Federal Court Cour fédérale

Date: 20191218

Docket: IMM-2655-19

Citation: 2019 FC 1612

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Montréal, Quebec, December 18, 2019

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

RODINALD JEAN-BAPTISTE
YOUDELINE ARISTILDE
ANA GAELLE JEAN-BAPTISTE

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of a decision made by the Refugee Appeal Division [RAD] of the Immigration and Refugee Board of Canada, dated April 2, 2019, concluding that the applicants are not refugees within the meaning of the *United Nations*

Convention Relating to the Status of Refugees, July 28, 1951, 189 UNTS 137 [Convention], or persons in need of protection according to the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] The applicants are a family. The mother and father are citizens of Haiti, while their minor child is a citizen of Brazil. In their Basis of Claim Forms [BOC Form], the applicants alleged that there is a risk of persecution following several events, including the murder of an uncle, a fire at their home in Haiti, an incident of rape in Haiti, and an incident of workplace violence in Brazil.

[3] The Refugee Protection Division [RPD] determined that the applicants are not Convention refugees or persons in need of protection. The RAD found that the father has permanent resident status in Brazil, which means that he enjoys the protection of the Brazilian state. The RAD found that the mother will not be at risk should she return to Haiti. The RAD found that there is no indication on the record that the child will be at risk in Brazil, her country of nationality.

[4] The application for judicial review is dismissed for the reasons set out below.

II. Facts

[5] The adult applicants are citizens of Haiti. Rodinald Jean-Baptiste is the principal applicant [also referred to as the male applicant] in this proceeding. He is the husband of the applicant Youdeline Aristilde [adult female applicant] and the father of their young daughter, Ana Gaelle Jean-Baptiste [minor applicant]. The minor applicant is a citizen of Brazil by birth.

[6] The principal applicant's uncle took care of him and took responsibility for helping him with his education following the death of his parents in Haiti.

[7] The adult applicants were married on April 16, 2013. A few weeks later, on May 6, 2013, the principal applicant left Haiti for Brazil. The principal applicant went to Brazil hoping to earn a better living. The principal applicant left the female applicant, who was pregnant with the minor applicant, in Haiti. For this reason, the principal applicant's passport contains a stamp from the Brazilian authorities.

[8] May 20, 2013, the principal applicant's wife was struck, beaten and raped in the street. The principal applicant went to the hospital, but did not report the incident to the police. After this incident of rape, the female applicant no longer wanted to live in Haiti and, in December 2013, she fled Haiti to join the principal applicant in Brazil.

[9] The wife received a Brazilian visa. She lived in Brazil without any problems until August 2016 and then travelled to the United States. The female applicant alleges that she fears for her life in Haiti.

[10] The principal applicant claims to be a victim of discrimination against Afro-Brazilians in Brazil. The principal applicant was mocked at work.

[11] While the principal applicant was in Brazil, his uncle in Haiti was killed by supporters of the Struggling People's Organization [OPL] party nicknamed "Blanc" and "Magre" [the murderers]. According to the minutes of the registry of the Peace Court, the uncle was beaten and struck and some of his teeth were knocked out by the murderers right before his death on May 5, 2015.

[12] The uncle was a member of the "Inite Patriyotik" (Patriotic Unity, or Inite) political party and lived in Haiti. The principal applicant is a supporter of the same political party and was informed of the murder within the same month.

[13] The principal applicant's cousins then contacted a justice of the peace to arrest the murderers. The murderers were found and incarcerated. A few months later, the murderers were released without going before a judge.

[14] In June 2015, one of the principal applicant's co-workers in Brazil insulted him and grabbed him by the throat. Following this incident, both lost their jobs.

[15] According to the principal applicant, after the incident at work, his former co-worker then hired young people to look for him and kill him. Apparently, the young people have a photograph of the principal applicant from Facebook and they are still looking for him. The principal applicant had to live in hiding for three months in Brazil. During that time, the principal applicant claims that he could not go out, could not take his daughter to the babysitter's and could not work.

[16] In November 2015, the male applicant travelled to Haiti. In doing so, the male applicant alleges that he lost his permanent resident status in Brazil. After being informed that the murderers had been released, the male applicant went to the court to have a new arrest warrant issued. Warrants were issued for the murderers on November 10, 2015.

[17] Upon learning that the principal applicant wanted to bring them to justice, the murderers visited the principal applicant's home in his absence to threaten him with firearms and bladed weapons. The principal applicant claims that on November 14, 2015, his brother informed him that unknown persons went to his home to look for him. Since the principal applicant was not there, the murderers set fire to his house in Haiti and destroyed it.

[18] On the evening of the events, the principal applicant left for Port-au-Prince to hide. His brothers and sisters took refuge in Gonaïves. The next day, the brother contacted a justice of the peace.

[19] To save himself from the Haitian persecutors, the principal applicant returned to Brazil in November 2015 to hide for 10 days.

[20] He then decided to leave Brazil for the United States on January 15, 2016. The principal applicant spent approximately five months near the Brazilian border because Peruvian immigration officials refused to allow him to cross the border.

[21] The principal applicant was able to leave Brazil permanently on June 9, 2016, and arrived in the United States on July 31, 2016. After his departure from Brazil, the principal applicant's wife, still in Brazil with their daughter, continued to be visited by young people who were looking for him to kill him at the request of his former colleague in Brazil.

[22] In May 2017, the male applicant's aunt informed him that his uncle's murderers had come to see her in Haiti to tell her that they were waiting for the male applicant to return so they could make him pay for what he had done.

[23] The principal applicant's wife and child then joined him in the United States a month later. The principal applicant applied for a visa in the United States for fear of the events following the murder of his uncle. In his United States application, the principal applicant stated that he had "temporary permission" to reside in Brazil.

[24] That application was rejected.

[25] Having no certain legal status in the United States and fearing deportation, the applicants left for Canada. The applicant arrived in Canada in August 2017 to claim refugee protection.

[26] The applicants filed their BOC Forms on September 1, 2017. In their refugee protection claim, the applicants allege that they fear for their lives and are unable to return to Haiti, in particular because of the serious risk of persecution they face. The applicants subsequently amended their refugee protection claim to indicate a fear of return to Brazil.

[27] The principal applicant alleges that he fears for the safety of his daughter in Brazil, where he claims she would not be able to receive adequate protection. He also fears the psychological impact of the possible separation of her parents.

[28] The RPD rejected their claims for refugee protection. The RPD found that the applicants were not entitled to Canada's protection as they are covered by Article 1E of the Convention,

based on their permanent resident status in Brazil. As such, the applicants are not Convention refugees or persons in need of protection.

[29] As for the minor child, who is a Brazilian citizen, the RPD found that the applicants failed to demonstrate that there was a serious possibility that she would be persecuted on a Convention ground or that she would face a danger of torture, a risk to her life or a risk of cruel and unusual treatment or punishment if she returned to Brazil.

[30] The applicants appealed this decision before the RAD.

III. RAD decision

[31] On appeal before the RAD, the applicants argued that they had provided sufficient evidence to support their fears. In particular, the applicants argued that the RPD did not conduct a thorough analysis of the record with respect to the applicants' immigration status in Brazil and the fears raised by the applicants with respect to Brazil and Haiti.

[32] The RAD dismissed the appeal and upheld the RPD's decision that the applicants are neither Convention refugees nor persons in need of protection. In its analysis, the RAD applied the standard of correctness.

[33] Like the RPD, the RAD found that the principal applicant is referred to in Article 1E of the Convention. According to the RAD, the principal applicant did not provide sufficient evidence to rebut the prima facie presumption that he is a permanent resident of Brazil and enjoys the rights and obligations associated with that status. Regarding the principal applicant's rights and obligations, the RAD analyzed the possible effect of his fear on the exercise of rights in Brazil and concluded that it has no effect.

[34] However, the RAD overturned the RPD's conclusion with respect to the female applicant and concluded that she did not have permanent resident status in Brazil because the RPD had not grasped the distinction between a permanent resident visa and permanent resident status. However, the RAD concluded that the female applicant had not demonstrated a serious possibility of persecution or a risk if she returned to Haiti.

[35] As for the minor child, the RAD came to the same determination as the RPD.

IV. Issues

[36] This case raises three issues:

1. Did the RAD apply the correct standard of review?
2. Did the RAD err in finding that the principal applicant is a person referred to in Article 1E of the Convention?
3. Did the RAD err in law in its interpretation and application of sections 96 and 97 of the IRPA with respect to the adult female applicant?

[37] The applicants do not challenge the RAD's determinations with respect to the minor applicant.

V. Standard of review

[38] The standard of reasonableness applies in this case (*Canada (Citizenship and Immigration) v Zeng*, [2011] 4 RCF 3, 2010 FCA 118 at para 11 [*Zeng*]; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 [*Khosa*]). The Court must therefore determine whether the conclusions are rational and whether they fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New-Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47; *Khosa* at para 59; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 at para 13).

VI. Analysis

1) Did the RAD apply the correct standard of review?

[39] The applicants argue that the RAD applied the standard of reasonableness rather than the standard of correctness.

[40] I disagree. In its reasons, the RAD indicated that it would apply the correctness standard:

> The Refugee Appeal Division (RAD) applies the correctness standard with regard to questions of fact, mixed fact and law, and law. The exception to that rule is where the RPD enjoys a meaningful advantage in assessing the credibility of or the weight to be given to the oral evidence it hears. Unless otherwise specified in my reasons, I will apply the correctness standard to all findings. [*English version of reasons, citation omitted.*]

[41] The choice of this standard is consistent with the rule recognized in *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93, that the RAD must review the RPD's decision on the correctness standard (at para 103).

[42] The RAD's reasons contain several indications that it did in fact apply the correctness standard. In paragraph 10 of its reasons, the RAD stated that it listened to the recording of the hearing and considered the evidence on the record. The RAD's reasons respond to the arguments provided by the applicants on appeal before the RAD, namely the conclusion relating to Article 1E (at paragraphs 11–28, 35 and 36–40 of the reasons) and the findings relating to the applicants' credibility (at paragraphs 29–34, 41–47 and 49 of the reasons). The RAD even found (at paragraph 40 of the reasons) that "the RPD erred in finding that the female appellant had permanent resident status".

[43] Several times, the RAD stated that it considered many components of the record, such as the National Documentation Package, the principal applicant's testimony and the applicants' claims for refugee protection. Without commenting on the RAD's specific conclusions, it must

be noted that the RAD applied the correct standard of review and conducted an analysis that is consistent with the role envisioned for it by Parliament.

2) Did the RAD err in finding that the principal applicant is a person referred to in Article 1E of the Convention?

[44] The applicants allege that the RAD erred in concluding that the principal applicant had permanent resident status in Brazil. The applicants argue that the principal applicant testified clearly and convincingly that he held only a visitor's visa. Because of this status, the principal applicant never obtained permanent resident status and therefore could not return to Brazil. In addition, the applicants claim that the RAD conducted an unreasonable analysis of the principal applicant's fear under section 96 of the IRPA and failed to assess the principal applicant's situation in light of section 97 of the IRPA.

[45] The respondent submits that the RAD's decision is reasonable and contains no errors of law. The respondent alleges that the principal applicant has not provided sufficient evidence to rebut the prima facie presumption that Article 1E of the Convention applies to him. In relation to the fear raised by the principal applicant, the respondent is of the opinion that it was reasonable to conclude that this fear does not affect the exercise of rights and obligations in Brazil.

[46] The starting point for any analysis of Article 1E of the Convention is the test set out in the Federal Court's decision in *Zeng*:

> [28] Considering all relevant factors to the date of the hearing, 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.

[47] The parties are essentially challenging the RAD's conclusions on the first of the three prongs of the *Zeng* test. The first prong asks whether the claimant has a status substantially similar to that of nationals of that country. This step examines whether the claimant has substantially the same rights as a national of the Article 1E country. The claimant's status is to be considered in relation to the last day of the hearing before the RPD (*Majebi v Canada (Citizenship and Immigration)*, 2016 FCA 274 at para 7; *Zeng* at para 16; Lorne Waldman, *The Definition of Convention Refugee*, 2nd ed (Toronto: LexisNexis Canada, 2019) at pp 545–46) and on a balance of probabilities (*Mikelaj v Canada (Citizenship and Immigration)*, 2016 FC 902 at paras 26–27; *Ramirez v Canada (Citizenship and Immigration)*, 2015 FC 241 at paras 22–24).

[48] This analysis concerns the rights and protections provided by the state in the Article 1E country. In *Shamlou v Canada (Minister of Citizenship and Immigration)* (1995), 103 FTR 241 at para 36 [*Shamlou*], also see *Vifansi v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 284 (CanLII) at para 27 [*Vifansi*]), this Court recognized four of these rights:

a) the right to return to the country of residence;

b) the right to work freely without restrictions;

c) the right to study; and

d) full access to social services in the country of residence.

[49] The decision maker must therefore determine whether the claimant has a status substantially similar to that of nationals of that country. If the answer is yes, the codified exclusion in Article 1E applies (*Zeng* at para 28). If the answer is no, the RAD must continue its analysis under the next two components of the *Zeng* test, otherwise the decision maker commits a reviewable error (*Xu v Canada (Citizenship and Immigration)*, 2019 FC 639 at para 44).

[50] The Minister has the burden of establishing prima facie that a claimant has a status substantially similar of that of nationals of the Article 1E country. Once demonstrated, there is a presumption that the applicant has permanent resident status in that country. It is established in the case law that the burden of proof shifts to the claimant once the Minister has established prima facie the first part of the test (*Shahpari v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 7678 (FC) at para 12; *Canada (Citizenship and Immigration) v Tajdini*, 2007 CF 227 at paras 36, 63; *Mai v Canada (Citizenship and Immigration)*, 2010 FC 192 at paras 34–35; *Hussein Ramadan v Canada (Citizenship and Immigration)*, 2010 FC 1093 at para 18).

[51] In this case, the Minister relied on four elements as prima facie evidence of his status in Brazil. First, the male applicant’s name is on the list of 43,781 Haitian nationals who have been granted permanent residence in Brazil by ministerial order. Second, as of January 2017, approximately 71% of the 43,781 Haitians had completed the administrative process to obtain

permanent residence. The granting of permanent residence is subject to procedural requirements. Thirdly, the female applicant has lived in Brazil for more than three and a half years (from December 2012 to July 2016). Fourth, the Minister indicates that the Brazilian state offers its residents all the rights and obligations associated with citizenship in that country.

[52] This is sufficient to constitute prima facie evidence of his status in Brazil and to shift the burden to the applicants (*Noel v Canada (Citizenship and Immigration)*, 2018 FC 1062 at paras 7, 16–21 [*Noel*]). This prima facie conclusion is not contested by the applicants. The onus is therefore on the principal applicant to show either that he was not a permanent resident of Brazil or that the Brazilian state did not provide him with all the rights and protections associated with nationality.

[53] I must conclude that the principal applicant has failed to demonstrate that the RAD's determination was unreasonable.

[54] First, the principal applicant did not provide convincing evidence that he did not have permanent resident status. As found by the RAD, the principal applicant's status had not lapsed at the time of the RPD hearing (February 15, 2018), since the hearing took place a few months before the expiry of his permanent residence (June 9, 2018). According to the evidence on the record, permanent resident status will be cancelled when a holder is absent from Brazil for more than two years. In addition, the principal applicant does not appear to have presented evidence that he could not reside in Brazil by virtue of his daughter's citizenship status.

[55] Second, the principal applicant has not shown that he does not enjoy his "right to return to the country of residence" (*Shamlou* at paras 35–36; *Vifansi* at para 27). At the hearing, the principal applicant mentioned that he could have returned to Brazil.

[56] Third, it was reasonable to conclude that the fear raised by the principal applicant did not restrict the exercise of his so-called *Shamlou* rights. In accordance with the *Zeng* test, the RAD analyzed the effect of the fear raised by the principal applicant relating to exercising *Shamlou* rights and concluded that the incidents invoked did not interfere with the exercise of his rights.

[57] Since the male applicant has failed to demonstrate that the RAD analysis on the first prong of the *Zeng* test was unreasonable, it can therefore be concluded that he is referred to in Article 1E of the Convention (*Zeng* at para 28).

3) Did the RAD err in law in its interpretation and application of sections 96 and 97 of the IRPA with respect to the adult female applicant?

[58] It should be noted that at the hearing before the RPD, the adult female applicant testified that she had left Haiti because of the rape and her desire not to give birth to a child in a dangerous environment. She also testified that she feared returning to Haiti because of the

incident of rape, her familial relationship with her husband, and the events that happened to her husband.

[59] However, the RPD did not conduct a risk analysis for the wife with respect to Haiti, simply because it found that she was excluded under Article 1E of the Convention by virtue of having permanent resident status. The RAD overturned this aspect of the RPD's decision.

[60] The male applicant states that the RAD should have referred the matter back to the RPD for an analysis of the wife's risk in Haiti. I disagree.

[61] Where the RAD determines that the RPD has made an error, it may either refer the matter back to the RPD for reconsideration or correct the error and substitute its own decision (*Huruglica*; *Kreishan v Canada (Citizenship and Immigration)*, 2019 FCA 223 at para 44).

[62] The RAD conducted its own analysis of the risks to the wife with respect to Haiti after concluding that she was not excluded under Article 1E of the Convention. It had access to the tapes and documents on the record and did not believe that it could not make a final decision without further evidence (*Huruglica* at para 103).

[63] The applicants argue that the RAD did not conduct an adequate analysis of the adult female applicant's fear in Haiti. Although the incident involving the murder of her husband's

uncle and the fire at her husband's house took place in 2015, after she had left Haiti in 2013, the adult female applicant submits that the circumstances giving rise to her husband's fear should have been specifically considered by the RAD in analyzing her risk because the evidence shows that there is a real risk to her should she return to her country of nationality.

[64] The adult female applicant claims to be a vulnerable woman and bases her argument on excerpts from the *Chairperson Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution* [Guidelines].

[65] With respect to the elements specific to the wife's family, the respondent concedes that the RAD did not specifically consider the adult female applicant's fear based on her familial relationship with the male applicant's uncle, but argues that the decision remains reasonable. I agree.

[66] First, in its reasons, the RAD concluded that the incident of rape was a random act. This conclusion is based on the documentary evidence demonstrating that violence is endemic in Haiti.

[67] Second, the RAD found that the adult female applicant will not be at risk in Haiti because her profile did not correspond to the profile of vulnerable women described in the Guidelines, which refers in particular to women without education and without the protection of a man.

[68] In this case, the RPD noted that the adult female applicant has two post-secondary degrees (in accounting and business) and will be among several male family members if she returns to Haiti.

[69] In considering the risk for the adult female applicant, the RAD considered the Guidelines and the documentary evidence on the situation of women in Haiti.

[70] In the end, there is simply no evidence other than the documentary evidence to suggest that the adult female applicant is in danger because of the husband's family situation. However, the RAD determined that the female applicant does not fit the profile of a women at risk referred to in the documentation. The applicants failed to demonstrate that this was an unreasonable decision.

[71] Lastly, the applicants allege that the RAD did not apply the correct test in its assessment of the female applicant's fear. I disagree.

[72] With respect to her risk of persecution in Haiti, the RAD applied the correct test in an analysis under section 96 of the IRPA, that of the "serious possibility of persecution" (*Pidhorna v Canada (Citizenship and Immigration)*, 2016 FC 1 at paras 26–27; *Alcantara Moradel v Canada (Immigration, Refugees and Immigration)*, 2019 FC 404 at para 23 [*Alcantara Moradel*]).

[73] With respect to the section 97 analysis, I note that the RAD adopted the correct evaluation criterion when it assessed the risk raised by the female applicant on the balance of probabilities. As Justice LeBlanc explained in *Alcantara Moradel* at paragraph 22 :

> For the purposes of section 97, the decision maker must consider whether the applicant’s removal could expose him or her personally to the risks and threats specified in the section. Risk must be personalized and must be determined on a balance of probabilities. It is prospective and has no subjective component (*Li v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1 (CanLII) at para 33; *Jarada v Canada (Minister of Citizenship and Immigration)*, 2005 FC 409 (CanLII) at paras 26–28).

[74] It is by applying this test that the RAD arrived at a determination of the applicant’s risk from the incident of rape.

VII. Conclusion

[75] The Court’s intervention is not warranted in this case. The application for judicial review is therefore dismissed. No question is certified for consideration by the Federal Court of Appeal.

JUDGEMENT in IMM-2655-19

THIS COURT ORDERS that the application for judicial review is dismissed. No question is certified.

"Peter G. Pamel"
Judge

Certified true translation
This 16th day of January 2020.

Michael Palles, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

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