Federal Court  Cour fédérale

Date: 20240521

Docket: IMM-279-23

Citation: 2024 FC 759

[ENGLISH TRANSLATION]

Ottawa, Ontario, May 21, 2024

PRESENT: The Honourable Madam Justice Ngo

BETWEEN:

KILEMBI ROBERTO MBAKI, PRISCILA JOANA KILAUDA PETELO and KILEMBI MBAKI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Background

[1] Kilembi Roberto Mbaki [principal applicant] and Priscila Joana Kialunda Petelo [associate applicant] are citizens of Angola, and their son, Kilembi Mbaki, is a citizen of Brazil [collectively the "applicants"].

[2] On June 9, 2022, the Refugee Protection Division [RPD] rejected the applicants' claim for refugee protection, finding that they fall within section E of Article 1 of the United Nations Convention Relating to the Status of Refugees [Convention]. This provision is referred to in section 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. Article 1E is considered to be an exclusion clause. The applicants appealed the RPD's decision to the Refugee Appeal Division [RAD].

[3] On December 15, 2022, the RAD rendered its decision, confirming that of the RPD and finding that the applicants were not Convention refugees or IRPA refugees. The applicants have filed an application for judicial review of the RAD's decision.

II. Issue

[4] The parties agree that at issue is whether the RAD's decision, which determined that the applicants were excluded from the Convention, was unreasonable.

III. State of law

[5] The relevant provision regarding exclusion from the Convention is found in section 98 of the IRPA. Section 98 of the IRPA reads as follows:

> 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.

[6] Article 1E of the Convention stipulates as follows:

> 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.

IV. Standard of review

[7] The parties agree that the Court must review the RAD's reasons on a standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 10, 16–17, 25).

[8] The Court must develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, the Court asks 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 (*Vavilov* at para 99).

[9] The burden is on the party challenging the decision to show that it is unreasonable. There must be sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency (*Vavilov* at para 100).

V. Facts and analysis

[10] In 2016, the applicants left Angola for Brazil because of their fear of persecution by the associate applicant's family. The applicants lived in Brazil until 2019.

[11] The applicants allege that they faced another fear of persecution in Brazil in May 2018, this time by a criminal group, the *Primeiro Comando da Capital* [PCC]. The abandoned building in PCC-controlled territory and in which they were living caught fire, and a rumour circulated that it was the applicants who had caused the fire following an electrical problem. In the aftermath of that fire, the applicants reportedly began receiving threats. In March 2019, the applicants left Brazil for the United States. In August 2019, the applicants entered Canada irregularly and filed a claim for refugee protection. That claim was considered by the RPD on August 28, 2019.

[12] The applicants had obtained their permanent resident [PR] status in Brazil in 2016 and entered Canada in possession of a PR card valid until October 18, 2025.

[13] The RPD and RAD determined that the applicants' PR status in Brazil provided them with rights and obligations under Article 1E that excluded them from the application of the Convention.

[14] The case law applicable to interpreting section 98 of the IRPA is described in *Zeng v Canada (Minister of Citizenship and Immigration)*, 2010 FCA 118 [*Zeng*] at para 28. The RAD and RPD also referred to*Zeng*, which reads as follows:

> 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.

[15] The applicants' position is that the RAD reached an unreasonable conclusion when it determined that the applicants were excluded from the Convention. According to the applicants, the evidence on the record confirms that they lost their PR status after their absence from Brazil for more than two years. Thus, it was unreasonable for the RAD to conclude that the applicants should be excluded from the Convention on the basis of their status in Brazil.

[16] The respondent argues that the RAD did not reach an unreasonable conclusion, given that its finding was based on the evidence on the record. First, the RAD found that the applicants did not dispute the fact that they had obtained PR status in Brazil. In addition, a document from the National Documentation Package ["NDP"], and to which the applicants referred, describes the administrative process in Brazil that enables applicants to recover their PR status. According to

the respondent, the fact that the minor son is a Brazilian citizen also created an opportunity for the applicants to access Brazilian citizenship, and their departure from Brazil was voluntary.

[17] In accordance with *Zeng*, the Federal Court of Appeal required the RAD to conduct an analysis that involves considering "all relevant factors to the date of the hearing" in order to determine whether the applicants have "status, substantially similar to that of its nationals, in the third country" (*Zeng* at para 28).

[18] More specifically, the RAD was required to consider whether the applicants had previously obtained a status conferring on them the same legal rights enjoyed by Brazilian nationals. In the event that the applicants had lost this status, the RAD had to determine whether there were any measures available to recover that status, and whether the applicants had taken any of those measures. The respondent argues that the spirit of Article 1E of the Convention does not allow applicants to asylum-shop, that is, to choose Canada as the best country for refugee protection when a third country, such as Brazil, has provided them with status substantially similar to that of its nationals.

[19] If I turn to the RAD decision, the reasons note that "[t]he RPD concluded that there was prima facie evidence that the male appellant had permanent resident status in Brazil, which granted him rights substantially similar to those of Brazilian nationals". In its own analysis, the RAD referred to Brazil's constitution to determine whether the rights the applicants could access were similar to those conferred on its citizens. The RAD determined that the rights to which the applicants had access were essentially similar to those enjoyed by Brazilian citizens.

[20] Although the applicants had lost the status that conferred upon them the same rights as Brazilian nationals, the RAD found that the applicants could recover their PR status through the administrative process in Brazil and through their son's citizenship status. In analyzing the specific facts, the RAD referred to the evidence in the record.

[21] I find, in considering the evidence that was before the RAD, that it was not unreasonable for the RAD to conclude that the applicants previously had PR status (essentially conferring the same rights upon them as Brazilian citizens) and that the applicants did not take the steps that were available to them to recover their status after having left Brazil more than two years ago.

[22] I find that it was not unreasonable for the RAD to conclude that the applicants had voluntarily chosen not to recover their PR status when they failed to take the measures available to them. The applicants did not explain how the administrative process that exists in Brazil was not a process that would enable them to recover their PR status. As the respondent argues, it was up to the applicants to demonstrate that they could not obtain the status that conferred substantially the same rights on them as enjoyed by a national of the country.

[23] Consequently, it was not unreasonable for the RAD to find that the applicants were excluded under Article 1E of the Convention.

[24] Although the analysis could have stopped at this point, the RAD nevertheless continued its review, balancing various factors, including the reason for the loss of status (voluntary or involuntary), whether the applicants could return to the third country, the risk the applicants

would face in their home country, Canada's international obligations, and any other relevant facts.

VI. RAD found that the other factors weighed in favour of exclusion from the Convention

[25] The applicants argue that the RAD contradicted itself in determining that the applicants were credible on certain facts regarding threats and organized crime in Brazil, given that the RAD found that the applicants should be excluded from the Convention. I do not agree that the RAD contradicted itself.

[26] In considering the various factors in light of the other relevant facts, the RAD concluded that the evidence was insufficient to support the applicants' allegations (*Sanchez v Canada (Citizenship and Immigration)*, 2007 FCA 99 at para 15). Thus, the respondent alleges that the applicants were unable to demonstrate that they met the burden of showing that the evidence favoured a conclusion contrary to the one reached by the RAD (*Solis Ramirez v Canada (Citizenship and Immigration)*, 2022 FC 71 at para 10).

[27] First, the RAD found that, despite his testimony that the fire had been reported in the media, the evidence was insufficient to support the applicants' allegations regarding the PCC.

[28] Second, the RAD found that there was no evidence on the record to support the fact that the PCC was still interested in tracking down the applicants. In particular, the testimony confirmed that the applicants had lost touch with the principal applicant's parents. On a balance

of probabilities, the RAD found that there was no risk of persecution further to its review of the evidence on the record.

[29] Third, the RAD determined that the applicants had abandoned their Brazilian PR status voluntarily and that they had not taken any steps to keep it.

[30] Lastly, the applicants allege that the RAD failed to consider the fact that the RPD had not analyzed the fear of persecution in Angola, the principal applicant and associate applicant's country of nationality. I disagree. The RAD determined that an analysis of the fear of a country of nationality was unnecessary once the facts showed that the applicants had a status that conferred upon them substantially the same rights as enjoyed by nationals of the third country.

[31] On the basis of the record before the RAD, I am unable to conclude that its findings were unreasonable. The RAD considered the factors required by the IRPA and the case law. It was not unreasonable for the RAD to find that the applicants were excluded from the Convention.

VII. Conclusion

[32] The applicants have not been able to show that the decision was unreasonable (*Vavilov* at para 100). I conclude that the Court's intervention is not justified in the circumstances. For the reasons above, I dismiss the application for judicial review.

[33] The parties confirm that there are no questions for certification, and I, too, concur that the facts do not raise any to that effect.

JUDGMENT in IMM-279-23

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.

2. No question is certified.

"Phuong T.V. Ngo"
Judge

Certified true translation
Sebastian Desbarats

FEDERAL COURT

SOLICITORS OF RECORD

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