Federal Court  Cour fédérale

Date: 20200416

Docket: IMM-2973-19

Citation: 2020 FC 525

[ENGLISH TRANSLATION]

Ottawa, Ontario, April 16, 2020

PRESENT: The Honourable Mr. Justice Bell

BETWEEN:

GEREMY ABEL

Applicant

and

MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] The applicant, Geremy Abel, claims that he left Haiti in January 2010 because of death threats made against him following his brother's death in 2008. In January 2014, he arrived in Brazil, and in April 2016, he left for the United States after experiencing a problem with a

co-worker. The co-worker had followed Mr. Abel to his home on two occasions, and as a result, Mr. Abel feared for his life.

[2] In 2017, Mr. Abel entered Canada and made a claim for refugee protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. On March 27, 2019, the Refugee Appeal Division [RAD] rejected his claim, confirming the decision of the Refugee Protection Division [RPD]. Both the RPD and the RAD concluded that he was excluded under Article 1E of the United Nations *Convention Relating to the Status of Refugees* [Convention] by reason of his permanent resident status in Brazil. As a consequence of his status in Brazil, Mr. Abel was not a refugee or a person in need of protection under section 98 of the *IRPA*.

[3] This is an application for judicial review under subsection 72(1) of the *IRPA* of the RAD's decision. For the reasons set out below, I dismiss the application for judicial review. Under the circumstances, I certify a question for consideration by the Federal Court of Appeal.

II. Decision under judicial review

[4] The Minister of Immigration, Refugees and Citizenship intervened before the RPD to argue that Mr. Abel was a permanent resident of Brazil. The RPD found that he was, and that he had not established a well-founded fear of persecution or a well-founded fear that he would face a threat to his life or a risk of being subjected to harm of any kind that would qualify him as a person in need of protection with respect to Brazil. Consequently, the RPD found that Mr. Abel was not a refugee by application of Article 1E of the Convention and section 98 of the *IRPA*.

[5] The RAD confirmed the RPD's decision. The RAD's only conclusion that is relevant to this application for judicial review is the one made in response to Mr. Abel's argument that the RAD had to consider his fear of return to Haiti because he had lost his permanent resident status in Brazil after being out of the country for more than two (2) years. The RAD concluded that the appropriate date to consider in this assessment is the date of the RPD hearing, citing *Majebi v Canada (Citizenship and Immigration)*, 2016 FCA 274, leave to appeal to the SCC refused, 37437 (June 1, 2017) [*Majebi*] and *Romelus v Canada (Citizenship and Immigration)*, 2019 FC 172 at para 35. In this matter, the RPD hearing was on February 5, 2018, two (2) years had not elapsed since Mr. Abel left Brazil in April 2016. The RPD had therefore concluded that Mr. Abel had permanent resident status in Brazil and there was no reason for the RPD to consider his fear of return to Haiti.

III. Relevant provisions

[6] The relevant provisions are sections 96, 97 and 98 of the *IRPA* and Article 1E of the Convention, which are set out in the Appendix.

IV. Issues

[7] This case raises the following issues:

1. Did the RAD err in failing to consider the possibility that Mr. Abel lost his permanent resident status after the date of the RPD hearing?
2. Did the RAD err in refusing to choose between two (2) lines of authority as to the applicable date when taking into account the exclusion under Article 1E of the

Convention? In other words, was the RAD unreasonable in its analysis of the doctrine of *stare decisis*?

V. Analysis

A. *Standard of review*

[8] I find that the reasonableness standard applies in this case as it applies to questions of mixed fact and law. Whether the doctrine of *stare decisis* applies is a question of mixed fact and law. This requires the decision maker to analyze the facts to determine whether the jurisprudence applies to the facts and whether it should be followed. After making this analysis, the decision maker may determine that there is, nevertheless, only one reasonable decision.

[9] The decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] supports my conclusion that the standard of reasonableness applies to every issue in this case. According to *Vavilov*, the reasonableness standard is presumed to apply. None of the exceptions rebutting this presumption arise in this case (*Vavilov*, at para 10). When a court reviews a decision under the reasonableness standard, it "must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified" (*Vavilov*, at para 15).

B. *Did the RAD err in failing to consider the possibility that Mr. Abel lost his permanent resident status after the date of the RPD hearing?*

[10] Mr. Abel argues that he lost permanent resident status in Brazil before the date his appeal was considered by the RAD, and therefore the RAD erred in failing to consider this change in circumstances. In his opinion, this also caused the RAD's failure to consider his risk of persecution in Haiti—the country to which he was at risk of being returned after the RAD made its decision. He raises the following four arguments in support of his position:

1. The RAD has jurisdiction to consider changes in circumstances or new facts that have occurred since the RPD decision that are invoked with respect to section 96 and 97 of the *IRPA*. For example, in *X (Re)*, 2017 CanLII 147800 (CA IRB), the RAD considered a change in circumstances in Turkey, namely, that there had been an increase in ethnic repression against Kurds in that country. Likewise, in *X (Re)*, (Decision of March 15, 2019, Member Roxanne Cyr MB7-04741), the RAD found that the refugee protection claimant had become pregnant since the RPD hearing and therefore had a prospective fear in relation to her status as a single mother who had conceived a child out of wedlock.

2. Paragraph 112(2)(b.1) of the *IRPA* prohibits Mr. Abel from applying for a pre-removal risk assessment [PRRA] within one year of the RAD decision. Without the ability to apply for a PRRA, he will be removed without any analysis of his risk of removal. This delay in applying for a PRRA demonstrates, in Mr. Abel's opinion, that it was Parliament's intention that the RAD should assess risk on the day of the RAD decision and not just on the day of the RPD decision.

3. The RAD's approach in this matter limits his ability to assert his rights under section 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. Removing him to Haiti, a country against which his risks have not been considered by the RAD, contravenes the *Charter*. He cites *Ragupathy v Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 1370 [*Ragupathy*]. According to Mr. Abel, section 113 of the *IRPA* prohibits the introduction of evidence or changes in circumstances that allegedly occurred before the rejection of his refugee protection claim and appeal. As a result, the PRRA officer may have to declare that he or she is unable to consider the change in circumstances that occurred prior to the RAD decision, namely Mr. Abel's loss of status in Brazil that occurred after the RPD decision.

4. The *Majebi* decision fails to consider the RAD's jurisdiction to assess facts or events occurring after the RPD decision, which are nonetheless protected by section 7 of the *Charter*.

[11] In contrast, the respondent argues that the RPD hearing date was the correct date to use in determining whether the applicant had lost his permanent resident status in Brazil. He raises the following four arguments:

1. The RAD had to follow *Majebi* under the principle of *stare decisis*, citing *Canada (Commissioner of Competition) v Superior Propane Inc*, 2003 FCA 53 at para 54, [2003] 3 FC 529.

2. The RAD's discretion to consider new evidence does not change the fact that the RAD is an appeal tribunal that is responsible for correcting RPD errors. Without concluding that the RPD erred in determining that Mr. Abel had permanent resident status in Brazil, the RAD could not reconsider its decision.

3. Mr. Abel is mistaken regarding the role of a PRRA officer. To start, refugee protection claimants who are rejected on the grounds set out in Article 1E of the Convention are exempt from the one-year bar on applying for a PRRA. In addition, PRRA officers may consider new evidence regarding changes in circumstances following an RPD decision finding exclusion under Article 1E. See *Parshottam v Canada (Citizenship and Immigration)*, 2008 FCA 355 [*Parshottam*].

4. The applicant's arguments regarding the *Charter* are premature because Mr. Abel has not reached the final stage of the deportation order. See *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96. Furthermore, in *Noha v Canada (Citizenship and Immigration)*, 2009 FC 683 at paras 50–58, the Court found that section 98 of the *IRPA* does not violate the *Charter* because its purpose is not to deport a person to his or her country of origin, but rather to deny the person's claim

> for refugee protection. The person in question still has the right to claim the protection of a PRRA application under section 112 of the *IRPA*.

[12] I am of the view that the RAD did not err in refusing to consider that Mr. Abel had possibly lost his permanent resident status after the hearing before the RPD. In *Majebi*, at paragraph 9, the Federal Court of Appeal addressed the following question and provided the following answer:

> Question: When the Refugee Protection Division correctly concludes that a claimant is or is not excluded under Article 1E of the *United Nations Convention Relating to the Status of Refugees*, can the Appeal Division reassess the applicability of the exclusion on the basis of facts that arise after the hearing before the Refugee Protection Division?
>
> Answer: Unless the Appeal Division concludes that the decision of the Refugee Protection Division was made in error, the Appeal Division may not reconsider the issue of exclusion pursuant to Article 1E *de novo*.

[13] In short, the Federal Court of Appeal has already resolved the issue raised by the applicant in this case. The Court of Appeal's answer makes it clear that the RAD review is conducted by analyzing the claimant's situation on the same day as the RPD's analysis.

[14] With respect to the applicant's argument that paragraph 112(2)(b.1) of the *IRPA* prohibits the applicant from applying for a PRRA within one year of the RAD decision, the respondent is correct. According to the wording of this provision, those who are excluded under Article 1E of the *Convention* are exempt from this minimum. The paragraph reads as follows [emphasis added]:

Immigration and Refugee Protection Act, SC 2001, c 27	***Loi sur l'immigration et la protection des réfugiés***, LC 2001, ch 27
Division 3 Pre-removal Risk Assessment	**Section 3 Examen des risques avant renvoi**
Exception	**Exception**
112 (2) Despite subsection (1), a person may not apply for protection if	112 (2) Elle n'est pas admise à demander la protection dans les cas suivants :
. . .	. . .
(b.1) subject to subsection (2.1), less than 12 months, or, in the case of a person who is a national of a country that is designated under subsection 109.1(1), less than 36 months, have passed since	b.1) sous réserve du paragraphe (2.1), moins de douze mois ou, dans le cas d'un ressortissant d'un pays qui fait l'objet de la désignation visée au paragraphe 109.1(1), moins de trente-six mois se sont écoulés depuis, selon le cas :
(i) the day on which their claim for refugee protection was rejected — unless it was deemed to be rejected under subsection 109(3) or was rejected on the basis of section E or F of Article 1 of the Refugee Convention — or determined to be withdrawn or abandoned by the Refugee Protection Division, in the case where no appeal was made	(i) le rejet de sa demande d'asile — sauf s'il s'agit d'un rejet prévu au paragraphe 109(3) ou d'un rejet pour un motif prévu aux sections E ou F de l'article premier de la Convention — ou le prononcé de son désistement ou de son retrait par la Section de la protection des réfugiés, en l'absence d'appel et de demande d'autorisation de contrôle judiciaire,

> and no application was made to the Federal Court for leave to commence an application for judicial review, or

[15] In addition, the respondent is also correct in arguing that a PRRA officer may take into account changes in circumstances following an RPD decision finding an exclusion under Article 1E of the Convention. In *Parshottam*, Justice Mosley certified the following question:

> Once the Refugee Protection Division excludes an individual from protection under Article 1E of the Refugee Convention and IRPA s. 98 due to having nationality of a third country, what is the relevant date for a PRRA officer's determination whether the individual should also be excluded under Article 1E and section 98 from PRRA protection—the time of admission to Canada or the time of the PRRA application?

[16] The Court of Appeal refused to answer the question because the certified question was not determinative of the appeal. In that case, the PRRA officer chose to use the date of the assessment when ruling on the refugee protection claimant's permanent resident status, as the claimant's counsel submitted. The Court stated that, as it was going to dismiss the appeal on other grounds, it was "prepared to assume for present purposes that counsel is right to say that an applicant's permanent residence in a third country is determined as of the date of the PRRA". However, this Court recognized in *Chen v Canada (Citizenship and Immigration)*, 2018 FC 756 that an applicant may, regarding a finding of exclusion by the RAD under section 98, present evidence at the PRRA stage. I note parenthetically that *Parshottam* was decided before the RAD was created in 2012 (*Balanced Refugee Reform Act*, SC 2010, c 8).

[17] With respect to the applicant's argument that his removal to Haiti violates the *Charter*, the respondent is again correct. It is the lack of a PRRA that contravenes the *Charter* (*Ragupathy*, at para 27). In this case, since the one-year minimum does not apply to the PRRA application of a claimant excluded under Article 1E of the Convention, Mr. Abel is entitled to apply for it. Therefore, there is no violation of the *Charter*.

C. *Did the RAD err in refusing to choose between two lines of authority as to the applicable date when taking into account the exclusion under Article 1E of the Convention? In other words, was the RAD unreasonable in its analysis of the doctrine of stare decisis?*

[18] Mr. Abel argues that the RAD erroneously declared itself bound by *Majebi*. In his opinion, the Federal Court of Appeal in *Majebi* simply stated that the RAD's position was a reasonable interpretation, without excluding the possibility that other reasonable interpretations might exist. Indeed, Mr. Abel argues that the Federal Court of Appeal, in finding one interpretation reasonable, does not automatically make any other interpretation unreasonable. He cites *Canada (Public Safety and Emergency Preparedness) v Tran*, 2015 FCA 237 at para 60. Mr. Abel cites the Federal Court decision in *Majebi v Canada (Citizenship and Immigration)*, 2016 FC 14 (not the decision of the Federal Court of Appeal) and *Canada (Citizenship and Immigration) v Alsha'bi*, 2015 FC 1381, to demonstrate that there are two lines of authority regarding the date that the RAD must consider in determining the possibility of a claimant's return to his or her country of residence.

[19] The respondent replies that the applicant is attempting to rely on two (2) Federal Court decisions prior to the Federal Court of Appeal's decision in *Majebi*. The respondent submits that

there are not two (2) lines of authority on this subject at this time: the approach taken in *Majebi* is determinative.

[20] I agree with the respondent's arguments. The two Federal Court decisions on which Mr. Abel relies predate the *Majebi* decision of the Federal Court of Appeal. Therefore, there are not two (2) lines of authority; the Federal Court of Appeal's approach in *Majebi* is determinative. Since the Federal Court of Appeal has already concluded that this approach was reasonable, it was also reasonable for the RAD to follow this approach in this case.

[21] In addition, the RAD explained that it was applying *Majebi* [TRANSLATION] "on the facts of this case". The issues in each case are indeed similar. I disagree with the applicant's argument that the Federal Court of Appeal's decision in *Majebi* is erroneous in light of the RAD's jurisdiction to assess new facts under subsection 110(4) of the *IRPA*. In both *Majebi* and this case, the applicants did not provide new evidence relating to their status in their country of residence that meets the criteria of subsection 110(4) of the *IRPA*. In *Majebi*, the Federal Court of Appeal found that it was reasonable for the RAD to have refused to consider the claimant's evidence that he had lost his permanent resident status because that evidence was available before the RPD made its decision. As such, the evidence was not "new" within the meaning of subsection 110(4) of the *IRPA*. In this matter, the applicant relies on the National Documentation Package [NDP] to argue that he lost his status, without providing any new evidence, other than the passage of time, and there is no evidence from an expert (e.g., a lawyer) or an official of Brazil to prove that Mr. Abel is no longer a permanent resident. The NDP documents were before the RPD. This evidence, cited before the RAD, was therefore not new. The applicant's

argument regarding the jurisdiction of the RAD under subsection 110(4) of the *IRPA* might be applicable if Mr. Abel had presented evidence that meets the requirements of that subsection of the *IRPA* and the case law.

[22] In addition, there are only two situations in which a lower court may review precedents of higher courts: (1) when a new legal issue arises; and (2) when a change in circumstances or evidence "fundamentally shifts the parameters" (*Carter v Canada (Attorney General)*, 2015 SCC 5 at para 44, [2015] 1 SCR 331 citing *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 42, [2013] 3 SCR 1101; see also *Céré v Canada (Attorney General)*, 2019 FC 221 at para 38). In this case, the legal framework has not changed since *Majebi*. The relevant provisions have not changed since *Majebi* was decided, and the issue addressed by the Federal Court of Appeal in *Majebi* is essentially the same as here: what date should the RAD use to assess the applicant's residency status?

VI. In the circumstances, is it necessary to certify a question for consideration by the Federal Court of Appeal?

[23] Mr. Abel asks that the following question be certified for consideration by the Federal Court of Appeal:

> Considering its authority to assess changes in circumstances that have occurred since the decision of the Refugee Protection Division (RPD), should the Refugee Appeal Division (RAD) consider the exclusion under Article 1E of the Convention of a refugee claimant when he or she loses status in the third country after the RPD's decision.

The respondent opposes the certification of a question in this case.

[24] In order for a question to be certified, it must be serious and determinative of the outcome of the appeal, and must transcend the interests of the parties, thereby raising an issue of broad significance or general importance. A question whose answer depends on the facts of the case or which is in the nature of a reference cannot be properly certified. See *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para 36 and *Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 at paras 44–47.

[25] I conclude that the proposed question would not be determinative of the outcome of the appeal. However, I am of the opinion that the RAD blindly followed *Majebi* without providing reasons (1) analyzing the facts to determine whether the passage of time, in conjunction with the content of the NDP, constituted new evidence; (2) if so, determining whether that new evidence was sufficient to prove that Mr. Abel lost his permanent resident status between the date of the RPD hearing and the date of the RAD hearing; and (3) if so, determining what effect, if any, it had on the applicable date for the purposes of the analysis, given the jurisdiction of the RAD under subsection 110(4). I am not criticizing the RAD for taking this approach because, in my opinion, *Majebi* is clear. However, given that the decision in *Parshottam* pre-dates the creation of the RAD and in light of Mr. Abel's submissions in this application for judicial review, I certify the following question for consideration by the Federal Court of Appeal:

> For the purposes of the application of *Majebi v Canada (Citizenship and Immigration)*, 2016 FCA 274, must the RAD first determine whether there is, and, if so, consider the probative value of, evidence that a person is not considered by the competent authorities of the country in which that person has taken residence to have the rights and obligations attached to the possession of the nationality of that country that arose after the date of the RPD hearing, by which the RPD had found that the individual in question was not a refugee by application of Article 1E of the

> Convention and section 98 of the *IRPA* because of that "residency status".

[26] If the answer to this question is in the affirmative, it would be determinative in this case and would also have broad significance and be of general importance.

JUDGMENT in IMM-2973-19

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed, without costs. The following question is certified for consideration by the Federal Court of Appeal:

> **For the purposes of the application of *Majebi v Canada (Citizenship and Immigration)*, 2016 FCA 274, must the RAD first determine whether there is, and, if so, consider the probative value of, evidence that a person is not considered by the competent authorities of the country in which that person has taken residence to have the rights and obligations attached to the possession of the nationality of that country that arose after the date of the RPD hearing, by which the RPD had found that the individual in question was not a refugee by application of Article 1E of the Convention and section 98 of the IRPA because of that "residency status".**

"B. Richard Bell"
Judge

APPENDIX

Immigration and Refugee Protection Act, SC 2001, c 27	***Loi sur l'immigration et la protection des réfugiés***, LC 2001, ch 27
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	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

habitual residence, would subject them personally

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

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

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

(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,

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

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

elle avait sa résidence habituelle, exposée :

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

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

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

Person in need of protection	**Personne à protéger**
(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.
. . .	. . .
Sections E and F of Article 1 of the United Nations Convention Relating to the Status of Refugees	Sections E et F de l'article premier de la Convention des Nations Unies relative au statut des réfugiés
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.

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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