Federal Court  Cour fédérale

Date: 20241122

Docket: IMM-12205-23

Citation: 2024 FC 1868

Toronto, Ontario, November 22, 2024

PRESENT: Mr. Justice Diner

BETWEEN:

JUDE AROKIYA JAGATHIEES GURUSAMY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant seeks judicial review of a decision made by the Refugee Appeal Division [RAD] of the Immigration and Refugee Board [IRB], dismissing his refugee claim [Decision]. The RAD confirmed the Refugee Protection Division's [RPD] finding that he is excluded from refugee protection pursuant to Article 1E of the *Convention Relating to the Status of Refugees* July 28, 1951, [1969] Can. T.S. No. 6 [Convention], referenced in sections 2 and 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. This was due to the fact that the

RAD found the Applicant had permanent resident status in Italy, with substantially the same rights as Italian nationals. For the reasons that follow, I will grant this application for judicial review.

I. Background

[2] The Applicant is a citizen of Sri Lanka. He is a Christian Tamil who lived in Colombo. He resided in Italy for several years, and applied for and obtained status as a *Permesso di Soggiorno per Soggiornante di lungo periodo – UE* [Residence Permit] from Italy, issued on May 19, 2014, with a validity period described as "illimitata" – "which is commonly understood to mean unlimited – Long-Term Resident – EU" (RPD decision, Certified Tribunal Record at p. 103). He alleges fear of persecution in both Sri Lanka.

[3] The RPD found the Applicant to be excluded from protection under Article 1E of the Convention and section 98 of IRPA because he failed to establish he could not renew his status in Italy, if it had lapsed. The RPD also found that the Applicant's claim of fear of persecution lacked credibility.

[4] The RAD upheld the RPD's findings and dismissed the appeal. The RAD found that the Applicant was excluded from refugee protection pursuant to Article 1E of the Convention and section 98 of the IRPA because he had permanent resident status in Italy, with substantially the same rights as Italian nationals, and that he had not established that his Italian permanent resident status had been revoked.

[5] Specifically, the RAD found that the evidence indicated that (i) the revocation of Italian permanent resident status was discretionary rather than automatic, (ii) the Applicant failed to demonstrate that he did not hold rights and obligations substantially similar to that of Italian nationals, (iii) he failed to demonstrate he did not have the right to return to Italy for an unlimited period and the right to work freely there with no restrictions, and (iv) the discrimination the Applicant may face in Italy does not amount to persecution.

[6] This Court must determine whether the RAD reasonably concluded that the Applicant was excluded pursuant to Article 1E of the Convention and section 98 of the IRPA. The Applicant argues that the RAD Decision is unreasonable because he had established before the RPD that he had lost his status in Italy, given that he was absent for more than 12 months at the time of the hearing. The Applicant also argues that the RAD unreasonably preferred a description of the law rather than relying on the Italian statute itself, and overlooked a personal response received from the Italian Consulate in Toronto [Consulate], as representing the government, which stated that a Residence Permit is revoked when a holder is absent from Italy for 12 consecutive months.

[7] The Respondent counters that the RAD considered all documentary evidence, including the email response from the Consulate regarding the Applicant, but argues that that evidence was deficient because it did not verify his status. The Respondent further contends that the RAD reasonably preferred the Italian government's English website to an unofficial translation of the legislation relied on by the Applicant, both of which addressed a government decree concerning permanent residency status. According to the Respondent, based on the documentary sources and

jurisprudence, the RAD reasonably found revocation of status was discretionary – that is, possible but not automatic.

II. Analysis

[8] An exclusion under Article 1E of the Convention and section 98 of the IRPA is to be reviewed on a reasonableness standard (*Singh v Canada (Citizenship and Immigration)*, 2024 FC 1134 at para 6; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]; see also *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at paras 7–9 [*Mason*]).

[9] First, it is important to note recent comments of Justice Battista in paragraph 79 in *Freeman v Canada (Citizenship and Immigration)*, 2024 FC 1839 [*Freeman*] where he stated "[t]he purpose of Article 1E is to exclude people who have status corresponding to nationals of third countries for the benefits of the Refugee Convention. There is no justification for an additional purpose." Exclusion is intended to be applied restrictively and must not be the subject of a broad interpretation by decision-makers or by this Court, and an onerous burden must not be placed on applicants to prove a negative (*Freeman* at paras 16–18, 45 also citing *Ramirez v Canada (Minister of Employment and Immigration)*, 1992 CanLII 8540 (FCA), [1992] 2 FC 306 [*Ramirez*] at 314; *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 [*Ezokola*])

[10] Justice Battista further commented that in accordance with the United Nations High Commissioner for Refugees [UNHCR] and principles of international law, applying exclusion broadly rather than restrictively is unreasonable (*Freeman* at paras 17–18, citing the *Handbook*

on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, 1 February 2019, HCR/1P/4/Eng/REV.2 [UNHCR Handbook] at para 180).

[11] Because Article 1E has been incorporated into IRPA without amendment, both *Vavilov* and *Mason* require its interpretation to be consistent with international law and the international instruments to which Canada is signatory (*Freeman* at para 26 citing *Mason* at paras 105–106; *Vavilov* at para 114, as well as *de Guzman v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436 [*de Guzman*] at para 83).

[12] The Federal Court of Appeal in *Zeng v Canada (Minister of Citizenship and Immigration)*, 2010 FCA 118 set out the test for exclusion pursuant to Article 1E of the Refugee convention as follows:

> [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.

[13] Turning from the law to the facts of this case, the RAD considered objective country condition evidence in the most current National Documentation Package [NDP] for Italy, namely an IRB Response to Information Request [RIR] dated November 23, 2018. This RIR states that

the type of Residence Permit held by the Applicant does not expire and is valid for an indefinite period (NDP for Italy, May 31, 2022, item 3.7). A further RIR dated April 20, 2021, also states that a permit may be revoked pursuant to Article 9(7)d) of Legislative Decree No. 286 of 1998, amended in 2014 [Decree], after a year of absence from Italy.

[14] The RAD went on to consider three specific sources in coming to its conclusion that the Applicant had permanent status in Italy which had not been revoked:

a. an unofficial English translation that states that the residence permit is revoked in specified circumstances, including an absence from the territory of the European Union [EU] for a period of 12 consecutive months;
b. an English PDF document cited in the April 2021 RIR found on the Italian General Directorate of Immigration and Integration Policies' website, part of the Ministry of Labour and Social Policies, which states that a resident permit may be revoked in cases of an absence from the EU for 12 consecutive months; and
c. the Applicant's evidence, in the form of the email from the Consulate to Applicant's counsel, referring to the provision in the Decree and providing an official translation of the response stating that "Pursuant to article 9, paragraph 7, letter d) of legislative decree 286/98, the residence permit for long-term residents is revoked in case of absence from the territory of the Union for a period of 12 consecutive months."

[Emphasis added.]

[15] After itemizing the evidence on file, the RAD explained that it preferred the language used by the Italian government on its own website to accurately reflect the relevant provisions of the Decree to the response from the Consulate to Applicant's counsel. While the RAD concluded that revocation of permanent residence following an absence of more than 12 consecutive months was possible, it found revocation not to be automatic.

[16] Furthermore, the RAD relied on a variety of jurisprudence from this Court which had considered the Decree and the status it conferred, holding that it was applicable to this case. The RAD held that revocation by Italian officials is discretionary rather than automatic, and that for a long-term resident permit to be revoked "there needs to be an act of revocation" (see for instance *Melo Castrillon v Canada (Citizenship and Immigration)*, 2018 FC 470 at para 24 [*Melo Castrillon*]; the Respondent also pointed to other case law about the Decree including, amongst other cases, *Mulugeta v Canada (Minister of Citizenship and Immigration)*, 2022 FC 1436 at paras 24–26; *Bhuiyan v Canada (Minister of Citizenship and Immigration)*, 2023 FC 915 at paras 14 and 17).

[17] However, I find that this case is distinct from the above-cited jurisprudence, because the Consulate provided a specific response to Mr. Crane's (Applicant's counsel) inquiry about the Applicant in this case. In choosing to favour the evidence that was not specific to the Applicant, but rather of a more general nature, the RAD failed to provide justifiable reasons as to why it did not place more weight on the response that came in direct response to Mr. Crane's email inquiry to the Consulate to confirm the Applicant's status in Italy, and the response that pursuant to the

Decree, “the residence permit for long-term residents is revoked in case of absence from the territory of the Union for a period of 12 consecutive months.”

[18] Apart from the analysis lacking justification, it also lacked intelligibility: the RAD held at paragraphs 17–18 of its Decision that it preferred “information provided by the Italian government on matters within its jurisdiction” to “accurately reflect the relevant provisions of the applicable Italian law” rather than the response from the Consulate who wrote back to Mr. Crane:

> I note that the Appellant asked the Consulate General of Italy in Toronto (Consulate) for confirmation of what his status in Italy is currently. In response, the Consulate did not address his specific status, instead referring to the provision in the Legislative Decree. The Appellant provided a notarized translation of this response, which states: “Pursuant to article 9, paragraph 7, letter d) of legislative decree 286/98, the residence permit for long-term residents is revoked in case of absence from the territory of the Union for a period of 12 consecutive months.”
>
> Having weighed the discretionary “may be revoked” that appears on the Italian government website against the translations into English of the Legislative Decree, both of which say “is revoked,” I prefer the language used by the government on its own website. It is reasonable to infer that information provided by the Italian government on matters within its jurisdiction must accurately reflect the relevant provisions of the applicable Italian law. This accords with the Federal Court decision in *Melo Castrillon*, which interpreted the Italian objective documentary evidence and determined that it was reasonable to find that revocation of permanent residence was possible but not automatic.
>
> [Emphasis added.]

[19] What is unintelligible in this analysis is that the Consulate represents the Italian government. The Consular response is also a government response, and therefore one could easily substitute in the word “Consulate” for the words “government on its own website” to the

underlined portion above, to come up with an equally accurate statement. The RAD's analysis is unintelligible because no reasons were provided as to why the latter was chosen over the former. In my view, this justification would have applied equally had the RAD decided to favor the confirmation of the interpretation of the legislation provided by the Consulate. Such a justification is void of reasonability; it is equivalent to saying "I favor A over B because X" when X is true for both A and B. The selection to give weight to one government source over the other is arbitrary, when Mr. Crane took the time to inquire into Mr. Gurusamy's status and received the Italian government's response.

[20] The Respondent argued that the weakness in this observation is that Mr. Crane did not go far enough and should have followed up with the Consulate, pointing to the RAD's rationale in noting that the Consular email was not specific that residency had been revoked, where the RAD wrote at paragraph 19:

> The Federal Court held, based on the facts in *Melo Castrillon*, that for Long-Term Resident status to be lost, "it appears that there needs to be an act of revocation."[15] In the Appellant's case, the Consulate cited the Legislative Decree in responding to the Appellant but did not provide specific information as to whether he had lost his status. The burden is on the claimant to establish that their Long-Term Resident status was automatically or otherwise revoked.[16] [FNs 15 and 16 cite to paras. 23 and 29 of *Melo Castrillon* respectively]

[21] Again, I am not convinced. *Melo Castrillon* is distinct from this case in two significant ways. First, in that case, there was no email from the Consulate – or from any arm of the Italian government – responding to a direct query about the applicant's personalized situation.

[22] Second, in *Melo Castrillon*, there was no concession by both sides that the applicant had indeed been out of Italy for over 12 months when the RPD hearing took place. Thus, I do not think that without further rationale, the RAD was justified in drawing a direct line between the facts of this case and *Melo Castrillon*, even though the Italian residency decree that applied to both applicants was the same.

III. Conclusion

[23] Having considered the RAD's analysis of the evidence, the Applicant has persuaded me that it unreasonably favoured general source information that had been relied on by the Court in past situations, to the specific situation in question, without explaining why that historic information superseded the information provided by the Consulate that related to the personal, individual circumstances of the Applicant. While I accept that the generic information from past situations relied on by the RAD concerned the same law, the applicants in those cases had not obtained personalized evidence from the Italian government relating to their particular situation.

JUDGMENT in IMM-12205-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted. The matter is remitted for redetermination by a different officer.

2. There is no question for certification.

3. No costs will issue.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-12205-23
STYLE OF CAUSE:	JUDE AROKIYA JAGATHIEES GURUSAMY v MCI
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