

CANADA / JUDGMENT

MB9-13401

COURT

Refugee Appeal Division

DECIDED

29 July 2020

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RAD File No. / No de dossier de la SAR : MB9-13401

MB9-13402

Private Proceeding / Huis clos

Reasons and Decision ? Motifs et décision

Persons who are the subject of the appeal

XXXX XXXX XXXX XXXXXXXXXX XXXX XXXX XXXX

Personnes en cause

Appeal considered / heard at

Montréal, Quebec

Appel instruit / entendu à

Date of decision

July 29, 2020

Date de la décision

Panel

Mokhtar Lamani

Tribunal

Counsel for the persons who are the subject of the appeal

Karima Karmali

Conseil des personnes en cause

Designated representative

XXXX XXXX XXXX

Représentant(e) désigné(e)

Counsel for the Minister

N/A

Conseil du ministre

REASONS FOR DECISION

OVERVIEW

- [1] XXXX XXXX XXXX (principal appellant), a citizen of Haiti, and her minor daughter, XXXX XXXX XXXX XXXX (associate appellant), a citizen of the United States, are appealing against the decision of the Refugee Protection Division (RPD) dated May 29, 2019, rejecting their claims for refugee protection based on a generalized risk.
- [2] The appellants allege that the RPD made two errors of law that would warrant setting aside the RPD's determination and allowing their refugee protection claims:¹
- a. The RPD erred in the analysis of the principal appellant's prospective risk of persecution under section 96 of the Immigration and Refugee Protection Act (IRPA).
 - b. The RPD erred in its analysis of the principal appellant's personalized risk under section 97 of the IRPA.
- [3] The appellant is asking the Refugee Appeal Division (RAD) to allow their appeal, set aside the RPD's determination and grant them refugee status or, alternatively, allow them to be heard on the merits of their refugee protection claims in compliance with the principles of natural justice.²
- [4] The principal appellant submitted an affidavit with a letter attached from her husband as new evidence and is requesting an oral hearing before the RAD.³
- [5] The determinative issue for the RAD is that of generalized risk.

DETERMINATION

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

BACKGROUND

- [7] According to her Basis of Claim Form (BOC Form), the principal appellant is married with two children (a Haitian son and an American daughter), and she alleges that she fears the insecurity and crime that were rampant in her neighbourhood in 2016 and 2017.

- [8] She frequently travelled to the United States, and made two trips to Canada in September 2012 and in August 2016. It was on this last trip that the idea of claiming refugee protection in Canada began to take shape in her mind, but she returned to her country since she did not want to leave her family in Haiti.
- [9] On December 24, 2016, the principal appellant was a victim of an armed robbery by an unidentified individual who took her bag.
- [10] On January 25, 2017, and on April 8, 2017, thieves stole supplies and equipment from the warehouse of the small family business.
- [11] Since her husband and her son were unable to obtain visas for either Canada or the United States, she decided, with her husband's approval, to leave Haiti with her American daughter.
- [12] The appellants arrived in the United States in XXXX2017, but given the political situation in the USA, her aunt advised her not to claim asylum in the United States for fear of having her claim rejected.
- [13] The appellants entered Canada legally on XXXX XXXX XXXX2017, and filed a claim for refugee protection on October 27, 2017.

NEW EVIDENCE

Evidence presented by the appellants is rejected

- [14] Under the IRPA,⁴ the RAD can only allow evidence:

- i. that arose after the RPD rendered its decision;
- ii. that was not reasonably available at the time of the decision; or
- iii. that the person could not reasonably have been expected in the circumstances to have presented to the RPD before the decision was rendered.

- [15] If the evidence meets one or more of these requirements, the RAD must decide whether the evidence is new, credible and relevant before accepting it.⁵

- [16] The principal appellant submitted two new pieces of evidence in support of her appeal and is requesting that an oral hearing be held before the RAD:

A) An affidavit from the principal appellant signed on July 11, 2019.⁶

B) A letter from the principal appellant's husband signed on July 8, 2019.⁷

- [17] The principal appellant submits that the explanations provided in her affidavit outline the reasons why she did not move in 2016-2017, thereby addressing the reasons of the RPD, which mentioned on several occasions that the fact that the appellants did not move is a factor which establishes they are not at risk.⁸

- [18] The principal appellant also submits that her explanations, as well as the letter from her husband, could not reasonably have been presented at the time of the hearing and must therefore be accepted under subsection 110(4). Alternatively, this evidence should be considered on the grounds of their relevance, in accordance with the principles of natural justice.⁹
- [19] With respect to the appellant's affidavit, she explains that the purpose of the affidavit is to introduce her application for appeal to the RAD and to submit the letter from her husband. She explains that in this letter, XXXX XXXX XXXX XXXX describes the incidents that occurred in May 2019, and that he left the family home in May 2019.
- [20] The appellant also explains that her family did not move beforehand since she believed that the situation would calm down, and also because they lacked the resources to move to a safer area.
- [21] While this affidavit was signed under oath on July 11, 2019, a few weeks after the RPD's decision (May 29, 2019), the information in the evidence was reasonably available at the time of the RPD's decision.
- [22] As for the letter from the principal appellant's husband, which was also written after and in response to the RPD's decision, the appellants' counsel considers that both this evidence and the affidavit were presented in response to the RPD's findings.
- [23] The letter consists of four paragraphs:
- A) The first describes the deteriorating situation in Haiti and the day-to-day issues he faces (violent protests, tires set ablaze, assaults).
 - B) The second describes a problem he had with a mob while getting food on May 7, 2019.
 - C) The third mentions that after the incident of May 7, 2019, he decided to leave his neighbourhood on May 10, 2019, and that he stayed with a friend temporarily.
 - D) The final one notes that the country's current security conditions are deteriorating and the authorities are not taking any measures to address this situation.
- [24] The RAD is of the opinion that the information in the husband's statement, like that in the appellant's affidavit, did not arise after the rejection of the refugee protection claim (May 29, 2019). It was all reasonably available to the appellant.
- [25] The RAD considered not only the date on which the document was written, but also the date of the event or the fact the document in question intends to prove.
- [26] The role of the RAD is not to provide the opportunity to complete a deficient record submitted before the RPD, but to allow for errors of fact, errors in law or mixed errors of fact and law to be corrected.¹⁰

- [27] The RAD has no discretion to admit the evidence,¹¹ and the corrections made in these documents were reasonably and easily available and should have therefore been presented to the RPD.
- [28] Consequently, the appellant's affidavit and the letter from her husband are not accepted as evidence.

Holding of an oral hearing before the Refugee Appeal Division

- [29] The RAD appeal process is generally a paper-based process. Prior to holding an oral hearing, new evidence must be accepted on appeal in accordance with subsection 110(4) of the IRPA, and the new evidence, if accepted, must raise a serious issue with respect to the credibility of the appellant, must be central to the decision with respect to the refugee protection claim, and must justify allowing or rejecting the refugee protection claim.
- [30] Since no new evidence was accepted, there is no cause to hold an oral hearing in this case.

STANDARD OF REVIEW

- [31] 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.¹² That said, the RAD's role is to determine whether the RPD has in fact erred, as alleged by the appellants.
- [32] The RAD applied the correctness standard in this case.

Merits of the appeal

- [33] The RPD did not question the principal appellant's credibility. The RAD must assess all of the evidence in order to issue its own opinion and determine whether the decision rendered is correct.

- [34] The appeal raises the following issues:

A) Is there a nexus between the principal appellant's fear and one of the five Convention grounds, specifically by reason of her membership in the particular social group of "women," or is she fearful because of the prevailing insecurity in Haiti and because, returning from abroad, she would be perceived as wealthy and thus would be at greater risk of being targeted than other Haitians?

B) Is the risk she would face if she returned a personal risk that differs from the "generalized risk" facing the entire Haitian population?

C) Did the RPD err by concluding that the risk she would face if she returned is a generalized risk?

ANALYSIS

[35] In a lengthy memorandum drafted in general terms, the appellants categorize all paragraphs in the RPD decision as areas where it erred, without any further relevant and detailed explanation as to the RPD's errors and where these errors are located, in accordance with subparagraphs 3(3)(g)(i) and (ii) of the Refugee Appeal Division Rules¹³ (RAD Rules).

Did the Refugee Protection Division err in the analysis of the appellant's prospective risk under section 96 of the Immigration and Refugee Protection Act?

[36] The RPD examined the issues raised by the appellants, and it concluded that the facts as alleged and the principal appellant's testimony at the hearing do not engage section 96 of the IRPA.

[37] The principal appellant cites several decisions from case law and a number of excerpts from the objective documentary evidence to argue that the RPD erred in the analysis of her prospective risk under section 96 of the IRPA. She is of the opinion that the RPD erred in limiting the scope of the particular social group of "women" and in analyzing the objective evidence in this case.¹⁴

[38] She argues that the RPD rejected some important aspects of her profile, including the fact that she would be considered as someone returning from abroad, and the documentary evidence also states that women who have lived abroad are likely to be attacked and raped.

[39] The RAD disagrees.

[40] The RPD considered Guideline 4 and *Dezameau*, and referred to the criteria to be considered when analyzing the refugee protection claim of a Haitian woman citing a fear of persecution by reason of her gender.

[41] The RAD shares the RPD's view that it has not been established that the principal appellant would face a possibility of persecution by reason of her membership in the particular social group of women, for the following reasons.

[42] The documentary evidence cited by the appellant, as well as other tabs of the National Documentation Package (NDP), establishes that violence against women is widespread in Haiti. However, all these documents indicate that the women and girls who are at greatest risk are those who are the most vulnerable and who live in displaced persons camps.

[43] The RPD correctly acknowledged that gender-based violence is a problem in Haiti. It then correctly acknowledged that the degree of risk to which a woman could be subjected is contextual in nature and depends on factors that make some women more vulnerable than others.

[44] The RAD considers that these factors include having been the victim of domestic violence, belonging to a sexual minority, being pregnant, being a minor, living in a rural community or camp for displaced persons, or having a disability.

- [45] The appellant did not provide evidence that any of these aggravating factors apply to her, and the RPD correctly concluded that the appellant's specific situation reduced her risk of persecution below the threshold of a serious possibility.
- [46] The case law is well established in this regard: "This is not to say that membership in a particular social group is sufficient to result in a finding of persecution. The evidence provided by the applicant must still satisfy the Board that there is a risk of harm that is sufficiently serious and whose occurrence is 'more than a mere possibility'."15
- [47] The same case law notes the importance of taking into account each woman's personal situation, the conditions in which they live or would live, and their families.16
- [48] As for the criticism of being perceived as returning from abroad as a person of wealth, the case law has established that victims of crime are not part of a particular social group. In Étienne,17 the Federal Court states that wealth or the perception of wealth does not constitute membership in a particular social group under section 96 of the IRPA.
- [49] Similarly, in Jean,18 which concerns a Haitian woman and her daughters who fear returning to Haiti after a stay abroad, Justice Shore referred to Tab 14.1 of the NDP on Haiti, stating that: "the diaspora as a whole cannot be considered a [translation] 'risk group' and that each case must be considered individually and within [translation] 'its own context.'"
- [50] A relevant document is a response to information request (RIR) from November 29, 2018, regarding the risks returnees face in Haiti.19 According to this document, middle-class and affluent Haitians have a higher individual risk of victimization by criminals than do lower-income individuals.
- [51] Haitians who have lived abroad are perceived to have access to more resources and may therefore be more likely to be victims of crimes, similar to affluent people, even if they are not. Since wealthy people can afford private security services, the majority of victims of this type of crime are poor. Residents of low-income neighbourhoods with a high population density are more likely to be victims of crime than residents of wealthier and less densely populated areas. For example, residents of populated areas were 18 times more likely to be physically assaulted and 27 times more likely to be sexually assaulted.
- [52] The degree of risk faced by returnees depends on the neighbourhood that they reside in or visit. This risk is not limited to them, but is shared by everyone who appears to be wealthy and who attracts attention. These crimes are motivated by money, tend to be crimes of opportunity and are linked to not exercising caution at a given time.
- [53] The RPD examined the documentary evidence available to it and the appellant's risk in the context of her personal situation. It asked the appellant a number of questions to determine the reasons behind her fear of returning to Haiti. All of the appellant's answers led to the same reason: the fear of being a victim of widespread crime in Haiti.

- [54] The RAD considered all the relevant factors, including the cultural, social and economic context, and reached the same conclusion as the RPD. In this case, the appellant is a resourceful person who graduated from high school and worked as head accountant; she is married to a protective and loving man. They have a stable family life together. Consequently, she is not subjected to a particular vulnerability that would put her at risk within the meaning of section 96 of the IRPA.
- [55] The RPD correctly concluded that the facts as described by the principal appellant do not engage a refugee protection claim under section 96 of the IRPA. She testified that, regardless of gender, an individual who is perceived as having money is likely to be robbed in Haiti.
- [56] The RAD is of the opinion that the appellant did not discharge her burden of establishing a serious possibility of persecution by reason of her gender.
- Did the Refugee Protection Division err in its analysis of the personalized risk faced by the appellant under section 97 of the Immigration and Refugee Protection Act?
- [57] The RPD concluded that the appellants were not persons in need of protection under subsection 97(1) of the IRPA since the nature of the incidents raised by the principal appellant do not qualify under the generalized risk exception.
- [58] The RPD did not call into question the truthfulness of the incidents reported by the principal appellant in her BOC Form and testimony, but she fears crime in general and left her country on account of the cumulative crimes allegedly committed against her family.
- [59] The appellants submit that the risk for the principal appellant in Haiti is different and significantly higher than that for the Haitian population,²⁰ and while she was perhaps unable to identify her assailants or establish, on a balance of probabilities, a link between the attacks against her and those against her sister, these events nevertheless show that armed criminals threatened and assaulted her. These uncontested facts show that she was targeted.²¹
- [60] The principal appellant cites case law to argue that the RPD did not identify the risk stated as part of its analysis under section 97. She believes that the risk should have been identified as a [translation] "risk of rape or murder in the event of attacks."
- [61] The RAD considers that for a claim to be allowed under section 97, the refugee protection claimant must establish that the risk she would face if she returned to Haiti is different from the generalized risk faced by all or part of the Haitian population.
- [62] Given the facts as alleged and the documentary evidence establishing that violence is a part of daily life in Haiti, the principal appellant was asked to explain how her risk was different from that faced by the rest of the population, and she simply repeated her fears about the country's problems of insecurity. All the evidence presented was along the same lines.

- [63] At the hearing, the appellant admitted that the armed assaults against her were a result of crime and, as mentioned by the RPD, she did not argue otherwise.
- [64] The RAD considers that the incidents experienced by the appellant and her family are no doubt traumatizing for them, and the RAD sympathizes with the general feeling of insecurity she expressed throughout the hearing. However, nothing in her testimony indicates that she would be personally subjected to this risk if she returned to her country.
- [65] The RAD is of the opinion that the RPD did not err in concluding that the risk to which the principal appellant would be subjected is a "generalized risk." The RAD notes that the Federal Court's remarks in *Soimin22* could easily apply in this case:

The violence feared by the applicant arises from general criminal activity in Haiti, and not the discriminatory targeting of women in particular. The harm feared is criminal in nature and has no nexus to the Convention refugee definition. The generalized risk of a situation in a country must be distinguished from the probable risk to a person on the basis of his or her particular circumstances.

- [66] The RPD's decision is correct.
- [67] No fear was mentioned regarding the United States for the minor daughter of American nationality; the RAD finds that the RPD did not err in its determination.

CONCLUSION

- [68] The RAD reiterates its sympathy for Haitians who are in search of stability in another country following incidents of violence, theft and assault. However, for the appellant to be granted refugee status, the burden was on her to show that she would be subjected to a personalized risk that is different from the prevailing situation of generalized criminality in Haiti or a serious possibility of persecution. In this case, the appellant did not discharge her burden.
- [69] The RAD dismisses the appeal and confirms the RPD's 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 29, 2020

Date

IRB translation

Original language: French

- 1 P-2, appellants' record, appellants' memorandum, para. 33.
- 2 Ibid. Conclusions sought, digital page 28.
- 3 P-2, appellants' record, written statement, digital page 5.
- 4 Subsection 110(4) of the Immigration and Refugee Protection Act.
- 5 Canada (MCI) v. Singh, 2016 FCA 96; Canada (MCI) v. Raza, FC 385
- 6 P-2, appellants' record, digital page 6.
- 7 Ibid., digital page 9.
- 8 P-2, appellants' record, appellants' memorandum, para. 75.
- 9 Ibid., para. 77.
- 10 Canada (Citizenship and Immigration) v. Singh, 2016 FCA 96, para. 54.
- 11 Deri v. Canada (Citizenship and Immigration), 2015 FC 1042, para. 55.
- 12 Canada (MCI) v. Huruglica, 2016 FCA 93; Rozas Del Solar v. Canada (MCI), 2018 FC 1145.
- 13 Refugee Appeal Division Rules (SOR/2012-257), current to May 22, 2019, last amended on December 15, 2012.
- 14 P-2, appellants' record, appellants' memorandum, para. 54.
- 15 Dezameau, Elmancia v. Canada (MCI), 2010 FC 559.
- 16 Josile, Duleine v. Canada (MCI), 2011 FC 39.
- 17 Étienne, Jacques v. Canada (MCI), 2007 FC 64.
- 18 Jean, Léonie Laureore v. Canada (MCI), 2010 FC 674.
- 19 National Documentation Package on Haiti, Tab 14.1
- 20 P-2, appellants' record, appellants' memorandum, para. 61.
- 21 Ibid., para. 62.
- 22 Soimin, Ruth v. Canada (MCI), 2009 FC 218.

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RAD.25.02 (January 2020)

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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 (January 2020)

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