Federal Court  Cour fédérale

Date: 20190211

Docket: IMM-2916-18

Citation: 2019 FC 172

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Montréal, Quebec, February 11, 2019

PRESENT: The Honourable Madam Justice St-Louis

BETWEEN:

GAST MAELO ROMELUS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Gast Maelo Romelus seeks judicial review of the decision dated May 14, 2018, by the Refugee Appeal Division [RAD], upholding the decision of the Refugee Protection Division [RPD] according to which he is a person referred to in section E of Article 1 [Article 1E] of the *United Nations Convention Relating to the Status of Refugees*, July 28, 1951, 189 UNTS 137 [the

Convention] and is not a Convention refugee or a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA].

[2] It is important to note that section 98 of the IRPA provides that "[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". Article 1E of the Convention, on the other hand, states that the Convention "shall not apply to a person who is recognized by the competent authorities of the country in which he is taking residence as having the rights and obligations which are attached to the possession of the nationality of that country". These two provisions do not provide for any exceptions.

[3] In his refugee protection claim, Mr. Romelus cited fears about his country of citizenship, Haiti, and his country of residence, Brazil.

[4] The RAD, in its May 14 decision, first confirmed that Article 1E applied to Mr. Romelus and that he was therefore excluded under section 98 of the Act. However, after finding that Mr. Romelus was excluded, the RAD nevertheless examined the fear that Mr. Romelus raised regarding his country of residence, Brazil, and ultimately found it to be unfounded. But section 98 of the Act expressly provides that a person referred to in Article 1E is not a Convention refugee or a person in need of protection, and the Court therefore considered the power of the RAD to grant one of these statuses once a person has been declared excluded and, consequently, examined the advisability of analyzing the fear regarding the country of residence at this stage of the analysis.

[5] The Court submitted its concerns to the parties, who then had the opportunity to submit additional submissions, which did not, however, allay the concerns of the Court. As such, the application for judicial review will be allowed and the file referred back to the RAD for reconsideration in light of these reasons and to provide the parties and the RAD with the opportunity to provide the necessary explanations.

I. BACKGROUND

[6] Mr. Romelus is a citizen of Haiti, a country he left on November 6, 2011, for the Dominican Republic. On December 28, 2011, Mr. Romelus entered Brazil where he obtained permanent resident status in 2013. In May 2016, he left Brazil for the United States. On August 1, 2017, he entered Canada, and on August 17, 2017, he made a claim for refugee protection.

[7] On August 23, 2017, Mr. Romelus signed a Basis of Claim form. In the narrative attached to the form, Mr. Romelus alleged fear regarding Haiti and fear regarding Brazil. Concerning his fear with respect to Haiti, Mr. Romelus alleged that in 2011 he was the victim of violence by a gang that had been extorting money from him since 2009. Regarding his fear with respect to Brazil, Mr. Romelus alleged that since 2014, Haitians there had been living in unsafe conditions and several had been murdered, that he himself was hit by a car while riding a bicycle, that he could not find work, and that he was the subject of insults.

[8] On November 21, 2017, the representative of the Minister of Immigration, Refugees and Citizenship of Canada [the Minister] filed a notice of intervention on the basis of [TRANSLATION]

"1E exclusion". In that notice, the Minister made the following points, among others: (1) Mr. Romelus stated that he had been a permanent resident of Brazil from December 2011 to May 2016; (2) the rights and obligations of permanent residents in Brazil are substantially similar to those of citizens; (3) foreigners lose their permanent resident status if they are absent for a period of more than two years; (4) Mr. Romelus had left Brazil for less than two years; and (5) Mr. Romelus did not raise any fears regarding Brazil. The Minister therefore submitted that he had established, *prima facie*, that Article 1E of the Convention applied to Mr. Romelus, that he was excluded from the application of the Convention and that he was not a Convention refugee or a person in need of protection.

[9] On November 22, 2017, the RPD dismissed Mr. Romelus' claim for refugee protection because he was inadmissible under Article 1E of the Convention and, pursuant to section 98 of the Act, not a "Convention refugee" or "person in need of protection" within the meaning of sections 96 and 97 of the Act. In its reasons, the RPD first determined that Mr. Romelus was a permanent resident of Brazil and had the same rights and obligations as Brazilian citizens, such that he [TRANSLATION] "is therefore referred to in Article 1E of the Convention" (RPD decision at paras 9-17).

[10] Second, and despite the fact that it confirmed that Mr. Romelus was referred to in Article 1E of the Convention and inadmissible under section 98 of the Act, the RPD analyzed Mr. Romelus' allegation of fear in relation to Brazil. The RPD concluded that this fear was not credible because Mr. Romelus' testimony was vitiated by a significant contradiction and omission (RPD decision at paras 18-30). The RPD therefore concluded that Mr. Romelus had not

discharged his burden of establishing that he was being persecuted in Brazil under section 96 of the Act, or that he was personally subject to section 97 of the Act (RPD decision at para 31).

[11] Mr. Romelus appealed the RPD's decision to the RAD. He then argued (1) that he would lose his permanent residence in Brazil after two years out of the country and that, therefore, as of May 2018, he would no longer be covered by Article 1E; (2) that he had demonstrated that he met the requirements of sections 96 and 97 of the Act, but that the RPD failed to take into account the cruel and unusual punishment he had suffered in Brazil, or the difficult economic situation in Brazil; and (3) that the negative finding on his credibility was unreasonable, since he had provided valid explanations in response to the contradiction and omission identified by the RPD, and since the RPD also had an obligation to refer to the factors supporting his credibility.

II. RAD DECISION

[12] On May 14, 2018, the RAD confirmed the RPD decision and dismissed the appeal by Mr. Romelus. In its decision, the RAD dealt with the factual context, the grounds for appeal and the scope of the appeal and ended with its analysis. The RAD noted in particular that Mr. Romelus did not dispute the RPD's conclusions about his status in Brazil, nor the claims that the rights and obligations attached to the status of a permanent resident of Brazil are essentially the same as those of nationals of that country.

[13] It found that two questions needed to be answered: (1) did the RPD err by finding that the appellant had permanent resident status in Brazil; and (2) did the RPD err in assessing the appellant's prospective risk and in assessing his credibility?

[14] The RAD therefore first examined the status of Mr. Romelus in Brazil. Relying on *Majebi v Canada (Citizenship and Immigration)*, 2016 FCA 274 [*Majebi*], the RAD stated that it had to consider the situation of Mr. Romelus the day the RPD considered it, that is, the day of the hearing. Thus, the RAD concluded that at the date of the RPD hearing, Mr. Romelus had a valid permanent resident status in Brazil allowing him to return. In paragraph 45 of its decision, the RAD confirmed that Mr. Romelus fell under Article 1E of the Convention because he had permanent resident status in Brazil.

[15] Next, despite the fact that Mr. Romelus is a person referred to in Article 1E of the Convention and that section 98 of the Act provides that the person referred to in Article 1E of the Convention cannot be a refugee or a person in need of protection, the RAD nevertheless examined the prospective fear of Mr. Romelus in respect of Brazil to determine whether he was a Convention refugee under section 96 of the Act or a person in need of protection under section 97. It concluded in this regard that Mr. Romelus had not established that the RPD's decision was erroneous, or that, in his case, he would face a serious possibility of persecution on any of the Convention grounds or would likely be subjected to one of the risks set out in section 97 of the Act if he returned to Brazil, his country of residence (RAD decision at para 44).

[16] The RAD did not deal with Mr. Romelus' fear in respect of Haiti.

[17] The application for judicial review concerns the RAD's decision.

III. ISSUES

[18] The parties raised the following issues in their memoranda: (1) the errors of law made by the RAD; (2) the ability of Mr. Romelus to return to Brazil; (3) the difference between a discriminatory act and persecution; (4) the credibility of Mr. Romelus; and (5) the duty of procedural fairness of the RAD.

[19] At the hearing, the Court raised additional concerns related to the intelligibility of the RAD's decision and asked the parties for additional representations.

IV. POSITIONS OF THE PARTIES

A. *Position of Mr. Romelus*

[20] In his memorandum, Mr. Romelus argues that the RAD (1) erred in law; (2) should have taken into account the expiry of his permanent resident status; (3) should have concluded that he was a victim of persecution; (4) misjudged his credibility; and (5) breached procedural fairness.

[21] In relation to the error of law argument, Mr. Romelus pleads that (a) the RAD is required to weigh the evidence on a balance of probabilities (*El Achkar v Canada (Citizenship and Immigration)*, 2013 FC 472 at para 26) and that he had proven his persecution in Haiti [TRANSLATION] "with some likelihood" (applicant's memorandum at para 5); (b) the decision of the RAD is based solely on his ability to return to Brazil and not on the existence of persecution; and (c) the RAD violated the principles of natural justice and procedural fairness by failing to consider facts that prove that Mr. Romelus was a Convention refugee or a person in need of protection.

[22] In relation to the argument concerning his status in Brazil, Mr. Romelus argues that (a) the RAD could not take advantage of the fact that he allowed his permanent resident status to expire pending the decision of the RAD (applicant's memorandum at para 10); (b) the RAD should have used its discretion and found that Mr. Romelus' status would have expired following the proceedings to obtain refugee protection, in accordance with the objective of Article 1E, which is to save lives (*Canada (Minister of Citizenship and Immigration) v Manoharan*, 2005 FC 1122 at para 28); (c) the RAD's decision was tainted by a fundamental error of law, since Mr. Romelus was not questioned about the persecution he suffered in Haiti; and (d) the RAD failed to verify whether Mr. Romelus would still have status in Brazil by the time of its decision.

[23] In relation to the persecution argument, Mr. Romelus argues that the RAD should have (a) analyzed the discriminatory acts that proved the persecution he suffered in Brazil, since discriminatory acts may constitute persecution in certain cases (*Sagharichi v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 796 (CA)); (b) taken into account the persecution he suffered in Haiti; and (c) taken into account the context in which those events occurred and the constancy of the vexatious actions.

[24] In relation to the credibility argument, Mr. Romelus argued that (a) a credibility finding is reviewed on the standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]); (b) the RAD erred in its assessment of the risks in Brazil, failing to take into account the mistreatment suffered by Mr. Romelus; (c) the RAD should not have noted the contradiction in the testimony of Mr. Romelus; (d) the omission identified by the RAD did not allow it to conclude that the event did not occur, since it is a fact that Haitians live in insecurity

in Brazil; and (e) the RAD deliberately sought out contradictions in his testimony, thus defying the principles established by the courts.

[25] In relation to the procedural fairness argument, Mr. Romelus argues that (a) the hearing was too short and he did not have the time to express himself as he wished (*Cardinal v Kent Institutional Director*, [1985] 2 SCR 643); (b) the RAD only mentioned Haiti briefly during the entire hearing; and (c) the RAD must state, during the hearing, the criteria it intends to apply (*Fazail v Canada (Citizenship and Immigration)*, 2016 FC 111).

[26] In response to the Court's question, Mr. Romelus submits that the RAD did not err in its risk assessment with respect to Brazil, since Articles 1E of the Convention and section 98 of the Act must be interpreted in such a way as to respect the spirit of sections 96 and 97 of the Act. Moreover, the tribunal erred in not turning its mind to the alleged risks to the country in issue (*Canada (Minister of Citizenship and Immigration) v Choovak*, 2002 FCJ 767 [*Choovak*]), and judges have always addressed the issue of state protection in the country in issue (*Omar v Canada (Citizenship and Immigration)*, 2017 FC 458 [*Omar*]). Mr. Romelus asserts that [TRANSLATION] "the exclusion cannot apply" where the alleged fear is reasonable and that neither the courts nor the regulations have established a specific order to assess the fear.

B. *Position of the respondent*

[27] The respondent argues that the RAD's decision was reasonable and did not contain any errors of law. The RAD conducted its own examination of the evidence, in accordance with *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93.

[28] In connection with the exclusion under Article 1E, the respondent argues that (1) section 98 of the Act prevents persons referred to in Article 1E of the Convention from having the status of Convention refugee or person in need of protection; (2) both the testimony and the evidence on record unequivocally demonstrate that Mr. Romelus is referred to in Article 1E (*Canada (Citizenship and Immigration) v Zeng*, 2010 FCA 118 at para 11 [Zeng]; *Mikelaj v Canada (Citizenship and Immigration)*, 2016 FC 902 at para 15); (3) in response to the allegation that he was no longer a permanent resident of Brazil, Mr. Romelus did not file any evidence that demonstrated his change of status; and (4) in any event, the RAD cannot re-evaluate the application of the exclusion on the basis of facts that occurred after the RPD hearing (*Majebi* at para 9, *Zeng* at para 28, *Melo Castrillon v Canada (Citizenship and Immigration)*, 2018 FC 470 at para 15 [*Melo Castrillon*]).

[29] In relation to the absence of a fear of persecution, the respondent argues that (1) contrary to what Mr. Romelus alleged, the RAD considered his fear of return; (2) the RAD reasonably concluded that the events recounted by Mr. Romelus do not constitute persecution; and (3) simply disagreeing with the decision does not make it unreasonable (*Koky v Canada (Citizenship and Immigration)*, 2017 FC 1035 at para 11, *Cortes v Canada (Citizenship and Immigration)*, 2015 FC 1325 at para 13).

[30] In relation to the breach of the duty of procedural fairness, the respondent submits that this argument is unfounded, since no hearing had taken place before the RAD. In the event that Mr. Romelus was referring instead to hearings before the RPD, the respondent submits that Mr. Romelus is precluded from raising this argument, since he did not raise it either before the

RPD or the RAD (*Giraldo Cortes v Canada (Citizenship and Immigration)*, 2015 FC 516 at para 32; *Yah Abedalaziz v. Canada (Citizenship and Immigration)*, 2011 FC 1066 at para 39).

[31] In response to the question raised by the Court, the respondent submits that the tribunal must consider the alleged risks in respect of a country in issue and may examine those risks before or after the review of a person's status. The respondent states that the existence of a risk of persecution precludes the application of the exclusion clause (*Kroon v Canada (Minister of Employment and Immigration)*, [1995] FCJ No 11 (QL) at para 10; *Omorogy v Canada (Citizenship and Immigration)*, 2015 FC 1255 at para 61 [*Omorogy*]), that a tribunal that does not consider the alleged risks of the country in issue commits an error (*Choovak* to paras 43-46) and that the tribunal should consider those risks before determining that a claimant is excluded (*Omar* at paras 24-25). The respondent also notes that the risk of persecution in a country in issue may be relevant in considering the status of a claimant (James C Hathaway and Michelle Foster, *The Law of Refugee Status*, 2nd edition, Cambridge, Cambridge University Press, 2014 at pp 503-04, 509).

V. ANALYSIS

[32] The Court will consider only two of the issues raised by this matter, since this review will be sufficient to dispose of the dispute and allow the application for judicial review. First, the Court will consider whether the RAD erred in using the date of the hearing before the RPD to assess whether Mr. Romelus was a permanent resident of Brazil, and second, the Court will examine how the RAD analyzed the fears alleged by Mr. Romelus to determine whether the assessment was intelligible in light of the provisions involved.

[33] Case law on the standard of review to be applied to this judicial review does not appear to be unanimous. The Federal Court of Appeal held in *Zeng* that the test to be applied under Article 1E is a question of law reviewable on a standard of correctness (*Zeng* at para 11). However, it then determined in *Majebi* that a question of the interpretation of Article 1E is subject to the standard of reasonableness (*Majebi* at paras 5-6).

[34] Yet, it does not appear necessary in this case to further elaborate on this issue since, regardless of the applicable standard, the Court is of the view that the application for judicial review must be allowed. Indeed, the decision of the RAD is incorrect and does not fall within the range of possible, acceptable outcomes which are defensible in that can be justified in respect of the facts and law (*Dunsmuir* at para 47).

[35] On the first point, the Court is satisfied that the RAD did not err in using the date of the hearing before the RPD to assess whether Mr. Romelus was a permanent resident of Brazil. This is consistent with the teachings of the Federal Court of Appeal in *Majebi* at paragraph 9.

[36] Furthermore, the Court considers that the analytical process followed by the RAD in relation to the application of Article 1E of the Convention and section 98 of the Act is unintelligible and inconsistent with the language of section 98 of the Act. I will therefore refer the file back to the RAD so that it can clarify its position in light of these reasons.

[37] Mr. Romelus held permanent resident status the relevant time, and he does not deny that this status conferred on him the same rights and obligations as those conferred on Brazilian

citizens. Thus, according to the language of Article 1E of the Convention, it does seem fair to conclude that Mr. Romelus is a person referred to in Article 1E of the Convention.

[38] Section 98 of the Act then comes into play to exclude the person concerned, who cannot then be a Convention refugee or a person in need of protection. The parties did not indicate that there are any exceptions to this exclusion.

[39] Thus, under what provision can the RAD, after confirming that Mr. Romelus is a person referred to in Article 1E, examine the prospective risk he faces in the event of a return to Brazil, so as to determine whether he is a Convention refugee or a person in need of protection with the aim of possibly granting him that status?

[40] Since the RAD did not consider the risk raised by Mr. Romelus in relation to Haiti, must it be concluded that it applied the section 98 exclusion only with respect to the applicant's country of citizenship and not his country of residence? The language of section 98 does not contain such a distinction, and the RAD, if that is its position, must justify it.

[41] The wordings of Article 1E of the Convention and section 98 of the Act and the interaction of those two wordings are not a problem in cases of persons referred to in Article 1E who rely on a fear only in respect of their country of citizenship. These persons are excluded, and the fear in respect of their country of citizenship is not considered since they are protected in their country of permanent residence.

[42] The situation seems to get much trickier when a claimant fulfills the requirements to become a “person referred to” in Article 1E of the Convention, but he or she invokes a fear with regard to his or her country of residence.

[43] The Court has dealt with similar cases and, without specifying its basis, has suggested that the analysis of the fear regarding the country of permanent residence must be made before declaring a person to be referred to in Article 1E (*Omar* at paras 24-25, *Omorogy* at para 61).

[44] Finally, the Court is aware that it is possible that, even if the file is referred back to the RAD, the result will remain unchanged for Mr. Romelus, given the facts in this case. However, the role of the Court, on judicial review, is to ensure the legality of administrative decisions, and Mr. Romelus is entitled to the appeal that Parliament created for the benefit of refugee protection claimants who are unsuccessful before the RPD (*Aloulou v Canada (Citizenship and Immigration)*, 2014 FC 1236 at paras 56, 70).

[45] The Court cannot dictate the solution to the RAD, but is persuaded that the current analysis is unintelligible.

JUDGMENT in IMM-2916-18

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, and the matter is referred back to the RAD for reconsideration in light of these reasons, without costs.

The parties did not submit any questions for certification, and the Court will not certify any at this stage.

" Martine St-Louis "
Judge

Certified true translation
This 7th day of March, 2019.
Michael Palles, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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