Federal Court  Cour fédérale

Date: 20190725

Docket: IMM-5743-18

Citation: 2019 FC 990

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, July 25, 2019

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

CONSTANT NISSAGE, VICTOR MARIE VICTOINIS, CONSTANT LUIDIA VITORIA, CONSTANT EMMANUEL NIKY

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The applicants, Nissage Constant and Marie Victoinis Victor [the principal applicants], are applying for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. This application concerns a decision of the Refugee

Appeal Division [RAD] dated November 7, 2018, confirming the decision of the Refugee Protection Division [RPD] dated December 19, 2017.

[2] This case raises issues with respect to section 98 of the IRPA, which incorporates Article 1E of the *United Nations Convention Relating to the Status of Refugees* [Convention]. Under certain conditions, Article 1E "excludes" from refugee status principal claimants who have left their country of origin (in this case, Haiti) and have obtained permanent resident status in what is considered a "safe" country [the third country] (in this case, Brazil) before coming to Canada and claiming to be refugees.

[3] In that decision, the RAD concluded that, under Article 1E, the principal applicants are excluded from the Convention, as both of them had been granted permanent resident status in Brazil. Moreover, they did not demonstrate the existence of a risk under sections 96 and 97 of the IRPA if they were to return to Brazil. It should be noted that the RAD identifies Luidia Vitoria Constant as the mother of Marie Victoinis Victor, which is incorrect, Marie Victoinis Victor being rather the mother of Luidia Vitoria Constant (Certified Tribunal Record at p 114). The applicants also claimed to have demonstrated a risk under sections 96 and 97 of the IRPA if they were to return to Brazil, which was rejected by the RAD.

[4] The principal applicants argue that the RAD erred in applying Article 1E of the Convention by upholding the RPD's decision on the grounds that the resident status they had in Brazil at the time of the RPD hearing granted them essentially the same rights as those of Brazilians, without first considering whether there was a risk of persecution in Haiti, their

country of citizenship. The principal applicants are of the opinion that this is relevant since they can no longer return to Brazil. They claim that the Court must intervene since they would be forced to return to Haiti.

II. Facts – The principal applicants, citizens of Haiti, were permanent residents of Brazil at the time of the RPD hearing but lost their permanent resident status before the RAD dismissed their appeal. The principal applicants allege a risk of persecution if they return to either to Haiti or Brazil.

[5] The applicant, Nissage Constant, alleges that after four years of medical school, he had to stop studying because his parents could no longer help him due to an earthquake that hit the country in 2010. A political party named “Ayiti an Aksyn” offered to pay for his medical courses in exchange for his involvement in the party. The applicant worked for the party for more than two years but was threatened in April 2013 when he asked them to honour their commitment. As a result, on May 29, 2013, he decided that his only option was to leave the country. He passed through the Dominican Republic and Panama and then went to Brazil on September 6, 2013.

[6] A few months later, the applicant, Marie Victoinis Victor, followed him to Brazil because of the earthquake in Haiti. In Brazil, the principal applicants had a child, Luidia Vitoria Constant. She is five years old, a citizen of Brazil and included in the refugee protection claim, but her status is not disputed.

[7] In 2015, Ms. Victor alleges that she was the victim of an armed robbery in Brazil and that on another day the son of the owner of the building she was renting attempted to rape her and threatened to kill her husband. She did not mention those incidents in her Basis of Claim [BOC]

Form. She explains that she was unaware of the relevance of those incidents to her refugee protection claim and that she was trying to forget that painful time in her life, like the majority of victims of sexual crimes.

[8] Mr. Constant alleges that in Brazil, he had to deal on a daily basis with [TRANSLATION] "all kinds of rejection, denigration and discrimination directed at him by Brazilians" because of his Haitian origins, which [TRANSLATION] "took the form of persecution over time" (Affidavit of appellant Constant Nissing at para 20). Both ordinary citizens and the Brazilian authorities responsible for protecting them are prejudiced against Haitians.

[9] On May 3, 2016, the applicants left Brazil for the United States because Mr. Constant was unable to obtain work in Brazil. He explained that his inability to get a job stemmed from the contemptuous view Brazilians have of immigrants. Once again, the applicants travelled through different countries in Latin America and arrived in California on September 1, 2016. As in Brazil, they received a work permit. They had a second child, Emmanuel Niky Constant. The latter, a citizen of the United States, is also part of the refugee protection claim. He is two years old. His status is not disputed.

[10] In 2017, due to Trump administration policies, they feared being deported and forced to return to Haiti because of the change of government in Brazil. They therefore entered Canada and claimed refugee protection.

III. RPD decision

[11] The impugned decision is that of the RAD, but an overview of the reasons issued by the RPD is helpful in understanding the analysis in its context. The RPD noted that the Mr. Constant alleges he left Haiti because he feared for his life throughout the country because of his troubles with a political party. The RPD did not assess the evidence of the risk of persecution in Haiti.

[12] The RPD went through the conditions under which the permanent resident status of the principal applicants could be cancelled in Brazil. The RPD noted that, according to the national documentation package on Brazil, status would be lost if they were absent for a period of more than two years. However, the RPD set aside this exception since the applicants had been absent from Brazil since May 3, 2016, for a period of less than two years at the time of the RPD hearing on November 15, 2017.

[13] In addition, the RPD concluded that it has not been demonstrated that the applicants had a well-founded fear of persecution in the event of their return to Brazil. In fact, the RPD found Ms. Victor's allegations of crime in Brazil not to be credible. As for the children, the RPD found that there was no valid reason to conclude that they would be in danger in their respective countries of citizenship, Brazil and the United States.

IV. RAD decision

[14] The principal applicants appealed this decision to the RAD, alleging that the RPD's negative inference regarding the assessment of their credibility as to the serious fear of persecution in the event of their return to Brazil was erroneous.

[15] The principal applicants did not raise any questions regarding the risk of persecution in Haiti. The RAD also pointed out that they did not question whether the exclusion under Article 1E of the Convention applied, that is, whether the applicants benefit from a status in Brazil that essentially grants them the same rights and the same obligations as nationals of that country.

[16] Mr. Constant requested that the RAD hold a hearing. This request was rejected since no new evidence was presented.

[17] The RAD admitted that the RPD erred in challenging the credibility of the principal applicants with respect to the allegations of incidents of crime in Brazil. The RAD, however, ruled that those incidents had nothing to do with their Haitian nationality. Although the attempted rape is related to the Ms. Victor's gender, there is no evidence that there is a serious possibility that she will be persecuted in the event of her return to Brazil. In addition, the RAD concluded that the applicants' departure from Brazil was likely a result of the lack of employment and not of the crimes or discrimination against them.

[18] Moreover, the discrimination that the principal applicants experienced in Brazil did not amount to persecution. The RAD relied on Brazil's 2016 national documentation package, as well as the legislative framework adopted by Brazil to fight racial discrimination.

V. Issues

[19] The principal applicants argue that the Convention should not be applied to them because they are not persons recognized by the competent authorities of Brazil as having the rights and obligations which are attached to the possession of the nationality of that country. Similarly, they maintain that the RAD did not consider whether they would face persecution if deported to Haiti, as they could not be transferred to Brazil after losing their permanent resident status.

VI. Relevant provisions: section 98 of IRPA and Article 1(E) of the Convention

[20] The following provision of the Act is relevant in this case:

Exclusion – Refugee Convention	**Exclusion par application de la Convention sur les 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.

[21] Furthermore, the following provision of the Convention states:

Article 1 - Definition of the term "refugee"	**Article 1. - Définition du terme « réfugié »**
E. This Convention shall not	E. Cette Convention ne sera

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.	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.

VII. Standard of review

[22] The applicants did not present arguments on the standard of review. The respondent argued that the standard of review is one of reasonableness because the issues are based on factual conclusions and mixed findings of fact and law drawn by the RAD (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35; *Jean v Canada (Citizenship and Immigration)*, 2019 FC 242 at para 14). I agree with this statement, particularly in that the Federal Court of Appeal confirmed that the reasonableness standard of review should apply in *Majebi v Canada (Citizenship and Immigration)*, 2016 FCA 274 at paragraph 5, despite the decisions of *Canada (Citizenship and Immigration) v Zeng*, 2010 FCA 118 at paragraph 11 [*Zeng*] and *Hernandez Febles v Canada (Citizenship and Immigration)*, 2012 FCA 324 at paragraph 25.

VIII. Analysis

A. *No justifiable issues to consider*

[23] The Court concludes that there are no justiciable issues to consider. The only issue raised by the principal applicants before the RAD is based on the RPD’s findings that they were not persecuted in Brazil. This issue was not raised in their submissions to the Court.

[24] Failing that, the principal applicants raise two new issues. First, they argue that they did not enjoy the same rights and obligations as Brazilian citizens and that the Convention therefore did not apply. Second, they argue that the RPD and the RAD erred in failing to consider the risk of persecution in Haiti, their country of citizenship. The evidence demonstrated that, although they had not lost their permanent resident status in Brazil at the time of the RPD hearing (that is, they had been excluded when the other status conditions in *Zeng* were met), they had lost it by the time the RAD made its decision and therefore could not be returned to that country.

[25] In their original memorandum, the respondent argued that there was no basis to seriously conclude that the RAD had erred in concluding that the applicants had not been persecuted in Brazil. However, the respondent did not dispute the new arguments raised by the applicants that had not been made before the RAD. Leave appears to have been granted without this point being brought to the attention of the Court. It cannot be said that the RAD erred by ignoring issues that counsel did not raise previously. The application must therefore be dismissed for this reason.

B. Zeng *prevents the Court from drawing conclusions sought by the applicants or the respondent according to which the RAD should have considered the risk to the applicants in Brazil or Haiti*

[26] After considering the arguments of the parties, it does not appear that there is much chance of success given the unambiguous contradictory statements made in *Zeng*.

[27] Both the Minister and the Court of Appeal have recognized the appalling problem of the potential return of a claimant to their country of origin, as an excluded refugee protection claimant, without a proper risk assessment being provided. The Court addressed this issue in

paragraphs 21 to 28 of the reasons. In so doing, the Court appears to have eliminated any possibility of risk analysis by a Pre-Removal Risk Assessment [PRRA] Officer when the claimant is returned to their home country. I conclude that this reasoning would also apply to removal to the third country in a claim before the RPD if the claimant has exclusion status at the time of the RPD hearing.

[28] Paragraph 21 describes the potential problem of failure to fulfill international obligations by returning failed refugee protection claimants to their country of origin without a risk assessment, as follows:

> [21] However, in view of the propositions that require the provision of protection to those in need as well as adherence to Canada's international law obligations, the Minister concedes that, in limited circumstances, when Article 1E is applied to those asylum shoppers who cannot return to the third country, the potential for removal from Canada to the home country without the benefit of a risk assessment exists. If this were to occur, it opens the door to the possibility of Canada indirectly running afoul of its international obligations.
>
> [Emphasis added.]

[29] Nevertheless, at paragraph 22, the Court anticipates a possible review of the issue of risk in the country of origin by a PRRA officer. However, the Court concluded that section 98 takes precedence even where it has been found that there is a risk of removal to the country of origin, as follows:

> [22] The Minister recognizes that the PRRA process does not provide a complete response to the dilemma. If a PRRA officer concludes that Article 1E applies, even if risk is established, refugee protection cannot follow by virtue of section 98 of the IRPA. Further, the claimant cannot reap the benefit of a section 114 stay of removal because Article 1E does not fall within subsection 112(3). Although it is within the power of the PRRA officer to determine that Article 1E does not apply, the paragraph 113(a) requirement for new

> evidence (in order to arrive at such a determination) presents a formidable hurdle for the claimant to overcome. [It should be noted that the last sentence refers to compliance with the exclusion conditions.]
>
> [Emphasis added.]

[30] The abovementioned statement that section 98 of the IRPA prohibits the granting of refugee protection despite the risk in the country of origin should also apply to a risk assessment by the RPD, unless status in the third country has been lost as at the date of the hearing, in accordance with the exceptions described at paragraph 28 of *Zeng*, discussed below. Thus, in light of all those statements, it seems unlikely that a post-exclusion risk reassessment order may be relevant in any circumstances, including before the RPD, once the status of the claimant in the third country is proven.

[31] Essentially, this confirms other cases of this Court holding that, once exclusion on the basis of status in a third country has been established, little in terms of risk issues stands in the way of removal, whatever the destination (*Romelus v. Canada (Citizenship and Immigration)*, 2019 FC 172, *Jean v Canada (Citizenship and Immigration)*, 2019 FC 242). Even though I find this conclusion to be problematic, I am bound to apply it given the clarity of the phrase in *Zeng* that exclusion outweighs evidence-based risk.

[32] My conclusion appears to be confirmed by that of the Court of Appeal implicitly accepting the Minister's argument set out at paragraph 23, according to which the assessment of the risk related to an immobilization is mutually exclusive ("redundant") with the purpose of Article 1E of the Convention.

> [23] The respondents propose, in circumstances where an individual has voluntarily forfeited (or has chosen not to access) the protection of the third country, but is at risk in the home country, the exclusion should not apply. Rather, the RPD should proceed to the section 96 and, if required, the section 97 inquiry where the claimant's actions would go to the issue of credibility. The Minister asserts that such an approach renders Article 1E redundant and suggests section 25 (exemption on humanitarian and compassionate grounds) as a possible alternative, when return to the third country is not an option.
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> [Emphasis added.]

[33] I agree that a risk assessment and an assessment of the exclusions are mutually exclusive with an interpretation of Article 1E which applies its ordinary meaning. It is my understanding that the respondent argues that sections 96 and 97 must be read together with section 98 and that an evidence-based risk assessment should always override a finding of exclusion brought before the RPD. This reflects the fact that a finding of exclusion is fundamentally a *de jure* presumption that people do not immigrate or flee to a dangerous third country. In fact, this is the presumption described in paragraph 1 of *Zeng*, according to which a person is "entitled to status in a 'safe' country (the third country)". I note that for this to be the case, it would seem that the same presumption should apply to all third-country citizens seeking refugee protection in Canada, and not just to those who immigrate to the third country, then to Canada to claim refugee status.

[34] In response to the first question in paragraph 28, the Court definitively confirmed that claimants who do not have status as at the date of the RPD hearing are excluded without access to evidence-based risk assessment procedures, as follows with my separation of the questions asked by the Court, for convenience:

> [28] Considering all relevant factors to the date of the hearing [that is, the RPD hearing: *Majebi v Canada (Citizenship and Immigration)*], does the claimant have status, substantially similar to

> that of its nationals, in the third country? If the answer is yes, the claimant is excluded.
>
> If the answer is no, the next question is whether the claimant previously had such status and lost it, or had access to such status and failed to acquire it.
>
> If the answer is no, the claimant is not excluded under Article 1E.
>
> If the answer is yes, the RPD must consider and balance various factors. These include, but are not limited to, the reason for the loss of status (voluntary or involuntary), whether the claimant could return to the third country, the risk the claimant would face in the home country, Canada's international obligations, and any other relevant facts.
>
> [Emphasis added.]

[35] I must admit that I do not understand how to solve the enigma set out in paragraph 21 in excluding a person who has permanent resident status in the third country at the date of the RPD hearing or prior to the decision of the RAD, knowing that this status will probably be, or was, lost before that person's removal, making the country of origin the only possible destination. I refer to the troubling result recognized by the Minister that "the potential for removal from Canada to the home country without the benefit of a risk assessment exists. If this were to occur, it opens the door to the possibility of Canada indirectly running afoul of its international obligations".

[36] I also note that no attempt has apparently been made to interpret section 98 in accordance with the modern principles of interpretation described in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, 1998 CanLII 837 (SCC) at paragraph 21, that is, "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament". The Supreme Court also

criticized the Court of Appeal in paragraph 20 because "the plain meaning of the words of the provisions here in question appears to restrict the obligation to pay termination and severance pay. . . . However, with respect, I believe this analysis is incomplete".

[37] An interpretation that embraces the principles of exclusion, when forward-looking evidence-based assessments prove the risks involved in a removal, leads to unreasonable or absurd consequences with respect to the objectives of the IRPA: see in general *Sullivan on the Construction of Statutes*, 6th edition 2014, particularly paragraphs 10.4 and 10.13 describing the range of considerations for assessing absurdity, in particular the norms of rationality, such as logical coherence and internal consistency.

[38] I suspect that a different interpretative approach might reasonably favour evidence-based risk assessments and override the presumptions of exclusion by "reading down", that is, by describing to some extent the scope of application of section 98. This would allow the RPD to take into account all risk applications, thereby avoiding the possibility of returning a refugee protection claimant to their country, where the risk is real. Of course, a finding of risk in the third country based on evidence should prevail over exclusion. This also facilitates removal decisions based on the RPD's findings and the avoidance of other delaying procedures due to concerns about unassessed risk. In reality, this interpretation ensures that Canada meets its international obligations, which are the object of the Convention, while allowing section 48 of the IRPA to expedite a removal, which "must be enforced as soon as possible".

[39] This would require taking a made-in-Canada "living tree" approach to interpreting Article 1E which is not subservient to a convention written in 1936 which at that time aimed to facilitate the refugee regime and now, by its interpretation, undermines the first objective set out in subsection 3(2) of the IRPA, that is, "to recognize that the refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted".

IX. Conclusion

[40] Although the Court considers that the questions raised merit certification, the application is dismissed on the basis that no justiciable issue arises and that, consequently, no question can be certified on appeal.

JUDGMENT in IMM-5743-18

THIS COURT ORDERS AND ADJUDGES that the application is dismissed on the basis that no justiciable issue arises and that, consequently, no question can be certified on appeal.

"Peter Annis"
Judge

Certified true translation
This 15th day of August, 2019.
Michael Palles, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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