Immigration and
Refugee Board of Canada

Refugee Protection Division

Commission de l'immigration
et du statut de réfugié du Canada

Section de la protection des réfugiés

RPD File No. / N° de dossier de la SPR : MB7-07692
Client ID No. / N° ID client : 1106578946

Private Proceeding / Huis clos

Reasons and Decision – Motifs et décision

Claimant(s)	**Demandeur(e)(s) d'asile**
XXXX XXXX	
Date(s) of Hearing	**Date(s) de l'audience**
September 7, 2018	
Place of Hearing	**Lieu de l'audience**
Montréal, Quebec	
Date of Decision and Reasons	**Date de la décision et des motifs**
October 12, 2018	
Panel	**Tribunal**
Melanie Calisto Azevedo	
Counsel for the Claimant(s)	**Conseil(s) du (de la/des) demandeur(e)(s) d'asile**
Michael Dorey	
Designated Representative	**Représentant(e) désigné(e)**
N/A	
Counsel for the Minister	**Conseil du (de la) ministre**
N/A	

Canada

REASONS FOR DECISION

INTRODUCTION

[1] The refugee protection claimant, **XXXX XXXX**, a citizen of Haiti, is claiming refugee protection under section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act* (IRPA).

ALLEGATIONS

[2] The claimant fears being killed by members of the Mouvement Chrétien Pour Une Nouvelle Haiti (MOCHRENHA) [Christian movement for a new Haiti], as well as a water merchant, by reason of his political opinion and his ties to the Organisation Peuple en Lutte (OPL) [struggling people's organization] party. He also fears the insecurity in Haiti.

DETERMINATION

[3] The claimant is not a "Convention refugee" or a "person in need of protection" for the reasons that follow.

ANALYSIS

Preamble

[4] Because the claimant did not appear to have been assisted by a translator when completing his Basis of Claim Form (BOC Form), the panel asked the claimant at the start of the hearing whether he could, in fact, read French and whether he had been able to read and understand the content of his BOC Form and the attachments, as per his written statement to that effect.[1] The claimant replied that he did not understand all of the content. Therefore, in keeping with the principles of natural justice, the panel suspended the hearing and gave the interpreter sufficient time to translate the entire content of the BOC Form. Afterwards, the panel confirmed with the interpreter and the claimant that the form had been translated. The panel asked the claimant whether he wanted to add or change anything in the content of his BOC Form. He

[1] Document 1: Basis of Claim Form (BOC Form): Declaration A.

stated that he had nothing to add or change. He confirmed that the content was complete, true and correct.

Identity

[5] The panel is satisfied as to the claimant's identity, which was established, on a balance of probabilities, by means of the certified true copy of his passport.[2]

Criminal conviction and exclusion under Article 1F(b)

[6] Because of the claimant's criminal conviction[3] in the United States of America, the panel considered the applicability of the exclusion clause in Article 1F(b) of the United Nations *Convention Relating to the Status of Refugees* (the Convention) and section 98 of the IRPA.

[7] Pursuant to rule 26 of the *Refugee Protection Division Rules* (RPD Rules), on July 25, 2018, the panel informed the Minister of Public Safety and Emergency Preparedness (the Minister) of the possibility that Article 1F of the Convention might apply.

[8] On August 1, 2018, the Minister informed the parties that he would not intervene in this case. The Minister did, however, submit documents.[4]

[9] According to the evidence[5] on the record, on August XXXX, 2010, the claimant was arrested and detained by US authorities. He was convicted on September XXXX, 2010, after pleading guilty to the offence set out in Title 18, section 1546(a),[6] of the American criminal code and was sentenced to [translation] "time served"[7] followed by 24 months of probation.

[10] Article 1F(b) states that the provisions of the Convention shall not apply to any person with respect to whom there are serious reasons for considering that they have committed a

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2 Document 2 – Information package provided by the Canada Border Services Agency or Citizenship and Immigration Canada.
3 Document from the United States District Court – Southern District of Florida.
4 Document from the United States District Court – Southern District of Florida + Article 1546, Title 18, of the American criminal code.
5 United States District Court – Southern District of Florida.
6 Fraud And Misuse of Visas.
7 United States District Court – Southern District of Florida.

serious non-political crime outside the country of refuge prior to their admission to that country as a refugee.

[11] The panel is of the opinion that, if committed in Canada, this crime would correspond to the offence set out in paragraph 122(1)(b) of the IRPA, which reads as follows:

> **122** **(1)** No person shall, in order to contravene this Act,
> **a)** possess a passport, visa or other document, of Canadian or foreign origin, that purports to establish or that could be used to establish a person's identity;
> **b)** use such a document, including for the purpose of entering or remaining in Canada;
> **c)** import, export or deal in such a document.

[12] The penalty for this offence is set out in paragraph 123(1)(b) of the IRPA, which states the following:

> **123** **(1)** Every person who contravenes
> **a)** paragraph 122(1)(a) is guilty of an offence and liable on conviction on indictment to a term of imprisonment of up to five years; and
> **b)** paragraph 122(1)(a) is guilty of an offence and liable on conviction on indictment to a term of imprisonment of up to five years.
>
> Margin note: Aggravating factors
> **(2)** The court, in determining the penalty to be imposed, shall take into account whether
> **a)** the commission of the offence was for the benefit of, at the direction of or in association with a criminal organization as defined in subsection 121.1(1); and
> **b)** the commission of the offence was for profit, whether or not any profit was realized.

[13] The panel analyzed whether section 133 of the IRPA, which is an exception to section 122 of the IRPA, applies and concluded that this section is not applicable in this case, as the claimant did not claim asylum in the US.

[14] The panel is therefore of the opinion that the crime committed by the claimant would correspond to the offence set out in paragraph 122(1)(b) of the IRPA, which is punishable by a term of imprisonment of up to 14 years.

[15] Considering that Canadian case law states that a serious non-political crime can be equated to a crime that, had it been committed in Canada, could be liable to a maximum term of

imprisonment of 10 years or more, the panel concludes that it can be assumed that this is a serious offence.

[16] However, in light of *Febles*,[8] the presumption of the 10-year rule can be rebutted depending on the particular circumstances of the case. This is a useful guideline to which other contextual factors, such as the sentence actually imposed, must be added when analyzing the issue.

[17] The Supreme Court of Canada[9] made the following remarks regarding the determination of the severity of a crime:

> The Federal Court of Appeal in *Chan v. Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 17150 (FCA), [2000] 4 F.C. 390 (C.A.), and *Jayasekara* has taken the view that where a maximum sentence of ten years or more could have been imposed had the crime been committed in Canada, the crime will generally be considered serious. I agree. However, this generalization should not be understood as a rigid presumption that is impossible to rebut. Where a provision of the Canadian *Criminal Code*, R.S.C. 1985, c. C-46, has a large sentencing range, the upper end being ten years or more and the lower end being quite low, **a claimant whose crime would fall at the less serious end of the range in Canada should not be presumptively excluded**. Article 1F(*b*) is designed to exclude only those whose crimes are serious. The UNHCR has suggested that a presumption of serious crime might be raised by evidence of commission of any of the following offences: homicide, rape, child molesting, wounding, arson, drugs trafficking, and armed robbery (Goodwin-Gill, at p. 179). These are good examples of crimes that are sufficiently serious to presumptively warrant exclusion from refugee protection. However, as indicated, the presumption may be rebutted in a particular case. While consideration of whether a maximum sentence of ten years or more could have been imposed had the crime been committed in Canada is a useful guideline, and crimes attracting a maximum sentence of ten years or more in Canada will generally be sufficiently serious to warrant exclusion, the ten-year rule should not be applied in a mechanistic, decontextualized, or unjust manner. **(Emphasis added)**

[18] Having analyzed the factors set out in *Jayasekara*,[10] namely the elements of the crime, the mode of prosecution, the penalty prescribed, the facts and the mitigating and aggravating circumstances underlying the conviction, the panel concludes that the crime committed by the claimant is not a serious crime that would exclude him pursuant to Article 1F of the Convention.

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8 *Febles, Luis Alberto Hernandez v. M.C.I.* (S.C.C., No. 35215), McLachlin, LeBel, Rothstein, Moldaver, Wagner (majority); Abella, Cromwell (dissenting), October 30, 2014; 2014 SCC 68, paragraph 62.

9 Ibid.

10 *Jayasekara v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404, [2009] 4 FCR 164, paragraph 44.

[19] Without minimizing the non-hybrid status of this provision and the fact that it is punishable by a term of imprisonment of up to 14 years, the sentence that is usually imposed for such offences can be much shorter, particularly if the offender has no previous criminal record, which is the case here. The panel refers to the Federal Court decisions in *Almrei*[11] and *Tabagua*[12] on this principle. Although the alleged crime in those decisions is not the same, it is nevertheless a non-hybrid offence that is liable to a term of imprisonment of up to 14 years, just as in this case.

[20] The foregoing indicates that these offences are liable to a range of sentences in Canada.

[21] In this case, the claimant was sentenced to "time served" (35 days in prison) and two (2) years of probation, even though he could have been sentenced to a maximum term of imprisonment of 10 years. The claimant's offence is therefore at the low end of the range.

[22] Having analyzed the file, the panel sees no indication that the claimant's offences caused harm to anyone or that he has a criminal record in Canada or in any other country. It has also not been demonstrated, on a balance of probabilities, that he committed these offences for profit or for the benefit, or at the direction, of a criminal organization.

[23] As such, taking into account all the foregoing factors, the panel is of the opinion that the claimant would, on a balance of probabilities, have received a sentence in Canada that would fall at the bottom of the range.

[24] In light of the available evidence, the panel is of the opinion that the offences committed by the claimant do not constitute serious non-political crimes within the meaning of Article 1F(b) of the Convention. Consequently, the claimant is not excluded.

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11 *Almrei v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 1002, paragraph 48.

12 *Tabagua* (adopted the reasoning of *Almrei*) *Tabagua v. M.C.I.* (F.C., No. IMM-2549-14), Gleason, June 4, 2015, 2015 FC 709, paragraph 19.

Analysis under section 96 of the IRPA

Credibility

[25] The claimant is alleging two incidents in support of his claim, namely, written threats accompanied by gun shots during an incident in 2006, and verbal threats on one occasion in 2008. The panel finds that the claimant is not credible for the reasons that follow.

Incident in 2006

[26] The claimant testified at the hearing that in 2006, before the elections, unidentified individuals came to his home. They allegedly fired shots and left handouts threatening to kill him if he did not stop. However, the claimant made no mention whatsoever of this incident in his BOC Form.

[27] Asked by the panel to explain why this incident was not mentioned in his BOC Form, the claimant replied that there was no reason. This is not a reasonable explanation—if it can be considered an explanation at all. The claimant confirmed to the panel at the beginning of the hearing that the information in his BOC Form was complete, true and correct. Furthermore, the panel insisted on making certain that the claimant had, in fact, understood the complete content of his BOC Form and requested a complete translation of the form at the start of the hearing. The panel then asked the claimant if he needed to add or change any information, and the claimant replied that he did not. The panel took this step even though the claimant was represented by counsel at the hearing and had received assistance[13] from said counsel in completing his BOC Form. Finally, the panel is of the opinion that it is reasonable to believe—considering the nature of the incident (gun shots) and its importance, being the only incident that the claimant alleged occurred during his involvement in the electoral campaign as an OPL member—that he would have mentioned this incident if it had taken place. For this reason, the panel does not believe this incident occurred.

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[13] Document 1: BOC Form.

[28] The panel is prepared to believe that the claimant might, in fact, have been a member of the OPL and acted as a mobilizer within the party; however, because of this significant omission, the panel does not believe the claimant was persecuted because of this.

[29] The claimant alleged no other incidents during this period.

[30] Furthermore, when asked why he had stopped his political activities, the claimant replied that it was because he could see that, despite his involvement, his party had not come to power. The panel then asked him whether he had any other reasons for stopping his political activities, and the claimant replied that he did not. Clearly, the claimant did not cease his activities because of a fear of persecution.

Incident in 2008

[31] The claimant testified at the hearing that a water merchant threatened to kill him in 2008 because of his political opinion. However, the claimant failed to mention this agent of persecution and this fear at the start of the hearing.

[32] When asked to explain this omission, the claimant replied that he had not thought of it. This explanation is not reasonable. At the beginning of the hearing, the panel asked the claimant whom he feared and why. The claimant then mentioned the MOCHRENHA political party and one of its members. The panel then asked him whether he feared anyone else, to which the claimant replied that he did not. The panel also asked him whether he had grounds to fear anything else in Haiti; he again replied that he did not. Despite the opportunities the panel gave him, the claimant never mentioned this agent of persecution. If he actually did fear this person, it is reasonable to believe that he would have mentioned it spontaneously, particularly since he allegedly fears only two people. Furthermore, had it not been for the questions the panel asked him about his work and any problems related to those activities, it is quite possible that the claimant would not have mentioned this fear. For this reason, the panel does not believe that this incident occurred.

[33] Furthermore, the claimant testified that he filed a complaint with the police following this incident, but he submitted no documents in this regard. When asked why he had not done so, the claimant replied that he had not believed it was necessary to obtain the document. The panel does not accept this explanation. Not only does rule 11 of the RPD Rules state that a claimant

must submit documents to establish their identity and the other elements of their refugee protection claim, but the claimant has also demonstrated that he is aware of the importance of submitting evidence in support of his allegations and that he is able to do so, given that he contacted the OPL office in Haiti to have them send him a copy of his membership card. The panel draws a negative inference from the absence of this evidence.

[34] For all these reasons, the panel does not believe that this incident took place.

[35] Furthermore, the claimant stated that he did not see this individual again between the alleged incident and his departure from Haiti in 2010.

Radio programs

[36] The claimant testified that he appeared on radio programs in Haiti during which he expressed his political opinion, and that he would continue to do so if he were to return to Haiti. He mentioned two or three appearances. When asked whether he had experienced problems of any kind following these appearances, the claimant stated that he had not. The panel is of the opinion that, given this and the absence of any other factors, the claimant has not demonstrated that he would face a serious possibility of persecution in the future on this ground.

Inconsistent behaviour

[37] Depending on the circumstances, a delay in leaving the country of persecution, a failure to claim asylum in a country that is a signatory to the Convention, or a return to the country of persecution can considerably undermine a refugee protection claimant's subjective fear.[14]

[38] On this subject, Justice Tremblay-Lamer stated the following in *Kamana*:[15]

> The lack of evidence going to the subjective element of the claim is a fatal flaw which in and of itself warrants dismissal of the claim, since both elements of the refugee definition--subjective and objective--must be met.

[39] In this case, it must be noted that the claimant did not think it necessary to leave his country of citizenship permanently, even though he had travel documents that would have

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14 *Ilie, Lucian Ioan v. M.C.I.* (F.C.T.D., No. IMM-462-94), MacKay, November 22, 1994.

15 *Kamana, Jimmy v. M.C.I.* (F.C.T.D., No. IMM-5998-98), Tremblay-Lamer, September 24, 1999, paragraph 10.

allowed him to do so. He left his country of nationality temporarily on two occasions, but then returned. The claimant travelled to the Dominican Republic and to Turks and Caicos (two months) after the alleged events, but then returned to Haiti.

[40] The claimant also failed to claim asylum in another country. He failed to claim asylum in the United States when he arrived there in 2010, and did not do so until he arrived in Canada in July 2017. When questioned about this, the claimant testified that he did not claim asylum in the United States because he would not have been believed given that he had arrived with a fake visa. The panel does not consider this explanation reasonable. On the contrary, the panel is of the opinion that, if the claimant truly feared for his life, it would have been reasonable for him to seek protection in the United States upon his arrival and thereby justify his use of a fake visa.

[41] In the panel's opinion, the claimant's behaviour is not that of someone alleging a well-founded fear of persecution.

Prospective risk

[42] In light of the claimant's testimony and the evidence on the record, the panel concludes that the claimant has not demonstrated that he would face a serious possibility of persecution upon his return to Haiti.

Analysis under section 97 of the IRPA

[43] Since the agent of persecution was not connected to the state, the claimant's refugee protection claim will not be analyzed under paragraph 97(1)(a) of the IRPA, but, rather, under paragraph 97(1)(b) of the IRPA.

[44] The claimant alleged that he fears returning to Haiti because of the widespread insecurity there.

[45] It is well established in the case law that being a victim of crime is not a ground of persecution within the meaning of section 96 of the Act.[16] Likewise, a generalized risk of crime

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[16] *Lozandier v. Canada (Citizenship and Immigration)*, 2009 FC 770; *Jean, Léonie Laurore v. Canada (Citizenship and Immigration)*, 2010 FC 674.

faced by the entire population of a country cannot ground a claim for refugee protection under subparagraph 97(1)(b)(ii) of the Act.[17]

[46] In this refugee protection claim, the claimant did not submit any evidence to the panel that could allow it to conclude that he would be targeted, other than randomly. He referred only to the general situation in the country. The claimant did not allege any factors other than those previously rejected by the panel that could place him at greater or different risk than the rest of the Haitian population.

[47] The situation that prevails in the country is not, in itself, sufficient to conclude that a person is at risk.[18]

[48] For these reasons, the panel is of the opinion that the claimant has not established, on a balance of probabilities, that he would be personally subjected to the risk he alleged of being a victim of the insecurity in Haiti if he were to return to the country.

CONCLUSION

[49] The panel determines that the claimant has not established that he would face a serious possibility of persecution on a Convention ground, or that, on a balance of probabilities, he would be personally subjected to a danger of torture, to a risk to his life or to a risk of cruel and unusual treatment or punishment should he return to his country. Consequently, his claim for refugee protection is rejected.

Melanie Calisto Azevedo
Melanie Calisto Azevedo
October 12, 2018
Date

IRB translation
Original language: French

[17] *Prophète v. Canada (Citizenship and Immigration)*, 2008 FC 331, 2009 FCA 31; *Lamour, Nathalie v. M.C.I.* (2011 FC 322), Montigny, March 17, 2011.
[18] *Jarada v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 409.