

CANADA / JUDGMENT

MB9-08064

COURT

Refugee Appeal Division

DECIDED

7 February 2020

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RAD File No. / No de dossier de la SAR: MB9-08064

MB9-08065 / MB9-08066

Private Proceeding / Huis clos

Reasons and decision ? Motifs et décision

Persons who are the subject of the appeal

XXXX XXXX XXXXXXXXXX XXXX XXXXXXXXXX XXXX

Personnes en cause

Appeal considered / heard at

Ottawa, ON

Appel instruit / entendu à

Date of decision

February 7, 2020

Date de la décision

Panel

Nicole Ladouceur

Tribunal

Counsel for the persons who are the subject of the appeal

Mohamed Diaré

Conseil des personnes en cause

Designated representative

XXXX XXXX

Représentant(e) désigné(e)

Counsel for the Minister

N/A

Conseil du ministre

REASONS FOR DECISION

OVERVIEW

- [1] XXXX XXXX (principal appellant), a citizen of Haiti, and her minor daughters XXXX XXXX and XXXX XXXX (associate appellants), citizens of Brazil and the United States respectively, are appealing against the decision of the Refugee Protection Division (RPD) of March 21, 2019. The RPD concluded that the principal appellant was excluded under Article 1E of the Convention, while in the case of the associate appellants, the RPD determined that they were neither refugees nor persons in need of protection.
- [2] XXXX XXXX was appointed as the designated representative of her minor daughters.
- [3] Under paragraph 111(1)(a) of the Immigration and Refugee Protection Act (IRPA), the Refugee Appeal Division (RAD) dismisses the appeal and confirms the RPD's determination.

BACKGROUND

- [4] The principal appellant left Haiti in XXXX 2014 in the wake of sexual violence she suffered at the hands of two men in 2010. On XXXX XXXX XXXX XXXX, she left Brazil for the United States because she claims her purse was stolen and she was discriminated against by Brazilians because she is Haitian.
- [5] She arrived in the United States on XXXX XXXX XXXX XXXX, but did not claim asylum. She then went to Canada where she filed a claim for refugee protection on November 27, 2017. She was with her two minor daughters, one who has Brazilian citizenship and the other American.
- [6] On January 9, 2019, the Minister of Citizenship and Immigration filed a notice of intervention asking the RPD to conclude that Article 1E of the Convention applies to the principal appellant because she has permanent resident status in Brazil.
- [7] In its decision, the RPD concluded that because the principal appellant was absent from Brazil for more than two years, she no longer had permanent resident status on the day of the hearing. However, as a mother of a child born in Brazil, the principal appellant could return to Brazil and obtain permanent residence.¹ The RPD was of the opinion that the principal appellant did not demonstrate a reasonable fear of persecution or a risk in accordance with subsection 97(1) of the IRPA in Brazil and that she therefore left Brazil voluntarily.

- [8] As far as the minor appellants are concerned, the RPD rejected the claims of the two children because they failed to establish that there was a possibility of persecution or that they would be subjected to one of the risks listed in section 97 in their respective countries of citizenship.
- [9] In her memorandum, the principal appellant argues that the RPD erred in its conclusion that she could return to Brazil and claim permanent resident status. The principal appellant also argues that the RPD erred in its credibility assessment and by concluding that there was no serious possibility of persecution or that her life would be subjected to risks under section 97 of the IRPA if she were to return to Brazil.
- [10] The appellants are asking the RAD to set aside the RPD's determination and to render a determination to the effect that they are Convention refugees and persons in need of protection.

SCOPE OF THE APPEAL

- [11] The RAD reviews RPD decisions by applying the correctness standard of review² after conducting its own analysis of the record. The exception to this rule concerns the RPD's findings in assessing credibility or the weight to be given to the oral evidence it hears in situations where it enjoyed a meaningful advantage.
- [12] In this case, I am of the opinion that there are no findings for which the RPD enjoyed a meaningful advantage. Therefore, I have applied only the correctness standard.

ANALYSIS

- [13] After conducting my own analysis of the record, including reviewing the transcript of the RPD hearing of January 21, 2019, I am of the opinion that the principal appellant's arguments are unfounded and the RPD's decision is correct. My reasons are as follows.
- [14] The evidence indicates that the principal appellant held permanent resident status in Brazil, but following an absence of more than two years, she lost that status.

Determinative issue

- [15] The determinative issue is whether the RPD erred in deciding that the principal appellant could return to Brazil and exercise her right to reclaim permanent resident status and in so doing would be excluded under Article 1E of the Convention.
- [16] By applying the Zeng³ factors to the facts in this case, for the exclusion in Article 1E of the Convention to apply, the RPD must be able to conclude three things: 1) that the principal appellant can return to Brazil and stay there, in other words she can reclaim her permanent resident status; 2) that she can enjoy substantially similar rights and responsibilities; and 3) that there is no serious possibility of persecution or of her life being subjected to any of the risks listed in section 97 of the IRPA.

Eligibility for obtaining resident status

The Refugee Protection Division's conclusion that the principal appellant could return to Brazil to claim and obtain permanent resident status in Brazil is correct.

- [17] The principal appellant left Brazil on XXXX XXXX XXXX XXXX XXXX for the United States because she was subjected to discriminatory actions and humiliating language by Brazilians. She also claims that she was robbed of her purse and cellphone.
- [18] On the day of the hearing, January 21, 2019, it had been more than two years since the appellant left Brazil. According to the documentary evidence on record, permanent resident status in Brazil is lost if a person is absent from the country for more than two years.⁴
- [19] However, the documentary evidence indicates that a foreign parent of a Brazilian child may obtain a permanent visa for permanent residence in Brazil by filing an application with the federal police⁵ without any formality other than presenting the child's birth certificate. The principal appellant gave birth to her daughter, the appellant XXXX XXXX, in Brazil on XXXX XXXX XXXX 2015. As a result, under the applicable legislative provisions, the principal appellant has the right to return to Brazil to obtain or renew her permanent resident status and thereby benefit from rights and responsibilities substantially similar to Brazilian citizens. When asked at the hearing whether she undertook such steps, the principal appellant indicated that she was unaware that she could.

The Refugee Protection Division's conclusion that the principal appellant benefitted from rights and responsibilities substantially similar to Brazilian citizens is correct.

- [20] The documentary evidence indicates that the Brazilian constitution guarantees that foreigners living in Brazil will have the same rights as Brazilian citizens in terms of access to health care, education, social services and security.⁶
- [21] At the hearing, the principal appellant testified that she lived in Brazil from XXXX 2014 to XXXX 2016. During that time, she obtained a work permit and had paid employment from September 6, 2014, to July 2016. She gave birth to a child at a Brazilian hospital. Even though she testified that she had been left alone in her room after giving birth while other women were being tended to, she added that she returned to the hospital for a follow-up appointment and everything went well with both the staff and her doctor.
- [22] In light of the appellant's testimony, it seems that she benefitted from rights and responsibilities substantially similar to Brazilian citizens, namely having paid employment and access to free health care.

Prospective risk in Brazil

The Refugee Protection Division's conclusion that the principal appellant left Brazil voluntarily is correct.

- [23] In her memorandum, the principal appellant claims she was persecuted in Brazil. She argues that Brazilians are racist and hostile toward Haitians. She also claims that her boss sexually harassed her at the workplace. She testified that her purse and cellphone were stolen.
- [24] The RPD identified several omissions and inconsistencies in the principal appellant's testimony and found that she was not credible.
- [25] For example, the principal appellant stated that she was robbed, but was unable to provide details about the robbers or explain whether she had been targeted because of her nationality or if this was simply a random crime. She apparently did not file a police complaint because she thought she would not be taken seriously. She claims she was subjected to humiliating comments when getting off the bus, but was unable to provide details. She also claims she was sexually harassed at work and fired, but did not file a complaint because she believed she would not be treated well.
- [26] However, her Basis of Claim Form (BOC Form) makes no mention of these incidents or mistreatment. What is more, the appellant failed to indicate on her BOC Form that she feared living in Brazil.
- [27] When asked by the RPD about these multiple major omissions, the principal appellant stated that she was not the one who wrote her account. Her friend wrote it and told her a summary would suffice.
- [28] These explanations are unsatisfactory. Given that the appellant maintains that these incidents are the reason she fled Brazil, it is reasonable to expect her to mention them in her BOC Form.
- [29] The principal appellant also indicated that she is not fluent in French. However, the question on the BOC Form about which country she fears is straightforward. She indicated Haiti, but not Brazil. Her answer undermines her credibility.
- [30] It is important to remember that at the beginning of the hearing, the principal appellant stated that the BOC Form was complete and accurate. Her omissions, for which she has no satisfactory explanation, undermine her credibility. When a refugee claimant fails to mention important facts in her BOC Form, the Board can legitimately consider that this omission undermines her credibility.⁷ I would add that when I read the transcript of the hearing, I noted that the principal appellant's testimony was vague and short on details, explanations or information in several areas. In this case, the cumulative omissions and lack of details were fatal to the principal appellant's credibility.
- [31] As far as the racist comments or behaviour she claims to have suffered are concerned, not every discriminatory act constitutes persecution. Comments, gestures or even difficulty finding work in the middle of an economic crisis do not meet the threshold for persecution, even when considered cumulatively. I note that the appellant had paid work for two years, before leaving the country because she believed she was not being paid enough, according

to her BOC Form. The courts have held several times that persecution consists of a sustained or systemic violation of fundamental human rights demonstrating the absence of state protection,⁸ and the principal appellant failed to establish that her fundamental rights were violated when she was living in Brazil.

- [32] Considering the principal appellant's testimony and the general statements in the BOC Form, I cannot conclude that the RPD erred in concluding that the appellant did not establish a serious possibility of persecution in Brazil on any of the five Convention grounds, even when considered cumulatively.
- [33] Finally, the RPD reviewed the prospective risk for the principal appellant and her minor daughter as members of the social group of women if they were to return to Brazil.
- [34] In reviewing the RPD's conclusions in this regard, I noted that it considered the documentary evidence and the principal appellant's personal situation, as required by the case law.⁹ In the absence of probative evidence on record, I have no reason to conclude that the RPD erred in its analysis.

Prospective fear-Haiti

- [35] Exclusion clause 1E is based on the principle that international protection is surrogate protection meant to benefit those facing a threat of persecution. Having concluded that the evidence is insufficient to conclude that there is a serious possibility of persecution in the country of residence, in this case Brazil, it was not necessary for the RPD to review the prospective risk with respect to Haiti, even though the appellant was asked questions in that regard at the hearing.

Minor appellants

- [36] The RPD was of the opinion that the principal appellant did not express any concern for her daughter XXXX XXXX, in Brazil, or for her daughter, XXXX XXXX, in the United States. In appeal, these findings are not disputed.
- [37] I reviewed all the evidence and I have found no grounds for changing the findings of the RPD whereby the principal appellant failed to establish a serious possibility of persecution or the likelihood that the lives of her minor daughters would be subjected to one of the risks listed in section 97 of the IRPA in their respective countries of citizenship.
- [38] For these reasons, having considered all the evidence, I am of the opinion that the appellants have not established that the RPD's decision is erroneous. The RPD's decision considers all the evidence on the record and the applicable jurisprudential principles.

CONCLUSION

- [39] The RAD confirms the impugned decision whereby XXXX XXXX is described in Article 1E of the Convention because she has the right to return to Brazil and reclaim her resident status. This status allows her to benefit from rights and responsibilities substantially similar to Brazilian nationals.
- [40] The principal appellant did not establish, for herself or her daughter XXXX XXXX, a serious possibility of persecution or a likelihood that their lives would be subjected to one of the risks listed in section 97 of the IRPA if they were to return to Brazil.
- [41] As far as XXXX XXXX is concerned, it was not established that she would encounter a serious possibility of persecution or that there is a likelihood that her life would be subjected to one of the risks listed in section 97 of the IRPA if she were to return to United States, her country of citizenship.
- [42] For these reasons, the appellants XXXX XXXX XXXX XXXX XXXX and XXXX XXXX are not Convention refugees under section 96 of the IRPA or persons in need of protection under section 97 of the IRPA.
- [43] The appeals are dismissed.

(Signed)

"Nicole Ladouceur"

Nicole Ladouceur

February 7, 2020

Date

1 RPD-1, Refugee Protection Division (RPD) record, RPD decision, paragraph 43.

2 Huruglica v. Canada, 2016 FCA 93, paragraph 53.

3 M.C.I. v. Zeng, 2010 FCA 118, paragraph 28.

4 Ibid.

5 National Documentation Package (NDP) on Haiti, July 20, 2018, Tab 14.11: ZZZ106127.FE, June 21, 2018.

6 NDP on Brazil, March 31, 2017, Tab 3.4, Response to Information Request BRA 105515.FE, Brazil: The rights and duties of permanent residents (...) procedure to obtain or renew a residency permit; grounds for losing permanent residence.

7 Grinevich v. Canada (M.C.I.) 1997 CanLII 16340 (FC).

8 Ranjha v. Canada (M.C.I.) 2003 FC 637.

9 Josile v. Canada (M.C.I.) 2011 FC 39.

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RAD.25.02 (April 4, 2019)

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Immigration and Refugee

Board of Canada

Refugee Appeal Division

Commission de l'immigration

et du statut de réfugié du Canada

Section d'appel des réfugiés

RAD.25.02 (April 4, 2019)

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