

CANADA / JUDGMENT

TB9-12278

COURT

Refugee Appeal Division

DECIDED

16 June 2020

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RAD File / Dossier de la SAR : TB9-12278 TB9-12279 Private Proceeding / Huis clos Reasons and decision ? Motifs et décision Persons who are the subject of the appeal XXXX XXXX XXXXXXXXXX XXXX Personnes en cause Appeal considered / heard at Toronto, ON Appel instruit / entendu à Date of decision June 16, 2020 Date de la décision Panel Christopher Harrison Tribunal Counsel for the persons who are the subject of the appeal Adela Crossley Conseil des personnes en cause Designated representative XXXX XXXX Représentant(e) désigné(e) Counsel for the Minister Conseil du ministre REASONS FOR DECISION OVERVIEW

- [1] XXXX XXXX (the "Principal Appellant") and her son, XXXX XXXX (the "Minor Appellant") are citizens of Hungary. The Principal Appellant and the Minor Appellant (collectively, the "Appellants") have appealed a decision of the Refugee Protection Division (the "RPD"), dated April 18, 2019, rejecting their claims for refugee protection. The Appellants ask that the Refugee Appeal Division (the "RAD") set aside the decision of the RPD and substitute its own decision that the Appellants are Convention refugees or persons in need of protection pursuant to the Immigration and Refugee Protection Act (the "IRPA").¹ In the alternative, the Appellants request that the matter be sent back to the RPD for a new hearing before a differently constituted panel.
- [2] The Principal Appellant has been appointed designated representative of the Minor Appellant. No new evidence has been presented and, accordingly, there is no jurisdiction to hold an oral hearing.²

DETERMINATION

- [3] The RAD finds that the Appellants are Convention refugees and persons in need of protection pursuant to section 96 and subsection 97(1) of the IRPA. Accordingly, the appeal is allowed.

BACKGROUND

- [4] The Appellants were formerly resident of XXXX, Hungary. The Principal Appellant has two sons from a previous relationship, the Minor Appellant and his elder brother who remained in Hungary where he XXXX XXXX. In or about XXXX of 2015, the Principal Appellant became involved with the agent of persecution, "Mr. J" who, after a relatively short period of time, was allowed to move into the Principal Appellant's apartment.
- [5] Not long after commencing cohabitation, the Appellants allege that Mr. J's behaviour changed and he became progressively more controlling and abusive of the Principal Appellant. During this period of time he verbally, physically and sexually assaulted the Principal Appellant. His controlling behaviour resulted in the Principal Appellant losing two jobs; on one occasion, the Principal Appellant attempted to flee XXXX and Mr. J by taking refuge with a XXXX XXXX in XXXX, a town slightly in excess of 100 kilometers from XXXX XXXX XXXX. According to the Principal Appellant, the agent of persecution tracked her down in XXXX, threatened her and her XXXX XXXX and forced her to return with him to XXXX where the cycle of domestic abuse continued. The Appellants fled Hungary and made their way to Canada where, in XXXX 2018, a refugee claim was initiated.
- [6] The RPD found that the Appellants were neither Convention refugees nor persons in need of protection pursuant to section 96 and subsection 97(1) of the IRPA as there were viable internal flight alternatives ("IFAs") available to them. The Appellants have appealed on a number of grounds including:
- (i) In its risk assessment, the RPD failed to consider the risk to the Appellants from the perspective of the agent of persecution; (ii) The RPD failed to consider the Immigration and Refugee Board (IRB) Gender Guidelines; and (iii) The RPD erred in its IFA analysis.
- [7] For reasons which follow, the RAD finds that the Appellants are Convention refugees and/or persons in need of protection and the appeal is granted. **ROLE OF THE REFUGEE APPEAL DIVISION**
- [8] The RAD reviews decisions of the RPD on a standard of correctness after having conducted an independent analysis of the evidence.³ The exception to this rule is where the RPD enjoyed a meaningful advantage in the assessment and weighing of oral evidence heard which may, in certain cases, allow for the RAD to defer to the RPD findings. The RAD is of the view that the RPD had no such meaningful advantage, as the RAD has considered all of the evidence before the RPD, including the audio tape of the proceeding and the documentary evidence submitted in support of the claim. **ANALYSIS OF MERITS OF APPEAL**
- Principal Appellant was victim of domestic abuse/Gender guidelines
- [9] As a starting point, it is important to note that the RPD found that the Principal Appellant experienced verbal, sexual and physical assault at the hands of Mr. J. Based upon its independent review of the matter, the RAD finds no reason to take issue with that finding, and accepts and confirms that finding. As such, in the course of this appeal and in making

its determination, the RAD has considered and applied the Chairperson's Guidelines for Women Refugee Claimants Fearing Gender-Related Persecution.⁴ All relevant factors, such as social and cultural context in which the Principal Appellant found herself. The RAD is sensitive to the difficulties faced by the Appellants (particularly, the Principal Appellant) in establishing the claim and, having listened to the audiotape of the proceeding, notes that she became quite upset and broke into tears at several points. The RAD also notes that the RPD Member was sensitive to these difficulties, asked her questions in a sensitive and non-threatening manner and offered periodic breaks to the Principal Appellant at such times. Internal flight alternatives ("IFAs") General principles

- [10] In order to determine whether a viable IFA exists, the RAD must consider whether the RPD properly applied the test established by the Federal Court of Appeal in the leading cases.⁵ These decisions stand for the proposition that for an IFA to be appropriate, a two-pronged test must be met. Firstly, the decision maker must be satisfied, on a balance of probabilities, that there is no serious possibility of the Appellant being persecuted in that part of the country to which the IFA is proposed to exist. Secondly, the conditions in that part of the country proposed as an IFA must be such that it would not be unreasonable in all of the circumstances for the Appellant to seek refuge there.
- [11] The RPD found that the Appellants had viable IFAs in both Budapest and Pécs in Hungary. In coming to this conclusion, the RPD made the following findings:
- (i) That the agent of persecution, Mr. J. would not be interested in pursuing the Appellants; (ii) That, on a balance of probabilities, Mr. J has no continuing interest in or motivation to harm the Appellants should they return to Hungary and move to one of the IFA locations; (iii) That Mr. J does not have influence or power and would not be supported by police or government authorities in his pursuit of the Appellants; and (iv) That the objective country evidence supported the finding of viable IFAs.
- [12] As indicated, the Appellants argue, among other things, that the RPD failed to consider the risk to the Appellants from the perspective of the agent of persecution and that the RPD failed to consider the Gender Guidelines. The RPD analysis was flawed Principal Appellant was credible
- [13] The RAD notes that, with one exception (discussed below), the RPD failed to make any specific credibility findings as to the evidence, primarily the oral testimony of the Principal Appellant at the hearing. In that part of the Reasons entitled, "Credibility," the RPD took note of the long-standing principle that when a claimant swears that certain facts are true, a presumption of truthfulness is created unless there is a valid reason to doubt their veracity.⁶ This presumption, sometimes referred to as the "Maldonado presumption" is always rebuttable dependent upon the evidence.
- [14] As indicated, the Appellants' evidence was presented principally through the testimony of the Principal Appellant, however, as is customary in IRB hearings, in addition to her testimony, the information contained in her Basis of Claim ("BOC") form and associated

narrative were affirmed to be truthful at the beginning of the proceeding. In this regard, this matter bears similarity to *Pech v. The Minister of Citizenship and Immigration*⁷ where the court raised concern that the RPD had failed to evaluate the credibility of the applicant's evidence and made no negative findings in this regard.⁸ In *Pech*, the Court cites with approval the following finding from *Gutierrez v. Minister of Citizenship and Immigration* which states: "In the absence of any credibility analysis, the applicant's story must be taken as having been accepted by the Board member as true."⁹

- [15] In her reasons, the RPD Member noted that only the Principal Appellant testified and that the RPD had the benefit of observing the Principal Appellant throughout the hearing and noted that she was able to provide sufficient details to most of her answers.¹⁰ While the RPD made no specific finding as to her credibility, the RAD also notes that there were no RPD findings that the Principal Appellant's evidence featured inconsistencies, gaps, vagueness, omissions, implausibilities, or any of the other usual indicia that might lead a decision-maker to an adverse credibility finding. Regardless of the testimonial issues noted in the Gender Guidelines and other factors such as the stress inherent the hearing room, the difficulty of testifying through an interpreter and so on; having listened to the audiotape of the proceedings the RAD is unable to detect any such concerns with her testimony. As such, the RAD finds that, for the most part, the Principal Appellant's testimony was credible.
- [16] The only negative credibility finding made by the RPD about the Principal Appellant's testimony was with respect to her subjective belief that Mr. J. had powerful or influential friends in Hungary who would be prepared to assist him in locating her. The RPD found this evidence to be speculative. The RAD concurs with that finding, subject to the comments made below.
- [17] In this regard, the RAD observes that apart from certain boasts made by Mr. J to the Principal Appellant, there was no persuasive evidence adduced to establish that such was the case. Mr. J was an "on-again, off-again" XXXX XXXX who apparently did not have a specific trade and there is no suggestion he (or they) socialized with the sort of people that might exert such influence. Indeed, the fact that on the occasion when the police came to their door in response to a call about a domestic violence incident in progress, the fact that Mr. J and the XXXX XXXX remembered each other from having attending the XXXX XXXX years previously would, in the opinion of the RAD, fall into the category of a chance encounter, as opposed to being evidence of friends in high places who might support his search for the Appellants in order to maintain his persecutory conduct via domestic abuse of the Principal Appellant.

- [18] Having said that, however, the RAD is of the view that this one negative credibility finding is insufficient to rebut the Maldonado presumption of truthfulness. In considering this issue, the RAD is sensitive to the IRB Chairperson's Gender Guidelines and notes that the guidelines highlight that women refugee claimants who have been subjected to domestic violence may exhibit a pattern of symptoms referred to as "Battered Woman Syndrome"¹¹ and, in arriving at these reasons, has considered principles and sources contained therein.
- [19] While the RAD does not find itself frequently referencing criminal law jurisprudence, the Lavallee case referenced in the IRB Chairperson's Gender Guidelines is instructive for its review of the "Battered Woman Syndrome."¹² While Lavallee was principally concerned with the role expert evidence had to play in criminal proceedings, Madam Justice Wilson provides analysis that is relevant to many cases involving domestic violence, including this particular appeal.
- [20] Lavallee references (with approval) the "Walker Cycle Theory of Violence" which features 3 distinct phases: (i) tension building; (ii) the acute battering incident; and (iii) loving contrition. The evidence in this matter is certainly consistent with this theory of domestic violence wherein Mr. J, following an abusive incident, would apologize and, on at least one occasion, XXXX XXXX for the Principal Appellant. More particularly, Lavallee references the fact that an abused spouse or common law partner (generally, female) can become "uniquely sensitized" to danger and that the relationship is often characterized by a power imbalance with resultant feelings of helplessness and powerless on the part of the battered spouse. The Gender Guidelines suggest that in consideration of an IFA, a decision-maker need be sensitive to the relevant religious, economic, social and cultural factors that may impact upon the determination as to whether an IFA is viable. In this particular matter, the evidence of the Principal Appellant was that she grew up in a family where domestic violence was commonplace and considered normal.¹³ This evidence was not challenged by the RPD; the objective documentary evidence found in the National Documentation package ("NDP") (as well as certain of the documentary evidence tendered by the Appellants) clearly establishes that Hungary is a state where, despite attempts to reform, domestic abuse remains problematic.¹⁴ When examined from a contextual perspective, it is unsurprising that the Principal Appellant felt that her agent of persecution had such connections and engaged in such speculation.
- [21] For the foregoing reasons, the RAD finds that the one instance where the RPD made a credibility finding against the Appellants based upon the Principal Appellant's testimony does not rebut the Maldonado presumption of truthfulness. The RAD also finds that this credibility issue does not detract from her general credibility as a witness and, further, fails to impact negatively upon the Appellants' claim. RPD failed to consider relevant and credible evidence

- [22] The RPD did not accept that the Appellants' subjective belief that they would be pursued by Mr. J to other locations in Hungary as objectively reasonable or grounded in the evidence that was before the panel.¹⁵ The Appellants argue that the RPD erred by failing to consider the risk profile of the agent of persecution and further, that the RPD failed to consider all of the evidence before it.
- [23] For reasons which follow, the RAD finds that the RPD did, in fact, fail to consider relevant and credible evidence in rendering its decision, thus constituting an error requiring intervention by the RAD.
- [24] In both her Narrative and her oral testimony, the Principal Appellant provided evidence that in XXXX 2018, she had attempted to flee Mr. J by removing herself to the town of XXXX, a town slightly in excess of one hundred kilometers removed from XXXX XXXX¹⁶ It was in XXXX that she sought refuge with a XXXX XXXX XXXX XXXX with whom the Principal Appellant had remained in contact and had visited from time to time.
- [25] Unfortunately, following her departure, Mr. J located a notebook in the apartment which had been left behind by the Principal Appellant in which she had recorded contact information of different parties, including the XXXX XXXX.¹⁷ Using this information, Mr. J tracked the Principal Appellant to her place of refuge and, according to the Principal Appellant, showed up at her former teacher's residence some 7-10 days after her arrival.¹⁸
- [26] The Principal Appellant testified that Mr. J created a terrible scene at her XXXX XXXX residence by shouting and calling her names and threatening her; he also threatened that the teacher would suffer some harm which caused the Principal Appellant to acquiesce to his demands and return to XXXX with him.¹⁹ This evidence was unchallenged by the RPD at the hearing, yet forms no part of the analysis in the RPD reasons and is conspicuous in its absence.
- [27] Once again, the RPD reasons indicate that the panel did not accept the Appellants' subjective belief that Mr. J would pursue them to other locations in Hungary as such belief was "not grounded in the evidence before the panel."²⁰ The RAD is of the view and finds that such omission constituted an error by the RPD as there was, in fact, evidence before the RPD that the agent of persecution was ready, willing and able to pursue the Appellants to another part of the country and had, in fact, already done so. Similarly, other unchallenged (and, therefore, accepted) evidence that was before the RPD that did not factor into the decision that impacted upon the issue of Mr. J's continued search for the Principal Appellant would be the information received from her eldest son who remains in Hungary that: (i) Mr. J had contacted him by telephone on a number of occasions seeking information as to her whereabouts; (ii) the information that Mr. J had come by their apartment looking for her some five months after the Appellants had fled Hungary for Canada.
- [28] Such evidence requires the RAD to revisit the two-pronged test for viable IFA locations. The first prong of the test requires that the Appellant demonstrate on a balance of probabilities that there would be a serious possibility of persecution in the IFA location. Under the

circumstances, the agent of persecution has demonstrated a penchant for violence via the physical, sexual and verbal abuse inflicted upon the Principal Appellant and has also shown a determination to track down the Principal Appellant (who he considers to be his "property")²¹ and has, in fact, done so evidencing a certain amount of resourcefulness in accomplishing that goal without the assistance of police or government authorities.

- [29] Based upon its independent review of the evidence and for the foregoing reasons, the RAD finds that if returned to Hungary to one of the proposed IFA locations, there is a serious possibility that the Principal Appellant (and, therefore, the Minor Appellant) would suffer renewed persecution in the form of domestic violence at the hands of Mr. J who has demonstrated that he is ready, willing and able to track her down in alternate locations in Hungary. Accordingly, the first prong of the Rasaratnam test is not established and the RPD findings of viable IFAs in Budapest and Pécs are not sustainable.

CONCLUSION

- [30] The appeal is allowed. Pursuant to section 111(1)(b) of the Immigration and Refugee Protection Act (IRPA), the RAD sets aside the determination of the RPD and substitutes its own determination that the Appellants are Convention refugees and/or persons in need of protection. (signed) "Christopher Harrison" Christopher Harrison June 16, 2020 Date 1 S.C. 2001, c. 27 (the "IRPA"). 2 Subsection 110(6) of the IRPA. 3 M.C.I. v. Huruglica, Bujar (F.C.A., no. A-470-14), Gauthier, Webb, Near, March 29, 2016, 2016 FCA 93; Canada (Citizenship and Immigration) v. Huruglica, 2016 FCA 93 [2016] 4 FCR 157, at para 103 (herein after "Huruglica"). 4 Chairperson Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution: Update, Guideline Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act, IRB, Ottawa, March 9, 1993; Update: November 1996, as continued in effect by the Chairperson on June 28, 2002, pursuant section 159(1)(h) of the Immigration and Refugee Protection Act (herein after the "Gender Guidelines"). 5 Rasaratnam v. M.E.I., [1992] 1 F.C.706 (C.A.) at 710; Thirunavukkarasu v. M.E.I., [1994] 1 F.C.589 (C.A.). 6 Maldonado v. Canada (Minister of Employment and Immigration) (1979), [1980] 2 FC 302 (FCA). 7 Pech v. Canada (Citizenship and Immigration), 2009 FC 83 (CanLII). 8 Ibid., at para 18. 9 Ibid; Sanchez v. Canada (Citizenship and Immigration), 2008 FC 971 (CanLII). 10 Exhibit RPD-1, RPD Record, RPD Reasons, page 5, at para 9. 11 IRB Gender Guidelines. "Special Problems at Determination Hearings" item D. 3. 12 R. v. Lavallee, [1990] SCR 852 (hereinafter "Lavallee"). 13 Exhibit RPD-1, RPD Record, Exhibit 2.1 Basis of Claim Narrative, pp. 23-32. 14 National Documentation Package (NDP) for Hungary, 31 March 2020, tab 5.2, Immigration and Refugee Board of Canada (IRB), Response to Information Request (RIR), HUN106144.E , Hungary: Domestic Violence, including in Roma communities; legislation including implementation; state protection and support services, particularly in Miskolc, Debrecen and Budapest (2016 July-2018). 15 Exhibit RPD-1, RPD Record, RPD Reasons, pp. 8-9 at paras. 20-25. 16 Exhibit RPD-1, RPD Record, Exhibit 2.1, Basis of Claim Narrative, page 28, at para 22.; RPD Hearing Recording, March 12, 2019, at 1:00:17. 17 RPD Hearing Recording, March 12, 2019 at 1:01:50. 18 Ibid., at 1:01:14. 19 Ibid., at 1:01:40. 20 Exhibit RPD-1, RPD Record,

RPD Reasons, page 6, at para. 13. 21 Exhibit RPD-1, RPD Record, Exhibit 2.1, Basis of Claim Narrative, pp. 25-26, at para 12.

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