



RAD File No. / N° de dossier de la SAR : MB3-04533

*Private Proceeding / Huis clos*

2014 CanLII 10968 (CA IRB)

## Reasons and decision – Motifs et décision

<b>Person who is the subject of the appeal</b>	<b>XXXXX XXXXX</b>	<b>Personne en cause</b>
<b>Appeal considered/heard at</b>	Montréal, Quebec	<b>Appel instruit à</b>
<b>Date of decision</b>	February 25, 2014	<b>Date de la décision</b>
<b>Panel</b>	Normand Leduc	<b>Tribunal</b>
<b>Counsel for the person who is the subject of the appeal</b>	M <sup>c</sup> Éric Taillefer	<b>Conseil de la personne en cause</b>
<b>Designated representative</b>	N/A	<b>Représentant désigné</b>
<b>Counsel for the Minister</b>	N/A	<b>Conseil du ministre</b>

## REASONS AND DECISION

### INTRODUCTION

[1] **XXXXX XXXXX**, a citizen of Haiti, is appealing against the decision of the Refugee Protection Division (RPD) rejecting his claim for refugee protection.

### DETERMINATION OF THE APPEAL

[2] I find that the RPD erred in fact in its determination. I am unable to set aside the RPD's determination and substitute the determination that should have been made, without hearing evidence that was presented to the RPD regarding the issue of the appellant's credibility, and, if necessary, regarding the issues of whether an internal flight alternative (IFA) is available to the appellant and whether the appellant could receive adequate state protection in Haiti.

[3] Under subsection 111(1) of the *Immigration and Refugee Protection Act* (IRPA), the Refugee Appeal Division (RAD) refers the matter to the RPD for re-determination by a differently constituted panel.

### BACKGROUND

[4] The appellant is a 28-year-old man from the city of Port-au-Prince. He alleged to the RPD that, in his country, he feared members of the Lavalas political party, who were targeting him because his late father belonged to the Front pour l'avancement et le progrès haïtien (FRAPH) [Front for the Advancement and Progress of Haiti]. The appellant alleged that members of the Lavalas party killed his father in 1999 and that since then, he and other members of his family have been persecuted in their neighbourhood.

[5] The appellant alleged that members of the Lavalas party regularly threatened to kill him and that a Lavalas gang leader stole money that his mother sent him in 2011. Another member of the same gang then allegedly stole his laptop computer and beat him.

[6] The appellant left his country on **XXXXX XXXXX**, 2013, for Canada, where his mother, a refugee, already lived, and where he was admitted as a visitor. He claimed refugee protection approximately one month after his arrival.

[7] The RPD rejected the claim for refugee protection because the appellant's credibility was [translation] "significantly undermined" and because an IFA was available to him in Haiti, in the city of Cap-Haïtien specifically.

[8] Before the RAD, the appellant argued that the RPD erred in the assessment of his credibility as follows:

- by finding that his failure to mention his sister's alleged rape in his Basis of Claim Form (BOC Form) undermined his credibility;
- by finding that his credibility was undermined because of his delay in claiming refugee protection after arriving in Canada; and
- by finding that he had no objective fear in light of the documentary evidence indicating that the Lavalas party is no longer an influential party.

[9] The appellant also argued that the RPD erred in its analysis of the IFA by concluding that he would have no fear of persecution or of threats to his life in Cap-Haïtien.

[10] For these reasons, the appellant is asking the RAD to set aside the RPD's determination and to grant him refugee protection, or, alternatively, to refer the matter to the RPD for re-determination of his claim for refugee protection.

## **STANDARD OF REVIEW**

[11] The IRPA does not expressly set out the standard of review that the RAD should apply when reviewing RPD decisions, nor is that standard of review directly set out in the case law. The appellant also does not propose in his memorandum what the standard of review should be.

[12] In the 2008 *Dunsmuir* decision,<sup>1</sup> the Supreme Court of Canada revisited the foundations of judicial review and the standards of review applicable in various situations. In order to simplify the analysis, the Supreme Court held that there should now be only two standards of review: correctness and reasonableness.

[13] Although the RAD does not conduct judicial reviews of RPD decisions, but rather acts as an appellate body within the same administrative tribunal, the Immigration and Refugee Board of Canada, I am of the opinion that without more direct guidance from higher courts, the principles developed in *Dunsmuir* can be applied to the RAD.

[14] In paragraph 51 of its decision in *Dunsmuir*, the Supreme Court states the following:

... [Q]uestions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness while many legal issues attract a standard of correctness. Some legal issues, however, attract the more deferential standard of reasonableness.

[15] In this case, the issue of whether the RPD erred in its assessment of the appellant's credibility is a question of fact, and I will therefore apply the reasonableness standard of review.

[16] The issue of whether the facts in this case result in the finding that an IFA is available to the appellant is a question of mixed fact and law. Therefore, I will also apply the reasonableness standard of review.

[17] In paragraph 47 of *Dunsmuir*, the Court states that reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. Judicial deference is therefore required, and deference must be given to the RPD's decision.

## ANALYSIS

[18] The first issue in this case is whether the RPD erred in its assessment of the appellant's credibility.

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<sup>1</sup> *Dunsmuir v. New Brunswick*, 2008 SCC 9, (2008) 1 SCR 190.

[19] In my view, the answer to that question is yes, for the following reasons.

[20] I find that the RPD's conclusion regarding the appellant's credibility is tainted by the RPD's lack of clear findings in this regard.

[21] In a section of its reasons entitled [translation] "credibility," the RPD wrote first that [translation] "the panel is of the view that your testimony was not credible on certain aspects, including the following."

[22] The RPD then found that the appellant failed to mention in his BOC Form that his sister in Haiti was raped, but also found that [translation] "while this omission is not fatal to your claim for refugee protection, it undermines your credibility."

[23] After reviewing the documentary evidence on the situation of the Lavalas political party, the RPD wrote that [translation] "you (the appellant) did not objectively provide a basis for your claim." In my view, the RPD's finding is unclear. I am not certain of what the RPD means by [translation] "you did not objectively provide a basis for your claim." Does it mean that the RPD does not believe that the appellant was threatened by members of the Lavalas party? Does it mean that the RPD finds that the documentary evidence shows that Lavalas supporters are no longer threatening anyone in Haiti? That last conjecture does not seem reasonable because the documentary evidence cited by the RPD indicates that Lavalas party members have transformed into criminal groups, which, in my view, does not negate the possibility that these individuals could threaten the appellant, either for political or other reasons. The RPD did not conduct an analysis on the subject, which also constitutes an error, in my view.

[24] The RPD then found, taking into account that the appellant lived at the same address for 13 years, that he had family and a job in Haiti and that his profile [translation] "is not consistent with the profile of a person who fears for his life or who fears persecution." Once again, the RPD's finding seems unclear. Is it a finding of a lack of credibility? If that is the case, the RPD does not mention what explanations the appellant gave on the subject, which also constitutes an error, in my view.

[25] The RPD also wrote that the appellant's profile is not consistent with the profile of a person who genuinely fears for his life because he waited one month before claiming refugee protection in Canada. Once again, not only is the RPD's finding not specific enough regarding the appellant's credibility, but it also concerns a subject that is of secondary importance to the claim and that, in my view, cannot be fatal as such to the claim.

[26] At the end of its section on credibility, the RPD wrote the following: [translation] "Therefore, regarding all the elements of credibility, I am of the opinion that your credibility is significantly undermined. However, the internal flight alternative was also examined." In my view, this finding is unclear with respect to which of the appellant's allegations are not credible and which are credible. In addition, the statement [translation] "However, the internal flight alternative was also examined" suggests that the reason that the claim was rejected was not because the appellant's allegations lacked credibility, but because an IFA was available to him in Haiti. If the RPD did not consider that the appellant had a well-founded fear of persecution or would be subjected to a risk to his life or to a risk of cruel and unusual treatment or punishment in the city of Port-au-Prince, why assess the IFA in the city of Cap-Haïtien? Nothing in the RPD's reasons indicates that it is an alternative finding.

[27] The second issue in this case is whether the RPD erred in finding that an IFA is available to the appellant in Haiti.

[28] Since I already found that the RPD's decision on the appellant's credibility was not reasonable, it automatically follows that the RPD's finding on the IFA must be erroneous. The RPD, regarding the first prong of the IFA analysis, namely, to determine whether the appellant is at risk in Cap-Haïtien, wrote the following: [translation] "...[I]f your fear in Cap-Haïtien is the same as your fear in Port-au-Prince, the issue is already resolved in my case." Should it be understood that the RPD found that the appellant failed to show fear in Port-au-Prince? First, the sentence seems ambiguous to me. In addition, since I have already found that the RPD's findings on the appellant's credibility were not reasonable, it follows that the RPD's analysis of the IFA must also be erroneous because it was conducted in a factual vacuum, or at least based on a false premise.

[29] I am of the opinion that the RPD must make clear findings regarding which of the appellant's allegations it finds credible or not credible, and only afterward, if necessary, assess the IFA.

[30] In view of the foregoing, I find that the RPD's decision is not reasonable because it is unintelligible and does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

### REMEDIES

[31] I find that the RPD erred in fact in its determination. I am unable to set aside the RPD's determination and substitute the determination that should have been made, without hearing evidence that was presented to the RPD regarding the issue of the appellant's credibility, and, if necessary, regarding the issues of whether an IFA is available to the appellant and whether the appellant could receive adequate state protection in Haiti.

[32] Under subsection 111(1) of the IRPA, the RAD refers the matter to the RPD for re-determination by a differently constituted panel.

[33] The appeal is allowed.

*Normand Leduc*

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**Normand Leduc**

*February 25, 2014*

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**Date**

IRB translation  
Original language: French