Federal Court  Cour fédérale

Date: 20191029

Docket: IMM-1897-19

Citation: 2019 FC 1336

[ENGLISH TRANSLATION]

Ottawa, Ontario, October 29, 2019

PRESENT: The Honourable Mr. Justice Bell

BETWEEN:

ODELINE SIMOLIA

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This case concerns an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], of the decision rendered on March 12, 2019, by a member of the Refugee Appeal Division ["RAD"]. The RAD rejected the refugee protection claim of the applicant and her son, thereby confirming the decision of the Refugee Protection Division ["RPD"] of April 16, 2018, determining that they were neither

refugees within the meaning of section 96 of the *IRPA* nor persons in need of protection within the meaning of section 97.

II. Relevant Facts

[2] The principal applicant, Odeline Simolia, is a Haitian citizen. Her son, Eclesiastes Simolia Philemon, is a Brazilian citizen. Pursuant to subsection 167(2) of the *IRPA*, the principal applicant agreed to act as her minor son's designated representative. Ms. Simolia's husband, who is also her son's father, still lives in Brazil.

[3] Initially, Ms. Simolia's claim stated that she feared for her life in Haiti because of a disagreement with her cousins over the ownership of a piece of land. She alleged they threatened to kill her when she attempted to take possession of it. She stated she had to leave Haiti in 2013 and settled in Brazil, where she gave birth to her son in 2015. Then, in July 2016, Ms. Simolia and her son left Brazil for the United States, where they lived until 2017, the year of their arrival in Canada. In her Basis of Claim Form, signed on September 25, 2017, she stated, among other things, the following:

> [TRANSLATION]
>
> I arrived in Brazil on January 23. My little boy was born in Brazil on March 15, 2015. I could not meet our needs or those of my two other children in Haiti . . . I was unable to both send money for those still in Haiti and send my youngest to daycare so that he could grow and learn with other children of his age. I suppose no parent likes to see her children suffer for lack of means. This is why I decided to travel to the United States of America. I left Brazil on July 4, 2016. I spent three years and seven months in Brazil. [Emphasis added.]

[4] Prior to the RPD hearing, the Canadian Minister of Public Safety and Emergency

Preparedness intervened in writing, stating that Ms. Simolia and her son were excluded from protection under the *IRPA* because the Brazilian government had granted permanent resident status to Ms. Simolia and because her son had Brazilian nationality. Accordingly, they could not claim fear in Haiti because they could return to live in Brazil and would have the rights of nationality of that country within the meaning of Article 1E of the *United Nations Convention Relating to the Status of Refugees*.

[5] Before the RPD, Ms. Simolia did not challenge the Minister's statement. She did, however, amend her refugee protection claim to add two incidents that allegedly occurred in Brazil in May 2016. According to her, an individual came to her residence and tried to sell her a telephone. When she declined, he threatened to take her son hostage. A neighbour then intervened and the individual left. Ms. Simolia later saw this individual again while waiting for a bus, and he began to run towards her. She telephoned the police but said she was told that she should [TRANSLATION] "watch people". Ms. Simolia argued before the RPD that because of these incidents (the attempt to sell her a telephone, the threats, the pursuit and the response of the police), she left Brazil and no longer felt safe there.

III. Decisions Under Review

[6] The RPD determined that the applicants were neither refugees nor persons in need of protection because, according to the documentary evidence, Ms. Simolia was a permanent resident of Brazil and her son was a citizen. They could return there. The RPD concluded that Ms. Simolia would not suffer mistreatment in Brazil and that she had no reasonable fear of persecution or harm within the meaning of section 97 of the *IRPA* in the event of her return. It

should be noted that nowhere in her application form did Ms. Simolia claim that she would be persecuted on account of race, religion, sex, political affiliation or any of the other grounds set out in section 96 of the *IRPA*.

[7] According to the RPD, Ms. Simolia lacked credibility because of two contradictions in her evidence: first, regarding whether she had really informed the police of the May 2016 incidents, and second, whether she had really moved following the incidents. The RPD also rejected Ms. Simolia's explanation for why she had not sought protection in the United States despite being there for almost nine (9) months.

[8] On appeal to the RAD, Ms. Simolia challenged the RPD's finding regarding her credibility and stated that the evidence clearly established, on a balance of probabilities, that she and her son were personally targeted by an individual likely to pose a risk to their lives or to subject them to cruel and unusual treatment in Brazil.

[9] First, the RAD addressed the standard of review applicable to the RPD's decision. It held that the standard of correctness applied because in the case being considered, the RPD did not enjoy a meaningful advantage with respect to any of its findings.

[10] With respect to refugee status under section 96 of the *IRPA*, the RAD concluded the evidence did not show that the May 2016 incidents in Brazil were due to the race, nationality or gender of Ms. Simolia or her son. Accordingly, none of these grounds would subject them to a serious possibility of persecution should they return to Brazil. They could therefore not be

recognized as refugees.

[11] With respect to the status of persons in need of protection under section 97 of the *IRPA*, the RAD concluded Ms. Simolia had not met her burden of proof. In contrast to the RPD, the RAD found Ms. Simolia credible and concluded that some incidents occurred in May 2016 that could have endangered her and her son and that she had reported these incidents to the police. However, the RAD concluded she did not enjoy the presumption of truthfulness regarding her statement that the police had displayed a lack of interest in protecting her. After listening to the recording of the RPD hearing, the RAD noted Ms. Simolia's testimony was ambiguous as to the steps she had taken to communicate her concerns to the police, especially with respect to the timing of this communication; what information she had shared; and how she had shared it—whether by telephone or in person. Without knowing the context in which a police officer had told her to watch her surroundings, the RAD was of the view that this did not constitute a refusal by the police to investigate a serious crime. In short, the RAD held that the applicant and her son did not meet the requirements of section 97 of the *IRPA* because (1) "[a] bad impression from a telephone interview with a police officer from three years ago is not enough in itself to show that it is probable that the individual who wanted to attack the principal appellant in May 2016 was still a threat to her and her son if they were to return to Brazil" and (2) Ms. Simolia did not indicate that she had received further threats in the months following her move in May 2016.

IV. Relevant Provisions

[12] Sections 96 and 97 of the *IRPA* and Article 1E of the *United Nations Convention Relating to the Status of Refugees* are the relevant provisions and are annexed to this decision.

V. Issue

[13] This case raises the following issue: Did the RAD err because its determinations that Ms. Simolia and her son were neither refugees nor persons in need of protection were reached without regard for all of the evidence, in particular the evidence with respect to the situation in Brazil, such that they are unreasonable?

VI. Analysis

A. *Standard of review*

[14] The standard of reasonableness governs the issue of whether a decision maker's conclusion was reached without regard to all of the evidence (*Jean-Baptiste v Canada (Citizenship and Immigration),* 2018 FC 285 at para 11 [*Jean-Baptiste*]; *Canada (Minister of Citizenship and Immigration) v Kornienko,* 2015 FC 85 at para 11, 474 FTR 110 [*Kornienko*]). When the standard of reasonableness applies, the reviewing court concerns itself with the existence of justification, transparency and intelligibility within the decision-making process and whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190).

B. *Did the RAD err because its determinations that Ms. Simolia and her son were neither refugees nor persons in need of protection were reached without regard for all of the evidence, in particular the evidence with respect to the situation in Brazil, such that they are unreasonable?*

[15] Ms. Simolia submits the RAD erred by failing to adequately consider the situation of Haitians in Brazil. She argues the documentary evidence shows that Haitians are subject to discrimination in Brazil and that this amounts to persecution. According to Ms. Simolia, the

RAD's decision demonstrates it failed to consider all the evidence, which showed the danger the applicant would face as a Haitian should she return to Brazil.

[16] According to Ms. Simolia, the documentary evidence demonstrates the situation in Brazil is such that:

- Persons of colour in Brazil are targeted and become victims of violence on account of their race;
- Economic and social conditions have deteriorated in Brazil since the Olympic Games and the World Cup, which had provided many jobs, giving rise to forms of persecution toward Haitians, accused of coming to Brazil to steal jobs from Brazilians;
- There is systemic discrimination by Brazilian authorities against Haitians who file complaints and seek protection: United States, Department of State, "Brazil. Country Reports on Human Rights Practices for 2016" (March 3, 2017); Immigration and Refugee Board of Canada, "Response to Information Request BRA104224.E" (November 13, 2012); United Nations, Human Rights Council, "Report of the Special Rapporteur on minority issues on her mission to Brazil" (February 9, 2016) ;
- There is corruption among Brazilian authorities: United Nations, Human Rights Council, "Report of the Special Rapporteur on minority issues on her mission to Brazil" (February 9, 2016); Immigration and Refugee Board of Canada, "Response to Information Request BRA104224.E" (November 13, 2012); Robert Muggah, Elliott School of International Affairs, Brazil Initiative "The State of Security and Justice in Brazil: Reviewing the Evidence" (March 2016);

- In light of these facts, it is [TRANSLATION] “impossible to seek protection from the Brazilian state”; and
- Corruption among Brazilian authorities and the persecution of Haitians exist in every region of Brazil.

[17] The applicant submits the RAD failed to consider all of the evidence that demonstrates the precarious situation of Haitians in Brazil, justifying her fear if she were to return there. In her view, this failure was an error made by the RAD and its decision is therefore unreasonable.

[18] I should note that in this case, the applicant did not cite any documents in her memorandum to the RAD. Her appeal dealt instead with her credibility and the inconsistencies in her story on which the RPD had relied.

[19] In this case, the RAD’s decision does not mention any documents from the national documentation package [“NDP”]. This is not surprising given my observations in paragraph 18. Nor does it include a general statement that it considered all of the evidence on the record. I will begin my analysis by summarizing the legal principles relevant to this issue, and then I will apply them to this case.

[20] According to the case law, the RAD need not refer to every piece of evidence (*Jean-Baptiste* at para 20 citing *Kaur v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1379 at paras 31–34, 421 FTR 309 [*Kaur*]; *Quebrada Batero v Canada (Citizenship and Immigration)*, 2017 FC 988 at para 13 [*Quebrada*]). There is a rebuttable presumption that the RAD has reviewed all of the evidence in the file, including the documents in the NDP

(*Quebrada Batero* at para 13 citing *Akram v Canada (Minister of Citizenship and Immigration)*, 2004 FC 629 at para 15; *D'Souza v Canada (Minister of Employment and Immigration)*, [1983] 1 FC 343 at para 8 (CA); *Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 at para 1 (CA) [*Florea*]; see also *Sivapathasuntharam v Canada (Minister of Citizenship and Immigration)*, 2012 FC 486 at para 24 [*Sivapathasuntharam*], citing *Florea*).

[21] However, the RAD must address any evidence that directly contradicts its findings on a fundamental issue (*Sivapathasuntharam* at para 24, citing *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 at para 17). In other words, it is only when the unmentioned evidence is "critical and contradicts the tribunal's conclusion that the reviewing court may decide that its omission means that the tribunal did not have regard to the material before it" (*Kornienko* at para 19, citing *Rahal v Canada (Minister of Citizenship and Immigration)*, 2012 FC 319 at para 39; see also *Koppalapillai v Canada (Citizenship and Immigration)*, 2018 FC 235 at para 24).

[22] However, even this obligation is subject to limitations: the RAD is not obliged "to comb through every document listed in the [NDP] in the hope of finding passages that may support the Applicant's claim and specifically address why they do not, in fact, support the Applicant" (*Jean-Baptiste* at para 19). This obligation does not supplant the ordinary reasonableness standard of review, under which reviewing courts must "be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful" (*Kornienko* at para 19, citing *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 17, [2011] 3 SCR 708 [*Newfoundland*

Nurses]). So long as the reasons "allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes", then there is no cause to infer that contrary evidence was overlooked (*Kornienko* at para 19, citing *Newfoundland Nurses* at para 16 and *Herrera Andrade v Canada (Citizenship and Immigration)*, 2012 FC 1490 at paras 11–13).

[23] For these reasons, it is common practice for the RAD to rely on documents found in the NDP even when the claimant did not refer to them, and, in some circumstances, it even has a duty to go beyond those cited by the claimant (*Magonza v Canada (Citizenship and Immigration)*, 2019 FC 14 at para 79 citing *Sivapathasuntharam* at para 22; *Umuhoza v Canada (Minister of Citizenship and Immigration)*, 2012 FC 689, 12 Imm LR (4th) 275; *Chagoya v Canada (Minister of Citizenship and Immigration)*, 2008 FC 721; *Kaur* at para 30).

[24] Given these legal principles, although the RAD's decision does not mention any documents from the NDP, its decision must be reviewed on the standard of reasonableness, in light of the documents in the NDP, to determine whether they contain any elements that directly contradict one of its findings. In my view, the RAD made two fundamental findings: (1) that the applicant would not be persecuted under one of the grounds set out in section 96 of the *IRPA*; and (2) that the applicant would not be subject to a risk to her life within the meaning of section 97 of the *IRPA*.

[25] With respect to the possibility of persecution, the principal applicant states that persons of colour in Brazil are victims of violence and that the discrimination against them amounts to

persecution. She does not rely on any documents in the NDP in support of this argument.

[26] Three documents in the NDP refer to nationality, ethnicity and race in Brazil. The first explains that Afro-Brazilians are subject to generalized social exclusion, lower salaries, fewer opportunities for education and higher levels of violence than Brazilians of European heritage. A 2015 study reveals that between 2003 and 2013, while the number of violent homicides committed against white Brazilian women decreased by 10%, the number committed against Afro-Brazilian women increased by 54% (Alfredo Gutierrez Carrizo and Carolyn Stephens, Minority Rights Group International, "Brazil. State of the World's Minorities and Indigenous Peoples 2016: Events of 2015" (July 2016) at p 114). The second document, regarding violence, explains that 77% of homicide victims each year are Afro-Brazilian men. Moreover, a large number of homicides are committed by members of the military police, who are rarely held accountable. Regarding criminality, crime rates are high among Afro-Brazilians; it is estimated that 75% of the prison population is Afro-Brazilian. When it comes to social and economic conditions, 70.8% of those living in extreme poverty are Afro-Brazilian. They earn less money, have higher rates of illiteracy and their education levels are lower. Afro-Brazilian women in particular are marginalized and disadvantaged, more likely to experience violence, overrepresented in low-skilled jobs and overrepresented in prison populations (United Nations, Human Rights Council, "Report of the Special Rapporteur on minority issues on her mission to Brazil" (February 9, 2016) at pp 10/22–13/22). The third document is not relevant because it pertains to the rights of Indigenous peoples in Brazil (United Nations, Human Rights Council, "Report of the Special Rapporteur on the rights of indigenous peoples on her mission to Brazil" (August 8, 2016)).

[27] In my view, the RAD's conclusion about the possibility of persecution in Brazil is reasonable. The discrimination does not amount to persecution (*Noel v Canada (Citizenship and Immigration,* 2018 FC 1062 at paras 29–30). Moreover, "country conditions alone are insufficient to ground a refugee claim" (*Owochei v Canada (Minister of Citizenship and Immigration)*, 2012 FC 140 at para 51; *Jean v Canada (Citizenship and Immigration)*, 2019 FC 242 at para 19). In my view, the documentary evidence on the country conditions does not directly contradict the RAD's finding. In this case, the RAD considered whether the incident experienced by the applicant could demonstrate the possibility of persecution on one of the grounds set out in section 96. It answered in the negative. This conclusion is reasonable.

[28] Regarding the likelihood that the applicant's life would be at risk, the RAD mainly addressed the conduct of the police. Ms. Simolia states that the police discriminate against people of colour, including Haitians, who file complaints and ask for protection. She cites several documents in the NDP in support of this claim. Even if this were true, the risk she faces must be personalized. The RAD considered the facts in this case. It held there was not enough information to find that the police refused to investigate the incident. As for the RAD, Ms. Simolia did not sufficiently explain the steps she took, such as when she contacted the police, what information she gave them and how she communicated with them. It was the RAD who concluded Ms. Simolia had contacted the police by telephone and that she had not followed up. The RAD also held that Ms. Simolia had not received any further threats after moving. There is therefore no evidence that Ms. Simolia has demonstrated a personalized risk. Given that the general country conditions evidence does not contradict the RAD's decision, the decision is reasonable.

VII. Conclusion

[29] In light of the above and given that the RAD did in fact consider all of the evidence, the application for judicial review must be dismissed. I would add the following: given the content of the original claim for refugee protection, it is clear to me that Ms. Simolia is an economic immigrant rather than a refugee. The frank words in her original claim clearly demonstrate she is not a refugee within the meaning of sections 96 and 97 of the *IRPA*. She simply desires a better life for her children.

JUDGMENT in IMM-1897-19

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed, without costs. No question is certified for consideration by the Federal Court of Appeal.

"B. Richard Bell"
Judge

ANNEX

Immigration and Refugee Protection Act, SC 2001, c 27	***Loi sur l'immigration et la protection des réfugiés***, LC 2001, ch 27
Convention refugee	**Définition de *réfugié***
96 A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	**96** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	**a)** soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays ;
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	**b)** soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
Person in need of protection	**Personne à protéger**
97 (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	**97 (1)** A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
(a) to a danger, believed on	**a)** soit au risque, s'il y a

substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture ;

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

Person in need of protection

(2) A person in Canada who is a member of a class of persons

Personne à protéger

(2) A également qualité de personne à protéger la

prescribed by the regulations as being in need of protection is also a person in need of protection.

personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

Section E of Article 1 of the United Nations Convention Relating to the Status of Refugees

E This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

Section E de l'article premier de la Convention des Nations Unies relative au statut des réfugiés

E Cette Convention ne sera pas applicable à une personne considérée par les autorités compétentes du pays dans lequel cette personne a établi sa résidence comme ayant les droits et les obligations attachés à la possession de la nationalité de ce pays.

FEDERAL COURT

SOLICITORS OF RECORD

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DATED:	OCTOBER 29, 2019

APPEARANCES:

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