Federal Court  Cour fédérale

Date: 20200506

Docket: IMM-1274-19

Citation: 2020 FC 597

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, May 6, 2020

Present: The Honourable Mr. Justice Pentney

BETWEEN:

EBEL FELIZNOR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant, Ebel Feliznor, is seeking the judicial review of the Refugee Appeal Division [RAD] decision of February 6, 2019, dismissing his appeal of the Refugee Protection Division [RPD] decision. The RPD and the RAD concluded that the applicant was excluded from the definition of refugee and person in need of protection pursuant to section 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], and Article 1E of the *United*

Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 UNTS 137 [Convention].

I. Background

[2] The applicant is a citizen of Haiti. He fled Haiti, alleging he feared returning since armed individuals attempted to take his agricultural land and his harvests. In February 2011, the applicant left Haiti for Brazil, where he lived for five and a half years. He obtained permanent resident status in Brazil.

[3] In August 2016, the applicant received a death threat from the spouse of a woman he had kissed. The woman's brother saw it happen and reported everything to her spouse. The applicant stated that he hid at his friends' place before leaving Brazil for the United States, where he arrived on January 5, 2017. On August 17, 2017, the applicant left the United States for Canada, and he claimed refugee status that same day. The applicant alleged a fear with regard to Brazil because of the threats by the spouse and persecution against Haitians and black people.

[4] The RPD dismissed the applicant's claim for refugee protection on the ground that he had permanent resident status in Brazil. This status gave him essentially the same rights as Brazilian nationals, and the applicant did not show a serious possibility of persecution or risk to life, or risk of cruel and unusual punishment pursuant to sections 97 and 98 of the IRPA should he return to Brazil.

[5] The applicant appealed this decision but the RAD confirmed it.

II. Issue and standard of review

[6] The only issue is whether the RAD decision is reasonable. This issue includes the applicant's arguments that the RAD misunderstood his status in Brazil, granted too much importance to certain evidence it determined undermined his credibility and improperly applied the persecution criteria set out in the Convention.

[7] The applicable standard of review for determining whether the facts lead to an exclusion pursuant to Article 1E of the Convention and section 98 of the IRPA is reasonableness (*Canada (Citizenship and Immigration) v Zeng*, 2010 FCA 118 at para 11 [*Zeng*]; *Noel v Canada (Citizenship and Immigration)*, 2018 FC 1062 at paras 14–15).

[8] The recent Supreme Court decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], does not change this conclusion. In the circumstances of the present case, and considering paragraph 144 of that decision, it is not necessary to request submissions from the parties on the standard of review or its application. As in the Supreme Court decision in *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at para 24 [*Canada Post Corp*], in this case, with the application of the *Vavilov* analysis "[n]o unfairness arises from this as the applicable standard of review and the result would have been the same under the Dunsmuir framework".

[9] To be reasonable, a decision must be based on an internally coherent analysis that is justified in light of the relevant factual and legal constraints that bear on it: *Vavilov* at para 101; *Canada Post Corp* at paras 29–33. The party challenging the decision must satisfy the Court that

“any shortcomings or flaws . . . are sufficiently central or significant to render the decision unreasonable” (*Vavilov* at para 100; *Canada Post Corp* at para 33).

III. Analysis

[10] The applicant submits that the RAD erred in its analysis of the exclusion factors pursuant to Article 1E of the Convention and section 98 of the IRPA by not considering the conditional nature of his status. He does not deny that he obtained permanent residence in Brazil but states that it was valid for intervals of eight years, and that Brazilian law indicates that a permanent resident loses their status after a two-year absence from the country. This is why the applicant argued before the RPD and the RAD that his residence was conditional. The RAD did not consider the evidence indicating that a permanent resident must reside in Brazil and carry out the activities prescribed by the terms of his status, and that a permanent resident must have good reasons to leave Brazil. The objective evidence in the National Documentation Package confirms that permanent resident status is conditional.

[11] The applicant adds that *Zeng* states that the panel that determines whether Article 1E of the Convention should apply in a specific case must weigh various factors to make a finding of exclusion. In the present case, the RAD did not weigh these factors.

[12] Moreover, the applicant states that he had good reasons to leave Brazil. He does not have the same rights as Brazilians because of the systematic violations of the human rights of Haitians and black people in Brazil. At the hearing, he stated that Haitians are pursued and killed in Brazil. The objective evidence confirms this fear, in particular the *Report of the Special Rapporteur on minority issues on her mission to Brazil* (February 9, 2016, National

Documentation Package on Brazil), which indicates that, after a migration of a considerable number of Haitians to Brazil, the Haitians were victims of violent attacks carried out for reasons related to race and nationality.

[13] The RAD agreed that the evidence shows that Brazil is a country where the rate of violence is very high and where there are incidents of discrimination and racism. However, by requiring the applicant to show this was the equivalent of a serious possibility of persecution, the RAD imposed an excessive burden of proof. The objective evidence already shows that the Brazilian state is ineffective at protecting its own Afro-Brazilian citizens. It is inconceivable that the Brazilian state would be more effective with regard to Haitians. Moreover, the RAD neglected to note that the applicant states in his forms that he was threatened with death by the husband of the woman he had kissed and that he faced discrimination and racism in Brazil.

[14] On the issue of credibility, the applicant submits that the RAD placed too much emphasis on the minor issues in his evidence, ignoring the fact that he was threatened with death. The RAD affirmed the RPD conclusion that the discrepancies between the applicant's account in his forms and the account in his testimony undermine his credibility. The RAD did not consider his explanations for the minor differences. Moreover, the RAD granted too much importance to the fact the applicant did not apply for refugee protection when he was in the United States.

[15] In light of the accumulation of errors committed by the RAD and considering the applicant's evidence that he fled Brazil after a death threat and because he was persecuted because of his race and origin, the applicant submits that the RAD decision is unreasonable.

[16] I am not convinced. The applicant obtained permanent resident status in Brazil, and the RAD did not err in its assessment of the evidence or the application of the law on this issue. The RAD conclusions are "based on an internally coherent chain of reasoning and [are] justified in light of the relevant legal and factual constraints" as required under the reasonableness standard of review stated in *Vavilov* (*Canada Post Corp*, at para 2).

[17] The applicant does not deny that at the time of the hearing before the RPD he had permanent resident status in Brazil. He submits that this status was conditional and that he did not have the same rights as Brazilian nationals because there was discrimination and racism against Haitian nationals. The RAD correctly dismissed these arguments.

[18] The exclusion set out in Article 1E of the Convention and section 98 of the IRPA must be assessed on the date of the hearing before the RPD (*Majebi v Canada (Citizenship and Immigration)*, 2016 FCA 274 at para 7; *Zeng* at para 28). The RAD applied this standard in the present case. The RAD assessed the applicant's argument that his status was conditional and did not grant him the same rights as Brazilian citizens because of the conditions in which Haitians currently live in Brazil. The RAD did not err in dismissing the applicant's argument; its analysis was well founded on facts and law:

> The fact that a permanent resident has to fulfill obligations, such as live in the country and not commit crimes, does not mean that their status is not permanent. His status was still granted to him for an indeterminate period. The appellant does not need to re-qualify to be able to renew the permanent resident status, and his card will be re-issued automatically.

[19] The RAD also concluded that the RPD did not err in the assessment of the applicant's credibility, and this conclusion is well founded in the evidence. The RAD noted significant

discrepancies between the applicant's account in his forms and the one he presented during his testimony. For example, in his forms, he alleged that Haitians are pursued and killed in Brazil, but he did not express this fear in his testimony. He stated that he experienced racism and discrimination at work but did not mention this in his forms.

[20] As for the death threat, the RAD noted that the applicant described the woman he had kissed as a neighbour in his forms, whereas in his testimony it was a friend of a co-worker. The RAD concluded that there are significant inconsistencies between the facts related in the forms and those in the applicant's testimony, which undermine his credibility. The applicant states that the RAD put too much emphasis on minor issues and neglected to consider the fact he had received a death threat.

[21] I am not convinced. The applicant's refugee protection claim is based on two main points: the non-application of Article 1E of the Convention and section 98 of the IRPA, and the death threat due to his interaction with the woman. The fact he described this in an inconsistent manner is not a minor issue. Moreover, it must be noted that the interpretation of evidence on credibility warrants considerable deference by a reviewing court (*Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319).

[22] As for the documentary evidence, the RAD reviewed the evidence and concluded that the applicant had not rebutted the presumption that the Brazilian state was able to protect its citizens and residents. Even though the RAD was not required to address this issue, considering the conclusion that the applicant did not have refugee status pursuant to Article 1E of the Convention and section 98 of the IRPA (see discussion in *Celestin v Canada (Citizenship and Immigration)*, 2020 FC 97), it was not unreasonable in this case to have conducted the analysis.

[23] The RAD concluded that the evidence shows that Brazil is a country with a very high rate of violence, where there are regular incidents of discrimination and racism. The RAD also noted the contradictions in the applicant's testimony about the problems he had in Brazil. The evidence indicates that the legal system is ineffective against organized criminality and drug traffickers, but this problem did not affect the applicant. The RAD noted that the objective evidence deals with discrimination against Afro-Brazilians and, in particular, people from 15 to 29 years of age. Considering the applicant is a 40-year-old Haitian, the RAD concluded that he does not fit the profile in this report.

[24] To conclude, I agree that the RAD decision is reasonable. The applicant did not show any "flaw . . . sufficiently central or significant to render the decision unreasonable" (*Vavilov* at para 100; *Canada Post Corp* at para 33).

[25] The application for judicial review is dismissed. There is no question of general importance for certification.

JUDGMENT in IMM-1274-19

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.

2. There is no question of general importance to be certified.

"William F. Pentney"
Judge

Certified true translation
This 25th day of May 2020.

Vincent Mar, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1274-19
STYLE OF CAUSE:	EBEL FELIZNOR v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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APPEARANCES:

Mohamed Diaré, Counsel	FOR THE APPLICANT
Isabelle Brochu, Counsel	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Diaré Avocat Lawyer Montréal, Quebec	FOR THE APPLICANT
Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT