Federal Court  Cour fédérale

Date: 20210526

Docket: IMM-3958-20

Citation: 2021 FC 497

Ottawa, Ontario, May 26, 2021

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

SAMUEL HAFLETION TESFAY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant seeks judicial review of a decision of the Refugee Appeal Division (RAD), which confirmed that he was excluded from refugee protection under Article 1E of the *Convention Relating to the Status of Refugees*, 28 July 1951, Can TS 1969 No 6 [*Refugee Convention*] due to his permanent resident status in Italy.

[2] For the reasons that follow, the application is dismissed.

II. **Background**

[3] The Applicant is an Eritrean national. He left Eritrea in 2005 for Sudan and later Libya, where he made multiple attempts to reach Italy by boat. In August 2007, the Applicant successfully crossed the Mediterranean. Italian officials initially detained him but granted him humanitarian protection three months later. He was then issued a residence permit (*permesso di soggiorno*) and a travel document. The Applicant chose not to make a refugee claim in Italy as he hoped to make his way to another European Union country where he might claim protection.

[4] In 2008, the Applicant travelled to France and the United Kingdom in an attempt to seek asylum. He was unsuccessful and was returned to Italy in 2010. In Italy, the Applicant was unemployed or underemployed. He often worked for wages that were below the minimum wage and lived in substandard housing.

[5] The Italian authorities granted the Applicant a long-term residence permit (*permesso di soggorio di lungo period*) in April 2016 because he had been in the country for more than five years. The duration of this permit was unlimited although it had to be renewed periodically to be used for identification purposes. The document entitles its holder to enter Italy without a visa to work and to have access to social services and benefits provided by the Italian government.

[6] As conditions for migrants in Italy had not improved, the Applicant left Italy and travelled to the United States in November 2017, where he sought asylum. The United States

denied the Applicant's asylum claim in March 2018. A month later, he travelled to Canada and claimed refugee protection here.

[7] In December 2018, the President of Italy signed into effect a new law popularly known as the "Salvini Decree" after the name of the Minister of the Interior. Among many other things, the new law provided for the replacement of residence permits granted on humanitarian grounds by new "special protection" residence permits. As this change in the law was promulgated just prior to the Refugee Protection Division (RPD) hearing of the Applicant's claim, the tribunal did not consider its effect on the Applicant's status in Italy.

[8] The RPD found that the Applicant's long-term residence permit, which was valid for an indefinite period, granted the Applicant substantially similar rights to that of Italian nationals. While the permit could be revoked after 12 months of continuous absence from the European Union, the RPD found that the revocation of status was not automatic.

[9] The RPD also concluded that while there was evidence of problems for migrants in Italy, including discrimination, the treatment did not amount to persecution. As a result, the RPD found that the Applicant was excluded from refugee protection under Article 1E of the *Refugee Convention*.

[10] Prior to the RAD hearing, the Applicant sought clarification from the Italian consulate in Vancouver regarding the effect of the Salvini Decree. The consulate responded as follows:

> …Generally speaking the Italian *Permesso di Soggiorno* expires after 12 months of the *Permesso* holder's absence from Italy. A very, very few exception apply; humanitarian protection could be one of those…It is probable your client did not receive the actual asylum in Italy but, for some reasons, could not be returned to the country of origin and has been allowed to remain in Italy. Due to the fact this is an old humanitarian protection designation, and if we can verify with the relevant Italian Immigration and Refugee Affairs authorities that there is no adverse circumstances, and this protection has not been revoked, your client could be authorized to re-enter Italy.

[11] The RAD confirmed the RPD's decision and dismissed the appeal. The effect of the "Salvini Decree" on the Applicant's right to status in Italy was considered along with a considerable amount of documentary evidence that had not been before the RPD. The RAD found that the Applicant was not similarly situated to the holders of the short-term humanitarian residence permits, who had lost that status because of the Salvini Decree, because he had been granted a EU permit for long-term residence in 2016.

[12] The RAD held that the Applicant's long-term resident permit had not expired, that it entitled him to enter Italy without a visa, to work, and to have access to social benefits and services, including access to health care and education. The RAD held that the jurisprudence only contemplates the examination of whether the refugee is entitled by law to the same rights as nationals of the third country. The RAD was satisfied that the Applicant's status in Italy was substantially similar to that of Italian nationals.

III. **Issue**

[13] The issue before the Court is whether the RAD's decision is reasonable.

IV. **Standard of Review**

[14] As determined by the Supreme Court of Canada in *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 30, reasonableness is the presumptive standard for most categories of questions on judicial review, a presumption that avoids undue interference with the administrative decision maker's discharge of its functions. While there are circumstances in which the presumption can be set aside, as discussed in *Vavilov*, none of them arise in the present case.

[15] The court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it. A court applying the reasonableness standard does not ask what decision it would have made in place of the administrative decision maker, attempt to ascertain the range of possible conclusions, conduct a new analysis or seek to determine the correct solution to the problem. Instead, the reviewing court must consider only whether the decision made by the decision maker, including both the rationale for the decision and the outcome to which it led, was unreasonable (*Vavilov* at para 83).

V. **Analysis**

[16] Refugee claimants such as the Applicant do not bear an initial evidentiary burden to show that they are not excluded from protection. However, when there is evidence, as there is here, 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: *Murcia Romero v Canada (Citizenship and Immigration*), 2006 FC 506 at para 8.

[17] The applicable test for Article 1E exclusions was set out by the Federal Court of Appeal in *Zeng v Canada (Citizenship and Immigration)*, 2010 FCA 118 at para 28 [*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. 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.

[18] The Applicant contends that even if he had status in Italy substantially similar to that of its nationals, he has lost it due to his absence from the European Union since November 2017. This, he argues, would have occurred, whether or not the law was changed in 2018, under the terms of the prior Italian law. However, the decision to revoke his humanitarian status would have been discretionary and not automatic: *Obumuneme v Canada (Citizenship and Immigration)*, 2019 FC 59 at para 43 and *Sharifi v Canada (Citizenship and Immigration)*, 2020 FC 556 at para 22.

[19] The information received from the consulate was ambiguous. Given that ambiguity and the lack of clarity in the record regarding the impact of the Salvini Decree on the Applicant's situation, I am unable to conclude that the RAD erred in holding that the Applicant had failed to

meet his onus in demonstrating that he had lost his status in Italy. Absent the "adverse circumstances" alluded to by the Consulate, it appears that the Applicant is not barred from seeking to return to Italy.

[20] The adoption of the Salvini decree undoubtedly signalled a hardening of the response of the Italian state to the pressures of migration within its borders. However, its promulgation was accompanied by a letter from the President of the Republic to the Council of Ministers to remind them that Italy was still bound by its international and constitutional obligations.

[21] Applying the *Zeng* test, even if the Applicant had established to the satisfaction of the RAD that he had lost his status, other relevant factors, such as whether the claimant left voluntarily and whether he could return to the third country, would have to be considered and balanced.

[22] The Applicant left Italy voluntarily and could have returned after his asylum claim was rejected in the United States. He chose not to do so and to bear the risk that his status would expire while he sought protection in Canada.

[23] The Applicant submits that even if he has not lost the right to long-term residency in Italy, the status he is entitled to is not substantially similar to that of its nationals in practice. The RAD erred, he says, by failing to consider the extent of the discrimination faced by racialized individuals in Italy. The reality, the Applicant argues, is that discrimination is systemic and amounts to persecution for persons like him – black migrants from Africa. Such persons are

unable to avail themselves of the rights they are supposedly entitled to in Italy such as proper employment and housing.

[24] The Respondent submits that the RAD reasonably concluded that the *permesso di soggorio di lungo periodo* was substantially similar to the rights of Italian nationals because it entitles the holder to reside in Italy, enter the territory without a visa, freedom of movement, the right to work, access to welfare services, national insurance, health, school, and social services. This satisfies the test articulated in *Shamlou v Canada (Minister of Citizenship and Immigration)*, (1995) 103 FTR 241 (FCTD) [*Shamlou*].

[25] It is apparent from the Applicant's evidence and supporting documentation in the record that while he was entitled to those fundamental rights, he was not able to enjoy them in the fullest sense of that word. Nonetheless, he had the legal right to those benefits. He was able to remain in and move about Italy, to seek and accept employment and had access to social and health services. That the quality of the work and housing he was able to obtain through his efforts was not what he had hoped for is not the test. To put it bluntly, the Respondent argues, the Applicant had the same right as an Italian national to be unemployed or underemployed.

[26] Contrary to what is alleged by the Applicant, the RAD considered whether, cumulatively, the discrimination suffered by the Applicant amounted to persecution. I see no error in this finding of fact.

[27] While this was not argued before the Court on this application, I note that the RAD dismissed as moot the Applicant's argument that a breach of procedural fairness occurred during the proceedings at the RPD. The Applicant represented himself at that hearing and argued on appeal that the RPD failed to assist him in providing clarification and in not postponing the hearing in order to allow the Applicant an opportunity to obtain counsel and additional documentary evidence in support of his claim.

[28] The RAD held that whatever the merits of that argument, the Applicant was represented on the appeal and had the opportunity to present voluminous additional evidence, which was admitted and considered. Thus, the RAD concluded, whatever prejudice might have existed had been cured on appeal.

[29] I will leave for another day and full argument the question of whether a breach of procedural fairness by the RPD can be cured on appeal to the RAD. However, whatever failings there may have been at the first instance, the Applicant had a full opportunity to present evidence and make submissions with the assistance of counsel on appeal.

VI. **Conclusion**

[30] Unfortunately, there are many similar cases of asylum seekers in third countries such as Italy and the resulting pressures on housing, social services and work opportunities are great. As the RAD recognized, this may also result in discrimination such as that experienced by the Applicant. However, it remains open to the RAD to find that discrimination does not amount to

persecution. Applying the *Vavilov* standard of reasonableness, I am unable to conclude that the Court should intervene. As a result, the application is dismissed.

[31] The Applicant proposed that I certify a question: Does exclusion under Article 1E of the Convention require consideration of whether the claimant enjoys the basic rights in practice and not just in theory.

[32] In response, the Respondent submitted that the proposed question for certification would not be determinative of this matter, and is contrary to the Convention, the legislation, and the *Zeng* test.

[33] I agree with the Respondent that the proposed question would not be determinative of this matter as it turns on whether the Applicant had established that he had no right to status in Italy. As I have concluded that the RAD did not err in that regard, the proposed question would not be dispositive. Therefore, I will not certify the question.

JUDGMENT IN IMM-3958-20

THIS COURT ORDERS that the application is dismissed. No questions are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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