Immigration and
Refugee Board of Canada

Refugee Appeal Division

Commission de l'immigration
et du statut de réfugié du Canada

Section d'appel des réfugiés

RAD File No. / N° de dossier de la SAR : MB4-00066
MB4-00067 MB4-00068 MB4-00069 MB4-00070

Private Proceeding / Huis clos

Reasons and decision – Motifs et décision

Persons who are the subject of the appeal	**XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX**	**Personnes en cause**
Appeal considered / heard at	Montréal, Quebec	**Appel instruit à**
Date of decision	March 18, 2014	**Date de la décision**
Panel	Normand Leduc	**Tribunal**
Counsel for the persons who are the subject of the appeal	M[e] Jeffrey Platt	**Conseil des personnes en cause**
Designated representative	XXXX XXXX XXXX Robert Naylor (PRAIDA)	**Représentante désignée**
Counsel for the Minister	N/A	**Conseil du ministre**

Canada

REASONS AND DECISION

INTRODUCTION

[1] **XXXX XXXX XXXX**, her three minor daughters, **XXXX XXXX XXXX**, **XXXX XXXX XXXX** and **XXXX XXXX**, and her husband's minor son, **XXXX XXXX XXXX**, all citizens of Guinea, are appealing against a decision of the Refugee Protection Division (RPD) rejecting their refugee protection claim.

[2] They presented new evidence in their appeal and are requesting that a hearing be held before the Refugee Appeal Division (RAD).

[3] The principal appellant, Ms. XXXX, was appointed as the designated representative for her three minor children before the RAD, while a social worker from the organization PRAIDA was appointed as the designated representative for the minor male appellant, XXXX XXXX XXXX

DETERMINATION OF THE APPEAL

[4] Pursuant to subsection 111(1) of the *Immigration and Refugee Protection Act* (IRPA), the RAD confirms the determination of the RPD, namely, that XXXX XXXX XXXX, her three minor daughters, XXXX XXXX XXXX, XXXX XXXX XXXX and XXXX XXXX, and XXXX XXXX XXXX are not "Convention refugees" under section 96 of the IRPA or "persons in need of protection" within the meaning of section 97 of the IRPA.

BACKGROUND

[5] In her Basis of Claim Form (BOC Form) submitted to the RPD, the principal appellant alleged that after the birth of her third daughter, her relationship with her family and her in-laws deteriorated because she had given birth only to girls. Her father-in-law allegedly demanded that his son leave her or take another wife, but the principal appellant's husband apparently refused.

[6] The principal appellant alleged that she and her daughters were subsequently mistreated by both families, and in particular beaten and deprived of food.

[7] The principal appellant also alleged that her two oldest daughters were subjected to female circumcision, which seriously affected their health, and that her father-in-law was demanding that their youngest daughter undergo the same procedure.

[8] After receiving death threats from both families, the appellants left Guinea for Canada on or around XXXX XXXX, 2013, and claimed refugee protection there. The minor appellants based their claim on that of the principal appellant.

[9] The Minister of Citizenship and Immigration Canada (the Minister), through his representative, intervened before the RPD by filing a notice of intention to intervene and some documents, alleging that the credibility of the principal appellant was undermined by statements that contradicted the statements in her BOC Form, which she allegedly made when she applied for a Canadian visa, given that she failed to mention that her husband had returned to Guinea and that the appellants did not claim refugee protection in the European countries they stayed in before they arrived in Canada.

[10] The RPD rejected the claims for refugee protection on the grounds that the principal appellant's essential allegations were not credible.

[11] Before the RAD, the appellants submit that the RPD erred in the assessment of the principal appellant's credibility, for reasons that will be set out later on in the "Analysis" section.

[12] For these reasons, the appellants are requesting that the RAD set aside the determination of the RPD and grant them refugee protection or refer the matter to the RPD for re-determination.

ADMISSIBILITY OF NEW EVIDENCE

[13] In their memorandum, the appellants state that they [translation] "are presenting new evidence that meets the requirements of subsection 110(4) of the IRPA, that is, evidence that was not available at the time of the rejection of their claim" (see page 14 of the memorandum). There

follows a list of 11 documents, of which only the last 3 were not presented at the time of the RPD hearing. Those documents are as follows:

- 9: Information on types of sexual removal, from UNICEF;
- 10: Article: "L'excision des fillettes" [female circumcision of young girls], from the website droitsenfants.fr; and
- 11: Other information on excision, taken from internet, from the Wikipedia website.

[14] Subsection 110(4) of the IRPA provides that the person who is the subject of the appeal may present to the RAD only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.

[15] Subparagraph 3(*g*)(iii) of the *Refugee Appeal Division Rules* (RAD Rules) also requires that the appellant's memorandum include full and detailed submissions regarding how any new evidence presented meets the requirements of subsection 110(4) of the IRPA and how that evidence relates to the appellant.

[16] To begin with, I find that the appellants have not complied with the requirements of subparagraph 3(*g*)(iii) of the Rules in that they failed to provide full and detailed submissions regarding how this evidence meets the requirements of subsection 110(4) of the Act and, in particular, regarding the reasons these three documents were not reasonably available at the time of the rejection of their claim, or why they could not reasonably have been expected to have presented them at the time of the rejection.

[17] Document 9 does in fact date from July 2010, which is before the date of the rejection of the claim, while documents 10 and 11 are undated. Moreover, no source or origin is indicated on document 10, while the source of document 11 is allegedly Wikipedia, which in my opinion is an unreliable source because the information on that site can be amended by users.

[18] For these reasons, I do not accept documents 9, 10 and 11 into evidence.

[19] On February 3, 2014, counsel for the appellants provided to the RAD a document that appears to be an affidavit from the principal appellant's husband. Counsel wrote the following with respect to this document: "I just received an additional proof in the above-mentioned file, an affidavit from XXXX XXXX, the principal appellant's husband. The affidavit explains why he had to leave Canada, why he went back to Guinea, and where he is now."

[20] Rule 29 of the RAD Rules states:

Documents or Written Submissions not Previously Provided

> **29.** (1) A person who is the subject of an appeal who does not provide a document or written submissions with the appellant's record, respondent's record or reply record must not use the document or provide the written submissions in the appeal unless allowed to do so by the Division.
>
> (2) If a person who is the subject of an appeal wants to use a document or provide written submissions that were not previously provided, the person must make an application to the Division in accordance with rule 37.
>
> (3) The person who is the subject of the appeal must include in an application to use a document that was not previously provided an explanation of how the document meets the requirements of subsection 110(4) of the Act and how that evidence relates to the person, unless the document is being presented in response to evidence presented by the Minister.
>
> (4) In deciding whether to allow an application, the Division must consider any relevant factors, including
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> (*a*) the document's relevance and probative value;
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> (*b*) any new evidence the document brings to the appeal; and
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> (*c*) whether the person who is the subject of the appeal, with reasonable effort, could have provided the document or written submissions with the appellant's record, respondent's record or reply record.

[21] I find that the appellants, or their counsel, did not comply with subrules 29(2) and (3) of the Rules, given that they did not make an application in accordance with rule 37 of these rules to obtain permission to provide a document that was not previously provided with the appellants' record, which was provided to the RAD on January 22, 2014.

[22] For that reason, I do not accept that document into evidence before the RAD.

DECISION ON WHETHER TO HOLD A HEARING

[23] Pursuant to subsection 110(6) of the IRPA, the RAD may hold a hearing if, in its opinion, there is new evidence that is admissible and that meets the following three criteria: 1) it raises a serious issue with respect to the credibility of the person; 2) it is central to the decision with respect to the refugee protection claim; and 3) if accepted, it would justify allowing or rejecting the refugee protection claim.

[24] Since the provision preliminary to this provision was not met, in that I did not admit any new documents into evidence, I conclude that a hearing may not be held in this appeal.

STANDARD OF REVIEW

[25] 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 set out explicitly in the case law. The appellants also do not suggest a standard of review in their memorandum.

[26] In *Dunsmuir*,[1] rendered in 2008, 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 determined that there should now be only two standards of review: correctness and reasonableness.

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

[28] Paragraph 51 of the Supreme Court's decision in *Dunsmuir* states that:

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1 *Dunsmuir v. New Brunswick*, 2008 SCC 9, (2008) 1 SCR 190.

> …questions 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.

[29] In the case at hand, I find that the error alleged by the appellants concerning the RPD's assessment of the principal appellant's credibility is a question of fact and is therefore reviewable on a standard of reasonableness.

[30] At 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 decision.

ANALYSIS

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

[32] To find that the principal appellant's allegations were not credible, the RPD first found that the fact that she omitted in her BOC Form that her husband had travelled to Canada with her and their children and later returned to Guinea undermined her credibility. The principal appellant testified about her husband at the beginning of the hearing, and the RPD was of the opinion that she [translation] "added" these facts because she was confronted with the evidence on her husband's travels that had been submitted by the Minister. The principal appellant's explanation for this omission—that she did not know that she was supposed to write that in her BOC Form—was found not reasonable by the RPD (see paragraphs 17 to 22 of the RPD's reasons).

[33] The appellants' memorandum does not contain any submissions regarding this finding by the RPD. In my opinion, it was open to the RPD to draw negative inferences from this omission.

[34] Still with respect to the principal appellant's husband, the RPD then found it not credible that someone like him, who fled his country because he feared for his life, could return there a few days later, for [translation] "business," according to the principal appellant, and subsequently make round trips between XXXX XXXX and Guinea. In the RPD's opinion, there was doubt about the appellants' allegations regarding the risks to their lives (see paragraphs 23 and 24 of the RPD's reasons).

[35] In this regard, the appellants submit that the RPD must consider all the circumstances, and especially the principal appellant's explanations, when assessing this fact.

[36] In my opinion, that is what the RPD did. The principal appellant's explanations on this point were vague, that is, that her husband had returned to Guinea for [translation] "business"—business that she moreover claimed not to know (see paragraph 47 of the RPD's reasons). The RPD considered all the circumstances presented to it, particularly the fact that the principal appellant failed to mention in her BOC Form that her husband had returned to Guinea. The facts in this case can be distinguished from the facts in the case law submitted by the appellants: in *Camargo*,[2] the refugee protection claimant had returned to his country for four days for the purpose of coming to Canada; in this case, the female appellant's husband returned to his country after coming to Canada. In my opinion, it was open to the RPD to draw negative inferences from the principal appellant's husband's return to Guinea, as it did.

[37] The RPD then identified another omission that, in its opinion, undermined the credibility of the principal appellant: at the beginning of the hearing, she verbally added that the male appellant, XXXX XXXX XXXX, her husband's XXXX XXXX, had been accused in Guinea [translation] "of XXXX XXXX XXXX and that he had been hit XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX." The RPD found the principal appellant's explanations for this omission—that she [translation] "did not think that the information given was insufficient and that she is illiterate"—to be unreasonable, given that the

principal appellant had been able to provide details about her other allegations (see paragraphs 25 to 32 of the RPD's reasons).

[38] In this regard, the appellants submit that this omission is not fatal to the claim, and they propose hypotheses to explain the omission (see page 18 of the appellants' memorandum).

[39] I agree with the appellants that this omission, in isolation, is undoubtedly not fatal to the claim, but in my opinion, it was nevertheless open to the RPD to draw negative inferences from the omission, as it did. The RPD considered the principal appellant's explanations for the omission, and I cannot, by that very fact, consider the other explanations or hypotheses submitted in the memorandum, which were not mentioned before the RPD.

[40] The RPD subsequently drew negative inferences about the credibility of the principal appellant because of her failure to mention in her BOC Form that she, her husband and her children had been helped by her husband's brother. In its analysis, the RPD considered that the principal appellant added that they had received assistance from her brother-in-law, whereas she had written that she especially fears her in-laws, after the Minister submitted evidence—the Canadian visa application—establishing the links between her husband and his brother (see paragraphs 33 and 34 of the RPD's reasons).

[41] The appellants submit in this regard that this omission or contradiction is not fatal to the claim. Although in isolation it may not be fatal, I am of the opinion that it was still open to the RPD to draw negative inferences from this omission, as it did.

[42] The RPD then found that the principal appellant had not established, on a balance of probabilities, that her daughters risk female circumcision should they return to Guinea, as she alleged. The RPD noted that the medical certificates regarding the female circumcision of the principal appellant's daughters are contradictory: the certificates issued in Guinea indicate, in the case of XXXX XXXX and XXXX XXXX, that [translation] "the removal of the clitoris was noted" (see pages 331 and 332 of the RPD record), and, in the case of XXXX, that "the presence

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[2] *Camargo v. M.C.I.* 2003, F.C.J. No.1830, 2003 F C 1434.

of the clitoris was noted" (see page 330 of the RPD record); however, the certificates issued in Canada indicate the following with respect to the two oldest daughters: "There is a small scar on the prepuce. The exam could be compatible with a partial circumcision or an incision" (see pages 297 and 300 of the RPD record). After also considering the documentary evidence submitted on this subject, the RPD concluded that the oldest daughters had been subjected to an incision or a symbolic mark, and not to female circumcision, and that the youngest daughter could also be subjected to an incision or symbolic mark, like her sisters, and not to female circumcision. The RPD attached no probative value to the medical certificates from Guinea (see paragraphs 35 to 40 of the RPD's reasons).

[43] The appellants submit in this regard that the RPD erred in not attaching any probative value to the certificates from Guinea, that they do not contradict the ones issued in Canada and that the RPD erred in concluding that the two oldest daughters had not been subjected to female circumcision.

[44] In my opinion, the appellants failed to establish that the RPD erred in this regard. I am of the opinion that the RPD's conclusion with respect to the female circumcision is clearly explained, that it is based in particular on the contradictory evidence that was submitted and on the general documentary evidence on female circumcision, and that it falls within a range of possible, acceptable outcomes. The documentary evidence submitted, in my opinion, clearly differentiates between female circumcision as such and a symbolic act in lieu thereof. In my opinion, it was also reasonable for the RPD not to attach any probative value to the certificates issued in Guinea because they contradict the ones issued in Canada with respect to the female circumcision. It was open to the RPD to attach greater probative value to the certificates issued by a Canadian doctor than to the ones issued by a Guinean doctor.

[45] In my opinion, the reasons of the RPD set out in the preceding paragraphs were sufficient to dispose of the case before it, and since I found them reasonable, they are also sufficient to dispose of the case before the RAD. Therefore, it will not be necessary for me to further assess the final reasons of the RPD that, in its opinion, undermined the credibility of the appellants, that is, the fact that they did not claim asylum in France or Germany, where they stayed before

coming to Canada, and the fact that they waited a month after they arrived before claiming refugee protection in Canada—reasons that, in any event, could not be fatal to the refugee protection claim.

[46] In light of the above, I conclude that the determination of the RPD is reasonable because it is transparent and intelligible and falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

REMEDIES

[47] For these reasons, I confirm the determination of the RPD, namely, that **XXXX XXXX XXXX**, her three minor daughters, **XXXX XXXX XXXX**, **XXXX XXXX XXXX** and **XXXX XXXX**, and **XXXX XXXX XXXX**, are not "Convention refugees" under section 96 of the IRPA or "persons in need of protection" within the meaning of section 97 of the IRPA.

[48] The appeal is dismissed.

Normand Leduc

Normand Leduc

March 18, 2014

Date

IRB translation
Original language: French