

DECIDED
4 March 2020

RAD File / Dossier de la SAR : MB9-27252 MB9-27253 / MB9-27254 / MB9-27255 MB9-27256 Private
 Proceeding / Huis clos Reasons and decision ? Motifs et décision Persons who are the subject of
 the appeal XXXX XXXX XXXX XXXX XXXXXXXXXXX XXXX XXXX XXXX XXXXXXXXXXX XXXX XXXX
 XXXX XXXXXXXXXXX XXXX XXXX XXXX XXXX XXXXXXXXXXX XXXX XXXX XXXX XXXX Personnes en
 cause Appeal considered / heard at Montreal, QC Appel instruit / entendu à Date of decision
 March 4, 2020 Date de la décision Panel Me Jo-Anne Pickel Tribunal Counsel for the persons who
 are the subject of the appeal Me Sandra Palmieri Conseil des personnes en cause Designated
 representative XXXX XXXX XXXX XXXX Représentant(e) désigné(e) Counsel for the Minister N/A
 Conseil du ministre REASONS FOR DECISION OVERVIEW

- [1] XXXX XXXX XXXX XXXX is a citizen of Mexico. Her spouse, XXXX XXXX XXXX XXXX, is a citizen of Guatemala. Their children, XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX, and XXXX XXXX XXXX XXXX XXXX XXXX are citizens of the United States (US). Although I have a great deal of sympathy for XXXX XXXX XXXX XXXX and her family, I dismiss this appeal for the reasons that follow.
- [2] The circumstances of this case are particularly unfortunate and arise due to certain policy changes brought in by the Trump administration in the US. XXXX XXXX XXXX XXXX and XXXX XXXX XXXX XXXX parents took each of them and their siblings to the US when they were just young children (XXXX and XXXX years old, respectively). They crossed into the US by illegal means but did everything they could to study, work and have a productive life in the US. Prior to 2008, XXXX XXXX XXXX XXXX consulted a lawyer who told her that she and her spouse were not eligible for any programme that would allow them to regularize their status in the US. Finally, in 2012, XXXX XXXX XXXX XXXX and her spouse became eligible to enroll in the Deferred Action for Childhood Arrivals (DACA) programme. DACA's aim was to protect from deportation persons, such as XXXX XXXX XXXX XXXX and XXXX XXXX XXXX XXXX, who entered the US as children and met certain eligibility criteria. In the fall of 2018, XXXX XXXX XXXX XXXX applied to renew his DACA status but he never received a response to his application. In XXXX 2018, he was fired from his work because his permit had expired and there was no sign that it would be renewed by the Trump administration. At this point, XXXX XXXX XXXX XXXX and her family made their way to Canada to claim refugee status. They fear that, if they are deported from the US to their countries of origin, their children will suffer serious harm as orphans in the child welfare system in the US.

- [3] The RPD found XXXX XXXX XXXX XXXX and XXXX XXXX XXXX XXXX XXXX to be very credible as to the events they described. However, the RPD found that the determinative issue in the case was the issue of whether XXXX XXXX XXXX XXXX and her family faced a forward-looking risk in their respective countries of origin. The RPD found that the violence and poverty that XXXX XXXX XXXX XXXX and XXXX XXXX XXXX XXXX fear in Mexico and Guatemala is a generalized risk of the kind that does not differ from the risk face by others in or from those countries. With respect to the children, the RPD found that the risk they faced of being separated from their parents and living in foster homes did not amount to persecution on a Convention ground within the meaning of s. 96 of the Immigration and Refugee Protection Act (IRPA) or one of the forms of serious harm that would make them persons in need of protection within s. 97 of the IRPA. In particular, the RPD found that sections 96 and 97 of the IRPA do not include the notion of family unity and that it is established in the case law that the separation of families, in itself, is not enough to found an asylum claim.
- [4] The Appellants make no arguments to contest the RPD's conclusion that XXXX XXXX XXXX XXXX and XXXX XXXX XXXX XXXX XXXX are neither Convention refugees nor persons in need of protection in relation to Mexico and Guatemala respectively. Instead, they focus their arguments on the situation of the children in the US. They argue that the RPD erred in finding that the children are not persons in need of protection in the US. DECISION
- [5] My role is to look at all the evidence and decide if the RPD made the correct decision.¹ I agree with the RPD that XXXX XXXX XXXX XXXX and XXXX XXXX XXXX XXXX were very credible. However, the RPD was correct in finding that the XXXX XXXX XXXX and her family are neither Convention Refugees nor persons in need of protection.² In particular, I find that the evidence in this case is insufficient to establish that, if they return to the US, the children would be subjected to any of the forms of serious harm that would make them persons in need of protection as that term is defined in s. 97 of the IRPA.

ANALYSIS

Unchallenged findings in relation to XXXX XXXX XXXX XXXX and her spouse

- [6] XXXX XXXX XXXX XXXX and XXXX XXXX XXXX XXXX XXXX did not make any arguments to contest the RPD's finding that the forward-looking risk they would face if they return to either Mexico or Guatemala is not the kind of risk that would make them persons in need of protection under s. 97 of the IRPA. Nevertheless, I have conducted a review of all of the evidence in this case, including the audio-recording. Based on this review, I find that the RPD was correct in its conclusion that the general violence, criminality, and insecurity to which XXXX XXXX XXXX XXXX and XXXX XXXX XXXX XXXX might be subject in Mexico or Guatemala do not make them persons in need of protection.

- [7] When a person alleges that they are a person in need of protection due to a risk to their life or a risk of cruel and unusual treatment or punishment, they must not only establish that they likely would face such a risk personally in their country. They must also show that this risk is not faced generally by other individuals in or from that country.³ If the personal risk faced by the claimant is the same risk faced generally by others in or from their country of origin, they will not be found to be persons in need of protection.
- [8] In this case, it is understandable that XXXX XXXX XXXX XXXX and XXXX XXXX XXXX XXXX are reluctant to return to countries to which they have almost no connection due to the fact that they left when they were very young. It is also understandable that they may be concerned about the general level of violence, criminality, and insecurity in Mexico and Guatemala. However, the risk they would face in returning to either of these countries does not differ significantly from the risk faced by others in and from those countries. Therefore, the RPD was correct to find that they are not persons in need of protection in relation to those countries. In addition, they did not allege, and the evidence does not support, any claim that they would be Convention refugees in relation to those countries. Therefore, despite the untenable situation that XXXX XXXX XXXX XXXX and XXXX XXXX XXXX XXXX have been placed in due to changes in US policy, the RPD was correct to deny the asylum claims filed by XXXX XXXX XXXX XXXX and XXXX XXXX XXXX XXXX. No error in findings relating to the children
- [9] XXXX XXXX XXXX XXXX and her family argue that the RPD erred in finding that the children were not persons in need of protection in relation to the United States. I am open to the argument that the separation of children from their parents may amount to cruel and unusual punishment in some circumstances, However, this argument needs to be supported by sufficient evidence which is lacking in this case.
- [10] XXXX XXXX XXXX XXXX and her family argue that their children will suffer cruel and unusual treatment or punishment if they are forced to return to the US. According to XXXX XXXX XXXX XXXX and her family, XXXX XXXX XXXX XXXX and XXXX XXXX XXXX XXXX will likely be deported if they and their family return to the US. They argue that the US cannot protect minor claimants and that rising immigration enforcement in the US causes long-lasting harmful effects on a child's developmental well-being.
- [11] I do not agree with XXXX XXXX XXXX XXXX and her family that the RPD erred in finding that family separation cannot, in itself, found a claim for asylum. They take issue with the fact that the RPD cited only one decision in support of this principle. I note that the decision cited by the RPD is a RAD decision that was identified as a decision of interest by the Immigration and Refugee Board.⁴ The decision relies on Federal Court case law that has made this precise finding.⁵ Therefore, I do not find that the RPD erred in citing only one decision in support of the well-established principle that family separation cannot, in itself, found a claim for asylum.

- [12] I do not agree with XXXX XXXX XXXX XXXX and her family that the fact that the principle of family unity is contained in the Convention on the Rights of the Child means that a claim for asylum can simply be based on the principle of family unity or the best interests of the child. I note that XXXX XXXX XXXX XXXX and her family seek to rely on court decisions dealing with humanitarian and compassionate applications to make their argument. However, the Federal Court in the Kim case, cited by XXXX XXXX XXXX XXXX and her family, specifically addressed this issue.⁶ In that case, the Court stated that the consideration of the best interests of the child are applied differently in the context of an asylum claim as compared to an application to remain in Canada on humanitarian and compassionate grounds.
- [13] In Kim, Court stated as follows: The Canadian immigration system provides for several methods by which to gain entry into Canada, one of which is to be a refugee under section 96. Section 96 provides a strict definition that is either met or not by the claimant in question. If the definition is met, then the claimant may be able to enter Canada as a refugee. If, on the other hand, the definition is not met, then the claimant may not enter Canada pursuant to that section and other options become available to him or her. One remaining option is pursuant to section 25, wherein the Minister at his discretion may grant an exemption "from any applicable criteria or obligation of" the IRPA. It is under section 25 that a substantive and thorough analysis of the best interests of the child is performed. At the stage of a section 96 application, it is sufficient that the best interests of the child are taken into account procedurally, as directed by the Guidelines [relating to child refugee claimants]. The Court must reiterate that the best interests of the child cannot shoehorn a refugee claimant into the section 96 definition if the child's claim would otherwise be rejected, but it can influence the process which leads to that decision.⁷ [emphasis in original]
- [14] In Kim, the Court found that the Convention on the Rights of the Child and the Guidelines relating to child claimants add nuances to the determination of whether a child fits the definition of a refugee under section 96 of the Immigration and Refugee Protection Act.⁸ These nuances are based on an appreciation that children have distinct rights that are in need of special protection, and can be persecuted or harmed in ways that would not amount to persecution or serious harm for an adult. The Court found in Kim that, when determining whether a child claiming refugee claimant fits the definition in section 96 of the Immigration and Refugee Protection Act, decision-makers must inform themselves of the rights recognized in the Convention on the Rights of the Child. It is the denial of these rights which may determine whether or not a child has a well-founded fear of persecution if returned to his or her country of origin.
- [15] In my view, the same analysis applies to assessments of whether children are persons in need of protection under s. 97 Immigration and Refugee Protection Act.

- [16] The only documentary evidence that XXXX XXXX XXXX XXXX and her family have filed in support of their argument that the children likely would be subjected to cruel and unusual treatment or punishment in the US is a section of the National Documentation Package for the US which discusses the country's practice of separating children from their parents when they were apprehended for crossing the border illegally. However, this is not the situation faced by XXXX XXXX XXXX XXXX children who were born in the US and who are all US citizens. Therefore, I find that this document has little relevance to the situation likely faced by XXXX XXXX XXXX XXXX and XXXX XXXX XXXX XXXX children if they return to the US.
- [17] In terms of oral evidence, XXXX XXXX XXXX XXXX testified that her children were traumatized by the idea of her husband being deported from the US. They were also traumatized when they thought they might be separated from their parents at the Canadian border. However, that is the extent of the evidence that was before the RPD, and that is before me, to support the argument made by XXXX XXXX XXXX XXXX and her family that her children's separation from their parents would amount to cruel and unusual treatment or punishment.
- [18] Although XXXX XXXX XXXX XXXX and her family argue that separating children from their families has a range of psychological, behavioural and cognitive effects, there was no social science or psychological evidence before the RPD or now before the RAD to support this argument. It is true, as noted by XXXX XXXX XXXX and her family, that Amnesty International has argued that the forcible separation of children from their family members at the US southern border has in some cases amounted to ill-treatment and torture. However, the organization was referring to the forced separation of children from their parents as they crossed the border, where in some cases, according to the organization, children were held in cages, locked up in freezing cells without adequate food or medicine.⁹ That is not the situation for XXXX XXXX XXXX XXXX and XXXX XXXX XXXX XXXX children who are US citizens born in the US.
- [19] Overall, the evidence in this case is not sufficient to enable me to find that the effects on XXXX XXXX XXXX XXXX children if they end up being separated from their parents is of such a degree, as to amount to cruel and unusual treatment or punishment. This is especially the case, since XXXX XXXX XXXX XXXX and XXXX XXXX XXXX XXXX do have family members who are citizens or permanent residents of the US. XXXX XXXX XXXX XXXX has a brother who is a citizen of the US and XXXX XXXX XXXX XXXX has a sister who she testified was a permanent resident of the US. When the RPD asked XXXX XXXX XXXX XXXX if it would be possible for the children to live with her or her husband's family members in the US, XXXX XXXX XXXX XXXX replied that it would be difficult. When the RPD asked whether it would nevertheless be possible, she said it would probably be possible but it would depend on the system. Later, in answer to her counsel's questions, XXXX XXXX XXXX XXXX said that, in order for her children to stay with their uncle in the US, she and her husband would have to be able to support them based on their earnings in Mexico or

Guatemala or else they would be placed in the foster-care system. I completely agree with XXXX XXXX XXXX XXXX and her family that their separation from their children will have significant effects on them. However, I do not find that the evidence in this case is sufficient to establish that the effects on the children would amount to cruel and unusual treatment or punishment.

- [20] I also do not agree with XXXX XXXX XXXX XXXX and her family that any discrimination that the children may face in the US due to their being Latino amounts to persecution. While all discrimination is unacceptable, not all discrimination amounts to persecution. In order for discrimination against a person to amount to persecution, it must be serious and occur with repetition. It must also have consequences of a prejudicial nature for the person, such as when an individual is denied a core human right, such as the right to practice religion or to earn a livelihood.¹⁰ In this case, XXXX XXXX XXXX XXXX testified that other children would harass and bully his children in school. In my view, such discriminatory actions, although unacceptable, are not sufficiently widespread or significant to rise to the level of persecution.
- [21] For all the above reasons, I find that the RPD did not err in concluding that the children do not face a serious possibility of persecution or the likelihood of any of the kinds of serious harm that would make them persons in need of protection in the US.

CONCLUSION

- [22] Unfortunately, I must dismiss the appeal and confirm the decision of the RPD that XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX and XXXX XXXX XXXX XXXX XXXX XXXX are neither Convention refugees nor persons in need of protection.
- [23] However, I echo the RPD's view that, even though these claims do not qualify under the asylum provisions of the Immigration and Refugee Protection Act, they may raise humanitarian and compassionate issues to be decided by a different entity through a different application process over which the RPD and the RAD have no jurisdiction. (signed) Jo-Anne Pickel Me Jo-Anne Pickel March 4, 2020 Date JP/tm
1. Canada (Citizenship and Immigration) v. Huruglica, 2016 FCA 93; Rozas del Solar v. Canada (Citizenship and Immigration), 2018 FC 1145. 2 Section 97 of the IRPA. 3 Section 97(1)(b)(ii). 4 X (Re), 2017 CanLII 142905 (CA IRB). 5 Casetellanos v. Canada (Solicitor General), 1994 CanLII 3546 (FC), [1995] 2 FC 190. This decision has been consistently applied in several other decisions: see for example Dawlatly v. Canada (Minister of Citizenship and Immigration), 1998 CanLII 7952. IMM-3607-97; Canada (Minister of Citizenship and Immigration) v. Khan, 2005 FC 398 (CanLII) at para. 49; Addulahi v. Canada (Citizenship and Immigration), 1996 CanLII 11846. 6 Kim v. Canada (Citizenship and Immigration), 2010 FC 149 (T.D.). While the Court in Kim addressed the issue in relation to claims of persecution made under s. 96 of the IRPA, the same analysis applies to claims of being a person in need

of protection under s. 97 of the IRPA. 7 Ibid. at para. 76. 8 Ibid. at para. 61. 9 Tab 5.6 of the National Documentation Package for the United States (January 31, 2020). 10 Noel v. Canada (Citizenship and Immigration), 2018 FC 1062 at a para. 29.

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Refugee Appeal Division Commission de l'immigration et du statut de réfugié du Canada Section
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