Federal Court  Cour fédérale

Date: 20200103

Docket: IMM-1444-19

Citation: 2020 FC 10

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, January 3, 2020

PRESENT: The Honourable Mr. Justice Pentney

BETWEEN:

YVELINE ISNARDIN
JOAO YVENSON SAINT FLEUR

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The female applicant, Yveline Isnardin, and her minor son, Joao Yvenson Saint Fleur, are seeking judicial review of the decision of the Refugee Appeal Division [RAD] upholding the decision of the Refugee Protection Division [RPD] determining that the female applicant is excluded under section 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27

[IRPA], and Article 1E of the *Convention relating to the Status of Refugees* on the ground that she had permanent residence in Brazil.

[2] The female applicant is a Haitian citizen and her minor son is a citizen of Brazil. In August 2013, the female applicant left Haiti for Brazil where she obtained permanent residence. According to the applicants, she returned to Haiti three years later, on March 19, 2016. According to the respondent, who is relying on immigration forms completed by the female applicant, the female applicant left Brazil on September 21, 2016.

[3] The female applicant alleges that in March and May 2016 some men tried to sexually assault her and to kidnap her after she filed a complaint with a justice of the peace. The female applicant, her son and her spouse left Haiti for the United States on May 19, 2016. The female applicant's spouse was deported, and in July 2017, the female applicant and her son came to Canada, where they filed a claim for refugee protection.

[4] On March 1, 2018, there was a hearing before the RPD. Canada's Minister of Public Safety intervened to establish that the female applicant was a person referred to in Article 1E of the Convention. The RPD rejected the refugee protection claim on March 23, 2018, essentially concluding that the female applicant was referred to in Article 1E of the Convention because she had permanent resident status in Brazil.

[5] On February 14, 2019, the RAD upheld the RPD's decision, concluding that the female applicant was excluded on the ground of her having permanent residence in Brazil at the time of

the hearing before the RPD, given that she had not been away from Brazil for over two years. The RAD also concluded that the applicants were not at risk in Brazil.

[6] The application for judicial review is challenging that decision.

[7] The only issue is the following: is the RAD's decision that the female applicant had permanent resident status similar to that of Brazilian nationals unreasonable? The standard of review applicable to whether the facts lead to exclusion under Article 1E of the Convention and section 98 of the IRPA is that of reasonableness: *Canada (Citizenship and Immigration) v Zeng*, 2010 FCA 118 at para 11 [*Zeng*].

[8] In applying this standard, the Court has to determine whether the decision falls within a range of "possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]). As long as "the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility", this Court cannot substitute its own view of a preferable outcome (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59).

[9] The Supreme Court of Canada's recent decision in *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], does not change this conclusion. In the circumstances of the case at bar, and in light of paragraph 144 of *Vavilov*, it is not necessary to request submissions from the parties on the standard of review and the application of that standard. As in the Supreme Court's decision in *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at para 24 [*Canada Post Corp*], "no unfairness arises from" the

application of the *Vavilov* framework in this proceeding "as the applicable standard of review and the result would have been the same under the *Dunsmuir* framework".

[10] The Supreme Court of Canada also instructs that judicial review is not a line-by-line treasure hunt for error; the decision should be approached as an organic whole: *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34 at para 54. Further, a reviewing court must determine whether the decision, viewed as a whole in the context of the record, is reasonable: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62; *Vavilov* at para 81; *Canada Post Corp* at para 30.

[11] In the matter at bar, the applicants' argument is based on the claim that the RAD adopted an unreasonable interpretation of the female applicant's status in Brazil. The applicants do not dispute the facts; at issue, rather, is the interpretation of the law and policies on permanent residence in Brazil.

[12] The RAD mentioned the fact that the female applicant's passport contains a five-year VIPER visa (special permanent visa and family reunification visa) issued on September 25, 2013, in Port-au-Prince, Haiti, and a stamp showing that she has permanent residence, effective November 7, 2013. The RAD rejected the female applicant's argument that her permanent residence was temporary in nature as she had to renew it every nine years, finding as follows:

> [19] I do not agree with this interpretation. As per the National Documentation Package on Brazil, permanent residence is indeterminate, even for a foreigner. With respect to the VIPER and its five-year timespan, referred to in Article 18 of Law No. 6,815, respectfully, the appellant is confusing the two documents. The VIPER does not confirm permanent residence; rather, it is the

> permanent residence stamp itself. Once granted, as is the case here, permanent residence is automatically renewed every nine years without the requirement to reapply.
>
> (Citations omitted.)

[13] The female applicant submits that this interpretation is unreasonable because the RAD did not consider article 18 of Law No. 6,815, which provides as follows:

> [TRANSLATION]
>
> Art. 18. The granting of the permanent visa may be conditional, for a period of 5 (five) years at the most, to the exercise of a specific activity and settlement in a given region in the Brazilian territory.

[14] The female applicant notes that the RAD's conclusion on permanent residence is inconsistent with the wording of this provision and with the fact that she stated that she had found neither employment nor housing in Brazil. She submits that, since she has neither employment nor housing in Brazil, she does not have indeterminate permanent resident status, but a temporary status, and that both the RPD's and the RAD's findings on this issue are unreasonable.

[15] The female applicant alleges that neither the RPD nor the RAD considered her statements at the Canadian border. The notes indicate that she stated that she was a [TRANSLATION] "permanent resident of Brazil", but that she also said that she had a [TRANSLATION] "temporary" status and a [TRANSLATION] "card for five years". It is unreasonable not to deal with this evidence.

[16] The female applicant notes that in most of the cases of Haitian citizens who came to Canada from Brazil, the respondent produced a list prepared by the Brazilian government, listing the names of Haitians who obtained indeterminate permanent residence in Brazil. There is no such evidence in the matter at bar. This is another sign that the female applicant's status in Brazil is only temporary.

[17] The respondent notes that the RAD's decision is based on the RAD's interpretation of the facts, including the information in the National Documentation Package on Brazil regarding permanent residence for individuals who have fled Haiti. The courts have established a framework for determining whether a person fulfills the criteria of Article 1E of the Convention, and the RAD's analysis follows this framework. The Minister made a *prima facie* case that the female applicant could have returned to Brazil at the time of the hearing before the RPD. Once this case was made, the burden of proof shifted to the female applicant, who had to establish that she could not in fact enjoy the rights conferred on her by her permanent residence.

[18] In the matter at bar, the RAD did not err in relying on the stamps in the female applicant's passport, which indicate that she obtained a temporary status allowing her to enter Brazil (the VIPER visa) and then permanent residence. The respondent notes that the document in the National Documentation Package on Haiti referred to by the RAD explains this process:

> [T]o apply for permanent residence Haitians must go to the Federal Police Department before the expiration of their five-year visa. Based on article 18 of Law No. 6,815 . . . , Haitian nationals must prove that they are working and living in Brazil . . . . Sources state that the validity period of the permanent residence is indeterminate, but that permanent residence must be re-issued periodically, currently at nine-year intervals. [R]e-issue of

> permanent residence is automatic and there is no question of re-application or re-qualification.
>
> (Citations omitted.)

[19] The respondent submits that the RAD's analysis is in line with this explanation. The RAD noted the stamps in the female applicant's passport, and it is not unreasonable for the RAD to give more weight to objective evidence instead of relying on the statement made by the female applicant at the border. The respondent argues that the female applicant did not satisfy the burden of establishing that she was unable to benefit from the rights conferred on her by her permanent residence.

[20] Before embarking on its analysis, the Court must note that this is an application for judicial review, and that the standard of reasonableness applies. As explained by the Supreme Court in *Canada Post Corp*:

> [28] In *Vavilov*, this Court held that "[r]easonableness review aims to give effect to the legislature's intent to leave certain decisions with an administrative body while fulfilling the constitutional role of judicial review to ensure that exercises of state power are subject to the rule of law" (para. 82). The Court affirmed that "it is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies" (para. 86 (emphasis in original)).
>
> . . .
>
> [31 A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the]

> conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
>
> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
>
> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on . . . are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).

[21] I am not persuaded by the applicants' argument in the matter at bar. The RAD considered both the evidence filed by the female applicant and the objective evidence in the National Documentation Package on Haiti. The RPD and the RAD expressly dealt with the female applicant's argument that her status in Brazil was only temporary. The RAD referred to article 18, but it also noted the objective evidence indicating that "permanent residence is automatically renewed every nine years without the requirement to reapply".

[22] The reasons for the RAD's decision are "justifiable" and provide a transparent and intelligible justification (see *Dunsmuir* at para 48; *Vavilov* at paras 81 and 136; *Canada Post Corp* at paras 28–29). The reasons demonstrate that the decision conforms to the relevant legal

and factual constraints that bear on the decision maker and the issue at hand (*Canada Post Corp* at para 30, citing *Vavilov* at paras 105–07).

[23] In their written submissions, the applicants refer to Tab 14.11 of the National Documentation Package on Haiti, alleging that the RAD did not take the contents of this document into consideration. At the hearing, I asked for clarification on whether this document was part of the National Documentation Package on the date of the RAD hearing since it is not part of the certified tribunal record filed before the Court by the Immigration and Refugee Board of Canada in the matter at bar.

[24] The applicants are unable to confirm whether the document was before the RAD; however, they confirm that the contents of this document are the same as the contents of Tab 3.7 of the National Documentation Package on Brazil. This document is the same document as the one at Tab 3.12 of the Haiti Package. I note that both the RPD and the RAD referred to Tab 3.12, and it therefore does not seem that the RAD's decision can be set aside because they did not refer to Tab 14.11 of the Haiti Package. If the contents are the same, there is no need for the RAD to mention both documents.

[25] The applicants have not established that the RAD ignored a document or an important fact in its analysis or that it adopted an interpretation that was not in line with the objective evidence: see *Zeng* at paras 35–36. The RAD's decision falls within a range of "possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para 47), and the RAD's analysis is "internally coherent and rational [and] is justified in relation

to the facts and law that constrain the decision maker" (*Vavilov*, at para 85). There is no reason to set aside the RAD's decision in the matter at bar.

[26] For all of these reasons, the application for judicial review is dismissed. There is no question of general importance to certify.

JUDGMENT in IMM-1444-19

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.
2. There is no question of general importance to certify.

"William F. Pentney"
Judge

Certified true translation
This 15th day of January 2020.

Michael Palles, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1444-19
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