

CANADA / JUDGMENT

TB8-25963

COURT

Refugee Appeal Division

DECIDED

4 November 2020

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RAD File / Dossier de la SAR : TB8-25963

Private Proceeding / Huis clos

Reasons and decision ? Motifs et décision

Person who is the subject of the appeal

XXXX XXXX XXXX XXXX

Personne en cause

Appeal considered / heard at

Montreal, QC

Appel instruit / entendu à

Date of decision

November 4, 2020

Date de la décision

Panel

Guerlain Guerrier

Tribunal

Counsel for the person who is the subject of the appeal

Pablo Andres Irribarra Valdes

Conseil de la personne en cause

Designated representative

N/A

Représentant(e) désigné(e)

Counsel for the Minister

N/A

Conseil du ministre

REASONS FOR DECISION

OVERVIEW

- [1] XXXX XXXX XXXX XXXX (Appellant) is a citizen of Colombia.
- [2] He fears persecution because of his sexual orientation as an HIV-positive gay man. The Appellant is also a human rights worker in Colombia. He fears persecution from the Black Eagles (BE), a paramilitary group that opposes his work with vulnerable communities.
- [3] The Refugee Protection Division (RPD) concluded that the Appellant is neither a Convention refugee nor a person in need of protection. The RPD found that, while there is evidence of discrimination against sexual minorities in Colombia, the Appellant had not established that it amounts to persecution. With respect to the threats from the BE, the RPD found that the Appellant's allegations were not credible. Alternatively, even if the allegations were true, the RPD concluded that state protection was adequate in Colombia.
- [4] On appeal, the Appellant submits that the RPD erred in making negative credibility inferences. In coming to its conclusion, the RPD wrongfully dismissed the psychological evidence. Secondly, the RPD engaged in a selective analysis of the objective evidence with respect to persecution and state protection for human rights workers and sexual minorities.

DECISION

- [5] The appeal is allowed. I set aside the determination of the RPD and substitute my own determination that the Appellant is a Convention refugee. I agree with the RPD that some of the Appellant's allegations lack credibility. However, the RPD accepted, as I do, that the Appellant is an HIV-positive homosexual human rights worker. In this case, the proper way to evaluate his risk is by compounding the Appellant's social identities. I find, using this comprehensive method, that he faces a serious possibility of persecution if he were to return to Colombia.

NEW EVIDENCE

- [6] According to the law,¹ I can only accept evidence that:
 - i. arose after the RPD decision; or
 - ii. was not reasonably available at the time of the decision; or
 - iii. that could not reasonably have been expected in the circumstances to bring to the RPD before the decision.

- [7] If the evidence meets one or more of these requirements, I must decide if the evidence is new, credible, and relevant before I can accept it.²
- [8] On appeal, the Appellant submitted 2 news articles and 10 reports³ from news media and other organizations.
- [9] Exhibit A of the Appellant's Further Submissions, Immigration and Refugee Board of Canada, "Colombia: Fact-Finding Mission Report" March 2020, is item 1.8 of the June 2020 National Documentation Package (NDP) for Colombia, which is already part of the record. This evidence arose after the RPD decision but is not new. Exhibit A of the Further Submissions is not admitted into evidence.
- [10] All the other articles and reports, about the country conditions in Colombia and submitted by the Appellant, are admitted.
- [11] They were written after and/or refer to events that occurred after the RPD rendered its decision. I find that they fulfill at least one of the criteria of subsection 110(4) of the Immigration and Refugee Protection Act (IRPA).
- [12] With respect to the Singh/Raza factors, I find that the exhibits meet the criteria of credibility, in that they have been drafted and issued by reputable news or social organizations. I also find that they are relevant. The information therein sheds light on the situation of human rights activists and sexual minorities in Colombia. Exhibit 1 and 2 of the Appellant's Record and Exhibits B to H of the Further Submissions are admitted into evidence.

ORAL HEARING

- [13] The Appellant does not request an oral hearing. According to the case law, the onus is on the Refugee Appeal Division (RAD) to determine whether the requirements for an oral hearing set out in subsection 110(6) of IRPA have been met.⁴
- [14] The description of the country conditions described in the new evidence is relevant, but it does not relate to central and important events that can justify rejecting or accepting this claim, nor does it raise a serious issue with respect to the credibility of the Appellant. For these reasons, I find that the criteria for an oral hearing was not met.

ANALYSIS

- [15] My role is to look at all the evidence and decide if the RPD made the correct decision.⁵
- [16] In doing so, I have considered the Chairperson's Guideline 9: Proceedings Before the IRB Involving Sexual Orientation and Gender Identity and Expression.⁶
- [17] The Appellant argues that the RPD erred in the following respect:
- a. The RPD gave little weight to a psychological report indicating that the Appellant's ability to provide evidence could be affected by concentration and memory problems.

- b. The RPD's credibility assessment was unreasonable because it ignored the psychotherapist's report.
- c. The RDP was selective in its analysis of the evidence. It ignored or misconstrued evidence which was contrary to its conclusions.

[18] Moreover, according to the Appellant, the new evidence filed in support of his appeal further corroborates the fact that he faces a serious possibility of persecution in Colombia based on his sexual orientation, health status, and profile as a human rights worker.

The psychotherapist's report

[19] In her report, psychotherapist XXXX XXXX makes the following comments:

Based on my observations and evaluations, I believe there are aspects of Mr. XXXX cognitive and emotional functioning that could impede his ability to provide a detailed history and clear testimony. He reports problems with concentration ("I wanted to learn English and went to class, but failed a level because my thoughts were always on other things"). He also experiences memory problems which make it difficult to retain information ("I forget my appointments and I misplace things"), as well as difficulty engaging in conversation ("I follow for a bit and then I feel lost suddenly").

It is important to note that concentration and memory problems are common among people exposed to traumatic stress. Cognitive difficulties are exacerbated under pressure, such as arises in the high-stakes [sic] context of immigration proceedings. Symptoms can take the form of difficulty understanding questions, requests for information to be repeated or rephrased, inability to retrieve specific details of the past, or an apparent inability to formulate a coherent response. Stress-related cognitive problems can lead to difficulties in providing clear and consistent testimony. Should such problems become evident, it will be important to understand that they likely reflect the disorganizing effects of traumatic stress rather than an effort to evade or obfuscate.

[20] The RPD gave little weight to the report. It noted the following points: Ms. XXXX, the Psychotherapist, did not attend the hearing to explain or defend her conclusions; as a Psychotherapist, she cannot communicate a diagnosis; the report inappropriately mixes opinion with advocacy.

[21] The appellant argues that, no matter what other concerns the RPD had about the report, it should have considered Ms. XXXX observations about his cognitive symptoms as they are relevant to the assessment of his credibility.

Federal Court jurisprudence on the use of psychological reports as evidence

[22] The Appellant cites several Federal Court decisions which say that the RPD needs to consider and adequately assess relevant evidence, generally and specifically psychological evidence.

[23] I note that there is considerable additional Federal Court jurisprudence which specifically addresses the use of psychological evidence in refugee claims. A 2018 Federal Court decision summarizes that jurisprudence:⁷

The jurisprudence has cautioned that the recounting of events to a psychologist or a psychiatrist does not make these events more credible and that an expert report cannot confirm allegations made by a claimant. For example, in *Rokni v Canada (Minister of Citizenship and Immigration)*, [1995] FCJ No 182 (QL), 53 ACWS (3d) 371 (FCTD), and *Danailov v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 1019 (QL), 44 ACWS (3d) 766 (FCTD), the Court noted that opinion evidence is only as valid as the truth of the facts upon which it is based. The same caution was noted by Justice Phelan in *Saha v Canada (Minister of Citizenship and Immigration)*, 2009 FC 304 (CanLII) at para 16, 176 ACWS (3d) 499: "It is within the RPD's mandate to discount psychological evidence when the doctor merely regurgitates what the patient says are the reasons for his stress and then reaches a medical conclusion that the patient suffers stress because of those reasons."

In *Czesak v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1149 (CanLII) at paragraphs 37-40, 235 ACWS (3d) 1054, Justice Annis noted concerns about psychological reports that advocate in the guise of an opinion and "propose to settle important issues to be decided by the tribunal." Justice Annis found that in such cases, without some way to probe the opinion, little weight should be attached to it.

The RAD is entitled to scrutinize psychological reports and discount opinions on the issues that it or the RPD, as the decision-maker, should make and to consider that the account provided by a refugee claimant to their psychologist or psychiatrist is their own account.

[24] Federal Court jurisprudence also confirms that a psychological report cannot serve as a cure-all for any and all deficiencies in a claimant's testimony:⁸

The Board reasonably found that a psychiatric report, or in this case a doctor's or counsellor's letter, submitted as evidence where there are concerns regarding the claimant's testimony, amounts only to opinion evidence that is only as valid as the truth of the facts on which it is based. Further, that it cannot serve as a cure-all for any and all deficiencies in a claimant's testimony (*Rokni*, above; *Danailov*, above; *Arizaj v Canada (Minister of Citizenship and Immigration)*, 2008 FC 774 at para 26). The Board had stated that it had credibility concerns and, therefore, it was open to it to consider the corroborating letters in the context of those concerns (*Lebrun v Canada (Minister of Citizenship and Immigration)*, 2009 FC 233 at para 6). Also see *Singh v Canada (Minister of Citizenship and Immigration)*, 2013 FC 202 at para 40. Accordingly, the Board assigned little weight to these reports and it is not the task of this Court to reweigh this evidence.

RAD analysis

[25] I give little weight to the report.

- [26] The evidence does not establish that the Appellant suffers from XXXX XXXX XXXX (XXXX). Only a psychiatrist or a psychologist could make a proper diagnostic. Instead, based on the Appellants report, Ms. XXXX writes that she is under the "impression? that the Appellant exhibits symptoms consistent with XXXX, XXXX and XXXX. According to Ms. XXXX, the self-reported symptoms - mainly memory and concentration problems - are "XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX. I note that it is not Ms. XXXX who observed the Appellant's concentration and memory problems; she is simply reporting the Appellant's own description of himself. He did not undergo any standardized psychological test for concentration or memory problems.
- [27] The Appellant reported that he "wanted to learn English and went to class, but I failed because my thoughts were always on other things?. He also told the author that he "forget[s] [his] appointments and misplace things". These are very vague and general statements that could apply to a large number of people who have failed a class or misplaced something whether they suffer from XXXX or not. I'm concerned that the method used to conclude that the Appellant suffers from cognitive problems is somewhat superficial.
- [28] As a psychotherapist, Ms. XXXX cannot diagnose XXXX. The Appellant was met only once for an unspecified amount of time. The psychological assessment of possible XXXX was based on the Appellant's self-report. The symptoms commonly associated with XXXX were also self-reported by the Appellant. The Appellant has not been subjected to any standardized psychological testing. Taking into account the above considerations, I find that the evidence of cognitive problems that would affect the ability of the Appellant to testify is not based on solid data, and therefore not very robust.

The Appellant's Testimony

- [29] The RPD found that the Appellant's testimony was not credible. The Appellant testified that he was seeking refugee protection because he received threats for the humanitarian work that he was doing in Colombia in 2015. He further explained that there were phone calls telling him to stop working with the youth and to stop working in the community. When confronted with contradictory facts between his testimony and his Basis of Claim Form (BoC) narrative concerning the calls in 2016, the Appellant's testimony kept evolving.
- [30] The Appellant argues his testimony was credible. The discrepancies are explained by his cognitive problems.
- [31] I have listened to the hearing and do not believe that cognitive problems explain the contradictory testimony of the Appellant. I note that he does not spontaneously mention memory lapses or concentration problems. Moreover, the confident, fluid and detailed testimony of the Appellant throughout the hearing betrays no signs of cognitive problems.

- [32] The Appellant's evidence about the number of threatening phone calls and when he received them is the concerning part of his testimony. The answers evolve after each new factual element introduced by the RPD. It is only after having been confronted with obvious contradictions between his statements and his BoC narrative that the Appellant claims his memory has failed him.
- [33] A negative inference can be drawn from the Appellant's testimony about the threats received in 2015 and 2016. But I do not believe that the confusion about the exact number of phone calls received is sufficient to conclude that the Appellant was never threatened.
- [34] I reject the Appellant's argument that the psychotherapist's report provides a reasonable explanation for his contradictions, but I accept that he received threats from the BE.

The possibility that the Appellant would be persecuted if he were to return to Colombia based on his sexual orientation

- [35] The RPD found that there is some evidence of discrimination and violence against sexual minorities. However, its analysis of the evidence does not indicate that the situation of sexual minorities in the country amounts to persecution. Rather, the RPD found that Colombia has taken many steps towards the normalization and protection of sexual minorities.
- [36] The Appellant argues that the RPD engaged in a selective analysis of the country conditions in Colombia. The Appellant contends that the documents used by the RPD to support its conclusions, when reviewed in their entirety, provide evidence of widespread persecution faced by the LBGTIQ+ community.
- [37] For the following reasons, I do not find that the RPD erred in its conclusion that there is no serious possibility of the Appellant being persecuted upon return to Colombia, based solely on his sexual orientation.
- [38] The documentary evidence on this issue is mixed. I note that the challenges faced by members of the various groups in the LBGTIQ+ community are not uniform. For instance, transwomen, sex workers, Afro-Colombian members of a sexual minority⁹ and sexual minorities in rural areas face higher levels of discrimination and violence.¹⁰
- [39] The latest human rights report from the US Department of State indicates that, although there are no reports of official discrimination, and despite the government measures to increase the rights and protection of LGBTI persons, there were reports of societal abuse and discrimination.¹¹ Furthermore, according to representatives from Colombia Diversa, legal developments regarding the situation of LGBTI people have improved their life in urban areas, and have translated themselves into a higher level of acceptance in Colombian cities.¹²

[40] The Appellant is a young, urban, highly educated, white gay man. He does not claim to have experienced any specific incident of persecution due to his sexual orientation. He explains that he has kept his sexual orientation secret. My review of the evidence convinces me that homosexual men need not hide their sexual orientation to avoid persecution in Colombia. State protection for white urban homosexuals, while not perfect, is adequate, and the overall situation is improving for sexual minorities.¹³

The Appellant's profile as a human rights activist and as an HIV-positive homosexual man puts him at risk of a serious possibility of persecution if he were to return to Colombia

[41] One must add the risks he faces as a human rights worker to the risks associated with the Appellant's sexual orientation. Individuals with his profile are targeted by paramilitary groups.¹⁴ The Colombian government established a National Protection Unit (UNP) specifically to protect such vulnerable individuals. However, the UNP has a limited budget and the protection measures are "inconsistent".¹⁵

[42] An examination of whether discrimination rises to persecution must always take into account the personal circumstances and vulnerabilities of the Claimant or Appellant.¹⁶ I find, on a balance of probabilities, that such conditions exist in the Appellant's case.

[43] The Appellant's profile is composed of multiple social identities that increase the risks that he faces in the Colombian society. In this case, conducting a sequential analysis of the Appellant's situation as a human rights worker and as a homosexual man would not take the full measure of the total risk. In my opinion, the intersection of homosexuality and human rights activism compounds the risks that he faces. This heightened risk is sufficient to conclude that he would face a serious possibility of persecution.

State Protection

[44] The RPD found that the Appellant failed to rebut the presumption of state protection. I disagree. Taking into account the intersectionality of the Appellant's profile and the heightened risks associated with such a profile, I find that operationally adequate state protection would not be forthcoming in Colombia for the Appellant in his circumstances.

CONCLUSION

[45] The appeal is allowed. I substitute my own decision that the Appellant is a Convention refugee.

(signed)

Guerlain Guerrier

Guerlain Guerrier

November 4, 2020

Date

GG/in

1 Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 110(4).

2 Canada (Citizenship and Immigration v. Singh, 2016 FCA 96; Raza v. Canada (Citizenship and Immigration), 2007 FCA 385.

3 Exhibit P-2, Appellant's Record, Exhibits 1 and 2, at pp. 21-33;

Exhibit P-3, Further submissions to Appellant's Record, Exhibit A to H, at pp. 19-166.

4 Horvath v. Canada (Minister of Citizenship and Immigration), No. IMM-3425-17, Mosley, February 8, 2018; 2018 FC 147, paragraph 18.

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

6 Chairperson's Guideline 9: Proceedings Before the IRB Involving Sexual Orientation and Gender Identity and Expression, Guidelines issued by the Chairperson pursuant to paragraph 159(1)(h) of the Immigration and Refugee Protection Act, effective date: May 1st, 2017.

7 Iyere v. Canada (Citizenship and Immigration), 2018 FC 67 (CanLII), paragraphs 47-49.

8 Shatirishvili v. Canada (Citizenship and Immigration), 2014 FC 407 (CanLII), paragraph 46.

9 Exhibit RPD-1, Exhibit 3, National Document Package (NDP) on Colombia, (June 12, 2020), item 13.1: "Situation and treatment of Afro-Colombians in Medellín, Bogotá, and Cali; legal recourse and support services (2012-March 2015)", Immigration and Refugee Board of Canada, 20 April 2015.

10 Exhibit RPD-1, Exhibit 3, NDP on Colombia, (June 12, 2020), item 6.1: "Situation of LGBTI Human Rights in Colombia. Report submitted to the Committee on Economic, Social and Cultural Rights, 62nd Session, September 18 to October 6 2017", Corporación Caribe Afirmativo et al., August 2017.

11 Exhibit RAD-1, NDP on Colombia (June 12, 2020), item 2.1: "Colombia 2019 Human Rights Report," US Department of State, March 11, 2020, at p.30.

12 Exhibit RAD-1, NDP on Colombia (June 12, 2020), item 6.3: "Colombia: Situation and treatment of sexual and gender minorities, including treatment by authorities and society; state protection and support services available (2017-May 2020)", Immigration and Refugee Board of Canada, May 26, 2020.

13 Exhibit RPD-1, Exhibit 3, NDP on Colombia, (April 30, 2018), item 6.4: "Colombia LGBTI: Landscape Analysis of Political, Economic & Social Conditions", Astraea Lesbian Foundation for Justice, 2015.

14 Exhibit RAD-1, NDP on Colombia (June 12, 2020), item 1.8: "Colombia:Fact-Finding Mission Report: Conflict Dynamics in the Post-FARC-EP Period and State Protection", Immigration and Refugee Board of Canada, March 2020.

15 Ibid.

16 Liang v. Canada (Citizenship and Immigration), 2008 FC 450, at paras. 21-22.

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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 (January, 2020)

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