Federal Court  Cour fédérale

Date: 20190227

Docket: IMM-2478-18

Citation: 2019 FC 242

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, February 27, 2019

PRESENT: Associate Chief Justice Gagné

BETWEEN:

JACQUELIN JEAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] Jacquelin Jean, a Haitian citizen and permanent resident of Brazil, is challenging the decision of the Refugee Appeal Division [RAD] confirming that he is excluded from the protection offered by Canada under Article 1E of the *United Nations Convention Relating to the Status of Refugees*, July 28, 1951, 189 UNTS 137, Can TS 1969 No 6 [Convention], and

section 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. These provisions state:

Convention	Convention
1 E. This Convention shall not apply to a person 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 of that country.	**1 E.** Cette Convention ne sera pas applicable à une personne considérée par les autorités compétentes du pays dans lequel cette personne a établi sa résidence comme ayant les droits et les obligations attachés à la possession de la nationalité de ce pays.
Immigration and Refugee Protection Act	Loi sur l'immigration et la protection des réfugiés
98 A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.	**98.** La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.

II. Facts

[2] Mr. Jean arrived in Canada in July 2017 after a short stay in the Dominican Republic, more than four years in Brazil and several months in the United States.

[3] In his Basis of Claim form for refugee protection in Canada, he alleges that he left Haiti in November 2011 because, as a member of the opposition political party, the Rally of Progressive National Democrats of Haiti, he feared for his life at the hands of the party in power, Tèt Kale.

[4] He explains that during a political event organized by his party in March 2011, attackers wearing shirts associated with Tèt Kale allegedly got out of a car and opened fire on the crowd, wounding him and killing his two sisters. The assailants subsequently recognized him and allegedly went to his home to kill his family. Mr. Jean and his family managed to escape before the assailants set fire to the house. Fearing for his life, Mr. Jean allegedly hid in the countryside before leaving Haiti.

[5] After a short stay in the Dominican Republic, Mr. Jean followed a large wave of Haitian migrants to Brazil. Along with more than 40,000 other Haitian nationals, Mr. Jean obtained permanent residency in Brazil in 2011, valid for nine years. He remained in Brazil for four years and found employment there, although he alleges having been dismissed because of the discrimination and racism against Haitians in Brazil.

[6] In 2016, Mr. Jean went to the United States with his wife and child, where he worked in construction until he left for Canada in July 2017.

[7] The Refugee Protection Division [RPD] found that as a Brazilian resident, Mr. Jean was excluded from Canada's protection under Article 1E of the Convention and section 98 of the IRPA, and that he had not demonstrated a subjective fear of persecution should he return to Brazil.

III. Impugned decision

[8] Before the RAD, the applicant did not submit any new evidence, nor did he request a hearing.

[9] He did not contest the finding that he is referred to in Article 1E either. He does submit, however, that the RPD erred in finding that his failure to allege a fear with regard to Brazil in his Basis of Claim form irreparably discredited his application.

[10] The RAD rejected the applicant's explanation that he did not have enough space on the form and that adding this fear would have made his application unnecessarily burdensome to deal with. The applicant was represented by counsel and had ample opportunity to claim a fear of returning to Brazil. Since the RPD addressed the application of Article 1E of the Convention, the applicant could not ignore the possibility he would be removed to Brazil.

[11] However, he did not submit any evidence on this, either to the RPD or the RAD. The RPD did allow him to submit new evidence corroborating his alleged fear with regard to Brazil, up to two weeks after the hearing before it.

[12] The RAD therefore came to the same conclusion as the RPD and dismissed the appeal.

IV. Issues and standard of review

[13] This application for judicial review raises a single question:

Did the RAD err in finding that the applicant was excluded from Canada's protection?

[14] The applicable standard of review is reasonableness, since the applicant is contesting findings of fact and findings of mixed fact and law made by the RAD (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35).

V. Analysis

[15] The applicant first submits that the RAD erred by not conducting its own analysis of the case and by merely justifying the RPD's decision. In his opinion, the RAD was content to analyze whether the RPD had erred in its analysis of the applicant's credibility with regard to his fear of returning to Brazil; it did not inquire into whether the risks alleged by the applicant were covered by sections 96 and 97 of the IRPA. In particular, the RAD allegedly neglected to consider the National Documentation Package for Brazil, in which it states that people of colour are specifically targeted in Brazil and are victims of violence and violations of their fundamental rights by state agents and the general public. In other words, the applicant criticizes the RAD for failing to analyze the objective fear of persecution in Brazil based on the evidence in the National Documentation Package.

[16] However, in order to show fear of persecution, a refugee protection claimant must (i) subjectively fear persecution, and (ii) this fear must be well-founded in an objective sense (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689).

[17] I am therefore of the opinion that the RPD and the RAD could reasonably conclude that the applicant's neglecting to state, in his Basis of Claim form, that he feared prosecution should he return to Brazil does indeed demonstrate that there was no subjective fear of persecution.

[18] Although authorized by the RPD to supplement his evidence after the hearing before it, the applicant did not submit any evidence that could support a subjective fear of persecution should he return to Brazil.

[19] A refugee protection claim cannot rely solely on the evidence found in the National Documentation Package of the country about which the fear is being raised (*Sinora v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 725 (QL) (FCA) at para 5; *Ithibu v Canada (Minister of Citizenship and Immigration)*, 2001 FCTD 288 at paras 99-101; *Morales Alba v Canada (Citizenship and Immigration)*, 2007 FC 1116 at paras 4, 30-32; *Reyes Pino v Canada (Citizenship and Immigration)*, 2012 FC 200 at para 50).

[20] Although this conclusion is sufficient to dispose of the applicant's application for judicial review, in my view, a few words are in order concerning the impact of not challenging before the Court the RPD's and the RAD's finding that the applicant is a person referred to in Article 1E of the Convention.

[21] The Court must infer from this conclusion that the applicant is recognized by the competent authorities of Brazil as having the rights and obligations which are attached to the possession of Brazilian nationality. The Court must also conclude that, as such, the applicant is

excluded from Canada's protection. Section 98 of the IRPA is, however, silent on whether he is excluded from protection only in his country of citizenship or also in his country of residence, the same one that led to the exclusion. In other words, once the RPD has concluded that Article 1E of the Convention applies and, therefore, that the refugee protection claimant is to be excluded, can it still assess the applicant's fear regarding the country of residence, or is it required to conduct this analysis before rendering a decision on the exclusion?

[22] Shortly after hearing the case, the Court provided the parties with an opportunity to make written submissions in this regard.

[23] The applicant did not take a position, whereas the respondent submits that the RPD must [TRANSLATION] "assess the risks alleged by a refugee protection claimant in respect of an Article 1E country" and that [TRANSLATION] "the stage at which the risk in the country concerned is assessed is not a determinative issue or likely to induce an error in the administration of the IRPA, as the existence of a risk or reasonable fear of persecution in that country will defeat the application of the exclusion clause". A little further on, the respondent clarifies this reasoning, adding that [TRANSLATION] "as soon as it is determined that a risk or a reasonable fear of persecution in that country exists, the exclusion clause of Article 1E of the Convention cannot apply. Thus, whether this fear is examined prior to or after the consideration of an individual's status as a resident having rights and obligations similar to those of a national of that country is of no consequence".

[24] With respect, there is a contradiction in the respondent's position. If an individual cannot be a person referred to in Article 1E of the Convention if he or she is at a risk of persecution in his or her country of residence, the risk analysis in respect of that country must necessarily be performed before the individual can be found to be a person referred to in Article 1E of the Convention, as once that finding is made, the individual is excluded from Canada's protection.

[25] Here, the applicant's failure to challenge the finding that he is a person referred to in Article 1E of the Convention is, it seems to me, fatal to his case.

[26] In my view, two interpretations of the mechanism offered by Article 1E of the Convention and section 98 of the IRPA are possible. The first requires adding to the text of Article 1E of the Convention, whereas the second requires adding to the text of section 98 of the IRPA.

[27] Article 1E can be interpreted as requiring an analysis of the risk in respect of the country of residence before concluding that the Convention does not apply. Said article should therefore be interpreted as reading as follows (emphasis added to the addition):

> (Convention) 1 E. This Convention shall not apply to a person 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 of that country **and who does not fear persecution in that country for reasons of race, religion, nationality, membership in a particular social group, or political opinion, or fear being subjected to a danger of torture, a risk to his life or a risk of cruel and unusual treatment or punishment, when he cannot avail himself of that country's protection the risk exists throughout the country.**

[28] In this first scenario, the risk analysis in respect of the country of residence must necessarily be performed before concluding that Article 1E of the Convention can be applied.

[29] However, section 98 of the IRPA can also be interpreted as limiting the exclusion from Canada's protection only in respect of the risk of return to the refugee protection claimant's country of citizenship. Section 98 should therefore read as follows (again, emphasis added to the necessary addition):

> (IRPA)98. A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection **in respect of his country of citizenship**.

[30] In this second scenario, the risk analysis in respect of the country of residence can be performed at any time.

[31] In any event, I need not make a determination in favour of either interpretation, as in this case the applicant did not challenge the application of Article 1E of the Convention (he is therefore necessarily excluded from Canada's protection in respect of Haiti), and in light of the fact that he failed to invoke risk in respect of Brazil in his Basis of Claim form, the RAD could reasonably conclude that the applicant had no reasonable fear of persecution if he were to return to that country.

VI. Conclusion

[32] I am of the view that the RAD could reasonably conclude that the applicant failed to discharge his burden of demonstrating that he had a subjective fear of persecution if he were to return to Brazil. Accordingly, his application for judicial review is dismissed.

[33] The parties have not submitted any question of general importance for certification, and this matter does not raise any.

JUDGMENT in Docket IMM-2478-18

THE COURT'S JUDGMENT is that

1. The application for judicial review is dismissed;

2. No question of general importance is certified.

"Jocelyne Gagné"
Associate Chief Justice

Certified true translation
This 16th day of April, 2019.

Michael Palles, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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