Federal Court Cour fédérale

Date: 20210119

Docket: IMM-3417-19

Citation: 2021 FC 62

[ENGLISH TRANSLATION]

Ottawa, Ontario, January 19, 2021

PRESENT: The Honourable Mr. Justice McHaffie

BETWEEN:

BELYNDA AMBROISE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Belynda Ambroise, a Haitian citizen who worked as a nurse in Port-au-Prince, was sexually assaulted on a bus on her way to work on June 22, 2016. She claimed refugee protection in Canada, fearing her attackers and sexual violence. The Refugee Appeal Division (RAD) rejected the refugee protection claim because it determined that Ms. Ambroise had an internal

flight alternative (IFA) in Cap-Haïtien, where other members of her family live. Ms. Ambroise is seeking judicial review of the RAD's decision.

[2] Ms. Ambroise alleges that the RAD erred in its analysis of the two-prong IFA test. She argues that the RAD failed to recognize that state protection for women is lacking throughout Haiti and that the IFA would be unreasonable for her because she would face a serious risk of sexual violence and would be unable to obtain employment in her profession. She also argues that the RAD's decision breached procedural fairness because the Refugee Protection Division (RPD) member failed to state at the outset of the hearing that an IFA would be raised.

[3] I am of the opinion that the RAD's decision is reasonable. The RAD's analysis of the danger or risk that Ms. Ambroise would face in the identified IFA within the meaning of section 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA), and the RAD's conclusion that there was no "serious possibility" that Ms. Ambroise would face persecution as a Haitian woman in the IFA within the meaning of section 96 were reasonable on the basis of the submissions raised by Ms. Ambroise. I am also of the opinion that it was reasonable for the RAD to conclude that Ms. Ambroise failed to meet the high threshold for establishing that the identified IFA is unreasonable. In addition, I am of the opinion that there was no breach of procedural fairness. Although Ms. Ambroise was not warned about it at the outset of the hearing, she was informed during the hearing that an IFA would be raised, and she and her counsel were given an opportunity to present evidence and make submissions in that regard.

[4] For these reasons, the application for judicial review is dismissed.

II. Issues and standard of review

[5] Ms. Ambroise raised seven issues, which fall under one of two main issues:

A. Did the RAD err in analyzing the viability of an IFA in Cap-Haïtien?

B. Did the RPD breach procedural fairness by failing to warn Ms. Ambroise at the outset of the hearing that an IFA would be raised?

[6] The first issue relates to the merits of the RAD's determination regarding an IFA. The parties agree that this issue must be reviewed on a standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16, 23–25; *Tariq v Canada (Citizenship and Immigration)*, 2017 FC 1017 at para 14). A reasonable decision is one that is justified, transparent and intelligible from the perspective of the individuals to whom the decision applies, "based on an internally coherent and rational chain of analysis" read holistically and with sensitivity to the administrative setting, from the record before the decision maker and the submissions of the parties (*Vavilov* at paras 81, 85, 91, 94–96, 99, 127–128). The justification of the decision is in light of the evidence that was before the decision maker (*Vavilov* at paras 125–26). Administrative decision makers are not required to respond "to every argument or line of possible analysis" raised by the parties, but the reasonableness of a decision may be compromised if the decision maker fails to consider relevant evidence (*Vavilov* at paras 125–28).

[7] The parties also agree that the second issue, that of procedural fairness, must be reviewed on a standard of correctness (*Alkhoury v Canada (Citizenship and Immigration)*, 2020 FC 153 at para 10). The Federal Court of Appeal recently confirmed that this standard applies to issues of procedural fairness, although it reiterated that the analysis is not really one that involves a

standard of review, but rather "whether or not procedural fairness has been met" (*Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 [*CARL*] at para 35; *Canadian Pacific Railway Limited v Canada (Attorney General)*, 2018 FCA 69 at para 54).

[8] I note that the decision under review is that of the RAD and not the RPD. Some decisions of this Court have concluded that the correctness standard always applies to the RAD's analyses of alleged breaches of procedural fairness before the RPD (*Tariq* at paras 15–16; *But v Canada (Citizenship and Immigration)*, 2016 FC 626 at para 4; *Eshetie v Canada (Citizenship and Immigration)*, 2019 FC 1036 at para 23; *Lakatos v Canada (Citizenship and Immigration)*, 2018 FC 1061 at paras 11–12). Other decisions have found that the reasonableness standard applies (*Zhang v Canada (Citizenship and Immigration)*, 2015 FC 1031 at paras 27–38; *Gebremedhin v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 497 at para 11; *XY v Canada (Citizenship and Immigration)*, 2020 FC 39 at para 26).

[9] In my view, this dispute must be resolved on the basis of the recent decision of the Court of Appeal in *CARL*, where the Court suggested that issues of procedural fairness should be analyzed outside the scope of judicial review, and therefore outside the standard of reasonableness (*CARL* at para 35). This is also consistent with the conclusion of the Federal Court of Appeal in *Kreishan v Canada (Citizenship and Immigration)*, 2019 FCA 223, where Justice Rennie stated, at paragraph 46:

> Before leaving this point, a *caveat*. It is important to note that the standard of review by which the Federal Court reviews RPD and RAD decisions does not preclude consideration of the merits or factual findings of either tribunal. Reasonableness and its criteria

> of justification, intelligibility and transparency, apply to how these tribunals assess the evidence before them and the inferences which may be drawn from that evidence, and correctness applies to the fairness of the procedure of the RPD hearing
>
> [Emphasis added; citation omitted]

[10] I therefore agree with the parties that the standard that applies to the second issue is the standard that applies to issues of procedural fairness, whether it be called the correctness standard or simply the fairness standard. That said, the applicable standard does not affect the outcome in any event, given my conclusion on this issue.

III. Analysis

A. *RAD's IFA determination reasonable*

(1) General principles

[11] The principles applicable to the issue of an IFA are not in dispute. The concept of an IFA is inherent to the definition of a Convention refugee under section 96 of the IRPA because the claimant must be a refugee from a country, not from some subdivision or region of a country (*Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589 (CA) at 592–593; *Velasquez v Canada (Citizenship and Immigration)*, 2010 FC 1201 at para 15). If a refugee protection claimant can seek safety in their own country, they are expected to do so rather than seek refugee protection in Canada (*Thirunavukkarasu* at 593; *Olusola v Canada (Citizenship and Immigration)*, 2020 FC 799 at para 7).

[12] Similarly, the definition of a person in need of protection set out in section 97 of the IRPA requires that the person face a risk of harm "in every part of that country" (*Sanchez v Canada (Citizenship and Immigration)*, 2007 FCA 99 at para 16; IRPA, s 97(1)(b)(ii)). Therefore, the existence of a viable IFA is fatal to a claim under section 96 or section 97, regardless of the merits of other aspects of the claim (*Barragan Gonzalez v Canada (Citizenship and Immigration)*, 2015 FC 502 at paras 45–46; *Olusola* at para 7).

[13] To rebut the viability of an identified IFA, a claimant must satisfy the RAD, on a balance of probabilities, that (1) the claimant will be subject to persecution (on a "serious possibility" standard), or a section 97 danger or risk (on a "more likely than not" standard) in the proposed IFA; and (2) in all the circumstances, including circumstances particular to the claimant, conditions in the IFA are such that it would be unreasonable for the claimant to seek refuge there (*Olusola* at para 8, citing *Thirunavukkarasu* at 595–97; *Hamdan v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 643 at paras 10–12). Both of these prongs must be satisfied to conclude that a refugee protection claimant does not have a viable IFA.

[14] As discussed below, Ms. Ambroise alleges that the RAD's analysis in each of the two prongs of the IFA test was unreasonable.

(2) Refugee protection claim and RAD decision

[15] Ms. Ambroise's refugee protection claim alleges that two men beat and sexually assaulted her in broad daylight on a bus in Port-au-Prince on June 22, 2016. Her attackers took her nurse's badge and her wallet, which contained identity documents, stating that they would

know where to find her the next time. She fears her attackers, as well as endemic sexual violence in Haiti.

[16] During the hearing, the RPD proposed an IFA in Cap-Haïtien, her hometown and the place where her mother, a sister, her brother and her son live. Ms. Ambroise alleged that an IFA in Cap-Haïtien was not viable because she would still face a risk that the men who assaulted would her find her there, as well as a more general risk of sexual violence. She also testified that she would have difficulty finding a job as a nurse in Cap-Haïtien, which has only one hospital. Despite these arguments, the RPD concluded that there was a viable IFA in Cap-Haïtien, and it rejected the claim.

[17] Like the RPD, the RAD found that Ms. Ambroise's account of the attack in Port-au-Prince was plausible. However, the RAD considered there to be no basis to Ms. Ambroise's allegations that her two attackers had the ability and motivation to find her wherever she might be. It therefore concluded that Ms. Ambroise failed to establish a serious possibility of persecution in Cap-Haïtien by her attackers. Regarding the second prong of the IFA test, the RAD concluded that Ms. Ambroise failed to establish that it would be unreasonable to relocate to Cap-Haïtien. The RAD therefore determined that there was a viable IFA and dismissed Ms. Ambroise's appeal and refugee protection claim.

[18] As for the more general risk of gender-based violence, the RAD considered the serious possibility of persecution in this regard separately, before analyzing the IFA. The RAD concluded that a refugee protection claim cannot be based solely on reports of the situation in the

country. It determined that neither the reports on the situation in Haiti nor Ms. Ambroise's actions supported the conclusion that all Haitian women face a serious possibility of persecution and that Ms. Ambroise feared this persecution. The RAD's conclusion in this regard does not distinguish between Port-au-Prince and Cap-Haïtien. I agree with the Minister that this conclusion also applies to the issue of persecution in the first prong of the IFA test. Indeed, it is the same issue, namely whether the applicant is in danger of persecution (*Thirunavukkarasu* at 592–593).

(3) Ms. Ambroise's arguments

a) *First prong: Risk of persecution or danger in IFA*

[19] In her arguments regarding the first prong, Ms. Ambroise emphasizes the risk of sexual violence throughout Haiti and the lack of police protection against this violence.

[20] Ms. Ambroise alleges that the RAD erred by failing to analyze the lack of state protection in Haiti. Referring to the Supreme Court of Canada's decision in *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, and Justice O'Reilly's decision in *Velasquez v Canada (Citizenship and Immigration)*, 2010 FC 1201, Ms. Ambroise argues that the RAD should have analyzed the effectiveness of state protection before it concluded that there was an IFA. I reject this argument.

[21] In *Ward*, the Supreme Court states that *having established that the claimant has a fear*, a panel is entitled to presume that persecution will be likely and the fear well-founded if there is an absence of state protection (*Ward* at 722). However, the Supreme Court does not require a panel

to analyze state protection if the fear has not been established. That is, a fear of persecution is not well-founded if adequate state protection is available, but a fear of persecution may also be not well-founded even before state protection is considered (*Carrillo v Canada (Citizenship and Immigration)*, 2007 FC 320 at paras 10–12).

[22] Similarly, in *Velasquez*, Justice O'Reilly does not insist that state protection must be considered when the main issue is an IFA. On the contrary, he states in paragraph 16 of his decision that the absence of a serious possibility of persecution may be based on a lack of evidence of persecution *or* the presence of adequate protection, but that the risk facing the claimant must be identified:

> There may, however, be an overlap between the Board's consideration of an IFA and its analysis of state protection. The first branch of the IFA test is met where there is no serious possibility of persecution in the particular location. That finding may flow either from a low risk of persecution there or the presence of state resources to protect the claimant, or a combination of both. But, in either case, the analysis can only be carried out properly after the particular risk facing the claimant has been identified.
>
> [Emphasis added]

[23] In this case, the RAD determined that there was no "serious possibility" that Ms. Ambroise would face persecution in Cap-Haïtien; therefore, I conclude that the RAD was not required to analyze state protection.

[24] Ms. Ambroise further argues that the RAD's decision is unreasonable given the evidence of conditions in Haiti, including sexual violence and criminal impunity. She refers to two decisions of this Court that also dealt with refugee protection claims based on allegations of

sexual violence in Haiti, *Dezameau v Canada (Citizenship and Immigration)*, 2010 FC 559, and *Josile v Canada (Citizenship and Immigration)*, 2011 FC 39.

[25] In *Dezameau* and *Josile*, the Court set aside RPD decisions that found sexual violence to be a risk of general criminality with no nexus to a Convention ground (*Dezameau* at paras 22–24, citing Immigration and Refugee Board of Canada, *Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution*; *Josile* at paras 7, 18–31). In both cases, the Court concluded that the RPD was required to examine the evidence and determine whether there was "more than a mere possibility" that the applicant risked suffering this harm in Haiti (*Dezameau* at paras 31, 32, 39; *Josile* at para 36).

[26] That said, the Court did not find in these cases that the applicants established such a risk or that all women in Haiti were subjected to such a risk. On the contrary, Justice Pinard in *Dezameau* pointed out the following at paragraph 29:

> This is not to say that membership in a particular social group is sufficient to result in a finding of persecution. The evidence provided by the applicant must still satisfy the Board that there is a risk of harm that is sufficiently serious and whose occurrence is "more than a mere possibility".

[27] In *Josile*, Justice Martineau also noted the importance of up-to-date evidence and the applicant's personal situation (*Josile* at paras 38–39).

[28] Ms. Ambroise and the Minister also refer to the more recent decision of Associate Chief Justice Gagné in *Jacinthe v Canada (Citizenship and Immigration)*, 2019 FC 1558. Ms. Jacinthe also referred to *Dezameau* and to *Josile*, arguing that the RPD did not sufficiently take into

account her risk of being sexually assaulted (*Josile* at paras 26–28). Associate Chief Justice Gagné noted that the findings in *Dezameau* and *Josile* (as well as *Desire v Canada (Citizenship and Immigration)*, 2013 FC 167) were based on the RPD's unreasonable conclusion that sexual violence was a general risk (*Jacinthe* at paras 31–33, 35, 39). By contrast, in *Josile*, the RPD analyzed the evidence and personal circumstances, and concluded that Ms. Jacinthe failed establish that she faced more than a mere possibility of persecution in Haiti based on her gender (*Jacinthe* at paras 34, 36). Associate Chief Justice Gagné found this conclusion to be reasonable (*Jacinthe* at para 40). Ms. Ambroise tries to set *Jacinthe* apart on the basis of the negative finding as to the applicant's credibility; however, Associate Chief Justice Gagné stated that the "debate did not actually focus on this issue [of credibility]" (*Jacinthe* at para 29).

[29] In this case, the RAD did not find sexual violence to be a general risk and did not doubt that a risk of sexual violence has a nexus to a Convention ground. I therefore agree with the Minister that the RAD did not make the error described in *Dezameau*, *Josile* or *Desire*. On the contrary, the RAD referred to *Dezameau*, citing the passage reproduced above, at paragraph 26. It also adopted the conclusion of Associate Chief Justice Gagné in *Jean* that "[a] refugee protection claim cannot rely solely on the evidence found in the National Documentation Package of the country about which the fear is being raised" (*Jean v Canada (Citizenship and Immigration)*, 2019 FC 242 at para 19). The RAD's reasons state that it was aware of "the gender-based violence in Haiti", but that it was also aware of "the importance of taking into account each one's personal circumstances, their current or future living conditions, and their family circle", citing *Josile*.

[30] Ms. Ambroise's other arguments are that the RAD erred in its assessment of the documentary evidence and in its conclusion that Ms. Ambroise failed to demonstrate that she faces a serious possibility of persecution. In my opinion, her arguments are in fact a request for the Court to carry out its own analysis of the refugee protection claim and to draw its own conclusions. That is not the role of the Court in reasonableness review (*Vavilov* at para 83). Although the RAD's analysis was brief, I cannot conclude from the evidence and arguments before it that it was unreasonable.

[31] The RAD stated its opinion that "[e]ven if the documentary evidence reports that the situation of women in Haiti is far from enviable, I do not agree that all Haitian women face a serious possibility of persecution". I agree with Ms. Ambroise that the question before the RAD was not whether "all Haitian women" face persecution, but only whether Ms. Ambroise does. Yet, aside from the risk posed by the attackers in the Port-au-Prince incident, the risk of persecution raised by Ms. Ambroise is that of [TRANSLATION] "generalized violence against women in Haiti". The RAD's analysis in this regard therefore also applied to Ms. Ambroise. There is no doubt that Ms. Ambroise experienced a traumatic and intolerable incident. However, the analysis of a refugee claim is prospective, not retrospective (*CARL* at para 75; *Pour-Shariati v Canada (Minister of Employment and Immigration*, [1995] 1 FC 767 at para 17; IRPA, ss 96, 97). In my view, it was not unreasonable for the RAD to determine that, on a balance of probabilities, there was not a "serious possibility" that Ms. Ambroise would face persecution as a woman in Cap-Haïtien.

[32] Ms. Ambroise also disputed the RAD's conclusion that her attackers in Port-au-Prince did not have the ability or interest to look for her in Cap-Haïtien. She made reference to *Dominguez Bando*, in which Justice Noël found it unreasonable to conclude that there was an IFA despite the applicant's credible evidence of sexual assault (*Dominguez Bando v Canada (Citizenship and Immigration)*, 2007 FC 980 at para 10). However, Ms. Dominguez Bando's evidence was that her persecutor had already pursued her elsewhere in Mexico and even in Canada through her family. There is no equivalent evidence in this case. On the contrary, the evidence before the RAD was that the attackers were strangers, that Ms. Ambroise had not been pursued since the June 2016 incident, and that there was no established connection between this incident and another incident at work in April 2016 where a man threatened her. I do not find it unreasonable for the RAD to conclude that Ms. Ambroise failed to establish, on a balance of probabilities, that she would face a risk of persecution or danger from those men in Cap-Haïtien.

b) *Second prong: Reasonableness of Cap-Haïtien as IFA*

[33] Once the RAD was satisfied that there was no "serious possibility" that Ms. Ambroise would face persecution within the meaning of section 96 or a danger or risk within the meaning of section 97 in Cap-Haïtien, it had to determine whether the identified IFA was nevertheless unreasonable. The threshold for the second prong of the IFA test is high, and the applicant must establish "actual and concrete evidence" of conditions that "would jeopardize the life and safety" of a claimant attempting to relocate temporarily to a safe area (*Ranganathan v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 164 (FCA) at para 15; *Olusola* at para 9).

[34] In her submissions to the RAD, Ms. Ambroise did not deal with the second prong of the IFA test or the reasonableness of relocating to Cap-Haïtien. However, Ms. Ambroise raised the fact that she testified that it would be impossible for her to find work as a nurse because there was only one hospital in Cap-Haïtien. She also disputed the RPD's conclusion that she could find a job as a secretary, a field in which she is also a graduate. The RAD considered these allegations and determined that the inability to find employment as a nurse would not put Ms. Ambroise's life or safety at risk such that Cap-Haïtien would not be a reasonable IFA.

[35] In *Thirunavukkarasu*, the Court of Appeal discussed the "reasonableness" of an IFA. It stated that it is "[not] enough for refugee claimants to say that they do not like the weather in a safe area, or that they have no friends or relatives there, or that they may not be able to find suitable work there" [emphasis added] (*Thirunavukkarasu* at 598; see also *Elusme v Canada (Citizenship and Immigration)*, 2020 FC 225 at paras 25–27).

[36] Ms. Ambroise alleges that the RAD's conclusion is unreasonable given the case law stating that the inability to find employment in one's field of work in an IFA "may or may not make the IFA unreasonable" (*Mchedlishvilli v Canada (Citizenship and Immigration)*, 2010 FC 630 at para 16(6)). Even though the rule in *Thirunavukkarasu* is not "absolute", it is only in exceptional circumstances that a mere lack of employment opportunities in the identified IFA would be sufficient to render the IFA unreasonable (*Mora Alcca v Canada (Citizenship and Immigration)*, 2020 FC 236 at paras 15–16, citing *Fernandez Cuevas v Canada (Citizenship and Immigration)*, 2005 FC 1169).

[37] I am of the opinion that the RAD did not err in concluding that the IFA is not unreasonable in that Ms. Ambroise may have to give up her profession as a nurse and return to a position as a secretary. The applicant's burden of showing that the IFA would not be reasonable in the circumstances is high. The RAD reasonably concluded that Ms. Ambroise failed to discharge that burden. The RAD considered Ms. Ambroise's allegations relating to the second prong, applied the relevant case law, and reached a reasonable conclusion. In the circumstances, there is no reason for this Court to intervene (*Vavilov* at paras 111–12, 125–28).

B. *No breach of procedural fairness*

[38] At the outset of the hearing before the RPD, the member told Ms. Ambroise that the issues to be determined were identity, credibility and subjective fear, and that [TRANSLATION] "if any other issues arise during the hearing, I will let you know". The member did not raise the IFA in Cap-Haïtien until towards the end of the hearing. Ms. Ambroise states that this was a breach of procedural fairness.

[39] As noted above, the existence of a viable IFA is fatal to a refugee protection claim under section 96 or section 97. Therefore, the issue of an IFA "is always an issue in a refugee hearing" (*Alkhoury* at para 13). However, it is established case law that there is an onus on the Minister and the RPD to warn the claimant if an IFA is going to be raised (*Thirunavukkarasu* at 596). This protects the claimant's right to be heard and gives the claimant notice of the case to be met (*Thirunavukkarasu* at 596).

[40] In *Tariq*, Justice Boswell addressed the ambiguity in the case law “as to whether notice *during* a hearing will satisfy the procedural fairness requirement, or whether notice must be provided *prior* to the hearing” [emphasis added] (*Tariq* at para 28). In *Tariq*, Justice Boswell determined that the RPD “clearly raised” the IFA during the hearing and that the applicant “could have adduced evidence” in this regard to the RPD (*Tariq* at para 29). The question raised by Ms. Ambroise is whether the IFA must be raised *at the outset* of the hearing and not *during* the hearing.

[41] In my opinion, procedural fairness does not require that an IFA be raised at the outset of the hearing, although it is preferable to do so as early as possible, even before the hearing (*Figueroa v Canada (Citizenship and Immigration)*, 2016 FC 521 at para 56). The duty of procedural fairness is met if the applicant has the opportunity to adequately respond to the possibility of an IFA. As Justice Pentney stated in *Alkhoury*, “[T]he PA’s counsel had an opportunity to pursue this at the hearing, either by further questioning, leading further evidence, making submissions, or by requesting the opportunity to lead further evidence or make further submissions following the hearing” (*Alkhoury* at para 15).

[42] In this case, I find that Ms. Ambroise was reasonably informed about the main issues the RPD was going to raise and that she had a reasonable opportunity to present her perspective. Although the IFA was raised towards the end of the hearing before the RPD, counsel for Ms. Ambroise was able to take advantage of his question period to ask Ms. Ambroise about the IFA. He also made submissions regarding the IFA at the end of the hearing. Like Justice Pentney, I am of the opinion that Ms. Ambroise had the opportunity at the hearing to present her case

regarding the IFA (*Alkhoury* at para 15; *Tariq* at para 29). I note that Ms. Ambroise did not seek leave from the RPD to present any further evidence or submissions after the hearing. She also did not request that the RAD allow further evidence under subsection 110(4) of IRPA on the grounds that she did not have a reasonable opportunity to present it to the RPD. In these circumstances, I cannot conclude that there was a breach of procedural fairness.

IV. Conclusion

[43] Consequently, the application for judicial review is dismissed. Neither party has proposed a question for certification. I agree that no certifiable question arises in the matter.

JUDGMENT in IMM-3417-19

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.

"Nicholas McHaffie"

Judge

Certified true translation
Vincent Mar

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3417-19
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HEARING HELD BY VIDEOCONFERENCE BETWEEN OTTAWA, ONTARIO, AND MONTRÉAL, QUEBEC

JUDGMENT AND REASONS:	MCHAFFIE J.
DATED:	JANUARY 19, 2021

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