Federal Court  Cour fédérale

Date: 20221221

Docket: IMM-1529-22

Citation: 2022 FC 1780

Ottawa, Ontario, December 21, 2022

PRESENT: The Honourable Madam Justice Rochester

BETWEEN:

EMBAIXADOR FRANCISCO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Embaixador Francisco, is a citizen of Angola, who had permanent resident status in Brazil, before travelling to Canada in August 2018 to claim refugee status. He claims he fears persecution at the hands of his former employer in Angola, who at the time of his employment was a General and Minister of State to the former president of Angola. The

Applicant worked as a commercial director in two different private companies owned by his former boss.

[2] The Applicant seeks judicial review of a decision by the Refugee Appeal Division [RAD], dated January 13, 2022, to dismiss the Applicant's appeal and confirm the decision of the Refugee Protection Division [RPD] to reject his claim for refugee protection, finding that the Applicant is neither a Convention refugee nor a person in need of protection under sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

[3] Both the RPD and the RAD concluded that the Applicant was excluded from protection under Article 1E of the *United Nations Convention Relating to the Status of Refugees*, July 28, 1951, 189 UNTS 137 [Convention] on the basis of his permanent resident status in Brazil. In rendering their decisions, the RPD and the RAD applied the test for Article 1E determinations as set out in *Canada (Citizenship and Immigration) v Zeng*, 2010 FCA 118 [*Zeng*].

[4] The Applicant submits that the RAD erred by failing to properly apply the factors in *Zeng*. In particular, the Applicant alleges that the RAD's decision is unreasonable because: (i) the Applicant has since lost his permanent residence status in Brazil; (ii) Brazil does not offer the same rights and obligations to its permanent residents as it does to its nationals; (iii) the RAD wrongly assumed the General is no longer a threat to the Applicant; (iv) the RAD erred by requiring corroboration and applied the wrong standard of proof; (v) the RAD failed to give due weight to the documentary evidence; (vi) the RAD ought to have granted the Applicant the benefit of the doubt; and (vii) the departure from Brazil was not voluntary.

[5] Having considered the record before the Court, including the parties' written and oral submissions, as well as the applicable law, the Applicant has failed to persuade me that the RAD's decision is unreasonable. For the reasons below, this application for judicial review is dismissed.

II. Standard of Review

[6] It is common ground between the parties that the applicable standard of review in the present case is one of reasonableness as set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. A reasonable decision is one that is justified in relation to the facts and the law that constrain the decision maker (*Vavilov* at para 85). It is the Applicant, the party challenging the decision, who bears the onus of demonstrating that the RAD's decision is unreasonable (*Vavilov* at para 100). For the reviewing court to intervene, the challenging party must satisfy the court that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency", and that such alleged shortcomings or flaws "must be more than merely superficial or peripheral to the merits of the decision" (*Vavilov* at para 100).

[7] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). As such, the approach is one of deference, especially with respect to findings of fact and the weighing of evidence. A reviewing court should not interfere with factual findings, absent exceptional circumstances, and it is not the function of this Court on an application for judicial review to reweigh or reassess the evidence considered by the decision maker (*Vavilov* at para 125). A reasonableness review also is not a "line-by-line treasure hunt for error," the

reviewing court simply must be satisfied that the decision maker's reasons "add up" (*Vavilov* at paras 102, 104).

III. Analysis

[8] It is settled law that a claimant who seeks refugee protection in Canada, but has a status similar to that of nationals of a safe third country must be excluded under Article 1E of the Convention. Effectively, Article 1E of the Convention is an exclusion clause that is designed to prevent "asylum shopping" where a person already enjoys protection in a third country (*Zeng* at para 1). When a refugee claimant already has surrogate protection in a country where the individual enjoys substantially the same rights and obligations as nationals of that country, then the individual is excluded (*Zeng* at para 1).

[9] The Federal Court of Appeal in *Zeng* set out a three-part test to be applied in the context of Article 1E determinations:

> [28] Considering all relevant factors to the date of the hearing, does the claimant have status, substantially similar to that of its nationals, in the third country? If the answer is yes, the claimant is excluded. If the answer is no, the next question is whether the claimant previously had such status and lost it, or had access to such status and failed to acquire it. If the answer is no, the claimant is not excluded under Article 1E. If the answer is yes, the RPD must consider and balance various factors. These include, but are not limited to, the reason for the loss of status (voluntary or involuntary), whether the claimant could return to the third country, the risk the claimant would face in the home country, Canada's international obligations, and any other relevant facts.

[10] As noted above, the Applicant submits that the RAD unreasonably applied the factors that comprise the third part of the test. During the hearing, the Applicant focused on three issues,

namely: (i) the Applicant's departure from Brazil was not voluntary given his history with the General and the fact that the companies operated in Brazil; (ii) the Applicant does not enjoy substantially the same rights and obligations as nationals of Brazil based on his skin colour; and (iii) the RAD failed to provide the Applicant with the benefit of the doubt and was overzealous in requiring evidence, given it did not doubt the credibility of the Applicant, and thus placed a burden of proof beyond a reasonable doubt upon the Applicant.

[11] The Respondent submits that the Applicant is asking this Court to reweigh and reassess the evidence. The Respondent objects to the Applicant raising the issues of (i) whether the Applicant enjoys substantially the same rights and obligations as nationals of Brazil, and (ii) the benefit of the doubt, on the basis that these points were not plead before the RAD.

[12] First, I turn to the issues that are alleged to have not been raised before the RAD. Having considered the Applicant's submissions to the RAD in detail, I agree with the Respondent that the issue of whether the Applicant enjoys substantially the same rights and obligations as nationals of Brazil was not raised. The RAD can hardly be faulted for not considering a submission that was not put to it (*Dakpokpo v Canada (Citizenship and Immigration)*, 2017 FC 580 at para 14; *Enweliku v Canada (Citizenship and Immigration)*, 2022 FC 228 at para 42). Moreover, this Court has consistently held that it is inappropriate to grant judicial review based upon a ground not raised before the RAD (*Tcheuma v Canada (Citizenship and Immigration)*, 2022 FC 885 at para 27; *Kanawati v Canada (Citizenship and Immigration)*, 2020 FC 12 at para 24; *Ogunmodede v Canada (Citizenship and Immigration)*, 2022 FC 94 at paras 23-30). As

such, I will not be considering the issue of whether the Applicant enjoys substantially the same rights and obligations as nationals of Brazil.

[13] As to the Applicant's argument that he ought to have been provided with the benefit of the doubt, I find that this was raised in the Applicant's submissions to the RAD, and as such, I will consider it.

[14] Second, I turn to the issue of whether the RAD erred in finding that the Applicant's departure from Brazil was voluntary because he was at risk there. The argument made by counsel is effectively the same argument raised before the RAD, being that the RPD (and now the RAD) did not question the Applicant's credibility and thus they should have accepted that he was at risk in Brazil. The RAD found that while the Applicant may credibly believe that he is at risk in Brazil because his former boss has influence in Brazil, he provided insufficient evidence of an actual risk. The RAD noted that the Applicant did not receive any threats there, and his wife and three children who live there have not had any problems whatsoever from his former boss. The RAD found there was insufficient evidence to support the Applicant's subjective belief.

[15] The Applicant raises a number of factors that speak to his risk, however, these were argued before and considered by the RAD. I have not been persuaded that there is an error in the RAD's analysis that warrants this Court's intervention. The RAD's finding that the Applicant was not at risk in Brazil and thus his departure was voluntary is supported by the evidence, and its reasons are intelligible and transparent.

[16] Third, I turn to the Applicant's submission that the RAD failed to provide him with the benefit of the doubt and placed a burden of proof beyond a reasonable doubt upon him. The Applicant submits that the RAD was overzealous in seeking proof and erred by requiring corroborative evidence. This issue relates to the RAD's analysis of whether the Applicant had established that he had a forward-looking risk should he return to Angola.

[17] The RAD considered the Applicant's fear that his former boss would seek to kill him for leaving his employment in the two companies in which he worked. The evidence that the Applicant's former boss was searching for him in 2018 was based on information provided to him on the telephone by a friend. This friend also provided an affidavit with a sentence that states that he was present when a search took place for the Applicant due to a misunderstanding regarding the contract between the employer and the employee. The RAD noted the corroborative evidence but considered the evidence, even if accepted as true, was insufficient to establish a serious possibility that the Applicant would be persecuted, killed or seriously harmed by his former boss.

[18] The Applicant relies on *Sahar v Canada (Citizenship and Immigration)*, 2015 FC 1400 at paragraph 22 for the proposition that he ought to have been given the benefit of the doubt with respect to the evidence provided and it was simply not possible to prove every aspect of his case.

[19] The Respondent submits that the benefit of the doubt is not applicable in this respect, as the RAD did not doubt the Applicant's credibility. Rather, there was simply insufficient evidence that the Applicant's former employer would seek to kill him for leaving his employment and/or

based on his knowledge of the companies. The Respondent pleads that the Applicant had experienced first-hand that his boss was indignant and angry when he quit, but it was only after, through a friend, that he found out the boss was furious. This in and of itself does not mean his life was in danger.

[20] Ultimately, having considered the record before the RAD and the decision as a whole, I find that the Applicant's submissions amount to a request for this Court to reweigh the evidence, which is not this Court's role on judicial review (*Vavilov* at para 125). I find no reviewable error in the RAD's analysis as to whether the Applicant had established a serious possibility that he would be at risk if he returned to Angola today. The evidence reasonably supports the RAD's findings, and the RAD's reasons bear the hallmarks of a reasonable decision. Therefore, there is no reason for this Court to intervene.

IV. Conclusion

[21] For the reasons set out above, I am of the view that the Applicant has failed to meet his burden of demonstrating that the RAD's decision is unreasonable (*Vavilov* at para 100). I therefore dismiss this application for judicial review.

[22] No serious question of general importance for certification was proposed by the parties, and I agree that no such question arises.

JUDGMENT in IMM-1529-22

THIS COURT'S JUDGMENT is that:

1. The Applicant's application for judicial review is dismissed; and

2. There is no question for certification.

"Vanessa Rochester"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1529-22
STYLE OF CAUSE:	EMBAIXADOR FRANCISCO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	DECEMBER 13, 2022
JUDGMENT AND REASONS:	ROCHESTER J.
DATED:	DECEMBER 21, 2022

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