Federal Court Cour fédérale

Date: 20210826

Docket: IMM-7738-19

Citation: 2021 FC 888

Ottawa, Ontario, August 26, 2021

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

OMAR MOHAMED KEDIYE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Mr. Kediye applied for refugee status abroad. A visa officer denied his application, finding that Mr. Kediye had a durable solution in Italy, where he currently resides. Mr. Kediye now seeks judicial review of this decision.

[2] I am allowing Mr. Kediye's application. The officer reasonably found that Mr. Kediye's *protezione sussidiaria* (subsidiary protection) status is similar to refugee status. However, the

officer unreasonably failed to consider Mr. Kediye's individual circumstances in assessing whether he has a durable solution.

I. Background

[3] Mr. Kediye is a citizen of Somalia. He comes from a region controlled by Al-Shabab militants. He alleges that Al-Shabab thought he was a spy for the central government because he travelled to Mogadishu on a number of occasions. For this reason, in 2014, an Al-Shabab "court" sentenced him to death. Before the sentence was carried out, however, he was able to escape from the makeshift prison where he was held. He fled his country and travelled through Africa, eventually making his way to Libya. After staying in Tripoli for over a year, he crossed the Mediterranean to land in Italy, where he claimed refugee status.

[4] In 2016, the Italian authorities denied Mr. Kediye's claim for refugee status, because he did not testify in a credible manner. Nevertheless, given the danger to which he would be exposed if returned to Somalia, he was granted *protezione sussidiaria*, or subsidiary protection. The precise nature of this status will be analyzed below. Mr. Kediye has remained in Italy ever since.

[5] In 2017, a group of five Canadian permanent residents made an application to sponsor Mr. Kediye as a Convention refugee abroad. After the sponsors were approved, the file was sent to the Canadian embassy in Rome, to determine whether Mr. Kediye qualified as a Convention refugee abroad.

[6] According to section 139(1)(d) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations], a person who has a durable solution in another country cannot be granted protection. After an initial review of the file, a visa officer sent Mr. Kediye a procedural fairness letter, explaining that he may not be eligible given that he seemed to have a durable solution in Italy, and asking him to provide a response.

[7] Mr. Kediye's response invited the officer to look at the reality of his situation, beyond his formal status in Italy. He described living arrangements that appear to be those of a shelter where he was residing with other migrants. He continued:

> As an immigrant, I have no right to a home, to receive an education, to medical care, to welfare or pension coverage benefits, and I cannot be entered on the rolls of the resident population.
>
> What is more, as soon as I am granted a residence permit, I would lose the right to sleep in the shelters for new arrivals, meaning I must find a place to sleep in one of the train or bus stations.
>
> As for work, the only jobs I can hope to get, as a third-world immigrant, are menial, unskilled tasks that are often unhealthy and underpaid. Working off the books is a condition that immigrants to Italy frequently have to accept, and that means no legal or medical safeguards.
>
> […]
>
> Finally, I wish to make clear that I have no other family members in Italy, I live by myself, sleeping in makeshift accommodations or at train stations.

[8] On September 17, 2019, the officer denied Mr. Kediye's application, because he had a durable solution in Italy. In his reasons, the officer summarized Mr. Kediye's response. He continued as follows:

> With PA's Permesso di Soggiorno per Protezione Sussidiaria, PA has stated that he does not have access to health care, education, or a home, however the rights of a holder of a Permesso di Soggiorno per Protezione Sussidiaria include the right to access shelters, ability to work, access to the Italy health care system, education system and welfare system. They also have the right to an Italian identity card. Holders of this type of status are also eligible to family reunification. The status Protezione Sussidiaria is a renewable 5 year status, which, after 10 years, renders PA eligible to apply to Italian citizenship. Further, after 5 years, PA can apply to work or study in other EU countries. While applicant has stated that his convention refugee claim was denied and that for this reason he does not have a durable solution in Italy, PA was granted status under another category which is for applicants who cannot return to their home countries for fear of serious harm (death, torture, serious threat). Like the Asilo class, this status has pathway to Italian citizenship and access to social services and employment market in the meantime. I have reviewed the considerations above, and the socio-political context that PA has described in his submission. While there are some example of challenges to integration by asylum seekers, refugees and other immigrants in Italy, Italy also has many examples of successful integration and the legislative framework for access to services and a durable solution.

[9] In response to Mr. Kediye's assertion that *protezione sussidiaria* is a temporary status and cannot constitute a durable solution, the officer noted:

> While PA states that this is a temporary status, the permesso di soggiorno issued to convention refugees has similar conditions; issued for 5 years, renewable.

[10] Mr. Kediye now seeks judicial review of the officer's negative decision.

II. Analysis

[11] The requirement that is at the forefront of this case is laid out by section 139(1) of the Regulations, which reads as follows:

139 (1) A permanent resident visa shall be issued to a foreign national in need of refugee protection, and their accompanying family members, if following an examination it is established that:	**139 (1)** Un visa de résident permanent est délivré à l'étranger qui a besoin de protection et aux membres de sa famille qui l'accompagnent si, à l'issue d'un contrôle, les éléments suivants sont établis :
[…]	[…]
(d) the foreign national is a person in respect of whom there is no reasonable prospect, within a reasonable period, of a durable solution in a country other than Canada, namely	**d)** aucune possibilité raisonnable de solution durable n'est, à son égard, réalisable dans un délai raisonnable dans un pays autre que le Canada, à savoir :
(i) voluntary repatriation or resettlement in their country of nationality or habitual residence,	**(i)** soit le rapatriement volontaire ou la réinstallation dans le pays dont il a la nationalité ou dans lequel il avait sa résidence habituelle,
(ii) resettlement or an offer of resettlement in another country; […]	**(ii)** soit la réinstallation ou une offre de réinstallation dans un autre pays; […]

[12] There is no precise definition of a durable solution: *Al-Anbagi v Canada (Citizenship and Immigration)*, 2016 FC 273 at paragraph 17 [*Al-Anbagi*]. Nonetheless, as explained below, determining whether a durable solution exists involves both a legal and a factual inquiry.

[13] Mr. Kediye's challenge to the officer's decision pertains to both aspects. He argues that the officer misapprehended his legal status in Italy and failed to consider his actual living conditions. While I disagree with the first prong of Mr. Kediye's submissions, I concur with the

second prong: the decision evinces no meaningful consideration of Mr. Kediye's individual circumstances.

A. *Durable Solution and Legal Status*

[14] Mr. Kediye's first ground of judicial review is that the officer unreasonably relied on his *protezione sussidiaria* status (subsidiary protection) to find that he had a durable solution in Italy. He argues that contrary to refugee status, subsidiary protection is temporary and cannot ground a durable solution.

[15] To assess this argument, it is useful to begin by explaining what is meant by subsidiary protection. The *Convention Relating to the Status of Refugees* (28 July 1951, 189 UNTS 150) [the Refugee Convention] protects against persecution based on certain enumerated grounds. Convention refugees may not be removed to their country of origin: this is the principle of *non-refoulement*. The Refugee Convention also requires States to treat refugees like their own nationals with respect to issues such as education, health services, work, and so forth.

[16] Over the years, however, it became apparent that removing persons not recognized as refugees to their countries of origin could result in serious breaches of human rights, if this would expose them, for example, to a risk of torture or a risk to their lives. Regimes for the protection of these categories of persons are called subsidiary or complementary protection: Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford: Oxford University Press, 2007). Canada implements subsidiary protection through section 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act]. Persons protected pursuant to section 97

have the same rights as refugees. Other countries, however, may or may not grant similar rights to refugees and beneficiaries of subsidiary protection.

[17] With this in mind, we may now turn to the officer's decision. The reasonableness of a decision must be assessed in light of the evidence and arguments put to the decision-maker. As the Supreme Court of Canada wrote in the seminal case of *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paragraph 127 [*Vavilov*]: "an administrative decision maker's reasons [must] meaningfully account for the central issues and concerns *raised by the parties*" [emphasis mine]. Thus, a decision is not unreasonable for failing to address arguments that were not initially put forward: *Grillo v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 343 at paragraph 2. For this reason, we need to review what Mr. Kediye told the officer with respect to the rights flowing from his *protezione sussidiaria* status.

[18] In his initial application, Mr. Kediye's stated that he failed to obtain refugee status and that his status in Italy was temporary. With respect to the rights flowing from his status, he wrote that, "My status legally allows me to work but companies don't give jobs to people like me." Mr. Kediye then received a procedural fairness letter indicating that the officer was concerned that his *protezione sussidiaria* status constituted a durable solution in Italy. In answering this letter, Mr. Kediye did not directly address this concern. Rather, he argued that his formal status "did not reflect the reality of the situation." The bulk of his response consists of a description of the dire living conditions of immigrants in Italy. While he states that he has "no right to a home, to receive an education, to medical care, to welfare or pension coverage benefits," this appears to be a description of his factual situation and not his formal legal rights.

[19] As we saw above, the officer found that *protezione sussidiaria* afforded Mr. Kediye the same rights as a Convention refugee. To reach this conclusion, it is obvious that the officer must have relied on his personal knowledge of Italian refugee law. Visa officers in embassies abroad are entitled, even required, to rely on their knowledge of local conditions, including the rights afforded to refugees: *Saifee v Canada (Citizenship and Immigration)*, 2010 FC 589 at paragraphs 28–32; *Bahr v Canada (Citizenship and Immigration)*, 2012 FC 527 at paragraphs 41–42; *Yuzer v Canada (Citizenship and Immigration)*, 2019 FC 781 at paragraphs 17–18.

[20] On judicial review, an applicant bears the onus of showing that the decision is unreasonable: *Vavilov*, at paragraph 100. Yet, Mr. Kediye did not show that the officer's finding is contrary to the evidence he provided. Given the manner in which Mr. Kediye presented his case, the officer was entitled to prefer his own understanding of Italian law to Mr. Kediye's assertions that his status was temporary or that he was factually prevented from enjoying the rights attached to this status. There is simply nothing to suggest that the officer's conclusions regarding Mr. Kediye's status were wrong.

[21] Mr. Kediye sought to rely on certain documents found in the National Documentation Package [NDP] regarding Italy maintained by the Immigration and Refugee Board. These documents, however, do not pertain to *protezione sussidiaria*, but to other forms of status that are not relevant for our purposes. Mr. Kediye has not directed my attention to anything in the NDP that has any bearing on the officer's findings.

[22] At the hearing before me, Mr. Kediye expressed the concern that the temporary nature of his status meant that he could be sent back to Somalia if the circumstances there change. Again, there is no basis for challenging the officer's conclusion that Mr. Kediye's status was comparable to refugee status and gave a path to citizenship. Thus, nothing supports Mr. Kediye's concern.

[23] Lastly, Mr. Kediye argued that the officer should have given more fulsome reasons for his findings, including precise references to the relevant Italian statutory provisions. He relied on *Vavilov*, at paragraph 135, for the proposition that there is a more stringent requirement to give reasons where important interests of vulnerable individuals are at stake.

[24] Reasons, however, must be responsive to the evidence and arguments put forward by the applicant. They need not deal with issues that were not in dispute. In his answer to the procedural fairness letter, Mr. Kediye did not suggest that the officer's concerns were based on a misreading of Italian law. Thus, in his decision, the officer did not have to engage in a detailed analysis nor to provide references to precise statutory provisions.

B. *Durable Solution in Fact*

[25] Beyond legal status, Mr. Kediye also argues that the officer failed to appreciate that he has no durable solution in fact in Italy. The actual living conditions of migrants in that country would effectively preclude their successful integration.

[26] Indeed, this Court's case law lends support to the idea that a durable solution involves both a legal and a factual component. In *Al-Anbagi*, Justice René LeBlanc, then a member of this Court, relied on a departmental manual as well as the United Nations High Commissioner for Refugees Handbook to conclude that an officer must have regard to country conditions as well as an applicant's individual circumstances to determine whether a durable solution exists.

[27] In *Anku v Canada (Citizenship and Immigration)*, 2021 FC 125 [*Anku*], my colleague Justice Christine Pallotta allowed an application for judicial review of a visa officer's decision that the applicant had a durable solution in Ghana. The officer had noted that the applicant, a citizen of Togo, had obtained refugee status in Ghana, but failed to renew it. In spite of this, the applicant had brought evidence of the obstacles he faced in obtaining rights and benefits similar to those of Ghanaian citizens. At paragraph 30, after citing *Al-Anbagi*, my colleague concluded as follows:

> In the present case, the Officer appears to have disregarded relevant evidence, and instead relied on generalizations regarding the applicants' ability to access certain services and the authorities' willingness to assist them. As such, in my view, the Officer's reasons are unreasonable.

[28] The Minister drew my attention to three cases in which this Court upheld determinations that persons who had obtained refugee status in South Africa had a durable solution in that country: *Hafamo v Canada (Citizenship and Immigration)*, 2019 FC 995; *Abdi v Canada (Citizenship and Immigration)*, 2016 FC 1050; *Uwamahoro v Canada (Citizenship and Immigration)*, 2016 FC 271. See also *Dusabimana v Canada (Citizenship and Immigration)*, 2011 FC 1238; *Gebreselasse v Canada (Citizenship and Immigration)*, 2021 FC 865. It is true that the applicants in these cases had obtained refugee status and that this was a highly relevant

consideration for finding that they had a durable solution. Nonetheless, in each case the Court pointed out that the officer had examined the personal circumstances of the applicants and their actual integration in South Africa.

[29] In the present case, in contrast, the officer simply refused to engage in any meaningful way with Mr. Kediye's allegations regarding his living conditions. The only substantive reason given by the officer is that subsidiary protection in Italy offers rights similar to refugee status. Even if this finding is reasonable, this does not end the matter. As in *Anku*, the officer had to assess whether Mr. Kediye could in fact successfully integrate in Italy.

[30] Only two passages of the officer's reasons touch upon Mr. Kediye's allegations regarding his actual situation. The first one responds to the allegations regarding the xenophobic statements made by then Minister of the Interior Salvini. The officer simply wrote:

> I note that full articles were not provided and therefore it does not show if the writers also show other opinions or reactions to the situations or statements highlighted by the applicant.

[31] I pause to note that this is factually incorrect. The title of one of the articles included a quote from French President Macron, who declared that Minister Salvini was his enemy. The problem, however, is deeper. The officer's comments evince an unwillingness to address the substance of Mr. Kediye's submissions. It is difficult to believe that a visa officer posted in Rome would need to see full newspaper articles to be made aware of the stance of one of the country's main political figures regarding immigration. As I mentioned above, visa officers are presumed to have a certain degree of local knowledge. Dismissing Mr. Kediye's concerns on

such a purely formal ground can only be interpreted as the officer's refusal to deal with the substance of the submissions.

[32] The officer's other comment related to Mr. Kediye's submissions regarding his living conditions. It was quoted above and I reproduce it for ease of reference:

> While there are some example of challenges to integration by asylum seekers, refugees and other immigrants in Italy, Italy also has many examples of successful integration and the legislative framework for access to services and a durable solution.

[33] Such a boilerplate statement is insufficient where the officer must review the applicant's individual circumstances: see, by way of analogy, *Aguirre Renteria v Canada (Citizenship and Immigration)*, 2019 FC 134 at paragraph 4. Merely stating that there are good and bad cases does not tell us whether the officer thinks Mr. Kediye's case is a good or a bad one. The only inference that can be drawn is that the officer did not believe Mr. Kediye's individual circumstances were relevant.

[34] The Minister argues that Mr. Kediye did not provide enough evidence for the officer to make a decision regarding his individual circumstances. It may be true that some passages of Mr. Kediye's response were ambiguous and could be interpreted as a description of either the living conditions of migrants generally or the specific shelter where Mr. Kediye is residing. But this misses the point. The officer was clearly of the view that Mr. Kediye's actual living conditions were irrelevant to the durable solution issue.

[35] Thus, the officer failed to consider the evidence and make findings with respect to a crucial component of the durable solution concept, namely, Mr. Kediye's individual circumstances pertaining to his integration in Italy. This renders the decision unreasonable.

III. Disposition

[36] As the officer's decision is unreasonable, I will allow Mr. Kediye's application for judicial review. The decision will be quashed and the matter will be sent back to a different officer for redetermination.

JUDGMENT in IMM-7738-19

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed.
2. The decision made by a visa officer on September 17, 2019 with respect to the applicant is quashed.
3. The matter is sent to a different visa officer for reconsideration.
4. No question is certified.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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