

CANADA / JUDGMENT

MB9-05715

COURT

Refugee Appeal Division

DECIDED

22 January 2020

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Dossier de la SAR / RAD File : MB9-05715 MB9-05716 / MB9-05717 Huis clos / Private Proceeding
Reasons and decision ? Motifs et décision Persons who are the subject of the appeal XXXX XXXX
XXXX XXXX XXXXXXXXXX XXXX XXXX XXXX XXXXXXXXXX XXXX XXXX Personnes en cause Appeal
considered / heard at Montréal, QC Appel instruit / entendu à Date of decision January 22, 2020
Date de la décision Panel Mokhtar Lamani Tribunal Counsel for the persons who are the subject
of the appeal Me Carolina Roa Sanchez 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 (principal appellant), his wife XXXX XXXX XXXX XXXX and their son XXXX XXXX XXXX (associate appellants), citizens of Colombia, are appealing against the decision of the Refugee Protection Division (RPD) made on February 21, 2019, to reject their refugee protection claims on credibility grounds.
- [2] The appellants allege that the RPD erred in its assessment of the facts underlying their claims for refugee protection and in its lack of assessment of the risks they could be subjected to in Colombia.¹
- [3] They are calling on the Refugee Appeal Division (RAD) to allow the appeal and grant them refugee status or grant a de novo hearing before a differently constituted panel.²
- [4] They are submitting new evidence in support of their appeal and asking that a hearing be held before the RAD.³

DETERMINATION

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

BACKGROUND

- [6] The adult co-appellants each presented an account with their Basis of Claim Form (BOC Form).
- [7] At the beginning of the RPD hearing, the principal appellant asked the RPD to consider his wife's account because it was more detailed.⁴

- [8] According to the BOC Form of XXXX XXXX XXXX, her father, who owned a farm in the XXXX XXXX region, refused to rent to a criminal group, the Front 32 of the Revolutionary Armed Forces of Colombia (FARC). Run off his farm in XXXX 2002, the appellant's father moved to another region.
- [9] He tried to recover his farm twice, in 2008 and in 2013, but it was occupied by collaborators of the criminals who threatened him.
- [10] XXXX XXXX XXXX met XXXX XXXX XXXX (the principal appellant) in 2012. They were married on XXXX XXXX, 2014, and had a son, XXXX XXXX (the minor appellant), in 2016.
- [11] On XXXX XXXX, 2013, the principal appellant was in an accident involving a police motorcycle.
- [12] In 2017, Ms. XXXX XXXX, the associate appellant, and her father decided to file a clam of restitution for the farm, aware that by doing so they were subjecting themselves to risks to their lives.
- [13] The father suggested to his daughter that she leave the country with her husband and her son.
- [14] According to the BOC Form of XXXX XXXX XXXX, the principal appellant, he was struck by a police motorcycle on XXXX XXXX (the year is not indicated) and the police did not allow him to file a complaint. He claims that an unidentified person pretending to be a member of the police force warned him not to take his father-in-law's advice or his family would be killed.
- [15] Because the minor appellant did not have a visa for the United States, his parents decided to leave Colombia separately. The mother had to wait for her son's visa.
- [16] On XXXX XXXX, 2017, XXXX XXXX XXXX left Colombia for the United States. He stayed there for four months without applying for asylum, and on XXXX XXXX, 2017, he illegally crossed the Canadian border and claimed refugee protection in Canada.
- [17] Two months later, on XXXX XXXX, 2017, XXXX XXXX XXXX and her minor son, XXXX, left Colombia for the United States. The next day, they illegally crossed the border and also claimed protection in Canada.
- [18] The Minister intervened in these claims for refugee protection by filing written submissions about the principal appellant's credibility.⁵
- [19] The Minister stated that when Mr. XXXX XXXX appeared before the Immigration Division (ID) on XXXX XXXX, 2017,⁶ the ID member indicated that Mr. XXXX XXXX stated at the interview with the Canada Border Services Agency (CBSA) that his life would not be in danger in Colombia and that he had previously filed an immigration application in the skilled worker category, but never completed his language test.

- [20] In his notice, the Minister asked that the elements affecting the appellant's credibility be considered and that his claim for refugee protection be rejected.
- [21] The determinative issue for the RAD in this case is credibility. STANDARD OF REVIEW
- [22] 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 in assessing credibility.⁷ That being said, the RAD's role is to determine whether, as argued by the appellant, the RPD did indeed err.
- [23] The RAD applied the correctness standard of review in this case. NEW EVIDENCE AND REQUEST FOR HEARING
- [24] The new evidence submitted (Exhibit A-1)⁸ by the appellants is a translation of an excerpt of Exhibit C-6 of the documents the appellants submitted to the RPD. This translation was done on April 16, 2019.
- [25] The appellants submit the following: [translation] The translation of an excerpt of Exhibit C-6 in the list of claimant's documents, attached as Exhibit A-1, did not exist at the time the application was rejected. It was not until after we received the negative decision from the RPD, in which the member had not understood the facts surrounding the claim for land restitution filed by the appellants in 2017, that a translation was required of a document that had already been submitted by the claimants' former counsel to the RPD. The translation was not done at the time.⁹
- [26] The appellants were required to have the missing part of the submitted evidence translated in response to an erroneous conclusion of the facts by the RPD.¹⁰
- [27] In reviewing the matter of whether evidence arose after the rejection of the claim for refugee protection, the RAD will not limit its analysis to the date the new evidence was submitted. The RAD finds that the "newness" of a document cannot be determined by the date of its issuance alone; the important thing is the fact or the circumstances the evidence seeks to establish.
- [28] The RAD finds that the refugee protection claimants already had this document, in the Spanish version, in their possession and should have had it translated in its entirety before the RPD hearing in accordance with subrule 32(1) of the Refugee Protection Division Rules, which stipulates that: "All documents used by a claimant or protected person in a proceeding must be in English or French or, if in another language, be provided together with an English or French translation and a declaration signed by the translator."
- [29] The appellants have been represented by counsel since the beginning of their protection claim process and the onus was on them to file documents that meet the statutory requirements and that are likely to corroborate their claims.

- [30] This evidence was therefore easily accessible and is not apt to refute all of the RPD's findings with respect to the appellants' credibility. Therefore, it will not be accepted as new evidence.
- [31] The RAD cannot hold a hearing because no new evidence was accepted.
- [32] The determinative issue in this case is the appellants' credibility and whether the harm feared by the associate appellant amounts to persecution, a risk to her life or to a risk of cruel and unusual treatment or punishment.

ANALYSIS

Did the RPD err in its assessment of the appellants' credibility?

- [33] At the beginning of the RPD hearing, Mr. XXXX XXXX, the principal appellant, following a change of counsel, asked to use his spouse's account because it was more detailed.¹¹
- [34] The RPD raised several credibility problems. It did not believe the allegations underlying the claims for refugee protection.
- [35] The RPD concluded that it was satisfied on a balance of probabilities that the associate appellant's father registered himself as displaced in XXXX 2003 and that he has since been trying to recover his land.¹²
- [36] The appellants argue that the RPD did not understand the allegations at the basis of the protection claim,¹³ that it mixed up two very different processes in its decision: the forced displacement and the restitution of land.¹⁴
- [37] The appellants find that [translation] "the first part of this conclusion [by the RPD], whereby the associate appellant's father registered himself as a displaced person in XXXX 2003, is correct. However, the second part of the conclusion, whereby he started trying to recover his land that same year, is not accurate."¹⁵ They argue that the land recovery effort, as they testified at the hearing, did not start until XXXX 2017.¹⁶
- [38] The appellants also cite different tabs of the National Documentation Package (NDP) regarding the law on victims and land restitution in Colombia and the terms for applying that law and found that [translation] "if the panel had read the documents that were available to the IRB, including those contained in the NDP, and also the written and oral testimony of the claimants, it would not have had the flawed reasoning described above and the finding regarding the appellant's credibility could have been different."¹⁷
- [39] After analyzing the entire record and listening to the recording of the hearing, the RAD cannot agree with the appellants' arguments.
- [40] First, according to the appellants' written and oral testimonies, the father has continually tried to recover his land ever since he was evicted from his farm in 2002.

- [41] In the associate appellant's account, paragraph 4 states the following: [translation] Six years had gone by since the displacement; in around XXXX 2008, my father decided to return to the farm, but when he arrived, it was occupied by people working for the guerillas. On his arrival he announced that the farm belonged to him and an argument ensued amongst the people who were there. When my father saw that, he decided to leave because he realized that it was impossible to get his farm back.¹⁸ Further in the same account, the father returned to the farm in 2013 to try to get it back.¹⁹
- [42] The appellants' memorandum clearly indicates in its factual background that the father made two attempts to recover his farm in 2008 and 2013.²⁰
- [43] The fact that the associate appellant's father responded to a government program in 2016 to reclaim the farm only renewed his determination to recover his land. The associate appellant's claim that her joining her father in initiating a complaints procedure subjected her and her family to risks to their lives was not established, and the evidence provided does not corroborate the existence of genuine threats to the appellants' lives.
- [44] In an effort to prove what cannot be demonstrated in the RPD's findings, the appellants' lawyer proceeded to detail in long-winded arguments, the so-called errors in assessing the facts underlying the claims for refugee protection and found, [translation] "[i]n analyzing the claimants' testimony, one should avoid a hasty characterization of lack of credibility, as the panel did in this case, and consider that what might seem to be a contradiction or reluctance may be a simple matter of lack of understanding of the situation by the panel."²¹
- [45] The RPD made several negative findings regarding the appellants' credibility, including as a result of inconsistencies and omissions, and inconsistent and muddled testimony such as the exchange between the RPD and the principal appellant about his hospitalization following the alleged collision in 2013 and the role of his insurance.²²
- [46] What is more, after having been informed by the RPD about the Minister's intervention in his case, Mr. XXXX XXXX was asked several times by the panel about his fear in Colombia and each time he stated the same thing, [translation] "I fear for my wife and son." Even when the RPD clarified, [translation] "What do you personally fear," after a lengthy silence, he responded, [translation] "I fear for my son and my wife."²³
- [47] The RAD agrees with each of the RPD's findings regarding the appellants' credibility. These many findings relate to important aspects of the appellants' claims for refugee protection and are based on evidence and submissions by the Minister regarding the principal appellant.
- [48] The appellants cite case law²⁴ to support that [translation] "The RPD mentioned in paragraph 16 that the Minister intervened to state that the member [of the ID (and not of the IAD as indicated in the appellants' memorandum)] mentioned that the claimant filed an immigration application for skilled workers that he subsequently abandoned. However, no analysis has been made of that statement."²⁵

- [49] The RAD cannot accept that argument.
- [50] First, the Minister's statement about the ID's conclusion concerns not just the immigration application filed by the principal appellant, but, as indicated in the RPD's reasons, it also mentions the statement made by the appellant to a CBSA officer that his life was not in danger in Colombia.²⁶
- [51] In its analysis of the facts regarding the collision in 2013, when the principal appellant—who was not yet married to the associate appellant—claims that the collision was an attack because he was a member of the family, the RPD clearly stated that [translation] "these facts coincide quite closely with one of the answers the principal claimant allegedly gave to the immigration officer, that his life would not be in danger in Colombia."²⁷
- [52] When the RPD invited the appellants to testify at the hearing about the Minister's submissions, their answers were evasive and unpersuasive. When the RPD questioned the principal appellant about his skilled worker visa application, he stated that he explained to the ID that he had to write a test and file his application, but he did nothing more, adding [translation] "I apologize if I said something that was incorrect, I was very nervous when they asked me questions, which is why I made so many mistakes." The RPD retorted, [translation] "you told them that you did not fear for your life if you were to return to Colombia." The appellant responded, [translation] "what I said is that I was not in danger here in Canada, but my wife and son are in Colombia, in my confusion I said things...the truth is I don't remember. I know that is no excuse, but I am a nervous person."²⁸
- [53] The RAD finds that the RPD's reasons are clear and easy to understand. They are detailed and exhaustive and clearly refer to the appellants' testimony at the hearing. Therefore, the RPD did not err regarding this aspect of its decision. Did the RPD err by not assessing the prospective risk?
- [54] The RPD found that the claimants' allegations with respect to their reasons for leaving Colombia were not credible.²⁹
- [55] The appellants argue that [translation] "this finding is unreasonable in light of the current case law on the matter of analyzing prospective risk."³⁰ They state that contrary to the findings of the RPD, they would still be subjected to a risk in Colombia because their agents of persecution, the FARC, would fear that the associate appellant's father is still seeking to recover his land.
- [56] They cite case law,³¹ the NDP on Colombia, an article by Amnesty International, a UNHCR report and newspaper articles included in the RPD record, under Exhibit C-17, to also support the evidence on the record showing that the appellants' risk is personal, that the general public in Colombia is not subjected to this risk and that the RPD did not conduct this analysis.³²

- [57] The RAD finds that this criticism is unfounded. In this case, the issues of credibility and prospective risk are closely intertwined.
- [58] For a claim for refugee protection to be admitted, the claimants have to be personally targeted. The RPD did not believe the appellants' testimony regarding the alleged instances of persecution, threats and risks. The documents submitted to corroborate their story are not enough to make testimony credible that fundamentally is not.
- [59] After taking into consideration the appellants' arguments and reviewing all the evidence, the RAD finds that it was not established that the RPD's conclusions are incorrect in the assessment of prospective risk. The Federal Court is clear that although the documentary evidence shows acts of violence committed [in a country], it is reasonable to find that the claimant was not at risk, considering that according to the evidence, his profile did not match that of the circumstances or the persecuted persons.³³
- [60] Under the circumstances, the RAD finds that the appellants did not meet their burden of proof, the RPD correctly assessed the inherent risks of their return to Colombia and that the evidence the appellants submitted did not adequately establish a current or prospective risk. They would not be subjected to the same risk as the general population in that country.
- [61] In its reasons, the RPD weighed the issue of whether the agents of persecution, after taking possession of the associate appellant's father's farm, would still try to cause the appellants harm. The RPD found, however, that the testimony and the evidence submitted by the appellants in this regard were speculative. On appeal, the appellants only reiterated their statement that the persecutors who illegally took over the father's farm would still want to kill them.
- [62] Ms. XXXX XXXX, the associate appellant, testified before the RPD that she never had any problems related to the steps her father had taken for restitution of his usurped land.³⁴ That conclusion is not disputed by the appellants and even though Ms. XXXX XXXX states that she would be subjected to a risk in Colombia, the RAD finds that her fear does not amount to a serious possibility of persecution.
- [63] The RAD agrees with the RPD's conclusion on the issue of prospective risk.
- [64] The RAD finds that the RPD's determination is correct.

CONCLUSION

- [65] The RAD dismisses the appeal and confirms the determination that the appellants are neither Convention refugees nor persons in need of protection under subsection 111(1) of the Immigration and Refugee Protection Act. Mokhtar Lamani Mokhtar Lamani January 22, 2020 Date IRB Translation Original language: French 1 Appellants' memorandum, items I and II, page 19 of the appellants' record. 2 Ibid. Conclusion of the memorandum, page 52 of the appellants' record. 3 Written statement, paras. 1 and 2, page 18 of the appellants' record. 4 Recording of the RPD hearing, minute 00:23:00. 5 RPD record, exhibits submitted by the

Minister, notice of intervention by the Minister. 6 Ibid. Transcript of the Immigration Division hearing held on X XX, 2017. 7 Canada (Citizenship and Immigration) v. Huruglica, 2016 FCA 93. 8 Appellants' record, new evidence 110(4), tab 5.3. 9 Appellants' memorandum, 1st paragraph of page 21 of the appellants' record. 10 Ibid. 2nd paragraph. 11 Recording of the RPD hearing, minute 20.00 and thereafter. 12 RPD reasons, para. 21. 13 Appellants' memorandum, para. 4, page 28. 14 Ibid. para. 6, page 29. 15 Ibid. para. 8, page 29. 16 Ibid. para. 9, page 29. 17 Ibid. para. 16, page 31. 18 Associate appellant's account, RPD record, page 7. 19 Ibid. paragraph 4, page 8. 20 Appellants' memorandum, paras. 4 and 6 of the factual background, page 22. 21 Ibid. para. 17. 22 Recording of the RPD hearing, minutes 1.04.00 to 1.07.00. 23 Ibid. minute 1.41.00 and following. 24 Owusu-Ansah v. Canada (Minister of Employment and Immigration), 1989 FCA 442; Mukamusoni v. Canada (Citizenship and Immigration), 2015 FC 196. 25 Appellants' memorandum, para. 33. 26 RPD reasons, para. 16. 27 Ibid. para. 30. 28 Recording of the RPD hearing, minutes 1.45.00 to 1.46.52. 29 RPD reasons, para. 32. 30 Appellants' memorandum, para. 40. 31 Miculescu v. Canada (Citizenship and Immigration), 2019 FC 166. 32 Appellants' memorandum, para. 50. 33 Kipre v. Canada (Immigration, Refugees and Citizenship), 2017 FC 92. 34 RPD reasons, para. 31.

RAD File / Dossier de la SAR : MB9-05715 MB9-05716 / MB9-05717 RAD.25.02 (April 4, 2019)
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