

Federal Court



Cour fédérale

Date: 20241004

Docket: IMM-8367-22

Citation: 2024 FC 1563

Ottawa, Ontario, October 4, 2024

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

**EMANUEL ANDRE
RITA DOMINGOS DOS SANTOS
NOEMIA ANDRE
FLORBELA GLORIA DOS SANTOS ANDRE
ESTER ERICA DOS SANTOS ANDRE**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants are a family and dual citizens of Angola and Portugal. They seek refugee protection in Canada because of asserted discrimination amounting to persecution in Portugal, as well as risks to life at the hands of a police officer in Portugal and a political family in Angola.

[2] The Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada [IRB] dismissed the Applicants' claims, finding no serious possibility of persecution in Portugal, and failure by the Applicants to rebut the presumption of available state protection in Portugal, a democratic country.

[3] On appeal, the Refugee Appeal Division [RAD] of the IRB agreed with the RPD, finding that the Applicants did not establish incidents of discrimination rising to the level of persecution and determining that the Applicants did not rebut the presumption of state protection afforded to them by Portugal. The RAD noted that a person who has access to adequate state protection cannot meet the criteria of section 96 or subsection 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, to be considered a Convention refugee or person in need of protection, and dismissed the appeal [Decision]. See Annex "A" for relevant legislative provisions.

[4] Neither the RPD nor the RAD considered the Applicants' risk in Angola, given the finding regarding available state protection in Portugal.

[5] In this judicial review, the Applicants challenge the reasonableness of the Decision. More specifically, the Applicants allege that the RAD unreasonably: (a) found that the alleged discrimination did not amount to persecution, (b) assessed state protection, (c) failed to apply *Chairperson Guideline 3: Child Refugee Claimants: Procedural and Evidentiary Issues*, and (d) failed to address their risk in Angola.

[6] I find that the Applicants have met their burden of convincing the Court that the Decision is unreasonable. Their judicial review application thus will be granted. The determinative issue is state protection in Portugal and the RAD's unreasonable speculation about its availability to these Applicants, as discussed below. Consequently, I decline to consider other issues they have raised.

II. Analysis

[7] To avoid judicial intervention, a challenged administrative decision must bear the hallmarks of reasonableness – justification, transparency and intelligibility. The decision may be unreasonable if the decision maker misapprehended the evidence before it. The party challenging the decision has the onus of demonstrating that it is unreasonable: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov] at paras 99-100, 125-126.

[8] The onus is on an applicant claiming lack of state protection to demonstrate its unavailability: *Flores Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 at para 30. Further, as recognized here by the RAD, the burden on an applicant who asserts such a claim in respect of a democratic country like Portugal is heavy: *Teofilio v Canada (Citizenship and Immigration)*, 2014 FC 783 at para 40.

[9] State protection, however, must be effective operationally: *Orakposim v Canada (Citizenship and Immigration)*, 2023 FC 1472 [Orakposim] at para 23. State efforts alone to address shortcomings may be insufficient, unless they result in adequate state protection at the operational level: *Rahman v Canada (Citizenship and Immigration)*, 2022 FC 516 at para 39.

[10] Bearing the above principles in mind, I find that the Applicants' submissions repetitive of their previous RAD submissions which, therefore, verge on a request for the Court to reweigh the evidence that was before the RAD. This is not the role of a reviewing court when assessing the reasonableness of an administrative decision: *Vavilov*, above at para 125.

[11] That said, in my view, the RAD unreasonably assesses the availability of state protection by refusing to consider police failure to assist the Applicants for racist reasons and by failing to engage reasonably with their country documentation.

[12] Among a host of discriminatory incidents, Applicants assert they were the victims of a real estate fraud. They describe ownership issues they encountered with the apartment they had purchased, and on which they consistently made mortgage payments, because the person who sold it to them did not own it legally. The bank eventually forced them to leave.

[13] According to the Applicants, when they sought to report the matter to the police, they were told that the police do not cover real estate fraud. They also were subjected to racism by one of the officers present who told them that black people do not earn the right to own property in Portugal. They later learned that their title insurance agent was a police officer who, they allege, not only refused to assist them but also threatened to kill them with the help of colleagues.

[14] The RAD acknowledges and accepts that the Applicants sought police assistance regarding their property fraud case. The RAD then speculates unreasonably that the police would

not be the competent authority to address land title or ownership fraud, without pointing to any supporting evidence.

[15] That the police refused to investigate the property fraud case, at the same time they expressed overt racism, is not reasonably indicative in any sense, in my view, of operationally effective police protection: *Orakposim*, above at para 31. More to the point, the RAD unreasonably failed to situate or consider the refusal of police assistance against the backdrop of the contemporaneous abhorrent statement by the police about property ownership by black people.

[16] I also find the RAD's focus on the "local failure" of state protection as insufficient to establish that state protection is not accessible to the Applicants on a national level is unjustified. The RAD relies on this Court's decision in *Zhuravlvev v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 17128 (FC) [*Zhuravlvev*] at para 31 for the proposition that "local refusal to provide protection is not a state refusal in the absence of evidence of a broader state policy to not extend state protection to the target group."

[17] As in *Zhuravlvev* (above at para 33), the RAD's analysis here, in my view, "was perfunctory [and] went directly to the assertion that the police had no basis on which to proceed with any investigation and therefore there was no foundation for a claim of refusal to provide state protection." I similarly determine that this was insufficient, in part because subsequent jurisprudence of this Court overwhelmingly has found that the adequacy of state protection must

be assessed at the operational level: *Bito v Canada (Citizenship and Immigration)*, 2022 FC 1370 at para 25 (numerous citations omitted).

[18] Further, I find that the RAD unreasonably assesses the Applicants' objective evidence about the lack of state protection. The RAD acknowledges that some of the newspaper articles provided by the Applicants outline that racism is a problem among some members of the Portugal police. Without referring to any specific articles, the RAD also observes that "other newspaper articles show that instances of racially-motivated violence against people of African descent is prosecuted by the state authorities in Portugal."

[19] Assuming that the RAD is referring to the article entitled "Portugal police officers sentenced in unprecedented trial," the RAD's statement fails to place the article in context. This article begins with a reference to institutional racism and police violence in Portugal and does not speak directly to the adequacy of state protection generally or operationally. Seventeen police officers were charged with grievous bodily harm and kidnapping of eight young black people. Only one of the eight officers convicted received jail time (one year and six months), while the rest received suspended sentences, with the police chief receiving the longest sentence. Further, and contradicting the RAD's conclusion about the prosecution of "racially-motivated violence," the article reports that the accusation of "racial hatred" was dropped, and notes that "racism is not a prosecutable criminal offence in Portugal."

III. Conclusion

[20] For the above reasons, the Applicants' judicial review will be granted. The Decision will be set aside, with the matter remitted to a different RAD panel for redetermination.

[21] Neither party proposed a question for certification, and I find that none arises in the circumstances.

JUDGMENT in IMM-8367-22

THIS COURT'S JUDGMENT is that:

1. The Applicant's judicial review application is granted.
2. The August 2, 2022 decision of the Refugee Appeal Division of the Immigration and Refugee Board of Canada is set aside, with the matter remitted to a different panel for redetermination.
3. There is no question for certification.

"Janet M. Fuhrer"

Judge

Annex “A”: Relevant Provisions

Immigration and Refugee Protection Act, SC 2001, c 27.
Loi sur l’immigration et la protection des réfugiés, LC 2001, ch 27.

<p>Convention refugee</p> <p>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,</p> <p>(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or</p> <p>(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.</p>	<p>Définition de réfugié</p> <p>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 :</p> <p>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;</p> <p>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.</p>
<p>Person in need of protection</p> <p>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</p> <p>(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or</p> <p>(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if</p> <p>(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,</p> <p>(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,</p> <p>(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in</p>	<p>Personne à protéger</p> <p>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 :</p> <p>a) soit au risque, s’il y a des motifs sérieux de le croire, d’être soumise à la torture au sens de l’article premier de la Convention contre la torture;</p> <p>b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :</p> <p>(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,</p> <p>(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,</p> <p>(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes</p>

disregard of accepted international standards, and
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

Person in need of protection

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

Personne à protéger

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-8367-22

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