

CANADA / JUDGMENT

TB8-29746

COURT

Refugee Appeal Division

DECIDED

28 July 2020

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RAD File No. / No de dossier de la SAR : TB8-29746; TB8-29747 Private Proceeding / Huis clos
Reasons and Decision ? Motifs et décision Persons who are the subject of the appeal XXXX XXXX
XXXXXXXX XXXX Personnes en cause Appeal considered / heard at Montréal, Quebec Appel
instruit / entendu à Date of decision July 28, 2020 Date de la décision Panel Me Alain Bissonnette
Tribunal Counsel for the persons who are the subject of the appeal Me John Grice 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

INTRODUCTION

- [1] XXXX XXXX XXXX, you are a Tunisian citizen and you are acting as the designated representative of your minor daughter, who has dual Tunisian and Lebanese citizenship.
- [2] You stated that you fear being persecuted in Tunisia because members of your family are angry with you for marrying a Lebanese man and because Muslim militias, fundamentalists and criminals want to harm you and your children because of your profile and your marriage. With respect to your minor daughter, you also stated that you fear that she would be kidnapped and circumcised by members of your husband's family if she had to return to live in Lebanon.¹
- [3] The Refugee Protection Division (RPD) found that you were not credible and it rejected your refugee protection claims.²
- [4] On appeal, you submit that the RPD did not observe the principles of procedural fairness and erred in its analysis of your credibility.³
- [5] I agree with you. In the paragraphs that follow, I will explain why I arrived at these conclusions. In light of these conclusions, your appeal is allowed, the RPD's determination is set aside, and your refugee protection claims are to be heard by a different member.

ANALYSIS OF THE APPEAL

- [6] The role of the Refugee Appeal Division (RAD) is not to carry out a de novo consideration of refugee protection claims, but rather to determine whether the RPD erred as alleged.⁴ I conducted my own analysis of the record, namely by listening to the recording of the RPD hearing⁵ and by taking into consideration the Chairperson's Guideline 4,⁶ the Chairperson's

Guideline 7,7 and the Code of Conduct for Members of the Immigration and Refugee Board of Canada.⁸ I concluded that the correctness standard had to be applied.⁹ The principles of procedural fairness and the appearance of bias

- [7] In your memorandum, you submit that the RPD did not observe the principles of procedural fairness, as the member's conduct gave rise to an appearance of bias.¹⁰
- [8] When procedural fairness is at issue, the particular circumstances of the case must be taken into consideration.¹¹ In refugee protection claims before the RPD, procedural fairness aims to ensure that the person claiming refugee protection understands the proceedings, has a reasonable opportunity to tender any evidence that supports their claim and is given a chance to persuade the RPD that their claim is well-founded.¹² The issues associated with a refugee protection claim are very important. Moreover, the fear of being a victim of violence simply because one is a woman often requires the decision-maker to listen with an understanding ear.¹³ There is therefore cause to ensure that the process gives the person who is claiming refugee protection the opportunity to put forward their views and evidence fully and to have them considered by the decision-maker.¹⁴
- [9] Impartiality refers to a state of mind or attitude that demonstrates absence of bias, actual or perceived. With regard to impartiality, appearances are as important as reality. It goes without saying that the RPD cannot assess the credibility of refugee protection claimants or reject the evidence they have adduced without giving them the opportunity to be heard and argue their case.¹⁵
- [10] Referring to these principles and viewing the matter realistically and practically,¹⁶ I am of the opinion that your arguments have merit and that we are faced with a situation of an appearance of bias, and that there is therefore cause to set aside the RPD's determination. Here is why.
- [11] In listening to the recording of the hearing,¹⁷ I noted that the member did not consult with your counsel about the issues, did not identify timelines, and provided no instructions for how the hearing would unfold, as set out in Guideline 7.¹⁸
- [12] I also noted that the member was insensitive in putting certain questions to you¹⁹ and that, at times, he made comments expressing disapproval, or even contempt for you.²⁰ Yet, members are to conduct hearings in a courteous and respectful manner. They are expected to take into account the social and cultural differences of the individuals testifying before them and to respect human rights. In my opinion, without his having acted in bad faith, the member conducted himself inappropriately during your hearing.²¹
- [13] What is more, in expressing his conviction that you lied to the Canadian authorities when you obtained a visa, for which the true purpose had been, in his opinion, to allow you to give birth to your son, and in stating that there were serious credibility issues with your story,²² the member did not show you that he was going to review your refugee protection claim with an open mind or that you could view him as being impartial and objective.²³ In

fostering such a climate during the first 30 minutes or so of your hearing, in my opinion, he adopted a logic of suspicion, identifying you as blameworthy, as someone who conceals things and who is capable of lying. Such conduct casts a shadow of symbolic violence over the hearing, thereby limiting your ability to testify in the hope of being heard.²⁴ The RPD erred when it found that you were not credible

- [14] In its decision, the RPD acknowledged that your testimony confirmed that you did in fact spend many years under your husband's control. However, it considered some of your responses to be vague, without taking into consideration that they, too, confirmed this as fact. The RPD also considered that the credibility of your fears today was undermined by the fact that, at the beginning of your marriage, you did not have the problems that arose some 10 years later. Finally, it considered that, because your husband had cut ties with you, you no longer had any reason to fear that your respective families would still want to harm you or your minor daughter in some way.²⁵
- [15] In your memorandum, you submit that the RPD made several errors when analyzing your credibility, notably because it failed to take into consideration the Chairperson's Guideline 4, the social and cultural differences between Canada and countries such as Lebanon and Tunisia, and the fact that you did not need to establish that you had been a victim of persecution in the past.²⁶
- [16] Based on my own analysis of the record, the RPD's assessment of your credibility does include the errors that you set out in your memorandum. I am of the opinion, however, that it is impossible for me to remedy these errors on appeal. The RPD must re-determine your refugee protection claims
- [17] Over a year and a half has passed since the hearing held before the RPD. The situation between you and your husband may have changed. For example, at the hearing, you stated that you wanted to divorce your husband.²⁷ However, on appeal, you presented no document to establish that you have initiated divorce proceedings. Another element that, in my opinion, should be analyzed is the fact that your husband does not appear to have taken any steps to have your minor daughter returned to him, when, according to your own submissions, it appears that he could be granted custody of her.²⁸ In the circumstances, I am of the opinion that it is not possible for me to substitute the determination of the RPD with the determination that, in my opinion, should have made, without holding a new hearing. However, as you submitted no new evidence on appeal, it is impossible for me to hold such a hearing.²⁹
- [18] Consequently, I am of the opinion that the best remedy is to refer the matter to the RPD for your refugee protection claims to be heard by a different member. With the authority conferred on me by paragraph 111(1)(c) of the Immigration and Refugee Protection Act, I give as direction that the RPD analyze your refugee protection claims by applying the Chairperson's Guideline 4. Although the Guideline cannot compensate for all deficiencies in a refugee protection claim, it is nevertheless designed to ensure a fair hearing when a

woman alleges to fear any of the forms of violence perpetrated against women.³⁰ I also give as direction that the RPD analyze your refugee protection claims by considering the most recent evidence concerning your relationship with your husband, your fears in both Lebanon and Tunisia, and the capacity of the authorities in both of those countries to protect both you and your minor daughter.

CONCLUSION

- [19] For these reasons, I set aside the determination of the RPD and refer the matter to the RPD for your refugee protection claims to be heard de novo by a different member.
- [20] Your appeal is allowed. (Signed) Alain Bissonnette Me Alain Bissonnette July 28, 2020 Date IRB translation Original language: French 1 Your Basis of Claim Forms are reproduced at pages 11 to 33 and the documents that you submitted as evidence are reproduced at pages 165 to 177 of the scanned version of the Refugee Protection Division (RPD) record. 2 RPD's Reasons and Decision, October 5, 2018, pages 6 to 10 of the scanned version of the RPD record. 3 Appellants' memorandum, December 5, 2018, pages 12 to 28 of the scanned version of the appeal record. 4 *Dahal v. Canada* (Minister of Citizenship and Immigration), No. IMM-330-17, Crampton, December 4, 2017; 2017 FC 1102, paragraphs 30 and 31. *Kanawati v. Canada* (Minister of Citizenship and Immigration), No. IMM-6486-18, Norris, January 3, 2020; 2020 FC 12, paragraphs 23 and 24. 5 Recording of the RPD hearing held on September 13, 2018, 00:01 to 02:04:20 (that is, 1 second to 2 hours, 4 minutes and 20 seconds). 6 Immigration and Refugee Board of Canada (IRB), Chairperson's Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution, effective November 13, 1996. 7 IRB, Chairperson's Guideline 7: Concerning Preparation and Conduct of a Hearing in the Refugee Protection Division, effective December 1, 2003, amended December 15, 2012. 8 IRB, Code of Conduct for Members of the IRB, effective June 1, 2008, amended April 17, 2019. 9 *Canada (Citizenship and Immigration) v. Huruglica*, A-470-14, Gauthier, Webb and Near, March 29, 2016; 2016 FCA 93. 10 Appellants' memorandum, supra, endnote 3, paragraphs 30 to 38. 11 *Wai Kheong Ching v. Canada* (Minister of Citizenship and Immigration), No. IMM-1272-14, Kane, June 9, 2015; 2015 FC 725, paragraph 75. 12 *Nemeth v. Canada* (Minister of Citizenship and Immigration), No. IMM-2522-02, O'Reilly, May 14, 2003; 2003 FCT 590, paragraph 10. 13 *Sy v. Canada* (Minister of Citizenship and Immigration), No. IMM-5962-04, Snider, March 17, 2005; 2005 FC 379, paragraphs 14 and 15. 14 *Dalirandi v. Canada* (Minister of Citizenship and Immigration), No. IMM-3269-19, Roy, February 17, 2020; 2020 FC 725, paragraph 30, notably citing the Supreme Court of Canada's decision in *Baker* [1999] 2 SCR 817. 15 *Kabongo v. Canada* (Minister of Citizenship and Immigration), No. IMM-1727-11, Martineau, September 28, 2011; 2011 FC 1106, paragraphs 33 to 41. 16 *Committee for Justice and Liberty v. National Energy Board*, [1978] 2 SCR 369, page 394. 17 Hearing recording, 02:40 to 06:30. 18 Chairperson's Guideline 7, supra, endnote 7, section 5.2. 19 Hearing recording, 07:01 to 15:15 regarding the visa applications made by your husband. 20 Ibid., 15:15 to 22:10 by stating that 1) it made no sense that you did not have with you the visa application that led you to get a visa and come to Canada and to give birth to your son here, when you explained that your

husband had been the one who made the applications and that you did not have them with you; 2) that you seemed like someone whose entire life was controlled by her husband, despite being an adult; and 3) that it made no sense that your husband wanted your son to be Canadian, when he was of the opinion that boys are superior to girls. 21 Code of Conduct for Members, *supra*, endnote 8, sections 9 and 10. 22 Hearing recording, 28:30 to 33:30. 23 Code of Conduct for Members, *supra*, endnote 8, section 29. 24 For further insight on these issues, but applied in the context of interviewers when asking people about their life experiences, read Pierre Bourdieu, "Comprendre", in *La misère du monde*, Paris, Éditions du Seuil, Collection Points, 1993, pages 1389 to 1447. 25 RPD's Reasons and Decision, *supra*, endnote 2, paragraphs 10 to 15, 17 and 18. 26 Appellants' memorandum, *supra*, endnote 3, paragraphs 10 to 29. 27 Hearing recording, 27:15 to 28:15. 28 Appellants' memorandum, *supra*, endnote 3, paragraph 19. 29 *Casilimas Murcia v. Canada* (Minister of Citizenship and Immigration), No. IMM-775-19, Pamel, September 17, 2019; 2019 FC 1182, paragraph 43, citing the Federal Court of Appeal's decision in *Singh*, 2016 FCA 96. 30 *Mavangou v. Canada* (Minister of Citizenship and Immigration), No. IMM-3722-18, Gascon, February 12, 2019; 2019 FC 177, paragraph 48. *Odurukwe v. Canada* (Minister of Citizenship and Immigration), No. IMM-3187-14, Mosley, May 8, 2015; 2015 FC 613, paragraph 40.

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