Federal Court Cour fédérale

Date: 20200219

Docket: IMM-131-19

Citation: 2020 FC 263

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, February 19, 2020

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

ERVA RIBOUL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the case

[1] This Court has before it an application for judicial review of a decision by the Refugee Appeal Division [RAD] dated November 26, 2019, which dismissed the applicant's appeal and confirmed the conclusion of the Refugee Protection Division [RPD] stating that the applicant was not a refugee because of his permanent resident status according to Article 1E of the

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] For the following reasons, the application for judicial review is dismissed.

II. Facts

[3] The applicant is a Haitian citizen, born in 1980 in Gonaïves (Haiti). On March 9, 2011, he was the victim of an armed robbery by two bandits. The incident took place in his business in Gonaïves.

[4] The applicant fled to Brazil in August 2011 via the Dominican Republic and three other countries in May 2011. He resided in Brazil until June 2016. The applicant alleged that, during his stay in Brazil, he was the victim of racism (because of his Haitian identity) and of socio-economic problems in Brazil. He therefore left Brazil for the United States (in June 2016) and then Canada (in July 2017).

[5] In July 2017, the applicant claimed refugee status and the status of person in need of protection. In his Basis of Claim [BOC] form, the applicant stated that he feared returning to Haiti given the crime, the lack of jobs in that country and that he constitutes a target for criminals there. The applicant also raised fears relating to the situation in Brazil, especially concerning the conflicts between Brazilians and Haitians which could affect him and his family. The applicant made no mention of the [TRANSLATION] “temporary” (which I would rather qualify as “revocable”) or conditional nature of his permanent residence in Brazil in his BOC.

[6] The RPD denied the applicant's refugee claim, finding that the applicant was covered by Article 1E of the Convention (exclusion for permanent residence) and was therefore neither a refugee nor a person in need of protection under the section 98 of the IRPA. This finding was confirmed by the RAD on November 26, 2018.

III. RPD Decision

[7] The RPD ruled mainly on two questions: (1) the applicant's permanent residence in Brazil; and (2) the merits of his fear of returning to Brazil. The RPD did not mention the revocable or conditional nature of his permanent residence.

[8] Regarding the first question, the RPD concluded that the applicant had permanent residence in Brazil: this was apparent from the documentary evidence (i.e., a list of people entitled to permanent residence in Brazil and a residence card).

[9] In addition, the RPD concluded that the applicant had all the rights that stem from permanent residence. The RPD noted that the applicant had informed them that he had the right to sponsor his wife and children, to work, for his children to study, to have access to medical care and to social benefits. The RPD also noted that several social rights are conferred on permanent residents by the Brazilian constitution. For those reasons, the RPD concluded that the applicant had a status essentially similar to that of Brazilian nationals.

[10] Despite this status, the applicant alleged that he fears returning to Brazil. The applicant alleged ([TRANSLATION] "confusingly" according to the RPD) that Brazilian children came

before children of Haitian descent during enrolment in public school, but that his children were always able to go to school and have never missed the beginning of the school year. The applicant alleged that there is instability in Brazil due to the lack of jobs.

[11] In addition, the applicant alleged that he received a death threat from his landlord after he spoke to the landlord’s wife. The RPD noted that the applicant’s account is less credible because he initially stated contradictory dates of the incident and did not produce any documents in support of his statement. In response to a question, the applicant stated that his wife and children were still living in the same dwelling and had not moved from there because it is difficult to find lodging in Brazil.

[12] In its analysis, the RPD first noted that it is aware of the social and economic conditions in Brazil and that there is a certain amount of racism against Haitians in that country. However, the RPD concluded that this socio-economic situation and the alleged incidents do not constitute persecution.

[13] Furthermore, the RPD noted that the applicant had decided to voluntarily quit his job in 2014 following a complaint alleging that he had not flushed the toilet at his workplace. In addition, the applicant stated that Haitians and foreigners earned the same wages, as did Brazilians.

[14] For all these reasons, the RPD concluded that the applicant had not demonstrated a serious possibility of persecution in Brazil.

IV. RAD Decision

[15] Before the RAD, the applicant argued that the RPD had erred when it failed to assess his situation according to the criteria established by case law (*Shamlou v Canada (Minister of Citizenship and Immigration)*, [1995] FCJ No 1537, 103 FTR 241 (FC) [*Shamlou*]). The applicant did not deny his permanent resident status, nor did he dispute the RPD's conclusion that he did not face a serious risk of persecution within the meaning of section 97 of the IRPA.

[16] In a decision dated November 26, 2018, the RAD confirmed the RPD's decision, finding that the RPD had not erred in concluding that the applicant enjoyed the same rights as Brazilian citizens, even after having taken into account the social reality of discrimination in Brazil: legally speaking, this reality did not translate into a lower status compared to Brazilian nationals.

[17] With respect to the applicant's conditions in Brazil, the RAD concluded that although it had not explicitly cited the *Shamlou* case law in its reasons, the RPD had applied the same criteria established by it. In *Shamlou*, the Federal Court listed four rights with respect to which the judge must determine whether the applicant enjoys the same rights as nationals of a given country:

> the right to return to the country of residence;
>
> the right to work freely without restrictions;
>
> the right to study;
>
> full access to social services in the country of residence.

[18] According to the RAD, the RPD did take these criteria into account in paragraphs 19 to 21 of its reasons.

[19] Regarding the second conclusion, the RAD accepted the argument that discrimination in Brazil does not translate into a lower status as regards permanent residents compared to Brazilian nationals, as provided for in Article 1E of the Convention. While recognizing the social reality of discrimination in Brazil, the RAD concluded that it had no bearing on the status of permanent residence in the applicant's country, nor on the finding that there was no serious risk of persecution.

[20] Regarding the claim that discrimination in Brazil results in a lower status for the applicant, the RAD once again confirmed the RPD'S findings. On this point, the RAD conducted an independent analysis of the evidence and concluded that the applicant had not met his burden of demonstrating a serious risk of persecution within the meaning of section 97 of the IRPA. Essentially, the RAD concluded that the evidence adduced by the applicant did not tend to establish sustained or systematic discrimination against the applicant's human rights.

[21] In the end, the RAD confirmed the RPD's decision that the applicant fell within the provisions of Article 1E of the Convention because he had permanent resident status in Brazil. Therefore, the RAD found that the applicant was neither a Convention refugee nor a person in need of protection. Like the RPD, the RAD did not mention the revocable or conditional nature of his permanent residence.

V. Issue

[22] The present case raises the following issue: did the RAD commit a reviewable error in concluding that the applicant's permanent resident status in Brazil gives him the same rights and obligations as Brazilian citizens or nationals? If so, the applicant is not a refugee or a person in need of protection under section 98 of the IRPA and Article 1E of the Convention.

VI. Standard of review

[23] It is undisputed that the standard of reasonableness plays a role in this case. I therefore see no reason to rebut the presumption that the reasonableness standard is the applicable standard (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 23; *Celestin c Canada (Citoyenneté et Immigration)*, 2020 CF 97 at para 32 [*Celestin*]).

VII. Discussion

[24] According to section 98 of the IRPA, persons covered by Article 1E of the Convention have neither refugee status within the meaning of the Convention nor that of a person in need of protection. The exclusion from Canadian protection provided for under Article 1E of the Convention covers all persons who have established their residence in a country which guarantees them all the rights and obligations attached to the possession of nationality in that country.

[25] The purpose of Article 1E is to discourage "asylum shopping": it precludes 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. (*Celestin* at paras 42, 91; *Canada (Citizenship and Immigration) v Zeng*, 2010 FCA 118 at para 1 [*Zeng*];

Fleurant v Canada (Citizenship and Immigration), 2019 FC 754 at para 16; *Mai v Canada (Citizenship and Immigration)*, 2010 FC 192 at para 1 [*May*]; *Maqbool v Canada (Citizenship and Immigration)*, 2016 FC 1146 at para 29; *Andreus c Canada (Citoyenneté et Immigration)*, 2020 CF 131 at para 46 [*Andreus*]). This interpretation of Article 1E is entirely consistent with the case law of *Canada (Attorney General) v Ward*, 1993 CanLII 105 (SCC), [1993] 2 SCR 689 at p 726, whereby the Supreme Court of Canada observed: "[r]efugee claims were never meant to allow a claimant to seek out better protection than that from which he or she benefits already".

[26] In *Zeng*, the Federal Court of Appeal enshrined an exclusion test in three areas, namely:

> [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.

[27] First of all, it is essential to understand the nature of this dispute. The applicant does not deny his permanent resident status in Brazil. On the other hand, the applicant alleges that he does not hold all the rights and obligations attached to Brazilian nationality. Essentially, the applicant submits, given the discrimination against black people and the renewable nature of his permanent residence status, that he does not have all the necessary rights and obligations calling for the exclusion provided for in Article 1E of the Convention.

[28] These allegations relate only to the first of three parts of the *Zeng* case law test. In the first part, one must ask whether the applicant has a status essentially similar to that of nationals of the country in question.

[29] This analysis concerns the rights and protections granted by the State of the country referred to in Article 1E. In the *Shamlou* case at paragraph 36, 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;
>
> (d) full access to social services in the country of residence.

[30] If the applicant has a substantially similar status to that of nationals of the country of residence and benefits from each of these four rights, the exclusion from the protection of the country where the application is presented, provided for in Article 1E, is met and the analysis goes no further (*Zeng* at para 28; *Celestin* at para 37). If the answer is no, the decision maker must continue his analysis, otherwise he commits a reviewable error (*Xu v Canada (Citizenship and Immigration)*, 2019 FC 639 at para 44; *Celestin* at para 37).

[31] With these principles in mind, I will discuss the specific arguments raised by the parties.

(1) Discrimination in Brazil

[32] According to the applicant, the RAD erred in its analysis by simply focusing on Brazilian law and failing to examine the true situation of Haitians in Brazil. According to the applicant, it is clear from the evidence in the record (that is, his testimony, his detailed statement and the documentary evidence) that Haitians in Brazil do not have the same rights and obligations as Brazilian citizens. It is because of this climate of discrimination that the applicant feared for his life in Brazil and decided to leave that country for Canada.

[33] In response, the respondent argues that the discriminatory incidents raised by the applicant do not amount to persecution. According to the respondent, the threshold of persecution in this context is high, taking into account the objectives of Article 1E, in particular to prevent asylum shopping (citing *Zeng* at paras 1, 26). According to the respondent, the applicant raises concerns of a general nature which do not respond to the *Shamlou* case law (citing *Noel v Canada (Citizenship and Immigration)*, 2018 FC 1062 [*Noel*]; *Tresalus v Canada (Citizenship and Immigration)*, 2019 FC 173 ; *Fleurisca v Canada (Citizenship and Immigration)*, 2019 FC 810) [*Fleurisca*]).

[34] I accept the respondent’s argument. I am of the opinion that it is reasonable to conclude that the problems raised by the applicant concern societal issues which affect certain demographic segments in general or isolated incidents which do not constitute persecution.

[35] Contrary to the applicant’s allegations, the RAD’s analysis went beyond a simple analysis of Brazilian law. After analyzing the National Documentation Package and other documentary evidence, the RAD noted that there is a climate of discrimination against

Afro-Brazilians in Brazil, but concluded that this climate has no serious effect on the exercise of rights within the meaning of the *Shamlou* case law. This conclusion is consistent with the doctrine of this Court (*Celestin* at para 62; *Noel* at paras 28-31; *Debel c Canada (Immigration, Réfugiés et Citoyenneté)*, 2020 CF 156 at para 29; *Simolia c Canada (Citoyenneté et Immigration)*, 2019 CF 1336 at paras 26-27).

[36] In addition, the RAD accepted the applicant's evidence that he was the victim of discriminatory and unacceptable behaviour. Like the RPD, the RAD referred to the unjust charges against the applicant (the toilet flushing and a telephone theft charge), as well as the jealousy incident involving his landlord, but concluded that these incidents did not constitute persecution.

[37] I find this conclusion reasonable since these incidents were not sufficiently repeated or persistent to constitute discrimination (*Sefa v Canada (Citizenship and Immigration)*, 2010 FC 1190 at para 10; *Noel* at para 29; *Liang v Canada (Citizenship and Immigration)*, 2008 FC 450 at para 19).

[38] As for the workplace incidents raised by the applicant, they do not meet the requirements of the *Shamlou* case law (including the right to work). The evidence on the record shows that these incidents had no effect on his employment situation or his salary. On another note, the applicant confirmed that he does hold all the rights and obligations that arise from Brazilian nationality. As no serious and present danger has been demonstrated, this Court concludes that

Brazil is a safe host country for the applicant (*Fleurisca* at para 24; *Noel* at para 29; *Jean-Pierre c Canada (Citoyenneté et Immigration)*, 2020 CF 136 at paras 32-34).

[39] This does not mean that discrimination does not exist in Brazil. On the contrary, the evidence shows that discrimination against Afro-Brazilians is very real in Brazil. This state of affairs is regrettable. However, the applicant has not discharged his burden of demonstrating how systemic discrimination in Brazil has had serious effects on his life. After all, the status of refugee and person in need of protection is granted not to demographic segments that are affected by general trends, but rather to individuals. The onus was on the applicant to demonstrate how these systematic forces constituted persecution against him, a burden which he did not discharge.

(2) The *Romelus* order of analysis and case law

[40] The applicant submits that the RAD made the same error in this case as the one noted by this Court in *Romelus v Canada (Citizenship and Immigration)*, 2019 FC 172 [*Romelus*]. The RAD concluded then that the applicant was covered by Article 1E of the Convention before continuing its analysis concerning the risks of persecution in Brazil under sections 96 and 97 of the IRPA (citing *Romelus* at paras 36-45). According to the applicant, the RAD should have conducted an analysis under sections 96 and 97 of the IRPA before concluding that the applicant was covered by Article1E. According to the applicant, this approach would have enabled him to express himself on the legal rights (theoretical rights), as well as on the practical exercise of these rights (*de facto* rights). Note that the applicant does not specify how the analysis under sections 96 and 97 was unreasonable.

[41] The respondent challenges this argument from a procedural and substantive point of view. At the hearing, the respondent maintained that this argument should be rejected for procedural reasons because it was a new argument that should have been raised before the RAD (citing *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654 at paras 23-25 [*Alberta Teachers*]). The respondent contends that he was taken by surprise, because the argument was not even raised in the applicant's memorandum of fact and the applicant did not serve the relevant authorities (including the *Romelus* judgment) the evening before the hearing of this case.

[42] Furthermore, the respondent contends that a distinction must be made between the facts of the present case and those of the *Romelus* case. In the *Romelus* case, the RAD decision was not intelligible because the RAD had concluded that the applicant was excluded from Canadian protection under Article 1E of the Convention before concluding that he was exposed to no risk in Brazil. In this case, the RAD only concluded that the applicant was excluded from Canadian protection under Article 1E of the Convention after it concluded that he was not exposed to any risk in Brazil.

[43] I accept the respondent's procedural argument. The *Romelus* case law (dated February 11, 2019) was indeed subsequent to the RAD's decision (dated November 26, 2018), but the applicant did not give sufficient notice regarding his argument. The applicant's argument based on the *Romelus* case law was not clarified either in his memorandum of fact and law or reply memorandum (*Dave v Canada (Minister of Citizenship and Immigration)*, 2005 FC 510 at para 5; *Coomaraswamy v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 153,

[2002] 4 FC 501 at para 39). On the other hand, the applicant simply quoted a long extract from the decision, without specifying either its relevance or its teaching. In my view, the respondent would be prejudiced by the Court entertaining the applicant's new argument at this late stage (*Alberta Teachers* at para 26; *Abdulkadir v Canada (Citizenship and Immigration)*, 2018 FC 318 at para 81; *Del Mundo v Canada (Citizenship and Immigration)*, 2017 CF 754 at paras 12-14).

[44] In any event, the error raised by the applicant has no determinative effect in this case.

[45] Before the RAD, the applicant did not challenge [TRANSLATION] "RPD's finding that he did not face a serious risk of persecution or a likelihood of harm within the meaning of s. 97 of the IRPA". However, the applicant argued that the RPD had erred in its analysis under the *Shamlou* case law.

[46] The RAD then focused on this case law and concluded that the applicant enjoyed the same rights as Brazilian nationals. Having made this finding, the RAD found that the applicant was excluded from Canadian protection under Article 1E of the Convention.

[47] The RAD then proceeded with an independent analysis of the evidence as to the risks relating to the applicant's country of residence. The RAD focused primarily on the documentary evidence and the applicant's testimony which related to the discrimination suffered by Haitians in Brazil. After considering this evidence, the RAD confirmed the RPD's decision that the applicant [TRANSLATION] "failed to establish that he would face a serious risk of persecution or a likelihood of harm within the meaning of s. 97 of the IRPA if he were to return to Brazil". In

conclusion, the RAD noted [TRANSLATION] “that the Article 1E exclusion applies to the” applicant. Again, the RAD concluded that the applicant was excluded from the protection afforded by the refugee regime enshrined in Article 1E of the Convention.

[48] In my view, the RAD’s independent analysis was an unnecessary step that only confirms the conclusion that the applicant is excluded from Canadian protection under Article 1E of the Convention and section 98 of the IRPA (*Celestin* at paras 92-103, 130; *Andreus* at paras 58-59). Contrary to what happened in the *Romelus* case, the RAD examined the applicant’s fears about the risks to which he would be exposed in Brazil before concluding (definitively) that he was excluded from Canadian protection under Article 1E of the Convention. In the absence of an error of law on the substance of this analysis, there is no need to intervene in the present case.

(3) The revocability of the applicant’s residence

[49] In the alternative, the applicant submits that the revocability of his permanent residence renders Article 1E inapplicable. His permanent resident status in Brazil may expire if he spends two years outside Brazil. According to the applicant, the conditional nature of his status is contrary to the criteria established by *Shamlou*.

[50] The respondent contends that this argument must be rejected for two reasons. First, he submits that the applicant could only raise the facts established at the time of the hearing before the RPD, and it is not disputed that the two-year time limit had not expired at the time. Second, the respondent notes that this argument is new: it should have been raised before the RAD.

[51] The revocable or conditional nature of the applicant's permanent residence was not raised before the RPD or the RAD.

[52] When an issue is raised for the first time in judicial review proceedings, the Court has discretion whether or not to consider it. Justice Rothstein, at paragraph 22 of *Alberta Teachers*, formulates the general principle as follows: the court may choose "discretion not to consider an issue raised for the first time on judicial review where it would be inappropriate to do so". In that same judgment, Justice Rothstein observed that "this discretion will not be exercised in favour of an applicant on judicial review where the issue could have been but was not raised before the tribunal" (at para 23; see also *Council of Canadians with Disabilities v VIA Rail Canada Inc*, [2007] 1 SCR 650 at para 89).

[53] In my view, it would be inappropriate in this case to exercise this discretion. The question of the revocability of the applicant's permanent residence is one of fact which should have been raised before the RPD and before the RAD. The determination of the revocability of his permanent residence is a mixed question which calls for an assessment of the evidence and of Brazilian law as to the conditional nature of his status as a resident. It was at this point that the applicant could have presented his evidence in order to challenge the *prima facie* presumption that he holds permanent resident status in Brazil (*Celestin* at para 50; *Shahpari v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 7678 (FC) at para 12 [*Shahpari*]; *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). Yet, the applicant did not deny the revocability of his status before the RPD.

[54] Consequently, I find that this argument is not admissible according to the general rule that, in the context of judicial review proceedings, the court should not hear arguments where the issue could have been but was not raised before the administrative court (*Alberta Teachers* at para 23).

[55] However, I note that the applicant appears to invoke his own turpitude. After reading the file, it is clear that the applicant left Brazil voluntarily, did not return, and there is nothing to indicate any procedural obstacle that could have prevented him from making his arguments regarding the possession of his permanent resident status.

[56] The law is well settled: the fact that the applicant caused his permanent residence status to expire after his application constitutes a difficulty that he himself created and is not sufficient to preclude the application of Article 1E (*Su v Canada (Citizenship and Immigration)*, 2019 FC 1052 at para 22; *Canada (Minister of Citizenship and Immigration) v Choovak*, 2002 FCT 573 (CanLII) at para 40 [*Choovak*]; *Shahpari* at paras 9-11). In addition, inaction by asylum seekers should not be encouraged when there are possibilities for permanent residence elsewhere. This possibility would open the door to asylum shopping, which is contrary to the very objective of Article 1E of the Convention (*Choovak* at para 17).

[57] Furthermore, allowing an applicant to apply for refugee protection in a third country during the period in which they retain the possibility of obtaining permanent resident status in a safe country would make it easier to asylum shop, knowing that their country of residence can be

invoked if no more suitable safe country is found before the expiration of the time allowed to obtain this status in the country of residence.

[58] If the applicant's argument were accepted, this would result in a loophole contrary to the objective of Article 1E: holders of permanent residence offers could obtain status in a country of their choice, without risk of losing their status in the country offering to provide such status.

VIII. Conclusion

[59] For these reasons, the RAD's decision is reasonable. The application for judicial review is dismissed. There is no question for certification.

JUDGMENT in IMM-131-19

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

1. The application for judicial review is dismissed.

2. There is no question for certification.

"Peter G. Pamel"
Judge

Certified true translation
On this 11th day of March 2020

Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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