

Federal Court



Cour fédérale

Date: 20250516

Docket: IMM-8440-23

Citation: 2025 FC 902

Ottawa, Ontario, May 16, 2025

PRESENT: Madam Justice Sadrehashemi

BETWEEN:

DANA CATALINA UDROIU

Applicant

and

**MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Dana Catalina Udroi, a citizen of Romania, applied for refugee protection in Canada based on her sexual orientation and Roma ethnicity. Both the Refugee Protection Division (“RPD”) and the Refugee Appeal Division (“RAD”) dismissed the claim, finding that she was excluded from protection because she had access to permanent resident status in Spain but failed to acquire it. Both the RPD and the RAD also found that she did not

face section 96 or 97 risk in Spain because she had access to an internal flight alternative (“IFA”).

[2] Ms. Udroiou challenges the merits of the RAD’s decision on judicial review. The parties agree, as do I, that the RAD’s decision should be reviewed on a reasonableness standard (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov] at paras 12-13, 84).

[3] Ms. Udroiou argues that the RAD erred in its application of the exclusion test, and in particular the third step of the test set out by the Federal Court of Appeal in *Zeng v Canada (Citizenship and Immigration)*, 2010 FCA 118 [Zeng]. I agree that the decision must be quashed because of the RAD’s unreasonable assessment of the relevant factors to be considered at the third step of the Zeng test.

II. Background to Refugee Claim and Decision under Review

[4] Ms. Udroiou is Roma and a citizen of Romania. At 15, she was married to a man. She had two children. Ms. Udroiou identified as a lesbian but could not share this with anyone in her family or community for fear she would be ostracized. After more than ten years of marriage, when her husband was away, Ms. Udroiou left Romania and went to Spain with her children. While she was there, she began divorce proceedings and travelled back and forth to complete this.

[5] Approximately three years later, in 2016, Ms. Udroiou's parents and others in her extended family followed her to Barcelona and settled in her same neighbourhood. At some point, a family friend saw Ms. Udroiou with a woman, whom she was having a relationship with, and reported this to her family. Ms. Udroiou was assaulted by her cousins and threatened for having humiliated her family.

[6] In February 2022, Ms. Udroiou left Spain, leaving her children in her mother's care, and travelled to Canada. Shortly after she made a claim for refugee protection. The Minister intervened on the basis of Article 1E exclusion. On January 12, 2023, the RPD dismissed Ms. Udroiou's refugee claim. The RPD found Ms. Udroiou to be credible and accepted as a lesbian Roma. Her risk in Romania was not assessed because the RPD found she was excluded from making this claim as she had access to permanent resident status in Spain but failed to acquire it.

[7] Ms. Udroiou appealed. The RAD considered the appeal in writing and dismissed it on June 15, 2023, upholding the RPD's finding that Ms. Udroiou was excluded from protection under the combined effect of Article 1E of the *United Nations Convention Relating to the Status of Refugees* [*Refugee Convention*] and section 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

III. Analysis

[8] Section 98 of IRPA expressly incorporates Articles 1E of the *Refugee Convention* into Canadian law, stating that a person who fits within the meaning of Article 1E is not a Convention refugee or a person in need of protection. Article 1E of the *Refugee Convention* provides that a

claimant will be excluded from refugee protection “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”.

[9] The Federal Court of Appeal in *Zeng* set out the three part test to apply in Article 1E exclusion cases. Justice Norris succinctly summarized the three steps:

1. As of the date of the hearing, does the claimant have status in a third country substantially similar to that of its nationals?
 - If yes, the claimant is excluded.
 - If no, proceed to the second question.
2. Did the claimant previously have such status and lose it or have access to such status but fail to acquire it?
 - If no, the claimant is not excluded.
 - If yes, proceed to the third question.
3. Considering and balancing all of the circumstances of the case – including the reason for the loss of status (or the failure to acquire it), whether the claimant could return to the third country now, the risk the claimant would face in their home country, and Canada’s international obligations – should the claimant be excluded?
 - If yes, the claimant is excluded.
 - If no, the claimant is not excluded.

(*Ru v Canada (Citizenship and Immigration)*, 2021 FC 1218 [*Ru*] at para 36).

[10] The parties are not disputing the RAD's analysis of the first two steps of the test: namely that Ms. Udroi u did not have permanent resident status in Spain at the time of the RPD hearing (first step), and that she did at some point in the past have access to that status and failed to acquire it (second step). The only issue on judicial review is the RAD's consideration of the third step.

[11] The third step asks the decision maker to "balance all of the circumstances of the case" and lists a series of non-exhaustive factors, including the reason for the loss of the status (or the failure to acquire it).

[12] The RAD found that her reasons for not obtaining status were considered by the RPD and her risk of harm from her family was assessed. The RAD agreed with the RPD that she had a viable IFA in Spain.

[13] Ms. Udroi u argues that both the RPD and the RAD limited the step three assessment to whether there was a section 96 or 97 risk in Spain. Ms. Udroi u asked in both her post-hearing submissions to the RPD and submissions to the RAD that the decision makers consider and balance, at the third step of the *Zeng* test, her reasons for not obtaining permanent resident status in Spain, namely, the stigma and attacks she faced from her family and community due to her sexual orientation. Ms. Udroi u specifically highlighted that these circumstances ought to be considered even if she did not establish her circumstances met the requirements of sections 96 or 97 of IRPA.

[14] This issue was considered by Justice Norris in two decisions, *Ru* and *Xu v Canada (Citizenship and Immigration)*, 2019 FC 639 [*Xu*]. In *Xu*, the applicants were Chinese citizens who lived and had access to status in Guyana. The RAD found that the anti-Chinese discrimination in Guyana did not rise to the level of persecution under section 96 and excluded the applicants from refugee protection. Justice Norris explained that even if it did not amount to risk under section 96 or 97, her experiences were relevant to the balancing exercise in the third step of the *Zeng* test in considering why she lost her status:

Even assuming, as the RPD and the RAD concluded, that these experiences were insufficient to establish her claims under sections 96 or 97 of the IRPA, it does not follow that they could not still be a very good reason for Ms. Xu not to want to “normalize” her status in Guyana (or to bring her son there). Under *Zeng*, Ms. Xu’s explanation for why she lost her status in Guyana must be considered but the member never does so. As a result, his conclusion that she is excluded from refugee protection under Article 1E of the Refugee Convention lacks justification, transparency and intelligibility.

[15] In *Ru*, a Chinese family living in Peru sought refugee protection in Canada based on one of the applicant’s fears of forced sterilization in China. The applicants also felt unsafe in Peru due to their Chinese ethnicity. In his analysis of the misapplication of the third step, Justice Norris again finds “in any event, conditions in Peru could still give them a good reason for leaving (which would weigh in their favour under the third step of the *Zeng* test) without having to amount to grounds for protection under sections 96 or 97 of the IRPA” (*Ru* at para 54).

[16] I find that that the RAD made a similar error as the decision makers in *Ru* and *Xu*. The RAD did not, in its analysis of third step of the test in *Zeng*, consider more broadly whether the

treatment Ms. Udroiú faced from her family in Spain, even if it did not amount to grounds for protection under sections 96 or 97, could still weigh against exclusion under Article 1E.

[17] The Respondent argues that the Applicant is making a form over substance argument because, even if the RAD considered the Applicant's circumstances through a section 96 and section 97 lens, these circumstances were still considered and balanced.

[18] I disagree. The RAD did not set out how it weighed and balanced Ms. Udroiú's reasons for failing to acquire status because of her family's treatment. This was a relevant factor at the third step of the *Zeng* test. The RAD limited its consideration of these circumstances to an IFA analysis. This is necessarily of a more limited scope.

[19] Given this Court's jurisprudence in *Ru* and *Xu* and the Applicant's submissions to the RAD, I find the RAD's exclusion analysis is unreasonable and requires redetermination.

[20] Neither party raised a question for certification and I agree none arises.

JUDGMENT in IMM-8440-23

THIS COURT'S JUDGMENT is that:

1. The Application for judicial review is allowed;
2. The June 15, 2023 decision is quashed and sent back to a different decision maker for redetermination; and
3. No serious question of general importance is certified.

"Lobat Sadrehashemi"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-8440-23

STYLE OF CAUSE: DANA CATALINA UDROIU v MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: NOVEMBER 7, 2024

JUDGMENT AND REASONS: SADREHASHEMI J.

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