

CANADA / JUDGMENT

MB9-22876

COURT

Refugee Appeal Division

DECIDED

19 February 2020

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RAD File / Dossier de la SAR : MB9-22876 MB9-22877 / MB9-22878 Private Proceeding / Huis clos
Reasons and decision ? Motifs et décision Persons who are the subject of the appeal XXXX
XXXXXXXX XXXX XXXX XXXXXXXXXXX XXXX Personnes en cause Appeal considered / heard at
Toronto, ON Appel instruit / entendu à Date of decision February 19, 2020 Date de la décision
Panel J. Lourenço Tribunal Counsel for the persons who are the subject of the appeal Mohammad
Khan Khokhar Conseil des personnes en cause Designated representative XXXX Représentant(e)
désigné(e) Counsel for the Minister N/A Conseil du ministre REASONS FOR DECISION
OVERVIEW

- [1] XXXX (Principal Appellant), XXXX XXXX XXXX, and XXXX XXXX (Minor Associate Appellants) appealed a decision of the Refugee Protection Division (RPD), dated September 03, 2019, rejecting their claims for refugee protection. The Appellants allege that they face persecution and a risk to life at the hands of their family in Pakistan. The Appellants also allege that they faced xenophobia in South Africa. The RPD found that the Appellants had not credibly established their allegations and rejected their claims.
- [2] I agree with the Appellants that the RPD breached their right to procedural fairness and erred in its assessment of their claims. For the reasons that follow, the appeal is granted for the Principal Appellant and the minor female Associate Appellant. The Appeal for the minor male Associate Appellant is dismissed.

BACKGROUND

- [3] The Appellants' claims at the RPD were initially joined with the claim of the Principal Appellant's husband, XXXX. The RPD found that XXXX was excluded pursuant to article 1E because of his permanent residence in South Africa. In considering his risk in South Africa, the RPD found that his claim had no credible basis. As such, he does not have access to appeal that decision to the RAD and the determination in his claim will not be considered in this appeal.
- [4] The Principal Appellant is a citizen of Pakistan. The minor female Associate Appellant is a citizen of South Africa, while the minor male Associate Appellant is a citizen of the United States. The Appellants allege that they face persecution at the hands of XXXX uncle. They allege that XXXX dishonoured the family by refusing an arranged marriage to his uncle's

daughter. They allege that XXXX uncle has connections to extremist organizations. The Appellants allege that they, along with XXXX, have been targeted by this uncle and his associates. They allege that they have been the victims of attempted kidnapping and repeated threats. Furthermore, the Appellants allege that they experienced xenophobia in South Africa as they are perceived to be foreigners.

- [5] The RPD found that the Principal Appellant had not credibly established her allegations and refused her claim. The RPD found that the minor male Associate Appellant did not have a claim as he was an American citizen and made no allegation of risk in that country. The RPD found that the minor female Associate Appellant had not established any "credible allegation of persecution or submissions made with respect to a claim against South Africa."¹

ANALYSIS

- [6] The Appellants allege on appeal that the interpretation at the RPD was deficient and led to a breach of natural justice. The Appellants also allege that the RPD member demonstrated bias which prevented the Appellants from having a fair hearing. They argue that the member's conduct prevented them from providing their evidence in a full and fair manner. As such, the Appellants argue that the RPD erred in finding that their claims were not credible. Role of the Refugee Appeal Division
- [7] The Refugee Appeal Division (RAD) reviews decisions of the RPD on a standard of correctness after conducting an independent assessment of the evidence before it. The exception to this rule is where the RPD enjoys a meaningful advantage in the assessment and weighing of oral testimony heard, which in particular cases, attracts deference. Unless specifically stated below, I have applied a correctness standard.² New evidence
- [8] The Appellants submit new evidence with their appeal. For the reasons that I will outline, I find that there is enough on the existing record to grant the appeal without considering the new evidence. Given that I am granting the appeal and sending the matter back for redetermination, it is not necessary for me to deal with the new evidence submitted by the appellants. When the matter is returned to the RPD for reconsideration, the Appellants can file this evidence with their claim if they choose. The Appellants did not have the opportunity to provide their evidence fully and fairly.
- [9] The determinative issues in this appeal is whether the RPD member's conduct prevented the Appellants from presenting their allegations and breached procedural fairness, and whether the RPD demonstrated a reasonable apprehension of bias. The Appellants point to a number of times in the record where they allege the RPD interrupted testimony, and made inflammatory statements. Having fully reviewed the audio, I find that the RPD's conduct led to a reasonable apprehension of bias and would have prevented the Appellants from being able to fully present their case.

- [10] In reviewing the audio, I find that the conduct of the RPD created an environment in which the Appellants would have reasonably felt apprehensive about presenting their case. At the first sitting before the RPD, the appellants attempted to make amendments to their BOC narratives. It is clear from the audio that these were amendments they had discussed with counsel, but on counsel's advice had decided to ask for the amendments to be made orally on the record.³ The RPD member is clearly frustrated that these amendments are being requested by the Appellants. After initially agreeing to allowing the amendments to be made orally, the RPD member indicates that there are too many amendments and as such she is requiring that the narratives be rewritten amalgamated, and submitted to her within 24 hours as "this is not how we proceed in Canada."⁴
- [11] While this procedure in and of itself is not problematic, the concern arises from the comments of the RPD member. The RPD member also tells the Appellants that her time is valuable, that she did not think it was reasonable that she would have to redo all her hard work, that they would have to redo the work, and that no further changes would be allowed. The RPD member also indicates to the appellants that she will hold onto the original narratives because they are going to have to explain why their story kept changing. The RPD member also tells the Appellants that they have wasted her time as she prepared for this hearing to proceed. Further, the RPD member indicates to the Appellants that because of their delay other refugee claimants will now have to wait longer for their hearings.⁵ While it is understandable that the RPD wanted to proceed in an efficient manner, I find that making these comments to the Appellants would reasonably lead them to the conclusion that the RPD member might hold this delay against them and that she was not fully open to fairly considering their claim.
- [12] I also agree with the Appellants' argument that the member at the RPD interrupted when the Appellants were responding to questions, which often led to an inability for them to explain themselves fully. At times, the RPD member would ask the Appellants questions, and when they began their responses or asked if they could elaborate or clarify their evidence, the member told them to simply answer the questions and/or to move on. Again, while I can appreciate the need to proceed efficiently, I find that this hindered the Appellant's ability to answer the questions fully. This inability to fully explain their evidence had a negative impact on the RPD's assessment of the Appellants' credibility.
- [13] I also note that during the RPD hearing there were exchanges between counsel and the RPD member which were not interpreted for the Appellants. At times these exchanges were about the member's view on the Appellants evidence.⁶ I find that the Appellants had the right to have these exchanges translated, and that in the context of the other issues during the hearing, not having them translated breached the Appellants' right to a procedurally fair hearing.
- [14] In independently reviewing the audio, I also find that at times the RPD member's questions would suggest a pre-determination on the evidence. For example, when the RPD member asked the Principal Appellant about whether she could relocate to Karachi, the question

suggested that the member was already of the view that she could. The RPD asked the Principal Appellant why she couldn't move to Karachi given that it was a city of millions and that clearly her uncle would not be able to find her there since he couldn't find her before. In addition, the RPD stated the Principal Appellant would be able to find a job anywhere because she was an educator.⁷ I find that this suggested that the RPD had already improperly come to a determination on whether the Principal Appellant would have a viable IFA. While that issue ultimately was not determinative of the claim, I find that this type of questioning could have reasonably led to the conclusion that the member had not approached their hearing with an open mind.

- [15] Finally, as highlighted by the Appellants in the memorandum, the RPD makes a comment during the second sitting of the hearing which was problematic. During an exchange about language and waiting for interpretation, the RPD member says "I apologize for anyone who will be hearing this through appeal."⁸ Counsel at the RPD raised a concern about this comment to the member immediately, indicating that it was premature to discuss an appeal as this would suggest that the claim was predetermined. The RPD member insisted that she would never dream of saying that and that she had said if there was an appeal. In reviewing the audio, I find that the Appellants' description of the comment is accurate. In listening to the comment from the RPD, there is no qualifier in her statement about the appeal. While I do not believe that the statement on its own necessarily indicates that the RPD had pre-decided the claim or that there is actual bias, in the context of the other statements from the RPD member, this creates a reasonable apprehension of bias.
- [16] The test for a reasonable apprehension of bias asks whether an informed person viewing the matter realistically and practically, and having thought the matter through, would conclude that the decision-maker is more likely than not to decide unfairly. There is no requirement to find that actual bias was demonstrated. In the Appellants' case, I do not believe that they have established that the RPD was actually biased. However, I find that taking cumulatively all of these aspects of the record would lead an informed person viewing the matter realistically and practically to conclude that the member was more likely to decide this matter unfairly. I find that the above-mentioned statements and questions of the RPD also hindered the Appellants' ability to present their evidence freely. Given that the determination of their claim turned on credibility, this is fatal.
- [17] Given the deficiencies with the hearing at the RPD, I find that there are areas of the Principal Appellant's claim that were not fully and fairly canvassed. As such, I am unable to make a determination based on the record before me. Therefore, this claim will be remitted back to the RPD for redetermination. The claim of the female minor Associate Appellant was not assessed.
- [18] Further to the above-mentioned concerns, I find that the RPD erred by failing to assess the risk of the minor female Associate Appellant. Although the Appellants do not raise this issue in their memorandum, it is glaring before me on the record. It is worth noting that the Appellants' memorandum and notice of appeal indicates that all the Appellants are Pakistani

citizens.⁹ This is not reflective of the RPD decision or the evidence in the record. The record clearly indicates that the minor female Associate Appellant is South African, while the male minor Associate Appellant is American. The RPD rejected the claim of the female minor Associate Appellant by stating that there was no credible allegation or submission against South Africa. I find that this is an error.

- [19] The narrative of her father Haseeb, who was the principal claimant before the RPD, clearly indicated that the family feared xenophobia in South Africa. The RPD failed to assess whether this Associate Appellant would face a serious possibility of persecution or risk to life in South Africa. Essentially, the RPD undertook no analysis whatsoever as to whether or not the minor associate appellant faced any risk in South Africa. As this was not canvassed at the RPD or addressed in its reasons, I'm unable to conduct an independent analysis and come to a conclusion on this matter. As such the assessment of the female minor associate appellant's claim is returned to the RPD. The RPD is to canvass and assess whether this appellant faces a risk to life or a serious possibility of persecution in South Africa which is her country of citizenship. The male minor associate appellant has not established a claim against the United States and as such his appeal is denied.
- [20] The RPD concluded that the male minor Associate Appellant had not alleged any risk in his country of citizenship, the United States. As such the RPD rejected his claim. The Appellants offer no specific argument about this determination in their appeal. As previously mentioned, the Appellants' memorandum identifies them as Pakistani citizens but the record establishes that the minor male Associate Appellant is an American citizen. This is also established during the RPD hearing in the testimony of his father Haseeb who was the principal claimant and his designated representative. XXXX testified before the RPD that the minor male Associate Appellant did not allege any risk in the United States.¹⁰ In having independently reviewed the record, there is no indication of risk faced by this Appellant in the United States. As such, I find that the minor male Associate Appellant's appeal is denied and I confirm the determination of the RPD that he is neither a Convention refugee nor a person in need of protection.

CONCLUSION

- [21] The appeal is allowed for the Principal Appellant and the female minor Associate Appellant. Pursuant to section 111(1)(c) of the Immigration and Refugee Protection Act (IRPA), the RAD refers the matter to the RPD for redetermination by a differently constituted panel.
- [22] The RAD dismisses the appeal of the minor male Associate Appellant and confirms the decision of the RPD that the Appellant is neither a Convention refugee nor a person in need of protection, pursuant to section 111(1)(a) of the Immigration and Refugee Protection Act (IRPA). (signed) "J. Lourenço" J. Lourenço February 19, 2020 Date 1 Exhibit RPD-1, RPD Record, RPD Reasons, at p.12, para. 98. 2 Canada (Citizenship and Immigration) v. Huruglica, 2016 FCA 93, [2016] 4 FCR 157, at para 103. 3 RPD Hearing Audio Recording (8 May 2019), at approximately 21:00. 4 Ibid, at approximately 32:45. 5 Ibid, at approximately

32:45-41:30. 6 RPD Hearing Audio Recording (14 May 2019), at approximately 1:32:00. 7 Ibid, at approximately 1:46:00. 8 Ibid, at approximately 1:09:30. 9 Exhibit P-2, Appellants' Record, Appellants' Memorandum, at p. 136, para. 3. 10 RPD Hearing Audio Recording (14 May 2019), at approximately 31:15.

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Commission de l'immigration et du statut de réfugié du Canada Section d'appel des réfugiés
RAD.25.02 (April 04, 2019) Disponible en français

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