Federal Court  Cour fédérale

Date: 20181023

Docket: IMM-1795-18

Citation: 2018 FC 1062

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, October 23, 2018

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

ORIOL NOEL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The refugee claim of Mr. Oriol Noel, a citizen of Haiti, was rejected under Article 1E of the *Convention relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137 [Convention], on the ground that his permanent resident status in Brazil gives him rights and obligations similar to those of citizens of that country.

[2] Mr. Noel is challenging this decision and argues that his permanent resident status was no longer valid at the time of his hearings before the Refugee Protection Division [RPD] and the Refugee Appeal Division [RAD], and that even if he had that status, it is wrong to claim that it confers the same rights on him as those enjoyed by Brazilians.

II. Facts

[3] Mr. Noel alleges that his father was the victim of a crime in 2014. Even though he reported his father's attacker to the police authorities, the attacker was quickly released. Fearing retaliation, Mr. Noel left Haiti for the Dominican Republic on February 26, 2015, and travelled to Brazil on March 23, 2016. On the same day, he was granted permanent resident status in Brazil, which is valid for nine years.

[4] Mr. Noel worked in Brazil from August 2015 to June 2016, when he left for the United States as a result of the unemployment crisis Brazil was facing at the time. He claimed refugee protection in the United States and worked there from August 2016 to August 2017.

[5] He arrived in Canada on August 3, 2017, and filed his refugee protection claim on August 21, 2017.

[6] The RPD and the RAD denied Mr. Noel's refugee protection claim on the ground that his permanent resident status in Brazil essentially conferred on him the same rights as those enjoyed by a Brazilian citizen and that he did not risk being persecuted should he return to Brazil. It is the RAD's decision that is the subject of this application for judicial review.

III. Impugned decision

[7] First, the RAD concluded that the RPD did not err in concluding that the appellant had permanent resident status in Brazil. He had received a permanent resident card that was valid for nine years, under a ministerial order granting permanent residence in Brazil to 43,871 Haitian nationals. According to the National Documentation Package [NDP] for Brazil dated March 2017, permanent residence is granted indeterminately, but it must be renewed every nine years, without having to follow a special procedure. There is therefore *prima facie* evidence that Mr. Noel is a permanent resident of Brazil.

[8] In such a case, the burden of proof shifts to the refugee claimant, who must establish that this status is no longer available to him or that he can no longer return to the third country (*Shahpari v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 7678 (FC) at paras 11–12). The NDP for Brazil, at Tab 3, provides that permanent resident status is cancelled in the following circumstances:

> I. the alien is awarded Brazilian nationality;
>
> II. the alien's expulsion has been ordered;
>
> III. the alien requests his/her definitive departure from the Brazilian territory, and expressly waives the right of return as provided in article 51;
>
> IV. the alien absents himself/herself from Brazil for a period exceeding the one mentioned in article 51 [two years];
>
> V. in case of visa transformation as provided in article 42;
>
> VI. the alien violates article 18, article 37, [para.] 02, or 99 to 101; and

> VII. the alien is a temporary resident or a political refugee nearing the expiration of his/her stay in the Brazilian territory (*ibid.*, Art. 49).

[9] According to the RAD, the mere fact that Mr. Noel left Brazil in June 2016, without informing the authorities, does not automatically result in his losing his permanent resident status. Mr. Noel still had his permanent resident status at the time of the hearing before the RPD on November 16, 2017.

[10] Like the RPD before it, the RAD found that permanent resident status grants the holder substantially the same rights and obligations as the citizens of Brazil have with respect to healthcare, education, social security and safety. There are some exceptions with respect to the right to vote, to carry out military service and to hold certain public offices, but, as a whole, the RAD concluded that the RPD did not err in this regard.

[11] The RPD also found that Mr. Noel failed to establish a serious possibility of persecution on one of the Convention grounds if he were to return to Brazil. He also failed to establish one of the risks set out in section 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]; in his Basis of Claim Form for his claim for refugee protection in Canada, Mr. Noel did not reply that he feared serious harm should he be removed to Brazil. When he applied for refugee protection in the United States, he did not claim protection from Brazil, only Haiti. Finally, it was impossible for the RPD to conclude, on the basis of the evidence on the record, that Haitians are persecuted throughout Brazil (*Ranjha v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 637; *Sagharichi v Canada (Minister of Employment and Immigration)* (1993), 182 NR 398 (FCA) (QL)). Mr. Noel alleges that he was discriminated against in Brazil,

but for there to be persecution, the measures of discrimination must lead to consequences of a substantially prejudicial nature for the person concerned, such as serious restrictions on the right to earn a livelihood, the right to practise religion, or access to normally available educational facilities. The evidence does not establish that this is the fate of Haitians residing in Brazil.

[12] Finally, the RPD had reason to consider the appellant's delay in claiming fear in relation to Brazil.

IV. Issues and standard of review

[13] This application for judicial review raises only one issue:

> *Did the RAD err in concluding that Mr. Noel was excluded under section 98 of the IRPA and Article 1E of the Convention given his permanent resident status in Brazil?*

[14] The applicable standard of review is that of reasonableness as this is a question of mixed fact and law (*Canada (Citizenship and Immigration) v Zeng*, 2010 FCA 118 at para 11).

[15] Moreover, the interpretation of foreign law is also to be reviewed on the reasonableness standard (*Lhazom v Canada (Citizenship and Immigration)*, 2015 FC 886 at para 7).

V. Analysis

[16] Mr. Noel submits that the RAD should have concluded that leaving Brazil without informing the authorities results in the automatic revocation of permanent resident status in Brazil. He is relying on article 51 of the law governing permanent residence in Brazil:

> Art. 51. An alien registered as a permanent resident who leaves Brazil, may return to the country independently from a visa if he/she returns within two years. (Renumbered by Law no. 6964 of 12/09/81)
>
> Sole paragraph. The evidence of the date of departure for the purposes of this article shall be the annotation on the alien's travel document made by the competent agency of the Ministry of Justice at the time of his departure from Brazil.

[17] He submits that since his passport was not stamped when he exited Brazil, he is unable to return there. Since, according to him, the exit stamp is the only way of proving the length of his absence from Brazil, he has no evidence.

[18] Mr. Noel also submits that the RAD erred in finding that Haitian permanent residents in Brazil have the same rights as Brazilians. He refers the Court to the *Country Report on Human Rights Practices (Brazil),* which states that Haitians suffer employment discrimination:

> According to local NGO Reporter Brasil, Haitian workers reported being victims of employment discrimination. The Ministry of Labor published and distributed a workers' rights manual in Portugese (*sic*) and Haitian Creole, but workers – especially in the construction business – complained some employers displayed racist behavior and would not disclose the rights Haitians had under law, including social security benefits.

[19] First, regarding Mr. Noel's status in Brazil, at the time of both hearings, before the RPD and the RAD, the evidence reveals the following:

> -His name appears on the list of Haitians to whom the Brazilian government granted permanent residence;
>
> -A stamp in his passport indicates that he registered as a permanent resident in March 2016; and
>
> -The Brazilian authorities issued him a permanent resident identity card valid for nine years.

[20] Regarding the impact of his leaving Brazil on his keeping his permanent residence, the RAD had to consider the following factors:

> -Mr. Noel alleges that he left Brazil without informing the authorities and that his passport does not contain an exit stamp; and
>
> -He left in June 2016, meaning that not only did the RAD hearing take place within the two-year period, but the RAD's decision (April 12, 2018) was also issued within that time.

[21] In my opinion, the RAD reasonably found that there was *prima facie* evidence that Mr. Noel had permanent resident status in Brazil.

[22] He therefore had to establish that he had lost this status (*Ramirez v Canada (Citizenship and Immigration)*, 2015 FC 241 at para 14; *Hassanzadeh v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1494 at paras 27–29).

[23] In light of the evidence before it, it is my opinion that it was also reasonable for the RAD to conclude that Mr. Noel failed to establish that he had lost his status by the time of the hearing

before the RPD (*Hadissi v Canada (Minister of Citizenship and Immigration)*, [1996] FCJ No 436 (QL) at paras 14–15).

[24] The NDP for Brazil does not suggest that the lack of an exit stamp results in the revocation of permanent resident status. The first paragraph of article 51 of the law governing permanent residence in Brazil provides that permanent residents may leave and return without a visa within a two-year period. It does not state whether permanent residents may return after this period has expired by applying for a visa. The second paragraph provides that the length of the absence from Brazil is established with the help of the exit stamp. It does not indicate what happens when there is no stamp or whose burden it is to establish the length of the absence, that of the permanent resident who wishes to enter without a visa or of the authorities intending to revoke the foreign national's permanent resident status.

[25] This provision can be interpreted in a number of ways, some of which advantage Mr. Noel. Since he had the burden of establishing that he had lost his permanent resident status, I believe that the RAD could conclude that he failed to do so, especially as the two-year period had not expired by the time it issued its decision.

[26] Mr. Noel left Brazil voluntarily, and nothing prevents him from attempting to return there before the expiry of the two-year period (*Canada (Minister of Citizenship and Immigration) v Choovak*, 2002 FCT 573 at paras 40–43).

[27] I share the concern expressed by the Honourable Marshall Rothstein, then of this Court, about refugee protection claimants being able to voluntarily renounce the protection of one country and then to claim protection in another one:

> . . . I would observe that if, by reason of their absence from Germany and sojourn in Canada, the applicants are, in effect, entitled to renounce the protection they received from Germany and claim protection from Canada, such a result is anomalous. In substance, it gives persons who have Convention refugee status in one country the right to emigrate to another country without complying with the usual requirements, solely by reason of their unilateral renunciation of the protection initially given to them by the first country. In effect, this means that they can "asylum shop" amongst countries who are signatories to the Geneva Convention and "queue jump" normal immigration waiting lists to the country of their choice. If this is the case, the applicants, who resided in Germany for ten years, may simply abandon Germany for Canada. They would have greater rights to emigrate to Canada than persons of German nationality. That is neither fair nor logical.
>
> (*Wassiq v Canada (Minister of Citizenship and Immigration)*, [1996] FCJ No 468 (QL) at para 11)

[28] Moreover, regarding the analysis of the situation of Haitians with permanent residence in Brazil, Mr. Noel submits that the RAD erred in concluding that they enjoyed the same rights as Brazilians. He argues that the evidence establishes that they suffer discrimination and are not informed of their rights.

[29] However, for discrimination against a person to amount to persecution, it must be serious and occur with repetition, and must have consequences of a prejudicial nature for the person, such as when an individual is denied a core human right, such as the right to practice religion or to earn a livelihood (*Sefa v Canada (Citizenship and Immigration)*, 2010 FC 1190 at para 10).

[30] In light of the evidence, it is my opinion that the RAD could reasonably conclude that the discrimination alleged by Mr. Noel did not amount to persecution. Mr. Noel did indeed work in Brazil at a time when, by his own admission, the country was going through an unemployment crisis. His allegations that some Brazilians have a racist attitude towards Haitians are, albeit very unfortunate, insufficient to conclude that Haitians are being persecuted.

[31] I note in closing that in both his claim for refugee protection in the United States and his Basis of Claim Form for his claim in Canada, Mr. Noel makes no mention of any fear in relation to Brazil.

VI. Conclusion

[32] Mr. Noel did not meet his burden of establishing that, on the date of the hearing before the RPD, he had lost the rights conferred on him by permanent residence in Brazil, or that he would not be granted them again if he returns to Brazil. He also failed to establish that he risks persecution if he is removed to Brazil. For these reasons, his application for judicial review is dismissed. Neither party proposed a question of general importance for certification, and this case does not give rise to one.

JUDGMENT in Docket IMM-1795-18

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed;

2. No question of general importance is certified.

"Jocelyne Gagné"
Judge

Translation certified true
on this 31st day of October 2018

Johanna Kratz, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET :	IMM-1795-18
STYLE OF CAUSE :	ORIOL NOEL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	SEPTEMBER 27, 2018
JUDGMENT AND REASONS:	GAGNÉ J.
DATED:	OCTOBER 23, 2018

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