Federal Court  Cour fédérale

Date: 20110216

Docket: IMM-3622-10

Citation: 2011 FC 186

Ottawa, Ontario, February 16, 2011

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

PATERNISE DIEUJUSTE-PHANOR
ROCK DIEUJUSTE
JEAN ROLDY SAMEUL DIEUJUSTE
ANNE MEDJINE DIEUJUSTE

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated April 30, 2010, concluding that the applicants are not Convention refugees or persons in need of protection pursuant to sections 96 or 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 (the Act) because their claims

have no nexus to a Convention refugee ground and because they do not face a personalized risk of persecution in Haiti.

FACTS

Background

[2] The principal applicant, Paternise Dieujuste-Phanor, is a 47 year-old citizen of Haiti. She worked in Haiti as a registered nurse. The second applicant, Rock Dieujuste, is her husband. He is a Haitian citizen and worked in Haiti as a teacher. The other two applicants are their minor children.

[3] The principal applicant arrived in Canada with her two children on July 17, 2008, and claimed refugee protection. She was joined by her husband, the second applicant, on December 16, 2008.

[4] In her Personal Information Form (PIF) narrative, the principal applicant described three incidents in which she had been attacked in Haiti:

1. During elections in 2006, a group of men tried to threaten the principal applicant to force her to vote in the election. She refused to vote because of her religion. She has had no further contact from any of those men;
2. Around May of 2008 two men approached the principal applicant and told her that a patient had died because she had refused to admit him into her hospital. The principal applicant did not remember the incident to which the men were referring. The men told her that one day they would come back for revenge;
3. On May 30, 2008, the minor applicants were kidnapped and a ransom demanded for their return. The principal and her husband were able to raise the required money

> and their children were returned to them in exchange on the following day. The principal applicant reported the incident to the police and asked the police to keep the report secret. Nevertheless, the next week she began to receive more calls from the same kidnappers, who told her that because she had gone to the police they were going to kill her.

[5] As a result of these threats, the applicants fled Haiti. The family first went to the United States (US), where they remained for one month before coming to Canada to claim refugee protection. The husband did not accompany his family to Canada but returned to Haiti. He stated in his PIF and in his oral testimony that he returned to Haiti because he had a job there and wanted to support his family (he thought that he would not be able to find employment in Canada or the US).

[6] The husband returned to Haiti on August 1, 2008. Beginning in September, he began to receive phone calls on his cellular phone from callers looking for his wife. The callers accused him of hiding his wife, and warned him that if he did not tell them where she was they would kill him. As a result of these threats, the second applicant moved from his own house into his cousin's house, which was nearby. In the early morning hours of September 12, 2008, the husband heard gunshots from the vicinity of his house. Later in the morning, he went by his house and saw that his house had been riddled with gunshots. He reported the attack to the police, who made a report.

[7] As a result of the attack, the applicant moved to a town approximately 15 kilometres away. He continued to receive threatening telephone calls. In early November, two men saw him near the

high school where he taught and exclaimed that now they knew where to find him. The husband decided to flee Haiti.

[8] In her PIF narrative, the principal applicant states the basis of her fear of returning to Haiti:

> ¶14. I am afraid that if I return to my country I will be killed by the kidnappers who took my children, as they have threatened to do. I am afraid they may kidnap my children again and this time I may not be able to get them back. I do not believe that the government can protect me. For the above reasons I am asking for protected person status.

Decision under Review

[9] In a decision dated May 27, 2010, the Board dismissed the applicants' refugee claims because it found that there was no nexus to a Convention ground under section 96 of the Act, and because there was no personalized risk of persecution under section 97 of the Act.

[10] The Board found both the principal applicant and her husband credible. It accepted their identities and found that their oral testimony was consistent with their PIFs.

[11] The Board found that there was no nexus to a Convention ground under section 96 of the Act. Citing *Rizkallah v. Canada (Minister of Employment and Immigration)*(1992), 156 N.R. 1 (F.C.A.), and *Cius v. Canada (Citizenship and Immigration)*, 2008 FC 1, the Board found that neither wealth nor status as a person returning to Haiti from abroad are sufficient to constitute a social group under the Convention. The Board also considered whether the principal applicant or her daughter could claim nexus based on gender, but found, citing *Soimin v. Canada (Citizenship*

and Immigration), 2009 FC 218, and *Sermot v. Canada (Citizenship and Immigration)*, 2009 FC 1105, that their fear was not gender-related.

[12] Finally, the Board considered the applicants' submission that the social group of which the applicants were members was "persons aware of possible police complicity in criminal acts." The Board rejected this description of a social group. At paragraph 10, the Board stated that law with regard to what social group falls within the definition of the Act:

> ¶10. . . . In terms of membership in a particular social group, the Supreme Court of Canada in *Ward*[1] defined three groups; the first was a group defined by an innate or unchangeable characteristic, the other is groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association. And the third is groups associated by a former voluntary status unalterable due to its historical permanence. The panel determines that the particular social group proposed by counsel does not fall into any of these three definitions.

[13] With regard to a risk of persecution under section 97 of the Act, the Board's central finding was that the risk faced by the applicants is one faced generally by other individuals in Haiti. In contrast, the Board stated, quoting *Carias v. Canada (Citizenship and Immigration)*, 2007 FC 602, at paragraph 25, and *Cius*, above, at paragraph 23, that the law is that refugee claimants must be able to show a personal risk not faced by others in Haiti. The Board defined the risk faced by the applicants as a "risk of kidnapping," which it found is widespread in Haiti:

> ¶13. Counsel suggested that the claimant's risk of kidnapping is personalized as they are afraid of specific kidnappers. The documentary evidence suggests that kidnapping is a widespread phenomenon in Haiti. . . .

[1] *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689.

[14] Quoting from *Prophète v. Canada (Citizenship and Immigration)*, 2008 FC 331, at paragraph 23, and *Soimin*, above, at paragraph 16, the Board concluded at paragraph 17:

> After considering the evidence in light of the jurisprudence, the panel is satisfied that the claimants' fear of kidnapping is one faced generally by other individuals in Haiti. The claimants are not persons in need of protection, accordingly.

LEGISLATION

[15] Section 96 of the Act, grants protection to Convention refugees:

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,	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) 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	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) 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	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.

[16] Section 97 of the Act grants protection to persons whose removal from Canada would subject them personally to a risk to their life, or of cruel and unusual punishment, or to a danger of torture:

97. (1) A person in need of	97. (1) A qualité de personne à

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	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) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	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 (i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country, (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, (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and (iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant : (i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays, (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) 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) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

ISSUES

[17] The applicant submits the following two issues:

1. Did the Board err by ignoring two central pieces of evidence contradicting its conclusion that the principal applicant faced only a generalized risk of persecution?
2. Did the Board err by failing to provide adequate reasons supporting its conclusion that the applicants faced only generalized risk and are not persons in need of protection?

STANDARD OF REVIEW

[18] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of (deference) to be accorded with regard to a particular category of question": see also *Khosa v. Canada (MCI)*, 2009 SCC 12, per Justice Binnie at para. 53.

[19] The Board's assessment of whether the applicants are persons in need of protection and whether they face a particularized risk is a question of mixed fact and law and subject to review on a reasonableness standard: see, for example, my decision in *Michaud v. Canada (Citizenship and Immigration)*, 2009 FC 886, at paragraphs 30-31.

[20] In reviewing the Board's decision using a standard of reasonableness, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir*, supra, at paragraph 47; *Khosa*, supra, at para. 59.

[21] The determination of whether the Board gave adequate reasons for dismissing the applicants' claims is an issue of procedural fairness and must be correct: *Weekes v. Canada (Citizenship and Immigration)*, 2008 FC 293, at paragraph 17.

ANALYSIS

Issue 1: Did the Board err by ignoring evidence contradicting its conclusion that the principal applicant faced only a generalized risk of persecution?

[22] The applicant submits that the Board ignored evidence submitted by the principal applicant that her risk of kidnapping arose as a result of her failure to admit a patient into her hospital. In support of this belief, the applicant submits that the Board had before it the following two pieces of evidence that it did not consider:

1. Statements made in the principal applicant's amended PIF narrative:

> ¶4. At the hospital I usually worked at night. One day in approximately May 2008, while I was shopping, two men approached me and told me that one day I had not admitted a patient into the hospital and because of that the patient had died. They told me that one day they were going to come back for revenge. I did not remember who they were referring to.
>
> ¶5. . . . On 30 May 2008, I received a phone call at work on my cell phone at approximately 1:30 and the caller told me that I need not worry if I do not see the children because he has them. He told me he knew I worked at the hospital.

2. A certificate of attestation from the Conseil D'administration de la 2eme Section Communale de Belander Commune Des Verrettes, stating that the principal applicant had reported being threatened by two strangers on account of failing to admit a patient into the hospital where she worked.

[23] The principal applicant submits that the applicant was directly targeted by these two men as a result of her failure to admit the patient. Then the principal applicant was threatened after she reported the kidnapping to the police. After the principal applicant and the two children had fled from Haiti, the principal applicant's husband was threatened and his house was "riddled with bullets". The Board makes reference to the Personal Information Form in paragraph 5 of its decision, and the Board finds that the applicants are credible. The applicants therefore submit that the risk of persecution faced by the principal applicant was personalized in a way that the Board failed to consider.

[24] At the hearing, the Board invited counsel to make submissions regarding personalized risk. Counsel made the following submissions on the point:

> The claimants do not fear random kidnapping if they return to Haiti. This is not a case where they have been away for a while and want to go back and fear being identified as a ripe target for kidnappers. They fear a specific set of kidnappers who have already kidnapped the children and subsequent to the actual kidnapping threatened the death of the female claimant and the two children and afterwards not only threatened but shot up the house where the male claimant had been living. They have clearly demonstrated more than a passing interest in these two claimants. . . .
>
> (Certified Tribunal Record page 302)

[25] The Board did not refer to the principal applicant's evidence regarding the threats that she received regarding her failure to admit the patient. The Court may infer that the Board has not considered the evidence in cases where the Board fails to address evidence that contradicts its findings. See *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1425 (F.C.A.)(QL), 157 F.T.R. 35.

[26] In *Aguilar Zacarias v. Canada (M.C.I.)*, [2011] FC 62, Mr. Justice Noël held at paragraph 17:

> ¶17…Because the Applicant's credibility was not in question, the Board had the duty to fully analyse and appreciate the personalized risk faced by the Applicant in order to render a complete analysis of the Applicant's claim for asylum under section 97 of IRPA. It appears that the Applicant was not targeted in the same manner as any other vendor in the market: reprisal was sought because he had collaborated with authorities, refused to comply with the gang's requests and knew of the circumstance of Mr. Vicente's death.

In the case at bar, the Board did not fulfill its duty to fully analyse and appreciate the personalized risk faced by the applicants. Just as Justice Noël held, the applicants were not targeted in the same manner as any other person in Haiti. In the case of the applicants, reprisal was sought because the principal applicant, a nurse, had not admitted a patient who later died and the kidnappers sought revenge. Then when the principal applicant reported the kidnapping to the police, the kidnappers again sought revenge. Even after the principal applicant and her two children had left Haiti, the kidnappers continued to seek revenge against the principal applicant's husband who is also an applicant before the Board. None of this evidence was referred to by the Board in its decision.

[27] As I held in *Melvin Alonso Cruz Pineda v. Canada (M.C.I.)*, [2011] FC 81 at paragraph 39 where the Board failed to refer to an expert report that the applicant would now face a heightened threat as compared to the general population, the failure to mention this evidence is a reviewable error.

<u>Issue 2</u>: Did the Board err by failing to provide adequate reasons supporting its conclusion that the applicants faced only generalized risk and are not persons in need of protection

[28] The applicants submit that the Board's reasons are lacking because the Board failed to apply the case law that it cites to the specific facts of the applicants' claim. The applicants submit in particular that the Board failed to explain why the evidence provided by the applicants did not demonstrate the existence of a personalized risk not generally faced by other Haitians. In fact, the applicants submit that the Board failed to refer to any evidence at all in reaching this conclusion. Instead, the Board's section 97 analysis consisted of a single paragraph:

> ¶13. After considering the evidence in light of the jurisprudence, the panel is satisfied that the claimants' fear of kidnapping is one faced generally by other individuals in Haiti. The claimants are not persons in need of protection, accordingly.

[29] In *VIA Rail Canada Inc. v. Canada (National Transportation Agency)* (2000), [2001] 2 F.C. 25 (Fed. C.A.) Justice Sexton set out at paragraph 22 the contents of the duty to provide reasons:

> ¶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 set out and must reflect consideration of the main relevant factors.

[30] In this case, the Board recognized, at paragraph 13, the applicants' evidence that their "risk of kidnapping is personalized as they are afraid of specific kidnappers." The Board went on to quote from four cases of this Court. In *Carias*, above, the Court held that applicants could not demonstrate personalized risk by showing merely that they are part of a large group targeted for their wealth. In

Cius, above, the Court held that a risk of violence was a risk faced by all in Haiti and not personalized to the applicant in that case. Likewise in *Prophète* and *Soimin*, above.

[31] The Board's reasons do not make clear how these cases relate to the principal applicant's evidence that the kidnappers had threatened her and because of the incident at the hospital, and because they knew that she had reported the kidnapping to the police, nor to her husband's evidence that he was repeatedly contacted and threatened upon his return to Haiti by individuals who were looking for the principal applicant.

[32] The failure by the Board to discuss the specifics of the applicants' claim in the context of the law is an error.

CERTIFIED QUESTION

[33] Both parties advised the Court that this case does not raise a serious question of general importance which ought to be certified for an appeal. The Court agrees.

JUDGMENT

THIS COURT'S JUDGMENT is that:

This judicial review application is allowed and the matter sent back to a different panel for redetermination in accordance with these Reasons.

"Michael A. Kelen"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3622-10
STYLE OF CAUSE:	*Paternise Dieujuste-Phanor, Rock Dieujuste, Jean Roldy Sameul Dieujuste, Anne Medjine Dieujuste v. The Minister of Citizenship and Immigration*
PLACE OF HEARING:	Ottawa, Ontario
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