

CANADA / JUDGMENT

MB9-26399

COURT

Refugee Appeal Division

DECIDED

2 November 2020

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RAD File No. / No de dossier de la SAR : MB9-26399 MB9-26400 Private Proceeding / Huis clos
Reasons and decision ? Motifs et décision Persons who are the subject of the appeal XXXX XXXX
XXXXXXXX XXXX XXXX XXXX (a.k.a. XXXX XXXX XXXX XXXX) Personnes en cause Appeal
considered / heard at Montréal, QC Appel instruit / entendu à Date of decision November 2, 2020
Date de la décision Panel Mokhtar Lamani Tribunal Counsel for the persons who are the subject
of the appeal Jean-Pierre Chamoun Conseil des personnes en cause Designated representative N/
A Représentant(e) désigné(e) Counsel for the Minister N/A Conseil du ministre REASONS FOR
DECISION OVERVIEW

- [1] XXXX XXXX (principal appellant) and his wife, XXXX XXXX XXXX XXXX (a.k.a. XXXX XXXX
XXXX XXXX) (associate appellant) are citizens of Haiti. They are appealing the Refugee
Protection Division (RPD) decision dated October 22, 2019, rejecting their refugee protection
claims on the grounds of an exclusion under 1E.
- [2] The appellants allege that the RPD's reasons for decision contain the following errors:
- Erroneous assessment of the application of the exclusion under 1E1
 - Erroneous assessment of their fear in Haiti²
 - Erroneous determination that they are not refugees³
- [3] The appellants are asking the Refugee Appeal Division (RAD) to set aside the RPD's
determination and grant them refugee status or refer the matter to differently constituted
panel of the RPD.⁴
- [4] The determinative issue for the RAD, as it was for the RPD, is the 1E exclusion.

DETERMINATION

- [5] For the reasons given below, the appeal is dismissed. The RAD agrees with the RPD's
conclusion that the appellants are excluded from protection under Article 1E of the United
Nations Convention Relating to the Status of Refugees (the Convention) and section 98 of the
Immigration and Refugee Protection Act (IRPA).

- [6] Moreover, the RAD agrees with the RPD's conclusion that the appellants did not establish a serious possibility of persecution on a Convention ground or, on a balance of probabilities, a risk of harm that would make them persons in need of protection in relation to their country of origin, Haiti.

BACKGROUND

- [7] According to his Basis of Claim Form (BOC Form), the principal appellant belonged to the Inite political party in 2011. He allegedly received death threats from the group Répons Paysans, which eventually became the Parti haïtien Tèt Kale (PHTK) [Haitian Tèt Kale party].
- [8] On XXXX XXXX, 2013, his house was vandalized by that group, and he decided to leave his country to save himself. Three days later (XXXX XXXX, 2013), he went to the XXXX XXXX.
- [9] The following day (XXXX XXXX, 2013), and because of racism against Haitians, the principal appellant left the XXXX XXXX. He travelled through several countries before arriving in Brazil on XXXX XXXX, 2013.
- [10] His wife (the associate appellant) joined him in Brazil on XXXX XXXX, 2013.
- [11] The appellants remained in Brazil for more than three years (until XXXX XXXX, 2016).
- [12] They did not claim asylum in Brazil because of the widespread racism against Haitians.
- [13] The appellants allege that they received death threats in Brazil. They left Brazil and travelled through several countries before arriving in the United States on XXXX XXXX, 2016 (for the husband) and XXXX XXXX, 2016 (for the wife).
- [14] They did not claim asylum in the United States because they feared the Trump administration.
- [15] On XXXX XXXX, 2017, they crossed the Canadian border illegally and claimed Canada's protection. Minister's intervention
- [16] On September 20, 2019, the Minister filed a notice of intervention⁵ in which he argues that the appellants' names are on the list of 43,781 Haitians who were given a chance to regularize their status and obtain permanent residence.
- [17] The Minister states that Brazil's Official Gazette published on XXXX XXXX, 2014, shows that the principal appellant, XXXX XXXX, was granted permanent residence in Brazil.
- [18] The Minister states that he has established prima facie that the appellants should be excluded from the application of the Convention under Article 1E. STANDARD OF REVIEW
- [19] The RAD reviews RPD decisions by applying the correctness standard after carrying out its own assessment of the record. The exception to this rule is where the RPD enjoys a meaningful advantage in assessing credibility.⁶ That said, the RAD's role is to determine whether, as submitted by the appellants, the RPD erred.

[20] The RAD applied the correctness standard in this case.

ANALYSIS

[21] After weighing the Zeng factors, the RPD concluded that the appellants are referred to in Article 1E of the Convention.⁷

[22] The RAD, like the RPD, considered the factors in Zeng regarding the application of the 1E exclusion: Considering all relevant factors to the date of the hearing, does the claimant have status, substantially similar to that of its nationals, in the third country? If the answer is yes, the claimant is excluded. If the answer is no, the next question is whether the claimant previously had such status and lost it, or had access to such status and failed to acquire it. If the answer is no, the claimant is not excluded under Article 1E. If the answer is yes, the RPD must consider and balance various factors. These include, but are not limited to, the reason for the loss of status (voluntary or involuntary), whether the claimant could return to the third country, the risk the claimant would face in the home country, Canada's international obligations, and any other relevant facts.

[23] The RAD notes that the RPD continued its reasons by analyzing the exclusion in accordance with the Zeng factors, namely, the reason for the loss of status, whether the appellants could return to Brazil, the risk the appellants would face in Haiti, Canada's international obligations, and any other relevant facts. The appellants were permanent residents of Brazil

[24] The appellants are not challenging the fact that they obtained permanent resident status in Brazil, which gave them rights similar to those of Brazilian citizens. The RAD sees no error in the RPD's conclusion. Loss of status in Brazil

[25] The appellants left Brazil on XXXX XXXX, 2016, and the RPD hearing was held on October 3, 2019, more than two years later. The documentary evidence⁸ shows that, on a balance of probabilities, this absence of more than two years means that they lost their status in Brazil.

[26] The RAD must therefore continue to analyze the exclusion in accordance with the other factors in Zeng, that is, the reason for the loss of status, whether the appellants could return to Brazil, the risk the appellants would face in Haiti, Canada's international obligations, and any other relevant facts. Voluntary loss of their permanent resident status in Brazil and risk of persecution in Brazil

[27] The RPD concluded based on the information in the National Documentation Package (NDP) that Haitians are not sheltered from discrimination and prejudice in Brazil. Nonetheless, the hardships that the appellants allegedly faced (racism and loss of employment) do not allow for a conclusion, on a balance of probabilities, that their situations in Brazil prompted an involuntary departure.

- [28] The appellants testified that during the three years they lived in Brazil, the only problems they experienced were in connection with their jobs. Although the RPD found it credible that the appellants were victims of discrimination and racism, it was of the opinion that those events did not amount to persecution within the meaning of the Convention and section 96 of the IRPA.⁹
- [29] They argue that, notwithstanding the fact that the assaults were essentially committed in the context of employment, that does not mitigate impact they had on the appellants' physical and psychological integrity.¹⁰ They cite the case law and also argue that they were threatened by their former Brazilian colleagues, that these actions do not constitute mere intimidation or [translation] "racism," and that they were not occasional,¹¹ but were repeated physical attacks that targeted them personally in a context of impunity and minimization of violence and hatred against Haitians.¹²
- [30] Lastly, the appellants submit that they established a fear of persecution in Brazil and that the RPD erred by considering that they left Brazil voluntarily.¹³
- [31] The RAD disagrees.
- [32] The workplace incidents reported by the appellants do indeed confirm that they faced acts of racism and discrimination that many Haitian claimants describe, but are not sufficient to constitute an involuntary reason for the appellants to leave Brazil. According to the case law, persecution is the "sustained or systematic violation of basic human rights demonstrative of a failure of state protection."¹⁴
- [33] The Brazilian authorities did not remove or deport the appellants or require them to leave the country. On the contrary, they gave them access to a permanent status that would have protected them from being removed or deported to Haiti, the country they allegedly fear returning to.
- [34] The appellants testified that they decided to leave Brazil after the principal appellant was dismissed. When the RPD asked him to explain why he mentioned in his BOC Form that he had received a death threat, the principal appellant answered that in 2014 or 2015, his former boss had told him [translation] "that he would cross paths with him again in the area where he lived" and that the only attacks against him were at work.
- [35] He was then asked if there had been any other problems, and the principal appellant only mentioned the economic crisis in Brazil. The associate appellant also testified that there was a job shortage in Brazil and that employers were starting to lay off all Haitians.
- [36] Therefore, the appellants left Brazil voluntarily and went off into the unknown, without worrying that one of the countries they travelled through might decide to deport them, refuse to let them enter or return them to Haiti. Although the appellants are entitled to want to improve their economic situation, the RPD found that that situation did not align with an interpretation that could be given to section 96 or subsection 97(1) of the IRPA.

- [37] In that context, the RAD concludes that the appellants left Brazil voluntarily to go the United States. The analysis of this factor weighs heavily in favour of exclusion, especially considering that, according to the case law, "refugee claims were never meant to allow a claimant to seek out better protection than that from which he or she benefits already."¹⁵ Whether the appellants could return to Brazil
- [38] At the time of the RPD hearing, the appellants had been absent from Brazil for more than two years. They lost their status as a result and, on a balance of probabilities, they cannot return to Brazil.
- [39] Moreover, the appellants are not challenging the RPD's conclusion regarding whether they could return to Brazil.
- [40] The RAD agrees with that conclusion. Risk in the country of origin (credibility and prospective risk)
- [41] The RPD analyzed the appellants' allegations against Haiti and found that their testimony was credible and that they demonstrated, on a balance of probabilities, that the principal appellant was a member of the Inite party and that he was a victim of telephone threats and an attack between 2011 and his departure from Haiti in 2013.¹⁶
- [42] However, the RPD was of the opinion that the past events, despite their relevance, were insufficient on their own to establish a future risk¹⁷ and concluded that the appellants did not establish, on a balance of probabilities, that the agents of persecution were individuals or criminals who intended to harm them if they returned to Haiti.¹⁸
- [43] The appellants argue that the RPD acknowledged that the political situation in Haiti is precarious but did not conclude that the principal appellant would be subjected to a risk [translation] "for the simple reason that he had previously been a member of an opposition political party."¹⁹ The appellants argue that the RPD's conclusion is erroneous [translation] "because, in Haiti, opposing a ruling political party is not an insignificant 'simple reason' that cannot be a basis for a refugee protection claim."²⁰ Thus, the RPD underestimated the danger in opposing the government and the people in power.²¹
- [44] The appellants cite passages from the NDP on Haiti and argue that even though the male appellant stated that he [translation] "no longer intended to be involved in politics if he returned to Haiti," as reported in paragraph 60 of the RPD decision, that does not mean that the previous assailants, who are still in power today, will leave him alone.²²
- [45] The RAD does not accept those arguments.
- [46] Evaluations of prospective risk must be based on a careful assessment of the evidence and reasonable inferences that can be made from the evidence. While the evidence in the NDP on Haiti indicates that political conflicts can often lead to vengeance, there must still be some evidence establishing that the alleged agents of persecution would have the interest and motivation to persecute or harm the claimant, especially so many years later.

- [47] The NDP states that the people most vulnerable to political revenge tend to be political figures, supporters and colleagues of political figures, community leaders, journalists, people working for non-governmental organizations and small business owners.²³
- [48] In addition, the evidence in the NDP on Haiti indicates that the likelihood of an act of revenge diminishes over time and depends on the issue that triggered the desire for revenge in the first place, geographical distance and the power of the armed group threatening revenge.²⁴
- [49] The source cited on this issue in the Response to Information Request at Tab 7.6 of the NDP on Haiti gave the hypothetical example of a person whose testimony leads to the imprisonment of a gang leader and then moves to a different part of the country and ceases to engage in activities against the gang. According to the source, in this scenario, the threat of revenge should be completely gone in five to ten years.²⁵
- [50] In this case, nearly nine years have passed since the telephone threats, and seven years since the PHTK criminals vandalized the appellants' home.
- [51] Although the PHTK is still in power, that is not a sufficient reason to conclude that the criminals affiliated with that party would have the interest and motivation to persecute the principal appellant because he was a member of the Init  party at that time. He took little action against them and, as he testified, his political involvement in 2011 was minimal and limited to menial tasks.
- [52] There is no credible evidence that the PHTK criminals continued to cause problems for the appellants' families and, at the hearing, the principal appellant confirmed that his family-several brothers and sisters-who still lived in Haiti had never been attacked or received threatening calls.
- [53] The RPD criticized the associate appellant for testifying that her family members had been attacked by the same group of criminals, but in her BOC Form, she did not mention this incident.
- [54] The appellants argue that the RPD misinterpreted the associate appellant's comments, as her statement that her BOC Form was complete was not meant to mislead the RPD, rather, she did not really understand the scope and the repercussions of her declaration on the outcome of the case.²⁶ They add that, in their opinion, the BOC Form and the testimony complement each other and there is no contradiction between them.²⁷
- [55] The RAD disagrees.
- [56] First, it is not a matter of a contradiction, but an omission of a factor at the heart of the refugee protection claim, namely, whether the appellants' family members who still live in Haiti were threatened or attacked. The omitted information is important to assessing the profile of the agent of persecution and the prospective risk should they return to Haiti.

- [57] Also, when the associate appellant was asked to explain the omission, her answer that it was the fault of the person who had helped her complete her BOC Form was not satisfactory. She signed her BOC Form on September 25, 2017, assisted by her counsel (given that she answered yes to question 9(a) of the BOC Form) and the RPD hearing was held on October 3, 2019, giving her more than two years to amend or correct her BOC Form.
- [58] Finally, the associate appellant confirmed at the start of the hearing that the information in her BOC Form was true, complete and correct, and that was an opportunity for her to complete her story. She could have added recent developments or even factors that she might have forgotten over time and remembered again as the hearing approached.
- [59] The RAD concludes, like the RPD did, that the appellants did not establish a serious possibility of persecution in Haiti or that they would be subjected to a risk to their lives or a risk of cruel and unusual treatment or punishment.
- [60] The analysis of this factor weighs strongly in favour of exclusion because the appellants did not demonstrate that they face a risk should they return to Haiti. Canada's international obligations
- [61] The RPD concluded that the appellants' removal to Haiti would not violate Canada's international obligations. The appellants are not challenging the assessment of this factor. The RAD sees no errors in this conclusion. Analysis of Zeng factors as a whole
- [62] The RPD's decision is correct. The factors in Zeng, considered as a whole, weigh in favour of the appellants' exclusion from Convention protection. The fact that they left Brazil voluntarily and did not establish a serious possibility of persecution or a personal risk, on a balance of probabilities, in Haiti are the factors with the most weight in this analysis.

CONCLUSION

- [63] The RAD dismisses the appeal and confirms the RPD's determination that the appellants, XXXX XXXXXXXXXX and his wife, XXXX XXXX XXXX XXXX (a.k.a. XXXX XXXX XXXX XXXXXXXXXX), are excluded under Article 1E of the Convention. (signed) Mokhtar Lamani Mokhtar Lamani November 2, 2020 Date IRB translation Original language: French 1 P-2, appellants' record, appellants' memorandum, para. 11. 2 Ibid., para. 12. 3 Ibid., para. 13. 4 Ibid., memorandum conclusion, page 35. 5 SPR-1, Refugee Protection Division (RPD) record, Minister's notice of intervention, pages 190 to 194. 6 Canada (MCI) v. Huruglica, 2016 FCA 93; Rozas del Solar v. Canada (MCI), 2018 FC 1145. 7 SPR-1, RPD record, RPD reasons, para. 82. 8 SPR-1, National Documentation Package (NDP) on Haiti (September 30, 2019), Tab 14.11, Brazil and Haiti: Situation of Haitians in Brazil, including their rights and obligations; permanent resident status; documents issued to Haitians, including Foreigner Identity Cards.... Immigration and Refugee Board of Canada (IRB). June 21, 2018. ZZZ106127.FE. 9 SPR-1, RPD record, RPD reasons, para. 41. 10 P-2, appellants' record, appellants' memorandum, para. 19. 11 Ibid., para. 20. 12 Ibid., paras. 21 and 22. 13 Ibid., paras. 31 to 35. 14 Ranjha v. Canada (MCI), 2003 FC 637; Sagharichi v. Canada (MCI) (1993), 182 N.R. 398

(C.A.). 15 Canada (Attorney General) v. Ward, [1993] 2 SCR 689, p. 726; recently cited in Fleurant v. Canada (MCI), 2019 FC 754, para. 13. 16 SPR-1, RPD record, RPD reasons, paras. 51 to 55. 17 Ibid., para. 56. 18 Ibid., para. 68. 19 P-2, appellants' record, appellants' memorandum, para. 38. 20 Ibid., para. 39. 21 Ibid., para. 40. 22 Ibid., paras. 41 to 47. 23 SPR-1, NDP on Haiti (September 30, 2019), Tab 7.6: Acts of revenge committed by gangs or by other organized crime entities; ability of gangs or other organized crime entities to track down their targets, including those who return to Haiti after a long absence. IRB. July 3, 2018. HTI106117.FE, s. 1.4. 24 Ibid., NDP on Haiti (September 30, 2019), Tab 7.6, p. 5. 25 Ibid., NDP on Haiti (September 30, 2019), Tab 7.6, s. 1.3. 26 P-2, appellants' record, appellants' memorandum, para. 57. 27 Ibid., para. 58.

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Prepared on 28 October 2026 · Esheria