Federal Court Cour fédérale

Date: 20250212

Docket: IMM-12992-23

Citation: 2025 FC 277

Ottawa, Ontario, February 12, 2025

PRESENT: The Honourable Madam Justice Ngo

BETWEEN:

EDUARDO KUMUENA JUNIOR
LILIANA MUNJIGA
ANA JULIANA MUILA KUMUENA
SONIA SANDRA MUNJINGA KUMUENA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Eduardo Kumuena Junior [Principal Applicant], and his family members [collectively, the Applicants] seek judicial review of a decision from the Refugee Appeal Division [RAD] of the Immigration and Refugee Board of Canada dated September 19, 2023, rejecting their refugee

claim [Decision]. The RAD confirmed the decision by the Refugee Protection Division [RPD], finding that the Applicants were excluded from protection under the *Immigration and Refugee Protection Ac*t, SC 2001, c 27 [IRPA] pursuant to Article 1E of the *United Nations Convention Relating to the Status of Refugees* [Convention]. The RAD found that they could return to Brazil under the terms of a family reunification process available to parents and siblings of a Brazilian citizen.

[2] For the reasons that follow, this application for judicial review is dismissed. The Applicants have not demonstrated that the Decision is unreasonable.

II. Background and Decision Under Review

[3] The Applicants are all citizens of Angola and no other country, except for the youngest child, who is also a citizen of Brazil. The facts relating to the Applicants leaving Angola and arriving in Brazil on April 29, 2016, are not in dispute and I will not repeat them. They stayed in Brazil for almost three years. During this time, the youngest child was born and was automatically granted Brazilian citizenship. In 2018, the other family members were granted permanent residency. The Principal Applicant claims that he was a victim of persecution and discrimination in Brazil. He alleged receiving death threats from criminals acting at the behest of his employer against whom he had filed a labour relations complaint. On June 23, 2019, the Applicants arrived in Canada and claimed asylum on August 7, 2019.

[4] On January 6, 2023, the RPD found that the Applicants were excluded from refugee protection pursuant to section 98 of the IPRA because they were covered by Article 1E of the

Convention. The RPD also found that the Applicants left Brazil voluntarily and that the Principal Applicant's allegations regarding the threats received, including those related to the labour dispute were not credible. The RAD concluded that the Applicants were not able to prove that they had been persecuted in Brazil and that there was a serious possibility of reoccurrence if they were to return there. Prior to the RPD decision, the Applicants lost their permanent resident status in Brazil because it had been more than two years since they left the country.

[5] On September 19, 2023, the RAD confirmed the RPD's decision. The Applicants argued that they could not return to Brazil because they lost their status and that there is no process to reinstate their permanent residency. In finding that Article 1E of the Convention applied, the RAD found that Brazil's family reunification process is available to the four non-Brazilian Applicants since one of the children is a Brazilian citizen. This process establishes a means by which the Applicants could regain their residency status which would be substantially similar to that of Brazilian nationals. The Applicants challenge the RAD's decision.

III. Issue and Standard of Review

[6] The issue on judicial review is whether the RAD's Decision was unreasonable as it relates to the analysis of the Applicants' exclusion under Article 1E of the Convention applying the reasonableness standard of review (C*anada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 10, 25). To avoid intervention on judicial review, a decision must bear the hallmarks of reasonableness – justification, transparency and intelligibility (*Vavilov* at para 99). A reasonable decision will always depend on the constraints imposed by the legal and factual context of the particular decision under review (*Vavilov* at para

90). A decision may be unreasonable if the decision maker misapprehended the evidence before it (*Vavilov* at paras 125-126). The party challenging the decision bears the onus of demonstrating that the decision is unreasonable (*Vavilov* at para 100).

IV. Analysis

[7] The parties both submit that the framework of the analysis for Article 1E exclusion cases, permitting exclusion in some instances even after a person's status in the former country of residence has been lost is described in *Zeng v Canada (Minister of Citizenship and Immigration)*, 2010 FCA 118 at paragraph 28 [*Zeng*]. The *Zeng* framework established that the claimants must have rights that are similar to nationals in order to be excluded.

[8] The three-pronged *Zeng* test remains the applicable analysis:

A. 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.

B. If the answer is no, the claimant is not excluded under Article 1E.

C. If the answer is yes, the RPD must consider and balance various factors. These include, but are not limited to:

    i. the reason for the loss of status (voluntary or involuntary);

    ii. whether the claimant could return to the third country;

    iii. the risk the claimant would face in the home country;

    iv. Canada's international obligations;

    v. and any other relevant facts.

[9] The burden of proof to establish the exclusion lies on the Minister, but on a basis of serious reasons, which is less than the balance of probabilities. Once a prima facie case of exclusion has been made out by the Minister, the onus shifts to the applicant to establish, on a balance of probabilities, that they are no longer subject to the exclusion (*Mikelaj v Canada (Citizenship and Immigration)*, 2016 FC 902 at paras 20, 26*; Shahpari v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 7678 (FC), 146 FTR 102 at para 6).

[10] The Applicants did not dispute the RAD's findings on the first two parts of the *Zeng* test. However, the Applicants argued that the RAD failed to reasonably apply the third part of the *Zeng* test which erroneously weighed the five factors and misconducted the objective evidence. More specifically, the Applicants submitted that the objective evidence shows that the family reunification process in Brazil is done through the application for a temporary visa. Even though the concept of "permanent visa" does not exist anymore under the new legislation in Brazil, the Applicants argued that obtaining a temporary visa is not equivalent to a permanent visa since it does not provide a similar status to a Brazilian citizen. It is not clear whether they would have access to other rights, including health care and social security. The Applicants argued that at most, the family reunification process might be a new pathway to migrate to Brazil. However, this is not sufficient grounds to exclude them pursuant to Article 1E of the Convention.

[11] The family reunification process is set out in the Brazilian regulations Article 45 of Decree No. 9,199 of 20 November 2017, that provides the following:

> "Art. 45. A temporary visa for family reunification shall be granted to immigrants who

> I. are the spouse or partner [of a Brazilian citizen], without discrimination, in accordance with the Brazilian legal system;
>
> II. are the child of a Brazilian [citizen] or an immigrant granted a residence permit;
>
> III. have a Brazilian child;
>
> IV. have a child who is an immigrant granted a residence permit;
>
> V. are an ancestor up to the second degree of a Brazilian [citizen] or an immigrant granted a residence permit;
>
> VI. are a descendant up to the second degree of a Brazilian [citizen] or an immigrant granted a residence permit;
>
> VII. are the sibling of a Brazilian [citizen] or an immigrant granted a residence permit; or
>
> VIII. have a Brazilian [citizen] under their tutelage, guardianship or custody.
>
> § 1. By means of an order, the Minister of State for Foreign Affairs can determine the need for in-person interviews and for additional documents to prove the family relationship, as necessary. (…)" [emphasis added]

[12] At the hearing, the Applicants agreed that based on the language in the applicable regulations, they would essentially "automatically" obtain status through the family reunification process. However, they reiterated that the status is not permanent because it is for an "indefinite term" and the rights they would be granted under this status is not substantially similar to those of Brazilian nationals. The Applicants also raised a new issue, for the first time on reply, stating that the RPD failed to raise the Article 1E exclusion without first advising them. They withdrew the argument after acknowledging that it was never placed before the RAD, nor was it pleaded in their application for leave and judicial review. As such, I need not address this new issue.

[13] The Respondent argued that the Applicants presented a selective read of the objective evidence as it related to the temporary visas and the family reunification process. The RAD reasonably concluded that the family reunification process, which is available to the Applicants, is a means by which the Applicants could regain residency status in Brazil and eventually citizenship. The National Documentation Package for Brazil updated on July 22, 2022 [NDP], also confirmed that immigrants in Brazil regardless of legal status, have access to health care services, education and social services. The Respondent also states that the RAD's analysis on the Applicant's alleged persecution in Brazil is reasonable. The Applicants did not provide any convincing evidence of the lack of protection nor that the relocation to a viable internal flight alternative would be unreasonable. The Applicants did not establish that they faced a risk of serious harm in Brazil that forced them to flee. In sum, the analysis on the third factor of the *Zeng* test was reasonable.

[14] The Respondent also relied on *Paul v Canada (Citizenship and Immigration),* 2022 FC 54 [*Paul*]. The Court in *Paul* considered facts very similar to the Applicants' case: a family from Angola obtaining refugee status in Brazil, a child subsequently born in Brazil with Brazilian citizenship, the loss of their permanent residence status in Brazil, and the same family reunification process in Brazil under an Article 1E Convention analysis by the RAD.

[15] With respect, in the circumstances of the Applicants' case, I cannot find that the RAD's decision is unreasonable. As the Applicants agreed and as set out in the explicit language in the regulations, status in Brazil seems available to them by virtue of the fact that one of the children possesses Brazilian citizenship. The RAD considered the Brazilian regulations and the objective

evidence in the ND Pa that describes the rights of individuals who obtained status under the family reunification process. The NDP confirmed that the term “permanent visa” for family reunification was replaced with “temporary visa” all while being granted essentially the same status as Brazilian nationals. The evidence further supports that applicants with the temporary visa for foreign parents of a child with Brazilian enjoy rights substantially similar to those of other Brazilian nationals.

[16] The RAD reasonably concluded that the evidence before it established the Applicants’ status in the family reunification process on the grounds that one of the children is a Brazilian citizen. Once it had drawn this conclusion, it was up to the Applicants to refute this, and establish that, in truth and fact, this option was not open to them (*Paul* at paras 18-19) or that the status they would obtain was not substantially similar to those of other Brazilian nationals.

[17] To accept the Applicants’ arguments, the Court would have to reweigh the evidence already considered and assessed by the RAD, which it cannot do on judicial review. It is for the RAD to assess the evidence submitted by the Applicants and to give it the weight it deserves in its review (*Vavilov* at para 125).

[18] Furthermore, I have no facts which would give me any reason to distinguish Justice Gascon’s conclusions in *Paul* given that the Applicants’ youngest family member is a Brazilian citizen, that they could acquire a permanent visa in Brazil and that this status gave them rights substantially similar to those of other Brazilian nationals.

[19] Finally, though the Applicants' focus at the hearing related to the Article 1E exclusion on the family reunification process, I also cannot agree with the Applicants that the RAD erred in its assessment of the Applicants' risk upon returning to Brazil. This conclusion was based on adverse credibility findings by the RAD and the RPD. The arguments that the Applicants advanced are also asking the Court to reweigh and reassess the evidence.

V. Conclusion

[20] The RAD's decision is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and law that constrain the decision maker. As such, the Applicants have not demonstrated that the decision is unreasonable. The application for judicial review is dismissed.

[21] The parties confirm, and I agree, that there is no question of general importance to certify.

JUDGMENT in IMM-12992-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question for certification.

"Phuong T.V. Ngo"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-12992-23
STYLE OF CAUSE:	EDUARDO KUMUENA JUNIOR, ET AL. v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	MONTRÉAL (QUÉBEC)
DATE OF HEARING:	JANUARY 16, 2025
JUDGMENT AND REASONS:	NGO J.
DATED:	FEBRUARY 12, 2025

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