Federal Court Cour fédérale

Date: 20200127

Docket: IMM-623-19

Citation: 2020 FC 136

[ENGLISH TRANSLATION]

Ottawa, Ontario, January 27, 2020

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

ISAAC JEAN-PIERRE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] In this case, the applicant submits that the Refugee Appeal Division [RAD] committed a reviewable error in finding that the applicant is a person referred to in Article 1E of the United Nations *Convention Relating to the Status of Refugees*, July 28, 1951, 189 UNTS 137 [Convention], because he did not actually have permanent resident status or the rights and

obligations flowing from that status. In other words, the applicant is of the view that the RAD should have answered in the negative to the first part of the test established by the Federal Court of Appeal in *Canada (Citizenship and Immigration) v Zeng*, 2010 FCA 118 at paragraph 28 [*Zeng*]: “does the claimant have status, substantially similar to that of its nationals, in the third country?”

[2] The applicant is seeking judicial review of the RAD’s decision that he is a person referred to in Article 1E of the Convention and that he is excluded from protection by operation of section 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[3] As I will explain, the RAD’s analysis was reasonable and consistent with this Court’s case law regarding the status granted to Haitian immigrants living in Brazil. The application for judicial review is dismissed.

II. Facts

[4] The applicant is a Haitian citizen, who, on March 6, 2013, left his country of citizenship after an incident. That day, the applicant was threatened by heavily armed individuals who ordered him to give up his job as a mason for another person. He complied with their demand, but they continued to harass him. On April 7, 2013, he left for Brazil with his wife and two children.

[5] The applicant then left Brazil on April 1, 2016. In July 2016, he arrived in the United States and remained there until he crossed the Canadian border in August 2017.

[6] On August 2, 2017, the applicant claimed refugee protection under section 96 and subsection 97(1) of the IRPA. In his Basis of Claim Form [BOC Form], the applicant raises a risk of serious harm if he were to return to Haiti, his country of citizenship. However, his BOC Form does not mention any fear of persecution with regard to Brazil. On the contrary, his account mentions only that he worked as a mason in Brazil from 2013 to 2015 until he lost his job. His BOC Form also states that he is a [TRANSLATION] "temporary resident" of Brazil.

[7] Before the Refugee Protection Division [RPD], the Minister of Immigration, Refugees and Citizenship intervened to argue that the applicant must be excluded from Canadian protection on account of his permanent resident status in Brazil. The Minister's position is based on three factors. First, the applicant's name and passport number appear on the list of 43,781 Haitian nationals who have been granted permanent resident status in Brazil by ministerial order. Second, the applicant's passport contains a stamp (dated December 21, 2015) indicating that he is registered as a permanent resident with the Brazilian authorities. Third, the documentary evidence shows that permanent residents of Brazil have the same rights and obligations as Brazilian citizens.

[8] During the RPD hearing, the applicant stated that he feared returning to his country of residence. According to the applicant, he was a victim of discrimination and threats. He alleged that a friend had been killed by thieves and that he had been robbed by criminals. Following these two events, he began to fear for his life. He no longer feels safe in Brazil, despite the fact that he admits to having obtained permanent resident status and having worked as a mason for two years.

[9] The claim was rejected by the RPD because the applicant was excluded from the protection of the IRPA by operation of section 98. Having read the documentary evidence and heard the applicant's testimony, the RPD concluded that the applicant had the right to return to, work in, study in and have access to social services in Brazil. The RPD also concluded that there was no serious possibility that the applicant would be persecuted because of his race or nationality within the meaning of subsection 97(1) of the IRPA if he were to return to Brazil. On this point, the RPD held that the failure to report any fear whatsoever relating to Brazil greatly undermined the applicant's credibility. This decision was appealed before the RAD.

III. RAD decision

[10] On appeal before the RAD, the applicant essentially challenged the RPD's conclusions. The applicant submitted that the documentary evidence showed that black people are subjected to discrimination and violence in Brazil. The Certified Tribunal Record does indeed contain several newspaper articles and reports documenting incidents of violence and discrimination directed at Haitians in Brazil. He criticized the RPD for not having taken into account this evidence in assessing the risk he would face if he were to return to Brazil.

[11] The RAD confirmed the RPD's decision. The RAD mainly focused on the risk of persecution if the applicant were to return to Brazil. The RAD considered two incidents that were not mentioned in his BOC Form. The first involved his Haitian friend who was killed during a robbery. The second involved an armed robbery of which the applicant himself was a victim and that allegedly made him fear for his life. The RPD found that neither incident demonstrated that he would be personally targeted or that his life would be in danger if he were to return to Brazil.

[12] The RAD also rejected the argument that the economic and social situation would be a risk if the applicant were to return to Brazil. Like the RPD, the RAD reviewed several documents from the National Documentation Package and the documents filed by the applicant. The RAD upheld the RPD's finding that the applicant did not face a personalized risk of persecution because of his status. The RAD noted that "although the appellant is a young black man, this fact itself does not mean that he would face a serious risk of persecution".

[13] As before the RPD, the applicant did not challenge his permanent resident status before the RAD, which therefore concluded that he did indeed enjoy permanent resident status in Brazil with all its associated rights and obligations.

IV. Preliminary issue

[14] At the beginning of the hearing, counsel for the applicant produced the French translation of a piece of identification of the applicant's. The respondent noted that this document had no seal but did not challenge its introduction into the record, which I therefore accepted.

V. Issues

[15] The applicant is not challenging the RAD's decision regarding the filing of an additional document.

[16] Before this Court, the applicant is essentially challenging the RAD's conclusions. Three issues are raised in this case:

1) Did the RAD commit a reviewable error in finding that the applicant had permanent resident status in Brazil?

2) Did the RAD commit a reviewable error in its analysis of the risks that the applicant would face if he were to return to his country of residence, Brazil?

3) Did the RAD commit a reviewable error in its analysis of the risks that the applicant would face if he were to return to his country of nationality, Haiti?

VI. Standard of review

[17] The parties agree that the standard of reasonableness is applicable in this case. I therefore see no reason to rebut the presumption that the applicable standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 23).

VII. Discussion

[18] In this case, the RAD confirmed the RPD's decision to the effect that the applicant was referred to in Article 1E of the Convention, given his permanent resident status in Brazil. The RAD also found that the applicant was not a refugee, given that his life would not be in danger in Brazil.

[19] Before this Court, the applicant is challenging both of these conclusions by the RAD.

1) Did the RAD commit a reviewable error in finding that the applicant had permanent resident status in Brazil?

[20] The applicant alleges that the RAD misunderstood the nature of his status in Brazil. According to him, the "permanent resident" status that he was granted by Brazil is misnamed to the extent that this status is temporary and subject to conditions for renewal (such as a

confirmation of eligibility). In other words, given the conditional nature of this permanent residence, the applicant does not have all the rights and obligations flowing from nationality in that country. The applicant argues that there is a distinction between a true permanent residence card and the piece of identification held by the applicant, an identity card for foreign nationals. I note, however, that this argument was not raised before the RAD. The applicant did not file any evidence regarding the renewal conditions of his residence.

[21] However, the applicant had already admitted to having permanent resident status in Brazil at his hearing before the RPD, which is the relevant time to assess exclusion under Article 1E (*Majebi v Canada (Citizenship and Immigration)*, 2016 FCA 274 at para 7; *Zeng* at paras 16, 28).

[22] At the beginning of the hearing, counsel for the applicant confirmed that the applicant had permanent resident status in Brazil at the time of the hearing before the RPD. This is consistent with the applicant's testimony. At the time of hearing before the RPD, the applicant held an identity card for foreign nationals declaring that he was a permanent resident of Brazil. According to the facts on the record, his permanent resident status has now expired because more than two years have passed since he left Brazil. His residence was to expire in April 2018, two months after the hearing before the RPD and the date of the RPD's decision, but more than nine months before the date of the RAD's decision (January 4, 2019).

[23] I can therefore conclude that it was reasonable to conclude that the applicant was a permanent resident of Brazil at the time of the hearing before the RPD (*Tresalus v Canada*

(Citizenship and Immigration), 2019 FC 173 at para 6 [*Tresalus*]). Although it was possible for him to lose that status after the RPD's decision was issued, the reviewing court must nevertheless assess the facts in light of the time relevant to the analysis, namely, the time of the hearing before the RPD.

[24] In any case, the time relevant to the analysis is not determinative in the case, as the law is clear on this point: the fact that the applicant allowed his permanent resident status in a foreign country to lapse after making a claim for refugee protection does not exclude the application of Article 1E (*Su v Canada (Citizenship and Immigration)*, 2019 FC 1052 at para 22; *Canada (Minister of Citizenship and Immigration) v Choovak*, 2002 FCT 573 at paras 15–17, 40 [*Choovak*]; *Shahpari v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 7678 (FC) at paras 9–11; *Wassiq v Canada (Minister of Citizenship and Immigration)* (1996), 33 Imm LR (2d) 238 at para 10; *Desir v Canada (Citizenship and Immigration)*, 2019 FC 1164 at paras 15–16; *Ramirez v Canada (Citizenship and Immigration)*, 2015 FC 241 at paras 19–24). Otherwise, claimants would have an incentive to allow their permanent resident status to lapse in order to seek a better country of asylum (*Choovak* at para 17).

[25] Moreover, this interpretation of Article 1E must be rejected because it is contrary to its objectives of excluding those who do not need protection and preventing "asylum shopping" (*Celestin v Canada (Citizenship and Immigration)*, 2020 FC 97 at paras 42, 91; *Zeng* at para 1; *Fleurant v Canada (Citizenship and Immigration)*, 2019 FC 754 at para 16 [*Fleurant*]; *Mai v Canada (Citizenship and Immigration)*, 2010 FC 192 at para 1).

2) Did the RAD commit a reviewable error in its analysis of the risks that the applicant would face if he were to return to his country of residence, Brazil?

[26] The applicant submits that he does not have all the same rights and obligations as Brazilian citizens.

a) The constitutional rights of immigrants in Brazil

[27] First, the applicant alleges that the constitutional rights of immigrants are more limited than those of Brazilian citizens. For example, article 6 of the Brazilian constitution guarantees immigrants the same rights as Brazilian citizens with respect to health and education, but does not grant them other constitutional rights.

[28] However, this Court has repeatedly rejected this argument and upheld the RAD's analysis with respect to the sufficiency of the rights and obligations granted to permanent residents in Brazil (*Noel v Canada (Citizenship and Immigration)*, 2018 FC 1062 at paras 7, 16–21; *Tresalus* at paras 4–5; *Celestin* at paras 46–49).

b) The effect of discrimination against Afro-Brazilians on the exercise of their rights

[29] As a second argument, the applicant submits that the living conditions of Afro-Brazilians and Haitians in Brazil amount to persecution. According to the applicant, the RAD underestimated this risk of persecution in Brazil. More specifically, the RAD ignored the fact that the applicant has been a victim of violence and the precarious socio-economic situation in Brazil. Moreover, the RAD misinterpreted documentary evidence stating that the Brazilian

government has taken measures to fight structural discrimination in Brazilian society. At the hearing, the applicant argued that racial discrimination in Brazil constitutes persecution because it affects every aspect of life (e.g., education, health, relations with government authorities).

[30] It should be noted that the parties are in complete agreement that the RAD analyzed the applicant's fear of persecution with respect to his country of residence and indicated the legal basis for its analysis. However, the parties' arguments concern the effects of discrimination on the exercise of certain rights and obligations flowing from nationality, such as the rights to work, to study and to have access to social services (*Shamlou v Canada (Minister of Citizenship and Immigration)* (1995), 103 FTR 241 at para 36; *Choovak* at paras 31–34).

[31] As the respondent has pointed out, the applicant is relying on evidence that does not directly relate to his personal circumstances. For example, the applicant points to documentary evidence reporting that Afro-Brazilians are often victims of crime. The applicant also raises two criminal acts involving his friend. None of these incidents involved the applicant.

[32] The RAD held that none of these incidents established that he would be personally targeted or that his life would be in danger if he were to return to Brazil. Given the lack of nexus between the general country conditions in Brazil and his personal risk, the RAD was not persuaded that the applicant would face any danger in returning to Brazil. I find that this decision is reasonable and supported by the evidence (*Vavilov* at para 102).

[33] Contrary to the applicant's arguments, I do not consider this evidence sufficient to establish a fear of persecution or deficiencies in the protection provided by the Brazilian state (*Osazuwa v Canada (Citizenship and Immigration)*, 2016 FC 155 at paras 49–51; *Fleurisca v Canada (Citizenship and Immigration)*, 2019 FC 810 at paras 24–26; *Occean v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 1234 at paras 38–41).

[34] Haitians may be victims of discrimination and high crime rates, but this situation does not amount to persecution (*Fleurant* at paras 17–18; *Shen v Canada (Citizenship and Immigration)*, 2016 FC 99 at paras 11–14; *Zhong v Canada (Citizenship and Immigration)*, 2011 FC 279 at paras 29–31).

[35] In any case, as noted above, I reject the idea that the risk in the country of residence must necessarily be assessed before determining whether the claimant is excluded from Canadian protection under Article 1E of the Convention (*Celestin* at paras 92–103).

3) Did the RAD commit a reviewable error in its analysis of the risks that the applicant would face if he were to return to his country of nationality, Haiti?

[36] The applicant submits that the RAD failed to conduct an adequate analysis of his fear with respect to a return to his country of nationality. In his view, the RAD has disregarded the trauma he suffered in Haiti and the events that provoked it. This argument was not raised at the hearing before this Court.

[37] I will note, however, that there was no need to assess the applicant's fear with respect to Haiti because he is excluded from Canadian protection under Article 1E on account of his

permanent resident status in Brazil. Such an analysis would be redundant because, given Article 1E, it is confirmed that the applicant has adequate protection in another country (*Augustin v Canada (Citizenship and Immigration)*, 2019 FC 1232 at para 34).

VIII. Conclusion

[38] For these reasons, I find that the RAD's decision was reasonable. The application for judicial review is dismissed. No question is certified for consideration by the Federal Court of Appeal.

JUDGMENT in IMM-623-19

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.

2. No question is certified.

"Peter G. Pamel"
Judge

Certified true translation
This 7th day of February 2020.

Michael Palles, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-623-19
STYLE OF CAUSE:	ISAAC JEAN-PIERRE v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	OCTOBER 15, 2019
JUDGMENT AND REASONS:	PAMEL J.
DATED:	JANUARY 27, 2020

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