

CANADA / JUDGMENT

MB9-17600

COURT

Refugee Appeal Division

DECIDED

10 December 2020

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RAD File No. / No de dossier de la SAR : MB9-17600 MB9-17601 Private Proceeding / Huis clos
Reasons and Decision - Motifs et décision Persons who are the subject of the appeal XXXX XXXX
XXXXXXXX XXXX XXXX Personnes en cause Appeal considered / heard at Montréal, Quebec
Appel instruit / entendu à Date of decision December 10, 2020 Date de la décision Panel Me
Jolyane Lefebvre Tribunal Counsel for the persons who are the subject of the appeal Walid Ayadi
Conseil des personnes en cause Designated representative XXXX XXXX Représentant(e)
désigné(e) Counsel for the Minister N/A Conseil du ministre REASONS FOR DECISION
OVERVIEW

- [1] The appellants, XXXX XXXX, a citizen of Haiti, and her minor daughter, XXXX XXXX XXXX, a citizen of Brazil, are claiming refugee protection in Canada.
- [2] In her Basis of Claim Form (BOC Form), the principal appellant alleges that the employees of the store where she worked were jealous and wanted her job. In 2013, a store employee allegedly threatened her as she was leaving work, and five armed individuals came into her yard, uttered threats against her and raped her. The day following that event, she allegedly went to the clinic and filed a complaint with the authorities. She asserts that she informed her aunt, the owner of the store where she worked, who reportedly dismissed the person responsible for the incident. The principal appellant left Haiti in XXXX 2013 for Brazil.
- [3] The Refugee Protection Division (RPD) rejected the appellants' claim. It determined that the principal appellant was excluded under Article 1E of the Convention. It also determined that the minor appellant was not a Convention refugee or a person in need of protection.
- [4] The appellants are contesting the RPD's decision. They argue that the principal appellant should not be excluded under Article 1E and that the RPD erred in concluding that there was an overall lack of credibility. They add that her testimony was clear, sufficiently detailed and free of inconsistencies and contradictions. They add that the RPD conducted a selective and erroneous analysis of the documentary evidence and failed to consider the principal appellant's vulnerable situation. They consider that the RPD's conclusion pertaining to the minor appellant is unreasonable, as she faces a risk if she returns to Haiti.

- [5] I conducted an independent analysis of the evidence, taking into consideration the record of the Refugee Appeal Division (RAD) and that of the RPD, including the recording of the hearing before the RPD.

DETERMINATION

- [6] I determine that the principal appellant is excluded and that her minor daughter is not a Convention refugee or a person in need of protection. The RPD's decision is correct and I dismiss the appeal.

ANALYSIS

Minister's intervention before the Refugee Protection Division

- [7] The Minister intervened in the appellants' claim to ask that the principal appellant be excluded under Article 1E.
- [8] I note that the Minister did not intervene in this appeal. Was exclusion based on Article 1E of the Convention correctly applied?
- [9] In Zeng,¹ the Federal Court set out the factors to consider in determining whether exclusion 1E applies to a specific case: Considering all relevant factors to the date of the hearing, does the claimant have status, substantially similar to that of its nationals, in the third country? If the answer is yes, the claimant is excluded. If the answer is no, the next question is whether the claimant previously had such status and lost it, or had access to such status and failed to acquire it. If the answer is no, the claimant is not excluded under Article 1E. If the answer is yes, the RPD must consider and balance various factors. These include, but are not limited to, the reason for the loss of status (voluntary or involuntary), whether the claimant could return to the third country, the risk the claimant would face in the home country, Canada's international obligations, and any other relevant facts.
- [10] Consideration of the application of this article must be completed on the day of the hearing before the RPD, as established in Majebi. The RPD hearing was held on May 21, 2019, and the appellants allege that they left Brazil in XXXX 2016. Permanent resident status in Brazil
- [11] At the hearing, the principal appellant testified that she did not know whether her name was on the list of Haitians approved for permanent residence, but she knew that she had acquired permanent residence. When asked whether she was able to return to Brazil, she stated that she had lost her status because she had spent two years outside the country.²
- [12] After clarifying that the principal appellant's name did appear on the list of Haitians approved for permanent residence in XXXX 2015 and considering her testimony and the documentary evidence, the RPD concluded that there was every indication that she had acquired permanent residence in Brazil. The RPD consequently concluded that the appellant held permanent resident status in Brazil, that she had not made any effort to ensure that she did not lose this status and that she [translation] "had, through her

permanent residence, status in Brazil substantially similar to that of Brazilian nationals." She could therefore be a person referred to in Article 1E of the Convention.

- [13] The appellants argue that the fact that the principal appellant's name is on the list of Haitians approved for permanent residence is insufficient to conclude that she held permanent resident status. They add that the principal appellant testified that she was uncertain as to the nature of her status and the scope of the residence that the Brazilian authorities had granted her. She also did not know the validity period of her card or the benefits associated with it.³ They submit that she had residence but that this status had to do with a humanitarian visa. They submit further that the RPD erred in concluding that she had status substantially similar to that of Brazilian nationals and add that the documentary evidence shows that Haitians do not have the same rights as Brazilians and are victims of violence, discrimination and rejection.
- [14] I am of the opinion that the RPD did not err.
- [15] The evidence in the record, namely the Minister's intervention, shows that the appellant's name appears on the list of 43,781 Haitian nationals granted permanent residence. The same evidence indicates that, as of January 2017, approximately 71% of the 43,781 Haitians granted permanent residence had completed the administrative proceedings to acquire permanent residence. In my opinion, based on these elements, in addition to the fact that the appellant stated that she had acquired permanent residence in Brazil and asserted that she had worked and received health care, I am able to establish that the principal appellant had acquired permanent residence in Brazil and that her status conferred on her rights substantially similar to those of nationals of the country.
- [16] Similarly, I cannot accept the appellants' arguments that the principal appellant did not know her status at the time of her hearing. The recording of the hearing reveals that the principal appellant confirmed having acquired permanent residence and added that she could not [translation] "lie about it."⁴ Moreover, contrary to what they allege in their memorandum, she never testified that she was not aware of the benefits and drawbacks associated with the residence card. She simply stated that she had acquired it in 2015 and that she did not know for how many years her residence card was valid.
- [17] Regarding the argument that the appellant's resident status had more to do with a humanitarian visa, I note that this argument was never raised before the RPD, as she asserted that she had acquired permanent residence. That being said, the Brazilian authorities granted special permits to Haitians following the earthquake that struck Haiti. Initially temporary for five years, the humanitarian visa was transformed into special permanent status for persons whose names were on the list of 43,871 Haitians, as was the case for the principal appellant.
- [18] With respect to the rights of nationals, I disagree with the arguments made by the appellants. According to the documentary evidence, there are certain restrictions on the rights of foreign nationals in Brazil, the most significant being prohibition from performing

military service and from voting. However, the Brazilian constitution guarantees foreign nationals residing in Brazil the same rights that it guarantees to Brazilian citizens, notably in the areas of education, health, health and social services. As stated previously, based on the principal appellant's testimony, she worked and received health care. Whether she can return to Brazil

- [19] The RPD concluded that, having a dependent minor daughter of Brazilian citizenship, the principal appellant would be able to obtain a family reunification visa under which she could return to Brazil. The RPD therefore concluded that the principal appellant could [translation] "be granted a permanent resident visa under Brazilian law and thereby return to Brazil."
- [20] The appellants did not submit any arguments in their memorandum.
- [21] I agree with the RPD. The evidence in the National Documentation Package (NDP) on Haiti clearly establishes that, as the mother of a Brazilian child, the principal appellant would be able to obtain a visa of equivalent duration to her daughter's resident permit, that is, indefinitely. The same law provides that after residing in Brazil for one year the principal appellant could apply for naturalization as a Brazilian citizen. I consequently conclude that the principal appellant has the right to return to Brazil, which weighs in favour of her exclusion. Fear in Brazil and voluntary or involuntary departure
- [22] The RPD identified contradictions and omissions in the principal appellant's testimony concerning her life in Brazil. It found that her testimony was not credible at all.
- Addition to Basis of Claim Form at the start of hearing
- [23] At the start of the hearing, the principal appellant requested to add to her BOC Form what she had experienced in Brazil. She explained that she had not been aware that she was supposed to describe her experiences in Brazil and that a friend who had had an RPD hearing had informed her, one week earlier, that it was important for her to add this information.
- [24] The RPD concluded that it could not accept her explanations. It concluded that it would have been relevant for the appellant to explain why she had fled [translation] "Brazil's protection" since she was a permanent resident and represented by a lawyer since the start of the proceedings. It also concluded that, given that the minor appellant held Brazilian nationality, the panel could have expected it to contain information on Brazil, since this is a country of reference that would surely be analyzed.
- [25] The appellants argue that this addition at the start of the hearing should not undermine the principal appellant's credibility and that she had reasonably explained to the panel the reason for this delayed addition.

- [26] I am of the opinion that the RPD did not err. In my view, the fact that the principal appellant attributes this addition on the morning of the hearing to the fact that her friend told her that it was important to do so undermines her credibility. As the RPD stated, the appellants were represented by a lawyer when the principal appellant completed the BOC Forms, and Brazil was a country of reference, since the minor appellant was born there and the principal appellant held permanent residence there. What is more, although the appellant stated that she did not know that she was supposed to add a written account of the events she had experienced in Brazil, question 3 of the BOC Form indicates to list all countries where you believe you are at serious risk of harm. The appellant listed only Haiti when she had the opportunity to list Brazil. This undermines her credibility.
- Omission of threats received from her ex-partner
- [27] The principal appellant testified at the hearing that she left Brazil due to death threats made against her by her former partner. She stated that the two had separated in XXXX 2015. When asked why she states in question 5 of her BOC Form that XXXX was her common-law partner, she replied that the person who helped her complete her form had told her to state this. When confronted with the fact that she also states that she was in a common-law relationship with XXXX since 2013 in her IMM-0008 immigration form and that she states that he had given her \$XXXX toward her travel to Canada, the principal appellant responded that she had not known how to complete the documents and that the person who helped her told her to enter this information.
- [28] After noting that the principal appellant was represented by a lawyer when she completed her BOC Form, the RPD found that her credibility was seriously undermined and that it did not accept that she and her partner separated in XXXX 2015. It added that it also did not accept that the death threats are what led her to move in with a female friend in Brazil and then leave the country. It found that the principal appellant's testimony was not credible and that she had failed to demonstrate that she [translation] "would face a serious possibility of persecution or that, on a balance of probabilities, there would be a risk under subsection 97(1) of the Act,"⁵ should she return to Brazil.
- [29] The appellants submit that the principal appellant explained the context in which the documents were completed. They argue that the volunteers and the immigration officer never asked them about how the documents should be completed and that she [translation] "never received assistance from a lawyer" to explain the proceedings to her. They add that the volunteer did not have a legal background, that he had advised her to write down her ex-partner's name when she had objected to this and that he had misled her, [translation] "by asking her to state that her ex-partner had given her \$XXXX toward her travel to Canada."⁶ They argue that this omission is insufficient [translation] "to undermine or reject the credibility of the principal appellant's essential allegations."⁷

- [30] The RPD did not err. The fact that the principal appellant states more than once in her forms that she is still in a relationship with her daughter's father when she alleges that the two have been separated for several years and she attributes her departure from Brazil to death threats he made against her undermines her credibility. That said, even considering the possibility that the principal appellant received erroneous advice from a volunteer when she completed the various forms upon arriving in Canada, she never pointed out these errors in these documents when she completed her BOC Form with help from a lawyer or at the start of the hearing when she was invited to make additions or changes to her BOC Form. The panel could have expected the principal appellant to make the necessary corrections, particularly since she alleges that she had objected to the volunteer's recommendations. This undermines her credibility to the point of not believing her testimony and, like the RPD, I consider that she failed to demonstrate, on a balance of probabilities, that she would face a serious possibility of persecution or a risk to her life if she returned to Brazil.
- Treatment of Haitians in Brazil
- [31] The appellants argue that Tab 14.11 of the NDP on Haiti, [translation] "paints a bleak picture of the situation of Haitians in Brazil," and cite multiple passages from it.
- [32] However, this same tab also indicates that Haitians are highly valued as workers and that there is little information concerning violent incidents targeting Haitian nationals. While the tab does report an incident from 2015 during which six Haitians lost their lives, the publication Br sil(s) indicated that this event may in fact have been related to drug trafficking. That being said, the appellants did not cite any specific examples that might lead me to conclude that Haitians in Brazil generally encounter discrimination to an extent potentially amounting to persecution. Fear in Haiti
- Agent of persecution in Haiti
- [33] The principal appellant alleges that she fears individuals in Haiti. She alleges that she was assaulted by five individuals sent by a co-worker ("XXXX") who had made threats against her. At the hearing, she testified that her aunt dismissed this individual. When asked whether her aunt had received any threats or visits from XXXX following his dismissal, the principal appellant answered that she did not know. She added that she had not attempted to contact her aunt or cousins and that she had not been interested in knowing whether her aunt had had any problems.
- [34] The RPD concluded that it was [translation] "reasonable to expect the claimant to make an effort to find out whether her agent of harm had gone after the aunt,"⁸ and that her credibility was undermined for this reason.

- [35] The appellants argue that the principal appellant's testimony was sufficiently detailed and free of inconsistencies and contradictions. They submit that it is, [translation] "reasonable for the appellant not to contact her aunt for updates, since she was the victim of the assault."⁹ They add that it is unfair for the RPD to [translation] "reject the appellant's corroborating evidence and not to attribute any probative value to it on a pretext of lack of credibility due to a transcription error on a medical certificate."¹⁰
- [36] The RPD did not err. I consider that the panel could have expected the principal appellant to contact her aunt and other family members to find out whether they had received any threats or visits from XXXX following the event in 2013. In my view, the fact that the principal appellant stated to the RPD that she was not interested in knowing this undermines her credibility, particularly since she asserts that he is still looking for her and seeking revenge since he lost his job because of her, even though she confirmed to the RPD that she did not have any information in this regard. I find that her credibility is undermined.
- [37] Meanwhile, I cannot accept the appellants' other arguments. The RPD's decision shows that it never rejected or declined to give any probative value to the evidence provided by the appellant. Additionally, I do not note any finding as to a [translation] "lack of credibility due to a transcription error," in the medical certificate. The recording of the hearing reveals that the appellant lost her medical certificate¹¹ and that it was not provided as evidence.
- Failure to apply for asylum in the United States
- [38] The principal appellant did not apply for asylum in the United States upon her arrival in 2016. When questioned by the RPD, she stated that she had not had anyone to advise her, that she had gone to appointments with the immigration authorities and that she had thought that they were going to lead to something positive.¹² When asked whether she had asked questions concerning the possibility of obtaining protection from the U.S. authorities, she stated that she had asked only once but that she would have had to retain a lawyer, and she did not have any money since she was not working.
- [39] The RPD concluded that the principal appellant's conduct [translation] "is not consistent with the risks that she presented,"¹³ and that it would have expected her to apply for asylum in the United States. It consequently drew a negative inference and found her credibility to be undermined.
- [40] The appellants argue that it was unfair for the RPD to make this finding considering that the principal appellant delivered reasonable and convincing testimony and acted reasonably based on the information provided to her.

- [41] The RPD attributed some importance to the fact that the principal appellant did not apply for asylum in the United States even though she explained that she had gone to multiple appointments at the immigration office thinking that it was going to [translation] "lead to something," and that she did not have the resources required to pursue that avenue. I agree with the RPD that this undermines the appellant's credibility in relation to the fear she asserts, but I conclude that it is not a determinative factor.
- Situation alleged by principal appellant
- [42] The appellants argue that the principal appellant testified that she was a victim of rape in Haiti, [translation] "as well as a victim of domestic death threats and that she was afraid of the violence and assaults perpetrated against women in Haiti."¹⁴ They add that her fear is broadly supported by documentary evidence in the NDP on Haiti.
- [43] The RPD concluded that the principal appellant had the right to return to Brazil, that her entire testimony pertaining to her fear in Brazil was not credible and that, for these reasons, it did not accept her story of persecution, risk and threats in Brazil. It added that it would have rejected her refugee protection claim even if it had not determined that the principal appellant was excluded. She had failed to demonstrate a serious possibility that she would be persecuted in Haiti or that, on a balance of probabilities, she would be subjected personally to a danger of torture, a risk to her life or a risk of cruel and unusual treatment or punishment if she were to return to Haiti.
- [44] The principal appellant asserts that death threats were made against her in Brazil and that she was raped by a group of individuals in Haiti. However, these allegations were found not to be credible. I therefore consider that the RPD's decision is correct.
- [45] Chairperson's Guideline 415 and the case law¹⁶ establish that women may be considered a particular social group within the meaning of the Convention and that rape is a gender-based crime that cannot be deemed motivated by mere criminal intent. It has been established that merely being a member of the particular social group of women is not sufficient to conclude that there is a possibility of persecution on this ground.
- [46] The evidence shows that the principal appellant has a family unit in Haiti and male protection. Several members of her family live there, including her mother, her two brothers and a number of cousins. This being the case, there is every indication that she would not be alone or homeless should she return to Haiti. Canada's international obligations
- [47] The RPD did not conduct this analysis in its decision, but I understand from the decision that the factors weighed in favour of exclusion.
- [48] The appellants make no comment in this regard in their memorandum.

- [49] That being said, I consider that Canada is meeting its international obligations. First, I consider that the appellant voluntarily abandoned her permanent resident status in Brazil. Regardless, because she is the mother of a Brazilian child, she could return there by obtaining a family reunification visa. The principal appellant did not establish a serious possibility of persecution in Brazil or Haiti or one of the five Convention grounds. Additionally, she did not demonstrate that she would be subjected personally to any of the risks listed in subsection 97(1) of the IRPA if she were to return to Haiti or Brazil. Concluding that she is a person referred to in Article 1E of the Convention does not contravene Canada's international obligations.
- [50] After weighing the Zeng factors, the RPD determined that the principal appellant was excluded under Article 1E of the Convention. The RAD is of the view that the factors weigh in favour of exclusion and that the RPD's conclusion is correct. The Refugee Protection Division acted in accordance with Chairperson's Guideline
- [51] The appellants submit that the RPD [translation] "did not adhere to the IRB Chairperson's Guideline with respect to claims by female sexual assault victims."¹⁷ They add that the RPD never stated in its reasons for decision that it had taken it into consideration. They submit further that [translation] "the panel appeared confused with its repetitive, insistent and unsettling questions to find that the principal appellant was not credible"¹⁸ and that it failed to "follow the Minister's Guideline in accordance with standards governing the conduct of the hearing."¹⁹
- [52] While the RPD did not state in its reasons that it had considered the Chairperson's Guideline, I do not consider that it erred by not mentioning this specifically. The fact that it did not mention the Guideline does not constitute an error, and I consider that the RPD acted in accordance with the Guideline.
- [53] As for the arguments concerning the conduct of the hearing, I note that the appellants do not refer to any particular moment in their memorandum. After listening to the recording of the hearing, I disagree with them. In my view, the questioning was respectful, and it was left to the principal appellant to answer the questions put to her. I do not note any questions that were repetitive, insistent or unsettling. The RPD member did not fail to observe any principle of natural justice or procedural fairness through her attitude or the questions she asked. Fear for minor appellant
- [54] The RPD concluded that insofar as the principal appellant had failed to demonstrate that she would face a fear of persecution within the meaning of the Convention or a risk under subsection 97(1) of the IRPA if she returned to Brazil, it drew the same conclusions with respect to the minor appellant, whose claim was based on the same allegations as those of her mother, the principal appellant.

- [55] The appellants argue that the RPD's conclusion was unreasonable and that the minor appellant [translation] "also faces a risk if she returns to Haiti with her mother based on her membership in the particular social group of the family by reason of her family ties to the principal appellant"²⁰ and "due to sexual abuse, exploitation, violence, psychological harm, etc. if she were to be removed to Haiti."²¹
- [56] The RPD did not err in concluding that the minor appellant would not face a serious possibility of persecution or a risk of harm in Brazil. I conclude that the RPD's decision was correct and that it did not err in declining to analyze the risk that the minor appellant would face in Haiti, as she is a citizen of Brazil.

CONCLUSION

- [57] For these reasons, I dismiss the appeal and confirm the RPD's determination that the principal appellant, XXXX XXXX, is excluded under Article 1E of the Convention and that the minor appellant, XXXX XXXX XXXX, a citizen of Brazil, is not a "refugee" within the meaning of section 96 of the IRPA or a "person in need of protection" under section 97 of the IRPA. (signed) Jolyane Lefebvre Me Jolyane Lefebvre December 10, 2020 Date IRB translation Original language: French 1 Canada (Citizenship and Immigration) v. Zeng, 2010 FCA 118. 2 Recording of hearing, 32:10. 3 Appellants' memorandum, para. 33. 4 Recording of hearing, 1:57:25. 5 Refugee Protection Division (RPD) decision, para. 54. 6 Appellants' memorandum, para. 65. 7 Appellants' memorandum, para. 66. 8 RPD decision, para. 57. 9 Appellants' memorandum, para. 70. 10 Appellants' memorandum, para. 73. 11 Recording of hearing, 1:08:30. 12 Recording of hearing, 43:51. 13 RPD decision, para. 60. 14 Appellants' memorandum, para. 98. 15 Chairperson's Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution. 16 Dezameau v Canada (Citizenship and Immigration), 2010 FC 599, paras. 34-36. 17 Appellants' memorandum, para. 96. 18 Appellants' memorandum, para. 55. 19 Appellants' memorandum, para. 90. 20 Appellants' memorandum, para. 102. 21 Appellants' memorandum, para. 102.

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