Federal Court Cour fédérale

Date: 20220608

Docket: IMM-7840-21

Citation: 2022 FC 859

Ottawa, Ontario, June 8, 2022

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

VITALIS MBAH NANKOBE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is a judicial review application from a decision of the Refugee Appeal Division (RAD) that concluded that the Applicant is neither a Convention refugee nor a person in need of protection. The judicial review application is made pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act].

[2] According to the RAD, the Applicant is excluded from the protection of the refugee regime by operation of section 98 of the Act which reads:

Exclusion – Refugee Convention	**Exclusion par application de la Convention sur les réfugiés**
98 A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.	**98** La personne visée aux 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.

[3] Section E of Article 1 of the United Nations *Convention Relating to the Status of Refugees* reads as follows:

E 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.	**E** Cette Convention ne sera pas applicable à une personne considérée par les autorités compétentes du pays dans lequel cette personne a établi sa résidence comme ayant les droits et les obligations attachés à la possession de la nationalité de ce pays.

I. The facts

[4] The Applicant is a citizen of Cameroon. As a member of the Southern Cameroon National Congress, he claimed that he was persecuted because of his political opinions. He fled to Italy where he received refugee protection in 2008. He returned to Cameroon in 2011, having been advised that his agent of persecution had passed away. He stayed in his country of

nationality until 2014, when he left for Sweden where he lived until June 2018. It appears that he studied and worked in Sweden.

[5] He returned to Cameroon in June 2018 where he claims that he was harassed and arrested for his political activities. Charged in August 2018 with secession, he fled to the United States in September 2018 and crossed the border into Canada on September 13, 2018. A refugee claim followed on September 17, 2018.

[6] The Minister of Public Safety and Emergency Preparedness intervened and argued that Article 1E operated to deny access to the refugee regime.

II. The decision under review

[7] Both the Refugee Protection Division (RPD) and the RAD found that Article 1E had application. It is the RAD decision that is before the Court on judicial review.

[8] Before reaching the decision under review, it is necessary to have an understanding of the decision appealed to the RAD.

[9] The RPD found that the Applicant was barred from seeking refugee status by the operation of Article 1E because he had permanent resident status in Italy, the country to which he found refuge in 2008. It also concluded that a refugee in Italy has substantially the same rights as an Italian citizen (except for the right to vote and being elected for public office).

[10] Furthermore, the expiration of a renewable card, as those issued by Italian authorities to the Applicant, does not bring the status to an end. Thus, when the Applicant came to Canada in September 2018, he held a valid resident permit in Italy. The *Permesso di Soggiorno* issued in favour of the Applicant in 2014 and valid until 2019 is confirmation that the Applicant's status in Italy continued well after he had left the country in 2011.

[11] The RPD found that it was for the Applicant to renew his status in Italy or establish that it cannot be renewed. For the RPD, the existence of a card is merely the representation of legal standing in Italy. In fact, the desire to abandon the protection status in Italy does not result in the permanent resident status being lost. Rather, says the RPD, the evidence shows that the status revocation is not automatic because of an extended absence from the country. There appears to be a process which calls for the person to be given an opportunity to be heard before there can be revocation of status. It would have been for the Applicant to show that there has been such process in his case. There is no evidence that such procedures were ever initiated.

[12] The Applicant's whole case before the RAD turned on his status in Italy. He contends that he was a temporary resident in Italy. In submissions that run for more than 20 pages, the Applicant's then counsel argued that his client was a temporary resident. His whole argument seemed to be encapsulated in the following passage taken from paragraph 5 of the written case before the RAD:

> 5 … Given he was never a permanent resident of Italy, but only a temporary resident, he could not be excluded from refugee protection by operation of section 98 IRPA and Article 1E unless the Tribunal clearly articulated that it was analyzing the rights and obligations of a "temporary permit holder" in Italy and/or the rights of a Italian convention refugee – whether those rights were

> equivalent to the rights of a national and analyzed the evidence related thereto. The Tribunal never properly grappled with that issue since it **mistakenly thought** the claimant had testified he had permanent residence status and never came to grips with the Response to Information Request information ITA 104045.E before it on the difference between temporary and permanent resident status holders, given the Tribunal appears to have failed to mark it as an Exhibit although it stated all documents before it were in evidence. In addition it never addressed the documents related to the issue of the difference between the status of a convention refugee in Italy and someone who had a permanent status in Italy.

I note that the Applicant raised before the RAD that he did not have status in Italy which conferred on him rights substantially similar to those of Italian nationals.

[13] It will therefore be understood that the decision under review, that of the RAD, was exclusively in response to the case put forth by the Applicant.

[14] A large part of the submissions made to the RAD (the RAD proceeds without a hearing (subsection 110(3) of the Act, except in the circumstances described at subsection 110(6)) concerned a Response to Information Request ITA 104045.E (RIR ITA 104045.E) which, according to the Applicant, favoured his position that the resident permit he received as a refugee in Italy was temporary.

[15] The RAD found that the RPD ought to have considered more fully RIR ITA 104045.E. However, it also found that that error could be corrected as part of its own decision. Thus, the RAD finds “that the RPD correctly concluded that the Permesso Di Soggiorno conferred to the

Appellant a permanent residence status with substantially the same rights as an Italian citizen, except for voting or being elected to public office" (RAD decision, para 6).

[16] In effect, the RAD considered another Response to Information Request, which came three years after RIR ITA 104045.E, to confirm that the *Permesso di Soggiorno* which was given to the Applicant is the same as the EC Residence Permit for Long-Term Residents, which is indefinite. That particular RIR bears the number ITA 105009.E and was issued on March 6, 2015.

[17] The information provided in 2015 in what became ITA 105009.E is preferred to the information relied on by the Applicant (ITA 104045.E of April 23, 2012). Both responses to information requests seek to address Italian residence permits, but RIR of 2015 is viewed as an update obtained from an official at the Embassy of Italy in Ottawa.

[18] The RAD was satisfied that the "*Permesso di Soggiorno illimitata*" is the same as the "EC Residence Permit for Long-Term Residents", as stated in RIR 105099.E. That EC Residence Permit is said to be valid for an indefinite period. The RAD's reasoning is found at paragraphs 20 to 22 of its decision. Instead of offering a paraphrase, I reproduce the paragraphs:

> [20] Item 3.7 indicates that the embassy official "clarified that the *Permesso di Soggiorno illimitata* is the same as the EC Residence Permit for Long-Term Residents." It further indicates that "There have been two formats of the EC Residence Permit for Long-Term Residents; the first format, which was first issued in 2007, did not include the term *illimitata* on the card."
>
> [21] Therefore, I find that all the evidence pertaining to the EC Residence Permit for Long-Term Residents is relevant to the situation of the Appellant, as, despite the fact that his *Permesso di*

> *Soggiorno* card did not include the term *illimitata*, it confers the same rights.
>
> [22] Item 3.7 goes on to say that "The official at the Embassy of Italy in Ottawa noted that the EC Long-Term Residence Permit is a permanent document and that it does not expire (Italy 24 Feb. 2015). A document issued by the Ministry of Interior of Italy entitled Staying in Italy Legally similarly states that the EC Long-Term Residence Permit is valid for an indefinite period, although it notes that, in order to be valid as a personal identification document, it must be renewed with a new photo after five years."

[19] Hence, the RAD concluded that, on a balance of probabilities, the Applicant had not lost his indefinite status in Italy. The card issued to him did not have the word "*illimitata*", but on the basis of ITA 105099.E, the RAD was satisfied that it did not have to be. That makes the RAD state that in view of the fact that no notice, as required by the Italian procedure, having been given to the Applicant that revocation of his refugee status was initiated, he still benefit from the equivalent of the EC Long-Term Residence Permit. That status confers substantially the same rights as an Italian citizen.

III. Arguments and analysis

[20] No one disputes that the standard of review in this case is reasonableness (*Obumuneme v Canada (Citizenship and Immigration)*, 2019 FC 59; *Tesfay v Canada (Citizenship and Immigration)*, 2021 FC 497). The Respondent is right that the reasonableness standard of review carries consequences for an applicant. First and foremost perhaps is the fact that it is the Applicant who carries the onus of showing that the decision under judicial review is unreasonable (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 100). It is said that the hallmarks of reasonableness are justification,

transparency and intelligibility, and "whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99). The reviewing courts are instructed to start from the principle of restraint and to adopt a posture of respect (*Vavilov* at paras 13 and 14).

[21] On the other hand, reasonableness review considers the outcome of the administrative decision as well as how the decision was reached. As the Supreme Court put it in *Vavilov*, administrative decision makers must adopt a culture of justification.

[22] In the case at bar, the Applicant, who is a litigant-in-person before this Court, made submissions which were, for all intents and purposes, variations on one theme: he was only a temporary resident of Italy. He repeats that the administrative decision maker "assumed" that he was a permanent resident. In order to dispute the decision, he relies on his affidavit and testimony before the RPD.

[23] The Applicant seems to believe that a reviewing court can substitute its appreciation of the merits of his case for that of the administrative decision maker. Such is evidently not the case. On the contrary, the Applicant had to engage with the decision in order to show that it was unreasonable, as opposed to arguing that he was right that his status in Italy was temporary. Instead of stating, the Applicant had to demonstrate, which was not done.

[24] Instead of demonstrating that the interpretation given to ITA 105099.E was unreasonable, the Applicant moved from his statements that he had only a temporary status in Italy to

discussing, on the basis of a report from Médecins Sans Frontières, that the conditions in Italy are inhumane and degrading for refugees. That is not an issue that a reviewing court can and should consider as it was not before the RAD which, evidently, could not rule on it, assuming of course that it could be relevant to a decision on section 98 of the Act because it could tend to show that basic services for refugees in Italy are lacking. As I understand it, the Applicant raises for the first time not that refugees in Italy do not have substantially the same rights as Italian citizens, but rather that services for refugees in Italy are dearly lacking. Since this was not raised before the RAD, this is not a matter that is properly before a reviewing court. Nevertheless, I note that issues of that nature, supported by evidence, may be presented before other instances in the immigration process if the Applicant seeks other remedies.

[25] Similarly, the Applicant raised in his written case before this Court arguments which could be part of an application based on humanitarian and compassionate grounds. Thus, he advised the Court of his establishment in Canada, where he has more robust ties than what he has in Italy. As a matter to be considered on whether the Applicant is excluded from the refugee regime in Canada, these considerations are not relevant. At any rate they were not before the RAD, and they are not before this Court either. As the Court tried to explain during the hearing, a reviewing court is limited to the decision rendered by an administrative decision maker. Different and new issues cannot validly be dealt with because of the limits put on judicial review.

[26] The standard of reasonableness which governs has not been met. I have found myself unable to conclude that the Court could intervene. The Applicant simply did not demonstrate that

the decision of the RAD was unreasonable, as was his burden. Merely repeating that his status in Italy was temporary is insufficient to challenge successfully the reasoning of the decision maker.

IV. Conclusion

[27] That is not to say that the matter was crystal clear. There was no expert evidence that was offered in this case after the Minister chose to intervene. The parties relied on Responses to Information Requests that left a lot to be desired as they were ambiguous and probably incomplete. There was no exposé about residence permits in Italy such that a more comprehensive picture could emerge. Indeed, it is unclear why the Canadian Embassy in Italy could not be put to contribution. The lack of clarity as to the various residence permits in Italy makes the Court unable to conclude that the RAD erred unreasonably without an argument, let alone a convincing argument, by he who carries the burden. Accordingly, the onus on the Applicant to demonstrate his absence of status was not discharged, which must result in the judicial review application being dismissed.

[28] The Applicant suggested a question to be certified in accordance to section 74 of the Act. The proposed question reads:

> Should Article 1E apply to refugees who risk harm or persecution in their first country of asylum?

[29] The conditions for submitting a certified question to the Court of Appeal were not met. There are several decisions of the Federal Court of Appeal which set the requirements for a question to be certified in accordance with section 74. In *Lewis v Canada (Public Safety and*

Emergency Preparedness), 2017 FCA 130, [2018] 2 FCR 229, the Court provides in one paragraph the essence of those requirements:

> [36] The case law of this Court establishes that in order for a question to be properly certified under section 74 of the IRPA, and therefore for this Court to have jurisdiction to hear an appeal, the question certified by the Federal Court must be dispositive of the appeal, must transcend the interests of the parties and must raise an issue of broad significance or general importance. In consequence, the question must have been dealt with by the Federal Court and must necessarily arise from the case itself (as opposed to arising out of the way in which the Federal Court may have disposed of the case): *Zhang v. Canada (Citizenship and Immigration)*, 2013 FCA 168 at para. 9, 446 N.R. 382; *Varela v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145 at paras. 28-29, [2010] 1 F.C.R. 129; *Canada (Minister of Citizenship and Immigration) v. Zazai*, 2004 FCA 89 at paras. 11-12, 318 N.R. 365 [*Zazai*]; and *Liyanagamage v. Canada (Secretary of State)*, 176 N.R. 4 at para. 4, [1994] F.C.J. No. 1637 (F.C.A.).

Here, what is now raised by the Applicant cannot be dispositive and it was not dealt with and, indeed, could not have arisen from the case itself.

[30] The issue that would be the subject of the proposed question was never raised before the RAD. The issue was the exclusion of the Applicant from applying for refugee status or a person in need of protection by operation of section 98 of the Act. It follows that the new issue cannot be validly raised on judicial review since the Court is considering the legality of the decision of the administrative tribunal. That is not an issue that should be considered by this Court, and it was not considered (*Delios v Canada (Attorney General)*, 2015 FCA 117 at paras 41-42).

[31] The Federal Court of Appeal decided that much in a recent decision. In *Goodman v Canada (Public Safety and Emergency Preparedness)*, 2022 FCA 21, 95 Admin. L.R. (6th) 180, the Court wrote:

> [4] The issues with respect to section 2(e) of the Bill of Rights should not have been considered by the Federal Court as they were barred from judicial review. Indeed, *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, counsels us against accepting issues on judicial review that were not raised before the administrative decision-maker. Therefore, the section 2(e) issues had to be raised before the administrative decision-maker (*Okwuobi v. Lester B. Pearson School Board*; *Casimir v. Quebec (Attorney General)*; *Zorrilla v. Quebec (Attorney General)*, 2005 SCC 16, [2005] 1 S.C.R. 257; *Landau v. Canada (Attorney General)*, 2022 FCA 12) who is the merits-decider under this legislative regime. However, even if the said issues were not raised before the administrative decision-maker, we are all of the view that they had no legal merit for essentially the same reasons given by the Federal Court. The intervention of this Court is therefore not warranted.
>
> [My emphasis.]

[32] Counsel for the Respondent did not have a suggestion for a question to be certified. Accordingly, there is no question that ought to be stated pursuant to section 74 of the Act.

JUDGMENT in IMM-7840-21

THIS COURT'S JUDGMENT is:

1. The judicial review application is dismissed.

2. There is no question to be certified pursuant to section 74 of the Act.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7840-21
STYLE OF CAUSE:	VITALIS MBAH NANKOBE v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	MAY 16, 2022
JUDGMENT AND REASONS:	ROY J.
DATED:	JUNE 8, 2022

APPEARANCES:

Vitalis Mbah Nankobe	FOR THE APPLICANT (SELF-REPRESENTED)
Edward Burnet	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT