Federal Court  Cour fédérale

Date: 20210922

Docket: IMM-1478-20

Citation: 2021 FC 976

[ENGLISH TRANSLATION]

Ottawa, Ontario, September 22, 2021

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

NINA JOSEPH HILAIRE
MARIE JULIANA MONICA JOSEPH

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision by the Refugee Appeal Division [RAD] dated February 14, 2020. The application for judicial review is brought pursuant to section 72 of the *Immigration and Refugee Protection Act* SC 2001, c 27 [IRPA]. The RAD confirmed the decision of the Refugee Protection Division [RPD], which found that the applicant

lacked credibility with respect to the events she alleged occurred in September 2017 and that led her to leave her country of origin, Haiti. Moreover, at the hearing before the RPD, the applicant raised the issue of spousal abuse, of which she claimed to have been a victim. Finally, the danger that someone like the applicant would be in if she were to return to Haiti was also raised.

I. The facts

[2] It is imperative to note that this is an application for judicial review of the decision of the Refugee Appeal Division. On occasion, the applicant has relied on the decision of the RPD. It should be remembered that the RAD considered the appeal of the RPD decision on the basis of correctness. This implies that the RAD makes its own assessment of the evidence presented before the RPD and is under no obligation to show any deference to the RPD's decision. The RAD conducts a review of the evidence presented before the RPD. It can only admit into evidence what is permitted under section 110(4) of IRPA. I have reproduced it below:

(4) On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.	**(4)** Dans le cadre de l'appel, la personne en cause ne peut présenter que des éléments de preuve survenus depuis le rejet de sa demande ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'elle n'aurait pas normalement présentés, dans les circonstances, au moment du rejet.

Simply put, the RAD can only consider the evidence that was before the RPD, except in the cases specified in subsection 110(4).

[3] The facts of this case, which should have been relatively straightforward, took on another dimension when the versions provided by the applicant were inconsistent.

[4] In the Basis of Claim Form (BOC Form), the applicant made a series of statements relating to the events that are alleged to have occurred in Haiti and that prompted the applicant to leave her country and make a claim for refugee protection in Canada. These assertions were later found to be contradicted by the applicant herself. The applicant claims to have been the assistant administrative secretary for the Coordinator of the Haitian Popular Sector following the 2011 elections. The Haitian Popular Sector was reportedly one of the political movements that were to merge with Politique VÉRITÉ. The applicant's then husband, one Wilner Joseph, was to run for deputy in the August 9, 2015 legislative election. The applicant stated that she [TRANSLATION] "rallied alongside her husband during the election campaign." She added that although the partial results of the election showed that Mr. Joseph had a substantial lead, the provisional electoral council decided otherwise, giving the seat to another candidate.

[5] It seems that there was a transitional government set up in February 2016 to govern during this transitional period and to organize new elections. Given the partisan activities of the applicant's husband, she was appointed First Secretary at the Haitian embassy in the Dominican Republic in May 2016. However, in the new elections held in November 2016, another party won the elections, and a new person was installed as President of the Republic, on February 7, 2017. Since it was not her husband's party that won the elections, the applicant's position as First Secretary was revoked on June 16, 2017.

[6] The applicant stated that on September 12, 2017, she took part in a demonstration to protest against [TRANSLATION] “the cost of living and rising oil prices and to support a higher minimum wage” (narrative, para 10). Two days after the demonstration, on September 14, 2017, the applicant was allegedly attacked in her home. She claimed she was abused and asked where her husband was as she was being struck in the face and body. She answered that she had no knowledge of his whereabouts, so the assailants left the premises, but not without threatening the applicant to return.

[7] The applicant contacted her husband, and he entered the house with three of his friends a few minutes later. He took the applicant to the hospital while his brother was responsible for taking the couple’s daughter to the applicant’s sister’s house. Once treated at the hospital for a swollen eye, swollen face and red marks on her arms, the applicant was taken back to her mother’s house where her daughter was. The account does not explain how the applicant’s daughter could have been taken to her sister’s house and the couple’s daughter to the applicant’s mother’s house.

[8] The applicant stated that the next day, her husband’s brother took her to the police station to file a complaint. She further stated that [TRANSLATION] “in the meantime, I resolved to leave the country with my daughter at all costs. My husband proceeded to obtain Canadian visas for us to leave the country using my diplomatic passport, which was fortunately still in my hands” (narrative, para 15). The visa applications were made on October 3, 2017, and the visas were obtained on October 30, 2017. The applicant and her daughter had already left Haiti for the Dominican Republic on October 10, 2017, and it was from there that they embarked for Canada

on November 14, 2017. Thus, a period of two months elapsed between the only abuse of which the applicant was allegedly a victim and her arrival in Canada, where she filed a claim for refugee protection.

[9] As can be seen, the applicant complained that what happened to her was a result of her political activities. She also stated in her BOC Form that she wanted to ask the Canadian authorities for political asylum. Things began to take a different turn when, at the hearing before the RPD, she indicated that she had been subjected to domestic violence by her husband since 2011 (RPD, para 11). It was claimed that the applicant told her counsel about this history of domestic violence just minutes before the hearing on March 15, 2019.

[10] Both the RPD and the RAD noted significant differences about the events of September 14, 2017, when the applicant presented her testimony. At the hearing, the applicant testified that during the evening of September 14, 2017, she put ice on her eye and that it was not until the next day that she went to the hospital. She also said at the hearing that she stayed at a neighbour's house from September 14 through September 19, 2017, and then went to her sister's house. This is different from the BOC Form with respect to the hospital visit and where the applicant stayed thereafter. The RPD’s request for explanations in relation to such different versions did not produce any results since, at the hearing, the applicant maintained the version given at the hearing.

[11] At the hearing before the RPD on March 15, 2019, the applicant stated that it was her brother-in-law who filed a complaint with the police and that she was not present as she had

stayed with her sister for a week. However, it was the applicant who submitted the police certificate indicating that it was she who filed the complaint; no mention of the brother-in-law was made in said certificate. With every explanation, the applicant said that she did not remember whether her brother-in-law accompanied her to the police station.

II. RAD decision

[12] The RAD of course noted the differences between the BOC Form and the version given by the applicant at the hearing before the RPD. For the RAD, such a testimony cast doubt on the sequence of events of September 14, 2017. The RAD added that no medical or psychological evidence was provided to try and explain the applicant's ability to testify at the time of the hearing. The RAD stated that the applicant's emotional state could not justify the inconsistencies. In addition, nothing of the sort was even raised before the RPD, where reference could have been made to difficulties in testifying owing to an emotional state. Paragraph 21 of the RAD decision states its findings on the contradictions between the applicant's narrative and her story:

> [21] I note that the principal appellant's testimony at the hearing contradicts the events noted in her written account. First, she stated at the hearing that she had put ice over her eye and went to the hospital the day after the incident of September 14, 2017, contrary to what is indicated in her written account, which states that her husband brought her to the hospital the day of the incident. Her testimony at the hearing, that she stayed with her neighbour between September 14 and 19, 2017, also contradicts her written account, which states that she went to her sister's house after receiving hospital care. There is no mention in the written account of her stay with the neighbour. I agree with the RPD and consider the contradictions raised to be significant. I want to point out that the incident of September 14, 2017, is the crucial element that forced the principal appellant to flee her country. The RPD's

> negative finding on the principal appellant's credibility regarding the occurrence of this event is correct.

[13] The RAD also commented on the complaint made to the police. It noted that the versions varied as to whether the brother-in-law was at the police station. Ultimately, at the RPD hearing, the applicant stated that she did not remember whether he was there. The RAD concluded that the versions were not reconcilable, and that the appellant's overall credibility was greatly damaged. Indeed, the RAD stated that "this finding and the RPD's other negative findings on the principal appellant's credibility are uncontested in the memorandum of appeal, and I do not see the RPD's alleged error in this matter" (RAD decision, para 24).

[14] The RAD's decision went on to consider the allegations of domestic violence that the applicant had suffered and that she raised for the first time at the RPD hearing. The applicant had attempted to introduce new evidence before the RAD. This was a divorce certificate along with an excerpt from the divorce judgment. The RAD had requested that it be provided with the entire divorce decree, rather than just an excerpt. It was necessary to know the reasons for the divorce. Two requests were made in this regard, and neither resulted in the information being provided. As a result, the RAD was unable to examine the applicant's allegations regarding the content of the divorce judgment. Moreover, the RAD noted that no explanation was given as to why this divorce judgment, which was allegedly granted on April 19, 2019, was not forwarded to the RPD, which did not render its decision until May 6, 2019. To reiterate, the hearing before the RPD was held on March 15, 2019, the decision was rendered on May 6, 2019, and a judgment granting a divorce was supposedly entered on April 19. Although the RPD noted the applicant's

decision to separate from her husband, no mention of a divorce having been finalized appeared in the RPD's decision.

[15] New evidence, such as a divorce judgment, sought to be introduced before the RAD under subsection 110(4) of the IRPA must meet the express provisions, which are, as a matter of law, inescapable. The RAD also noted that the probative value of such evidence would have been nil in this case, since the excerpt produced by the applicant indicated that the Haitian court granted the divorce [TRANSLATION] "for serious and public abuse" against her husband. However, the applicant stated during the hearing before the RPD that it was because of her husband's extramarital affairs that she wanted to separate. Moreover, the RAD noted that the excerpt from the divorce judgment and the divorce certificate have the same signature, namely, that of the civil registrar, despite the fact that the divorce judgment was made by a Haitian court judge. This means that the inadmissible evidence would have had no effect, according to the RAD, since it had no probative value.

[16] This led to the allegations of domestic violence first made by the applicant before the RPD. The RPD found that no reasonable explanation for the delay in making such a statement had been provided by the applicant. The applicant had been represented by the same counsel since the signing of her BOC Form in December 2017 and that same counsel represented her before the RPD. Indeed, it is still the same counsel who has continued to represent the applicant's interests before the RAD and before this Court.

[17] It was argued before the RAD that counsel had been informed by the applicant of the decision to separate, but it was not until the day of the hearing that the applicant informed counsel of her alleged domestic violence. The RAD specifically noted that, in her memorandum of appeal, the applicant stated that she had sent a note to the RPD, notifying it "of her decision to separate from her husband as of that date." However, there is nothing to that effect on the record, and in her memorandum of fact and law before this Court, the applicant laconically conceded, at paragraph 8, that [TRANSLATION] "it was a mistake". It is understood that nothing of the sort was done despite the assertion. This confusion fueled by the applicant is deplorable. One would have expected, at the very least, an explanation. Even when raised at the hearing before this Court, no explanation was offered.

[18] The RAD also noted that no explanation was given for such late disclosure. The RAD pointed out that while there may be some reluctance to disclose incidents of domestic violence, this does not explain why the applicant decided to let everything out only minutes before the hearing. Relying on this Court's decision in *Lawani v Canada (Citizenship and Immigration)*, 2018 FC 924 [*Lawani*], the following passage is cited in the RAD decision:

> [33] I also do not agree with Ms. Lawani's contention that the RPD erred in drawing negative inferences from the late presentation of her bisexuality claim. The RPD has flexibility in examining factors affecting credibility. It did not believe Ms. Lawani's explanation for the last-minute addition of her bisexuality claim, and explained why in great details in its decision, taking into account the fact that Ms. Lawani was in Canada for a long period before her refugee claim was examined by the RPD.

The RAD stated that it agreed with the RPD when it rejected the allegations of domestic violence. The RPD learned that the applicant had decided to separate from her husband in late

2018, three months prior to the hearing of March 15, 2019. However, her BOC Form was never amended, and the applicant failed to provide a reasonable explanation to account for the delay. As noted above, the applicant has had the same counsel since at least the signing of the BOC Form in December of 2017. The applicant has long benefited from the assistance of counsel. The RPD went on to say that the allegation of domestic violence was considered in light of its finding that the applicant would "not have been a credible witness on both key and peripheral aspects of the allegations supported in her BOC Form in support of her claim for refugee protection" (RPD decision, para 33).

[19] Finally, the applicant submitted to the RAD that she is a single woman who would be vulnerable in Haiti. We are told that in her memorandum of appeal to the RAD, the applicant argued that the RPD should have considered that, if she returned to Haiti, she would be persecuted because of her alleged political opinion and her husband's political activities. This is in addition to her fear because of her status as a single young woman without resources.

[20] The RAD did consider the applicant's situation, if she had to return to Haiti, and noted that she is educated, worked in Haiti and also held the First Secretary position at the Haitian embassy in the Dominican Republic. She still has family in Haiti. She has a sister and a mother who would welcome her with open harms, according to the RAD; her father and two brothers still live in Haiti. The applicant appears to be claiming that her parents have a disability, but no new evidence was provided, and this allegation was not before the RPD. In addition, the RAD noted the rule in *Dezameau v Canada (Citizenship and Immigration)*, 2010 FC 559 where this Court reiterated that it is not sufficient to claim that someone has a profile that is similar to that

of groups of at-risk women, which moreover is not accepted by either the RPD or the RAD, in order to succeed. Membership in a particular social group, if proven, is not sufficient to result in a finding of persecution. There must be evidence of a risk of harm that is sufficiently more than a mere possibility. In this case, the RAD agreed with the RPD that the applicant is not a member of one of these groups of at-risk women in Haiti. In any event, there was no evidence to satisfy the decision-maker that there is a risk of harm that is sufficiently serious to be more than a mere possibility.

III. Arguments and analysis

[21] The memorandum of fact and law repeats the applicant's entire affidavit. The remainder of the memorandum is an amalgamation of submissions without ever once identifying the standard of review and how those submissions meet that standard of review.

[22] The applicant generally takes issue with what she claims is contrary to the principle of fairness set out in the well-known case of *Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 (CA) [*Maldonado*]. It seems fitting to note what was actually decided in that particular case. At page 305 of the decision, it reads as follow:

> It is my opinion that the Board acted arbitrarily in choosing without valid reasons, to doubt the applicant's credibility concerning the sworn statements made by him. When an applicant swears to the truth of certain allegations, this creates a presumption that those allegations are true unless there be reason to doubt their truthfulness.

As can be seen, the presumption referred to in *Maldonado* is nothing special and far from irrebuttable. Someone who testifies sincerely deserves to be believed unless there are reasons not

to be. This is the case here. There is nothing arbitrary about recognizing contradictions and inconsistencies that are glaringly obvious. This is exactly what the RAD, and before it the RPD, did. There is no doubt that the applicant contradicted herself on essential elements of her BOC Form. These contradictions have never been explained. It obviously follows that the presumption no longer applies. There is ample reason to doubt the allegations when contradictions and inconsistencies come to light, especially since they are not peripheral but are at the heart of the subject matter of the decision.

[23] The applicant merely treated the application for judicial review as if the Court had to rule on the correctness standard. This is not the case. The Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, confirms that the standard of review of an administrative decision is reasonableness, with some exceptions that do not apply here. Correctness implies an absence of judicial deference to the decision under review, which would result in the reviewing court being entitled to substitute its conclusion for that of the administrative tribunal. The standard of reasonableness is quite different. Thus, the Supreme Court requires that "[a] reviewing court must develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable" (para 99). The Court sets out what makes a decision unreasonable in paragraph 101:

> [101] What makes a decision unreasonable? We find it conceptually useful here to consider two types of fundamental flaws. The first is a failure of rationality internal to the reasoning process. The second arises when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it. There is however, no need for reviewing courts to categorize failures of reasonableness as belonging to one type or the other. Rather, we use these descriptions simply as a convenient way to discuss the types of issues that may show a decision to be unreasonable. . . .

The burden is naturally on the party challenging the decision. This is a challenge to the RAD's decision, which means that it is the matter as it came before the RAD that is subject to judicial review. The party challenging the decision must show that it is unreasonable. But before doing so, "the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision" (*Vavilov*, para 100). This was the burden that the applicant had to meet. However, the applicant failed to discharge her burden.

[24] In the case at bar, the applicant did not review the RAD's decision to show that it was unreasonable. Rather, she sought to satisfy the decision-maker that the decision, in her opinion, should have been different, which is the standard of correctness. Thus, the applicant devoted many paragraphs to the divorce judgment that was reportedly rendered in Haiti and that she never produced in any case, despite two requests to do so by the RAD. The divorce certificate and the excerpt of the divorce judgment were rejected because they could not satisfy section 110 of the IRPA. The admissibility of documents before the RAD is subject to the conditions set out in the Act. I see nothing wrong with the RAD asking a party to provide the full document before deciding the matter. These documents, which were not admissible, were neither before the RAD nor therefore before this Court.

[25] Another example of an attack that goes nowhere is paragraph 28 of the RAD decision. The RAD pointed out that "the RPD stated that it had considered the allegations of domestic violence put forward by the principal appellant at her hearing". The applicant stated that this was

not true and added that this [TRANSLATION] “suggests that the findings of the RPD and the RAD do not meet the standard of correctness”. Apart from the fact that this sentence is in itself elliptical, the applicant did not provide any evidence as to why this was not true, especially since the RPD devoted five paragraphs to this allegation in its decision (paras 11–13 and 32–33). If one considers only these two decisions together, the RAD is held to the standard of correctness in relation to the RPD decision: it can thus come to a different conclusion on the merits. But the standard is quite different when the reviewing court is called upon to review the case as decided by the RAD. An applicant must therefore show that the decision is unreasonable (*Vavilov*, para 100).

[26] The RPD explained that the fact that the revelation of domestic violence came so late undermined her credibility. The RAD went further by citing this Court’s judgment in *Lawani*, which recognized the flexibility of the trier of fact; in *Lawani*, a bisexuality claim was presented late, which could justify an adverse finding. What the applicant had to do was show how the RPD’s finding, adopted by the RAD, was unreasonable in order to succeed in this Court. What were the serious flaws that made the decision not have the qualities of reasonableness? The applicant was content to make her submissions without acknowledging that the Court did not have the role she seemed to hope it would, one that would allow a Court to simply take a different view of the merits of the arguments she made again.

[27] The applicant did not stop there. She added that the RPD and the RAD had [TRANSLATION] “no valid reason not to at least give the benefit of the doubt to the allegations of domestic violence . . .” (applicant’s memorandum of fact and law, para 20). As is

well known, the burden is that of the balance of probabilities. More importantly for our purposes, the applicant is making an argument that has nothing to do with the standard of reasonableness. Not only does reasonable doubt have no place where allegations must be proven on a balance of probabilities, but it strongly suggests that the applicant misunderstood the standard of review. The RAD's reasoning is intelligible and rational; it leads to a justification. Attacks without a basis in evidence cannot demonstrate that a decision is unreasonable, which is an applicant's burden. This is not to say that once an administrative decision-maker has spoken, there is *ipso facto* justification, transparency and intelligibility. Rather, it is that baseless attacks cannot demonstrate a lack of reasonableness. Moreover, attacks here, there and everywhere very often leave much to be desired.

[28] Thus, the substance of the judicial review initiated by the applicant does not take aim at the target, which is the reasonableness of the RAD's decision. It does not demonstrate it. The arguments presented are based on the correctness of the decision, where the reviewing court is not bound by the deference that flows from "the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers" (*Vavilov*, para 13). The reviewing court does not substitute its opinion for that of the administrative decision-maker. Only when the decision is found to be unreasonable will there be judicial review of a RAD decision.

IV. Conclusion

[29] In this case, the applicant claimed to fear for her safety for political reasons, which the applicant appears to believe led to the assault on September 14, 2017. Indeed, this was the only assault that was alleged. It was not until five minutes before the RPD hearing that she indicated

she wanted to allege domestic violence dating back to the beginning of the decade to justify a fear of returning to Haiti. This allegation was rejected by the RPD because it was untimely. The lateness of an allegation can affect its credibility.

[30] The matter did not improve when a divorce judgment arose during the RPD's deliberations and was not provided to the RPD. It was only before the RAD that the applicant sought to file only an excerpt of the divorce judgment, despite two requests by the RAD to see the entire judgment, which appears to be the very least that the applicant could have done. In any event, section 110 of the IRPA stood in the way of such production.

[31] This just left the allegation of gender-based risk. The applicant argued before this Court that she was subjected to gender-based persecution and domestic violence.

[32] There is no doubt that the situation of women in Haiti is very difficult. However, the RPD and the RAD concluded that the applicant is in a favorable situation compared to vulnerable groups: she has family there who supports her, and she is educated in comparison to the rest of the population. If the applicant belonged to a vulnerable group, which was clearly not demonstrated, in order for there to be persecution, evidence would have to be provided to satisfy the decision-maker that the risk of persecution is more than a mere possibility. The RAD did not find any such evidence, and there is nothing before this Court to question this conclusion, let alone find that it was unreasonable.

[33] Accordingly, the application for judicial review must be dismissed. There is no question for certification, as agreed by the parties.

JUDGMENT in IMM-1478-20

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.

2. No question is certified.

"Yvan Roy"
Judge

Certified true translation
Michael Palles, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

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