Federal Court  Cour fédérale

Date: 20240808

Docket: IMM-662-23

Citation: 2024 FC 1240

Ottawa, Ontario, August 8, 2024

PRESENT: The Honourable Madam Justice Tsimberis

BETWEEN:

ANDRÉ EXAVIER

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a Refugee Protection Division [RPD] decision that determined that Mr. André Exavier [Applicant] is excluded from refugee protection under Article 1E of the United Nations *Convention Relating to the Status of Refugees*, July 28 1951, 189 UNTS 150 (entered into force 22 April 1954) [*Convention*], pursuant to section 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The RPD concluded that the

Applicant is not a Convention refugee or person in need of protection because there was evidence demonstrating the Applicant withheld material information about his connections to potential countries of reference when making his refugee claim, the Applicant already had or could have obtained permanent residency status in Chile, and the Applicant did not face a serious possibility of persecution in Chile [Decision].

[2] For the reasons that follow, this application for judicial review is granted. I remit the Decision back to the RPD for a determination of the risks the Applicant may face in their home country of Haiti, which was not done, contrary to the Federal Court of Appeal's jurisprudence on exclusion under section 98 of IRPA and Article 1E of the *Convention*. In summary, while the RPD considered all relevant factors and evidence, reasonably finding they could not trust the evidence and submissions of the Applicant in light of numerous omissions and inconsistencies that generally undermined the Applicant's credibility, the RPD only assessed the Applicant's risks in respect to Chile as a country of reference, failing to consider the risks posed in Haiti, which was his home country.

II. Background

[3] The Applicant is a 38-year-old citizen of Haiti who is married to a Chilean citizen, and he has a Chilean son and a Chilean stepdaughter with his wife. The Applicant also had a child with someone else in Venezuela, and that other child lives in Brazil.

[4] The Applicant claims he left Haiti in September 2013 for Chile in pursuit of better employment opportunities. Although he did not acquire long-term work, he met his wife in 2015

and they had their son in 2016. The Applicant obtained a nine-month temporary residency from the Chilean government in May 2018, but allegedly, his status was not renewed upon expiry.

[5] In October 2019, neighbours threw stones at the Applicant's family home because they were hostile to Haitian migrants. This incident was reported to the police, but the Applicant decided to leave Chile in December 2019 and crossed Peru, Ecuador, Colombia, Panama, Costa Rica, Honduras, and Nicaragua before arriving in Mexico in February 2020. Once in Mexico, the Applicant obtained a one-year visitor permit in May 2020. However, the Applicant crossed the border into the United States in January 2021, and was promptly deported back to Haiti in February 2021.

[6] The Applicant stayed in Haiti between February 2021 and April 2021. During this time, he joined a local citizen's committee. He alleges that in March 2021, he was approached near his home and threatened by ten masked men because the Applicant was supposedly introducing foreign political views to Haiti. In April 2021, the Applicant says he was attacked in the street by masked individuals who beat him and threatened his life. This incident was reported to police.

[7] The Applicant left Haiti for Mexico in April 2021, as his visitor's permit had not yet expired. After one month, he again crossed into the United States in May 2021. A deportation hearing was scheduled for September 30, 2021, but the Applicant fled the United States into Canada before it could be heard. He arrived in Canada and filed a refugee claim on June 19, 2021. At the border crossing, the Applicant's narrative focused entirely on his fears in Haiti and did not allege any fears in Chile or Brazil.

III. Decision under Review

[8] The RPD heard the matter on May 16, July 12, and September 8, 2022. After inviting the Applicant to provide further documentation, they issued the Decision, which rejected the Applicant's refugee claim on December 30, 2022.

[9] Instead of conducting an assessment of the Applicant's risk of persecution in Haiti, the RPD assessed Chile as a possible country of reference because there was evidence to suggest the Applicant already had or could have obtained permanent residency status in Chile. In the absence of documents to support the Applicant's allegations, the RPD found that the Applicant's explanations for not obtaining status in Chile were not credible. Since Chile was assessed as a country of reference, the RPD determined that the Applicant did not face a serious possibility of persecution in Chile, and that he was excluded from refugee protection in Canada because he had possible surrogate protection in Chile.

[10] In addition to the findings with respect to Chile, the RPD also found that the Applicant withheld travel history and relevant connections to Brazil, which suggested Brazil could also be assessed as a second potential country of reference.

[11] In the CTR, the RPD states it received a memo from the Immigration and Refugee Board [IRB] just before the second day of its hearings identifying a name identical to the Applicant's on a list of Haitians eligible for residence in Brazil [IRB Memo]. Counsel was given time to review the document and discuss with the Applicant, no pre-hearing conference was requested, and counsel indicated it had read the IRB Memo and was ready to proceed. However, after the

IRB Memo was filed, counsel asked to defer the hearing due to procedural fairness, and the RPD obliged counsel's request by moving the hearing from July 12, 2022 to September 8, 2022. The Applicant made two separate requests for the panel to recuse themselves, both of which were denied, as well as a motion to have the IRB Memo stricken from the record.

[12] After having doubts raised by this memo, the RPD gave the Applicant two months to file evidence either in their possession or from Brazilian authorities to confirm that he had never been to Brazil, but the Applicant failed to do so. On July 14, 2022, the Applicant wrote to the RPD that there was no proof he had traveled to Brazil in 2017. Until the RPD requested proof to the contrary, the Applicant was adamant he had never been to Brazil. After their request, the Applicant confessed he had been to Brazil once in either 2013 or 2014 via a land crossing from Chile, and he was authorized to enter Brazil under a program that let him stay there for up to a year. None of this was previously disclosed in the Applicant's immigration forms upon arriving in Canada or the Basis of Claim [BOC] form filed one month after his arrival in Canada. This series of issues was central to the RPD's negative credibility finding.

[13] Other contributing factors to the negative credibility finding were: the Applicant's failure to disclose his time in Venezuela, the Applicant's failure to file original identity or immigration documents (despite the fact that his co-applicant wife had managed to file the integrality of her Chilean immigration documents), the Applicant's omission from his original BOC that he had left Haiti in 2013 for Chile and that he had allegedly been the victim of an attack there in October 2019 (though these were included in an amendment). The reason given for the omissions with respect to Chile was the Applicant was not good with French, though the RPD

struggled with this explanation because the Applicant had an interpreter assisting with his claim at the border.

IV. Relevant Law

A. *Legislation*

[14] The following provisions of the IRPA are applicable in this proceeding:

> **Exclusion — Refugee Convention**
>
> **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.
>
> **Requirement to report**
>
> **98.1 (1)** A designated foreign national on whom refugee protection is conferred under paragraph 95(1)(b) or (c) must report to an officer in accordance with the regulations.
>
> **Obligation when reporting**
>
> **(2)** A designated foreign national who is required to report to an officer must answer truthfully all questions put to him or her and must provide any information and documents that the officer requests.

[15] The following article of the *Convention* is applicable in this matter:

> **Article 1** of the **United Nations Convention Relating to the Status of Refugees**
>
> **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 obligations which are attached to the possession of the nationality of that country.

B. *Jurisprudence*

(1) Standard of Review

[16] Analyzing the same issue, Justice Pamel determined that the interpretation of Article 1E and the relevant sections of the *IRPA* fall within the tribunal's delegated jurisdiction and expertise (*Celestin v Canada (Citizenship and Immigration)*, 2020 FC 97 [*Celestin*] at para 32). Further, the RPD's assessment of credibility is subject to the standard of reasonableness (see *Gomez Florez v Canada (Citizenship and Immigration)*, 2016 FC 659 at para 18). As a result, the Decision is reviewable against a reasonableness standard (see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 23). To avoid intervention on judicial review, the decision must bear the hallmarks of reasonableness – justification, transparency and intelligibility (*Vavilov* at para 99). A reasonable decision will always depend on the constraints imposed by the legal and factual context of the particular decision under review (*Vavilov* at para 90). A decision may be unreasonable if the decision maker misapprehended the evidence before it (*Vavilov* at paras 125-126). The party challenging the decision bears the onus of demonstrating that the decision is unreasonable (*Vavilov* at para 100).

[17] The reasonableness presumption does not apply to an issue involving a breach of natural justice or the duty of procedural fairness (*Vavilov* at para 23). Issues of procedural fairness are to be reviewed on a correctness standard (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 [*Khosa*] at para 43). In *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [*CPR*], the Federal Court of Appeal held that the required reviewing exercise is best – albeit imperfectly – reflected in the correctness standard. The Court is to determine whether the proceedings were

fair in all of the circumstances (*CPR* at paras 54-56; see also *Watson v Canadian Union of Public Employees*, 2023 FCA 48 at para 17). In considering issues of procedural fairness, the ultimate question to be answered by a reviewing Court is whether the Applicant knew the case to be met and had a full and fair chance to respond (*CPR* at para 56).

(2) Credibility Findings

[18] There is no dispute that the RPD, which is a specialized tribunal, has complete jurisdiction to determine the plausibility of testimony and assess the evidence in these matters (see *Sheikh v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 15200 (FC) [*Sheikh*] at paras 19-23). Credibility findings are entitled to considerable deference on judicial review, and should not be overturned unless they are perverse, capricious, or made without regard to the evidence (see *Siad v Canada (Secretary of State)* (CA), 1996 CanLII 4099 (FCA), [1997] 1 FC 608 at para 24; *Desir v Canada (Citizenship and Immigration)*, 2019 FC 1164 at para 25).

[19] The RPD will usually be afforded a reasonable basis to find a claimant lacks credibility if there are contradictions in the evidence, particular in their own testimony, but these contradictions must be real as opposed to truly trivial or minute contradictions (*Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319 at para 43, as cited in *Lalegbin v Canada (Citizenship and Immigration)*, 2015 FC 1399 at para 26). While discrepancies amounting to a failure to recall minute details amounting to a memory test should not amount to a credibility issue, discrepancies in facts that are central to the basis of a refugee claim support a negative

credibility finding (see *Olusola v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 46 at paras 13-14, citing *Shiekh*).

[20] When evaluating a claimant's credibility with respect to difference between written statements and oral testimony, this Court has long-recognized that "a person's first story is usually the most genuine, and therefore the one to be believed" and that contradictions between the two justify a negative credibility finding (*Navaratnam v Canada (Citizenship and Immigration)*, 2011 FC 856 at paras 11-12).

(3) Article 1E Determinations

[21] The test to be applied to Article 1E determinations was set out by the Federal Court of Appeal in *Zeng v Canada (Minister of Citizenship and Immigration)*, 2010 FCA 118 [*Zeng*]. That test is:

> 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.
>
> (*Zeng* at para 28)

[22] As Justice Pamel explained in *Celestin*, the first prong asks "whether the claimant has status substantially similar to that of nationals of the country in question. It is here that the

decision maker must examine whether the claimant enjoys substantially the same rights as a national of the country referred to in Article 1E of the Convention. This analysis concerns the rights and protections provided by the state referred to in Article 1E of the Convention" (*Celestin* at para 34). The rights being analyzed are:

1. The right to return to the country of residence;
2. The right to work freely without restrictions;
3. The right to study; and,
    1. Full access to social services in the country of residence.

(*Celestin* at para 35, citing *Shamlou v Canada (MCI)*, [1995] FCJ No 1537, 103 FTR 241 (TD) at para 35).

[23] If the claimant has status similar to nationals of the country of reference, and enjoys each of these four rights, the exclusion codified in Article 1E applies and the analysis stops there (*Celestin* at paras 36-37; *Zeng* at para 28).

[24] If the claimant does not have similar status, or does not enjoy each of those four rights, they move on to the second prong and determine "whether the claimant had lost resident status or could have acquired it by reasonable means, but did not do so. If the answer is no, the analysis ends, since the applicant is not excluded under Article 1E" (*Celestin* at para 39, citing *Molano Fonnoll v Canada (Citizenship and Immigration)*, 2011 FC 1461 at paras 29-31).

[25] If the answer at the second prong is affirmative, the RPD must "consider and balance various factors", including (but not limited to), "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" (*Zeng*, at para 28; *Mojahed v Canada (Citizenship and Immigration)*, 2015 FC 690 at paras 27-28). This assessment "must be done when the claimant has lost their status or has not taken steps to acquire a status similar to nationals of the country in question" (*Celestin* at para 41).

[26] The purpose of this legislative framework and legal analysis discourages "asylum shopping" and excludes claimants from Canadian refugee protection if they have surrogate protection in a country where the individual enjoys substantially the same rights and obligations as nationals of that country (*Celestin* at para 42; *Zeng* at para 1).

[27] Notably, the wording in the third prong of *Zeng* is such that risks *must* be considered in the Applicant's home country (*Zeng* at para 28). Where a third country has been identified as a country of reference where the Applicant had and lost (or had access to and failed to obtain) resident status where they claim they face persecution, the RPD *must also* consider risk in the country of reference *as well as* his home country. Indeed, as Justice Régimbald pointed out, "if the applicant is persecuted in the third country where he has resident status, as well as in his country of origin, he can seek refugee protection in Canada" (*Lauture v Canada (Citizenship and Immigration)*, 2023 FC 1121 [*Lauture*] at para 37). However, this does not obviate the necessity to assess risk in the home country, the obligation to assess status similar to that of nationals in a third country and risk in that country is additive, not a replacement for assessing risk in the home country as required in the third prong of the *Zeng* test.

V. Issues

[28] While the written submissions were somewhat unclear, counsel for the Applicant conceded at the hearing that the only issue determinative of this matter is whether the Decision was reasonable in excluding the Applicant because of the identified country of reference in Chile. He further conceded that there is no procedural fairness issue here, and on the basis of the submissions filed by the Respondent, the Court will not address that issue.

[29] The Applicant spent a great deal of time discussing evidence and arguments related to Brazil and a second country of reference, but I must note that the RPD only made findings in respect of Chile and merely identified the possibility of Brazil as an *additional* potential country of reference arising from an intervening IRB Memo. The parties focused on the issue of whether the Decision is reasonable in excluding the Applicant from refugee protection under Article 1E of the *Convention* on the basis of Chile as a country of reference.

[30] At the hearing, I raised the question of the risks posed to the Applicant in Haiti given the wording of the third prong of the test in *Zeng*. I asked the parties to provide post-hearing submissions on the issue: with regards to the third prong of the *Zeng* test, was it reasonable for the RPD not to consider "the risk the claimant would face in the home country" in its Decision? The Applicant submits that it was not reasonable for the RPD not to consider "the risk the claimant would face in the home country" in its Decision, because the conclusion of its first and second prong analysis required it to undertake the third prong of the *Zeng* test, which includes home country risk analysis. I find this issue is determinative.

VI. Analysis

A. *Credibility Issues*

[31] There was an overriding concern regarding the Applicant's credibility that invaded the RPD's analysis of the above factors. The Applicant's position is that any omissions or contradictions the RPD held against them were insignificant, it was unfair to hold against them that he was unable to provide corroborative evidence that the RPD requested, and the RPD let their negative credibility findings as they related to whether or not Brazil was a second possible country of reference affect their analysis of unrelated factors and evidence regarding Chile. I disagree with the Applicant for the reasons below.

[32] The Respondent highlighted *Gomez Florez v Canada (Citizenship and Immigration)*, 2016 FC 659 [*Gomez Florez*], which sets out that "a lack of credibility concerning the central elements of a claim could extend to other elements of the refugee protection claim… and generalized to all of the documentary evidence presented to corroborate a version of the facts" (*Gomez Florez* at para 30, citing *Sheikh* at paras 7-9). What transpired before the RPD is a series of omissions and contradictions that, if each is individually assessed, may be considered small (except for the issues surrounding Brazil). However, when viewed in their totality, which is what appears to have occurred in this case, is a generally negative credibility from the sum of the Applicant's numerous and seemingly unending omissions and inconsistencies.

[33] There were myriad evidentiary issues with the Applicant not being able to provide any original immigration documentation, any documentation that relates to the denial of their status

in Chile or Brazil, or any documentation of some of the alleged incidents he claims occurred, contrary to his co-applicant wife, for example, who was able to file all of her immigration documentation for Chile. The evidentiary issues were issues the RPD had asked the Applicant to address by providing evidence, but the Applicant failed to do so, and now argues he should not have had to do so in the first place. The omissions are issues the RPD identified that either the Applicant testified to at the RPD hearings or that arose from the evidence before them, which resulted in new information that the Applicant did not originally include in their BOC. The contradictions are issues the RPD identified in statements and evidence from the Applicant that were inconsistent with, and usually contrary to, earlier oral or written evidence provided by the Applicant. A number of these issues, omissions, and contradictions can be summarized as follows:

1) The Applicant did not submit original identity document or immigration document because he lost his old documents when he was attacked by three armed men between Colombia and Panama, but omitted from his BOC and narrative that this attack even happened;
2) The Applicant did not submit new identity document or immigration document because they were all allegedly seized by the American authorities;
3) Upon request from the RPD, the Applicant did not submit any corroborative evidence confirming the Applicant did apply for, and was denied, permanent residency in Chile before emigrating in 2019;
4) Omitting the “attack” and supposed bike theft in Chile until well after the claim was started (even though his wife never mentioned it in her own claim), and did not report it

to the police even though he had reported worse incidents to the police previously (and the wife did mention the ones reported to the police);

5) Upon request from the RPD, the Applicant did not submit any corroborative evidence that could rebut the IRB Memo's concern that the Applicant may be eligible for permanent residency in Brazil;
6) Omitting that the Applicant stayed in Venezuela in 2013 and had a child born there;
7) Omitting that the Venezuelan child and their mother now live in Brazil;
8) Omitting that the mother of his Venezuelan child allegedly has mental health issues and the Venezuelan child was in the custody of the Brazilian government;
9) Contradicting his earlier statement that he was in regular communication with his Venezuelan child by later stating the child only speaks Portuguese (dominant language in Brazil), which the Applicant claims he does not speak;
10) Contradicting his earlier statement during the second hearing that the Applicant had never traveled to Brazil, he later declared that he stayed in Brazil in either 2013 or 2014 under a "protocol" allowing him to stay for up to one year; and,
11) Contradicting his earlier declaration that the Applicant had not requested refugee protection in Brazil but stayed there under a "protocol", RPD found out that individuals who request refugee status in Brazil receive a temporary identity document called a "Refugee Protocol" and the Applicant offered no further evidence of what "protocol" this was.

[34] It was on the Applicant to satisfy the RPD with credible evidence and argument that the consideration and weighing of factors related to their circumstances militated in favour of not

excluding them in their Canadian immigration process. Instead of meeting this burden (as will be explained below), the Applicant now asks this Court to find that their lack of documentary evidence, the avalanche of omissions and inconsistencies that he was caught with by the RPD and IRB team during the adjudication of their claim, and their insufficient (and, at times, implausible) explanations of those omissions and inconsistencies, are simply insignificant and should not weigh against them. I cannot agree. In light of the never-ending parade of reasons to make negative credibility findings, it was entirely open and reasonable for the RPD to find they could not trust the Applicant and the evidence he offered. Regardless of whether any single instance of the Applicant's omissions or inconsistencies was insignificant, it is simply unreasonable to justify any presumption that the Applicant is telling the truth or offering credible evidence when he is consistently being caught later contradicting their own evidence, other authorities credibly identify that the Applicant has hidden details or evidence relevant to the proceeding, and the Applicant is unable to justify or corroborate his explanations for this bouquet of issues.

[35] While the contradictions regarding Brazil were the most concerning to the RPD, they identified wide-ranging credibility issues that concern the central elements of the Applicant's claim. The sum of these individual credibility issues called into question the whole of his evidence and the very basis of his claim, and the general negative credibility finding infected both the evidence the Applicant did put forward and the evidence he claimed not to have. It was reasonable for the RPD to have these concerns, the burden shifted to the Applicant to provide evidence that corroborated their version of events in the face of these concerns and the evidence to the contrary, and he failed to do so. The RPD cannot be faulted for finding against the

Applicant when he has demonstrated himself to lack credibility and when he has failed to provide any corroborative evidence to prove he is telling the truth.

[36] In these circumstances, and as stated by Mr. Justice Beaudry in *Pinedo v Canada (Minister of Citizenship and Immigration)* 2009 FC 1118, [2009] FCJ No. 1585 (QL) , at paragraph 13:

> A panel cannot draw a negative inference from the mere fact that a party failed to produce any extrinsic documents corroborating his or her allegations, except when the applicant's credibility is at issue (*Ahortor v Canada (Minister of Employment and Immigration)*, (1993), 65 F.T.R. 137 (FCT); *Nechifor v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1004, [2003] F.C.J. No. 1278 (QL) at paragraph 6).
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> (Our emphasis)

[37] After review of the record, the RPD reasonably held that the Applicant had withheld material information about his connections to potential countries of references (notably Chile) when making his refugee claim.

B. *Article 1E Exclusion*

[38] While the bulk of this matter focuses on the second and third prongs of the *Zeng* test, I shall quickly discuss why the first prong is not at issue. The *Zeng* test, put succinctly, is:

1. Does the claimant have status, substantially similar to that of its nationals, in the third country? If yes, the claimant is excluded.

2. Did the claimant previously have such status and lost it, or had access to such status and failed to acquire it? If not, the claimant is not excluded. If yes, proceed to the third prong.

3. If the answer to the second prong is yes, consider and balance various factors including but not limited to:

    i. The reason for the loss of status (voluntary or involuntary);

    ii. Whether the claimant could return to the third country;

    iii. The risk the claimant would face in the home country;

    iv. Canada's international obligations; and,

    v. Any other relevant facts.

(1) First prong of the *Zeng* Test

[39] The parties do not contest that there is no evidence that the Applicant *currently has* any legal status in other countries of reference. This being the case, we proceed to the second prong.

(2) Second prong of the *Zeng* test

[40] There is unrebutted evidence in the record that the Applicant *previously had status* in Chile *and lost it, or had access to,* legal status in Chile. The record shows, and the RPD references, that the Applicant declared the following: that he arrived in Chile with a visitor permit, that after the birth of his son, the Chilean government granted him temporary resident status for nine months permitting him to work, and that at the expiration of the temporary resident status, it was not renewed.

[41] The Applicant alleges he was unable to renew it and his request for residency was refused. The difficulty is that he has not provided any evidence, credible or otherwise, that he applied for said status and failed to obtain it.

[42] The RPD reasonably assessed Chile as a country of reference, because there was evidence to suggest the Applicant had or could have obtained permanent residency status in Chile, given his close family ties to Chilean citizens and Chile's immigration laws appear to indicate eligibility based on family ties. Given the Applicant *previously had status* in Chile *and lost it, or had access to, and failed to acquire* legal status in Chile, we proceed to the consideration and balancing exercise of the third prong that was conducted by the RPD.

(3) Third prong of the *Zeng* test

[43] The RPD analyzed the following factors:

1. The reason for the loss of Chilean status (work visa);
2. Can the Applicant return to Chile; and,
3. The risk the Applicant would face in Chile.

[44] The Applicant argues the RPD did not consider objective evidence found in an article that he argues demonstrate Haitians with status in Chile were thwarted from sponsoring family members (those able to sponsor family were the exception rather than the rule) and that Chilean immigration policy favoured excluding Haitians and even repatriating them. The Applicant's argument invites this Court to reweigh the evidence, which is not appropriate on judicial review, as the RPD is assumed to have reviewed all materials before it, which included other documents, including extracts of the Chilean Immigration Act.

[45] The RPD reasonably questioned the Applicant on any attempts to obtain status in Chile to determine whether it was possible to obtain permanent status in Chile. From the record, it is clear

the RPD granted time for the Applicant to obtain, if applicable, a confirmation of refusal from Chilean authorities. There is no evidence the Applicant tried to seek status in Chile or had sought any time in order to provide such evidence. As referenced by the RPD in its Decision at paragraph 178, despite the time limits granted and considered reasonable by counsel for the Applicant, there was no corroborative evidence filed by the Applicant that could explain to the Court why the Applicant did not have status in Chile or why he could not obtain status in the future. The RPD reasonably held the burden is on the Applicant to show that he could not return to Chile and it is not enough for the Applicant to give hypothetical answers about their status, citing the jurisprudence of this Court in *Desir v Canada (Citizenship and Immigration*), 2019 FC 1164:

> [15] The Applicants submit that while the RPD was required to consider the various factors under the *Zeng* test, this did not place a burden on Ms. Desir to prove that her status could not be reinstated. I disagree. Mr. Justice Paul Rouleau held in *Canada (Minister of Citizenship and Immigration) v Choovak*, 2002 FCT 573 at paragraphs 15 and 17 that a claimant's choice to allow his or her status in a third country to expire amounts to an impermissible form of asylum shopping. The Federal Court of Appeal confirmed in *Zeng* that the reason why a claimant lost their status remained a valid factor to be considered and weighed by the RPD in reaching its decision. The Court also stated at paragraph 39 that it is reasonable for the RPD to consider what steps the foreign national may or may not have taken in order to prevent the loss of status in the third country.
>
> [16] It is well-established that a refugee claimant has the burden of proof in showing, on a balance of probabilities, the validity of the allegations on which his or her claim is based. I conclude that a similar burden rests on a claimant who has caused their permanent residence status in a third country to expire to demonstrate why the status was lost and why the claimant could not have reapplied and obtained a new visa. This only makes sense. Otherwise, who else could speak to the circumstances leading to the loss of one's status or what steps, if any, one took to re-acquire status?
>
> [17] For the above reasons, I am satisfied that the RPD applied the correct test when considering the Article 1E exclusion and

> correctly placed the burden on Ms. Desir to explain why she left Chile and why she could not have reapplied and obtained a new visa.

[46] In the circumstances, the RPD correctly placed the burden on the Applicant to explain why he could not return to Chile given his close family ties to Chilean citizens. The RPD reasonably held, on a balance of probabilities, that the Applicant did not prove that he could not return to Chile and why he could not have reapplied and obtained a new visa to return to Chile. Overall, the RPD reasonably assessed Chile as a possible safe country reference that could provide surrogate protection to the Applicant.

[47] Finally, given the lack of credibility of the alleged robbery and burglary in Chile, the RPD reasonably determined that the Applicant had not proven that his circumstances (including alleged difficulty finding employment in Chile and problems with neighbours) rise to the level of persecution. Ultimately, the RPD reasonably found that the Applicant did not face a serious possibility of persecution in Chile.

[48] The RPD's job was not finished, however, upon concluding that the Applicant did not face a serious possibility of persecution in Chile. In the circumstances of this case where the Applicant previously had substantially similar status in the country of reference and lost it or had access to such status and failed to acquire it (second prong of the *Zeng* test), my reading is that *Zeng* necessitates that the RPD assess the Applicant's risk of persecution in his home country of Haiti, irrespective of whether his risk was assessed in his country of reference, Chile:

> 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.
>
> (*Zeng* at para 28, our emphasis)

[49] Here, I find the RPD unreasonably determined they had no need to assess the risks in Haiti because they had already determined the Applicant faced no serious risk in his country of reference Chile. The RPD also determined that, in the unlikely event that the Applicant is made to return to Haiti, any risk would be assessed if the Applicant then applied for a Pre-Removal Risk Assessment, which is speculative. Whether or not the Applicant can return to Chile, it remains that he is claiming refugee protection from his home country, Haiti, and the RPD unreasonably failed to complete their *Zeng* assessment. In their additional submissions, the Respondent cited *Lauture* and *Canada (Citizenship and Immigration) v Elizaire*, 2022 FC 1353, which can be distinguished from this matter in that, in those cases, the Applicants were permanent residents of their countries of reference, thus removing the need to proceed beyond the first prong of the *Zeng* test. Here, the Applicant did not have any such status, and so consideration of the second and third prongs of the *Zeng* test is necessary, including the necessity to assess risk in the Applicant's home country.

[50] The Applicant faces an uphill battle in light of the RPD's myriad, reasonable credibility findings. However, this does not absolve the RPD of their obligation to reasonably conduct a

complete assessment of the third prong of the *Zeng* test as enunciated by the Federal Court of Appeal.

[51] For the foregoing reasons, the Decision was unreasonable.

VII. Conclusion

[52] This application for judicial review is granted, in part, and the Decision is remitted to the RPD for a redetermination of the third prong of the *Zeng* assessment of exclusion under Article 1E of the *Convention* that includes an adequate assessment of the Applicant's alleged risk of persecution in his home country, Haiti. There are no questions for certification.

JUDGMENT in IMM-662-23

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted;
2. The RPD's decision is set aside, in part, in accordance with the reasons for this judgment, and remitted to a different panel of the RPD for a redetermination of the third prong of the *Zeng* assessment of exclusion under Article 1E of the *Convention* that includes an adequate assessment of the Applicant's alleged risk of persecution in his home country, Haiti; and
3. No question of general importance is certified.

"Ekaterina Tsimberis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-662-23
STYLE OF CAUSE:	ANDRÉ EXAVIER v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	FEBRUARY 21, 2024
JUDGMENT AND REASONS:	TSIMBERIS J.
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