Federal Court  Cour fédérale

Date: 20190925

Docket: IMM-113-19

Citation: 2019 FC 1234

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, September 25, 2019

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

JEAN CHARLES OCCEAN
CHERICIA OCCEAN ARCHELUS

Applicants

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

I. Preamble

[1] The decision *Canada (Citizenship and Immigration) v Zeng*, 2010 FCA 118 [*Zeng*], establishes the following framework for the interpretation and application of Article 1E of the *United Nations Convention Relating to the Status of Refugees* [Article 1E of the Convention]:

> [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 included, 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.

[2] It is therefore necessary to determine what is meant by "status, substantially similar to that of its nationals". Since *Shamlou v Canada (Minister of Citizenship and Immigration)*, [1995] FCJ No 1537 [*Shamlou*], this Court has repeatedly reiterated that an applicant should enjoy the four fundamental rights established by Lorne Waldman (*Immigration Law and Practice* (1992) [loose-leaf]), vol 1 at No 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; and

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

II. Nature of the matter

[3] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board [IRB] dated December 13, 2018, in which the RAD confirmed the decision of the Refugee Protection Division [RPD].

[4] Regarding the male applicant, the RPD determined that he is a person referred to in Article 1E of the Convention, and therefore is not a refugee or a person in need of protection under section 98 of the IRPA.

[5] Regarding the female applicant, the RPD rejected her refugee protection claim because it found that there was no evidence of a serious possibility that she would be persecuted or subjected to a risk of a threat to her safety.

III. Facts

[6] Jean Charles Occean and Chericia Occean Archelus are citizens of Haiti who are 35 and 33 years old respectively. They are married with four children, three boys and one girl, who stayed in Haiti under the care of the female applicant's sister.

[7] In October 2011, the male applicant was the victim of an armed robbery in the market following the sale of two pigs that he raised. Fearing that he would not be able to obtain help from the Haitian police, the appellant left the country shortly afterwards to settle in Brazil, where he obtained a work permit. At that time, the applicants wanted to take steps to move the whole family to Brazil.

[8] On March 18, 2016, when the female applicant went to pay for her Brazilian visa, she claims that her identity papers and visa payment records were stolen. The criminal was annoyed that he did not find money, so he threatened to kill the female applicant. This incident is the basis of her fear for her safety if she is to return to Haiti, and of her Basis of Claim Form [BOC Form].

[9] On June 22, 2016, the female applicant joined her husband in Brazil. The female applicant provides no explanation as to how she was able to recover her passport and Brazilian visa after the alleged theft.

[10] From July to November 2016, the applicants crossed several countries before reaching the United States. There, the female applicant was detained for eight months by the American customs authorities. The applicants did not apply for asylum there, ostensibly because they did not know the appropriate procedure. Without status in the United States, the applicants feared deportation to Haiti and decided to come to Canada to claim refugee protection, which they did on August 30, 2017.

[11] During his stay in Brazil, the male applicant claims to have suffered constant racism from Brazilian society. The applicant points out that he was the victim of an attack while waiting for a bus in May 2016, when a man armed with a knife tried to steal his cell phone. However, there is no mention of this event in the male applicant's BOC Form.

[12] Having noted that the male applicant's name appears on *A joint ministerial act of the Ministry of Justice and the Ministry of Labour and Social Security of Brazil* [Ministerial Act] granting permanent resident status to the persons named therein, the Department of Citizenship and Immigration sent a notice of intervention requesting the Court to find that the applicants were excluded under Article 1E of the Convention.

IV. IRB decisions

A. *RPD decision*

(1) Decision regarding applicant Jean Charles Occean

[13] At a hearing held on January 22, 2018, the RPD determined that the applicant is not a Convention refugee, for two reasons. First, the RPD was of the opinion that there is prima facie evidence that the applicant was, at the time of the hearing, a permanent resident of Brazil. The RPD based this decision on the fact that the applicant's name and passport number appear on the list in the Ministerial Act and the amendment to the applicant's BOC Form.

[14] Thus, it was up to the applicant to demonstrate that he did not have permanent resident status in Brazil. The applicant alleged that he no longer believes he has permanent residence in Brazil since he had left the country and did not have his passport to prove when he left the country. However, the RPD concluded that this allegation is not supported by any evidence as to the procedure to be followed in the event of the loss of the passport of a permanent resident attempting to return to Brazil. Similarly, the applicant has not taken any steps with the Brazilian authorities to clarify his status, despite the RPD panel's instructions before the hearing and the fact that he was represented by counsel.

[15] Finally, although the male applicant pointed out that it is possible to lose permanent residence in Brazil by being absent for more than two years, the RPD noted that he left Brazil in July 2016, less than two years before the hearing date.

[16] According to the RPD's analysis, permanent residence in Brazil grants its holders a status similar to that of Brazilians, which provides the right to work without restriction, the right to study and the right to use the country's social services without restriction. Consequently, the applicant is subject to Article 1E of the Convention

[17] The RPD also analyzed the male applicant's fear of returning to Brazil. In his BOC Form, the applicant does not allege any fear of returning to Brazil. When questioned at the hearing, the applicant mentioned the attempted robbery and pointed out that he did not indicate it in his BOC Form because no one had asked him what had happened to him in Brazil.

[18] The RPD found that the applicant lacks credibility and that there is no reasonable fear of persecution or harm within the meaning of subsection 97(1) of the IRPA in the event of his return to Brazil.

(2) Decision regarding applicant Chericia Occean Archelus

[19] Since her name does not appear on the list in the Ministerial Act, the RPD found that there is no prima facie evidence that the female applicant obtained permanent resident status in Brazil. As a result, the RPD assessed her refugee protection claim on the basis of her fear of mistreatment in Haiti.

[20] The female applicant raised the attack and theft she experienced as the source of her legitimate fears for her safety. The RPD found that the applicant lacks credibility and rejected

her refugee protection claim. The RPD reached this conclusion because of the contradictions in the female applicant's account.

[21] In the female applicant's BOC Form, she mentions a single theft, but at the hearing she talked about two, then retracted that statement and said that there was only one. Then, in her BOC Form, the female applicant recounts that the thief got angry when he could not find any money in her bag. At the hearing, the female applicant stated that she was afraid that he would get angry when he opened the bag later to discover that there was no money in it. When confronted with this contradiction, the female applicant alleged that there was an error in the transcript of her account.

B. *RAD decision*

[22] The RAD confirmed the RPD's reasoning and conclusions that the male applicant is covered by Article 1E of the Convention. In particular, it found that the RPD had correctly concluded that the male applicant has permanent resident status in Brazil. With respect to the RPD's findings regarding the male applicant's fear in Brazil, the RAD also found that there was no evidence to support his refugee protection claim.

[23] As for the female applicant, the RAD confirmed the RPD's decision about her not holding permanent resident status in Brazil. Then, the RAD confirmed the RPD's findings as to the female applicant's credibility. In this regard, the RAD pointed out that these are not minor contradictions, but elements that relate to important and determining aspects of an incident at the core of the female applicant's claim for refugee protection.

V. Issues

[24] The issues put forward by the applicants can be reworded as follows:

1) Did the RAD err in concluding that the applicant is referred to in Article 1E of the Convention?
2) Did the RAD err in concluding that there was no basis to the claim for refugee protection with respect to the male applicants' situation in Brazil?
3) Did the RAD err in concluding that there was no basis for a claim for refugee protection with respect to the female applicant's situation in Haiti?

VI. Relevant provisions

[25] The following provisions are relevant:

Immigration and Refugee Protection Act	***Loi sur l'immigration et la protection des réfugiés***
Convention refugee	**Définition de « réfugié »**
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,	**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) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	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) not having a country of nationality, is outside the	b) soit, si elle n'a pas de nationalité et se trouve hors du

country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Person in need of protection

Personne à protéger

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

(iv) la menace ou le risque

the inability of that country to provide adequate health or medical care.	ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.	(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.
Exclusion — Refugee Convention	**Exclusion par application de la Convention sur les réfugiés**
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.
Ineligibility	**Irrecevabilité**
101 (1) A claim is ineligible to be referred to the Refugee Protection Division if	**101** (1) La demande est irrecevable dans les cas suivants :
…	[…]
(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;	d) reconnaissance de la qualité de réfugié par un pays vers lequel il peut être renvoyé;
United Nations Convention Relating to the Status of Refugees	***Convention des Nations Unies relatives au statut des réfugiés***
Article 1 - Definition of the term "refugee"	**Article premier. - Définition du terme "réfugié"**
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	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

obligations which are attached to the possession of the nationality of that country.	droits et les obligations attachés à la possession de la nationalité de ce pays.

VII. Analysis

A. *Standard of review*

[26] First, with respect to the exclusion from the application of the Convention pursuant to Article 1E, this issue concerns findings of mixed fact and law and is subject to the standard of reasonableness (*Zeng*, above, at para 34).

[27] Second, relating to the analysis of state protection, the standard of reasonableness must also be applied. The Federal Court of Appeal held, in *Canada (Citizenship and Immigration) v Flores Carrillo*, 2008 FCA 94 at para 36, that the standard of review applicable to a state protection analysis is that of reasonableness.

B. *Status of the male applicant under Article 1E of the Convention*

[28] The factors derived from *Fleurisca v Canada (Citizenship and Immigration)*, 2019 FC 810, establish the criteria by which this Court may analyze judicial review of a decision based on Article 1E of the Convention.

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

[30] Article 1E of the Convention is incorporated into Canadian law through section 98 of the IRPA, which provides that a person referred to in Article 1E of the Convention cannot be a refugee or a person in need of protection.

[31] As the Supreme Court stated in *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, international protection is a surrogate that comes into play only when the applicant has no alternative. In Justice LaForest's words, "refugee claims were never meant to allow a claimant to seek out better protection than that from which he or she benefits already".

(1) Did the RAD make a reasonable decision regarding the male applicant's permanent resident status?

[32] Given that the applicant was granted permanent residence in Brazil in November 2015, the RAD reasonably concluded that there was prima facie evidence that the applicant held permanent resident status in Brazil. It was therefore up to him to show 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).

[33] Given the evidence before the RAD, it was reasonable for it to conclude that the male applicant failed to rebut the prima facie evidence that he held permanent resident status in Brazil. Indeed, although the male applicant was represented by counsel and had the opportunity to amend his BOC Form to address the issue of the risk of returning to Brazil, he did not present any evidence that would disprove the Minister's evidence.

[34] Finally, it should be noted that, at this time, the male applicant left Brazil over two years ago. However, it is the situation of the applicants at the end of the hearing that matters, which was on January 22, 2018 (*Majebi v Canada (Citizenship and Immigration)*, 2016 FCA 274 at para 7 and *Melo Castrillon v Canada (Citizenship and Immigration)*, 2018 FC 470 at para 15). On that date, the applicant had not been absent from Brazil for a period of two years and, therefore, would not have lost his permanent residence.

(2) Did the RAD make a reasonable decision about the male applicant's rights in Brazil?

[35] In *Zeng*, above, the following framework for the interpretation and application of Article 1E of the Convention is established:

> [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 included, 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.

[36] It is therefore necessary to determine what is meant by "status, substantially similar to that of its nationals". Since *Shamlou*, above, 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 at No 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; and

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

[37] The RPD analyzed the evidence, which indicates that a permanent resident has substantially the same rights and obligations as a citizen of Brazil, including the four fundamental rights mentioned above. On appeal, the RAD upheld this decision. In this regard, the decision of the RAD is reasonable and cannot be reviewed by this Court.

(3) Did the RAD make a reasonable decision regarding state protection?

[38] The male applicant claims to have been assaulted by a thief. On appeal, the male applicant also raised the situation of Haitians in Brazil. Since no agent of persecution has been identified, no clear and present danger has been demonstrated and, moreover, the male applicant never asked the Brazilian state to protect him, this Court concludes that Brazil is a safe host country of refuge for the applicant. The RAD's decision regarding state protection was reasonable.

[39] Admittedly, neither the RPD nor the RAD directly addressed the documentation in evidence regarding the difficult situation of Haitians in Brazil, but the RAD's decision is not unreasonable. The personal and subjective evidence regarding the male applicant was not found to be credible, and no clear and present danger was demonstrated. In the absence of this essential element for refugee status, it was reasonable for the RAD to dispense with an analysis of the objective evidence.

[40] To this effect, Justice Denis Gascon wrote the following in *Gomez Florez v Canada (Citizenship and Immigration)*, 2016 FC 659:

> [35] Moreover, the fact that a piece of evidence is not expressly dealt with in a decision does not render it unreasonable when there are sufficient grounds to assess the tribunal's reasoning (*Corzas Monjaras v Canada (Minister of Citizenship and Immigration)*, 2010 FC 771 at para 20; *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 [*Cepeda-Gutierrez*] at para 16). The RPD is presumed to have weighed and examined all the evidence submitted to it, unless it is demonstrated not to have done so (*Newfoundland Nurses* at para 16; *Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (FCA) at para 1) In this case, I am satisfied that the RPD considered all the evidence, even if it does not refer directly to all its components. It is only when a tribunal is silent on evidence clearly pointing to the opposite conclusion that the Court can intervene and infer that the tribunal overlooked the contradictory evidence when making its finding of fact (*Cepeda-Gutierrez* at para 17). That is not the case here. [Emphasis added.]

[41] In this case, there is no reason to conclude that the RPD or the RAD has overlooked the analysis of the documentary evidence. Without denying the difficulties of Haitians in Brazil, the documentary evidence supports the absence of persecution of Haitians within the meaning of the IRPA, and there is no evidence here that is inconsistent with the RPD's or RAD's findings of fact.

C. *Did the RAD err in concluding that there is no basis for a claim for refugee protection with respect to the female applicant's situation in Haiti?*

[42] The female applicant claims to have been robbed and threatened, so she fears for her life if she were to return to Haiti. The RAD upheld the RPD's conclusion that the female applicant's lack of credibility was due to significant contradictions in a central element of her account.

[43] It is well established by jurisprudence that contradictions that may appear minor in isolation may be fatal to a witness's credibility when they add up and are considered in the context of the refugee protection claim (*Rajaratnam v Canada (Minister of Employment and Immigration)* (FCA), [1991] FCJ No 1271, (1991) 135 NR 300; *Aguilar v Canada (Citizenship and Immigration)*, 2012 FC 150 at para 42). Consequently, the RAD's findings of fact with respect to the female applicant are reasonable and do not allow for a judicial review.

VIII. Conclusion

[44] This Court finds no error in the RAD's decision-making process and therefore dismisses this application for judicial review.

JUDGMENT in IMM-113-19

THIS COURT ORDERS that the application for judicial review be dismissed. There is no question of general importance to certify. The Court adds that the style of cause has been corrected to reflect the correct designation of the applicants' names.

"Michel M.J. Shore"
Judge

Certified true translation
This 11th day of October, 2019.
Michael Palles, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-113-19
STYLE OF CAUSE:	JEAN CHARLES, OCCEAN, CHERICIA, OCCEAN ARCHELUS v THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP
PLACE OF HEARING:	MONTRÉAL, QUEBEC
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