Federal Court Cour fédérale

Date: 20240306

Docket: IMM-2062-23

Citation: 2024 FC 374

[ENGLISH TRANSLATION]

Vancouver, British Columbia, March 6, 2024

PRESENT: Mr. Justice Gascon

BETWEEN:

JOAO MBIOMBIO MATONDO
MOTONDO MBIYAVANGA LUZOLO
ILDA JOSE MBIOMBIO
VERONICA LUZOLO MATONDO
SILVIA MBIOMBIO YILA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision dated January 30, 2023 [Decision], by the Refugee Appeal Division [RAD]. In the decision, the RAD determined that the applicants were excluded under Article 1E of the *United Nations Convention Relating to the Status of*

Refugees, July 28, 1951, 189 UNTS 137 [Convention], as referred to in section 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The applicants, citizens of Angola, had lost their status as permanent residents of Brazil, but could nonetheless return to Brazil as permanent residents through family reunification, which would essentially confer the same legal rights as Brazilian nationals on them.

[2] In addition, they had failed to establish a serious possibility of persecution in Brazil on any of the Convention grounds, or that they would be personally subjected to any of the risks enumerated in subsection 97(1) of the IRPA in the event of a return to Brazil. As a result, the applicants were denied Convention refugee status or status as persons in need of protection under sections 96 and 97 of the IRPA.

[3] The applicants raise three arguments to challenge the Decision. First, they submit that the Article 1E exclusion does not apply to them, as they had lost their permanent resident status in Brazil. Secondly, they claim that the Decision was unreasonable, as the RAD failed to take into account all the relevant evidence with regard to the risk they would be subjected to in the event they were to return to Brazil. Lastly, they maintain that the RAD erred in law by failing to assess the risk to which they would be subjected if they were to return to Angola.

[4] For the reasons that follow, the applicants' application for judicial review will be dismissed. Having considered the RAD's reasons and conclusions, the evidence before it and the applicable law, I see no reason to set aside the Decision, as it contains no serious shortcomings that would warrant the Court's intervention.

II. Background

A. *Facts*

[5] The applicants are a family originally from Angola, consisting of the principal applicant, Joao Mbiombio Matondo, his wife, Matondo Mbiyavanga Luzolo, and their three children, Ilda Jose Mbiombio, Veronica Luzolo Matondo and Silvia Mbiombio Yila. Prior to their arrival in Canada, they lived in Brazil as permanent residents. However, the applicants lost their status as permanent residents of Brazil because they left the country more than two years ago. Their third child, Silvia Mbiombio Yila, was born in Brazil while they resided there and is therefore a Brazilian citizen.

[6] The applicants tell us they fear General Bento Dos Santos in Angola. Mr. Matondo allegedly worked in one of General Dos Santos's businesses, and he and other employees were accused of being responsible for thefts and a fire in the business. The applicants left Angola for Brazil on January 31, 2016.

[7] In Brazil, the applicants fear street vendors. While the principal applicant worked as a security officer, he had to seize the goods of these vendors, who threatened him with death.

[8] The applicants therefore left Brazil in May 2019, after Mr. Matondo crossed paths with an associate of General Dos Santos in Brazil, who threatened his life. They arrived in Canada on July 31, 2019, where they claimed refugee protection.

B. *Decision of Refugee Protection Division [RPD]*

[9] In May 2022, the RPD dismissed the applicants' refugee protection claim, on the grounds that they are not referred to in Article 1E of the Convention. Indeed, the four Angolan applicants had obtained permanent residence in Brazil. Referring to the test set out in *Canada (Citizenship and Immigration) v Zeng*, 2010 FCA 118 [*Zeng*], the RPD first examined the National Documentation Package [NDP] for Brazil and determined that the applicants enjoyed a status substantially similar to that of Brazilian nationals.

[10] The RPD then determined that the Angolan applicants had lost their status as permanent residents of Brazil because they had left the country more than two years earlier. However, the RPD found that the applicants had not demonstrated, on a balance of probabilities, that it would not be possible for them to renew that status. In particular, the objective documentary evidence states that Brazil grants permanent residence visas to the parents and siblings of a dependent Brazilian minor, on the basis of the provisions enabling family reunification. Thus, the RPD concluded that the applicants would still be able to obtain the right to permanent residence in Brazil.

[11] The RPD then analyzed another of the criteria listed in *Zeng* and assessed the risk the applicants would face should they return to Brazil. According to the RPD, Mr. Matondo's testimony regarding the alleged death threats in Brazil was not credible. Thus, the applicants had failed to establish, on a balance of probabilities, that their lives would be at risk or that they would be exposed to a risk of cruel and unusual treatment or punishment in Brazil. The RPD also found that young Silvia (a Brazilian citizen) did not qualify as a Convention refugee under section 96 or subsection 97(1) of the IRPA because her parents' testimony lacked credibility.

[12] The RPD did not analyze the risk to which the applicants would be subjected in their country of origin, Angola.

C. *RAD's decision*

[13] In its decision, the RAD also analyzed the Article 1E exclusion n reference to *Zeng*. The RAD noted that the applicants had not disputed certain key findings of the RPD, including the fact that they would be able to obtain permanent residency in Brazil through family reunification. The RAD analyzed the objective documentary evidence in the record and determined that the RPD had not erred on this point. According to the RAD, the onus was on the applicants to demonstrate that they would not be able to obtain permanent residency in Brazil, which they failed to do.

[14] The RAD then determined that the RPD had not erred in its analysis of risk in Brazil. The RAD noted several omissions in and contradictions between Mr. Matondo's testimony and his statements in the Basis of Claim Form, which undermined his credibility. In addition, the RAD determined that the applicants had not established a serious possibility of persecution in Brazil on any of the Convention grounds, or that they would be personally subjected to any of the risks enumerated in subsection 97(1) of the IRPA should they return to Brazil.

[15] In *Ahmad v Canada (Citizenship and Immigration)*, 2021 FC 214 [*Ahmad*], the Court stated that, independently of the right to return to a third country, the risk to which a claimant would be subjected in his or her country of citizenship must also be analyzed before concluding that the Article 1E exclusion applies (*Ahmad* at para 27). Relying on *Ahmad*, the RAD therefore determined that the RPD had erred in failing to analyze the risk the applicants would face in

Angola. However, the RAD did not directly analyze this risk either. Indeed, the RAD explained that, even if it had come to the conclusion that the applicants would be subjected to a risk if they were to return to Angola, Canada's international obligations would not be breached by the application of the Article 1E exclusion of the Convention, given that the applicants would have been able to return to Brazil by obtaining a family reunification visa.

D. *Standard of review*

[16] There is no doubt that the standard of reasonableness applies to the RAD's conclusions regarding the 1E exclusion (*Majebi v Canada (Citizenship and Immigration)*, 2016 FCA 274 at paras 5–6; *Zeng* at paras 11, 34; *Zaman v Canada (Citizenship and Immigration)*, 2022 FC 53 at para 17 [*Zaman*]).

[17] Moreover, the framework for judicial review of the merits of an administrative decision is that established by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] (*Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 7 [*Mason*]). This framework is based on the presumption that the standard of reasonableness is now the applicable standard in all cases.

[18] When the applicable standard of review is reasonableness, the role of a reviewing court is to examine the reasons given by the administrative decision maker and determine whether the decision is based on "an internally coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker" (*Mason* at para 64; *Vavilov* at para 85). To make this determination, the reviewing court asks "whether the decision bears the

hallmarks of reasonableness — justification, transparency and intelligibility” (*Vavilov* at para 99, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 47, 74).

[19] It is not enough for the outcome of a decision to be justifiable. Where reasons for a decision are required, “the decision must also be justified, by way of those reasons, by the decision maker to those to whom the decision applies” [italics in original] (*Vavilov* at para 86). Thus, reasonableness review is concerned with both the outcome of the decision and the reasoning process that led to that outcome (*Vavilov* at para 87). Reasonableness review must include a robust assessment of administrative decisions. However, in analyzing the reasonableness of a decision, the reviewing court must “take a ‘reasons first’ approach that evaluates the administrative decision maker’s justification for its decision”, examine the reasons provided with “respectful attention” and seek to understand the reasoning process followed by the decision maker to arrive at its conclusion (*Mason* at paras 58, 60; *Vavilov* at para 84). The reviewing court must adopt an attitude of restraint, intervening only “where it is truly necessary to do so to safeguard the legality, rationality and fairness of the administrative process” (*Vavilov* at para 13). The standard of reasonableness, I emphasize, finds its starting point in the principle of judicial restraint and deference, and requires reviewing courts to demonstrate respect for the distinct role that Parliament has chosen to assign to administrative decision makers rather than to the courts (*Mason* at para 57; *Vavilov* at paras 13, 46, 75).

[20] The burden is on the party challenging the decision to prove that it is unreasonable. To set aside an administrative decision, the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision to render it unreasonable (*Vavilov* at para 100).

III. Analysis

A. *Legislative and legal framework*

[21] The Article 1E exclusion in the Convention is designed to prevent asylum shopping, reflecting the principle that refugee protection will not be conferred on an individual if they have protection in a country where they enjoy substantially the same rights and obligations as nationals of that country *(Zeng* at para 1; *Ahmad* at para 18).

[22] I should point out that it is settled case law that a refugee protection claimant who arrives in Canada with a status similar to that of nationals of a safe third country must be excluded under Article 1E of the Convention. Indeed, this provision and section 98 of the IRPA are designed to prevent “asylum shopping” where a person already enjoys protection in a third country *(Zeng* at para 1). This is consistent with the principle that the right to refugee protection comes into play only where there is no alternative *(Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at p 726). The refugee protection regime is intended to assist people in need of protection, not those who prefer to seek asylum in one country rather than another. Thus, Article 1E of the Convention prohibits persons who already have status that is substantially similar to that of nationals of the country in which they reside from making a claim elsewhere for refugee status or status as a person in need of protection (*Zaman* at para 23).

[23] In *Zeng*, the Federal Court of Appeal set out a three-step test for determining whether a person is excluded under Article 1E of the Convention. The test is as follows:

> [28] [1] 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, [2] 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, [3] 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. [Numbering added.]

[24] As the Minister pointed out in his submissions, both the RPD and the RAD determined that the Article 1E exclusion applied to the applicants.

B. *Article 1E exclusion applies*

[25] In my opinion, the RAD applied the exclusion correctly. The applicants bore the burden of establishing, on a balance of probabilities, that they could not reacquire their status as permanent residents in Brazil (*Ahmad* at para 32). However, the RAD noted that the applicants did not dispute several of the RPD's findings based on the objective documentary evidence, including the fact (1) that they had obtained permanent resident status in Brazil; (2) that this status was substantially similar to that of Brazilian nationals; (3) that they had lost this status since they had left Brazil more than two years previously; and (4) that they could, however, return to Brazil as permanent residents for the purpose of family reunification, given that their daughter Silvia was born in Brazil.

[26] The RAD's conclusions were eminently reasonable. In reaching them, the RAD consulted Brazil's NDP and noted that Brazilian law enables parents and siblings of Brazilian children to obtain permanent residency. Relying on the objective documentary evidence, the RAD explained intelligibly that the requirements associated with the family reunification visa

application were merely administrative formalities, and determined that the applicants had not discharged their burden of demonstrating that they could not return to Brazil. The fact that they had lost their status as permanent residents of Brazil does not prevent the application of the Article 1E exclusion of the Convention. Indeed, the question is whether the claimant previously had such status and lost it, or had access to such status and failed to acquire it (*Zeng* at para 28; *Ahmad* at para 34). The RAD applied the correct test, and its assessment of the facts against that test was entirely reasonable.

[27] The applicants have raised no arguments that undermine the RAD's conclusion.

C. *Analysis of risk in Brazil*

[28] The applicants' submissions on this point were not very detailed.

[29] The RAD dealt with this argument in paragraphs 26–27 of the Decision. In particular, it noted that the threats from street vendors referred to by the principal applicant, Mr. Matondo, did not even feature in his account supporting his claim for refugee protection, even though this event triggered the applicants' claim. The RAD was not satisfied with the principal applicant's explanation that he had forgotten about the death threats, given that this was one of the main reasons that led the family to leave Brazil.

[30] In addition, the RAD explained that the applicants had not demonstrated the existence of new threats from these street vendors or a continuing risk of persecution at the hands of their agents of persecution in Brazil after almost three years since their departure.

[31] Similarly, Mr. Matondo's testimony concerning his alleged chance meeting with an associate of General Dos Santos was vague and evasive, with Mr. Matondo being unable to provide the name of this person and the day of the incident, or to clarify whether threats had been made against him at the time. In addition, the RAD noted that Mr. Matondo testified that he had been threatened by this person, but that this important information was not included in his Basis of Claim Form, which merely stated that the person had "exclaimed" when he saw the applicant. This contradiction was not explained to the satisfaction of the RAD. In sum, nothing in the evidence on the record suggested that the applicants' departure from Brazil was involuntary.

[32] Thus, it is clear that the RAD's conclusion on the absence of risk in Brazil has all the hallmarks of a reasonable determination, given the lack of evidence on the record. In a judicial review such as this, it is not the Court's role to reweigh the evidence before the RAD (*Sharma v Canada (Attorney General)*, 2018 FCA 48 at para 13). Moreover, the RAD's credibility findings are owed deference, and the Court can neither substitute its own view of a preferable outcome, nor can it reweigh the evidence if the conclusions were transparent, justifiable and intelligible (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59; *Lawani v Canada (Citizenship and Immigration)*, 2018 FC 924 at para 16). It is sufficient that the reasons "allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16). That is the case here.

D. *Analysis of risk in Angola*

[33] As a third argument, the applicants criticize the RAD for failing to analyze their risk in Angola.

[34] I do not share the applicants' reading of the Decision in this regard. As is clearly mentioned in the Decision, the RAD assumed that there was a risk in Angola, and even assuming the existence of that risk, determined that the Article 1E exclusion still applied given the applicants' right to return to Brazil. I find nothing unreasonable in that analysis.

[35] Canada's international obligations are the basis for both the RPD's and the RAD's duty to consider various factors, including the risk of persecution in a refugee claimant's country of origin, before concluding that the Article 1E exclusion applies (*Zeng* at para 21):

> [21] However, in view of the propositions that require the provision of protection to those in need as well as adherence to Canada's international law obligations, the Minister concedes that, in limited circumstances, when Article 1E is applied to those asylum shoppers who cannot return to the third country, the potential for removal from Canada to the home country without the benefit of a risk assessment exists. If this were to occur, it opens the door to the possibility of Canada indirectly running afoul of its international obligations.

[36] However, an important objective of the 1E exclusion is to prevent asylum shopping (*Zeng* at para 1). The RAD must therefore strike a balance between the criteria set out by the Federal Court of Appeal in *Zeng*:

> [43] In making a determination under the third *Zeng* step, the RPD must consider and balance the elements identified by the Court of Appeal. One aspect of that determination requires the balancing of the certainty, complexity and discretionary nature of any process in

> place to reacquire permanent residence against the risk a claimant alleges they would face in their home country. In this way, the RPD satisfies the principles identified in *Zeng*, including the prevention of asylum shopping, while ensuring a reasonable assessment of the claimant's risk allegations.
>
> *Ahmad* at para 43.

[37] In the Decision, the RAD expressly mentioned Canada's international obligations and determined that the application of Section E of Article 1 of the Convention in this case did not contravene those obligations. This distinguishes the present matter from Mr. Ahmad's case, in which the RAD had declared that "no consideration has to be given to Canada's international obligations" (*Ahmad* at para 39). Like the applicants, Mr. Ahmad had lost his permanent resident status, in Spain, having been absent from the country for more than a year. He also had the possibility of reacquiring his status by making an application. However, the acquisition of his status and his return to Spain were not sufficiently certain, unlike the applicants' circumstances in this case.

[38] Like the RPD, the RAD determined that the family reunification visa application requirements were merely administrative formalities. The applicants did not dispute this conclusion of the RPD before the RAD or that of the RAD in this application for judicial review. This, too, contrasts with *Ahmad*, where the RAD conceded that it was unclear Mr. Ahmad could use the simplified process to reacquire his permanent resident status, and that the general process was cumbersome with no guarantee of success (*Ahmad* at para 44).

[39] The applicants failed to explain how the RAD erred in not analyzing the risk in Angola and deciding instead to presume that there was a risk. The burden was on the applicants

challenging the Decision to show that it is unreasonable (*Vavilov* at para 100). Considering the RAD's written acknowledgement of Canada's international obligations and its detailed analysis concluding that there was no risk should the applicants return to Brazil, and considering the high level of certainty that the applicants would be able to reacquire permanent residence in Brazil, the decision not to analyze the risk in Angola was justified and reasonable. The fear of return to Angola did not change the conclusion that the applicants are excluded from the application of the Convention under Article 1E by virtue of the option available to them in Brazil. All in all, I am satisfied that the RAD did not err and that it struck a reasonable balance between the criteria set out by the Federal Court of Appeal in *Zeng*.

IV. Conclusion

[40] For the foregoing reasons, the applicants' application for judicial review is dismissed. The Decision bears the hallmarks of intelligibility, transparency and justification required under the standard of reasonableness, and there is no reason that would warrant the Court substituting its opinion for that of the RAD.

[41] Neither party proposed a question of general importance for certification, and I agree that none arises.

JUDGMENT in IMM-2062-23

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed, without costs.

2. There is no question of general importance to certify.

"Denis Gascon"
Judge

Certified true translation
Sebastian Desbarats

FEDERAL COURT

SOLICITORS OF RECORD

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