

Federal Court



Cour fédérale

Date: 20240110

Docket: IMM-10143-22

Citation: 2024 FC 35

Calgary, Alberta, January 10, 2024

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

**ROSA MARIA GOMEZ HERNANDEZ
OSWALDO RAMON HEVIA ARAUJO**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS AND JUDGMENT

[1] Ms. Rosa Maria Gomez Hernandez (the “Principal Applicant”) and her husband Mr. Oswaldo Ramon Hevia Araujo (collectively “the Applicants”) seek judicial review of the decision of the Immigration and Refugee Board, Refugee Appeal Division (the “RAD”), dismissing their appeal from a decision of the Immigration and Refugee Board, Refugee Protection Division (the “RPD”). The RPD had found that the Applicants were excluded from

seeking refugee protection in Canada pursuant to section 98 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the “Act”).

[2] Section 98 of the Act provides as follows:

Exclusion — Refugee Convention

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.

Exclusion par application de la Convention sur les réfugiés

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.

[3] Article 1E of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, [1969] Can. T.S. No. 6 (the “Convention”), provides as follows:

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

[4] The Applicants are citizens of Venezuela. They obtained permanent residence status in Panama and lived there from 2014 until they came to Canada. The Principal Applicant arrived in Canada in November 2018 and her husband arrived in December 2019.

[5] In November 2019, the Principal Applicant lost her Venezuelan passport and permanent residence card for Panama when her purse was stolen. She attended at the Venezuelan Consulate in April 2020, to apply for a new passport but the office was closed, due to restrictions arising from the COVID-19 Pandemic.

[6] According to the Principal Applicant's Basis of Claim, her permanent residence status in Panama was likely expired after an absence of two years from Panama.

[7] The husband's Venezuelan passport expired in 2021. His status in Panama likely expired by 2021.

[8] In May 2021, the Applicants sought protection in Canada on the basis of their fear of the current Venezuelan government, based upon their political opinions and activities.

[9] The RPD rejected their claim on the basis of section 98 of the Act and Article 1E of the Convention. This finding was upheld by the RAD. Both the RPD and the RAD considered the test set out by the Federal Court of Appeal in *Zeng v. Canada (Minister of Citizenship and Immigration)*, [2011] 4 F.C.R. 3 (F.C.A.).

[10] In *Zeng, supra*, the Federal Court of Appeal set out a three-part test for the exclusion of a claim for protection under Article 1E of the Convention as follows:

[28] Considering all relevant factors to the date of the hearing, does the claimant have status, substantially similar to that of its nationals, in the third country? If the answer is yes, the claimant is excluded. If the answer is no, the next question is whether the

claimant previously had such status and lost it, or had access to such status and failed to acquire it. If the answer is no, the claimant is not excluded under Article 1E. If the answer is yes, the RPD must consider and balance various factors. These include, but are not limited to, the reason for the loss of status (voluntary or involuntary), whether the claimant could return to the third country, the risk the claimant would face in the home country, Canada's international obligations, and any other relevant facts.

[11] Both the RPD and the RAD found that the Applicants had lost their status in Panama at the time of the hearing of their refugee claims. The RAD confirmed the finding of the RPD that the Applicants had failed to show, on a balance of probabilities, that they could not obtain passports from Venezuela in order to regain permanent residence status in Panama.

[12] The RAD also found that the Applicants had voluntarily allowed their status in Panama to lapse and that they had failed to show that they had taken steps to obtain travel documents to allow them to return to Panama, to apply for reinstatement of their status.

[13] The Applicants now argue that the RAD erred in its application of the test set out in *Zeng*, *supra* at paragraph 28. In particular, they submit that the RAD erred in its consideration of the second factor in that test.

[14] The Minister of Citizenship and Immigration (the "Respondent") argues that the RAD reasonably applied the test and that the Applicants are now asking the Court to reweigh the evidence. He submits that there is no basis for judicial intervention.

[15] Following the decision of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] 4 S.C.R. 653 (S.C.C.), the decision of the RAD is reviewable on the standard of reasonableness.

[16] In considering reasonableness, the Court is to ask if the decision under review “bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision”; see *Vavilov, supra* at paragraph 99.

[17] The Applicants’ main submission is that the RAD did not reasonably assess the second element of the *Zeng* test, that is in balancing the factors identified by the Federal Court of Appeal. Specifically, they argue that the RAD ignored objective documentary evidence about the steps to be followed in order to reacquire status in Panama, including the presentation of the expired Panamanian permanent resident card and a notarized copy of an applicant’s passport.

[18] Although the Respondent submits that the Applicants are effectively asking this Court to reweigh the evidence that was before the RPD, I disagree. The Applicants’ complaint is about the reasoning process followed by the RAD, in reaching its conclusions. In my opinion, both the RPD and the RAD accepted the facts presented by the Applicants; the problem lies with the conclusions drawn from those facts.

[19] I agree substantially with the Applicants that the reasons of the RAD about their ability to regain status in Panama do not show the hallmarks of a reasonable decision.

[20] In my opinion, the decision is unreasonable because the RAD did not address the Applicants' argument that approaching the Venezuelan Consulate to obtain passports constitutes reavailment of the protection of the country from which they seek protection.

[21] Accordingly, the application for judicial review will be allowed, the decision will be set aside and the matter will be remitted to a different member of the RAD for redetermination.

There is no question for certification.

JUDGMENT IN IMM-10143-22

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, the decision of the Refugee Appeal Division is set aside and the matter is remitted to a different member of the Refugee Appeal Division for redetermination. There is no question for certification.

"E. Heneghan"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-10143-22

STYLE OF CAUSE: ROSA MARIA GOMEZ HERNANDEZ ET AL. v. THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: EDMONTON, ALBERTA

DATE OF HEARING: JULY 13, 2023

REASONS AND JUDGMENT: HENEGHAN J.

DATED: JANUARY 10, 2024

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