Federal Court  Cour fédérale

Date: 20150225

Docket: IMM-5088-14

Citation: 2015 FC 241

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, February 25, 2015

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

JULIETA RAMIREZ
IVAN MARTINEZ RAMIREZ
ESTHEFANY PRIMERO RAMIREZ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Preliminary remarks

> [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.
>
> [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.
>
> (*Zeng v Canada (Minister of Citizenship and Immigration)*, 2010 FCA 118 [*Zeng*]).

II. Introduction

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of a decision of the Refugee Protection Division [RPD], according to which the applicants are excluded from refugee protection under Article 1E of the *United Nations Convention Relating to the Status of Refugees*, signed at Geneva on July 28, 1951 [Convention].

III. Facts

[2] Julieta Ramirez [the applicant] and her two children, Ivan and Esthefany, are citizens of Colombia. The applicant's brother and her first husband were killed by members of the Revolutionary Armed Forces of Colombia [FARC] on April 15 and 23, 1997, respectively. Fearing for her life and the lives of her children, the applicant moved to another city, where she met Ivan Martinez Toro [Mr. Toro], her husband.

[3] On September 15, 2005, members of the FARC contacted Mr. Toro by telephone and demanded that he pay ransom. Fearing for their lives, the applicant, her children and Mr. Toro fled Colombia and were granted refugee protection in Costa Rica. However, they continued to receive threats from the FARC in Costa Rica.

[4] On November 14, 2007, the applicants were granted refugee protection in the United States, which led to them being granted permanent resident status in the United States. Mr. Toro lost his refugee status on the ground that he failed to declare to the authorities that he had been convicted of trafficking cocaine in the United States in April 1989, for which he had served a 10-year prison sentence.

[5] On February 8, 2010, the applicants claimed refugee protection in Canada at Montréal-Trudeau airport, while Mr. Toro claimed refugee protection in Canada on February 15, 2010. Mr. Toro declared to the Canada Border Service Agency [CBSA] that he had never been arrested or convicted in the United States. He was denied refugee protection in Canada because the CBSA discovered upon making their verifications that Mr. Toro had been convicted in the United States under the name of Herman Nunez.

[6] The Minister of Public Safety of Canada intervened to request that the applicants be excluded on the basis that they have permanent resident status in the United States, expiring on March 17, October 13 and August 20, 2019, respectively (Tribunal Record, at pp. 436-38).

IV. Decision under review

[7] In a decision dated May 26, 2014, the RPD concluded that the applicants are permanent residents of the United States and that they are subject to exclusion under Article 1E of the Convention.

[8] Relying on the documentary evidence and oral testimony before it, the RPD concluded that the applicants did not credibly establish the loss of their permanent resident status in the United States. The RPD found as follows:

> [TRANSLATION]
>
> [26] It is reasonable to believe that the applicants came to Canada because Ivan Martinez TORO is facing imminent deportation by the American authorities to Colombia and that they did not want to be separated from him.
>
> (RPD Decision, at para 26).

V. Statutory provisions

[9] The following provisions of the IRPA are relevant to this application:

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	*a*) soit se trouve hors de tout

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

(*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.

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) 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

97. (1) A person in need of protection is a person in Canada 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

(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(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,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in

Personne à protéger

97. (1) A qualité de personne à protéger la personne qui se 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) 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) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(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) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles

disregard of accepted international standards, and	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 medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
(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.
Exclusion – Refugee Convention	**Exclusion par application de la Convention sur les réfugiés**
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.

[10] In addition, Article 1E of the Convention states as follows:

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.

VI. Issues

[11] Is the RPD's decision that the applicants are referred to in Article 1E of the Convention reasonable?

VII. Standard of review

[12] Whether the applicants are referred to in Article 1E of the Convention is a question of mixed fact and law that attracts the reasonableness standard of review (*Zeng*, above at para 11; *Ramirez-Osorio v Canada (Minister of Citizenship and Immigration)*, 2013 FC 461; *Fonnoll v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1461 at para 18; *K.K.G. v Canada (Minister of Citizenship and Immigration)*, 2014 FC 202 at para 28 [*K.K.G.*]).

VIII. Analysis

[13] In accordance with the suppletive role of the mechanism for international refugee protection, "[t]he purpose of Article 1E and section 98 of IRPA is to prevent a refugee claim in Canada if the claimant's status in another country enables him/her to make a refugee claim there" (*Mai v Canada (Minister of Citizenship and Immigration)*, 2010 FC 192 at para 1; see also: *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at p 726). As the Federal Court of Appeal stated in *Zeng*, above at para 19, "asylum shopping is incompatible with the surrogate dimension of international refugee protection".

[14] According to the case law, since there is *prima facie* evidence that they have permanent resident status in the United States, the applicants bear the burden of presenting reliable evidence of sufficient probative value to prove that they do not have such status (*K.K.G.*, above at para 3; *Lozada v Canada (Minister of Citizenship and Immigration)*, 2008 FC 397 at para 27; *Therqaj v Canada (Minister of Citizenship and Immigration)*, 2014 FC 209 at para 1).

[15] For the purposes of an analysis under Article 1E of the Convention, the RPD's role is to consider and weigh all the relevant evidence up to the date of the hearing (*Zeng*, above at para 16).

[16] After analyzing the record and the applicant's testimony at the hearing, the RPD found that there was no evidence supporting the claim that the applicants had lost their permanent resident status before arriving in Canada.

[17] For example, at the RPD hearing, the applicant testified that she learned that she and her children had lost their status in a letter sent by the U.S. authorities. However, the applicant was unable to produce the letter or any other evidence that could corroborate that she had received such a letter.

[18] First, the RPD found that the applicant was not credible with regard to the contents of that letter. The applicant testified that the letter did not include any information regarding the available legal remedies for contesting the loss of her permanent resident status. According to the applicant, the letter did not give a hearing date or any information regarding the possibility of

making submissions. When the RPD confronted her about how unlikely this allegation was, the applicant repeated that the letter stated only that the applicants had lost their permanent resident status because Mr. Toro had failed to declare his criminal record to the authorities.

[19] The RPD then asked the applicant about her efforts to contest the loss of her status in the United States. The applicant admitted that she had not considered seeking legal advice and had not done anything in this regard. The RPD concluded that it was reasonable to believe that a person who feared for her life would at least consult a lawyer to contest the loss of her permanent resident status, which the applicant did not do.

[20] Furthermore, at the hearing, when the RPD wanted to examine the letter in question to dispel its doubts about the implausibilities raised, the applicant stated that she had lost the letter and had not taken any steps to obtain a copy of it.

[21] The RPD noted that the evidence in the record shows that applicants have permanent resident status in the United States. First, the CBSA's interview notes, dated February 17, 2010, show that Mr. Toro declared to the CBSA that the applicants held permanent resident status in the United States at that time (Tribunal Record, at pp 466-67). Second, a document issued by the U.S. authorities and dated May 10, 2012, confirms that the applicants were permanent residents in the United States on that date. The document makes no mention of a loss of status regarding the applicants.

[22] In light of the evidence establishing that the applicants have permanent resident status and the lack of any evidence supporting a claim to the contrary, it was entirely open to the RPD to find that the applicants were not credible.

[23] The Court finds that the RPD considered all the evidence, including the oral evidence and the explanations given by the applicant at the hearing, and concluded that the applicants are referred to in Article 1E of the Convention.

[24] In light of the principles set out above and the entire record under review, the Court finds that the RPD's decision falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9; see also: *Zeng*, above at para 36).

IX. Conclusion

[25] The Court's intervention is unwarranted. The application is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be dismissed.

There is no question of general importance to be certified.

"Michel M.J. Shore"

Judge

Certified true translation
Michael Palles

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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