Federal Court  Cour fédérale

Date: 20220202

Docket: IMM-6709-20

Citation: 2022 FC 119

Toronto, Ontario, February 2, 2022

PRESENT: Mr. Justice Diner

BETWEEN:

ABIY MEZEMER HAILE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This case concerns an application for judicial review, made pursuant to s 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*Act*], of a decision (the Decision) of the Refugee Appeal Division (the RAD or the member), dated December 20, 2020. In the Decision, the RAD confirmed the Refugee Protection Division's (RPD) finding that the Applicant is excluded from refugee protection pursuant to Article 1E of the *Convention Relating to the Status*

of Refugees [the *Refugee Convention*] because he had already been granted refugee protection and permanent residence in Italy.

II. Background

[2] The Applicant is a 36-year-old citizen of Eritrea who made an asylum claim in Canada on October 28, 2017.

[3] The Applicant states that he was born in Ethiopia, but in 2000, he and his father were expelled to Eritrea, where they were subsequently detained for practicing their protestant religion. Italy, having accepted him as a refugee, granted the Applicant permanent resident status in 2014. After obtaining this status in Italy, he travelled to the United States ("US"), claiming asylum under a fraudulent identity as a citizen of Ethiopia in 2015. The Applicant was detained for more than two years while American authorities investigated his identity, eventually discovering his Eritrean citizenship and Italian permanent resident status.

[4] On September 7, 2017, the US government released the Applicant under a supervision order, having been unable to obtain the necessary documentation to remove him to that point. His release conditions included (i) remaining in the State of Texas and (ii) cooperation in obtaining travel documents. On October 28, 2017, the Applicant crossed into Canada, and claimed asylum here.

[5] The Minister of Public Safety intervened in the Applicant's asylum claim before the RPD, filing evidence and making written submissions in support of exclusion under Article 1E

of the *Refugee Convention* as incorporated into s 98 of our *Act*, and that with his permanent residence status in Italy, he had a right to re-enter and remain there. The RPD, citing the leading jurisprudence, agreed, concluding that the Applicant indeed had substantially similar status to Italian nationals when he voluntarily left Italy in 2015.

[6] The RPD also noted that the Applicant had testified to having obtained various employment that had permitted him to travel, to having collected unemployment insurance in Italy when he was laid off from seasonal workplaces, and to having purchased fraudulent documents in Ethiopia. The RPD noted that none of this was contested, and that the Applicant had testified to assuming a false identity when he claimed asylum in the US in an attempt to prevent American authorities from discovering his status in Italy.

[7] The RPD acknowledged that the Applicant's submission was that he had since lost his status in Italy, and that he testified in support of this that neither Ethiopia, Eritrea, nor Italy would endorse American efforts to repatriate him. The RPD noted, however, that there was no evidence to demonstrate that any of the valid Italian identity documents had been submitted with a formal request for re-entry, and that he had not complied with the US Supervision order, including making requests of the Italian authorities for travel documents.

[8] The RPD determined that the Applicant had failed to establish that his Italian status had been lost or could not be reinstated. The RPD observed that having voluntarily abandoned his status in Italy to risk a fraudulent claim in the US, the Applicant's conduct of asylum shopping

“may well reflect a disinclination to take appropriate and genuine actions to reinstate his Italian status, if indeed it is lost” (at para 40).

[9] The RPD also pointed to a November 29, 2018 email from the Italian Consulate in Ottawa, which indicated that as a general rule, a refugee does not lose protection by having left the territory of the asylum granting country; it takes a formal revocation or termination process. The official noted that even where documents were expired, the claimant could return to Italy by applying for a re-entry visa. The RPD considered this e-mail to contain the most reliable and up-to-date information available on the Applicant’s situation and assigned it great weight.

[10] The RPD also considered the Applicant’s testimony of his conversations with Italian Consulate officials in Toronto to be vague. Despite claiming that they had indicated he would not be issued a re-entry visa for Italy without a travel document, the Applicant had not established what would be required of him to replace or obtain one. Instead, the RPD found he had not provided evidence of the revocation of his status, nor did he appear inclined to address the issue.

[11] As such, after considering the relevant jurisprudence, the RPD concluded that the Applicant had failed to discharge his burden of showing convincing evidence that he had lost his status in Italy and that it could not be reinstated. The RPD noted that the Applicant had not applied for a new travel document, and that he had not made any contact with Italian officials until he had been in Canada for more than a year.

[12] The RPD also considered evidence that the Applicant had attempted to enter the United Kingdom illegally in 2008 after obtaining refugee protection in Italy, resulting in detention in France and a forced return to Italy. This conduct, combined with his subsequent fraudulent application in the US, was voluntary and indicative of a lack of subjective fear of returning to his country of origin. After considering and determining that there was no credible evidence of any risk to the Applicant of returning to Italy, the RPD concluded that he was excluded from refugee protection and denied his asylum claim.

III. RAD Decision under review

[13] On appeal, the RAD confirmed the decision of the RPD. The RAD began by acknowledging its role is to look at all the evidence and decide if the RPD made the correct decision. The member found that since he had read all the transcripts and reviewed the entire file, the RPD had no meaningful advantage over the RAD in assessing the evidence. The RAD also decided to allow the admission of new evidence submitted by the Applicant, consisting of an affidavit and a series of e-mail exchanges with the Italian Consulate, along with additional submissions. The RAD found the evidence to be probative, relevant, credible and new. The RAD also invited the Applicant to provide submissions on the newest available Italian National Documentation Package, to which the Applicant responded.

[14] Conducting its own independent analysis, the RAD noted that the RPD's findings with regard to the Applicant's experiences in Italy, his voluntary departure in 2015, his asylum shopping efforts under a false identity in the US, his lack of initial efforts to inquire into his Italian status after arriving in Canada, and the lack of any evidence of a formal revocation

process in Italy were all unchallenged. The RAD agreed with these findings, and found no basis to disturb them. The RAD also disagreed that there was any flaw in the RPD's reasoning on the either of the two main grounds of appeal.

[15] In response to the first argument, the RAD found the RPD had not erred in relying on evidence from the Toronto Consulate, since that evidence addressed the precise circumstances of the Applicant – namely a protected person who, despite having expired documents, would not lose their status absent a formal revocation process in Italy, which had not taken place. Rather, the RAD agreed that his expired documents could be renewed from within Italy on obtention of a re-entry visa.

[16] Further, the RAD did not accept the Applicant's contention that the RPD should have relied on the more particular experiences faced by the Applicant in the US, namely the failure to remove him to Italy. The RAD disagreed with the Applicant's submission that the tribunal should presume the American authorities were given adequate information for the removal, particularly considering that the Applicant had proven to be an unreliable source of truthful information. This included his departure from the US, which breached his release conditions.

[17] Second, the RAD found that even if the Applicant's permanent residence had expired (which it found had not been established), this would not have impacted his right to return to Italy. Rather, the available evidence suggested that his permanent residence could be renewed from within Italy. As for obtaining a re-entry visa to obtain such renewal, and addressing the new evidence, the RAD found that the Applicant showed minimal efforts to pursue his return, and

had instead made this process more challenging to Italian officials by providing insufficient information for them to issue him a travel authorization, including by providing illegible copies of documentation and printouts of his fingerprints, which the officials noted were impossible to match with their files.

[18] The RAD also found for these, and other reasons including the alleged loss of his Italian documents through the mail and other prior non-cooperation with the authorities, he had failed to exhaust his options or follow up on the suggestions of Consular officials when roadblocks were encountered. The Tribunal concluded that with genuine effort and diligence, he could provide the evidence necessary to obtaining re-entry. The Applicant now challenges this outcome.

IV. Analysis

[19] The parties agree that the applicable standard of review for the Decision is reasonableness. A court conducting reasonableness review scrutinizes the decision maker's decision in search of the hallmarks of reasonableness – justification, transparency and intelligibility – to determine whether it is justified in relation to the relevant factual and legal constraints that brought the decision to bear (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 99). Both the outcome and the reasoning process must be reasonable and the decision as a whole must be based on an internally coherent and rational chain of analysis (*Vavilov*, at paras 83-85).

[20] I find that the RAD Decision met all standards of reasonability. The Applicant does not contest the legal principles and criteria relied on by the RAD regarding exclusion pursuant to

s 98 of the *Act* – which incorporates Article 1E of the *Refugee Convention* – and the Federal Court of Appeal's guidance in *Zeng*. As such, the disagreement in this case is limited to whether the RAD reasonably determined that the Applicant had failed to provide sufficient evidence that he had lost his status or his right to return to Italy. In other words, it turns on the RAD's interpretation of the facts as borne out by the evidence in the record before it.

[21] According to the Applicant, he has provided evidence of two different sets of circumstances, the first while he was in the US and the second while he was in Canada, each of which prove he cannot return to Italy. The Applicant submits these circumstances render the RAD's findings unreasonable.

[22] With respect to the US proceedings, the Applicant submits that the Decision unreasonably dismisses the findings of a US immigration Court. The Applicant contends that it is to be presumed that the Court had evidence to support the determination it arrived at to release the Applicant, citing *Mahdi v. Canada (Citizenship and Immigration),* 2016 FC 218, at paragraph 12 in support. The Applicant submits that it was speculative to conclude otherwise.

[23] I am unpersuaded by this argument. The jurisprudence cited by the Applicant involved an RPD finding that there was insufficient credible evidence of the Applicant's identity, when a US Court had addressed that specific issue and found identity had been established. In this case, the US Court was concerned with whether to release the Applicant after approximately two years in detention, without success in obtaining removal documentation, which required the cooperation of the Applicant, per the Court's terms of release.

[24] While the foreseeable prospect of removing the Applicant to Italy may have been relevant to the Court's considerations, no determination was made as to the Applicant's status in Italy or his right to return. The RAD also reasonably inferred from the conditions of the Court's supervision order that the effort to remove the Applicant was an ongoing process.

[25] Furthermore, the RAD's decision not to leap to conclusions about the significance of a Court decision on a completely distinct legal issue, without knowing what evidence was put before it was not only reasonable on its face, it was justified in its observation that the Applicant had been an unreliable source of truthful information in the past. In short, the RAD was justified in refusing to draw inferences about the specific evidence that had been provided to Italian authorities at the time of the US Court decision, since said evidence did not appear in the record.

[26] As for the RAD's analysis of his new evidence, the Applicant submits that with the assistance of former Canadian counsel, he has been engaged in a diligent but fruitless effort to obtain the necessary approvals to return to Italy, evidenced by email exchanges with Italian officials in Canada, and the retention of an expert in Italian law. The Applicant submits that Italian authorities ultimately refused to assist him and instead referred him to the Canada Border Services Agency for fingerprint assistance.

[27] The Applicant submits that even if a right to a return to Italy somehow exists despite his efforts, it is only a theoretical right and that the state's efforts to assist him ought to also be assessed, analogous to the Federal Court's jurisprudence on state protection, where capacity, and not only best efforts must be taken into consideration. Relying on *Canada (Citizenship and*

Immigration) v. Zeng, 2010 FCA 118 at paragraphs 28-29, the Applicant submits that it is clear that having been denied travel documents to return to Italy and having been denied consular assistance, the evidence demonstrates that he does not have similar rights to Italian nationals, rendering the Decision unreasonable.

[28] I note that the Applicant provided the RAD with no indication that he had attempted to comply with the US supervision order compelling him to make efforts to return to Italy, and he waited more than a year after his refugee claim in Canada before he contacted any Italian officials here. The RAD's reasons and the record before it demonstrate that it amply considered both these past circumstances, as well as the new evidence from consular officials. It explains how, even after that delayed contact, the Consulate's inability to assist him stemmed entirely from his own failure to provide legible supporting documentation and fingerprints.

[29] More fundamentally, as the Respondent points out, the fact remains that the Applicant provided no evidence that he has made an actual application for re-entry documentation, as opposed to back-and-forth email communications with consular officials. The fact is that his prior counsel found helpful Italian officials in Canada with which to make enquiries and correspond, but none of this equated to an actual application for a visa, or any other Italian document to facilitate travel or establish status.

[30] Furthermore, the Applicant's state protection analogy and application to the *Zeng* criteria vis-à-vis "effective" rights as opposed to best efforts, are unpersuasive for two reasons. First, the Board's finding amounted to the fact that the Applicant has never demonstrated best efforts to

obtain travel authorization or procurement of his “lost” Italian status documentation. The onus is on an Applicant to show that he pursued reasonable efforts to obtain state protection. Second, Applicant’s counsel was unable to point to any authority that supported his analogous application of the law concerning state protection to a different concept in law.

V. Conclusion

[31] The RAD reasonably found that the Applicant failed to prove that he could not return to Italy, and despite accepting new evidence, aptly found that it did not prove the converse, justifiably concluding that he failed to discharge his burden under the law. For these and all the other reasons detailed above, I would dismiss the judicial review.

JUDGMENT in IMM-6709-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed

2. No certified questions arise.

3. The whole without costs.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6709-20
STYLE OF CAUSE:	ABIY MEZEMER HAILE v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	JANUARY 27, 2022
REASONS FOR JUDGMENT AND JUDGMENT:	DINER J.
DATED:	FEBRUARY 2, 2022

APPEARANCES:

Daniel Tilahun Kebede	FOR THE APPLICANT
James Todd	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Daniel Tilahun Kebede Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT