Federal Court  Cour fédérale

Date: 20190529

Docket: IMM-5603-18

Citation: 2019 FC 754

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, May 29, 2019

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

PIERRE VITAL FLEURANT

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Pierre Vital Fleurant, a citizen of Haiti, is claiming status as a refugee or a person in need of protection, under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act]. His efforts before the Refugee Protection Division [the RPD] were unsuccessful (decision dated January 12, 2018), while his appeal to the Refugee Appeal Division [the RAD]

was dismissed (October 15, 2018). The Court must therefore dispose of the application for judicial review of the latter decision, which application was filed under section 72 of the Act.

[2] Section E of Article 1 of the *United Nations Convention Relating to the Status of Refugees*, [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.

This provision is relevant because the status of refugee or person in need of protection cannot be conferred on anyone referred to in this provision of the Refugee Convention, as stipulated in section 98 of the Act:

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.

I. Facts

[3] In this case, there are relatively few facts available concerning Mr. Fleurant's immigration history. Mr. Fleurant alleges that he was a businessman in Haiti and was therefore targeted by thugs who robbed him on several occasions and murdered his wife in April 2004.

[4] Believing that his life was in danger, Mr. Fleurant obtained a visa for Venezuela and settled there in 2005. He apparently obtained permanent residence in that country. He returned to Haiti a number of times, starting in 2010, and he says that a number of shots were fired at him by a robber during one of his visits. Mr. Fleurant was also allegedly attacked and robbed in Venezuela, while he was going to church. This attack allegedly occurred in 2014.

[5] In light of the deterioration of the political, economic and social situation in Venezuela, he decided to leave and go to the United States. He arrived there in August 2016 after travelling across several countries in Central America. Fearing deportation measures targeting people of Haitian origin without status in the United States, Mr. Fleurant came to Canada in July 2017 and filed a claim for refugee protection.

II. Decision under review

[6] As stated above, the RAD's decision confirmed the decision rendered by the Refugee Protection Division. First, no new evidence was presented in support of the appeal, and no application was filed to obtain a hearing. Moreover, the RAD stated that it had listened to the RPD hearing. Applying the test in *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93, [2016] 4 FCR 157 [*Huruglica*], the RAD applied the standard of review of correctness.

[7] The only issue decided was whether the exclusion based on Section E of Article 1 was applied correctly. Since the applicant had established his residence in Venezuela, the RAD was therefore required to consider whether he had all the rights and obligations attached to the possession of the nationality of that country.

[8] To answer this question, it was necessary to apply the analysis grid established by the Federal Court of Appeal in *Canada (Citizenship and Immigration) v Zeng*, 2010 FCA 118, [2011] 4 FCR 3. More specifically, the RAD referred to paragraph 28 of the decision and quoted the first few lines in it:

> [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. . . .

The review will therefore focus on Mr. Fleurant's status in Venezuela and on the rights conferred on him as a result.

[9] It has been admitted that Mr. Fleurant has permanent resident status in Venezuela. He acknowledged this fact before the RPD and has not brought it back into play since then. The RAD confirmed that the RPD questioned Mr. Fleurant about his right to return to Venezuela, his right to live, work and study there and his right to access social services in that country. In so doing, the RPD was trying to satisfy the requirements set out in the precedent-setting decision rendered in *Shamlou v Canada (Minister of Citizenship and Immigration)*, [1995] FCJ No 1537, (1995), 103 FTR 241 [*Shamlou*]. Mr. Fleurant confirmed that he had access to health services in Venezuela and that, essentially, "the only difference between himself and a citizen of Venezuela is that he is a foreign national and not a native of Venezuela" (RAD Decision, para 12). The RAD therefore upheld the RPD's decision since the rights and obligations attached to the possession of Venezuelan nationality are consistent with the permanent resident status that Mr. Fleurant held in that country. Even before the RPD hearing began, Mr. Fleurant had amended the Basis of Claim Form in order to allege a general fear of violence, famine and lack of

employment in Venezuela. Even though the effect of section 98 is to exclude the application of sections 96 and 97 of the Act, both the RPD and the RAD made brief comments to point out that the general situation in Venezuela would not have given rise to a remedy if it had been open to the applicant. Accordingly, the RAD concluded as follows at paragraph 14 of its decision:

> [14] . . . Thus, even if I were to conclude that the appellant would be at risk of further assault if he returned to Venezuela, it is clear from his testimony and the documentation on Venezuela, cited above, that this is a risk faced generally by the entire population of the country.

Moreover, none of the grounds of persecution listed in section 96 were invoked. The RAD therefore found that the RPD had not erred and dismissed the appeal.

III. Issue

[10] The applicant presented the issue to be determined as follows:

> [TRANSLATION]
>
> 1. Did the RAD err in finding that the appellant's permanent resident status in Venezuela essentially confers on him the same rights and obligations as Venezuelan citizens and that he is therefore excluded under section 1E [sic] of Article 1 of the Convention?
>
> (Applicant's Supplementary Memorandum, p 5)

[11] The applicant claims that it was an error of law to conclude that he was excluded from the application of the Convention. Does permanent residence in Venezuela result in exclusion under Section E of Article 1? Mr. Fleurant therefore submits that it is not enough to simply conduct an analysis based on the criteria set out in *Shamlou*. The applicant would have liked the

situation in Venezuela at the time the RAD rendered its decision to have been part of the analysis. The situation in Venezuela is very difficult, such that it is alleged that the rights listed in *Shamlou* to establish equivalence between the rights enjoyed by nationals and residents who do not hold citizenship are not respected in practice. That would be enough to set aside the consequences of section 98 of the Act and thereby declare him to be a refugee or person in need of protection.

[12] To start, counsel for the respondent points out that the style of cause was flawed because it referred to the Minister of Immigration, Refugees and Citizenship Canada. However, the Act still provides that it is the Minister of Citizenship and Immigration who is responsible for the application of the Act. Counsel is correct. While it is true that the Minister often goes by the title of Minister of Immigration, Refugees and Citizenship Canada, the fact remains that the Act has not been amended and must be referred to in the context of judicial proceedings. The Court therefore granted the respondent's motion and amended the style of cause to name the Minister of Citizenship and Immigration as respondent.

[13] With respect to the merits of the case, the respondent agrees that the decisions in *Zeng* and *Shamlou* are applicable in this case. The respondent adds that the Supreme Court, in *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, confirmed that "[r]efugee claims were never meant to allow a claimant to seek out better protection than that from which he or she benefits already" (p 726). Therefore, the refugee protection regime is intended to help people who need protection and not those who prefer to seek refugee protection in one country rather than another. As counsel notes, "asylum shopping" is prohibited. This is why Section E of Article 1 aims to

prevent anyone who already has a status that is substantially similar to that of nationals of the country of residence from claiming status as a refugee or person in need of protection elsewhere.

[14] With respect to the situation in Venezuela, the respondent argues that no grounds of persecution within the meaning of section 96 were presented and that the alleged risk within the meaning of section 97 was not personalized.

IV. Standard of review and analysis

[15] The standard of review in this matter is reasonableness (*Majebi v Canada (Citizenship and Immigration)*, 2016 FCA 274; *Zeng* (cited above); *Melo Castrillon v Canada (Citizenship and Immigration)*, 2018 FC 470). The standard therefore calls for deference and requires the Court to refrain from substituting its own opinion for that of the decision maker provided that the decision is reasonable, meaning that the decision demonstrates justification, transparency and intelligibility within the decision-making process and falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

[16] The purpose of Section E of Article 1 was succinctly articulated by the Court of Appeal in *Zeng*:

> [1] This appeal concerns Section E of Article 1 (Article 1E) of the *United Nations Convention Relating to the Status of Refugees*, 189 U.N.T.S. 150 (the Convention) and more particularly, the issue of asylum shopping. Article 1E is an exclusion clause. It precludes the conferral of refugee protection if an individual has surrogate protection in a country where the individual enjoys substantially the same rights and obligations as nationals of that country. Asylum shopping refers to circumstances where an individual seeks protection in one country, from alleged persecution, torture, or cruel

> and unusual punishment in another country (the home country), while entitled to status in a "safe" country (the third country).

This led the Court to determine that the question that needed to be addressed was whether the person had a status that was substantially similar to the status of nationals of the country of residence (*Zeng*, para 28). The more specific factors listed in *Shamlou* came from *Immigration Law and Practice* (1992, loose-leaf) by Lorne Waldman and were explicitly adopted by Justice Bastarache in *R v Cook*, [1998] 2 SCR 597 at paragraph 140. These factors are:

(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.

Therefore, if these factors were satisfied, Mr. Fleurant would be deemed to have a status substantially similar to that of Venezuelans. I do not think that there is any bat to considering other factors relevant to the determination of a status equivalent to that of citizens of the country where someone has found refuge. However, no such attempt was made in this case. The question that was put forward was therefore described in paragraph 36 of *Shamlou*:

> I accept the criteria outlined by Mr. Waldman as an accurate statement of the law. The issue with respect to the Board's application then really turns on whether or not it was reasonably open for the Board, on the facts before it, to conclude that the applicant was a person recognized by the competent authorities in Mexico as having most of the rights and obligations which are attached to a person of that nationality.

[17] There is no doubt that the RPD and the RAD found that the four factors were satisfied. The applicant's burden was to establish that these findings were not reasonable. This was not

done. Instead, it is my view that the regime for protecting refugees subjected to persecution for any of the listed grounds, or for protecting persons who would personally be subjected to a danger of torture or a risk of cruel and unusual treatment or punishment has been conflated with the social upheaval that Venezuela is currently facing. In fact, the applicant does not by any means allege being persecuted for any of the grounds listed in section 96 of the Act. Moreover, it is not claimed that he may qualify under section 97 of the Act. Instead, he complains about the extremely difficult situation currently facing residents of Venezuela. In my opinion, there is a conflation of two separate issues here. Mr. Fleurant does not deny that he is able to return to his country of residence; he does not deny that he is able to work there freely; he does not deny that he is able to study there; and he does not deny that he has full access to social services in his country of residence. He instead complains about the quality of life, as probably any Venezuelan national suffering the same shortages as the applicant could do.

[18] Therefore, the applicant is excluded under section 98 of the Act because his country of residence is accessible to him and he is able to work there, study there or obtain access to social services in the same way as citizens of Venezuela. In my opinion, the fact that there is a shortage of work or that social services have been reduced (which, in any case, was not proved) because of the problems the country is facing is not among the factors to be considered in the context of a refugee protection regime. The evidence shows that despite everything, when the RAD sought to establish whether the conditions of sections 96 and 97 could be met, it was forced to conclude that such was not the case. No persecution was demonstrated under section 96 (or even seriously alleged), or for that matter under section 97, which explicitly requires personal risk in order to

benefit from it. It is worth reproducing section 97 here. As can be seen, the risk must be personalized, and the fear must concern personal attacks that are defined in this provision:

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 habitual residence, would subject them personally	**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 elle avait sa résidence habituelle, exposée :
(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	**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) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	**b)** soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,	**(i)** elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(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,	**(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) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	**(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) the risk is not caused by the inability of that country to provide adequate health or medical care.	**(iv)** la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

[Emphasis added.]

[19] Clearly, the applicant does not qualify under section 98 if the analysis grid in *Shamlou* is applied, and he is also ineligible to file a claim under sections 96 and 97.

[20] Consequently, the decision rendered by the RAD is reasonable, and the application for judicial review must be dismissed. The parties agree that there is no question for certification, and the Court concurs.

JUDGMENT in IMM-5603-18

THE COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. No serious question of general importance is certified;

3. The style of cause is amended to provide that the respondent is the Minister of Citizenship and Immigration.

"Yvan Roy"
Judge

Certified true translation
This 10th day of June, 2019.
Michael Palles, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5603-18
STYLE OF CAUSE:	PIERRE VITAL FLEURANT v MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	MONTRÉAL, QUEBEC
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