

Federal Court



Cour fédérale

Date: 20240205

Docket: IMM-3185-23

Citation: 2024 FC 179

[ENGLISH TRANSLATION]

Ottawa, Ontario, February 5, 2024

PRESENT: The Honourable Madam Justice Azmudeh

BETWEEN:

LEONARD OKECHUKWU EKE

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The applicant, Leonard Okechukwu Eke, is seeking judicial review of a decision by the RAD in which he was excluded under article 1E of the *Convention Relating to the Status of Refugees* [the Convention] and subsection 98(1) of the *Immigration and Refugee Protection Act* [IRPA]. For the reasons given below, I allow the application for judicial review.

[2] As a preliminary matter, the applicant, a Nigerian citizen, lived in South Africa as a permanent resident. It is not disputed by the parties that, at least until mid-2018, he had a valid permanent resident status in South Africa or that the permanent residency rights were largely equivalent to those associated with citizenship. The dispute is on the issue of whether the applicant had lost his status as of the date of the hearing before the RPD and, if so, whether it was voluntary or not in accordance with *Zeng v Canada (Minister of Citizenship and Immigration)*, 2010 FCA 118 [Zeng]. All of this is in the context of his allegation that he had to leave South Africa because of frequent and serious xenophobic attacks that he experienced.

I. Decision

[3] I allow the applicant's application for judicial review because I consider the decision rendered by the RAD to be unreasonable.

I. Issues and standards of review

[4] The parties submit, and I agree, that the only issue before me is whether the RAD's decision was reasonable.

[5] The standard of review applicable to decisions related to refugee protection is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 23 [Vavilov]; *Singh v Canada (Citizenship and Immigration)*, 2022 FC 1645 at para 13; *Shah v Canada (Citizenship and Immigration)*, 2022 FC 1741 at para 15). A reasonable decision must be "based on an internally coherent and rational chain of analysis and ... justified in relation to the facts and law that constrain the decision maker" (Vavilov at para 85). The

reviewing court must ensure that the decision is justified, intelligible and transparent (Vavilov at para 95). Justified and transparent decisions account for the central issues and concerns raised in the parties' submissions to the decision maker (Vavilov at para 127).

Analysis

Legal framework of Article 1E of the Convention

[6] The legal framework for analyzing Article 1E was provided at paragraph 28 of Zeng.

[28] 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 facts.

[7] The RAD also adopted the reasoning in a decision considered persuasive

(RAD MB8-00025) in which the RAD interpreted the application of the Zeng test as follows:

[4] The traditional framework of analysis which I support in this decision involves asking the following questions:

1) At the date of the RPD hearing, did the claimant hold a status in a country of residence that confers on them substantially the same rights and obligations that are attached to the possession of the nationality of that country?

a. If the answer to question 1) is no, the RPD and/or RAD must consider whether the claimant previously held such a status and lost it or had access to such a status and failed to acquire it. If so, the RPD and the RAD must consider and balance the factors set

out by the Court of Appeal in the last part of para. 28 of the *Zeng* decision.

b. If the answer to question 1) is yes, the next question is whether the claimant's country of residence is unsafe for them in the sense that they face a serious possibility of persecution on a Convention ground or, the likelihood of being subjected to a danger of torture, a risk to life, or a risk of cruel and unusual treatment or punishment for which they have no state protection or internal flight alternative.

i. If the claimant's country of residence is unsafe for them, they are not excluded from refugee protection and the decision maker must consider whether they are a Convention refugee or a person in need of protection in respect of their country of nationality.

ii. If the claimant's country of residence is safe for them, they are excluded from refugee protection by the combined effect of Article 1E and s. 98 of the IRPA.

[8] I agree that the RAD was correct in adopting a framework of analysis that reasonably interpreted *Zeng* as requiring the decision maker to assess whether a refugee claimant would face a serious possibility of persecution on a Convention ground or a personal risk of harm under subsection 97(1) of the IRPA in the country covered by Article 1E of the Convention.

[9] In this context, assessing the credibility of the attacks allegedly suffered by the applicant in South Africa is important. Credibility findings by a specialized administrative tribunal such as the RPD are generally treated with great deference. As a general rule, this Court will not intervene in a decision if the evidence presented to the Board, taken as a whole, supports its negative credibility assessment, if its conclusions are reasonable in light of the evidence, and if reasonable inferences have been drawn from that evidence (*Tsigezana v Canada (Citizenship and Immigration)*, 2020 FC 426 at paras 33–35).

Was the RPD's decision reasonable?

[10] In this case, the applicant provided the following information in his Basis of Claim Form [BOC Form] to corroborate the attacks suffered in South Africa:

I seek refugee protection from Canada because while in South Africa I was a prime target of xenophobic hate and violence. My business premises and I suffered repeated xenophobic attacks and plunders. I have watched friends and colleagues maimed, plundered, murdered, while the police stood and did nothing. During the last attack which precipitated my running to Canada I narrowly escaped death; in fact, I was attacked with bottles and irons and my business plundered and vandalised. I was robbed of everything I had, stabbed and left to die. I woke up in a pool of blood; recovered with the aid of modern medicine. I still have the scars of some of the injuries I sustained. How I escaped alive still surprises me...

[11] As can be seen, the attacks are mentioned in general terms. During the RPD hearings, the member asked questions to better understand the context of the attacks. However, in rejecting them, she used circular logic that is neither transparent nor intelligible. She asked for specific details that were often contained within long, confusing multiple-question statements. When the applicant offered a response, the member rejected the claim on the ground that those details were not mentioned in the BOC Form. Throughout the process, she never sought to inquire into the credibility of their motivations, even though she had to assess South Africa's safety in the context of section 96 and subsection 97(1) of the IRPA:

MEMBER: Okay. So tell me now, I am going to move on to ask you about your reason for leaving South Africa.

CLAIMANT: I left South Africa for the consistent xenophobic attack on foreign nationals in particular my business. My business has been attacked in so many occasions and the consistent attack

on foreign nationals, the xenophobic attack on foreign nationals, that is my reason of leaving South Africa.

MEMBER: Were you personally ever attacked in South Africa?

CLAIMANT: Yes I have been attacked at my business premises.

MEMBER: Just don't get ahead of me, just wait.

CLAIMANT: Yes.

MEMBER: I think you said, I am not sure, did you say you were attacked at your business premises or your business premises were attacked?

CLAIMANT: My business premise was attacked, I have been attacked as well.

MEMBER: Okay. Now you left, you left South Africa July 24th, 2018, correct?

CLAIMANT: Yes.

MEMBER: So tell me about the last attack on yourself that you experienced before leaving? In other words is there any specific, let's start with this, is there any specific incident among all those incidents that made you leave South Africa?

CLAIMANT: Aside the personal attack on myself which I survived and the other one that, you know, that made me, you know, decided to leave is the one that cost the life of my partner. They came and attacked him and he lost his life.

MEMBER: Okay, I am going to ask you about that. In what year did the personal attack that you just mentioned occur?

CLAIMANT: 2018.

MEMBER: Do you remember the month?

CLAIMANT: It was in, again my personal one was February, the one I had personally and my friend was ended in June-July, beginning of July.

MEMBER: Okay. So the attack in which you were the victim occurred February 2018.

CLAIMANT: Yes, that is correct. I am continually been, you know, after that incident we had different occasion attacks at our

business premises with the last one that happened it cost the life of my partner.

MEMBER: Okay. And that was the end of June or beginning of July 2018?

CLAIMANT: Yes. There was a widespread xenophobic attack in that period.

MEMBER: So I want to follow up on some of the information you have given. So in your narrative account you say that the last attack, sorry this is paragraph 2, you say that the last attack that precipitated you to run to Canada is the February 2018 attack. Do you mention anything about, this is in your written narrative, right, do you mention anything about the attack on your partner in your written story?

CLAIMANT: I did, I did.

MEMBER: Okay, now a copy of that in front of you that you can direct me to where you talk about your partner having been killed? So, so make sure you are looking at your amended narrative, right, the one that you signed more recently. So that would be Exhibit 2.1 which is also found in Exhibit 8.1. So do you see that somewhere?

[12] At the hearing, counsel for the respondent admitted that the RPD member had never asked about the reasons for the attacks. However, he argued that, since the RPD had completely rejected that the attacks had happened, the reasons for the attacks were no longer relevant. This position would seem acceptable to me if the attacks had been rejected in such a way that it could be seen as a logical chain of reasoning. However, the RPD found—and the RAD confirmed—that the material omissions undermined the applicant's credibility even though the applicant had been asked specific questions about the details of the attacks, such as dates, and answered those questions. The applicant provided straightforward answers that were largely consistent with the other evidence presented to the member, including with regard to conditions in the country. In short, by accepting this reasoning, the RAD created an inherent paradox by presenting the

applicant with an impracticable scenario. Responding to a general statement devoid of details with detailed information was seen as contradictory, which presents the applicant with a dilemma: refrain from giving specific answers, which may be regarded as a lack of truthfulness, or provide additional details, which may also make him look dishonest. This circular logic rendered the applicant incapable of establishing the truthfulness of his allegations by any means, revealing the intrinsically illogical nature of such an argument.

[13] The RAD also shared the RPD's view and considered the absence of documents corroborating the attack, such as medical reports, to be problematic. As counsel for the respondent acknowledged during the hearing, if the credibility assessment accepted by the RAD was reasonable and there was no independent evidence to corroborate the facts relevant to the claim, the decision maker is reasonably left with insufficient credible evidence to conclude that the fact supporting the claim is established. However, in this case, the rejection of the facts was based on unreasonably equating the absence of details in a general statement with a material omission.

[14] As the RAD noted in assessing documents on South Africa, xenophobic attacks are common. However, as there were no questions regarding the potential reasons for the attacks, the RAD was not able to assess if a return to the 1E country, that is, South Africa, would be safe pursuant to sections 96 or 97 of the IRPA. Consequently, although the RAD had proposed the appropriate legal test to interpret the Zeng analytical framework, it did not have sufficient evidence before it from the RPD's examinations to correctly assess the issues in its own test. This error rendered the decision unreasonable.

[15] There was a disagreement between the RAD and the applicant concerning the applicant's status in South Africa. The RAD believed that he had not met the burden of proving that he had lost his status. Even if he had kept his status, information regarding the reasons for the attacks is relevant to determining whether the applicant would face a serious possibility of persecution on a Convention ground or a personal risk of harm under subsection 97(1) of the IRPA in South Africa.

[16] The RPD never asked any questions about the reasons and the RAD did not deem it necessary to do so, which prevented the RAD from properly applying the Zeng test as it was interpreted in the RAD's persuasive decision. The RAD's decision was therefore unreasonable.

JUDGMENT in IMM-3185-23

CONCLUSION:

1. The application for judicial review is allowed and the matter is referred back to be assessed by another member of the RAD.
2. The parties did not propose any certified question and I agree that none arises in this matter.

“Negar Azmudeh”

Judge

Certified true translation
Margarita Gorbounova

FEDERAL COURT

SOLICITORS OF RECORD

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