

CANADA / JUDGMENT

MB9-28672

COURT

Refugee Appeal Division

DECIDED

13 November 2020

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RAD File No. / N° de dossier de la SAR : MB9-28672 MB9-28673 Private Proceeding / Huis clos
Reasons and decision - Motifs et décision Persons who are the subject of the appeal XXXX XXXX
XXXXXXXXX XXXX Personnes en cause Appeal considered / heard at Montréal, QC Appel instruit /
entendu à Date of decision November 13, 2020 Date de la décision Panel Me Toni Jedid Tribunal
Counsel for the persons who are the subject of the appeal François Jean Denis Conseil des
personnes 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 (the principal appellant) and her spouse XXXX XXXX (the associate appellant) are citizens of Haiti. They are appealing the decision of the Refugee Protection Division (RPD) rejecting their refugee protection claims due to a lack of credibility.
- [2] The appellants state that they were targeted by members of their respective families because of a land conflict.
- [3] The appellants argue that the RPD failed to observe the principles of natural justice. They argue that it was selective with respect to certain points and that it failed to take into account all the evidence on the record. They state that the RPD conducted a microscopic analysis of the evidence. They argue that, on its own, the fact that they failed to claim asylum in the ten countries they travelled through from XXXX to the United States is insufficient to undermine their credibility to the point of rejecting their claim. They argue that the RPD failed to review the prospective risk and that its decision was made in advance. As for the RPD, it found that the appellants were not credible.
- [4] The determinative issues for the Refugee Appeal Division (RAD) are those of whether the RPD failed to observe the principles of natural justice and whether it erred in assessing the appellants' credibility.
- [5] I am of the opinion that the RPD erred and that its decision is incorrect.

DETERMINATION

- [6] The appeal is allowed. I refer the matter for redetermination by a differently constituted RPD panel. Request for an oral hearing before the RAD

- [7] In support of her appeal memorandum, the principal appellant requested that an oral hearing be held before the RAD. Subsection 110(6) of the Immigration and Refugee Protection Act (IRPA) sets out that the RAD may hold a hearing if, in its opinion, there is new admissible documentary evidence that fulfills the three conditions that are listed.¹ In this case, I am of the opinion that there is no reason to hold an oral hearing given that no new evidence has been presented in support of the appeal memorandum. For these reasons, the RAD will not hold an oral hearing.

ANALYSIS

- [8] My role is to review all of the evidence and establish whether the RPD's decision is correct.² In light of *Huruglica* and *Rozas del Solar* and after conducting my own analysis of the record, in particular, listening to the audio recording of the hearing and taking into account all of the evidence, I am of the opinion that it is the correctness standard of review that must be implemented.
- [9] I would like to point out that I considered in my decision Chairperson's Guideline 43 because the principal appellant's story includes allegations pertaining to an attempted rape. Failure to claim refugee protection in the countries travelled through before reaching Canada
- [10] I would like to point out that the RPD's decision is uniquely based on the appellants' behaviour, that is, their failure to claim asylum in the countries they travelled through from XXXX to the United States.
- [11] The RPD pointed out that the appellant travelled through a number of countries after leaving XXXX (XXXX, XXXX, XXXX, XXXX, XXXX, XXXX, XXXX, XXXX XXXX, XXXX and even the United States) and did not claim asylum in any of these ten countries. When he was questioned on this topic, the associate appellant answered that his destination was the United States and that he was scared of being returned to his country.⁴ The principal appellant stated that she was scared of being returned to Haiti. She also emphasized the trauma stemming from the attempted rape.⁵ The RPD reported that the appellants did not claim asylum in the United States.
- [12] The RPD rejected the appellants' explanations and concluded that there is no reason to consider that the authorities in the countries they travelled through would not have honoured their international commitments with respect to granting asylum if a claim had been made in due form.
- [13] The RPD reported that the principal appellant stated that she had received a summons from the American immigration authorities for an asylum claim hearing. When she was questioned about the outcome of the hearing, she stated that she did not show up for it out of fear of being returned to Haiti. The RPD considered the principal appellant's response unsatisfactory. It found that the principal appellant did not go to the United States seeking asylum and that her behaviour stripped her claim of all credibility.

- [14] In her appeal memorandum, the principal appellant argues that the RPD only reviewed their failure to claim asylum in the countries they travelled through without reviewing the well-foundedness of their refugee protection claim. She states that the decision was made in advance. She argues that the RPD conducted a microscopic examination of the evidence and credibility and focused on unimportant details instead of addressing all the important points in its decision. She argues that the only factor pointed out by the RPD, that is, their behaviour, is insufficient to undermine credibility to the point of rejecting their refugee protection claim. She argues that the RPD failed to observe the principles of natural justice. She states that the RPD failed to analyze the prospective risk. She argues that the RPD did not review the issue of exclusion in XXXX.
- [15] I agree with the appellants with respect to some of their submissions. I note that the associate appellant stated that he obtained permanent residence in XXXX.⁶ However, the RPD's reasons do not include an analysis on this topic. I note that the RPD's decision was solely focused on the appellants' behaviour, that is, the failure to claim asylum in the countries identified.
- [16] After reviewing all the evidence, I consider that the RPD's process was unfair. Attakora sets out that an administrative decision-maker must not be over-zealous in conducting a microscopic examination or of evidence that is not relevant that is accessory to a refugee protection claimant. A negative credibility finding should not be based on a "microscopic" analysis of issues irrelevant or peripheral to a refugee protection claim.⁷
- [17] The appellants provided explanations regarding the failure to claim asylum in the various countries travelled through until they reached the United States. They stated that their intent was to go to the United States via the named transit countries. In Mendez, it was determined that a short stay in a safe third country en route is not necessarily considered enough sojourn to oblige the claimant to declare there on his or her way to Canada.⁸
- [18] I acknowledge that failure to claim the protection of another country that is a signatory to the Convention may be considered among the other important factors to be taken into account in the assessment of the subjective fear. However, I consider that it is not, on its own, a determinative factor. I agree with the appellants that their behaviour does not justify rejecting their refugee protection claim without further review. Mubengaie Malaba, Gea sets out that "a distinction must be made between a behaviour that is inconsistent with a well-founded fear of persecution (which may be presumed from a lengthy delay in making a claim) and whether the applicant's account of persecution is credible or not."⁹
- [19] Without addressing all the submissions in the appeal memorandum, I am persuaded that the appellants' refugee protection claims were not processed fairly and that the RPD erred in assessing their credibility.
- [20] I note that the RPD did not make any findings regarding the credibility of the allegations in the Basis of Claim Forms, or with respect to the evidence presented by the appellants.

[21] In conclusion, I am of the opinion that the RPD erred in its decision, which I consider incorrect.

CONCLUSION

[22] The appeal is allowed. I refer the matter for redetermination by a differently constituted RPD panel. (signed) Toni Jedid Me Toni Jedid November 13, 2020 Date IRB translation Original language: French 1 M.C.I. v. Singh, 2016 FCA 96, paragraph 51. 2 Canada (Citizenship and Immigration) v. Huruglica, 2016 FCA 93; Rozas del Solar v. Canada (Citizenship and Immigration), 2018 FC 1145. 3 Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution. Update, Guidelines issued by the Chairperson pursuant to section 65(3) of the Immigration Act, Immigration and Refugee Board, Ottawa, November 25, 1996, as continued in effect by the Chairperson on June 28, 2002, under paragraph 159(1) (h) of the Immigration and Refugee Protection Act. 4 Audio recording of the hearing on October 31, 2019, 01.03.42. 5 Ibid., 01.38.13 and 01.40.35. 6 Ibid., 00.56.04. 7 Attakora v. Canada (Minister of Employment and Immigration) (1989), 99 NR 168 (FCA) [Attakora] at para. 9. 8 Mendez, Alberto Luis Calderon v. M.C.I. (F.C., No. IMM-1837-04), Teitelbaum, January 27, 2005; 2005 FC 75, at para. 37. 9 Mubengaie Malaba, Gea v. M.C.I. (F.C., No. IMM-3814-12), Martineau, January 28, 2013; 2013 FC 84, at para. 25.

RAD File No. / N° de dossier de la SAR : MB9-28672 MB9-28673 RAD.25.02 (Janvier 2020) Available in English 6 Immigration and Refugee 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) Disponible en français

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