Federal Court  Cour fédérale

**Date: 20200122**

**Docket: IMM-977-19**

**Citation: 2020 FC 97**

[REVISED ENGLISH TRANSLATION]

**Ottawa, Ontario, January 22, 2020**

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

**BETWEEN:**

**MARIE LUNA CELESTIN**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## Nature of the case

[1] In this case, the two parties are seeking clarification on the tests applicable to the analysis of Article 1E of the *United Nations Convention Relating to the Status of Refugees*, July 28, 1951, 189 UNTS 137 [Convention], and section 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] The applicant is seeking judicial review of a decision made by the Refugee Appeal Division [RAD] of the Immigration and Refugee Board of Canada, dated December 20, 2018, which confirmed the decision of the Refugee Protection Division [RPD], according to which the applicant is not a refugee or a person in need of protection in Canada under Article 1E of the Convention and section 98 of the IRPA, because she has all the rights and obligations attached to the possession of Brazilian nationality and therefore is not a Convention refugee or person in need of protection under sections 96 and 97 of the IRPA.

[3] The applicant claims to have done everything possible to fulfill the conditions allowing her to rebut the *prima facie* presumption of permanent residence and requests clarification of those conditions. She admits that there is *prima facie* evidence that she had permanent resident status in Brazil, but she disputes the weight of this evidence, that is, the importance given to the fact that her name is on the list accompanying the Brazilian Ministerial Order. She submits that the Order merely authorizes persons on the list to acquire permanent resident status.

[4] For his part, the respondent is asking this Court to end the debate on whether the RPD and the RAD should analyze a refugee protection claimant's fear of persecution or the risk of harm to which they are exposed in the country of residence before or after determining whether a claimant is referred to in Article 1E of the Convention under the first prong of the test set out in *Zeng* (*Canada (Citizenship and Immigration) v Zeng*, 2010 FCA 118, [2011] 4 FCR 3 [*Zeng*]).

[5] In the event that such a risk analysis must be carried out before making a decision on the application of Article 1E, the respondent proposes a broad interpretation of section 98 of the IRPA by the RPD and the RAD allowing this kind of analysis.

[6] For the reasons that follow, this application for judicial review is dismissed.

Facts

[7] The applicant is a Haitian citizen born in 1986 and the mother of a young boy. In Haiti, she worked as a merchant. She alleges having seen her husband with another woman. She also alleges that he squeezed money out of her continuously for months. On November 12, 2012, the applicant allegedly confronted her husband about his infidelity. The husband allegedly assaulted the applicant, and she had to go to the hospital for treatment. The police then allegedly asked the husband to leave the house.

[8] On November 27, 2012, her husband allegedly returned to her home and asked her for money. After the applicant refused, he allegedly ransacked the house. The police then arrested the husband, who then allegedly threatened the applicant.

[9] In December 2012, the applicant fled Haiti and settled in Brazil until July 2016. In December 2016, she arrived in the United States and remained there until she crossed the Canadian border in July 2017. She left the United States because she was afraid of being deported by the Trump administration.

[10] On August 25, 2017, the applicant completed a Basis of Claim Form [BOC Form]. In her BOC Form, she indicated that she feared suffering serious harm in Haiti and wrote about violent and criminal events concerning her husband.

[11] In the same BOC Form, the applicant stated that she had lived a life of misery and discrimination in Brazil amounting to persecution. In Brazil, she was often bothered by police in search of money or sexual favours. In addition, she alleges that she was the victim of theft in Brazil when she was about to send money to her daughter. She was unemployed in Brazil.

[12] The applicant alleges that her husband is part of a group engaged in criminal activities such as extortion and sexual exploitation in Haiti, and that he regularly tells her sister that he will make her pay for all the harm that she did to him. In addition, the applicant alleges that her husband is considered to be a dangerous individual, and that he may have obtained a visa for Brazil. The applicant claims to be certain that her husband will kill her.

[13] On December 18, 2017, the Minister of Immigration, Refugees and Citizenship intervened and stated, in his submissions, that the applicant should be excluded from the protection granted by Canada to refugees because of her permanent resident status in Brazil.

[14] The RPD held two hearings (January 8, 2018, and January 24, 2018) regarding the applicant's refugee protection claim. At the first hearing, the RPD questioned her about her status in Brazil. The applicant replied that she had the so-called [TRANSLATION] "protocol" status, which she had to renew every year. The panel then informed the applicant that it was

satisfied that it had been provided with *prima facie* evidence that she had permanent resident status in Brazil.

[15] Things then became somewhat muddled.

[16] The applicant stated that she did not obtain permanent residence because her name was not yet on the list of candidates. After being questioned about this, the applicant changed her testimony and replied that her name was on the list, but that she had not been granted permanent residence.

[17] She then changed her testimony once again, stating that she did not even know that her name was on the list. Later during the same hearing, the applicant admitted that she had made no effort to acquire permanent residence since she did not know that her name was on the list.

[18] Her counsel then contradicted this testimony by claiming that he had informed the applicant of the existence of the list submitted by the Minister. Since there was some confusion in the presentation of the evidence, the panel granted a postponement of the hearing to allow the applicant to clarify her immigration status.

[19] At the second hearing, the applicant stated that she had made no further effort to clarify her immigration status. Her counsel indicated that she had obtained a document from the Brazilian consulate describing the procedure to be followed to verify her status in Brazil.

[20] Obliged to address the fact that there were ways to verify her immigration status, the applicant alleged that she had nothing but a C.P.F. card (*Cadastro de Pessoas Fisicas - Registration of Natural Persons)* from Brazil in her possession. The card entitles the holder to public transportation and medical care. This card does not establish the holder's immigration status.

[21] At that same hearing, the applicant further described her fear of persecution in Brazil. She alleged that Brazilians are racist towards Afro-Brazilians (as well as Haitians) and that she was robbed when she tried to send funds to her family in Haiti. The applicant stated that she was sexually harassed and extorted by Brazilian police. In addition, she is afraid to return to Brazil after learning that her husband had obtained a visa for Brazil. However, she admitted that she did not know if her husband even went to Brazil.

[22] On Friday, February 2, 2018, the RPD rejected the applicant's claim for refugee protection. The RPD determined that the applicant was not a Convention refugee or a person in need of protection pursuant to section 98 of the IRPA. The RPD found that the applicant had the permanent resident status in Brazil, which essentially gives her the same rights as Brazilian nationals. The RPD also found that the applicant did not do everything she could to verify her immigration status in Brazil.

[23] The RPD then analyzed the applicant's perceived fear of persecution or harm in the event of her removal to Brazil, to determine whether subsection 97(1) of the IRPA applied in this case. According to the RPD, the applicant failed to demonstrate that racist attitudes in Brazil amount

to persecution. The RPD believed that her being robbed arose rather from widespread crime in Brazil. In addition, the RPD found that the applicant's chances of meeting her husband in Brazil were academic.

RAD decision

[24] Before the RAD, the applicant essentially challenged the RPD's conclusions.

[25] The applicant claims that she had discharged her burden of establishing that she was not a permanent resident of Brazil by contacting the Brazilian consulate in Montréal, Brazil's federal police and a non-governmental organization in Brazil. In a decision dated December 20, 2018, the RAD confirmed the RPD's determination. According to the RAD, the applicant's rather inconsistent testimony on the steps she had taken and a copy of her C.P.F. card were insufficient to rebut the *prima facie* presumption that she had permanent resident status in Brazil.

[26] Regarding the applicant's fear of persecution in Brazil, the RAD confirmed the RPD's conclusion that the applicant had not established that she feared being persecuted. The RAD devoted 13 paragraphs to an analysis of this fear, after which it concluded that the applicant had all the rights and obligations associated with Brazilian nationality. According to the RAD, the applicant's fear of her husband's possible arrival in Brazil was not supported by sufficient evidence and was therefore rather speculative.

[27] The RAD also found that the evidence filed by the applicant did not support the conclusion that she would be the victim of personalized persecution if she were removed to

Brazil. In addition, the RAD determined that the theft suffered by the applicant was an isolated criminal incident in Brazil. For these reasons, the RAD concluded that the applicant did not establish the existence of a serious risk of persecution and did not satisfy the RAD that she was a person to be protected within the meaning of section 97 of the IRPA.

[28] The RAD did not mention the incident in which the applicant was threatened by Brazilian police officers and did not feel the need to analyze the adequacy of state protection or the internal flight alternative.

[29] The RAD therefore dismissed the appeal.

Issues

[30] This case raises two issues:

(1) Did the RAD make a reviewable error in concluding that the applicant was referred to in Article 1E of the Convention?

(2) Did the RAD err in analyzing the fear of persecution (under section 96 of the IRPA) and the risk of serious harm (under paragraph 97(1)(b) of the IRPA) after finding that the applicant was referred to in Article 1E of the Convention?

Standard of review

[31] In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the Supreme Court established a revised analytical framework for determining the standard of review applicable to administrative decisions. Under this analytical framework, the starting point is a presumption that the standard of review is that of reasonableness (*Vavilov* at para 23). This presumption can be rebutted in two types of situations: where there is a statutory appeal

mechanism or where the rule of law requires that the standard of correctness be applied (*Vavilov* at para 17).

[32] However, in this case, none of the situations justifying a derogation from the strong presumption of reasonableness review apply here. The legislature has not provided for an appeal mechanism for the issues raised in this case. The issue of interpretation of Article 1E (of the Convention) and sections 96, 97 and 98 (of the IRPA) falls within the delegated jurisdiction and expertise of the RAD, and does not have a significant impact on the legal system as a whole. In light of this, I do not believe that this case raises the (rare) types of legal issues that warrant a higher standard of review (*Vavilov* at paras 58–62, 69). I therefore conclude that the immigration officer's decision is reviewable against a reasonableness standard (*Vavilov* at paras 73–142).

Analysis

(1) Preliminary remarks on the test developed in *Zeng*

[33] The case before me provides this Court with an opportunity to clarify the analytical framework for Article 1E of the Convention. In *Zeng*, the Federal Court of Appeal established a test that serves as the starting point for the entire analysis of Article 1E:

> [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.

[34] This test has three prongs. Under the first prong, the decision maker must ask whether the claimant has status substantially similar to that of nationals of the country in question. It is here that the decision maker must examine whether the claimant enjoys substantially the same rights as a national of the country referred to in Article 1E of the Convention. This analysis concerns the rights and protections provided by the state referred to in Article 1E of the Convention.

[35] In *Shamlou v Canada (Minister of Citizenship and Immigration),* [1995] FCJ No 1537, 103 FTR 241 at paragraph 35 [*Shamlou*]) [see also *Canada (Minister of Citizenship and Immigration) v Choovak*, 2002 FCT 573 (CanLII) at paras 31–34], 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.

[36] The decision maker has a duty to determine whether the claimant has status substantially similar to that of nationals of that country and whether the claimant enjoys each of those four rights (*Vifansi v Canada (Minister of Citizenship and Immigration),* 2003 FCJ No 397, 2003 FCT 284 at para 27; *Mahdi v Canada (Minister of Citizenship and Immigration),* [1994] FCJ No 1691 (1994), 86 FTR 307).

[37] If the answer is yes, the exclusion codified in Article 1E applies (*Zeng* at para 28). The analysis stops there.

[38] If the answer is no, the decision maker must continue the analysis because failing to do so is a reviewable error (*Xu v Canada (Citizenship and Immigration)*, 2019 FC 639 at para 44 [*Xu*]).

[39] In the second stage, the decision maker must ask whether the claimant had lost resident status or could have acquired it by reasonable means, but did not do so. If the answer is no, the analysis ends, since the applicant is not excluded under Article 1E (*Molano Fonnoll v Canada (Citizenship and Immigration)*, 2011 FC 1461 at paras 29–31). The claimant's case will then be examined on the basis of sections 96 and 97 of the IRPA.

[40] If the answer at this second stage is affirmative, 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" (*Zeng* at para 28; *Mojahed v Canada (Citizenship and Immigration)*, 2015 FC 690 at paras 27–28 [*Mojahed*]).

[41] The assessment of these factors is made at the third stage of the test established in *Zeng* and must be done when the claimant has lost their status or has not taken steps to acquire a status similar to nationals of the country in question.

[42] This analysis is applied so as to fulfill the purposes of Article 1E of the Convention, and that is why Parliament has incorporated this exception into Canadian law by way of section 98 of the IRPA (*Zeng* at para 19). This discourages "asylum shopping" and precludes an individual from acquiring refugee protection if the individual has surrogate protection in a country where the individual enjoys substantially the same rights and obligations as nationals of that country (*Zeng* at para 1; *Fleurant v Canada (Citizenship and Immigration*), 2019 FC 754 at para 16 [*Fleurant*]; *Mai v Canada (Citizenship and Immigration)*, 2010 FC 192 at para 1 [*Mai*]).

(2) Did the RAD commit a reviewable error in concluding, under the first prong of the test established in *Zeng*, that the applicant was a permanent resident of Brazil?

[43] The respondent relied on four factors as *prima facie* evidence of the applicant's status in Brazil. First, the applicant's name is on a list of 43,781 Haitian nationals who have been granted permanent residence in Brazil by virtue of a ministerial order. Second, in January 2017, approximately 71% of these 43,781 Haitians had taken the administrative steps required to obtain permanent residence. Third, the applicant lived in Brazil for over three and a half years (from December 2012 until July 2016). Fourth, the respondent asserts that the Brazilian state confers on its permanent residents all the rights and obligations attached to the possession of the nationality of that country.

[44] The respondent contends that it was reasonable for the RAD to exclude the applicant under Article 1E of the Convention. According to the respondent, the RAD was correct in concluding that there was *prima facie* evidence establishing a presumption that the applicant was a permanent resident of Brazil, especially given the fact that she had lived in that country for more than two years. The applicant's testimony and her C.P.F. card are not sufficiently

compelling to rebut this presumption. In addition, the respondent believes that the RAD was not mistaken in finding that the applicant did not take steps to obtain permanent residence.

[45] The applicant alleges that the RAD committed a serious error in concluding that she had permanent resident status in Brazil. Although the applicant does not dispute that the four factors mentioned above constitute *prima facie* evidence of her permanent residence, she claims that the fact that her name was on the list accompanying the ministerial order only proves that she is authorized to initiate steps to obtain permanent residence in Brazil, not that she automatically acquired Brazilian residence as a Haitian national. In addition, the applicant alleges that the RAD placed too much weight on this evidence and downplayed the testimonial and documentary evidence establishing that she never had permanent resident status in Brazil. She is uncertain about the burden of proof she has to discharge to rebut the *prima facie* evidence presented against her.

[46] These arguments relate to the RAD's decision under the first prong of the test established in *Zeng.* As I explained above, the first prong of the *Zeng* test concerns the question of whether the refugee protection claimant has status substantially similar to that of the third country nationals. The appellant's status must be considered as of the last day of the hearing before the RPD (*Majebi v Canada (Citizenship and Immigration)*, 2016 FCA 274 at para 7 [*Majebi*]; *Zeng* at para 16; Lorne Waldman, *The Definition of Convention Refugee*, 2nd ed (Toronto: LexisNexis Canada, 2019) at pp. 545 and 546) and on a balance of probabilities (*Mikelaj v Canada (Citizenship and Immigration)*, 2016 FC 902 at paras 26–27 [*Mikelaj*]; *Ramirez v Canada*

*(Citizenship and Immigration)*, 2015 FC 241 at paras 22–24). If the answer to this question is yes, the claimant is excluded. If the answer is no, the analysis continues (*Zeng* at para 28).

[47] I do not agree with the applicant's argument. Although I agree that the fact that her name is on the list merely establishes that she is authorized to complete the administrative formalities required to obtain permanent resident status, the fact remains that these administrative formalities are straightforward. The applicant accepts that the items submitted are *prima facie* evidence of permanent resident status.

[48] The Minister has the burden of establishing that the applicant, at first glance, has status substantially similar to that of nationals of the country referred to in Article 1E of the Convention. In this case, he discharged this burden.

[49] These elements are sufficient to constitute *prima facie* evidence of the applicant's status in Brazil and to shift the burden of proof to the applicant (*Noel v Canada (Citizenship and Immigration)*, 2018 FC 1062 at paras 7, 16– 21 [*Noel*]). The applicant does not challenge this conclusion.

[50] Once this case is established, the applicant is presumed to hold permanent resident status in the third country. It is trite law that the onus shifts to the applicant once the Minister has provided *prima facie* evidence that satisfies the first prong of the *Zeng* test (*Shahpari v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 7678 (FC) at para 12; *Canada (Citizenship and Immigration) v Tajdini*, 2007 FC 227 at paras 36, 63; *Mai* at para 34; *Hussein*

*Ramadan v Canada (Citizenship and Immigration)*, 2010 FC 1093 at para 18 [*Hussein Ramadan*]).

[51] It is then up to the applicant to demonstrate that she was not a permanent resident of Brazil or that the Brazilian state did not confer on her all the rights and obligations attached to the possession of Brazilian nationality.

[52] However, the applicant's status appears to be ambiguous. In her claim for refugee protection, the applicant stated that she was a temporary resident during her time in Brazil. However, before the RPD, the applicant claimed to have so-called [TRANSLATION] "protocol" status. She never presented an identity document establishing this status. At her first hearing before the panel, the applicant admitted that she had made no effort to obtain permanent residence, since she did not know that her name was on the list. The panel granted the applicant a postponement of the hearing (of more than two weeks) following some confusion in which counsel for the applicant contradicted her testimony by stating that he had informed the applicant of the existence of the list submitted by the Minister. At the second hearing, the applicant filed in evidence her C.P.F. card from Brazil, a card which does not indicate her immigration status. At the same hearing, the applicant stated that she had obtained a document from the Brazilian consulate describing the procedure to follow for checking one's status. The applicant explained that she had not contacted Brazil after the RPD issued its decision. In her memorandum, the applicant states that she does not know her status in Brazil.

[53] The applicant's evidence wavers between certainty (temporary residence, [TRANSLATION] "protocol" status) and uncertainty. The applicant has not alleged that the Brazilian state has refused to grant her rights and protection, be it in terms of health care, education, government services or social security (the rights and obligations enumerated in the *Shamlou* decision), or she was unable to prove it. In addition, the applicant made little effort to seek clarification of her status in Brazil, where she lived for more than three years.

[54] The applicant failed to discharge the burden of proof on her (*Dieng c Canada (Citoyenneté and Immigration)*, 2013 CF 450 at paras 23–34). In the circumstances, I do not see anything unreasonable in the RAD's decision on this issue.

[55] The first question forming part of the *Zeng* test must therefore be answered in the affirmative. Since the answer is affirmative, the exclusion codified in Article 1E of the Convention applies, and the analysis based on Article 1E must stop at the first prong (*Zeng* at para 28). Pursuant to section 98, the applicant was not protected by the IRPA in the context of the decisions of the RPD and the RAD.

(3) Reasonableness of the analysis of the fear of persecution and the risk of serious harm in relation to the country of residence

[56] The applicant argues that in addition to the risks specific to Brazil, the RAD should have analyzed the risks specific to Haiti.

[57] I disagree. Although it may be useful to conduct a risk analysis for the country of which she is a citizen to avoid having to refer the matter back to the RAD at a later stage, this analysis

only becomes necessary under the third prong of the *Zeng* test. Assuming that there is a risk assessment to be undertaken in the context of an Article 1E exclusion, the only relevant country is the country of residence (*Milfort-Laguere v Canada (Citizenship and Immigration)*, 2019 FC 1361; *Gonzalez v Canada (Minister of Employment and Immigration)*, [1994] 3 FC 646, 1994 CanLII 3486 (FCA); Lorne Waldman, *Immigration Law and Practice*, 2nd edition (loose leaf) at para 8.518.1).

[58] The applicant claims that the RAD's analysis of the fear of persecution in Brazil was premature and did not take into account all of the evidence on the record. On appeal, the applicant alleged that the RPD had not questioned her on all of the evidence related to her fear of persecution in Brazil.

[59] I agree with the applicant that the RAD's analysis is unreasonable because it did not properly respond to all of the evidence related to her fear of persecution.

[60] After concluding that the applicant had not discharged the burden of establishing that she did not have permanent resident status, the RAD turned to the RPD's risk of persecution analysis. One of the fundamental issues in this case appears to be the applicant's fear of persecution, the applicant having raised four fears of persecution in relation to her country of residence.

[61] First, the applicant mentioned a fear of meeting her husband, who has allegedly been given a visa for Brazil. The RAD confirmed the RPD's conclusion that this allegation was

inconsistent and unfounded. At the hearing, the applicant testified that her husband was still in Haiti, but that she feared that he would go to Brazil and find her. Like the RPD, the RAD found that the applicant did not establish that the husband had the intention or the means to travel to Brazil. This finding is not unreasonable.

[62] Second, the applicant alleged that she was at risk of persecution because of the widespread racism against Afro-Brazilians in Brazil. Like the RPD, the RAD concluded that the evidence filed by the applicant did not establish that there is a systematic violation of human rights in Brazil. Again, there is nothing unreasonable in this conclusion (*Noel* at para 30; *Simolia c Canada (Citoyenneté et Immigration)*, 2019 CF 1336 at paras 26–27).

[63] However, the analysis of the following two fears is problematic.

[64] Third, the applicant indicated that she was sexually harassed and extorted by Brazilian police. The RAD did not analyze the fear of persecution arising from the sexual harassment and extortion by the Brazilian police. In her BOC FORM, the applicant stated that she was [TRANSLATION] "often bothered by police officers asking for money or sexual favours when I said that I did not have any". It is obvious that the applicant perceived certain Brazilian police officers as agents of persecution and that this could raise a doubt about the adequacy of state protection in Brazil. However, the RAD did not mention this subject in its decision and even held that it was not necessary to address the applicant's arguments regarding the adequacy of state protection in Brazil.

[65] Fourth, the applicant claimed that she was the victim of theft in Brazil, of an amount she was preparing to send to her daughter. In her BOC Form, the applicant mentioned a robbery that allegedly took place in July 2016 during which [TRANSLATION] “a man pointed his gun at [her], while another took the money”.

[66] This fear also was not subjected to a sufficiently rigorous analysis. At the hearing before the RPD, the applicant testified that she did not feel safe in Brazil, relying in support of this allegation on the theft of which she was a victim, the impeachment of Brazil’s former president and the racist climate prevailing in Brazil. After hearing this allegation, the RPD member asked the applicant a question about the source of her income, but did not ask her about the theft as such.

[67] The RAD, for its part, did not analyze this incident to determine whether the perpetrators of the theft were motivated by racist or sexist reasons. Instead, the RAD, like the RPD, simply concluded that this incident was an isolated criminal incident in the context of high crime in Brazil. In the case of the RAD, the panel relied on the documentation from the National Documentation Package and concluded that the theft was an isolated criminal incident.

[68] In short, the RAD decided to disregard this fear of persecution on the basis of general reasons which ignored the details of the theft the applicant was a victim of. Yet, the RAD should have closely analyzed the evidence related to the theft suffered by the applicant in order to assess the adequacy of the protection afforded to her by the Brazilian state. Given the importance of the

decision for an “individual’s rights and interests”, the reasons provided by the RAD should have addressed these “concerns” raised by the applicant (*Vavilov* at paras 127–133).

[69] The failure of the RAD to fulfil its duty of making findings of fact on important issues is a reviewable error in the assessment of the facts (*Vavilov* at paras 126–128; *Feboke v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 855; *Colmo v Canada (Citizenship and Immigration)*, 2018 FC 931 at para 7). In addition, the RAD failed to provide an explanation for the gaps in its analysis (*Magonza v Canada (Citizenship and Immigration)*, 2019 FC 14 at para 11).

[70] These errors alone are subject to judicial review.

[71] However, in this case judicial intervention is inappropriate because, as I will explain, the analysis for Brazil is unnecessary and not determinative.

(4) Did the RAD err in analyzing the fear of persecution (under section 96 of the IRPA) and the risk of serious harm (under paragraph 97(1)(b) of the IRPA) after finding that the applicant was referred to in Article 1E of the Convention?

[72] The applicant claims that the RAD erred in analyzing the fear of persecution (under section 96 of the IRPA) and the risk of serious harm (under paragraph 97(1)(b) of the IRPA) after finding that the applicant was referred to in Article 1E of the Convention. The applicant’s argument is based primarily on her interpretation of *Romelus v Canada (Citizenship and Immigration)*, 2019 FC 172 [*Romelus*]. According to the applicant, the RAD should have analyzed the fear with respect to the country of permanent residence (Brazil) before declaring

that she is referred to in Article 1E of the Convention. The fear of persecution alleged by the applicant arises from the climate of racism towards Haitians allegedly reigning in Brazil, a robbery and alleged act of aggression against the applicant in Brazil, and the possibility that her husband is in the Brazil.

[73] The respondent admits that the RAD erred in basing its analysis on section 97 of the IRPA, but submits that the analysis was reasonable because the applicant's fears did not meet the persecution threshold.

(a) *RAD's analysis*

[74] After concluding that the applicant had not discharged her burden of establishing that she did not have permanent resident status, the RAD turned to the RPD's risk of persecution analysis. After its (problematic) analysis of the fear felt by the applicant in Brazil, the RAD concluded that the applicant did not establish that she was exposed to a serious risk of persecution or that she was a person to be protected under the meaning of section 97 of the IRPA. The RAD held as follows at paragraphs 41 and 43:

> [41] In light of the evidence just discussed in paras. 37-39 above, the RPD did not err in finding that the Appellant had not established a serious possibility of persecution because of her race or nationality if she were to return to Brazil.
>
> . . .
>
> [43] Therefore, I agree with the RPD that the appellant has not established as serious risk of persecution based on any Convention ground, nor that she is a person in need of protection within the meaning of s. 97 of the IRPA in Brazil.

[75] In this passage, the RAD refers to section 97 of the IRPA and alludes to the risk of persecution test recognized in section 96 of the IRPA to frame or guide its analysis concerning the applicant's country of residence. In the RAD's reasons, this risk analysis is presented as a component of Article 1E of the Convention.

[76] Sections 96 and 97 should not be considered when determining whether a refugee protection claimant is covered by the first prong of the *Zeng* test. Such an analysis is not relevant since the criteria in sections 96 and 97 of the IRPA only refer to a person's country of nationality or country of habitual residence, in the case of persons without a country of nationality:

| **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 themself 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 that country. | 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 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 themself 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 |

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| | 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. |

[77] Assuming that a risk analysis was even necessary, putting aside the reference to sections 96 and 97, the RAD performed the appropriate analysis because it focused on the risks to which the applicant was exposed in Brazil, and which were similar in nature to those set out in sections 96 and 97.

[78] For his part, the respondent recognizes that its analysis of the fear felt by the applicant in Brazil based on sections 96 and 97 of the IRPA was an error of law since any analysis of risk must relate to the country of citizenship and not to the country of residence. The country of residence is not mentioned anywhere in these provisions. The respondent adds that the order in which the panel examined the rights conferred on a person and the risks to which he or she is exposed in the third country is immaterial, because all the conditions must be fulfilled before the exclusion clause can apply. Assuming that such an analysis is necessary in this context, I agree with the respondent.

[79] However, the respondent nevertheless emphasizes that such a risk analysis is necessary in the context of the application of Article 1E of the Convention and section 98 of the IRPA, in the same way as for sections 96 and 97, but without mentioning these provisions. He submits that the RPD and the RAD should have examined the presence of a fear of persecution or risk in the country of residence (Brazil) when they were asked to determine whether a refugee protection claimant should be excluded by operation of Article 1E of the Convention.

[80] I do not agree with the respondent for the following reasons.

[81] As we will see later, this interpretation does not take into account the statutory context of the IRPA (*Vavilov* at paras 118, 121–122; *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53; *Hillier v Canada (Attorney General)*, 2019 FCA 44 at paras 24–25). Furthermore, such an analysis amounts to a modification of the criteria set out in *Zeng* (*Vavilov* at paras 111–112).

(5) Interpretation of the exclusion by operation of Article 1E

[82] The unnecessary analysis carried out under sections 96 and 97 of the IRPA therefore gives us an opportunity to reflect on the relevance of the risk analysis in relation to the country of residence carried out by the RPD and the RAD. This gives us the opportunity to reflect on the nature of Article 1E of the Convention and section 98 of the IRPA.

(a) *Principles related to the interpretation of section 98 and Article 1E*

[83] The Supreme Court of Canada and the Federal Court of Appeal have held that section 98 of the IRPA has incorporated articles 1E and 1F of the Convention into Canadian law by reference (*Febles v Canada (Citizenship and Immigration)*, [2014] 3 SCR 431, 2014 SCC 68 at para 11 [*Febles*]; *Németh v Canada (Justice)*, [2010] 3 SCR 281, 2010 SCC 56 at para 117 [*Németh*]; *Ezokola v Canada (Citizenship and Immigration)*, [2013] 2 SCR 678, 2013 SCC 40 at para 33 [*Ezokola*]; *Zeng* at para 10; *Tapambwa v Canada (Citizenship and Immigration)*, 2019 FCA 34 at para 5 [*Tapambwa*]; *Xie v Canada (Minister of Citizenship and Immigration)*, [2005] 1 FCR 304, 2004 FCA 250 at para 35 [*Xie*]; see also *Jung v Canada (Citizenship and Immigration)*, 2015 FC 464 at para 26). This incorporation means that Parliament accepts the international obligations flowing from articles 1E and 1F of the Convention.

[84] The incorporation of these provisions supports a contextual interpretation of section 98 of the IRPA, which is in line with the modern principles of interpretation (*Rizzo & Rizzo Shoes Ltd (Re)*, 1998 CanLII 837 (SCC), [1998] 1 SCR 27 at para 21; *R v Hape*, 2007 SCC 26 at paras 53–54 [*Hape*]; *B010 v Canada (Citizenship and Immigration)*, 2015 SCC 58 at paras 47–49 [*B010*]). The Supreme Court has repeatedly held that international interpretative documents are part of the context of section 98.

[85] For example, in *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982, 1998 CanLII 778 (SCC), the Supreme Court held that it was an error of law to dismiss "the objects and purposes of the treaty" "in according virtually no weight to the indications provided in the *travaux préparatoires*" (at para 55). In the same judgment, the Supreme Court relied on the preparatory work, the United Nations High Commissioner for

Refugees [UNHCR] Handbook, documents of the Social Committee of the Economic and Social Council and several other international treaties to interpret the exclusionary provision set out in Article 1F(c) incorporated in section 98 of the IRPA (at paras 55–64).

[86] Similarly, in *Ezokola*, at paragraphs 31 to 36, the Supreme Court cited the UNHCR's *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* and other international documents in support of its narrow interpretation of Article 1F(a).

[87] In line with this contextual approach, the courts have used UNHCR documents and foreign case law to guide their analysis of international obligations incorporated in section 98 (see, for example, *Jayasekara v Canada (Minister of Citizenship and Immigration)*, [2009] 4 FCR 164, 2008 FCA 404 at paras 38–43; *Febles* at paras 92–101 (Abella J., dissenting); *Varela v Canada (Minister of Citizenship and Immigration)*, 2008 FC 436, 72 Imm LR (3d) 236 at paras 40–44).

[88] An interpretation guided by these principles reveals that Article 1E should not be interpreted as completely doing away with the risk of persecution analysis applied in Canadian law (subsection 3(2) of the IRPA). Such an interpretation would be contrary to the presumption of Canadian domestic law being in line with international law (*Vavilov* at para 114; *B010* at paras 47 to 49; *Hape* at paras 53–54; *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at para 70; *Ramanathan v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 834 at para 43).

[89] According to the ordinary meaning of Article 1E of the Convention and section 98 of the IRPA, there is no mention of a risk analysis in these provisions, and the courts should therefore be wary of an interpretation that would run counter to the purpose of these provisions. It is for this reason that the exclusions incorporated in section 98 apply only when there are "serious reasons to consider that the person has committed the acts described in sections E and F of Article 1 of the Convention" (*Li v Canada (Minister of Citizenship and Immigration)*, [2010] 3 FCR 347, 2010 FCA 75 at paras 26 and 27 [*Li*]). Otherwise, 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" and could mean Canada running afoul of its international obligations (*Constant v Canada (Citizenship and Immigration)*, 2019 FC 990 at paras 35, 37 [*Constant*]).

[90] This interpretation also finds support in international sources of doctrine. Authors James Hathaway and Michelle Foster (*The Law of Refugee Status*, 2nd ed. (Cambridge (UK): Cambridge University Press, 2014) at page 509 [Hathaway and Foster]) believe that an analysis under Article 1E of the Convention necessarily involves an analysis of the fear of persecution in the country of residence, since "[t]his intentionally high standard [set by Article 1E] requires . . . the ability to enter the putative state of *de facto* nationality and to be protected against the risk of being persecuted there". Moreover, I would add that the UNHCR advocates a risk analysis prior to the application of Article 1E (*UNHCR Note on the Interpretation of Article 1E of the 1951 Convention relating to the Status of Refugee* at para 17):

> Although the competent authorities of the country in which the individual has taken residence may consider that he or she has the rights and obligations attached to the possession of the nationality of that country, this does not exclude the possibility that when

> outside that country the individual may nevertheless have a well-founded fear of being persecuted if returned there. To apply Article 1E to such an individual, especially when a national of that country who is in the same circumstances, would not be excluded from being recognized as a refugee, would undermine the object and purpose of the 1951 Convention. Thus, before applying Article 1E to such an individual, if he or she claims a fear of persecution or of other serious harm in the country of residence, such claim should be assessed vis-à-vis that country.

[91] On the contrary, Article 1E should be interpreted to exclude only refugee protection claimants who do not genuinely need protection. It should not be forgotten that the purposes of Article 1E are to prevent "asylum shopping" and to preclude the conferral of refugee protection if an individual has surrogate protection in a country where the individual enjoys substantially the same rights and obligations as nationals of that country (*Zeng* at para 1; *Fleurant* at para 16; *Mai* at para 1). This interpretation of Article 1E is consistent with *Canada (Attorney General) v Ward*, 1993 CanLII 105 (SCC), [1993] 2 SCR 689 at page 726, in which the Supreme Court of Canada held that "[r]efugee claims were never meant to allow a claimant to seek out better protection than that from which he or she benefits already".

(b) *Implementation of risk analysis*

[92] Having recognized the obvious need for a risk analysis in relation to the country of residence, another question that arises is how Canada decided to implement risk analysis in the context of applying Article 1E. In particular, there remains some doubt as to when the fears of risk raised by a person referred to in Article 1E should be analyzed (see, "10.1.7. Fear of Persecution and State Protection in the Article 1E Country" in the Immigration and Refugee

Board's *Interpretation of the Convention Refugee Definition in the Case Law*, updated in October 2019).

[93] The *Zeng* decision provides a partial answer to this question.

[94] In *Zeng*, the Federal Court of Appeal held that a risk analysis ("the risk the claimant would face in the home country") is a component of the third prong of the test established in this judgment (in paragraph 28). This analysis would therefore take place only if the answer to the first question is no. In other words, the decision maker must carry out a risk analysis if the applicant "previously had" permanent resident status and "lost it, or had access to such status and failed to acquire it" (*Zeng* at para 28; see, for example, *Zhong* at paras 29–31; *Su v Canada (Citizenship and Immigration)*, 2019 FC 1052 at paras 23, 30–35; *Desir v Canada (Citizenship and Immigration)*, 2019 FC 1164 at para 19; *Noel* at paras 28–30; *Ramirez-Osorio v Canada (Citizenship and Immigration)*, 2013 FC 461 at paras 44–48). Failure to perform such an analysis is a reviewable error (*Xu* at para 44).

[95] On the other hand, the Federal Court of Appeal does not indicate whether a risk analysis should take place if it is established that the refugee protection claimant enjoys status substantially similar to that of nationals of that country (that is, if the answer to the first question of the *Zeng* test is yes). This Court has raised the question of the legal basis for such a risk analysis (*Romelus* at para 39; *Constant* at paras 31–39).

[96] In this case, the respondent asserts that Canadian jurisprudence and international practice support a broad interpretation of Article 1E of the Convention, which includes this risk analysis by the RPD and the RAD. The applicant has not commented on this point.

[97] The respondent's proposal is essentially based on four factors.

[98] First, the respondent argues that *Omar v Canada (Citizenship and Immigration)*, 2017 FC 458 [*Omar*], provides a sufficient basis to justify the risk analysis by the RPD and the RAD. At paragraph 24 of her reasons for that decision, Justice Mactavish held as follows:

> [24] [T]he purpose of Article 1E is to exclude persons who do not need protection under the Refugee Convention. As the United Nations High Commissioner for Refugee notes in the "*Note on the Interpretation of Article 1E of the 1951 Convention Relating to the Status of Refugees*", regard must also be had to whether the individual has a well-founded fear of persecution in the country where the individual has been granted refugee protection. This makes sense: if it were otherwise, an individual in Mr. Omar's position would be denied refugee protection in Canada, while a citizen of South Africa facing the same risk would be entitled to refugee protection.

However, as Justice St-Louis concluded, "mak[ing] sense" is not a legal basis (*Romelus* at para 43).

[99] Second, the respondent asserts that *Jean v Canada (Citizenship and Immigration)*, 2019 FC 242 [*Jean*], offers two interpretations to integrate the risk analysis. The first integrates risk analysis in respect of the country of residence in the wording of Article 1E, and the second limits the application of section 98 of the IRPA to the country of citizenship (*Jean* at paras 26–30). However, the Court did not incorporate these modifications through a broad construction of these provisions and decided not to "make a determination in favour of either interpretation" (*Jean* at

para 31). Without commenting on their merits, I believe that these proposed modifications fall within the legislative competence of Parliament rather than the common law interpretive power.

[100] Third, the respondent cites *Kroon v Canada (Minister of Employment and Immigration)*, [1995] FCJ No 11, 89 FTR 236 [*Kroon*], in support of the proposition that the RPD should carry out a risk analysis. However, the decisive question in the *Kroon* decision was whether the claimant enjoyed in Estonia the four rights set out in the *Shamlou* decision. The Court had not established an obligation to carry out a risk analysis.

[101] I would add that after an exhaustive reading of the case law of this Court, I was unable to identify a legal basis for a risk analysis before the RPD and the RAD with respect to the country of residence (e.g., *Tresalus v Canada (Citizenship and Immigration)*, 2019 FC 173 at paras 4–5 [*Tresalus*]; *Fleurisca v Canada (Citizenship and Immigration)*, 2019 FC 810 at paras 24–26 [*Fleurisca*]; *Mikelaj* at paras 25–29; *Tshiendela v Canada (Citizenship and Immigration)*, 2019 FC 344 at paras 37–40 [*Tshiendela*]; *Occean v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 1234 at paras 38–41 [*Occean*]).

[102] Fourthly, the respondent refers to the UNHCR interpretative note and the work of James Hathaway and Michelle Foster to argue that it would be contrary to the Convention to order the removal of a person with a well-founded fear of persecution to that person's country of residence. As I explained above, I agree with these international sources, which emphasize the importance of performing a risk analysis before ordering the removal of a person from Canada.

However, none of these sources clarify the administrative process to be followed to fulfill this obligation in international law.

[103] In short, the respondent has not persuaded me that there is a legal basis for a risk analysis by the RPD and the RAD with respect to the country of residence after these panels have determined that a refugee protection claimant is excluded under Article 1E. Parliament or the Federal Court of Appeal can resolve this issue (e.g., *Li* at para 27), but it is not appropriate for this Court to venture into this area and change the interpretation of the text of section 98 and Article 1E.

(c) *Risk analysis as part of the pre-removal risk assessment*

[104] For the reasons that follow, I believe that the right time to perform a risk analysis is at the pre-removal risk assessment [PRRA] stage. Indeed, in 2012, Parliament intervened to settle a previously unresolved issue.

[105] In her reasons in the Federal Court of Appeal's decision in *Parshottam v Canada (Minister of Citizenship and Immigration)*, [2009] 3 FCR 527, 2008 FCA 355, Justice Sharlow noted an unresolved issue regarding the PRRA process after the RPD had refused refugee protection to a person under Article 1E of the Convention. I quote the relevant passages:

> [35] Article 1E of the Convention and section 98 of IRPA establish a legal bar to a refugee claim. . . .
>
> [36] It is generally accepted that the Article 1E exclusion would apply to any person who has the status of permanent resident of the U.S. and who makes a refugee claim in Canada against the country of his or her nationality. Mr. Parshottam was a permanent resident of the U.S. in February of 2004 when he entered Canada and when

> he made his refugee claim against Uganda (he also made a refugee claim against the U.S. but that claim was dismissed and is not being pursued). There is no evidence that the U.S. immigration authorities have taken any steps to deprive Mr. Parshottam of his status as a permanent resident of the U.S. Thus, if Mr. Parshottam's refugee claim against Uganda had been adjudicated in February of 2004, it would have been barred by Article 1E. Mr. Parshottam's fear is that if he is now removed to the U.S., the U.S. authorities may determine that he is no longer entitled to the status of permanent resident of the U.S., and could remove him to Uganda despite his well-founded fear of persecution there.
>
> [37] It is clear from the record that, even if the U.S. authorities determine that Mr. Parshottam is no longer entitled to the status of permanent resident of the U.S., he is unlikely to be refouled to Uganda. However, that should not obscure the importance of this appeal to Mr. Parshottam. If the decision of the PRRA officer in this case is wrong in law or is unreasonable, Mr. Parshottam will have been wrongly deprived of his right to assert, in Canada, a potentially valid refugee claim against Uganda. It is clear that, but for Article 1E, Mr. Parshottam's refugee claim against Uganda would have succeeded on the merits (see the written observations made by the Refugee Protection Officer, appeal book, Vol. 2, at page 241).
>
> [38] As I understand the certified question, it is intended to determine whether it was open to the PRRA officer to consider whether the Article 1E bar remained in effect in December of 2006 when, on the eve of Mr. Parshottam's removal to the U.S., he made his claim for protection under section 112 of IRPA. I agree with Justice Evans that this issue is unsettled but I do not agree that it should remain unsettled, even if it is not dispositive of this appeal. I reach that conclusion because the Federal Court jurisprudence discloses some confusion on this point and because Justice Mosley, by certifying the question, has expressed the opinion that it is a serious question of general importance.

[106] In *Zeng*, the Federal Court of Appeal was aware of the uncertainty about the appropriate time for performing a risk analysis and its effect on Canada's ability to fulfill its international law obligations:

> [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.

[107] In the same decision, the Federal Court of Appeal contemplated a potential examination of risk in the country of origin by a PRRA officer, but concluded that priority should be given to section 98 and Article 1E. In addition, the Federal Court of Appeal noted that refugee protection claimants could not be granted a stay of removal, nor were they able to present new evidence after the hearing before the RPD and the RAD:

> [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.

[108] Two years after *Zeng*, in 2012, Parliament intervened to resolve these shortcomings in the PRRA process by amending section 112 of the IRPA. Among the changes to this provision, Parliament introduced subparagraph 112(2)(b.1)(i), which expressly provides that the prohibition on making a PRRA application does not apply when the claim for refugee protection has been rejected by operation of articles 1E and 1F of the Convention.

[109] At the time of the RAD's decision, section 112 of the IRPA read as follows:

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| **Application for protection** | **Demande de protection** |
| 112(1) A person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force or are named in a certificate described in subsection 77(1). | 112(1) La personne se trouvant au Canada et qui n'est pas visée au paragraphe 115(1) peut, conformément aux règlements, demander la protection au ministre si elle est visée par une mesure de renvoi ayant pris effet ou nommée au certificat visé au paragraphe 77(1). |
| **Exception** | **Exception** |
| (2) Despite subsection (1), a person may not apply for protection if | (2) Elle n'est pas admise à demander la protection dans les cas suivants : |
| (a) they are the subject of an authority to proceed issued under section 15 of the *Extradition Act*; | a) elle est visée par un arrêté introductif d'instance pris au titre de l'article 15 de la *Loi sur l'extradition*; |
| (b) they have made a claim to refugee protection that has been determined under paragraph 101(1)(e) to be ineligible; | b) sa demande d'asile a été jugée irrecevable au titre de l'alinéa 101(1)e); |
| (b.1) subject to subsection (2.1), less than 12 months, or, in the case of a person who is a national of a country that is designated under subsection 109.1(1), less than 36 months, have passed since their claim for refugee protection was last rejected — unless it was deemed to be rejected under subsection 109(3) or was rejected on the basis of section E or F of Article 1 of | b.1) sous réserve du paragraphe (2.1), moins de douze mois ou, dans le cas d'un ressortissant d'un pays qui fait l'objet de la désignation visée au paragraphe 109.1(1), moins de trente-six mois se sont écoulés depuis le dernier rejet de sa demande d'asile — sauf s'il s'agit d'un rejet prévu au paragraphe 109(3) ou d'un rejet pour un motif prévu à la |

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| the Refugee Convention — or determined to be withdrawn or abandoned by the Refugee Protection Division or the Refugee Appeal Division; | section E ou F de l'article premier de la Convention — ou le dernier prononcé du désistement ou du retrait de la demande par la Section de la protection des réfugiés ou la Section d'appel des réfugiés; |
| (c) subject to subsection (2.1), less than 12 months, or, in the case of a person who is a national of a country that is designated under subsection 109.1(1), less than 36 months, have passed since | c) sous réserve du paragraphe (2.1), moins de douze mois ou, dans le cas d'un ressortissant d'un pays qui fait l'objet de la désignation visée au paragraphe 109.1(1), moins de 36 mois se sont écoulés depuis, selon le cas : |
| (i) the day on which their application for protection was rejected or determined to be withdrawn or abandoned by the Minister, in the case where no application was made to the Federal Court for leave to commence an application for judicial review, or | (i) le rejet de sa demande de protection ou le prononcé du désistement ou du retrait de celle-ci par le ministre, en l'absence de demande d'autorisation de contrôle judiciaire, |
| (ii) in any other case, the latest of | (ii) dans tout autre cas, la dernière des éventualités ci-après à survenir : |
| (A) the day on which their application for protection was rejected or determined to be withdrawn or abandoned by the Minister or, if there was more than one such rejection or determination, the day on which the last one occurred, and | (A) le rejet de la demande de protection ou le prononcé de son désistement ou de son retrait par le ministre ou, en cas de pluralité de rejets ou de prononcés, le plus récent à survenir, |
| (B) the day on which the Federal Court refused their application for leave to commence an application for judicial review, or denied | (B) le refus de l'autorisation de contrôle judiciaire ou le rejet de la demande de contrôle judiciaire par la Cour |

their application for judicial review, with respect to their application for protection.

fédérale à l'égard de la demande de protection.

(d) [Repealed, 2012, c. 17, s. 38]

d) [Abrogé, 2012, ch. 17, art. 38]

[…]

[…]

**Application**

**Application**

(2.2) However, an exemption made under subsection (2.1) does not apply to persons in respect of whom, after the day on which the exemption comes into force, a decision is made respecting their claim for refugee protection by the Refugee Protection Division or, if an appeal is made, by

(2.2) Toutefois, l'exemption ne s'applique pas aux personnes dont la demande d'asile a fait l'objet d'une décision par la Section de la protection des réfugiées ou, en cas d'appel, par la Section d'appel des réfugiés après l'entrée en vigueur de l'exemption.

**Regulations**

**Règlements**

2.3) The regulations may govern any matter relating to the application of subsection (2.1) or (2.2) and may include provisions establishing the criteria to be considered when an exemption is made.

(2.3) Les règlements régissent l'application des paragraphes (2.1) et (2.2) et prévoient notamment les critères à prendre en compte en vue de l'exemption.

**Restriction**

**Restriction**

(3) Refugee protection may not be conferred on an applicant who

(3) L'asile ne peut être conféré au demandeur dans les cas suivants :

(a) is determined to be inadmissible on grounds of security, violating human or international rights or organized criminality;

a) il est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou criminalité organisée;

(b) is determined to be inadmissible on grounds of

b) il est interdit de territoire pour grande criminalité pour

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| serious criminality with respect to a conviction in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years or with respect to a conviction outside Canada for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; | déclaration de culpabilité au Canada pour une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou pour toute déclaration de culpabilité à l'extérieur du Canada pour une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans; |
| (c) made a claim to refugee protection that was rejected on the basis of section F of Article 1 of the Refugee Convention; or | c) il a été débouté de sa demande d'asile au titre de la section F de l'article premier de la Convention sur les réfugiés; |
| (d) is named in a certificate referred to in subsection 77(1). | d) il est nommé au certificat visé au paragraphe 77(1). |
| [Emphasis added.] | [Je souligne.] |

[110] Since June 20, 2019, section 112 of the IRPA reads as follows:

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| **Application for protection** | **Demande de protection** |
| 112(1) A person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force or are named in a certificate described in subsection 77(1). | 112(1) La personne se trouvant au Canada et qui n'est pas visée au paragraphe 115(1) peut, conformément aux règlements, demander la protection au ministre si elle est visée par une mesure de renvoi ayant pris effet ou nommée au certificat visé au paragraphe 77(1). |

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| **Exception** | **Exception** |
| (2) Despite subsection (1), a person may not apply for protection if | (2) Elle n'est pas admise à demander la protection dans les cas suivants : |
| (a) they are the subject of an authority to proceed issued under section 15 of the *Extradition Act*; | a) elle est visée par un arrêté introductif d'instance pris au titre de l'article 15 de la *Loi sur l'extradition*; |
| (b) they have made a claim to refugee protection that has been determined under paragraph 101(1)(e) to be ineligible; | b) sa demande d'asile a été jugée irrecevable au titre de l'alinéa 101(1)e); |
| (b.1) subject to subsection (2.1), less than 12 months, or, in the case of a person who is a national of a country that is designated under subsection 109.1(1), less than 36 months, have passed since | b.1) sous réserve du paragraphe (2.1), moins de douze mois ou, dans le cas d'un ressortissant d'un pays qui fait l'objet de la désignation visée au paragraphe 109.1(1), moins de trente-six mois se sont écoulés depuis, selon le cas : |
| (i) the day on which their claim for refugee protection was rejected — unless it was deemed to be rejected under subsection 109(3) or was rejected on the basis of section E or F of Article 1 of the Refugee Convention — or determined to be withdrawn or abandoned by the Refugee Protection Division, in the case where no appeal was made and no application was made to the Federal Court for leave to commence an application for judicial review, or | (i) le rejet de sa demande d'asile — sauf s'il s'agit d'un rejet prévu au paragraphe 109(3) ou d'un rejet pour un motif prévu aux sections E ou F de l'article premier de la Convention — ou le prononcé de son désistement ou de son retrait par la Section de la protection des réfugiés, en l'absence d'appel et de demande d'autorisation de contrôle judiciaire, |

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| (ii) in any other case, the latest of | (ii) dans tout autre cas, la dernière des éventualités ci-après à survenir : |
| (A) the day on which their claim for refugee protection was rejected — unless it was deemed to be rejected under subsection 109(3) or was rejected on the basis of section E or F of Article 1 of the Refugee Convention — or determined to be withdrawn or abandoned by the Refugee Protection Division or, if there was more than one such rejection or determination, the day on which the last one occurred, | (A) le rejet de la demande d'asile — sauf s'il s'agit d'un rejet prévu au paragraphe 109(3) ou d'un rejet pour un motif prévu aux sections E ou F de l'article premier de la Convention — ou le prononcé de son désistement ou de son retrait par la Section de la protection des réfugiés ou, en cas de pluralité de rejets ou de prononcés, le plus récent à survenir, |
| (B) the day on which their claim for refugee protection was rejected — unless it was rejected on the basis of section E or F of Article 1 of the Refugee Convention — or determined to be withdrawn or abandoned by the Refugee Appeal Division or, if there was more than one such rejection or determination, the day on which the last one occurred, and | (B) son rejet — sauf s'il s'agit d'un rejet pour un motif prévu aux sections E ou F de l'article premier de la Convention — ou le prononcé de son désistement ou de son retrait par la Section d'appel des réfugiés ou, en cas de pluralité de rejets ou de prononcés, le plus récent à survenir, |
| (C) the day on which the Federal Court refused their application for leave to commence an application for judicial review, or denied their application for judicial review, with respect to their claim for refugee protection, unless that claim was deemed to be rejected under subsection 109(3) or was rejected on the basis of | (C) le refus de l'autorisation de contrôle judiciaire ou le rejet de la demande de contrôle judiciaire par la Cour fédérale à l'égard de la demande d'asile — sauf s'il s'agit d'un rejet de cette demande prévu au paragraphe 109(3) ou d'un rejet de celle-ci pour un motif prévu aux sections E ou F de l'article premier de la Convention; |

section E or F of Article 1 of the Refugee Convention; or

(c) subject to subsection (2.1), less than 12 months, or, in the case of a person who is a national of a country that is designated under subsection 109.1(1), less than 36 months, have passed since

(c) sous réserve du paragraphe (2.1), moins de douze mois ou, dans le cas d'un ressortissant d'un pays qui fait l'objet de la désignation visée au paragraphe 109.1(1), moins de 36 mois se sont écoulés depuis, selon le cas :

(i) the day on which their application for protection was rejected or determined to be withdrawn or abandoned by the Minister, in the case where no application was made to the Federal Court for leave to commence an application for judicial review, or

(i) le rejet de sa demande de protection ou le prononcé du désistement ou du retrait de celle-ci par le ministre, en l'absence de demande d'autorisation de contrôle judiciaire,

(ii) in any other case, the later of

(ii) dans tout autre cas, la dernière des éventualités ci-après à survenir :

(A) the day on which their application for protection was rejected or determined to be withdrawn or abandoned by the Minister or, if there was more than one such rejection or determination, the day on which the last one occurred, and

(A) le rejet de la demande de protection ou le prononcé de son désistement ou de son retrait par le ministre ou, en cas de pluralité de rejets ou de prononcés, le plus récent à survenir,

(B) the day on which the Federal Court refused their application for leave to commence an application for judicial review, or denied their application for judicial review, with respect to their application for protection.

(B) le refus de l'autorisation de contrôle judiciaire ou le rejet de la demande de contrôle judiciaire par la Cour fédérale à l'égard de la demande de protection.

(d) [Repealed, 2012, c. 17, s. 38]

d) [Abrogé, 2012, ch. 17, art. 38]

**Application**

(2.2) However, an exemption made under subsection (2.1) does not apply to persons in respect of whom, after the day on which the exemption comes into force, a decision is made respecting their claim for refugee protection by the Refugee Protection Division or, if an appeal is made, by the Refugee Appeal Division.

**Application**

(2.2) Toutefois, l'exemption ne s'applique pas aux personnes dont la demande d'asile a fait l'objet d'une décision par la Section de la protection des réfugiées ou, en cas d'appel, par la Section d'appel des réfugiés après l'entrée en vigueur de l'exemption.

**Regulations**

(2.3) The regulations may govern any matter relating to the application of subsection (2.1) or (2.2) and may include provisions establishing the criteria to be considered when an exemption is made.

**Règlements**

(2.3) Les règlements régissent l'application des paragraphes (2.1) et (2.2) et prévoient notamment les critères à prendre en compte en vue de l'exemption.

**Restriction**

(3) Refugee protection may not be conferred on an applicant who

**Restriction**

(3) L'asile ne peut être conféré au demandeur dans les cas suivants :

(a) is determined to be inadmissible on grounds of security, violating human or international rights or organized criminality;

a) il est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou criminalité organisée;

(b) is determined to be inadmissible on grounds of serious criminality with respect to a conviction in Canada of an offence under an Act of Parliament punishable by a maximum term of

b) il est interdit de territoire pour grande criminalité pour déclaration de culpabilité au Canada pour une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans

| | |
|---|---|
| imprisonment of at least 10 years or with respect to a conviction outside Canada for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; | ou pour toute déclaration de culpabilité à l'extérieur du Canada pour une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans; |
| (c) made a claim to refugee protection that was rejected on the basis of section F of Article 1 of the Refugee Convention; or | c) il a été débouté de sa demande d'asile au titre de la section F de l'article premier de la Convention sur les réfugiés; |
| (d) is named in a certificate referred to in subsection 77(1). | d) il est nommé au certificat visé au paragraphe 77(1). |
| [Emphasis added.] | [Je souligne.] |

[111] Through these amendments, Parliament has addressed shortcomings identified in the former legislation. As a result of the amendment, Article 1E refugee protection claimants who appear before the RPD now have access to the PRRA mechanism. So, unlike the Article 1F exclusion (set out in paragraph 112(3)(c) of the IRPA; *Tapambwa* at paras 34–62), refugee protection can be granted to refugee protection claimants who were excluded under Article 1E before a previous panel (paragraph 114(1)(a) of the IRPA). This responds to one of the shortcomings identified in *Zeng*.

[112] The PRRA regime set out in Part 2, Division 3, of the IRPA (sections 112 to 116) stipulates that a claimant can apply for protection against removal to the country of residence or the country of citizenship. This regime is separate from the regime set out in Division 2 of the

IRPA (sections 99 to 111.1), under which claimants claim refugee protection to obtain refugee status or protected person status, as assessed by the RPD.

[113] In addition, paragraph 2(b.1) of section 112 expressly provides that the prohibition on making a PRRA application does not apply when the claim for refugee protection was rejected on the basis of Article 1E.

[114] I understand that paragraph 113(c) stipulates that the examination of an application for protection under the PRRA regime must be made on the basis of sections 96 to 98, but paragraph 112(2)(b.1) would be stripped of meaning if it allowed claimants to immediately apply for a pre-removal risk assessment for claims rejected on the basis of Article 1E and such rejections became the basis for refusing pre-removal risk assessments.

[115] Three other factors support the interpretation that the risk analysis should take place at the PRRA stage.

[116] First, PRRA officers are best placed to perform the risk analysis. When an applicant alleges a fear of persecution or a risk related to their country of residence, the PRRA officer can reconsider the question of exclusion (*Li* at paras 46–56) in light of the most recent facts and concerns raised, at the latest when the PRRA application is submitted. As Justice de Montigny pointed out, “[at the PRRA stage], the country of removal will be clearer and the assessment of the risk will be undertaken by people with expertise and on the basis of the most up to date evidence” (*Mojahed* at para 24).

[117] Indeed, a risk analysis at this stage allows the PRRA officer to perform a more in-depth risk analysis. Unlike the RPD and the RAD, the PRRA officer can assess fears based on facts raised after the last day of the RPD hearing (*Majebi* at para 7; *Zeng* at para 16). In the same context, the PRRA officer can weigh the risks associated with removal (and their impact on Charter rights) and the duty to comply with the requirements associated with the Canadian refugee protection system (*Xie* at para 39; *Febles* at paras 67–68; *Suresh v Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCR 3, 2002 SCC 1 at para 58 [*Suresh*]).

[118] Second, performing a risk analysis at the PRRA stage can force Canada to comply with its international obligations. This interpretation promotes the humanitarian goals of the Convention (which I addressed earlier) and ensures a narrow interpretation of Article 1E (subsection 3(2) of the IRPA; *Febles* at para 30; *Li* at paras 26 –27; Hathaway and Foster, at page 509; *UNHCR Note on the Interpretation of Article 1E of the 1951 Convention relating to the Status of Refugees*).

[119] In addition, the PRRA context is a better context for contemplating Canada's international obligations with respect to the principle of non-refoulement (section 115 of the IRPA; *Németh* at para 1; *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 (CanLII) at para 10; *Nagalingam v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 153 at para 37). By performing this analysis, the PRRA officer can ensure that a person will not be returned to their country of residence if their safety is threatened there.

[120] Third, this interpretation is more in line with Parliament's intention to streamline the Canadian refugee protection system to improve its efficiency. Giving PRRA officers the exclusive ability to perform risk analysis avoids duplicating ineffective and costly procedures. In fact, preventing a multiplicity of proceedings was one of the main objectives of the 2012 amendments, including the addition of paragraph 112(2)(b.1) (*Mariyanayagam v Canada (Public Safety and Emergency Preparedness)*, 2013 FC 1281 at paras 3 and 8). It is not for this Court to question Parliament's clear intent (*Raincoast Conservation Foundation v Canada (Attorney General)*, 2019 FCA 259 at paras 11 and 12).

[121] The fact that the risk analysis following the exclusion of a refugee claimant on the basis of Article 1E is carried out at the PRRA stage is consistent with the examination process in the context of exclusion under paragraph 101(1)(d) of the IRPA. In *Farah v Canada (Citizenship and Immigration)*, 2017 FC 292, [2018] 1 FCR 473, Justice Southcott held as follows at paragraphs 30 to 32:

> [30] I note that at the hearing of this application, the Applicant provided the Court with a copy of a publication of the United Nations High Commission for Refugees [UNHCR], entitled *UNHCR Note on the Interpretation of Article 1E of the 1951 Convention relating to the Status of Refugees* dated March 2009 [UNHCR Note]. The text of Article 1E is as follows:
>
> > 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.
>
> [31] In the copy of the UNHCR Note provided to the Court, the Applicant highlighted the following paragraph 17:
>
> > C. NON-REFOULEMENT CONSIDERATIONS ARISING FROM PERSONS EXCLUDED ON THE BASIS OF ARTICLE 1E IN A THIRD COUNTRY

> 17. Although the competent authorities of the country in which the individual has taken residence may consider that he or she has the rights and obligations attached to the possession of the nationality of that country, this does not exclude the possibility that when outside that country the individual may nevertheless have a well-founded fear of being persecuted if returned there. To apply Article 1E to such an individual, especially when a national of that country who is in the same circumstances, would not be excluded from being recognized as a refugee, would undermine the object and purpose of the 1951 Convention. Thus, before applying Article 1E to such an individual, if he or she claims a fear of persecution or of other serious harm in the country of residence, such claim should be assessed vis-à-vis that country.

> [32] UNHCR publications of this sort can be useful guidance for interpreting Convention provisions, but they are not law and are not determinative of such interpretation (see *Fernandopulle v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 91, at para 17; *Hernandez Febles v. Canada (Minister of Citizenship and Immigration)*, 2012 FCA 324, at para 50). Moreover, other than the Applicant highlighting the above paragraph 17, neither party made any submissions related to the UNHCR Note. While this paragraph may support the interpretation of s. 101(1)(d) that Mr. Farah advocates, it may also be consistent with the considerations identified in this paragraph for Canada to address risk associated with removal to a person's country of asylum through IRPA's pre-removal risk assessment process. Therefore, particularly in the absence of specific submissions on the UNHCR Note, I do not consider it a basis to adopt Mr. Farah's proposed interpretation of s. 101(1)(d).

(d) *Concerns related to this interpretation of the regulatory scheme of Article 1E*

[122] According to the respondent, there are two problems with this approach.

[123] First, the respondent believes that sections 112 and 113 of the IRPA prevent PRRA officers from performing a full analysis of the fear relating to the country of residence. However,

this belief is unfounded. Paragraph 113(a) of the IRPA provides that a refugee protection claimant whose claim to refugee protection has been rejected may present “evidence that arose after the rejection” but that “was not reasonably available” or that they “could not reasonably have been expected in the circumstances to have presented, at the time of the rejection”.

[124] In other words, this provision allows a refugee protection claimant to present any evidence related to their fear with respect to their country of residence (regardless of when it was presented) and even to request the holding of a new hearing. Any evidence of fear of persecution in the country of citizenship would not be relevant and would not have been taken into account in the context of an exclusion under Article 1E. Evidence that could not have been presented at the RPD or RAD hearing can be presented to a PRRA officer. Indeed, refugee protection claimants do not have the burden of proof as to such a fear once they are excluded by the application of Article 1E before these panels (*Zeng* at para 28). It would be unreasonable for a PRRA officer not to perform a risk analysis under sections 112 and 113. Such an analysis would be consistent with the spirit of the exclusionary rule in paragraph 113(a).

[125] Second, the respondent claims that Article 1E and section 98 could exclude the possibility of a risk analysis at the PRRA stage. Such an application of these provisions would be a reason for a legal intervention.

[126] In my view, it makes no sense to interpret the provisions of the IRPA, on the one hand, by removing the freeze period for persons excluded on the basis of Article 1E and, on the other

hand, by preventing PRRA officers from considering their exposure to risk because they are excluded on the basis of Article 1E.

[127] It would be unreasonable for a PRRA officer to interpret Article 1E and section 98 in such a way as to expose a person to risk (*Vavilov* at para 114; *Griffiths v Canada (Citizenship and Immigration)*, 2011 FC 434 at para 15; see also in the context of exclusion by operation of Article 1F, *Moba v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 662 at paras 17 and 18). In such a situation, Canada would violate its international non-refoulement obligations.

[128] In addition, the removal of a refugee protection claimant without a risk analysis would possibly be contrary to section 7 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, 1982, c 11 *(Suresh* at paras 113–128, Lorne Waldman, *Immigration Law and Practice*, 2nd ed (loose leaf), Volume 1, (Toronto: LexisNexis Canada, 2019) at para 8.529.8). It is therefore obvious that PRRA officers are required to analyze the fears and risks with respect to country of residence raised by refugee protection claimants. Failing to do so would be a reviewable error (*Vavilov* at paras 108, 114).

(6) The need for judicial intervention

[129] In summary, the amendments to section 112 demonstrate that Parliament intended to ensure that a risk analysis was carried out at the PRRA stage. The recognition that this risk analysis is necessary is in line with Canada's international law obligations and gives rise to a more in-depth analysis of the case that is more suited to the real risks associated with removal.

This analysis should take place for refugee protection claimants who are referred to in Article 1E, but who have not had the benefit of a risk analysis before the RPD and the RAD (i.e., refugee protection claimants excluded on the basis of Article 1E because the answer to the first question of the *Zeng* test is yes).

[130] By incorporating a risk analysis based on sections 96 and 97 and in the analysis carried out under Article 1E, the RAD has attempted to modify the interpretation of the wording of sections 96 and 97 and the test established by the Federal Court of Appeal in *Zeng* (*Vavilov* at paras 111–112, 114, 122). The RAD did not specify a proper legal basis to justify that analysis (*Vavilov* at para 109). Such an analysis is unnecessary since the RAD was not even required to perform it. As stated by the Federal Court of Appeal in *Zeng*, answering yes to the first question leads to the application of the exclusion codified in Article 1E. The analysis must stop there (*Zeng* at para 28).

[131] However, the intervention of the Court is not warranted here because the analysis carried out by the RAD is immaterial. For reasons of administrative efficiency, I do not think it necessary to order the reconsideration of a decision because of an error of law related to a decision that is immaterial (*Vavilov* at para 142; *Maple Lodge Farms Ltd v Canada (Food Inspection Agency)*, 2017 FCA 45 at paras 51–52). This presupposes that my interpretation of the statutory scheme regarding the exclusion of refugee protection claimants on the basis of Article 1E is correct.

(7) Proposed question for certification

[132] In this case, the respondent proposed a question for certification:

> Should a decision maker consider the fear or risk raised by a refugee protection claimant in their country of residence before excluding that person on the basis of Article 1E of the United Nations Convention Relating to the Status of Refugees and section 98 of the *Immigration and Refugee Protection Act*?

[133] In my view, part of this question has already been answered by the Federal Court of Appeal in *Zeng*, which makes it inappropriate to certify this question (*Rrotaj v Canada (Citizenship and Immigration)*, 2016 FCA 292 at para 6 [*Rrotaj*]). Since *Zeng*, it is obvious that a fear or risk analysis must be carried out if the refugee protection claimant "previously had" permanent resident status "and lost it, or had access to such status and failed to acquire it" (*Zeng* at para 28).

[134] Considering this precedent, I would rephrase the question to be certified as follows:

> If the decision maker has already concluded that the refugee protection claimant has status substantially similar to that of the nationals of their country of residence (meaning an affirmative answer to the first question of the *Zeng* test), should the decision maker take into account the fear or risk raised by the refugee protection claimant in their country of residence before excluding the claimant by the combined effect of Article 1E of the *United Nations Convention Relating to the Status of Refugees* and section 98 of *the Immigration and Refugee Protection Act*?

[135] As the Federal Court of Appeal has indicated, a certified question must be "of general importance that transcends the interests of the parties to the litigation" and "must bear upon the outcome of the appeal" (paragraph 74(d) of the IRPA; *Rrotaj* at para 4; *Varela v Canada (Citizenship and Immigration)*, 2009 FCA 145, [2010] 1 FCR 129 at paras 28–29; *Canada (Minister of Citizenship and Immigration) v Zazai*, 2004 FCA 89 at para 11).

[136] With regard to the first condition, I conclude that this question is of general importance (*Constant* at para 40). Unlike the question raised in *Rrotaj*, this question was not resolved in *Zeng*. In addition, in *Zeng*, the Federal Court of Appeal did not address the issue of the PRRA's relevance in the context of the interpretation of Article 1E and section 98, especially after the 2012 amendments to the IRPA.

[137] The fact that this issue has never been resolved has resulted in disparate judgments in the Federal Court. In some decisions, this Court accepted the reasonableness of the risk analysis after answering yes to the first question of the *Zeng* test (see, for example, *Omar* at paras 19–22, 27 and 28; *Tresalus* at paras 4–6; *Mikelaj* at paras 21–27; *Noel* at paras 28–30; *Augustin v Canada (Citizenship and Immigration)*, 2019 FC 1232 at paras 32–33; *Jean* at paras 15–32; *Fleurisca* at paras 23–26; *Occean* at paras 37–41; *Tshiendela* at paras 37–40; *Li v Canada (Citizenship and Immigration)*, 2009 FC 841 at paras 21–27; *Gao v Canada (Citizenship and Immigration)*, 2014 FC 202 at paras 35–37).

[138] In some other decisions, this Court has questioned the relevance of such an analysis (*Romelus* at paras 36–45; *Constant* at paras 31–39). This disparity throws the Canadian refugee protection system into a whirlwind of uncertainty as to the approach to be followed in applying Article 1E (see, for example, "10.1.7. Fear of Persecution and State Protection in the Article 1E Country").

[139] The reformulated question to be certified is therefore of general importance for the Canadian refugee protection system (*Eymard Boni v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 68 at para 10).

[140] I am also satisfied that the question to be certified is determinative in this case. For the reasons discussed above, I have concluded that the RAD's analysis of the applicant's fear with respect to Brazil was unreasonable, which would have resulted in judicial intervention. However, given that the analysis was unnecessary, there is no need to intervene. In other words, if my interpretation of the regulatory regime related to exclusion by operation of Article 1E is correct, judicial intervention is unwarranted. On the other hand, if my interpretation is wrong in law, judicial intervention is warranted, since the analysis carried out by the RAD on this point was unreasonable. In fact, the RAD did not address all the elements of the applicant's fear with respect to Brazil in its analysis.

[141] I would add that the question to be certified was a fundamental outcome to this dispute. Both panels (RPD and RAD) devoted several paragraphs to an analysis of the applicant's fear with respect to Brazil and based themselves on the criteria established in sections 96 and 97 of the IRPA. In this proceeding, the arguments of both parties focused on this issue. One of the main arguments raised by the applicant was the intelligibility of the RAD's analysis of the risk of persecution. As for the respondent, he made two detailed written submissions and dedicated the most important part of his oral argument to this question. I even issued a directive to obtain more information on this issue. I must therefore conclude that the parties focused on this issue and

sufficiently debated it (*Nguesso c Canada (Citoyenneté et Immigration)*, 2018 CAF 145 at para 21).

Conclusion

[142] For these reasons, the intervention of this Court is not warranted.

**JUDGMENT in IMM-977-19**

**THE COURT'S JUDGMENT is as follows:**

1. This application for judicial review is dismissed.

2. The Court will certify the following question:

   If the decision maker has already concluded that the refugee protection claimant has status substantially similar to that of the nationals of their country of residence (meaning an affirmative answer to the first question of the *Zeng* test), should the decision maker take into account the fear or risk raised by the refugee protection claimant in their country of residence before excluding the claimant by the combined effect of Article 1E of the *United Nations Convention Relating to the Status of Refugees* and section 98 of *the Immigration and Refugee Protection Act*?

"Peter G. Pamel"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-977-19 |
| **STYLE OF CAUSE:** | MARIE LUNA CELESTIN v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | MONTRÉAL, QUEBEC |
| **DATE OF HEARING:** | SEPTEMBER 11, 2019, AND OCTOBER 21, 2019 |
| **JUDGMENT AND REASONS:** | PAMEL J. |
| **DATE OF REASONS:** | JANUARY 22, 2020 |

**APPEARANCES:**

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|---|---|
| Cristian E. Roa-Riveras | FOR THE APPLICANT |
| Daniel Latulippe | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Cristian E. Roa-Riveras<br>Montréal, Quebec | FOR THE APPLICANT |
| Attorney General of Canada<br>Montréal, Quebec | FOR THE RESPONDENT |