Federal Court  Cour fédérale

Date: 20200324

Docket: IMM-4837-19

Citation: 2020 FC 412

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, March 24, 2020

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

BETWEEN:

MIGUEL JOSEPH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review brought against a decision by the Refugee Appeal Division [RAD] finding that the applicant is a person referred to in Article 1E of the United Nations *Convention Relating to the Status of Refugees*, July 28, 1951, 189 UNTS 137 [Convention], because he truly had permanent resident status in Brazil at the time of the hearing

before the Refugee Protection Division [RPD]. The applicant therefore not a Convention refugee or the status of a person in need of protection under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] In this case, the applicant submits that the RAD made an error of fact as he did not truly have permanent resident status at the time of the hearing before the Refugee Protection Division [RPD].

[3] For the reasons set out below, the application for judicial review is dismissed.

II. Facts and proceedings

[4] The applicant alleges that he fears for his life should he return to Haiti. According to the applicant, the politician Jules Lionel Anelus and his associates wanted to go after him because he supported another political party (INITE).

[5] The applicant therefore decided to leave Haiti for Brazil in March 2013. He obtained permanent resident status in November 2014. There are several conditions to this status. According to Brazilian law, the permanent resident status granted by Brazil is usually lost when the person in question leaves the country for a period of more than two years.

[6] In 2016, the applicant decided to leave Brazil to go to the United Stated because of the political insecurity in Brazil.

[7] The exact date of his departure from Brazil is controversial and is the central issue of this case.

[8] On August 11, 2016, the applicant entered the United States by the San Ysidro port of entry, a major land border crossing between San Diego and Tijuana, in Mexico, without a US visa. After spending a few days in detention, he was released and remained in the United States.

[9] On May 21, 2017, the applicant crossed the Canadian border and submitted a refugee protection claim. His immigration forms indicate that he had a job and lived in Brazil until August 2016, before leaving Brazil for the United States.

[10] More specifically, in his *Schedule A – Background / Declaration* form (IMM5669 form), it states that the applicant worked in Sao Paolo from "2013-03" (third month of the year 2013) to "2016-08" (eighth month of the year 2016). The applicant's initials ("MJ") appear a few inches from these dates on the same page of this form. On the next page of the same form, it states that the applicant lived at an address in Sao Paolo from "2013-03" (third month of the year 2013) to "2016-08" (eighth month of the year 2016). Again, the applicant's initials appear on this page.

[11] The form was signed by the applicant. Moreover, the applicant asked for and received an interpreter's services when the immigration documents were being completed.

[12] His Basis of Claim Form [BOC Form] does not state the exact date the applicant left Brazil or his route to get to the United States. It is clear, however, that he entered the United States on August 11, 2016, and not August 16 as indicated in the RPD decision.

[13] On June 6, 2018, the Minister of Immigration, Refugees and Citizenship intervened and stated, in his observations, that the applicant must be excluded from the refugee protection offered by Canada because of his status as a permanent resident of Brazil.

[14] His hearing before the RPD was held on June 18, 2018.

[15] During that hearing, the applicant testified that he left Brazil on March 19, 2016, more than two years prior to that hearing, such that he had lost his status as a permanent resident in that country on the date of the hearing, June 18, 2018. The applicant did not present any corrected forms during the RPD hearing.

[16] The RPD observed that this statement contradicted the information in his immigration documents, which stated that he resided in Brazil until August 2016. In light of this inconsistency, the applicant explained that the immigration officers had misunderstood his answers and had not given him the chance to re-read his forms before signing. In fact, the applicant repeated several times that he would have filled out his immigration forms himself if he could have done it in creole.

[17] In order to corroborate his date of departure from Brazil in March 2016, at the hearing, the applicant presented a copy of an email that seemed to contain the plane ticket he used to leave Brazil. According to the applicant, this document shows that he left Brazil in March 2016.

[18] For unknown reasons, counsel for the applicant did not submit this email in evidence before the RPD. However, the panel proceeded with a review of this email to determine whether it was admissible.

[19] The panel recognized that the email was from March 2016, but did not allow this document as evidence. The reasons for the refusal are not relevant, as before me, the applicant confirmed that he was not challenging the RPD or RAD decision to exclude this email as evidence.

[20] As a result, the only evidence in support of the theory that the applicant left Brazil in March is his testimony during the hearing.

[21] The applicant also stated that he did not follow up with the Brazilian authorities on his immigration status in Brazil because he thought his permanent resident status had expired.

[22] The RPD did not accept the applicant's explanations because he had [TRANSLATION] "testified that he understood the French language sufficiently to understand and answer the questions in his BOC Form"—even though he was assisted by an interpreter—and had initialled each page of his immigration forms. In this case, the RPD considered it was reasonable to

assume that the Canadian immigration officers performed their duties professionally and in good faith.

[23] The RPD therefore relied on the evidence in the immigration forms, with the date of August 2016 as the date the applicant left Brazil.

[24] However, the RPD also noted that it was not likely that the applicant took more than 59 days (from June 18, 2016) to get to the United States, considering that he had admitted he used an airplane as means of transportation.

[25] For these reasons, the RPD concluded that, on a balance of probabilities, at the time of the hearing on June 18, 2018, the applicant had not been absent from Brazil for more than two years and therefore had permanent resident status in Brazil.

[26] After this finding, the RPD also discussed the applicant's fear with regard to Brazil and concluded that the applicant had not rebutted the presumption that the Brazilian state could protect him. The RPD thus concluded that the applicant was excluded under Article 1E of the Convention because on the day of the hearing the applicant had permanent resident status in Brazil.

[27] The RPD also correctly concluded that the assessment of the risks in the applicant's country of citizenship, Haiti, was not necessary.

III. RAD decision

[28] The RPD decision was appealed before the RAD. The applicant raised the following three issues:

1. Was the RPD decision regarding his permanent resident status in Brazil based on an erroneous interpretation of the evidence? More specifically, did the RPD err by dismissing the applicant's testimony that he left Brazil in March 2016, and by finding that the date on the immigration forms was incorrect?

2. Did the RPD err by not conducting a risk analysis regarding his country of citizenship, Haiti?

3. What is the potential risk the applicant would face should he be returned to Brazil?

[29] The RAD confirmed the RPD decision in a decision dated July 15, 2019.

[30] In his appeal record, the applicant also included a copy of the same email that the RPD had rejected, but this time it was accompanied by a French translation. The RAD refused the submission of this document. Again, the reasons for this refusal are not relevant, as before me, the applicant confirmed that he was not challenging the RAD decision to exclude this email.

[31] Because this evidence was rejected, the RAD was not required to grant a new hearing.

[32] The RAD noted that the applicant seemed to understand French and did not make any effort to correct the alleged errors. Like the RPD, the RAD found the applicant's explanations to be unsatisfactory.

[33] The RAD concluded that the presumption of truth of the applicant's testimony was rebutted due to the inconsistency between his testimony and the information in his immigration forms (*Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 (CA)).

[34] Moreover, the RAD found that given the inconsistency between the applicant's testimony and his immigration forms regarding his date of departure from Brazil, it could conclude that his testimony lacked credibility.

[35] Finally, the RAD confirmed the RPD decision to exclude the email the applicant had presented.

[36] For these reasons, the RAD did not commit any error by finding that the applicant had not rebutted the prima facie presumption that he was a permanent resident of Brazil.

[37] After confirming the reasoning of the RPD on these two issues, the RAD approved the RPD conclusion that the applicant had permanent resident status in Brazil at the time of the hearing before the RPD.

IV. Issue

[38] The applicant is not challenging any aspect of the RAD decision other than the finding that he was caught by the exclusion set out in Article 1E. As a result, and as confirmed by the parties, the only issue is the following:

Was it reasonable for the RAD to rely on evidence confirming that the applicant left Brazil in August 2016 rather than in March 2016?

V. Standard of review

[39] In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the Supreme Court presented a revamped analytical framework for determining the standard of review that applied to administrative decisions. According to this framework, the starting point is the strong presumption that reasonableness is the applicable standard (*Vavilov* at para 23). This presumption may be rebutted in two types of cases: when there is a statutory appeal mechanism or where the rule of law requires that the correctness standard be applied (*Vavilov* at para 17). In this case, neither of these scenarios applies. I therefore conclude that the immigration officer's decision must be reviewed under the reasonableness standard (*Vavilov* at paras 73–142).

VI. Discussion

[40] First, I recognize that the immigration form erroneously indicates that the applicant arrived in the United States on August 16, 2016, while the document obtained by the US customs authorities confirms that the applicant entered the United States at the San Ysidro border crossing on August 11, 2016. The RPD and RAD both used the date on the immigration form, erroneously.

[41] However, what appears in the immigration form comes from what the officer understood from the applicant, and at the time it was completed, I do not know whether it was possible that

the documents from the United States were not in the officer's or the applicant's possession. At any rate, this error in date has no impact on the present case.

[42] The applicant also stated that the officer did not correctly complete the immigration form in that he did not indicate in a complete manner, as required, the full story of the applicant's route, nor the details of the trip (detailed itinerary) taken by the applicant to arrive in Canada.

[43] I do not see how this is relevant. Although I admit it is better to have more information than not enough, the fact remains that the applicant could have reported this information in his account and amended this account up to the date of the hearing. No such amendments were made. I therefore cannot find fault with the officer for not producing all the details requested in the immigration form, in case that information might have helped determine the exact date the applicant left Brazil.

[44] I will now address the heart of the matter.

[45] In *Canada (Citizenship and Immigration) v Zeng*, 2010 FCA 118, [2011] 4 SCR 3 [*Zeng*], the Federal Court of Appeal established the criterion that is the starting point for the Article 1E discussion:

> [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 factors.

[46] The parties agree that the RAD's analysis regarding the applicant's date of departure from Brazil is the central question in this case. This issue activates the first prong of the analytical framework based on the *Zeng* test.

[47] As I explained in *Celestin v Canada (Citizenship and Immigration)*, 2020 FC 97 [*Celestin*], the first prong of the test laid down in *Zeng* addresses the issue of whether the refugee protection claimant has an essentially similar status to that of nationals in the third country:

> [34] . . . 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*]).

[48] According to established case law, a claimant's status must be reviewed based on 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; *Celestin* at para 46). This analysis is also conducted on the balance of probabilities (*Mikelaj v Canada (Citizenship and Immigration)*, 2016 FC 902 at paras 26–27; *Ramirez v Canada (Citizenship and Immigration)*, 2015 FC 241 at paras 22–24). If the answer at the first stage of the *Zeng* test is yes, the applicant is excluded. If the response is no, the analysis continues (*Zeng* at para 28).

[49] The Minister had the burden of showing that the applicant, first, had an essentially similar status to that of nationals in the third country under Article 1E of the Convention (*Celestin* at para 48). In this case, the applicant even admitted that he had permanent resident status in Brazil as of November 2014 and that this status gave him the same rights and obligations as Brazilian nationals. By his own admission and other evidence on record, it is reasonable to conclude that the Minister met his burden.

[50] Based on this prima facie evidence, the burden of proof shifts to the applicant (*Celestin* at paras 49–51; *Andreus v Canada (Citizenship and Immigration)*, 2020 FC 131 at para 1 [*Andreus*]; *Jean-Baptiste v Canada (Citizenship and Immigration)*, 2019 FC 1612 at para 52; *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 v Canada (Citizenship and Immigration)*, 2010 FC 192 at para 34; *Hussein Ramadan v Canada (Citizenship and Immigration)*, 2010 FC 1093 at para 18). It is therefore the applicant's burden to show that he did not have permanent resident status in Brazil at the time of the RPD hearing (*Majebi* at para 7; *Zeng* at para 16; *Celestin* at para 46).

[51] There is some controversy between the parties as to whether there is sufficient evidence to justify the finding that the applicant had permanent resident status in Brazil at the time of the hearing before the RPD (*Majebi* at para 7; *Zeng* at para 16; *Celestin* at para 46; *Jean-Pierre v Canada (Citizenship and Immigration)*, 2020 FC 136 at para 23).

[52] According to the applicant, he left Brazil in March 2016. Under this hypothesis, the applicant lost his permanent resident status in March 2018, a few months prior to the hearing before the RPD. In such a case, regarding an Article 1E analysis, the second prong of the *Zeng* test applies.

[53] According to the respondent, it is reasonable to conclude that the applicant left Brazil in August 2016. According to this hypothesis, the applicant had permanent resident status at the time of the hearing before the RPD and is excluded from protection under Article 1E.

[54] The applicant's account, signed when he prepared his Basis of Claim Form, states the following:

> [TRANSLATION]
> But because of the political crisis and insecurity in Brazil, I did not want to stay because I was unsafe and I preferred to go through certain countries illegally to arrive in the United States.
> [Emphasis added.]

[55] In his account, the applicant clearly stated that he passed through several countries in Latin America before arriving in the United States. The documents also indicate that the applicant arrived from Mexico at the US border with no visa to enter the United States, which contradicts the RAD's statement that the applicant had taken a direct flight from Brazil to the United States.

[56] The applicant states that the RAD did not address his route to the United States, when it should have, and should have asked him to describe his route to the United States during the hearing.

[57] According to the respondent, this is a new argument that was never presented before the RPD or the RAD, and therefore should not be reviewed by this Court. I recognize that it is a new argument that was not presented before the RAD, but I believe I can dispose of it very quickly.

[58] First, nothing in the documents presented by the applicant shows that he left Brazil in March 2016, or that in their decisions, the RPD and the RAD concluded that the applicant arrived in the United States by air. It is important to note that the applicant is not challenging the

exclusion of the email that allegedly established that the applicant had purchased an airplane ticket in March 2016.

[59] It is not the RPD's responsibility to seek evidence not produced by the applicant. It is the applicant's responsibility to support his arguments. Moreover, the RAD discussed the issues the applicant raised in his appeal on the evidence presented before the RPD.

[60] In my opinion, it was not unreasonable for the RAD to rely on the applicant's evidence as it appeared in his immigration form instead of in his statements at the hearing, considering the small amount of evidence the applicant presented with regard to the manner in which he travelled from Brazil to the United States. We must keep in mind that the applicant was represented by counsel at the hearings before the RPD and before the RAD.

[61] The applicant submits that the RAD did not seek out the truth about his date of departure from Brazil, but instead chose to rely on the error or misunderstanding in the immigration forms and apply the exclusion under Article 1E of the Convention. According to the applicant, it was unreasonable to dismiss his explanations regarding the misunderstanding in his forms, especially because there were other elements that brought the date of August 2016 in his immigration form into question.

[62] From what I have noted, the RAD was faced with two hypotheses regarding the applicant's date of departure. The first (departure on March 19, 2016) was supported by nothing more than the applicant's testimony. On the other hand, the second (departure in August 2016) is

supported by forms that were signed or initialled by the applicant. Faced with these two inconsistent hypotheses, the RAD reviewed the applicant's explanations and concluded that the second hypothesis was more persuasive. The RAD explained why it decided on the second hypothesis rather than the first. This step shows that the RAD considered the evidence and explained the reasons for which it concluded that the applicant did not meet his burden of proof.

[63] If there had been other credible and reliable evidence on which the RPD or the RAD could have relied to tip the balance in favour of the applicant on the issue of when he had actually left Brazil, things could have been different. However, in this case, it seems there was no such thing.

[64] The applicant states that it was impossible for him to have travelled from his country to the United States in only 11 days, arguing that he did indeed leave Brazil in August 2016 and arrive at the Mexico-US border on August 11, 2016. However, this argument does not need to be correct in order to confirm the reasonableness of the RPD decision.

[65] Keeping in mind the applicant's account, which stated he had transited through several countries to arrive in the United States, the RPD noted the following:

> [TRANSLATION]
> Then, the panel is aware that the route from Brazil to the United States can be long and arduous. However, considering the applicant stated at the hearing that he had used an airplane as a means of transportation, the panel is of the view that it is highly unlikely that he needed more than 59 days to get to the United States of America, where he arrived on August 16, 2016. [Emphasis added.]

[66] The RPD or the RAD did not draw any definitive conclusions regarding the exact date the applicant left Brazil. On this, the RPD concluded by stating the following:

> [TRANSLATION]
> As a result, the panel finds that it is more likely than not that on the date of the hearing (June 18, 2018), the applicant had not been absent from Brazil for more than two years.

[67] The relevance of the 59 days is that there are 59 days from June 18, 2016, to August 16, 2016, the date indicated in the applicant's immigration forms as his date of entry to the United States. It is not necessary to definitively find out when the applicant actually left Brazil. As the evidence established, on a balance of probabilities, that he left Brazil after June 18, 2016, his status as a permanent resident was not lost at the time of the hearing.

[68] The RAD simply confirmed this observation by the RPD.

[69] I see nothing unreasonable in the RAD analysis. I do not see how 5 days (the difference between August 11 and 16) would have made any difference.

[70] For this reason, it was reasonable to conclude that the applicant failed to rebut the prima facie presumption of permanent residence.

[71] Moreover, I will repeat that the burden of rebutting the prima facie presumption is on the applicant (*Celestin* at para 50; *Andreus* at para 1). The applicant did not show me that the RAD committed an error by concluding that he did not meet this burden.

VII. Conclusion

[72] The intervention of this Court is therefore not required. This application for judicial review is dismissed.

JUDGMENT in IMM-4837-19

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.

2. No question is certified.

"Peter G. Pamel"
Judge

Certified true translation
This 20th day of April 2020.

Michael Palles, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

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