

Federal Court



Cour fédérale

**Date: 20190109**

**Docket: IMM-2200-18**

**Citation: 2019 FC 21**

[ENGLISH TRANSLATION]

**Ottawa, Ontario, January 9, 2019**

**PRESENT: The Honourable Mr. Justice Bell**

**Docket: IMM-2200-18**

**BETWEEN:**

**BERNADETTE FLEURY**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

I. Nature of the case

[1] This is an application for leave and for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of a decision dated April 3, 2018, by a member of the Refugee Protection Division of the Immigration and Refugee Board of

Canada [RPD], rejecting the claim for refugee protection filed by the applicant, Bernadette Fleury [Ms. Fleury]. Ms. Fleury was seeking refugee protection under section 96 and subsection 97(1) of the *IRPA*.

II. Relevant facts as related by Ms. Fleury

[2] Ms. Fleury is a 36-year-old Haitian citizen. In her Basis of Claim [BOC] form, she most notably claims that on January 30, 2015, a group of individuals approached her and told her that they had been looking for her. One of the individuals then grabbed her by the neck and pointed his firearm at her. At that point, since there was a van heading down the street, the individuals moved out of the way in order to allow the van to pass. Fortunately for Ms. Fleury, the distraction caused by the van allowed her to escape.

[3] Ms. Fleury states that after the incident described above, she went to the home of a friend, Patricia Jean, to seek refuge. She indicates that she stayed there for two days. While she was there, she claims that she received anonymous calls threatening her. The anonymous person at the other end of the line threatened her, saying that he was going to find her, and warned her not to call the police; if she did, he would go after her family as well.

[4] During her testimony before the RPD, Ms. Fleury added that the anonymous caller had told her that when he found her, he was [TRANSLATION] “going to have sex with me and then pass me around to all the others so they could do the same, and he would then insert a piece of wood into me” (minutes of the hearing, at p 5).

[5] Fearing for her life, Ms. Fleury decided to move to the home of another friend, Michaëlle Exantus, in Pétion-Ville, Haiti. She confirms that this time, she lived with her friend for a period of one month. Despite this change of address, Ms. Fleury claims that she continued to receive anonymous calls from people threatening both her and her family.

[6] Without indicating the exact date in her BOC form, Ms. Fleury reports that she decided to call members of her family to warn them that she was still receiving threats by telephone; she therefore suggested that they leave the family home. It was at this point that she learned that her brother, Horlody Fleury, had been shot dead on February 4, 2015. Ms. Fleury claims that after the murder of her brother Horlody, the members of her family left the family home to seek refuge elsewhere in Haiti. She also confirms that her father moved to Miragoâne, in Haiti.

[7] Despite the fact that members of her family frequently changed their telephone number, Ms. Fleury states that they continued to receive threatening telephone calls.

[8] After living with her friend Michaëlle for approximately one month, Ms. Fleury moved for a third time, to the home of another friend, Nadège Romulus, in Pétion-Ville, Haiti. This is where she remained until she was able to finalize the documentation required for her to travel to Brazil. On August 31, 2015, she officially left Haiti for Brazil.

[9] Ms. Fleury states that she was able to obtain a five-year visa to live and work in Brazil, but that she only stayed there for eight months. While living in Brazil, she was not able to integrate because, according to her, she ran into problems with Brazilian women. She therefore

left Brazil for the United States, where she lived for over a year. Ms. Fleury confirms that she never applied for refugee protection while she was living in either the United States or Brazil.

[10] On or about August 5, 2017, Ms. Fleury entered Canada via the Saint-Bernard-de-Lacolle border crossing, hence her refugee protection claim.

### III. Decision by the RPD

[11] In its decision dated April 3, 2018, the RPD concluded that on a balance of probabilities, there was no reasonable possibility that Ms. Fleury would be persecuted, tortured or subjected to cruel and unusual treatment or punishment if she were to return to Haiti. Consequently, the RPD rejected the claim, concluding that Ms. Fleury was not a Convention refugee or a person in need of protection within the meaning of section 96 and section 97 of the *IRPA*, respectively. Under subsection 107(2) of the *IRPA*, the RPD added that there was no credible basis for Ms. Fleury's claim. This finding therefore precludes an appeal to the Refugee Appeal Division [RAD].

Nevertheless, the RPD accepted Ms. Fleury's identity, but held that she was not credible and that she had failed to discharge her burden of proof.

[12] At the hearing before the RPD, Ms. Fleury produced four copies of the supporting documents for her refugee protection claim:

- Exhibit C-1 – Complaint dated Tuesday, February 4, 2015, allegedly filed with the police by a neighbour of her family in Port-au-Prince, after the death of her brother, Horlody Fleury;

- Exhibit C-2 – An excerpt from the records of the district civil court (*Tribunal de Paix*), also dated Tuesday, February 4, 2015, concerning the death of Horlly Fleury;
- Exhibit C-3 – The death certificate of Horlly Fleury, dated January 4, 2018; and
- Exhibit C-4 – A letter from Ms. Fleury’s father, dated February 4, 2018, as well as a copy of his national identity card.

[13] The RPD identified several contradictions and inconsistencies in Ms. Fleury’s testimony related to the documentary evidence listed above and deemed them sufficiently significant to make her testimony devoid of any credibility.

[14] With respect to Exhibits C-1, C-2 and C-3, counsel for Ms. Fleury clarified, at the beginning of the hearing, that February 4, 2015, was a Wednesday and not a Tuesday. In addition, the RPD noted that these exhibits provided contradictory information about the death of Ms. Fleury’s brother, Horlly Fleury. Exhibits C-1 and C-2 indicate that Horlly’s time of death was approximately 4:45 p.m., while Exhibit C-3 instead indicates that he died at 10:00 a.m. When questioned about this contradiction, Ms. Fleury reiterated that the documentary evidence had been obtained through a third party and that, consequently, she did not have any control over the information.

[15] With respect to Exhibit C-4, the RPD noted that the national identity card belonging to Ms. Fleury’s father indicates that he lives in Pointe-à-Raquette. However, during her testimony, she confirmed that in 2015, he was living in Delmas with her and her brothers and that he moved to Miragoâne. To add to the confusion, Exhibit C-3, dated January 4, 2018, indicates that he lives

in La Gonave. Still concerning the documents, Ms. Fleury states that she received them on January 29, even though several are dated February 4.

[16] With respect to the chronology of events following the incident on January 30, 2015, the RPD is of the opinion that the explanations provided by Ms. Fleury are not credible. For example, in her BOC form, she indicates that she lived in hiding for a period of one month. The RPD found it implausible that she would not have contacted members of her family immediately after the incident on January 30, 2015. In her testimony, she contradicts this assertion by stating that she only contacted members of her family on or about February 5, 2015, six (6) days after the incident.

[17] Ms. Fleury also claims that she was a victim of targeted violence and that she fears for her life. She alleges that she will face a serious possibility of persecution, if she were to return to Haiti, because she is a woman. She simply does not want to go back there, especially since, according to her account, the police in Haiti have not been able to find the culprits. It was the RPD's opinion that Ms. Fleury did not match the profile of an at-risk woman in Haiti and that her travels over the previous three (3) years were not reflective of the travels of someone who would be considered to be at risk. The RPD adds that it was not credible that both she and her family would continue to be subjected to threats, over a period of three years, for reasons unknown to either her or her family.

[18] The RPD concluded that it was not likely that Ms. Fleury continued to receive threats almost four (4) years after the incident (*Singh v Canada (Minister of Citizenship and Immigration)*, 2007 FC 62, at para 21, 159 ACWS (3d) 568).

[19] The RPD also noted that Ms. Fleury never claimed refugee protection during the period of almost one year that she lived in the United States. The RPD was of the opinion that this conduct was inconsistent with the behavior one might reasonably expect from someone who fears for her life in her country of origin.

#### IV. Relevant provisions

[20] For reasons of brevity, the relevant provisions of the *IRPA* are reproduced in the Schedule.

#### V. Analysis

##### A. *Standard of review*

[21] The parties agree that the appropriate standard of review is reasonableness. I agree with their arguments. The assessment of Ms. Fleury's credibility is a question of fact that is subject to the standard of review of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 164, [2008] 1 SCR 190 [*Dunsmuir*]). See also: *Aguebor v Canada (Minister of Employment and Immigration)* (FCA), (1993) 160 NR 315, 42 ACWS (3d) 886; *Liu v Canada (Citizenship and Immigration)*, 2018 FC 1027 at para 16; *Devanandan v Canada (Citizenship and Immigration)*, 2016 FC 768 at para 15; *Zhou v Canada (Citizenship and Immigration)*, 2013 FC 619 at para 26;

*Paul-Forest v Canada (Citizenship and Immigration)*, 2012 FC 815 at para 15; *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319 at para 22, 213 ACWS (3d) 10.

[22] The RPD's finding that there was no credible basis for the claim under subsection 107(2) of the *IRPA* must also be assessed according to the standard of reasonableness (*Olaya Yauce v Canada (Citizenship and Immigration)*, 2018 FC 784 at para 5; *Mohamed v Canada (Citizenship and Immigration)*, 2017 FC 598 at para 22; *Iyombe v Canada (Citizenship and Immigration)*, 2016 FC 565 at para 4; *Hernandez v Canada (Citizenship and Immigration)*, 2016 FC 144 at para 3).

[23] When a decision is reviewed according to the standard of reasonableness, the analysis must be concerned with the existence of justification, transparency and intelligibility within the decision-making process and with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir*, at para 47).

B. *Did the RPD err in its credibility findings?*

[24] Failure to claim refugee protection at the first opportunity is an indicator of the absence of subjective fear of persecution, even though an adverse credibility finding with respect to an applicant cannot be made solely on this basis (*Islam v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1246 at para 22). The RPD's reasons show that Ms. Fleury's failure to take serious and timely action to apply for refugee protection while living in the United States was just one of several factors which undermined her credibility (*Gilgorri v Canada (Minister of*



*Citizenship and Immigration*), 2006 FC 559 at paras 23-27, 152 ACWS (3d) 695; *Garavito Olaya v Canada (Citizenship and Immigration)*, 2012 FC 913 at paras 51-55).

[25] Criticism of the RPD's interpretation of testimony and of statements made by an applicant is not sufficient grounds to justify the Court's intervention. It is up to the RPD—and not this Court—to determine the probative value of the statements made by an applicant and to draw appropriate conclusions regarding credibility (*Eker v Canada (Citizenship and Immigration)*, 2015 FC 1226, [2015] FCJ No 1341, at para 9).

[26] The RPD set out, in detail, its reasons for rejecting Ms. Fleury's testimony, based on the evidence. This Court must show judicial deference to such findings, as long as they are reasonable, based on the criteria set out in *Dunsmuir*. It is my opinion that these factors were fully analyzed by the RPD and that this exercise led to a reasonable conclusion.

C. *Did the RPD err in concluding that there was no credible basis for Ms. Fleury's claim for refugee protection?*

[27] I agree with Ms. Fleury's claim that there is a high threshold for concluding that there is no credible basis for a claim, the consequence being that she was not able to appeal the RPD's decision to the RAD. I am also aware that a finding that an applicant lacks credibility does not automatically lead to the conclusion that there is no credible basis for a claim (*Li v Canada (Citizenship and Immigration)*, 2018 FC 536 at para 23; *Tsikaradze v Canada (Citizenship and Immigration)*, 2017 FC 230 at paras 19-20, 277 ACWS (3d) 614).

[28] Despite the case law cited above, it is my opinion that the RPD did nothing of the sort. More specifically, it did not conflate its finding that Ms. Fleury lacked credibility with its finding that there is no credible basis for her claim for refugee protection.

[29] On the contrary, the jurisprudence of this Court states that when the RPD has reasonable grounds to doubt a fact central to the claim, i.e. in this case, the incident on January 30, 2015, it can on this basis alone dismiss all of the claimant's testimony (*Randhawa v Canada (Citizenship and Immigration)*, 2007 FC 485 at paras 19-20, 312 FTR 179; *Sheikh v Canada (MEI)*, [1990] 3 FC 238 at paras 7-8, 112 NR 61).

[30] When we also consider the fact that Ms. Fleury failed to apply for refugee protection during the year that she lived in the United States, as well as the contradictions in the documentary evidence, it is my opinion that the RPD reasonably concluded that there was no credible basis for Ms. Fleury's claim.

## VI. Conclusion

[31] The credibility findings outlined by the RPD in its decision are reasonable in the circumstances and do not warrant this Court's intervention. It is also my opinion that the RPD's finding that there is no credible basis for the claim is reasonable under subsection 107(2) of the *IRPA*.

[32] The application for judicial review is therefore dismissed. No question is certified.

**JUDGMENT in IMM-2200-18**

**THE COURT’S JUDGMENT is that:**

1. The application for judicial review is dismissed; and
2. No question is certified.

“B. Richard Bell”

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Judge

## SCHEDULE

*Immigration and Refugee Protection Act, SC 2001, c 27*

*Loi sur l'immigration et la protection des réfugiés, L.C. 2001, ch. 27*

### **Application for judicial review**

### **Demande d'autorisation**

**72 (1)** Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is, subject to section 86.1, commenced by making an application for leave to the Court.

**72 (1)** Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est, sous réserve de l'article 86.1, subordonné au dépôt d'une demande d'autorisation.

### **Convention refugee**

### **Définition de réfugié**

**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,

**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 :

**(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

**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;

**(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

**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

that country.

y retourner.

**Person in need of protection**

**Personne à protéger**

**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

**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 :

**(a)** to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

**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;

**(b)** to a risk to their life or to a risk of cruel and unusual treatment or punishment if

**b)** soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

**(i)** the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

**(i)** elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

**(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,

**(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,

**(iii)** the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

**(iii)** la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

**Person in need of protection**

**Personne à protéger**

(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.

(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.

**Decision**

**Décision**

107 (1) The Refugee Protection Division shall accept a claim for refugee protection if it determines that the claimant is a Convention refugee or person in need of protection, and shall otherwise reject the claim.

107 (1) La Section de la protection des réfugiés accepte ou rejette la demande d'asile selon que le demandeur a ou non la qualité de réfugié ou de personne à protéger.

**No credible basis**

**Preuve**

(2) If the Refugee Protection Division is of the opinion, in rejecting a claim, that there was no credible or trustworthy evidence on which it could have made a favourable decision, it shall state in its reasons for the decision that there is no credible basis for the claim.

(2) Si elle estime, en cas de rejet, qu'il n'a été présenté aucun élément de preuve crédible ou digne de foi sur lequel elle aurait pu fonder une décision favorable, la section doit faire état dans sa décision de l'absence de minimum de fondement de la demande.

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-2200-18

**STYLE OF CAUSE:** BERNADETTE FLEURY v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** MONTRÉAL, QUEBEC

**DATE OF HEARING:** NOVEMBER 5, 2018

**JUDGMENT AND REASONS:** BELL J.

**DATED:** JANUARY 9, 2019

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