Federal Court  Cour fédérale

Date: 20130503

Docket: IMM-7418-12

Citation: 2013 FC 461

Ottawa, Ontario, May 3, 2013

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

RAMIREZ-OSORIO, ALEXANDER AND SILVA-CAMARGO, PAOLA ANDREA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The Applicants seek judicial review of a decision of the Refugee Protection Division [RPD] of the Immigration and Refugee Board, wherein it was determined that they are not Convention refugees or persons in need of protection under section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The Applicants argue that section 98 of the

IRPA and Article 1E of the Convention Relating to the Status of Refugees, 189 UNTS 150 [Convention] do not apply.

II. Judicial Procedure

[2] This is an application under subsection 72(1) of the *IRPA* for judicial review of the decision of the RPD, dated July 5, 2012.

[3] The Respondent has requested that the Court, in rendering judgment, certify that three serious questions of general importance are involved and that the Court states these questions under paragraph 74(*d*) of the *IRPA*.

III. Background

[4] The principal Applicant, Mr. Alexander Ramirez-Osorio, and his spouse, Ms. Paola Andrea Silva-Camargo, were born in Colombia in 1975 and 1977, respectively.

[5] From June 1997 to January 2001, the principal Applicant was a police officer in Colombia fighting organized crime and terrorism. In late 1997, the Fuerzas Armadas Revolucionarias de Colombia [FARC] threatened him with death for these activities.

[6] After death threats in October 2000, the principal Applicant relocated to the United States. He applied for asylum but his claim failed.

[7] In December 2006, the principal Applicant was arrested attempting to enter Canada.

[8] In February 2007, the principal Applicant was deported to Colombia, where his spouse joined him. They initially resided in Bogota and, after April 2007, in Pereira.

[9] In the spring of 2007, FARC found the principal Applicant when he ran in a municipal election for a Christian political party and renewed its death threats.

[10] The principal Applicant and his spouse relocated to Bogota and, since the death threats persisted, they fled to Chile in December 2007.

[11] The Applicants obtained permanent residence in Chile but fled in August 2010 when a FARC deserter told him FARC had infiltrated Chile.

[12] The principal Applicant claims a fear of persecution and lack of state protection in Chile, which is predominately Catholic, because of his Protestant beliefs.

[13] On August 3, 2010, the Applicants entered Canada.

IV. Decision under Review

[14] The RPD determined that there were serious reasons for considering that the Applicants were recognized by the competent authorities of Chile as having the rights and obligations attached to the possession of Chilean nationality. From this, the RPD inferred that the Applicants were

excluded from refugee protection on the basis of section 98 of the *IRPA* and Article 1E of the Convention.

[15] Citing the Federal Court of Appeal in *Canada (Minister of Citizenship and Immigration v Zeng*, 2010 FCA 118, [2011] 4 FCR 3 [*Zeng* test], the RPD stated that section 1E of the Convention applies if a claimant, considering all relevant factors at the hearing date, has status substantially similar to that of the nationals in a third country in which that claimant has taken up residence. If a claimant previously had, but lost, status or had access to it but failed to acquire it, section 1E will apply depending on a balancing of a non-exhaustive list of factors, including whether the claimant could return to the third country, reasons for the loss of status (voluntary or involuntary), risk in the claimant's home country, Canada's international obligations, and other relevant facts.

[16] The RPD accepted, without contradicting evidence, that the Applicants lost Chilean permanent residence on August 4, 2011, one year after fleeing.

[17] In applying the *Zeng* test, the RPD concluded that the applicable factors weighed in favour of applying section 1E of the Convention.

[18] The RPD considered the alleged FARC presence in Chile an insufficient reason for voluntary loss of the Applicants' permanent residence. The RPD found that notwithstanding an affidavit from an ex-FARC member stating that individuals tied to various actors in the armed conflict in Colombia entered Chile creating insecurity issues for Colombian refugees. On this affidavit, the RPD commented that it did not establish that FARC actually targets individuals in

Chile and that it did indicate that Chile is actively monitoring FARC members who have fled Columbia. The RPD also noted evidence that Chile is actively collaborating with the Colombian government in its search for FARC members, that it closely monitored former FARC members who were not extradited, and that the Chilean president strongly condemned a deputy in the Chilean government who was linked with FARC.

[19] Given the state protection available to the Applicants in Chile and the peaceful and open life they led there, the RPD also considered their fear of FARC's alleged presence in Chile as speculative. The RPD noted that the country condition evidence showed that Chile generally investigated and punished wrongdoers and that the Applicants led a peaceful and relatively public life there.

[20] The RPD found no evidence to support the Applicants' allegation that they would not receive state protection in Chile because they are Protestant.

[21] The RPD also found that that the principal Applicant did not credibly establish that he was at risk in Colombia. The RPD noted that the principal Applicant presented evidence that he worked as a police officer, written testimonies attesting to his risk, and country condition evidence on the FARC. Nonetheless, the RPD found that the principal Applicant's return to Colombia while residing in Chile twice in October 2008 and July 2009 to visit sick family members was inconsistent with subjective fear and did not correspond to that of a person whose life was in danger. The RPD also did not accept that the principal Applicant had established that he was at risk in Colombia since the threats against him never materialized. Since the principal Applicant's spouse's risk was

premised on her relationship to him, the RPD reasoned that she too could not credibly establish that she was at risk in Colombia.

V. Issue

[22] Was the RPD's application of the *Zeng* test reasonable?

VI. Relevant Legislative Provisions

[23] The following legislative provisions of the *IRPA* are relevant:

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	**97.** (1) A qualité de personne à protéger la personne qui se

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

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

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins

medical care.	médicaux ou de santé adéquats.
Person in need of protection	**Personne à protéger**
(2) A person in Canada who is 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.	(2) A également qualité de 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.

[24] The following provisions of the Convention are relevant:

1E. 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.	1E. 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.

VII. Position of the Parties

[25] The Applicants submit that the RPD's analysis of their objective and subjective fear was unreasonable. First, the Applicants argue that a lack of subjective fear is not determinative of an applicant's status as a person in need of protection under section 97 of the *IRPA*. Second, the RPD was unreasonable to infer a lack of subjective fear from temporary re-availment on two occasions to visit sick family members and from the fact that FARC's death threats never materialized. Third, according to the principal Applicant, it was unreasonable to find that he was not at risk because FARC's threats against him in Colombia never materialized.

[26] The Respondent argues that the RPD reasonably found that the principal Applicant and his spouse were not at risk in Chile because: (i) they encountered no personal problems in Chile; (ii) they lived openly in Chile, working in a Protestant church (an occupation requiring frequent contact with the public); (iii) the third party affidavit they submitted did not state that FARC targets individuals in Chile; (iv) the country condition evidence did not show that FARC targets individuals in Chile; and (v) they did not rebut the presumption of state protection in Chile.

[27] According to the Respondent, the application of section 1E of the Convention calls for a risk analysis that is distinct from that under section 96 and 97 of the *IRPA*. In the Respondent's view, the third prong of the *Zeng* test required the RPD to balance the principal Applicant's risk against his voluntary surrender of Chilean status; the RPD reasonably balanced these factors and this Court may not intervene. Equating the risk analysis required under the *Zeng* test would render this balancing process superfluous and would be contrary to the purpose of Article 1E.

[28] Citing *Zaied v Canada (Minister of Citizenship and Immigration)*, 2012 FC 771 and *Farfan v Canada (Minister of Citizenship and Immigration)*, 2011 FC 123, the Respondent argues that a lack of subjective fear is fatal to a claim for refugee protection. It was reasonable to reject the principal Applicant's explanation that FARC's threats could materialize at any time because his re-availment suggests a lack of subjective fear. The RPD could also rely on his lack of subjective fear because the country condition evidence did not show that he was at risk.

[29] According to the Respondent, the RPD also assessed the principal Applicant's objective risk reasonably. In particular, the RPD could reasonably infer an absence of risk from the failure of the

FARC threats to materialize. The Respondent further notes that the Applicant's United States immigration history supplements the RPD's analysis.

[30] Finally, the Respondent argues that the decision was reasonable because the Applicants did not bring evidence to the RPD establishing that they could not reacquire permanent residence status in Chile, if they were to reapply. The Respondent states that there is country condition evidence on the record that permanent residence status in Chile can be eventually regained.

[31] The Respondent proposes three questions for certification (Respondent's Proposed Questions for Certification [Proposed Questions]). It is the Respondent's view that there is a "glaring need" to revisit and refine the *Zeng* test. The proposed questions should be certified under *Kunkel v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 347 because they raise issues of general importance, which transcend the particular context of the case in which they arose and which could be dispositive of an appeal.

[32] The first question addresses the required elements of a risk assessment conducted according to the third prong of the *Zeng* test in applying Article 1E of the Convention:

> In context of the application of Article 1E of the Refugee Convention, when a decision-maker has to consider the risk a refugee protection claimant would face in his or her country of nationality, as prescribed by the third step of the test set out in the decision of the Federal Court of Appeal in *Minister of Citizenship and Immigration v Zeng*, 2010 FCA 118 (at para. 28), is this decision-maker required to conduct an analysis of that claimant's subjective fear and objective risk in his or her country of nationality in accordance with sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, as would be the case in an inclusion analysis? (Proposed Questions at p 2)

[33] According to the Respondent, requiring the RPD to conduct an exhaustive inclusion analysis under section 96 and subsection 97(1) of the *IRPA* would be premature and superfluous in the Article 1E context. From subparagraph 112(2)(*b*.1) and paragraph 113(*c*) of the *IRPA*, the Respondent infers that Parliament intended for the inclusion analysis of a claimant excluded under Article 1E to occur at the Pre-Removal Risk Assessment [PRRA] stage. The Respondent argues that subsection 241(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*] (which permits the Minister to determine the country to which a foreign national should be removed) supports this inference. A PRRA decision-maker is better-equipped than the RPD (which may not determine where a claimant is sent on removal) to conduct an inclusion analysis in the Article 1E context in respect of the country to which the Minister has decided to remove a claimant. The Respondent contends that the *Zeng* test has not settled the extent of the risk assessment the RPD is required to make under Article 1E.

[34] The second question asks if a lack of subjective fear is sufficient to find a negative risk determination under the third prong of the *Zeng* test:

> When a decision-maker assesses the risk the refugee protection claimant would face in his or her country of nationality, as prescribed by the Federal Court of Appeal in *Minister of Citizenship and Immigration v Zeng*, 2010 FCA 118, at paragraph 28, is a finding by this decision-maker that such a claimant has not established having a subjective fear of persecution, risks and threats in his country of nationality sufficient to found a negative risk determination in this context? (Proposed Questions at p 2)

[35] The Respondent submits that a negative determination on subjective fear alone can be decisive in applying Article 1E because the RPD is not required to conduct a full inclusion analysis.

[36] The third question asks if Article 1E requires claimants who lose permanent residence status in a third country to demonstrate that they could not reacquire permanent residence status in that same third country:

> In the context of the application of Article 1E of the Refugee Convention, when the Minister has established *prima facie* evidence that the refugee protection claimant had permanent residency status in a third country when he or she applied for refugee protection in Canada and that this claimant has caused this status to expire by the time of the hearing of his or her refugee protection claim, should Article 1 E of the Convention be applied to that claimant, if he or she fails to demonstrate that there is evidence on the record to show that he or she could not reacquire permanent resident status in that same third country? (Proposed Questions at pp 5 and 6).

[37] Citing *Hassanzadeh v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1494, 244 FTR 154, the Respondent argues that claimants who voluntarily lose their permanent residence status in a third country have the burden of demonstrating why they cannot reapply and obtain a new permanent residence visa.

[38] In his reply, the principal Applicant argues that the Court must consider whether he honestly believed it was necessary to claim refugee protection in Canada and whether Article 1E excludes asylum shoppers at the risk of endangering their lives. He argues that the affidavit from the ex-FARC member establishes that his belief that he was at risk in Chile was not objectively unsubstantiated and that state protection in the largely-Catholic country would not be reasonably forthcoming to him.

[39] The principal Applicant also replies that the risk factor under the third prong of the *Zeng* test is the predominate factor. Whether a loss of status in a third country is voluntary or involuntary is a factor under the *Zeng* test that must be modulated by the risk analysis. The principal Applicant also

contends that the RPD cannot determine that he was not at risk from his lack of subjective fear alone.

VIII. Analysis

[40] Whether the facts give rise to an exclusion under section 98 of the *IRPA* and Article 1E of the Convention is a question of mixed fact and law reviewable on the standard of reasonableness; this applies to the RPD's risk and subjective fear analysis (*Fonnoll v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1461).

[41] Where reasonableness applies, the Court may only intervene if the RPD's reasons are not "justified, transparent or intelligible". To meet the standard, decisions must also fall in the "range of possible, acceptable outcomes ... defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

[42] The leading case on the application of section 98 of the *IRPA* and Article 1E of the Convention is the Federal Court of Appeal's decision in *Zeng*, above, where Justice Carolyn Layden-Stevenson stated:

> [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. [Emphasis added].

> [29] It will be for the RPD to weigh the factors and arrive at a determination as to whether the exclusion will apply in the particular circumstances.

[43] This Court must determine if the RPD could reasonably find that they were not at risk in Colombia because (i) the principal Applicant was not objectively at risk as FARC's death threats never materialized; and (ii) his temporary re-availment to Colombia on two occasions was inconsistent with a subjective fear of persecution.

[44] In these circumstances, it was unreasonable to find that the principal Applicant was not objectively at risk because FARC's death threats never materialized. The RPD is required to conduct an individualized assessment of a claimant's particularized risk (*Belle v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1181 at para 20). An individualized assessment required the RPD to consider the circumstances surrounding FARC's threats; most notably, that the principal Applicant relocated to Bogota, the United States, Bogota again, and finally, Chile, in response to each of FARC's death threats (Certified Tribunal Record at pp 100, 103 and 107).

[45] Quite simply, the RPD's objective risk analysis does not engage with the evidence the principal Applicant presented. Since the RPD did not express a negative credibility finding in "clear and unmistakable terms" (*Hilo v Canada (Minister of Employment and Immigration)*, [1991] FCJ No 228 (QL/Lexis) (FCA) at para 6), this Court presumes it believed that FARC threatened to kill the principal Applicant and he continually relocated in response. Perhaps one could reasonably find that a claimant who never relocated in response to threats that never came to fruition had no objective risk. If, however, the RPD accepted that a claimant repeatedly relocated to prevent threats from materializing, this inference is outside the range of acceptable, possible outcomes.

[46] The RPD could not, in the absence of a negative general credibility finding, reasonably determine that the principal Applicant lacks subjective fear. This Court is bound by the Federal Court of Appeal's decision in *Shanmugarajah v Canada (Minister of Employment and Immigration)*, [1992] FCJ No 583 (QL/Lexis) that "it is almost always foolhardy for a Board in a refugee case, where there is no general issue as to credibility, to make the assertion that the claimants had no subjective element in their fear" [emphasis added] (reference is also made to *Camargo v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1434 and *Rodriguez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1291).

[47] In *Sukhu v Canada (Minister of Citizenship and Immigration)*, 2008 FC 427, Justice Yves de Montigny described with clarity the cognitive dissonance that arises if the RPD accepts testimony on risk but finds that a claimant lacks subjective fear:

> [27] If the Board member wanted to impugn the credibility of the applicants, he had to say so explicitly and to provide an explanation. In the absence of such a finding, it is difficult to understand why the Board member came to the conclusion that the applicants' fears were not subjectively well founded. If he accepts that the female applicant has been twice sexually assaulted, how could she not have a subjective fear to return to the location of her aggressors, in a country where the authorities are unwilling and/or incapable to protect her? ...

[48] If the RPD believed that the principal Applicant was threatened with death by the FARC, it is indeed "difficult to understand" how it could conclude that he was not afraid of them (*Sukhu*, above, at para 27).

[49] The Respondent cites *Zaied* and *Farfan*, above, for the proposition that an absence of subjective fear is fatal to a claim. These are distinguishable because they both involve credibility problems (*Zaied* at para 9; *Farfan* at para 14).

[50] The Respondent is correct that the Court should not interfere with how the RPD balanced the relevant factors. *Zeng*, above, states that "[i]t will be for the RPD to weigh the factors and arrive at a determination as to whether the exclusion will apply in the particular circumstances" (at para 29). The Court, however, does not find the RPD decision unreasonable because of the weight that the RPD assigned to the risk factor. It finds the decision unreasonable because the RPD's analysis of that particular factor falls outside of the range of possible, acceptable outcomes. This does not amount to re-weighing the factors.

[51] The Court declines to certify the questions proposed by the Respondent. The proposed questions do not meet the test in *Kunkel*, above. *Kunkel* holds that a proposed question will only meet the threshold if it is a serious question of general importance that would be dispositive of an appeal and that transcends the particular context in which it arose.

[52] The first question on whether the *Zeng* test requires a full inclusion analysis does not meet the threshold in *Kunkel* because it would not be dispositive of an appeal. The determinative question of this Application is whether the RPD could find that the Applicant lacked subjective fear in the absence of a general negative credibility finding. Answering this question does not require the Court to consider if the risk analysis in the *Zeng* test mandates a full inclusion analysis in accordance with sections 96 and 97 of the *IRPA*. As the Federal Court of Appeal stated in *Zazai v Canada (Minister*

of Citizenship and Immigration), 2004 FCA 89: "[t]he corollary of the fact that a question must be dispositive of the appeal is that it must be a question which has been raised and dealt with in the decision below" (at para 12) [emphasis added]. Since this Court does not find that it was necessary to address the first question to dispose of the Application, it is not to be certified under paragraph 74(*d*).

[53] The second question concerning whether a lack of subjective fear is sufficient to find a negative risk determination under the *Zeng* test is not certifiable because it too is not dispositive. The question at issue in this Application was not whether a lack of subjective fear is sufficient to find a negative risk determination under the *Zeng* test but rather whether the RPD could, in the absence of a negative general credibility finding, reasonably determine that the principal Applicant lacks subjective fear. The Federal Court of Appeal settled this question in *Shanmugarajah*, above.

[54] The third question concerning an applicant's burden under the *Zeng* test to demonstrate why they cannot reapply and obtain a new permanent residence visa is not certifiable. Like the first and second questions, the third question would not be dispositive of an appeal. The question of whether a claimant could return to the third country is one of the non-dispositive factors in third prong of the *Zeng* test that the RPD must weigh.

IX. Conclusion

[55] For all of the above reasons, the Applicant's application for judicial review is granted and the matter is returned for determination anew (*de novo*) before a differently constituted panel.

JUDGMENT

THIS COURT ORDERS that the Applicants' application for judicial review be granted and the matter be returned for determination anew (*de novo*) before a differently constituted panel.

No question of general importation for certification.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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