Federal Court  Cour fédérale

Date: 20220118

Docket: IMM-6459-20

Citation: 2022 FC 53

[ENGLISH TRANSLATION]

Ottawa, Ontario, January 18, 2022

PRESENT: The Honourable Mr. Justice Gascon

BETWEEN:

KHALID ZAMAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Mr. Khalid Zaman, is seeking judicial review of a Refugee Appeal Division [RAD] decision dated November 30, 2020 [Decision], that dismissed Mr. Zaman's appeal against a Refugee Protection Division [RPD] decision rejecting his claim for refugee protection.

[2] The RPD and the RAD each refused Mr. Zaman's claim for refugee protection on two main grounds: first, Mr. Zaman's inability to demonstrate that he was not subject to exclusion under Article 1E of the *United Nations Convention Relating to the Status of Refugees*, July 28, 1951, 189 UNTS 137 [Convention]; and second, Mr. Zaman's failure to show that the country in which he has permanent resident status, Brazil, could not provide him with reasonable protection. The RAD found that Mr. Zaman was neither a Convention refugee nor a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[3] Mr. Zaman submits that the RAD erred in finding he should be excluded from refugee protection under Article 1E of the Convention and that it erred in its prospective analysis of his risk of persecution and serious harm after finding that he was referred to in Article 1E of the Convention. Mr. Zaman is asking this Court to set aside the Decision and to refer the matter back to the RAD for reconsideration by a differently constituted panel.

[4] For the following reasons, I will dismiss the application for judicial review. Having reviewed the RAD's findings, the evidence before the panel and the applicable law, I see no reason to set aside the RAD's decision. In both the application of Article 1E of the Convention and the assessment of state protection in Brazil, the evidence reasonably supports the RAD's findings, and the RAD's reasons bear the hallmarks of a reasonable decision. Therefore, there is no reason for this Court to intervene.

II. Background

A. *Facts*

[5] Mr. Zaman is a citizen of Pakistan. In 2016, he left his home country and settled in Brazil. Mr. Zaman alleges that he left Pakistan for fear of persecution by the militant group Tehrik-i-Taliban Pakistan by reason of his political affiliations and his involvement with female soccer teams.

[6] In September 2016, Mr. Zaman married Flávia Kelly Batista Cabral Zaman, a Brazilian citizen, and was granted permanent resident status in Brazil at the end of the same month. His permanent residence card was then issued, valid for nine years. However, the couple divorced less than a year later, in August 2017.

[7] Mr. Zaman alleges that after the divorce, his former in-laws began to harass him over money. The harassment included physical violence, theft and death threats. Ms. Batista Cabral's uncle, a man named Vanderlei Batista Silva, was said to be especially involved in harassing Mr. Zaman. Mr. Batista Silva, a municipal politician in Amaralina for many years, was convicted of murder in 2017. He was sentenced to 15 years in prison but has only been under house arrest since his conviction, according to Mr. Zaman. Mr. Zaman alleges that Mr. Batista Silva is a powerful politician in Brazil with a large network of contacts throughout the country.

[8] In January 2018, Mr. Zaman fled Brazil for Canada, where he claimed refugee protection in July 2018. The RPD hearing took place in September 2019, approximately 20 months after Mr. Zaman arrived in Canada.

[9] On October 31, 2019, the RPD rejected Mr. Zaman's claim for refugee protection on the grounds that he was subject to exclusion under Article 1E of the Convention, which is intended to discourage "asylum shopping". Mr. Zaman's claim for refugee protection was rejected by the RPD under section 98 of the IRPA, which introduces Article 1E of the Convention into Canadian law. Mr. Zaman appealed this decision to the RAD.

B. *RAD decision*

[10] The RAD confirmed the RPD's decision on November 30, 2020.

[11] Before the RAD, Mr. Zaman alleged that the RPD had made numerous errors in its analysis, specifically (i) misinterpreting Article 1E of the Convention; (ii) selectively analyzing the physical evidence; and (iii) misinterpreting the test for reasonable protection in Brazil. The RAD considered Mr. Zaman's first and third allegations to be determinative in this case.

[12] On the issue of the application of Article 1E of the Convention to Mr. Zaman's circumstances, the RAD began its analysis by detailing the steps of the test developed by the Federal Court of Appeal in *Zeng (Canada (Citizenship and Immigration) v Zeng*, 2010 FCA 118 [*Zeng*] at para 28). In its analysis of the first step of the *Zeng* test, the RAD noted that Mr. Zaman

bore the onus of establishing that his status at the time of the RPD hearing was not "substantially similar" to that of Brazilian nationals.

[13] The RAD concluded that the objective evidence supported the determination that permanent residents have the same rights as Brazilian citizens, including the four rights relevant to the analysis of the "substantially similar" nature of the status at issue (*Shamlou v Canada (Minister of Citizenship and Immigration)*, [1995] FCA No. 1537, 103 FTR 241 [Shamlou]). The objective evidence also indicated that permanent residents are entitled to enter Brazil unless they have been absent from the country for more than two years without justification, which would result in their losing their status as "substantially similar" to Brazilian citizens. At the time of the RPD hearing, Mr. Zaman had not yet been absent from Brazil for more than two years. The RAD therefore concluded, on the basis of the objective evidence submitted, that Mr. Zaman still held permanent residence in Brazil and was therefore subject to exclusion under Article 1E of the Convention.

[14] On the issue of state protection, the RAD began its analysis by recalling the presumption that a state is capable of protecting its nationals unless that state has completely collapsed. The RAD was of the opinion that the RPD was correct in concluding that Mr. Zaman was not at political risk in Brazil, even though he appeared to be involved in a family dispute. On the basis of the objective evidence, the RAD concluded that Brazil was a functioning, albeit imperfect, democratic state and that there was no evidence that the Brazilian state was incapable of providing reasonable protection to its people. Therefore, the onus was on Mr. Zaman to prove that the Brazilian state was unable to protect him in his particular circumstances.

[15] The RAD stated that the RPD had correctly determined that the evidence submitted by Mr. Zaman was not sufficient to clearly and convincingly lead to a conclusion, on a balance of probabilities, that the Brazilian state would be unable to protect Mr. Zaman from the actions of his former in-laws. In particular, the RAD stated that Mr. Zaman's failure to go to the police in the wake of the harassment precluded a conclusion as to the ability or willingness of the state to provide him with adequate protection in Brazil.

[16] For these two reasons, the RAD confirmed the RPD's decision that Mr. Zaman was neither a refugee nor a person in need of protection.

C. *Standard of review*

[17] The analytical framework for judicial review of the merits of an administrative decision is now that established by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. This framework is based on the presumption that reasonableness is now the applicable standard in all cases. The parties do not dispute this, and the RAD Decision is therefore subject to review by this Court on this deferential standard. Indeed, the pre-Vavilov jurisprudence is consistent with this and had already recognized that the reasonableness standard of review applies to the question of whether the facts permit the exclusion of a person under Article 1E of the Convention (*Majebi v Canada (Citizenship and Immigration)*, 2016 FCA 274 at paras 5–6; *Zeng* at paras 11, 34; *Saint Paul v Canada (Citizenship and Immigration)*, 2020 FC 493 [*Saint Paul*] at paras 43–45; *Celestin v Canada (Minister of Citizenship and Immigration)*, 2020 FC 97 [*Celestin*] at paras 31–32; *Su v Canada (Citizenship and Immigration)*, 2019 FC 1052 [*Su*] at para 17). The same is true for state

protection (*Hinzman v Canada (Citizenship and Immigration)*, 2007 FCA 171 at para 38; *Burai v Canada (Citizenship and Immigration)*, 2020 FC 966 [*Burai*] at para 17).

[18] Where the applicable standard of review is reasonableness, the role of a reviewing court is to examine the reasons given by the administrative decision maker and to determine whether the decision is based on "an internally coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at paras 2, 31). The reviewing court must therefore consider "whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility" (*Vavilov* at para 99, citing, among others, *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 47, 74).

[19] It is not enough for the decision be justifiable. Where reasons are required, the "decision must also be justified, by way of those reasons, by the decision maker to those to whom the decision applies" [emphasis in original] (*Vavilov* at para 86). Thus, a court conducting a reasonableness review considers both the outcome of the decision and the reasoning process followed (*Vavilov* at para 87). Reasonableness review must entail a robust evaluation of administrative decisions. However, a reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with "respectful attention" and seek to understand the reasoning process followed by the decision maker to arrive at its conclusion (*Vavilov* at para 84). The reviewing court must exercise restraint and intervene only "where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process" (*Vavilov* at para 13). The reasonableness standard always finds its

starting point in the principle of judicial restraint and deference and requires reviewing courts to show respect for the distinct role that Parliament has chosen to confer on administrative decision makers rather than on the courts (*Vavilov* at paras 13, 46, 75).

III. Analysis

A. *Exclusion under Article 1E of the Convention*

[20] The RAD determined that, on the date of the RPD hearing, Mr. Zaman enjoyed the four rights identified in the case law and therefore had status as a permanent resident that was substantially similar to that of Brazilian nationals. Mr. Zaman alleges that this conclusion is unreasonable because the RAD, like the RPD before it, failed to take into account that Mr. Zaman could lose his permanent resident status in Brazil as a result of his divorce. Indeed, Mr. Zaman argues, his permanent resident status was obtained through a family reunification process. To reach this conclusion, Mr. Zaman relies on Article 135 of Brazil's Decree No. 9.199, which reads as follows:

> [TRANSLATION]
>
> . . . A residence permit will be revoked in the following circumstances: the original basis for the residence permit no longer exists, meaning that applicants who are no longer married lose their residence permit when they end their marital relationship, and they must notify the federal police that the original basis for their permanent residence no longer exists.
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> [Text as reported by Mr. Zaman in his supplementary memorandum at p. 17.]

[21] Mr. Zaman alleges that the Decision is unreasonable because it is based on a selective analysis of the evidence: the RAD failed to explain why it discounted evidence that he could lose his permanent resident status as a result of his divorce (*Omar v Canada (Citizenship and Immigration)*, 2017 FC 458 at paras 19–22).

[22] I am not persuaded by Mr. Zaman's arguments. Rather, I find that it was reasonable for the RAD to conclude that Mr. Zaman still had permanent resident status in Brazil when the RPD heard his claim for refugee protection in Canada, and that he had not lost it since. In short, the RAD did not err in excluding Mr. Zaman under Article 1E of the Convention.

[23] It is settled case law that a refugee protection claimant who arrives in Canada with a status similar to that of nationals of a safe third country must be excluded under Article 1E of the Convention. Article 1E of the Convention and section 98 of the IRPA are designed to prevent "asylum shopping" where a person already enjoys protection in a third country (*Zeng* at para 1). This is consistent with the principle that asylum comes into play only where there is no alternative (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at 726). The refugee protection regime is intended to assist people in need of protection, not those who prefer seeking asylum in one country over another. Accordingly, Article 1E of the Convention is intended to prevent persons who already have status that is substantially similar to that of nationals of the country in which they reside from making a claim elsewhere for refugee status or status as a person in need of protection.

[24] In *Zeng*, the Federal Court of Appeal described the three-step test applicable to determine if a person is excluded under Article 1E of the Convention. The test is as follows:

> [28] [**1**] 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, [**2**] 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, [**3**] 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.
>
> (*Su* at para 23, citing *Zeng* at para 28 [numbering added])

[25] In relation to the first step of the test, the Court has recognized four rights to determine whether an applicant in an application for judicial review has status that is "substantially similar" to that of nationals of the country in question (*Shamlou* at para 35): (a) the right to return to the country of residence; (b) the right to work freely without restrictions; (c) the right to study; and (d) full access to social services in the country of residence (*Celestin* at paras 33–42). Once it has been established that a claimant has status that is substantially similar to that of nationals of the country of residence, the onus is on the claimant to show the contrary (*Celestin* at paras 51–54).

[26] In the Decision, the RAD focused specifically on applying the three steps of the *Zeng* test and concluded that, on the basis of the facts in this case, Mr. Zaman could not be granted refugee protection in Canada because his permanent resident status in Brazil had not been revoked. Moreover, Mr. Zaman acknowledged that his permanent resident status was not revoked when he

left Brazil for Canada in January 2018, and that less than two years had elapsed between his arrival in Canada and his hearing before the RPD. Therefore, although his divorce became official in August 2017, Mr. Zaman did not lose his permanent resident status because the original basis for permanent residence no longer existed. There is also no doubt that, as a permanent resident, Mr. Zaman had the right to work, study, and receive medical insurance and social services in Brazil.

[27] Mr. Zaman states that the RAD should have considered the very real possibility that he could lose his permanent resident status as a result of his divorce, as he claims is provided for under Brazilian law. Mr. Zaman further states that he does not know if his permanent resident status in Brazil has been revoked since he arrived in Canada, even though he has been in contact with the Consulate-General of Brazil in Montreal.

[28] However, the evidence presented at the RPD hearing shows that Mr. Zaman's divorce did not automatically result in the loss of his permanent resident status. In fact, Mr. Zaman's status may only be revoked through an administrative process which, in Mr. Zaman's case, had not been initiated in any way. In short, the loss of permanent resident status is merely a possibility in Mr. Zaman's case. Consequently, there can be no doubt that nothing in the evidence before the RAD suggested that Mr. Zaman's status had been revoked or that his rights at the time of the RPD hearing were not substantially similar to those of other Brazilian nationals, as Mr. Zaman still had permanent resident status. Moreover, there is nothing to suggest that the RAD did not consider all the evidence, including Mr. Zaman's divorce, to which the RAD expressly refers in the Decision. Mr. Zaman simply did not meet his burden of proof to show that he no longer

enjoyed rights that were substantially similar to those of Brazilian nationals, even after his divorce.

[29] I would also note that, according to the Basis of Claim Form that Mr. Zaman filed with the Canadian immigration authorities, he had left Brazil to visit his sister until the problems with his former in-laws subsided, and he did not fear the Brazilian authorities because of his divorce. Therefore, I am of the opinion that the RAD reasonably concluded that Mr. Zaman was a permanent resident of Brazil, that this status gave him rights substantially similar to those of other Brazilian nationals, and that he was therefore subject to exclusion under Article 1E of the Convention.

B. ***Persecution and risk of serious harm***

[30] Secondly, Mr. Zaman alleges that the RAD carried out its analysis of persecution and prospective risk of serious harm in Brazil having already concluded that he was subject to Article 1E of the Convention. Having already determined that Mr. Zaman was excluded under Article 1E of the Convention, the RAD unreasonably and incorrectly analyzed Mr. Zaman's fear of persecution and prospective risk in Brazil. According to Mr. Zaman, this Court established in *Saint Paul* and *Celestin* that it is not the RAD's role to carry out this analysis after concluding that a claimant is excluded under Article 1E (*Saint Paul* at paras 52–54, 56). Mr. Zaman also argues that the RAD's analysis of the Brazilian state's ability to protect belongs instead to the third step of the Zeng test. Since the RAD had determined that Mr. Zaman was referred to in Article 1E of the Convention, there was no need to perform this third step.

[31] I disagree with Mr. Zaman's arguments. In *Celestin* and *Saint Paul*, justices Pamel and St-Louis concluded that the RAD's analysis of the claimants' fear in respect of their country of residence was unreasonable (*Celestin* at para 140; *Saint Paul* at para 60). However, this conclusion was based on the fact that applying Article 1E of the Convention before analyzing the risk in respect of the country of residence would exclude from the outset asylum seekers who are in genuine need of protection (*Celestin* at para 91).

[32] I am not persuaded that the decisions cited by Mr. Zaman support his assertion in the circumstances. Rather, I am of the view that the reasoning of the RAD in this case is reasonable and that the Decision is reasonable. In Mr. Zaman's case, the RAD did assess the serious possibility of persecution and risk of prospective harm in Brazil as part of its analysis under the third step of *Zeng*. The fact that it found that other factors weigh in favour of exclusion before it undertook its analysis under the last step is not a reviewable error. Furthermore, the RAD's finding that Mr. Zaman does not face a serious possibility of persecution or risk of prospective harm in Brazil is supported by the evidence, and its reasons are intelligible and transparent. The evidence shows that Mr. Zaman's alleged fear of persecution did not arise from his divorce but rather from fear of reprisal by his former in-laws. There is nothing in the evidence to suggest that the Brazilian state was unable to protect Mr. Zaman in this regard.

[33] Mr. Zaman has simply failed to discharge his burden of demonstrating, by clear and convincing evidence, that Brazil cannot provide him with reasonable protection. As the RAD noted, Mr. Zaman did not take any action, before he left Brazil, to determine whether the authorities could provide him with adequate protection from his former in-laws. Incidentally,

before he left Brazil of his own accord for Canada, Mr. Zaman was able to live in Brazil for a number of months after his divorce without being deported, even though the police knew he was in the country (Respondent's Supplementary Memorandum at para 33).

[34] It is well established that a refugee protection claimant must clearly and convincingly establish the state's inability to provide protection and that state protection need not be perfect; it is sufficient that it be adequate at an operational level (*Burai* at para 24). In this case, Mr. Zaman has not produced any convincing evidence of a lack of state protection in Brazil in relation to his family dispute and fears about his former in-laws (*Raymond v. Canada (Citizenship and Immigration)*, 2021 FC 74 at para 23).

IV. Conclusion

[35] For these reasons, Mr. Zaman's application for judicial review is dismissed. The RAD's decision is reasonable. It contains no reviewable error with respect to the exclusion under Article 1E of the Convention or state protection in Brazil. On the contrary, the RAD's decision demonstrates a coherent logic and is justified in light of the legal and factual constraints to which the RAD is subject.

[36] The parties did not raise any serious question of general importance for certification in their submissions, and I concur that there is none.

JUDGMENT in IMM-6459-20

THIS COURT ORDERS as follows:

1. The application for judicial review is dismissed, without costs.

2. No serious question of general importance is certified.

"Denis Gascon"
Judge

Certified true translation
Elizabeth Tan

FEDERAL COURT

SOLICITORS OF RECORD

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