Federal Court  Cour fédérale

Date: 20200319

Docket: IMM-3348-19

Citation: 2020 FC 392

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, March 19, 2020

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

BERNATO AUGUSTE ET KATIANA TELFIN

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] The applicants are husband and wife and are both of Haitian origin. They seek judicial review of a decision of the Refugee Appeal Division (RAD) confirming a decision of the Refugee Protection Division (RPD). Both decision-making bodies found that the applicants were excluded from Canada's protection pursuant to Article 1E of the United Nations *Convention*

Relating to the Status of Refugees, 189 UNTS 150 (the Convention) and section 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act), because they were satisfied that at all relevant times, the applicants had held permanent resident status in Brazil, giving them essentially the same rights as Brazilian nationals.

[2] According to Article 1E, the 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 attaching to possession of the nationality of that country. For its part, section 98 of the Act, which incorporates this provision of the Convention into domestic law, provides, *inter alia*, that a person referred to in said provision "is not a Convention refugee or a person in need of protection".

[3] At the judicial review hearing, the applicants abandoned a procedural fairness argument that they had raised in their written submissions. This leaves a single issue, which relates to the decision-making process followed by the RAD to reach the conclusion that the applicants are excluded from Canada's protection.

[4] Specifically, the applicants argue that the RAD erred in failing to explain how, once it had addressed the issue of their exclusion from the definition of refugee or person in need of protection under Article 1E of the Convention and section 98 of the Act, it was nevertheless authorized, in view of the silence of these two provisions on this point, to consider, on the basis of sections 96 and 97 of the Act, the potential risk they would face if they returned to their

country of residence and to conclude, in particular, that a viable internal flight alternative (IFA) was available to them in Rio de Janeiro.

[5] They argue that this omission is contrary to this Court's decision in *Romelus v Canada (Citizenship and Immigration)*, 2019 FC 172 [*Romelus*], and therefore renders the RAD's decision unintelligible.

II. BACKGROUND

[6] The relevant facts of this case can be summarized as follows. The applicants arrived separately in Canada in the summer of 2017. They both arrived via the United States, where they had resided after leaving Brazil. Each signed a Basis of Claim Form (BOC Form) providing separate accounts of their reasons for leaving first Haiti, and subsequently Brazil.

[7] Applicant Bernato Auguste asserted in his BOC Form that he left Haiti for Brazil in 2013 as a result of a conflict over farmland owned by his father that a third party wanted to acquire. Mr. Auguste said he received death threats because he opposed this third party, which prompted him to relocate to another city in the country. He added that this relocation did not prevent him from being the target of a murder attempt by individuals hired by that person. He resigned himself to leaving Haiti for Brazil in October 2013.

[8] Once established in Brazil, Mr. Auguste said he was a victim of the racism that prevails in that country, where a large number of Haitians are beaten, lynched or even killed with impunity. Specifically, he said that in July 2015, he was beaten by a colleague and two other

people as he was leaving work. He reported the incident to his supervisor, which resulted in the colleague's dismissal. The applicant subsequently received death threats from this person, which led to him seeking refuge in Sao Paulo. This did not help, however, since the applicant claimed to have met his persecutor on the streets of Sao Paulo a few days after he had settled there. The day after this chance meeting, he left Brazil for the United States, where he claimed to have sought asylum but never received a response. He therefore crossed the Canadian border on July 19, 2017 to seek Canada's protection.

[9] Applicant Katiana Telfin, meanwhile, asserted that she fled Haiti because she was something of a collateral victim of a conflict that broke out in September 2010 between her father and a man who accused him of using voodoo to cause the death of his daughter. According to Ms. Telfin's account, this allegedly resulted in the family home being burned down and death threats being made against both her and her father. After taking refuge in the Dominican Republic between December 2010 and 2015, Ms. Telfin and her father returned to Haiti with the intention of rebuilding their burned home. The girl's father showed up with a group of armed men and warned them that they would be killed if they went ahead with rebuilding the house.

[10] As a result of this incident, Ms. Telfin's father decided to return to the Dominican Republic, while Ms. Telfin hid with a friend in Haiti before departing for Brazil in February 2016. Shortly after she arrived, her father informed her that the girl's father was travelling to Brazil, which convinced Ms. Telfin to go to the United States, which she did on November 29, 2016. The applicant arrived in Canada from the United States a few weeks after Mr. Auguste, in August 2017.

[11] The respondent intervened before the RPD to argue that the applicants had permanent resident status in Brazil and that this gave them the same rights as Brazilian nationals. As a result, they were not entitled to Canada's protection, in accordance with Article 1E of the Convention and section 98 of the Act.

III. RPD AND RAD DECISIONS

[12] After determining that the applicants had obtained permanent resident status in Brazil and that they had the same rights as Brazilian nationals, the RPD inquired about the risk they would face if they returned to Brazil. In both cases, the RPD found this risk to be unsubstantiated, in part because of contradictions and implausibilities in each applicant's story. The RPD rejected the argument regarding pervasive racism and discrimination against Haitians in Brazil on the basis that the situation was not such that it gave rise to a serious possibility of persecution within the meaning of section 96 of the Act.

[13] Having made these findings, the RPD concluded that the applicants were described in Article 1E of the Convention and therefore could not be determined, under section 98 of the Act, to be refugees or persons in need of protection within the meaning of sections 96 and 97 of the Act.

[14] In considering the applicants' appeal, the RAD first noted that the applicants did not dispute that they were permanent residents of Brazil at the time of their hearing before the RPD. It also found no error in the RPD's conclusion that, by virtue of that status, the applicants enjoyed the same rights as Brazilian nationals. Nor did it find that there was any basis for

intervening with respect to the conclusion that the risk involved in returning to Brazil alleged by Ms. Telfin was not credible.

[15] The RAD did not find credible the risk invoked by Mr. Auguste either, but for different reasons than those put forward by the RPD. The RAD also found that the general climate of racism and discrimination against Haitians in Brazil did not amount to persecution. Finally, the RAD determined that, assuming the risk claimed by the applicants to be credible, there was nonetheless a viable IFA for them in Rio de Janeiro.

IV. ISSUE AND STANDARD OF REVIEW

[16] As I indicated at the outset, the applicants argue, in essence, that the RAD made an error that would justify the Court's intervention because it analyzed the potential risk they would face upon return to their country of residence after it had determined that they were excluded from Canada's protection under Article 1E of the Convention and section 98 of the Act.

[17] I note that the applicants do not dispute that at all times relevant to this case, they had permanent resident status in Brazil. Nor do they dispute the RAD's finding that this status conferred on them essentially the same rights as those of Brazilian nationals.

[18] Additionally, there is no dispute that the issue here must be examined on the standard of reasonableness. It has indeed been recognized that when an administrative decision maker is called upon to interpret provisions of its own statute or a statute closely connected to its function, its decision is reviewable on standard of reasonableness (*Alberta (Information and Privacy*

Commissioner) v Alberta Teachers' Association, 2011 SCC 61 at para 30). The recent judgment of the Supreme Court of Canada in *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] did not change the state of the law in this area (*Vavilov* at para 116; *Célestin v Canada (Citizenship and Immigration)*, 2020 FC 97 at paras 31–32 [Célestin]).

V. Analysis

[19] The applicants argue that once they had been excluded from Canada's protection by virtue of Article 1E of the Convention and section 98 of the Act, there was no legal basis for the risk analysis conducted by the RAD, which led to, *inter alia*, the conclusion that a viable IFA existed.

[20] As I have already noted, the applicants' theory is based essentially on *Romelus*.

[21] It is important to note that at the time this case was argued, there was no doubt as to the RAD's power, when determining whether a refugee protection claimant was excluded from Canada's protection under Article 1E of the Convention and section 98 of the Act, to assess the alleged risk that the claimant would face if returned to his or her country of residence (*Jean v Canada (Citizenship and Immigration)*, 2019 FC 242 at paras 21 and 24 [*Jean*]; *Constant v Canada (Citizenship and Immigration)*, 2019 FC 990 at para 38; *Milfort-Laguere v Canada (Citizenship and Immigration)*, 2019 FC 1361 at para 39). However, there was—and still is—some question as to when this assessment should occur: must it necessarily precede the finding of exclusion, or can it take place after that finding has been made? (*Romelus* at para 43; *Jean* at para 21).

[22] As the respondent correctly points out, the debate is academic in this case, given that a complete reading of the RAD decision leaves no basis on which to conclude that the RAD assessed the alleged risk in the country of residence only after the decision had been made to exclude the applicants. The applicants' argument is based mainly on 2 of the 26 paragraphs of the RAD decision: paragraph 6, which summarizes the reasons to follow, and paragraph 25, which serves as a general conclusion on the issue of exclusion. This portrayal of the RAD's decision does not do it justice, in that it distorts what I see as substantiation of a clear process in which risk assessment is an integral part of the exclusion determination, and not the other way around. This is consistent with the teachings of the majority of this Court's decisions on the issue at the time the case was argued.

[23] In my opinion, *Romelus* does not advance the applicants' cause, given that in that case the Court (Justice St-Louis) considered "the power of the RAD to grant one of these statuses [that of refugee or person in need of protection] 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" (*Romelus* at para 4; see also para 39) [emphasis added]. Justice St-Louis allowed the judicial review with a view to giving the RAD an opportunity to provide possible explanations as to the legal basis for this power. She did not certify a question for appeal.

[24] *Romelus* does raise the issue of the RAD's power to consider the prospective risk faced by a refugee protection claimant in his or her country of residence "after confirming that [this

refugee protection claimant] is a person referred to in Article 1E [of the Convention]" (*Romelus* at para 39) [emphasis added], but that issue, as we have seen, does not arise here.

[25] That reflects the state of the law at the time this case was argued. However, on the very day that the hearing for this judicial review took place, the Court (Justice Pamel) released its decision in *Célestin*, in which the respondent Minister asked the Court to "end the debate on whether the RPD and the RAD should analyze a refugee protection claimant's fear of persecution or the risk of harm to which they are exposed in the country of residence before or after determining whether a claimant is referred to in Article 1E of the Convention under the first prong of the test set out in Zeng (Canada (Citizenship and Immigration) v Zeng, 2010 FCA 118, [2011] 4 FCR 3 [Zeng])"(*Célestin* at para 4).

[26] Zeng establishes the following three-stage analytical framework for determining whether Article 1E of the Convention applies to a refugee protection claimant:

> [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.

[27] In a lengthy decision, Justice Pamel concluded, in essence, that in order to give full effect to Article 1E of the Convention, despite its silence regarding the assessment of a fear of persecution in the country of residence when the refugee protection claimant enjoys status

substantially similar to that of nationals of that country, such assessment was required (*Célestin* at para 92). However, he was of the view that the "implementation" of this assessment was not the responsibility of the RPD or the RAD, but rather should take place as part of the pre-removal risk assessment [PRRA] provided for in sections 112 and 113 of the Act, as amended. This procedure is distinct from that under which a claim for refugee protection is processed and decided (*Célestin* at paras 111–14).

[28] With respect to the remedy, Justice Pamel held that the Court's intervention was not warranted, despite the jurisdictional shortcomings that had been identified, since the risk analysis conducted by the RAD was not a requirement and was therefore immaterial (*Célestin* at paras 130–31).

[29] He decided, however, to certify a question to allow the Federal Court of Appeal, if it deems appropriate, to rule on the merits of his interpretation of the combined effect of Article 1E of the Convention and section 98 of the Act. He considered the issue to be one of general importance that transcends the interests of the parties to the litigation and that could have bearing on the outcome of the appeal.

[30] On this last point, Justice Pamel stated that if his interpretation were to prevail on appeal, judicial intervention in that case would be unwarranted, given the irrelevance of the risk analysis conducted by the RAD. On the other hand, if his interpretation were to be overturned, judicial intervention would be warranted, given that he had found that analysis to be unreasonable, the

RAD having failed to address all the elements of the applicant's fear with respect to Brazil, her country of residence (*Célestin* at para 140).

[31] For these same reasons, I find that *Célestin* has no bearing on the present case. Indeed, if I apply Justice Pamel's interpretation to the facts of this case, the risk analysis conducted by the RAD becomes immaterial, since the RAD was not required to conduct it. In such event, the applicants would not suffer prejudice since they could assert their fear of returning to their country of residence at the PRRA stage. If I do not apply it, the Court's intervention would still be unwarranted because, contrary to *Célestin*, the applicants did not challenge before me the merits or reasonableness of the risk analysis conducted by the RAD. Rather, they merely challenged the process by which the RAD came to the conclusion that they were excluded from Canada's protection.

[32] Therefore, assuming that the RAD has the power to conduct such an analysis in the context of implementing Article 1E of the Convention, there is no justification for returning the case to the RAD, since the applicants have not criticized the results of that analysis.

[33] The parties did not request at the hearing that I certify a question for appeal, and indeed I see no reason to do so, given that again, contrary to the situation in *Célestin*, such a question, necessarily based on the question certified by Justice Pamel, cannot, for the reasons I have just given, have any bearing on the outcome of the appeal.

[34] The application for judicial review will therefore be dismissed. No question will be certified.

JUDGMENT in IMM-3348-19

THE COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.
2. There is no question to certify.

"René LeBlanc"
Judge

Certified true translation
This 17th day of April 2020.

Michael Palles, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Cristian F. Roa-Riveros	FOR THE APPLICANTS
Chantal Chatmajian	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Cristian F. Roa-Riveros Montréal, Quebec	FOR THE APPLICANTS
Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT