Federal Court  Cour fédérale

Date: 20200407

Docket: IMM-2379-19

Citation: 2020 FC 493

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Montréal, Quebec, April 7, 2020

PRESENT: The Honourable Madam Justice St-Louis

BETWEEN:

EZEXUEL SAINT PAUL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Ezexuel Saint Paul is seeking judicial review of the decision of the Refugee Appeal Division [RAD] on March 19, 2019, dismissing his appeal and upholding the decision of the

Refugee Protection Division [RPD] that he is neither a Convention refugee nor a person in need of protection.

[2] Mr. Saint Paul's application is for judicial review of only the portion of the RAD decision related to him and not the portion of the RAD decision related to his spouse. In short, for the reasons set out below, the application for judicial review will be allowed, and the matter will be referred back to the RAD for redetermination.

II. Background

[3] Mr. Saint Paul is a citizen of Haiti. He left Haiti on August 17, 2012, and entered Brazil a week later, staying for slightly more than four years. On December 14, 2016, he left Brazil for the United States and, in July 2017, he entered Canada with his spouse and they claimed refugee protection. Mr. Saint Paul based his refugee protection claim on a fear in Haiti, where he was allegedly attacked by criminals because he is a merchant, and on a fear in Brazil, where he alleges that conditions became too harsh and he was threatened.

[4] Before the RPD, the Minister of Citizenship and Immigration [the Minister], the respondent in this case, intervened to request that Mr. Saint Paul be excluded under section 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act], on the grounds that Mr. Saint Paul is a person referred to in section E of Article 1 of the *Convention Relating to the Status of Refugees* [Article 1E of the Convention].

[5] In its notice of intervention, the Minister pointed out that (1) Ezexuel Saint Paul's name appears on the list of 43,781 Haitian nationals who have been granted permanent residence in Brazil under the joint ministerial order of the Ministry of Justice and the Ministry of Labour and Social Affairs in Brazil (Certified Tribunal Record [CTR] at pp 282–284); (2) this is *prima facie* evidence that Mr. Saint Paul has permanent resident status in Brazil; (3) the documentary evidence indicates that the rights and obligations of permanent residents in Brazil are substantially similar to those of Brazilian nationals, including rights to health care, education and employment; (4) the documentary evidence also indicates that foreigners lose their permanent resident status in Brazil if they leave for more than two years; and (5) Mr. Saint Paul reportedly left Brazil less than 24 months earlier. The Minister submitted that the onus was therefore on Mr. Saint Paul to show that he no longer had permanent resident status in Brazil or that he had a well-founded fear of persecution or fear of being subjected to a risk of harm within the meaning of subsection 97(1) of the Act.

[6] In its decision, the RPD reiterated the applicants' allegations, summarized the reasons for the Minister's intervention and carried out its analysis. The RPD cited Article 1E of the Convention and the test for its application, based on the principles set out by the Federal Court of Appeal [FCA] in *Canada (Citizenship and Immigration) v Zeng*, 2010 FCA 118 [*Zeng*]. The RPD cited paragraph 28 of *Zeng*, the first sentence of which is the first step of the test to be applied: "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".

[7] The RPD examined the rights enjoyed by permanent residents of Brazil and ultimately concluded that, under the Brazilian constitution, permanent residents have the same rights as Brazilian citizens, with some limitations.

[8] The RPD reviewed the particular situation of Mr. Saint Paul, who testified that he had temporary residence in Brazil because his residence card showed an expiry date 10 years after the date of receipt. The RPD noted the testimony but, citing the documentary evidence, concluded that the expiry date refers to the card itself and not the status, and that Mr. Saint Paul's residence in Brazil is indeed permanent.

[9] The RPD then decided to examine Mr. Saint Paul's risk in Brazil but not to examine his risk in Haiti, stating that it had, at that point, applied section 98 of the Act and excluded Mr. Saint Paul.

[10] However, despite the exclusion, the RPD did analyze the risk of persecution or harm, within the meaning of subsection 97(1) of the Act, if Mr. Saint Paul were to return to Brazil, his country of permanent residence. In that regard, the RPD concluded that Mr. Saint Paul did not show that [TRANSLATION] "the issues regarding his employment constitute a serious human rights violation, that they have nexus to a Convention ground or that there is any connection to the application of subsection 97(1) of the Act" (CTR at p 91).

[11] The RPD determined that Mr. Saint Paul cannot be a Convention refugee or a person in need of protection because he is a person referred to in Article 1E of the Convention by reason of

his permanent residence in Brazil. The RPD used the wording of section 98 of the Act without specifically referring to it.

[12] Mr. Saint Paul filed an appeal of this decision with the RAD. He did not dispute the facts as presented by the RPD but essentially argued that there was a serious possibility of persecution in Brazil, that the state could not protect him, that there was no viable internal flight alternative and that his subjective fear of returning to Brazil was well founded. Mr. Saint Paul submitted that he should therefore not be excluded under section 98 of the Act and Article 1E of the Convention, and that his fear in Haiti should be analyzed. Finally, Mr. Saint Paul challenged the RPD's finding as to his permanent resident status in Brazil, submitting that he had only temporary residence there.

III. Refugee Appeal Division's decision

[13] In its analysis, the RAD first determined that the RPD had not erred in concluding that Mr. Saint Paul is a permanent resident of Brazil. The RAD also noted that Mr. Saint Paul is one of 43,781 Haitian nationals who "have been granted permanent residence in Brazil" and that he had further testified before the RPD that his Brazilian residence card was valid for 10 years. The RAD agreed with the RPD and concluded that Mr. Saint Paul is, on a balance of probabilities, a permanent resident of Brazil.

[14] However, the RAD concluded that the RPD had erred in its analysis of Mr. Saint Paul's prospective risk in Brazil because it had not analyzed the documentary evidence. Therefore, the RAD substituted its own analysis for that of the RPD in this regard and concluded that, while the

documentary evidence shows that there is serious discrimination against black people in Brazil, it does not show that these people are persecuted by the state or the Brazilian population. The RAD also noted that Mr. Saint Paul had not shown the necessary cumulative effect for his experience to amount to persecution. The RAD concluded that Mr. Saint Paul had not established a serious possibility of persecution by reason of his race or that he would be subjected to a risk or danger for one of the reasons stated in subsection 97(1) of the Act.

[15] The RAD did not analyze whether permanent residents of Brazil have the rights and obligations attached to the possession of Brazilian nationality and did not make a determination on exclusion under section 98 of the Act and Article 1E of the Convention. However, since the RAD upheld the RPD's decision, except with respect to the analysis of prospective risk in Brazil, it therefore agreed with the RPD's conclusions on these two issues.

IV. Parties' positions before this Court

A. *Mr. Saint Paul's position*

[16] Mr. Saint Paul submits that the RAD erred in (1) concluding that he is a permanent resident of Brazil; (2) affirming that he has the same rights and obligations as Brazilian citizens; and (3) analyzing the prospective risk he faces in Brazil without analyzing his fear in Haiti, his country of nationality. He submits that the decision is unreasonable.

[17] Regarding the first argument, Mr. Saint Paul submits that the RPD erred in considering the validity of his residence card to be equivalent to permanent residence, since his residence is

on humanitarian and compassionate grounds and does not automatically entitle him to permanent residence, and that the RPD should therefore have concluded that he was not a person referred to in Article 1E of the Convention. Mr. Saint Paul also submits that the RAD should have carried out its own thorough, comprehensive and independent review rather than reiterating the RPD's reasons (*Gabila v Canada (Citizenship and Immigration)*, 2016 FC 574 at para 20) and further submits that the RAD should have verified whether he still had permanent resident status in Brazil.

[18] Regarding the second argument, Mr. Saint Paul conflates the review of the risk he alleges in the country of permanent residence with the review of the rights and obligations enjoyed by permanent residents in Brazil.

[19] He submits that there is ample evidence in the national documentation packages on Haiti and Brazil that Haitians face violence, discrimination and exclusion in Brazil and that they therefore do not have the same rights as Brazilians. Some passages suggest that some Haitians are treated like slaves, that Brazilian labour standards are not observed with respect to Haitians in Brazil, that companies are forcing Haitians to work overtime, that Haitians are struggling to enrol their children in school, that there are communication problems between health personnel and Haitian nationals, and that Haitians are experiencing violence and xenophobia.

[20] Mr. Saint Paul further submits that he should not be excluded simply because he did not show the necessary cumulative effect for his experience to amount to persecution. He argues that discrimination may amount to persecution in some cases (*Sagharichi v Canada (Minister of*

Employment and Immigration), [1993] FCJ No 796 (CA), and cites documentary evidence that shows, in his opinion, systemic discrimination by Brazilian authorities against people of colour, a very high level of impunity for violent crimes, and a judicial system that is overburdened, corrupt and virtually powerless to deal with organized crime.

[21] Regarding the third argument, Mr. Saint Paul submits that the possibility of returning to Brazil is pure conjecture given that he lost his residence after the two-year period had elapsed, leaving Haiti as the only possible destination. He therefore argues that the RAD breached the principles of natural justice and procedural fairness by failing to consider the facts that prove that he is a refugee or a person in need of protection, and by failing to question him about the persecution he experienced in Haiti and the threats he faced. Mr. Saint Paul further states that, by acknowledging that the RPD erred in its analysis of his prospective risk in Brazil, the RAD implicitly admits that there is discrimination against Haitians in Brazil by reason of their race and must consider his fear in respect of his country of nationality. Finally, he argues that his testimony regarding threats in Brazil does not lead to the conclusion that nothing would happen, since it is a fact that Haitians live in insecurity in Brazil.

[22] At the hearing, I discussed with the parties whether the RAD or the RPD could even consider the allegation of fear raised by Mr. Saint Paul in respect of Brazil once it was established that he has permanent resident status there and that this status gives him the same rights as Brazilian citizens, given the wording of Article 1E of the Convention and section 98 of the Act. I therefore asked the parties to make additional written submissions in this regard.

[23] In his response, Mr. Saint Paul essentially argues that it is reasonable to examine the fear of persecution in a refugee protection claimant's country of residence before excluding the claimant under Article 1E of the Convention, an interpretation that is justified in light of the objectives of the implementation of Article 1E and the fact that, in his view, the protection regime conferred by section 112 of the Act is not available to an excluded person until a 12-month period has elapsed.

B. *Minister's position*

[24] The Minister submits that the applicable standard of review for RAD decisions on questions of fact and of mixed fact and law is reasonableness. The Minister further submits that this Court should not intervene if the RAD's decision is intelligible, transparent, justifiable and defensible in respect of the facts and law.

[25] In response to Mr. Saint Paul's arguments, the Minister first submits that Mr. Saint Paul raises arguments that were not raised before the RAD and refers to documents that were not before the RAD, and that these cannot form the basis of an application for judicial review.

[26] The Minister further states that Mr. Saint Paul is a person referred to in Article 1E of the Convention, and the RAD was therefore not required to analyze his fear in respect of Haiti.

[27] Regarding Mr. Saint Paul's first argument, the Minister submits that the analytical framework for exclusion under section 98 of the Act and Article 1E of the Convention is a two-step process. First, the Minister must establish *prima facie* that the refugee protection claimant is

a permanent resident in a country where the claimant has the same rights as the country's nationals based on an examination of four basic rights (*Shamlou v Canada (Citizenship and Immigration)*, [1995] FCJ No 1537). Once this has been proven, the onus is then on the claimant to show that they lost their permanent resident status (*Zeng*) on a given date.

[28] The Minister goes on to state that (1) there was *prima facie* evidence that Mr. Saint Paul was a permanent resident of Brazil at the time of the hearing before the RPD; (2) Mr. Saint Paul did not show that he did not have permanent resident status; and (3) a person's status must be determined as of the last day of the hearing before the RPD.

[29] The Minister agrees that the risk alleged by a claimant in respect of their country of residence should be reviewed as part of the analysis of the claimant's status in their country of permanent residence and not afterwards, as the RAD did in upholding the RPD's determination in this regard. However, the Minister submits that the analysis is nevertheless reasonable and that the fact that it was carried out after the analysis of permanent residence is not prejudicial.

[30] Regarding Mr. Saint Paul's second argument, the Minister responded that it is well established that the RAD does not analyze a claimant's situation in their country of citizenship where the claimant is a person referred to in Article 1E of the Convention (*Zeng*; *Xie v Canada (Citizenship and Immigration)*, 2004 FCA 250).

[31] Regarding Mr. Saint Paul's third argument, the Minister points out that no submission was made before the RAD that he had lost his status, other than the argument that his renewable residence card is valid for only five years, and the Minister asks that this argument be rejected.

[32] In response to this Court's above-mentioned request for additional submissions, the Minister submits that paragraph 112(2)(b.1) of the Act states that the 12-month waiting period for filing an application for a pre-removal risk assessment does not apply where a claim for refugee protection is rejected on the basis of Article 1E of the Convention.

[33] The Minister then submits that a number of recent decisions of this Court deal with the issue of considering a claimant's alleged risks in respect of their country of residence where they are to be excluded under Article 1E of the Convention and section 98 of the Act. The consensus in the case law is that the analysis of a risk alleged by a claimant in respect of their country of residence cannot be carried out once they have been excluded under section 98 of the Act, and that this analysis, if possible, should be carried out before the exclusion is applied. At the hearing, the Minister also agreed that this analysis cannot refer to section 96 or 97 of the Act.

[34] Essentially, the Minister argues that such an analysis can and should be carried out, even though the Convention does not provide for it. The Minister submits that this analysis can be incorporated into the Canadian statute by implicitly reading it into the text of the Convention, without actually adding it. In particular, the Minister relies on an interpretation note from the Office of the United Nations High Commissioner for Refugees [UNHCR] to argue that it is appropriate to read into the Convention the granting of protection to those in need of it, thereby

enabling the RPD or the RAD to consider whether the claimant's fear in their country of residence is well founded before establishing that they are excluded (*Omar v Canada (Citizenship and Immigration)*, 2017 FC 458 at paras 24–25; *Omorogie v Canada (Citizenship and Immigration)*, 2015 FC 1255 at para 61).

[35] The Minister notes that this Court recently considered, in *Romelus v Canada (Citizenship and Immigration)*, 2019 FC 172, and *Jean v Canada (Citizenship and Immigration)*, 2019 FC 242, whether a pre-exclusion analysis is possible, and the Minister submits that the evolutionary approach of the living tree (*R v NS*, 2012 SCC 72 at para 72) proposed in *Constant v Canada (Citizenship and Immigration)*, 2019 FC 990, is preferable because it favours an interpretation that allows for this risk assessment without any actual addition to Article 1E of the Convention. The Minister further notes that pre-exclusion risk assessment is consistent with international case law.

[36] The Minister submits that this Court has jurisdiction to read in this analysis based on the decisions of the Supreme Court of Canada in *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 at para 32, and *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR at para 57, where it stated the principle that the interpretation of the exclusion clauses of the Convention must take into account the overarching human rights object and purpose set out in the Convention. The Minister believes that this interpretative approach would be in line with the UNHCR note.

[37] Since recent case law is not settled and since this issue directly affects the jurisdiction of the RPD and the RAD, the Minister submits that this issue transcends the interests of the parties. The Minister reiterates its request to this Court to certify a question within the meaning of paragraph 74(d) of the Act, arguing that there is a serious issue of general importance and that the issue would be determinative if this Court were to refer the matter back to the RAD.

V. Issues

[38] This Court must determine whether the RAD erred in (1) confirming that Mr. Saint Paul is a permanent resident of Brazil; (2) considering Mr. Saint Paul's allegation of risk in respect of his country of permanent residence, Brazil, having confirmed that Mr. Saint Paul is a permanent resident of Brazil and that permanent residents of Brazil have the same rights as Brazilian citizens, with some limitations; and (3) failing to consider Mr. Saint Paul's allegation of fear in respect of his country of nationality, Haiti.

[39] This Court will not consider Mr. Saint Paul's argument regarding the equivalency analysis of rights granted to permanent residents and Brazilian citizens because he did not raise this argument before the RAD. Indeed, in his memorandum to the RAD, Mr. Saint Paul argues that it is not enough to say that Haitians *have the same rights as Brazilians*, but rather that it is necessary to assess whether there is a serious possibility of persecution in Brazil. He further argues that one must look at the fear of claimants *even though, as permanent residents, they have the same rights and obligations as Brazilians* and consider whether Brazil is a safe haven (CTR at pp 98–99). The same conclusion applies to the argument regarding the date on which status in Brazil is to be assessed (RPD decision at para 34; *Zeng* at paras 16, 28, 35; *Majebi v Canada*

(Citizenship and Immigration), 2016 FCA 274 at para 9) because Mr. Saint Paul did not raise the argument before the RAD. Lastly, this Court also will not examine the Brazilian legislation now referred to by Mr. Saint Paul because it also was not before the RAD.

[40] In short, the Court finds that the RAD did not err in confirming that Mr. Saint Paul, on a balance of probabilities, is a permanent resident of Brazil and in failing to consider Mr. Saint Paul's alleged fear in respect of Haiti, his country of nationality, given the exclusion under section 98 of the Act (*Zeng*; *Xie v Canada (Citizenship and Immigration)*, 2004 FCA 250).

[41] However, the RAD erred in considering Mr. Saint Paul's alleged fear in respect of Brazil. The parties have not persuaded me that the Act permits such an analysis where it is established that the claimant has a nationality and is a resident of another country and that that residence gives the claimant the rights and obligations attached to the possession of that country's nationality.

[42] The parties have not persuaded me that it is permissible, when the above premises are established, to read into the text of the Convention a protection regime that the Convention does not provide for. Rather, I note that (1) the category of refugee protection claimants suggested is not one of the categories of claimants Parliament has provided for (subsection 95(1) of the Act); and (2) Parliament has set out a protection regime for excluded persons (section 112 of the Act and *Celestin v Canada (Citizenship and Immigration)*, 2020 FC 97 [*Celestin*]).

VI. Analysis

A. *Standard of review*

[43] I agree with the position of the parties that the RAD decision should be reviewed on a standard of reasonableness, as the FCA stated in *Majebi v Canada (Citizenship and Immigration)*, 2016 FCA 274, adjusting *Zeng and Hernandez Febles v Canada (Citizenship and Immigration)*, 2012 FCA 324. The analytical framework set out in the recent Supreme Court of Canada decision *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov], is based on the presumption that reasonableness is the applicable standard whenever a court reviews an administrative decision, and that presumption is not rebutted here (*Vavilov* at paras 16–17; *Celestin* at para 32).

[44] At paragraph 83 of its decision in *Vavilov*, the Supreme Court teaches that "the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. The role of courts in these circumstances is to review, and they are, at least as a general rule, to refrain from deciding the issue themselves. Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the 'range' of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the 'correct' solution to the problem. The Federal Court of Appeal noted in *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171, that, 'as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did': at para. 28; see also *Ryan*, at paras. 50–51.

Instead, the reviewing court must consider only whether the decision made by the administrative decision maker—including both the rationale for the decision and the outcome to which it led—was unreasonable".

[45] The Supreme Court also states that "an otherwise reasonable outcome also cannot stand if it was reached on an improper basis" (*Vavilov* at para 86). *Vavilov* specifically requires a detailed review by the Court of the administrative decision maker's reasoning, which was not previously necessary (*Farrier v Canada (Attorney General)*, 2020 FCA 25 at paras 9, 12–13, 32).

B. *Permanent resident status in Brazil*

[46] Regarding the facts, recall that the Minister intervened before the RPD and filed an excerpt from the list of 43,781 Haitian nationals who were granted permanent residence in Brazil, subject to proceedings of an administrative nature (CTR at p 282). Mr. Saint Paul's name is on this list, and it seems reasonable to consider this to be *prima facie* evidence of his permanent resident status in Brazil. Mr. Saint Paul then failed to show that he was not a permanent resident of Brazil. He confirmed in his testimony before the RPD that he had a residence card that was valid for 10 years [TRANSLATION] "because there was an expiry date on his residence card 10 years after he allegedly received it" (RPD decision at para 31), which, based on the documentary evidence, supports the position that he is a permanent resident. The RAD's conclusion upholding the RPD's finding that Mr. Saint Paul is a permanent resident of Brazil is reasonable in light of the evidence before it.

C. *Analysis of fear in respect of Brazil*

[47] Part 2 of the Act deals with refugee protection and is divided into three divisions. Division 1 deals with "Refugee Protection, Convention Refugees and Persons in Need of Protection", Division 2 deals with "Convention Refugees and Persons in Need of Protection" and Division 3 deals with "Pre-removal Risk Assessment".

[48] Subsection 95(1) of the Act states that refugee protection is conferred on a person who is in one of the three enumerated categories, namely (1) Convention refugee (section 96 of the Act); (2) person in need of protection (section 97 of the Act); or (3) person whose application for protection is allowed by the Minister (section 112 of the Act).

[49] Sections 96 and 97 of the Act deal with a claimant's fear in respect of any of their countries of nationality and with the situation of a claimant who has no nationality. As the Minister acknowledges, where the claimant has a nationality, these sections cannot be referred to in considering a claimant's fear in respect of their country of residence in an analysis under Article 1E of the Convention. Yet that is what the RAD did in this case (Respondent's Further Memorandum at para 24).

[50] Section 98 of the Act, entitled *Exclusion—Refugee Convention*, reads, "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".

[51] Article 1E of the Convention reads, “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”.

[52] Therefore, by the combined effect of Article 1E of the Convention and section 98 of the Act, a person considered by the competent authorities of the country in which that person has taken residence as having the rights and obligations attached to the possession of the nationality of that country cannot be a refugee or a person in need of protection in Canada.

[53] As I pointed out in *Romelus v Canada (Citizenship and Immigration)*, 2019 FC 172 at paragraphs 41 and 42, the wording of Article 1E of the Convention, the wording of section 98 of the Act and the interaction of these two provisions are not a problem in the case of persons referred to in Article 1E of the Convention who rely on a fear only in respect of their country of nationality. These persons are excluded, and the fear in respect of their country of citizenship is not considered since they are protected in their country of permanent residence. The situation gets much trickier when a claimant fulfills the requirements to become a “person referred to” in Article 1E of the Convention, but they invoke a fear in respect of their country of residence, which is the case with Mr. Saint Paul. The Minister submits that the analysis of risk in the country of residence must be carried out as part of the analysis of the claimant’s status in their country of residence and not afterwards (Respondent’s Further Memorandum at para 67), that is, it must be done before determining that the claimant is referred to in Article 1E of the Convention, as the RAD did in this case.

[54] This Court has dealt with similar cases in the past and, without stating the basis, has suggested that the analysis of fear in respect of the country of permanent residence should be done before declaring that a person is referred to in Article 1E (*Omar v Canada (Citizenship and Immigration)*, 2017 FC 458 at paras 24–25; *Omorogie v Canada (Citizenship and Immigration)*, 2015 FC 1255 at para 61). Justice Pamel recently analyzed this issue in *Celestin* and concluded, essentially, that this analysis could not be carried out. As detailed below, I agree with my colleague's statements and position.

[55] As stated above, the Minister submits that the panel can and should analyze the fear that Mr. Saint Paul alleges in respect of Brazil, without referring to section 97 of the Act and within its own framework, before determining that he is a person referred to in Article 1E of the Convention. The Minister submits that one must read into the text of Article 1E of the Convention an analysis that is not provided for, in order to enable the panel to analyze the claimant's fear in respect of his country of residence, which is suggested in an interpretation note from the UNHCR. If the fear is well founded, then the claimant is not referred to in Article 1E of the Convention and is therefore not excluded under section 98.

[56] I cannot agree with the Minister's position. I am of the opinion that the Act does not permit the panel to consider the fear alleged by Mr. Saint Paul, a citizen of Haiti, in respect of Brazil, once it has been established that he is a permanent resident and, as such, has the same rights and obligations as citizens of Brazil.

[57] In this regard, I agree with the analysis supported by my colleague Justice Pamel in *Celestin*. As my colleague points out in detail in that decision, everything indicates that Parliament chose to meet its obligations by eliminating, for excluded persons, the 12-month waiting period provided for in paragraph 112(2)(b.1) of the Act, thus giving them the opportunity to use sections 112 and 113 of the Act to apply to the Minister for protection within the prescribed parameters. The text of the Convention and the text of section 98 of the Act are clear and do not include the analysis suggested by the Minister. The test set out by the FCA in *Zeng* does not include it either. Subsection 95(1) of the Act sets out the categories of persons who may claim refugee protection, and the category suggested by the Minister does not appear there. The Minister has not persuaded me that this is a matter of *interpreting* a legislative provision in a way that is consistent with Canada's international obligations and the objectives of the Act. Everything suggests that this amounts to taking Parliament's place and *reading into* the text of the Act a category of refugee protection claimants that is not provided for in the Act. In this case, this belief is exacerbated by the fact that Parliament has, in section 112 of the Act, already provided for a protection regime for persons excluded under section 98 of the Act.

D. *Fear in respect of Haiti*

[58] The RAD, confirming the RPD's decision, upheld the conclusion that permanent residents of Brazil have the same rights as citizens, that Mr. Saint Paul is a person referred to in Article 1E of the Convention and that the risk he alleges in respect of Haiti, his country of citizenship, cannot therefore be considered. Given the plain language of section 98 of the Act, and since Mr. Saint Paul is a person referred to in Article 1E of the Convention, this conclusion is reasonable.

E. *Conclusion*

[59] Contrary to the decision of my colleague Justice Pamel in *Celestin*, I will allow the application for judicial review. The wording of Article 1E of the Convention and sections 95(1), 98 and 112 of the Act, as well as the first test set out by the FCA in *Zeng*, do not make it possible to carry out the suggested analysis in the circumstances. The legislative scheme does not support the panel's reading in of an analysis to examine the fear alleged by Mr. Saint Paul in respect of Brazil once the premises of the *Zeng* test have been established. Moreover, in this case, the RAD considered the said fear *after* determining that Mr. Saint Paul is a person referred to in Article 1E of the Convention, and it carried out this analysis under section 97 of the Act, which the Minister acknowledges to be incorrect.

[60] I conclude that the RAD's decision is unreasonable because its basis is flawed, even though the result may be considered reasonable. I agree with the Minister's position that it is appropriate to certify a question in this case, similar to the one certified by Justice Pamel:

> If the decision maker concludes that the claimant, a citizen of one country, has residence status in another country and that this status confers rights similar to those of citizens of that country (an affirmative answer to the first part of the *Zeng* test), should the decision maker take into account the fear or risk raised by the refugee protection claimant in respect of 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*?

JUDGMENT in IMM-2379-19

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is allowed.

2. The matter is referred back to the RAD for redetermination in light of these reasons.

3. The following question is certified:

   If the decision maker concludes that the claimant, a citizen of one country, has residence status in another country and that this status confers rights similar to those of citizens of that country (an affirmative answer to the first part of the *Zeng* test), should the decision maker take into account the fear or risk raised by the refugee protection claimant in respect of 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*

"Martine St-Louis"
Judge

Certified true translation
This 21st day of May 2020.

Johanna Kratz, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Walid Ayadi	FOR THE APPLICANT
Rigers Alliu Patricia Nobl	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Walid Ayadi Montréal, Quebec	FOR THE APPLICANT
Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT