Federal Court  Cour fédérale

Date: 20160208

Docket: IMM-846-15

Citation: 2016 FC 155

Ottawa, Ontario, February 8, 2016

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

STEVEN OSAZUWA

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] for judicial review of a decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board of Canada dated February 4, 2015, which determined that the Applicant is not a Convention refugee or a person in need of protection [Decision], confirming the decision of the Refugee Protection Division [RPD].

II. BACKGROUND

[2] The Applicant is a 41-year-old citizen of Nigeria who claimed a well-founded fear of return to Nigeria based on an alleged belief that the police there consider him to be a member of the Movement for the Actualization of the Sovereign State of Biafra [MASSOB], an illegal Nigerian organization. The Applicant also alleges that he has received threats from MASSOB members.

[3] The Applicant says that out of fear of persecution from MASSOB, which he contends believed he had leaked information about its organization to police in Nigeria, he fled to Italy in 2010. He entered the United States of America in June 2013 and left in August 2013 following an incident in which the Applicant says he was approached at a store by two black males who asked his name and whether he was Nigerian. With the help of a friend, the Applicant located an agent who helped him travel to Canada, ultimately making an inland refugee claim on September 10, 2013.

[4] The Applicant's application for refugee protection was heard on June 10, 2014 by the RPD. The Minister of Citizenship and Immigration [Minister] intervened, arguing that by virtue of Article 1E of the Refugee Convention [Convention], the Applicant is excluded from refugee protection in Canada as he has permanent residence in Italy and has not rebutted the presumption of state protection there. The Minister also alleged that, because of Article 1F of the Convention, the Applicant is excluded from refugee protection in Canada because he committed a serious

non-political crime outside the country prior to his admission as a refugee. The RPD ultimately found the Applicant to be excluded from protection pursuant to Article 1E.

[5] The Applicant filed an appeal with the RAD on August 18, 2014, requesting that the negative decision of the RPD be struck and that he be awarded another opportunity to have his claim heard by a different panel. The RAD proceeded without a hearing and the Applicant received its written reasons for decision on February 16, 2015.

III. DECISION UNDER REVIEW

[6] The RAD looked to the Federal Court decision in *Huruglica v Canada (Minister of Citizenship and Immigration*, 2014 FC 799 for guidance as to the appropriate standard to apply to the decision of the RPD. The RAD consequently conducted an independent assessment of the RPD decision and formed its own opinion of whether the Applicant is a Convention refugee or a person in need of protection. Where the RPD had a particular advantage in reaching its conclusions, its findings were recognized and respected by the RAD.

[7] The RAD began by looking at the RPD's application of the Article 1E analysis set out in *Canada (Citizenship and Immigration) v Zeng*, 2010 FCA 118 [*Zeng*]. Article 1E provides that "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 national of that country." The test established by the Federal Court of Appeal in *Zeng* involves the following:

- Considering all relevant factors up to the date of the hearing, does the claimant have status, substantially similar to that of nationals in the third country? If so, 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.

[8] The evidence before the RPD was that the Applicant was the holder of a resident permit for Italy when he arrived in Canada and was therefore entitled to government social welfare, health care, and Italian employment benefits and that there were no impediments to his return. It was held in *Shamlou v Canada (Minister of Citizenship and Immigration)* (1995), 32 Imm LR (2d) 135 (FCTD) [*Shamlou*] that full access to social services, and the rights of return to work freely without restrictions and to study qualified as "rights and obligations" under Article 1E.

[9] The objective evidence revealed that, as a permit holder, the Applicant would be entitled to the same benefits as Italian nationals. The RAD notes that the Applicant had not provided to the RAD or the RPD any evidence that temporary/permanent residents in Italy enjoy lesser rights than nationals. There is no requirement for benefits to be identical to those of nationals in order to engage Article 1E; they need only be "substantially similar:" *Zeng*, above, at para 28. Following its own assessment of the objective evidence, the RAD arrived at the same conclusion as the RPD: the rights and obligations of temporary residents in Italy are substantially similar to those of Italian nationals.

[10] The RAD answered the first *Zeng* question in the negative, as the Applicant did not have status in Italy at the time of the RPD hearing. The Applicant had allowed his resident permit to lapse and, as a result, had lost his "similar rights." In terms of the second question, the RPD had found that the Applicant did have status similar to nationals of Italy, requiring the consideration and balancing of various factors as set out in the third portion of the *Zeng* test. The RAD concluded that the RPD's decision to consider exclusion was correct in law and supported by the Federal Court of Appeal in *Zeng*. As a result, the RAD found that the remaining concerns of the Applicant about the contamination of the RPD's reasoning, and its closed mind about risks in Nigeria, were no longer at issue.

[11] The RAD also reached the same conclusion as the RPD in finding that the Applicant could return to Italy, resume his residence and expect protection. Hence, there was no point in analyzing the risks of the Applicant returning to Nigeria, despite this being an element of the third prong of the *Zeng* test. The RAD concluded that the RPD had not erred in this regard.

[12] As regards the Applicant's fear of persecution in Italy, the RAD held that there was no evidence of any incidents or threats of harm or persecution having occurred in Italy to support his alleged fear. There is a presumption that a country is capable of protecting its residents except where there is state breakdown. A claimant must provide clear and convincing evidence to the contrary in order to rebut this presumption. The relevant test is whether the protection offered is adequate: *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 [*Ward*].

[13] The RAD said that it is well established in Canadian refugee law that a claimant's failure to approach a state for protection will defeat a refugee claim where the protection might reasonably have been forthcoming. See *Ward*, above. Given that the Applicant had enjoyed resident status in a democratic country, and did not produce any evidence suggesting that this could not be reacquired, he could reasonably be expected to approach the Italian authorities for protection against reprisals from the alleged members of MASSOB. The RAD concluded that it was reasonable for the RPD to decide that the Applicant had not rebutted the presumption of state protection. Italy remains an Article 1E country as no risk of harm there was established.

[14] No challenge was launched by the Applicant in reference to Article 1F. As a result, the RAD was able to make a determination of the appeal on the issue of Article 1E and arrived at the same conclusion as the RPD: the status that the Applicant held in Italy precluded him from refugee protection by virtue of Article 1E. The appeal was dismissed.

IV. ISSUES

[15] The Applicant has raised one issue in this proceeding: whether the RAD assessment was reasonable.

V. STANDARD OF REVIEW

[16] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a

satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[17] Whether the Decision is reasonable is a question of mixed fact and law, yielding substantial deference to the decision-maker. The reasonable standard therefore applies: *Matta v Canada*, 2015 FC 331 at para 19; *Caliman v Canada (Citizenship and Immigration)*, 2015 FC 332 at para 20; *Tota v Canada (Citizenship and Immigration)*, 2015 FC 890 at paras 18-19 [*Tota*]; *Kamara v Canada (Citizenship and Immigration*), 2008 FC 785 at para 19.

[18] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at para 47, and *Khosa v Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12 at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

VI. STATUTORY PROVISIONS

[19] The following provisions of the Act are applicable in these proceedings:

Convention Refugee	**Définition de « réfugié »**
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques:
(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	(*a*) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	(*b*) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
Person in need of protection	**Personne à protéger**
97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée:
(*a*) to a danger, believed on	(*a*) soit au risque, s'il y a des

substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

Exclusion – Refugee Convention

motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(*b*) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

Exclusions 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.

Appeal

110. (1) Subject to subsections (1.1) and (2), a person or the Minister may appeal, in accordance with the rules of the Board, on a question of law, of fact or of mixed law and fact, to the Refugee Appeal Division against a decision of the Refugee Protection Division to allow or reject the person's claim for refugee protection.

Appel

110. (1) Sous réserve des paragraphes (1.1) et (2), la personne en cause et le ministre peuvent, conformément aux règles de la Commission, porter en appel — relativement à une question de droit, de fait ou mixte — auprès de la Section d'appel des réfugiés la décision de la Section de la protection des réfugiés accordant ou rejetant la demande d'asile.

Schedule:

SECTIONS E AND F OF ARTICLE 1 OF THE UNITED NATIONS CONVENTION RELATING TO THE STATUS OF REFUGEES

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.

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons

Schedule :

SECTIONS E ET F DE L'ARTICLE PREMIER DE LA CONVENTION DES NATIONS UNIES RELATIVE AU STATUT DES RÉFUGIÉS

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.

F. Les dispositions de cette Convention ne seront pas applicables aux personnes dont on aura des raisons sérieuses

for considering that:	de penser:
(*a*) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;	(*a*) Qu'elles ont commis un crime contre la paix, un crime de guerre ou un crime contre l'humanité, au sens des instruments internationaux élaborés pour prévoir des dispositions relatives à ces crimes;
(*b*) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;	(*b*) Qu'elles ont commis un crime grave de droit commun en dehors du pays d'accueil avant d'y être admises comme réfugiés;
(*c*) he has been guilty of acts contrary to the purposes and principles of the United Nations.	(*c*) Qu'elles se sont rendues coupables d'agissements contraires aux buts et aux principes des Nations Unies.

VII. ARGUMENT

A. *Applicant*

[20] The Applicant alleges that the RAD committed reviewable errors and the matter should be sent back to a differently constituted panel of the RPD.

[21] While the RAD confirms the RPD's finding that the Applicant allowed his status in Italy to "lapse," this is done without any reference to the Applicant's contention that this occurred while he was in the United States. The "voluntary" aspect of the "lapse" discussion is not an accurate statement of the facts by the RPD or the RAD. This is significant because voluntariness was central to the RAD's confirmation of the RPD decision.

[22] Also, both the RAD and the RPD erred by assuming that the Applicant could simply return to Italy and resume his residency. The RPD may have stated that a regaining of status would not occur automatically, but the RAD made no such comment. Even if it could be regained, the RPD did not undertake a proper assessment of the risk of return to Italy. In order for the exclusion created by s 98 of the Act and Article 1E to apply, the affected person must have taken up residence in a country outside the country of his or her nationality and have been recognized as having the rights and obligations that attach to the possession of nationality in that country. Also, the claimant must be able to return to and remain there. Where the claimant's status in the outside country is uncertain, Article 1E does not apply. Similarly, if the outcome of an attempt to renew status is uncertain, or if the claimant does not have the right to return, Article 1E may not be applicable.

[23] Whether an applicant can return to a country should be analyzed from the perspective of the country in question, not from that of the RPD: *Pashtoon Wassiq v Canada (Minister of Citizenship and Immigration* (1996), 33 Imm LR (2d) 238 (FCTD) [*Wassiq*]. Furthermore, rights such as those being discussed in the present application are not permanent, and their renewal is at the discretion of the relevant government: *Choezom v Canada (Minister of Citizenship and Immigration*, 2004 FC 1329.

[24] The Applicant says that as of the date of the RPD hearing, the Applicant did not have any of the benefits that should be considered when undertaking an analysis of basic rights, as identified in *Shamlou*, above. More specifically, the Applicant did not have the right to return to

the country of residence, the right to work freely without restrictions, the right to study, nor full access to social services in the country of residence.

[25] In addition, risk in Nigeria should have been considered in the alternative should status in Italy not be resumed.

B. *Respondent*

[26] The Respondent says that the RAD reasonably upheld the RPD decision finding the Applicant to be excluded pursuant to Article 1E, which precludes asylum shopping.

[27] The Respondent highlights credibility concerns and the RPD's finding that the evidence revealed that the Applicant has a history of uttering altered and non-genuine documents.

[28] The Applicant has not demonstrated that he would be refused admittance to Italy, and has not justified his lack of attempt to renew or re-apply for permanent residence. Furthermore, he has not properly demonstrated that he would be denied were he to re-apply.

[29] The Applicant has argued that the RAD and the RPD erred in assuming that he could simply return to Italy and resume his residence. This is not a reviewable error and the Applicant does not specify where in the record this error occurs. The Respondent says that, in any event, the Applicant has it backwards. Both tribunals indicated that once he admitted to having had permanent resident status in Italy, he bore the onus of showing that he could not regain status or return there. The Applicant has disputed this, but such a conclusion is in accordance with the

Federal Court decision in *Hassanzadeh v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1494 [*Hassanzadeh*].

[30] As regards the issue of risk in Italy, the Applicant has never sought protection in Italy and has failed to rebut the presumption of state protection there. The RAD and RPD had no evidence of any incidents of actual or attempted harm to the Applicant in Italy. The extent of the Applicant's allegations was that persons, allegedly part of MASSOB, threatened him with harm should he remain there. Furthermore, the Applicant has not shown that he could not reasonably approach Italian authorities for protection, were it to become necessary.

[31] The RAD acknowledged that the Applicant had been out of Italy for more than twelve months and had lost his permanent resident status as a result. He voluntarily allowed his status to lapse. The facts of the case do not suggest that the Applicant could not return to Italy and renew his status, and he did not claim to have been misled by authorities; instead, he appears to have simply tried to say he called the consulate too late. The Applicant's highlighting of the fact that the lapse occurred while he was in the United States goes unexplained and is, in any event, irrelevant.

[32] The Applicant relies on *Wassiq*, above, in asserting that the RAD and RPD erred. However, the RPD also considered that case, differentiating it from the present circumstances by noting that the applicants in *Wassiq* provided clear evidence that they had been advised by the German government that they could not return. This is not the case here. The Applicant has merely asserted that he contacted the Italian Embassy and there was no possibility of regaining

status. The Respondent argues that, given that the Applicant had already shown that he is not credible, the RPD was entitled to look for verifying evidence. It is of note that the Applicant also did not provide any evidence to corroborate his assertions to the RAD in his attempt to refute the RPD's determinations.

[33] The Applicant also failed to show that the rights of resident permit holders in Italy are not substantially similar to the rights of an Italian national.

[34] While the Applicant argues that the risk of persecution in Nigeria ought to have been analyzed as an alternative to the findings on the safety of living in Italy, the Respondent replies that there is no duty on the RAD to make supplemental findings in the alternative, particularly when the initial finding (that the Applicant voluntarily relinquished his status in Italy) is not unreasonable.

VIII. ANALYSIS

[35] After assessing the evidence in its entirety, the RAD reached the same conclusion as the RPD and found the Applicant to be excluded from protection by virtue of Article 1E of the Refugee Convention.

[36] The RAD concluded as follows:

> [31] It is well-established in Canadian refugee law that a claimant's failure to approach the state for protection will defeat his refugee claim where such protection might reasonably have been forthcoming. The Appellant had status in a democratic country, and has not produced any evidence that he could not

> regain that status, where the rule of law prevails. In such a context, the Appellant could reasonably be expected to approach the authorities for protection, including protection against reprisals from these alleged members of MASSOB; as such, protection might reasonably have been forthcoming. The Appellant has failed to do so, and it was rational for the RPD to conclude that he has not rebutted the presumption of state protection. As such, Italy remains an article 1E country as the Appellant has failed to establish that he is at risk of harm there.

[37] The Applicant has raised a number of issues in his argument, some of which are not well developed.

A. *Lapse of Status in Italy*

[38] The Applicant points out that as of the date of his refugee hearing, he had lost his status in Italy and says "there is no evidence for or against, that indicated whether the Applicant can re-apply and gain legal status in Italy in the future." In other words, the Applicant takes the position that it is "inconclusive, as to whether the Applicant can regain his lost status in Italy."

[39] The RAD addressed this issue as follows:

> [20] The RPD found that the Appellant was the holder of a resident permit for Italy when he arrived in Canada and that resident permit "is entitled to government social welfare, health care and employment benefit" in Italy. Further evidence at the RPD hearing, which was submitted by the Minister, demonstrated that the Appellant did indeed have all the rights and benefits that Italian citizens were entitled to. The evidence before the RPD, which was submitted by the Appellant, shows that the permit expired September 13, 2013, but later it was amended to read 2012.
>
> [21] In *Shamlou*, the Federal Court considered the rights and obligations set out in Article 1E, and held that these include the right of return, the right to work freely without restrictions, the

> right to study, and full access to social services. In the case of the Appellant, the RPD considered recent objective evidence, which states clearly that the Appellant had status in Italy and there are no impediments to his return. That same evidence explains that such permit holders may also travel outside of and return to Italy. Holders of resident permits are also entitled to government social welfare, health care, and employment benefits.
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> …
>
> [26] The RPD, in its reasons, found that the Appellant could return to Italy and resume his residency. In assessing the evidence before it (see paragraphs 21-22, above), the RAD arrived at the same conclusion as the RPD did.
>
> [footnotes omitted]

[40] The Applicant has not explained or demonstrated why these conclusions were unreasonable. He takes the position that the evidence was inconclusive on whether he could return, but this means that he did not submit sufficient evidence to demonstrate that he cannot return to Italy and assume his residency. The onus is upon him to demonstrate this point. See *Hassanzadeh*, above, at paras 28 and 30.

[41] The Applicant makes much of para 22 of the RPD decision and the words "it is clear that he has no automatic right of re-entry into Italy." These words, however, have to be read in context:

> [19] The claimant testified that his permanent resident status in Italy expired after he was absent from Italy for a period longer than 12 months. He testified that he never attempted to extend or re-acquire his status as he believed "Once you lost it, you lost it. It's automatic…"
>
> [20] The panel finds that the claimant lost his right to permanent resident status in Italy voluntarily as the claimant testified that, on his own volition, he stayed outside of Italy longer than the 12 months allowed.

[21] The claimant was asked if he had made efforts to reacquire his status in Italy and he responded that although he had called the Italian embassy, there was no way he could "get it back". He testified that he couldn't renew his status in Italy as he was no longer employed in Italy and had already started his business in Nigeria in 2003; and he was also afraid to return to Italy because of the threats he had received from MASSOB.

[22] The panel finds that the claimant has failed to demonstrate that he would be denied a re-entry or permanent resident visa for Italy if he were to reapply for one, although it is clear that he has no automatic right of re-entry into Italy.

[23] The panel differentiates the facts in this case from those set out in *Wassiq* where there was clear evidence in that case that the applicants had been advised by the German government that they could not return. In this case, the claimant has provided no such evidence from the government of Italy. The panel is mindful that the claimant has a propensity for acquiring and utilizing fraudulent documents. As such, the panel cannot accept his testimony as credible or reliable in this regard without evidence to corroborate it.

Status Substantially Similar to that of its Nationals

[24] Having found that the claimant has not established that he would be denied a re-entry or permanent resident visa to Italy, the panel must consider four main criteria as set out in *Shamlou* that must be assessed in undertaking the analysis of whether a claimant enjoys the basic rights attached to the possession of nationality in the country of residence.

[25] These factors are the right to return to the country of residence; the right to work freely without restrictions; the right to study; and full access to social services in the country of residence.

[26] Does the claimant have the right to return to Italy? The claimant testified that during his period of permanent residence in Italy, he travelled back and forth to Nigeria and experienced no difficulties entering Italy upon return. The panel notes that Italian Residence permits allow individuals, unless specific limitations are imposed, to travel to several European countries without restraint for a period not to exceed 90 days in any 6-month period.

[27] While the panel is mindful that a permanent resident who is absent from Italy for 12 months or more will lose his or her permanent resident status, regardless of the validity indicated on

> the Carta di Soggiorno, the panel is not persuaded, on the evidence before it, that the claimant would not be permitted to enter Italy, should he travel there today.
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> [footnotes omitted]

[42] The Applicant argues that, if he has no "automatic right of re-entry" then this must mean that he might be refused, and that there is an element of discretion that Italian authorities might not exercise in his favour. He says that the RAD simply accepted the RPD's conclusions and did not deal with this discretionary issue.

[43] It is clear from the full context of the RPD decision that the RPD found that there was insufficient evidence that he would not be able to re-enter Italy "should he travel there today." In other words, the Applicant failed to discharge the onus upon him that he could not re-enter Italy and once again enjoy the rights he had voluntarily relinquished by allowing his resident permit to lapse.

[44] So the RPD decision was that, even though he may have lost permanent residence status, the Applicant had not established "that he would be denied a re-entry or permanent resident visa for Italy if he were to apply for one," and he had not established that he "would not be permitted to enter Italy, should he travel there today." In other words, the Applicant (whether as a permanent or temporary resident) did not demonstrate that he could not re-enter Italy and enjoy the same rights as Italian nationals.

[45] The Applicant was fully aware of this deficiency in his evidence and yet he chose not to try to remedy this before the RAD. As was appropriate, the RAD did its own independent

assessment and came to the same conclusions as the RPD. I can find no reviewable error on this issue. Essentially, the Applicant is attempting to use his own failure to adduce acceptable evidence that he could not re-enter Italy as evidence that the situation is unclear. There is no evidence that Italian law is in any way ambiguous on this point. The problem is that the Applicant failed to discharge the onus he bears to show that he will not be able to re-enter Italy. See *Hassanzadeh*, above, *Mai v Canada (Citizenship and Immigration)*, 2010 FC 192, and *Shahpari v Canada (Citizenship and Immigration)*, [1998] FCJ No 429. As the Court stated in *Canada (Citizenship and Immigration) v Choovak*, 2002 FCT 573 at para 42:

> Thus, at the time of the hearing, the respondent failed to demonstrate that there was evidence on the record to show that she would be denied a re-entry or permanent resident visa for Germany if she reapplied for one, although it is clear that she had no automatic right of re-entry into Germany.

See also *Tota*, above, at para 27.

[46] As the excerpts from the RPD decision cited above make clear, there is also no reason to find unreasonable the conclusions of both tribunals that the Applicant's loss of status in Italy was voluntary.

[47] There is nothing unreasonable about the RAD's finding that the Applicant could re-enter Italy and enjoy rights essentially similar to Italian nationals.

B. *Assessment of Risk in Italy*

[48] The Applicant says that

> The RPD did not make proper assessment of the risk of return to Italy even if the Applicant could regain his lost status there. There was no detailed discussion of the risk of harm the Applicant alleged he faced if he returns to Italy or Nigeria if the Applicant cannot regain his lost status in Italy.

[49] There is, in fact, a full and thorough discussion of this issue in the Decision:

> [27] In this case, the RPD determined that the Appellant can return to Italy, where he can expect protection. In such a context, it would make no sense for the RPD to proceed to consider the risk to the Appellant in Nigeria, even though this is one element set out in the third question of the *Zeng* test. If the Appellant can return to Italy, the risk that he may face in Nigerian is simple not relevant, as he is excluded from refugee protection, and the RPD did, in fact, consider and discuss that risk.
>
> [28] The Appellant also claimed a fear of persecution there; it proceeded to undertake an analysis of the state protection available to him in Italy and, as such, continued the assessment of whether Italy is a 1E country for the Appellant.
>
> [29] *State Protection in Italy:* The Appellant does not argue that the RPD's state protection analysis for Italy was flawed. The RPD noted the Appellant's alleged fear in Italy – that the Appellant never approached police to ask for protection there. It noted that the Appellant did seek help from the police during his stay in Italy, based on his own testimony at the hearing. The RAD, in its assessment of the evidence, which was provided by the audio hearing, notes that there is no evidence of any incidents. The only evidence found was that members purporting to MASSOB threatened him harm if he was to remain in Italy. There is no evidence of any threats of harm or persecution. There is a presumption that a state is capable of protecting its citizens except in situations where there is a complete state breakdown. To rebut that presumption of state protection, a claimant must provide clear and convincing evidence of the state's inability to protect that national. While the effectiveness of the protection is relevant consideration, the test is whether the protection offered is adequate.
>
> [30] The RAD noted in the case of *Ward*, at paragraph 10.
>
> > "The claimant must provide clear and convincing confirmation of a state's inability to protect absent

> and admission by the national's state of its inability to protect that national. Except in situations of complete breakdown of the state apparatus, it should be assumed that the state is capable of protecting a claimant."
>
> [31] It is well-established in Canadian refugee law that a claimant's failure to approach the state for protection will defeat his refugee claim where such protection might reasonably have been forthcoming. The Appellant had status in a democratic country, and has not produced any evidence that he could not regain that status, whether the rule of law prevails. In such a context, the Appellant could reasonably be expected to approach the authorities for protection, including protection against reprisals from these alleged members of MASSOB; as such, protection might reasonably have been forthcoming. The Appellant has failed to do so, and it was rational for the RPD to conclude that he has not rebutted the presumption of state protection. As such, Italy remains an article 1E country as the Appellant has failed to establish that he is at risk of harm there.
>
> [footnotes omitted]

[50] Apart from making bald assertions that the risk of his returning to Italy was not properly assessed, the Applicant has made no attempt to demonstrate before the Court what was improper, inadequate or unreasonable about the decisions of the RPD and the RAD on this issue.

[51] Having concluded that the Applicant can return to Italy, there was nothing unreasonable about the conclusion that there was no point in analysing the risks faced by the Applicant in Nigeria.

C. *Basic Rights of Enjoyment*

[52] Relying on *Shamlou*, above, the Applicant argues that, at the time of the refugee hearing, he did not enjoy:

a) The right to return to Italy;

b) The right to work freely in Italy without restrictions;

c) The right to study; and,

d) Full access to social services in the country of residence.

[53] The RPD and the RAD both addressed this issue and the Applicant has not shown why the RAD's conclusions are unreasonable:

> [22] While the Appellant challenges the RPD's finding here, he fails to provide evidence in support of his argument. The Appellant does not challenge the RPD's finding that the Appellant had the same rights as Permanent Residents in Italy and those rights are substantially similar to Italian nationals. The objective evidence (European Commission residence permit as referred to in the RPD reasons) cited above indicates that holders of residence permits are entitled to the same benefits as nationals. The Appellant did not provide, either to the RPD or the RAD, objective evidence to support his contention that temporary/permanent residents enjoy lesser rights than do Italian nationals, and it was sensible for the RPD to accept the objective evidence over the Appellant's uncorroborated allegations. The RAD did its own independent assessment of this evidence, and it arrived at the same conclusion as did the RPD. The RAD notes that there is no requirement that such benefits be identical in order to engage Article 1E, as the Court held in *Zeng*, the status must be "substantially similar" to that of nationals. The RAD, after assessing all the evidence in its entirety, finds that, based on the objective evidence found in the Appeal record which included the audio of the hearing, it was rational for the RPD as it was for the RAD to conclude that the rights and obligations of temporary residents are substantially similar to those of Italian nationals, and the RPD did not err in the application of the second *Zeng* test factor to the facts of the Appellant's claim. It is the understanding of the RAD that the Appellant as a temporary/permanent resident has substantially similar rights to that of an Italian national.
>
> [footnotes omitted]

[54] It is true that the Applicant did not have permanent resident status in Italy at the time of the refugee hearing, but this did not mean he could not re-acquire it and once again enjoy rights equivalent to those of Italian nationals. Voluntary loss of status in Italy did not lead to the exclusion of Article 1E of the Convention; it led instead to a consideration of the *Zeng*, above, factors:

> [24] The first *Zeng* question is answered by the RAD in the negative: the Appellant did not have status in Italy at the time of her RPD hearing as it had expired just prior to the hearing. After considering the evidence relating to the second question, the RPD found that the Appellant did have status similar to nationals of Italy. These conclusions did require the RPD to then "consider and balance various factors," as set out in the third question of the *Zeng* test, which mentions the reasons for the loss of status, the ability to return to the third country, the risk faced in the country of origin, Canada's international obligations, and any other relevant facts. If the answer to the first question is yes, then the second and third questions do not need to be answered, however the RPD did examine the third question and found that the Appellant did have the same similar rights and benefits as Italian nationals; however, he had lost those rights as a result of not renewing his residency permit, as he had allowed it to lapse.
>
> [25] As such, the RAD finds that the RPD's decision to consider exclusion despite the Appellant's indicating that they had a fear in the Article 1E country was correct in law and supported by the Federal Court of Appeal in the *Zeng* decision. Given that the RAD has found that the RPD did not err in assessing the claim under Article 1E, the RAD finds that the remaining concerns of the Appellant (contamination of RPD's reasoning and closed mind to risk in Nigeria) were no longer an issue.
>
> [26] The RPD, in its reasons, found that the Appellant could return to Italy and resume his residency. In assessing the evidence before it (see paragraphs 21-22, above), the RAD arrived at the same conclusion as the RPD did.
>
> [27] In this case, the RPD determined that the Appellant can return to Italy, where he can expect protection. In such a context, it would make no sense for the RPD to proceed to consider the risk to the Appellant in Nigeria, even though this is one element set out in the third question of the *Zeng* test. If the Appellant can return to Italy, the risk that he may face in Nigerian is simple not relevant,

> as he is excluded from refugee protection, and the RPD did, in fact, consider and discuss that risk.
>
> [footnotes omitted]

[55] The Applicant has not explained or demonstrated why these conclusions are unreasonable or not in accordance with the governing jurisprudence.

D. *Other Matters*

[56] The Applicant's principal grounds for review are those set out above. He mentions other points such as "There is no reference to the Applicant's contention that it was while outside Italy in the USA… [that] the Applicant was under threat of persecution and came to Canada to claim refugee (*sic*)" and he says the "voluntary" aspect to the "lapse" is not an accurate statement of the facts by the RPD and RAD, but he does not explain or demonstrate what difference it makes whether he was in the United States or Canada when he allowed his status in Italy to lapse, or why it was not reasonably open to the RPD and the RAD to conclude that he did voluntarily allow his resident status in Italy to lapse.

[57] The Applicant also made an attempt at the hearing of this application before me to suggest that the RAD had not fully understood its role as an appellate tribunal. A simple reading of the Decision shows that the RAD fully understood the governing jurisprudence on this point and went to considerable pains to conduct itself accordingly. I can find no reviewable error on this issue.

[58] Having reviewed the Applicant's submissions in their entirety, I can find no reviewable error with the Decision. Having been granted permanent residence status in Italy, a country that can provide him with state protection against the threats he claims to fear, the Applicant came to the United States and Canada and allowed his status in Italy to lapse, and he has not demonstrated, either to the RPD, the RAD or the Court, that he cannot return to Italy and re-acquire residency and all the rights such status entails, which includes the right to state protection against the threats he claims to fear. The Applicant has not shown that it was unreasonable to deny him refugee protection under Article 1E of the Convention.

[59] The parties agree that there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. There is no question for certification.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Peter Lulic	FOR THE APPLICANT
Stephen Jarvis	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Peter Lulic Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT