**CITATION:** ZENG *v.* CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), 2009 FC 466, [2010] 1 F.C.R. 211 IMM-4183-08

**Guanqiu Zeng** and **Yanhong Feng** (*Applicants*)

*v.*

**The Minister of Citizenship and Immigration** (*Respondent*)

***INDEXED AS: ZENG v. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) (F.C.)***

Federal Court, Gibson J.—Toronto, April 9 and May 8, 2009.

*Citizenship and Immigration — Exclusion and Removal — Inadmissible Persons — Judicial review of Refugee Protection Division (RPD) of Immigration and Refugee Protection Board decision rejecting applicants' claims to refugee status on ground excluded under United Nations Convention Relating to the Status of Refugees, Art. 1E — RPD finding applicants, citizens of People's Republic of China, holding permanent resident status in Chile at time of hearing — Application of novel test to issue of exclusion under Art. 1E — RPD not examining whether applicants still having status in Chile — In absence of evidence as to possibility applicants' status might have expired, impossible for RPD to fulfill objective in Immigration and Refugee Protection Act, s. 3(2)(a) to save lives, protect displaced, persecuted — RPD thus erring in deciding matter as it did — Application allowed.*

This was an application for judicial review of a decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board rejecting the applicants' claims to refugee status on the ground that they were excluded from protection under Article 1E of the *United Nations Convention Relating to the Status of Refugees*. The applicants, citizens of the People's Republic of China, claimed they were persecuted in that country and sought refugee status while transiting through Canada. The RPD found that the applicants held permanent resident status in Chile at the time of their hearing to which was attached rights and obligations equivalent to those attached to Chilean nationality. As such, the RPD held that the applicants were excluded under Article 1E and rejected their claim. In considering exclusion under Article 1E, the RPD assessed the applicants' status in Chile as it was at the time of the hearing, not when they applied for admission to Canada.

The issue was whether the RPD erred in finding that the applicants were excluded pursuant to Article 1E of the Convention.

*Held*, the application should be allowed.

Article 1E should be read in a manner consistent with the first objective stated in paragraph 3(2)(*a*) of the *Immigration and Refugee Protection Act*, which is to save lives and protect the displaced and persecuted. The exclusion test under Article 1E is more complex than simply applying the facts to either the date that protection is sought or the date of the hearing before the RPD. After applying a novel three-step test to the facts herein, it was found that the RPD failed to examine whether the applicants still had status in Chile after having been outside of that country for more than a year at the time of the hearing. If the applicants had presented themselves at a port of entry to Chile, it was possible they might not have been admitted because their status might have been found to have expired. In the absence of evidence as to the foregoing possibility, the RPD could not fulfill the objective stated in paragraph 3(2)(*a*), and thus erred in deciding the matter as it did.

STATUTES AND REGULATIONS CITED

*Immigration and Refugee Protection Act*, S.C. 2001, c. 27, ss. 3(2)(*a*), 98.

TREATIES AND OTHER INSTRUMENTS CITED

*United Nations Convention Relating to the Status of Refugees*, 28 July 1951, [1969] Can. T.S. No. 6, Art. 1E, F.

CASES CITED

CONSIDERED:

*Rosenberg v. Yee Chien Woo*, 402 U.S. 49 (1971); *Canada (Minister of Citizenship and Immigration) v. Manoharan*, 2005 FC 1122, 49 Imm. L.R. (3d) 252; *Parshottam v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 355, [2009] 3 F.C.R. 527, 303 D.L.R. (4th) 672, 75 Imm. L.R. (3d) 165.

REFERRED TO:

*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, 329 N.B.R. (2d) 1, 291 D.L.R. (4th) 577; *Mahdi v. Canada (Minister of Citizenship and Immigration)* (1994), 86 F.T.R. 307, 26 Imm. L.R. (2d) 311 (F.C.T.D.); *Canada (Minister of Citizenship and Immigration) v. Chopra*, 2002 FCT 573, 220 F.T.R. 127, 21 Imm. L.R. (3d) 184; *Mahdi v. Canada (Minister of Citizenship and Immigration)* (1995), 32 Imm. L.R. (2d) 1, 191 N.R. 170 (F.C.A.); *Semextant v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 29; *Fernandopulle v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 91, 253 D.L.R. (4th) 425, 331 N.R. 385.

APPLICATION for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board rejecting the applicants' claims to Convention refugee status or like protection on the ground they were excluded from protection under Article 1E of the 1951 *United Nations Convention Relating to the Status of Refugees*. Application allowed.

APPEARANCES

*Lorne Waldman* for applicants.
*Bridget A. O'Leary* for respondent.

SOLICITORS OF RECORD

*Waldman & Associates*, Toronto, for applicants.

*Deputy Attorney General of Canada* for respondent.

*The following are the reasons for order rendered in English by*

GIBSON J.:

Introduction

[1] These reasons follow the hearing at Toronto on April 9, 2009, of an application for judicial

review of a decision of the Refugee Protection Division (the RPD) of the Immigration and Refugee Board wherein the RPD rejected the applicants' claims to Convention refugee status or like protection on the ground that they were excluded from protection under Article 1E of the 1951 *United Nations Convention Relating to the Status of Refugees* [July 28, 1951, [1969] Can. T.S. No. 6] (the Refugee Convention). The member of the RPD wrote:

> In my view, based upon the balance of probabilities, both claimants held a permanent residence status in Chile at the time of the hearing sufficient that they could or should have been able to return to Chile with their Chilean son and that they would have sufficient rights and obligations similar to that of nationals of Chile such that, under Article 1E of the 1951 *Convention on the Status of Refugees*, their claims for refugee protection in Canada are excluded. I therefore reject the claims of [the Applicants]. As stated previously, I have also rejected the claim of their son, Jun Yan Zeng Feng.

[2] The applicants' son referred to in the above quotation was born in Chile and is a citizen of that country.

[3] The decision under review is dated September 12, 2008.

Background

[4] The applicants are husband and wife and citizens of the People's Republic of China (the PRC). When they left the PRC, they left behind them, in the care of her grandparents, a daughter.

[5] Guanqiu Zeng left the PRC, for Chile, on November 6, 2002. He had an offer of employment in Chile. He received a Chilean work permit and obtained foreign registration (temporary resident) status in Chile on April 23, 2003.

[6] Yanhong Feng followed her husband to Chile on December 23, 2003, on a visitor's visa. She received a Chilean work permit on April 23, 2004 and foreign registration (temporary resident) status in Chile on November 17, 2004.

[7] A second child, a son, was born to the applicants in Chile on August 29, 2005.

[8] On May 19, 2006, the applicants, with their son, left Chile to return to the PRC. They travelled on return air tickets, through Canada.

[9] On their return to the PRC, the applicants claim to have been persecuted by reason of that country's one-child policy. In the result, on or about June 21, 2006, only slightly more than one month after returning to the PRC from Chile, the applicants availed themselves of their return air tickets but, rather than transiting through Canada and continuing to Chile, they entered Canada on their arrival here and claimed Convention refugee status or like protection.

The Decision Under Review

[10] Early in its reasons, the RPD noted with respect to the applicants' son:

> The dependant claimant son does not raise a claim for refugee protection against any country. …It is

acknowledged by counsel for the claimants that the dependant claimant son, Jun Yan Zeng Feng, is only a citizen of Chile and not China. The son has not raised any claim against Chile. Accordingly, counsel concedes that this son has no valid claim for refugee protection in Canada.

[11] Section 98 of the *Immigration and Refugee Protection Act*[1] (the Act) provides that 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. Sections E and F of Article 1 of the Refugee Convention are scheduled to the Act. Section E reads as follows:

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.

[12] The RPD noted:

The Minister submits that both the husband and wife have obtained permanent resident status in Chile whereby they have rights and obligations which are attached to the possession of the nationals of Chile such that Article 1E should apply and that, therefore, their claims for refugee protection should be rejected. As stated above, counsel for the claimants submits in response that the two do not have such status and therefore, they are entitled to claim refugee protection in Canada.

[13] The RPD noted that an "important issue" in considering exclusion under Article 1E "concerns the point in time one looks at when coming to determinations about the status of the claimant in the putative alternative country".

[14] The RPD further noted:

In *Madhi* the Federal Court of Appeal held that the real question that had to be determined was whether the claimant was, *when they applied for admission to Canada*, a person who was still recognized by the competent authorities of the putative Article 1E country as a permanent resident of that country. That issue was to be decided on a balance of probabilities.

There are other decisions which have found that the appropriate time of the determination is at *the time of the hearing before the Board*. [Emphasis in original; citation omitted.]

[15] The RPD concluded on the issue of the appropriate point in time as follows:

This Panel heard from both Minister's counsel and claimant's counsel on this question. In this case, both counsels took the position that the appropriate time for determination of the status of the claimants in the putative Article 1E country was *at the time of the hearing*. Accordingly, that is the time of assessment I will utilize. [Emphasis in original.]

[16] Counsel for the applicants, the claimants before the RPD, urged that, even if the applicants had acquired permanent resident status, which he did not concede they had, by reason of their absence from Chile for more than a year before the date of the hearing before the RPD without having taken steps to extend their status, the applicants had lost that status in Chile by the date of the hearing before the RPD and therefore Article 1E did not apply to them. In this regard, the RPD concluded:

Moreover, if that status could have been lost, as suggested by claimants' counsel, because the claimants were

outside of Chile for more than a year without applying to extend their permanent status, the failure to make such an application is that of the claimants themselves which, as stated by the authorities, cannot avail to their benefit.

[17] In the result, as noted above, the RPD concluded that the applicants were excluded from Convention refugee protection or like protection.

The Issues

[18] In an applicants' further memorandum of fact and law, filed March 24, 2009, counsel for the applicants defines the issues here before the Court in the following terms:

- What is the relevant date for a determination whether a person should be excluded under Article 1E of the Refugee Convention?

- Did the tribunal err in law in concluding that the applicants continued to have permanent resident status in Chile?

[19] In a respondent's further memorandum of argument, counsel for the respondent urged that the sole issue before the Court, apart from the issue of standard of review, was whether or not the RPD erred in finding that the applicants are excluded pursuant to Article 1E of the Refugee Convention.

[20] For reasons that will become apparent from what follows, I prefer the respondent's broad-based definition of the principle issue herein.

Analysis

(a) Standard of review

[21] Counsel for the respondent urges that the test for exclusion under Article 1E of the Refugee Convention is a question of law that attracts a correctness standard of review. In support of this position, counsel for the respondent refers to *Dunsmuir v. New Brunswick*[2] at paragraphs 45, 49, 50, 55, 63 and 64.

[22] That being said, counsel for the respondent acknowledges that the question of whether or not the facts of any particular case support the conclusion that a person is excluded pursuant to Article 1E of the Refugee Convention, by virtue of section 98 of the Act, is a question within the specialized area of expertise of the RPD and thus attracts a standard of review of reasonableness.

[23] I conclude that the test for exclusion under Article 1E is a question of law reviewable on a correctness standard so that if the wrong test is applied, the decision under review must be set aside and that the application of the correct test to the particular facts before the RPD is reviewable on a reasonableness standard with substantial deference owed to the RPD's conclusion in that regard.

(b) The test for exclusion under Article 1E of the Refugee Convention

[24] It is interesting to note that while the Supreme Court of Canada has not had occasion to comment on the proper application of Article 1E of the Refugee Convention, in *Rosenberg v. Yee Chien Woo*,[3] the United States Supreme Court [U.S.S.C.] broached the question of whether an asylum seeker with ties to a third country could qualify as a refugee, albeit with reference only to domestic American law. The U.S.S.C. held that "firm resettlement" in a third country "is one of the factors which the Immigration and Naturalization Service must take into account to determine whether a refugee seeks asylum in this country as a consequence of his flight to avoid persecution," but stopped short of mandating peremptory exclusion if "firm resettlement" was established. Indeed, the four dissenting judges would not have attached any consequence to third country settlement.

[25] It is fair to say that Canada has been less indulgent to would-be refugees with ties to a safe third country, who may be excluded peremptorily under the terms of Article 1E. I am satisfied that there remains, by reason of case law, a need for nuance. In *Canada (Minister of Citizenship and Immigration) v. Manoharan*,[4] I wrote at paragraph 28 of my reasons:

> The evidence before the Court indicates that, when the Respondent applied for admission to Canada, to paraphrase the words of article 1E of the Convention, he was a person who was recognized by the competent authorities of Germany as having the rights and obligations attached to the possession of the nationality of Germany. That being said, I do not read the words of the *Mahdi*[5] decision as being absolute. I prefer an interpretation of those words that reflects the rationale provided by Justice Rouleau in the *Choovak*[6] decision. While article 1E should be read in a manner that precludes the abuse of "jurisdiction shopping", it should also be read, in the words of Justice Rouleau, "…in a more purposive light so as to provide safe-haven to those who genuinely need it. . .". Such a reading is consistent with the first objective stated in subsection 3(2) of the *Immigration and Refugee Protection Act*, which provides that among the objectives of that *Act* with respect to refugees [is] "…to recognize that the refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted". That objective was not a stated objective of the Canadian Refugee Law at the time of either the *Mahdi* or *Choovak* decisions, nor was it the law of Canada at the time of the "exclusion" decision in favour of the Respondent and his mother that is here sought to be reviewed. That being said, on the very particular facts of this matter, I am satisfied that the "exclusion" decision in favour of the Respondent and his mother was correct and that the *Mahdi* decision is distinguishable by reason of the different factual background that was there at issue and of the newly stated statutory objective just referred to.

[26] I am satisfied that the foregoing is not inconsistent with the position adopted by the Federal Court of Appeal in *Mahdi v. Canada (Minister of Citizenship and Immigration)*.[7] Both decisions, in my view, imply a test for exclusion under Article 1E of the Refugee Convention that is more complex than simply application of the facts as of the choice between two dates, namely, the date protection is sought in Canada and the date of the hearing to determine whether protection should be granted.

[27] Much more recently, in *Parshottam v. Canada (Minister of Citizenship and Immigration)*,[8] the Federal Court of Appeal had before it an appeal from a decision of this Court wherein the following question was certified [at paragraph 8]:

> Once the Refugee Protection Division excludes an individual from protection under Article 1E of the Refugee Convention and IRPA s. 98 due to having nationality of a third country, what is the relevant date for a PRRA officer's determination whether the individual should also be excluded under Article 1E and section 98 from PRRA protection — the time of admission to Canada or the time of the PRRA application?

[28] Justice Evans, writing for the majority, declined to answer the certified question on the ground

that an answer to it would not be dispositive of the appeal. That being said, Justice Evans [at paragraph 11] went on to add that he did not share the view that it is "settled law" that whether a claimant for protection in Canada is a permanent resident of a third country for the purpose of Article 1E and section 98 of the Act is invariably determined as of the time of the claimant's arrival in Canada and that subsequent events are irrelevant.

[29] Justice Sharlow, in separate concurring reasons in *Parshottam*, above, wrote at paragraph 38:

> I agree with Justice Evans that this issue is unsettled but I do not agree that it should remain unsettled, even if it is not dispositive of this appeal. I reach that conclusion because the Federal Court jurisprudence discloses some confusion on this point and because Justice Mosley, by certifying the question, has expressed the opinion that it is a serious question of general importance.

Justice Sharlow then went on to answer the certified question in terms specifically applicable to the matter that was there before the Court.

[30] Before me, both counsel for the applicants and for the respondent urged that I should utilise this particular matter to propose a test in more general terms. I accept that challenge.

[31] It is important, I think, that any novel test be consonant with established principles of Canadian law relating to refugee determination. Two of those principles strike me as particularly worthy of mention in this context:

- first, it has been consistently held by this Court and the Federal Court of Appeal that a refugee claimant's failure to seek protection at the earliest available opportunity may undermine his or her claim, in that such a failure may indicate a lack of subjective fear: see the decision of Justice Michel Shore in *Semextant v. Canada (Minister of Citizenship and Immigration)*,[9] and cases cited therein. A claimant's failure to claim protection in a state through which he or she has transited en route to Canada, however, will not justify a peremptory dismissal of the claim, because factors explaining the failure to claim protection at an earlier time may emerge in an analysis on the merits; and

- second, the acquisition of refugee status rests on a forward-looking inquiry, in that protection should only be granted where a claimant has a well-founded fear of persecution in the future: *Fernandopulle v. Canada (Minister of Citizenship and Immigration)*.[10]

Bearing these principles in mind, I am satisfied that any test which would justify a peremptory exclusion from protection based on the claimant's status in a third country at the date protection is claimed, as opposed to his or her status on the date the claim is determined, is to be avoided as inconsistent with the forward-looking orientation of refugee determination.

[32] The foregoing being said, if at the time of his or her application for protection, a refugee claimant had status in a third country, which has subsequently lapsed, the sincerity of the fear of persecution alleged may be called into question. That is a factor which can only be fairly weighed, however, by inquiring whether the claimant has raised good and sufficient reasons for not availing themselves of refuge in the third country while this was still possible. This will invariably involve at least some consideration of the merits of the claim.

[33] Counsel for the respondent, in her further memorandum of argument, proposed the following:

> The Respondent submits that the Refugee Division can look at the status of the Applicants upon arrival in Canada and thereafter, up until and including the date of the hearing. The Refugee Division must also consider what degree of responsibility should be borne by the Applicants if their status has changed.

[34] I adopt the substance of the foregoing submission but would propose the following more specific three-step test:

1. Did the applicant or applicants, as of the date of his, her or their application for protection in Canada, have status in a third country, on the facts of this matter Chile, to which are attached rights and obligations recognized by the competent authorities of that country to be equivalent to those attached to the possession of the nationality of that country?

If the answer to that question is "no", then the applicant or applicants are not excluded under Article 1E. If the answer to the question is "yes", then the decision maker should go on to the following question:

2. Would the applicant or applicants, if he, she or they had attempted to enter the country in question, in this case Chile, on the date their refugee claim was determined, on a balance of probabilities, have been admitted to the country in question with status equivalent to that which they had on the date they applied for protection in Canada?

If the answer to the foregoing question is "yes" then the applicant or applicants should be excluded under Article 1E. If the answer is "no", the decision maker should proceed to the following question:

3. If the applicant or applicants would not be admitted to the country in question, in this case Chile, could the applicant or applicants have prevented that result and, if so, did he, she or they have good and sufficient reason for failing to do so?

If the applicant or applicants could have preserved his, her or their right to be permitted entry and failed to do so without good and sufficient reason for failing to do so, the applicant or applicants should be excluded under Article 1E. If the applicant or applicants could not have preserved his, her or their right of entry or could have but provided good and sufficient reason for failing to do so, then he, she or they should not be excluded under Article 1E.

(c) Application of the foregoing formulation of the test to the facts of this case

[35] The RPD found the applicants, on a balance of probabilities, and on the basis of evidence adduced by the respondent, to have acquired status in Chile to which was attached rights and obligations equivalent to those attached to Chilean nationality and not to have lost that status at the time of the hearing before it, the relevant point in time in the submission of both counsel for the applicants and for the respondent. It simply failed to examine whether the applicants still had that status only because the fact that the applicants had been outside of Chile for more than a year at the time of the hearing before the RPD had not come to the attention of Chilean authorities.

[36] That the length of the applicants' absence from Chile might not have come to the attention of Chilean authorities is not surprising and it is therefore equally not surprising that if the applicants indeed had such status and presented themselves at a port of entry to Chile and were examined regarding the length of their absence, they might not have been admitted since their status might have been found to have expired.

[37] Evidence as to the foregoing possibility was not before the RPD and I am satisfied the burden was on the respondent to bring forward such evidence. In the absence of such evidence, it was simply impossible for the RPD to fulfill the objective of the Act specified in paragraph 3(2)(*a*), that is to say, to fully recognize that the refugee program is, in the first instance, about saving lives and offering protection to the displaced and persecuted. In failing to fulfill that objective through examination of the applicants' claim to a fear of persecution if they were required to return to the PRC because they might not be readmitted to Chile, I am satisfied that, against whatever standard of review is appropriate, the RPD erred in a reviewable manner in deciding this matter as it did.

Conclusion

[38] For the foregoing reasons, this application for judicial review will be allowed, the decision under review will be set aside and the applicants' application for protection will be referred back to the RPD for redetermination by a differently constituted panel.

Certification of a Question

[39] At the close of the hearing of this application for judicial review, the Court advised counsel that it would circulate these reasons for decision and provide an opportunity for submissions on certification of a question. These reasons will be circulated and counsel will have 14 days from the date of circulation to consult on the issue of certification and to provide submissions to the Court confirming that consultation has taken place and reflecting any recommendations, with supporting reasons, regarding certification.

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[1] S.C. 2001, c. 27.

[2] 2008 SCC 9, [2008] 1 S.C.R. 190.

[3] 402 U.S. 49 (1971) (not cited before the Court).

[4] 2005 FC 1122, 49 Imm. L.R. (3d) 252, August 22, 2005.

[5] [*Mahdi v. Canada (Minister of Citizenship and Immigration)*] (1994), 86 F.T.R. 307 (F.C.T.D.), November 15, 1994.

[6] [*Canada (Minister of Citizenship and Immigration) v. Choovak*], 2002 FCT 573, 220 F.T.R. 127.

[7] (1995), 32 Imm. L.R. (2d) 1 (F.C.A.), December 1, 1995.

[8] 2008 FCA 355, [2009] 3 F.C.R. 527, November 14, 2008.

[9] 2009 FC 29, January 12, 2009.

[10] 2005 FCA 91, 253 D.L.R. (4th) 425, March 8, 2005.