of *Cius* and *Prophète* to disregard the evidence and testimony provided by the Applicants. See *Cius v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1, [2008] F.C.J. No. 9 and *Prophète v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 331, 70 Imm. L.R. (3d) 128. Unlike these cases, however, the Applicants provided evidence of a particularized risk to Haitian returnees.

[37] The Board can be presumed to not have considered evidence that contradicts its findings if the Board has not made reference to such evidence. See *Hatami v. Canada (Minister of Citizenship and Immigration*, [2000] F.C.J. No. 402. The Board considered *Cius* and *Prophète* to dispose of the issue raised by the Applicants. In so doing, the Board did not consider the evidence provided by the

Applicants to support their claim. Rather, the issue was analyzed without reference to the evidence before the Board. This constitutes a legal error. See *Lucien v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 179, [2009] F.C.J. No. 223. Moreover, the evidence provided by the Applicants was from reliable sources such as the United Nations High Commission for Refugees. Such evidence cannot simply be disregarded without consideration.

Procedural Fairness

[38] The Board also erred in failing to take recent IRB research into account when making its Decision. The report which the Applicants attempted to submit, dated December 1, 2008, had not yet been released to the public. The Applicants, however, obtained a copy on January 19, 2009. Counsel for the Applicants faxed it to the Board the same day. However, the Board refused to consider the evidence since it was submitted on January 19, 2009 - less than twenty days prior to the hearing. The Board gave no consideration of the relevance of the document, and treated the date of the document as determinative.

[39] The Applicants contend that this decision was arbitrary and unreasonable, since the Applicants' counsel gave the report to the Board the same day that he received it himself. Moreover, this document was not yet available to the public. The Applicants contend that this evidence might have impacted the Board's analysis of circumstances in Haiti since the report found that "political gangs deployed by Préval and his party" are increasingly targeting members of opposing parties, and have been committing "politically-motivated kidnappings."

[40] The Applicants submit that the Board erred in law by excluding evidence originating from the Board itself which contradicted its finding of a material change in circumstances. The Federal Court has found that relevant evidence cannot be excluded by the Board simply because the evidence was submitted within 20 days of the hearing. See *Canada (Minister of Citizenship and Immigration) v. Tiky*, 2001 FCT 980, [2001] F.C.J. No. 1357. Rather, Rule 40 of the *Convention Refugee Determination Division Rules*, SOR/93-45 provides that this requirement can be waived where no injustice is likely to be caused or the proceedings will not be unreasonably impeded. The Applicants contend that the Board erred in law by failing to consider the relevance of this report. As in *Tiky*, in the case at hand, "[a]t no time did the Board state in its reasons for excluding the evidence why [it] was not relevant."

[41] The Applicants recognize the power of the Board to control its own procedures, but submit that this power should not prevent parties from placing relevant evidence before the Board. In this case, the evidence was relevant, produced by the Board itself, and was only two pages in length. The Board failed to understand the reason for the late submission of this evidence, and also failed to consider its relevance. The Applicants submit that this error is amplified by the fact that the Board's Decision was based on a purported change in circumstances which was rebutted by this document.

The Respondent

All evidence was considered

[42] The Respondent submits that the Board was aware that Jean Abraham and Antoine David fled Haiti because they believed they were experiencing persecution based on political opinion and that the murder of their sister had made the family visible to Aristide supporters.

[43] The Respondent contends that the Board's failure to make explicit reference to the 2000-2001 incidents in its reasons is immaterial. The same agents of persecution, that is, Aristide's supporters, were involved in both the murder of the sister as well as the Applicants' persecution. The Respondent also submits that the Board was correct in recognizing the passage of time, since the Applicants have been away from Haiti for almost eight years. Moreover, there has been a change the circumstances in Haiti's political situation since Aristide is no longer in power.

[44] The Board considered all the evidence and determined that the Applicants would not be at risk due to their political opinion. Furthermore, the Respondent contends that a misunderstanding of some of the evidence does not require judicial intervention where the decision is not dependent on those facts. See *Kuanzambi v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1307, [2002] F.C.J. No. 1814 at paragraph 36, *Chulu v. Canada (Solicitor General)*, [1995] F.C.J. No. 116, [1995] F.C.J. No. 116 at paragraph 16.

[45] The Respondent submits that the test for Convention refugee status is based on the current circumstances of Haiti, and requires evidence of a prospective risk of persecution if the Applicants were to return to their country of origin. See *Yusuf v. Canada (Minister of Employment and Immigration)* (1995), 179 N.R. 11, [1995] F.C.J. No. 35 at paragraph 2; *Mileva v. Canada (Minister of Employment and Immigration)*, [1991] 3 F.C. 398, [1991] F.C.J. No. 79; *Canada (Minister of Employment and Immigration) v. Paszkowska* (1991), 13 Imm L.R. (2d) 262, [1991] F.C.J. No. 337. The conditions in Haiti at the time of the Applicants' departure is only relevant to the extent that other evidence does not demonstrate a material change of circumstances so that the Applicants no longer have reason to fear persecution. See *Mileva*; *Paszkowska*.

[46] The issue of "changed circumstances" is a factual determination about whether the change is meaningful enough to render the Applicants' fear unreasonable. See, for example, *Rahman v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 487.

[47] The Board determined that the Applicants were not Convention refugees since their fear was not prospectively well-founded. The Respondent submits that this conclusion was open to the Board since Jean Abraham and Antoine David had been out of the country for eight years and since Aristide is no longer President. The Board considered the documents and weighed the evidence to determine that the Applicants' fear was not prospectively well-founded. This conclusion was reasonable.

[48] The Respondent submits that section 97 of the Act requires the Applicants themselves to be exposed to a risk to life or serious harm. Accordingly, evidence that demonstrates a generalized violation of human rights is not sufficient to justify a section 97 claim without also linking this general evidence to the Applicant's personal circumstances. See *Ahmad v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 808, [2004] F.C.J. No. 995 at paragraph 22; *Vickram v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 457, [2007] F.C.J. No. 619 at paragraph 14; *Prophète v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 31, [2009] F.C.J. No. 143 at paragraphs 3, 6-7.

[49] The Applicants did not provide sufficient evidence to show a risk to life or serious harm that is unique to them, since the risk faced is a general risk faced by all people in Haiti. The Respondent notes that according to *Prophète* (FC) the term "generally" in section 97 may include *segments* of a larger population as well as *all* residents or citizens of a given country. Moreover, the Court found in paragraph 23 that "[w]hile a specific number of individuals may be targeted more frequently because of their wealth, all Haitians are at risk of becoming victims of violence." The Respondent submits that the Applicants either fall within segments of the larger population or are a part of all residents of Haiti. Accordingly, the Board was correct to conclude that the Applicants do not fall under the scope of section 97.

[50] The Respondent submits that a Board is presumed to have considered all the evidence placed before it, and that the Applicants have not succeeded in rebutting this presumption.

No breach of natural justice occurred

[51] The Applicants' claim began on September 19, 2008 and continued on January 21, 2009. As such, at the time the Applicants attempted to introduce further evidence the hearing was underway. Furthermore, the Respondents contend that *Tiky* is distinguishable from the current case on its facts.

[52] The Applicants failed to object to the exclusion of the report prior to the Board's Decision. Rather, the Applicants remained silent until the Decision had been released. The Federal Court of Appeal has determined that a failure to object to a breach of natural justice at the earliest opportunity amounts to a waiver of the breach. See *Yassine v. Canada (Minister of Employment and Immigration)*(1994), 172 N.R. 308, 27 Imm. L.R. (2d) 135 at paragraph 7. Because the Applicants failed to object to the exclusion of the evidence, they waived their right to allege a breach of procedural fairness.

[53] Even if the Court finds that an error was made by the Board, the Respondent contends that any mistakes were immaterial and do not amount to a reversible error since the Board provided sufficient reasons to support its findings. See *Yassine*, *supra* at paragraphs 3-5, *N'Sungani v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1759, 44 Imm. L.R. (3d) 118; *Nyathi v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1119, [2003] F.C.J. No. 1409 at paragraphs 18 and 24.

ANALYSIS

[54] In my view, the Board has misconstrued the fundamental basis of the Applicants' claim and the risks they face.

[55] The Applicants fear civilian militants. Jean Abraham and Antoine David fear persecution from the Lavalas movement and not from the government of Haiti. It was this fear that led them to flee Haiti. The Board appears to have concluded that the brothers fear Aristide, who is no longer leading the country, so that there has been a change of circumstances in Haiti and Jean Abraham and Antoine David need no longer fear political persecution and personal risk.

[56] The evidence before the Board shows that Lavalas militants are able to carry out violence with impunity and that the police cannot provide protection. The situation which the Applicants face today is the same one they faced when they fled: violence at the hands of civilians who belong to gangs loyal to the Lavalas party which is directed at political opponents such as Jean Abraham and Antoine David.

[57] The Board's failure to direct itself to the alleged source of persecution and personal risk has resulted in a fundamentally flawed analysis that disregards material evidence and comes to an unreasonable conclusion: the occurrence of a change of circumstances which removes the source of the persecution and the risk.

[58] Misconstruing the issue and failing to address facts and evidence that constitute the basis of the refugee claim is an unreasonable and reviewable error. See *Mbiya*.

[59] There are other problems with the Decision. For example, the Board fails to address documentary evidence with regard to deportees and particularized risk that contradicts its conclusions. The Board's failure to address this evidence gives rise to a presumption that the Board either overlooked or simply chose to ignore it. See *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35, [1998] F.C.J. No. 1425.

[60] The general impression is that the Board has failed to appreciate the real basis of the Applicant's claim. The Court can have little confidence in a Decision that is based upon fundamental misconceptions of fact and which ignores material evidence.

[61] The Applicants also raised procedural fairness issues. However, there is no need for the Court to address this matter because the Decision must be quashed and the application referred back for reconsideration on the grounds discussed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application is granted. The Decision is quashed and the matter is referred back for reconsideration by a different Board member;
2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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