Federal Court  Cour fédérale

Date: 20190911

Docket: IMM-6092-18

Citation: 2019 FC 1164

Ottawa, Ontario, September 11, 2019

PRESENT: The Honourable Mr. Justice Lafrenière

BETWEEN:

ASELIE BERCY DESIR AND SAIMA RACHEL BERCY

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] On July 25, 2017, the Applicants, Aselie Bercy Desir and her eight-year-old daughter, Saima Rachel Bercy, applied for asylum in Canada under section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. Their asylum claims were rejected by the Refugee Protection Division of the Immigration and Refugee Board of Canada

[RPD] on the grounds that the principal Applicant, Ms. Desir, is excluded from protection under Article 1E of the *United Nations Convention Relating to the Status of Refugees* [Article 1E], and the Applicants are not Convention refugees or persons in need of protection. The Applicants seek judicial review of the RPD decision dated November 20, 2018.

II. Facts

[2] Ms. Desir is a citizen of Haiti. Her allegations are set out in her Basis of Claim form, as amended, and further explained in her testimony at the RPD hearing. In summary, Ms. Desir alleges that during the 2010 election in Haiti, she supported the political campaign of Michel Joseph Martelly, who went on to serve as President. On a live, call-in radio program, Ms. Desir encouraged listeners to support Mr. Martelly and criticized Mirlande Manigat, leader of the opposition Le Rassemblement des démocrates nationaux progressistes [RDNP].

[3] Ms. Desir claims that in November 2010, she and her children were threatened, terrorized and beaten at her home by armed supporters of Ms. Manigat for having conducted political rallies against their candidate. According to Ms. Desir, she called the police; however, they did not attend until the next day and took no action.

[4] In December 2010, after the election, the supporters of Ms. Manigat returned to Ms. Desir's home. They threatened and beat Ms. Desir because she had complained to the police and attempted to rape her and her daughters. When neighbours heard the commotion and started approaching, the assailants ran off, promising they were going to come back to finish them all. Fearing for her life, Ms. Desir left Haiti for Chile in January 2011 with her children.

[5] Ms. Desir claims that she was a victim of discrimination and racism during her time in Chile, including at her workplace. Feeling marginalized, she left Chile for the United States in March 2014 with Miss Bercy, who was born in Chile and is therefore a citizen of that country. They arrived in Canada in July 2017 and claimed asylum.

III. RPD's Decision

[6] The RPD concluded the Applicants were not Convention refugees or persons in need of protection. It found that Ms. Desir was excluded under Article 1E as she had permanent residence status in Chile and lost it through her own voluntary actions. It further found that Miss Bercy was not a Convention refugee as she did not have a well-founded fear of persecution on a Convention ground in Chile. It also found Miss Bercy was not a person in need of protection in that her removal to Chile would not subject her personally to a risk to life or a risk of cruel and unusual treatment or punishment. Finally, the RPD found that there were no substantial grounds to believe that Miss Bercy's removal to her country of citizenship would subject her personally to a danger of torture.

IV. Issues to be Determined

[7] The Applicants submit that the issues before this Court are as follows:

1. Whether the RPD's analysis of Ms. Desir's alleged exclusion pursuant to Article 1E was unreasonable; and

2. Whether the RPD's consideration of subsection 97(1) of the IRPA was incomplete and improper and therefore unreasonable.

[8] It bears noting that the arguments advanced by the Applicants focussed exclusively on the RPD's findings made against Ms. Desir. The findings relating to her minor daughter remain unchallenged.

V. Standard of Review

[9] The test for exclusion under Article 1E is a question of law of general application to the refugee determination process, and it is reviewable on a standard of correctness. However, whether the facts of a particular case give rise to an exclusion is a question of mixed fact and law, and it is reviewed on a standard of reasonableness. The RPD is owed a significant degree of deference with respect to this determination (see *Zeng v Canada (Minister of Citizenship and Immigration)*, 2010 FCA 118 at para 11 [*Zeng*]; see *Zhong v Canada (Minister of Citizenship and Immigration)*, 2011 FC 279 at para 15).

VI. Analysis

A. *The RPD's approach to the Article 1E exclusion*

[10] The Applicants submit that in reaching its conclusion, the RPD failed to apply the correct test and misinterpreted and misapplied relevant jurisprudence governing exclusions under Article 1E. There was considerable discussion at the hearing of the application concerning the evidentiary burden on the parties before the RPD. According to the Applicants, the onus was on the Respondent to establish on a *prima facie* basis that the Applicant actually had status on the date of the hearing in another country in order to engage Article 1E. The Applicants contend that the Respondent failed to meet its burden. The Applicants further maintain that the Article 1E

exclusion does not apply when a claimant's status in the third country is uncertain. For the reasons that follow, I disagree.

[11] The test for exclusion under Article 1E was articulated by the Federal Court of Appeal in *Zeng*. In that case, the claimants were Chinese citizens entitled to permanent resident status in Chile. They argued there was a risk their permanent resident status would expire as they had been outside Chile for more than one year and had not applied to have their status extended. The RPD rejected this argument, finding that the claimants held permanent residence status in Chile at the time of the hearing. The RPD further found that if their status could have been lost because the claimants were outside of Chile for more than a year without applying to extend it, that failure to extend could not avail to their benefit. In allowing the claimants' application for judicial review from the RPD's decision, the application judge identified a discrepancy in the jurisprudence regarding the appropriate date for assessing the applicability of the Article 1E exclusion.

[12] On appeal, the Federal Court of Appeal held it was permissible for the RPD to consider what steps the claimant took or did not take to cause or fail to prevent the loss of status in a third country in assessing whether Article 1E should apply. The Court added the following qualification at paragraph 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. [Emphasis added.]

[13] It follows that a refugee claimant does not bear an initial evidentiary burden to show he or she is not excluded from protection. The burden is on the Minister of Citizenship and Immigration to establish a *prima facie* case that a claimant holds or held status substantially similar to that of nationals in a third country before being able to invoke Article 1E.

[14] In the present case, the RPD found, on a balance of probabilities, that Ms. Desir obtained permanent resident status in Chile, that she possessed and enjoyed fundamental rights shared by Chilean citizens, and that she lost her status in March 2015. These findings are not disputed by the Applicants. The RPD then considered the various factors set out in *Zeng* at paragraph 28, including the reason for Ms. Desir's loss of status, whether she could return to Chile, the risk she would face in Haiti, Canada's international obligations, and other relevant facts.

[15] The Applicants submit that while the RPD was required to consider the various factors under the *Zeng* test, this did not place a burden on Ms. Desir to prove that her status could not be reinstated. I disagree. Mr. Justice Paul Rouleau held in *Canada (Minister of Citizenship and Immigration) v Choovak*, 2002 FCT 573 at paragraphs 15 and 17 that a claimant's choice to allow his or her status in a third country to expire amounts to an impermissible form of asylum shopping. The Federal Court of Appeal confirmed in *Zeng* that the reason why a claimant lost their status remained a valid factor to be considered and weighed by the RPD in reaching its decision. The Court also stated at paragraph 39 that it is reasonable for the RPD to consider what

steps the foreign national may or may not have taken in order to prevent the loss of status in the third country.

[16] It is well-established that a refugee claimant has the burden of proof in showing, on a balance of probabilities, the validity of the allegations on which his or her claim is based. I conclude that a similar burden rests on a claimant who has caused their permanent residence status in a third country to expire to demonstrate why the status was lost and why the claimant could not have reapplied and obtained a new visa. This only makes sense. Otherwise, who else could speak to the circumstances leading to the loss of one's status or what steps, if any, one took to re-acquire status?

[17] For the above reasons, I am satisfied that the RPD applied the correct test when considering the Article 1E exclusion and correctly placed the burden on Ms. Desir to explain why she left Chile and why she could not have reapplied and obtained a new visa.

(1) Whether Ms. Desir left Chile voluntarily

[18] The RPD sets out in great detail Ms. Desir's explanation for leaving Chile. Ms. Desir testified that she had experienced some incidents of discrimination and racism in Chile. When asked whether the Applicant had sought assistance from the police, Ms. Desir testified that she had not as she did not speak Spanish and she would not know what to say. The RPD noted that the documentary evidence indicates that the Chilean police force is considered one of the most professional police forces in Latin America. It found that Ms. Desir had not demonstrated a satisfactory explanation for failing to seek their assistance.

[19] The RPD also noted that Chile has a long history of encouraging immigration and has supports in place to assist with the integration of immigrants. While the RPD accepted that Ms. Desir may have experienced discrimination and racism in Chile, it concluded that she had failed to establish with sufficient evidence that she or her daughter would face discrimination amounting to persecution if she returned to that country. Ultimately, the RPD concluded it appeared that the Applicants left Chile in 2014 voluntarily and that this was a factor in favour of exclusion. I can see no error in the RPD's analysis.

(2) Whether Ms. Desir could return to Chile

[20] Ms. Desir was asked by the RPD if she could regain her permanent status in Chile. Her response was that she could not get it back. When pressed by the RPD if she had tried to find out if and how she could revive her status, Ms. Desir replied that she looked on the Internet and found that she would have to be sponsored by someone in Chile and that she would have to make her request from Haiti.

[21] The Applicants submit that the RPD did not point to any evidence that permanent resident status could be re-acquired in Ms. Desir's particular circumstances. However, the Applicants ignore the fact that the burden was on Ms. Desir to demonstrate to the RPD that she could not return to Chile. It is insufficient for claimants to offer speculative answers regarding their status in place of confirmation with third country authorities: *Wasel v Canada (Minister of Citizenship and Immigration),* 2015 FC 1409 at para 21. The RPD's conclusion that this factor could not be properly evaluated appears reasonable given the paucity of evidence presented by the Applicants.

(3) The risk Ms. Desir would face in Haiti

[22] The RPD's conclusion that Ms. Desir was not at risk if returned to Haiti was based, in part, on its determination that Ms. Desir's persecution narrative was not credible. The RPD addressed the inconsistencies in that narrative, including discrepancies as to the dates she made her police report and attended a clinic and as to when and where she travelled after the alleged assaults. The RPD also determined that some of Ms. Desir's supporting documents were fraudulent, as they were inconsistent with her narrative. The RPD also addressed the ease with which falsified documents are acquired in Haiti. After finding Ms. Desir's persecution narrative not credible, it was open to the RPD to find the police report and clinic record not credible (see *Campo Diaz v Canada (Minister of Citizenship and Immigration)*, 2016 FC 1343 at para 15).

[23] Ms. Desir provided the RPD with a letter from her sister stating there were people looking for her in Haiti, as well as a letter from the Secretary General of the Regwoupman Sitwayen Pou Espwa party (RESPÈ) stating Ms. Desir was a "victim of great persecution." The RPD discounted the statement of Ms. Desir's sister as it was vague and confusing. The RPD noted that Ms. Desir testified that her problems in Haiti were not connected to the RESPÈ party. The RPD also found that the letter from RESPÈ did not describe how the author became aware of Ms. Desir's problems or establish that Ms. Desir would face a forward-looking risk in Haiti due to her previous involvement with the RDNP.

[24] Ms. Desir argued that the RPD erred in its assessment of her forward-looking risk of gender-based violence as the RPD assumed Ms. Desir would live with her husband. However,

the RPD found Ms. Desir's evidence of a forward-looking risk of gender-based violence in Haiti was insufficient as Ms. Desir did not demonstrate she shared the specific profile of vulnerable, persecuted persons (namely women living in a rural environment, women who have been internally displaced or who are living in camps, women victims of domestic violence including spousal rape, women with disabilities, sexual minorities, and pregnant women and girls) or had some specific fear (see *Dezameau, Elmancia v Canada (Minister of Citizenship and Immigration)*, 2010 FC 559 at para 29).

[25] It is well-established that significant deference is due to the findings of a tribunal, including the RPD, in matters of credibility. In my view, the RPD's analysis of Ms. Desir's credibility is not tainted by any reviewable error.

[26] Moreover, I am satisfied that the RPD's findings regarding the forward-looking risk of persecution Ms. Desir may face in Haiti are reasonable and fall within the range of possible, acceptable outcomes which are defensible in respect of the facts and law.

B. *The RPD's approach to subsection 97(1) of the IRPA*

[27] Given that I have concluded that the RPD's analysis of the factors to be considered in determining whether or not Ms. Desir was a person referred to in Article 1E—and given that persons referred to in Article 1E are not Convention refugees or persons in need of protection under section 98 of the IRPA, I see no reason to review the RPD's analysis under section 97 of the IRPA separately. I also note that section 97 of the IRPA entails many of the same considerations as the Article 1E analysis. Suffice it to say that no error has been demonstrated in

the RPD's findings that the Applicants were not Convention refugees or persons in need of protection in either Chile or Haiti.

VII. Conclusion

[28] The application for judicial review of the decision of the RPD dated November 20, 2018 is dismissed.

[29] There are no questions for certification.

[30] Ms. Desir's surname is misspelled in the style of cause. It should read "Desir" not "Desire." The style of cause shall be amended accordingly.

JUDGMENT IN IMM-6092-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. The style of cause is amended with immediate effect to correct the surname of the principal Applicant to read "Desir".

"Roger R. Lafrenière"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6092-18
STYLE OF CAUSE:	ASELIE BERCY DESIR AND SAIMA RACHEL BERCY v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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