

Persecution Grounds as a Restricting Tool of the Right to Asylum in Canada: The Example of Haitian Women Who Fear Gendered Violence

Following the infamous 2010 earthquake, a wave of Haitians left their country and settled in large numbers in Canada and the United States. The US government then offered temporary protection status to nearly 59,000 Haitians, allowing them to live legally in the United States. In 2017, the threat of the cancellation of the program caused a wave of migration to Canada of Haitians living abroad. The number of Haitian refugee claims increased exponentially; 631 claims were referred to the Immigration and Refugee Board of Canada (hereinafter, the “IRB”) in 2016 which increased to 8,286 in 2017. This massive influx of Haitian asylum seekers highlights some of the limitations of the Canadian refugee-determination system.

In fact, section 96 of the *Canadian Immigration and Refugee Protection Act*, defines a refugee as “a person who [has] a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion (...).” We describe in this publication how Canadian law attempts — using the flexible nexus of “particular social group” and the Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution — to include women’s experiences in refugee law.

Towards the end of the 2000s, the Federal Court of Canada broadened this definition by recognizing that Haitian women fearing gender-based violence could constitute a particular social group deserving of refugee status. While this change has proved beneficial to them, the interpretation made by some of IRB’s commissioners has also limited Haitian women’s access to asylum in Canada. By taking the perspective of Haitian women seeking protection from the Canadian government, we take a critical, feminist look at the use of legal mechanisms used in Canadian law to include women in this definition.

In this chapter, we set out the key principles established by this line of case law. Next, through a non-exhaustive analysis of certain decisions of the IRB’s Refugee Appeal Division (hereinafter, the “RAD”) issued in 2018 and 2019 regarding Haitian women, we highlight some trends that we have observed on the ground. Ultimately, this article analyzes the way in which the interpretation adopted by certain commissioners from RAD limited Haitian women’s access to the right to asylum in Canada: on the one hand, by imposing on them the obligation to identify their request as being based on their gender, while on the other hand, by interpreting certain characteristics — for example, the absence of a “male presence” — as an additional burden of proof to be met.

This case law analysis of RAD decisions shows that even when well-intentioned guidelines specifically designed to include the experiences of refugee women are adopted, many women remain excluded. This article demonstrates that the interpretation of these tools by IRB members is a key aspect to monitor when assessing the progress of women’s access to asylum.

The latent sexism of the Canadian asylum system is complex. Superficial changes will not resolve this fundamental problem which goes back to the conceptual origins of the 1951 Convention Relating to the Status of Refugees. Our conclusions are intended to highlight the flaws in the reasoning of the IRB’s commissioners and thereby help harmonize the approach of the courts towards Haitian refugee claimants. We know that many factors, such as the competence of the person representing the claimant or the credibility of her testimony are, among other things, central considerations that can influence the refugee’s determination process. That said, we hope that the criticisms in this article provide a better understanding of the system and



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help to implement, in a consistent manner, measures that are favorable to women who appear before the IRB. In any event, Canada's asylum system still has a long way to go before it can claim to be truly inclusive and fair to women asylum seekers.

KEYWORDS: *Asylum; Gender; Persecution grounds; Haiti.*