Federal Court | Cour fédérale

Date: 20191218

Docket: IMM-974-19

Citation: 2019 FC 1626

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, December 18, 2019

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

AGAMAN ELISIAS
MARIE YOLANDE RICHÉ
SCHUNIMAN MANCINY ELISIAS

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Background

[1] Agaman Elisias [principal applicant] and his spouse, Yolande Riché [female applicant] are citizens of Haiti. Their minor son, also included in the application, is citizen of Brazil.

Together, they are seeking judicial review of a decision of the Refugee Protection Division [RPD] dated January 21, 2019. In that decision, the RPD determined that the applicants are not refugees or persons in need of protection within the meaning of sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], by reason of the application of Article 1E [Article 1E] of the *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137 at page 156 (entered into force: April 22, 1954) [*Convention*].

[2] In his Basis of Claim Form, le principal applicant claims to have been threatened in 2004 by two (2) Lavalas party supporters and political opponents of his father. In between 1980-1990, his father was a member of the Tontons Macoutes, a militia with a fearsome reputation that was responsible for numerous crimes against humanity. Fearing that he was becoming increasingly known as the son of a Tonton Macoute, the applicant left Haiti on June 8, 2011. He travelled to the Dominican Republic and later to Ecuador, where he remained for about one (1) year. Not knowing the process for claiming asylum in that country, the applicant left for Brazil in July 2012. The female applicant, who had remained in Haiti, joined him in June 2014. A few months later, the applicant's father was beaten and tortured in Haiti. He died in November 2014.

[3] In November 2016, the applicants left Brazil for the United States as a result of political tensions that had arisen from the economic crisis. They entered Canada on August 13, 2017, and filed a claim for refugee protection. The female applicant based her claim on that of her spouse, as did their minor son, who also claimed a risk of living in inhumane and unusual conditions in Brazil as a result of his Haitian origin and the need to remain with his parents, who have no relatives in Brazil.

[4] The Minister of Immigration, Refugees and Citizenship [Minister] intervened before the RPD. He alleges that the name of the applicant and that of the female applicant, as well as her passport number, appear on the list of 43,871 Haitians who were given the opportunity to regularize their status and obtain permanent residence in Brazil under an act of acknowledgement signed by the Minister of Labour and the Minister of Justice in November 2015 [joint ministerial act of 2015]. The Minister added that an edition of the Official Journal of Brazil published in February 2014 indicated that principal applicant had been granted permanent residence on humanitarian grounds. The Minister argued that the applicants should be excluded in application of Article 1E of the Convention by reason of their permanent residence in Brazil.

[5] On January 21, 2019, the RPD rejected the refugee protection claims on the basis that the exclusion under Article 1E of the Convention applied to the applicants. Applying the analytical framework set out by the Federal Court of Appeal in *Canada (Citizenship and Immigration) v Zeng*, 2010 FCA 118 [*Zeng*], the RPD concluded that (1) the applicants had permanent resident status in Brazil, or, at least, had been granted the right to such status; (2) their rights were therefore comparable to those of Brazilian citizens; (3) their alleged fear of persecution in Brazil was not credible and did not amount to persecution; (4) in spite of their loss of status in Brazil prior to the day of the hearing, the applicants had voluntarily left Brazil and had therefore voluntarily lost their permanent residence; (5) the applicants did not testify in a credible manner about their alleged fear of persecution in Haiti; (6) the applicants' behaviour was incompatible with their fear, having remained in the United States for a period of eight (8) months without claiming asylum; and (7) there is nothing to suggest that the application of the exclusion under

Article 1E of the Convention would contravene Canada's international obligations. The RPD further determined that the claim for refugee protection for the applicants' son was unfounded, given that he is a citizen of Brazil and the applicants did not articulate any specific fear, other than not being able to provide for his education in the event something were to happen to them.

[6] The applicants are essentially criticizing the RPD for having treated the claim for refugee protection as if they were permanent residents of Brazil and for having failed to consider the *Chairperson's Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution* [Guideline 4].

II. Analysis

[7] The standard of review applicable to exclusion within the meaning of Article 1E of the Convention is reasonableness, given that it is a question of mixed fact and law (*Majebi v Canada (Citizenship and Immigration)*, 2016 FCA 274 at para 6; *Zeng* at para 11; *Noel v Canada (Citizenship and Immigration)*, 2018 FC 1062 at para 14). This same standard applies to reviewing the RPD's application of the Chairperson's Guidelines (*Abdulkadir v Canada (Citizenship and Immigration)*, 2018 FC 318 at para 21).

[8] When the reasonableness standard applies, the role of the Court is to determine whether the decision falls within the range of "possible, acceptable outcomes which are defensible in respect of the facts and law". When "justification, transparency and intelligibility within the decision-making process" exist, it is not open to the Court to substitute its own preferred

outcome (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59).

[9] The applicants submit that the RPD erred in finding that they had status as permanent residents of Brazil. They argue that the presence of their names on the joint ministerial act of 2015 does not support the conclusion that they had permanent resident status. In addition, at the time of the hearing before the RPD, they had lost this status, having been outside Brazil for more than two (2) years and were therefore unable to return there. According to the applicants, it is not clear whether a refugee claimant can be excluded under Article 1E of the Convention if they have lost their status in the country of permanent residence.

[10] Upon reviewing the record, the Court cannot agree with this argument.

[11] Article 1E of the Convention precludes the conferral of refugee protection if an individual has protection in another country where the individual enjoys substantially the same rights as the citizens of that country. This provision is incorporated into Canadian law through section 98 of the IRPA.

[12] The analytical framework for determining whether a person meets the criteria of Article 1E of the Convention was defined as follows by the Federal Court of Appeal in *Zeng*:

> [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.

[13] The second question in this analytical framework specifically provides for the possibility of a refugee claimant having lost permanent resident status or having failed to take steps to obtain such status when given the opportunity to do so. In such circumstances, it is incumbent on the RPD to proceed with its analysis and examine the other factors that are set out in *Zeng*.

[14] This is what the RPD did here.

[15] The RPD first determined, on a balance of probabilities, that the applicants had obtained permanent resident status when they were living in Brazil, or, at the very least, had been provided with the opportunity to accede to that status. It was also of the view that the applicants were aware of that fact. In making this finding, it relied not only on the presence of the applicant's names on the joint ministerial act of 2015, but also on the presence of a stamp in the passport of the female applicant which indicated [TRANSLATION] "definitive permanence—Brazilian son" and was dated January 2016, the various jobs held by the applicants in Brazil over the years, and their testimony that they were aware of the steps to be taken in order to obtain their permanent resident cards.

[16] The RPD further concluded that the Brazilian constitution confers the same rights on permanent residents as it does on Brazilian citizens and that the applicants' alleged fear should they return to Brazil was not credible.

[17] After acknowledging, however, that the applicants had most likely lost their status at the time of the hearing, having been away from Brazil for more than two (2) years, the RPD then addressed the four (4) factors in *Zeng*.

[18] The RPD began by examining the possibility of the applicants returning to Brazil. It noted that there was a mechanism through which holders of permanent residence who had been away for more than (2) years could regain their status. It further noted that there was an April 2018 ministerial act that allowed for permanent or temporary status to be obtained in the family class based on their Brazilian son. Showing deference and prudence, the RPD concluded that it lacked sufficient evidence to make a final determination on the applicants' right of return to Brazil or the type of status they would be able to obtain if they were to return.

[19] Next, the RPD examined whether or not their loss of status had occurred voluntarily. It noted that, although the applicants had claimed to have left Brazil as a result of the violence experienced by Haitians in that country, the applicants failed to provide any conclusive evidence of this or show that they would face persecution if they were to return to Brazil. The RPD concluded that the applicants had voluntarily left Brazil and that they therefore voluntarily lost their permanent residence there.

[20] With respect to the alleged fear of persecution in Haiti, the RPD determined that the applicants did not testify in a credible manner. It noted that the applicants relied on vague, general and speculative statements and that they were unable to provide examples of concrete threats against them that would enable them to connect their fear to the political activities of the principal applicant's father. Furthermore, it found that it was not credible that the applicant would have waited for several years before leaving Haiti and that the female applicant had left three (3) years after him, when the applicant's brothers apparently left Haiti in 1994 based on a risk to their lives. The RPD was also of the view that the principal applicant speculated about the circumstances surrounding the death of his father and that he embellished his story so as to raise the profile of his fear of returning to Haiti, which further damaged his credibility. Lastly, in the opinion of the RPD, the applicants' behaviour was inconsistent with their alleged fear, given that they had remained in the United States for a period of eight (8) months without claiming asylum.

[21] The RPD ultimately concluded that there was nothing to suggest that the application of the exclusion under Article 1E of the Convention that would contravene Canada's international obligations. It found this conclusion to be all the more fair given that it had determined that the applicants would not be at risk if they were to return to either to Haiti or Brazil.

[22] Having reviewed the record, the Court finds that the RPD's decision was reasonable and supported by sufficient reasons. It is consistent with the analytical framework set out in *Zeng* and is supported by the evidence in the record. It was open to the RPD to find that the applicant were excluded under Article 1E of the Convention.

[23] The applicants further argued that the RPD failed to [TRANSLATION] "properly consider" Guideline 4. In that regard, they asserted that since they no longer had any permanent status in Brazil, they would be forced to return to Haiti. They submitted that the RPD ought to have examined whether the female applicant would have some protection in Haiti, given that she had been targeted by Lavalas supporters as the spouse of the applicant. They criticized the RPD for failing to ask the female applicant any question about this and for having made no mention of Guideline 4 in its reasons.

[24] The Court finds this argument to be without merit.

[25] The female applicant never claimed a fear of gender-based persecution and there is no evidence of such persecution or of any specific difficulties related to her gender. Guideline 4 does not apply to every situation in which a woman seeks protection. The gender of the female applicant must play a role in her fear of persecution. In this case, the fear of persecution is solely based on her association with the applicant's father in his past political activities. It was not a question of gender-based persecution or discrimination. Moreover, the Court did not detect any insensitivity towards the female applicant.

[26] In this case, it is important to remind the applicants of the Supreme Court of Canada's guidance to the effect that a judicial review is not a line-by-line treasure hunt for error. On the contrary, the decision must be viewed as a whole, in the context of the record (*Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34 at para 54; *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65 at para 3;

Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board), 2011 SCC 62 at para 14).

[27] In any event, even if one were able to argue that the RPD erred in its application of the analytical framework set out in *Zeng*, the Court is of the view that such an error would not be determinative, given that the RPD nonetheless examined the applicants' alleged fears with regard to Brazil and Haiti. In the two (2) cases, it found these not to be credible. The applicants have not demonstrated that those findings were unreasonable.

[28] The application for judicial review is dismissed. No question of general importance was submitted for certification and the Court is of the view that this case does not raise any.

JUDGMENT in IMM-974-19

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed;

2. No question of general importance is certified.

"Sylvie E. Roussel"
Judge

Certified true translation
This 24th day of January 2020.

Vincent Mar, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-974-19
STYLE OF CAUSE:	AGAMAN ELISIAS ET AL V MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JULY 10, 2019
JUDGMENT AND REASONS:	ROUSSEL J.
DATED:	DECEMBER 18, 2019

APPEARANCES:

Jean Auberto Juste	FOR THE APPLICANTS
Charles Maher	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Jean Auberto Juste Barrister and Solicitor Ottawa, Ontario	FOR THE APPLICANTS
Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT