Federal Court  Cour fédérale

Date: 20250422

Docket: IMM-13556-23

Citation: 2025 FC 726

Toronto, Ontario, April 22, 2025

PRESENT: Mr. Justice Diner

BETWEEN:

MISBHAU OLAJIDE BALOGUN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

(Delivered from the Bench by videoconference on April 22, 2025)

[1] The Applicant seeks judicial review of an appeal that found that he failed to establish he would be at risk either in his native Nigeria, or Malawi, where he had obtained status. For the reasons that follow, this application for judicial review will be rejected.

[2] The Applicant is a citizen of Nigeria who obtained permanent resident status [PR] in Malawi after fleeing his native Nigeria with his wife and children in 2019.

[3] The Applicant alleges having a well-founded fear of persecution both in Malawi on account of his experiences there, and in Nigeria. In the latter, his fears arose due to unknown individuals who attacked his family home in Nigeria and set it on fire in June 2018. The Applicant, his wife and children were able to escape, but his parents and two sisters unfortunately perished in the fire.

[4] The Applicant further alleges that in 2020, he was again targeted in Malawi by some of the same men that had attacked his family home back in Nigeria. He alleges that armed men came to his residence and shot at him, but he was able to escape.

[5] In February 2022, the Applicant left Malawi for Canada where he made an application for refugee status. On February 7, 2023, his claim was heard by the Refugee Protection Division [RPD]. The RPD determined that the Applicant is excluded from refugee protection per Article 1E of the *United Nations Convention Relating to the Status of Refugees*, 189 UNTS 150 [Convention].

[6] During the RPD hearing, the Applicant acknowledged that he had PR status in Malawi and enjoyed substantially the same rights and obligations as that of Malawian nationals. However, the Applicant alleges that his status in Malawi expired four days after the RPD hearing, having been absent from the country for more than twelve consecutive months.

[7] The central question before the RPD was the relevant time, or “lock-in date”, for assessing the Applicant’s status to determine the applicability of Article 1E of the Convention.

The RPD concluded that, based on the caselaw, the RPD hearing date is the lock-in date to determine whether the facts warrant exclusion. The RPD then determined that given its previous conclusion on Article 1E, it was not open to determine whether the Applicant faces a serious possibility of persecution or risk as described in section 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] in Malawi.

[8] The Applicant then appealed the RPD's decision to the Refugee Appeal Division [RAD], which rendered its decision on September 28, 2023 [Decision], confirming that the RPD did not err in concluding that the Applicant had valid status in Malawi at the time of the RPD hearing, and was therefore excluded under Article 1E. However, the RAD determined that the RPD had failed to assess the risk faced by the Applicant in Malawi and addressed the issue on appeal.

[9] Because the risk was a new issue on appeal, the RAD served the Applicant a notice informing him it would consider this new issue and invited him to make further submissions (which the RAD also refers to as the *Alazar* Notice, stemming from this Court's decision by the same name in *Canada (Citizenship and Immigration) v Alazar*, 2021 FC 637) [RAD *Alazar* Notice] – mainly on the credibility of his allegations of fear of persecution in Malawi. While the Applicant filed additional submissions, he did not file any new evidence in support of his submissions. The RAD engaged in an independent review of the evidence and found that the Applicant had failed to credibly establish that he faces a serious possibility of persecution or a risk, as described in the IRPA.

I. Parties' Position

[10] The Applicant first argues that the relevant time to assess his status under Article 1E of the Convention is not the time of the RPD hearing, but rather the time the RPD renders its Decision, because his PR status in Malawi was to expire four days after the RPD hearing. Further, he argues that the RPD's delay in rendering a Decision must be taken into account. The Applicant also argues that the RAD breached procedural fairness by failing to hold a hearing to examine the Applicant's risk in Malawi.

[11] The Respondent replies that the RAD decision is well founded in fact and law, and that the Applicant has failed to demonstrate that the RAD committed a material error. The Respondent further argues that the RAD provided comprehensive and intelligible reasons in support of its finding that the Applicant is excluded from refugee protection pursuant to Article 1E of the Convention, and that his allegations of risks in Malawi are not credible. The Respondent contends that since no new evidence was proffered by the Applicant, there was no reason for the RAD to hold a new hearing.

A. *The RAD did not err in applying the Article 1E exclusion*

[12] The reasonableness standard is applicable to the first question, namely, the relevant time for assessing the Applicant's status and his exclusion under Article 1E (*Canada (Citizenship and Immigration v Zeng*, 2010 FCA 118 at para 11 [*Zeng*]; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 101).

[13] First, because Article 1E was incorporated into IRPA without amendment, both *Vavilov* and *Mason* require it to be interpreted consistently with international law principles and the international instruments to which Canada is signatory (*Freeman v Canada (Citizenship and Immigration)*, 2024 FC 1839 at para 26; *Gurusamy v Canada (Citizenship and Immigration)*, 2024 FC 1868 at para 11).

[14] The test for exclusion pursuant to Article 1E was established by the Federal Court of Appeal in *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.

[15] Previously, in *Shamlou*, this Court had established that determining whether a claimant has "substantially similar" status to that of a national in a third country comprised four basic rights: the right to work without restrictions, the right to study, the right to have full access to social services, and the right to return (*Shamlou v Canada (Minister of Citizenship and Immigration)* (1995), 1995 CanLII 19407 (FC), 103 FTR 241 at para 36).

[16] Where there is evidence suggesting that a claimant has status in another country that would engage Article 1E, the onus shifts to the claimant to establish that he does not have such

status in the third country (*Tesfay v Canada (Minister of Citizenship and Immigration)*, 2021 FC 497 at para 16).

[17] The Applicant does not point to any legal authority to support his position that the RAD erred in considering the RPD hearing date as the lock-in date to consider the Applicant's status in the third country, but rather argues that the caselaw relied upon by the RAD predates *Vavilov* (i.e., *Majebi v Canada (Citizenship and Immigration)*, 2016 FCA 274 at paras 7–9 [*Majebi*], and *Zeng* at para 28).

[18] However, this Court has consistently found that the claimant's status in the third country is to be assessed at the time of the RPD hearing both pre- and post-*Vavilov* (see for instance *Jean-Pierre v Canada (Citizenship and Immigration)*, 2020 FC 136 at paras 23–25 [*Jean-Pierre*]; *Joseph v Canada (Citizenship and Immigration)*, 2020 FC 839 at para 5 [*Joseph*], and *Huang v Canada (Citizenship and Immigration)*, 2023 FC 1491 [*Huang*], all of which post-date *Vavilov*).

[19] Specifically, Justice Grammond held that the passage of time between the RPD hearing and the resulting loss of status is irrelevant (*Joseph* at para 5). Prior to *Vavilov*, in *Majebi*, the Federal Court of Appeal relied on *Huruglica* and *Zeng* to conclude that the RAD's assessment on appeal of an exclusion order under Article 1E must be made at the time of the RPD hearing, otherwise the RAD would be deciding a different question from that decided by the RPD (*Majebi* at para 8; *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93, 396 DLR (4th) 527 at paras 78–79; *Zeng* at para 28). The Supreme Court of Canada refused to grant leave

to appeal in *Majebi* in 2017. This principle – as noted in *Joseph* and *Jean-Pierre* is still good law, and has been consistently applied since.

[20] More recently in *Huang*, the RAD examined the 1E exclusion *de novo* as the RPD had failed to address the issue. In that case, the RAD considered the date of the RAD hearing as the lock-in date for the applicant's status. This Court upheld the determination, and further reiterated that the passage of time between the hearing and the loss of status is insufficient to avoid the application of Article 1E of the Convention (*Huang* at paras 76, 79 and 85).

[21] While it is unfortunate that the Applicant's status in this case was set to expire four days after the RPD hearing, the RAD's confirmation of the RPD's reliance on the date as the lock-in date was reasonable and in accordance with the jurisprudence on the issue. The RAD provided ample reasons for its interpretation of Article 1E, as did the RPD prior to it on this first issue raised by the Applicant, both pointing to the relevant caselaw and properly interpreting the legislative scheme. There is no reviewable error raised by the Applicant on this first point.

B. *The RAD did not err in exercising its discretion not to hold an oral hearing*

[22] The Applicant argues that the RAD's decision not to hold an oral hearing is to be reviewed on a correctness standard. I disagree. As found in *Madu*, the holding of an oral hearing is in the RAD's discretion and therefore, is not a procedural fairness issue (*Madu v Canada (Citizenship and Immigration)*, 2022 FC 758 at para 23; see also *Rashid v Canada (Citizenship and Immigration)*, 2023 FC 1569 at paras 27–28).

[23] The RAD found that the Applicant failed to establish, on a balance of probabilities, that he faces a serious possibility of persecution, or a risk described in section 97 of the IRPA if he were to return to Malawi. This was based on the RAD's determination that the Applicant's claim lacked credibility.

[24] The Applicant does not challenge the merit of the RAD's credibility finding, but argues that procedural fairness was breached because the RAD did not hold an oral hearing. The Applicant raises exactly the same argument before this Court that was raised in his additional submissions to the RAD (made in response to the RAD Notice), namely that the additional submissions constitute new evidence and should be considered a new document within the meaning of subsections 110(3) and 110(4) of the IRPA. The Applicant also argues he should have been allowed to respond fully to the contradictions noted in the evidence.

[25] Justice Grammond summarized the law as it relates to new issues before the RAD in *Savit v Canada (Citizenship and Immigration)*, 2023 FC 194 at paras 11–16). He wrote that "[t]he RAD cannot give further reasons based on its own review of the record, if the refugee claimant ha[s] not had a chance to address them," (citing *Kwakwa v Canada (Citizenship and Immigration)*, 2016 FC 600 at para 22) and that "notice must be given if the RAD intends to make negative findings regarding an applicant's credibility when the RPD has not doubted it."

[26] In this case, as mentioned by the RAD, the Applicant was given two opportunities to make his case (i.e., at the hearing before the RPD and in response to the RAD *Alazar* Notice in his further submissions). In fact, the RAD *Alazar* Notice indicated that the RPD erred by failing

to assess the risk the Applicant would face should he return to Malawi. The RAD specified the new issue in its *Alazar* Notice as "credibility relating to the Appellant's allegations in the third, or 1E, country," and went on to write to the Appellant (the Applicant in this judicial review) as follows:

> The Refugee Appeal Division (RAD) Member would like to address the following:
>
> In their review of the record, the Refugee Appeal Division (RAD) Member assigned to this appeal has identified the following credibility concern that was not addressed in the RPD's reasons.
>
> • The Appellant alleges he is at risk in Malawi. The Appellant noted in his Basis of Claim (BOC) narrative that the attack in Malawi occurred in March of 2020. The Appellant testified that the attack happened prior to his divorce, and at another point, the Fall of 2021. Furthermore, the evidence relating to his divorce was not provided in his narrative.
>
> • The Appellant testified he did not report the attack in Malawi to the police and does not have a hospital report relating to his injuries.
>
> • The Appellant testified that his wife allowed the attackers in the home, as she thought he knew them. Later in his testimony he was asked if his family was harmed in the attack, and the Appellant testified that his family was not home on the day of the incident.
>
> Please provide any additional submission on these credibility concerns, if required.

[27] Thus, I find that the RAD explicitly provided the Applicant with an opportunity to respond, which he did through his counsel, addressing the three points raised in the RAD *Alazar* Notice through legal submissions to the tribunal – but without submitting any new evidence -- all of which the RAD amply noted and addressed in their findings. Rather, the Applicant argued that for the purpose of the RAD proceedings, the legal submissions constituted new evidence.

[28] I start with the IRPA. Pursuant to subsections 110(3) and (6) of the IRPA, the RAD has the discretion as to whether to hold an oral hearing under limited circumstances, namely, where it admits new documentary evidence that meets the explicit admissibility requirements of subsection 110(3) of the IRPA, as well as the implicit criteria of *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 (i.e., credibility, relevance and newness), and the new evidence fulfils the conditions to hold a hearing set out in subsection 110(6) of the IRPA (see also *Hossain v Canada (Citizenship and Immigration)* 2023 FC 1255 at paras 32–35).

[29] I disagree with the Applicant that his new submissions filed in response to the RAD *Alazar* Notice qualify as "new documentary evidence", an argument which the RAD rejected on appeal, and which he has once again pleaded before this Court. Indeed, subsections 110(3) and (6) of the IRPA, as well as Rule 3(3) of the *Refugee Appeal Division Rules*, SOR/2012-257 [RAD Rules] make a clear distinction between written submissions and documentary evidence.

[30] Specifically, IRPA's subsection 110(3) refers to "documentary evidence and written submissions" as two separate items, while subsection 110(6) refers to and applies to documentary evidence only. Rule 3(3) of the RAD Rules lists the items to be included in the Appellant's Record, including "any documents that the Refugee Protection Division refused to accept as evidence" and "a memorandum that includes full and detailed submissions." Therefore, the RAD Rules, like the IRPA provisions, clearly delineate legal submissions from evidence. The RAD panel's reasons on the issue of new evidence, and its decision not to hold a hearing, were eminently intelligible, justifiable and transparent.

[31] In short, given the fact that the Applicant submitted no new evidence, it was reasonable for the RAD to proceed on the basis of its appeal without convoking an oral hearing.

II. Conclusion

[32] The Applicant has failed to convince me of any error made by the RAD that warrants intervention of this Court. In my view, the RAD's Decision is reasonable, based on an internally coherent and rational chain of analysis and is justified in light of the specific facts of the case and the law. This application for judicial review is therefore dismissed.

JUDGMENT in IMM-13556-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No question is certified.

3. No costs are awarded.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	MISBHAU OLAJIDE BALOGUN v MCI
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