Federal Court Cour fédérale

Date: 20220929

Docket: IMM-295-22

Citation: 2022 FC 1353

[ENGLISH TRANSLATION]

Ottawa, Ontario, September 29, 2022

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

JAMES ELIZAIRE
YVENA JOSEPH
RYAN JAY OLIVER ELIZAIRE JOSEPH

Respondents

JUDGMENT AND REASONS

[1] The Minister of Citizenship and Immigration (the Minister or the applicant) is seeking judicial review of a decision of the Refugee Protection Division [RPD] under section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act or IRPA].

[2] It is notable in this case that neither the respondents nor their counsel appeared before the Court at the hearing of the application for judicial review. However, they courteously informed the Court, and the Court thanked them.

[3] The respondents were challenging the Minister's application for judicial review and did not believe that there was a basis for judicial review. The Court therefore heard the application for judicial review and advised counsel for the Minister that it would consider the respondents' memorandum regarding leave for judicial review.

I. Facts

[4] The facts of this case are straightforward and undisputed.

[5] The principal respondents are Haitian citizens. The third respondent, Ryan Jay Oliver Elizaire Joseph, is the child of the other two and is a Chilean citizen by birth.

[6] Based on the issue raised by the judicial review, the relevant facts can be summarized as follows:

- The principal respondents are citizens of Haiti. Extortion in Haiti allegedly drove Mr. Elizaire from his country of citizenship to the Dominican Republic in September 2016; he then travelled to Chile, where he stayed from September 2016 to February 2020.

- Ms. Joseph allegedly had “enemies” at the university she attended in Haiti and feared criminals who were pursuing her. Mr. Elizaire was allegedly able to arrange for her to join him in Chile; Ms. Joseph lived in Chile from April 2017 to February 2020.
- In Chile, Mr. Elizaire allegedly created a “money transfer” and food depot business. He stated that he feared criminals who had complained that he was competing with them and smuggling.
- It appears that the respondents left Chile in February 2020 but did not arrive at the Saint-Bernard-de-Lacolle border crossing until May 4, 2020.

[7] The RPD’s reasons state that the respondents claimed refugee protection in Canada from both Chile and Haiti.

II. Decision under review

[8] The Court notes that the RPD’s decision lacks clarity, as the applicant suggests. For example, the panel states that the respondents are not Convention refugees or persons in need of protection “because they are persons described in Article 1E of the *Convention Relating to the Status of Refugees*” (RPD decision at para 15). One would think, on the basis of an understanding of Article 1E, incorporated into Canadian law by section 98 of the Act, that this closes the case.

[9] However, this does not appear to be how the RPD panel understands it. Rather, it appears that this conclusion is meant, without saying so, to apply to Chile only. Indeed, the panel carries out an analysis based on the Federal Court of Appeal’s test in *Canada (Citizenship and*

Immigration) v Zeng, 2010 FCA 118, [2011] 4 FCA 3 [*Zeng*] and concludes that, with respect to Chile, "the claimants [the respondents before this Court] must be excluded under Article 1E of the Convention, even though they lost their permanent residence in Chile because they were outside the country for more than 180 days" (RPD decision at para 40).

[10] The RPD then goes on to analyze allegations regarding the principal respondents' country of origin, Haiti. The RPD concludes that the "claimants are 'persons in need of protection' pursuant to paragraph 97(1)(b) of the IRPA" (RPD decision at para 49).

III. Arguments and analysis

[11] The applicant is not seeking judicial review of the findings regarding Chile. In that regard, the applicant was successful. Rather, the RPD failed to apply Article 1E of the United Nations Convention Relating to the Status of Refugees as required by Canadian law. It was inappropriate for the RPD to consider the conditions in Haiti. As noted above, sections E and F are incorporated into Canadian domestic law by section 98 of the IRPA. I am reproducing section 98 and sections E and F of Article 1 of the United Nations Convention Relating to the Status of Refugees, which are contained in a schedule to the IRPA:

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.
E. This Convention shall not apply to a person who is recognized by the competent	**E.** Cette Convention ne sera pas applicable à une personne considérée par les autorités

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.	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.
F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:	**F.** Les dispositions de cette Convention ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser :
(a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;	a) qu'elles ont commis un crime contre la paix, un crime de guerre ou un crime contre l'humanité, au sens des instruments internationaux élaborés pour prévoir des dispositions relatives à ces crimes;
(b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;	b) Qu'elles ont commis un crime grave de droit commun en dehors du pays d'accueil avant d'y être admises comme réfugiés;
(c) He has been guilty of acts contrary to the purposes and principles of the United Nations.	c) Qu'elles se sont rendues coupables d'agissements contraires aux buts et aux principes des Nations Unies.

[12] As can easily be seen, sections E and F cover completely different situations. Section F excludes anyone who has committed an international crime referred to in paragraph (a), committed a serious crime outside the country of refuge, or been guilty of acts contrary to the purposes and principles of the United Nations. If a person has committed an act described in paragraph (a), (b) or (c) of section F, which is incorporated by reference into Canadian law by section 98 of the Act, the person may not claim refugee status.

[13] The purpose of section F is clear. A person described in one of these sections is excluded from claiming and obtaining protection as a refugee and as a person in need of protection because of past actions (*Zrig v Canada (Minister of Citizenship and Immigration)*, 2003 FCA 178, [2003] 3 FC 761 at para 108, per Decary JA). The applicant sought to pull the rug out from under the respondents by arguing, on the basis of *Xie v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 250, [2005] 1 FCR 304 [*Xie*], that "[o]nce the Board found that the exclusion applied, it had done everything that it was required to do, and there was nothing more it could do, for the appellant" (*Xie* at para 38).

[14] However, with all due respect, I am not persuaded that the remark to which the Minister refers is relevant. In *Xie*, the additional issue was the alleged risk of torture if the applicant were to return to her country of nationality, China. Because Ms. Xie had allegedly committed economic crimes in China, the issue before the RPD was not the application of section E but rather that of paragraph F(b).

[15] In *Xie*, the Federal Court of Appeal noted that it was the Refugee Protection Division that had examined the refugee protection claim. Having concluded that paragraph F(b) applied, the RPD had continued its review of the refugee protection claim and had dealt with the possibility of torture upon return. However, the Federal Court of Appeal stated in *Xie* that the application of the exclusion under section 98 of the Act is not tantamount to a final removal decision. The Federal Court of Appeal stated that issues relating to the risk of torture had to be dealt with in a pre-removal risk assessment application, which was outside the jurisdiction of the RPD: "From the point of view of statutory interpretation, there is no reason to believe that decisions which are

reserved to the Minister should be somehow given to the Refugee Protection Division because there is a risk of torture" (at para 37).

[16] The quoted passage from *Xie* at paragraph 38 therefore refers to a different situation, where paragraph F(b) must be applied and where the issue relates to different jurisdictions dealing with different facets.

[17] I believe that it is better to consider the purpose of section E and determine its scope than to take a shortcut such as stating that "there was nothing more [the RPD] could do" for the respondents, a remark that was made in a different context where a different issue might later be dealt with. That was the reason for the remark, a reason that does not exist here.

[18] The most relevant authority for section E is *Zeng*. The well-known authors J. A. Hathaway and M. Foster explain the origins of section E in *The Law of Refugee Status*, 2nd ed (Cambridge University Press) at 500–509. They summarize the scope of the section E exclusion as follows, at page 509:

> In sum, Art. 1(E) excludes from refugee status all persons who may truly be said to be *de facto* nationals of a safe country in which they have previously taken residence. This intentionally high standard requires not simply the ability to enter the putative state of *de facto* nationality and to be protected against the risk of being persecuted there, but rather the possession of rights, including economic rights, that are broadly analogous to those of citizens.
>
> As such, Art. 1(E) does not validate the exclusion of persons simply because someone may have been recognized elsewhere as a refugee, might benefit from protection elsewhere, or is deemed to have received an offer of some form of admission or status from another country. To the contrary, exclusion under Art. 1(E) is lawful only in the case of persons who have, in fact, already

> *resided* elsewhere and who, whatever their formal status in that country of prior residence, enjoy in practice a subsisting right to enter and remain in that other country permanently and with clear guarantees of rights and obligations that bespeak true assimilation to the nationals of that state.

[19] For the limited purposes of this case, it need only be noted that the Federal Court of Appeal saw in section E the intention to prevent "asylum shopping" (*Zeng* at para 1). In paragraph 1, the Federal Court of Appeal also describes in detail the purpose of the exclusion clause, and therefore its scope:

> Article 1E is an exclusion clause. 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. Asylum shopping refers to circumstances where an individual seeks protection in one country, from alleged persecution, torture, or cruel and unusual punishment in another country (the home country), while entitled to status in a "safe" country (the third country).

[20] Therefore, if the respondents already have protection in one country, they may seek and obtain protection in another country only if they do not already have substantially the same rights and obligations in the country of residence they are leaving in order to claim refugee protection in Canada. In other words, the purpose of section E is to exclude people who do not need protection because they already have it. In *Zeng* at paragraph 28, the Federal Court of Appeal sets out a decision tree for determining whether a person is excluded by the combined operation of section E and section 98:

> [28] Considering all relevant factors to the date of the hearing, does the claimant have <u>status, substantially similar to that of its nationals, in the third country? If the answer is yes, the claimant is excluded</u>. 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.
>
> [Emphasis added.]

[21] However, the RPD concluded in its decision that the respondents had essentially the same rights and obligations as citizens of Chile, where they had permanent residence. It decided that "the claimants must be excluded under Article 1E of the Convention …".

[22] The issue before the Court is a very narrow one. The only issue on judicial review in this case is whether the RPD should have continued its analysis after it had concluded that Article 1E of the Convention applied, in order to consider refugee protection in respect of the respondents' country of nationality, Haiti. Since the respondents are not seeking judicial review of the decision on the application of section E to Chile, the only issue before this Court is the scope of the RPD's decision. Could it, as it did, declare the respondents to be persons in need of protection on the basis of allegations made in relation to Haiti, even though it had concluded that they were excluded (that is, not Convention refugees or persons in need of protection) under section 98 of the Act, pursuant to section E of the Convention?

[23] Before this issue is examined, the standard of review must be determined. The respondents have made no submissions. The applicant submits that the standard of reasonableness applies, even though its argument is that the RPD erred in law by extending its analysis to Haiti.

[24] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653 [*Vavilov*], establishes a presumption that the applicable standard is reasonableness (at paras 23, 58). This standard applies both to questions of law and to questions of mixed fact and law. None of the exceptions set out in *Vavilov* are relevant to the issue in this case. Therefore, the standard of reasonableness applies (see *Canada (Public Safety and Emergency Preparedness) v Gaytan*, 2021 FCA 163 at para 23).

[25] The Minister noted at the hearing that the RPD had failed to explain why it continued its analysis after it had concluded that section E applied, which should have settled the matter pursuant to section 98 of the Act. As a result, it is difficult to have an internally coherent and rational chain of analysis, as *Vavilov* requires. But there is more. A decision is reasonable only if it is justified, transparent and intelligible and if "it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para 99). A major legal constraint here is the Federal Court of Appeal's seminal decision in *Zeng*. According to the test at paragraph 28 of that decision, if the claimant has status substantially similar to that of citizens of the country of permanent residence, Chile, the claimant is excluded from protection under sections 96 and 97 of the Act. This means, as stated in section 98 of the Act, that 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". In short, this conclusion precludes any further consideration. In this case, it can only be in respect of the respondents' country of nationality (*Jean v Canada (Citizenship and Immigration)*, 2019 FC 242 at paras 26–31). This means that the consideration of conditions in Haiti was irrelevant and inappropriate.

[26] In *Vavilov*, the Supreme Court gave clear guidance on the role of legal precedents in terms of legal constraints. In particular, paragraph 112 applies in this case. I reproduce it in full:

> [112] Any precedents on the issue before the administrative decision maker or on a similar issue will act as a constraint on what the decision maker can reasonably decide. An administrative body's decision may be unreasonable on the basis that the body failed to explain or justify a departure from a binding precedent in which the same provision had been interpreted. Where, for example, there is a relevant case in which a court considered a statutory provision, it would be unreasonable for an administrative decision maker to interpret or apply the provision without regard to that precedent. The decision maker would have to be able to explain why a different interpretation is preferable by, for example, explaining why the court's interpretation does not work in the administrative context: M. Biddulph, "Rethinking the Ramifications of Reasonableness Review: *Stare Decisis* and Reasonableness Review on Questions of Law" (2018), 56 *Alta. L.R.* 119, at p. 146. There may be circumstances in which it is quite simply unreasonable for an administrative decision maker to fail to apply or interpret a statutory provision in accordance with a binding precedent. For instance, where an immigration tribunal is required to determine whether an applicant's act would constitute a criminal offence under Canadian law (see, e.g., *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, ss. 35 to 37), it would clearly not be reasonable for the tribunal to adopt an interpretation of a criminal law provision that is inconsistent with how Canadian criminal courts have interpreted it.

[27] Therefore, Zeng and the considerable body of case law that followed are binding precedents that the RPD should have considered and from which the RPD should have explained how it could depart. That was not done. As the majority in *Vavilov* stated, "it would be unreasonable for an administrative decision maker to interpret or apply the provision without regard to that precedent".

[28] More recently, the Federal Court of Appeal stated that the reviewing court's analysis must be focused on the reasons the administrative decision maker gave for declining to follow a

precedent. These reasons are of central importance (*Canada (Attorney General) v National Police Federation*, 2022 FCA 80 at para 54). In this case, the lack of reasons when there are precedents from the Federal Court of Appeal makes the decision unreasonable.

[29] Because the respondents were permanent residents of Chile and the RPD was satisfied that they enjoyed essentially the same rights and obligations as nationals, section E of the United Nations Convention Relating to the Status of Refugees applies. The respondents' allegations of threats in Chile were not accepted. Consequently, the RPD refused the refugee protection claim because "Chile's economic situation cannot be a reason to claim international protection" (RPD decision at para 30). Thus, two conclusions can be drawn. The respondents are permanent residents of Chile, where they enjoyed rights similar to those of nationals, and they cannot be Convention refugees or persons in need of protection in Canada because of the exclusion created through the incorporation of section E into our domestic law. This is clearly a case of asylum shopping, which is what section E is intended to exclude.

[30] As noted, the RPD's determination on Chile is not being challenged before this Court. The other determination made by the RPD, regarding refugee status with respect to Haiti, does not bear the hallmarks of reasonableness because it fails to take into account a major legal constraint, the Federal Court of Appeal decision in *Zeng*, which explicitly states that a person who has status substantially similar to that of nationals in a country where the person has sought refuge cannot validly claim refugee protection in Canada. Asylum shopping is contrary to the objective of section E, which is to prevent persons from claiming status as refugees or persons in need of protection if they already have it elsewhere.

[31] The RPD gave no reason for departing from what is the state of the law on the issue. Moreover, it is difficult to see what reason could be given. It follows that the decision is unreasonable.

IV. Conclusion

[32] The question arises as to what an appropriate remedy would be. The Minister is requesting simply that the matter be referred back to a different member. I would add that if this course of action is followed, the matter as it stands before this Court must be referred back for redetermination in light of the reasons given in this decision.

[33] The alternative is to decline to remit the matter to the RPD because the outcome is evident and inevitable and because remitting the case would therefore serve no purpose. This is mentioned in *Vavilov* at paragraph 142:

> However, while courts should, as a general rule, respect the legislature's intention to entrust the matter to the administrative decision maker, there are limited scenarios in which remitting the matter would stymie the timely and effective resolution of matters in a manner that no legislature could have intended … An intention that the administrative decision maker decide the matter at first instance cannot give rise to an endless merry-go-round of judicial reviews and subsequent reconsiderations. Declining to remit a matter to the decision maker may be appropriate where it becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose … Elements like concern for delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and the efficient use of public resources may also influence the exercise of a court's discretion to remit a matter, just as they may influence the exercise of its discretion to quash a decision that is flawed …

> [Citations omitted.]
>
> [Emphasis added.]

[34] In my opinion, a new RPD panel could only come to one decision: that the claim for refugee protection must be rejected because the respondents are neither Convention refugees nor persons in need of protection. Once it is found that section E applies, the test in *Zeng* leads to the conclusion that the respondents are excluded. Since no judicial review was sought of the RPD's section E determination, the determination is final, and the outcome, evident. The respondents, who are persons described in section E, are not Convention refugees or persons in need of protection because their status in Chile. The efficient use of public resources and the inevitability of the outcome lead to this conclusion.

JUDGMENT in IMM-295-22

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review by the Minister of Citizenship and Immigration is allowed.
2. The respondents' claim for refugee protection is rejected, without the need to refer the matter back to the Refugee Protection Division for redetermination.
3. There is no serious question of general importance that must be certified under section 74 of the IRPA.

"Yvan Roy"
Judge

Certified true translation
Vincent Mar

FEDERAL COURT

SOLICITORS OF RECORD

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