

CANADA / JUDGMENT

MB9-05801

COURT

Refugee Appeal Division

DECIDED

8 January 2020

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RAD File No. / N° de dossier de la SAR : MB9-05801 MB9-05802 / MB9-05803 Private Proceeding / Huis clos Reasons and decision ? Motifs et décision Persons who are the subject of the appeal XXXX XXXX XXXXXXXXXX XXXX XXXX XXXX XXXXXXXXXX XXXX XXXX XXXX XXXX Personnes en cause Appeal considered / heard at Ottawa, Ontario Appel instruit / entendu à Date of decision January 8, 2020 Date de la décision Panel Pascale Aubin Tribunal Counsel for the persons who are the subject of the appeal Ron Shacter Conseil des personnes en cause Designated representative XXXX XXXX XXXX XXXX Représentant(e) désigné(e) Counsel for the Minister N/A Conseil du ministre REASONS FOR DECISION OVERVIEW

- [1] XXXX XXXX, the principal appellant, XXXX XXXX XXXX XXXX, the associate appellant, citizens of Haiti, and XXXX XXXX XXXX XXXX XXXX, the minor appellant, an American citizen, are appealing against the February 22, 2019, decision of the Refugee Protection Division (RPD) rejecting their refugee protection claim.
- [2] The principal appellant, a XXXX at the XXXX XXXX XXXX XXXX XXXX, alleges that he fears for his life because he received threatening calls and because he was kidnapped on XXXX XXXX XXXX 2017. He claims that he hid at his sister's home in Port-de-Paix. He states that the agents of persecution are still looking for him. The associate appellant and her daughter, XXXX XXXX XXXX XXXX, left Haiti for the United States. The principal appellant left Haiti for Canada on XXXX XXXX, 2017. ADMISSIBILITY OF NEW EVIDENCE AND REQUEST FOR AN ORAL HEARING
- [3] In support of this appeal, the appellants filed the following documents:
1. Leave request dated XXXX XXXX, 2017;
 2. Excerpt of the registry minutes from June 13, 2017;
 3. Affidavit of XXXX XXXX dated XXXX XXXX, 2018;
 4. National identity card of XXXX XXXX;
 5. Written statement of XXXX XXXX dated XXXX XXXX XXXX 20 2018;
 6. Identity card of XXXX XXXX;
 7. Affidavit of XXXX XXXX dated XXXX XXXX XXXX 2017;

8. Licence of XXXX XXXX;
 9. Responses to Information Requests dated December 16, 2016;
 10. Account of XXXX XXXX;
 11. Affidavit of XXXX XXXX, XXXX, dated XXXX XXXX XXXX 2019. Legal principles pertaining to new evidence
- [4] According to subsection 110(4) of the Immigration and Refugee Protection Act (IRPA) new evidence can only be admitted if: 1) it arose after the rejection of the refugee protection claim by the RPD; 2) it was not reasonably available; or 3) the appellant could not reasonably have been expected in the circumstances to have presented it at the time of the rejection. The Refugee Appeal Division (RAD) does not have the discretion to admit evidence that not does fall into one of these three categories.¹
- [5] If the evidence fulfils the above-mentioned legislative conditions, I must then analyze whether it is credible, relevant and new.² Decision regarding the admissibility of new evidence Items 1 to 8:
1. Leave request dated XXXX XXXX, 2017;
 2. Excerpt of the registry minutes from June 13, 2017;
 3. Affidavit of XXXX XXXX dated XXXX XXXX XXXX 2018;
 4. National identity card of XXXX XXXX;
 5. Written statement of XXXX XXXX dated XXXX XXXX, XXXX 2018;
 6. Identity card of XXXX XXXX;
 7. Affidavit of XXXX XXXX dated XXXX XXXX, 2017;
 8. Licence of XXXX XXXX;
- [6] I find that the documents (items 1 to 8) are not admissible as new evidence for the reasons that follow. These same documents were filed as evidence before the RPD. These documents contain information about incidents that occurred before the hearing and the RPD decision. In other words, these are not incidents that arose after the rejection of the refugee protection claims, but rather, circumstances that were known before the decision to reject dated February 11, 2019. I therefore find that they do not qualify as new evidence, as these documents and facts have already been before the RPD. As these documents do not meet the conditions required by law, I am not required to analyze their relevance or credibility. Item 9: 9. Responses to Information Requests
- [7] I note that the appellants' memorandum does not explain whether this evidence arose after the RPD's rejection of the refugee protection claim and how it was not reasonably available, or why it could not reasonably have been expected in the circumstances to have been

presented to the RPD prior to the claim being rejected. It was incumbent upon the appellants to explain how the documentary evidence meets the conditions set out in subsection 110(4) of the IRPA in the memorandum. However, neither the written statements nor the appeal memorandum offer the slightest explanation.

[8] According to the recent Federal Court decision in Ilias,³ the absence of such an explanation is sufficient grounds for me to reject this new evidence. Furthermore, I note that the document is clearly dated before the RPD's decision of February 11, 2019, and that it is not information that arose after the RPD rejected the refugee protection claim, but rather, responses to information dated December 15, 2016.

[9] Considering that the memorandum in no way explains that this evidence arose after the RPD's rejection of the refugee protection claim, why it was not reasonably available, or why it could not reasonably have been expected in the circumstances to have been presented to the RPD prior to the claim being rejected, I find that this document is inadmissible for the appeal as it does not meet any of the conditions set out in subsection 110(4) of the IRPA.

Item 10: 10. XXXX XXXX - Account

[10] I find that the account (item 10) is not admissible as new evidence for the reasons that follow. This document is the principal appellant's account and it restates the allegations in his Basis of Claim Form (BOC Form). In this document, the principal appellant simply tells his story again and reiterates the facts that were presented before the RPD. The document contains information about incidents that occurred before the hearing and the decision rendered by the RPD. In other words, these are not incidents that arose after the rejection of the refugee protection claim, but rather, circumstances that were known before the decision to reject dated February 11, 2019. This document presents the story in the BOC Form. I therefore find that it does not qualify as new evidence, as the document and facts have already been before the RPD. Since it does not meet the statutory requirements, I do not have to consider the relevance or credibility of these documents. Item 12: 12. Affidavit of XXXX XXXX, XXXX, dated XXXX XXXX, 2019

[11] I find that the affidavit (item 12) is not admissible as new evidence for the reasons that follow. This document is the affidavit of a XXXX from the XXXX XXXX XXXX XXXX that reiterates the principal appellant's testimony to support the submissions in the appeal. I find that this document does not meet the legislative conditions as it is not new evidence that arose after the RPD rejected the refugee protection claim, but rather, a summary of the key aspects of the principal appellant's testimony. It is also not evidence that that was not reasonably available, or that the appellants could not reasonably have been expected in the circumstances to have presented at the time of the rejection. DECISION ON HOLDING AN ORAL HEARING BEFORE THE REFUGEE APPEAL DIVISION

[12] None of the evidence presented was found to be admissible. For this reason, I am of the opinion that there is no cause to hold an oral hearing. APPLICABLE STANDARD OF REVIEW

- [13] For questions of fact, mixed fact and law, and law, the RAD applies the standard of correctness. When assessing the credibility of the oral evidence, the RAD may show deference in situations where the RPD enjoyed a meaningful advantage. Unless stated otherwise in my reasons, I have applied the correctness standard of review to all findings.

ANALYSIS

- [14] I find that the determinative issue in the case is credibility. Credibility
- [15] The appellants maintain that the RPD erred in its findings about their credibility. Based on my independent analysis of the record, I find that the RPD's decision is correct for the reasons that follow.
- [16] This appeal seeks to determine whether the RPD erred in assessing the appellants' credibility. The contradictions and omissions that the RPD identified are significant and directly related to their allegations of fear and risk should they return to Haiti.
Inconsistencies - Role of the XXXX XXXX XXXX XXXX
- [17] The appellants argue in their memorandum that the RPD failed to properly assess the principal appellant's credibility by incorrectly evaluating the evidence. They claim that the testimony had no inconsistencies, lack of detail or omissions regarding the fact that the principal appellant had worked in a formal or secret position. They argue that the RPD did not give the principal appellant an opportunity to provide details.
- [18] In its reasons, the RPD indicates that the principal appellant could not provide a clear answer about his alleged role at the XXXX. The RPD concludes that the principal appellant's allegations regarding his supposed role as XXXX XXXX at a XXXX XXXX XXXX XXXX were unproven.
- [19] I note that the principal appellant testified that his role was in no way formal, that he XXXX XXXX XXXX XXXX XXXX of his initiative, and that he had not been appointed by the XXXX to do so.⁴ However, his BOC Form states that [translation] "the XXXX had set up an XXXX XXXX XXXX XXXX XXXX, for which I was the XXXX XXXX."⁵ When confronted with this discrepancy, the principal appellant stated that XXXX XXXX XXXX was a personal initiative he had undertaken, that he had not been appointed and that he did it in secret.⁶ He stated that it was when he started seeing XXXX XXXX that the threatening calls began.⁷ He testified that he had stated that he was the XXXX XXXX in his BOC Form because none of his colleagues wanted to do that job.
- [20] After thoroughly listening to the recording of the hearing, I share the RPD's opinion that the principal appellant's testimony about his role at the XXXX was confusing and imprecise. I cannot accept the appellants' argument that there were no inconsistencies, lack of detail or omissions because the two versions, when compared, are undeniably different. The explanation that he did this work in secret is unsatisfactory because it contradicts the fact that the XXXX had set up a station and that he was the XXXX XXXX.

- [21] Furthermore, after carefully listening to the hearing, I am of the opinion that the RPD used a direct approach and asked specific and to-the-point questions. In its questioning, the RPD clearly stated that it sought to understand the difference between simply treating patients and why he had indicated that he was XXXX XXXX XXXX XXXX in his BOC Form.⁸ The RPD then asked what he meant when he stated that he did something in secret.⁹ Therefore, I cannot accept the principal appellant's argument that he did not have a chance to explain himself. On the contrary, I am of the opinion that at the hearing before the RPD, he had several opportunities to provide details and explanations about his hidden/secret role at the XXXX, which he did in an imprecise and confusing way. Therefore, on a balance of probabilities, I conclude that the principal appellant fully understood the questions about his role at the XXXX and his answers contradicted the information in his BOC Form.
- [22] In my opinion, the RPD made its conclusion based on the information provided by the principal appellant at the hearing. Furthermore, the principal appellant cannot adjust the answer in his memorandum in reaction to a negative inference in the RPD decision, nor can he adjust his answer to undercut the inference drawn from his testimony, as the RPD's inference regarding his role is correct. Use of medical reports in legal proceedings
- [23] In their memorandum, the appellants submit that there was a lack of consideration for the evidence regarding medical reports and legal proceedings. The appellants argue that the principal appellant had provided general information about the situation of XXXX XXXX in Haiti and did not have to provide a concrete example.
- [24] After carefully listening to the recording of the hearing, I note that the RPD asked the following question: [translation] "although you say there is typically no follow-up, do you know whether your reports were used in legal proceedings?" In my opinion, the principal appellant's testimony here was evasive, as he did not answer the question, stating instead that [translation] "there's no stopping a politician," when a police officer does something, we give them a promotion, send them to be ambassadors in other countries, women have to fight. He also provided the example of a mayor who was raped and beaten by her husband.¹⁰ Although the principal appellant testified about the general situation of raped women in Haiti, he did not provide an answer as to whether his reports had been used in legal proceedings. For this reason, I draw a negative inference with regard to his credibility. Inconsistencies - threats
- [25] In his memorandum, the appellants argue that in its decision, the RPD did not properly explain why it did not find the explanation about the threatening calls starting XXXX months after the work in the XXXX started to be credible.
- [26] The RPD clearly indicated in its decision that the principal appellant was unable to explain why he stated in his account that the threatening calls started XXXX months after he started working in the XXXX. I share the RPD's opinion that the principal appellant stated that he started XXXX XXXX XXXX XXXX in XXXX-XXXX 2017. When asked why he did not XXXX XXXX XXXX as soon as he was appointed to the XXXX in XXXX 2016, he stated that it was not

something that everybody had to do and that he was training residents.¹¹ He gave examples of XXXX XXXX in performing XXXX XXXX, XXXX XXXX XXXX XXXX, and XXXX XXXX XXXX XXXX.¹²

- [27] I am of the opinion that XXXX XXXX may cause a delay; however, this response is unsatisfactory, as it is difficult to reconcile with the position of a XXXX XXXX in charge of a XXXX XXXX XXXX. The explanation does not compensate for the fact that he testified not having XXXX XXXX XXXX XXXX for almost a year after being appointed, that is, from XXXX 2016 to XXXX-XXXX 2017. The answer also fails to compensate for the statement in his account that [translation] "the XXXX had set up an XXXX XXXX XXXX XXXX XXXX, for which I was the XXXX XXXX."¹³
- [28] Furthermore, when the RPD asked him to identify a specific date for when work started in the XXXX, he stated that it was when he had starting XXXX XXXX and there was political turbulence.¹⁴ I am of the opinion that the principal appellant's testimony was fairly confusing even though the member questioned him repeatedly about the gap between XXXX 2016 and when work started in the XXXX,¹⁵ which, according to his answer, was in XXXX-XXXX 2017.¹⁶
- [29] When confronted with the RPD's query as to why he wrote in his account that the calls started XXXX months after he started working in the XXXX, he stated that he remembered because he had XXXX XXXX XXXX XXXX XXXX XXXX XXXX, and this had affected him.¹⁷ I also note that the principal appellant testified that what signalled the start of that work was starting to XXXX XXXX and receive anonymous calls,¹⁸ yet his account indicates that the calls started XXXX months after the work began. I am of the opinion that there is a contradiction between his BOC Form and his testimony regarding the point in time when he allegedly received threatening calls. For these reasons, I am inclined to agree with the RPD in that his answers appear to be adjusted to the RPD's line of questioning, which undermines the principal appellant's credibility with regard to the threatening telephone calls.
- Omissions Threats received by XXXX XXXX XXXX
- [30] The RPD did not consider it reasonable that the principal appellant forgot the threatening calls received by XXXX XXXX XXXX, given that they were similar to those he allegedly received and that instead, he vaguely alluded to an altercation with an XXXX XXXX XXXX XXXX. Although the principal appellant thoroughly described his relationship with XXXX XXXX XXXX, considering the severity of the threatening calls and the significance of this incident-which is central to his fears-I am of the opinion that the principal appellant's answers related to the threatening calls are unsatisfactory, because even after the RPD questioned him, he did not provide any details about the circumstances surrounding the threatening calls. For these reasons, I draw a negative inference with regard to his credibility. Omission about shots fired at his vehicle

- [31] I listened to the testimony regarding the claimant's vehicle allegedly being hit by bullets. Although the RPD clearly asked the principal appellant if he had anything to add about this incident, I note that he did not say anything about shots being fired at his vehicle.¹⁹ I am of the opinion that the alleged shooting of his vehicle constitutes a significant threat, one that I would have expected the principal appellant to mention. Indeed, I find this to be a significant omission, especially because he filed a complaint with the peace court about the shots fired at his vehicle, and that the shooting is mentioned in that report. I am of the opinion that this further undermines his credibility. Inconsistent behaviour
- [32] The RPD questioned the principal appellant about why he did not want to return to Haiti. The principal appellant stated that he was afraid of the individuals who had shot at him. The RPD's next question was about why he waited XXXX months after his kidnapping before leaving. Faced with that question, he stated that he had fled to Port-de-Paix, where he thought he would be safe until he was found. However, I note that the principal appellant had a visa for Canada as of XXXX 2017 and that after his agents of persecution allegedly found him there, he spent another XXXX and XXXX XXXX in Port-de-Paix. I am of the opinion that this is not the behaviour of a man who feared for his life. The negative inference of the RPD with regard to the male appellant's credibility is correct.
- [33] I also note that the associate appellant returned to Haiti after the alleged kidnapping of the principal appellant. She claims that she had to leave the United States because the stay period allowed by her visa was about to expire; however, she did not claim asylum. The associate appellant claims that she remained in hiding throughout her stay in Haiti and that she did not claim asylum in the United States because of her family situation.
- [34] It is well established in case law that a delay in making a claim for refugee protection may be a relevant factor in assessing a claimant's credibility, but it is not determinative. The circumstances and potential explanations for the failure to act must be considered.²⁰
- [35] In this case, the associate appellant did not claim asylum in the United States and she chose to leave the United States, a safe country, to return to Haiti, a country where she alleges her life is in danger. Her reasoning that she did not claim asylum because of her family situation in Haiti is unsatisfactory. If that is the case, it strikes me that the first thing to do after managing to leave the country where one is threatened, would be to apply for asylum upon arrival in the United States, so as not to have to return to Haiti.
- [36] Consequently, I am of the opinion that the RPD is entirely correct in finding that the associate appellant's credibility was undermined by her failure to apply for asylum in the United States. The explanations provided by the associate appellant in this case do not justify her failure to act, a failure that further undermines her credibility. Documents filed and failure of the RPD to examine all of the evidence
- [37] With regard to the documents filed by the appellants, although the appellants argue that the RPD did not assess all of the evidence or adequately analyze the full scope of evidence on the record, I cannot agree with that argument. I note that the RPD considered the appellants'

BOC Form, their testimony and the documentary evidence. I also note that the RPD considered the principal appellant's role at the XXXX XXXX XXXX XXXX, the alleged threatening calls, the allegation about shots fired at a vehicle, the allegation that the principal appellant's agents of persecution were looking for him, and the associate appellant's stay in the United States. Furthermore, I note that in paragraph 8 of its decision, the RPD clearly states that it analyzed all of the evidence. For these reasons, I find that in its assessment of all of the evidence, the RPD analyzed the most important elements for its assessment of the prospective fear and that the conclusion that there is no prospective risk is correct.

- [38] The appellants maintain that there is a presumption of authenticity regarding documents from foreign jurisdictions and that the RPD erred in giving little weight to the affidavits from his cousin and the attending physician who supposedly treated him after the alleged kidnapping. I am of the opinion that there is no reason for me to doubt the authenticity of those two affidavits. However, considering the credibility issues related to his XXXX role at the XXXX XXXX XXXX, these affidavits do not allow me to conclude that his injuries were related to the allegations about receiving threatening calls and being kidnapped because of that very same management role. For these reasons, I do not give any weight to those two affidavits.
- [39] The RPD observed a significant omission with regard to his colleague XXXX XXXX XXXX, who signed a note in support of his claim. During the hearing, the RPD asked if other XXXX had experienced problems similar to those of the claimant. The principal appellant testified that XXXX XXXX XXXX was in New York because he had written a XXXX XXXX XXXX XXXX XXXX XXXX. The RPD concluded that this was a significant omission on the part of the principal appellant, as he is a colleague and friend who was in a situation that closely resembled that of the principal appellant.
- [40] When questioned about this omission, the principal appellant stated that he did not mention it in his BOC Form because his colleague left after he had signed his BOC Form. I am of the opinion that this explanation is unsatisfactory, because, as the RPD stated, the principal appellant could have easily made a change in his BOC Form. I am also of the opinion that this is not a question of the information related to his colleague's asylum claim, but rather, the important information related to his allegations that he fears for his life after receiving threatening calls, the death of XXXX XXXX XXXX, and the alleged kidnapping; as such, the negative inference regarding his credibility here is correct.
- [41] With regard to the leave request, I note that the XXXX-day leave request does not coincide with the XXXX-day closure or the return date. I agree with the RPD's finding that this document does not corroborate his account that he quit his job for good the day that XXXX XXXX XXXX was murdered, that is, XXXX XXXX XXXX 2017. Furthermore, I am of the opinion that when the RPD confronted the principal appellant with the dates, he adjusted his testimony, stating that these were errors. Just as the RPD did, I give no weight to this request for leave.

- [42] With regard to the complaint filed with the peace court, I note that the principal appellant did nothing more than relay the alleged facts, and that the court reported no findings for that complaint. Consequently, I give no weight to that document, because the complaint stems from the principal appellant's non-credible statements. Furthermore, when RPD asked the principal appellant if he had anything to add regarding the kidnapping, he did not mention the shots fired at the vehicle, as described in the complaint filed with the peace court. Therefore, I also find this to be a significant omission that undermines his credibility.
- [43] Once again, I cannot agree with the arguments in the principal appellant's memorandum that the RPD failed to examine all of the evidence. After carefully listening to the recording and reviewing all of the evidence on record, I found the testimony to be confusing, imprecise and contradictory. At the start of the hearing, as is customary, the appellants were questioned about the veracity of the contents of their BOC Form and they stated that the contents were correct. The RPD identified contradictions between the testimony and the BOC Form, and the explanations for these contradictions were unsatisfactory. It gave him every opportunity to provide the necessary clarifications, but again, they failed to do so. Consequently, I find their credibility to be severely undermined.
- [44] Faced with these numerous inconsistencies and contradictions, on a balance of probabilities, the appellants did not present credible evidence that there is a serious possibility of persecution on a Convention ground, or that they would be personally subjected to a danger of torture, a risk to their lives or a risk of cruel and unusual treatment or punishment upon return to their country. Minor associate appellant
- [45] Lastly, the associate appellant is an American citizen by birth. The principal appellant, as the designated representative, presented no evidence or testimony relating to any fear on the part of the minor appellant of being persecuted or personally subjected to a danger of torture, a risk to her life or a risk of cruel and unusual treatment or punishment in her country of nationality, the United States. The minor appellant is therefore not a Convention refugee or a person in need of protection.

CONCLUSION

- [46] The RAD dismisses the appeal and confirms the RPD's determination according to which the appellants are neither Convention refugee nor persons in need of protection, pursuant to paragraph 111(1)(a) of the IRPA. (signed) "Pascale Aubin" Pascale Aubin January 8, 2020 Date IRB translation Original language: French 1 M.C.I. v. Singh, 2016 FCA 96, paras. 34 to 36, 63, 74. 2 Ibid., paras. 38 to 49, 74. 3 Ilias v. Minister of Citizenship and Immigration, 2018 FC 661 (CanLII). 4 SPR-1, Refugee Protection Division (RPD) Record, testimony, hearing, 35:42 to 37:28. 5 SPR-1, RPD Record, Basis of Claim Form (BOC Form), account, page 44. 6 SPR-1, RPD Record, testimony, hearing, 37:00 to 39:00. 7 Ibid., 37:30 to 37:45. 8 Ibid., hearing, 37:05 to 37:28. 9 Ibid., 38:15 to 38:17. 10 Ibid., between 41:12 to 43:48. 11 Ibid., 52:00 to 52:35. 12 Ibid., 52:23 to 52:30. 13 SPR-1, RPD Record, BOC Form, account, page 44. 14 SPR-1, RPD Record, testimony, hearing, 45:53 to 46:03. 15 Ibid., 45:07 to 45:53. 16 Ibid., between 45:45

and 46:30. 17 Ibid., 48:02 to 48:38. 18 Ibid., between 44:02 and 44:48. 19 Ibid., between 1:58 and 2:00. 20 Gurung v. Canada (Citizenship and Immigration), 2010 FC 1097 (CanLII).

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