



RPD File No. / N° de dossier de la SPR : TB4-08519

Private Proceeding / Huis clos

Reasons and Decision – Motifs et Décision

Claimant(s)	XXXX XXXX	Demandeur(e)(s) d'asile
Date(s) of Hearing	June 7, 2016	Date(s) de l'audience
Place of Hearing	Toronto, Ontario	Lieu de l'audience
Date of Decision and reasons	March 16, 2018	Date de la décision et des motifs
Panel	Daniel Marcovitch	Tribunal
Counsel for the Claimant(s)	Susan Woolner	Conseil(s) du (de la/des) demandeur(e)(s) d'asile
Designated Representative(s)	XXXX XXXX	Représentant(e)(s) désigné(e)(s)
Counsel for the Minister	Christine Houde	Conseil du (de la) ministre

2018 CanLII 125216 (CA IRB)

REASONS FOR DECISION

[1] XXXX XXXX (the “minor claimant”) came to Canada as an unaccompanied minor and seeks refugee protection pursuant to sections 96 and 97(1) of the *Immigration and Refugee Protection Act* (IRPA).¹

[2] Pursuant to Rule 20 of the RPD Rules, Ms. XXXX XXXX was appointed as the independent designated representative for the minor claimant.

[3] The Minister intervened on the primary bases of identity and credibility of the claim, including the credibility of witness testimony. The Minister also made submissions on subjective fear, delay in departure and internal flight alternative.

[4] The hearing and all pre-hearing conferences were conducted by a Member of the Refugee Protection Division who left the RPD on the same day that the last written submission was received from the minor claimant’s counsel. The current panel is rendering this decision on the basis of an agreement reached by counsel for the claimant, the independent designated representative and Minister’s Counsel that a new Member of Board decide the case based on hearing recordings and the paper record before the original Member.² The panel has added to and amended the Consolidated List of Documents (“CLOD”) as follows:

- a) Exhibit 3 has been amended to reflect the September 14, 2017 version of the National Documentation Package for India;
- b) Exhibit 12 has been added to the CLOD and consists of the package of photographs submitted by the minor claimant’s counsel as part of her written submissions package;
- c) Exhibit 13 is counsel’s written submissions for the minor claimant;
- d) Exhibit 14 is Minister’s counsel’s written submissions;

¹ *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, as amended, sections 96 and 97(1)

² Exhibit 15, Letter from Independent Designated Representative, XXXXX XXXXX, dated February 28, 2017 and letter from Minister’s Counsel dated March 2, 2017.

- e) Exhibit 15 is the letter from XXXX XXXX, the Independent Designated Representative, consenting to the within claim being decided by a new Member using the audio recording from the hearings and evidence before the original Member; and
- f) Exhibit 16 is the audio recording of the June 7, 2016 hearing.

[5] The panel has considered Chairperson's Guideline 3: Child Refugee Claimants: Procedural and Evidentiary Issues,³ in arriving at its determination.

[6] As the minor claimant was adjudged to be too young to provide evidence at her hearing, the panel has relied on the evidence adduced in the paper record and the witness testimony of the minor claimant's alleged uncle and aunt, XXXX XXXX XXXX XXXX ("JS") and XXXX XXXX ("NS") in arriving at its determination. Both JS and NS are Canadian citizens.

ALLEGATIONS

[7] The minor claimant's BOC was written by JS, based on information told to him by his sister, XXXX XXXX XXXX ("XXXX"), the minor claimant's alleged mother. Where JS had personal knowledge, this was also communicated in the minor claimant's BOC.

[8] It is alleged that XXXX, in 2009, entered a relationship with XXXX XXXX ("XXXX") and that she moved in with him in XXXX 2010. XXXX determined that XXXX was a heavy drinker after she moved in with him. XXXX got pregnant at approximately age XXXX and she gave birth to the minor claimant on XXXX XXXX, 2011. XXXX was against the pregnancy and pressured XXXX to have an abortion and when she refused, he became abusive. XXXX felt he was trying to force a miscarriage by pushing, tripping and kicking her.

[9] XXXX tried to involve the police as a result of this violence, but they would not take a report on her domestic abuse allegations. XXXX abused XXXX further for approaching the police.

³ Guidelines issued by the Chairperson pursuant to Section 65(3) of the *Immigration Act*, Immigration and Refugee Board, Ottawa, Canada, September 30, 1996, as continued in effect by the Chairperson on June 28, 2003 pursuant to section 159(1)(h) of the *Immigration and Refugee Protection Act*.

[10] XXXX left XXXX and moved back in with her mother in XXXX 2010, but XXXX continued to bother XXXX at mother's home until XXXX 2011.

[11] As XXXX had wanted XXXX to have an abortion and wanted nothing to do with the child, XXXX did not list XXXX as the father of the minor claimant on the birth certificate. However, about a year after the minor claimant was born, XXXX approached XXXX and stated that he now wanted to be a father to the minor claimant and get back together with XXXX. XXXX agreed as long as XXXX moved in with her and her mother. Shortly after he moved back in, he resumed his drinking and abusive behaviour to XXXX and also started abusing the minor claimant. The minor claimant allegedly became fearful of men as a result.

[12] The abuse continued until XXXX 2013 when XXXX called JS to come to India to help her get XXXX out of her home. Once JS got to India to assist, XXXX left the home, but then called to say that he had hired people to throw acid at XXXX and the minor claimant. XXXX also brandished a gun at JS and threatened him.

[13] As a result, JS and XXXX confined the minor claimant to the house and JS stayed for nine months to protect them. During this time, JS tried to get XXXX and the minor claimant out of India, by applying for Canadian and USA visa's but no visa was issued for XXXX. A USA visa was issued for the minor claimant and JS/NS travelled with the minor claimant to Disney World and then travelled to the USA/Canada border. XXXX agreed to let the minor claimant travel without her in order to be safe.

[14] The minor arrived in Canada on September 12, 2014 by way of the Ambassador Bridge border crossing with the United States. She was accompanied by Jagat Jeet Singh Sandhu.

[15] XXXX authorized JS to be the minor claimant's legal guardian.

DETERMINATION

[16] The panel determines that the minor claimant is not a Convention refugee or a person in need of protection pursuant to s.96 and s.97(1) of the IRPA. The determinative issue is identity.

ANALYSIS

Identity

[17] The decisive issue in this claim is identity, that is, the minor claimant's personal and national identity, including parentage. According to the jurisprudence, if a claimant cannot establish his or her identity on a balance of probabilities, the claim will simply fail.

[18] In *Su v. Canada (Citizenship and Immigration)*, 2012 FC 743, Madame Justice Snider stated the following:

Proof of identity is a pre-requisite for a person claiming refugee protection as without it there can “be no sound basis for testing or verifying the claims of persecution or, indeed for determining the Applicant’s true nationality” (*Jin v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 126 at para 26, [2006] FCJ No 181 (QL); see also *Liu v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 831 at para 18, [2007] FCJ No 1101(QL). Section 106 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] and s. 7 [now section 11] of the Refugee Protection Division Rules, SOR/2002-228 [Rules] set out the importance of establishing a claimant’s identity:

[...]

The *onus* is on the claimant to *produce acceptable documentation* establishing his or her identity. This is a *high burden*, as it should be.⁴

[19] A decision of the Board with respect to identity is *exclusively fact driven*.

[20] In *Yip*, the Federal Court held that a claimant has the “*fundamental obligation* to establish her or his identity on a balance of probabilities.”⁵ In *Kante*, the Court affirmed that a claimant

⁴ *Su v. Canada (Citizenship and Immigration)*, 2012 FC 743, at paras. 3-4.

⁵ *Yip, Fu On v. MEI* (F.C.T.D., no. A-921-92), Nadon, October 27, 1993.

must come to a hearing with *all of the evidence that he or she is able to offer* and believes is necessary to prove the claim.⁶

[21] In the view of the panel, if a claimant is not able to provide acceptable documentation, then an explanation which is reasonable must be given, and the claimant must establish her identity through other methods such as reliable, credible and trustworthy testimony. In *Duale* the Federal Court provided that it is up to the claimant to establish her identity and she must make a “genuine substantive effort to do so.”⁷ Ultimately, the panel finds, on a balance of probabilities, that the minor claimant has failed to meet the burden of establishing her identity and has failed to provide a reasonable explanation for not doing so.⁸

[22] Additionally, pursuant to Rule 11 of the Refugee Protection Division Rules (the “Rules”) the minor claimant is required to provide acceptable documents to establish the elements of her claim. However, the minor claimant has not done so, particularly with respect to her identity, and the witness JS has provided inconsistent, confusing, and evasive testimony in this regard.

[23] The minor claimant has provided the panel with an Indian passport and birth certificate to establish her personal and national identity. Normally, the provision of a genuine passport is sufficient to ground national identity and a birth certificate can serve to bolster that finding. However, in this case, the uncontroverted evidence is that XXXX has been inexplicably inconsistent in respect to where she gave birth to the minor claimant and how the minor claimant was conceived. The panel finds that the following inconsistencies raise questions as to whether the minor claimant’s passport and birth certificate were obtained fraudulently. To be clear, the panel finds that the passport and birth certificate are genuine, but finds on a balance of probabilities that they were both obtained using fraudulent information.

[24] CBSA agents conducted an investigation in Canada and in India in order to ascertain the *bona fides* of the minor claimant after she arrived at the border with JS on September 12, 2014. In the course of the investigation, CBSA returned results from the Field Operational Support

⁶ *Kante, Abdoulaye v. MEI* (F.C.T.D., no. IMM-2585-93), Nadon, March 23, 1994.

⁷ *Mohamed Aden Duale v. Canada (MCI)*, 2004 FC 150, at para. 3 [*Duale*].

⁸ *IRPA*, s. 106.

System (“FOSS”) which contained contacts that JS and XXXX had with Canadian authorities.⁹ On XXXX XXXX, 2012 XXXX applied for a TRV, but was refused. Notes in the FOSS file indicated that XXXX was a XXXX year old, unemployed female who had a 10 month old daughter, conceived by In-Vitro Fertilisation (“IVF”). On September 16, 2014, a CBSA Anti-Fraud Officer met with XXXX in India to discuss issues surrounding the identity of the minor claimant and a report on this meeting was generated.¹⁰ During this meeting XXXX advised that the minor claimant had been born in a nursing home in Ferozepur, but also stated that it might have been a civil hospital. The CBSA agent asked to see discharge papers or a birth certificate from the nursing home, but XXXX stated she did not have those documents with her and that those were strictly personal documents and she did not wish to share them. XXXX also admitted to the CBSA officer that the information contained in her April 2012 TRV regarding the minor claimant being conceived by IVF was a lie that would allow her to more easily obtain an Indian passport because she would not have to provide the details of the father. XXXX added that there was a policy that if you show that the child was born with IVF, you do not have to provide the father’s details. Later, on October 5, 2016, the same CBSA agent provided a further update with respect to his phone call with XXXX XXXX, a civil surgeon in Faridkot who had reviewed the minor claimant’s birth certificate and was familiar with records XXXX submitted to obtain the birth certificate. Mr. XXXX advised that XXXX alleged that the minor claimant was illegitimate, so they had not made inquiries about the minor claimant father. Mr. XXXX further advised that XXXX told them that the minor claimant was born at home and not in any hospital.¹¹ The panel finds on a balance of probabilities that Mr. XXXX information reveals a third version of where the minor claimant was born. The panel finds on a balance of probabilities that the minor claimant has not established where she was born and that this undermines her identity and alleged nationality.

[25] The panel finds that XXXX unexplained inconsistencies and refusal to provide additional documentation with respect to the location of the birth of the minor claimant undermines her credibility and the credibility of her submission that she is the mother of the minor claimant and that the minor claimant was born in India. The panel therefore takes a negative inference as to

⁹ Exhibit 4, page 18

¹⁰ Exhibit 4, page 14

¹¹ Exhibit 4, page 8

XXXX credibility and the credibility of her allegations regarding the identity of the minor claimant generally.

[26] The panel finds on a balance of probabilities that XXXX inconsistent evidence regarding the circumstances surrounding the conception of the minor claimant undermines her evidence that she is the mother of the minor claimant and therefore undermines the identity of the minor claimant. XXXX explained that she made up the IVF story to tell to Indian authorities so that she wouldn't have to deal with disclosing the minor claimant's father and she would more easily be able to get a passport for the minor claimant. However, XXXX told the CBSA agent that if you "show" that that the child was born with IVF you don't have to provide details regarding the father when applying for an Indian passport. XXXX answer suggests, and the panel finds on a balance of probabilities, that XXXX used documents related to IVF treatment in order to obtain the minor claimant's passport. The panel has not been provided with the documentation that XXXX used to "show" Indian authorities that the minor claimant was conceived through IVF. The panel is left with two potential answers as to how the minor claimant was conceived and neither answer has been substantiated with sufficient credible evidence that the panel is able to make a finding as to whether the minor claimant was conceived naturally, with XXXX as the father or through IVF, with no known father. The panel therefore finds that XXXX inconsistent evidence, failure to provide corroborative documents and willingness to deceive authorities in order to achieve her ends undermines her credibility and the further casts doubt as to the identity of the minor claimant.

[27] Even if the panel were to accept XXXX explanation regarding why she chose to tell Indian authorities that the minor claimant was born through IVF, which the panel does not accept, it does not explain why she continued the charade in her April 2012, TRV application to Canada. It has not been alleged that XXXX feared for her own or the minor claimant's life in XXXX 2012, so the panel has been provided with no basis to believe that XXXX listed IVF on her application in order for the minor claimant to escape harm. The panel has therefore been provided with no explanation for why XXXX would continue to list IVF on her Canadian TRV application, particularly when JS listed the minor claimant's father as being deceased on the XXXX XXXX,

2014 USA visa application.¹² The panel has not been provided with enough credible or persuasive evidence that would allow it to rule out IVF as the manner in which the minor claimant was conceived.

[28] This results in the minor claimant either having no known father (through IVF), a deceased father or an abusive father. JS explained that he never wrote that the minor claimant's father was deceased on the USA visa application, but rather that he had left the spot for 'father' blank. The panel does not accept this explanation as there is no reason for the US authorities to mischaracterize or insert false information into the minor claimant's visa application. The panel finds on a balance of probabilities that JS intentionally indicated that the minor claimant's father was deceased and his denial of the same results in the panel taking a negative inference as to JS's credibility.

[29] JS also told CBSA officials at the Ambassador Bridge crossing on September 12, 2014 that the minor claimant could not speak English, but at the hearing, his testimony evolved when he stated rather, that "he" had not heard the minor claimant speak English. Children's Aid Society officials who briefly took the minor claimant into custody on the same day, reported that the minor claimant could speak English. It is the panel's finding that JS was attempting to prevent CBSA officials from speaking to the minor claimant, and, on a balance of probabilities, was aware that the minor claimant could speak some English. In the FOSS results JS was also noted to have not been truthful during the Canadian sponsorship process for his father by initially indicating that his father was alive, but that he wanted to be dropped from the sponsorship application, when in fact his father had died approximately one year prior. There were other issues identified that called into question JS's credibility, however, the issues noted above are sufficient for the panel to find on a balance of probabilities that JS is not a credible witness. The panel finds that JS was prepared on several occasions to be less than forthright in applications and in person meetings with CBSA officials and in his evidence before the original member. The panel finds that JS is not an objective source of information as he has a vested interest in keeping custody of the minor claimant and he has shown himself willing to mislead the Board and immigration officials when it suited his or his families' ends.

¹² Exhibit 8

[30] As the panel has found that JS and XXXX are not credible witnesses, corroborating evidence is required to establish the minor claimant's identity. Neither JS, XXXX, nor the minor claimant provided any corroborative evidence establishing on a balance of probabilities that XXXX exists or that XXXX gave birth to the minor claimant. XXXX indicated to the CBSA agent that she had erased all records of XXXX. No one was able to provide the panel any photographs of XXXX or XXXX with XXXX or the minor claimant. Further, XXXX did not provide any photographs showing herself to be visibly pregnant which could have greatly aided the panel in determining whether or not she is the biological mother of the minor claimant. The panel finds that insufficient credible or reliable corroborative evidence has been adduced to establish that the minor claimant is the child of XXXX or that she is a citizen of India.

[31] XXXX initially told the CBSA agent in September 2013 that she had not filed a police report regarding XXXX threats, but that she had called the police several times. However, XXXX also wrote a letter to the Court on November 1, 2014, for use in a custody hearing, indicating that she had gone to the police to file a report against XXXX and that she went to the police twice afterwards with the intent of retrieving her filed complaint.¹³ The panel notes that this evidence contradicts what she told the CBSA officer in September 2013, that she had not filed a report. Thus, the panel is again left to doubt the credibility of XXXX and the existence of XXXX, which a police report would have gone some ways to establish, if in fact a report was ever made in the first place. The panel finds that the evidence taken as a whole does not establish on a balance of probabilities that XXXX exists and this further detracts from the allegation that the minor claimant has a parent who is a citizen of India.

[32] All of the above noted issues related to the minor claimant's identity and unreliability of identity documents could have been answered on a balance of probabilities, if XXXX, JS and the minor claimant had consented to a DNA test being conducted which would establish a genetic relationship. The panel also notes that prior to the hearing of the claim, counsel for the minor claimant sought the consent of both JS and XXXX to submit to DNA testing¹⁴, which was ultimately refused by JS, citing that the passport and birth certificate should be enough.¹⁵ JS advised the minor claimant's counsel that XXXX had refused to take DNA testing as well. The

¹³ Exhibit 9, page 47

¹⁴ Exhibit 9, page 1 (letter to XXXXX); page 2 (letter to JS); both dated October 15, 2015

¹⁵ Exhibit 9, page 3, letter from JS, dated October 22, 2015

panel notes that the original Member who heard JS's testimony impressed upon JS the gravity of the situation and that she did not believe that the minor claimant's identity had been established to that point of the hearing such that she strongly suggested that DNA testing be done. JS clearly understood the Member's concern and simply stated that the passport and birth certificate should be enough; JS also indicated that he heard from a friend that DNA testing is not reliable. The panel does not find JS's explanations to be reasonable, given that XXXX and JS have alleged that the minor claimant is in grave danger of injury from XXXX(including the threat of throwing acid at XXXX and the minor claimant). The panel finds that JS's refusal to get DNA testing is unreasonable and not in keeping with what one would reasonably expect of a legal guardian/witness nothing to hide, who has testified that he wants to protect the minor claimant. The panel finds that if XXXX and JS were truly afraid of what would happen to the minor claimant if she were returned to India, the taking of a DNA test would have been done without question. The panel takes a negative inference as to both JS and XXXX credibility in this regard and finds that they have not established on a balance of probabilities that they are blood relatives of the minor claimant.

[33] The panel acknowledges the numerous photographs and video showing the minor claimant with XXXX and JS from a young age.¹⁶ However, these documents do not establish on a balance of probabilities, particularly given the above noted identity and credibility concerns, that the minor claimant is a citizen of India or a blood relative of JS or XXXX. As noted above, a DNA test could have alleviated these concerns and allowed the panel to make the connection of familial relationship and citizenship between XXXX, JS and the minor claimant, however XXXX and JS made a conscious decision to deny such evidence to the Board. As a result, the panel has not been provided with sufficient credible or corroborative evidence to establish on a balance of probabilities that the minor claimant is a citizen of India or the biological child of XXXX. The panel therefore finds that the minor claimant's national and familial identity has not been established on a balance of probabilities.

¹⁶ Exhibit 4 (page 30-32); Exhibit 11; Exhibit 12 (including CD).

CONCLUSION

[34] Accordingly, the panel determines the minor claimant is not a Convention refugee or a person in need of protection and therefore her claim for refugee protection is denied.

(signed) “Daniel Marcovitch”
Daniel Marcovitch
March 16, 2018
Date