

Federal Court



Cour fédérale

Date: 20220421

Docket: IMM-1944-21

Citation: 2022 FC 583

Ottawa, Ontario, April 21, 2022

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

**HERODE DOUDOUTE
HERONNE MIMAH DOUDOUTE (MINOR)
CORALIE YARAH DOUDOUTE (MINOR)**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants, Mr. Herode Doudoute (the “Principal Applicant”) and his two minor children, seek judicial review of a decision of the Refugee Appeal Division (“RAD”), dated February 26, 2021, confirming the determination of the Refugee Protection Division (“RPD”)

that the Applicants are neither Convention refugees nor persons in need of protection under sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (“*IRPA*”).

[2] The Applicants fear persecution in Haiti on the basis of gang-related violence. The RAD dismissed the Applicants’ appeal because it found that the Applicants were not credible and did not face a risk different from that faced by most of the population in Haiti.

[3] The Applicants submit that the RAD’s decision is unreasonable because the RAD failed to adequately assess the evidence, to consider how the agent of persecution is a non-state actor, and to consider the Applicants’ claim under section 97 of the *IRPA*.

[4] For the reasons that follow, I find that the RAD’s decision is reasonable. This application for judicial review is dismissed.

II. **Facts**

A. *The Applicants*

[5] The Principal Applicant is a 38-year-old citizen of Haiti. His two daughters (the “Minor Applicants”), ages 7 and 4, are citizens of the United States. The Principal Applicant’s wife and the Minor Applicants’ mother, Doodlyne Samedi (Ms. “Samedi”), is a citizen of Haiti.

[6] The Principal Applicant fears he and his family will be targeted by criminals in Haiti due to a perception that he is wealthy. He fears extortion, kidnappings and a risk to their lives.

[7] The Principal Applicant claims that on March 6, 2018, unidentified masked individuals fired gun shots at his vehicle while he and Ms. Samedi were on their way to work. Additionally, on July 11, 2018, the Applicants' residence in Port-au-Prince was attacked by a group of armed, unidentified individuals who broke the front gate and windows of their house, killed two guard dogs, stole property and threatened to kill and rape the Principal Applicant's family.

[8] Following the attack on their home, the Applicants came to Canada on July 12, 2018. They did not seek refugee protection at that time. Shortly after, the Principal Applicant returned to Haiti to work. The Principal Applicant states that upon his return to Haiti, his employer, the Croix-Rouge française ("CRF"), transferred him to work in a different part of the country in Artibonite, Haiti, due to safety risks. In Artibonite, the Principal Applicant alleges that he was threatened by armed bandits who demanded that he give them the money he was carrying from the bank for the wages of CRF employees.

[9] Fearing for his safety, the Principal Applicant resigned from his job and returned to Canada on September 6, 2018. On September 8, 2018, the Applicants filed their claim for refugee protection. Ms. Samedi was joined to the Applicants' refugee claim.

B. *RPD decision*

[10] In a decision dated February 24, 2020, the RPD determined that the Applicants are neither Convention refugees nor persons in need of protection under sections 96 and 97(1) of the *IRPA*. However, the RPD found that Ms. Samedi is a Convention refugee pursuant to section 96 of the *IRPA*. The RPD made the following findings:

- The Principal Applicant's credibility was undermined by his failure to make an asylum claim when he first landed in Canada in July 2018. His return to Haiti until September 2018 undermined his credibility with respect to the severity of the attacks and his fear of persecution.
- Although the country conditions indicate that crime and gang violence is increasing in Haiti, the Principal Applicant did not establish a nexus to a Convention ground and did not provide sufficient credible evidence that he is personally at risk in Haiti.
- The Principal Applicant was the designated representative for the Minor Applicants and did not make any allegations against the United States on their behalf. It was not established that the Minor Applicants would face a serious possibility of persecution or a risk to their lives, or cruel and unusual treatment or punishment if they return to the United States.
- Ms. Samedi is a credible witness and provided credible testimony that she fears gender-based persecution in Haiti, including sexual violence and rape. The objective evidence indicates that victims of sexual violence face major obstacles in seeking legal justice and support in Haiti, and that there is no operationally effective state protection for women who face gender-based persecution.

[11] The RPD rejected the Applicants' claims, but accepted Ms. Samedi's claim on the grounds that she had established a nexus to membership in a particular social group (those facing

gender-based persecution) and that she would face more than a mere possibility of gender-based persecution in Haiti.

[12] The Applicants appealed the RPD's decision to the RAD. On appeal, they submitted ten (10) pieces of new evidence under section 110(4) of the *IRPA*, and requested a hearing pursuant to section 110(6) of the *IRPA*.

C. *Decision Under Review*

[13] In a decision dated February 26, 2021, the RAD dismissed the Applicants' appeal, confirming the RPD's determination that the Applicants are neither Convention refugees nor persons in need of protection.

[14] In reviewing the new evidence, the RAD rejected three typewritten letters on the grounds that they were not credible on their face. The RAD admitted seven documents that were published after the RPD's decision and contained relevant country condition evidence. The RAD determined that since the admissible new evidence does not raise an issue of credibility, it does not meet the criteria under subsection 110(6) of the *IRPA* and a hearing was denied.

[15] The RAD found that the Principal Applicant failed to provide sufficient credible evidence that he is personally at risk if he returns to Haiti and did not establish that he faces a prospective risk in Haiti.

[16] Since the Applicants made no submissions about the RPD's finding that the Minor Applicants did not face a serious possibility of persecution or risk in the United States, the RAD found no reason to disturb the RPD's finding.

[17] The RAD also found that the RPD was correct to find that the Principal Applicant did not establish a nexus ground and his claim fails under section 96 of the *IRPA*. Since the RPD had not referenced the Principal Applicant's explanation for his return to Haiti, the RAD considered the evidence that would corroborate the Principal Applicant's explanation for his return in July 2018 and found it to be inconsistent and contradictory, which adversely affects his credibility.

[18] Furthermore, in finding that the RPD failed to undertake a fulsome analysis of the Principal Applicant's prospective risk, the RAD conducted the two-part test for a section 97 analysis. With respect to the first prong of the test – characterizing the nature of the risk – the RAD found that the Principal Applicant had not established that he was personally targeted in the March and July 2018 incidents and could not identify any of the attackers in these incidents. The RAD determined that the nature of the risk faced by the Principal Applicant is that of random criminal attacks by unidentified perpetrators, and is an ongoing future risk in Haiti.

[19] In the second prong of the test, the RAD compared the risk faced by the Principal Applicant to that faced by a similar group in Haiti and determined that the evidence indicates that all Haitians are at risk of being targeted by bandits and gangs. The RAD found that the Principal Applicant has not established, on a balance of probabilities, that his personal situation would subject him to a risk any different from that faced by most of the Haitian population.

III. **Issue and Standard of Review**

[20] The issue in this application for judicial review is whether the RAD's decision is reasonable.

[21] Both parties submit that the applicable standard of review in evaluating the RAD's decision is reasonableness. I agree (*Adelani v Canada (Citizenship and Immigration)*, 2021 FC 23 at paras 13-15; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("Vavilov") at paras 10, 16-17).

[22] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker (*Vavilov* at para 85). Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[23] For a decision to be unreasonable, the applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). Not all errors or concerns about a decision will warrant intervention. A reviewing court must refrain from reweighing evidence before the decision maker, and it should not interfere with factual findings absent

exceptional circumstances (*Vavilov* at para 125). Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a “minor misstep” (*Vavilov* at para 100; *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156, at para 36).

IV. Analysis

A. *The family as a social group*

[24] The Applicants submit that the RAD failed to analyse the evidence of persecution of the family as a social group, given that the Principal Applicant’s spouse’s claim was accepted based on the risk of gender-based persecution. To support this argument, the Applicants rely on the theory of “indirect persecution”, as it is discussed in *Bhatti v Canada (The Secretary of State)*, 1994 CarswellNat 173, [1994] F.C.J. No. 1346 (“*Bhatti*”). The Applicants submit that the theory of indirect persecution recognizes that family members of persecuted persons may themselves be victims of persecution and allows refugee status to be granted to those who might otherwise be unable to individually prove a well-founded fear of persecution. The Applicants maintain that, having accepted Ms. Samedi’s refugee claim, the RAD was required to consider whether the Applicants were also deserving of protection, by reasons of their membership in the family.

[25] The Respondent contends that at no stage in the proceedings did the Applicants offer any evidence or argument that the family feared persecution in Haiti as a social group based on Ms. Samedi’s risk of gender-based persecution. The Respondent further submits that the concept of “indirect persecution” as described in *Bhatti*, was directly overruled by the Federal Court of Appeal in *Pour-Shariati v Canada (Minister of Employment and Immigration)*, 1997 CanLII

16641 (FCA) (“*Pour-Shariati*”). I agree. As clearly stated by the Federal Court of Appeal in *Pour-Shariati*, there must be a personal nexus between the refugee claimant and the alleged persecution based on a Convention ground:

We accordingly overrule *Bhatti's* recognition of the concept of indirect persecution as a principle of our refugee law. In the words of Nadon, J. in *Casetellanos v. Canada (Solicitor General)* (1994), 1994 CanLII 3546 (FC), 89 F.T.R. 1, 11, "since indirect persecution does not constitute persecution within the meaning of Convention refugee, a claim based on it should not be allowed." It seems to us that the concept of indirect persecution goes directly against the decision of this Court in *Rizkallah v. Canada*, A-606-90, decided 6 May 1992, where it was held that there had to be a personal nexus between the claimant and the alleged persecution on one of the Convention grounds. One of these grounds is, of course, a "membership in a particular social group," a ground which allows for family concerns in on appropriate case [...]

B. *Reavailment in Haiti*

[26] Paragraph 108(1)(a) of the *IRPA* addresses reavailment and the cessation of refugee protection:

Rejection

108 (1) A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection, in any of the following circumstances:

(a) the person has voluntarily reavailed themselves of the protection of their country of nationality;

Rejet

108 (1) Est rejetée la demande d’asile et le demandeur n’a pas qualité de réfugié ou de personne à protéger dans tel des cas suivants:

a) il se réclame de nouveau et volontairement de la protection du pays dont il a la nationalité;

[27] The Applicants submit that the RAD failed to meaningfully grapple with the concept of reavailment when considering the Principal Applicant's return to Haiti and finding that he does not face a personal risk in Haiti. The Applicants argue that the Principal Applicant did not reavail himself of the state protection of Haiti within the meaning of paragraph 108(1)(a) of the *IRPA*, because he never had state protection to begin with. The Applicants further submit that the RAD failed to consider how non-state actors are the agents of persecution.

[28] The Respondent contends that the RAD's decision was not based on the concept of reavailment under paragraph 108(1)(a) of the *IRPA* and that the RAD therefore did not need to engage with the concept. The Respondent also maintains that the Applicants did not argue before the RAD that non-state actors are the agents of persecution. As such, the RAD cannot be faulted for not considering an argument that was never made on appeal.

[29] I agree. The RAD's decision does not conclude that the Principal Applicant placed himself under the protection of Haiti. Rather, the RAD found that the Principal Applicant's return to Haiti undermined his credibility with respect to whether the attacks were personalized and how seriously the Principal Applicant took the attacks. In fact, the RAD agreed with the Applicants that the RPD had unreasonably failed to reference the Principal Applicant's explanation for his return to Haiti. In its analysis, the RAD made a point of explicitly considering the evidence related to the Principal Applicant's return to Haiti, and found it to be inconsistent and contradictory, which adversely impacted his credibility.

C. *Analysis based on section 97 of the IRPA*

[30] The Applicants submit that the RAD's decision is unreasonable because the RAD failed to evaluate their claim under section 97 of the *IRPA* (*Bouaouni v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1211 at para 41). The Applicants maintain that there was sufficient credible and trustworthy evidence to determine that there is more than a mere possibility that the Principal Applicant would face a risk to his life if he returned to Haiti, pursuant to section 97 of the *IRPA*. The Principal Applicant explains that, after ensuring that his wife and children were safe in Canada, he returned to Haiti to see if it would be safe to live and work elsewhere in the country. He continued to work for the CRF and was transferred to another department in Artibonite for security reasons. There, he received threats from bandits during the course of his work. Following this final incident, the Principal Applicant returned to Canada and his family made refugee claims.

[31] The Respondent contends that the Applicants failed to meet their burden to establish that the RAD committed reviewable errors on appeal in confirming the RPD's determination. The Respondent submits that the RAD conducted a fulsome prospective risk analysis based on the Applicants' documentary evidence and applied the two-part test for section 97 of the *IRPA*. In doing so, the RAD's decision addressed and resolved the issues with the RPD's decision that were raised by the Applicants.

[32] Furthermore, the Respondent affirms that the RAD did not commit a reviewable error when it found that the evidence which would corroborate the Principal Applicant's explanation

for returning to Haiti in July 2018 was inconsistent, contradictory and adversely affected his credibility. The Respondent argues that, based on the evidence, the RAD reasonably determined that the Principal Applicant had not established that he faces a personalized risk if he were to return to Haiti or that his personal situation would subject him to a prospective risk that is any different from that faced by most Haitians.

[33] I agree with the Respondent. In determining that the RPD had failed to analyze the Applicants' claim pursuant to section 97 of the *IRPA*, the RAD went on to apply the two-part test as it is laid out by this Court in *Komaromi v Canada (Citizenship and Immigration)*, 2018 FC 1168 to analyze the Principal Applicant's prospective risk in Haiti. I also agree with the Respondent that the RAD reasonably determined that the Applicants failed to provide sufficient credible evidence that they are personally at risk in Haiti.

[34] In reviewing the evidence that would corroborate the Principal Applicant's explanation for returning to Haiti in July 2018, the RAD notes:

[29] I have reviewed the transcript of the RPD hearing and note that neither the Principal Appellant nor his spouse gave any testimony about why the Principal Appellant returned to Haiti, however, their counsel did make detailed submissions. The Principal Appellant's BOC says, "I went back home, I think I could work in a different place but it was not a success. I continued to receive attack from different people." His spouse's statement makes the Appellants' argument referenced above almost verbatim.

[30] The evidence from the Principal Appellant's employer is mixed. One letter dated January 2020, not on Croix-Rouge française letterhead, references a transfer to Artibonite but does not give any dates and makes no reference to the Principal Appellant's being traced and threatened in Artibonite. Another letter on Croix-Rouge française letterhead dated August 2018, makes no reference

to any transfer and the Principal Appellant's Croix-Rouge française identity card, valid until December 31, 2018, says that he is based in Port-au-Prince. I also note that the Principal Appellant's immigration form which he signed on September 26, 2018, says that he worked in Port-au-Prince from February 2017 to September 2018.

[35] I find that it was reasonable for the RAD to determine that Ms. Samedi's statement and the Applicants' counsel's statement did not adequately explain why the Principal Applicant chose to return to Haiti. A review of the transcript from the RPD hearing also reveals that the RPD did not ask the Principal Applicant why he returned to Haiti in July 2018, nor did the Applicants' counsel.

[36] I also do not find that the RAD ignored the evidence from the Principal Applicant's employer. As counsel for the Respondent aptly noted during the hearing, the two letters from the CRF do not indicate that the Principal Applicant faced problems during his tenure in Artibonite, nor do they consistently demonstrate that he in fact worked in that location.

[37] The letter from January 2020 serves as an attestation for the Principal Applicant's resignation from his position with the CRF for reasons of insecurity. The letter indicates that the Principal Applicant experienced an attack on March 6, 2018 and an attack on his family home on July 11, 2018. The letter notes that due to these incidents, the CRF found it necessary to transfer the Principal Applicant to their department in Artibonite. However, the letter does not mention whether any incident or attack occurred in Artibonite and does not provide any details about when the Principal Applicant was transferred to Artibonite. The letter dated August 8, 2018 was written shortly after the Principal Applicant returned to Haiti and states that the Principal

Applicant has worked for the CRF since September 2013, yet makes no reference to a transfer to Artibonite. Moreover, the Applicant's own Basis of Claim form states that he worked for the CRF in Port-au-Prince from February 2017 to September 2018. I therefore find that it was reasonable of the RAD to draw a negative credibility finding based on these inconsistencies.

[38] Furthermore, I do not find that the RAD erred in concluding that the Applicants do not face a prospective risk in Haiti based on the grounds that they would be perceived as wealthy. Haiti is a dangerous country where violence is pervasive. The RAD reviewed the objective country condition evidence and noted that violence affects a large segment of the population and appears to be indiscriminate, affecting rich and poor alike. The RAD also reviewed the factors that contribute to a heightened risk for returnees to Haiti and found that the Principal Applicant did not fall into one of the identified risk categories. As such, I find that the RAD reasonably determined that the attacks experienced by the Applicants stemmed from the criminality that is unfortunately pervasive in Haiti and faced by most of the Haitian population. Overall, I find that the RAD's decision reveals an internally coherent and rational chain of analysis (*Vavilov* at paras 102-104).

V. **Conclusion**

[39] For the reasons above, I find the RAD's decision is reasonable. Accordingly, this application for judicial review is dismissed. No questions for certification were raised, and I agree that none arise.

JUDGMENT in IMM-1944-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. There is no question to certify.

"Shirzad A."

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1944-21

STYLE OF CAUSE: HERODE DOUDOUTE, HERONNE MIMAH
DOUDOUTE (MINOR) AND CORALIE YARAH
DOUDOUTE (MINOR) v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: BY VIDEOCONFERENCE

DATE OF HEARING: MARCH 22, 2022

JUDGMENT AND REASONS: AHMED J.

DATED: APRIL 21, 2022

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