

CANADA / JUDGMENT

MB9-06784

COURT

Refugee Appeal Division

DECIDED

20 February 2020

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RAD File No. / No de dossier de la SAR : MB9-06784

MB9-06785 / MB9-06786

Private Proceeding / Huis clos

Reasons and Decision ? Motifs et décision

Persons who are the subject of the appeal

XXXX XXXX

XXXX XXXX

XXXX XXXX XXXX

Personnes en cause

Appeal considered / heard at

Ottawa, Ontario

Appel instruit / entendu à

Date of decision

February 20, 2020

Date de la décision

Panel

Me Tammy Tremblay

Tribunal

Counsel for the persons who are the subject of the appeal

François Jean-Denis

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 principal appellant, XXXX XXXX, and her children, XXXX XXXX (female associate appellant) and XXXX XXXX XXXX (minor male associate appellant), are citizens of Haiti. They are appealing against the decision of the Refugee Protection Division (RPD) that they were not credible regarding their fear of persecution in Haiti, as well as the lack of prospective risk.

DETERMINATION

- [2] The appeal is allowed. The appellants are credible regarding their fear in Haiti and are Convention refugees.

BACKGROUND

- [3] Within the context of her work for a family health care centre XXXX XXXX), the principal appellant was persecuted after informing the police about the rape of one of the patients in her care. The Haitian police tried to apprehend some of the alleged perpetrators but had to back off after exchanging gunfire with them. Afterwards, the principal appellant and another nurse received telephone threats. The principal appellant filed a complaint with the police and continued to work, though she remained vigilant. Her colleague, who was supposed to travel to the United States to visit her family, rushed to do so. During the night of June XXXX to XXXX, 2017, three armed individuals entered the principal appellant's home, ransacked her house, fired some shots, raped her and physically assaulted her son, who at that time was 15 years old. The principal appellant spent a week in the hospital and filed a complaint with the police. Fearing for her life and her son's life, the principal appellant left Haiti on XXXX XXXX, 2017. Colleagues from work informed the principal appellant that some strangers were still looking for her. The female associate appellant stated that she had been the victim of an attempted kidnapping in 2013 and had left Haiti a few weeks later to live in the United States. She stated that she was afraid her kidnappers would come after her if she were to return to Haiti.

- [4] The principal appellant and the female associate appellant also alleged a fear in Haiti owing to the fact that they are members of the particular social group of Haitian women.
- [5] On appeal, the appellants are arguing that the RPD was being overly vigilant, that it applied a North American perspective and reasoning, that it conducted a microscopic examination of the evidence and that it erred by refusing to give any probative value to the documents. The appellants argue that these breaches raise natural justice issues.

ANALYSIS

- [6] I conducted an independent analysis of all the evidence on the record, after carefully listening to the hearing, in order to form my own opinion regarding this refugee protection claim and to ensure the application of Chairperson's Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution¹ and Chairperson's Guideline 8: Procedures with Respect to Vulnerable Persons Appearing Before the IRB² to determine whether the RPD's decision is correct.

The Refugee Protection Division erred in applying Chairperson's Guidelines 4 and 8

- [7] The RPD was not sensitive to the principal appellant's situation in this matter, particularly the aspects related to her gender and her vulnerability, as required by Guidelines 4 and 8.
- [8] In its decision, the RPD states in paragraphs 4, 9 and 31 that it took Guideline 4 into consideration. The recording of the hearing contains no mention of Guideline 4 or 8.

Analysis framework of Chairperson's Guidelines 4 and 8

- [9] Guideline 8 indicates that some refugee protection claimants are especially vulnerable and that their situations require special consideration. The persons identified as vulnerable in Guideline 8 include women who state that they have suffered sexual violence. Guideline 8 states that vulnerability must be established through independent credible evidence, such as "a detailed report by an expert following an in-depth assessment of the person," but only in cases where it is reasonable for a refugee protection claimant to obtain one.
- [10] Guideline 4 sets out a framework of analysis for assessing the harm feared or suffered by a woman who claims to be the victim of gender-related persecution and specifically refers to victims of sexual violence.
- [11] The principles included in Guidelines 4 and 8 require RPD and Refugee Appeal Division (RAD) decision-makers to consider that individuals who have suffered sexual violence may exhibit symptoms that make it difficult for them to testify. The Guidelines require decision-makers to be sensitive and understanding in assessing these cases. The Guidelines propose ways to mitigate the impact that testifying may have on survivors of sexual violence, such as by giving them the option of providing their testimony outside the room, by affidavit or by videotape, or in front of a member trained in dealing with violence against women.

- [12] The case law tells us that RPD members must take these Guidelines into account in appropriate cases where refugee protection claimants like the principal appellant state that they have suffered sexual violence. RPD members must also exhibit the knowledge required and must apply it in a full and sensitive manner when deciding issues of violence against women.³
- [13] The case law also holds that although the Chairperson's Guidelines are not binding, the RPD must nonetheless apply the principles that they contain in a meaningful way.⁴ Therefore, it is not sufficient, as the RPD has done in this case, to simply say that the Guidelines were applied⁵ to discharge the [translation] "burden" of taking them into account.⁶

The Refugee Protection Division did not conduct the hearing in a manner that respects the principles of Chairperson's Guidelines 4 and 8

- [14] At the start of the hearing when the principal appellant began to speak about the events that led her to leave her country, the RPD interrupted her and told her that it knew her story and that it was not necessary to repeat what had happened.⁷ Not making the principal appellant testify about these disturbing events would have been commendable if the intention had been to avoid traumatizing her again and if her credibility had not been doubted. However, that is not the case here.
- [15] I assume that the RPD acted in good faith when it declined to hear the appellant on the traumatizing aspects of the events that led her to seek Canada's protection, but in doing so the RPD committed several errors. Guidelines 4 and 8 do not release the Immigration and Refugee Board of Canada and the RAD from their duty to hear the evidence, especially in cases where a female refugee protection claimant's credibility is in doubt. Also, someone claiming refugee protection may understand this to mean that she is credible regarding the aspects of her claim that she was trying to establish through her interrupted testimony.
- [16] Failing to hear a refugee protection claimant on aspects that are central to her protection claim and subsequently concluding that the person lacks credibility with regard to her fear of persecution is both a misunderstanding of Chairperson's Guidelines 4 and 8 and a breach of the principle of natural justice. The Federal Court highlights this in a recent decision:
- [25] Presiding over proceedings that are more inquisitorial than adversarial, RPD members have an important and difficult role to play. Determining whether a claim is well-founded or not often involves at least some degree of testing of the evidence, particularly the viva voce testimony of a claimant. Fairness requires that the claimant have a reasonable opportunity to respond to any concerns that the member may have about the claim. This can sometimes mean that probing or even pointed questions must be put to the claimant so that he or she has an opportunity to respond to them, if possible. At the same time, members must not test a claim in ways that reasonably suggest that they have prejudged a case, in ways that prevent claimants from giving as complete and accurate an account as they are able to provide, or in ways which themselves could (re)traumatize the claimant.

...

- [36] The Gender Guidelines exist to help ensure that relevant evidence is adduced and evaluated with due sensitivity to those claiming to be victims of sexual violence and other forms of gender-related persecution. It does such claimants no favours, and undermines the integrity of the refugee determination process, to simply seal off such allegations from any examination, as this member did - especially when the decision-maker harbours concerns about the credibility of those allegations.⁸
- [17] In this case, the principal appellant was also denied her right to a full and complete hearing and thus establish the evidence of her refugee protection claim. Furthermore, the RPD should not cut testimony short without giving the specific reason, especially when it pertains to key aspects of the refugee protection claim. If a survivor of sexual violence wants to tell her story, RPD or RAD members have two choices:
- a. If decision-makers do not doubt a refugee protection claimant's credibility, they can suggest to her that her testimony is unnecessary because they find her credible on that part of her testimony. It would then be up to the claimant to decide whether she wants to testify or not. If she decides to do so, members would need to take Guidelines 4 and 8 into account and make the necessary accommodations.
 - b. If decision-makers have doubts about a refugee protection claimant's credibility, they must hear her testimony, apply Guidelines 4 and 8 and make the necessary accommodations. They must also take into consideration the impact that sexual trauma may have on the refugee protection claimant, particularly the impact on her memory, when assessing her written and oral testimony.
- [18] The RPD erred by not hearing the principal appellant's testimony on the traumatic aspects at the heart of her refugee protection claim. In doing so, the RPD also breached the principle of natural justice by depriving the principal appellant of her right to a full and complete hearing.

The Refugee Protection Division erred by concluding that, in the absence of medical evidence, it did not have to take into account circumstances specific to victims of sexual violence

- [19] In its decision, the RPD repeatedly rejects the principal appellant's explanation, notably the state of shock that she was in after the sexual assault, which subsequently affected her written and oral testimony.
- [20] At paragraph 18 of its decision, the RPD notes in its conclusions that [translation] "the claimant submitted no medical evidence that would indicate that she suffered from a mental health problem at the time of the hearing." Yet, the RPD did not consider whether it was reasonably possible for the principal appellant to obtain a medical report, as required by section 8(3)(g) of Guideline 8, which is, in my opinion, an error.

- [221] The RPD erred by concluding that the lack of medical evidence meant that it did not have to take into account circumstances specific to victims of sexual violence when assessing the principal appellant's credibility.
- [222] For all these reasons, the RPD made several errors in its consideration of Guidelines 4 and 8 when analyzing the principal appellant's claim. Therefore, I am going to remedy these breaches by applying the lens of Guidelines 4 and 8 to the appellants' refugee protection claim.

The Refugee Protection Division erred in assessing the principal appellant's credibility

The Refugee Protection Division erred by rejecting the appellant's explanation that the sexual assault she had suffered affected her written and oral testimony

- [223] Repeatedly in its decision, the RPD rejects the principal appellant's explanation that the sexual violence she had suffered affected her testimony. I will point out a few examples in the RPD's decision to illustrate the circular reasoning in its decision and how the RPD erred.
- [224] At paragraph 18 of its decision, the RPD opines that the principal appellant [translation] "apparently omitted facts from her account and contradicted her testimony." The omitted facts and the contradiction noted by the RPD are two sides of the same coin: in her written account, the principal appellant states that she was in the hospital for more than a week and that she notified the police, but no one came to the hospital. At the hearing, the appellant stated that she went in on XXXX XXXX, 2017, for treatment and left on XXXX XXXX, 2017, to file the complaint with the police. Based on this, the RPD erroneously inferred that the appellant failed to establish that she was in the hospital for a week and concluded that being in a state of shock after an assault did not explain why she apparently [translation] "omitted facts from her account nor why she contradicted her account in her testimony."
- [225] In addition to not applying the lens of Guidelines 4 and 8, the RPD's conclusion is unfounded in fact, since the principal appellant's testimony and the documentary evidence indicate that she spent a week in hospital and that she left for a day to file the complaint with the police and meet with the justice of the peace.⁹ These two things are not mutually exclusive. Although the appellant's written and oral testimony translated into French are not worded in the same way, they do not contradict each other on the fact that the principal appellant was hospitalized after her assault and that she filed a complaint with the police.
- [226] The RPD applied similar logic when it rejected the principal appellant's testimony explaining why, in her account, she states that she called the police for help, whereas at the hearing, she stated that she went in person. This could be construed as a [translation] "contradiction," but it must be noted that the difference between calling the police and going to the police in person is slight, especially when one considers that the appellant was testifying through an interpreter. Therefore, even if it was a contradiction, it would be minor and peripheral to the appellants' refugee protection claim.

- [27] At the hearing and in its decision, the RPD ignored the fact that survivors of sexual violence may suffer memory problems and post-traumatic stress, not just immediately after the incident, but sometimes for the rest of their lives. Personally, I find the principal appellant's explanations, with regard to the differences between her written and oral testimony, to be acceptable.
- [28] Having listened to the principal appellant's testimony, and considering the impact that a sexual assault can have on a refugee protection claimant's behaviour and memory, I am of the opinion that she is credible regarding her fear of persecution in Haiti. Her testimony was spontaneous and detailed. Furthermore, throughout the hearing, she answered the questions directly and did not seek to embellish her story.
- [29] The RPD incorrectly found the appellant's testimony to be not credible.

The Refugee Protection Division erred by rejecting the documentary evidence submitted by the principal appellant

- [30] In its decision, the RPD gives no probative value to the police reports, the justice of the peace's findings or the two medical certificates attesting to the assaults suffered by the principal appellant and her son. I reviewed those documents and I am of the opinion that they establish, on a balance of probabilities, that the principal appellant was sexually assaulted and her son physically assaulted during an attack at their residence.

The police complaint

- [31] Since the RPD found that the principal appellant lacked credibility regarding her complaint to the police, it gave no weight to the police report that the principal appellant entered into evidence. Even though the RPD had doubts about the appellant's credibility, it should have considered all the evidence on the record, not just the evidence that it regarded as not credible.
- [32] The RPD erred by giving no weight to the police report submitted by the principal appellant.

The minutes of the registry of the peace court of XXXX

- [33] The RPD drew a negative inference regarding the principal appellant's credibility because she did not mention the statement that she had made to the justice of the peace in her written testimony, because the document is dated XXXX XXXX and not XXXX XXXX, 2017, and because her complaint does not allege that the attack was related to her work at the health care centre and to the threats that she had received before being assaulted. The RPD rejected the appellant's explanations that she had difficulty recalling the events. The RPD also rejected the appellant's explanation that she had been able to give only a short statement when she went to the justice of the peace because she was having difficulty talking about what had happened to her.

[34] By applying the lens of Guidelines 4 and 8, one can understand that, on the day after a violent sexual assault (see the medical certificate), a woman would not feel comfortable talking in detail about the events in front of four individuals in a position of authority whom she had never met, namely, a justice of the peace, two police officers and a registrar.

[35] The documentary evidence is clear about the difficulties that survivors face when filing a complaint:

...gender-based inequalities, religion that encourages the submission of the woman to her husband, fear of reprisals for victims and their family in the absence of the availability of protection, difficulty accessing services that are provided more by civil society than by the state, lack of competence of police and justice services personnel, the fees associated with legal proceedings and the lack of effective legal aid mechanisms, difficulty in accessing the courts (also since [translation] "non-central regions have limited or no coverage"), the use of French as the language of justice in a country where [translation] "80 percent of the population speaks only Creole," and the tendency of judges to encourage out-of-court agreements rather than investigations. The OFPRA also mentions legal fees, the language barrier, the fear of reprisals and gender discrimination.¹⁰

[36] There is a presumption that documents issued by a competent foreign public official are valid unless there is a valid reason for doubting their authenticity.¹¹ I am of the opinion that the fact that the document is dated XXXX XXXX and not XXXX XXXX, 2017, is a minor error that in no way invalidates the information contained therein, including that armed individuals raped the principal appellant during the night of XXXX XXXX to XXXX, 2017.

[37] In addition to giving no weight to the minutes of the registry of the peace court of XXXX, the RPD drew a negative inference regarding the principal appellant's credibility for having submitted a fraudulent document. The RPD's finding is even more disturbing because the RPD submitted no expert appraisal of the document in support of this finding. While it was commendable of the RPD to express doubts about the validity of this document, it was the RPD's duty to inform the principal appellant of its concerns and give her the opportunity to respond to them at the hearing.¹²

[38] The RPD erred by giving no weight to the minutes of the registry of the peace court of XXXX entered into evidence by the principal appellant.

The medical reports

[39] The RPD gave no probative value to the two medical reports corroborating the assaults that the principal appellant and her son suffered at their residence. The RPD noted the following [translation] "irregularities" with the medical certificates:

- The RPD found it [translation] "irregular" that the medical report is dated XXXX XXXX, 2017, the day on which the principal appellant entered the hospital, when she remained there for one week. The RPD rejected the appellant's explanation that such reports are written on the day a victim enters the hospital; and
 - The RPD found it [translation] "irregular" that one medical report was signed by four employees, including the [translation] "administrative and financial director of the hospital."
- [40] The RPD noted that, on their own, these [translation] "irregularities" do not invalidate the medical certificates, but that given [translation] "the credibility problems in the claimant's testimony regarding the events that occurred at the time of her hospitalization, and also given that, on a balance of probabilities, the claimant entered into evidence at least one fraudulent document, the panel gives no probative value to the certificates." However, I have already concluded that the RPD's conclusions in this regard were incorrect.
- [41] I accept the appellant's explanation that the certificate was written on the day that she was diagnosed. As for the question of whether it is irregular for a medical report to be signed by four employees, including the [translation] "administrative and financial director of the hospital," there is no evidence on the record indicating that this would be an irregularity.
- [42] Therefore, the RPD erred by giving no weight to the medical certificates entered into evidence by the principal appellant.
- [43] I reviewed all of the evidence in my analysis of this appeal, in particular the principal appellant's testimony, and I find that, on a balance of probabilities, the appellant is credible. Therefore, the RPD erred in finding that the principal appellant was not credible.
- [44] There is a serious possibility that the principal appellant would be persecuted by reason of her membership in the group of Haitian women. In addition, there is a risk that, as a survivor of sexual violence, the appellant would be stigmatized by her community and would be subjected to further sexual violence.¹³

The refugee protection claim of XXXX XXXX

- [45] The RPD did not challenge the female associate appellant's credibility regarding the kidnapping she experienced or her fear of being persecuted because of her membership in the particular social group of Haitian women. The RPD also did not challenge the police report entered into evidence that confirms the female associate appellant had been kidnapped. The RPD did, however, express doubts about the female associate appellant's subjective fear because she went back to Haiti once after the kidnapping. The RPD was also of the opinion that, in the absence of evidence that the kidnappers were still looking for her and that the attack was not random, the female associate appellant failed to establish a risk of persecution if she were to return to Haiti.

- [46] Although it had doubts about the female associate appellant's subjective fear because she had gone back to Haiti, the RPD should have considered those doubts in light of all the evidence, in particular the fact that the female associate appellant was a credible witness and the documentary evidence submitted in support of her claim.
- [47] In addition, although it had doubts about the risk of future persecution by criminals who had already attacked her, the RPD should have analyzed the female associate appellant's risk of persecution from the perspective of her other subjective fear, namely, her membership in the particular social group of Haitian women. In *Dezameau and Josile*, the Federal Court accepts that Haitian women constitute a particular social group within the meaning of section 96 of the Immigration and Refugee Protection Act,¹⁴ and the documentary evidence also supports this conclusion.¹⁵

The possibility of persecution

- [48] In my opinion, if the female associate appellant had to move back to Haiti, she would be subjected to more than a mere possibility of persecution by reason of her membership in the group of Haitian women. The appellant's age, 23, and the fact that in 2013 she left Haiti, a country where she has no family, are factors that make the female associate appellant especially vulnerable to experiencing sexual violence.
- [49] Like the RPD, I am also of the opinion that the female associate appellant's testimony was credible with regard to the kidnapping that she experienced. Unlike the RPD, I am of the opinion that the female associate appellant did establish, on a balance of probabilities, that there is a serious possibility that she would be persecuted if she were to return to Haiti, based on her membership in the particular social group of Haitian women.

Internal flight alternative and state protection

- [50] The RPD acknowledged that the documentary evidence states that sexual violence against women is widespread in Haiti. I agree with this finding and add that it also indicates that the statistics show that it continues to increase.¹⁶ The documentary evidence also indicates that the state offers no protection to women who are victims of sexual violence in Haiti. In such circumstances, there is no internal flight alternative for the principal appellant and her son or for the female associate appellant.
- [51] Therefore, the RPD erred in concluding that the female appellants failed to establish a well-founded fear of persecution by reason of their membership in the particular social group of Haitian women.

CONCLUSION

- [52] For these reasons, I set aside the RPD's determination and substitute the one that should have been made, namely, that the appellants are Convention refugees. The appeal is allowed.

(signed)

"Tammy Tremblay"

Me Tammy Tremblay

February 20, 2020

Date

IRB translation

Original language: French

1 Chairperson's Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution, pursuant to subsection 65(3) of the Immigration Act, November 13, 1996.

2 Chairperson's Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution and Chairperson's Guideline 8: Procedures with Respect to Vulnerable Persons Appearing Before the IRB, effective December 15, 2016, amended December 15, 2012.

3 Aziza Mahamat Nour v. Canada (Minister of Citizenship and Immigration), No. IMM-8278-11, Scott, June 25, 2012; 2012 FC 805 (CanLII), at paragraph 37.

4 Kaké v. Canada (Citizenship and Immigration), 2015 FC 852 (CanLII), para. 3.

5 Yoon v. Canada (Minister of Citizenship and Immigration), 2010 FC 1017 (CanLII), at para. 5; Odia v. Canada (Minister of Citizenship and Immigration), 2014 FC 663 (CanLII), 2014 FC 663, at para. 18.

6 RPD-1, Refugee Protection Division (RPD) record, RPD's reasons, pages 3 to 16; in its decision, the RPD states in paras. 4, 9 and 31 that it took Guideline 4 into consideration. The recording of the hearing contains no mention of Directive 4 or 8.

7 Minute 00:18 of the recording of the hearing before the RPD, February 8, 2019.

8 Olah v. Canada (Citizenship and Immigration), 2019 FC 401, paras. 25 and 36.

9 Minute 00:57 of the recording of the hearing before the RPD, February 8, 2019.

10 RAD-1, National Documentation Package, version of September 30, 2019, Tab 5.3, HTI106291.FE "Violence, including sexual violence, against women; state protection and support services (2017-June 2019)," June 14, 2019, p. 11.

11 Rasheed, Sohail v. M.C.I. (F.C., No. IMM-1956-03), Martineau, April 21, 2004.

12 Yildiz, Ceren v. M.C.I. (F.C., No. IMM-5152-12), O'Keefe, July 31, 2013; 2013 FC 839; Angulo, Oscar Rene Diaz v. M.C.I. (F.C., No. IMM-5378-13), Zinn, November 25, 2014; 2014 FC 1131; Karadag, Abdurrahman v. M.C.I. (F.C., No. IMM-7393-13), Hughes, March 19, 2015; 2015 FC 353.

13 Supra, endnote 10, Tab 5.12, Haïti : Les violences faites aux femmes [Haiti: violence against women], France. Office français de protection des réfugiés et apatrides [French office for the protection of refugees and stateless persons], January 9, 2017, page 12; and

Tab 5.5, Against Their Will: Sexual and Gender Based Violence Against Young People in Haiti, Doctors Without Borders, page 21.

14 Josile v. Canada (Citizenship and Immigration), 2011 FC 39, paragraphs 10, 17, 18, 28, 29, 30, 34, 35 and 36.

15 Supra, endnote 10, Tab 5.9, Violence against Women, Trafficking, Prostitution, and Exploitation by UN Peacekeepers, Bureau des Avocats Internationaux [office of international lawyers] et al., January 22, 2016, pp. 7 to 9; and

Tab 2.1, Haiti. Country Reports on Human Rights Practices for 2018, United States. Department of State, March 13, 2019, Section 6, under the heading "Women," pages 19 and 120; and

Tab 2.3, A/HRC/34/73, Report of the Independent Expert on the situation of human rights in Haiti, United Nations. Human Rights Council, March 8, 2017, paragraph 72; and

Tab 5.12, Haïti : Les violences faites aux femmes, France. Office français de protection des réfugiés et apatrides, January 9, 2017, pages 11-12.

16 Supra, endnote 10, Tab 5.3, HTI106291.FE "Violence, including sexual violence, against women; state protection and support services (2017-June 2019)," Immigration and Refugee Board of Canada, June 14, 2019, pages 11 to 12.

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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 (April 4, 2019)

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