Federal Court  Cour fédérale

Date: 20200206

Docket: IMM-304-19

Citation: 2020 FC 176

Ottawa, Ontario, February 6, 2020

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

SUTHAKARAN SIVARASA

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review brought pursuant to s 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a Refugee Protection Division [RPD] decision made on December 27, 2018 which determined that Suthkaran Sivarsa, a Sri Lankan national, [Respondent] was a Convention refugee.

[2] The Minister of Citizenship and Immigration [Applicant] contends that Article 1E of the *United Nations Convention Relating to the Status of Refugees* [*UN Convention*] applied and excluded the Respondent from Refugee status. The RPD found that Article 1E did not apply. Article 1E of the *UN Convention* provides:

> 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.

[3] The Applicant argues that the RPD erred in several respects, including applying incorrect onuses of proof, making unreasonable assessments of the evidence, incorrectly applying legal tests, and exceeding its jurisdiction.

[4] The application for judicial review is dismissed for the reasons that follow.

II. Background

[5] The Respondent is a 37-year-old Sri Lankan citizen who claims refugee protection pursuant to sections 96 and 97(1) of IRPA. From autumn 2001 to May 2012, the Respondent worked in Italy under a work permit, with the exception of the following visits to Sri Lanka:

- From December 2005-January 2006, he returned to visit his parents
- From June 2006-July 2006, where he claims he was detained and beaten for about one week in an army camp

- From October 2009-April 2010, where he claims he was taken from his home, beaten, and questioned by the Karuna Group—an armed group— about aiding the Liberation Tigers of Tamil Eelam (LTTE) and about his time in Italy

[6] On May 27, 2010, the Respondent obtained a long-term European Commission [EC] residence permit in Italy. He continued to live and work in Italy; but, in May 2012, travelled to Mexico and then to the United States. He arrived in the United States in June 2012 and made an asylum claim after being detained for six months.

[7] On November 22, 2012, the Respondent reached Canada and made a refugee claim. He maintains that, meanwhile, his house in Sri Lanka is repeatedly searched and officials question his family about his whereabouts and circumstances.

[8] The Applicant filed a Notice of Intent to Intervene at the RPD hearing requesting the Respondent provide documentation issued by Italian authorities indicating prior and current legal status in Italy.

III. Decision under Review

[9] The RPD considered whether Article 1E of the *UN Convention* applied to the Respondent. Section 98 of IRPA provides that a person referred to in Article 1E of the *UN Convention* is not a Convention refugee or a person in need of protection.

[10] In considering whether the Respondent was a Convention refugee, the RPD employed the exclusion test in *Canada (Citizenship and Immigration) v Zeng*, 2010 FCA 118 at para 28 [*Zeng*]:

> 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.

A. *Did the Respondent have status substantially similar to a national of Italy?*

[11] In considering whether the Respondent had "status substantially similar to a national" of Italy, the RPD noted that the Respondent had a long-term EC residence permit and an opinion from an Italian immigration lawyer suggesting that the Respondent had lost his status.

[12] The EC residence permit has one condition: if the holder is absent from Italy for more than 12 months, the Italian authorities can revoke it. The language used is not conclusive by itself on whether this revocation is automatic or discretionary.

[13] The Respondent submitted evidence that he had been noted in the Italian Population Register as "absent" since 2014, making his revocation "certain". Considering this evidence, the letter from the Italian immigration lawyer, and the National Documentation Package [NDP], the RPD found that the Respondent had lost his status in Italy on a balance of probabilities by being

outside of Italy for twelve consecutive months. In the event he had not formally lost his EC residence status, the RPD found that he would lose such status if revocation proceedings were instituted and finalized. Accordingly, he did not have "status similar to an Italian national" as of the date of the RPD hearing.

B. *Did the Respondent have such status and lost it or had access to such status and failed to reacquire it?*

[14] In considering whether the Respondent had lost his status, the RPD, relying on the same evidence described above, found on a balance of probabilities that he had status in Italy similar to that of an Italian national but lost it.

C. *Balancing of Factors*

[15] Next, in balancing the relevant factors and in considering whether the exclusion applied, the RPD found that: the Respondent had voluntarily lost his status; the Respondent could not return to Italy; and the Respondent had a reasonable fear of returning to Sri Lanka based on his Tamil ethnicity. In addition, the RPD considered Canada's obligations under international and domestic law and other factors.

[16] In its balancing exercise, the RPD noted that there was a collision of strong positive and negative factors. On one hand, the Respondent lost his status voluntarily, raising concerns about asylum shopping. On the other hand, the Respondent demonstrated a strong fear of persecution if he returned to Sri Lanka due to his Tamil ethnicity, his encounters with the army and the Karuna

Group. The RPD considered the fact that the Respondent could not return to Italy to be a neutral factor.

[17] The RPD made these findings notwithstanding his misleading answers when he entered Canada and notwithstanding his travel to and from Sri Lanka before he was targeted by the Karuna Group. The RPD also found that the country condition evidence indicated that state protection was not available to the Respondent and therefore there was no viable internal flight alternative available to the Respondent in Colombo, Sri Lanka.

[18] Ultimately, the RPD concluded that the balance weighed toward accepting the Respondent because of his possibility of persecution and the concept of non-refoulement. It found that the exclusion should not apply and the Respondent was therefore a Convention refugee.

IV. Issues and Standard of Review

[19] The issues raised are:

(1) Did the RPD reasonably conclude that the Respondent was not excluded by application of Article 1E of the *UN Convention*?

(2) Did the RPD exceed its jurisdiction in finding that the Respondent would be removed to Sri Lanka?

[20] The Applicant submits that all the above issues should be assessed a question of mixed fact and law, attracting a reasonableness standard (*Zeng* at para 11) except the jurisdiction issue,

which is to be assessed on a correctness standard (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 50 [*Dunsmuir*]).

[21] The Respondent submits that the applicable standard of review is reasonableness.

[22] This matter was argued prior to the Supreme Court's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. The Court did not direct further submissions on the standard of review and counsel did not request such an opportunity. I have reviewed the Supreme Court's recent review of the Canadian administrative law framework and find that both these questions should be assessed under a reasonableness standard of review. I can see no reason to rebut the now-presumed presumption of reasonableness; and questions of administrative jurisdiction, where they do not involve competing administrative bodies, do not attract a correctness standard (*Vavilov* at paras 16–17, 65–68).

V. Submissions

A. *Did the RPD reasonably conclude that the Respondent was not excluded by application of Article 1E of the UN Convention?*

[23] The Applicant submits that the RPD unreasonably applied the test in *Zeng* (1) in its assessment of the Minister's evidence; (2) in its assessment of the Respondent's evidence; (3) by erring in its subjective fear assessment.

[24] Respecting the assessment of the Minister's evidence, the Applicant argued that the RPD conflated its onus with that of the Respondent. It submits that the onus was not on the Minister to

establish the Respondent's current status. All the Applicant had to do was establish a *prima facie* case, which it argues it did. The Applicant argues that the RPD misunderstood the purpose of the evidence that the Minister provided, which consisted of its submissions as well as the NDP, which supported its position that the Respondent's loss of permanent residence was not automatic.

[25] The Applicant further submits that the RPD erred by not recognizing that, once there is *prima facie* basis that the Respondent has status in another country, the onus shifts to the Respondent to establish that he does not have status in the third country. It cites *Obumuneme v Canada (Citizenship and Immigration),* 2019 FC 59 at para 41 [*Obumuneme*] and *Ramirez v Canada (Citizenship and Immigration),* 2015 FC 241 at para 14.

[26] In addition, the Applicant argues that not only is there an onus to show that a claimant does not have status in the third country, but there is also an onus to renew his or her status after losing it or to establish that he or she could not reacquire the status. The Applicant cites *Chen v Canada (Citizenship and Immigration),* 2018 FC 756, at paras 7-8 [*Chen*], *Canada (Minister of Citizenship and Immigration) v Choovak*, 2002 FCT 573 at para 42 [*Choovak*], and *Osazuwa v Canada (Citizenship and Immigration),* 2016 FC 155 at paras 41, 45 [*Osazuwa*].

[27] The Applicant argues that the opinion from the Italian lawyer was insufficient to establish that the Respondent lost status. It argues that the letter was merely a restatement of the law and it was, therefore, inadequate. The Applicant cites *Mikelaj v Canada (Citizenship and Immigration),* 2016 FC 902 at para 24 [*Mikelaj*].

[28] Regarding the third alleged error, the Applicant submits that the RPD improperly assessed the Respondent's subjective fear as a result of his voluntary loss of status in Italy. The Applicant relies on *Shahpari v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 7678 at para 14 (FC) [*Shahpari*] where Justice Rothstein held that the fact that a claimant has voluntarily relinquished protection enjoyed in a third country is relevant to the subjective fear analysis.

[29] The Applicant argues that this consideration should have resulted in a *prima facie* finding of asylum shopping which would have resulted in a negative inference on the Respondent's subjective fear. The RPD noted that the Respondent's repeated trips to Sri Lanka were indicative of a lack of fear but, according to the Applicant, the RPD did not engage fully in the consideration of this factor.

[30] The Respondent, on the other hand, argues that the Applicant's arguments simply amount to a disagreement with the RPD's assessment of the evidence, which does not constitute a reviewable error (*Therqaj v Canada (Citizenship and Immigration)*, 2014 FC 209).

[31] The Respondent also disagrees that he has an onus to renew his status after losing it or to establish that he cannot reacquire the status. The Respondent argues that the RPD did not err when it assessed both the Applicant's evidence and the Respondent's evidence and found, on a balance of probabilities, that the Respondent had lost his status in Italy.

[32] In short, the Respondent argues that the RPD correctly applied the test in *Zeng*. It also argues that the authorities the Applicant relies upon are not particularly helpful because they dealt with different factual considerations. In particular, the Respondent contrasts the legal opinion used in this case with the one in *Mikelaj*, as in that case the report was very brief and it did not provide any context, unlike the opinion letter in this case.

[33] The Respondent notes that weighing the evidence falls within the specialized expertise of the RPD and ought to be given deference, citing *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 [*Khosa*]. He also cites *Zeng* at para 29, where the Court gives the RPD great deference.

B. *Did the RPD exceed its jurisdiction in finding that the Respondent would be removed to Sri Lanka?*

[34] The Applicant argues that the RPD exceeded its jurisdiction by assuming the Respondent would be returned to Sri Lanka when it is the Minister of Public Safety and Emergency Preparedness who determines country of removal. The Applicant also argues that a claimant who is excluded from refugee protection can still be eligible for a Pre-Removal Risk Assessment [PRRA] prior to removal and that the country of removal can also be determined at this time. The Applicant cites *Majebi v Canada (Citizenship and Immigration)*, 2016 FC 14 at paras 30-31 and *Majebi v Canada (Citizenship and Immigration)*, 2016 FCA 274.

[35] The Respondent disagrees and argues that the guidance from *Zeng* requires the RPD to weigh a list of factors including the risk that the claimant would face in his home country. The

Respondent also argues that the Court in *Zeng* recognized that a PRRA does not provide a complete response prior to removal.

VI. Analysis

A. *Did the RPD reasonably conclude that the Respondent was not excluded by application of Article 1E of the UN Convention?*

[36] I am not persuaded by the Applicant's argument that the RPD erred in the assessment of the evidence. The record does not indicate that the RPD treated the Respondent's evidence in a manner requiring the Applicant to prove more than the *prima facie* case. The record indicates that the RPD spent considerable time addressing whether the Respondent was excluded by applying the *Zeng* test.

[37] *Zeng* does not offer guidance on the issue of the onuses; however, subsequent cases do shed some light on the issue. In *Obumuneme* at para 41:

> Refugee claimants do not bear an initial evidentiary burden to show that they are not excluded from protection […] Nevertheless, this Court has held that when there is evidence suggesting on a prima facie basis that a claimant has status in another country that would engage Article 1E, the onus shifts to the claimant to establish that he or she does not have such status in the third country […]
>
> [Emphasis added.]

[38] And from *Murcia Romero v Canada (Minister of Citizenship and Immigration)*, 2006 FC 506 at para 8:

> Initially, the burden is on the Minister to establish a *prima facie* case that a claimant can return to a country where he or she

> enjoys the rights of the nationals of that country. At that point, the onus shifts to the claimant to demonstrate why, having allowed the permanent residency to expire, she could not have re-applied and obtained a new permanent resident card.

[39] While the RPD did not use wording related to the shifting of the onus to the Respondent, the way in which it considered the evidence is related to the Respondent establishing whether or not he provided sufficient evidence to show he lost his status in Italy. There was no error at this initial stage of the assessment of the *Zeng* test and the RPD's consideration of the Applicant's evidence.

[40] After determining that the Respondent had status in Italy but lost it—which satisfied the second part of the *Zeng* test—the RPD went on to consider the third part of the *Zeng* test.

[41] Respecting the second alleged error by the RPD, I am also not persuaded by the Applicant's argument that the RPD did not undertake a fulsome assessment of the Respondent's evidence. The Applicant is correct when it argues that the Respondent had to either present evidence about attempts to renew his status after losing it, or evidence to establish that he could not reacquire the status. The Respondent's failure to adduce any evidence would lead the RPD to consider this failure in the balancing of the other factors. In my view, the RPD reasonably conducted such an analysis as the jurisprudence suggests should be done (*Chen* at paras 7-8; *Osazuwa* at para 45; *Tshiendela v Canada (Citizenship and Immigration)*, 2019 FC 344 at paras 34-35; *Choovak* at paras 40-41).

[42] The Applicant cites *Mikelaj*, a case where an opinion letter from an Italian lawyer was found to be "inadequate" because it contained a "conclusion with no analysis," "no legal reasoning and no jurisprudence". The Applicant claims that the lawyer's letter in this case should have been given no weight for the same reasons. The Applicant also argues that the letter and the Response to Information Request [RIR]—the search of the Italian Resident Registry— only showed that the Applicant *could* have lost his status, not that he *did*. The Applicant cited *Obumuneme* at paragraph 43 as an example:

> While the RIR provided evidence that they could have lost their status for the reasons they pointed to, the applicants did not adduce any evidence that this had actually happened. Especially considering the absence of evidence that the applicants had ever attempted to ascertain their current status in Italy, it was open to the RPD to conclude that they still enjoyed permanent resident status there.

[43] The Respondent asked the court to consider the differences between this case and the ones the Applicant has cited, noting that different facts will produce different results. He notes that the lawyer's letter is acceptable in this case because it is lengthy, referenced Italian legislation, and is accompanied by a long *curriculum vitae*. For the Respondent, this distinguishes it from the Court's rejection of the lawyer letter in *Mikelaj*.

[44] The Applicant submits that the factual differences between the lawyer's report in *Mikelaj* and the lawyer's letter in the present case do not detract from the principle that this evidence, in both cases, was inadequate to discharge the onus.

[45] I find that the RPD did not commit an error by relying on the Italian lawyer's letter and the RIR. As a board of considerable expertise, the RPD is empowered to determine which evidence is appropriate for finding facts and assigning weight to such evidence (*Khosa*).

[46] I note the Court in *Mikelaj* stated at paragraphs 23–24:

> [23] *Qi-Xiao v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 195 [*Qi-Xiao*] at paragraph 25, was relied on by the Applicant for the proposition that statements by officials, in this case the police website, are not acceptable because they are not expert evidence. However *Qi-Xiao* at paragraph 28 goes on to acknowledge that "the weight to be given expert evidence is a matter for the trier of fact and an expert's conclusion which is not appropriately explained and supported may properly be given no weight at all."
>
> [24] The legal opinion provided is inadequate. It contains a conclusion with no analysis. There is no legal reasoning and no jurisprudence is cited. In *Qi-Xiao* this was referred to as a bare opinion and that may properly be given no weight. When the RPD and then the RAD weighed the lawyer's letter against the documentary and other evidence dealing with residence cards, they each reasonably preferred the other evidence to the lawyer's letter.
>
> [Emphasis added.]

[47] The above passage does not mandate that no weight is to be given to lawyers' letters. Rather, the content of the letter is to be considered and weighed like other evidence. As noted above, the Courts, in acknowledging the deference owed to the RPD and RAD in findings of fact, have only gone as far as to state that "bare opinions" *may* properly be given no weight at all, but they have the discretion to decide otherwise depending on the facts.

[48] In this case, the lawyer's letter was long, referenced Italian legislation, and included a lengthy *curriculum vitae* for the RPD's review. In other words, the RPD did not consider it as simply a bare letter.

[49] As for the RIR, much of the same applies. The RPD is entitled to rely on it, with other evidence, towards establishing the fact that the Respondent had lost status and could not return to Italy.

[50] The RPD considered the other factors including that the Respondent had a reasonable fear of returning to Sri Lanka based on his Tamil ethnicity. The RPD also considered Canada's international legal obligations including the concept of non-refoulement. After considering all of the factors, the RPD determined that the Respondent was not excluded. It was a reasonable conclusion based on the evidence before the RPD.

[51] Respecting the third error, the lack of an assessment of the Respondent's subjective fear, I do not find that the RPD committed an error. The Applicant claims that the failure to mention "asylum shopping" in the analysis is an error of law. The Applicant also claims that the RPD did not substantially engage with the fact that the Respondent repeatedly took trips to Sri Lanka, suggesting a lack of subjective fear.

[52] With respect to the "asylum shopping" arguments, I am not persuaded by the Applicant's argument that the RPD was not alive to this issue. The Applicant claims that there should be a *prima facie* presumption against subjective fear where "asylum shopping" concerns are present,

but the cited cases do not appear to support this. The text in *Shahpari* only notes, at paragraph 14, that it "may well evidence" a lack of subjective fear. The Applicant argues in this case that while failure to claim refugee status is not determinative, it is relevant for assessing subjective fear.

[53] With respect to the Respondent's trips to Sri Lanka evidencing a lack of subjective fear, I find that the RPD did not fail to engage with it. As noted in the decision, the RPD stated that the previous trips, made many years ago, were not indicative of the Respondent's current fear, but only past fear. I agree, and find it reasonable that the RPD did not see the need for a more lengthy analysis.

[54] The factors outlined in the *Zeng* test are not a ranking system. They are to be considered and balanced by the RPD. I find that the RPD did not err and that it reasonably balanced the *Zeng* factors.

B. *Did the RPD exceed its jurisdiction in finding that the Respondent would be removed to Sri Lanka?*

[55] As stated above, this is a question of reasonableness. This is determined by examining whether the RPD's interpretation of their authority to determine the Respondent's country of removal was reasonable (*Vavilov* at para 68). Respecting jurisdiction, s 162 of IRPA sets out the broad scope of the RPD's jurisdiction:

> Each Division of the Board has, in respect of proceedings brought before it under this Act, sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction.

[56] I find that the RPD's application of the *Zeng* test was reasonable in considering the Respondent's return to Sri Lanka. The *Zeng* test refers to the balancing of certain factors, including "the risk the claimant would face in the home country". The consideration of such a factor inevitably requires an assessment of the probable country of removal. The RPD did not err by conducting this assessment.

[57] The RPD, in not considering a PRRA under the third stage of the *Zeng* analysis, did not err. Mandating that the RPD consider a PRRA assessment as a "relevant factor" in each case would be unprecedented when noting the following in *Zeng* at paragraphs 20–22:

> [20] The Minister's quarrel is with a claimant who controls the third country status by choosing not to access it and then loses it as a result. The refugee claim process is not intended to provide a route to better protection when there is existing and available protection elsewhere.
>
> [21] However, in view of the propositions that require the provision of protection to those in need as well as adherence to Canada's international law obligations, the Minister concedes that, in limited circumstances, when Article 1E is applied to those asylum shoppers who cannot return to the third country, the potential for removal from Canada to the home country without the benefit of a risk assessment exists. If this were to occur, it opens the door to the possibility of Canada indirectly running afoul of its international obligations.
>
> [22] The Minister recognizes that the PRRA process does not provide a complete response to the dilemma. If a PRRA officer concludes that Article 1E applies, even if risk is established, refugee protection cannot follow by virtue of section 98 of the IRPA. Further, the claimant cannot reap the benefit of a section 114 stay of removal because Article 1E does not fall within subsection 112(3). Although it is within the power of the PRRA officer to determine that Article 1E does not apply, the paragraph 113(a) requirement for new evidence (in order to arrive at such a determination) presents a formidable hurdle for the claimant to overcome.
>
> [Emphasis added.]

[58] I do not believe that, where the PRRA is not a certainty in every Article 1E case, this Court can appropriately mandate it as a factor in the *Zeng* analysis. It is for the RPD to make such determinations on the facts of the case before them.

[59] As a result, I also find that the RPD did not err by exceeding its jurisdiction when it considered Sri Lanka as the country of removal as part of the *Zeng* analysis and when it did not consider the possibility of a PRRA.

VII. Conclusion

[60] For all of the above reasons, the application for judicial review is dismissed.

[61] The parties did not raise any question for certification and none arises.

JUDGMENT in IMM-304-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. There is no question for certification.
3. There is no order as to costs.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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