Federal Court Cour fédérale

**Date: 20210623**

**Docket: IMM-852-20**

**Citation: 2021 FC 649**

**Ottawa, Ontario, June 23, 2021**

**Present: The Honourable Mr. Justice McHaffie**

**BETWEEN:**

**JUNIOR WECHE**
**MARIE LUCIANA ST-LOUIS**
**JAMIE-LYNN WECHE**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. Overview

[1] Junior Weche is seeking refugee protection in association with his spouse, Marie Saint-Louie, and their daughter, Jamie-Lynn. While Mr. Weche and Ms. Saint-Louis met in the United States, they are both citizens of Haiti. Jamie-Lynn is an American citizen. The family's claim for

refugee protection is based on Mr. Weche's account and his alleged fear of persecution at the hands of militant thugs from the Haitian Tèt Kale Party (PHTK).

[2] The Refugee Appeal Division (RAD) denied the refugee protection claim on the grounds that Mr. Weche's story was not credible. Although the applicants provided explanations in their appeal memorandum challenging the conclusion of the Refugee Protection Division (RPD) as to Mr. Weche's lack of credibility, the RAD rejected those explanations. In their application for judicial review in this case, the applicants are challenging the reasonableness of the RAD's decision to reject their explanations. Furthermore, they allege that the RAD applied the wrong test for assessing persecution under section 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA), and erred in refusing to consider the best interests of the child, namely Jamie-Lynn.

[3] In my view, the RAD did not err and did not apply a more stringent test in assessing the prospective risk the applicants would face should they return to Haiti. Moreover, while the applicants would have liked the RAD to accept their explanations addressing the doubts about their credibility, I do not find the RAD's reasons to be unreasonable. The applicants' explanations were assessed and found to be insufficient to overcome the RAD's concerns about the inconsistencies in Mr. Weche's story.

[4] With respect to Jamie-Lynn, who is a citizen of the United States, the review of her claim for refugee protection is limited to the risks she would face should she return to that country. Although the best interests of the child is a basic principle of Canada's immigration system, the

criteria for determining whether a person is a refugee or a person in need of protection under sections 96 and 97 of the IRPA do not include consideration of those interests. The RAD did not err in refusing to address the applicants' arguments regarding Jamie-Lynn's best interests in being granted refugee protection status with her family.

[5] The application for judicial review is therefore dismissed.

## II. Issues and standard of review

[6] In their written submissions, the applicants raised the issue of procedural fairness in that the RAD did not give them an opportunity to explain the anomalies identified in their file. However, the applicants withdrew this allegation at the hearing.

[7] Therefore, the issues are the following:

A. Did the RAD err in applying a more stringent test in assessing the risk of persecution?

B. Did the RAD err in rejecting Mr. Weche's story and explanation on the basis of a lack of credibility?

C. Did the RAD err in refusing to consider the best interests of Jamie-Lynn when dealing with the claim?

[8] The parties agree that the standard of review the Court must apply to the issues in this case is reasonableness: *Canada (Minister of Citizenship and Immigration v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25. On this standard, an administrative decision must be internally

coherent, as well as justified, intelligible and transparent in light of the record before the decision maker and the submissions of the parties: *Vavilov* at paras 99, 105–107, 125–128. However, the reviewing court should not conduct a "line-by-line treasure hunt for errors": *Vavilov* at para 102. Superficial or peripheral shortcomings with respect to the merits of the decision would not justify the Court's intervention: *Vavilov* at para 100.

## III. Analysis

### A. *The RAD did not apply a more stringent test*

#### (1) The two applicable tests

[9] When the RAD deals with claims for refugee protection under section 96 of the IRPA, it applies two standards. The first is the balance of probabilities, where the RAD must weigh the evidence before it and make the necessary determinations of fact: *Nageem v Canada (Citizenship and Immigration)*, 2012 FC 867 at para 24; *Chan v Canada (Minister of Employment and Immigration)*, [1995] 3 SCR 593 at paras 120, 149–150; *Alam v Canada (Minister of Citizenship and Immigration)*, 2005 FC 4 at para 8; *Ramanathy v Canada (Citizenship and Immigration)*, 2014 FC 511 at para 16. The second is to assess, against the factual background established by the evidence, whether there is a "reasonable chance" or a "serious possibility" that the applicant would suffer persecution if returned to their country of nationality: *Nageem* at para 25; *Adjei v Canada (Minister of Employment and Immigration)*, [1989] 2 FC 680 (CA) at paras 7–8. As de Montigny J. aptly noted in *Pacificador v Canada (Citizenship and Immigration)*, 2007 FC 1050 at para 74:

> [O]ne must distinguish between what happened in the past, to be established on the civil standard of the balance of probabilities, and what will happen in the future, to be determined on the basis of the reasonable chance yardstick.
>
> [Emphasis added.]

[10] In this case, the applicants allege that the RAD assessed the risk of persecution against a balance of probabilities, resulting in a more stringent test.

(2) The claim for refugee protection and the RAD's decision

[11] Mr. Weche claims that in February and March 2014 he had three encounters with PHTK thugs who threatened him and assaulted his parents when he was not home. He alleges that on the morning of February 1, 2014, the thugs shouted at him in the street and threatened him. Later that day, the thugs broke into his parents' house in Les Cayes, where he was living, and vowed to find Mr. Weche and kill him if he continued criticizing the PHTK in the streets. However, Mr. Weche said he didn't fear for his life until the third encounter on March 7, 2014.

[12] On March 7, Mr. Weche fled after receiving a call warning him that the thugs were returning to his parents' house. Once there, the thugs pushed his mother and threatened to slit his father's throat. Three days after this incident, Mr. Weche filed a complaint with the Tribunal de paix (peace court), and eight days later, a justice of the peace examined the scene and prepared a report. Sixteen days after the incident, Mr. Weche and his parents left Les Cayes for Jérémie.

[13] To avoid danger, on May 10, 2014, Mr. Weche travelled to Mexico and then to the United States, where he stayed and met Ms. St. Louis, and where Jamie-Lynn was born. The family entered Canada in July 2017.

[14] Both the RPD and the RAD found several inconsistencies and contradictions between Mr. Weche's story and his testimony and did not find him to be credible. The RAD found the RPD's determination that Mr. Weche had failed to demonstrate that he was a Convention refugee or a person in need of protection to be correct. I will address several of these inconsistencies and contradictions when I deal with Mr. Weche's allegation that the credibility findings were unreasonable.

(3) The RAD did not apply the wrong test

[15] In their statement of appeal to the RAD, the applicants identified three paragraphs in the RPD's decision where it determined that Mr. Weche had not shown, on a balance of probabilities, that he had been visited by PHTK thugs. On appeal, the RAD considered these three paragraphs and found that the RPD had not erred, and that these paragraphs "involved an assessment of the evidence presented."

[16] In this application for judicial review, the applicants argue that it was impossible in such a claim for refugee protection to distinguish the assessment of the evidence of the incidents from the assessment of the fear of persecution. They then argue that the RAD applied the wrong test for assessing persecution. I disagree.

[17] The RAD applied the balance of probabilities to its review of the evidence. It found that the applicants did not, on that balance, demonstrate that Mr. Weche had faced the kinds of threats he alleges he experienced on February 1 and March 7, 2014. In accordance with the case law cited above, this is exactly the standard that applies to such determinations. Since the applicants based their prospective fear on the alleged acts of persecution they had previously experienced, there was nothing for the RAD to base a fear of a possibility of future persecution on when it concluded that it did not believe that Mr. Weche had experienced threats in the past.

[18] Accordingly, I find that the RAD did not err in its assessment of the two criteria and did not err in applying the balance of probabilities when assessing Mr. Weche's account and the events he allegedly experienced in 2014.

B. *The RAD reasonably concluded that Mr. Weche's story lacked credibility*

[19] The applicants challenge several of the RAD's findings of inconsistencies or contradictions and provide plausible explanations for these inconsistencies or contradictions. What the applicants are asking the Court to do is to reweigh the evidence before the decision-maker, but that is not the Court's role on judicial review if the decision-maker's findings are reasonable: *Vavilov* at para 125. It is not for the Court to set aside the decision because there was another plausible version of the facts. The RAD's decision not to accept the explanations was internally coherent and rational and, therefore, justified, transparent and intelligible in light of the applicants' submissions: *Vavilov* at paras 85, 125–127.

[20] The applicants have raised six negative credibility findings that they claim undermine the reasonableness of the RAD's decision, and I will discuss these one by one.

(1) No death threat on February 1, 2014

[21] The claimants allege that it was unreasonable for the RAD to find an inconsistency between Mr. Weche's account in his Basis of Claim form (BOC form) and his testimony at the RPD hearing as to the death threats made by the PHTK thugs during the incident on the street. Mr. Weche claims that his testimony at the hearing was simply an elaboration of his story. Although he stated in his BOC form that the PHTK thugs had [TRANSLATION] "made death threats" against him in the street, he said at the hearing that the thugs had warned him that he should [TRANSLATION] "stop talking about Tet Kahlé's rule, because [they would] be [there] for five years". Both the RPD and the RAD drew a negative inference from the fact that, in their opinion, this was not a "death threat" and that Mr. Weche therefore did not receive a death threat against him despite of what he wrote in his BOC. The RPD therefore did not believe, on a balance of probabilities, that Mr. Weche had encountered PHTK thugs on the street on the morning of February 1.

[22] In my view, the RAD considered the applicants' view that this was merely an elaboration of the story, not an inconsistency between the story and the testimony. The RAD found that "the written account did not contain any of the details provided by the male appellant at the hearing regarding his encounter with the criminals" and drew a negative inference from this. The case law is clear that the RAD can draw such an inference when it finds that important details provided at the hearing are absent from the story in the BOC form: *Ogaulu v Canada*

*(Citizenship and Immigration)*, 2019 FC 547 at para 18; *Guerrero Jimenez v Canada (Citizenship and Immigration)*, 2021 FC 175 at para 18. A reviewing court owes deference to the assessment of the applicants' credibility and to the manner in which they testify. Given that the RAD justified its negative inference by considering the applicants' arguments and the context of the case, I find nothing unreasonable in its analysis or its conclusion that Mr. Weche's written account of this event lacked credibility.

(2) Mr. Weche [TRANSLATION] "barely escaped"

[23] Similarly, the applicants contend that the negative inference drawn by the RAD from Mr. Weche's written account that he [TRANSLATION] "barely escaped" on the evening of February 1 was unreasonable. The RAD found that given his testimony at the RPD hearing that he was not home that night because he was at a friend's house, there was an inconsistency "as to where the male appellant was and what occurred on February 1". Although it noted that the applicants insisted that "the two events [of February 1]" could be considered "as a whole", the RAD could not accept this assertion.

[24] In my view, the RAD justified why it did not accept the applicant's explanation. It had the discretion to draw the same conclusion as the RPD about the inconsistency between the two accounts and Mr. Weche's lack of credibility.

(3) Contradictions regarding the roles of the neighbours

[25] The SAR also found that the evidence before it, namely, the account in the BOC form, Mr. Weche's testimony and the *Extrait des minutes du Greffe du Tribunal des Cayes*, consisted of different accounts of the neighbours' involvement in the attack by the PHTK thugs. The applicants do not claim that these stories are consistent. However, they argue that [TRANSLATION] "it is unreasonable and perverse to expect an accurate, black-and-white account" given that the events were recounted to Mr. Weche by his parents and he was not present during the attacks.

[26] The RAD did not accept this explanation. It listened to the recording of the hearing before the RPD and found meaningful differences between the different versions of the facts. On the basis of these differences, it found that the written account was not credible and that, on a balance of probabilities, Mr. Weche had not established that the February 1 attack had occurred.

[27] Negative credibility findings should not be based on a "memory test," any more than on a microscopic examination of issues irrelevant to the case or peripheral to the claim: *Shabab v Canada (Citizenship and Immigration)*, 2016 FC 872 at para 39; *Lawani v Canada (Citizenship and Immigration)*, 2018 FC 924 at para 23. But the neighbours played a central role in one of the accounts of the February 1 attack, yet in another only arrived after the thugs had left. Moreover, the February 1 attack is one of the central events in Mr. Weche's allegation of persecution. It is not a peripheral or irrelevant issue; it is at the heart of the events on which the applicants' claim is based. Accordingly, I find nothing unreasonable in the RAD's negative credibility finding regarding the February 1 attack.

(4) Characterization as "*rebelle*"

[28] The applicants allege that, in rejecting their claim for refugee protection, the RPD, and subsequently the RAD, stereotyped Mr. Weche as *rebelle*, in French, or defiant, in English, and in so doing undermined the decision-making process. The relevant passage reads as follows:

> After having been targeted twice in the same day, on the street and at his home, implicating his family as well, the Panel finds his failure to move elsewhere and appeal to the authorities runs counter to his defiant profile.
>
> Après avoir été ciblé à deux reprises au cours de la même journée, c'est-à-dire dans la rue et à son domicile, impliquant également sa famille, le tribunal conclut que son défaut de déménager ailleurs et de demander l'aide des autorités va à l'encontre de son profil de rebelle.
>
> [Emphasis added. Original version of the decision in English, French translation by the RPD]

[29] The RAD found that in the context it would have been better to translate the English word "defiant" by *provocateur* rather than *rebelle*. However, it noted that its word choice was of minor importance since it also believed that Mr. Weche's behaviour was inconsistent with his fear.

[30] In my view the RAD clearly rejected the idea that Mr. Weche was negatively stereotyped as being defiant. Moreover, the context of the RPD's decision demonstrates that the French word *rebelle* was simply a poor choice of words and does not undermine Mr. Weche's character in general.

(5) Behaviour inconsistent with his fear

[31] Mr. Weche said that despite the February 1 attack, he developed a subjective fear only after the March 7 attack. However, the RAD found that his behaviour was inconsistent with such a fear, be it between February 1 and March 7 or between March 7 and March 23, when he fled to Jérémie.

[32] I agree with Mr. Weche that the RAD erred in deciding whether his behaviour between February 1 and March 7 was consistent with his account of the attack against him on February 1. Mr. Weche did not claim that his behaviour between these dates was consistent with a subjective fear. Furthermore, the RAD had previously noted that it did not believe that the February 1 incident had occurred, given the inconsistencies in the accounts and the testimony on this incident. Since it ruled on the central issue of whether Mr. Weche experienced subjective fear after March 7, this error is somewhat peripheral in my view and not sufficiently central or significant to require the Court to intervene and set the decision aside: *Vavilov* at para 100.

[33] The central issue is whether Mr. Weche's allegation that he had a subjective fear after March 7 was credible. The RAD found that Mr. Weche's behaviour after that date was inconsistent with his stated fear. In addition, the RAD noted that in his account in the BOC form, Mr. Weche had stated that he fled to Jérémie after the March 7 incident, but that in his testimony, he had stated that he did not leave Les Cayes until March 23. The RAD may draw inferences about the credibility of a refugee protection claimant when it finds relevant contradictions in the claimant's evidence and accounts: *Noël v Canada (Citizenship and Immigration)*, 2020 FC 281 at para 20.

[34] The RAD considered Mr. Weche's explanation that he had to stay in Les Cayes for a few weeks so as not to abandon his parents, but explicitly rejected it. The RAD noted that he did not file a complaint with the police until three days after the incident, that the justice of the peace did not come until eight days after the incident and that Mr. Weche and his parents did not leave for Jérémie until 16 days after the incident.

[35] The RAD provided well-founded reasons for its decision to reject Mr. Weche's explanation. Although the applicants argue in the application for judicial review that the RAD was [TRANSLATION] "indifferent to the distinctive values of other societies," I cannot accept that its analysis reveals such an indifference. It seems to me that the RAD's concern is not why Mr. Weche did not abandon his family; it should be why the family did not flee Les Cayes until 16 days after the second attack by PHTK thugs.

[36] What the applicants now seem to be claiming is that the Court should weigh the evidence and find that Mr. Weche's explanation was sufficient and should have overcome the RAD's doubts about his subjective fear between March 7 and March 23. The Court must show deference to factual findings made by the RAD and refrain from "reweighing and reassessing the evidence considered by the decision maker": *Rivera Benavides v Canada (Citizenship and Immigration)*, 2020 FC 810 at para 76; *Hourra v Canada (Citizenship and Immigration)*, 2019 FC 1266 at para 14; *Vavilov* at para 125. This argument must therefore be rejected.

[37] At the same time, I find problematic the RAD's explanation of why the RDP did not err in disregarding Mr. Weche's actions after March 23 in its consideration of his subjective fear.

The RPD does not mention Mr. Weche's actions after March 23. The RAD determined that the RPD did not err given that it had found Mr. Weche's conduct before March 23 to be inconsistent with his alleged fear. In my view, the RPD's failure to mention the steps Mr. Weche took after March 23 was an error because it ignored relevant evidence. However, the RAD's analysis, despite its brevity, makes up for that error. Although the RAD appears to accept that Mr. Weche's actions after March 23 were consistent with his fear, these actions cannot overcome the factual finding that his conduct before that date was inconsistent with his fear. I clarify this aspect of the RAD's reasons to make it clear that this is not a sufficiently central or significant shortcoming to render the decision unreasonable: *Vavilov* at para 100.

(6) Lack of prospective risk

[38] The RAD drew a negative inference about Mr. Weche's credibility because he failed to mention in his BOC form that his sister was approached by a stranger in Jérémie who was looking for Mr. Weche after he had left Haiti.

[39] In their memorandum for this application for judicial review, the applicants argue that the RAD erred in its analysis of Mr. Weche's prospective risk by focusing on the likelihood of this incident involving his sister. They argue that the RAD should have considered that Mr. Weche's mother, sister and brother had all fled Haiti. However, although the applicants have submitted evidence that the Weche family members no longer reside in Haiti, there are no documents in the record as to why they left. In light of the RAD's prior findings that, on a balance of probabilities, Mr. Weche was not threatened by PHTK thugs on February 1 and March 7, there was no evidence that Mr. Weche or his family would be at risk if they returned to Haiti. I find nothing

unreasonable in the RAD's decision in respect of the RAD's failing to mention that the rest of Mr. Weche's family had also left Haiti.

[40] Given my conclusion that the RAD did not make a sufficiently central or significant error—individually or cumulatively, I find that the RAD's determination that Mr. Weche lacked credibility was reasonable and justified.

C. *The RAD did not err in its determination that it lacked jurisdiction to consider the best interests of the child*

[41] The applicants argue that the RAD had to consider the best interests of Jamie-Lynn under paragraph 3(3)(f) of the IRPA, which requires the interpretation of the IRPA to comply with "international human rights instruments" such as the United Nations *Convention on the Rights of the Child.* The RAD reviewed this issue and determined that neither the RAD nor the RPD is "empower[ed] . . . to make decisions based on humanitarian and compassionate considerations". Rather, their role is limited to determining whether the claimant faces a serious possibility of persecution or being subjected to cruel and unusual treatment or punishment or a danger of torture should they return to their country of citizenship. I agree with the RAD.

[42] Sections 96 and 97 of the IRPA set out clear and strict tests for the merits of a claim for refugee protection, and these tests do not include the best interests of the child: *Aissa v Canada (Citizenship and Immigration)*, 2014 FC 1156 at para 79, citing *Kim v Canada (Citizenship and Immigration)*, 2010 FC 149 at para 76. At issue under sections 96 and 97 is the likelihood of a prospective risk to Jamie-Lynn should she return to her country of *citizenship*, namely, the

United States. The applicants have submitted no evidence or testimony that Jamie-Lynn would be at risk in the United States. I note that the applicants have raised arguments as to the situation they face as asylum claimants in the United States, but this situation has no bearing on the case at bar. Jamie-Lynn is a citizen of the United States, so at issue under sections 96 and 97 is whether she can seek protection in that country.

[43] Moreover, the best interests of Jamie-Lynn and her Canadian-born brother have no bearing on the merits of their parents' claim for refugee protection. Each claimant must establish the merits of their own claim either on one of the grounds of the *Convention Relating to the Status of Refugees* or on the basis of a personal risk in their country of citizenship. How the determination on refugee protection status impacts the best interests of the child has no bearing on this issue.

[44] The applicants also argue that the RAD's analysis overlooks that it is in Jamie-Lynn's best interests to remain with her parents and her Canadian-born brother. With respect, the applicants seem to be unaware that sections 96 and 97 of the IRPA are merely one of the many elements and types of statutes underlying the IRPA's legislative scheme. In *Varga*, Evans J. clarified that "[n]either the Charter nor the *Convention on the Rights of the Child* [references omitted] requires that the interests of affected children be considered under every provision of IRPA": *Varga v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 394 at para 13. As the Minister noted at the hearing of this application for judicial review, these issues can be considered in other applications under the IRPA, but they have no bearing on the determination of a claim for refugee protection: *Asim v Canada (Citizenship and Immigration)*, 2017 FC 415 at

paras 28–29; *Aissa* at para 79; *Kim* at para 76; *Chavez Carillo v Canada (Citizenship and Immigration)*, 2012 FC 1228 at para 18.

[45] In my view, the RAD did not err when it determined that it did not have the discretion to consider the best interests of the child in dealing with the claim for refugee protection at issue.

## IV. Conclusion

[46] The application for judicial review is therefore dismissed.

[47] Neither party proposed a question for certification, and I find that none arises in this case.

**JUDGMENT in IMM-852-20**

**THIS COURT'S JUDGMENT is that:**

1. The application for judicial review is dismissed.

"Nicholas McHaffie"
Judge

Certified true translation
Johanna Kratz

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | IMM-852-20 |
| **STYLE OF CAUSE:** | JUNIOR WECHE ET AL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |

**HEARING HELD ON APRIL 21, 2021, BY TELECONFERENCE FROM OTTAWA, ONTARIO (THE COURT), AND MONTRÉAL, QUEBEC (THE PARTIES)**

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| **JUDGMENT AND REASONS:** | MCHAFFIE J. |
| **DATED:** | JUNE 23, 2021 |

**APPEARANCES:**

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| Félix F. Ocana Correa | FOR THE APPLICANTS |
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