Federal Court  Cour fédérale

Date: 20200724

Docket: IMM-4889-19

Citation: 2020 FC 792

[ENGLISH TRANSLATION]

Ottawa, Ontario, July 24, 2020

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

EMANUEL KWATA MWANO aka EMMANEL EMANY MWANDU

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 of the Refugee Appeal Division [RAD] dated July 12, 2019, confirming a decision of the Refugee Protection Division [RPD]. Both panels found that the applicant is not a Convention refugee or a person in need of

protection in Canada under Article 1E of the United Nations *Convention relating to the Status of Refugees*, July 28, 1951, 189 UNTS 137 [Convention], and section 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], because he is a permanent resident of the United States and therefore not a Convention refugee or a person in need of protection under sections 96 and 97 of the IRPA.

II. Facts

[2] The applicant is a citizen of the Democratic Republic of the Congo [DRC] and suffers from schizophrenia. In March 2014, the applicant left the DRC to join his father in the United States. His father succeeded in obtaining permanent resident status for him in that country, but did so by giving a false date of birth to American authorities.

[3] In January 2015, a warrant for the applicant's arrest was issued in Texas for allegedly molesting his minor sister (or half-sister according to the documents). In February 2015, the applicant left the United States and returned to the DRC. The applicant claims that he was persecuted in the DRC because of his hallucinations, which led to death threats because people around him were uncomfortable and believed him to be a sorcerer. The applicant also feared the actions of the DRC government. The DRC authorities allegedly wanted to target him because of his father's activities as a political dissident. The applicant was reportedly detained by the military following a demonstration.

[4] With the help of a smuggler, the applicant eventually fled the DRC and travelled to Canada. In June 2015, the applicant claimed refugee protection pursuant to section 96 and

subsection 97(1) of the IRPA. According to his Basis of Claim Form, the applicant fears serious harm in the DRC and the United States.

[5] The Minister of Public Safety and Emergency Preparedness intervened before the RPD to have the applicant's claim for refugee protection rejected on the basis of his permanent resident status in the United States (exclusion under Article 1E of the Convention) and the arrest warrant issued against the applicant (exclusion under Article 1F(b) of the Convention).

[6] The RPD determined that the applicant was excluded from claiming Canada's protection for two reasons. First, the applicant has all the rights and obligations associated with citizenship in the United States within the meaning of Article 1E of the Convention by virtue of his permanent resident status in that country. Second, the applicant committed a serious non-political crime within the meaning of Article 1F(b) of the Convention. Furthermore, the RPD found that the applicant could not establish a serious possibility of persecution in the United States by reason of race or mental disability.

III. RPD decision

[7] In a decision rendered on July 12, 2019, the RAD confirmed the RPD's decision to the effect that the applicant has all the rights and obligations associated with citizenship in the United States because he did not demonstrate that his permanent resident status had been revoked as of the last day of the RPD hearing. The RAD also found that there was no evidence to establish a serious possibility of persecution or cruel and unusual treatment should he return to

the United States. Having found that the applicant is excluded from IRPA protection under Article 1E of the Convention, the RAD did not address the other issues raised on appeal.

IV. Analysis

[8] The applicant is essentially challenging the reasonableness of the RAD's findings. First, the applicant alleges that the RAD unreasonably concluded that he still has permanent resident status in the United States. Second, the applicant challenges the reasonableness of the RAD's findings with respect to its analysis of his risk of persecution if he returns to the United States.

[9] Pursuant to *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], when conducting a reasonableness review, this Court must begin its inquiry by examining the reasons provided, with respectful attention, seeking to understand the reasoning process followed by the decision maker to arrive at a conclusion. A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker.

A. *Applicant's permanent resident status in United States*

[10] Article 1E of the Convention, incorporated into Canadian law by way of section 98 of the IRPA, sets out an exclusion for refugee protection claimants who are considered by the competent authorities of the country in which they have taken residence as having the rights and obligations that are attached to the possession of the nationality of that country.

[11] In *Celestin v Canada (Citizenship and Immigration)*, 2020 FC 97 at paras 33–42 [*Celestin*], Justice Pamel summarized the principles applicable to an analysis under Article 1E of the Convention, which it is useful to quote here in full:

> [33] The case before me provides this Court with an opportunity to clarify the analytical framework for Article 1E of the Convention. In *Zeng*, the Federal Court of Appeal established a test that serves as the starting point for the entire analysis of Article 1E:
>
> > [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.
>
> [34] This test has three prongs. **Under the first prong, the decision maker must ask whether the claimant has status substantially similar to that of nationals of the country in question**. It is here that the decision maker must examine whether the claimant enjoys substantially the same rights as a national of the country referred to in Article 1E of the Convention. This analysis concerns the rights and protections provided by the state referred to in Article 1E of the Convention.
>
> [35] In *Shamlou v Canada (Minister of Citizenship and Immigration),* [1995] FCJ No 1537, 103 FTR 241 at paragraph 35 [*Shamlou*]) [see also *Canada (Minister of Citizenship and Immigration) v Choovak*, 2002 FCT 573 (CanLII) at paras 31–34], this Court recognized four of these rights:
>
> > (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.

[36] The decision maker has a duty to determine whether the claimant has status substantially similar to that of nationals of that country and whether the claimant enjoys each of those four rights (*Vifansi v Canada (Minister of Citizenship and Immigration)*, 2003 FCJ No 397, 2003 FCT 284 at para 27; *Mahdi v Canada (Minister of Citizenship and Immigration)*, [1994] FCJ No 1691 (1994), 86 FTR 307).

[37] **If the answer is yes, the exclusion codified in Article 1E applies** (*Zeng* at para 28). The analysis stops there.

[38] If the answer is no, the decision maker must continue the analysis because failing to do so is a reviewable error (*Xu v Canada (Citizenship and Immigration)*, 2019 FC 639 at para 44 [*Xu*]).

[39] **In the second stage, the decision maker must ask whether the claimant had lost resident status or could have acquired it by reasonable means, but did not do so**. If the answer is no, the analysis ends, since the applicant is not excluded under Article 1E (*Molano Fonnoll v Canada (Citizenship and Immigration)*, 2011 FC 1461 at paras 29–31). The claimant's case will then be examined on the basis of sections 96 and 97 of the IRPA.

[40] If the answer at this second stage is affirmative, 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" (*Zeng* at para 28; *Mojahed v Canada (Citizenship and Immigration)*, 2015 FC 690 at paras 27–28 [*Mojahed*]).

[41] **The assessment of these factors is made at the third stage of the test established in *Zeng* and must be done when the claimant has lost their status or has not taken steps to acquire a status similar to nationals of the country in question**.

[42] This analysis is applied so as to fulfill the purposes of Article 1E of the Convention, and that is why Parliament has incorporated this exception into Canadian law by way of section 98 of the IRPA (*Zeng* at para 19). This discourages "asylum

> shopping" and precludes an individual from acquiring refugee protection if the individual 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 [*Fleurant*]; *Mai v Canada (Citizenship and Immigration)*, 2010 FC 192 at para 1 [*Mai*]).
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> [Emphasis added.]

[12] The applicant claims that the RAD unreasonably concluded that he does not have permanent resident status in the United States. According to the applicant, he cannot return to the United States because he resided in Canada for more than five years (at the time of the RAD decision) with no intention of returning to the United States, obtained permanent resident status through his father's fraud, is charged with a crime in the United States, and has not filed an income tax return in the United States for five years.

[13] These arguments relate to the RAD's decision on the first prong of the test set out in *Canada (Citizenship and Immigration) v Zeng*, 2010 FCA 118, [2011] 4 FCA 3 [*Zeng*], namely whether the applicant has status, substantially similar to that of its nationals, in the third country.

[14] The RAD found that the Minister had met his burden of establishing on the face of it that the applicant has status substantially similar to that of nationals of the country covered by Article 1E of the Convention. It was therefore up to the applicant to demonstrate that he had lost permanent resident status in the United States, or that the American state did not confer on him all the rights and obligations attached to the possession of the nationality of that country (*Celestin*, above, at paras 50–51; *Joseph v Canada (Citizenship and Immigration)*, 2020 FC 412 at para 50).

[15] The *prima facie* presumption of permanent residence can only be rebutted by convincing evidence, not by uncertainty (*Celestin*, above, at paras 51–54). Before the RAD, the applicant raised certain factors that could be sufficient grounds for the loss of permanent resident status. However, the evidence itself confirms that loss of status is only a possibility. Indeed, the letter received from the American authorities describes scenarios under which status could be lost ("may also lose" and "You may be found to have abandoned your status if"). In addition, the applicant did not provide any evidence that the American authorities have terminated his permanent resident status in that country. In this case, it was not unreasonable to conclude that the evidence did not contradict the RPD's finding that loss of status is merely a possibility.

[16] Next, as the respondent points out, the applicant's status under the first prong of the *Zeng* test must be considered as of the last day of the RPD hearing, not at the time of the RAD decision (*Majebi v Canada (Citizenship and Immigration)*, 2016 FCA 274 at para 7; *Zeng*, above, at para 16; *Celestin*, above, at para 46). In this case, the relevant date for the analysis is February 11, 2016, the date of the last of the three RPD hearings. On that day, the applicant had been outside the United States for one year. There was therefore no reason to believe that the applicant had lost his permanent residence at the time of the last RPD hearing.

[17] Since the first prong of the *Zeng* test has been answered in the affirmative, the exclusion codified in Article 1E of the Convention applies, and the analysis under Article 1E must stop at the first stage (*Zeng*, above, at para 28). The RAD reasonably concluded that the applicant was covered by Article 1E and therefore could not claim refugee protection in Canada as a result of alleged risks in the DRC.

B. *Possibility of persecution in United States*

[18] The applicant claims that the RAD committed a reviewable error in finding that he had failed to prove that there is more than a mere possibility of persecution in the United States. The applicant's argument is essentially based on an American arrest warrant, which would demonstrate a high probability of incarceration. In its decision, the RAD found that the applicant's fear of possible persecution in an American prison was speculative since it was not certain that the applicant would be convicted of the charges against him.

[19] In this case, the RAD's finding as to the possibility of persecution in the United States appears unreasonable. The RAD did not conduct an analysis of conditions in American prisons for Black inmates with mental health problems in response to the applicant's allegations of persecution; in its reasons, the RAD confined itself to concluding that the possibility of the applicant's incarceration is speculative. From the facts, however, it appears undeniable that the applicant will be incarcerated should he return to the United States. There is an arrest warrant against the applicant, which prompted him to flee to the DRC and then travel to Canada. The applicant is still a Congolese citizen. It would be unreasonable not to conclude that the American justice system would consider the accused applicant to be a flight risk and would therefore detain him pending trial.

[20] The respondent argues that the United States is a democratic country, and that the case law of this Court is consistent with regard to the absence of a ground for persecution in that country. Accordingly, even if the applicant were to be incarcerated there, it has not been

established that he would be persecuted. Certainly, a new RAD decision could reach that conclusion. That being said, it is not for this Court to conduct that analysis (*Vavilov*, above, at para 96). In this case, the RAD did not consider further analysis to be warranted since it had determined (unreasonably) that it was hypothetical to say that the applicant would be incarcerated in the United States. It follows necessarily from this Court's earlier conclusion that the RAD must complete its analysis with respect to the United States.

[21] In this case, the applicant has raised a ground of persecution with respect to his country of residence, as opposed to his country of nationality (the DRC). Where a refugee protection claimant raises a ground of persecution with respect to his or her country of nationality when he or she is otherwise excluded under Article 1E of the Convention, the case law of this Court is clear: that claimant cannot be a refugee or a person in need of protection under the IRPA, and the RPD and the RAD are not required to conduct this analysis (*Augustin v Canada (Citizenship and Immigration)*, 2019 FC 1232 at para 34; *Saint-Fleur v Canada (Citizenship and Immigration)*, 2020 FC 407 at para 10; *Milfort-Laguere v Canada (Citizenship and Immigration)*, 2019 FC 1361 at para 46). Where a claimant otherwise excluded by Article 1E raises a ground of persecution with respect to his or her country of residence, there remains to this day some jurisprudential debate as to whether the RPD or the RAD should conduct an analysis with respect to the country of residence (*Romelus v Canada (Citizenship and Immigration)*, 2019 FC 172; *Jean v Canada (Citizenship and Immigration)*, 2019 FC 242 at paras 26-31 [*Jean*]; *Saint Paul v Canada (Citizenship and Immigration)*, 2020 FC 493 [*Saint Paul*]). In *Celestin*, Justice Pamel certified the following question:

> If the decision maker has already concluded that the refugee protection claimant has status substantially similar to that of the

> nationals of their country of residence (meaning an affirmative answer to the first question of the *Zeng* test), should the decision maker take into account the fear or risk raised by the refugee protection claimant in their country of residence before excluding the claimant by the combined effect of Article 1E of the *United Nations Convention Relating to the Status of Refugees* and section 98 of *the Immigration and Refugee Protection Act*?

[22] In *Saint Paul*, Justice St-Louis certified the same question. The Minister of Citizenship and Immigration has appealed that decision.

[23] In light of the applicable law and case law, I must conclude that the RAD had to conduct an analysis of the applicant's risk with respect to his country of residence. Like my colleague, Justice Annis, I believe that an unduly textual and restrictive interpretation of section 98 of the IRPA and Article 1E of the Convention would impose a result that is inconsistent with and contrary to the objectives of the IRPA (*Constant v Canada (Citizenship and Immigration)*, 2019 FC 990 at paras 36–39). The purpose of Article 1E of the Convention is to ensure that a person fleeing his or her country of nationality cannot claim refugee protection in a third country when he or she may already be residing in another country. If the refugee protection claimant fears persecution in both his or her country of nationality and that of residence (which is the case here), such an interpretation would not reflect the spirit of the law as a whole and would be contrary to Canada's international obligations in not allowing him or her to seek Canada's protection simply because he or she has the right of residence in both countries.

[24] This interpretation is also favoured by authors Hathaway and Foster and the United Nations High Commissioner for Refugees [UNHCR]. Hathaway and Foster interpret Article 1E to the same effect as Justice Gagné proposed in *Jean*, that is, by reading it as implicitly

establishing protection in the country of residence as an intrinsic limitation (*The Law of Refugee Status*, 2nd ed (Cambridge, UK: Cambridge University Press, 2014) at page 509). For its part, the UNHCR states in its note on the interpretation of the Convention:

> Although the competent authorities of the country in which the individual has taken residence may consider that he or she has the rights and obligations attached to the possession of the nationality of that country, this does not exclude the possibility that when outside that country the individual may nevertheless have a well-founded fear of being persecuted if returned there. To apply Article 1E to such an individual, especially when a national of that country who is in the same circumstances, would not be excluded from being recognized as a refugee, would undermine the object and purpose of the 1951 Convention. **Thus, before applying Article 1E to such an individual, if he or she claims a fear of persecution or of other serious harm in the country of residence, such claim should be assessed vis-à-vis that country**. [Emphasis added.]
>
> (*UNHCR Note on the Interpretation of Article 1E of the 1951 Convention relating to the Status of Refugees*, at para 17.)

[25] This conclusion was not rejected by my colleague, Justice Pamel, who rightly believes that "Article 1E should be interpreted to exclude only refugee protection claimants who do not genuinely need protection" (*Celestin*, above, at paras 90–91). However, Justice Pamel argues that the analysis of risk in respect of the country of residence must ultimately take place at the pre-removal risk assessment [PRRA] stage and not at the RPD or RAD stage (*Celestin*, above, at paras 111–14). In *Saint Paul*, Justice St-Louis reached a similar conclusion as Justice Pamel.

[26] With respect, I am unable to agree with this interpretation. A PRRA is not equivalent to consideration of a refugee protection claim before the RPD or the RAD. A PRRA is not intended to determine a refugee protection claim, but simply to ensure that Canada does not remove foreign nationals who would be in danger or at risk upon removal.

[27] Given that a serious question of general importance has been certified by Justice Pamel and Justice St-Louis, it will eventually be up to the Federal Court of Appeal to settle the matter. For the purposes of this case, it is sufficient to find that the RAD was right to analyze the applicant's claims with regard to the United States. Since it was unreasonable to conclude that the applicant would not be imprisoned in the United States, it is necessary here to return the matter to the RAD for redetermination.

V. Conclusion

[28] For these reasons, the application for judicial review is allowed. The matter is referred back for redetermination by a differently constituted panel.

JUDGMENT in IMM-4889-19

THIS COURT'S JUDGMENT IS THAT the application for judicial review is allowed and the matter is referred back for redetermination by a differently constituted panel. There is no question of general importance to be certified.

"Michel M.J. Shore"
Judge

Certified true translation

Michael Palles, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

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