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Private Proceeding / Huis clos

Reasons and Decision – Motifs et décision

Claimant(s)

XXXX XXXX XXXX XXXX
XXXX XXXX XXXX XXXXX
XXX XXXX XXXX XXXX

Demandeur(e)s d'asile

Date(s) of hearing

November 23, 2018

Date(s) de l'audience

Place of hearing

Montréal, Quebec

Lieu de l'audience

Date of decision
and reasons

December 5, 2018

Date de la décision
et des motifs

Panel

Donna Ramacieri

Tribunal

Counsel for the claimant(s)

Guillaume Cliche-Rivard

Conseil(s) du (de la/des)
demandeur(e)s d'asile

Designated representative

XXXX XXXX XXXX XXXX

Représentant(e) désigné(e)

Counsel for the Minister

N/A

Conseil du (de la) ministre

REASONS FOR DECISION

[1] The three minor children, XXXX XXXX XXXX, XXXX XXXX XXXX and XXXX XXXX XXXX XXXX, citizens of the United States, are claiming refugee protection under section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act* (IRPA).

[2] Their mother, XXXX XXXX XXXX XXXX, was designated as the representative for her minor children.

DETERMINATION

[3] The panel determines that the claimants have failed to establish that there is a serious possibility of persecution on one of the Convention grounds or that, on a balance of probabilities, the claimants would be personally subjected to a danger of torture, to a risk to their life, or to a risk of cruel and unusual treatment or punishment if they had to return to their country.

SUMMARY OF ALLEGATIONS

[4] The claimants fear returning to the United States. Since neither of the parents have legal status in the United States, they fear being placed in foster care or with a host family where they might be mistreated. They also fear being separated from their mother. Finally, two of the claimants, XXXX XXXX XXXX and XXXX XXXX XXXX XXXX, fear that they will not have access to the medical care that they need.

IDENTITY

[5] The claimants' identities were established to the panel's satisfaction by means of a copy of their passports entered into evidence.¹

ANALYSIS

¹ Document 2 – Information package provided by the Canada Border Services Agency (CBSA) and/or Immigration, Refugees and Citizenship Canada (IRCC), formerly Citizenship and Immigration Canada.

[6] The panel took into consideration the Chairperson's *Guideline 3: Child Refugee Claimants: Procedural and Evidentiary Issues*.²

[7] The panel cannot allow their refugee protection claim for the following reasons.

[8] First, the panel would like to address the issue of the claimants' multiple citizenships.

[9] Their mother is Guatemalan and their father is Peruvian.

[10] On October 22, 2018, the panel sent the claimants' lawyer a letter notifying him that the packages on Guatemala and Peru would be submitted into evidence because it was possible that there would be multiple citizenships to analyze.

[11] On November 19, 2018, the claimants' lawyer sent the panel documentary evidence on Guatemala. He indicated in his cover letter that he was going to present his submissions regarding Peru at the hearing.

[12] The documentary evidence on the record indicates that the children have Guatemalan and Peruvian citizenship.³ This is not being challenged by their lawyer.

[13] The panel decided to start its analysis with the refugee protection claim made against the United States. And since it is rejecting that claim for the following reasons, it will not pursue its analysis against the other countries of citizenship.

[14] The evidence on the record does not allow for the application of paragraph 97(1)(a) of the IRPA; therefore, the panel will analyze the refugee protection claim only under section 96 and paragraph 97(1)(b) of the IRPA.

[15] In this case, the claimants' mother and their lawyer argue in their submissions that the United States is unable to protect the children.

² Chairperson's *Guideline 3: Child Refugee Claimants: Procedural and Evidentiary Issues*, Immigration and Refugee Board, effective date: September 30, 1996.

³ Document 6 – *Nationality Law*, Law No. 26574, Peru, art. 2.

Document 7 – Archive – National Documentation Package, Guatemala, March 14, 2014, Tab 3.2: *Response to Information Request*, Immigration and Refugee Board of Canada, April 7, 2005, GTM43453.FE.

[16] The mother of the claimants testified that she read in the media that children taken into state care are mistreated, put in cages, abused, tied up, murdered and sexually assaulted. She testified that her children need her, especially XXXX and XXXX, who need special care.

[17] A letter from the children's pediatrician states that XXXX has a severe language delay, selective mutism, high social anxiety, and suspected symptoms of autism spectrum disorder. As for XXXX, she suffers from a severe language delay, and the doctor suspects an intellectual delay. XXXX also presents symptoms of anxiety related to traumatic events (car accidents, an animal attack). According to the doctor, her obesity needs to be assessed to eliminate metabolic complications.⁴

[18] In his written arguments, the claimants' lawyer submits to the panel that the United States is unable to protect the children because the system is failing. It would also be unable to provide access to appropriate health care and education for the claimants because the allowances paid to host families do not cover all the estimated costs for the care of children with cognitive delays.⁵ In particular, he submits that the documentary evidence indicates that 20% of children in state care end up on the street at the age of 18; that one out of every two children will be employed at the age of 24; that seven out of ten girls will become pregnant before the age of 21; that 25% will suffer from post-traumatic stress disorder; and that dozens of children suffer extreme abuse in their family before being placed in state care.⁶

[19] The panel finds that adequate protection will be available to the claimants in the United States for the following reasons.

⁴ Document 3 – Exhibit P-17: Centre intégré universitaire de santé et de services sociaux de l'est de l'Île de Montréal (Dr. Tinh-Nhan Luong), *Évaluation pédiatrique d'Angela et de Kevin* [pediatric evaluation for Angela and Kevin], dated October 15, 2018, p. 18.

⁵ Document 3 – Written arguments, dated November 12, 2018, para. 19.

⁶ Document 3 – Written arguments, dated November 12, 2018, para. 26.

[20] Under the 14th Amendment to the Constitution, the claimants were granted US citizenship, despite the fact that their parents are not citizens, because they were born on US soil.⁷ In that regard, the claimants enjoy the full rights of US citizens.

[21] In particular, they benefit from a series of laws on the protection of children and mechanisms in case of abuse. For 27 years, the National Child Abuse and Neglect Data System (NCANDS), a national organization, has been collecting data on child abuse in the United States. The most recent edition of the National Documentation Package states:

All 50 states, the District of Columbia, and the U.S. Territories have child abuse and neglect reporting laws that mandate certain professionals and institutions refer suspected maltreatment to a child protective services (CPS) agency.

Each state has its own definitions of child abuse and neglect that are based on standards set by federal law. Federal legislation provides a foundation for states by identifying a set of acts or behaviors that define child abuse and neglect. The Child Abuse Prevention and Treatment Act (CAPTA), (P.L. 100-294), as amended by the CAPTA Reauthorization Act of 2010 (P.L. 111-320), retained the existing definition of child abuse and neglect as, at a minimum:

Any recent act or failure to act on the part of a parent or caretaker which results in death, serious physical or emotional harm, sexual abuse or exploitation; or an act or failure to act, which presents an imminent risk of serious harm.

Most states recognize four major types of maltreatment: neglect, physical abuse, psychological maltreatment, and sexual abuse. Although any of the forms of child maltreatment may be found separately, they can occur in combination.⁸

[22] Moreover, the same report indicates:

A victim may have been maltreated multiple times by the same perpetrator or by different combinations of perpetrators (e.g., mother alone, mother and nonparent(s), mother and father). This analysis counts every combination of relationships for each victim in each report and, therefore, the percentages total more than 100.0 percent. For FFY 2016, 91.4 percent of victims were maltreated by one or both parents. The parent(s) could have acted together, acted alone, or acted with up to two other people to maltreat the child. Approximately 70.0 percent of victims were maltreated by a mother, either acting alone (40.3%) or with a father and/or nonparent (28.4%). More than 13.0 percent (13.4%) of victims were maltreated by a perpetrator who was not the child's parent. The largest categories in the nonparent group were male relative,

⁷ Document 4 – National Documentation Package, United States, March 29, 2018 (NDP United States), Tab 3.4: *Report on Citizenship Law: United States of America*, European University Institute, European University Democracy Observatory on Citizenship, Peter J. Spiro, July 2015, p. 13.

⁸ Document 4 – National Documentation Package, United States, *supra*, footnote 7, Tab 5.4: *Child Maltreatment 2016*, Child Welfare Information Gateway, February 1, 2018, p. 10.

male partner of parent, and “other.” (See table 3–16 and related notes.) The NCANDS category of “other” perpetrator relationship includes any relationship that does not map to one of the NCANDS relationship categories. According to states’ commentary (appendix D), this category includes nonrelated adult, nonrelated child, foster sibling, babysitter, household staff, clergy, and school personnel.⁹

[23] The panel notes from this evidence that not only are there laws, but also that the states have obligations to protect the children. The panel also cannot ignore that the number of children abused by their parents is higher than that of children abused by other categories of persons in authority. The panel also takes into account that the evidence indicating that a portion of the population of children in state care have already been victims of violence, which in the panel’s view, makes it more difficult to rehabilitate them once they are out of the system.

[24] As for the examples of the horrible abuse of children in state care, the documentary evidence submitted by the claimants indicates that, in many cases, charges are laid against the abusers.¹⁰

[25] The panel also takes into account that there are initiatives such as the *Fostering Connections to Success and Increasing Adoption Act 2008*, which requires that child welfare agencies have a plan in place to ensure the stability of children’s education; or the *Uninterrupted Scholars Act* to ensure academic follow-up between schools. There are also volunteer networks such as Court Appointed Special Advocates, to ensure that the children are not lost in legal and administrative red tape.¹¹

[26] The claimants’ lawyer also submitted into evidence a guide from the US Department of Education. It states:

⁹ Document 4 – Ibid., p. 37.

¹⁰ Document 3 – Exhibit P-20: Fox, “Children removed from Roy home after foster parents booked for felony child abuse,” March 26, 2017;
Document 3 – Exhibit P-21: *New York Post*, “Man accused of sexually abusing foster children headed to trial,” March 28, 2017;
Document 3 – Exhibit P-22: *The Mercury News*, “South Bay Sex Abuse Lawsuit Ex-foster Child Awarded 30 million,” August 5, 2010;
Document 3 – Exhibit P-24: *New York Post*, “How Foster Care Turns into Hell,” April 7, 2017.

¹¹ Document 3 – Exhibit P-26: *The Atlantic*, “Every Time Foster Kids Move, They Lose Months of Academic Progress,” February 28, 2014.

The US Department of Education, in partnership with the US Department of Health and Human Rights Services, the US Department of Housing and Urban Development, the US Department of Transportation, the US Department of Labor, as well as foster youth and practitioners, developed this Foster Care transition Toolkit ... to inspire and support current and former foster youth pursuing college and career opportunities. The toolkit includes tips and resources to help foster youth access and navigate social, emotional, educational and skills barriers as they transition into adulthood.¹²

[27] Whereas the United States is a democracy in control of its institutions;¹³ there are laws to protect its citizens and minors in particular; the state plays its leading role in protecting minors who have been abandoned or abused by their families by having a national system of care; there are mechanisms in place to monitor the system; the criminal justice system has played its role in some cases of abuse; the various departments have worked together to create reintegration tools for children reaching adulthood; these are all examples indicating to the panel that despite some flaws in the system, the United States is able to protect its citizens adequately.

[28] The panel concludes that the claimants have therefore failed to rebut, with clear and convincing evidence, the presumption that the United States is able to protect them.

[29] Lastly, the claimants' mother testified that the children would suffer if they were to be separated from her.

[30] The separation of children from their mother is never desirable. The fact remains, however, that the separation of family members as the basis for a refugee protection claim cannot be successful. The Federal Court has already ruled on this matter:

[20] While Canadian immigration laws may strive to facilitate family unity in certain circumstances such as those contemplated by section 25 of the IRPA, Canadian refugee law does not recognize any fundamental right for refugee claimants to live together (*Chavez Carrillo v Canada (Citizenship and Immigration)*, 2012 FC 1228 (CanLII) at paras 15, 17; *Jawad v Canada (Citizenship and Immigration)*, 2012 FC 1035 (CanLII) at para 10; *Canada (Minister of Citizenship and Immigration) v Khan*, 2005 FC 398 (CanLII) at para 11). Moreover, the concept of family unity does not relieve a refugee claimant of the onus of demonstrating that he or she falls within

¹² Document 3 – Exhibit P-30, U.S. Department of Education, “Students in Foster Care,” last modified: June 27, 2015, p. 77.

¹³ Document 4: NDP, United States, *supra*, footnote 7, Tab 1.3: *United States. The World Factbook*, United States, Central Intelligence Agency, March 14, 2018;
Document 4: *Ibid.*, Tab 2.1: *United States. Freedom in the World 2018*, Freedom House, 2018.

the definition of “Convention refugee” (*Garcia Garcia v Canada (Citizenship and Immigration)*, 2010 FC 847 (CanLII) at para 15).¹⁴

[31] With respect to the allegation that the claimants would be personally subjected to a risk or to cruel and unusual treatment because of the separation, the panel is of the opinion that paragraph 97(1)(b) of the IRPA, like section 96 of the IRPA, does not recognize any fundamental right for the refugee protection claimants to live with their mother in order to fall within the definition of persons in need of protection.

CONCLUSION

[32] For these reasons, the panel determines that the claimants are not “Convention refugees” under section 96 of the IRPA or “persons in need of protection” within the meaning of subsection 97(1) of the IRPA.

[33] Consequently, the panel rejects the refugee protection claims of **XXXX XXXX XXXX**, **XXXX XXXX XXXX** and **XXXX XXXX XXXX XXXX**.

Donna Ramacieri

Donna Ramacieri

December 5, 2018

Date

IRB translation

Original language: French

¹⁴ *Nazari v. Canada (Citizenship and Immigration)*, 2017 FC 561.