

CANADA / JUDGMENT

TB9-23837

COURT

Refugee Appeal Division

DECIDED

31 January 2020

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RAD File / Dossier de la SAR : TB9-23837 TB9-23838 / TB9-23839 Private Proceeding / Huis clos
Reasons and decision ? Motifs et décision Persons who are the subject of the appeal XXXX XXXX
XXXX XXXX XXXX XXXX XXXX XXXX (a.k.a. XXXX XXXX XXXX XXXX) XXXX XXXX XXXX XXXX
Personnes en cause Appeal considered / heard at Vancouver, BC Appel instruit / entendu à Date of
decision January 31, 2020 Date de la décision Panel Kim Polowek Tribunal Counsel for the
persons who are the subject of the appeal Marianne B Lithwick Barrister and Solicitor Conseil des
personnes en cause Designated representative XXXX XXXX XXXX XXXX for XXXX XXXX XXXX
XXXX Représentant(e) désigné(e) Counsel for the Minister N/A Conseil du ministre REASONS
FOR DECISION

INTRODUCTION

[1] XXXX XXXX XXXX XXXX (Principal Appellant), XXXX XXXX XXXX XXXX (a.k.a. XXXX XXXX
XXXX XXXX) (Female Appellant), and XXXX XXXX XXXX XXXX (Minor Appellant),
(collectively the Appellants), citizens of Ecuador, appeal a decision of the Refugee Protection
Division (RPD) dated July 30, 2019. Their claims were denied on the basis that the Principal
Appellant was not credible with respect to his fear of persecution and harm in Ecuador, the
failure to claim asylum in the United States (US) undermined subjective fear and state
protection was not rebutted. No new evidence is being submitted in support of this appeal
and an oral hearing has not been requested. The Principal Appellant was appointed the
Designated Representative of the Minor Appellant. The Appellants ask the Refugee Appeal
Division (RAD) to substitute the RPD decision with a determination that they are
Convention1 refugees or persons in need of protection or to refer the matter back to the RPD
for redetermination.

BACKGROUND

[2] Briefly, the Appellants are a family of three who fear the criminals who killed the Principal
Appellant's uncle and his family have vowed revenge for their incarceration. The issues in
Ecuador began when his uncle (XXXX XXXX XXXX XXXX), his wife (XXXX) and two
daughters were brutally assaulted and murdered. This occurred in XXXX, 2007 in XXXX,
Loja, Ecuador, where this family was living. The Principal Appellant became the primary
caregiver of the uncle's surviving children (the cousins), one of which had witnessed the

murders. The criminals responsible were convicted and sentenced but vowed to seek revenge. In early 2009, the Principal Appellant received the first of several threatening and suspicious phone calls which escalated in 2012 and the family fled to the US in 2012. Over the years, through conversations with his father, the Principal Appellant learned that the criminals have continued to represent a threat. The Appellants lived underground and without status in the US from 2012 to 2018 and did not claim refugee status due to lack of knowledge and fears of being deported to a place they feared. On the advice of lawyers, the Appellants came to Canada to seek refuge on XXXX XXXX, 2018. Since being in Canada, the Appellants have heard that the most recent threat received by family in Ecuador was at the beginning of 2019. The Appellants fear returning to Ecuador as they fear being harmed by the criminals. Grounds of appeal

- [3] It is submitted that the RPD erred in its forward-looking analysis of risk to the Appellants and incorrectly found that state protection was available. **ROLE OF THE RAD**
- [4] When reviewing the RPD decision, the RAD is required to independently assess all the evidence and determine whether the RPD erred in relation to each alleged error of law, fact or mixed fact and law. For this assessment, the standard of correctness as per the Federal Court of Appeal decision in *Huruglica*² is applied.
- [5] The RAD may defer to the RPD in the exceptional situation that the RPD had a meaningful advantage in the circumstances, and reasons will be provided in that situation. The RAD finds that the RPD was not in an advantageous position regarding the assessment of the Appellants' evidence, and the RAD was able to review and understand the Appellants' testimony through a review of the written transcript in the Appellants' Record, listening to the entire oral hearing, as well as a review of the documentary evidence. **DETERMINATIVE ISSUE**
- [6] The RAD finds that there is no link established to a Convention ground and as such, the RPD was correct to analyze the Appellants' claims for protection under section 97 of Immigration and Refugee Protection Act (IRPA).³ The determinative issue in the present appeal is whether the Appellants have demonstrated that they are persons in need of protection and specifically, whether they have established that, on a balance of probabilities, they would be personally subjected to a risk to their life or a risk of cruel and unusual treatment or punishment upon their return to Ecuador. The RAD will also address the RPD's finding that the Appellants' failure to claim asylum in the US undermined subjective fear and that the presumption of state protection was not rebutted.

ANALYSIS

- [7] The RAD notes that it is the Appellants who bear the burden of proof to show, on a balance of probabilities,⁴ that they would be personally subjected to a risk to their life or a risk of cruel and unusual treatment or punishment upon return to Ecuador. The RAD finds that the RPD was correct to find that the Appellants have failed to adduce sufficient credible

evidence to establish that it is more likely than not that they would face a section 97 harm if they were returned to Ecuador. Personal risk of section 97 harm to the Appellants is not established

- [8] In assessing risk to the Appellants, the RAD first observes that the persons who are described in the Principal Appellant's Basis of Claim (BOC) form are at the greatest risk of harm; namely the cousins, who have remained living in Ecuador since the original criminal incident in 2007. There is no evidence adduced that any harm has come to them despite rumors that a hit man had been hired to kill them and threats received by the Principal Appellant in XXXX of 2009 that he would be killed if he did not deliver his cousins to him.⁵ The Principal Appellant's BOC also indicates that he has not had contact with his cousins since he moved in 2009.⁶ It has now been approximately ten years and despite reports that the criminals have been actively seeking the cousins, there is no evidence that any harm has occurred to them or any other family member connected to the initial criminal event in 2007.
- [9] To establish a section 97 risk, there must be persuasive evidence that, on a balance of probabilities, the Appellants face a risk to their lives or danger of torture or other cruel or degrading treatment should they be returned to Ecuador. The RAD finds that the evidence does not establish such a forward-looking section 97 risk. As noted, the family members who are closest to the tragedy and whom the agents of harm are most motivated to find, namely the surviving cousins have not come to any harm despite living in Ecuador for 12 years. The most significant threat directly received by the Principal Appellant was in August of 2009 whereby he was threatened by phone with death if he did not deliver the cousins. After this threat, the Principal Appellant testified that he changed his phone number, moved and did not receive any further calls. Despite the Principal Appellant not following through with delivering the cousins or revealing their whereabouts, no harm came to him in Ecuador where he remained for more than three years before leaving for the US in 2012. Since arriving in the US, none of the Appellants have personally been contacted by the criminals they fear in Ecuador.
- [10] While the Principal Appellant believes that since 2016 when some of the criminals were released, the risk to him and his family has escalated as "...the search is even more-much more intense ...",⁷ the RAD does not find this is supported by the evidence and in particular, the testimony of his father who remains in Ecuador. The Principal Appellant's father, XXXX XXXX XXXX, testified by phone that since 2007 he has received four calls from people whom he believes to be the criminals who were interested in harming him or family members, including the Appellants.⁸ Most recently, he testified to receiving a call in 2016 in which the caller asked him to please pass the phone to the Principal Appellant as they wanted to speak with him. His testimony was that he "...told them no, that they had the wrong number. And [he] hung up the phone".⁹ More importantly, there was no evidence adduced of any specific threats of harm being delivered during this 2016 phone call. Further, regarding the most recent phone call which he testified to having received three months

ago, he testified that he did recognize the voice who asked if Mr. XXXX was back. In response to this query, he testified that he was sorry and hung up the phone. Again, no evidence was adduced that any threats were delivered in this phone call. The RAD observes, as did the RPD that this testimony is different from that outlined in his letter in which he stated "Three months ago, I received phone calls from different unknown numbers and asking for you saying that it's a friend of yours, but I think that it is those men that are looking for you, son. I am still receiving calls but I'm afraid to answer so I don't pick up for my own safety".¹⁰

- [11] Overall, having reviewed the Record, the RAD finds that there is no evidence to support a finding that the calls received by the father since 2016 are linked to the criminals the Appellants are fearful of, and furthermore, given the evidence available, there is nothing within these calls to suggest that they were threatening in nature. While the Appellants may believe that these calls are somehow linked to criminals who are seeking revenge and to do them harm, these beliefs are speculative. Subjective fear - failure to claim in the US
- [12] The RPD found that the Appellants' failure to claim protection in the US, without reasonable explanation, is inconsistent with a person claiming to fear persecution and harm. The Appellants lived illegally in the US for seven years knowing that if caught, they would be deported.
- [13] On appeal it is submitted that the RPD's findings regarding lack of subjective fear are unreasonable given that the Appellants had no knowledge of what a refugee claim was and believed that the only way to avoid deportation was to ensure that they were not caught by immigration. They further submit that there is no obligation for those fleeing persecution to make a claim in the first country they arrive in. The Appellants submit that their actions, namely taking steps to regularize their status by coming to Canada when the risk to their lives escalated, was reasonable.
- [14] The RAD is not persuaded by the Appellants' arguments and finds that the RPD was correct to find a lack of subjective fear given the circumstances in this case, namely that the Appellants were residing in the US for seven years illegally and knowing that if caught, they would be deported back to a country they feared significant harm. The Principal Appellant's explanation that they were unaware about immigration laws in the US presents as insufficient to account for why the Appellants would not have sought protection if they believed that their lives were in grave danger. The RAD considered that the Female Appellant was detained by immigration officials when she crossed into the US for a period she testified to being a week or less. Her testimony that she had no knowledge about the refugee claim process is difficult to believe, particularly given that her daughter was already in the US with another party. Under such circumstances, it would be more likely than not that a person would be interested in receiving information about the immigration and asylum claim system in the US. As well, the Appellants had family members who had been in the US for many years, namely the Principal Appellant's mother in-law and uncle. The Appellants' decision to choose instead to live illegally in the US and risk deportation for

many years is inconsistent with a fear of harm, death or torture. State protection is available and adequate in Ecuador

- [15] The RAD does not agree with the Appellants that the RPD erred in its finding that the Appellants failed to adduce sufficient satisfactory evidence that the state would be unwilling or unable to provide adequate protection for the Appellants in Ecuador.
- [16] Claimants and Appellants seeking to rebut the presumption of state protection must adduce relevant, reliable and convincing evidence that state protection is inadequate or demonstrate that it was not reasonable to seek state protection. While the Appellants' submissions and the country evidence indicate that there are problems with criminality and reports of police corruption, the Appellants did not adduce sufficient credible evidence to establish that they would be more at risk to be victims of these kinds of issues than any other citizen who resides in Ecuador. The RAD has already found that the Appellants have not established forward-looking risk of harm.
- [17] The documentary evidence establishes that Ecuador is a democracy, holding free and fair elections and the government maintains effective control over its security forces. The Appellants' own evidence establishes that, despite the reported ties of XXXX XXXX XXXX to the paramilitary or organized crime, the authorities in Ecuador arrested, prosecuted, convicted and ultimately incarcerated him. The RAD agrees with the RPD that this is evidence that the police and judicial system works in Ecuador.
- [18] Refugee protection is meant to be a form of surrogate protection, to be invoked only in those situations where the refugee Claimant or Appellant has unsuccessfully sought the protection of their home state. The onus is on the refugee Claimant or Appellant to approach the state for protection in situations where state protection might be reasonably forthcoming.
- [19] In the absence of a compelling explanation, a failure to pursue state protection opportunities within the home state will usually be fatal to a refugee claim, at least where the state is a functioning democracy with a willingness and the apparatus necessary to provide a measure of protection to its citizens. In this case, none of the threats reportedly received by the Appellants or other family members were reported to the police whereby state protection could be tested.
- [20] The RAD agrees with the RPD that the Principal Appellant embellished his testimony regarding a XXXX theft incident in Ecuador. The theft of the Principal Appellant's XXXX allegedly by the police in Ecuador and the police threats that they would beat him if he continued to pursue the issue is not mentioned in the original BOC. An amended BOC mentions the XXXX theft by police but leaves out the threats from police. The RAD does not agree with the argument on appeal that the Principal Appellant presented a reasonable explanation for this omission, namely that this incident and police threatening behaviour was omitted because he was focused on the problem he had with the killing of his aunt and uncle. The RAD observes that there are many details outlined in the original and amended BOC which veer from this issue. Further, in the original BOC it is stated: "I did not report

these threats to the authorities as I don't trust the police, since they are very corrupt".¹¹ The Appellants then submitted a BOC amendment which stated as follows: "I also do not trust the police because they stole my XXXX in around 2008. I was informed about this through my neighbour".¹² The RAD finds it suspicious that the threats from the police were not described in either the original BOC or the BOC amendment. Further, the testimony of the father, while corroborating the theft of the XXXX did not corroborate the allegation that threats from the police had been received. The RAD agrees with the RPD that the Principal Appellant embellished this story and given the omission of police threats in both BOCs and lack of corroboration from the father, this undermines credibility and particularly the Appellants' claims that they possessed a subjective fear of the police that explains their fear of and failure to seek state protection.

- [21] The RAD also considered that it is presumed that a state is able and willing to afford protection to its citizens unless it is in a state of complete breakdown. Ecuador is not in a state of complete breakdown.
- [22] The Appellants have not met their burden of demonstrating that Ecuador is unable or unwilling to provide operationally effective protection to the Appellants should they seek it.

CONCLUSION

- [23] Having considered the totality of the evidence and based on the foregoing, the RAD finds that the Appellants have not satisfied their burden of establishing that they are Convention refugees or persons in need of protection, pursuant to sections 96 and 97 of the IRPA as they do not face a serious possibility of persecution, and because their removal to Ecuador would not subject them personally, on a balance of probabilities, to a risk to their life, or a risk of cruel and unusual treatment or punishment, or to a danger of torture.
- [24] The RAD dismisses the appeal and confirms the decision of the RPD that the Appellants are neither Convention refugees nor persons in need of protection, pursuant to section 111(1)(a) of the Immigration and Refugee Protection Act. Their claim for protection therefore fails. (signed) "Kim Polowek" Kim Polowek January 31, 2020 Date 1 1951 Convention Relating to the Status of Refugees: Office of the United Nations High Commissioner for Refugees, "Handbook on Procedures and Criteria for Determining Refugee Status", under the 1951 Convention. 2 Canada (Citizenship and Immigration) v. Huruglica, 2016 FCA 93. 3 Immigration and Refugee Protection Act, S.C. 2001, c. 27 4 Li v. Canada (Minister of Citizenship and Immigration) 2005 FCA 1. 5 Exhibit RPD-1, RPD Record at p. 59, para 14 and para 16. 6 Exhibit RPD-1, RPD Record at p. 59, para 15. 7 RPD Transcript at p. 34. 8 RPD Transcript at p. 54. 9 RPD Transcript at p. 50. 10 Exhibit RPD-1, RPD Record at p. 159. 11 Exhibit RPD-1, RPD Record at p. 31, para 14. 12 Exhibit RPD-1, RPD Record at p. 67.

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Commission de l'immigration et du statut de réfugié du Canada Section d'appel des réfugiés
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