Federal Court  Cour fédérale

Date: 20250127

Docket: IMM-1292-23

Citation: 2025 FC 167

Ottawa, Ontario, January 27, 2025

PRESENT: Madam Justice Sadrehashemi

BETWEEN:

IBRAHIM ROKE SESAY
RAKIATU ROKE SESAY
WULIAMATU ROKE SESAY
ZAINAB ROKE SESAY
ASATU ROKE SESAY

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The sole issue in this judicial review is the Refugee Protection Division's (RPD) assessment of the Applicants' risk in Brazil. Four of the Applicants have permanent residence status in Brazil, and are citizens of Sierra Leone. For these four Applicants, the RPD considered

their risk in Brazil in order to determine whether it ought to exclude them from having their claims against Sierra Leone determined. The combined effect of section 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] and Article 1E of the *United Nations Convention Relating to the Status of Refugees* [*Refugee Convention*] is to exclude refugee claimants from obtaining protection where they have substantially the same rights and obligations as nationals in their country of residence, and therefore are deemed not to need international protection. Exclusion under Article 1E did not apply to the fifth Applicant, Wuliamatu Sesay, a minor with no status in Sierra Leone. Instead, the RPD relied on the same risk analysis to determine whether she faced a forward-looking risk in Brazil, her country of citizenship, under sections 96 and 97 of IRPA.

[2] The RPD found that the Applicants did not face a well-founded fear of persecution or serious harm in Brazil. On this basis, the RPD rejected Wuliamatu's refugee claim against Brazil, and found the other Applicants to be excluded under section 98 of IRPA. The exclusion finding meant that the four Applicants with citizenship in Sierra Leone did not have their claims against Sierra Leone assessed.

[3] I agree with the Applicants that the RPD's assessment of their risk in Brazil is unreasonable. The RPD found that, on a balance of probabilities, the threatening calls that the Principal Applicant, Mr. Sesay, received in Brazil were coming from individuals in Sierra Leone and not Brazil. This conclusion is unsupported by the evidence in the record. The RPD's conclusion about the location of the anonymous callers was the foundation for other key findings it made about the risk faced by this family in Brazil. On this basis alone, the matter requires

redetermination. The RPD also made other findings that are unsupported by the evidence and based on weak inferences that do not “add up.”

[4] I asked the parties to provide written submissions addressing a recent decision of this Court, *Tshimuangi v Canada (Citizenship and Immigration)*, 2024 FC 1354 [*Tshimuangi*], that commented on the ability of the RPD or the RAD to consider a claimant’s risk in their country of residence in the context of an exclusion finding under Article 1E and section 98 of IRPA. The Applicants and the Minister agree, as do I, that the RPD applied the appropriate framework in considering risk in the country of residence prior to making an exclusion finding. Having considered this Court’s *obiter* comments in *Tshimuangi*, I see no basis to disturb the RPD’s approach to assessing risk in the country of residence prior to making an exclusion finding.

II. Background to the Refugee Claim under Review

[5] The Applicants are family members and their claims for refugee protection were heard and decided together. The Applicants’ legal status in Sierra Leone and Brazil varies. This impacted the analysis undertaken by the RPD in deciding their claims.

[6] The Principal Applicant, Mr. Ibrahim Roke Sesay, fled his country of citizenship, Sierra Leone, because he feared persecution based on his political activism. Mr. Sesay was outspoken against the All People’s Congress and was detained several times in Sierra Leone. Due to the continued threats and attacks related to Mr. Sesay’s activism, Mr. Sesay’s wife, two minor daughters, and sister also fled Sierra Leone.

[7] In 2018 Mr. Sesay and his wife, who was pregnant at the time, went to Brazil. One of his daughters, Wuliamatu, was born in Brazil and only has citizenship status there. Later, following further threats and attacks in Sierra Leone, Mr. Sesay's sister, Ms. Asatu Sesay, and his daughter, Rakiatu, came to Brazil.

[8] Mr. Sesay, his wife, Ms. Zainab Sesay, his daughter, Rakiatu, and his sister, Ms. Asatu Sesay, all obtained permanent resident status in Brazil. Mr. Sesay's other minor daughter, Mariama, arrived last in Brazil and did not obtain permanent resident status. Mariama only has citizenship in Sierra Leone. She is not an applicant in this judicial review because the RPD found Mariama to be a Convention refugee in relation to Sierra Leone based on her father's political opinion and the threats and attacks she faced in Sierra Leone.

[9] All of the Applicants eventually made their way to Canada and made refugee claims. The Minister intervened to argue that the Applicants with permanent residence in Brazil should be excluded under section 98 of IRPA and Article 1E of the *Refugee Convention*. The Applicants had their refugee claims heard together on December 21 and 23, 2022. Only Mr. Sesay testified.

[10] The parties do not contest the RPD's finding that Mr. Sesay, his wife, Ms. Zainab Sesay, his daughter, Rakiatu, and his sister, Ms. Asatu Sesay, have permanent resident status in Brazil, and that his daughter, Wuliamatu, only has citizenship in Brazil.

[11] The Applicants alleged that they continued to face threats and attacks in Brazil because of Mr. Sesay's political profile, and that they could not obtain state protection in Brazil. At issue is

the RPD's assessment of the Applicants' risk in Brazil, the country of citizenship of Wuliamatu, and the country of residence for the other Applicants.

III. Relevance of the *Tshimuangi* Decision

[12] The parties agree that the RPD took the correct approach in this case by first evaluating the Applicants' claim that they were at risk in their country of residence, Brazil, prior to excluding them from having their refugee claim considered against Sierra Leone, their country of citizenship.

[13] A day before I heard oral arguments, this Court issued *Tshimuangi*, a decision that commented on assessing risk in the country of residence in the context of an exclusion finding. As neither party had challenged the RPD's decision to assess risk in the country of residence, the question of whether it was appropriate to do so was not an issue that was explored in written submissions prior to the hearing or at the hearing itself. I asked the parties to provide written submissions, post-hearing, on the applicability of the *Tshimuangi* decision to this matter.

[14] In *Tshimuangi*, the RAD had confirmed a decision of the RPD that found, as the first step of its analysis, that the applicant, as a permanent resident of South Africa, was excluded from protection under Article 1E of the *Refugee Convention* and section 98 of IRPA because she enjoyed the rights and obligations of the nationals of South Africa. The RAD then went on to a second step and considered her risk in South Africa under section 97 of IRPA. This Court found that there was no legal foundation for the RPD to assess risk in a country of residence under

section 97, which is limited to a country of citizenship, after a claimant has already been excluded under section 98 of IRPA. As a result, the Court sent the matter to be redetermined.

[15] This particular problem does not arise here because the RPD did not consider risk after already finding the claimants were excluded. Instead, the RPD assessed the Applicants' risk in their country of residence as part of its analysis in determining whether they ought to be excluded from making a refugee claim against their country of citizenship.

[16] The rest of the *Tshimuangi* decision, under the heading "comments" focuses on whether there is any legal basis for the RPD to consider risk in the country of residence at all. The Court states this portion of its reasons are not determinative of its decision to allow the judicial review, but asks the RAD to consider these comments on redetermination (*Tshimuangi* at para 14).

[17] In my view, these comments are *obiter* because the Court in *Tshimuangi* did not decide to allow the judicial review on this basis. These *obiter* comments, however, go to the foundation of the matter before me where the key issue is the RPD's assessment of risk in the country of residence. In these circumstances, where I am sending the matter back on the basis of an unreasonable assessment of risk in the country of residence, and the parties provided me with submissions on this very issue that may arise on redetermination, I have decided to comment briefly.

[18] The core issue for the Court in *Tshimuangi* was the interpretation of section 98 of IRPA and Article 1E of the *Refugee Convention*. Section 98 of IRPA expressly incorporates Articles

1E and F of the *Refugee Convention* into Canadian law. It states that a person that fits within the meaning of Article 1E or Article 1F is not a Convention refugee or a person in need of protection. In *Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68 [*Febles*], the Supreme Court of Canada confirmed that there is nothing in the scheme of IRPA that indicates any intention underlying section 98 other than excluding those who fit within these Articles of the *Refugee Convention* (*Febles* at para 66). The real issue then is the interpretation of Article 1E of the *Refugee Convention*, which states that a claimant will be excluded from refugee protection "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".

[19] In the *obiter* comments in *Tshimuangi*, the Court's overriding concern was, in its view, the absence of a legislative authority for the RPD or the RAD to undertake a risk assessment in relation to a claimant's country of residence when evaluating exclusion under Article 1E of the *Refugee Convention*. In explaining its concern, the Court considered the RAD's approach in MB8-00025, a decision designated by the Immigration and Refugee Board ("IRB") as a jurisprudential guide under 159(1)(h) of IRPA ("Jurisprudential Guide"). The IRB marked this decision as the "preferred interpretation of … [Article 1E] in situations where a refugee has the rights and obligations similar to a national of third country and is alleging mistreatment in that country" (Immigration and Refugee Board of Canada, *Policy note for identification of MB8-00025 as a Refugee Appeal Division Jurisprudential Guide* (22 Dec 2020), online: https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/note-mb8-00025.aspx). Just as in this case, and in the case before the Federal Court of Appeal in *Canada (Citizenship and Immigration) v Saint Paul*, 2021 FCA 246, both the applicant and the Minister in *Tshimuangi* agreed with the approach set

out in the Jurisprudential Guide. Both parties took the position that a risk claim ought to be assessed in the country of residence before an exclusion finding under Article 1E of the *Refugee Convention* is made.

[20] The Court in *Tshimuangi* commented that it considered the parties' positions "indefensible" because, despite the text of section 98 of IRPA and Article 1E of the *Refugee Convention* being unambiguous, the interpretation being advanced by the parties and in the Jurisprudential Guide requires "reading into the text", resulting in an approach that "usurped the role of Parliament." The Court noted that in these circumstances, where the text is unambiguous, the objectives of the *Refugee Convention* – while laudable – "were not at stake" and there is no need to look to the purpose and the context of Article 1E of the *Refugee Convention* in order to determine its meaning.

[21] With great respect, I do not share the concerns raised in *Tshimuangi*. In my view, the interpretation of Article 1E of the *Refugee Convention* is not limited to its text, even if one considers the text to be unambiguous. The approach suggested in the *obiter* in *Tshimuangi* runs counter to the requirement that "the meaning of the incorporated Articles of the *Refugee Convention* must be determined in accordance with the *Vienna Convention*" (*Febles* at paras 11-12, 15; *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 at para 31; see also the very recent decision of Justice Grammond in *Ralek Horodiuk v Canada (Citizenship and Immigration)*, 2025 FC 112 at paras 40-46, which addresses this reasoning in *Tshimuangi*).

[22] Article 31 of the *Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37 [*Vienna Convention*] provides that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Consideration of both the context and purpose of Article 1E, and the object of the *Refugee Convention*, are therefore an indispensable part of the exercise of interpreting the meaning of Article 1E. This approach is also consistent with the modern approach to statutory interpretation set out in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 (*Febles* at para 12).

[23] In the Jurisprudential Guide, the RAD undertakes this exercise, considering the text, context and purpose of Article 1E in light of the object of the *Refugee Convention* as a whole. The RAD considers the protective aims of the *Refugee Convention* (see also *Febles* at para 27; *Ezokola* at para 32, and *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 778 (SCC), [1998] 1 SCR 982 at para 57) and the serious consequences of an exclusion finding. Further, the RAD references the general consensus that the purpose of Article 1E is to exclude those who do not need refugee protection (*Zeng v Canada (Minister of Citizenship and Immigration)*, 2010 FCA 118, [2011] 4 FCR 3 [*Zeng*] at paras 1, 19; see also *Németh v Canada (Justice)*, 2010 SCC 56, [2010] 3 SCR 281 at para 117 and *Freeman v Canada (Citizenship and Immigration)*, 2024 FC 1839 at para 68).

[24] At the conclusion of its interpretative exercise, the RAD finds that the RPD and the RAD are required, where a claimant asserts risk in the country of residence, to assess whether the claimant can access protection there before an exclusion finding is made. If a claimant is to be

excluded because of the availability of international protection elsewhere, an assessment has to be done to ascertain that this protection is, in fact, forthcoming.

[25] The RAD also considers the jurisprudence of this Court, specifically, *Saint Paul v Canada (Citizenship and Immigration)*, 2020 FC 493 and *Celestin v Canada (Citizenship and Immigration)*, 2020 FC 97, that does not support its view and explains why it prefers the approach followed in other cases of this Court (see for example: *Mwano v Canada (Citizenship and Immigration)*, 2020 FC 792; *Kroon v Canada (Minister of Employment and Immigration) (1995)*, 89 F.T.R. 236; see also *Lauture v Canada (Citizenship and Immigration)*, 2023 FC 1121 at paras 28-36 for a description of the divergence in the jurisprudence of this Court prior to the Federal Court of Appeal's decision in *Saint Paul* and the issuance of the Jurisprudential Guide).

[26] In support of its position, the RAD also references the United Nations High Commissioner for Refugees' ("UNHCR") interpretative note on Article 1E in which the UNHCR cautioned that applying Article 1E to a person who had a well-founded fear of persecution in their country of residence would "undermine the object and purpose of the Convention." Accordingly, the UNHCR advises that if a person claims persecution or serious harm in the country of residence, before applying Article 1E, "there is an obligation to examine the existence of any fear claimed vis-à-vis the 1E country."

[27] The RPD in this case undertook the same reasoning used by the RAD in the Jurisprudential Guide. Relying on paragraph 1 of the Federal Court of Appeal's decision in *Zeng*, the RPD explained:

> …the safety of the 1E country lies at the core of the definition of a 1E country; a 1E country is by definition, a safe country where the claimant enjoys surrogate protection. Therefore, I am of the view that before excluding, I should examine whether or not there is a serious possibility of persecution, or on a balance of probabilities, a danger of torture or risk to life or risk of cruel and unusual treatment or punishment in the 1E country.

[28] Having considered the reasoning in *Tshimuangi*, the parties' submissions before me and the RAD's Jurisprudential Guide, I find the RPD's approach to be a reasonable one. I do not see any need to disturb or comment further on the RPD's decision to assess the Applicants' risk in Brazil prior to making an exclusion finding under section 98 of IRPA.

IV. Analysis

[29] I have serious concerns with the justification and intelligibility of several of the RPD's key findings that underpin the basis of its conclusion that the Applicants do not face risk in Brazil. The Applicants have raised a number of concerns with the RPD's reasoning. I have found it necessary to address only three key findings: the location of the agents of persecution, the Applicants' relocation attempts in Brazil and the attacks on the home in Brazil.

[30] The RPD finds that on a balance of probabilities the anonymous calls Mr. Sesay received in Brazil were coming from individuals who were in Sierra Leone. The RPD claims that both Mariama, Mr. Sesay's daughter, and his sister, Ms. Asatu Sesay, affirm in their refugee form narratives that the threatening calls were coming from Sierra Leone. I do not agree that either narrative makes that assertion.

[31] In Mariama's narrative she states: "Before I arrived to Brazil, my father was receiving threatening phone calls from Sierra Leone people who lived in Brazil because my father had continued to post on social media about the corruption of the Sierra Leone government" (emphasis added). She then explains that after she arrived in Brazil, the calls continued: "After I arrived, the threatening phone calls continued to my father's cellphone and the home phone. The unknown callers would tell him that we need to leave the country and that we are not safe here." She describes one of the calls that she heard in Brazil, saying: "One of the times my father was with us, he received a threatening phone call, put it on speaker, and the person was not speaking Portuguese, it was someone from Sierra Leone who speaks our language."

[32] When Mariama's narrative is read in its full context, it is very clear that she is not suggesting that the callers were in Sierra Leone but rather, that they were people of Sierra Leonean background living in Brazil. Mr. Sesay's sister's narrative includes the same paragraph as Mariama's that indicates that Mr. Sesay received a call from "someone from Sierra Leone". Following this statement, she, as Mariama does, connects these threatening anonymous calls with the attacks at their home in Brazil:

> After they [Mr. Sesay and family] left [Brazil], the threatening phones were still happening on the home phone. Both Mariama and I were getting very scared because the threatening phone calls continued, people would come to our home and bang on the door in the middle of the night while we were sleeping but we would not open the door.

[33] Having reviewed both Mariama's and Ms. Asatu Sesay's narratives, I cannot follow how the RPD relies on this evidence to say it is more likely than not that the calls were from Sierra Leone.

[34] The RPD concludes its discussion about the location of the threats, stating: “Therefore, I find that it is more likely than not that the phone threats were made from Sierra Leone, because the only evidence that I have before me is the information from your sister’s and your daughter’s narrative.” Not only does the evidence on which the RPD relies (Mariama’s and Ms. Asatu Sesay’s narratives) not say what the RPD says it does, there was other evidence in the record that supported the opposite conclusion. For example, both Mariama and Ms. Asatu Sesay describe attacks in Brazil on their home, and at least two of the threatening calls mention the cities in which Mr. Sesay was living in Brazil.

[35] The RPD’s conclusion on the location of the anonymous callers is not supported by the record. The RPD fundamentally misapprehended the evidence. This is a sufficient basis to find the decision unreasonable and requiring redetermination (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 126). As I will explain, the location of the callers was not a minor finding, but one that the RPD repeatedly relied upon to draw other negative inferences about the Applicants’ claims, including the Applicants’ relocation within Brazil.

[36] The RPD relies on its faulty finding – that the callers were living in Sierra Leone – as a basis to doubt the Applicants’ evidence on relocating within Brazil. The RPD states, “I can’t determine what would motivate you to move around in Brazil, when the threats made against you were from overseas.” The RPD finds that it “makes no sense” for the Applicants to move around Brazil since it had determined that the threats were coming from individuals living in Sierra Leone and not Brazil. Based on my reasoning above, the RPD’s determination on the plausibility of Mr. Sesay relocating within Brazil is also unreasonable.

[37] The remainder of the RPD's analysis about the Applicants' relocation in Brazil is difficult to understand. The RPD accepts Mr. Sesay's explanation for the inconsistent information that he provided when he first entered Canada regarding the dates of his moves in Brazil. The RPD acknowledges that the circumstances were challenging because Mr. Sesay's wife went into labour at the border. Despite accepting this explanation, the RPD finds it cannot "assess the reliability" of Mr. Sesay's oral testimony about his relocations in Brazil because it has "no other evidence to compare the consistency of [the] testimony." This is not a valid basis to draw a negative inference. Being unable to compare to a previous account is not grounds to discount the Applicants' testimony. Further, other evidence in the record supported Mr. Sesay's testimony about his relocation in Brazil, including the narratives of other family members and transcripts of the threatening calls that reference his locations in Brazil.

[38] The RPD discounts the evidence about the attacks on the home in Brazil as unreliable. I find the RPD cursorily addresses this evidence and I cannot follow the logic of its concerns. Both Mariama and Ms. Asatu Sesay stated when they were living in Brazil, their home was attacked in the middle of the night by people throwing stones at it. The RPD discounts this evidence because it finds the statements in their narratives were "vague", neither testified at the hearing, and this attack is not mentioned in the other family members' narratives. I cannot follow how the RPD's concerns justify discounting this evidence. The RPD did not call either of these claimants to testify. If the RPD had questions about the statements the claimants made in their narrative about the attack, it was incumbent on the RPD to ask questions about it. Further, I do not find it unusual that the other claimants did not include this evidence in their narratives given the claims

were joined and the information about the attacks was contained in the narratives of the two claimants who experienced these attacks first-hand.

[39] The Applicants also made arguments challenging the reasonableness of the RPD's state protection analysis. I have found it unnecessary to directly address the state protection arguments because I have already found the claims as a whole must be redetermined. In my view, the problems set out above in the RPD's evaluation of the nature of the threats facing the Applicants in Brazil are significant and affect the RPD's state protection analysis.

[40] The application for judicial review is granted. I agree with the parties that there is no need to certify a serious question of general importance.

JUDGMENT in IMM-1292-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted;
2. The RPD decision dated January 5, 2023 is set aside and sent back to be redetermined by a different member; and
3. No serious question of general importance is certified.

"Lobat Sadrehashemi"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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