Federal Court  Cour fédérale

Date: 20190925

Docket: IMM-1034-19

Citation: 2019 FC 1232

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, September 25, 2019

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

MURAT AUGUSTIN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of a decision under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of a decision rendered by the Refugee Appeal Division [RAD] of the Immigration and Refugee Board [IRB] on January 18, 2019, in which the RAD upheld a decision of the Refugee Protection Division [RPD], stating that the applicant was a person referred to in section E of Article 1 of the *United Nations*

Convention relating to the Status of Refugees and that consequently, under section 98 of the IRPA, he cannot be a Convention refugee or a person in need of protection.

II. Facts

[2] The applicant is a Haitian citizen. For 15 years, he worked as a surveyor at a land surveying company in Croix-des-Bouquets, a commune not far from Port-au-Prince.

[3] Starting in November 2013, the applicant had to deal with a criminal gang that wanted to appropriate lots and resell them by falsifying the survey operations. Since he refused to cooperate, the applicant was persecuted by these criminals, to the point that, fearing for his life, he fled Haiti for Brazil.

[4] On January 6, 2015, the applicant fled to Brazil. The applicant states that, during his stay in Brazil, he was constantly subjected to racism meted out by Brazilian society. In his Basis of Claim [BOC] Form, he notes the many murders of Haitians in Brazil with the tacit support of the local police. However, he only mentioned a single personal incident where he was allegedly the victim of a sexual assault and threated with death if he reported his attackers.

[5] According to his BOC Form, the applicant had a steady job and stable housing during the period that he was in Brazil. He also states that he decided to leave Brazil after he lost his job.

[6] On July 17, 2016, the applicant left Brazil. After travelling across several countries, he arrived in the United States, where he remained until August 2017, when he came to Canada and sought refugee protection.

[7] After noting that the applicant's name was included in a joint ministerial act issued by the Ministry of Justice and the Ministry of Labour and Social Security in Brazil [Ministerial Act], which granted permanent resident status to the individuals listed therein, the Department of Citizenship and Immigration sent a notice of intervention on January 9, 2018, asking the panel to find that the claim was excluded under Article 1E of the Convention.

III. IRB's decisions

A. *RPD's decision*

[8] In reasons delivered on March 2, 2018, the RPD found that the applicant was not a Convention refugee or a person in need of protection, for two reasons. First, the RPD believed that there was *prima facie* evidence that at the time of the hearing, the applicant was a permanent resident of Brazil. The RPD's finding was based on two elements, the fact that the applicant's name and passport number were included on the list appended to the Ministerial Act, and the applicant's amended BOC Form, in which he admits that he did in fact obtain permanent residence in May 2016.

[9] Consequently, the onus was on the applicant to establish that he did not have permanent resident status in Brazil. The applicant alleged that he believed that he had lost his permanent residence in Brazil because he had left the country and no longer had a permanent residence

card. However, the RPD found, based on the National Documentation Package for Brazil, that permanent residence is separate from the physical document, the card. Moreover, although it is possible to lose permanent residence in Brazil by being away from that country for over two years, the RPD noted that the applicant had left Brazil in July 2016, less than two years before the date of the hearing.

[10] According to the RPD's analysis, permanent residence in Brazil grants holders thereof a status similar to the status of Brazilians, that is, the right to work without restrictions, the right to study and the right to make unlimited use of the country's social services.

[11] The RPD then analyzed the applicant's fear if he were return to Brazil. In his initial claim, the applicant did not allege any fear of returning to Brazil. Following the Department's intervention, the applicant amended his BOC Form to include the difficult situation attributable to his ethnic origin.

[12] The RPD also considered documentation concerning the racism and discrimination faced by Haitians in Brazil. However, it did not find that this constituted persecution within the meaning of the Convention. It therefore found that the applicant was excluded under Article 1E of the Convention.

B. *RAD's decision*

[13] The RAD upheld the RPD's reasoning and findings concerning the fact that the applicant is a person referred to in Article 1E of the Convention. The RAD found, in particular, that the

RPD had rightly concluded that the evidence established that the applicant held permanent residence in Brazil. The RAD therefore concluded that there was *prima facie* evidence that the applicant had permanent residence in Brazil and that consequently, the burden of proof had shifted such that the onus fell on the applicant to establish why he would no longer have permanent residence.

[14] The applicant alleged that permanent residence could be revoked for reasons other than a two-year absence from the country, such as a person permanently leaving Brazil and expressly renouncing the right to return there. According to the RAD, the applicant's explanation was not satisfactory: although the applicant rightly highlighted the fact that permanent residence could be revoked for several reasons, he did not establish that at least one of these reasons applied to him.

[15] With respect to the RPD's findings concerning the discrimination faced by Haitians in Brazil, the RAD also concluded that it did not constitute persecution.

[16] Lastly, despite the fact that the applicant alleged that he was sexually assaulted and threatened with death if he reported his attacker to the police, the RAD concluded that the applicant's life was not in danger and that he was not at risk of cruel and unusual treatment.

IV. Issues

[17] The questions raised by the applicant can be rephrased as follows:

1. Did the RAD err in finding that the applicant is a person referred to in Article 1E of the Convention?

2. Did the RAD err in failing to analyze the applicant's situation in Haiti?

V. Relevant provisions

[18] The following provisions are relevant:

Immigration and Refugee Protection Act	*Loi sur l'immigration et la protection des réfugiés*
Convention refugee	**Définition de « réfugié »**
96 A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	**96** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
Person in need of protection	**Personne à protéger**
97 (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	**97** (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

Exclusion — Refugee Convention

Exclusion par application de la Convention sur les réfugiés

98 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.	**98** La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.
Ineligibility	**Irrecevabilité**
101 (1) A claim is ineligible to be referred to the Refugee Protection Division if	**101** (1) La demande est irrecevable dans les cas suivants :
…	[…]
(d) the claimant has been recognized as a Convention refugee by a country other than Canada and can be sent or returned to that country;	d) reconnaissance de la qualité de réfugié par un pays vers lequel il peut être renvoyé;
United Nations Convention Relating to the Status of Refugees	***Convention des Nations Unies relatives au statut des réfugiés***
Article 1 - Definition of the term "refugee"	**Article premier. - Définition du terme "réfugié"**
E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.	E. Cette Convention ne sera pas applicable à une personne considérée par les autorités compétentes du pays dans lequel cette personne a établi sa résidence comme ayant les droits et les obligations attachés à la possession de la nationalité de ce pays.

VI. Analysis

[19] The factors flowing from the decision rendered in *Fleurisca v Canada (Citizenship and Immigration)*, 2019 FC 810, provide the tests by which this Court can analyze the judicial review of a decision based on Article 1E of the Convention.

A. *Applicable standard of review*

[20] First, with respect to the exclusion of the application of the Convention pursuant to Article 1E, this issue concerns findings of mixed fact and law and is reviewable against a standard of reasonableness (*Canada (Citizenship and Immigration) v Zeng*, 2010 FCA 118 at para 34 [*Zeng*]).

[21] Second, with respect to the state protection analysis, the standard of reasonableness also applies. In *Canada (Citizenship and Immigration) v Flores Carrillo*, 2008 FCA 94 at para 36, the Federal Court of Appeal held that the applicable standard of review in the case of a state protection analysis is that of reasonableness.

[22] However, with respect to the application of the legal test, the Court uses the standard of correctness, while the subsequent assessment of the facts in light of this test is reviewable on a standard of reasonableness (*Rrotaj v Canada (Citizenship and Immigration)*, 2016 FC 152 at para 10, and *Zeng*, above, at para 11). Therefore, the issue of whether the RAD erred in failing to establish the applicant's situation in Haiti should be analyzed against a standard of correctness.

B. *Did the RAD err in finding that the applicant is a person referred to in Article 1E of the Convention?*

[23] The first step consists of determining whether the RAD erred in concluding that the applicant was excluded from the Convention pursuant to Article 1E.

[24] Article 1E of the Convention is incorporated into Canadian law through section 98 of the IRPA, which stipulates that a person referred to in Article 1E of the Convention is not a Convention refugee or a person in need of protection.

[25] As affirmed by the Supreme Court in *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, 1993 CanLII 105 (SCC), international protection is a surrogate that comes into play where no alternative remains to the claimant. To quote Mr. Justice La Forest, "[r]efugee claims were never meant to allow a claimant to seek out better protection than that from which he or she benefits already".

(1) Was the RAD's decision concerning the applicant's permanent residence reasonable?

[26] The applicant never disputed the fact that he obtained permanent residence in Brazil. However, he claimed that he might have lost this permanent residence. Both the RPD's and the RAD's decision highlight the fact that the applicant failed to establish that he had lost this status.

[27] Given that the applicant obtained permanent residence in Brazil in May 2016, the RAD reasonably concluded that there was *prima facie* evidence that the applicant held permanent resident status in Brazil. He therefore bore the burden of establishing that he had lost this status (*Ramirez v Canada (Citizenship and Immigration)*, 2015 FC 241 (CanLII) at para 14; *Hassanzadeh v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1494 at paras 27–29).

[28] Given the evidence before it, it was reasonable for the RAD to conclude that the applicant failed to refute the *prima facie* evidence indicating that he had permanent resident status in Brazil. Indeed, even though the applicant was represented by counsel and had an opportunity to amend his BOC Form to address the issue of the risk of returning to Brazil, the applicant did not present any evidence that might refute the evidence presented by the Minister.

[29] Lastly, it is important to note that the applicant now left Brazil over two years ago. However, it is the applicant's situation at the end of the hearing, on February 7, 2018, that matters (*Majebi v Canada (Citizenship and Immigration)*, 2016 FCA 274 at para 7, and *Melo Castrillon v Canada (Citizenship and Immigration)*, 2018 FC 470 at para 15). On that date, the applicant had not yet been away from Brazil for two years and consequently, he would not yet have lost his permanent residence.

(2) Was the RAD's decision concerning the applicant's rights in Brazil reasonable?

[30] The decision rendered in *Zeng*, above, establishes the framework for interpreting and applying Article 1E of the Convention, as follows:

> [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.

[31] It is therefore necessary to determine the meaning of "status, substantially similar to that of its nationals, in the third country". Since the decision in *Shamlou v Canada (Minister of Citizenship and Immigration)*, [1995] FCJ No 1537, 103 FTR 241, this Court has repeatedly stated that applicants should benefit from the four fundamental rights established by Lorne Waldman (*Immigration Law and Practice* (1992) [loose leaves]), Vol. 1 at No 8.2.17.4), which are the following:

a) The right to return to the country of residence;

b) The right to work freely without restrictions;

c) The right to study, and

d) Full access to social services in the country of residence

[32] The RAD analyzed the evidence indicating that a permanent resident essentially has the same rights and obligations as a Brazilian citizen, including the four aforementioned fundamental rights. Relying on *Noel v Canada (Citizenship and Immigration)*, 2018 FC 1062, the RAD found that the applicant would essentially have the same rights as a Brazilian citizen. The RAD also noted that the applicant had had a steady job and had stable housing in Brazil. In this regard, the RAD's decision is reasonable and cannot be reviewed by this Court.

(3) Was the RAD's decision concerning state protection reasonable?

[33] The applicant claims that he was sexually assaulted and that he received death threats from his attackers. The applicant also raises the issue of widespread racism towards Haitians in Brazil. Since no agent of persecution was identified, no clear and present danger was established and, additionally, the applicant never asked the Brazilian government to protect him, this Court concludes that Brazil is a safe host country for the applicant. The RAD's decision concerning state protection was reasonable.

C. *Did the RAD err in failing to analyze the applicant's situation in Haiti?*

[34] Given the RAD's finding that the applicant was a person referred to in Article 1E of the Convention, the RAD did not have to analyze the applicant's situation in Haiti. Indeed,

section 98 of the IRPA clearly indicates that a person referred to in Article 1E of the Convention is excluded and is not a Convention refugee or a person in need of protection.

VII. Conclusion

[35] This Court finds no errors in the RAD's decision-making process and consequently dismisses this application for judicial review.

JUDGMENT in Docket IMM-1034-19

THIS COURT ORDERS that the application for judicial review is dismissed. There is no question of general importance to certify.

"Michel M.J. Shore"
Judge

Certified true translation
This 8th day of October 2019

Johanna Kratz, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

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