

CANADA / JUDGMENT

MB9-07917

COURT

Refugee Appeal Division

DECIDED

24 February 2020

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RAD File / Dossier de la SAR : MB9-07917

MB9-07918

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 24, 2020

Date de la décision

Panel

Me Toni Jedid

Tribunal

Counsel for the persons who are the subject of the appeal

Me Aniurka Virginia Cabello Coronado

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), a citizen of Haiti, is the mother of XXXX XXXX XXXX (associate appellant), a 15-year-old minor and citizen of the Netherlands. They are appealing against the Refugee Protection Division (RPD) decision excluding the principal appellant under Article 1E of the Convention and rejecting the associate appellant's refugee protection claim because there is no risk for him in the Netherlands.
- [2] The appellants allege that the RPD failed to consider all the evidence and failed to assess the prospective risk for the associate appellant in the Netherlands.
- [3] The determinative issues are as follows:
- * Was the exclusion under Article 1E of the Convention correctly applied?
 - * Did the RPD incorrectly assess state protection with respect to the associate appellant?
- [4] I conclude that the principal appellant is not excluded, I allow her appeal and I refer the matter to the RPD.
- [5] Regarding the associate appellant, I conclude that the RPD's determination is correct and that he is not a Convention refugee or a person in need of protection. His appeal is dismissed.

FACTUAL BACKGROUND

- [6] In her Basis of Claim Form (BOC Form), the principal appellant alleges fear of returning to Curaçao, a Dutch island, because her husband's mistress, Isabella, threatened to murder her and paid individuals in her neighbourhood to carry out the threat. She alleges that she called the police to file a complaint but was unsuccessful. The associate appellant's refugee protection claim is based on the allegations in the principal appellant's BOC Form. At the hearing, the principal appellant introduced a new allegation that Isabella's son had also threatened to murder her son, the associate appellant.
- [7] I note that the RPD notified the Minister that Article 1E of the Convention would possibly apply to the principal appellant. I note that the Minister did not intervene.

ROLE OF THE REFUGEE APPEAL DIVISION

- [8] In their memorandum of appeal, the appellants maintain that it is the standard of reasonableness that must be applied.¹
- [9] Regarding questions of fact, mixed fact and law, and law, the Refugee Appeal Division (RAD) applies the correctness standard. The exception to this rule is where the RPD enjoyed a meaningful advantage in assessing the credibility of or the weight to be given to the oral evidence before it. I completed my own review of all the evidence, including the audio recording of the hearing, and unless otherwise indicated in my reasons, I will apply the correctness standard to all findings.²

GROUND OF APPEAL

- [10] In her memorandum of appeal, the principal appellant maintains that Curaçao is a small island and that she cannot hide from XXXX or avoid her. She maintains that despite the fact that Curaçao is part of the Netherlands, she does not feel protected, because the police are not taking charge of the situation. She argues that there is crime, based on the objective documentary evidence.
- [11] In her memorandum of appeal, the principal appellant argues that the RPD clearly does not seem to establish what the relevant elements in this matter are or how much probative value to grant them. She maintains that the RPD erred by concluding there was a lack of evidence with respect to their lives possibly being in danger in Curaçao, such that its determination is inconsistent and unintelligible.
- [12] The principal appellant maintains that the RPD failed to clearly establish how it concluded there was no risk for her and her minor son should they return to Curaçao.

ANALYSIS

Exclusion 1E-permanent residence in the Netherlands

- [13] In her BOC Form, the principal appellant states that she obtained permanent residence in Curaçao on February 4, 2016. At the hearing, she confirmed she was a permanent resident, and that when she left Curaçao, she knew she had that status. She stated that she could live in every part of Curaçao, that she was free to leave and re-enter the country with no restrictions and that she had the right to study and to work. She stated that she had occupied various positions before leaving Curaçao. With respect to the possibility of returning, the principal appellant stated at the hearing that she had not confirmed her status and right to return to the country with the Dutch authorities given that she had been in Canada for approximately a year and a half.³

- [14] With regard to her fear in Curaçao, the principal appellant stated that her agent of persecution apparently paid criminals to have them murder her. She received threats for four years. She made the decision to leave Curaçao in XXXX 2017. She stated that she had been targeted by three individuals seeking to run her down with their vehicle and another incident in 2014.
- [15] The RPD is of the opinion that the principal appellant failed to file any evidence showing that she lost her permanent resident status when she left Curaçao or that she could not return. Without proof to confirm the loss of permanent residence, and given the principal appellants' testimony and her valid permanent resident card, the RPD considered that those elements constituted prima facie evidence that she still had permanent resident status in Curaçao.
- [16] Although it was not challenged by the principal appellant, it is important to note that the evidence to which the RPD referred,⁴ that is, Exhibit P-3, is not a permanent resident card, but rather an identity card as shown by its title, Identiteitskaart, and as confirmed in the objective documentary evidence, which alludes to the term "Identity Card":⁵ "Identity Card...Document Name: Identiteitskaart."
- [17] Based on this evidence, believing that it was an unexpired permanent resident card, and given the principal appellant's admission, the RPD determined that she was a permanent resident on the hearing date. Respectfully, in my opinion, the evidence on which the RPD based its determination does not constitute prima facie evidence of permanent residence and, if applicable, the validity of such status on the hearing date. I considered the principal appellant's admission that she had obtained permanent residence in the Netherlands, but I find that the admission is not clear even to the principal appellant, who herself has a copy of an identity card, that is, Exhibit P-3, and believes it to be a valid permanent resident card.
- [18] More importantly, I note that in her generic immigration form IMM0008, under question 12(b), the principal appellant indicates that she has temporary resident status in Curaçao,⁶ which the RPD did not raise, by the way. I took into consideration the principal appellant's testimony with respect to her attainment of residence, her right to study and to work, and the right to leave and re-enter the country, but in my opinion, in the particular circumstances of this matter, this testimony alone, without evidence attesting to her having obtained permanent residence, does not constitute prima facie evidence in that respect. The objective documentary evidence touches on this issue of loss of residence called "temporary" and reveals the following:⁷

...the residence permit holder notifying the Dutch Tax Services (Belastingdienst) of a move to a foreign country; notifying the Police Department for Foreigners (Vreemdelingenpolitie) of a move abroad; resigning from employment or workplace closure; closing of a bank account; transfer of periodic monetary benefits to an address outside of the Netherlands; cashing out of pension rights; clearing furniture from the residential home in the Netherlands and moving furniture across the border; subletting the residential home in the Netherlands to others.

[19] In light of this evidence, I consider that the holder of a temporary residence permit enjoys certain rights associated with permanent residence, but nevertheless remains the holder of temporary residence. I therefore consider that, on a balance of probabilities, the principal appellant was the holder of a temporary residence permit.

[20] With respect to revocation of temporary residence, the same source states the following:

As long as a permit has not been withdrawn, it is valid until its expiry date. However, with a Dutch temporary residence permit, residency outside the Netherlands for more than 6 consecutive months, or for 4 consecutive months over 3 consecutive years, can be grounds for withdrawal of the permit unless the holder of the permit can prove that his/her absence from the Netherlands for an extended period is caused by circumstances that are outside his/her control (incarceration/detention abroad is expressly excluded). (Senior Immigration Lawyer 31 Mar. 2017)

The page entitled "primary residence" on the website of the Netherlands Immigration and Naturalisation Service (Immigratie en Naturalisatie Dienst, IND) states that a holder of a Dutch residence permit is allowed to be abroad for short durations, as long as the residence permit holder does not move their primary residence (Netherlands n.d.a). The maximum stay allowed depends on the residence permit: holders of Dutch temporary residence permits are allowed to stay a maximum of six consecutive months within one year outside of the Netherlands (Netherlands n.d.a). Within three consecutive years, a holder of a Dutch temporary residence permit is permitted to stay outside the Netherlands for a maximum of four months per each of the three years (Netherlands n.d.a).

The same web page further states that a [translation] "holder of a Dutch residence permit" needs to have their "primary residence" in the Netherlands (Netherlands n.d.a). According to the same source, a primary residence is the location where the person resides [translation] "permanently" (Netherlands n.d.a). If the holder of a Dutch residence permit changes their primary residence to a foreign country, the residence permit will be revoked (Netherlands n.d.a).

According to the same web page, IND decides that the holder of the Dutch residence permit has moved their primary residence abroad in the following situations:

- * the permit holder used their [translation] "right to remigration" upon departure from the Netherlands, for example in accordance with "the Remigration Law;"
- * the permit holder has been outside of the Netherlands for longer periods than allowed (Netherlands n.d.a).

[21] In light of this objective documentary evidence, I am of the opinion that the principal appellant's absence from the Netherlands since 2017 could be considered a reason to revoke her temporary residence status. For all the above reasons, I find that the principal appellant must not be excluded.

- [22] Pursuant to paragraph 111(2)(b) of the Immigration and Refugee Protection Act (IRPA), I refer the matter to the RPD because, without holding a hearing, I can neither confirm the determination nor substitute it with the determination that should have been made.

Associate appellant (minor-Dutch citizen)

- [23] At the hearing, the principal appellant stated that her minor son, who was born in 2004, was threatened by XXXX son in Curaçao when he was playing soccer with three or four other friends. She stated that XXXX son was in a car with a group of young men and that they fired shots in the air. When confronted about her omission of this incident from her written account, the principal appellant stated that she did not know she had to do it.
- [24] In the RPD's opinion, the principal appellant's explanation was not satisfactory and it drew a negative inference from this omission about her credibility with respect to the risks to which her son would be personally subjected should he return to Curaçao. It was of the opinion that the late addition of this allegation demonstrates that the principal appellant was attempting to embellish her account. Regarding state protection, the RPD was of the opinion that the principal appellant failed to file any clear and convincing evidence to rebut the presumption of state protection.
- [25] In her memorandum of appeal, the principal appellant submits only general allegations without demonstrating how the RPD erred.
- [26] I agree with the RPD and I note that the minor son's BOC Form is based on the allegations made in the principal appellant's account. The account contains no mention of the incident in question and no amendments were made to include it. In my opinion, this omission is significant because the alleged incident was serious given that shots were fired in the air in a location where the principal appellant's minor son was present. Much like the RPD, I note that the minor son was accompanied by four friends and there is nothing to establish that he himself was targeted by the shooters. I am of the opinion that the RPD's conclusion is correct in that respect.

- [27] Where state protection is concerned, I refer to Federal Court case law:

...the RPD is not obliged to prove that the state can offer the claimant effective protection, rather, the claimant bears the legal burden of rebutting the presumption that state protection exists by adducing clear and convincing evidence which satisfies the RPD, on a balance of probabilities.⁸

Doubting the effectiveness of the protection offered by the state when one has not really tested it does not rebut the existence of presumption of state protection.⁹

- [28] In my opinion, the principal appellant failed to file persuasive evidence that the police did not wish to or were unable to help her in the Netherlands. I also took into consideration the objective documentary evidence on the Netherlands, which reveals the following:

Ultimate responsibility for safeguarding fundamental human rights and freedoms in all kingdom territories lies with the combined governments of the kingdom... Throughout the kingdom civilian authorities maintained effective control over the security forces... Authorities in the kingdom investigated, prosecuted, and punished officials who committed violations... In the Netherlands the Ministry of Justice and Security oversees law enforcement organizations, as do the justice ministries in Aruba, Curacao, and Sint Maarten. The military police (Marechaussee) are responsible for border control in the Netherlands. The Border Protection Service (immigration), police, and the Dutch Caribbean Coast Guard share the responsibility for border control in Sint Maarten, Aruba, and Curacao. Civilian authorities in the entire kingdom maintained effective control over the security forces, and the government had effective mechanisms to investigate and punish abuse.¹⁰

[29] Taking into account reports on the situation in the country and the principal appellant's lack of effort to obtain protection in a country in which she resided, I conclude that she failed to provide clear and convincing evidence to establish that state protection was not guaranteed for her in the Netherlands. Moreover, the RPD had no information to establish ineffective state protection in the Netherlands. A claimant who maintains that state protection is inadequate must convince the RPD or the RAD that the evidence establishes that state protection is inadequate.¹¹ The burden of proof that falls on the claimant is directly proportional to the degree of democracy attained in the state in question: the more democratic the state's institutions, the more a claimant must do to exhaust all courses of action available.¹² Obviously, the principal appellant's single attempt to contact police in 2014 to avail herself of state protection is not sufficient to rebut the presumption of state protection.

[30] In summation, having reviewed all the evidence, I conclude that I agree with the RPD that the principal appellant's son has state protection in the Netherlands.

CONCLUSION

[31] The RAD dismisses the associate appellant's appeal and confirms the determination that he is neither a Convention refugee nor a person in need of protection pursuant to paragraph 111(1)(a) of the IRPA.

[32] The RAD allows the principal appellant's appeal pursuant to paragraph 111(1)(c) of the IRPA and refers the matter to a differently constituted RPD panel to make a determination on her fear in her country of origin, Haiti.

Toni Jedid

Me Toni Jedid

February 24, 2020

IRB translation

Original language: French

1 Appellants' memorandum, paras. 48-49, page 22.

2 Canada (Citizenship and Immigration) v. Huruglica, 2016 FCA 93 (CanLII) and Rozas del Solar v. Canada (Citizenship and Immigration), 2018 FC 1145 (CanLII).

3 Audio recording of the hearing, 00:20:41 to 00:29:15.

4 Refugee Protection Division (RPD) record, list of documents, Exhibit P-3: residence in Curaçao.

5 National Documentation Package (NDP), Netherlands, September 30, 2019, Tab 3.4: Netherlands. U.S. Visa: Reciprocity and Civil Documents by Country. United States. Department of State, page 9 of 15.

6 Supra, endnote 4, principal appellant's immigration form, IMM0008, Q. 12(b).

7 Supra, endnote 5, Tab 3.5: Validity of a Temporary Residence Permit after leaving the Netherlands. Immigration and Refugee Board of Canada. May 19, 2017. NLD105809.EF.

8 Nadeem, Choudhry Muhammad v. M.C.I. (F.C.T.D., No. IMM-6320-00), McKeown, November 15, 2001. "...the Court held that the CRDD did not err when it stated that the issue is not whether there is clear and convincing evidence that the police would not be reasonably forthcoming with a guarantee of effective protection but whether there is clear and convincing evidence that the police would not be reasonably forthcoming with serious efforts at protection. The onus is on the claimant to produce clear and convincing evidence that the police would not provide protection, not on the Board to provide proof that there will be state protection." Kaleja, Michal v. M.C.I. (F.C., No. IMM-4106), Near, June 9, 2011; 2011 FC 668.

9 Rio Ramirez, Leticia Lizet Del v. M.C.I. (F.C., No. IMM-1301-08), Lagacé, October 31, 2008; 2008 FC 1214.

10 NDP, Netherlands, September 30, 2019, Tab 2.1: Netherlands. Country Reports on Human Rights Practices for 2018. United States. Department of State. March 13, 2019.

11 Flores Carrillo v. Canada (Minister of Citizenship and Immigration), [2008] 4 F.C.R. 636 (F.C.A.), 2008 FCA 94, paras. 20, 24.

12 M.C.I. v. Kadenko, Ninal (F.C.A., A-388-95), Hugessen, Décary, Chevalier, October 15, 1996. Posted decision: Canada (Minister of Citizenship and Immigration) v. Kadenko (1996), 1996 CanLII 3981 (FCA), 143 D.L.R. (4th) 532 (F.C.A.), at 536.

RAD File No. / No de dossier de la SAR : MB9-07917

MB9-07918

RAD.25.02 (April 4, 2019)

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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 (April 4, 2019)

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