

Federal Court



Cour fédérale

Date: 20240815

Docket: IMM-3121-23

Citation: 2024 FC 1271

Ottawa, Ontario, August 15, 2024

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

JAVIER GUZMAN CABRERA

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The outcome of this judicial review turns on whether the Refugee Appeal Division [RAD] of the Immigration and Refugee Board of Canada [IRB] reasonably found that a claimant's willing participation in divorce in a country where they previously enjoyed permanent resident status is the equivalent of voluntarily losing or relinquishing that status, resulting in the claimant's exclusion from refugee protection in Canada.

[2] I find that the RAD's conclusion in this matter unreasonably conflates the voluntariness of divorce with the voluntariness of loss of residence status. For the reasons below, I therefore grant this judicial review application.

II. Background

[3] The Applicant, Javier Guzman Cabrera, is a Cuban citizen who fears persecution by government authorities for having expressed an anti-government political opinion.

[4] Following asserted persecutory actions by government authorities in Cuba for having displayed the slogan "we demand change" on a computer screen while a university student, Mr. Guzman Cabrera fled to Brazil where his parents were permanent residents. He became a permanent resident upon marrying a Brazilian national but the couple divorced less than a year later. According to Mr. Guzman Cabrera, the divorce ended his permanent resident status.

[5] Mr. Guzman Cabrera returned to Cuba several times, most recently in 2019 to aid his ill daughter and to attend his brother's graduation. Asserting he was subjected again to harassment by Cuban authorities, he fled to Canada where he sought refugee protection.

[6] The Refugee Protection Division [RPD] of the IRB found that Mr. Guzman Cabrera was inadmissible pursuant to section 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] and Article 1E of the *United Nations Convention relating to the Status of Refugees* [Convention]. See Annex "A" below for applicable legislative provisions.

[7] Applying the three-step *Zeng* test for exclusion (*Zeng v Canada (Minister of Citizenship and Immigration)*, 2010 FCA 118 at paras 28-29), the RPD found that when Mr. Guzman Cabrera lived in Brazil and, so long as he was a permanent resident there, he held status substantially similar to that of Brazilian nationals. By the time of the RPD hearing, he was absent from Brazil for more than two years and, thus, according to the RPD, he likely lost his status. Examining a number of factors, the RPD determined that, although the permanent residency ceased when he divorced, he had other avenues for retaining status, had he stayed in Brazil. Because Mr. Guzman Cabrera chose to leave Brazil, the RPD concluded his loss of status was voluntary.

[8] The RPD concluded that Mr. Guzman Cabrera likely could return to Brazil and that he did not face a forward-looking risk of persecution or serious harm there. Further, the RPD found that Mr. Guzman Cabrera had not provided sufficient credible evidence to establish that he would be at risk in his home country, Cuba. He thus was excluded from protection in Canada and his claim was rejected.

[9] Applying a correctness standard to its own assessment of the evidence, the RAD agreed with the RPD and dismissed the Applicant's appeal. The RAD's key findings were that Mr. Guzman Cabrera lost his status voluntarily in Brazil through his divorce, and that his returns to Cuba without taking precautions demonstrated a lack of subjective fear in returning to Cuba.

III. Analysis

[10] Although Mr. Guzman Cabrera challenges both of the RAD's key determinations, I find that the voluntariness of loss of status in Brazil is determinative. In other words, Mr. Guzman Cabrera has met his onus, in my view, of showing that the RAD's finding of voluntary loss of status is unreasonable: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 25, 99-100. I therefore decline to address the RAD's treatment of his subjective fear in returning to Cuba.

[11] The test for exclusion by the operation of Article 1E of the *Convention* and section 98 of the *IRPA* was reformulated in *Zeng* (at paras 28-29), requiring the administrative decision maker to pose a series of questions along the following lines:

1. Accounting for all relevant factors to the date of the hearing, does the refugee claimant have status in a third country (i.e. other than the claimant's home country, and Canada where the claimant now seeks status)?
 - a. If the answer is yes, then the claimant is excluded and the enquiry ends.
 - b. If the answer is no, then the analysis proceeds to the next question.
2. Did the claimant previously have such status and lost it, or have access to such status and failed to acquire it?
 - a. If the answer is no, then the claimant is not excluded under Article 1E.
 - b. If the answer is yes, then the analysis proceeds to the next step.
3. Considering and balancing or weighing an open-ended list of factors, will exclusion apply in the claimant's particular circumstances? These factors include, among all relevant factors, the reason for the loss of status (voluntary or involuntary), whether the claimant could return to the third country, the risk the claimant may face in the home country, and Canada's international obligations.

[12] The RAD notes in its decision that the RPD, at step 1, found that, at the time of the hearing, Mr. Guzman Cabrera did not have status substantially similar to that of Brazilian

nationals. The RAD also notes that, at step 2, the RPD found Mr. Guzman Cabrera previously had such status but lost it. He did not dispute either finding before the RAD.

[13] The RAD's decision thus was focused on step 3 and some of the factors weighed by the RPD. Regarding Mr. Guzman Cabrera's argument that he lost his residence status when he divorced his former Brazilian spouse, the RAD finds that he did not present any evidence that he opposed his divorce and, therefore, he was a willing party to the divorce. The RAD concludes that, because Mr. Guzman Cabrera's loss of permanent residence was a direct result of his willingness to divorce, he therefore lost his status in Brazil voluntarily. According to the RAD, this factor weighs in favour of exclusion.

[14] I do not disagree with the Respondent that by divorcing his spouse, Mr. Guzman Cabrera initiated a process of him losing his status. The result flowing from the divorce, however, was a state-imposed consequence. In other words, the loss of status, in itself, was not something Mr. Guzman Cabrera could have chosen to do voluntarily (i.e. in the sense of acting on his own free will), apart or separate from the divorce; hence, my conclusion of unreasonable conflation.

[15] I agree with Mr. Guzman Cabrera that, by equating the act of a permanent resident obtaining a divorce from a national (the state-imposed consequence of which in Brazil is the loss of residence status) with voluntarily electing to lose permanent residence status in a country (such as, for example, by leaving a country willingly), the RAD engaged in an unreasonable assessment, thus warranting the Court's intervention.

IV. Conclusion

[16] For the above reasons, the judicial review application thus will be granted. The RAD's decision will be set aside, with the matter remitted to a different panel for redetermination.

[17] Neither party proposed a question for certification, and I agree that none arises here.

JUDGMENT in IMM-3121-23

THIS COURT'S JUDGMENT is that:

1. The judicial review application is granted.
2. The February 15, 2023 decision of the Refugee Appeal Division is set aside. The matter will be redetermined by a different panel.
3. There is no question for certification.

"Janet M. Fuhrer"

Judge

Annex “A”: Relevant Provisions

*Immigration and Refugee Protection Act, SC 2001, c 27.
Loi sur l’immigration et la protection des réfugiés, LC 2001, ch 27.*

<p>Exclusion — Refugee Convention</p> <p>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.</p>	<p>Exclusion par application de la Convention sur les réfugiés</p> <p>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.</p>
<p>SCHEDULE (Subsection 2(1))</p> <p>Sections E and F of Article 1 of the United Nations Convention Relating to the Status of Refugees</p> <p>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.</p>	<p>ANNEXE (paragraphe 2(1))</p> <p>Sections E et F de l’article premier de la Convention des Nations Unies relative au statut des réfugiés</p> <p>E 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.</p>

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3121-23

STYLE OF CAUSE: JAVIER GUZMAN CABRERA v THE MINISTER OF
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