Federal Court  Cour fédérale

Date: 20190322

Docket: IMM-2509-18

Citation: 2019 FC 345

Ottawa, Ontario, March 22, 2019

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

TESFALDET KALAEB

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Tesfaldet Kalaeb, seeks judicial review of the May 9, 2018 decision of the Hearings Advisor [the Officer] of the Canada Border Services Agency [CBSA], which found Mr. Kalaeb ineligible to be referred to the Refugee Protection Division [RPD] for a determination of his claim for refugee protection, pursuant to paragraph 101(1)(d) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

[2] The Applicant argues that he is not ineligible to claim refugee protection in Canada. He submits that the "subsidiary protection" he was granted in Italy is distinct from Convention refugee status; therefore, the Officer erred in finding that this status was equivalent to being recognized as Convention refugee.

I. Background

A. *The Applicant's Claim*

[3] The Applicant is a citizen of Eritrea. He recounts that in 2007, he defected from military service and fled to Sudan. In 2008, he travelled to Italy via Libya and applied for protection. He was granted "subsidiary protection" in Italy with a three-year permit of stay, which he subsequently renewed for another three years. The permit expired in 2014.

[4] The Applicant recounts that while in Eritrea he met an American woman, who later returned to the United States. They kept in touch and later became engaged. In January 2012, he arrived in the United States on a "fiancé visa" and in March 2015, the two married. He recounts that the relationship temporarily broke down in 2015, during which time they lived apart. His application for permanent residence in the United States was denied because of insufficient proof of his marital relationship. He recounts that he later reconciled with his wife and made additional submissions in support of his application for permanent residence. However, the application was again denied in February 2016 and he was asked to leave the United States.

[5] The Applicant arrived in Canada in 2016 and was allowed to enter because his sister lives in Canada. He applied for refugee status. The CBSA initially referred his claim to the RPD. In November 2016, the CBSA terminated his claim upon determining that he was ineligible on the basis that he had been granted Convention refugee status in Italy.

[6] The Applicant challenged the CBSA decision, a settlement was reached, and his claim was redetermined. On September 17, 2017, the CBSA advised the Applicant that the Minister had evidence that he has Convention refugee status in Italy and invited further submissions.

[7] The Applicant's submissions highlighted that he only had "subsidiary protection" in Italy and noted the material differences between subsidiary protection and refugee protection under the 1951 *Convention relating to the Status of Refugees*, 189 UNTS 150 and its 1967 *Protocol relating to the Status of Refugees*, 606 UNTS 267 [together, the *Refugee Convention*]. He provided a legal opinion by Chiara Favilli, an Italian law professor and lawyer.

B. *The expert evidence*

[8] The opinion of Professor Favilli described the subsidiary protection scheme in Italy as complementary protection to Convention refugee status according to the *Refugee Convention*. It is applicable when a person does not fulfill the requirements for refugee protection but is likely to suffer "serious harm" if returned.

[9] The opinion states, among other information, "[t]hus subsidiary protection covers any situation in which a person is entitled to receive protection to prevent the infringement of a right

recognized in international conventions that add to those laid out in the Geneva Refugee Convention." Professor Favilli referred to Articles 2 and 3 of the European *Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 UNTS 221, which enshrine the right to life and the prohibition of torture. She noted that the protection is very similar to that granted by Article 3 of the 1984 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1465 UNTS 85 but it differs from what is provided by the *Refugee Convention*, "which envisages the existence of individual persecution as determining the right to asylum."

[10] Professor Favilli noted that there is not much difference in the content of subsidiary protection and refugee status. Both allow access to jobs, to study, and to social services and permit family reunification and the issuance of a travel document. After five years of uninterrupted residence (which means less than six months of absence), a European Union [EU] residence permit could be issued. Professor Favilli stated that individuals who are granted subsidiary protection are provided with a residence permit which is valid for five years and may be renewed. The application for renewal is assessed by the police upon an opinion issued by the International Protection Commission on the actual need for protection. She added that a negative opinion is issued only if a radical change has occurred in the country of origin and when there are no humanitarian reasons 'against' the expulsion of the person. Professor Favilli added that there are some concerns about effective integration of those with subsidiary protection.

[11] Professor Favilli suggested that a formal request by Canada to take back the Applicant would likely be rejected because his permit of stay had expired.

C. *The April 5, 2018 letter from CBSA*

[12] The preliminary decision dated April 5, 2018 included the following statement:

> The Minister's evidence includes an identity card from Italy that indicates that Tesfaldet KALAEB UCI: 9617-4978 has Convention Refugee status in Italy. The reply from the Italian government dated 16 Feb 2018… also confirms that the Italian government will allow your re-admission to Italy. Therefore, based on this information you are not eligible to be referred to the Refugee Protection Division… under IRPA section 101(1)(d).

[13] The Applicant was invited to make additional submissions before the final decision was made and did so. The Applicant's further submissions in May 2018 focused on the difference between Convention refugee status and subsidiary protection.

D. *The letter from Italy's Ministry of the Interior*

[14] The letter dated February 16, 2018 does not state that the Applicant has Convention refugee status in Italy. It states:

> Please be advised that <u>international protection has been recognized</u> for this alien by the Italian authorities, and he may therefore return to Italy.
>
> It is requested that this Central Directorate be notified, sufficiently in advance, of the details concerning the flight by which transfer will take place. This is for the purpose of informing the competent border police office at the point of entry and the Bari Police Headquarters, which issued to the alien the residence permit for <u>subsidiary protection</u> with the following particulars: Tesfaldet KALAEB, born on January 1, 1985, in Eritrea. The permit expired on November 11, 2014, and was never renewed.
>
> [Emphasis added]

II. The Decision under Review

[15] The Officer's decision, dated May 9, 2018, sets out the relevant statutory provisions—paragraph 101(1)(d) and parts of subsection 104(1) and 104(2) —and states, "[t]he Minister has reviewed and taken into consideration the submissions and disclosure provided. Nonetheless, the decision remains unchanged. You are not eligible to be referred to the Refugee Protection Division of the IRB under IRPA section 101(1)(d)."

III. The Issues

[16] The issue is whether the Officer's decision was reasonable—i.e., whether the Officer reasonably found that the Applicant, having received subsidiary protection in Italy, is ineligible to make a claim for refugee protection in Canada pursuant to paragraph 101(1)(d). In other words, did the Officer reasonably find that subsidiary protection status is equivalent to being recognized as a Convention refugee?

IV. The Standard of Review

[17] The Applicant submits that the issue of whether subsidiary protection is equivalent to being recognized as a Convention refugee is a matter of interpretation of international law and should be reviewable for correctness (citing *Hernandez Febles v Canada (Citizenship and Immigration)*, 2012 FCA 324 at paras 22-25, [2014] 2 FCR 224).

[18] The Respondent disputes the Applicant's submission that questions of international law must be reviewed on a standard of correctness (citing *Majebi v Canada (Citizenship and Immigration)*, 2016 FCA 274 at para 5, [2016] FCJ No 1273 [*Majebi*]).The Respondent also submits that the interpretation of paragraph 101(1)(d) is reviewed on the reasonableness standard because it involves interpretation of the decision-maker's home statute.

[19] The Court notes that the jurisprudence has evolved with respect to the standard of review. In *Majebi*, the Federal Court of Appeal stated at paras 5 -6:

> 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, [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, [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, [2014] 4 F.C.R. 326, at paragraphs 58-72.
>
> It follows that the Appeal Division's interpretation of the *Convention* was correctly reviewed on the reasonableness standard of review.

[20] In *Aghazadeh v Canada (Public Safety and Emergency Preparedness*, 2019 FC 99, [2019] FCJ No 125 (QL) [*Aghazadeh*], Justice Gleeson considered the standard of review in a similar case. He acknowledged the jurisprudence which noted a distinction between a tribunal

interpreting its home statute and a single administrative decision-maker who is not empowered to determine a question of law (see *Canada (Citizenship and Immigration) v Tobar Toledo*, 2013 FCA 226 at paras 42-43, [2015] 1 FCR 215). However, Justice Gleeson found at para 22 that the trend in the jurisprudence favoured the standard of reasonableness. On the facts of *Aghazadeh*, Justice Gleeson concluded at para 22 that the outcome would be the same whether the reasonableness or the correctness standard applied.

[21] Based on the prevailing jurisprudence, I find that the Officer's decision whether the Applicant is ineligible pursuant to paragraph 101(1)(d) requires consideration of the facts, the home statute (the Act) and international conventions, all of which are issues reviewed on the reasonableness standard.

[22] The standard of reasonableness requires the Court to consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190). Deference is owed to the decision-maker.

V. The Applicant's Submissions

[23] The Applicant initially argued that the Officer's decision was based on a material error of fact: that the Applicant has been granted Convention refugee status in Italy. The Applicant notes that the evidence is clear that he had subsidiary protection in Italy. Based on the more general wording of the May 2018 decision, which indicates that the Applicant's submissions have been

considered and states only that he is not eligible, the Applicant did not pursue the argument based on a material error of fact.

[24] The Applicant argues that the Officer erred in finding that the he is not eligible to claim refugee protection in Canada because his subsidiary protection in Italy is not equivalent to Convention refugee status.

[25] The Applicant notes that the determinative factor in assessing whether other forms of protection are equivalent to Convention refugee protection for the purposes of paragraph 101(1)(d) is whether a person is protected from the same risks (*Wangden v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1230 at paras 65, 72, [2009] 4 FCR 46, aff'd 2009 FCA 344 [*Wangden*]). The Applicant submits that where the protection granted addresses and assesses the same risks as Convention refugee protection, despite attracting different benefits, it is equivalent. The Applicant argues that the subsidiary protection granted to him by Italy does not protect him against the same risks as Convention refugee status.

[26] The Applicant submits that subsidiary protection is not based on the *Refugee Convention* but on the EC, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted*, [2011] OJ, L 337/9 [the *Qualification Directive*]. The Applicant submits that the *Qualification Directive* treats the two forms of protection differently.

[27] The Applicant submits that the scope of subsidiary protection is narrower than that of Convention refugee status in three ways.

[28] First, the Applicant submits that, due to the definition of "serious harm" under the *Qualification Directive*, subsidiary protection primarily protects against torture and death. The Applicant submits that it may not protect against restrictions on fundamental freedoms, such as freedom of religion, or forms of discrimination amounting to persecution. Unlike refugee protection, this definition of serious harm does not evolve with human rights norms.

[29] Second, the Applicant submits that, unlike Convention refugee status, the standard of proof for subsidiary protection is purely objective (i.e., subjective fear is not a factor). The Applicant suggests that this makes it more difficult to demonstrate cumulative acts of discrimination or harassment which constitute persecution.

[30] Third, the Applicant submits that the exclusion provisions for subsidiary protection are broader than those applicable to Convention refugees. For example, a person would be excluded from Convention refugee status where there are serious reasons to consider that the person has committed a crime against peace, a war crime, a crime against humanity or a serious non-political crime outside the country of refuge prior to his admission, or that the person is guilty of acts contrary to the purpose and principles of the United Nations. The *Qualification Directive*, which applies to persons who are granted subsidiary protection, excludes persons for similar reasons. However, it also excludes persons for additional reasons, including that the person

constitutes a danger to the community or to the security of the Member State in which the person is present.

[31] The Applicant also argues that subsidiary protection may expose a person to a possibility of refoulement. This would be the case if the person has a well-founded fear of persecution but was excluded pursuant to the *Qualification Directive* (for example, if the person is a danger) or no longer faces a real risk of "serious harm". The Applicant notes that the majority of EU states generally recognize Eritrean asylum seekers as refugees but that Italy does not.

[32] The Applicant also notes that the purpose of the Act, with respect to refugees, is to protect persons who face a well-founded fear of persecution. The Applicant submits that subsidiary protection does not achieve this objective.

[33] The Applicant argues that the facts of his case are analogous to those in *Aghazadeh*, where the applicant had been granted subsidiary protection in Hungary, another EU state. The Applicant notes that in *Aghazadeh*, Justice Gleeson applied the same approach as in *Wangden* to conclude that subsidiary protection is not equivalent to refugee protection.

[34] The Applicant points to *Aghazadeh* at para 38, where Justice Gleeson noted that the determinative issue for paragraph 101(1)(d) is whether the protections extended by the other state arise as a result of that state having recognized the person as a Convention refugee. This recognition triggers the state's international legal obligations as signatories to the *Refugee Convention*. Justice Gleeson found that this is what paragraph 110(1)(d) is intended to capture.

[35] The Applicant also points to *Aghazadeh* at para 41, where Justice Gleeson noted that the objectives of the Act are not advanced by interpreting paragraph 101(1)(d) as excluding claims by persons who have been refused refugee status in another country. The Applicant submits that like the applicant in *Aghazadeh*, he was refused Convention refugee status in Italy. Therefore, his subsidiary protection cannot be considered equivalent.

[36] The Applicant submits that in both *Wangden* and *Aghazadeh*, the Court focused on whether the claimants were protected from the same risk. The Applicant submits that he is not protected from the same risk as a Convention refugee; he sought but was denied this status.

[37] The Applicant argues that subsidiary protection—even if it is similar or analogous to section 97 protection—is not equivalent. The differences between sections 96 and 97 cannot be ignored; section 97 is not about persecution.

[38] The Applicant also notes that subsidiary protection in Italy requires that he be assessed every time he applies to renew his permit of stay. The Applicant submits that even section 97 protection in Canada would lead to permanent resident status, without additional risk assessments.

VI. The Respondent's Submissions

[39] The Respondent argues that the Officer reasonably found, based on the evidence, that the Applicant had been granted international protection and could return to Italy. The Officer reasonably relied on the evidence that the Applicant's status in Italy meant that he would not be

deported to Eritrea if he was still in need of international protection. Therefore, the Officer's finding that the Applicant was ineligible to be referred to the RPD was reasonable.

[40] The Respondent points to *Wangden* where the Court emphasized that ineligibility pursuant to paragraph 101(1)(d) is concerned with whether the claimant is protected from risk. The terminology used to describe the claimant's status is not determinative. The Respondent notes that in *Wangden*, the applicant was found to be ineligible even though he had "withholding of removal" status rather than Convention refugee status in the United States.

[41] The Respondent submits that paragraph 101(1)(d) must be read in context, taking into account the objectives of the Act. The Respondent notes that objectives with respect to refugees, as set out in subsection 3(2), include that the "refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted" and "to offer safe haven to persons with a well-founded fear of persecution… as well as those at risk of torture or cruel and unusual treatment or punishment".

[42] The Respondent points to Professor Favilli's opinion which noted that subsidiary protection protects those who do not qualify for Convention refugee status but who face serious harm. The Respondent submits that the protection is analogous to subsection 97(1) of the Act, which provides that a person is in need of protection where removal would subject them to a danger of torture, a risk to their life or a risk of cruel and unusual treatment or punishment. The Respondent submits that despite that a person in need of protection pursuant to section 97 is not

a Convention refugee, paragraph 101(1)(d) should be read to include persons in need of protection.

[43] The Respondent also notes that Professor Favilli's opinion acknowledged that there was little difference between subsidiary and refugee protection.

[44] The Respondent relies on *De Melo v Canada (Citizenship and Immigration)*, 2014 FC 1094 at para 22, 468 FTR 178 [*De Melo*], to submit that section 97 provides "refugee protection" to a claimant. In *De Melo*, the Court stated at para 22:

> Section 96 of *IRPA* incorporates the 1951 *Convention Relating to the Status of Refugees*, to which Canada is a signatory, into Canada's domestic legislation. Section 97 offers what is known in international parlance as "complimentary" or "subsidiary" protection in incorporating Canada's treaty obligations under the *Convention Against Torture* [CAT] and *International Covenant on Civil and Political Rights*: Martin Jones and Sasha Baglay, *Refugee Law* (2007), at p. 166. In other words, even though they are not Convention refugees, s. 97 can accord persons in need of protection refugee protection.

[45] The Respondent submits that there is no evidence that the Applicant is at risk of *refoulement*. The Respondent notes that Italy is bound by the *Qualification Directive*, which protects against *refoulement* in Article 21. Article 21 provides that "[m]ember States shall respect the principle of *non-refoulement* in accordance with their international obligations." Article 21 only permits *refoulement* where it is not prohibited by international obligations and where there are reasonable grounds to consider the person a danger to the security of the Member State or where, due to conviction for a serious crime, the person constitutes a danger to the community of the Member State.

[46] The Respondent submits that based on the letter from Italy's Ministry of the Interior which clearly stated that Italy will allow the Applicant to return, and based on Italy being bound by the *Qualification Directive*, there is no evidence to suggest that Italy would return the Applicant to Eritrea.

[47] The Respondent argues that *Aghazadeh* is not analogous to the present case. In *Aghazadeh*, the Court did not refer to any expert evidence regarding the scope of subsidiary protection in Hungary or to evidence regarding the provisions of the *Qualification Directive* which binds EU member countries.

[48] The Respondent suggests that the Applicant is asylum shopping. The Respondent notes that the Applicant was protected in Italy, sought status in the United States and was refused, and then came to Canada rather than returning to Italy. The Respondent notes that when the Applicant sought refugee protection upon his arrival in Canada, he indicated not that he faced threats in Eritrea or Italy, but that he hoped to find a better job in Canada. The Respondent submits that the purpose of the Refugee Convention is to protect persons, not to assist those who prefer asylum in a specific country (*Mohamed v Canada (Citizenship and Immigration)* (1997), 127 FTR 241; [1997] FCJ No 400 (QL) at para 9).

VII. The Decision is Not Reasonable

[49] In the May 2018 decision, the Officer stated, "[y]ou are not eligible to be referred to the Refugee Protection Division of the IRB under IRPA section 101(1)(d)." The Officer reproduced paragraph 101(1)(d), which provides that a claim is ineligible if "the claimant has been

recognized as a Convention refugee by a country other than Canada and can be sent or returned to that country". The Officer must, therefore, have found that the Applicant has been recognized as a Convention refugee in Italy.

[50] Both parties rely on *Wangden* to guide the interpretation of paragraph 101(1)(d). In *Wangden*, the applicant had withdrawn his asylum claim in the United States and instead applied for and was granted "withholding of removal" status , which Justice Mosley found was equivalent to being recognized as a Convention refugee.

[51] In *Wangden*, Justice Mosley relied on expert evidence which explained that asylum and withholding of removal are different ways by which a "deportable alien" (to use the United States terminology) who claims a fear of persecution can seek protection (at para 60). Justice Mosley then considered whether both forms of protection were equivalent to Convention refugee status.

[52] Justice Mosley noted that the expert opinion described asylum in the same manner as the protection covered by Article 1 of the *Refugee Convention* and section 96 of the Act. With respect to withholding of removal status, Justice Mosely noted at para 63:

> Withholding of removal protects eligible claimants from removal or deportation to a country in which they are at risk, but does not prevent exclusion or deportation to another hospitable, safe country willing to accept or take in the refugee. Withholding of removal is not a discretionary remedy. An entitlement exists for the subcategory of refugees who can show that it is more likely than not they would be threatened upon return to their home country: *INS v. Cardoza-Fonseca*, above.

[53] Justice Mosley considered the expert opinion and American jurisprudence cited therein, which noted that the standard of proof for granting withholding of removal status is more demanding than the standard for asylum. The claimant must show that persecution is more likely than not. Justice Mosley concluded that despite the different status, persons with withholding of removal status are necessarily Convention refugees because they have established a well-founded fear of persecution in their country of nationality on a Convention ground (*Wangden* at paras 61-65).

[54] Justice Mosley noted that the interpretation of the term "Convention refugee" under Article 1 and within the meaning of paragraph 101(1)(d) was at the heart of the issue to be determined. He acknowledged that the plain meaning of paragraph 101(1)(d) appears to restrict the ineligibility for referral to claimants who have been granted Convention refugee protection in another country and can be returned there (*Wangden* at para 68). However, Justice Mosley noted that he was required to consider the words of the provision in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament (*Wangden* at para 69). In doing so, he considered the reciprocal agreements between Canada and the United States and the objectives of the Act.

[55] In *Wangden*, the key features and findings include that the applicant had not been refused asylum (which mirrors Convention refugee status); rather, he had withdrawn that application and been granted withholding of removal status. Justice Mosely found that withholding of removal status was granted because the applicant had established a well-founded fear of persecution in his country of nationality on a Convention ground. In other words, the risks of persecution were

assessed. Justice Mosley acknowledged that withholding of removal status did not provide the same range of rights as asylum but found that the key issue is whether the person is protected from risk (at para 72). Although asylum would have provided greater benefits, withholding of removal status protected the applicant from risk. This did not detract from the conclusion that the withholding of removal status was equivalent to being recognized as a Convention refugee (at para 75).

[56] In the recent case of *Aghazadeh*, Justice Gleeson considered whether a person granted subsidiary protection in Hungary was eligible to seek refugee protection in Canada. Applying the same approach as in *Wangden,* Justice Gleeson found that subsidiary protection is not equivalent to being recognized as a Convention refugee (at para 37).

[57] Justice Gleeson agreed that the terminology used was not determinative for the purpose of paragraph 101(1)(d). Rather, he stated at para 38:

> What is determinative for the purposes of paragraph 101(1)(d) is whether the protections extended by a country other than Canada arise as a result of the state having recognized the individual as a Convention refugee. Such recognition, regardless of the terminology used, triggers a state's international legal obligations as a party to the *Refugee Convention*. In my view, it is this circumstance—whether a country's international obligations have been triggered—that paragraph 101(1)(d) is intended to capture.

[58] Justice Gleeson noted that, as in *Wangden,* the issue was how the term "Convention refugee" in paragraph 101(1)(d) should be interpreted. He considered the principles of statutory interpretation and the principles and objectives of the Act, and found at para 41:

> These principles are neither consistent with, nor advanced through, an interpretation of paragraph 101(1)(d) that results in excluding

> from consideration claims by persons who have been refused Convention refugee status in another country but have been granted some other form of protection. To render a claim ineligible on the basis that some other form of protection has been granted—protection that a granting state is under no international legal obligation to grant or maintain—even where those protections might be similar to those a state is obligated to provide where a person is recognized as a Convention refugee, is inconsistent with the stated objectives of the IRPA.
>
> [Emphasis in original]

[59] Justice Gleeson noted that in *Wangden*, Justice Mosley compared withholding of removal status and asylum and concluded that the protections extended in the United States were based on the state recognizing Mr. Wangden as a Convention refugee. However, in *Aghazadeh*, Justice Gleeson found that "[t]he protections extended to the applicants by way of a grant of subsidiary protection do not arise as a result of the applicants being recognized as Convention refugees" (at para 48).

[60] *Aghazadeh* raises the same issues that arise in the present case in that the applicants in *Aghazadeh* and the Applicant, Mr. Kaleab, were refused refugee status but granted an alternative form of protection—subsidiary protection—in an EU Member State.

[61] There are some differences between *Aghazadeh* and the present case. It appears that Justice Gleeson was not provided with expert evidence regarding the scope of subsidiary protection or the differences in terms of the protection from risk.

[62] In the present case, the record contains the expert evidence of Professor Favilli, which explains that there is little difference in the content of subsidiary protection and refugee status in

Italy. However, this evidence focuses primarily on the benefits or entitlements that accrue. The jurisprudence has established that the focus should be on the risk faced by the Applicant and assessed by the other country, rather than on the labels given to the status.

[63] The evidence supports the view that the Applicant may return to Italy and will not face a return to a risk of serious harm in Eritrea. However, Professor Favilli's opinion explains that subsidiary protection is for non-EU foreigners or stateless persons who have applied for international protection and do not satisfy the requirements for obtaining refugee status but are likely to suffer serious harm if returned to their country of origin. Subsidiary protection does not reflect recognition that the Applicant had established a well-founded fear of persecution in Eritrea. If he had done so, presumably he would have been granted refugee status in Italy, but he was refused.

[64] While the Applicant would be protected from serious harm, he may not be protected from a well-founded fear of persecution on Convention grounds because those risks were not assessed or found.

[65] In *Aghazadeh*, Justice Gleeson concluded, for the reasons noted above, that an applicant cannot logically be considered to have been recognized as a Convention refugee if they have been refused refugee protection. The same conclusion must be reached in the present case.

[66] With respect to the Respondent's reliance on *De Melo* in support of the argument that section 97 accords a claimant "refugee protection" and that paragraph 1010(1)(d) should be read

to include Convention refugees (as in section 96) as well as persons in need of protection (as in section 97), I disagree. The Respondent has stretched the passage relied on beyond its context. Justice Diner stated at para 22, "[i]n other words, even though they are not Convention refugees, s. 97 can accord persons in need of protection refugee protection." While it is true that section 97 can provide a person protection, this does not mean that they have "Convention refugee" status. If that were the case, there would be no need for the two separate provisions.

[67] I acknowledge the Respondent's concern that the Applicant may be "asylum shopping" given his failure to renew his status in Italy and his unsuccessful attempt to seek permanent resident status in the United States. In doing so, he may be taking a different risk—that of not obtaining what he seeks in Canada. However, the issue is whether the Officer reasonably found that subsidiary protection is equivalent to being recognized as a Convention refugee for the purpose of being found ineligible pursuant to paragraph 101(1)(d).

[68] In the present case, the decision of the Officer is very brief and does not convey an analysis of the opinion of Professor Favilli, the provisions of the *Qualification Directive* or other international instruments. I acknowledge that the jurisprudence has recognized that an Officer's role is one of screening and that a detailed analysis of whether the status granted by a foreign jurisdiction is equivalent to the definition of "refugee" under the Convention should be left to the RPD (*Wangden*, at para 76). However, where the decision is that the person is ineligible, there is no recourse to the RPD. In addition, the role of the Court on judicial review is to determine if the Officer's decision is reasonable. This borders on impossible where there are no reasons other than pointing to the statutory provisions and stating that submissions have been considered. As a

result, the court must look to the record to determine whether the Officer's decision is reasonable (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board),* 2011 SCC 62 at para 15, [2011] 3 SCR 708). In the future, the Respondent may wish to consider whether some brief reasons should be provided where the finding is that the claimant is not eligible pursuant to paragraph 101(1)(d).

[69] Based on my review of the record in the present case, I must conclude that the Applicant, having been refused refugee protection and granted subsidiary protection in Italy, cannot reasonably be considered to be recognized as a "Convention refugee" for the purpose of paragraph 101(1)(d).

VIII. Proposed Question for Certification

[70] The Respondent proposes the following question:

> Is a person claiming refugee protection in Canada that holds "subsidiary protection" in a country signatory to the 1951 Convention, [who] is protected against *refoulement,* and [who] is granted a right to return, ineligible to be referred to the Refugee Protection Division pursuant to (paragraph) 101(1)(d) of IRPA?

[71] The Respondent submits that the answer to the proposed question, with the specific reference to *refoulement*, would dispose of an appeal. The Respondent again submits that the Applicant has protection in Italy against *refoulement*. Whether the Court decides that the Officer's decision was reasonable or not, the outcome of an appeal will decide the proper scope of paragraph 101(1)(d), which transcends the interests of the parties.

[72] The Applicant opposes the certification of the question. The Applicant submits that the law is clear, noting that *Wangden* was confirmed by the Federal Court of Appeal and that *Agazadeh* applied *Wangden*. The determination of whether the Officer reached a reasonable decision is based on an assessment of the facts and application of the established law to those facts.

[73] The Applicant submits that if any question is certified, the following would be more appropriate:

> Is a claim ineligible pursuant to paragraph 101(1)(d) of the Immigration and Refugee Protection Act if the person making the claim has received subsidiary protection in a European Union member state?

[74] In order for the Court to certify a question for appeal, the question "must be dispositive of the appeal, must transcend the interests of the parties and must raise an issue of broad significance or general importance. In consequence, the question must have been dealt with by the Federal Court and must necessarily arise from the case itself (as opposed to arising out of the way in which the Federal Court may have disposed of the case)" (*Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para 36, [2018] 2 FCR 229).

[75] In the present case, the Court's finding is that the Applicant, having been refused refugee protection in another country and granted alternative protection, cannot be considered to be recognized as a Convention refugee in that other country. This finding is based on a consideration of the evidence provided in this case, which demonstrates, among other things, that the same risks were not assessed in granting subsidiary protection. Although the Applicant would

not face return to a risk of serious harm unless he falls within one of the few exceptions, his status differs from that of a Convention refugee. Although greater clarity regarding the scope of paragraph 101(1)(d) would be helpful to Officers and to the Court, the determination is based on the facts of the present case. As such, it is not necessary to certify either question.

JUDGMENT in IMM-2509-18

THIS COURT'S JUDGMENT is that:

1. The Application is allowed.
2. The Applicant's eligibility to be referred to the Refugee Protection Division in accordance with section 101 of the Act must be redetermined.
3. There is no question for certification.

"Catherine M. Kane"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2509-18
STYLE OF CAUSE:	TESFALDET KALAEB v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 5, 2019
JUDGMENT AND REASONS:	KANE J.
DATED:	MARCH 22, 2019

APPEARANCES:

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