Federal Court  Cour fédérale

Date: 20160808

Docket: IMM-2748-15

Citation: 2016 FC 902

Ottawa, Ontario, August 8, 2016

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

PELLUMB MIKELAJ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] of a decision of the Refugee Appeal Division of the Immigration and Refugee Board [RAD] dated May 29, 2015, [Decision] confirming the decision of the Refugee Protection Division [RPD] of January 29, 2015. The Decision denied the Applicant's claim for Convention refugee status on the basis that he is excluded from refugee

protection under Article 1E of the *United Nations Convention Relating to the Status of Refugees* [the Convention].

[2] For the reasons that follow I have determined the application must be dismissed.

I. Background

[3] The Applicant is a citizen of Albania who moved, with his family, to Italy in 1996. In 2001 he received temporary status in Italy and became a permanent resident in 2010. In January 2013, the Applicant returned to visit his elderly parents in Albania. After a series of incidents with the neighbouring Babaj clan in February 2013 the Babaj declared a blood feud against the Applicant and his family. After the police, Elders and the Commune could not resolve the feud, the Applicant left Albania for Canada. He arrived on September 14, 2013. The Applicant did not return to Italy fearing he would not be safe because there is a large Albanian community in Italy and his belief that he could not obtain state protection.

[4] The Minister intervened in writing before the RPD to advise that on November 4, 2013 the Rome Visa Post confirmed Italian authorities indicated the Applicant was a permanent resident of Italy whose permit was still valid and had no expiry date.

[5] The RPD accepted the Applicant is an Albanian national. They found the determinative issues were credibility and exclusion pursuant to Article 1E of the Convention. The credibility concerns included that when he first made his refugee claim he did not mention he was a permanent resident of Italy. Approximately one year later he filed an amended claim stating his

residency in Italy and claiming he believes it is a country where he has a risk of serious harm. He also did not initially disclose that he returned to Albania from Italy in January 2013. The Applicant blamed the advice of a smuggler. Although the RPD drew a negative inference about his credibility because of these omissions the Applicant noted before the RAD that the only finding the RPD made was that he was excluded under Article 1E.

[6] The RPD found, on a balance of probabilities, that the Applicant had status in Italy, as of the date of the hearing and it was substantially similar to that of Italian nationals. In the alternative, they found that if he had lost his status in Italy the reason for the loss was voluntary in that he stayed outside of Italy for a period of more than 12 months.

[7] The RPD had no credibility issues regarding the blood feud in Albania. They concluded though that the Applicant was excluded pursuant to Article 1E of the Convention because of his residency status in Italy. The RPD also found the Applicant failed to rebut the presumption of state protection in Italy.

II. The RAD Decision

[8] The RAD focused on two issues: (1) did the RPD err in finding the Applicant was excluded from refugee protection based on Article 1E of the Convention; (2) did the RPD err in finding there was adequate state protection available in Italy?

[9] The RAD concluded that the Applicant was excluded under Article 1E of the Convention and he had not rebutted the presumption of state protection existing in Italy. In arriving at the

exclusion finding the RAD relied upon several documents including the November 4, 2013 email from the Rome Visa Post, a recent RIR, the Ministry of the Interior publication "Staying in Italy Legally" and information from the website of the Italian State Police. After careful review and fresh analysis, the decision of the RPD was confirmed.

[10] In determining the standard of review to apply to the RPD decision the RAD followed the guidance in *Huruglica v Canada (Minister of Citizenship and Immigration)*, 2014 FC 799. The RAD indicated they would review all aspects of the RPD decision and come to an independent assessment of the Applicant's claim and where their assessment differed from the RPD the RAD would substitute their own determination.

[11] After setting out the basic background of the RPD decision, the RAD acknowledged the Applicant put forward various errors he said were made by the RPD including failing to consider the best evidence about his permanent residence status in Italy. They then reviewed the evidence, made their findings and confirmed the RPD decision.

III. Standard of Review

[12] The Applicant submitted the proper standard of review of findings made by the RAD is correctness because there is no oral hearing. However since the hearing of this matter the Court of Appeal in *Canada (Citizenship and Immigration) v. Huruglica,* 2016 FCA 93, at paragraph 35 confirmed the standard of review of the decision made by the RAD is reasonableness. That is the standard I will apply.

IV. Arguments, Analysis and Conclusion

[13] Section 98 of *IRPA* provides that a person to whom Article 1E applies is not a Convention refugee nor a person in need of protection. Article 1E states:

1E. 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.	**1E**. 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.

[14] In *Canada (Citizenship and Immigration) v Zeng*, 2010 FCA 118 [*Zeng*] the Court of Appeal considered Article 1E. They held the relevant date for determining status under the Convention is the date of the hearing.

[15] The Court noted in *Zeng* that the purpose of Article 1E is to exclude persons who do not need protection. It is also intended to prevent asylum shopping. They articulated a multi-part test to be applied by a tribunal such as the RPD to determine whether Article 1E applies. The first part of the test is to determine whether the claimant has status substantially similar to that of the nationals in the third country. Both the RPD and RAD found the Applicant had permanent residence status in Italy as of the date of the hearing. They each concluded that the Applicant is therefore excluded under Article 1E by virtue of section 98 of *IRPA*.

[16] The dispute between the parties is a factual one - whether, at the date of the hearing, the Applicant actually did have status as a permanent resident of Italy. There is also the issue of whether state protection is available to the Applicant in Italy.

[17] The Applicant left Albania in January, 2013. At the date of the hearing in October, 2014 he had been absent from Italy for more than one year. After much confusion at the RPD hearing as to the kind of residency card the Applicant possessed he agreed he held an "EC Residence Permit for Long-Term Residents". He says that card expires once he has been absent from the country for 12 months or more. In support of that allegation he produced at the RPD hearing an opinion letter written by a lawyer in Varese, Italy to that effect.

[18] The Applicant says the RAD should not have relied upon the November 4, 2013 email from the Rome Visa Post in preference to the legal opinion he submitted. The legal opinion was the best evidence; the legislation was enclosed with the opinion and it was translated into English. The legal opinion was written on the lawyer's letterhead, it was accompanied by both his personal identification and his bar membership card. The Applicant says it was an error in law when the RAD failed to consider the legal opinion as little more than a personal opinion.

[19] The Applicant also says that even if the legal opinion was not persuasive it at least should have been sufficient to rebut the *prima facie* evidence submitted by the Minister in the November 4, 2013 email. Regarding the email, the Applicant notes that at the time it was written he had only been out of the country for 10 months so his status had not then expired.

[20] The Respondent says it is not surprising that the RAD came to the same conclusion as the RPD given the Applicant did not file any evidence before the RAD. They point out that once a *prima facie* case of exclusion has been made out the onus shifts to the Applicant and that onus was not met. They also say the Applicant between the date of the RPD hearing and the RAD decision could have obtained new evidence from the authorities confirming his status had expired but he chose not to.

[21] With respect to the legal opinion, the Respondent points out that the letter is very brief. Only a small part of the legislation was translated and it was insufficient to provide context. The letter did not provide any context either. The actual opinion itself essentially referred to the wording of the legislation without any commentary or explanation of process or reference to jurisprudence. They say that given the totality of the evidence, including the RIR that indicates the status "may be" lost and the information on the police website, the RAD did not commit any error in preferring the information in the RIR. It is presumptively reliable.

[22] The Respondent also says Italy is a multi-party state democracy and the Applicant failed to prove he would not be protected. Despite his claims that foreign workers are discriminated against and harassed, he successfully lived in Italy since 1996 without incident. The finding with respect to state protection was reasonable as the Applicant did not establish the Bajaj family was established in Italy or posed a threat there.

[23] *Qi-Xiao v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 195 [*Qi-Xiao*] at paragraph 25, was relied on by the Applicant for the proposition that statements by officials, in

this case the police website, are not acceptable because they are not expert evidence. However *Qi-Xiao* at paragraph 28 goes on to acknowledge that "the weight to be given expert evidence is a matter for the trier of fact and an expert's conclusion which is not appropriately explained and supported may properly be given no weight at all."

[24] The legal opinion provided is inadequate. It contains a conclusion with no analysis. There is no legal reasoning and no jurisprudence is cited. In *Qi-Xiao* this was referred to as a bare opinion and that may properly be given no weight. When the RPD and then the RAD weighed the lawyer's letter against the documentary and other evidence dealing with residence cards, they each reasonably preferred the other evidence to the lawyer's letter.

[25] With respect to whether state protection is available to the Applicant in Italy, the RAD found there was no evidence to rebut the presumption that Italy is able to protect its residents. Before the RPD the Applicant acknowledged he had not been in touch with Italian authorities or the embassy since he came to Canada saying he feared returning and had not been back since the blood feud began as he came straight to Canada. He also did not know whether he could re-instate his Permanent Resident status if he had lost it. His fear in Italy was that Albanians can now enter Italy because of EU Passports and the Bajaj family will find him and kill him. His wife and two sons live in Albania.

[26] When it comes down to it, the onus is on the Applicant to prove his case on the balance of probabilities. The *prima facie* evidence of exclusion under Article 1E was not persuasively rebutted by the Applicant.

[27] The RAD conducted a detailed, thorough and thoughtful analysis of the evidence. They drew reasonable conclusions. The RAD even considered that if the *prima facie* case of exclusion was not proven by the Minister the Applicant still had the problem, identified as a factor in *Zeng*, that he voluntarily left Italy to return to Albania.

[28] Although counsel for the Applicant made strong submissions at the RPD, the RAD and in this application the problem facing the Applicant is his evidence is, at best, equivocal. While the Applicant disagrees with the conclusions arrived at by the RAD, the reasoning process and the outcomes are defensible on the facts and law. The reasons provided allow the Applicant to understand why the RAD came to those conclusions.

[29] The RAD's decision is entitled to deference and I cannot re-weigh the evidence in order to find in favour of the Applicant. The application is therefore dismissed.

[30] No serious question of general importance arises on these facts.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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