

Federal Court



Cour fédérale

Date: 20170421

Docket: IMM-4313-16

Citation: 2017 FC 384

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Montréal, Quebec, April 21, 2017

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

GURPREET SINGH

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 [IRPA] of a decision by the Immigration and Refugee Board's Refugee Appeal Division [RAD] dated September 1, 2016, in which the RAD upheld

the decision rendered by the Refugee Protection Division [RPD] on October 8, 2015, dismissing the applicant's refugee claim, which was based on section 96 and subsection 97(1) of the IRPA.

II. Facts

[2] The applicant is a 40-year-old citizen of India and has been a permanent resident of Italy since 1995.

[3] After his arrival in Italy, he operated and owned a pizzeria near Milan. Eventually, the mafia allegedly demanded money and assaulted him in his restaurant in February 2014.

[4] He reportedly asked the local police for help but was told that he had to either adapt to Italy or return to his own country. He later went to police headquarters to meet with the authorities, but this attempt was also unsuccessful.

[5] He left Italy for India in March 2014, but was allegedly unable to recover a parcel of land that his uncle refused to give him; the applicant was allegedly intimidated during this dispute.

[6] He subsequently returned to Italy on March 22, 2014. His problems with the mafia resumed, and it took control of his restaurant in March 2015.

[7] He left Italy again in April 2015. After his departure, his brother-in-law was in a car accident. The applicant claims that he was in fact the intended target.

[8] The applicant arrived in Canada in May 2015. He claimed refugee protection on July 10, 2015.

III. Decision

A. *RPD decision – October 8, 2015*

[9] First, the panel stated that it was satisfied with the applicant's identity. Mr. Singh explained that he had worked for a long time to save enough money to open a restaurant. After the restaurant opened, the mafia allegedly showed an interest and wanted to take his earnings. The situation became such that the applicant left Italy for Canada.

[10] The panel found that although the situation was regrettable, the applicant had not rebutted the presumption that he could avail himself of the protection of the Italian State, a democratic country. The applicant allegedly filed a complaint with the local police on one occasion, without success. He also reportedly tried to approach a higher authority by going to police headquarters.

[11] The panel held that, while the documentary evidence established the existence of organized crime in Italy and a certain level of racism and discrimination against foreign nationals, the applicant's attempts to seek assistance were insufficient to establish that he could not avail himself of state protection.

B. *RAD decision – September 1, 2016*

[12] The RAD first established that it must, according to *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93 [*Huruglica*], analyze the RPD's decisions according to the correctness standard, except for questions of credibility for which the RAD considers that it must show deference.

[13] The RAD then recalled that, following the principles in *Canada (Attorney General) v. Ward*, [1993] 2 SCR 689 [*Ward*], the more democratic a state is, the heavier the burden of rebutting the presumption of protection. In the view of the RAD, the documentary evidence showed that Italy is a democratic country [TRANSLATION] “that has functional judicial institutions and effective legal remedies against criminal offences and discrimination.” It then noted that Italy has put a great deal of effort into the fight against the mafia. Thus, according to the RAD, the RDP did not err in finding that the applicant [TRANSLATION] “had made insufficient efforts to seek protection in Italy.” Since the applicant had never filed a formal complaint, he failed to rebut the presumption of state protection.

IV. Issues

[14] This case raises the following issues:

1. Did the RAD err in fact and in law by failing to refer to all the evidence in the record?
2. Did the RAD err in fact and in law in its findings with respect to state protection?
3. Did the RAD err in fact and in law by finding that the applicant was subject to exclusion under article 1E of the Convention?

[15] These are questions of mixed fact and law subject to the reasonableness standard (*Huruglica*, above, at paragraphs 32–35).

V. Relevant provisions

[16] The following provisions of the IRPA apply:

Convention refugee

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

Person in need of protection

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would

Définition de « réfugié »

96. A qualité de réfugié au sens de la Convention—le réfugié—la personne qui, craignant avec raison d’être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n’a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Personne à protéger

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n’a pas de nationalité, dans lequel elle avait sa résidence

subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

Exclusion — Refugee Convention

98. A person referred to in

habituelle, exposée :

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

(2) A également qualifié de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

Exclusion par application de la Convention sur les Réfugiés

98. La personne visée aux

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 ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.

VI. Analysis

[17] For the reasons that follow, the application for judicial review is dismissed.

A. *Reference to evidence in the record*

[18] The applicant argues that the RAD erred in fact and in law because it failed to explain why it did not consider a portion of the documentary evidence, including a report on the long delays for investigations on abuses by law enforcement officials, as well as the significant discrimination faced by foreign nationals.

[19] The respondent submits that, contrary to the applicant's suggestion, the RAD was not required to comment on all the passages in the contradictory documentary evidence, and there is a presumption that it has been taken into consideration. Furthermore, the respondent argues that the evidence to which the applicant is referring relates to the time to complete investigations on police abuse, as well as discrimination against foreign nationals. With respect to timeliness, the Federal Court has already ruled that it must not impose on other countries a standard of effective protection that is not always met in Canada (*Smirnov v. Canada (Secretary of State)*, 1994 CanLII 3545, [1995] 1 FCR 780 (FCTD)). With respect to the discrimination, the RAD reportedly referred to it expressly in its reasons.

[20] The Court notes that the RAD makes specific reference to the documentation in the record (RAD decision at paragraphs 28, 30 and 34). The RAD is not required to comment on each statement in the objective evidence included in a record. Therefore, the Court finds that, on this aspect, the RAD did not commit a reviewable error.

B. *State protection*

[21] The applicant submits that the RAD failed to assess the level of discrimination and available remedies, and to consider that the applicant had approached the police, without success. He states that the RAD found that he could obtain assistance from the authorities without considering the evidence in the record which showed otherwise.

[22] The respondent argues that the RAD's finding with respect to state protection is reasonable. Indeed, jurisprudence of the Federal Court of Appeal instructs that a refugee claimant "must do more than simply show that he or she went to see some members of the police force and that his or her efforts were unsuccessful" (*Canada (Citizenship and Immigration) v. Kadenko*, 1996 CanLII 3981 (FCA), [1996] FCJ No. 1376 (C.A.) (QL)).

[23] In *Ward*, the Supreme Court established that state protection must be sought in the country of origin when such protection could have reasonably been provided. Furthermore, in *Hinzman v. Canada (Citizenship and Immigration)*, 2007 FCA 171, the Federal Court of Appeal recalled, at paragraph 57, that "a claimant coming from a democratic country will have a heavy burden when attempting to show that he should not have been required to exhaust all of the recourses available to him domestically before claiming refugee status." Also, in *Flores Carrillo*

v. Canada (Minister of Citizenship and Immigration), 2008 FCA 94, the Federal Court of Appeal reiterated at paragraph 30 that “a claimant seeking to rebut the presumption of state protection must adduce relevant, reliable and convincing evidence which satisfies the trier of fact on a balance of probabilities that the state protection is inadequate.”

[24] The RAD had to determine whether the applicant had availed himself of protection from Italy after he was targeted by the mafia. Given that Italy is a democratic country in the European Union, the applicant’s burden to prove that he sought state protection and that said state had failed to meet this responsibility was heavy. In this sense, given that the applicant failed to file a formal complaint with the police and considering the objective documentation concerning the relative effectiveness of legal remedies against criminal offences, as well as efforts to fight the mafia, it was reasonable for the RAD to find that the applicant had failed to discharge his burden of proof.

[25] Therefore, the Court finds that the RAD, with respect to its findings regarding state protection, did not make a reviewable error.

C. *Exclusion under article 1E of the Convention*

[26] The applicant argues that the RAD erred in law by finding exclusion because he believes that his exclusion under article 1E of the Convention should not apply since he would be at risk if he returned to Italy, as the police will not protect him from the mafia. He sought protection from the state but was unsuccessful. This protection is therefore inadequate for the applicant.

[27] The respondent, for its part, argues that the RAD correctly concluded that the applicant was excluded under article 1E. In *Zeng v. Canada (Citizenship and Immigration)*, 2010 FCA 118, at paragraph 28, Madam Justice Layden-Stevenson summarized the determination of applicability of article 1E as follows: “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.” In the case at bar, the applicant admitted that he is a permanent resident of Italy and, therefore, would be excluded. Thus, when an exclusion clause applies, the RAD does not have to rule on inclusion in the country for which refugee status is being claimed.

[28] Section E of article 1 of the United Nations’ *Convention relating to the Status of Refugees* (1952), which is the basis of section 98 of the IRPA, states the following: “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.” This provision is therefore applicable to the applicant, since he is a permanent resident of Italy.

[29] The Court finds that the RAD concluding in the applicant’s exclusion was therefore reasonable.

VII. Conclusion

[30] The application for judicial review is dismissed.

JUDGMENT in IMM-4313-16

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

There are no questions of general importance to be certified.

“Michel M.J. Shore”

Judge

Certified true translation
This 17th day of October 2019

Lionbridge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4313-16

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