

Federal Court



Cour fédérale

Date: 20190613

Docket: IMM-512-18

Citation: 2019 FC 810

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Montreal, Quebec, June 13, 2019

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

PETERSON FLEURISCA

Applicant

and

**MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Nature of the case

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], for judicial review of a decision by the Refugee Protection Division

(RPD) of the Immigration and Refugee Board of Canada, dated December 28, 2017, determining that the applicant was neither a Convention refugee nor a person in need of protection.

II. Facts

[2] The applicant is a 38-year-old citizen of Haiti. In the event of a return to Haiti, he fears for his life and his security because of political reasons. He was a member of a non-profit organization, the Organisation pour le développement de Hatte-grand-mont, and in the 2010 presidential elections in Haiti, he supported a candidate named Mirlande Hyppolite Manigat.

[3] On November 29, 2010, the applicant left his country for Brazil, where he obtained permanent residence on September 17, 2012. He held various jobs there, but his fellow workers allegedly accused him of stealing their jobs, treated him as a homosexual and threatened him with death.

[4] On April 3, 2016, the applicant left Brazil with the intention of coming to Canada, passing through eight countries, including the United States. He stated that he made a refugee claim in the United States in order to enter it and to then travel to Canada.

[5] The applicant believes that he lost his permanent residence in Brazil for having lived more than one year outside the country.

[6] On March 30, 2017, the applicant made a refugee claim at the Canadian border. He first claimed to have permanent residency in Brazil, but did not want to return because there was no

work. However, at the hearing, he alleged to have left Brazil because of the discrimination he suffered.

[7] The Minister of Immigration, Refugees and Citizenship [Minister] intervened in this case to seek the exclusion of the applicant since the applicant has permanent resident status in Brazil, which gives him almost the same rights and obligations as a citizen of Brazil, and where he can return without fear of persecution or being subject to a danger under section 97 of the IRPA.

III. Impugned decision

[8] In its decision dated December 28, 2017, the RPD concluded that the applicant is covered by Section E of Article 1 of the *United Nations Convention Relating to the Status of Refugees*, signed in Geneva on July 28, 1951 [Article 1E of the Convention] because he is a permanent resident of Brazil. This status confers on him the same rights and obligations attached to the nationality of Brazil, a country where he can return and remain without fear of persecution. As a result, the refugee claim was refused.

A. *Status in Brazil*

[9] After considering the documentary and testimonial evidence, the Commissioner concluded that the applicant could not have lost his permanent resident status in Brazil since he had not been out of the country for two consecutive years. Therefore, the RPD determined that the applicant did not have to apply to renew his foreign identity card or to prove his employment status in Brazil. To this end, the RPD further noted that the applicant's foreign identity card is

valid until January 25, 2020. The RPD is satisfied that the applicant holds permanent resident status in Brazil and has not discharged his burden of proving that he no longer has that status, according to *Canada (Citizenship and Immigration) v Tajdini*, 2007 FC 227. According to the RPD, the applicant can therefore return to Brazil and has the [TRANSLATION] “right to work, to study and to have full access to the social services of that country, which the applicant admitted in court” (Reasons and Decision of the RPD, para 20).

B. *Fear in Brazil*

[10] The applicant alleged discrimination in Brazil. In its decision, the RPD noted in the applicant’s comments according to which:

[H]e was very hardworking and appreciated by his employers, which caused jealousy on the part of his Brazilian coworkers. He added that the Brazilians said that the Haitians came to Brazil to steal their work and for that he was insulted, told to return to his country, treated as a homosexual and threatened with death.

[11] The RPD noted that the applicant did not report this to the authorities to seek protection because his bosses told him that the situation was to be resolved at work.

[12] The RPD did not accept the applicant’s non-plausible explanation when he was confronted with his own statement made at the Fort Erie point of entry. The applicant responded that the immigration officer wanted him to give short answers to the questions put to him. In his statement, the applicant told the immigration officer that [TRANSLATION] “nothing prevented him from returning to Brazil, that he could return as he wished, but that he did not wish to go, because there was no work left” (Reasons and Decision of the RPD, at para 25).

[13] In addition, when questioned at the point of entry as to why he had made a refugee claim in Canada, the applicant responded that [TRANSLATION] “there was no stability in the United States, he had not slept well and where he lived, the wife of his cousin was jealous of having family members at their home” (Reasons and Decision of the RPD, at para 28).

[14] In sum, the RPD noted that the applicant never indicated the allegations of discrimination at work in his claim form. Following the fifty-one questions asked to the applicant at the port of entry, the RPD found that the applicant could have stated, even briefly, the problems he alleged to have encountered in Brazil. The RPD then raised inconsistencies between the applicant’s written statements and his testimony. The Commissioner was rather of the opinion that the applicant tried several times to adjust his story during his testimony following the intervention of the Minister requesting his exclusion within the meaning of Article 1E of the Convention.

[15] For those reasons, the Commissioner concluded that the applicant’s credibility was tainted, such that he did not believe the applicant’s story that he feared persecution in Brazil because of discrimination.

IV. Issue

[16] Is the RPD’s decision that the applicant is subjected to Article 1E of the Convention reasonable?

[17] According to the applicant, the standard of review applicable to exclusion within the meaning of Article 1E of the Convention is that of reasonableness (*Canada (Minister of*

Citizenship and Immigration) v *Choovak*, 2002 FCT 573). This position, however, offers an incomplete view. When it comes to the application of the legal test, the Court uses the standard of correctness, whereas the subsequent assessment of the facts under this test is based on the standard of reasonableness (*Rrotaj v Canada (Citizenship and Immigration)*, 2016 FC 152 at para 10 *Rrotaj*] and *Canada (Citizenship and Immigration) v Zeng*, 2010 FCA 118 at para 11 [*Zeng*]).

V. Relevant provisions

[18] The following provisions of the IRPA are relevant:

Convention refugee

96 A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

Person in need of protection

97 (1) A person in need of

Définition de “réfugié”

96 A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d’être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n’a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Personne à protéger

97 (1) A qualité de personne à

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

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(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,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(2) A person in Canada who is a member of a class of persons prescribed by the regulations

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) 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) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(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) 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) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

(2) A également qualifié de personne à protéger la personne qui se trouve au

as being in need of protection is also a person in need of protection.

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.

Ineligibility

101 (1) A claim is ineligible to be referred to the Refugee Protection Division if

...

(d) the claimant has been recognized as a Convention refugee by a country other than Canada and can be sent or returned to that country;

Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de 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.

Irrecevabilité

101 (1) La demande est irrecevable dans les cas suivants :

[...]

d) reconnaissance de la qualité de réfugié par un pays vers lequel il peut être renvoyé;

[19] In addition, Article 1E of the Convention states as follows:

Article 1 - Definition of the term "refugee"

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.

Article premier. - Définition du terme "réfugié"

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.

VI. Analysis

[20] The first step is to determine whether the RPD erred in concluding that the applicant was excluded from the Convention by the application of Article 1E of the Convention.

A. *Are the rights granted to the applicant essentially the same as those of Brazilian nationals?*

[21] *Zeng* establishes the framework of interpretation and application of 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.

[22] It is therefore necessary to determine what is meant by a "status, substantially similar to that of its nationals". Since *Shamlou v Canada (Minister of Citizenship and Immigration)* (1995), 103 FTR 241, this Court has repeatedly reiterated that the applicant should enjoy the four fundamental rights established by Lorne Waldman (*Immigration Law and Practice*). (1992) [loose-leaf], Vol. 1 to 8.2.17.4), that is:

- (a) the right to return to the country of residence;
- (b) the right to work freely without restrictions;

(c) the right to study;

(d) full access to social services in the country of residence.

(*Rrotaj*, above, at para 16.)

[23] The applicant admitted that he had all these rights. In addition, the evidence is that the applicant's permanent residence in Brazil was valid until 2020.

B. *Is the applicant's safety adequate in Brazil?*

[24] The applicant claims to have had conflicts with co-workers, going as far as receiving death threats. As no persecutor has been identified, no clear and present danger has been demonstrated, and furthermore, the applicant has never asked the Brazilian State to protect him, this Court concludes that Brazil is a safe host country for the applicant.

C. *Second hearing*

[25] Following a first hearing, the applicant was offered the opportunity to demonstrate that he had lost his permanent residence in Brazil, which he did not do. Moreover, the information held by the Court does not support the conclusion that the current situation in Brazil is such that the applicant would face persecution if he were to return.

VII. Conclusion

[26] In conclusion, it should be recalled that the primary objective of the Convention is to offer a host country to applicants who need it while preventing them from asylum shopping.

In *Zeng*, supra, at para 1, the Federal Court of Appeal defined “asylum shopping” as referring 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)”. Based on the facts of this case, it appears that this is what the applicant is attempting to accomplish.

[27] For the reasons given above, this application for judicial review is dismissed.

JUDGMENT in Docket IMM-512-18

THE COURT ORDERS THAT the application for judicial review is dismissed. There is no question of general importance to certify.

“Michel M.J. Shore”

Judge

Certified true translation
This 5th day of July, 2019.

Daniela Guglietta, Translator

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-512-18

SYTLE OF CAUSE: PETERSON FLEURISCA v THE MINISTER OF
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