Federal Court  Cour fédérale

Date: 20200324

Docket: IMM-2944-19

Citation: 2020 FC 407

[CERTIFIED ENGLISH TRANSLATION, REVISED BY THE AUTHOR]

Ottawa, Ontario, March 24, 2020

PRESENT: The Honourable Mr. Justice Bell

BETWEEN:

JUNIOR SAINT-FLEUR

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] The applicant [Mr. Saint-Fleur] is a Haitian citizen, born on March 19, 1985. He claimed before the Refugee Protection Division [RPD] that on July 7, 2011, armed criminals broke down the front door and entered the family home he shared with his mother. They beat him, forced him to engage in sexual acts with his mother, and ransacked the house. On September 11, 2011,

Mr. Saint-Fleur left Haiti, claiming to have been persecuted there because of his mother's business activities and his homosexuality. He arrived in Brazil in October 2011 and lived there until his departure in June 2016. He travelled through several countries before reaching the United States in August 2017. He arrived in Canada in August 2017 where he claimed refugee protection after crossing the Canadian border illegally. He did not seek refugee protection in the United States or in the other countries he travelled through after leaving Brazil.

[2] Mr. Saint-Fleur denies having had homosexual relations since leaving Haiti and claims that he was motivated to have a relationship with a man in Haiti in order to receive economic support from him. In addition, in his Basis of Claim Form [BOC Form] Mr. Saint-Fleur does not mention any grounds for persecution in Brazil. In the BOC Form, he refers only to problems in Haiti. It was at the beginning of the hearing before the RPD on April 17, 2018, that Mr. Saint-Fleur changed his account to claim that, in Brazil, he had experienced two events that led him to leave that country.

[3] The RPD found that the applicant was excluded under Article 1E of the *United Nations Convention Relating to the Status of Refugees* [the "*Convention*"] because of his permanent resident status in Brazil. Therefore, the applicant was not a refugee or a person in need of protection under section 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The Refugee Appeal Division [RAD] dismissed the appeal on April 11, 2019. This is an application for judicial review, pursuant to subsection 72(1) of the *IRPA*, of the RAD's decision.

[4] For the reasons set out below, I dismiss the application for judicial review.

II. Decision Under Review

[5] The RAD found that the RPD did not err in finding that Mr. Saint-Fleur's claim was excluded from the scope of the *IRPA* by reason of his permanent resident status in Brazil and in the absence of a serious possibility of persecution or risk upon return there.

[6] With respect to the exclusion under Article 1E of the *Convention*, the RAD determined there was a *prima facie* case that Mr. Saint-Fleur had obtained permanent resident status in Brazil. His name appeared on a list of names annexed to a ministerial order dated November 12, 2015, members of which the Brazilian government had granted permanent residence. In addition, Mr. Saint-Fleur testified at the RPD hearing that he had been granted permanent residence in Brazil. It was therefore incumbent on Mr. Saint-Fleur to refute this evidence. However, Mr. Saint-Fleur did not take steps to clarify his status in Brazil. Moreover, the documentary evidence showed that permanent resident status in Brazil allows for the enjoyment of essentially the same rights and obligations as citizens of the country. Finally, although the documentary evidence showed that permanent residence can be lost if the beneficiary is absent from Brazil for more than two (2) years, the RAD concluded that, according to the case law, this assessment is made on the day of the hearing before the RPD (*Majebi v Canada (Citizenship and Immigration*), 2016 FCA 274, leave to appeal to SCC refused, 37437 (1 June 2017) [*Majebi*]). Two (2) years had not elapsed from the applicant's departure date from Brazil (June 19, 2016) to the date of the RPD hearing (April 17, 2018).

[7] With respect to the risk under section 97 of the *IRPA* if returned to Brazil, the RAD found Mr. Saint-Fleur lacked credibility. First, in his BOC Form, he only referred to events that occurred in Haiti, not in Brazil. Furthermore, it was only at the outset of the RPD hearing that he referred to the incidents that were alleged to have occurred in Brazil. The RAD concluded Mr. Saint-Fleur's explanation that the omission was due to a translation problem in writing his BOC Form was not credible. Second, there were contradictions between his BOC Form and his testimony as to where he lived in Brazil, why he left and when he left. Therefore, the RAD found the applicant had not established, on a balance of probabilities that the alleged assaults justifying his fears had actually occurred.

[8] With respect to the risk to the applicant in Brazil within the meaning of section 97 of the *IRPA* because of his sexual orientation, the RAD agreed with the RPD that Mr. Saint-Fleur had not established that such a possibility or threat exists.

III. Relevant Provisions

[9] The relevant provisions are sections 96, 97, and 98 of the *IRPA* and Article 1E of the *Convention*, which are set out in the Schedule attached hereto.

IV. Issues

[10] The following issues arise in this matter: was the RAD unreasonable in its assessment of (i) the exclusion of Mr. Saint-Fleur based on Article 1E of the *Convention*; or (ii) the analysis of Mr. Saint-Fleur's fear of return to Brazil? If the decision on the issue of the applicant's status in

Brazil was reasonable, it is not necessary to consider the risk of his return to Haiti (*Milfort-Laguere v Canada (Citizenship and Immigration*), 2019 FC 1361 at para 46 [*Milfort-Laguere*]; *Augustin v Canada (Citizenship and Immigration)*, 2019 FC 1232 at para 34 [*Augustin*]).

V. Positions of the Parties

A. *Standard of Review*

[11] The parties agree that the findings of the RAD are reviewable on a standard of reasonableness (*Ramirez v Canada (Citizenship and Immigration*), 2015 FC 241 at para 12; *Lhazom v Canada (Citizenship and Immigration)*, 2015 FC 886 at para 7; *Majebi* at paras 5–6; *Canada (Citizenship and Immigration) v Zeng*, 2010 FCA 118 at para 11, 402 NR 154; *Noel v Canada (Citizenship and Immigration)*, 2018 FC 1062 at para 14 [*Noel*]).

B. *Applicant's Exclusion under Article 1E of the Convention*

[12] Mr. Saint-Fleur submits the RAD erred in concluding there was *prima facie* evidence that he had been granted permanent resident status in Brazil. Under Brazilian law, there are different types of permanent residence, one of which is similar to a humanitarian visa valid for five (5) years. Mr. Saint-Fleur contends that he never expressly testified that he had permanent residence, but rather that he had a time-limited card. Moreover, the fact that his name was on a list of Haitians invited to receive permanent resident status is only evidence of general importance.

[13] Second, he argues that the RAD failed to consider whether he was still a permanent resident of Brazil when it rendered its decision. The applicant's position is that he had lost his

permanent resident status by the date of the RAD hearing. According to Brazilian law, individuals who are out of Brazil for more than two (2) years lose their permanent resident status. By the date of the RAD hearing, more than two (2) years had elapsed since the applicant had left Brazil. Therefore, he claimed before the RAD that he could only return to Haiti.

[14] Lastly, Mr. Saint-Fleur left Brazil irregularly without informing the Brazilian authorities and without having a departure date stamped in his passport. Without that stamped date, he states that the *Majebi* decision does not apply because it is not possible to prove the dates for the purpose of calculating the time limit in an unequivocal manner.

C. *Applicant's Fear in the Event of a Return to Brazil*

[15] Mr. Saint-Fleur maintains that he has a fear of returning to Brazil for the following reasons: (1) the documentary evidence demonstrates that Haitians are victims of violence and discrimination in Brazil; (2) this documentary evidence is supported by his testimony of specific incidents of racism and discrimination which demonstrate that he faces persecution, citing *Sagharichi v Canada (Minister of Employment and Immigration)* (1993), 182 NR 398 (FCA) and *Warner v Canada (Citizenship and Immigration)*, 2011 FC 363 at para 7; (3) his sexual orientation puts him at risk; (4) the documentary evidence demonstrates that Brazilian authorities discriminate against people of colour who file complaints and seek help; (5) the documentary evidence demonstrates that the level of impunity in Brazil for violent crimes is very high; and (6) the omissions in his BOC Form should not have affected his credibility with respect to the problems and threats he experienced in Brazil. Furthermore, the RAD erred in determining that

he was excluded under Article 1E of the *Convention* before assessing his fear regarding his country of residence (*Omar v Canada (Citizenship and Immigration*), 2017 FC 458).

VI. Analysis

A. *Standard of Review*

[16] I agree with the parties regarding the standard of review. The standard of reasonableness applies to issues relating to permanent residence status in Brazil and whether the facts support the claim for refugee protection: see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 10. Where a court reviews a decision on the reasonableness standard, it "must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified": *Vavilov*, at para 15.

B. *Exclusion of the Applicant under Article 1E of the Convention*

[17] I am of the view the RAD reasonably concluded there was a *prima facie* case that Mr. Saint-Fleur had obtained permanent resident status in Brazil. His name was on a list of Haitian nationals who were granted permanent residence. When the name of a Haitian national appears on this list, he or she must present certain documents to the Brazilian authorities in order to obtain permanent residence through this process (document 3.7 of the National Documentation Package, *Brazil and Haiti: Resident status of Haitian citizens in Brazil, including their rights and responsibilities (2010-September 2017)*). Given that Mr. Saint Fleur testified at the RPD hearing that he had obtained permanent resident status in Brazil, this supports him having taken the

necessary steps to do so. Therefore, the RAD's conclusion that these two pieces of evidence demonstrate a *prima facie* case that he had permanent resident status in Brazil is reasonable: see *Noel* at para 21; *Milfort-Laguere* at paras 34–35.

[18] With respect to the length of validity of the applicant's permanent resident status, according to the documentary evidence, this is valid for either five (5) or nine (9) years. If a Haitian national is granted permanent residence on humanitarian and compassionate grounds, it is valid for five (5) years pursuant to CNIg Normative Resolution No. 97 of 12/01/2012, which reads as follows:

> [TRANSLATION]
>
> Article 1. A permanent visa set out in article 16 of Law No. 6.815 of 19 August 1980 may be granted to a Haitian national for humanitarian reasons, for a duration of five (5) years under article 18 of that same law, a circumstance that must be noted on the incumbent's ID card.
>
> . . .
>
> Article 3. In compliance with the legislation in effect, prior to the end of the period set out in paragraph 1 of this normative resolution, Haitian nationals are required to provide justification of their employment to validate their permanence in Brazil and be issued a new foreign ID card.

[19] The period of validity of permanent residence is indefinite. However, it must be re-issued at intervals of nine (9) years (document 3.7 of the National Documentation Package, *Brazil and Haiti: Resident status of Haitian citizens in Brazil, including their rights and responsibilities (2010-September)*). At the hearing, the applicant said he was granted permanent residence in 2014. So whether the applicant would have been granted permanent residence in 2014 for five (5) or nine (9) years, he had it at the time of the RPD hearing in 2018.

[20] In addition, although the applicant could have lost permanent resident status after having been out of the country for more than two (2) years, it was reasonable for the RAD to conclude that this period was based on the date of the RPD hearing, which was April 17, 2018 (*Milfort-Laguere* at para 42 citing *Majebi* at paras 7, 9; *Augustin* at para 34). Therefore, it was reasonable for the RAD to confirm the RPD's conclusion that Mr. Saint-Fleur had not lost his status as a result of having been out of the country for two (2) years.

[21] Given that the applicant did have permanent resident status in Brazil, the RAD did not have to consider his fear if he returned to Haiti (*Milfort-Laguere* at para 46; *Augustin* at para 34).

[22] Finally, the applicant maintains that without a departure date stamped in his passport, he cannot return to Brazil. This argument was already dismissed by this Court in *Noel* at paras 24–25:

> The NDP for Brazil does not suggest that the lack of an exit stamp results in the revocation of permanent resident status. The first paragraph of article 51 of the law governing permanent residence in Brazil provides that permanent residents may leave and return without a visa within a two-year period. It does not state whether permanent residents may return after this period has expired by applying for a visa. The second paragraph provides that the length of the absence from Brazil is established with the help of the exit stamp. It does not indicate what happens when there is no stamp or whose burden it is to establish the length of the absence, that of the permanent resident who wishes to enter without a visa or of the authorities intending to revoke the foreign national's permanent resident status.
>
> This provision can be interpreted in a number of ways, some of which advantage Mr. Noel. Since he had the burden of establishing that he had lost his permanent resident status, I believe that the RAD could conclude that he failed to do so, especially as the two-year period had not expired by the time it issued its decision.

[23] Moreover, it seems to me that it would be unreasonable to conclude that an applicant cannot return to his or her country of origin simply because he or she lacks a departure date stamped in his or her passport. This would encourage people to leave their country irregularly and take advantage of the fact that they cannot return: see *Noel* at para 27, citing *Wassiq v Canada (Minister of Citizenship and Immigration)*, [1996] FCJ No 468 (QL) at para 11.

C. *Applicant's Fear in the Event of Return to Brazil*

[24] The RAD's finding that discrimination in Brazil alone did not amount to persecution is reasonable (*Noel* at paras 28–30; *Jean v Canada (Citizenship and Immigration)*, 2019 FC 242 at paras 16–19). In addition, with respect to Mr. Saint-Fleur's fear on the basis of his sexual orientation, he did not mention this in his narrative in his BOC Form as a reason for which he fears returning to Brazil. Indeed, in response to the question on the form, "[l]ist the country or countries where you believe you are at risk of serious harm", he only mentioned Haiti. He also confirmed at the beginning of the RPD hearing that his narrative was accurate. In my view then, it was reasonable for the RAD to confirm the RPD's conclusion. Furthermore, it should be noted that it was indeed the RPD that raised the possibility that Mr. Saint-Fleur is homosexual and fears returning to Brazil for this reason. Although the applicant admitted he had had sexual relations with a man in Haiti, he explained that he only did this in order to receive economic support from that man. He admitted that since leaving Haiti, he had not had sex with men because he only did so in Haiti to receive economic support.

VII. Conclusion

[25] The application for judicial review is dismissed, without costs. Neither party has proposed a question for the Federal Court of Appeal, and there is no question of general importance that arises in the circumstances.

JUDGMENT in IMM-2944-19

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed, without costs. No question is certified for consideration by the Federal Court of Appeal.

"B. Richard Bell"
Judge

SCHEDULE

Immigration and Refugee Protection Act, SC 2001, c 27	***Loi sur l'immigration et la protection des réfugiés***, LC 2001, ch 27
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 médicaux ou de santé adéquats.

Person in need of protection

(2) A person in Canada who is

Personne à protéger

(2) A également qualité de

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.

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.

Exclusion — Refugee Convention

Exclusion par application de la Convention sur les réfugiés

98 A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.

98 La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.

[…]

[…]

Sections E and F of Article 1 of the United Nations Convention Relating to the Status of Refugees

Sections E et F de l'article premier de la Convention des Nations Unies relative au statut des réfugiés

E 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.

E Cette Convention ne sera pas applicable à une personne considérée par les autorités compétentes du pays dans lequel cette personne a établi sa résidence comme ayant les droits et les obligations attachés à la possession de la nationalité de ce pays.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2944-19
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