Federal Court  Cour fédérale

Date: 20230921

Docket: IMM-4207-22

Citation: 2023 FC 1271

Ottawa, Ontario, September 21, 2023

PRESENT: The Honourable Madam Justice Rochester

BETWEEN:

DRITAN HOXHAJ, GLEDIANA HOXHAJ AND DIONELA HOXHAJ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants, Dritan Hoxhaj, his wife Glediana Hoxhaj, and their minor daughter, are citizens of Albania. Mr. Hoxhaj resided in Italy between 1998 and 2018, where he had the status of permanent resident. Ms. Hoxhaj was also a permanent resident of Italy, having married Mr. Hoxhaj in 2005 and moved to Italy in 2007. Their daughter was born in Italy in 2011.

[2] They arrived in Canada on tourist visas in November 2018 and claimed refugee protection in April 2019. They allege that Mr. Hoxhaj is bisexual, and upon his brother discovering this, his brother threatened to kill him. Mr. Hoxhaj's brother, along with certain other members of his family, live in Italy. The Applicants allege that they fear their families in Albania and Italy, as well as persecution in Italy and Albania, on the basis of Mr. Hoxhaj's bisexuality.

[3] The Minister of Immigration, Refugees and Citizenship Canada intervened in the Applicants' refugee claim on the basis of Article 1E of the United Nations Convention Relating to the Status of Refugees, 189 UNTS 150 [Convention], claiming that the Applicants are excluded from refugee protection based on their permanent resident status in Italy.

[4] The Applicants seek judicial review of a decision by the Refugee Appeal Division [RAD] dated April 7, 2022, dismissing the Applicants' appeal and confirming the decision of the Refugee Protection Division [RPD] to reject their claim for refugee protection. The determinative issue for both the RPD and the RAD was exclusion under Article 1E of the Convention. The RAD concluded that the Applicants are neither Convention refugees nor persons in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[5] The Applicants submit that the RAD erred by not accounting for the evidence before it, notably that although they once had status in Italy similar to that of its nationals, it has been lost due to their absence from the Italy since 2018. The Applicants plead that they only have the

"possibility" of returning, thus exposing them to a risk of being returned to Albania. The Applicants further submit that the RAD demonstrated a lack of sensitivity in its assessment of the persecution of the LGTBQ community in Italy.

[6] For the reasons that follow, this application for judicial review is dismissed.

II. Analysis

[7] It is common ground between the parties that the applicable standard of review in the present case is one of reasonableness as set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[8] It is settled law that a claimant who seeks refugee protection in Canada, but has a status similar to that of nationals of a safe third country must be excluded under Article 1E of the Convention. Effectively, Article 1E of the Convention is an exclusion clause that is designed to prevent "asylum shopping" where a person already enjoys protection in a third country (*Canada (Citizenship and Immigration) v Zeng*, 2010 FCA 118 at para 1 [*Zeng*]). Thus, a refugee claimant is excluded when they already have surrogate protection in a country where they enjoy substantially the same rights and obligations as nationals of that country (*Zeng* at para 1). Both parties rely on the multi-part test set out in *Zeng* at para 28:

> [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.

[9] Once a *prima facie* case of exclusion has been made out by the Minister, the onus shifts to the Applicants to establish that they do not have status in a third country (*Tesfay v Canada (Citizenship and Immigration)*, 2021 FC 497 at para 16; *Obumuneme v Canada (Citizenship and Immigration)*, 2019 FC 59 at para 41; *Wasel v Canada (Citizenship and Immigration)*, 2015 FC 1409 at paras 15 and 16).

[10] The Applicants submit that the objective documentary evidence demonstrates that it is not certain they can obtain status in Italy, and that the RAD erred by finding them excluded on the basis of the "possibility" that they may return there. If they cannot return to Italy in the future, then they will be returned to Albania and be at risk of persecution. The Applicants claim that would be in breach of the principle of non-refoulement set out in s 115(1) of IRPA.

[11] The Respondent submits that, as noted by the RAD, the Applicants have taken no steps to apply for Italian visas, re-establish Italian permanent resident status, or even connect with the Italian authorities to confirm their status. In short, the Respondent pleads that despite being fully informed of the risks, the Applicants have done nothing and cannot rely on their inaction to gain refugee status. The Respondent further submits that the Applicants' argument based on the principle of non-refoulement is premature and s. 115(1) does not apply to the present case.

[12] Having considered the record before the RAD, I am unable to conclude that the RAD erred in finding that the Applicants are excluded on the basis of Article 1E. I agree with the Respondent that, on the basis of the evidence before it, the RAD reasonably determined that the Applicants had failed to provide sufficient evidence that they had lost their right to return to Italy.

[13] The RAD was entitled to prefer the documentary evidence demonstrating that the Applicants are entitled to apply for an Italian visa to return and may re-establish permanent resident status there. The Respondent highlights that the Applicants have provided no evidence that they have taken any steps to do so. I agree, as there is no evidence that they have attempted to contact consular officials, make enquiries, or apply for re-entry documentation, if needed.

[14] I further agree with the Respondent that the question of non-refoulement is premature. This Court has consistently held that such an argument is premature at this stage on the basis that the refusal of a refugee claim is not a removal (*Singh v Canada (Citizenship and Immigration)*, 2022 FC 1692 at para 12; *Ogiemwonyi v Canada (Citizenship and Immigration)*, 2021 FC 346 at paras 38-39).

[15] As to the Applicants' submission that the RAD unreasonably demonstrated a lack of sensitivity in its assessment of the persecution of the LGTBQ community in Italy, I disagree. The Applicants highlight that the RAD concluded that the Applicants had not established that Mr. Hoxhaj would be persecuted in Italy, and noted that Mr. Hoxhaj had not been living openly as a member of the LGTBQ community. The Applicants submit that the RAD is suggesting that only

members of the community who are living openly can be persecuted. As per *Vavilov*, a reasonableness review is not a "line-by-line treasure hunt for error," the reviewing court must simply be satisfied that the decision maker's reasons "add up" (*Vavilov* at paras 102 and 104). In my view, the Applicants' submissions on this point constitute a treasure hunt for error. I find that the RAD was simply stating a fact, as it was true that Mr. Hoxhaj had not lived openly as a member of the LGTBQ community.

[16] Having reviewed the articles cited by the Applicants concerning the LGTBQ community in Italy, I have not been persuaded that the RAD committed a reviewable error. The RAD acknowledged the incidents detailed in the documentary evidence, but concluded that they were isolated incidents and thus, did not establish that Mr. Hoxhaj would be persecuted on this ground. I am mindful of the Supreme Court of Canada's instructions that a reviewing court should not interfere with factual findings, absent exceptional circumstances, and that it is not the function of this Court on an application for judicial review to reweigh or reassess the evidence considered by the decision maker (*Vavilov* at para 125). Consequently, I decline to intervene.

[17] Finally, at the outset of the hearing, the parties made submissions as to whether the Court ought to accept an affidavit from an articling student employed by counsel for the Applicants attaching her transcription of the hearing before the RPD. Ultimately, that issue has become irrelevant as neither party referred to or relied upon the transcript in their memoranda or during their oral submissions.

III. Conclusion

[18] For the reasons set out above, I am of the view that the Applicants have failed to meet their burden of demonstrating that the RAD's decision is unreasonable (*Vavilov* at para 100). I therefore dismiss this application for judicial review.

[19] There is no serious question of general importance for certification arising.

JUDGMENT in IMM-4207-22

THIS COURT'S JUDGMENT is that:

1. The Applicants' application for judicial review is dismissed; and

2. There is no question for certification.

"Vanessa Rochester"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4207-22
STYLE OF CAUSE:	DRITAN HOXHAJ, GLEDIANA HOXHAJ AND DIONELA HOXHAJ v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	AUGUST 24, 2023
JUDGMENT AND REASONS:	ROCHESTER J.
DATED:	SEPTEMBER 21, 2023

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