Federal Court  Cour fédérale

Date: 20191030

Docket: IMM-1512-19

Citation: 2019 FC 1361

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, October 30, 2019

PRESENT: The Honourable Mr. Justice Lafrenière

BETWEEN:

MARIE SHERLYNE MILFORT-LAGUERE
GARY BRUNO MILFORT

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision rendered by the Refugee Appeal Division (RAD) of the Immigration and Refugee Board, on January 22, 2019, upholding the decision rendered by the Refugee Protection Division (RPD), on December 22, 2017, which had

rejected the refugee protection claim filed by the principal applicant, Marie Sherlyne Milfort-Laguere, and her minor son.

[2] The RAD concluded, for different reasons, that Ms. Milfort-Laguere is excluded from Convention refugee status pursuant to Article 1E of the *Convention Relating to the Status of Refugees* (Article 1E), and that her son is neither a Convention refugee nor a person in need of protection within the meaning of sections 96 and 97 of the *Immigration and Refugee Protection Act* [IRPA].

[3] As explained in more detail below, the application is dismissed, because the arguments made by the applicants fail to provide any basis to support the conclusion that the RAD decision was unreasonable.

II. Factual background

[4] Ms. Milfort-Laguere is a citizen of Haiti. Her minor child, Gary Bruno MILFORT, is a citizen of Brazil.

[5] In her Basis of Claim Form (BOC Form), Ms. Milfort-Laguere alleged that she was at risk because her husband's family was being persecuted in Haiti.

[6] On October 18, 2010, her husband's father was allegedly assassinated while leaving a meeting that had been organized by his son. Allegedly, the bandits then threatened to kill everyone.

[7] Her husband reportedly received anonymous phone calls threatening to kill him. Fearing for his life, he sought refuge in the Dominican Republic.

[8] Ms. Milfort-Laguere claims that on February 15, 2014, the same individuals who had killed her father-in-law allegedly fired shots in her mother's house; they then fled to a neighbour's house.

[9] After a few months, her husband then allegedly went to Brazil. On April 1, 2014, Ms. Milfort-Laguere left Haiti to join him there.

[10] Ms. Milfort-Laguere lived in Brazil from April 9, 2014, to July 28, 2016. She alleges that her husband was discriminated against by Brazilians and that they therefore both decided to leave Brazil.

[11] Ms. Milfort-Laguere lived in the United States from October 24, 2016, to July 16, 2017, the date on which she arrived at the Canadian border with her son to claim refugee protection in Canada.

A. *Refugee Protection Division decision*

[12] The Minister of Immigration, Refugees and Citizenship Canada (the Minister) did not intervene in the hearing before the RPD, except to file a copy of a list of individuals to whom the Government of Brazil had granted the right to obtain permanent resident status. Ms. Milfort-Laguere's name and passport number are on this list.

[13] The RPD found that it could not conclude *prima facie* that Ms. Milfort-Laguere had taken the necessary measures to obtain the permanent resident status she had been granted by the Government of Brazil and that she was therefore not referred to Article 1E.

[14] However, the RPD drew a negative inference from Ms. Milfort-Laguere's failure to regularize her status, considering the alleged risk in Haiti, the fact that her name was on the list of individuals to whom the Government of Brazil had granted permanent resident status and the fact that her brother had taken the necessary measures to obtain permanent resident status in Brazil. The RPD denied Ms. Milfort-Laguere's refugee protection claim because it found that she was not credible. Her son's claim was also denied because he failed to establish a serious possibility of persecution and did not show that he was a person in need of protection.

B. *Refugee Appeal Division decision*

[15] On December 10, 2018, the RAD sent a letter to Ms. Milfort-Laguere to invite her to make submissions in support of her notice of appeal on the issue of whether her refugee protection claim should be denied by operation of Article 1E. The RAD asked Ms. Milfort-Laguere to address the issue of whether her inclusion on the list of individuals who had been granted permanent resident status proved *prima facie* that she had obtained permanent resident status, which would reverse the burden of proof. The RAD also asked Ms. Milfort-Laguere to produce any documentary evidence available to her that would establish her status in Brazil and to describe all the measures that she had taken to obtain proof of her status.

[16] Ms. Milfort-Laguere presented written submissions on December 17, 2018. She acknowledged that she had refugee status under the 1967 *Protocol relating to the Status of Refugees*, Can. T.S. 1969 No. 29, but stated that she did not know whether she could have obtained permanent residence. She claimed that even if the burden of proof was reversed or even if she had obtained permanent residence, which she denies, she would automatically have lost her permanent resident status in Brazil because she left that country on July 18, 2016, and did not return for over two years.

[17] The RAD dismissed the applicants' appeal and upheld the RPD's decision that Ms. Milfort-Laguere is not a Convention refugee nor a person in need of protection. The RAD concluded that the determinative issue was whether Ms. Milfort-Laguere should be denied refugee status because she had permanent resident status in Brazil.

[18] The RAD found that the RPD erred in its analysis, because Ms. Milfort-Laguere's failure to regularize her status should have been taken into consideration in the assessment of the application of Article 1E. Before the RPD, Ms. Milfort-Laguere testified that she did not have permanent resident status, but she also admitted that once a name is in the system, permanent resident status may be granted to that individual. When questioned about the steps she had taken, Ms. Milfort-Laguere responded that she was unfamiliar with the steps that needed to be taken, and subsequently stated that she was aware that her brother had obtained permanent resident status, and that she had communicated with someone who worked for the Brazilian government, who had allegedly told her that her name had yet to be called. The RAD did not find this explanation to be credible, because it contradicted the ministerial order of November 2015,

which confirmed that Ms. Milfort-Laguere had been granted the right to obtain permanent resident status on or before November 2015.

[19] The RAD also found that Ms. Milfort-Laguere had failed to establish a serious possibility of persecution or that, based on a balance of probabilities, she would be personally exposed to the risk of mistreatment in Brazil. In her BOC Form, Ms. Milfort-Laguere did not describe any risk affecting her personally in Brazil. When questioned on this subject by the RPD, Ms. Milfort-Laguere testified that she had been threatened by an unknown man on two occasions. The RAD found that her explanations for omitting these events in her BOC Form were not reasonable.

[20] The RAD found that Ms. Milfort-Laguere was not a refugee and that consequently, it was not necessary to assess the credibility of her story about the events that had occurred in Haiti. The RAD also concluded that Ms. Milfort-Laguere had failed to demonstrate a serious possibility of persecution or that she would be personally exposed to a risk of mistreatment in Brazil. The RAD's finding for her son was the same, since, according to Ms. Milfort-Laguere, he had nothing to fear in Brazil.

III. Issues

[21] This application for judicial review raises three issues:

A. Did the RAD err in concluding that the RPD had erred in neglecting to analyze Ms. Milfort-Laguere's failure to regularize her status in Brazil in relation to the issue of exclusion by operation of Article 1E of the Convention?

B. Did the RAD err in finding that Ms. Milfort-Laguere had failed to discharge her burden of establishing that, on a balance of probabilities, she did not have permanent resident status?

C. Did the RAD err in concluding that Ms. Milfort-Laguere had failed to establish a serious risk of being persecuted or that she was a person in need of protection with respect to Brazil?

IV. Standard of review

[22] The test to establish exclusion under Article 1E of the Convention is a question of law of general application in the refugee status determination process and is reviewable on a standard of correctness. The issue of whether the facts give rise to exclusion is a question of mixed fact and law and consequently, the standard of reasonableness applies (*Zeng v. Canada (Citizenship and Immigration)*, 2010 FCA 118, at para. 18 [*Zeng*]; *Zhong v. Canada (Citizenship and Immigration)*, 2011 FC 279, at para. 15).

[23] The RAD's finding also involved consideration of questions of mixed fact and law and therefore calls for deference and the application of the standard of reasonableness (*Zhang v. Canada (Citizenship and Immigration)*, 2019 FC 870, at para. 9).

V. Analysis and decision

[24] The case law has developed a framework to determine whether a person meets the criteria of Article 1E of the Convention. First, the Minister must establish a *prima facie* case that the

claimant can return to his or her country and enjoy the rights of the citizens of that country. If that step is completed successfully, the burden then shifts to the claimant, who must show that he or she cannot in fact enjoy the rights of his or her residence status (*Ramadan v. Canada (Citizenship and Immigration)*, 2010 FC 1093, at para. 18 [*Ramadan*]; *Mai v. Canada (Citizenship and Immigration)*, 2010 FC 192, at para. 35; *Romero v. Canada (Citizenship and Immigration)*, 2006 FC 506, at para. 8.

[25] To determine the time at which the claimant has status in the third country granting him or her rights equivalent to those of nationals, the three-pronged analysis proposed in *Zeng* must be applied. The claimant must have that status when making his or her claim in Canada and on the date his or her refugee protection claim is determined. If the claimant did not have that status, the panel must ascertain whether the claimant could have preserved his or her right to enter the country or if the claimant had good and sufficient reason for failing to do so (*Zeng*, at para. 34).

[26] The applicants claim that the RAD acted unreasonably in deciding, on its own initiative, to quash the RPD decision, even though this part of the RPD decision, concerning the applicability of the exclusion clause, was not part of the grounds for appeal.

[27] However, the RAD is not limited to considering only the grounds for the appeal before it: *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93, at paras. 78 and 98. Rather, it has a duty to assess the entire record before the RPD and to intervene if it notes that the latter erred.

[28] The applicants also believe that Ms. Milfort-Laguere did not have an opportunity to respond to the issue decided by the RAD, most notably the fact that Ms. Milfort-Laguere's brother had obtained permanent resident status in Brazil and that his name was on the same list as the name of his sister's. According to the applicants, this is a breach of procedural fairness. I disagree.

[29] The RAD is empowered to independently draw negative conclusions about a claimant's credibility without warning the claimant and without giving the claimant an opportunity to make submissions. However, procedural fairness requires that claimants be given an opportunity to address the RAD's concerns about any new issue.

[30] Counsel for the applicants submits that the RAD failed to respect the duty of procedural fairness in its investigation. He claimed that the RAD's decision was unfair because it hinged on the fact that Ms. Milfort-Laguere's brother was also on the list of Haitians who could apply for permanent residence. According to counsel, there was no evidence before the RPD that this brother was on this list—his name was not even mentioned in the course of the hearing before the RPD; more specifically, counsel criticized the RAD for failing to give the applicants an opportunity to be heard again so that they could respond to all the RAD's concerns and to the evidence that it planned to use, namely, the reference to Ms. Milfort-Laguere's brother, whose name was also on the list in question.

[31] Yet the RAD did inform the applicants of its concerns regarding the application of the exclusion clause contained in Article 1E and the issue of the reversed burden of proof. It also

invited Ms. Milfort-Laguere to file submissions and any supporting evidence. Ms. Milfort-Laguere therefore had an opportunity to respond to the RAD's concerns, in full knowledge that the burden of proof concerning her status in Brazil had been reversed.

[32] In its decision, the RAD found that the fact that Ms. Milfort-Laguere's name was on the list of Haitians who were given the opportunity to obtain permanent residence in Brazil was *prima facie* evidence of her exclusion, given that Ms. Milfort-Laguere could have obtained this status if she had chosen to complete the administrative procedures: *Noël v. Canada (Citizenship and Immigration)*, 2018 FC 1062, at paras 7 and 8.

[33] Ms. Milfort-Laguere first testified before the RPD that she had received the information concerning the opportunity to regularize her status in Brazil, then admitted that her brother had obtained permanent resident status and that she was aware of the steps he had undertaken. Finally, she changed her testimony by admitting that she would have taken the steps required by the Brazilian authorities, but that her name had not yet been called.

[34] The RAD considered the information which Ms. Milfort-Laguere provided in her BOC Form, her testimony at the hearing and the objective documentary evidence that she had been granted the right to obtain permanent resident status in Brazil. In light of this evidence and the case law, the RAD had reason to conclude that there was a *prima facie* case that, on December 12, 2017, the last day of her hearing before the RPD, Ms. Milfort-Laguere had the right to return to live in Brazil, the right to work there freely without restrictions, the right to

study there and the right to access social services in Brazil with no restrictions other than those that apply to Brazilian citizens.

[35] The RAD's finding that there was *prima facie* evidence that, on the date of the hearing, Ms. Milfort-Laguere still had the right to return to live in Brazil was made on the basis of objective and credible evidence, and the Court owes the RAD deference in this regard.

[36] Ms. Milfort-Laguere did not submit any evidence that her right to permanent residence may have expired. In addition, when she testified at the hearing, she admitted that she had not taken the steps required by the Brazilian authorities.

[37] The conclusion that Ms. Milfort-Laguere had failed to meet her burden of proving that she was no longer recognized in Brazil and that she was unable to benefit from the rights attached to that status is also reasonable.

[38] Consequently, it is my opinion that the RAD did not err in concluding that Ms. Milfort-Laguere was excluded under Article 1E of the Convention.

[39] Even though this issue was not raised by the applicants, it appears that the RAD assessed Ms. Milfort-Laguere's risk in Brazil after concluding that she was excluded. Recent decisions by this Court indicate that the risk in a third country, if alleged, must be assessed when determining whether Article 1E applies: *Romelus v. Canada (Citizenship and Immigration*), 2019 FC 172, at

paras. 39 to 45; *Jean v. Canada (Citizenship and Immigration)*, 2019 FC 242, at paras. 21 and 24; *Constant v. Canada (Citizenship and Immigration)*, 2019 FC 990, at para. 38.

[40] In any event, the RAD found that Ms. Milfort-Laguere was not credible in terms of her testimony that she was threatened in Brazil on two occasions and that even if these two incidents had occurred as described, they would not constitute a case of persecution or serious prejudice. This finding is reasonable.

[41] The applicants claim that it was unreasonable for the RAD to not have analyzed the possibility that Ms. Milfort-Laguere might have lost her permanent resident status because she had been outside Brazil for over two years. According to the applicants, the RAD should also have considered the applicants' situation if they were to return to Haiti.

[42] The Federal Court of Appeal reviewed the issue of the time at which an applicant's status should be assessed in the decisions rendered in *Zeng*, at paras. 28, 38 and 39, and *Majebi v. Canada (Citizenship and Immigration)*, 2016 FCA 274, at paras. 7 and 9. The Court of Appeal clarified that the panel could consider any change of status from the date of entry into Canada until the last day of the hearing before the RPD. Normally, the RAD does not need to consider any change that might have occurred after this date, because its role is to assess the decision rendered by the RPD.

[43] In this case, Ms. Milfort-Laguere lived in Brazil from April 9, 2014, until July 28, 2016. Therefore, on the last day of the hearing before the RPD, that is, December 12, 2017, she had been away from that country for less than 17 months.

[44] I agree with the respondent's position that the possible loss of Ms. Milfort-Laguere's status since the hearing before the RPD is not relevant. Deciding otherwise would mean allowing all claimants to wait to lose their status during the appeal process and would render the exclusion in Article 1E utterly meaningless.

[45] The applicants claim that the documentary evidence should have led the RAD to conclude that Ms. Milfort-Laguere's son would be persecuted or at risk in Brazil. However, there is no evidence on the record to suggest that her son suffered any type of discrimination in Brazil. On the contrary, Ms. Milfort-Laguere herself testified that her son had nothing to fear. This is fatal to her refugee protection claim.

[46] Moreover, the RAD was not obliged to consider the applicants' situation in the event of their return to Haiti. Having concluded that Ms. Milfort-Laguere was subject to an exclusion clause, the RAD did not have to weigh the risks in the event of a return to her country of origin, because she cannot be found to be a refugee or a person in need of protection: *Xie v. Canada (Citizenship and Immigration)*, 2004 FCA 250, at para. 39; *Canada (Citizenship and Immigration) v. Sartaj*, 2006 FC 324, at paras. 15 and 16.

[47] Overall, the RAD's decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. Consequently, the application for judicial review is dismissed. Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT in Docket IMM-1512-19

THIS COURT'S JUDGMENT is that:

The application for judicial review is dismissed.

"Roger R. Lafrenière"
Judge

Certified true translation
This 28th day of November 2019

Johanna Kratz, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1512-19
STYLE OF CAUSE:	MARIE SHERLYNE MILFORT-LAGUERE, GARY BRUNO MILFORT v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	October 2, 2019
JUDGMENT AND REASONS:	LAFRENIÈRE J.
DATED:	October 30, 2019

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