

Federal Court



Cour fédérale

Date: 20221123

Docket: IMM-1247-20

Citation: 2022 FC 1610

Ottawa, Ontario, November 23, 2022

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

HOLANDA JEAN MICHEL

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] Holanda Jean Michel [Applicant] seeks judicial review of the Refugee Protection Division's [RPD] December 16, 2019 decision wherein the RPD found that the Applicant is not a Convention refugee nor a person in need of protection [Decision]. The determinative issue for the RPD was the Applicant's prospective risk and her underlying profile as a woman in Haiti.

[2] The application for judicial review is allowed.

II. Background

[3] The Applicant is a 30-year-old citizen of Haiti. In May 2016, the Applicant learned that her father, who died in 2004, left a property deed [Deed] in her name. The Applicant's aunt, Polonne, was residing on the property. The Applicant advised Polonne that she was taking the property, but Polonne refused to recognize the Deed and tried to seize it from the Applicant.

[4] After returning from a trip to the United States [US] on November 3, 2016, two armed men attacked the Applicant, stole her luggage and passport, followed her home, pointed guns at her and her husband, and slashed their vehicle's tires. On December 5, 2017, armed assailants entered the Applicant's home in an attempt to seize the Deed. Unable to locate the Deed, the assailants assaulted the Applicant and her husband and stole several items. The assailants threatened to return and kill the Applicant and her husband.

[5] The following day, the Applicant contacted Polonne, who was more concerned about whether the Applicant had seen the assailants' faces. The Applicant submitted a complaint in court, but the court was unable to act without proof of the assailants' identities.

[6] The Applicant and her husband moved in with the Applicant's mother-in-law. The Applicant also changed her phone number, having received threats on her former phone number. However, the threats continued on her new number. Polonne was the only one who knew her new phone number.

[7] The Applicant decided to return to the US on January 24, 2018. The Applicant informed Polonne, who tried to convince her to cancel or delay her departure.

[8] On January 21, 2018, the Applicant and her husband returned home to gather their belongings for their departure. While at home, the Applicant and her husband were assaulted. The next day, the Applicant's husband traveled to Les Cayes for work. That night, the two armed men broke into the Applicant's home, threatened to kill her if she did not relinquish the Deed, and asserted that Polonne had paid them 50,000 Haitian Dollars in return for her death. The Applicant told the assailants that her husband would return the following day with the Deed. The assailants then beat and raped the Applicant, who was pregnant at the time. The assailants fled when they heard a vehicle approaching, believing it to be the police, but threatened to return and kill the Applicant. The Applicant's husband and his friend, a police officer, were in the approaching vehicle. The Applicant hid with her husband at her maternal aunt's home in Port-au-Prince.

[9] On January 24, 2018, the Applicant's husband and his police-officer friend drove the Applicant to the airport for her departure to the US. The Applicant's husband fled to Cuba, as he did not have a US visa. The husband is currently hiding in the Dominican Republic. On February 2, 2018, the Applicant entered Canada and submitted a refugee claim.

III. The Decision

[10] The RPD found the Applicant does not face a prospective risk of persecution due to the property dispute or her underlying profile as a woman in Haiti.

[11] The RPD found that Polonne and the assailants would have no motivation to harm the Applicant if she relinquished the Deed. As the issue involved a property dispute, there was no nexus under section 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. As for section 97 of IRPA, the Applicant's fear that Polonne would be motivated to kill her to prevent legal action from the Applicant's children was speculative, as the Applicant had no children and her future children would have no legal recourse if the Applicant relinquished the Deed. The Applicant's assertion that Polonne would be motivated kill her out of embarrassment of the events that transpired was also speculative.

[12] Turning to the Applicant's risk as a woman in Haiti, the RPD acknowledged evidence in the National Documentation Package [NDP] indicating that violence against women in Haiti is endemic. The RPD noted that younger and elder women can be vulnerable to sexual and gender-based violence. The RPD further noted that sexual and gender-based violence, in particular, is widespread, chronic, and systematic, and that state protection is not available to protect women from such violence. The RPD found, however, that although the Applicant was "severely beaten and raped by the criminals for hire by [Polonne]", her personal circumstances distinguish themselves from the NDP for various reasons:

- 1) The Applicant "can benefit from male protection" in Haiti if her husband returns from the Dominican Republic. This is possible if the Applicant relinquishes the Deed;
- 2) The Applicant's work experience and educational history, including her completion of high school and one year of college, makes her well placed to secure employment compared to other Haitian women; and

- 3) The Applicant's two returns to Haiti from the US indicate that her gender is not a risk factor.

IV. Issues and Standard of Review

[13] After considering the submissions of the parties, the sole issue is whether the Decision is reasonable. The sub-issues are best characterized as:

- 1) Did the RPD reasonably assess the Applicant's fear of persecution or risk of harm from Polonne?
- 2) Did the RPD reasonably assess the Applicant's fear of persecution or risk of harm as a woman in Haiti?

[14] I agree with the parties that the standard of review is reasonableness. None of the exceptions outlined in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov] arise in this matter (at paras 16-17). A reasonableness review requires the Court to examine the decision for intelligibility, transparency, and justification. In conducting a reasonableness review, the reviewing court must look to both the outcome of the decision and the justification of the result (*Vavilov* at para 87). A reasonable decision must be "justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99). However, a reviewing court must refrain from reweighing and reassessing the evidence considered by the decision-maker (*Vavilov* at para 125, citing *Canada (Canadian Human Rights Commission) v Canada (AG)*, 2018 SCC 31 at para 55). If the reasons of the decision-maker allow a reviewing Court to understand why the decision was made and determine whether the

decision falls within the range of acceptable outcomes defensible in respect of the facts and law, the decision will be reasonable (*Vavilov* at paras 85-86).

V. Analysis

A. *Did the RPD reasonably assess the Applicant's fear of persecution or risk of harm from Polonne?*

(1) Applicant's Position

[15] Relinquishing the Applicant's Deed would not eliminate the harm, nor would it result in a positive relationship between the Applicant and Polonne. The RPD disregarded the evidence that Polonne had resorted to barbaric tactics in furtherance of her goal to secure the Deed. The RPD also unreasonably speculated "as to the agents of persecutions' motives, means, and future intentions" (*Soos v Canada (Citizenship and Immigration)*, 2019 FC 455 at para 12 [*Soos*], citing *Builes v Canada (Citizenship and Immigration)*, 2016 FC 215 at para 17 [*Builes*]).

[16] The RPD erred in finding that the Applicant was not at risk because she has no children and that any future children would have no legal recourse if the Applicant relinquished the Deed. The Applicant indicated in her original Basis of Claim [BOC] narrative that she was pregnant when she was raped. She also indicated in her amended BOC that she had given birth to a child, and included copies of her newborn daughter's Canadian passport and Ontario Statement of Live Birth form. Further, the RPD did not provide any support to its contention that the Applicant's children would lack legal recourse, nor did it consider whether the Applicant's children might challenge the relinquishment of the Deed. If the RPD was asserting specialized knowledge of

Haitian property or estate law, it was obligated to inform the Applicant and provide her an opportunity to respond, pursuant to Rule 22 of the *Refugee Protection Division Rules*, SOR/2012-256.

[17] The RPD failed to consider the Applicant's personal evidentiary documents supporting her well-founded fear of persecution, including a letter from her husband attesting to the events, a letter from the Applicant's mother, and a psychosocial assessment noting that the Applicant exhibits symptoms of depression and post-traumatic stress as a result of her trauma. The RPD was required to consider this evidence in assessing the Applicant's ability to care for herself and her risk of future harm as a woman who had been raped.

(2) Respondent's Position

[18] The RPD reasonably assessed the Applicant's claim under section 97 of the *IRPA*, finding no nexus between the Applicant's property ownership and section 96 of *IRPA* (*Malik v Canada (Citizenship and Immigration)*, 2019 FC 955 at paras 25-26).

[19] The RPD reasonably concluded that the Applicant would not be at risk of persecution if she relinquished her property rights (*Sanchez v Canada (Citizenship and Immigration)*, 2007 FCA 99 at para 17 [*Sanchez*]). The Applicant was unable to provide a satisfactory response to the RPD as to why Polonne would continue to persecute her if she relinquished the Deed. The RPD noted that the Applicant felt a duty to retain the property for her husband and future children, and that Polonne would want to kill her out of embarrassment and to prevent claims from the Applicant's children.

[20] The RPD's statement that the Applicant had no children was reasonable, as it was responsive to the Applicant's explanation of Polonne's motives. The Applicant did not provide evidence that Polonne knew of her pregnancy. The Applicant also did not have children in Haiti at the time of her persecution. The RPD is not required to respond to every piece of evidence. The Applicant's reference to one statement, taken out of context, does not show that the RPD made a material error or ignored evidence (*Vavilov* at paras 97, 102-103, 128, 137; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 14; *Jean-Baptiste v Canada (Citizenship and Immigration)*, 2018 FC 285 at para 20).

(3) Conclusion

[21] The RPD did not reasonably assess the Applicant's fear of persecution from Polonne. The Applicant is correct that the RPD did not adequately engage with the fact that the Applicant has a child; however, that is not determinative.

[22] Rather, the RPD's determination that the relationship between the Applicant and Polonne would return to normal if the Applicant simply relinquished the Deed is unsupported by the evidence. To the contrary, the evidence indicated that Polonne hired assailants to threaten and assault the Applicant on multiple occasions regardless of whether the assailants obtained the Deed. In my view, this reasoning constitutes an illogical speculation into the agents of persecution's means, motives, and future intentions (*Soos* at paras 12-16; *Builes* at paras 17-19). This is sufficient to grant the application for judicial review.

B. *Did the RPD reasonably assess the Applicant's fear of persecution or risk of harm as a woman in Haiti?*

(1) Applicant's Position

[23] The RPD erred in limiting their consideration of the Applicant's risk to section 97 of *IRPA*. Women who fear persecution based on their gender, including women who fear rape, constitute a particular social group under section 96 of *IRPA*. The RPD's failure to consider the Applicant's risk of being kidnapped and raped as a risk of gender-based persecution under section 96 was unreasonable (*Josile v Canada (Citizenship and Immigration)*, 2011 FC 39 at paras 24-36 [*Josile*]; *Duversin v Canada (Citizenship and Immigration)*, 2018 FC 466 at paras 32-34).

[24] The RPD considered the risk to the Applicant as a woman in the abstract, not as a female victim of gender-based violence. The RPD disregarded the uncontradicted evidence that she was beaten and raped. This Court has acknowledged that rape in Haiti is a gender-specific issue (*Dezameau v Canada (Citizenship and Immigration)* 2010 FC 559 at para 36 [*Dezameau*]). Further, the RPD's finding that the Applicant would be safe in Haiti with her husband's protection disregards the fact that her husband was in Haiti when she was raped. This Court has previously found that decision-makers ought to consider the risk of sexual violence when a woman is away from her husband (*Siffort v Canada (Citizenship and Immigration)*, 2020 FC 351 at para 31).

[25] The RPD's assessment of the NDP evidence of gender-based risk was also unreasonable, as it does not support the finding that married women can be distinguished from women at risk in Haiti. Even if it did, the RPD would have had to reconcile that evidence with the fact that the Applicant was raped as a married woman.

[26] Lastly, the RPD's finding that the Applicant's multiple returns to Haiti from the US undermined her risk of gender-based violence was unreasonable. The Applicant's trips to the US occurred before she was attacked. The RPD failed to conduct an individualized inquiry into the Applicant's prospective risk (*Prophète v Canada (Citizenship and Immigration)*, 2009 FCA 31 at paras 6-7).

(2) Respondent's Position

[27] The RPD reasonably assessed the Applicant's gender-based risk of persecution. It was open to the RPD to rely on the NDP evidence, which describes the vulnerability of women in Haiti. It was also open to the RPD to find that the husband's protection of the Applicant, the Applicant's career and educational history, and the Applicant's failure to claim refugee protection in the US before the attacks occurred, undermined the Applicant's claim that her profile as a woman in Haiti was a risk factor.

[28] The Applicant's attacks arose from her own choices in relation to a property dispute with Polonne. It was open to the RPD to characterize the Applicant's claim in relation to sections 96 and 97 of *IRPA*, while acknowledging the gendered nature of her persecution. The RPD fulfilled its duty to consider the Applicant's profile as a woman in Haiti.

(3) Conclusion

[29] The RPD erred in not considering the Applicant's risk under section 96 of *IRPA*. The RPD prefaced their analysis of the Applicant's gender-based risk with the following statement:

The national documentation package (NDP) for Haiti indicates that there is endemic violence against women in Haiti. Sexual and gender-based violence (SGBV) against women in Haiti has been described as being widespread, chronic and systematic. The state is unwilling or unable to adequately protect Haitian women from SGBV.

[30] While the NDP evidence cited by the RPD indicates that younger and elder women are at heightened risk of sexual and gender-based violence, and that economic dependence on men exacerbates that risk, the evidence does not indicate that being married, educated, or employed nullifies that risk.

[31] The Respondent cites *Josile* to support its submission that the RPD fulfilled its duty to consider the Applicant's profile as a woman. I note that the Court in *Josile* stated the following:

[29] Indeed, Canadian scholar and practitioner, Lorne Waldman holds that women, at large, should be recognized as a particular social group, provided that the evidence proves that they are subject to severe violations of their fundamental human rights because of their gender (Lorne Waldman, *The Definition of Convention Refugee* (Buttersworth: Markham, Ontario, 2001) at §8.288). In my opinion, such an approach is the correct one and flows from *Ward*, above.

[30] This conclusion is also in accordance with the human rights purpose of the Convention and is in line with other decisions of the Board, where women without male protection and adequate state protection who are persecuted in certain countries (e.g. Pakistan and Somalia) were found to be Convention refugees by reason of their membership in that group (*G.L.U. (Re)*, [2000] C.R.D.D. No. 69; *E.U.C. (Re)*, [2001] C.R.D.D. No. 253).

[Emphasis added.]

[32] In light of the objective evidence regarding the prevalence of sexual and gender-based violence against women in Haiti and the Applicant's personalized evidence of being threatened, beaten, and raped by the assailants hired by Polonne, the RPD's conclusion that the Applicant did not demonstrate a serious possibility of risk based on her gender is not justified in relation to the facts and law (*Vavilov* at paras 85-86, 102).

[33] The RPD's finding that the Applicant is not at risk because of her husband's protection is also not supported by the NDP evidence. The finding is belied by the fact that (1) the Applicant was raped while her husband was in another city in Haiti for less than 24 hours, and (2) that the same assailants previously assaulted both the Applicant and her husband in their home.

[34] Lastly, I agree with the Applicant that the RPD's negative inference from the Applicant's returns to Haiti before the attacks occurred was unreasonable. It is illogical to expect the Applicant to make a refugee claim before she was subject to the persecutory acts.

VI. Conclusion

[35] The application for judicial review is allowed.

[36] The parties do not propose a question for certification and I agree none arises.

JUDGMENT in IMM-1247-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed. The matter is remitted for redetermination by a different member of the RPD.
2. There is no question for certification.
3. There is no order as to costs.

"Paul Favel"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1247-20

STYLE OF CAUSE: HOLANDA JEAN MICHEL v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

DATE OF HEARING: MAY 17, 2022

JUDGMENT AND REASONS: FAVEL J.

DATED: NOVEMBER 23, 2022

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