Federal Court  Cour fédérale

Date: 20180501

Docket: IMM-1617-17

Citation: 2018 FC 470

[ENGLISH TRANSLATION]

Ottawa, Ontario, May 1, 2018

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

RUBY AMPARO MELO CASTRILLON

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Ruby Amparo Melo Castrillon seeks judicial review (under section 72 of the *Immigration and Refugee Protection Act* (S.C. 2001, c. 27) [IRPA]) of the decision of the Refugee Protection Division (RPD) finding that Ms. Melo Castrillon is not a Convention refugee or a person in need of protection.

I. Preliminary Issue

[2] The RPD's decision was made under more nuanced circumstances. Its decision on March 13, 2017, related to Ms. Melo Castrillon and four members of her immediate family. Ms. Melo Castrillon is excluded under section 98 of the IRPA. With regard to the other four claimants, the RPD found that there was no serious possibility of them being considered Convention refugees or persons in need of protection given the lack of credibility of their claim. The RPD also seems to have found that this is the case for Ms. Melo Castrillon. Ms. Melo Castrillon is the sole applicant in this judicial review. She seeks judicial review of only the aspect of the decision regarding her exclusion under section 98.

[3] It is paradoxical for the applicant to seek judicial review of only one part of the RPD's decision. As counsel for the respondent observed, it seems that the RPD not only declared Ms. Melo Castrillon to be excluded, but also found that she was not a Convention refugee or a person in need of protection. The applicant is contesting the first finding that she is excluded, but not the finding that none of the claimants could qualify under sections 96 and 97 of the IRPA. If that is true, even if the applicant were successful in her case before the Court, that would not set aside the finding that she is not a Convention refugee or a person in need of protection because she is not contesting that aspect of the decision. This makes the application for judicial review moot since, either way, the applicant cannot succeed in her effort to benefit from sections 96 and 97 of the IRPA (*Borowski v. Canada (Attorney General)*, [1989] 1 SCR 342 [*Borowski*] at page 353).

[4] Nevertheless, the Court heard the parties because leave was given by this Court, and it decided to review the application for judicial review on merit even though it is moot (*Borowski*, at pages 358-363). The Court is convinced that the applicant could reasonably be excluded pursuant to section 98 of the IRPA.

II. Issue

[5] Ms. Melo Castrillon, who is the mother of the principal claimant before the RPD, is subject to a particular refusal because, according to the RPD, she is excluded under Article 1E of the *Convention relating to the Status of Refugees*. Article 1E reads as follows:

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.

Section 98 of the IRPA incorporates the consequences of being subject to Article 1E into Canadian law. Section 98 reads as follows:

Exclusion — Refugee Convention	**Exclusion 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.

[6] The only decision the RPD made on the basis of section 98 was the one regarding Ms. Melo Castrillon's exclusion.

III. Facts

[7] The applicant obtained permanent resident status in Italy on March 12, 2013. She had been living in Italy since August 2007. She decided to leave Italy on May 29, 2015, and return to her home country of Colombia, where her family was living. However, she did not remain there for long. After travelling to the United States in January 2016, she and her immediate family arrived at the Canadian border on January 22, 2016. They then filed a refugee claim. They were arriving from Colombia.

[8] Ms. Melo Castrillon reported that she had left Italy on May 29, 2015, to return to Colombia. There were two hearings before the RPD, on May 4, 2016, and on June 23, 2016. This is of some importance, since a claim was made that permanent resident status may be lost in Italy if a person does not reside there for a period of 12 consecutive months. Indeed, the applicant claims that her absence from Italy resulted in her losing her permanent resident status and, therefore, that section 98 of the IRPA did not apply after May 29, 2016. Since the RPD hearing did not end until June 23, 2016, this would indicate that the RPD erred in excluding the applicant under section 98 because she had been absent for more than 12 consecutive months.

[9] Therefore, the question is as to whether Ms. Melo Castrillon had lost her permanent resident status in Italy, meaning that Article 1E of the Convention could no longer be validly

applied to her and that she could therefore claim refugee or person in need of protection status in Canada.

IV. The RPD's decision

[10] The Minister of Public Safety and Emergency Preparedness intervened before the RPD under subsection 170(e) of the IRPA. It has been established that the applicant was a resident of Italy between August 2007 and May 29, 2015. The Minister made allegations about Ms. Melo Castrillon's legal situation. The Minister alleges that she claimed to have permanent resident status in Italy during her point-of-entry interview on January 23, 2016. In addition, the Minister said that he had received confirmation from the Italian authorities that Ms. Melo Castrillon holds a permanent residence permit issued on March 12, 2013. The Minister stated that there are conditions that could result in the loss of permanent resident status in Italy. However, the applicant did not file any such evidence. That is why the Minister is arguing that there is a *prima facie* case that the applicant was still a permanent resident in Italy on the day of the RPD hearing. According to the Minister, this would mean that section 98 of the IRPA provides that Ms. Melo Castrillon is simply excluded by the application of Article 1E of the Convention and cannot be considered a Convention refugee or a person in need of protection in Canada.

[11] The RPD placed little importance on the fact that the applicant apparently claimed on two different forms that she had begun living in Italy in November 2004 and had resided in Italy since August 2007. Furthermore, it is established that she stated during her interview on January 23, 2016, that she had permanent resident status in Italy.

[12] Therefore, the following issues were before the RPD:

a) Ms. Melo Castrillon was a permanent resident of Italy until her departure on May 29, 2015;

b) The period of 12 consecutive months is being considered for the purposes of Canadian law from the date of departure until the hearing before the RPD;

c) Therefore, the one-year period had not elapsed on the day the applicant made a refugee claim in Canada or on May 4, 2016, the day the hearing began, but it had elapsed on June 23, 2016, the day of the second hearing;

d) A person may lose permanent resident status in Italy if they are outside the European Union for a period of 12 consecutive months;

e) The RPD was satisfied that permanent resident status in Italy entitles the holder to return there. Furthermore, the RPD found that a permanent resident in Italy has the same rights and obligations as Italian citizens within the meaning of section 98. The RPD based this finding in particular on the index of the National Documentation Package on Italy (May 31, 2016), a national package made available to the public by the Immigration and Refugee Board of Canada. In particular, the RPD seems to have based its conclusion on the following paragraph:

> 7. **Rights of Individuals Holding an EC Long-Term Residence Permit** The State Police website indicates that individuals holding an EC Long-Term Residence Permit are entitled to enter Italy without a visa, to work, to have access to social benefits and services provided by the Italian government, and to "participate in local public life" (Italy 29 Mar. 2010). The Ministry of Interior's *Staying in Italy Legally* indicates that foreign

> nationals with a valid residence permit are granted the same education rights as Italian citizens (*ibid*. n.d., 21). The same source indicates that foreign nationals with a "regular residence permit" are required to register with the National Health Service (Servizio Sanitario Nazionale, SSN), and are entitled by law to receive health care and have "equal treatment as Italian citizens regarding compulsory contributions, health care given in Italy by the SSN and its time limit" (*ibid*., 23).

f) The burden was on the applicant to demonstrate to the RPD's satisfaction that she had lost permanent resident status. The RPD stated the following in this regard:

> [47] [TRANSLATION] That being said, according to recent evidence from Italian authorities regarding the claimant, there is simply the possibility of losing status; they did not indicate that she was going to lose her status in Italy, nor that she had lost her status at the time of the hearing. Moreover, in the documents the applicant submitted regarding her communications with Italian authorities, there is no confirmation that she had lost her permanent resident status.

V. Standard of review and analysis

[13] It has been well established that the role of a reviewing judge is solely to ensure that the decision made is legal. Therefore, for certain issues, the reviewing judge must decide whether a given issue is reviewable on the standard of correctness. As the law stands, these issues are rare. In the vast majority of cases, the applicable standard of review is reasonableness (see the recent *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, at para. 26 *et seq.*, for an illustration of the changes in the law on the appropriate standard). That is the case here, where Article 1E of the Convention must be interpreted. In *Majebi v. Canada (Citizenship and Immigration)*, 2016 FCA 274 [*Majebi*], the Federal Court of Appeal stated the following:

> [5] First, we disagree that the Federal Court incorrectly reviewed the decision of the Appeal Division on the reasonableness standard of review. As the Federal Court correctly noted, this Court has expressed different opinions on the standard of review that applies to decisions interpreting international instruments. However, authorities that pre-date the articulation of the presumption of reasonableness review set out in cases such as *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 (CanLII), [2011] 3 S.C.R 654 must be approached with caution. In the present case we agree with the Federal Court that nothing in the legislative context reveals Parliament's intent "not to protect the tribunal's jurisdiction" (*Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16 (CanLII), [2015] 2 S.C.R. 3, at paragraph 46). Nor does the interpretation of the Convention fall into one of the categories of questions to which the correctness standard continues to apply as explained in *Alberta Teachers'* at paragraph 30. This conclusion is consistent with the more recent decision of this Court in *B010* v. *Canada (Citizenship and Immigration)*, 2013 FCA 87 (CanLII), [2014] 4 F.C.R. 326, at paragraphs 58-72.
>
> [6] It follows that the Appeal Division's interpretation of the *Convention* was correctly reviewed on the reasonableness standard of review.

[14] In applying that standard, the Court is seeking what makes a decision reasonable. Does the decision fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law? Was there justification, transparency and intelligibility within the decision-making process? (*Dunsmuir v. New Brunswick*, 2008 SCC 9; 2008 1 SCR 190 at para. 47).

[15] No one disputes that the review of the application of Article 1E must be done at a certain point. The parties and the Court agree that the review of the application of Article 1E of the Convention is performed on the last day of the hearing before the RPD. In *Majebi*, the Court wrote:

> [7] The Appeal Division applied the decision of this Court in *Canada (Citizenship and Immigration) v. Zeng*, 2010 FCA 118 (CanLII), [2011] 4 F.C.R. 3 to conclude that the appellants' status should be considered as of the last day of the hearing before the Refugee Protection Division. We agree with the Federal Court that this was a reasonable conclusion for the Appeal Division to reach.

[16] As James C. Hathaway and Michelle Foster explain in *The Law of Refugee Status,* 2nd ed. (Cambridge University Press, 2014), Article 1E of the *Convention relating to the Status of Refugees* provides that protection is no longer available to a certain category of persons (the other being in Article 1D). These persons benefit from the protection of another state, meaning that the protection of a substitute state, in this case, Canada, is not required. In short, if Ms. Melo Castrillon was able to benefit from the protection of another state at the time of her refugee claim hearing, the claim had to be made to that state.

[17] Of course, there are conditions that result in the loss of Convention benefits. Essentially, these are cases of "*de facto* nationals," those who have the rights and obligations attached to the possession of the nationality of that country.

[18] In this case, the issue is to determine whether the applicant was still a "*de facto* national" of Italy because of her permanent resident status, which entitled her to enter Italy without a visa, among other things. The applicant limited her dispute to her claim that she had lost her permanent resident status 12 months after she left Italy. She is arguing that the loss of status would be automatic.

VI. Analysis

[19] The applicant says that she did research to confirm whether or not she had lost her status. Neither on the day of the hearing before the RPD, nor since, including on the day of the Court hearing, was she able to determine whether she is a permanent resident of Italy. This, in itself, indicates that the status is not automatically lost. At most, the status can be revoked from those who are absent from the country for 12 months.

[20] Therefore, the sole issue before the Court is to determine whether the RPD's decision that the applicant had permanent resident status on June 23, 2016, is reasonable. It is not disputed that a person who has been absent from Italy for more than 12 consecutive months could lose their permanent resident status. The question is to determine whether the loss of status is automatic.

[21] To succeed in her claim, the applicant was required to convince the RPD that as of May 30, 2016, she had lost her permanent resident status in Italy. That loss would have to be automatic, or practically so.

[22] As previously noted, the applicant attempted to determine her status in Italy. What is relevant for our purposes is her status on the day of the hearing, June 23, 2016. Despite her attempts, she was unable to confirm her status. If the status was automatically lost on May 30, 2016, i.e. 12 months after she left Italy, it would have been simple for the Italian authorities to confirm the loss of status. That was not the case. This seems to confirm the documentary

evidence indicating that refugee status may be revoked if the permanent resident is not on European Community (EC) territory for 12 consecutive months.

[23] The reality is that the applicant has not even established that she was absent from Italy and the EC for 12 consecutive months. All we know is that she apparently left Italy on May 29, 2015. Regardless, what is relevant in this case is that the RPD concluded on the documentary evidence only that the possibility of status revocation exists; it is not lost automatically. It appears that there needs to be an act of revocation. As the RPD observed, if revocation was automatic, there should have been a simple and direct response from the Italian authorities, which suggests that the interpretation of the documentary evidence is correct. Therefore, it must be reasonable.

[24] I consulted the documentary evidence on file and do not doubt the reasonableness of the RPD finding that revocation of permanent residence is possible, but not automatic.

[25] Referencing *Canada (Citizenship and Immigration) v. Zeng*, 2010 FCA 118 [*Zeng*], the RPD concluded that Ms. Melo Castrillon had essentially a similar status to that of Italian citizens. Therefore, she is excluded if she was a permanent resident on the day of the RPD hearing, in other words, if she had not lost her permanent resident status on the day of the hearing. Paragraphs 28 and 29 of *Zeng* speak for themselves:

> [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.
>
> [29] It will be for the RPD to weigh the factors and arrive at a determination as to whether the exclusion will apply in the particular circumstances.

[26] The RPD found that the applicant had permanent resident status on the day of the hearing and that this status is essentially similar to that of Italian citizens. Therefore, it was unnecessary to proceed with an analysis based on the decision tree proposed by the Federal Court of Appeal.

[27] If the applicant cannot establish whether she was automatically excluded from permanent resident status, it was perfectly reasonable for the RPD to conclude that she had that status on the day of the hearing.

VII. Conclusion

[28] Two questions arise upon review of Article 1E of the Convention. Firstly, does a person's status in the country where they resided entitle them to the same benefits that the country's citizens receive? Secondly, does this person still have this status if that is the country where they are a "*de facto* national"? If so, that is the country where the person must seek refuge.

[29] The RPD hearing took place more than 12 months after the applicant left Italy. I cannot find anything unreasonable in considering that the permanent resident status may be revoked after 12 months, but is not automatically revoked. It being established that the applicant had that

status when she left Italy, which is not disputed, the burden was on the applicant to establish to the RPD's satisfaction that the status was automatically or otherwise revoked. This was not done. Consequently, the RPD's decision was reasonable on its face as to the maintenance of the status on the hearing date. The rights conferred by this status in Italy are similar to the rights and obligations attached to the possession of the nationality of that country, as required by Article 1E. As a result, the application for judicial review must be dismissed, because the RPD's decision is reasonable.

[30] The parties did not indicate that there is a question within the meaning of subsection 74(d) of the IRPA. There is no serious question of general importance to certify.

JUDGMENT in file IMM-1617-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. No questions of general importance are proposed or certified.

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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