Federal Court  Cour fédérale

Date: 20221020

Docket: IMM-5025-21

Citation: 2022 FC 1436

Ottawa, Ontario, October 20, 2022

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

FANTAHUN AYALEW MULUGETA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Section 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27, provides that someone "referred to in section E or F of Article I of the Refugee Convention is not a Convention refugee or a person in need of protection."

[2] The Refugee Protection Division [RPD] in its decision dated March 29, 2021, concluded that the Applicant was excluded from refugee protection under Article IE as he is a permanent resident of Italy.

[3] On appeal to the Refugee Appeal Division [RAD], the Applicant tendered a letter from an Italian Attorney and an Immigration Law expert dated May 5, 2021, that provided his opinion as to the Applicant's status in Italy [the New Evidence].

[4] The RAD refused to admit the New Evidence, finding that "this evidence was reasonably available to the Appellant to seek and present to the RPD for his hearing." The RAD dismissed the appeal and affirmed the finding of the RPD that the Applicant was excluded from protection under the Act.

[5] For the reasons that follow, I am not persuaded that the RAD erred in its treatment of the New Evidence or in its conclusion on the merits of the appeal, and this application must be dismissed.

Background

[6] The Applicant is an Ethiopian citizen. Upon his arrival in Canada in July 2018, he was in possession of an Italian Permanent Resident card that the Applicant states was first issued in 2000, and had been renewed numerous times. He has lived and worked in Italy for twenty years, from 1994 to 2014. He returned to Ethiopia to obtain work.

[7] It is unclear to the Court whether the Applicant attempted to return to Italy in 2018 before coming to Canada. Regardless, his wife and children returned to Italy from Ethiopia in 2018 and they were allowed to enter.

[8] As of March 30, 2021, his spouse and children live in Italy and all obtained a permanent resident permit after returning from Ethiopia in 2018.

Issues

[9] There are two issues that require the Court's attention:

1. Whether the RAD erred in denying the admission of the New Evidence; and
2. Whether the RAD's decision that the Applicant is excluded pursuant to Article 1E from refugee protection, is reasonable.

1. Admissibility of the New Evidence

[10] The admissibility of the New Evidence is governed by subsection 110(4) of the Act:

110 (4) On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.	**110 (4)** Dans le cadre de l'appel, la personne en cause ne peut présenter que des éléments de preuve survenus depuis le rejet de sa demande ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'elle n'aurait pas normalement présentés, dans les circonstances, au moment du rejet.

[11] The issue here is whether the New Evidence was reasonably available to be presented to the RPD.

[12] In support of its admission, the Applicant swore an affidavit explaining why, in his view, it was not reasonably available earlier:

> 4. I tried to obtain this evidence when my case was scheduled for a hearing. However, I was unable to retain counsel in Italy at the time.
>
> 5. My spouse tried to retain this firm and other firms to give expert opinion in my case, she was unable to do so because law offices were closed at the time due to the COVID emergency.
>
> 6. I also tried to retain law firm online, however, several firms asked that I or my representative in Italy, must communicate with them. My wife is not educated and cannot use the internet to retain law firms on my behalf.
>
> 7. Following the easing up of COVID restrictions my spouse was able to attend the above noted law firm and retain their service.
>
> 8. I respectfully submit that I was unable to present this evidence before the RPD and I am presenting it as soon as I am able to do.

[13] The RAD ruled that this New Evidence was reasonably available and could have been presented to the RPD:

> [10] I find that this evidence was reasonably available to the Appellant to seek and present to the RPD for his hearing. If the Appellant had made efforts to obtain such evidence prior to his hearing but faced barriers, as explained in his affidavit for this appeal, then it was open to him or his Counsel to explain this to the RPD and request further time to submit such evidence. I have reviewed the transcript and find no mention of the Appellant or his Counsel having sought such evidence for purposes of his RPD hearing. Further, I observe that the Appellant made his refugee claim in August of 2018, was assisted by an Immigration Consultant at that time, and had ample opportunity to collect all

> documentation in support of his claim prior to restrictions of COVID-19. The Appellant was represented by the same Immigration Consultant at his RPD hearing. As well, I do not find it credible that COVID-19 restrictions were so restrictive that the Appellant would have been unable to communicate with an Italian law firm by phone or other means prior to his RPD hearing for purposes of providing the opinion that is now forwarded for my consideration as new evidence.

[14] With the greatest of respect, I am unable to agree with the Applicant's characterization of the RAD's reasoning.

[15] It is submitted firstly that the reasons were speculative and misstate the evidence because the Applicant did not state that he was unable to communicate with the law firm in Italy. Respectfully, the RAD makes no such statement. Rather, it states that it does not accept that the COVID restrictions were so severe that the Applicant "would have been unable to communicate with an Italian law firm by phone or other means prior to his RPD hearing for purposes of providing the opinion." Given that part of that period was prior to the COVID pandemic, the observation is sound.

[16] It is submitted secondly that the RAD "erred in making an adverse credibility finding based on its misstated evidence." With respect, the RAD make no adverse credibility findings either directly or by implication.

[17] It is submitted thirdly that the RAD made the implausibility finding that if it were true that the Applicant was trying to get the above-noted expert opinion, he could have made an

application for an extension of time; as he did not, his statement is not true. Again, with respect, no such finding was made.

[18] All of these submissions are based on the reasonable finding of fact made by the RAD that there was nothing standing in the way of the Applicant to seek the New Evidence prior to the COVID restrictions and if he was unable to obtain the document prior to the RPD hearing, then nothing stood in his way to seek an adjournment.

[19] I agree with the Respondent that the RAD reasonably concluded that the new evidence from May 2021 could have been available for the February 2021 RPD hearing or at least an explanation provided to the RPD regarding barriers to obtaining such evidence.

[20] I would think, at a minimum, that an applicant who is seeking evidence to support his claim before the RPD must show that he did everything to obtain it prior to the RPD adjudication, including a request for an adjournment where circumstances require a delay.

2. The Exclusion Finding

[21] The test for exclusion was set out in *Canada (Citizenship and Immigration) v Zeng*, 2010 FCA 118 at para 28:

> 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.

[22] The burden of proof to establish the exclusion lies on the Minister, but on a basis of less than the balance of probabilities. Once a *prima facie* case of exclusion has been made out by the Minister, the onus shifts to the Applicant to establish that status has been lost: see *Wasel v Canada (Citizenship and Immigration)*, 2015 FC 1409 at paras 15 and 16.

[23] Here, the Respondent met its initial burden based on the evidence that the Applicant arrived in Canada with an Italian Permanent Resident card.

[24] The RPD and the RAD found that the Applicant's permanent residency had not expired, and that he had not established, on a balance of probabilities, that he had lost his status as a permanent resident of Italy, and could not return there. It was found that the Applicant's permanent resident permit was a permanent document that did not expire and was valid for an indefinite period. Further, it was noted that the Applicant had no trouble renewing his status in Italy for a period of 20 years, that his wife and children were living in Italy with status as at the day of the RPD hearing and that their status was based on the Applicant's status as a permanent resident of Italy.

[25] The RAD based its decision on item 3.8 of the National Documentation Package for Italy that states that the resident permit may be revoked. The use of "may" implies that the Applicant's permanent resident status may not have been revoked. Based on this, it is reasonable

for the RAD to conclude that the Applicant's permanent resident status has not been revoked. The onus is on the Applicant to demonstrate that his permanent resident status has been revoked. He failed to do so.

[26] The Applicant submits that the RAD arrived at an unreasonable determination of facts by giving weight to the theoretical ability of the Applicant to return to Italy and by discounting the Applicant's personal experience as disingenuous. The RAD did not discount the Applicant's personal experience; it gave it little weight based on credibility concerns during the RPD hearing. Moreover, the RAD's decision was not based on a theoretical ability of the Applicant to return to Italy, it was based on the insufficiency of evidence to conclude that he had lost his permanent residence, and therefore, had the ability to return to Italy. I reiterate that the onus is on the Applicant to demonstrate that his permanent residence has expired. His mere statement to that effect, was reasonably found not to be sufficient to establish it as a fact.

[27] No question was proposed for certification.

JUDGMENT in IMM-5025-21

THIS COURT'S JUDGMENT is that this application is dismissed and no question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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