

CANADA / JUDGMENT

MB9-11972

COURT

Refugee Appeal Division

DECIDED

28 July 2020

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RAD File No. / No de dossier de la SAR : MB9-11972 MB9-11973 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 July 28, 2020 Date de la décision Panel Mokhtar
Lamani Tribunal Counsel for the persons who are the subject of the appeal Serge Khoury 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] XXXX XXXX (principal appellant), a citizen of Haiti, and her minor daughter, XXXX XXXX
XXXX (associate appellant), a citizen of Brazil, are appealing against the decision of the
Refugee Protection Division (RPD) dated April 4, 2019.
- [2] They allege that the RPD erred on the following points:
- a. Findings based on an unduly narrow margin of appreciation of the alleged weaknesses of
their testimony.¹
 - b. Several elements of the RPD's decision reveal bias in the rejection of their claim, thus
disregarding the obligation of impartiality and procedural fairness.²
- [3] The appellants ask the Refugee Appeal Division (RAD) to allow their appeal and recognize
them as refugees or to refer the matter to a differently constituted RPD panel.³
- [4] The determinative issue for the RAD is credibility.

DETERMINATION

- [5] The RAD confirms the determination of the RPD and dismisses the appeal.

BACKGROUND

- [6] The RPD had analyzed this record jointly with that of the principal appellant's brother and
rejected all the refugee protection claims in the same decision based on credibility. The
parties concerned made an application to separate their appeal record, and their application
was allowed.

- [7] According to the principal appellant's Basis of Claim Form (BOC Form), her younger sister had warned her on July 15, 2013, not to go home since a group of people wanted to stone her for having had sexual relations with a woman.
- [8] The principal appellant sought refuge with her grandmother in XXXX, then in XXXX, where she was assaulted by individuals with spears and machetes. She fled to XXXX XXXX XXXX, where she was harassed and threatened by people, often strangers.
- [9] XXXX XXXX XXXX, 2013, she decided to flee to Brazil, and she arrived there in 2014.
- [10] In Brazil, she was in a domestic relationship with a man named XXXX XXXX. They had a child together (the associate appellant), but her spouse ended up abandoning them.
- [11] The appellant worked as XXXX XXXX, but she left Brazil on XXXX XXXX, 2016, due to discrimination and exploitation. After crossing through ten countries, she and her daughter arrived in the United States on XXXX XXXX, 2016.
- [12] Feeling confused in the United States, and fearing being deported to Haiti, she and her daughter crossed the Canada-U.S. border and claimed protection in Canada. STANDARD OF REVIEW
- [13] The RAD reviews RPD decisions by applying the correctness standard of review after conducting its own analysis of the record. The exception to this rule is where the RPD enjoys a meaningful advantage with respect to the credibility assessment.⁴ That said, the RAD's role is to determine whether the RPD has in fact erred as alleged by the principal appellant.
- [14] The RAD applied the correctness standard in this case.

ANALYSIS

- [15] The appellants' memorandum includes certain areas where the RPD's errors can be found. Unfortunately, it does not include full and detailed submissions regarding these errors in accordance with subparagraph 3(3)(g)(i). Furthermore, the paragraphs of this memorandum were not numbered.
- [16] The allegation of this refugee protection claim involves sexual orientation and gender-based violence. The RAD therefore considered Chairperson's guidelines 45 and 96 on gender-related persecution and on sexual orientation.
- [17] According to these guidelines, women refugee claimants and members of LGBT communities can face special problems in demonstrating that their claims are credible and trustworthy. The RAD also considered the principal appellant's cultural, social and economic background.

- [18] The case law establishes that these Guidelines ought to be considered by RPD members in appropriate cases. It is incumbent on RPD members to possess the knowledge required, and to apply it in an understanding and sensitive manner when deciding issues of violence against women.⁷
- [19] However, if the RPD, just like the RAD, must be particularly sensitive to the difficulty of testifying for certain women or homosexuals who are victims of or who fear being victims of violence, these Guidelines are not intended to serve as a cure for all deficiencies in the refugee protection claim or the documents provided as evidence⁸ and they do not oblige IRB decision-makers to overlook inconsistent evidence.⁹ Joint assessment of the principal appellant's record with that of her brother
- [20] In its decision, the RPD concluded that the principal appellant (and her brother, whose appeal is filed separately, as indicated above) did not establish that they had a well-founded fear of persecution based on one of the Convention grounds, and that they failed to demonstrate, on a balance of probabilities, that they are persons in need of protection. Their behaviour was not consistent with their allegations.¹⁰
- [21] The principal appellant submits that the RPD made a serious error in examining the appellant's and her brother's behaviour together, given that they had separate testimonies and accounts, and the deficiencies in one's testimony should in no way affect the credibility of the other.¹¹
- [22] The RAD disagrees.
- [23] First, subrule 55(1) of the Refugee Protection Division Rules (RPD Rules) states that: 55(1) The Division must join the claim of a claimant to a claim made by the claimant's spouse or common-law partner, child, parent, legal guardian, brother, sister, grandchild or grandparent, unless it is not practicable to do so.
- [24] Therefore, joining the refugee protection claims of a brother and his sister is perfectly legal and the RPD did not err in applying this subrule of the RPD Rules.
- [25] Next, subrule 56(2) reads as follows: 56(2) A party may make an application to the Division to separate claims or applications to vacate or to cease refugee protection that are joined.
- [26] Therefore, nothing prevented the appellant or her brother from applying to separate their RPD file, which they failed to do.
- [27] According to the appellant's record, her counsel before the RAD is the same one who represented her before the RPD, and he should be aware of the rules in effect.
- [28] According to the transcript of the first RPD hearing (November 8, 2018), the RPD asked the claimants if they would not mind testifying in the each other's presence, and the claimants' counsel responded as follows: [translation] "I told them that you will have to respond and that you will be in each other's presence, and it seems to me that they are okay."¹²

- [29] Later, during the brother's testimony, the legal counsel suggested that the female claimant and her daughter leave the room for about 20 minutes, to which the RPD agreed, after having informed the female claimant that she had the right to stay for the entire hearing and that it was for her to decide whether she should leave or stay.¹³
- [30] Furthermore, the RPD conducted its questioning of the claimants entirely separately, dedicating most of the hearing on November 8, 2018, to the brother, and most of the hearing on January 22, 2019, to the sister.
- [31] Lastly, when the RPD jointly assessed the refugee protection claims, it is perfectly natural to provide the reasons in the same decision. The RPD addressed the allegations of each claimant separately and, in its decision, refrained from referring to either of them as the principal claimant or the associate claimant.
- [32] The RAD is of the opinion that the RPD did not err in its approach and that the appellant's arguments are unfounded. Refugee Protection Division's bias or impartiality
- [33] The appellant claims that [translation] "several elements (of the RPD's decision) showed bias in the rejection of the claim. As such, the Board disregarded its duty of impartiality and procedural fairness in denying the appellant her right to present her evidence and to justify each relevant factor individually in support of her claim. The Board did not assess whether the female claimant was a member of a particular social group that faces discrimination in Haiti, namely the LGBT community. Thus, on multiple occasions, the Board evaluated the evidence submitted based on a pre-established opinion stemming from residual evidence it has rebutted."¹⁴
- [34] The RAD considers the appellant's argument to be unfounded.
- [35] Bias is a serious charge. If the appellant was concerned about bias or more specifically a reasonable apprehension of bias on the part of the RPD, the burden was on the appellant to raise the issue at the hearing and provide evidence to that effect. There is no evidence of either.
- [36] The Federal Court has emphasized that "an allegation of bias cannot be done lightly. It cannot rest on mere suspicion, pure conjecture or mere impressions of an applicant. It must be supported by material evidence."¹⁵
- [37] Given the allegations of bias and lack of procedural fairness (or natural justice), the RAD listened to the entire recording of the hearing and carefully reviewed the entire record. The RAD notes that the appellant, who was represented by an experienced legal counsel, never raised the matter of bias at the hearing or in the counsel's submissions.

- [38] In addition, and as established by case law in *Committee for Justice and Liberty et al. v. National Energy Board et al.* (1978) 1 S.C.R. 369: What would an informed person, viewing the matter realistically and practically-and having thought the matter through-conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.
- [39] The RAD carefully examined the RPD's reasons, and it is unable to find evidence that supports the allegations put forward by the appellant in this case. Consequently, in the absence of a supporting evidentiary base, the RAD rejects the appellant's allegation regarding a reasonable apprehension of bias on the part of the RPD. Credibility
- [40] The RPD found that the appellant's testimony was not credible and that she did not establish her allegations on a balance of probabilities.¹⁶ The RPD noted the following omissions, inconsistencies and contradictions:
- Omission in the BOC Form that her sexual partner's parents had caught them having a sexual encounter during the applicable event of July 15, 2013. The appellant explained that she remembered the event and that she did not believe it was necessary to make a written record of everything.¹⁷
 - Inconsistency that her partner's parents had caught them in June or July 2013. The appellant stated at the hearing that they were caught in June 2013 and that the attempted assault was in July 2013. When asked to explain why the event of June 2013 was not mentioned in her BOC Form, she provided the same answer as for the previous omission.¹⁸
 - Contradiction between her account and her testimony about the assault in XXXX with spears and machetes, and that her sister had warned her that a violent group was looking for her. When asked to explain this contradiction, the appellant stated that she believed she had written too much and that she wanted to omit certain facts.¹⁹
 - Contradiction between the account and the oral testimony regarding her presence in XXXX XXXX XXXX. Her account mentions that she was harassed and threatened, while she testified that she did not have any problems. As an explanation, the appellant reiterated that she had been threatened in XXXX, then she moved to XXXX XXXX XXXX XXXX
- [41] The appellant submits that it is clear that the RPD categorically found that the appellant was not credible by applying the "balance of probabilities" criteria with regard to the alleged risk of persecution, while considering only the contradictions between the events mentioned in the appellant's account and testimony.²⁰
- [42] The appellant argues that these factors are not sufficient and that the "balance of probabilities" is not the correct criterion applicable under section 96. The RPD did not assess whether or not the appellant was a member of the particular social group of homosexuals.²¹

- [43] The appellant also claims that while both her accounts (written and oral) are not identical, the written account was not written by the appellant given her very low level of education and that she is unable to write a text.²²
- [44] Lastly, she submits that the RPD did not assess the entire evidence and broke down its assessment of each piece of evidence by drawing conclusions that failed to consider her social condition and education level. The factors invoked by the RPD in its decision are not sufficient to question the appellant's credibility regarding her sexual orientation.²³
- [45] The RAD disagrees.
- [46] The RPD had many concerns regarding the appellant's allegations in determining the merits of her fear of persecution, conducted its questioning properly and drew numerous negative findings as to her credibility due to major omissions, contradictions and inconsistencies, confusing testimony and evasive answers.
- [47] The RAD notes that the appellant often answered in a roundabout manner, meaning that the RPD had to ask the questions again and never received precise and convincing answers.
- [48] For example, when the RPD asked the appellant about the key elements of her refugee protection claim, that is, when her partner's parents caught her and her partner (XXXX) having sexual relations, and the events that followed. This story, its location, date and how it unfolded changed every time, which led the RPD not to believe any of the story. The appellant's responses were often convoluted and meandering, as shown in the following exchange:²⁴ MEMBER
- So, in your account, you didn't mention being caught in the room... in a room at her house by XXXX parents. Why did you omit that moment? CLAIMANT
 - I stored it in my memory. I told myself that I didn't have to write everything down. MEMBER
 - But you mentioned being caught off guard by a group of people who were waiting for you at your house. CLAIMANT
 - Yes, that was when I was returning from Port-au-Prince; the people thought I had come with money since I was doing business. At night, while... as I slept, I heard knocking at the door and then I fled through a back door. MEMBER
 - And when was that incident? CLAIMANT
 - It happened in June since I was coming back from going back-to-school shopping; I had come back from going back-to-school shopping in Port-au-Prince. It happened several times. Several times, I had just gone shopping. I was stopped by thieves, the thieves pointed weapons at me. MEMBER
 - I don't know... even if (phon.) you mention June of what year? CLAIMANT
 - It happened in June 2013, when I had returned from back-to-school shopping. MEMBER

- But you stated in your account that this incident... you said "caught off guard" when you came back home on July 15, 2013. CLAIMANT
 - On July 13, 2013, that was when I was attacked when I was with Ms. XXXX, I was with Ms. XXXX. MEMBER
 - And you don't mention having experienced incidents in June. In your account, you don't mention the incident of June 2013. CLAIMANT
 - No, I didn't mention it. It was on many occasions, and when I returned from shopping in Port-au-Prince and in Monpilbouro (phon.) and they pointed weapons at me and took everything, my bag, they took money, everything I was carrying with me.
- [49] The RPD's credibility findings pertained to important aspects of the appellant's refugee protection claim and were based on evidence. The appellant failed to provide satisfactory answers likely to corroborate her allegations of fear.
- [50] The RAD is of the opinion that the burden was on the appellant to convince the RPD, on a balance of probabilities, that there is a serious possibility of persecution, or that she would be subjected to a risk to her life or to a risk of cruel and unusual treatment or punishment if she returned to Haiti.
- [51] The RPD gave her several opportunities to express her fears as well as their basis and origin, and to explain her allegations, but the appellant was unable to provide satisfactory answers and, consequently, did not discharge her burden of proving the truthfulness of her allegations in a probative manner.
- [52] As for the reproach with regard to the appellant's education level and her inability to write to justify her omissions and contradictions, the RAD cannot support these arguments because the appellant was assisted by a competent counsel from the time her BOC Form was submitted on November 2, 2017. The appellant indicated in response to question 9(a) of her BOC Form that she has a counsel and that he helped her complete her BOC Form.²⁵ As such, the appellant's low education level cannot explain the many serious and significant problems with credibility raised during the hearing.
- [53] The RAD is of the opinion that the RPD's findings were extensive and detailed, and accurately reflected the state of the appellant's testimony. The RPD was right to question her credibility.
- [54] The RPD has onerous tasks. It must, among other things, ensure that refugee protection is granted only to those who need it; the process of granting refugee protection must not be used for other purposes. To this end, the RPD must question the refugee protection claimant to ensure the truthfulness of the alleged facts, and when it has doubts, it has no choice but to communicate this to the claimant in order to give him the opportunity to respond. That was done in this case. The minor appellant's case

- [55] The RPD concluded that the minor appellant, a citizen of Brazil, did not make any allegations specific to her situation in her BOC Form, and that during the hearing, her designated representative stated that her daughter did not have any problems in Brazil and could return there.
- [56] As this conclusion was not contested, the RAD does not see any error with it and is of the opinion that it is correct.

CONCLUSION

- [57] After analyzing all of the evidence, the RAD concludes that the appellants failed to establish that there would be a reasonable chance of persecution under section 96 of the Immigration and Refugee Protection Act (IRPA). They also did not establish, on a balance of probabilities, that they would be subjected to a danger of torture, a personal risk to their lives or a risk of cruel and unusual treatment or punishment under section 97 of the IRPA.
- [58] The RAD dismisses the appeal and confirms the determination that the appellants are neither Convention refugees nor persons in need of protection pursuant to paragraph 111(1) (a) of the IRPA. (signed) Mokhtar Lamani Mokhtar Lamani July 28, 2020 Date 1 Appellants' memorandum, paragraph 2 of digital page 8 of the appellants' record. 2 Ibid. paragraph 3. 3 Appellants' record, decision sought, digital page 5. 4 Canada (MCI) v. Huruglica, 2016 FCA 93, Rozas Del Solar v. Canada (MCI), 2018 FC 1145. 5 Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution (November 1996). 6 Guideline 9: Proceedings Before the IRB Involving Sexual Orientation and Gender Identity and Expression (May 2017). 7 Aziza Mahamat Nour v. Canada (MCI), 2012 FC 805; para. 37. Highbogun v. Canada (MCI), 2010 FC 445, paras. 55 to 58. 8 Manege v. Canada (MCI), 2014 FC 374, paras. 29 to 32. 9 Kaniz v. Canada (MCI), 2013 FC 63, at para. 15. 10 Refugee Protection Division (RPD) reasons, para. 14. 11 Appellants' memorandum, paragraph 1 of the analysis section, digital pages 6 and 7. 12 Transcript of the first RPD hearing (November 8, 2018), pages 28 to 31. 13 Ibid. pages 55 to 58. 14 Appellant's memorandum, paragraph 3 at digital page 8. 15 Ali v. Canada (Minister of Citizenship and Immigration), 2002 FC 1034. 16 RPD reasons, para. 45. 17 Ibid. paras. 46 and 47. 18 Ibid. paras. 48 and 49. 19 Ibid. paras. 50 and 51. 20 Appellant's memorandum, last paragraph of digital page 10. 21 Ibid. 22 Ibid. paragraph 3 of digital page 11. 23 Ibid. paragraph 4 of digital page 11. 24 Transcript of the second RPD hearing (January 22, 2019), pages 23 and 24. 25 RPD record, digital page 52.

RAD File No. / No de dossier de la SAR : MB9-11972 MB9-11973 RAD.25.02 (January 2020)
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