

CANADA / JUDGMENT

TB9-09185

COURT

Refugee Appeal Division

DECIDED

2 September 2020

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RAD File / Dossier de la SAR : TB9-09185 TB9-09186 Private Proceeding / Huis clos Reasons and decision ? Motifs et décision Persons who are the subject of the appeal XXXX XXXX XXXX XXXXXXXX XXXX XXXX Personnes en cause Appeal considered / heard at Toronto, ON Appel instruit / entendu à Date of decision September 2, 2020 Date de la décision Panel Caitlin Maxwell Tribunal Counsel for the persons who are the subject of the appeal Astrid Mrkich Conseil des personnes en cause Designated representative N/A Représentant(e) désigné(e) Counsel for the Minister Bryan McDonald Conseil du ministre REASONS FOR DECISION OVERVIEW

- [1] These are my reasons for granting the appeals of XXXX XXXX XXXX ("Principal Appellant") and XXXX XXXX XXXX ("Associate Appellant"). I am substituting a decision that the Appellants are Convention refugees.
- [2] The Appellants, who are common-law partners, are both citizens of Romania. The Principal Appellant alleges a fear of persecution based on XXXX XXXX XXXX XXXX XXXX while the Associate Appellant alleges a fear of persecution at the hands of her abusive former partner. The Refugee Protection Division ("RPD") accepted that the Principal Appellant had suffered discrimination based on XXXX XXXX XXXX XXXX XXXX but found that this did not rise to the level of persecution. While the panel accepted that the Associate Appellant had been in an abusive relationship with her former partner, it did not find a forward-looking risk of persecution. On appeal, the Appellants argue that the panel failed to engage in a cumulative assessment of persecution facing the Principal Appellant, failed to consider the Chairperson's Gender Guideline in relation to the Associate Appellant, and failed to conduct a s. 97 analysis.
- [3] The Minister of Citizenship, Immigration, and Refugees has intervened in this appeal, providing information on criminal charges filed against the Principal Appellant in May 2020. He argues that the Principal Appellant's engagement in criminal activity undermines his subjective fear of persecution. SCOPE OF THE APPEAL
- [4] Generally, I must review a decision of the RPD on a standard of correctness.¹ The exception to this rule is where the RPD enjoys a meaningful advantage in assessing the credibility of oral testimony, which may attract deference in particular cases.² In this case, however, the RPD had no advantage. I have therefore considered whether its decision was correct.

- [5] The Appellants have not submitted any new evidence in support of their appeal. They have requested an oral hearing should any credibility concerns arise. In the absence of any new evidence, however, I have no jurisdiction to convene a hearing.³

ANALYSIS

- [6] The determinative issues on appeal are the well-foundedness of the Appellants' claims of persecution, as well as a lack of state protection and internal flight alternatives ("IFAs"). For the following reasons, I agree with the Appellants that the RPD erred in its assessment and find that they both face a forward-looking risk of persecution. I am not persuaded by the Minister's submission. It is not necessary for me to consider the Appellants' arguments with respect to s. 97. A. Principal Appellant
- [7] The RPD accepted that the Principal Appellant was XXXX XXXX XXXX XXXX. It accepted that he faced instances of discrimination on this basis, including being ostracized by family and friends and being denied employment at a state taxi agency. While it accepted that some employers require medical testing in violation of anti-discrimination laws, it found there was insufficient evidence to corroborate the Principal Appellant's allegation that mandatory medical testing was a prerequisite to employment. It ultimately concluded that his experiences did not rise to the level of persecution.
- [8] The Minister has argued on appeal that the Principal Appellant's decision to engage in criminal activity in Canada has undermined his credibility and claim to subjectively fear persecution in Romania. I am not persuaded by this submission. First, the charges against the Principal Appellant remain outstanding and have not resulted in a conviction. They have not yet been established on a balance of probabilities. Second, there is no rational connection between the Principal Appellant's actions and his claim of persecution in Romania. He credibly established XXXX XXXX XXXX before the RPD. His engagement in criminal activity is not determinative of the risk he faces on this basis.⁴
- [9] I agree with the Appellants that the panel did not give appropriate weight to the country conditions evidence regarding employment discrimination facing XXXX XXXX XXXX XXXX. Counsel highlighted a 2006 report by Human Rights Watch which spoke to this issue in post-hearing submissions. The evidence indicates that Romanian law provides for mandatory medical testing for a wide variety of jobs XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX and that, as a result of the legal emphasis on medical testing, private and public employers regularly require job applicants to undergo medical examinations that may include XXXX XXXX XXXX when not required by law. Further, breaches of confidentiality about XXXX XXXX XXXX are common and rarely punished.⁵
- [10] While somewhat dated, I nevertheless find this is credible evidence which corroborates the Principal Appellant's testimony. In addition, I note that more recent evidence in the National Documentation Package indicates that the authorities have failed to adopt regulations necessary to provide confidentiality and fair treatment for XXXX XXXX XXXX XXXX XXXX.

XXXX anti-discrimination legislation is not effectively enforced, and that employment discrimination persists on this basis.⁶ On a balance of probabilities, I therefore accept the Principal Appellant's allegations in this regard. Given that this discrimination goes directly to his ability to earn a livelihood, I find that it is serious enough to rise to the level of persecution.⁷

- [11] In reaching this conclusion, I acknowledge the panel's finding that the Principal Appellant had been self-employed as XXXX XXXX XXXX since prior to his diagnosis; however, I do not find that this precludes a finding of discrimination amounting to persecution. The fact that he managed to get by does not mitigate the seriousness of the violation, particularly when considered within the context of widespread societal discrimination against XXXX XXXX XXXX XXXX in Romania.⁸ In light of this, I find that the Principal Appellant faces a serious possibility of persecution upon return.
- [12] Because the state remains complicit in discrimination against those XXXX XXXX XXXX, and because anti-discrimination legislation is not effectively enforced, I find, on a balance of probabilities, that adequate state protection is not available to the Principal Appellant. Because these conditions exist throughout Romania, neither is an internal flight alternative.
- B. Associate Appellant
- [13] The RPD accepted that the Associate Appellant had been in an abusive relationship with her former partner, the father of her daughter. However, it found her failure to mention the abuse at the Port of Entry ("POE"), combined with vague and evolving testimony and a lack of corroborative evidence, undermined her credibility. The panel concluded there was no forward-looking risk of persecution.
- [14] I agree with the RPD that the Associate Appellant's claim could have been better documented, including with evidence from family and friends aware of her situation; however, having reviewed the transcript of the proceeding, I find that the Associate Appellant testified in a largely straightforward manner. While her failure to mention her ex-partner's abuse as a basis for her claim at the POE was a valid consideration for the panel, I accept the Associate Appellant's explanation that she did not want to go into the details and acknowledge she may not have realized she had a refugee claim in her own right.
- [15] I find the specific examples of inconsistencies highlighted by the RPD—for instance, that the Associate Appellant indicated in her Basis of Claim ("BOC") narrative that her ex-partner called her a "bitch" and "crazy," whereas she simply indicated at the hearing he "cursed her" and used "bad words"—to be overly microscopic. Nor do I find the Associate Appellant's statement that she did not trust the system to be inconsistent with her evidence that she had reported to the police over twenty times. I agree with the Appellants that the panel failed to appreciate the reality that the police are the primary state agency tasked with protecting citizens, and that the Associate Appellant may have continued to hope protection would be forthcoming despite past failures.

- [16] I further find the panel's assumption that because she was educated, the Associate Appellant would have sought further avenues of redress ignores the reality of power and control dynamics in abusive relationships, which are not dependent on one's level of education. Its finding that the Associate Appellant would have found ways not to interact with her ex-partner similarly ignores these dynamics. The Associate Appellant's evidence was that her ex-partner had primary custody, that he required her presence at pick-ups and drop-offs, that the court had refused to open a file for her to amend the custody agreement, and that the police had refused to become involved. Her continued interaction with her ex-partner under these circumstances is not, in my view, indicative of a lack of subjective fear, but rather of a desire to continue seeing her daughter.
- [17] I find the Associate Appellant's testimony establishes that her ex-partner previously made threats against her life; that he was abusive during their encounters; that he stalked her; that the police refused to assist; and that she was unsuccessful in trying to have the custody agreement amended.
- [18] In reaching this conclusion, I note the country conditions evidence which indicates that violence against women continues to be a serious problem which the Romanian government has not effectively addressed;⁹ that existing legislation on gender-based violence is limited in scope;¹⁰ that authorities blame women for domestic violence;¹¹ that police refuse to intervene in the absence of a court mandate¹² and seek to avoid filing criminal cases related to domestic violence;¹³ that investigation rates for trespassing and stalking are low;¹⁴ that courts prosecute very few cases of domestic violence;¹⁵ that forensic proof of the violence suffered is required to request a protection order;¹⁶ that protection orders are rarely issued and poorly enforced;¹⁷ and that women continue to experience discrimination in marriage, divorce, and child custody proceedings, which fail to adequately account for domestic violence.¹⁸
- [19] In light of the above, I find the Associate Appellant faces a serious possibility of gender-based persecution upon return.
- [20] Considering the Associate Appellant's own failed attempts to access state protection as well as the country conditions evidence which indicates that Romania continues to lack effective protections for women experiencing gender-based violence, I find, on a balance of probabilities, that there would not be adequate state protection available to her upon return. Given that these problems exist throughout Romania, and that the custody order in place mandates the involvement of the Associate Appellant's ex-partner, there is not a viable internal flight alternative available.

CONCLUSION

- [21] For the reasons set out above, the appeal is allowed. I substitute my own decision that the Appellants are Convention refugees. (signed) "Caitlin Maxwell" Caitlin Maxwell September 2, 2020 Date 1 Canada (Minister of Citizenship and Immigration) v Huruglica, 2016 FCA 93, at

para. 103. 2 Ibid., at para. 70. 3 Immigration and Refugee Protection Act (IRPA), SC 2001, c 27, as amended, at ss. 110(6). 4 In reaching this conclusion, I also note the Federal Court jurisprudence that, in the absence of a general negative credibility finding, the panel cannot reasonably determine that a claimant lacks a subjective fear of persecution: *Ramirez-Orsorio v Canada (Citizenship and Immigration)*, 2013 FC 461, at para. 46, citing *Shanmugarajah v Canada (Minister of Employment and Immigration)*, [1992] FCJ No 583 (FCA); see also, *Perez v Canada (Citizenship and Immigration)*, 2015 FC 1100, at para. 23. 5 Exhibit RPD-1, RPD Record, Exhibit 11, Counsel's post-hearing submissions, pp. 374-375, citing Exhibit 8, Counsel's country disclosure, Human Rights Watch, "Life Doesn't Wait: Romania's Failure to Protect and Support XXXX XXXX XXXX XXXX XXXX XXXX," XXXX XXXX at p. 255. 6 Exhibit RPD-1, RPD Record, Exhibit 4: National Documentation Package ("NDP") for Romania (31 October 2018), Item 2.1, US Department of State, Country Reports on Human Rights Practices 2017: Romania, 20 April 2018, at pp. 31, 35-36; see also, Item 2.7, European Commission, Country report on non-discrimination: Romania, 2017, p. 6. 7 *Soto v Canada*, 2002 FCT 768, at paras. 16, 21; *Horvath v Canada (Citizenship and Immigration)*, 2011 FC 1350, at paras. 40, 43; Office of the United Nations High Commissioner for Refugees, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status, reissued Geneva, December 2011, at para. 54. 8 See, e.g., Exhibit RPD-1, RPD Record, Exhibit 8, Counsel's country documentation, XXXX, "Romania: Country Progress Report 2016," April 2016, at p. 236; Exhibit 9, Counsel's country documentation, UN Human Rights Committee, "Human Rights Committee examines Romania's efforts to implement civil and political rights," 26 October 2017, at p. 308; Exhibit 4, NDP for Romania (31 October 2018), Item 2.3, Freedom House, "Romania: Freedom in the World 2018," at p. 12. 9 Exhibit RPD-1, RPD Record, Exhibit 4, NDP for Romania (31 October 2018), Item 2.1, US Department of State, Country Reports on Human Rights Practices 2017: Romania, 20 April 2018, at p. 23; Item 2.2, Amnesty International Report 2017/2018: Romania, 22 February 2018, p. 3. 10 Ibid., Item 5.3, UN Committee on the Elimination of Discrimination Against Women, Concluding observations on the combined seventh and eighth periodic reports of Romania, CEDAW/C/ROU/CO/7-8, 24 July 2017, at p. 6. 11 Ibid., Item 2.1, US Department of State, Country Reports on Human Rights Practices 2017: Romania, 20 April 2018, at p. 24. 12 Ibid., Item 5.3, UN Committee on the Elimination of Discrimination Against Women, Concluding observations on the combined seventh and eighth periodic reports of Romania, CEDAW/C/ROU/CO/7-8, 24 July 2017, at p. 6. See also NDP for Romania (31 March 2020), Item 2.1, US Department of State, Country Reports on Human Rights Practices 2019: Romania, 11 March 2020, at p. 23, which indicates that police condone violence against women and, in some cases, have refused to register complaints. 13 Ibid., Item 2.1, US Department of State, Country Reports on Human Rights Practices 2017: Romania, 20 April 2018, at p. 24. 14 Ibid., Item 5.3, UN Committee on the Elimination of Discrimination Against Women, Concluding observations on the combined seventh and eighth periodic reports of Romania, CEDAW/C/ROU/CO/7-8, 24 July 2017, at p. 6. 15 Ibid., Item 2.1, US Department of State, Country Reports on Human Rights Practices 2017: Romania, 20 April 2018, at p. 23. 16 Ibid., Item 5.3, UN Committee on the Elimination of Discrimination Against Women, Concluding observations on the

combined seventh and eighth periodic reports of Romania, CEDAW/C/ROU/CO/7-8, 24 July 2017, at p. 6. 17 Ibid. 18 Ibid., at p. 15.

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