

Federal Court



Cour fédérale

Date: 20221116

Docket: IMM-6647-21

Citation: 2022 FC 1566

Ottawa, Ontario, November 16, 2022

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

BERHANU ABESHA FEYISSA

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a decision of the Refugee Appeal Division of the Immigration and Refugee Board of Canada [the “RAD”], dated September 3, 2021 [the “Decision”], which dismissed the Applicant’s appeal and upheld the decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada [the “RPD”], dated March 1, 2021.

[2] The RPD found that the Applicant did not face prospective risk of persecution and was excluded from refugee protection under section 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the “*IRPA*”].

II. Background

[3] The Applicant, Berhanu Abesha Feyissa, is a 47-year-old male citizen of Ethiopia of Amhara ethnicity and permanent resident of Germany.

[4] The Applicant left Ethiopia for Germany in 2005 to complete his PhD. He became a permanent resident in Germany in 2013. The Applicant entered Canada on July 21, 2019 and claimed refugee protection pursuant to sections 96 and 97 of the *IRPA* on the basis that he faced racial discrimination amounting to persecution in Germany.

[5] During his time in Germany, the Applicant claims to have worked several jobs where he believes employers discriminated against him due to his race:

- i. In May 2012, the Applicant began working for a private company as a structural engineer. His employer dismissed him shortly after he requested a pay raise in early 2014.
- ii. In January 2015, the Applicant began working for another company as a structural engineer. He was dismissed three months into this job. His employer claimed this was because he was overpaid in comparison to other staff members.

- iii. From October 2016 to June 2017, the Applicant worked as a civil engineer. He was fired because he was unable to obtain a German driver's license. A company tasked with assessing his license application unnecessarily delayed processing it.
- iv. In January 2018, the Applicant worked as a structural engineer. His employer forbade him from working a side job, despite his contract stating that working another job was allowed subject to consultation with his employer.

[6] The Applicant further claims he was subject to racial discrimination in other aspects of his German life, including in the healthcare system.

[7] The RPD rejected the Applicant's section 96 and 97 refugee claims. The RPD found that the Applicant was excluded from refugee status pursuant to section 98 of the *IRPA* and did not face prospective risk of persecution if returned to Germany. The RPD made the following relevant findings:

- i. The Applicant has status in Germany substantially similar to German nationals and is therefore excluded under section 98 of the *IRPA*. This included the rights to travel to Germany, to work freely, to study and to access social benefits.
- ii. The Applicant is not at risk in Germany. The Applicant's race "may have been a factor" but was not the primary reason for his workplace problems. The Applicant did experience discrimination in other areas of his life but this discrimination did

not amount to persecution. Moreover, there were anti-discrimination laws and institutions that worked to stem discrimination in Germany.

[8] On September 3, 2021, the RAD upheld the RPD's decision, rejecting the Applicant's refugee claim. The Applicant asks the Court to set aside this decision and return the matter to the RAD for reconsideration.

III. Decision Under Review

[9] For the most part, the RAD upheld the RPD's decision. The RAD observed the mixed case law from this Court as to whether risk is to be evaluated when it is determined that an individual has status in a country substantially equivalent to nationals of that country under section 98 of the *IRPA* (see *Celestin v Canada (Citizenship and Immigration)*, 2020 FC 97 [*Celestin*] at paragraph 103; *Saint Paul v Canada (Citizenship and Immigration)*, 2020 FC 493 [*Saint Paul*] at paragraph 57). However, as it has been the administrative practice of the RAD to consider risk in such cases, the RAD panel nonetheless considered the prospective risk to the Applicant in Germany along with considering whether he was excluded under section 98.

[10] The RAD held that the discrimination the Applicant faced in Germany did not amount to persecution. The RAD made the following findings with respect to the alleged discrimination:

- i. The RPD erred in holding the Applicant's workplace problems were not a product of discrimination, even though it found race "may have been a factor". Under the mixed-motive doctrine, if race is even just one of many factors in a decision, it will

amount to racial discrimination. However, there was no evidence of widespread racial discrimination in Germany. The Applicant had worked at various companies and there were legal remedies available in Germany to redress discriminatory employment practices.

- ii. When the Applicant's child required intensive care, authorities forbade him from riding in the ambulance with his child and provided him with police transport instead. The RAD rejected the Applicant's belief that this was due to racial discrimination.
- iii. Considered cumulatively, the discrimination the Applicant faced did not amount to persecution.

[11] The RAD analyzed the four relevant factors in considering whether a refugee claimant has status in a country similar to a national of that country under section 98 (*Shamlou v Canada (Minister of Citizenship and Immigration)*, [1995] FCJ No 1537 (TD) at paragraphs 35 to 36).

The RAD made the following findings with respect to each of the factors as applied to the Applicant:

- i. The right to return to the country: the Applicant did not dispute that he has the right to return to Germany.

- ii. The right to work freely without restrictions: the RAD reiterated its conclusions from its prospective risk analysis. The Applicant has worked several jobs in the past and retains the right to work in Germany.
- iii. The right to study: the Applicant studied in Germany and did not dispute that he has this right.
- iv. Full access to social services: there was no obstacle to the Applicant's access to social services.

[12] Accordingly, the RAD concluded that the Applicant was excluded from making a successful refugee claim pursuant to section 98 of the *IRPA*.

IV. Issue

[13] The issue is whether the Decision is reasonable.

V. Standard of Review

[14] The standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paragraph 25).

VI. Analysis

[15] Under section 98 of the *IRPA*, “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”.

[16] Section E of Article 1 of the *Convention Relating to the Status of Refugees*, June 28, 1951, 189 UNTS 137 reads:

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.

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.

[17] Therefore, a refugee claimant that has status, substantially similar to that of its nationals, in a third country will be excluded from claiming refugee protection under sections 96 and 97 of the *IRPA*.

[18] The Court of Appeal has described the test to determine whether an individual is excluded under section 98 (*Canada (Citizenship and Immigration) v Zeng*, 2010 FCA 118 [Zeng] at paragraph 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.

[19] Recent case law from this Court is mixed in regard to whether the RAD is obligated to consider prospective risk at all in the section 98 context when the answer to the first question in *Zeng* is "yes" (*Celestin* at paragraph 103; *Saint Paul* at paragraph 57). Nevertheless, the RAD considered the Applicant's allegations of discrimination and purported fear of persecution.

[20] The Applicant takes issue with the RAD's conclusions on this front. The Applicant believes that the RAD erred by not finding the Applicant faced a prospective risk of persecution if returned to Germany. In arriving at this faulty conclusion, the Applicant contends that the RAD selectively ignored evidence from the National Documentation Package [the "NDP"] that showed the prevalence of discrimination in Germany.

[21] I disagree. I find the RAD reasonably found the discrimination the Applicant faced did not amount to persecution. The RAD demonstrated that it was aware of the relevant law that required it to consider discrimination cumulatively to determine whether it amounted to persecution and observed relevant contextual factors, such as the general conditions in Germany and the availability of anti-discrimination legal remedies to workers in Germany. The RAD was entitled to, as it did, weigh the Applicant's evidence to determine which events amounted to discrimination and which did not. It is not the role of this Court to reweigh and reassess evidence considered by the RAD.

[22] The mere fact that the RAD referenced certain parts of the NDP and not others does not make the Decision unreasonable. In any event, the excerpts of the NDP that the Applicant references and claims the RAD ignored do not contradict the RAD's findings. The RAD never stated that there was no discrimination in Germany; it simply found the discrimination alleged by the Applicant did not amount to persecution.

[23] The Decision is reasonable.

VII. Conclusion

[24] This Application is dismissed. There is no question for certification.

JUDGMENT in IMM-6647-21

THIS COURT'S JUDGMENT is that:

1. The Application is dismissed.
2. There is no question for certification.

"Michael D. Manson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6647-21

STYLE OF CAUSE: BERHANU ABESHA FEYISSA v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

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