

CANADA / JUDGMENT

## MB9-11243

COURT

Refugee Appeal Division

DECIDED

20 February 2020

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RAD File No. / No de dossier de la SAR : MB9-11243

MB9-11244

Private Proceeding / Huis clos

Reasons and Decision ? Motifs et décision

Persons who are the subject of the appeal

XXXX XXXX XXXX XXXXXXXXX XXXX XXXX

Personnes en cause

Appeal considered / heard at

Montréal, QC

Appel instruit / entendu à

Date of decision

February 20, 2020

Date de la décision

Panel

Mokhtar Lamani

Tribunal

Counsel for the persons who are the subject of the appeal

François Jean Denis

Conseil des personnes en cause

Designated representative

XXXX XXXX XXXX

Représentant(e) désigné(e)

Counsel for the Minister

N/A

Conseil du ministre

## REASONS FOR DECISION

### OVERVIEW

- [1] XXXX XXXX XXXX (principal appellant) and her minor daughter, XXXX XXXX XXXX (associate appellant) are Haitian citizens.
- a. The principal appellant left Haiti for Brazil, where she obtained permanent resident status, because of persecution by her uncle. She and her daughter left Brazil for the United States because of discrimination. They applied for asylum but did not wait to find out the outcome. They crossed the Canadian border illegally and sought Canada's protection.
  - b. The appellants submit that the Refugee Protection Division (RPD) erred in its analysis of their claim for refugee protection. They are requesting that the Refugee Appeal Division (RAD) set aside the RPD's determination and grant them refugee protection or hold another hearing to establish that the appellants are credible and that there are no inconsistencies or implausibilities between their testimony and the evidence on the record.<sup>1</sup> After analyzing the factors in Zeng, including the fear in Haiti (country of origin), the RPD excluded the appellants under 1E because it found that the principal appellant was not credible with regard to her allegations.
  - c. The issue in this case is whether the RPD erred in its assessment of the appellants' credibility.
  - d. The appellants did not present new evidence under subsection 110(4), but are nevertheless requesting that a hearing be held before the RAD.<sup>2</sup> In another separate paragraph, they also ask that the matter be referred to the RPD.<sup>3</sup>
  - e. As was the case for the RPD, the determinative issue for the RAD is exclusion under 1E.

### DETERMINATION

- [2] The RAD dismisses the appeal. The RPD correctly concluded that the appellants are excluded under 1E of the Convention.

### BACKGROUND

- [3] According to her Basis of Claim Form (BOC Form), the principal appellant alleges that after her father's death in 2011, her uncle took over their assets. She and her husband took legal action against her uncle.

- [4] Her uncle tried to kill them with the help of criminals, which prompted her husband to leave for Brazil in XXXX 2012. She moved from Gonaïves to Port-au-Prince shortly thereafter, but her uncle kept searching for her in order to kill her.
- [5] On XXXX XXXX XXXX XXXX, the appellant and her minor daughter joined her spouse in Brazil, where they stayed until XXXX XXXX XXXX XXXX, in fear of her uncle, who stated that he would go all the way to Brazil to kill them.
- [6] They decided to leave Brazil for the United States on account of discrimination, but the American authorities denied the husband entry to the United States, so he stayed in Mexico.
- [7] In the United States, the appellants applied for asylum in February 2017, did not follow up and, because of President Trump's immigration policies, they decided to cross the Canadian border illegally on XXXX XXXX XXXX XXXX.
- [8] The Minister filed a notice of intervention<sup>4</sup> in which he submits that he established prima facie that Article 1E of the Convention applies to the appellants because the evidence on the record shows that they have a status in Brazil that confers rights on them that are substantially similar to those of Brazilian nationals.
- [9] The Minister considers the fact that they abandoned their permanent residency in Brazil in order to risk irregularly entering several countries from which they could have been deported to Haiti, to be behaviour that is inconsistent with that of a person who claims to fear for their life.

## HEARING BEFORE THE REFUGEE APPEAL DIVISION

- [10] Subsection 110(6) of the Act<sup>5</sup> stipulates that the RAD may hold a hearing if there is new evidence that meets certain admissibility criteria. As no new evidence was submitted and accepted in this case, the RAD will proceed without holding a hearing pursuant to subsection 110(3) of the Act.<sup>6</sup>

## ANALYSIS

- [11] The RAD's role is to examine all of the evidence and determine whether the RPD's decision is correct.<sup>7</sup>
- [12] The RPD found that the cumulative credibility issues raised at the hearing irremediably undermined the principal appellant's credibility and that she failed to establish her allegations, on a balance of probabilities.<sup>8</sup> After weighing the factors in Zeng, the RPD also concluded that, under Article 1E of the Convention and section 98 of the Immigration and Refugee Protection Act (IRPA), the appellants are neither Convention refugees nor persons in need of protection within the meaning of subsection 97(1) of the IRPA.

[13] The appellants submit that [translation] "[t]he RPD erred in its assessment of the principal appellant's credibility, particularly in the interpretation of the Minister's arguments. It was over-vigilant. Some of its findings are capricious and based on non-determinative factors."<sup>9</sup>

[14] Aside from general grievances and without specific arguments, that is, the application of North American understanding and reasoning, a poor analysis of the evidence, the RPD's overzealousness in conducting a microscopic examination, over-vigilance and a breach of the principle of natural justice, the appellants submitted two specific criticisms against the RPD's decision:

- 1) Did the RPD correctly apply the exclusion based on Article 1E of the Convention?
- 2) Did the RPD correctly assess the appellants' allegations and fear in Haiti?

### A) Application of Zeng

[15] In cases where a refugee protection claimant had a status that granted them substantially the same rights as those of the nationals of a third country, but then lost that status, the factors in Zeng must be weighed to establish exclusion from protection.

[16] The appellants are not contesting having obtained permanent resident status in Brazil, which grants rights similar to those of Brazilian citizens. The RAD does not see any errors in the RPD's conclusion.

[17] The appellants left Brazil on XXXX XXXX XXXX XXXX, and the RPD hearing was held more than two years later on April 11, 2019. The documentary evidence shows that, on a balance of probabilities, this absence of more than two years means that they have lost their status as residents of Brazil.

[18] The RAD considers that, in its reasons, the RPD correctly analyzed the exclusion based on the other factors set out in Zeng, namely, the reason for the loss of status, whether the appellants can return to Brazil, the risk that the appellants would face in Haiti, Canada's international obligations and any other relevant facts.

[19] In their memorandum, the appellants submit that the RPD erred in its conclusions with respect to the voluntary nature of the loss of their status in Brazil and the possibility of returning to Brazil.

### Voluntary or involuntary loss of residency

[20] The RPD was of the opinion that the alleged incidents in Brazil do not meet the persecution threshold. Consequently, it could not conclude that the circumstances of the appellants' departure from Brazil were involuntary.<sup>10</sup>

- [21] At the hearing, the appellants argued that the principal appellant explained all the reasons why she could not stay in Brazil. It was impossible for her to take a course to learn Portuguese or to find employment without speaking the country's language. As a result, the loss of residency was involuntary.<sup>11</sup>
- [22] The RAD disagrees.
- [23] In her written account, the principal appellant mentions no fear or incident in Brazil. She brought them up for the first time at the hearing.
- [24] When confronted with this omission, she responded that she believed she could discuss it at the hearing, that there were so many things to write down, and that she summarized the reasons for her refugee protection claim.<sup>12</sup>
- [25] The RAD finds that failing to make allegations regarding Brazil is a significant omission that undermines the credibility of the principal appellant, who also acknowledged that she had basic rights in Brazil similar to those of Brazilian citizens, despite certain discrimination issues.<sup>13</sup>
- [26] In this context, the RAD concludes that the appellants voluntarily left Brazil for the United States, and then for Canada. The analysis of this factor significantly weighs in favour of exclusion, especially considering that the case law establishes that "[r]efugee claims were never meant to allow a claimant to seek out better protection than that from which he or she benefits already."<sup>14</sup>

### **Possibility of returning to Brazil and risk in Brazil**

- [27] The RPD was of the opinion that the documentary evidence was not conclusive regarding the appellants' possibility of returning to Brazil and having administrative recourse to maintain their permanent resident status. As a result, the panel gives neutral weight to this criterion in the analysis referred to in Zeng.<sup>15</sup>
- [28] The appellants submit that the RPD erred in its approach since the principal appellant had clearly explained during her testimony that she was a victim of discrimination. They cite the documentary evidence,<sup>16</sup> which states that permanent visa holders in Brazil do not have the right to return to Brazil if they leave the country.
- [29] They claim that their fear is consistent with the documentary evidence outlining the discrimination and endemic racism against Haitians in Brazil, and that the RPD erred in assessing the prospective risk to which they would be exposed in Brazil.<sup>17</sup>
- [30] The RAD does not contest the various parts of the National Documentation Package (NDP) on Brazil, cited by the appellants in their memorandum of appeal. All of these excerpts reflect the unfortunate existence of racial discrimination against Afro-Brazilians and Haitians in particular.

- [31] While racism against Afro-Brazilians and Haitians in Brazil does exist, it is not sufficient to establish persecution in the appellants' case. The case law clearly states that persecution is defined as "sustained or systematic violation of basic human rights demonstrative of a failure of 'state protection'."18
- [32] The jurisprudence is clear that once the Minister establishes prima facie evidence of the appellants' status, the burden shifts to the appellants to demonstrate to the RPD that they do not have permanent resident status.19
- [33] Furthermore, the evidence in the most recent NDPs on Haiti and Brazil are also unclear with respect to the possibility of permanent residents regaining their status if they have been absent from Brazil for a period exceeding two years. Brazilian law now specifies that loss of status is not automatic, but that the status will be lost unless an individual justifies his or her absence.20
- [34] Consequently, the RPD did not err in concluding that the evidence is not clear with respect to the right to return to Brazil or in giving neutral weight to this criterion.

### Canada's international obligations

- [35] The RPD considered Canada's international obligations with respect to refugee protection and concluded that these obligations would not be contravened with the application of Article 1E of the Convention by giving careful consideration to the fact that the reasons for which the appellants left Brazil do not correspond to persecution under section 96 of the IRPA or to a personalized risk within the meaning of section 97 of the IRPA.21 Furthermore, the appellants did not establish a serious possibility of persecution in Haiti or that, on a balance of probabilities, they would be subjected personally to a danger of torture, to a risk to their lives or to a risk of cruel and unusual treatment or punishment if they returned to Haiti.22
- [36] The appellants did not provide any arguments relating to this factor, except for the fact that the RPD limited itself to the Minister's arguments and did not consider the documentary evidence on Brazil, especially that which outlines a situation of discrimination against Blacks, who are mistreated and killed in Brazil.23
- [37] Under the same heading (Canada's international obligations), they submit that the RPD was indifferent and biased, if not malicious, that its [translation] "conclusions are so ambiguous, it stands to reason that it is a breach of the principle of natural justice."24
- [38] The RAD is of the opinion that the RPD did not err in concluding that Canada has met its international obligations for refugee protection since the appellants would not be subjected to a risk in Haiti, as set out below. They consequently were not likely to return to a country where they would face a serious possibility of persecution or a risk of harm. This also applies to Brazil, where the appellants had voluntarily lost their status.

[39] This conclusion weighs in favour of excluding the appellants under Article 1E of the Convention.

### Natural justice

[40] With respect to the RPD's indifference, bias and maliciousness, and its breach of natural justice, the appellants did not provide any specific arguments or relevant explanation as to the RPD's errors in the matter, as stipulated by subparagraph 3(3)(g)(ii) of the Refugee Appeal Division Rules, which states that the memorandum must include full and detailed submissions regarding where the errors are located in the RPD's written reasons.

[41] The RAD cannot support these arguments and considers them unfounded. The RAD analyzed the entire record, including the recording of the hearing, and finds that there was no breach of natural justice. The RPD considered all of the evidence, and the principal appellant understood the proceedings, submitted evidence in support of her claim and had the opportunity to persuade the panel that her claim was well-founded.

[42] The RPD respected the principles of natural justice.

#### B) Appellants' fears in Haiti

##### 1) Principal appellant's contradictions

[43] Having noted significant contradictions and omissions in the principal appellant's testimony and between her testimony, her BOC Form and the documents submitted in support of the refugee protection claim,<sup>25</sup> the RPD therefore found that the principal appellant's allegations were not credible.<sup>26</sup>

[44] The appellants submit that the RPD chose to disregard the explanations of the principal appellant, who was stressed as it was her first experience before a panel. She completed a few years of elementary school, and she did not know how to correctly explain her evidence.<sup>27</sup>

[45] She also submits that the RPD erred since it was over-vigilant with respect to non-essential evidence. They cited a series of decisions from the case law to request that the RAD reject the RPD's unjust and erroneous conclusions.<sup>28</sup>

[46] The RAD cannot agree with the appellants' arguments.

[47] In a number of paragraphs of its reasons, the RPD clearly explained and elaborated on the nature of the contradictions and omissions that undermined the appellants' credibility:

- The fact that she left Gonaïves for Port-au-Prince, where she remained in hiding for three years without ever leaving her hiding places or filing a complaint with the police, and her subsequent testimony when she stated that she had returned to Gonaïves to file a complaint. When asked to explain this contradiction, the appellant responded that she had returned because she could no longer bear the situation with her uncle.

- The fact that the appellant indicates in her Schedule A form that she was a XXXX in Gonaïves from October 1, 2007, to October 1, 2015, when she testified that she had left Gonaïves to live in Port-au-Prince from 2012 to 2015, without holding a job because she no longer left the house. When asked to explain this contradiction, the appellant claimed that she did not understand the question, after attempting to give evasive answers, such as: [translation] "Yes, I wrote that and I travelled a lot."<sup>29</sup>
- The failure to mention that her family continued to receive regular threats from the persecuting uncle until 2017. When asked to explain this omission, the appellant responded that she was told to expand on her allegations during her testimony.
- Other contradictions regarding credibility were raised in the RPD's reasons and, like those mentioned above, were not contested.

[48] At the start of the hearing, the RPD asked the appellant's counsel to show his client the forms signed upon her arrival in Canada. These forms included Schedule A of the IMM 5669 form. The appellant confirmed that the information on the forms was complete, true and correct and that she had understood the forms.

[49] During the hearing, the principal appellant did not have satisfactory answers for several of the RPD's concerns regarding the failure to include major incidents of persecution in her BOC Form, contradictions between the account in her BOC Form and her statements before the RPD, or the omissions in the evidence provided in support of her allegations. Her answers were evasive and inconsistent and her explanations were unreasonable and unsatisfactory.

[50] The appellants' stress and low education level, as noted by their counsel, cannot account for the many major, serious and significant credibility issues that were raised at the hearing.

[51] The Federal Court holds that "when the witness has difficulty giving adequate and direct answers, the panel may make a negative credibility finding."<sup>30</sup>

[52] The RPD rightfully found that she was not credible with respect to her allegation that she was in hiding in Port-au-Prince for three months and that her explanations were not satisfactory.

[53] The analysis of this factor strongly weighs in favour of exclusion because the principal appellant failed to demonstrate that she would be subjected to danger if she returned to Haiti.

## 2) Risk in Haiti - residual profile

[54] The RPD concluded that the principal appellant failed to establish a well-founded fear of gender-related persecution.<sup>31</sup>

[55] The appellants claim that the RPD chose to downplay their objective fear in its assessment of their membership in the particular social group of women.<sup>32</sup>

- [56] The RAD disagrees for the following reasons.
- [57] In their memorandum, the appellants did not state how the RPD allegedly failed to consider Guideline 4.
- [58] The RPD specifically mentioned in its reasons that it took it into account and explained in several paragraphs its consideration to assess whether the principal appellant would be at risk of gender-related violence under section 96 of the IRPA.
- [59] Guideline 4 sets out guidelines to determine whether women constitute a particular social group within the meaning of the Convention and offers advice on assessing a claim that meets this criterion. The decisions in Josile and Dezameau confirm that women in Haiti may be a particular social group within the meaning of the Convention.
- [60] Like the RAD, the RPD must be particularly sensitive to the difficulties experienced by certain women who are victims of or who fear being victims of violence when they testify. However, Guideline 4 was not intended to serve as a cure for deficiencies in the refugee protection claim or documents provided as evidence.
- [61] Nothing in the RPD's analysis indicates that Guideline 4 and the above-cited case law were not taken into consideration. The RPD showed due respect for the principal appellant's situation.
- [62] The RPD also seems to be following the recent case law confirming that women in Haiti are a particular social group within the meaning of the Convention. It assessed the refugee protection claim under section 96 to determine whether there is a serious possibility of persecution.
- [63] Upon finding that the appellant was not credible with respect to the alleged facts, the RPD concluded that there was no "serious possibility" of her being persecuted on one of the Convention grounds.
- [64] The RPD did not err in applying the guideline or recent case law. The panel instead rejected the claim based on its credibility assessment, which is not an error in itself.
- [65] Lastly, the RAD is of the opinion that the appellants' criticisms are unfounded and concludes that the principal appellant failed to demonstrate, on a balance of probabilities, that she would be subjected to a risk to her life or to a risk of cruel and unusual treatment or punishment if she returned to Haiti.
- [66] The RAD concludes that the factors set out in Zeng, considered as a whole, weigh in favour of excluding the appellants from the protection of the Convention. The fact that they left Brazil voluntarily and that they failed to establish a serious possibility of persecution or a risk to their lives or a risk of cruel and unusual treatment or punishment in Haiti are the factors carrying the most weight in this analysis.
- [67] The RPD's decision is correct.

## CONCLUSION

[68] The RAD dismisses the appeal and confirms the determination of the RPD that the appellants are not refugees under Article 1E of the Convention. Consequently, they are neither Convention refugees nor persons in need of protection under section 98 of the IRPA.

Mokhtar Lamani

Mokhtar Lamani

February 20, 2020

Date

IRB translation

Original language: French

1 Appellants' memorandum, Conclusion: Decision sought, p. 30 of the scanned Refugee Protection Division (RPD) record.

2 Appellant's record, p. 19, Checklist for the appellant's record submitted to the RAD, para. 6.

3 Appellants' memorandum, p. 8, para. 8.

4 RPD record, Minister's notice, pp. 148 to 152 of the scanned record.

5 Subsection 110(6) of the Immigration and Refugee Protection Act (IRPA).

6 Subsection 110(3) of the IRPA.

7 Canada (M.C.I.) v. Huruglica, 2016 FCA 93; Rozas del Solar v. Canada (M.C.I.), 2018 FC 1145.

8 RPD reasons, para. 36.

9 Appellants' memorandum, page 2, para. 3.

10 RPD reasons, para. 28.

11 Appellants' memorandum, first point in para. 6, page 4.

12 Hearing recording, minute 36:15.

13 Ibid., minutes 34:40 to 38:00.

14 Canada (Attorney General) v. Ward, [1993] 2 SCR 689, p. 726; Fleurant v. Canada, 2019 FC 754, para. 13.

15 RPD reasons, para. 30.

16 Response to Information Request. Brazil. (May 25, 2016) BRA105515.FE, para. 1.

17 Appellants' memorandum, second point in para. 6, page 5.

18 Ranjha v. Canada (MCI) 2003 FCT 637, 2003 FC 637; Sagharichi v. Canada (M.E.I.) (1993), 182 N.R. 398 C.A.

19 Canada (M.C.I.) v. Tajdini, 2007 FC 227, at para. 36.

20 National Documentation Package on Haiti (March 29, 2019), Tab 14.11: Brazil and Haiti: Situation of Haitians in Brazil, including rights and obligations; permanent resident status; documents issued to Haitians, including Foreigner Identity Cards... Immigration and Refugee Board of Canada. June 21, 2018. ZZZ106127.FE, section 2.4.

21 RPD reasons, para. 43.

22 Ibid.

23 Appellants' memorandum, third point in para. 6, page 5.

24 Ibid.

25 RPD reasons, para. 31.

26 Ibid., para. 36.

27 Appellants' memorandum, page 6.

28 Ibid., page 7.

29 Hearing recording, minute 1:14:16.

30 Gjergo v. Canada (M.C.I.), 2004 FC 303.

31 RPD reasons, para. 42.

32 Appellants' memorandum, (b) risk in Haiti, page 7.

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RAD File No. / No de dossier de la SAR : MB9-11243

MB9-11244

RAD.25.02 (January 2020)

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Immigration and Refugee

Board of Canada

Refugee Appeal Division

Commission de l'immigration

et du statut de réfugié du Canada

Section d'appel des réfugiés

RAD.25.02 (January 2020)

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