

CANADA / JUDGMENT

MC2-12762

COURT

Refugee Appeal Division

DECIDED

15 December 2022

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RAD File No. / No de dossier de la SAR : MC2-12762

MC2-12763 / MC2-12764

Private Proceeding / Huis clos

Reasons and Decision ? Motifs et decision

[Translation of the original version]

Persons who are the subject of the appeal

XXXX XXXX XXXX XXXXXXXXXXX XXXX XXXX XXXX XXXXXXXXXXX XXXX

Personnes en cause

Date of decision

December 15, 2022

Date de la décision

Panel

Pascale Aubin

Tribunal

Counsel for the persons who are the subject of the appeal

Felipe Morales

Conseil des personnes en cause

Designated representative

XXXX XXXX XXXX

Représentant(e) désigné(e)

Counsel for the Minister

REASONS FOR DECISION

- [1] I dismiss the appeal. XXXX XXXX XXXX (principal appellant) and XXXX XXXX XXXX XXXX, associate appellant, are citizens of XXXX XXXX XXXX XXXX (minor appellant) is a citizen of Brazil.
- [2] The principal appellant and the associate appellant are afraid of being persecuted by the associate appellant's family because they did not approve of their relationship.
- [3] In 2016, the principal appellant and the associate appellant were threatened and decided to flee, leaving Angola for Brazil.
- [4] The appellants lived in an abandoned building on territory XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX
- [5] In XXXX 2018, the building where the claimants were living caught fire. The appellants subsequently heard a rumour that their family had caused the fire since the source was an electrical issue. The appellants' family began receiving threats in XXXX 2018.
- [6] In XXXX 2019, the appellants left Brazil for the United States. In XXXX 2019, the appellants entered Canada irregularly. Their respective refugee protection claims were referred to the Refugee Protection Division (RPD) on August 28, 2019.
- [7] The Minister of Immigration, Refugees and Citizenship Canada (the Minister) intervened, arguing that the appellants were granted permanent residence in Brazil in 2016 and that they entered Canada in possession of a permanent resident card valid until XXXX XXXX, 2025.
- [8] On June 9, 2022, the RPD rejected the appellants' refugee protection claims because they are persons referred to Article 1E of the Convention.
- [9] The determinative issue for the Refugee Appeal Division (RAD) is exclusion.

[11] My role is to examine all the evidence and establish whether the RPD's decision is correct.¹

[12] The male appellant argues that the RPD did not properly apply the Zeng test. He submits that the RPD did not correctly consider and analyze the events as valid reasons for leaving Brazil for more than two years. The male appellant contends that the RPD did not examine all the evidence on the situation of migrants in Brazil. The male appellant submits that the RPD also did not consider the risk they would face upon their return to Brazil.

[13] I disagree with these allegations.

[14] The RPD concluded that the male appellant is a person referred to in Article 1E of the Convention. In order to analyze whether the exclusion clause applies, the RPD correctly relied on Zeng, which sets out the following test for exclusion under Article 1E of the Convention:

Considering all relevant factors to the date of the hearing, does the claimant have status, substantially similar to that of its nationals, in the third country? If the answer is yes, the claimant is excluded. If the answer is no, the next question is whether the claimant previously had such status and lost it, or had access to such status and failed to acquire it. If the answer is no, the claimant is not excluded under Article 1E. If the answer is yes, the RPD must consider and balance various factors. These include, but are not limited to, the reason for the loss of status (voluntary or involuntary), whether the claimant could return to the third country, the risk the claimant would face in the home country, Canada's international obligations, and any other relevant factors.

[15] I am of the opinion that the RPD was correct to conclude that permanent resident status in Brazil confers the rights and obligations that are attached to nationality within the intended meaning of Article 1E of the Convention. Furthermore, even assuming that the male appellant has lost this status, I agree with the RPD that the male appellant must still be considered excluded from protection under the Immigration and Refugee Protection Act (the Act). The RPD did not err in applying the factors to consider according to Zeng. The male appellant also failed to establish that he is likely to be personally subjected to a risk to his life or to a risk of cruel and unusual treatment or punishment.

Nature of the principal appellant's and the associate appellant's status in Brazil

[16] At the hearing and in their Basis of Claim Form, the male appellant and the associate appellant admitted that they were granted permanent resident status in Brazil. However, they testified that they did not know whether that status was still valid today, given that it had been more than two years since they had left Brazil. I note that the principal appellant and the associate appellant have a permanent resident card issued in Brazil on XXXX XXXX, 2016, and valid until XXXX XXXX XXXX 2025. In my opinion, this evidence demonstrates, on a balance of probabilities, that the principal appellant and the associate appellant have permanent resident status in Brazil.

- [17] The RPD concluded that there was prima facie evidence that the male appellant had permanent resident status in Brazil, which granted him rights substantially similar to those of Brazilian nationals. The RPD also concluded that, at the date of the hearing, the male appellant had lost his permanent resident status because he had been absent from Brazil for more than two years. The male appellant did not present any submissions challenging these conclusions. I see no error in these conclusions, as the RPD was correct.
- [18] Furthermore, the National Documentation Package (NDP) clearly states that permanent resident status in Brazil confers economic, social, cultural, health and education rights substantially similar to those of Brazilian citizens.² Therefore, the RPD did not err when it concluded that the male appellant had permanent resident status in Brazil.
- [19] In my opinion, this evidence demonstrates, on a balance of probabilities, the male appellant's permanent resident status in Brazil. Therefore, the RPD did not err when it concluded that the male appellant had permanent resident status in Brazil.

The rights and obligations conferred by permanent residence in Brazil

- [20] The Brazilian constitution³ clearly states that permanent residents in Brazil have all the same rights as Brazilian citizens, with the exception of the right to vote, particularly with regard to health, education and access to the labour market.⁴ While that is not consistent with the male appellant's experience, these were still rights that he could have claimed.

Whether they could return to Brazil

- [21] The appellants submit that the RPD failed to properly consider the fact that they had left Brazil more than two years previously and, as a result, do not have the right to live, work or study in Brazil. The appellants argue that the fact that they did not take any steps is not a recognized factor that weighs in favour of exclusion.
- [22] According to the documentary evidence,⁵ permanent resident status is lost when an individual remains outside Brazil for more than two years without justifying their absence. There is nothing in the legislation that defines what type of justification would be acceptable. There is administrative recourse, and status can be lost only upon completion of an administrative proceeding in which the individual has the right "to the principles of contradictory debate and ample defence." The appellants did not avail themselves of that proceeding.
- [23] Considering that the appellants left Brazil in XXXX 2019. He had therefore been absent from the country for more than two years at the time of the hearing, and although they had permanent residence in Brazil, they would have lost it by the date of the hearing.

[24] However, I note that the appellants' son is a Brazilian national. As a result, the appellants can, if necessary, obtain a new residence visa that will enable them to return to Brazil. As parents of a Brazilian child, they have access to Brazilian citizenship one year after arriving in Brazil.

[25] The objective documentation states that people seeking to reside in Brazil may be granted a temporary visa for a variety of reasons, including family reunification.⁶ The parents of a Brazilian national may apply for a family reunion visa, even if that Brazilian national is a minor and does not reside in Brazil at the time of the application.⁷

The same source added that "the visa in itself is temporary, even though its holder might live indefinitely in Brazil as long as they follow some procedures when they arrive in Brazil in order to [be] granted a Permanent Resident status" (Brazil 9 Dec. 2020). According to the source, visas are temporary because they have an expiry date, but they provide the opportunity to apply for permanent residence in Brazil (Brazil 9 Dec. 2020).⁸

[26] As the RPD stated, the appellants testified that they were granted permanent residence in Brazil in 2016 as the parents of a Brazilian child, and I am of the opinion that, on a balance of probabilities, they were familiar with these procedures but chose not to avail themselves of the proceeding that could have restored their status. On a balance of probabilities, the appellants failed to demonstrate that they could not return to Brazil.

[27] This weighs in favour of exclusion.

Voluntary departure

[28] The male appellant states that he is afraid of returning to Brazil because of the persecution or mistreatment that they could face from a gang called Primeiro Comando da Capital (the "PCC").

[29] At the hearing, the RPD questioned the appellants about why they left Brazil after being granted permanent resident status. The appellants stated that they were being sought in connection with the loss of the building that had burned down, which was also being used as a location, controlled by the "PCC," where drugs were sold.

[30] To begin, I note that the RPD found that the appellants were credible in terms of being threatened by some individuals. I acknowledge that organized crime is widespread in Brazil and that a determined adversary with the necessary resources can likely find people in Brazil. In my opinion, a well-established, wealthy criminal organization in Brazil might be able to locate someone, if it so desired, by using all its resources to do so, and in particular by using corrupt state employees working in some ministries. It is my view, however, that the issue is instead whether the criminals would have the willingness and interest to locate the appellants elsewhere in Brazil.

- [31] When asked why they did not leave Sao Paulo for another city in Brazil, like Brasilia or Rio de Janeiro, the appellants stated that they were being sought throughout Brazil. Although the principal appellant testified that this fire had been covered in the media and that the PCC would be looking for them throughout Brazil, since that building was being used as a place to sell drugs, I note, as did the RPD, that there is no evidence on the record corroborating the fire at that building or the fact that the building was being used as a place to sell drugs. Therefore, I am of the opinion that there is insufficient evidence to support the allegation that the building where they were living had been destroyed by fire or regarding the cause of the fire.
- [32] Furthermore, when the appellants were asked why they thought that the individuals who had threatened them were still interested in them, he stated that his father had done the electrical work in the building. I also note that the principal appellant testified that he had lost contact with his parents and that, when last he heard, they were in Brazil and were also preparing to travel to the United States. The appellants pointed out that it was possible they had not heard from them because the individuals had killed them. Once again, I note that there is no evidence on the record to support this allegation. I am of the opinion that there is insufficient evidence to conclude that the individuals are looking for him because the building had burned down as a result of work done by his father and that the building was being used as a place to sell drugs. Without additional evidence, I concur with the RPD that the alleged death of his parents is speculative.
- [33] Given that the principal appellant's parents remained in Brazil and that he himself did not do the alleged electrical work, in the absence of any other evidence, I am of the opinion that, on a balance of probabilities, the evidence on the record does not establish that the PCC wants revenge and holds him responsible for the loss of the building and wants to find them anywhere in Brazil. I am of the opinion that, on a balance of probabilities, the agents of harm no longer have any motivation for wanting to harm the appellants.
- [34] Considering the power of organized criminal groups, I am of the view that, if the cartel truly wanted to actively look for the appellants, they could have gotten in touch with them and pressured them, but they did not do so. Therefore, it is my opinion that it is speculative to state that the criminals are highly interested in finding them. In these circumstances, I am of the view that the RPD's conclusion that the appellants failed to demonstrate, on a balance of probabilities, that the agents of harm are sufficiently interested in them today to look for him is absolutely correct. This factor weighs in favour of exclusion.
- [35] The appellants also stated that they were subjected to racism in Brazil. The appellants testified that it is harder for Black people to find employment. The associate appellant stated that she felt isolated at work. Another example was that she had the impression that she was being watched by the security guards at the supermarket. She stated that the teachers let the Black children cry over the white children at the daycare. The principal appellant testified that he had heard in the media about an assault on a Congolese immigrant.

- [36] The documentary evidence in the NDP on Brazil reports that a high percentage of the population who are of Black ethnicity, particularly Afro-Brazilians, encounter discrimination.⁹ Nevertheless, the situation of Afro-Brazilians is complex and must be assessed in light of their own specific context, and the fact that incidents of discrimination and racism occur regularly, or that some Black people have been discriminated against, beaten or even killed, is not, in itself, sufficient to conclude that there is a serious possibility that the appellants will face persecution.
- [37] While the employment situation may be difficult for some Black people in Brazil, the evidence does not support the conclusion that they are deprived of the right to work, but rather that there may not be enough work because of the economic situation in the country.
- [38] According to the case law, persecution requires an affliction of repeated acts of cruelty or a particular course or period of systematic infliction of punishment.¹⁰ Discriminatory acts may constitute persecution where those acts are "sufficiently serious and occur over such a long period of time that it can be said that the claimants' physical or moral integrity is threatened."¹¹
- [39] It is my opinion that the appellants failed to establish that their fundamental rights were violated in a sustained or systemic manner or that they would be if they were to return to Brazil. In this case, the racism and discrimination in Brazil are insufficient to conclude that the appellants would face persecution in that country or that they would constitute involuntary reasons for leaving Brazil.
- [40] Based on the case law, the evidence in the NDP on Brazil and the appellants' testimony, I am of the opinion that the RPD's conclusion that the allegations of discrimination and racism do not meet the necessary threshold to amount to persecution is correct. It is also my opinion that the RPD relied on material and not peripheral evidence and did not err in concluding that they had voluntarily abandoned their permanent resident status in Brazil.
- [41] Having permanent status requires making an effort to maintain its validity. As long as it is valid, the resident is demonstrating a continued interest in living in the host country permanently. Leaving the country for longer than a prescribed period, without a justification that is recognized under the law, results in the forfeiture of the right conferred by Brazil.
- [42] As they had been granted permanent resident status, the appellants could have maintained their status, and if it was not possible to do so because they were outside the country, then it was by their own actions that they jeopardized the retention of their status. Considering that the reasons for leaving Brazil do not amount to persecution, I consequently agree with the RPD that the appellants left Brazil voluntarily and chose to remain outside the country for more than two years. The loss of their permanent resident status was therefore voluntary and weighs in favour of exclusion. The RPD did not err.

The Refugee Protection Division is not required to analyze the male appellant's refugee protection claim with respect to Angola

- [43] I note that, in the memorandum, it is unclear whether the appellants are challenging the RPD's decision on the ground that it did not conduct a comprehensive analysis of the allegations regarding Angola. I have nevertheless considered the issue.
- [44] With regard to exclusion, it is well-settled law that, if it has been established that a refugee protection claimant has status in a country other than their country of nationality, a status that affords them rights and obligations similar to those afforded to that country's citizens, the RPD may conclude that the appellant is not entitled to protection under the Refugee Convention. There is no need to proceed with the analysis. This is clearly established by the Federal Court of Appeal in Zeng: "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."¹²
- [45] Based on the aforementioned case law, the RPD was not required to analyze the allegations regarding Angola in its written decision.
- [46] Nevertheless, I note that, at the hearing, the RPD questioned the appellants about their fear of returning to Angola. This issue was examined even though, ultimately, it was not considered determinative in the appellants' case.
- [47] Having examined all the evidence, I conclude that the appellants are excluded under Article 1E of the Convention. Consequently, pursuant to section 98 of the Act, the appellants are neither refugees nor persons in need of protection. In the alternative, I also conclude that there is no serious possibility that the appellants would be persecuted.

Canada's international obligations

- [48] With respect to the possibility that he would face discrimination, it is important to note that Canada has never made a commitment to the international community to refuse or turn back refugee protection claimants on that particular ground. In my opinion, Canada's international obligations would be upheld if the exclusion under Article 1E of the Convention were applied, particularly the obligation to protect individuals who have a well-founded fear of persecution and individuals who would be subjected to a risk within the meaning of subsection 97(1) in the event of their return.

Weighing the Zeng factors

- [49] For all of these reasons, I conclude that the principal appellant and the associate appellant are excluded under Article 1E of the Convention. Considering that the appellants lost their permanent resident status voluntarily, that they have the right to return to Brazil and that there is no risk in Brazil, and having weighed all of the relevant factors in Zeng, I am of the opinion that the male appellant is excluded from the application of Article 1E of the

Convention. Canada would not be breaching its international obligations by not providing protection.

Minor appellant

[50] The minor appellant has Brazilian nationality by birth. The minor appellant's claim was entirely based on the claim of the principal appellant, the designated representative. Considering the voluntary loss of the principal appellant's and the associate appellant's status in Brazil and the possibility of their returning there, I am of the opinion that the minor associate appellant has failed to establish that he would face a serious possibility of persecution if he were to return to Brazil or that he would be personally subjected, on a balance of probabilities, to a danger of torture, to a risk to his life or to a risk of cruel and unusual treatment or punishment.

CONCLUSION

- [51] The RAD confirms the RPD's determination that, pursuant to section 98 of the Act, the principal appellant and the associate appellant are not Convention refugees or persons in need of protection because he is a person referred to in Article 1E of the Convention as a result of his right to permanent residence in Brazil. The principal appellant and the associate appellant failed to establish that they would face a serious possibility of persecution or that it is likely that their lives would be subjected to one of the risks set out in paragraph 97(1)(b) of the Act if they were to return to Brazil.
- [52] I dismiss the appeal and confirm the RPD's determination that the principal appellant and the associate appellant are neither Convention refugees nor persons in need of protection.
- [53] I conclude that the minor associate appellant is neither a Convention refugee under section 96 of the Act nor a person in need of protection within the meaning of paragraphs 97(1)(a) or 97(1)(b) of the Act. Therefore, I reject the minor associate appellant's refugee protection claim.

(signed)

Pascale Aubin

Pascale Aubin

December 15, 2022

Date

IRB translation

Original language: French

1 Canada (Citizenship and Immigration) v. Huruglica, 2016 FCA 93; Rozas del Solar v. Canada (Citizenship and Immigration), 2018 FC 1145.

2 SPR-1, National Documentation Package (NDP) on Brazil, July 30, 2021, Tab 3.4: Brazil and Haiti: Temporary visas, including for family reunification; whether foreign national parents of a child with Brazilian citizenships can obtain a temporary visa for family reunification; rights and responsibilities of holders of a ... Immigration and Refugee Board of Canada (IRB). July 27, 2021. ZZZ200658.E; SAR-1, NDP on Brazil, July 29, 2022, Tab 3.4: Brazil and Haiti: Update to ZZZ200658 on the temporary visas, including for family reunification; whether foreign national parents of a child with Brazilian citizenships can obtain a temporary visa for family reunification; rights and ... IRB. July 22, 2022. ZZZ201121.E.

3 Ibid.

4 Shamlou v. Canada (Minister of Citizenship and Immigration) (1995), 32 Imm. L.R. (2d) 135 (FCTD).

5 SPR-1, NDP on Brazil, July 30, 2021, and that of July 29, 2022, Tab 3.7: Response to Information Request (RIR) - Brazil and Haiti: Resident status of Haitian citizens in Brazil, including their rights and responsibilities (2010-September 2017). IRB. October 3, 2017. ZZZ105986.FE; Tab 3.8: Whether a permanent resident automatically loses permanent resident status if outside the country for more than two years; recourse available to contest cancellation of permanent resident status (2017-March 2018), IRB, February 14, 2018, BRA106054.FE.

6 SPR-1, NDP on Brazil, July 30, 2021, Tab 3.4: RIR - Brazil and Haiti: Temporary visas, including for family reunification; whether foreign national parents of a child with Brazilian citizenships can obtain a temporary visa for family reunification; rights and responsibilities of holders of a ... IRB. July 27, 2021. ZZZ200658.E, p. 3.

7 Ibid.

8 Ibid.

9 SPR-1, NDP on Brazil, July 30, 2021, Tab 2.1: Brazil. Country Reports on Human Rights Practices for 2020. United States. Department of State. March 30, 2021; SAR-1, NDP on Brazil, July 29, 2022, Tab 2.1: Brazil. Country Reports on Human Rights Practices for 2021. United States. Department of State. April 12, 2022.

10 Bandula v. (Minister of Citizenship and Immigration), 2003 FC 1062; Sagharichi v. Canada (Minister of Employment and Immigration) (1993), 182 NR 398 (CA); Rajudeen v. Canada (Minister of Employment and Immigration), [1984] FCJ No. 601 (CA).

11 Bandula v. (Minister of Citizenship and Immigration), 2003 FC 1062; N.K. v. Canada (Solicitor General), [1995] FCJ No. 889, at paragraph 21 (TD).

12 Canada (Citizenship and Immigration) v. Zeng, 2010 FCA 118.

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RAD.25.02 (August 20, 2021)

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Immigration and Refugee

Board of Canada

Refugee Appeal Division

Commission de l'immigration

et du statut de réfugié du Canada

Section d'appel des réfugiés

RAD.25.02 (August 20, 2021)

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