Federal Court  Cour fédérale

Date: 20200127

Docket: IMM-979-19

Citation: 2020 FC 131

[REVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, January 27, 2020

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

NIXON ANDREUS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] With respect to the exclusion enshrined in Article 1E of the United Nations *Convention Relating to the Status of Refugees*, July 28, 1951, 189 UNTS 137 [Convention], the law is well established: the burden of proof shifts to the claimant once the Minister of Citizenship and Immigration [Minister] has established a prima facie case that the claimant is a permanent resident of a country referred to in Article 1E (*Celestin v Canada (Citizenship and Immigration)*,

2020 FC 97 at paras 49–50 [*Celestin*]; *Shahpari v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 7678 (FC) at para 12; *Canada (Citizenship and Immigration) v Tajdini*, 2007 FC 227 at paras 36, 63; *Mai v Canada (Citizenship and Immigration)*, 2010 FC 192 at para 34 [*Mai*]; *Hussein Ramadan v Canada (Citizenship and Immigration)*, 2010 FC 1093 at para 18).

[2] In a decision dated December 19, 2018, the Refugee Appeal Division [RAD] concluded that the applicant in this proceeding fell within the scope of Article 1E of the Convention because he was presumed to be a permanent resident of Brazil, and that he had not provided sufficient evidence to rebut this prima facie presumption of permanent residence.

[3] The applicant submits that he has shown sufficient reasons to rebut this presumption. In particular, the applicant submits that the determinative factor is that the RAD has not established convincingly that the applicant has in fact obtained permanent resident status in Brazil. This is the argument put forward by the applicant seeking judicial review of that decision.

[4] On the other hand, the respondent argues that the applicant must show more than mere conjecture. He must provide solid evidence to rebut the prima facie presumption. In the respondent’s view, the fact that the applicant has not rebutted this presumption does not justify the intervention of this Court.

[5] For the reasons that follow, it is my opinion that the RAD followed the proper approach to the application of Article 1E and made a reasonable decision. The application for judicial review is dismissed.

I. Facts

[6] The applicant was born in Haiti in 1974 and resided in Haiti until March 2013. On that date, he fled Haiti and settled in Brazil where he lived and worked until August 2016. In December 2016, the applicant arrived in the United States and lived there for nine months. In August 2017, the applicant arrived in Canada and claimed refugee status.

[7] In his Basis of Claim Form [BOC Form], the applicant alleged fears regarding his situation in Haiti. The applicant fears for his life because of an attack resulting from the circumstances related to a claim to a family plot of land. The applicant alleged that his parents purchased land after the death of the former land owner, despite the applicant's disagreement.

[8] The applicant did not cite any risks in relation to Brazil in his claim for refugee protection.

[9] On October 27, 2017, the Minister filed a disclosure in the applicant's file in response to a request made by the Refugee Protection Division [RPD]. The Minister noted that the applicant's name appears on a list of 43,781 Haitian citizens who were granted permanent resident status following a joint order of the Minister of Labour and Social Security and the Minister of Justice of Brazil issued in November 2015. However, the Minister states that he has

no information confirming that the applicant has initiated the registration procedures detailed in this order or that he has been granted permanent residence by the Brazilian authorities. The Minister has therefore invited the applicant to clarify his immigration status in Brazil by submitting any relevant documentation in his possession.

[10] However, the applicant stated in his Generic Application Form that he is a resident of Brazil. In this form, the applicant responded to questions about his status in Brazil by indicating that he is a [TRANSLATION] "resident" (country of previous residence, country of current resident, personal history). In addition, in response to question 2(g) in his BOC Form ("Did you move to another country (other than Canada) to seek safety?") the applicant wrote: [TRANSLATION] "I have obtained residence in Brazil".

II. RPD decision

[11] In a decision dated February 18, 2018, the RPD rejected the applicant's claim for refugee protection, concluding that he is excluded from Canadian protection pursuant to Article 1E of the Convention and section 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], because he has permanent resident status in Brazil and has all the rights and obligation that come with that country's nationality (referring to *Shamlou v Canada (Minister of Citizenship and Immigration)*, [1995] FCJ No 1537, 103 FTR 241).

[12] On the issue of exclusion from Canadian protection under Article 1E of the Convention, the RPD concluded that there is a prima facie case that the applicant has completed the process for permanent residence in Brazil and has obtained it for the following reasons:

- The applicant's name is on the list of 43,781 Haitians who benefited from the ministerial order. According to the documentary evidence, there were a few formalities that had to be completed to formalize his status. The RPD notes that as of January 2017, 71% of the 43,781 Haitians have completed these steps and are therefore permanent residents.

- The applicant testified that he never started the process. He decided to leave Brazil because of the discrimination experienced by Haitians in Brazil; however, in the immigration forms completed as part of the applicant's refugee protection claim, he stated in several places that his status was that of [TRANSLATION] "resident" in Brazil.

- In his BOC Form, the applicant responded as follows to question 2(g): [TRANSLATION] "I have obtained residence in Brazil".

- The RPD rejected the applicant's explanations that he was not the one who completed the forms and that someone who speaks Creole and French translated the questions for him and wrote his verbal answers in French on a draft and that the applicant transcribed his translated answers in the draft to his BOC Form. The applicant signed the forms and made a statutory declaration that the information given is true, complete, and correct. This explanation [TRANSLATION] "undermines the credibility of his testimony".

[13] Having established a prima facie case for his permanent residence, the RPD noted that the applicant therefore had the burden of showing that he was not a permanent resident of Brazil. On this point, the RPD concluded that he has not met his burden for this following reasons:

- The applicant claimed that he went to the Consulate of Brazil in Montréal, but this was not documented.

- Considering that the credibility of his testimony was undermined, he could not establish that he did not have permanent residence is Brazil.

- The documents filed by the applicant on the issue of his status in Brazil are insufficient because they relate to facts that occurred before the list was published.

- Permanent resident status in Brazil may be lost if the applicant is absent from Brazil for at least two years. However, the applicant allegedly left Brazil in August 2016, so less than two years have passed since his departure from the country.

[14] For these reasons, the RPD concluded that the applicant is a permanent resident of Brazil.

[15] In addition, the RPD considered the effects of discrimination on the applicant's situation in Brazil. The RPD noted the applicant's arguments that Haitians are discriminated against in Brazil. However, the applicant's BOC Form does not mention that he was discriminated against in Brazil. According to the RPD, it is reasonable to expect that he would have mentioned Brazil if he feared harm. Although the evidence in the National Documentation Package [NDP] refers to the hardship suffered by Haitians in Brazil, this is not sufficient to demonstrate that all Haitians in Brazil face a serious possibility of persecution anywhere in that country.

[16] The RPD concluded that the applicant was excluded from Canadian protection under Article 1E of the Convention. Consequently, the RPD did not feel the need to proceed with the analysis of his risk or fear in Haiti.

III. RAD decision

[17] Before the RAD, the applicant argued that he had demonstrated, on a balance of probabilities, that he was not a permanent resident of Brazil. In his opinion, the RPD erred in its analysis of his credibility by expressing doubt that he had never been granted permanent residence in Brazil because he had not completed the necessary steps. Moreover, in his forms, the applicant only mentioned that he was a [TRANSLATION] "resident" and not a [TRANSLATION] "permanent resident" in Brazil.

[18] In a decision dated December 18, 2018, the RAD confirmed the RPD's decision. The RAD concluded that the applicant was excluded from Canadian protection by reason of his status as a permanent resident in Brazil.

[19] First, the RAD concluded that there is a prima facie case that the applicant was granted permanent residence in Brazil and that the burden of proof was therefore on the applicant to demonstrate that he was not granted permanent residence. The RAD noted that the applicant's name appears on the list 43,781 Haitians who have been granted permanent residence in Brazil. The RAD acknowledged that the ministerial order of November 2015 provides that the granting of permanent residence is subject to requirements: "consisting of a birth or marriage certificate, two photographs, a criminal record extract and a declaration that the person has not been the subject of criminal proceedings in their country of origin. There are also time limits for producing these documents, as well as application fees."

[20] Like the RPD, the RAD concluded that there was no evidence that he was not a permanent resident of Brazil. The RAD noted that the applicant stated in his BOC Form that he had been granted residency in Brazil. Like the RPD, the RAD found the applicant's explanation unconvincing. The applicant had testified before the RPD that he was not the one who completed the forms and that he had not been able to regularize his status. The applicant allegedly explained his story to the people who helped him fill out his form, and his BOC Form and Generic Application Form were completed on different dates by different people. The applicant did not provide a meaningful explanation as to how this information came to be on these forms, and he signed the forms indicating that the information given was true, complete, and accurate.

[21] Therefore, the RPD did not err in finding that, on a balance of probabilities, the applicant was a permanent resident of Brazil

[22] The RAD confirmed the RPD's conclusion that he was still a permanent resident at the time of the hearing before the RPD because less than two years had elapsed since his departure from Brazil. The RAD also confirmed the RPD's conclusion that permanent residence in Brazil gives the applicant essentially the same rights and obligation as Brazilian nationals (access to health care, education, social welfare and security).

[23] The RAD went on to note that the applicant failed to establish a serious possibility of persecution on any of the Convention grounds, and it is not likely that he would be a person in need to protection if he returns to Brazil. His testimony about the attitude of Brazilians toward Haitians is not sufficient to establish discrimination amounting to persecution, and the evidence on the record does not allow the RAD to conclude that the applicant has been persecuted in Brazil or that there is a serious possibility that he would be persecuted if he returns to Brazil.

[24] Lastly, the RAD confirmed the RPD's decision that the applicant is referred to in Article 1E of the Convention because he is a permanent resident of Brazil. Moreover, the applicant has not demonstrated a serious fear of persecution or that his life would be in danger if he returned to Brazil.

IV. Issue

[25] The only question is as follows:

Did the RAD commit a reviewable error in concluding that the applicant is excluded from Canadian protection under section 98 of the IRPA and Article 1E of the Convention?

V. Standard of review

[26] In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, the Supreme Court established a revised analytical framework for determining the standard of review applicable to administrative decisions. Under this framework, the starting point is a presumption in favour of the standard of reasonableness (*Vavilov* at para 23). This presumption can be rebutted in two types of situations: where there is a statutory appeal mechanism or where the rule of law requires review on the standard of correctness (*Vavilov* at para 17). In this case, none of the situations justifying a departure from the strong presumption of application of the standard of reasonableness applies. Therefore, I find that the decision of the immigration officer is subject to review on the standard of reasonableness. (*Vavilov* at paras 73–142).

VI. Analysis

[27] The applicant submits that the RAD committed two reviewable errors.

A. *The determination of permanent residence*

[28] First, the applicant submits that the RAD erred in concluding that he had permanent resident status, and that he had the rights and obligations arising from the possession of Brazilian nationality, because he never went through the process of becoming a permanent resident in Brazil.

[29] The applicant does not challenge the finding of fact that his name appears on the list of 43,781 Haitians to whom the Government of Brazil has granted authorization to begin procedures for permanent residence within one year of the publication of the ministerial order. Moreover, he acknowledges that there was therefore prima facie evidence that he had permanent residence in Brazil.

[30] However, the applicant challenges the [TRANSLATION] "weight" given by the RAD to the fact that his name is on this list in concluding that he is a permanent resident of Brazil. In his view, the RAD erred in concluding that he is indeed a permanent resident of Brazil on the basis that his name is on the list and that, therefore, he has completed the necessary steps to be granted that status. The RAD gave significant weight to the fact that the applicant stated in his BOC Form that he was a [TRANSLATION] "resident" in Brazil, but little weight to his testimony that he had never completed the procedure to become a permanent resident in Brazil. According to the applicant, he was unable to complete the procedure to obtain permanent residence because of errors in one of the required documents. In his opinion, his testimony must be presumed to be true, and the RAD erred in concluding that he had not met his burden to demonstrate that he did not have the rights and obligations arising from the possession of Brazilian nationality.

[31] The applicant did not cite any case law to support his argument that he has rebutted the presumption in question.

[32] The respondent first argues that, given the RAD's reasons, the applicant was on the list of persons who were granted permanent residence and not just those who had the [TRANSLATION]

"opportunity" to initiate proceedings to obtain that status. In the alternative, the respondent argues that even if the applicant had not been granted permanent residence in Brazil, the failure to finalize the process did not remove the presumption that he was under Brazilian protection (citing *Tshiendela v Canada (Citizenship and Immigration)*, 2019 FC 344 at paras 27–28, 33 [*Tshiendela*]).

[33] For the following reasons, I accept the respondent's arguments.

[34] However, I will make a preliminary observation. I reject the respondent's argument that the list containing the applicant's name before the RAD was for persons who have successfully completed the process of obtaining permanent residence. In this regard, I would note the Minister's letter dated October 27, 2017; it is not clear that the applicant has completed this process.

[35] Moreover, one of the documents in the NDP shows that this list contains the names of 43,781 Haitians who could obtain permanent residence in Brazil if they took the steps (apparently 71% of these people have in fact taken these steps). Copies of the list contained in the certified tribunal record do not show that the applicant is among the group of Haitians who have been granted permanent residence.

[36] The applicant claims that the RPD erred in concluding that he is indeed a permanent resident of Brazil. I accept that the fact that a person's name appears on the list does not

definitively confirm that he or she has completed the process to become a permanent resident, but only that he or she has been granted the opportunity to regularize his or her status.

[37] Moreover, in my reading of the RAD decision, it does not appear to me that the RAD concluded that the respondent had definitely obtained permanent residence status. The RAD noted that "the granting of permanent residence is subject to requirements". The RAD has never found that the applicant's name is on the list of the 71% of 43,781 Haitians who have been granted permanent resident status.

[38] Rather, the question is whether, once it is established on a prima facie basis that the applicant is a permanent resident, the applicant has provided sufficient evidence to rebut this presumption.

[39] The applicant acknowledges that in this case, the list containing his name constitutes prima facie evidence that he has been granted permanent residence in Brazil, as the RAD concluded. This means that there is a rebuttable presumption that he is a permanent resident. The applicant therefore had the burden to demonstrate, on a balance of probabilities, that he was not a permanent resident in Brazil or that he has lost permanent resident status (*Tshiendela* at para 35; *Obumuneme v Canada (Citizenship and Immigration)*, 2019 FC 59 at para 41).

[40] It is therefore necessary to consider whether the RAD erred in concluding that the applicant was excluded from Canadian protection under Article 1E of the Convention. The relevant test was articulated by the Federal Court of Appeal in *Canada (Citizenship and Immigration) v Zeng*, 2010 FCA 118, 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.

[41] At the time of the RPD's decision, the applicant could have completed the steps to obtain permanent residence in Brazil, but chose not to do so. According to his testimony, he filed an application for permanent residence, according to the procedure set out in the ministerial order, with all the required documents, but he did not finalize the process because he did not pay the required fees. In addition, it appears that there was a document that contained an error that he had to give back to the Brazilian authorities, but before the process was completed, he left Brazil.

[42] The applicant's explanation that he did not finalize the process in question, and therefore did not ultimately obtain permanent resident status in Brazil, was not persuasive to the RAD because the applicant declared his status as [TRANSLATION] "resident" in his forms and stated [TRANSLATION] "I have obtained residence in Brazil" in his BOC Form.

[43] Neither the RAD nor the RPD accepted the applicant's explanation that he was not the one who completed the BOC Form. In fact, according to his BOC Form, the applicant completed the form himself in French without the assistance of a representative or an interpreter. The

applicant also wrote that he had [TRANSLATION] "resident" status in Brazil in his generic immigration forms which, as the RAD noted, were prepared on separate dates.

[44] In the end, these are findings of fact that could legitimately be made by the RAD in the absence of credible evidence to the contrary on the balance of probabilities (*Mikelaj v Canada (Citizenship and Immigration)*, 2016 FC 902 at paras 26–27; *Ramirez v Canada (Citizenship and Immigration)*, 2015 FC 241 at paras 22–24). It should be remembered that, according to the applicant's testimony before the RPD, he had gone to the Consulate of Brazil in Montréal to inquire about his status in Brazil, but he did not file documentation (after the list of 43,781 Haitians was released) as to the outcome of his efforts in order to meet his burden of showing that he is not excluded from Canadian protection under Article 1E of the Convention.

[45] The RAD did not commit a reviewable error in finding that the applicant had not met his burden of establishing that he was not a permanent resident of Brazil. The RAD's conclusion in this regard was reasonable since it "is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85).

[46] It should be remembered that the basic philosophy of Article 1E is the prevention of "asylum shopping": refugee protection should not be conferred on an individual who has surrogate protection in a country where the individual enjoys substantially the same rights and obligations as nationals of that country (*Zeng* at para 1; *Fleurant v Canada (Citizenship and Immigration*), 2019 FC 754 at para 16; *Mai* at para 1; *Maqbool v Canada (Citizenship and Immigration)*, 2016 FC 1146 at para 29; *Celestin* at paras 42, 91).

[47] As an alternative argument, the applicant argued before me that, in its decision, the RAD has consistently held that the applicant is a permanent resident of Brazil. The applicant states that the RAD simply did not review the process and simply found him to be a permanent resident of Brazil.

[48] The applicant cites *Zeng*, and argues that the process followed by the RPD and the RAD was unreasonable. According to the applicant, the first issue was whether he was a permanent resident. If the answer is yes, the inquiry would go no further. If the answer was no, he should have been asked why he had not continued the process. In this case, according to the applicant, even before making a finding on this issue, the RAD simply considered the question of why the applicant did not continue the process of obtaining permanent resident status in Brazil. The reason appears to be that he feared harm in Brazil.

[49] I must confess that I am not following the applicant's reasoning on this issue. In my view, a series of questions may serve a dual purpose. There is nothing wrong with asking a series of questions and concluding that those answers are relevant for two purposes. The mere fact that the questions were not asked in the proper order does not invalidate them, and certainly not the answers.

[50] Again, however, this may not be relevant. The applicant presupposes in his analysis that the burden is on the respondent to first establish with certainty that the applicant is a permanent resident of Brazil, and argues that there is insufficient evidence in this regard.

[51] I reject this thesis. We must begin the analysis by first assessing the evidence with respect to the applicant's status as a permanent resident. In this case, there is a document from the government of Brazil, which indicates that the applicant has been granted permission to become a permanent resident and that he can proceed to finalize the formal process, which is more of an administrate process than a substantive process. Furthermore, the applicant concedes that the prima facie case demonstrates that he has been granted permanent residence in Brazil. He has simply not rebutted the presumption to show that he was not a permanent resident in Brazil or that he has lost that status.

[52] On the facts of this case, the RAD could reasonably conclude that the applicant is indeed referred to in Article 1E of the Convention.

B. *The order of analysis and the* Romelus *case*

[53] Second, the applicant submits that the RAD made the same error identified by the Court in *Romelus*. The RAD concluded that the applicant was referred to in Article 1E of the Convention before continuing its analysis regarding persecution and risk in Brazil under sections 96 and 97 of the IRPA (citing *Romelus* at paras 36–45).

[54] This argument was not further developed at the hearing.

[55] In addition, the respondent argues that the facts of this case must be distinguished from those of *Romelus*. In this case, it was only during his testimony before the RPD that the applicant alleged a fear with respect to Brazil. Moreover, in *Romelus*, the decision of the RAD was

unintelligible because it found that the applicant was excluded from Canadian protection under Article 1E of the Convention before finding that no fear or risk had been established with respect to Brazil.

[56] In this case, the RAD only found that the applicant is excluded from Canadian protection under Article 1E of the Convention in its conclusions, after finding that (1) the applicant was a permanent resident in Brazil; (2) he had not lost that status at the time of the hearing before the RPD; (3) the status held by the applicant gave him substantially the same rights and obligations as nationals of that country; and (4) there was no risk or fear for him in Brazil.

[57] Having made these findings, the RAD concluded that the applicant was excluded from Canadian protection under Article 1E of the Convention.

[58] In any event, as I noted above, I reject the notion that the risk in the country of residence must be assessed before concluding that the applicant is excluded from Canadian protection under Article 1E of the Convention (*Celestin* at paras 92–103).

[59] The fact that the risk analysis was conducted for Brazil was not determinative (*Vavilov* at para 100; *Celestin* at paras 130–131). In the end, the RAD reasonably concluded that the applicant was excluded from Canadian protection under Article 1E of the Convention.

VII. Conclusion

[60] The applicant has not satisfied me that the RAD's decision is unreasonable. For these reasons, the application for judicial review is dismissed. No question is certified.

JUDGMENT in IMM-979-19

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 11th day of February 2020].

Michael Palles, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Christian Roa-Riveras	FOR THE APPLICANT
Mario Blanchard	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Christian Roa-Riveras Montréal, Quebec	FOR THE APPLICANT
Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT