Federal Court  Cour fédérale

Date: 20231108

Docket: IMM-8142-22

Citation: 2023 FC 1491

Ottawa, Ontario, November 8, 2023

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

JIAN HUANG
(a.k.a. JIM WONG)

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Is it reasonable to conclude that a permanent resident of Canada has surrogate protection disentitling him to refugee protection due to the application of Article 1E of the 1951 United Nations Convention Relating to the Status of Refugees [the Convention], and section 98 of the *Immigration and Refugee Protection Act*, SC 2001 c 27 [the Act], when that very decision results in the removal of his permanent resident status?

I. Overview

[2] On August 8, 2022, the Refugee Appeal Division of the Immigration and Refugee Board of Canada [the RAD] excluded the Applicant from the application of the Convention pursuant to Article 1E. The RAD had to assess the Article 1E exemption afresh, and with the knowledge that a finding of applicability based on pre-existing status would lead to the Applicant losing that very status. For the reasons that follow, I find that the RAD's decision was reasonable.

[3] Section 98 of the Act provides a person excluded under Article 1E of the Convention is neither a Convention refugee nor a person in need of protection. Article 1E reads:

> 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.

[4] In *Zeng v Canada (Minister of Citizenship and Immigration)*, 2010 FCA 118 [*Zeng*] at paragraph 1, the Federal Court of Appeal described exclusion under Article 1E and its purpose:

> Article 1E is an exclusion clause. It precludes the conferral of refugee protection if an individual has surrogate protection in a country where the individual enjoys substantially the same rights and obligations as nationals of that country.

[5] In the decision under review, the RAD found that the Applicant had the surrogate protection captured by Article 1E as a permanent resident of Canada at the time of the RAD hearing:

> As a permanent resident of Canada, he has the rights and obligations of a PR of Canada, though his status is not

> unconditional. His rights and obligations are substantially similar to those of Canadian nationals.

[6] It is undisputed that the Applicant was a permanent resident of Canada at the date of the RAD decision; however, the Applicant submits that the facts before the RAD show that his status as a permanent resident was "inherently vulnerable" because its continued validity is not within his control and its loss is not speculative. Specifically, the Applicant submits that if the RAD excludes him from Convention protection, he will lose his permanent resident status. This is because the Immigration Division's deportation order against him does not come into force until 15 days after the RAD's determination. This is a fact accepted by both parties and acknowledged by the RAD. However, the RAD found this fact did not render the Applicant's status so vulnerable that he falls outside the ambit of the Article 1E exclusion.

[7] The facts are undisputed. The following brief summary is taken from the decision under review and an earlier decision dated December 16, 2021, of the Immigration Division that found the Applicant inadmissible to Canada for serious criminality under paragraph 36(1)(c) of the Act. That decision is currently under review before this Court (IMM-9566-21).

II. Background

[8] The Applicant is a citizen of China, having been born there on September 20, 1979. On March 29, 2012, he applied at the Canadian consulate in Shanghai for a temporary resident visa [TRV] to come to Canada as a visitor for tourism purposes. On April 4, 2012, he was issued a TRV in the name Jian Huang. He entered Canada on May 2, 2012, at Vancouver Airport.

[9] In September 2012, Canada Border Services Agency [CBSA] was informed by China that Jian Huang had fled China after committing fraud of over one billion Yuan (about $190 million CAD). An inadmissibility report under section 44 of the Act was prepared and, in December 2012, CBSA issued a warrant but was unable to locate Jian Huang until February 2018.

[10] In the interim, on April 23, 2013, Chinese authorities issued an INTERPOL Red Notice for the arrest of Jian Huang on the charge that he did "illegally obtain credit funds from a financial institution."

[11] On September 3, 2013, Jim Wong made an application for a TRV at the Canadian embassy in Guatemala. The Applicant has since admitted that Jian Huang and Jim Wong are both names he used. The Applicant was issued a one-time visitor visa and he entered Canada on October 18, 2013, as a visitor.

[12] On October 22, 2013, the Applicant submitted another application for a TRV to the Canadian embassy in Guatemala. He was issued a multiple entry visa. He returned to Canada on December 9, 2013, and remained in Canada thereafter.

[13] On April 25, 2013, his wife sponsored his application for permanent residence. That application was approved and he became a permanent resident of Canada on October 12, 2016.

[14] On October 6, 2016, CBSA received confirmation that the Guatemalan passport used by the Applicant to obtain his most recent visas was an altered document. On February 21, 2018, CBSA issued a warrant for an admissibility hearing. The Applicant was arrested.

[15] The Immigration Division decision notes that originally CBSA issued a subsection 44(1) Report against the Applicant for misrepresentation under paragraph 40(1)(a) of the Act. However, he made a refugee claim after being arrested, and CBSA then issued a Report alleging inadmissibility pursuant to paragraph 36(1)(c) of the Act, presumably because persons who have claimed refugee protection are exempted from the operation of paragraph 40(1)(a), if the disposition of their claim is pending.

[16] The second Section 44 Report, as subsequently amended, alleges that the Applicant committed the crime of Swindling Financial Bill contrary to Article 175, paragraph 2 of the Criminal Law of the People's Republic of China and that his actions resulted in losses over $5000 CAD. It further alleged that this act, if committed in Canada, would constitute fraud, contrary to subsection 380(1) of the *Criminal Code,* RSC 1985, c C-46 [the *Criminal Code*]. As the offence exceeds $5000 CAD, he would be liable to a term of imprisonment not exceeding 14 years.

[17] The Applicant denies any wrongdoing as alleged by the Chinese authorities and claims that these charges are fabricated. As such, in early 2018, he filed his claim for refugee protection, alleging that, should he return to China, he will not receive a fair trial and will be convicted and imprisoned for crimes he did not commit.

[18] The refugee claim was heard by the Refugee Protection Division [RPD] over several days from June 2018 to August 2019. Its decision issued on September 22, 2020.

III. Procedural History

A. *The RPD Decision*

[19] The RPD found that the Applicant was excluded pursuant to Article 1F(b) of the Convention.

[20] The RPD, relying on the evidence disclosed by the Minister from the Public Security Bureau of China, determined that the Applicant had committed a serious non-political crime outside Canada before coming to Canada.

[21] It further found that there was no plausible connection between the country's conditions, which establish the use of torture, and the evidence against the Applicant. It found that due process against the Applicant was not tainted, and that the charges were not politically motivated. The RPD did not accept that he had been the victim of corrupt officials. Finally, the RPD found that he was not a credible witness.

[22] The RPD, having found that the serious non-political crime committed by the Applicant was equivalent to fraud in Canada as described by the *Criminal Code*, found the Applicant excluded from protection.

[23] Importantly, because the RPD found that the Applicant was excluded under Article 1F(b), it held that it was not necessary to consider exclusion under Article 1E. Therefore, the RPD made no finding with respect to exclusion pursuant to Article 1E.

B. *The RAD Decision*

[24] The Applicant appealed the Article 1F(b) finding to the RAD. The Minister asked that the RAD consider the application of both Article 1F(b) and 1E exclusions.

[25] The RAD concluded that the RPD was incorrect in finding that the "serious reasons for considering" standard that is required to make an Article 1F(b) determination was met.

[26] The RPD found it unnecessary to consider whether the Article 1E exemption was established; however, the RAD now had to turn its mind to that exception. The Applicant argued that the RPD did not err in declining to assess exclusion pursuant to Article 1E and, in any case, the exemption did not apply. The Minister argued that it was an error not to consider 1E, and that it did apply.

[27] The RAD found that at the time of its decision, the Applicant is a permanent resident of Canada. The RAD noted that by application of paragraphs 46(1)(c) and 49(2)(c) of the Act, should it find that the Applicant is excluded from refugee protection, his removal order will come into force and he will automatically lose his status as a permanent resident 15 days thereafter. Those provisions read:

46(1) A person loses permanent resident status	46 (1) Emportent perte du statut de résident permanent les faits suivants :
[…]	[…]
(c) when a removal order made against them comes into force;	c) la prise d'effet de la mesure de renvoi;
[…]	[…]
49(2) Despite subsection (1), a removal order made with respect to a refugee protection claimant is conditional and comes into force on the latest of the following dates:	49 (2) Toutefois, celle visant le demandeur d'asile est conditionnelle et prend effet :
[…]	[…]
(c) if the claim is rejected by the Refugee Protection Division, on the expiry of the time limit referred to in subsection 110(2.1) or, if an appeal is made, 15 days after notification by the Refugee Appeal Division that the claim is rejected;	c) en cas de rejet de sa demande par la Section de la protection des réfugiés, à l'expiration du délai visé au paragraphe 110(2.1) ou, en cas d'appel, quinze jours après la notification du rejet de sa demande par la Section d'appel des réfugiés;

[28] The RAD determined that because the RPD did not consider the Article 1E exemption, it must consider whether it applies as of the date of the appeal. This finding is not challenged: it is in keeping with the decision of the Federal Court of Appeal in *Zeng*. The Court of Appeal held that the tribunal was permitted to consider all relevant facts up to the date of the hearing, noting at paragraph 13:

> There is no debate on this issue. The parties agree, as do I, that the date must be fluid to ensure consideration is given to both the status and the actions of a claimant throughout. The facts at the date of the application are relevant; the facts as of the date of the

> hearing are relevant; pre-application facts may be relevant, depending upon the circumstances. These cases are largely fact-driven.

[29] The RAD found that there is nothing in the Act excluding permanent residents of Canada from seeking refugee protection in Canada. It rejected the Minister's submission that the Applicant was "status shopping" as described in *Zeng*. Rather, it held that he is "simply exercising a right that is open to him under the [Act]." It also rejected the Applicant's submission that the Minister's conduct is abusive and absurd. The Applicant advanced this proposition on the basis that the Minister seeks to exclude him pursuant to Article 1E because of his permanent resident status while at the same time trying to strip him of that status. The RAD noted that exclusion pursuant to Article 1E "is fundamentally different from inadmissibility."

[30] Lastly, the RAD rejected the submission that finding the Applicant to be excluded from protection under Article 1E will ultimately be contrary to Canada's *non-refoulement* obligation under international law, as he will not have the benefit of a Pre-Removal Risk Assessment [PRRA]. The RAD accepted the Minister's submission that the Applicant would have the opportunity to file a PRRA.

[31] The RAD concluded that the Applicant "is excluded pursuant to Article 1E and section 98 [of the Act]." As a permanent resident of Canada at the date of decision, "he has the rights and obligations" of a permanent resident of Canada, "though his status is not unconditional."

IV. Standard of Review

[32] The parties rightly agree that the decision is to be reviewed on the standard of reasonableness, as articulated by the Supreme Court of Canada [the Supreme Court] in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. A reasonableness review is concerned both with the decision-maker's reasoning process and the outcome. The decision must not only be justifiable in light of the record, but, when reasons are given, it must be justified by the reasons. None of the exceptions based in legislative intent or the rule of law, as articulated by the Supreme Court in *Vavilov* and *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*, 2022 SCC 30, apply to displace the presumption of reasonableness as the standard of review.

[33] The application of the reasonableness standard was recently revisited and affirmed by the Supreme Court in *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 [*Mason*], released following the hearing on this matter. The parties requested and were granted permission to submit post-hearing written submissions on its applicability to the case at bar.

[34] Where reasons are required and provided, a reviewing court undertaking reasonableness review must start its review with those reasons: "[the court] must focus on the decision the administrative decision-maker actually made, including the justification offered for it, and not on the conclusion that the court itself would have reached in the administrative decision-maker's place:" *Vavilov* at para 18. The court must give considerable deference to the decision-maker, as the entity delegated power from Parliament and who is equipped with specialized knowledge and

understanding of the "purposes and practical realities of the relevant administrative regime" and "consequences and the operational impact of the decision" that the reviewing court may not be attentive towards: *Vavilov* at para 93. At the same time, reasonableness review remains a robust form of review that is not a mere "rubber-stamping" process: *Vavilov* at para 13. Courts cannot disregard flawed reasoning processes, let alone substitute them with its own.

[35] To summarize, in conducting a reasonableness review, courts must look at whether the decision bears the "hallmarks of reasonableness" (i.e., justification, transparency, and intelligibility) and whether the decision is justified in relation to the relevant factual and legal constraints that bear on the decision: *Vavilov* at para 99.

[36] *Mason* did not change how courts conduct reasonableness reviews. Rather, *Mason* emphasized principles already present in *Vavilov*. In particular, *Mason* stressed the principle of "responsive justification:" the more severe a decision's impact is on an individual's rights and interests, the greater the need for reasons that reflect those stakes: *Mason* at para 76, citing *Vavilov* at para 133. The administrative decision-maker bears the burden of justifying its decision, and the resulting consequences, in light of the facts and law.

V. Issue

[37] The single issue on review is whether the RAD's finding that the Applicant is excluded from refugee protection pursuant to Article 1E of the Convention is unreasonable based on the facts before it.

[38] The parties do not contest that the RAD could determine the applicability of Article 1E as the RPD did not make a determination on it.

[39] The parties also do not contest that the correct test for determining exclusion under Article 1E, as applied by the RAD, is whether the person possesses at the relevant time a status that is "substantially similar" to that of a national: *Zeng* at para 28. If the person does have sufficient status, Article 1E may nevertheless not apply if that status is "inherently vulnerable;" *Rrotaj v Canada (Citizenship and Immigration)*, 2016 FC 152 [*Rrotaj*] at para 21.

[40] The Applicant advanced a number of submissions focused on purported defects in the RAD's reasoning that he says renders the decision unreasonable. These will be discussed under the following headings:

A. Was it reasonable for the RAD to find the Applicant had substantially similar status to that of Canadian nationals?

B. Was it reasonable for the RAD to find that the Applicant does not require absolute protection from forcible removal to be excluded under Article 1E?

C. Was it reasonable for the RAD to find the Applicant's status is not "inherently vulnerable" such that Article 1E would not apply?

VI. Preliminary issue: the RAD reasonably determined the relevant time for assessing the Applicant's status under Article 1E

[41] As a preliminary matter, the RAD had to determine the relevant time for assessing Article 1E exclusion: at the time of the RPD hearing or at the time of the RAD appeal. Determining the "lock-in date" is important as it dictates what evidence the RAD may consider in its assessment. At the time of the RPD hearing in 2018, the Immigration Division's inadmissibility proceeding was only initiated. Following the RPD's decision in 2020, the Immigration Division issued its inadmissibility finding and deportation order against the Applicant on December 16, 2021. The RAD accepted submissions from the parties in March 2022. At this point, it had knowledge of these facts, and knew in particular that the Applicant would lose its status if it determined that Article 1E applies, as the deportation order would come into effect 15 days following its decision.

[42] In its reasons, the RAD explicitly followed the Federal Court of Appeal's guidance in *Majebi v Canada (Citizenship and Immigration)*, 2016 FCA 274 [*Majebi*] which held that the RAD may only conduct a *de novo* review where it finds the RPD erred. As the RAD already determined that the RPD erred in failing to consider Article 1E, it found it had jurisdiction to conduct a *de novo* review and assess the Applicant's status under Article 1E as of the date of the RAD hearing.

[43] The Applicant argues the RAD was correct in this decision; i.e., the relevant time for assessing whether the Applicant's status is "substantially similar" to that of a national under Article 1E is the time of the RAD hearing. Therefore, it was reasonable for the RAD to consider

the consequences of its decision, namely that the Applicant would face deportation, and loss of status, should the RAD apply the Article 1E exclusion.

[44] The Respondent clarified at the hearing that it agrees with the Applicant that it was reasonable for the RAD to consider the Applicant's status at the time of the RAD hearing, given that it was assessing Article 1E on a *de novo* basis.

[45] I agree that the RAD reasonably determined the "lock-in date" for assessing the Applicant's status as the date of the RAD hearing. Importantly, as noted by the RAD, at both the time of the RAD appeal and RPD hearing, it is uncontested that the Applicant held permanent residence status in Canada.

VII. Analysis

A. *Was it reasonable for the RAD to find the Applicant had substantially similar status to that of Canadian nationals?*

[46] The RAD determined the Applicant has status substantially similar to Canadian nationals at the time of the RAD appeal. In making this determination, the RAD examined whether the Applicant possessed the rights articulated in this Court's decision in *Shamlou v Canada (Minister of Citizenship and Immigration)* (1995), 103 FTR 241 (FCTD) [*Shamlou*], which set out the criteria attaching to a person of nationality. This includes the right of return, the right to work and study, and access to social services [the *Shamlou* rights]. It found that the Applicant as a permanent resident had these rights.

[47] The Applicant submits that the RAD ignored evidence that the Applicant did not have the right to work and study without restriction. It claims that as the Applicant was in immigration detention and subsequently was under house arrest since 2018, his ability to work and study without restriction was impaired. It says that these conditions could not be imposed on a national, as a national cannot be detained on immigration grounds. The Applicant submits that the RAD did not address this evidence and therefore failed to engage meaningfully with his submissions as required under *Vavilov*.

[48] The Respondent counters that although the RAD did not explicitly address the Applicant's immigration detention conditions, it did not need to. *Vavilov* does not require the administrative tribunal to "respond to every argument or line of possible analysis" nor "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion;" only those relevant to issues core to the decision: *Vavilov* at para 128. The Respondent submits that the restrictions the Applicant faced are largely a non-issue in assessing whether the Applicant possessed rights substantially similar to that of a national.

[49] The RAD found that as a permanent resident, the Applicant did possess the *Shamlou* rights. The RAD rejected the Applicant's arguments that his status differs from that of nationals due to the lack of protection against deportation and expulsion, as required by the United Nations High Commissioner for Refugees. According to the RAD, this protection goes beyond the *Shamlou* rights, and is not required by Canadian jurisprudence.

[50] I find that the RAD reasonably concluded that the Applicant, at the time of the appeal, has status substantially similar to that of Canadian nationals pursuant to *Shamlou*. In the rare cases like this where claimants apply for refugee protection while holding permanent resident status in this country or elsewhere, the Courts have found those applicants to possess sufficient status for the purposes of Article 1E exclusion: see, as referenced by the RAD, *Zeng*, *Rrotaj*, and *Canada (Minister of Citizenship and Immigration) v Choovak*, 2002 FCT 573 [*Choovak*]. Looking to the jurisprudence, it was reasonable for the RAD to conclude that the Applicant, as a Canadian permanent resident, possessed sufficient status.

[51] The Applicant submits that the RAD failed to meaningfully grapple with his submission that his freedoms were limited by his immigration detention in a way that nationals' freedoms are not. Citing *Mason* in his post-hearing submissions, the Applicant claims this omission amounts to a failure of responsive justification. However, as the Respondent argues, the RAD did not have to address every single argument the Applicant raised: *Vavilov* at para 128. In accordance with the principle of responsive justification, the RAD's reasons had to reflect the stakes of the Applicant's risk of deportation. Although its reasons are silent on the Applicant's immigration detention conditions, the RAD does address the Applicant's broader argument that Article 1E cannot apply to exclude him because the rights he enjoys as a permanent resident are conditional. Citing *Choovak*, the RAD explains how a person's status, including the rights attached to that status, do not have to be unconditional for Article 1E to apply. While *Choovak* evaluated the claimant's right to return rather than the right to work and study, it nevertheless provides support for the RAD's reasoning that the rights must not necessarily be unconditional.

The fact that the Applicant was in immigration detention did not change the Applicant's status nor the rights attached to that status.

[52] I note here that *Vavilov* at para 91 explicitly states that the reasons provided by the administrative decision-maker must not be assessed against a standard of perfection: "[t]hat the reasons given for a decision do "not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred" is not on its own a basis to set the decision aside." Although the reasons may have benefited from explicitly referring to the Applicant's limited ability to exercise his rights to work and study, I do not find this omission to represent a failure of the RAD to meaningfully grapple with the Applicant's submissions nor a failure of responsive justification. The RAD addressed the Applicant's central issue and concern, regarding the durability of the *Shamlou* rights required for Article 1E to apply.

B. *Was it reasonable for the RAD to find that the Applicant does not require absolute protection from forcible removal to be excluded under Article 1E?*

[53] As discussed above, the RAD found that a person excluded under Article 1E for having substantially similar status to nationals must possess the *Shamlou* rights, which includes the right of return. However, the RAD determined that these rights do not necessarily include "absolute protection" against removal from that country. Applied to the facts, the RAD found that Article 1E could apply to the Applicant despite the fact that he could face deportation depending on the RAD's decision. It reasoned that all Canadian permanent residents, including the Applicant, face the risk of removal from Canada if they do not adhere to the conditions of their permanent

residency; as such, no permanent resident can be said to receive “absolute protection” against deportation. They are nevertheless persons to which Article 1E can apply.

[54] The RAD further found that despite not having “absolute protection” against removal from Canada, the Applicant was nonetheless effectively protected from *refoulement* as he may still apply for a PRRA.

[55] The Applicant submits that he cannot be excluded under Article 1E due to the Immigration Division’s inadmissibility finding and deportation order made against him, which render him a person in need of protection. He argues that the RAD made an error of law in finding that Article 1E does not require “absolute protection” against removal from the country of residence. In particular, the Applicant says that the RAD erred in failing to adhere to the *UNHCR Note on the Interpretation of Article 1E of the 1951 Convention relating to the Status of Refugees* [*UNHCR Note*] and its *Handbook on Procedures and Criteria for Determining Refugee Status* [*UNHCR Handbook*].

[56] The *UNHCR Note* at paragraph 2 reflects the UNHCR advice that Article 1E “should be strictly construed, and that only ‘limited exceptions’ should be permitted in derogation from the status of full nationality or citizenship:”

> The object and purpose of this Article is to exclude from refugee status those persons who do not require refugee protection because they already enjoy a status which, possibly with limited exceptions, corresponds to that of nationals. A strict test is, therefore, called for in order to be excludable under Article 1E.

[57] Paragraph 145 of the *UNHCR Handbook* reflects the position of the UNHCR that a person does not fall under Article 1E unless, as the Applicant submits, "he enjoys 'absolute' protection against deportation:"

> There is no precise definition of "rights and obligations" that would constitute a reason for exclusion under this clause. It may, however, be said that the exclusion operates if a person's status is largely assimilated to that of a national of the country. In particular, he must, like a national, be fully protected against deportation or expulsion.

[58] The Applicant submits that these UNHCR writings "must be considered a highly relevant authority in considering refugee admission practices": *Chan v Canada (Minister of Employment and Immigration)*, [1995] 3 SCR 593 [*Chan*], at para 46. Together, they provide support for the Applicant's interpretation of the policy and purpose of Article 1E to exclude only those individuals that do not require refugee protection because they are already enjoying the rights of nationals with limited exceptions elsewhere. It is a provision meant to avoid redundancies. The Applicant further submits that Canadian courts have interpreted Article 1E as a provision to protect against "asylum shopping," which the RAD found the Applicant is not doing: *Zeng* at para 19.

[59] The Applicant further argues that the RAD's interpretation of the Article 1E requirements runs contrary to Canada's international obligations to the principle of *non-refoulement*. While the Applicant agrees with the RAD that he may submit a PRRA, he argued that this is insufficient for protecting against *refoulement*—a requirement for Article 1E to apply. The Court in *Zeng* acknowledged at paragraph 22 that a person excluded under Article 1E does not benefit from a positive PRRA in the same way a person not excluded would:

> The Minister recognizes that the PRRA process does not provide a complete response to the dilemma. If a PRRA officer concludes that Article 1E applies, even if risk is established, refugee protection cannot follow by virtue of section 98 of the IRPA. Further, the claimant cannot reap the benefit of a section 114 stay of removal because Article 1E does not fall within sub-section 112(3). Although it is within the power of the PRRA officer to determine that Article 1E does not apply, the paragraph 113(a) requirement for new evidence (in order to arrive at such a determination) presents a formidable hurdle for the claimant to overcome

[60] Relying on *Zeng*, the Applicant argues that, as a person whom the RAD already excluded under Article 1E, paragraph 113(a) of the Act will significantly restrict the viability of the PRRA process to protect the principle of *non-refoulement*. Paragraph 113(a) of the Act reads:

113 Consideration of an application for protection shall be as follows:	113 Il est disposé de la demande comme il suit :
(a) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection	a) le demandeur d'asile débouté ne peut présenter que des éléments de preuve survenus depuis le rejet ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'il n'était pas raisonnable, dans les circonstances, de s'attendre à ce qu'il les ait présentés au moment du rejet;

[61] In advancing the position that the PRRA process is insufficient, the Applicant submits that the RAD failed to meaningfully grapple with his submissions, making the decision unreasonable.

[62] The Respondent responds that the RAD's interpretation of the policy and purpose of Article 1E is reasonable as the RAD simply followed the legislature's intention. Parliament has the ultimate power to legislate compliance with Canada's international obligations; it chose to make it so that the Applicant, having a removal order against him, retains his permanent resident status, and is therefore excluded under Article 1E, while his case is being heard by the RAD.

[63] The Respondent agrees with the Applicant that r*efoulement* must be respected for Article 1E to apply, but submits that the RAD's decision does not violate the principle of *non-refoulement*. It agrees with the RAD that the availability of the PRRA provides adequate protection against *refoulement* as a PRRA officer may consider Article 1E afresh.

[64] For the following reasons, I find that the RAD's interpretation of the Article 1E exclusion requirements, including their connection to the principle of *non-refoulement*, is reasonable. The RAD considered the legal constraints, particularly the framework provided in the Act and the jurisprudence, in reaching its decision.

(1) *The RAD reasonably interpreted Canada's adoption of Article 1E to find that it does not require a person have "absolute protection" against removal*

[65] As referenced by the RAD, the text of Article 1E states that a person excluded under the provision must have "the rights and obligations which are attached to the possession of the nationality of that country." The provision does not require excluded individuals to be citizens, or as the RAD states, "nationals in the true legal sense." Indeed, the jurisprudence accepted by

both parties in *Zeng* suggests that a person need only have substantially similar rights to a national: *Zeng* at para 28.

[66] The Applicant says that he is not suggesting that all permanent residents are outside the ambit of Article 1E. If, as he says, a person must always enjoy "full protection from forcible removal," this essentially amounts to excluding permanent residents from Article 1E as their status is always conditional. In other words, under the Applicant's interpretation, Article 1E could only apply to full nationals. This concern is what the RAD stressed in its reasons as guiding its interpretation of Article 1E. The RAD properly noted that excluding permanent residents from Article 1E application could not have been the drafters' intention nor the application Parliament wished to adopt. The RAD relied in part on the Court's decision in *Rrotaj* at paragraph 22 for this proposition:

> In my view, the plain text of the provision indicates that individuals will not be excluded if their status in the third country confers something less than the basic rights afforded to nationals, and I would not go so far as to state that Canadian law interprets 'nationality' in Article 1E as citizenship. Article 1E does not state that excluded claimants must become nationals in the true legal sense: rather, they need only have rights and obligations "attached to nationality". Considering all of the commentary above, this should be read to mean "analogous to" the rights and obligations of nationals, which translates, generally, to permanent residency, the status that has been recognized by the jurisprudence as satisfying Article 1E. If the drafters of the Refugee Convention intended to say that the claimant obtained actual nationality or citizenship in the third country, they would have said so in plain language.

[67] The RAD did not have to follow the suggested interpretation of Article 1E from the *UNHCR Handbook* for its decision to be reasonable; it properly noted it as a useful and persuasive interpretative tool but not determinative of Canadian refugee law: *Chan* at para 47. In

its reasons, the RAD explained why it deviated from the UNHCR materials, citing jurisprudence that found Article 1E can apply to Canadian permanent residents.

[68] The Applicant argues that the RAD erred in failing to consider its particular circumstances that it will certainly face removal if the RAD rules against it. In this way, the Applicant argues that while being a permanent resident is not sufficient to fall outside the ambit of Article 1E, Article 1E should not exclude individuals who have more than a mere speculative risk of removal. This does not include all permanent residents. Although this will be explored in more detail later in these reasons, I note here that the Applicant has not offered support for this argument outside the *UNHCR Handbook* and *Note*. These materials, again not binding, do not draw this distinction and call only for a person to be "fully protected" from deportation. I already discussed why it was reasonable for the RAD to find that Canadian law does not strictly adhere to this guidance. As the RAD established that individuals do not require "absolute protection" from removal to be excluded under Article 1E, it did not have to go further to explain why the Applicant merited special consideration to receive such protection.

[69] As the Applicant submits, the intended purpose of Article 1E is to avoid redundancies. Refugee protection should not be given to a person who already benefits from similar protection *at the relevant time of assessment*. In his post-hearing submissions, the Applicant correctly states that *Mason* emphasises that the administrative decision-maker's interpretation is constrained by the purpose of the statutory scheme in issue. However, the Applicant fails to note the important temporal limitation on the scope of Article 1E's purpose. Article 1E does not protect against all potential future losses of status. At the time of the RAD hearing, the

Applicant was a permanent resident, possessing the necessary *Shamlou* rights as discussed above. The RAD reasonably interpreted Article 1E in accordance with its purpose to find the Applicant fell within its parameters at the time of the RAD hearing.

(2) *The RAD reasonably considered the Applicant's submissions on refoulement in finding that the availability of the PRRA process is sufficient protection against refoulement*

[70] The Applicant conflates exclusion under Article 1E with removal, which he argues will subject him to *refoulement*. While it is an accepted fact that the Applicant's deportation order will come into effect 15 days following the RAD's decision to exclude the Applicant under Article 1E, the Applicant is still protected against *refoulement* due to the PRRA process.

[71] Contrary to the Applicant's submissions, the RAD did not find that individuals do not require full protection against *refoulement*. The RAD explicitly appreciated the Applicant's concern, as restated in *Mason*, for respecting Canada's international obligations to the principle of *non-refoulement*. It nonetheless found that its decision to apply Article 1E would be harmonious with that principle due to the availability of the PRRA process.

[72] The RAD meaningfully grappled with the Applicant's submissions on *refoulement*; it found that the Applicant may still apply for a PRRA as, in agreement with the Applicant's submissions, the Applicant is not a person under subsection 112(3) of the Act. The reasons acknowledge that the Applicant finds himself in a "difficult set of circumstances," stemming from his concern that he may not "benefit" from a positive PRRA due to the Article 1E finding against him. The RAD addressed this by explicitly stating at paragraph 571 that the Applicant

may submit new evidence in his PRRA application; essentially, the PRRA officer can re-evaluate the Applicant under Article 1E. If the PRRA officer finds Article 1E does not apply, and that risk is established, refugee protection or a stay of removal may follow. While introducing new evidence under paragraph 113(a) of the Act may present a "formidable hurdle," as the Court in *Zeng* put it, it is not a complete bar. It is also important to note that this case presents a different factual matrix from *Zeng*; here, the Applicant will face a certain material change in circumstances following the RAD's decision to exclude him under Article 1E as the deportation order will at that point certainly come into effect. Though the RAD considered the deportation order in its reasons, the consequences of the order remain in flux, depending on how the RAD rules. At the time the PRRA officer may consider the Applicant's case, the consequence of the deportation order will have crystallized. As the Respondent argued, and I agree, it was reasonable for the RAD to make this determination.

[73] I acknowledge the Applicant's concern that the RAD did not meaningfully engage with its submissions—the RAD's reasons on this point are notably short. I do not intend to substitute my view of the reasons for the RAD's, as to do so would be inappropriate under the "reasons first" approach to reasonableness review as outlined in *Vavilov* and emphasized in *Mason*. However, while the RAD's reasons must be responsive, they need not be lengthy. In *Mason*, the Supreme Court found that the administrative decision-maker failed to engage with the applicant's arguments on how its interpretation of section 34 of the Act would affect the protections available to him under the PRRA scheme. The applicant there argued that paragraph 34(1)(e) requires a nexus with national security or the security of Canada partly because a PRRA officer, in assessing section 34, must consider whether the person poses a danger to the security

of Canada. The decision-maker's reasons were absent on this point and the Supreme Court found no basis to conclude that this legal constraint was considered, "even implicitly:" *Mason* at para 97. This contributed to a failure of responsive justification. In contrast, the Applicant's submission here that he will not be protected from *refoulement* through the PRRA process relies on the assumption that the PRRA officer will find Article 1E exclusion. As the Court in *Zeng* noted, and the Applicant acknowledges, the PRRA officer may consider Article 1E afresh so long as new evidence is introduced—a formidable yet not absolute bar. Therefore, by noting that the Applicant could submit new evidence, the RAD implicitly responded to the Applicant's submission regarding the impact of Article 1E exclusion on the protection available to it through a PRRA.

C. *Was it reasonable for the RAD to find the Applicant's status is not "inherently vulnerable" such that Article 1E would not apply?*

[74] The RAD noted that Article 1E will not apply to exclude a person who otherwise meets the criteria of Article 1E (i.e., having substantially similar status to that of nationals) only where there is an inherent vulnerability to that person's status. It determined the Applicant's status as a permanent resident is not "inherently vulnerable." Specifically, the RAD found that "removal as a consequence of a finding of inadmissibility following due process does not constitute an inherent vulnerability or transience."

[75] The Applicant argues that the RAD unreasonably interpreted what constitutes "inherently vulnerable" status. In *Shamlou*, the Court found that a person with a mere temporary status or one that is conditional or revocable should not ordinarily be excluded under Article 1E (para 35).

In *Rrotaj*, which affirms *Shamlou*, and which the RAD cites, the Court found that a status is sufficiently durable where the person has the right to return to and reside in the third country of residence for an unlimited period (paras 18-20). The Applicant claims these findings are consistent with the *UNHCR Note* at paragraph 10 which reads:

> The phrase "has taken residence" means that temporary or short-term stay, mere transit or visit is not sufficient. The person concerned must benefit from a residency status which is secure and hence include the rights accorded to nationals to return to, re-enter and remain in the country concerned. These rights must be available in practice. Voluntary renunciation of residence does not render Article 1E inapplicable, provided the person remains entitled to a secure residency status, including the right to re-entry, and is recognized as having the rights and obligations attached to the possession of nationality.

[76] The issue of whether permanent residents, as persons holding by definition conditional status, may be excluded under Article 1E has already been discussed and affirmed as reasonable above. As the RAD found, while there is a durability requirement, permanent resident status is not inherently vulnerable. The Applicant agrees that the mere fact that permanent resident status may be lost is insufficient to avoid the application of Article 1E. However, the Applicant argues that as his deportation is imminent 15 days upon the RAD's finding of exclusion under Article 1E, it is no longer speculation that his permanent residency status will be lost; it is a legal certainty. Thus, the Applicant argues that its status is inherently vulnerable, as he does not possess secure residency status that will permit him to remain in the country for an unlimited time. In making this argument, the Applicant claims that the RAD failed to engage with the particular facts of the Applicant's case, which is sufficient to find the decision unreasonable.

[77] The Respondent argued that the RAD's interpretation of inherent vulnerability is reasonable given the legislative scheme which binds the RAD. Parliament explicitly created a legislative scheme that created this situation where the Applicant has a deportation order against him that will not come into effect until after the RAD issues its decision. The fact that the status will be lost after the hearing cannot be evidence that the status is inherently vulnerable as this is a result of Parliament's intention. The RAD has a statutory duty to implement Parliament's intention, and it did.

[78] The RAD's finding that the Applicant's status was not inherently vulnerable was reasonable. The case law cited by the RAD in support of the durability requirement's existence contemplated a claimant's protection against deportation. In *Rrotaj* at paragraph 28, as cited by the RAD, the Court explicitly notes that certain conditions may limit the Applicant's status but not render it *inherently* vulnerable, including failing to abide by the conditions of permanent residency—the very basis of the Applicant's deportation order (i.e., an inadmissibility finding). The Applicant argued that *Rrotaj* stood for the proposition that a finding of inherently vulnerable status requires evidence demonstrating more than a mere possibility that loss of status would occur; in that case, there was only speculative evidence that the claimant's status lapsed. It remained within the claimant's control to abide by the conditions of their status. Here, the Applicant argues there is more than a mere risk that his status will be lost for reasons outside of his control as there is already a deportation order against him.

[79] Though the timing in this case is unfortunate, the Applicant's circumstances are not wholly different from those discussed in the case law. The Applicant held permanent resident

status at the time of the RAD hearing when Article 1E was assessed; that permanent resident status is conditioned on being admissible in Canada. The fact that the Applicant breached that condition, rather than the mere risk of breach, willfully or not, does not render the status inherently vulnerable. Until the status is in fact lost, it is reasonable for the RAD to evaluate the Applicant under Article 1E like any other Canadian permanent resident.

[80] The Applicant emphasises that his case is different in that as a consequence of the decision he will lose the very status the RAD relies upon to apply Article 1E. With respect, this is an erroneous conclusion. The Applicant's status will be revoked due to the deportation order coming into effect; the RAD did not manufacture a vulnerability for the Applicant's status. As the RAD notes, Parliament designed the order of processes set out in the Act. When the Immigration Division finds an applicant inadmissible, he retains his permanent resident status until after the RAD disposes of any appeal. The RAD reasonably interpreted that this means that it should not consider the Applicant's status as already lost, or treated as imminently vulnerable or "entirely insecure" as the Applicant describes. It was within Parliament's powers to make it so that the Applicant lost his permanent resident status at the time the Immigration Division found him inadmissible but it chose not to. I find this a reasonable interpretation of the legislative scheme.

[81] The Applicant offers a different interpretation of "inherently vulnerable" status; that a status is not inherently vulnerable where it is voluntarily lost. Citing *Zeng*, which focused on a concern for asylum shopping, the Applicant argues that the exception of inherent vulnerability rather than any vulnerability is to exclude individuals who compromise their status via their own

actions. Even if this were true, the Applicant conflates voluntary loss of status with intentional. The Respondent argues that the Applicant did voluntarily compromise his status, as it was the Applicant's actions that gave rise to the Immigration Division's inadmissibility findings. Though the Applicant may not have intended to lose his status, he arguably did have some control over this loss. In any event, the RAD's interpretation of what constitutes "inherently vulnerable" status is just as, if not more, plausible.

[82] The Applicant further argues that the RAD's finding amounts to all permanent residents who might need to seek protection being barred from making refugee claims as their status will not be inherently vulnerable. In his post-hearing submissions, the Applicant claims that this renders the decision overbroad in light of *Mason*. *Mason* at para 69 cautions that "an administrative interpretation may well be unreasonable if it fails to consider the potentially harsh consequences of its interpretation of a statutory provision for a large class of individuals, and whether, in light of those consequences, the legislature would have intended the provision to apply in that way."

[83] Again, respectfully, this is not true. The RAD correctly notes that the Act does not prohibit Canadian permanent residents from making refugee claims. It found that permanent residents may be excluded under Article 1E and that in the case before it, the Applicant as a permanent resident held rights that excluded him under Article 1E. On the contrary, as discussed earlier, the Applicant's arguments amount to requiring a person excluded under Article 1E possessing rights amounting to citizenship, a much higher threshold then what the jurisprudence suggests.

[84] The RAD did not decide the Applicant's case in the abstract. It noted at paragraph 517 of its reasons that it had to look at the particular circumstances of the Applicant's status. In doing so, it did not find an inherent vulnerability that would exclude the Applicant from Article 1E application.

VIII. Conclusion

[85] The RAD decision was reasonable. While the Applicant's situation is unique in that the status the RAD relies on to exclude him under Article 1E will certainly lapse following the exclusion, the RAD reasonably made its decision based on the status the Applicant held at the time of the RAD hearing, and all the rights and obligations attached to that status. The RAD provided sufficient reasons for its interpretation of Article 1E, pointing to relevant jurisprudence and the legislative scheme. Regarding *non-refoulement*, the RAD explicitly considered this obligation in its reasons and reasonably determined that it would not be breached due to the availability of a PRRA.

[86] For these reasons, this application is dismissed. Neither party proposed a question for certification.

JUDGMENT in IMM-8142-22

THIS COURT'S JUDGMENT is that this application is dismissed and no question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-8142-22
STYLE OF CAUSE:	JIAN HUANG (a.k.a. JIM WONG) v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	AUGUST 21, 2023
JUDGMENT AND REASONS:	ZINN J.
DATED:	NOVEMBER 8, 2023

APPEARANCES:

Charles Steven	FOR THE APPLICANT
James Todd	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Waldman & Associates Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT