Federal Court Cour fédérale

Date: 20160208

Docket: IMM-2919-15

Citation: 2016 FC 152

Toronto, Ontario, February 8, 2016

PRESENT: The Honourable Mr. Justice Diner

Docket: IMM-2919-15

BETWEEN:

GJON RROTAJ
ELVANA RROTAJ
SAMUELE RROTAJ
JOANA RROTAJ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. BACKGROUND

[1] The Applicants bring this application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] to judicially review a June 4, 2015 decision [Decision] of the Refugee Protection Division of the Immigration and Refugee Board [the

Board]. In its Decision, the Board found the Applicants to be excluded under Article 1E of the *Convention Relating to the Status of Refugees*, 28 July 1951, Can TS 1969 No 6 [the Refugee Convention], as referenced in sections 2 and 98 of *IRPA*. The Applicants were therefore precluded from status as Convention refugees under section 96 of *IRPA* or persons in need of protection under section 97. The Applicants seek an order declaring that they are Convention refugees or persons in need of protection, or, in the alternative, an order remitting the matter to the Board for redetermination.

[2] Gjon Rrotaj, the Principal Applicant, and his spouse, Elvana Rrotaj, were born in and are citizens of Albania. Prior to their arrival in Canada, they resided in Italy as permanent residents, a status they held since 2001. Their two children, Samuele and Joana, were born in Italy in 2004 and 2009 respectively and have held permanent resident status in Italy since their birth. The Applicants claim protection from an Albanian gang. While the gang is not based in Italy, the Applicants assert that its reach extends there as a result of the liberalization of visas for Albanians to enter the European Union's Schengen Area.

[3] The Board found the Applicants credible with respect to the incidents that took place in Albania. However, they were excluded from protection under Article 1E of the Refugee Convention because the Board determined that the Applicants possessed valid *permesso di soggiorno illimitata* cards [PSI Cards] – the equivalent of a European Commission Residence Permit for Long-term Residents – which confer all the rights and social benefits of permanent residence in Italy (Certified Tribunal Record [CTR], p 9). The Board noted that this status could be revoked on grounds of serious criminality, or for being outside the European Union for more

than 12 consecutive months, but that the Applicants did not submit any documentary evidence to suggest their status had actually been revoked: to their knowledge, neither the European Union nor Italy had voided their PSI Cards.

[4] The Board concluded that their PSI Cards conferred a right of return to Italy, preferring more recent evidence on this point to an older opinion:

> One source, namely an official from the Canadian Embassy in Italy, did state in March 2012, that the holder of such a status "will lose his or her permanent resident status, "regardless of the validity indicated on the Carta di Soggiorno"." However, more recent information from the Immigration and Refugee Board, dating from 2013 and 2015, obtained following consultations with sources who represent directly the Italian authorities, either in their capacity as consular officials or the police, state that individuals can return to Italy and that their status <u>may</u> be revoked. It seems from the most recent evidence adduced that the decision to revoke the status is discretionary, not automatic (Emphasis in original; CTR, pp 9-10).

[5] While the Board acknowledged that the Applicants' PSI Cards could be voided, it nonetheless concluded that the Applicants could likely return to Italy and thus they were excluded from protection.

[6] Finally, with respect to their fear of persecution and future risk in Italy, the Board found that adequate state protection was available. Applicants' counsel did not challenge this conclusion on judicial review on the basis that he characterized it technically as *obiter* in light of the exclusion finding.

[7] The Applicants contend that the Board has unreasonably excluded them in that they lacked certain rights available to Italian citizens including, most importantly, the right to enter

Italy. Entry is a prerequisite to an exclusion finding. For rights equivalent to those of citizens, the Applicants refer to the *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees of the United Nations High Commission for Refugees*, HCP/IP/4/Eng/REV.1, January 1992, at para 144 [the UNHCR Handbook], which states that the individual "must, like a national, be fully protected against deportation or expulsion". The Applicants also submit that since their status is subject to revocation on grounds of serious criminality, they are not fully protected and thus it was wrong to exclude them under Article 1E.

[8] The Respondent counters that the Decision was reasonable because the Applicants failed to discharge their burden to demonstrate that they are not excluded under Article 1E. Specifically, the Applicants failed to establish they have no right of return to Italy, a right which the evidence suggests they indeed have. Furthermore, any possible status revocation is discretionary, not automatic, and nothing suggests such a revocation occurred. Finally, the Respondent submits that Article 1E does not require blanket protection against deportation.

II. ANALYSIS

[9] The issues to be determined by this Court are whether the Board erred in excluding the Applicants on the basis of a right of return to Italy and/or whether it erred in finding that they had substantially similar status to Italian nationals (including "unlimited" protection against deportation).

[10] The Board's selection of the Article 1E legal test should be reviewed on a standard of correctness. If the test set out was correct, then the Board's assessment of the facts under the said test should be subject to a reasonableness review (*Canada (Citizenship and Immigration) v Zeng*, 2010 FCA 118 [*Zeng*] at para 11). A reasonableness review assesses whether a decision is transparent, justified, intelligible, and defensible in respect of the facts and the law (*Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at para 47).

[11] Before examining the merits of the Board's Decision, a review of the law and jurisprudence is helpful. Article 1E of the Refugee Convention, incorporated into the law through section 98 of *IRPA*, states that "[t]his 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".

[12] A leading case on the interpretation and application of Article 1E is the Federal Court of Appeal's decision in *Zeng,* where Justice Layden-Stevenson, at para 28, identified the test for exclusion:

> 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.

[13] The FCA also noted that the purpose of Article 1E is to exclude persons who do not need protection and thus it “precludes the conferral of refugee protection if an individual has surrogate protection in a country where the individual enjoys substantially the same rights and obligations as nationals of that country” (*Zeng* at para 1). In so doing, Article 1E protects the integrity of the refugee system from so-called “asylum shopping”, where an individual seeks protection in Canada, despite being entitled to status in a safe third country.

[14] In *Zeng*, the claimants were Chinese citizens entitled to permanent resident status in Chile. The claimants argued there was a risk their permanent resident status would expire, as they had been outside Chile for more than one year and had not applied to have their status extended. The RPD had rejected this argument, finding that the claimants held permanent residence status in Chile at the time of the hearing and if that status could have been lost because the claimants were outside of Chile for more than a year without applying to extend it, that failure to extend could not avail to their benefit. The Court found that it owed deference to the RPD’s finding on this point.

[15] One important component of the Article 1E assessment is where the legal burden lies. In *Murcia Romero v Canada (Minister of Citizenship and Immigration)*, 2006 FC 506, Justice Snider found that the Minister must first raise a *prima facie* case that there is a right of return to a country where claimants enjoy substantially the same rights as its nationals. The onus then shifts to the claimants to establish they do not have such status in the third country. A key question in the exclusion equation is therefore whether the applicant possesses the basic rights associated with nationality.

[16] The test for determining whether an individual has substantially the same rights to a national was addressed in *Shamlou v Canada (Minister of Citizenship and Immigration)* (1995), 103 FTR 241 (FCTD) [*Shamlou*], which has been followed in several cases and was cited, albeit in a different context, by Justice Bastarache in his concurring reasons in *R v Cook*, [1998] 2 SCR 597 [*Cook*] at para 140:

> [140] Indeed, "nationality" is not defined in the Citizenship Act, R.S.C., 1985, c. C-29. However, the term has been interpreted by courts of this country in interpreting the Canadian definition of "national" used in the Schedule E of the Immigration Act […]
>
> Lorne Waldman, in his work Immigration Law and Practice (1992 (loose-leaf)), vol. 1, at § 8.217.4, identifies four factors relevant to Canadian law:
>
> (a) the right to return to the country of residence;
>
> (b) the right to work freely without restrictions;
>
> (c) the right to study; and
>
> (d) full access to social services in the country of residence.
>
> These criteria were adopted in *Shamlou v. Canada (Minister of Citizenship and Immigration)* (1995), 103 F.T.R. 241, per Teitelbaum J., at para. 36, where it was said:
>
> I accept the criteria outlined by Mr. Waldman as an accurate statement of the law. The issue with respect to the Board's application then really turns on whether or not it was reasonably open for the Board, on the facts before it, to conclude that the applicant was a person recognized by the competent authorities in Mexico as having most of the rights and obligations which are attached to a person of that nationality.

[17] In *Shamlou*, at paras 29 and 35, Justice Teitelbaum also quoted the following two passages by Mr. Waldman:

> … [A] person should be excluded from the Convention based upon Art. 1E only in circumstances where it is clear that the person has obtained all of the most fundamental basic rights associated with

> nationality of a country. Although it is not possible to make an exhaustive list of all the rights, these would include, at minimum, the right to return, the right to reside for an unlimited period of time, the right to study, the right to work, and access to basic social services.
>
> …If the applicant has some sort of temporary status which must be renewed, and which could be cancelled, or if the applicant does not have the right to return to the country of residence, clearly the applicant should not be excluded under Art. 1E. (Emphasis added)

[18] Justice Teitelbaum thus refers to a fifth criterion to the four enumerated above. This fifth criterion –the right of return to the third country of residence for an unlimited period of time – has been applied in several cases. In *Kanesharan v Canada (Citizenship and Immigration)*, [1996] FCJ No 1278 (FC) [*Kanesharan*], for example, Article 1E was found not apply because the UK Home Office could, at its discretion, remove individuals to their country of nationality. Along similar lines, Article 1E did not apply in *Choezom v Canada (Minister of Citizenship and Immigration),* 2004 FC 1329 [*Choezom*], where the claimant's status was subject to the sufferance of the third country. And in *Hurt v Minister of Manpower & Immigration*, [1978] 2 FC 340 (FCA), the claimant was not excluded because his status in the third country at issue was only temporary.

[19] Regarding the criterion of "the right of return", in *Mahdi v Canada (Citizenship and Immigration),* [1994] FCJ No 1691 (FC) [*Mahdi*], this Court found the Board erred in excluding a claimant when the evidence suggested there was no right of return, a decision that was upheld on appeal (*Mahdi v Canada (Minister of Citizenship and Immigration)*, [1995] FCJ No 1623).

[20] In each of the cases of this Court cited above, Article 1E exclusion did not apply because the claimant's status was vulnerable, conditional, or temporary: none enjoyed durable permanent status.

[21] In light of all the above, I find that the Board applied the correct test, as articulated by the FCA in *Zeng* and previously by this Court in *Shamlou*. This includes the interpretation that the protection against deportation need not be absolute, for I do not agree with the Applicants that such an extension of the principles enunciated in the *Zeng* and *Shamlou* tests would be correct. Certain conditions may properly limit the Applicants' unlimited status, including failing to abide by the conditions of permanent residency. Only where there is an inherent vulnerability or transience to their status will exclusion not apply, such as occurred to the claimants in *Choezom*, *Hurt*, *Kanesharan* and *Mahdi*.

[22] The UNHCR Handbook that the Applicants rely on, while a useful interpretative tool, is not determinative of Canadian refugee law (see, for instance, *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982 at para 53-54; *Chan v Canada (Minister of Employment and Immigration),* [1995] 3 SCR 593 at para 46). In my view, the plain text of the provision indicates that individuals will not be excluded if their status in the third country confers something less than the basic rights afforded to nationals, and I would not go so far as to state that Canadian law interprets 'nationality' in Article 1E as citizenship. Article 1E does not state that excluded claimants must become nationals in the true legal sense: rather, they need only have rights and obligations "attached to nationality". Considering all of the commentary above, this should be read to mean "analogous to" the rights and obligations of nationals, which

translates, generally, to permanent residency, the status that has been recognized by the jurisprudence as satisfying Article 1E. If the drafters of the Refugee Convention intended to say that the claimant obtained actual nationality or citizenship in the third country, they would have said so in plain language.

[23] Given that I find no error in the Board's characterization of the exclusion test, I now turn to its application to the factual underpinning of this case. I find the Board's conclusions in light of the evidence to be reasonable.

[24] The Applicants did not provide any evidence to meet their burden to demonstrate that they had lost status in Italy. The fact that they have been outside the European Union for far more than 12 months (and had been at the time of the hearing) does not mean that they have lost their status. The Board addressed this issue, acknowledging the inconsistency in the documentary evidence between the Canadian Embassy's March 2012 opinion, and the more recent (2013 and 2015) evidence confirming that revocation is discretionary, not automatic – information which was obtained from Italian police and consular officials. It is not my role to reweigh the evidence, and I find that this outcome was open to the Board.

[25] On the question of whether the Board erred in finding that the Applicants' status in Italy was substantially similar to that of nationals, the law does not require parity between citizens and permanent residents. As discussed above, the exclusion article referenced in *IRPA* does not necessitate that claimants must have absolute protection from deportation from the third country. Indeed, not even Canadian permanent residents benefit from such an elevated level of protection.

[26] Instead, the evidence in this case showed the Applicants held the equivalent of European Commission long-term resident status and therefore met the key *Shamlou* criteria:

> The State Police website indicates that individuals holding an EC Long-Term Residence Permit are entitled to enter Italy without a visa, to work, to have access to social benefits and services provided by the Italian government, and to "participate in local public life" (Italy 29 Mar. 2010). The Ministry of Interior's Staying in Italy Legally indicates that foreign nationals with a valid residence permit are granted the same education rights as Italian citizens (ibid. n.d., 21). The same source indicates that foreign nationals with a "regular residence permit" are required to register with the National Health Service (Servizio Nazionale, SSN), and are entitled by law to receive health care and have "equal treatment as Italian citizens regarding compulsory contributions, health care given in Italy by the SSN and its time limit" (CTR, p 17).

[27] According to these findings, under their Italian status, the Applicants held the right to work without restrictions, to study, to fully access social services, and to return to the country. Indeed, the Principal Applicant conceded during the hearing that he had all the formal rights of an Italian citizen except the right to vote and the right to a passport (CTR, pp 8, 714). In short, the Applicants possess the four basic *Shamlou* rights and the right to reside for an unlimited period of time; unlike in *Mahdi*, the evidence does not disclose a serious possibility, let alone a probability, that the Applicants have no right of return.

[28] Furthermore, there is neither evidence to suggest that the Applicants would face deportation nor are the conditions attached to the Applicants' permits (to avoid committing a serious crime and to avoid leaving the European Union for more than a year) due to any inherent vulnerability of their status. It remained within the control of the Applicants to abide by the conditions of their status. The test is not whether the person has exactly the same rights as a citizen of the country, but whether their status is substantially similar to that of a national (see

Zeng at para 28). Here, the Applicants had status substantially similar to that of Italian nationals and it was therefore open for the Board to arrive at its conclusion.

[29] I would also note that two recent cases decided by this Court are supportive of this conclusion within the context of the same status as these Applicants (hold PSI Cards issued by Italy). First, in *Omorogie v Canada (Citizenship and Immigration)*, 2015 FC 1255, Justice O'Keefe upheld a decision where the claimants unsuccessfully argued that they lost their permanent status in Italy. This Court found, in light of the inconsistent evidence as to whether the applicants would automatically lose their permanent residence after one year outside of Italy, that it was reasonable for the RPD to prefer the evidence that revocation is not automatic.

[30] Second, in *Tota v Canada (Citizenship and Immigration)*, 2015 FC 890, Justice Boswell upheld a decision where the claimant argued that the Refugee Appeal Division [RAD] had failed to consider that his status would be subject to revocation if he no longer met the permanent residency requirement, and also failed to consider that he had no right to social assistance or to study in Italy. Justice Boswell found that the RAD reasonably determined the claimant had the requisite status in Italy, and that there was no evidence before the RAD to indicate that such status could not be renewed or that the claimant's current status had been lost.

[31] In this case, it was equally incumbent on the Applicants to bring evidence that they could not renew their status in Italy, and/or had lost their right of return. They brought neither. The Board's determination on this point was reasonable, and again, per *Dunsmuir*, it is not my role to reweigh the evidence to arrive at a different conclusion.

[32] Finally, I find that the Board's protection findings vis-à-vis Italy were reasonable as well, even though Applicants' counsel referred to them as *obiter*.

III. CONCLUSION

[33] For the reasons above, the application for judicial review is dismissed.

IV. QUESTION FOR CERTIFICATION

[34] The Applicants asked that the following question be certified:

> Given that Article 1E is exceptional in nature, and *Shamlou* has held that it includes the ability to return to the country in question, must the ability to return be absolute, or is it satisfactory for it to be discretionary?

[35] I do not find this proposed question meets the criteria for certification because the right to return is necessarily included in the *Zeng* test, as well as the various authorities which have adopted the *Shamlou* criteria.

[36] Rather, what is key to this decision — and many other Article 1E decisions — is the *nature* of the rights attached to nationality of the third country. Therefore, the more relevant question is the following:

> Does Article 1E of the Refugee Convention, as incorporated into *IRPA*, apply if a claimant's third country residency status (including the right to return) is subject to revocation at the discretion of that country's authorities?

[37] I agree to certify this question, as it (i) is dispositive of the appeal and (ii) transcends the interests of the immediate parties to the litigation, and contemplates issues of broad significance or general importance (*Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168 at para 9).

JUDGMENT

THIS COURT'S JUDGMENT is that

1. This application for judicial review is dismissed.

2. The following question is certified:

   Does Article 1E of the Refugee Convention, as incorporated into *IRPA*, apply if a claimant's third country residency status (including the right to return) is subject to revocation at the discretion of that country's authorities?

3. There is no award as to costs.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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