Federal Court  Cour fédérale

Date: 20220118

Docket: IMM-3861-20

Citation: 2022 FC 54

[ENGLISH TRANSLATION]

Ottawa, Ontario, January 18, 2022

PRESENT: The Honourable Mr. Justice Gascon

BETWEEN:

SAINTANIA, PAUL
MARC JUNIO, LOZIN PAUL

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicants, Saintania Paul and her minor son, Marc Junio Lozin Paul, are seeking judicial review of a decision of the Refugee Appeal Division [RAD] rendered on August 4, 2020 [Decision]. In that decision, the RAD confirmed a decision of the Refugee Protection Division

[RPD] rejecting the refugee protection claim filed by Ms. Paul and her son and denying them Convention refugee or person in need of protection status under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The RAD dismissed the appeal on the ground that the exclusion clause provided for in Article 1E of the *United Nations Convention Relating to the Status of Refugees*, July 28, 1951, 189 UNTS 137 [Convention], applies to Ms. Paul and that there was no risk to Ms. Paul and her minor son should they return to Brazil.

[2] Ms. Paul and her son submit that the RAD's Decision is unreasonable, for three main reasons. First, the RAD erred in finding that Ms. Paul could obtain permanent residence in Brazil and return there on a family reunification visa given that her minor son is Brazilian. Second, the RAD erred in its assessment of Ms. Paul's fear in Brazil and of the merits of her allegations. Finally, the RAD's decision not to analyze Ms. Paul's fear in respect of her country of origin, Haiti, is unreasonable. Ms. Paul and her son are asking the Court to set aside the Decision and to refer the matter back to the RAD for redetermination by a differently constituted panel.

[3] I will dismiss the application for judicial review, for the following reasons. Having examined the RAD's conclusions, the evidence before the panel and the applicable rules of law, I see no reason to set the RAD's Decision aside. In respect of both the application of Article 1E of the Convention and the assessment of Ms. Paul's fear, the evidence reasonably supports the conclusions drawn by the RAD, and the reasons for its Decision have the qualities that make the RAD's reasoning logical and coherent in relation to the relevant legal and factual constraints. There are therefore no grounds to justify the Court's intervention.

II. Background

A. *The facts*

[4] Ms. Paul is a Haitian citizen. She left her country of origin, Haiti, in May 2013, in order to flee her brother-in-law, a certain André Lozin, who was threatening to kill her. Mr. Lozin blamed Ms. Paul for selling the house she had bought with money belonging to her husband, Mr. Lozin's brother. Ms. Paul therefore decided to move to Brazil.

[5] On April 19, 2014, Ms. Paul gave birth to her son, Marc Junio, in Brazil. Her son became a Brazilian citizen at birth. Ms. Paul alleges that her life in Brazil was difficult because of the racial discrimination experienced there by Haitians. Among other things, she allegedly had trouble at work.

[6] Ms. Paul and her son fled Brazil in August 2016. They crossed South and Central America, reaching the US border on January 20, 2017. They arrived in Canada on September 28, 2017, claiming refugee protection. It seems that Ms. Paul's husband, who was with her in Brazil, did not follow her to Canada.

[7] The RPD heard the refugee protection claim of Ms. Paul and her son in February 2019; however, it rejected the claim in March 2019, on the ground that Ms. Paul was not credible. Ms. Paul and her son appealed the RPD's decision in April 2019.

B. ***The RAD's Decision***

[8] In its Decision, the RAD identified the following determinative issues: (i) the applicability to Ms. Paul of the exclusion clause in Article 1E of the Convention; and (ii) the existence of a forward-looking risk for her minor son should they return to Brazil.

[9] The RAD began by noting that the RPD had erred in its analysis of whether the exclusion in Article 1E of the Convention applied to Ms. Paul's situation. The RPD had indeed found that that the evidence before it was insufficient to determine whether Ms. Paul could obtain permanent residence in Brazil and that she was therefore not excluded under the Convention. After analyzing the documentary evidence available at the time of the RPD hearing, the RAD concluded rather that Ms. Paul should be excluded under the Convention. Indeed, at the time of the hearing before the RPD, the objective evidence suggested that Ms. Paul could have obtained permanent residence in Brazil by applying for a family reunification visa, a visa available to immigrants with a child with Brazilian citizenship. Ms. Paul's son, Marc Junio, is a Brazilian citizen, and Ms. Paul was unable to establish that she could not obtain this visa.

[10] After concluding that the exclusion clause in Article 1E of the Convention applied, the RAD examined whether permanent resident status in Brazil is substantially similar to that of Brazilian citizen. The RAD therefore analyzed the documentary evidence for each of the rights identified in *Shamlou v Canada (Minister of Citizenship and Immigration)*, [1995] FCJ No 1537, 103 FTR 241), determining that permanent resident status in Brazil is substantially similar to citizen status. The RAD also examined at length the position of Haitians and African Brazilians

in Brazil. While the RAD recognized that there are indeed deep racial inequalities in Brazil, it found that the instances of discrimination mentioned in the evidence before it did not suggest that there was persecution.

[11] The RAD continued by noting that there was no need to analyze the risk Ms. Paul would be exposed to in Haiti, her country of origin. Relying on *Osazuwa v Canada (Citizenship and Immigration)*, 2016 FC 155 [*Osazuwa*], the RAD determined that Ms. Paul had not discharged her burden of establishing that she could not return to Brazil, her country of residence, and that there was no point in analyzing the risks she might face in Haiti (*Osazuwa* at para 51).

[12] The RAD added that the RPD had erred in not analyzing the risk Marc Junio would be exposed to should he return to Brazil. However, after performing its own review of the evidence, the RAD concluded that Marc Junio had failed to establish a serious possibility of persecution or a risk for him in Brazil. Here, the RAD relied on its earlier review in the Decision of whether the exclusion clause in Article 1E of the Convention applied to Ms. Paul.

[13] The RAD confirmed the RPD's decision and concluded that neither Ms. Paul nor her minor son were Convention refugees or persons in need of protection.

C. *Standard of review*

[14] The framework for the judicial review of the merits of administrative decisions is the one the Supreme Court of Canada established in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. This framework is based on the presumption that the applicable

standard of review in all cases is now that of reasonableness. The parties are not disputing this, and the Court will therefore review the RAD's Decision against this deferential standard. The pre-*Vavilov* case law also supports this and had already recognized that the standard of reasonableness applies to the issue of whether a person can be excluded on the basis of Article 1E of the Convention (*Majebi v Canada (Citizenship and Immigration)*, 2016 FCA 274 at paras 5–6; *Canada (Citizenship and Immigration) v Zeng*, 2010 FCA 118 [*Zeng*] at paras 11, 34; *Saint Paul v Canada (Citizenship and Immigration)*, 2020 FC 493 [*Saint Paul*] at paras 43–45; *Celestin v Canada (Citizenship and Immigration)*, 2020 FC 97 at paras 31–32; *Su v Canada (Citizenship and Immigration)*, 2019 FC 1052 [*Su*] at para 17).

[15] When the applicable standard is that of reasonableness, the reviewing court's role is to examine the reasons given by the administrative decision maker and to determine whether the decision is based on "an internally coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85; *Canada Post Corp. v Canadian Union of Postal Workers*, 2019 SCC 67 at paras 2, 31). To make this determination, the reviewing court asks "whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility" (*Vavilov* at para 99, citing in particular *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 47, 74).

[16] It is not enough that the decision be justifiable. Where reasons for a decision are required, "the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies" [emphasis in original]. (*Vavilov* at para 86). The focus of reasonableness review must therefore be on both the outcome of the decision and the reasoning

process that led to that outcome (*Vavilov* at para 87). Reasonableness review must entail a robust evaluation of administrative decisions. However, a reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with "respectful attention" and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion (*Vavilov* at para 84). The reviewing court must show restraint and intervene "only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process" (*Vavilov* at para 13). I note that reasonableness review always finds its starting point in the principle of judicial restraint and deference, and demonstrates a respect for the distinct role that the legislature chose to vest in an administrative decision maker rather than in a court (*Vavilov* at paras 13, 46, 75).

III. Analysis

A. *Exclusion on the basis of Article 1E of the Convention*

[17] Ms. Paul first alleges that the RAD erred in concluding that she could acquire permanent residence in Brazil and return there on a family reunification visa given that her son is Brazilian. Ms. Paul submits that applying for permanent residence through the family reunification process is far from being a mere formality. She alleges that applicants applying for a permanent residence visa in the family reunification stream have to be physically present in Brazil in order to apply. Ms. Paul also notes that the Brazilian law on family reunification does not say whether Brazilian children have to be in Brazil physically in order for their parents to apply. She submits, in short, that she cannot return to Brazil because getting permanent resident status is much harder than it seems.

[18] I do not share Ms. Paul's view. In its Decision, the RAD found that, contrary to her arguments, Ms. Paul had the option of returning to Brazil. The problem is that she did not exercise that option. In fact, Ms. Paul simply had to apply for a visa to get permanent residence on the ground that her child, Marc Junio, is a Brazilian citizen.

[19] It is for the RAD to assess the evidence submitted by Ms. Paul and to give it the weight it deserves in its review (*Vavilov* at para 125). In this case, the RAD concluded that the evidence before it established *prima facie* that Ms. Paul had the option of applying for permanent residence in the family reunification stream. Once it had drawn this conclusion, it was up to Ms. Paul to establish that, in truth and fact, this option was not open to her (*Riboul v Canada (Citizenship and Immigration)*, 2020 FC 263 at para 53; *Canada (Citizenship and Immigration) v Tajdini*, 2007 FC 227 at para 36). But, as the RAD noted, Ms. Paul failed to contact the Brazilian consulate in order to apply for a family reunification visa or even simply to clarify the requirements she had to meet to acquire one. Consequently, I must conclude that Ms. Paul failed to discharge her burden of establishing that, despite *prima facie* evidence that she could apply for permanent residence in Brazil, she was or would have been denied this status.

[20] Ms. Paul also claims that the information in the National Documentation Package on Haiti [Package] supports her argument that, since she is not currently in Brazil, she is unable to apply for permanent residence. According to Ms. Paul, the Package contains an exhaustive list of the different conditions individuals have to meet to apply for a visa in the family reunification stream in Brazil.

[21] I am not persuaded by these arguments. Tab 14.14 of the Package, which Ms. Paul refers to, was replaced by Tab 14.18 in July 2021. I note that the relevant excerpts mentioned by Ms. Paul are also part of Tab 14.18. Tab 14.18 compiles relevant excerpts from the legislation on the conditions applicants have to meet to acquire a family reunification visa in Brazil. It also includes comments and explanations from representatives of Brazil in Canada. Section 45(iii) of Decree No. 9,199 on family reunification clearly states that temporary visas are granted for family reunification reasons to immigrants who have a child with Brazilian citizenship. Moreover, Tab 14.18 indicates that Brazil no longer issues permanent visas and that temporary visa holders may apply for indefinite residence permits. At first glance, this documentary evidence suggests that if Ms. Paul qualified for a family reunification visa, she would indeed have to be in Brazil physically in order to apply for one. But the Package often mentions its "sources", and the information in these sources is sometimes either incomplete or contradictory. As pointed out by the Minister at the hearing before this Court, the information in the Package is insufficient to establish that the RAD erred in its conclusion. The information in this tab seems to be compiled for information purposes only, and the evidence on the record establishes that Ms. Paul did not take any steps personally to ask the Brazilian consulate in Montréal about the possibility of applying for a family reunification visa from outside Brazil.

[22] I am also not persuaded that the RAD's determination that it was possible for Ms. Paul to acquire permanent residence in order to be able to return to Brazil and to live there is unreasonable. According to the hearing transcript, there is no compelling evidence demonstrating that Ms. Paul could not acquire permanent residence. Moreover, it was open to the RAD to

conclude that, in light of the documentary evidence, the various statuses listed in the Package were merely examples.

[23] It is trite law that claimants who arrive in Canada with status akin to nationality in a safe third country should be denied refugee protection under Article 1E of the Convention. The purpose of Article 1E of the Convention and section 98 of the IRPA is to prevent "asylum shopping" by claimants who already enjoy the protection of another country (*Zeng* at para 1). This is consistent with the principle according to which the right to refugee protection only comes into play where no alternative remains to the claimant (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at 726). Indeed, the refugee protection regime is intended to help people who need protection, not those who prefer to seek refugee protection in one country rather than another. In *Zeng*, the Federal Court of Appeal set out a three-prong test for determining whether a person should be denied refugee protection under Article 1E of the Convention. The test entails the following:

> [28] [**1**] Considering all relevant factors to the date of the hearing, does the claimant have status, substantially similar to that of its nationals, in the third country? If the answer is yes, the claimant is excluded. If the answer is no, [**2**] the next question is whether the claimant previously had such status and lost it, or had access to such status and failed to acquire it. If the answer is no, the claimant is not excluded under Article 1E. If the answer is yes, [**3**] the RPD must consider and balance various factors. These include, but are not limited to, the reason for the loss of status (voluntary or involuntary), whether the claimant could return to the third country, the risk the claimant would face in the home country, Canada's international obligations, and any other relevant facts.
>
> (*Su* at para 23, citing *Zeng* at para 28 [Numbering added.])

[24] It is my opinion therefore that it was reasonable for the RAD to find that, given that her son is a Brazilian citizen, Ms. Paul could acquire permanent resident status in Brazil and that this status gave her rights substantially similar to those of other Brazilian nationals. She therefore falls under the exclusion in Article 1E of the Convention.

B. ***Assessment of Ms. Paul's fear in Brazil and of the merits of her allegations***

[25] Ms. Paul also alleges that the RAD performed a microscopic and overly fastidious examination of her fear of returning to Brazil, which, she claims, is contrary to this Court's case law (*Zhou v Canada (Citizenship and Immigration)*, 2013 FC 619 at paras 29–30; *Wu v Canada (Citizenship and Immigration)*, 2012 FC 578 at para 18). In the eyes of Ms. Paul, the extensive documentary evidence she filed on the situation of Haitians and African Brazilians in Brazil received a narrow interpretation from the RAD, even though this evidence speaks quite conclusively to the fact that the discrimination experienced by these groups is both widespread and systemic in Brazil and that it can amount to persecution. Ms. Paul also alleges that the RAD disregarded and skirted around her testimony on the difficulties she herself experienced in Brazil.

[26] I cannot accept Ms. Paul's conclusions and arguments.

[27] To begin with, it was for the RAD to assess the evidence filed by Ms. Paul and to give it the weight it deserved (*Vavilov* at para 125). Moreover, there is a presumption that a decision maker has weighted and considered all the evidence brought before it (*Burai v Canada (Citizenship and Immigration)*, 2020 FC 966 at para 38; *El Assadi v Canada (Citizenship and Immigration)*, 2014 FC 58 at para 37). I would add that, in its Decision, the RAD wrote

particularly long and detailed reasons and that it took the time to respond to the various objections raised by Ms. Paul. The evidence simply did not establish a personalized risk of persecution for Ms. Paul (*Garces Canga v Canada (Citizenship and Immigration)*, 2020 FC 749 at para 54).

[28] I am also not satisfied that the RAD's examination can be described as "microscopic". It is true that an unfavourable credibility finding should not be based on a so-called "microscopic" examination of issues that are irrelevant or peripheral to the refugee protection claim (*Attakora v Canada (Minister of Employment and Immigration)* (1989), 99 NR 168 (FCA) [*Attakora*] at para 9; *Cooper v Canada (Citizenship and Immigration)*, 2012 FC 118 at para 4; *Lubana v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 [*Lubana*] at para 11). However, as so clearly expressed by this Court in *Attakora* and *Lubana*, an administrative decision maker's approach cannot be called "microscopic" (and result in a reviewing court's intervention) unless it clings to issues that are irrelevant or peripheral to the refugee protection claimant's claim. I do not find that the RAD's examination of Ms. Paul's submissions was microscopic. While it did point out certain contradictions in Ms. Paul's testimony, it is wrong to say that it relied solely on minor inconsistencies to arrive at its conclusion. The RAD's analysis largely focused on the documentary evidence before it, and it cannot be said that it systematically searched for inconsistencies in Ms. Paul's evidence in order to undermine its credibility (*Owusu-Ansah v Canada (Minister of Employment and Immigration)*, [1989] FCJ No 442 at para 2; *Acikgoz v Canada (Citizenship and Immigration)*, 2018 FC 149 at para 37).

[29] I would add that an analysis cannot be called “microscopic” or overzealous because it is exhaustive. It is not the thorough, detailed and rigorous nature of the analysis or examination conducted by an administrative decision maker that makes it “microscopic”. Quite the contrary, such an approach reflects the rigour that we have the right to expect from an administrative decision maker’s analysis. I would even say that such rigour is expected to satisfy the requirement for a “justified” decision established in *Vavilov*. An administrative decision maker’s analysis veers towards being “microscopic” when it delves into peripheral issues and examines contradictions that are insignificant or irrelevant to the purpose of the refugee protection claim. In that case, the Court’s intervention may be required. In this case, the analysis conducted by the RAD in no way targeted contradictions or inconsistencies irrelevant, insignificant or peripheral to Ms. Paul’s allegations. Quite the contrary, the factors found in the RAD’s reasons concerned specific events which were central to Ms. Paul’s account supporting her refugee protection claim.

[30] Moreover, unlike the RPD, the RAD did not base its conclusions from its assessment of Ms. Paul’s fear solely on Ms. Paul’s lack of credibility. Rather, it focused its analysis on the distinction the law makes between “discrimination” and “persecution”, indicating that even if the evidence in the record generally supported the existence of racial discrimination in Brazil, it did not suggest that this discrimination amounts to persecution. As the Minister pointed out, persecution is characterized by a “particular course or period of systematic infliction of punishment” directed against a particular group (*Rajudeen v Canada (Minister of Employment and Immigration)*, [1984] FCJ No 601, 55 NR 129; *Valentin v Canada (Minister of Employment and Immigration)*, [1991] 3 FC 390 at para 8). Despite the difficulties she had in Brazil, Ms. Paul

was nonetheless able to work there, find housing and a daycare for her minor son, and access the country's public services.

[31] I acknowledge that the dividing line between discrimination and persecution can sometimes be difficult to establish. However, in light of Ms. Paul's account and the documentary evidence dealing with the experience of Haitians in Brazil, I find that it was reasonable for the RAD to conclude that the discrimination alleged by Ms. Paul did not amount to persecution. In fact, nothing in the evidence permitted the RAD to conclude that the discrimination experienced by Ms. Paul was so serious and so repeated as for it to constitute persecution. For all of these reasons, it follows that there is no reviewable error in the RAD's analysis of Ms. Paul's fear in respect of Brazil and that this analysis is completely reasonable.

C. *Decision not to analyze Ms. Paul's fear in respect of her country of origin*

[32] Ms. Paul submits lastly that the RAD should have analyzed the risk she was exposed to in Haiti, her country of origin. Ms. Paul claims, among other things, that the decision on which the RAD based its conclusion, *Osazuwa*, does not apply here given that it dealt with a different set of facts.

[33] Once again, I do not agree with Ms. Paul.

[34] To begin with, the RAD recognized that some of the facts in *Osazuwa* were different from this case. However, the two cases are similar in that the applicants in both cases failed to discharge their burden of establishing that they could not return to their country of residence.

Recent decisions of this Court have made it clear that the RAD does not have to analyze an applicant's fear of returning to the applicant's country of origin if it has determined that the applicant falls under the exclusion in Article 1E of the Convention (*Saint Paul* at para 58; *Saint-Fleur v Canada (Citizenship and Immigration)*, 2020 FC 407 at para 21; *Milfort-Laguere v Canada (Citizenship and Immigration)*, 2019 FC 1361 at para 46).

[35] The RAD's decision not to consider Ms. Paul's fear of returning to Haiti because she is excluded under Article 1E of the Convention was therefore entirely reasonable.

IV. Conclusion

[36] For the reasons set out above, I dismiss the application for judicial review of Ms. Paul and her minor son. I have not seen anything irrational in the decision-making process followed by the RAD or in its conclusions. The Decision does not contain any reviewable errors in respect of the exclusion under Article 1E of the Convention or the risk-of-persecution analysis. When reviewed against reasonableness, it is enough for a decision to be based on an internally coherent and rational chain of analysis and be justified in relations to the facts and law that constrain the decision maker. That is the case here.

[37] No question of general importance was proposed for certification, and I agree that none arises.

JUDGMENT in IMM-3861-20

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed, without costs.

2. There is no serious question of general importance to be certified.

"Denis Gascon"
Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3861-20
STYLE OF CAUSE:	SAINTANIA, PAUL, MARC JUNIO, LOZIN PAUL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	SEPTEMBER 15, 2021
JUDGMENT AND REASONS:	GASCON J.
DATED:	JANUARY 18, 2022

APPEARANCES:

Walid Ayadi	FOR THE APPLICANTS
Sherry Rafai Far	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Walid Ayadi, Counsel Montréal, Quebec	FOR THE APPLICANTS
Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT