Federal Court  Cour fédérale

Date: 20210107

Docket: IMM-7735-19

Citation: 2021 FC 24

[ENGLISH TRANSLATION]

Ottawa, Ontario, January 7, 2021

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

ROSE MAY HENRY
TREVOR SEBASTIAN SAINTIL
ELIJAH KEITH SAINTIL

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review brought against the decision rendered on November 18, 2019, by the Refugee Appeal Division [RAD] confirming the decision by the Refugee Protection Division [RPD] dated November 6, 2018, that the applicant, Ms. Henry and

her children [collectively the applicants] were not Convention refugees or persons in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] For the reasons that follow, I would dismiss the application.

II. Facts and proceedings

[3] The persecution is said to have started in the town of Les Cayes in Haiti, where Ms. Henry and her family lived and where her father was recognized as an exceptional tailor, [TRANSLATION] "being able to make suits and uniforms for the residents of the city".

[4] Ms. Henry alleges that she was persecuted in 1993 by sympathizers of the Front for the Advancement and Progress of Haiti [FRAPH], a party that was allegedly very present and threatening throughout the city of Les Cayes in Haiti, after her father refused to make clothes for the party. Following FRAPH's reprisals, Ms. Henry had to leave her school, her brother was physically attacked, and the maid was raped by individuals belonging to this group.

[5] No longer able to live in fear, Ms. Henry left Haiti in 1999 for the United States and applied for asylum there. Ms. Henry never obtained final status in the United States, where she gave birth to two children, on June 14, 2007, and November 2, 2008. Her two sons are Americans. Ms. Henry and her husband are divorced, with him now living in the Bahamas.

[6] She alleges that she returned to Haiti for a short period in 2014, to visit members of her family; her father and mother still live in Les Cayes while one of her sisters and three brothers live in Port-au-Prince. During a short stay, she alleges that she was recognized by supporters of the FRAPH and threatened; she therefore returned to the United States after a few days.

[7] For three years, Ms. Henry and her children felt safe in the United States. However, with President Trump coming to power, she no longer felt safe and constantly feared being deported back to Haiti. Therefore, on August 6, 2017, Ms. Henry and her children entered Canada and claimed refugee protection.

[8] Since arriving in Canada, Ms. Henry has given birth to her third child with her new Canadian partner.

[9] The hearing before the RPD was held on October 22, 2018, and on November 6, 2018, the RPD rejected her claim.

[10] In its decision, the RPD did not have to consider at length the issue of Ms. Henry's credibility because it concluded that there was an internal flight alternative [IFA] in Port-au-Prince. As noted, her sister and three brothers also live in Port-au-Prince. However, the RPD made some observations on certain aspects of Ms. Henry's account of the events.

[11] The RPD was of the opinion that Ms. Henry [TRANSLATION] "has not been able to establish, on the balance of probabilities, that relocating . . . to Port-au-Prince, a several hour

drive from Les Cayes, the alleged place of residence of her family's attackers around 1993, could cause her serious problems that could endanger her physical integrity and make her fear for her life".

[12] As for her allegations of harassment upon her return to Port-au-Prince in 2014, the RPD did not give much weight to Ms. Henry's testimony:

> [TRANSLATION]
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> The Court considers it unlikely that she was recognized by individuals 20 years later, while in Port-au-Prince, and that she was subsequently threatened. The Court is more of the opinion that this was an addition made by the applicant, or a fabrication intended to actualize her fears. When questioned about this during her hearing, the applicant was evasive and could not satisfy the panel that this event had occurred.

[13] The RPD noted that Ms. Henry's father, the person targeted by the reprisals, still resides in Les Cayes, the place where the reprisals in question took place. Asked about this fact, Ms. Henry simply replied that it was she and her sisters who bore the brunt of the threats. The RPD found this claim to be dubious and then asked Ms. Henry why her parents had stayed in Les Cayes rather than moving to Port-au-Prince. Again, Ms. Henry's response did not satisfy the RPD.

[14] In short, on the interest of FRAPH members in finding Ms. Henry, the RPD considered that this interest was [TRANSLATION] "obviously minimal, if not now absent", given that many years have passed since the incident and that the RPD did not believe that Ms. Henry suffered any retaliation in 2014.

[15] With regard to the first prong of the IFA test, the RPD was not persuaded that the FRAPH members had the resources and the capacity to locate Ms. Henry in Port-au-Prince.

[16] As for Ms. Henry's argument that she would be sexually assaulted because she is a woman, that it would be difficult and dangerous to settle in Port-au-Prince and that she would be vulnerable in these circumstances, the RPD considered that it was a matter of general criminality, that no connection with any of the grounds referred to in section 96 of the Convention had therefore been established, that fear of crime was a generalized risk, and that the risk to which she would be exposed rather reflected the grim reality that all Haitians face.

[17] With regard to the second prong of the IFA test, the RPD considered the evidence to be insufficient to establish that the IFA in Port-au-Prince would be unreasonable.

[18] The RAD rejected the applicants' appeal of the RPD decision on November 18, 2019.

[19] After the RAD conducted its own analysis of the evidence, it essentially concluded that there had been no breach of natural justice or procedural fairness on the part of the RPD and that Ms. Henry had failed to establish that there was a risk of persecution or a need for protection or that the IFA in Port-au-Prince was unreasonable and unviable.

[20] More specifically, with regard to the issue at hand, namely the reasonableness of the IFA in Port-au-Prince, the RAD concluded as follows:

a) The applicant had not established that there was a risk of persecution or a need for protection for her children in the event that they should return to the United States, they being American citizens without Haitian nationality, and that the notion of a refugee or of a person in need of protection under sections 96 and 97 of the IRPA does not include the concept of protection of the family unit against separation.

b) Even though Ms. Henry alleged that the RPD erred in focusing very little on her credibility, in reality the RPD did not focus on her credibility with respect to certain aspects of Ms. Henry's account simply because it did not find her allegations credible concerning the absence of an IFA in Port-au-Prince. It was therefore not necessary for the RPD to assess Ms. Henry's credibility with respect to the remainder of her account.

c) As to the issue relating to the IFA, Ms. Henry failed to establish that agents of persecution would be interested in looking for her upon her return to Haiti because she was evasive and adjusted her allegations to embellish her account when questioned about it, and because she failed to mention in her written account that she was allegedly recognized and threatened in 2014.

d) Ms. Henry produced unsatisfactory responses which did not explain why her alleged agents of persecution would be more interested in her and her sisters than her father, who was at the heart of the alleged problem with the FRAPH and who has always lived in Les Cayes without being bothered, for example, during his travels to Port-au-Prince.

e) Ms. Henry did not demonstrate that it would be difficult for her to relocate to Port-au-Prince and did not give reasons as to why this IFA would be unreasonable; she limited herself to pointing out the insecurity and general conditions in the country.

f) Ms. Henry's profile does not expose her to a risk of persecution based on gender other than a generalized risk to which the Haitian population as a whole is exposed, especially since the applicant voluntarily returned to Haiti despite her alleged fears and would be surrounded by members of her family if she returns.

III. Issue and standard of review

[21] The only question in this case is whether the RAD's assessment of the IFA was unreasonable; in this case, the standard of reasonableness must be followed (*Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 23; *Armando v Canada (Citizenship and Immigration)*, 2020 FC 94 at para 31).

[22] However, Ms. Henry contends that the failure of the RAD to assess the risk of a serious possibility of persecution in Port-au-Prince under section 96 of the Convention on the grounds that she is a woman constitutes a breach of natural justice and procedural fairness, such that the standard of review is correctness.

[23] I agree that the assessment of whether there has been a breach of procedural fairness is subject to a standard of review which closely corresponds to the standard of correctness: I must consider, in light of the nature of the fundamental rights in question and the consequences to

which Ms. Henry is exposed, whether a fair and just process was followed (*Canadian Pacific Railway Limited v Canada (Attorney General)*, 2018 FCA 69 at para 54). However, to characterize the issue as a matter of procedural fairness is wrong in this case.

IV. Discussion

[24] There is no doubt that the defining issue for the RAD was the IFA in Port-au-Prince, which is not disputed by Ms. Henry.

[25] Essentially, the two-pronged IFA test rests on the idea that an "IFA must be sought, if it is not unreasonable to do so, in the circumstances of the individual claimant" before claiming refugee protection in a foreign country (*Thirunavukkarasu v Canada (Minister of Employment and Immigration)* (CA), 1993 CanLII 3011 (FCA), [1994] 1 FC 589 at p 597).

[26] This two-pronged test was recently formulated by Justice McHaffie in *Olusola v Canada (Citizenship and Immigration)*, 2020 FC 799 [*Olusola*]:

> [8] To determine if a viable IFA exists, the RAD must be satisfied, on a balance of probabilities, that (1) the claimant will not be subject to persecution (on a "serious possibility" standard), or a section 97 danger or risk (on a "more likely than not" standard) in the proposed IFA; and (2) in all the circumstances, including circumstances particular to the claimant, conditions in the IFA are such that it would not be unreasonable for the claimant to seek refuge there: *Thirunavukkarasu* at pp 595–597; *Hamdan v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 643 at paras 10–12.
>
> [9] Both of these "prongs" of the test must be satisfied to conclude that a refugee claimant has a viable IFA. The threshold on the second prong of the IFA test is a high one. There must be "actual and concrete evidence" of conditions that would jeopardize the applicants' lives and safety in travelling or temporarily relocating

> to a safe area: *Ranganathan v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 164 (CA) at para 15. Once the potential for an IFA is raised, the claimant bears the onus of establishing it is not viable: *Thirunavukkarasu* at pp 594–595.
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> [Emphasis added.]

[27] Ms. Henry merely argues that the RAD's conclusions on the first prong of the IFA test were unreasonable. In other words, it cannot be said that her relocation to Port-au-Prince would be reasonable if it were found that there is a serious possibility of persecution for Ms. Henry in the Haitian capital.

[28] So, the controversy is limited to the first prong of the IFA test.

[29] Ms. Henry contends that the RAD erred in being insensitive to her specific persecution as a woman. Furthermore, the RAD had assessed the risk of persecution under the first prong of the IFA test under section 97 of the IRPA alone, whereas a well-founded fear of persecution based on sex is analyzed under section 96 of the IRPA, which refers to social groups; the RAD therefore carried out its analysis in a manner contrary to the principles of natural justice and procedural fairness.

[30] In short, Ms. Henry submits that the RPD, and therefore also the RAD, erred in law in applying the test under section 97 of the IRPA to analyze Ms. Henry's fear, which should have been done under section 96 of the IRPA. In particular, owing to the improper formulation of the test under section 97 of the IRPA rather than section 96, the RAD sought evidence of personalized risk rather than fear, be it objective or subjective.

[31] What is more, Ms. Henry maintains that the RAD failed to apply the *Chairperson Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution* [Guideline], in particular because it did not mention the Guideline at the beginning of its reasons.

[32] I cannot accept Ms. Henry's arguments.

[33] In this case, there is no evidence that the RAD's conclusions were made contrary to the principles of natural justice, and no authority was cited to support the contention that the RAD should have pointed out from the outset of the reasons for its decision that it had taken the Guideline into account.

[34] I accept the idea that a general risk faced by a particular social group does not preclude a finding of persecution. As observed by Justice Pinard: "[i]n other words, a finding that a risk is universally experienced by a social group does not foreclose the inquiry under section 96" (*Dezameau v Canada (Citizenship and Immigration)*, 2010 FC 559 at para 31 [*Dezameau*]).

[35] However, I find that Ms. Henry's allegations and evidence were analyzed by the RAD on the basis of the specific requirements of each of sections 96 and 97 of the IRPA. In fact, the RAD concluded as follows: "In light of the foregoing, I am of the opinion that the evidence in this case does not enable us to establish that there is a serious possibility that the principal appellant would be persecuted because of her gender if she returned to Haiti".

[36] Other than the objective evidence which shows that the country is generally dangerous for women due to the general insecurity, no specific evidence has been produced that Ms. Henry was in danger as a woman, except a statement that the agents of persecution were more interested in targeting her and her sisters than her brothers and parents; however, Ms. Henry conceded that her brothers were also targeted.

[37] While it is correct to say that the RAD considered that the risk recounted by Ms. Henry was not specific to her, I am not satisfied that the RAD's findings indicate that it, or the RPD, confused the tests of sections 96 and 97 of the IRPA.

[38] Under both sections 96 and 97, a claimant must establish a risk that is both personal and objectively identifiable. While persecution need not be personalized under section 96, as the claimant may demonstrate that their fear is felt by the group in which they are associated within the Convention definition, the claimant's profile must be considered when determining if there is a well-founded risk of persecution. (*Debnath v Canada (Citizenship and Immigration)*, 2018 FC 332 (CanLII) at para 35).

[39] The fact remains that the analysis under section 96 of the IRPA nonetheless remains personalized in the sense that the claimant must establish a link between himself or herself and the persecution for a reason provided for in the Convention; he or she must be targeted for persecution in some way, either "personally" or "collectively" (*Rizkallah v Canada (Minister of Employment and Immigration)* (1992), 156 NR 1 (FCA). In short, the risk must "apply to the specific person making the claim" (*Raza v Canada (Citizenship and Immigration)*, 2006 FC 1385

(CanLII) at para 29; see also *Sathivadivel v Canada (Citizenship and Immigration)*, 2010 FC 863 (CanLII) at paras 24 to 28).

[40] It is clear that Ms. Henry is a woman, but this is not the main source of her fear. In this case, the main reason which would motivate the agents of persecution in Les Cayes to seek out and attack Ms. Henry and her children would be revenge, since Ms. Henry's father refused to collaborate with them. In these circumstances, the RPD found, as confirmed by the RAD, that [TRANSLATION] "there is no link to any of the Convention grounds, in accordance with section 96, and that [Ms. Henry's] fear of criminals constitutes a generalized risk".

[41] As Justice Pinard observed in *Marcelin Gabriel v Canada (Citizenship and Immigration)*, 2009 FC 1170 (CanLII) at paragraph 20:

> A generalized risk need not be one experienced by every citizen. A subgroup can face a generalized risk. This was clear to Madam Justice Judith Snider in *Osorio v. Minister of Citizenship and Immigration*, 2005 FC 1459. The Court was asked to consider parents in Colombia as a specific group that is targeted as victims of crime, specifically, child abduction. The Court noted that the category of "parents" is significantly broad and the risk is a widespread or prevalent risk for all Colombian parents (at paragraph 25). The applicants in that case could not personalize the risk beyond membership to that subgroup and this did not satisfy the Court. Thus, a generalized risk could be one experienced by a subset of a nation's population thus, membership in that category is not sufficient to personalize the risk.
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> [Emphasis added.]

[42] In this case, Ms. Henry was unable to establish a personalized risk beyond belonging to the subgroup of women. In fact, the RAD found that "[a]part from [Ms. Henry's] general allegations with regard to her fear of being raped and the insecurity in the country, there is not

sufficient evidence in this case to demonstrate that there is a serious possibility that she would be a victim".

[43] The RAD therefore found that Ms. Henry's personal situation did not place her at particular risk of assault, as her profile did not match that of a vulnerable woman who [TRANSLATION] "would be persecuted if she returned to Haiti because of her membership in the social group of women".

[44] Accordingly, I adopt the observation of Justice Pinard in *Dezameau* at paragraph 29:

> This is not to say that membership in a particular social group is sufficient to result in a finding of persecution. The evidence provided by the applicant must still satisfy the Board that there is a risk of harm that is sufficiently serious and whose occurrence is "more than a mere possibility".

[45] Before me, Ms. Henry did not explain why it was unreasonable to conclude that she was not the subject of an individualized risk, specific to her personal situation. Considering that it was not unreasonable to conclude that the persecutors of 25 years ago have likely forgotten the case, there is no indication that Ms. Henry would be at a greater risk of persecution than the rest of the female population in Haiti because of her personal situation.

[46] Being targeted as a victim of a crime does not constitute a personalized risk. In addition, belonging to a subgroup of the country's population that is exposed to generalized risk is not sufficient to personalize that risk (*Marcelin Gabriel v Canada (Citizenship and Immigration)*, 2009 FC 1170 at paras 10 and 21). It is not enough to state that the country is generally dangerous for women due to the general insecurity in the country to claim refugee status under

section 96 of the IRPA or to claim being a person in need of protection under section 97 of the IRPA. As Justice Boivin observed in *Guerilus v Canada (Citizenship and Immigration)*, 2010 FC 394 (CanLII) at paragraph 15, "the assessment of the applicants' fear must be made *in concreto*, and not from an abstract and general perspective (*Ahmad v. Canada (Minister of Citizenship and Immigration*), 2004 FC 808, 134 A.C.W.S. (3d) 493 at paragraph 22)".

[47] In short, Ms. Henry has not established that her fear was more than a fear of being subjected to violence or random crime, which constitutes a generalized risk within the meaning of subparagraph 97(1)(b)(ii) of the IRPA. Ms. Henry has not established that the RAD unreasonably concluded that she is not subject to a personalized risk of persecution in Haiti. The question of procedural fairness is therefore not raised in this case. Rather, it is a question of the characterization of the fear of persecution. Therefore, the standard of review is reasonableness, and I fail to see how the characterization or analysis of the RAD was unreasonable.

[48] As for applying the Guideline, it should not be forgotten that this document is an interpretative tool, that the RAD's decision is based on Ms. Henry's non-credible account (not on the lack of consideration as to the specific difficulties that she will experience because of her sex), and that this Guideline alone cannot justify a refugee protection claim (*Boyce v Canada (Citizenship and Immigration)*, 2016 FC 922 at paras 67 and 68, *Uwimana v Canada (Citizenship and Immigration)*, 2012 FC 794 at paras 30–32; *Higbogun v Canada (Citizenship and Immigration)*, 2010 FC 445 at paras 48–50, *Kaur v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1066 at para 15).

[49] I do not think the RAD misjudged the risks women face in Haiti. It specifically pointed out on several occasions in its decision that women are assaulted more often than men. The RAD took the Guideline into consideration. If it chose to refer to it at the end of its reasons rather than at the beginning, that does not in itself allow me to conclude that it did not properly take the Guideline into account.

[50] Although Ms. Henry's father or her relatives might be targeted for the acts of revenge, no evidence has been produced suggesting that the agents of persecution preyed on other relatives of Ms. Henry's father. Nonetheless, it was established by the RAD that Ms. Henry's parents, as well as a sister and three brothers, still live in Haiti, and this finding of fact was not contested before me. In fact, Ms. Henry's sister lives in Port-au-Prince, and there is no indication in the record that she may have been the subject of reprisals, despite being a woman.

[51] Thus, if we exclude the events of 2014 to which the RPD and the RAD gave low probative value, there is nothing in the evidence showing that anything has happened since the 1990s with regard to Ms. Henry's father or her relatives who apparently live in Port-au-Prince.

[52] It is difficult in these circumstances to argue that the IFA in Port-au-Prince would be unreasonable considering that the person who caused the persecution still resides in the place where the persecution occurred and that her relatives still reside in Haiti, especially in Port-au-Prince, without any apparent problems.

[53] I find that Ms. Henry has failed to meet the burden of proof: the onus was on her to establish that there was no IFA (*Thirunavukkarasu*). In addition, it should be remembered that the bar is set quite high for establishing that no IFA exists and that it was open to the RAD to conclude that Ms. Henry had provided no evidence to substantiate [TRANSLATION] "her fear of tracing [by her alleged attackers], or explain how or why [they] would [still] be interested in pursuing her" (*Ranganathan v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 164; *Mchedlishvili v Canada (Citizenship and Immigration)*, 2010 FC 630 at paras 18 and 19).

[54] Finally, Ms. Henry essentially argues that the RAD erred in the assessment of the IFA because the RPD had found these assertions to be credible and that Ms. Henry testified that she could not return to Haiti because she feared being persecuted by her agents of persecution and because they would be looking for her if she were to return.

[55] So, according to Ms. Henry, [TRANSLATION] "the facts and accounts of her claim having been judged to be credible, the applicant continues to benefit from the presumption of truth", and "the burden of proof is [therefore] shifted onto the shoulders of the respondent, who must then prove that there is indeed an [IFA] for the applicant in Port-au-Prince".

[56] According to Ms. Henry, the RAD relied on guesswork and could not dismiss [TRANSLATION] "the applicant's testimony on the basis of assumptions [when] the documentary evidence shows that, in Haiti, it is easy to find victims by word of mouth [and that] the RAD never assessed the national or regional character of FRAPH supporters".

[57] In my opinion, what hurts Ms. Henry's position the most is the fact that her parents have been living all their lives in the area where the persecutions took place. This was one of the main reasons for the RAD's rejection of the appeal. Ms. Henry's only explanation is that she maintains that acts of revenge can target either the person who committed a wrongdoing or their relatives and that Ms. Henry, as a woman, would be more likely to face retaliation.

[58] Moreover, it was not for the RAD, in the absence of such evidence, to conclude that the presence of the persecuting group was national rather than regional. Ms. Henry has not cited any evidence to me to establish that the group in question has a national presence. Rather, the lack of persecution of Ms. Henry's sister seems to point to the contrary.

[59] With respect to the RPD's and the RAD's doubts about the events of 2014, the presumption of truth enjoyed by refugee protection claimants is not absolute. Indeed, it is well established that "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" (*Pedro Enrique Juarez Maldonado (Applicant) v Minister of Employment and Immigration (Respondent)*, [1980] 2 FC 302 at para 5) [emphasis added].

[60] In short, Ms. Henry invites me to re-assess the evidence put before the RAD in order to replace its reasoning with mine; that is not our role. The RAD's finding as to the reasonableness of the IFA in this case does not call for intervention by this Court. The RAD's decision is clear, well detailed, and based on facts and law. There is simply no evidence of unreasonableness in the RAD's decision in this case.

[61] I must say that there is no evidence that Ms. Henry's Canadian spouse will follow her if she were to return to Haiti. However, as I mentioned earlier, the fact that several members of Ms. Henry's family still live in Haiti and are expected to provide her with support, including Ms. Henry's sister and brothers who live in Port-au-Prince and are not subject to any harassment, weighs heavily in favour of finding that the decision is reasonable and that there are no personalized risks to Ms. Henry, even though she is a woman and is one of her father's close relatives.

V. Conclusions

[62] The persecution occurred over 25 years ago, and I cannot conclude that the RAD's finding regarding Ms. Henry's credibility with respect to her allegations of harassment in 2014 is unreasonable. Thus, I am of the opinion that the RAD's finding that Ms. Henry had not met the burden of establishing the lack of an IFA in Port-au-Prince is not unreasonable, since agents of persecution no longer seem to have an interest in persecuting Ms. Henry and the hardships she might face in Haiti are no different from the persecution experienced by all other women in Haiti.

[63] I would therefore dismiss the application for judicial review.

JUDGMENT in IMM-7735-19

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.

2. There is no question to certify.

"Peter G. Pamel"
Judge

Certified true translation
Michael Palles, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

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