Federal Court Cour fédérale

Date: 20210601

Docket: IMM-1498-20

Citation: 2021 FC 520

[ENGLISH TRANSLATION]

Ottawa, Ontario, June 1, 2021

PRESENT: The Honourable Madame Justice Walker

BETWEEN:

ESTEVELA CHARLES
JESSICA FRANCOIS

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The principal applicant, Estevela Charles, is a citizen of Haiti, and her minor daughter is a citizen of Brazil. Together, they are seeking judicial review of the Refugee Appeal Division (RAD) decision dated February 12, 2020, dismissing their appeal and confirming a Refugee Protection Division (RPD) decision. The RAD concluded that the principal applicant was

excluded by Article 1E of the United Nations Convention Relating to the Status of Refugees (the Convention) and section 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 21 (IRPA). Moreover, the RAD concluded that the minor applicant was not a Convention refugee or a person in need of protection.

[2] For the following reasons, I dismiss this application for judicial review.

I. **Background**

[3] The principal applicant left Haiti for Brazil in July 2012. She alleges that she was threatened by her uncle in Haiti in 2012 because she objected to the fact her father had handed over management of the family land to him. Her daughter was born in Brazil.

[4] The applicants left Brazil in July 2016 and arrived in the United States in December 2016. They entered Canada on August 2, 2017, and claimed refugee protection. The applicants base their refugee protection claims on (1) a fear of Haiti, where the principal applicant alleges she was threatened by her uncle, and (2) a fear of Brazil, where conditions have allegedly become too dangerous for Haitians and where the principal applicant alleges she suffered discrimination at work.

[5] The RPD rejected the applicants' refugee protection claims because the principal applicant is covered by Article 1E of the Convention and section 98 of the IRPA. The RPD also found that the principal applicant is not credible and that she did not establish the facts underlying her claim or her fear of Haiti.

[6] The applicants are appealing from this RAD decision. The RAD confirmed the RPD decision in an extensive decision.

[7] The RAD concluded that (i) the principal applicant had permanent resident status in Brazil and had left Brazil more than two years before the hearing before the RPD; (ii) the discrimination she suffered did not change the fact that she left Brazil voluntarily; (iii) she could return to Brazil as the parent of a Brazilian child; (iv) she did not demonstrate a risk within the meaning of sections 96 and 97 of the IRPA should she return to Haiti; and (v) the applicants did not establish that they would be persecuted should they return to Brazil.

II. **Issue and standard of review**

[8] There is only one issue in this case: was the RAD’s decision reasonable?

[9] I agree with the parties that the RAD decision should be reviewed against the reasonableness standard (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 10 (*Vavilov*); *Saint Paul v Canada (Citizenship and Immigration)*, 2020 FC 493 at paras 43–45 (*Saint Paul*)). None of the situations the Supreme Court of Canada identified in *Vavilov* for departing from the presumptive standard of review apply in this case.

[10] The Supreme Court teaches us that 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).

III. Analysis

[11] Article 1E of the Convention is incorporated in Canadian law through section 98 of the IRPA. Together, these two provisions aim to prevent asylum shopping:

***United Nations Convention relating to the Status of Refugees,* 28 July 1951, 189 UNTS 137**	***Convention des Nations Unies relative au statut des réfugiés*, 28 juillet 1951, 189 RTNU 137**
1E 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.	**1E** 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.
***Immigration and Refugee Protection Act*, SC 2001, c 27**	***Loi sur l'immigration et la protection des réfugiés*, LC 2001, c 27**
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.

[12] In *Canada (Citizenship and Immigration) v Zeng*, 2010 FCA 118 (*Zeng*), the Federal Court of Appeal set out a three-prong test that is used as the starting point in Article 1E analyses (para 28):

> [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.

[13] The parties are not challenging the RAD's assessment in regard to the first two prongs: (1) the principal applicant had permanent resident status in Brazil; and (2) she lost this status after being away from Brazil for more than two years. However, the parties disagree with the RAD's analysis of the third prong of *Zeng*. The applicants submit that the RAD made three errors:

1. By finding that the principal applicant's departure from Brazil was voluntary;
2. In its analysis of the principal applicant's fear regarding her country of nationality, Haiti, and of her credibility; and
3. In its assessment of the prospective risk faced by the principal applicant in Brazil when it had already excluded her.

[14] The principal applicant is not challenging the RPD's and RAD's finding that she could obtain permanent residency in Brazil as the parent of a Brazilian child.

[15] In my opinion, the RAD decision is entirely reasonable. The RAD logically and transparently weighed each factor under the third prong of *Zeng*.

[16] The RAD first found that the principal applicant chose to leave Brazil of her own volition. According to the RAD, the discrimination Haitians may face in Brazil, the fact some

Haitians have been victims of violence because of their race and nationality, and the employment issues the principal applicant alleged were not sufficient to constitute an involuntary reason for the principal applicant to leave Brazil.

[17] The case law recognizes that discrimination can amount to persecution in serious cases. The dividing line between persecution and discrimination is often difficult to establish (*Warner v Canada (Citizenship and Immigration)*, 2011 FC 363 at para 7, citing several decisions of this Court). However, I agree with Associate Chief Justice Gagne's recent description of this dividing line (*Noel v Canada (Citizenship and Immigration)*, 2018 FC 1062 at para 29):

> [29] However, for discrimination against a person to amount to persecution, it must be serious and occur with repetition, and must have consequences of a prejudicial nature for the person, such as when an individual is denied a core human right, such as the right to practice religion or to earn a livelihood (*Sefa v Canada (Citizenship and Immigration)*, 2010 FC 1190 at para 10).

[18] The RAD considered the principal applicant's evidence regarding discrimination towards Haitians in Brazil and her allegation that they are treated differently in a work context. The RAD also noted that she was scared in Brazil because a man she knew was allegedly stabbed in the street on his way home from work.

[19] Given the principal applicant's account and the documentary evidence on the experiences of Haitians in Brazil, I feel that the RAD could reasonably conclude that the discrimination alleged by the principal applicant did not amount to persecution. It follows that the RAD did not make a reviewable error by finding that the principal applicant's departure from Brazil was voluntary.

[20] Second, the applicants submit that the principal applicant had a reasonable fear in her country of citizenship, Haiti, despite the contradictions raised by the RPD and confirmed by the RAD. I cannot agree with this argument.

[21] The RAD carefully considered the principal applicant's allegations regarding her experiences in Haiti in May 2012 and the death threats against her mother in 2018. The RAD reviewed each incident, the principal applicant's testimony and the inconsistencies between her account of the facts at the hearing before the RPD and the account in her Basis of Claim (BOC) Form.

[22] The Court owes deference to the RAD's credibility findings (*Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319 at para 42). The RAD closely examined the RPD's findings, the evidence and the arguments in the applicants' appeal memorandum. The RAD does not conduct a "line-by-line treasure hunt for error" (*Vavilov* at para 102). I am satisfied that the RAD's detailed reasons could reasonably lead it to confirm the RPD's negative findings. Overall, the contradictions and inconsistencies identified by the RPD and the RAD seriously undermine the principal applicant's credibility.

[23] The applicants' main criticism of the RAD decision is the RAD's analysis of the principal applicant's prospective risk in Brazil when it had already excluded her. According to the applicants, the RAD weighed all the factors of the third prong of *Zeng* before reaching its conclusion that the factors supported her exclusion. Having already concluded that the principal applicant was excluded pursuant to Article 1E of the Convention, the RAD acted unreasonably

and erred by analyzing the principal applicant's fear of potential persecution or a prospective risk in Brazil. The applicants relied on a decision by my colleague, Justice St-Louis, who stated in *Saint Paul* that it is not the role of the RAD to conduct such an analysis after it has been determined that an applicant is excluded pursuant to Article 1E (*Saint Paul* at paras 52–54, 56).

[24] I find that the applicants' arguments on this subject are unfounded. The RAD did not make a reviewable error. First, it must be noted that the RAD assesses the various factors under the third prong of the *Zeng* test. However, in *Saint Paul* and *Celestin v Canada (Citizenship and Immigration)*, 2020 FC 97, my colleagues discuss RAD decisions made under the first prong of this test. The issue is not the same.

[25] I recognize that after its analysis of Canada's compliance with its international obligations, the RAD confirmed that it had weighed all the relevant factors and that these factors supported the principal applicant's exclusion. However, the RAD noted immediately after making this statement that "[t]o conclude its analysis", it had to examine the situation the principal applicant would face should she return to Brazil.

[26] In my opinion, the RAD assessed the serious possibility of persecution and risk of prospective harm in Brazil in its analysis of the factors under the third prong of *Zeng*. The fact it had noted that other factors argued in favour of the exclusion before conducting its analysis of the last factor is not a reviewable error.

[27] Moreover, the RAD's finding that the principal applicant did not face a serious possibility of persecution or a risk of prospective harm in Brazil is justified, and its reasons are intelligible and transparent. The RAD is required to conduct this type of analysis under the third prong of the *Zeng* test, and it did so in compliance with the evidence.

[28] Consequently, the application for judicial review is dismissed.

JUDGMENT in docket IMM-1498-20

THIS COURT'S JUDGEMENT is that:

1. The application for judicial review is dismissed.

2. No question is certified.

"Elizabeth Walker"
Judge

Certified true translation
Johanna Kratz, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

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