

Federal Court



Cour fédérale

Date: 20211105

Docket: IMM-3304-17

Citation: 2021 FC 1190

Ottawa, Ontario, November 5, 2021

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

DOLMA TSERING

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant is an Indian-born Tibetan who seeks judicial review of a decision of the Refugee Protection Division [RPD], which rejected her claim for refugee protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] As explained in greater detail below, this application is dismissed because, having considered the Applicant's arguments, I find the RPD's decision to be reasonable.

II. **Background**

[3] The Applicant was born in India to Tibetan parents. She says that she does not have Indian citizenship, but rather is a citizen of China, and therefore she cannot return to India for fear she will be deported to China and persecuted there for her Tibetan nationality as well as her political and religious beliefs as a follower of His Holiness the Dalai Lama.

[4] The Applicant's parents fled Tibet to India after participating in the 1959 Tibetan Uprising. She was born in Kollegal, India on January 14, 1985. The Applicant completed high school in Kollegal and thereafter worked on her family farm. In 2012, she travelled to Japan to study organic farming for a year.

[5] The Applicant has a Foreigner's Registration Certificate but does not have an Indian passport. She also does not have a birth certificate, because her parents did not register her birth. The Applicant states that in 2016, before she came to Canada, she attempted to apply for an Indian passport but was told that she did not have the required documents, specifically a birth certificate or other proof of birth. She also obtained the advice of a lawyer, who told her that she was ineligible for citizenship.

[6] In 2016, the Applicant obtained a U.S. visa and travelled to New York. In January 2017, she crossed by land into Canada and made a claim for refugee protection. She has an older brother, who was also born in India on September 21, 1976, and who successfully claimed refugee protection in Canada in 2009.

III. Refugee Protection Division Decision

[7] In a decision dated June 7, 2017 [the Decision], the RPD rejected the Applicant's claim for protection under sections 96 and 97 of *IRPA*, finding she was neither a Convention refugee nor a person in need of protection. The determinative issues were the Applicant's identity, nationality and country of reference.

[8] On the issue of identity, the RPD accepted the Applicant's claim that she is Tibetan but found that, notwithstanding her Tibetan identity, she is entitled to Indian citizenship. On the issue of nationality, the RPD observed that claimants cannot be given refugee protection if citizenship is available to them in another country and it is within their power to acquire said citizenship.

[9] The RPD relied on section 3(1) of the Indian *Citizenship (Amendment) Act, 2003* [*Citizenship Act*], which states that every person born in India between January 26, 1950, and July 1, 1987, shall be an Indian citizen by birth. The panel recognized that, despite the law, Indian authorities have been reluctant in recognizing Tibetans born during this period as Indian citizens. However, the RPD also noted that, in 2010, 2013 and 2014, the Indian High Courts in Delhi and Karnataka ordered authorities to issue passports to such petitioners and found that they

were entitled to claim status as Indian citizens. The RPD further noted a 2016 decision of the Delhi High Court, which ordered the Ministry of External Affairs to recognize Tibetans as Indian citizens if they met the requirements of the *Citizenship Act*.

[10] After concluding that the Applicant is likely entitled to Indian citizenship, the RPD assessed the evidence about her attempts to obtain citizenship. The RPD assigned little weight to an affidavit from the Applicant's cousin, in which he stated that the Applicant was unable to get a passport due to her lack of documentation, finding that the affidavit provided minimal detail about the efforts made to obtain the needed documentation.

[11] The RPD likewise assigned little weight to a letter from the lawyer the Applicant consulted, who advised the Applicant she would not be able to become a citizen without a birth certificate. The RPD found that date of birth was the important factor in determining eligibility for a passport and referenced documentation provided by the Applicant's counsel before the RPD, which stated that there are a number of documents that can be used as proof of a date of birth.

[12] The RPD also evaluated an affidavit from a friend of the Applicant, who accompanied the Applicant to the Indian High Commission in Toronto. The affidavit states that High Commission employees informed the Applicant that they did not know about the memorandum directing that passports should be issued to Tibetans born in India during the relevant period. The RPD found this affidavit was of minimal probative value, because lack of knowledge on the part

of High Commission employees has no bearing on whether the Applicant can claim citizenship and, further, the affidavit did not mention whether the Applicant had the required documentation.

[13] Finally, the RPD assessed the affidavits of three other individuals who stated they were unsuccessful in obtaining passports despite having the required documentation. The panel found that, because the affidavits were poor copies provided post-hearing and contained no verification of the affiants' identities, and because there was no continuation of the hearing requested in order to test the veracity of the claims, they were worthy of no weight.

[14] The RPD noted that the Applicant has a copy of her Registration Certificate, which lists the date and location of her birth, and also that, when the Applicant travelled to Japan in 2012, she did so by using an international travel document known as an Identity Certificate. The RPD found, on a balance of probabilities, that the Applicant had not shown that she needed a birth certificate to be eligible for a passport and that she had ample evidence to prove that she was born in India in the relevant period. It concluded that, as she was not uneducated or unsophisticated, she was capable obtaining the assistance needed to apply for an Indian passport.

[15] After a review of the relevant Canadian jurisprudence, the RPD considered whether the Applicant had made reasonable efforts to overcome the alleged impediment to exercising Indian citizenship rights. Based on the documentary evidence, the RPD found that her efforts had been superficial and that the Applicant had provided insufficient evidence to establish she could not apply for the documents she claimed were necessary to obtain a passport. Observing that the

Applicant is not unsophisticated or simple, the RPD concluded that she is resourceful and has the wherewithal to seek documents that would allow her to apply for a passport.

[16] The RDP therefore found that the Applicant's country of reference was India and that she is a citizen of India. She had adduced no evidence that she would suffer harm if returned to India, as her allegations of fear related only to deportation to China. As the RPD concluded that the Applicant has a right to Indian citizenship and that it was within her control to access to that right, it rejected her claim.

IV. **Issues and Standard of Review**

[17] The parties agree that the sole issue in this judicial review is whether the RPD erred in its nationality assessment. This issue is reviewable on a reasonableness standard.

V. **Analysis**

[18] The Applicant raises two principal arguments in support of her position that the Decision is unreasonable. First, she notes that, as identified to the RPD, her brother received refugee protection in Canada in 2009. The Applicant asserts that, even though she and her brother are identically situated, the RPD has made decisions that are opposite in outcome with no explanation for the different results.

[19] In support of this position, the Applicant relies on *Losel v Canada (Citizenship and Immigration)*, IMM-7989-14, October 9, 2015 [*Losel*], in which Justice Brown stated as follows:

I fully appreciate that members of the same family may have different outcomes for their respective applications under s. 96 and s. 97 of the IRPA. Clearly, each such claim must be assessed independently. Separate risk assessments under s. 96 and s. 97 are obviously required as a general rule because risk is personal to the claimant and includes both objective and subjective considerations which may differ between claimants.

However, when it comes to determining the nationality of two apparently identically-situated siblings to whom the same law and facts apply, it is not reasonable for the RPD to reach opposite outcomes. Each decision must be reasonable. However, these two decisions, one holding the Applicant to be an Indian national and the other holding his sister to be a Chinese national, cannot both be reasonable. One or the other must be unreasonable, particularly having regard to the statutory considerations of family reunification to which the RPD must refer. Inconsistent RPD decisions of this sort may also raise rule of law issues, requiring this Court's intervention as noted in *Wilson v Atomic Energy of Canada Limited*, 2015 FCA 17.

Where a first decision has previously been made on the nationality of one sibling, the RPD must pay particular close attention when dealing with the nationality of an identically situated sibling in a subsequent case. Here, the RPD did not have the benefit of the sister's evidence which should have been tendered. The reason the sister gained refugee status was not before the RPD although the record shows her to be Tibetan/Chinese.

In my view, an RPD must follow the decision made by a previous panel concerning the nationality of an identically-situated sibling unless the second RPD differentiates the two in clear and compelling reasons, which it did not do.

[Applicant's emphasis]

[20] The Applicant submits that the RPD's treatment of her brother's circumstances is limited to noting that he made a claim for refugee protection in 2009 and is now a Canadian citizen. She argues that the Decision contains no clear and compelling reasons for different results in her and her brother's claims and submits that, in the absence thereof, the Decision is not transparent,

intelligible and justified, as required by the reasonableness standard of review articulated in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 15 [*Vavilov*].

[21] I agree with the Respondent that the principle expressed in *Losel* does not assist the Applicant. As the Respondent submits, the Decision turned significantly on the decisions from the Indian High Court, which ordered that passports be issued to Tibetan residents living in India who had been born in India in the statutory period prescribed by the *Citizenship Act*. Those decisions were issued in 2010, 2013, 2014, and 2016 and therefore post-date the RPD's decision in the Applicant's brother's refugee claim in 2009.

[22] I appreciate that, as the Applicant submits, the Decision does not expressly state that, because of the intervening High Court decisions, the Applicant's claim results in a different outcome than did that of her brother. However, I do not consider *Losel* to require such a statement in the circumstances of this case. The principle expressed in *Losel* is described as applying in the context of two apparently identically-situated siblings to whom the same law and facts apply. The High Court decisions represent a change in the legal context (or possibly the factual context represented by foreign law) in which the two claims were decided.

[23] More generally, I regard the explanation in *Losel*, that the RPD must provide clear and compelling reasons for differentiating the nationality determinations of identically-situated siblings, to be a function of the broader requirement for transparent, intelligible and justified administrative decision-making as subsequently articulated in *Vavilov*. I consider this aspect of the RPD's reasoning to be entirely intelligible. In the context of the decisions by the Indian High

Courts, the Applicant failed to satisfy her burden to demonstrate that access to Indian citizenship was not within her control.

[24] I therefore find that the Applicant's first argument does not undermine the reasonableness of the Decision.

[25] The Applicant's second argument is that, in applying the test that governs allegations of impediments to establishing a right of citizenship, the RPD failed to turn its mind to her specific attributes (i.e., her educational background, level of sophistication, and financial circumstances) and therefore failed to conduct a proper case-specific analysis of her personal situation, when assessing the reasonableness of her efforts to overcome the impediment.

[26] Canvassing some of the governing jurisprudence will assist an understanding of the Applicant's argument. As explained by the Federal Court of Appeal in *Canada (Minister of Citizenship and Immigration) v Williams*, 2005 FCA 126 at para 27, where citizenship in another country is available, an applicant is expected to make attempts to acquire it and will be denied refugee status if it is shown that it is within his or her power to acquire that citizenship. The Federal Court of Appeal articulated the test applicable to such circumstances as follows in *Tretsetsang v Canada (Citizenship and Immigration)*, 2016 FCA 175 [*Tretsetsang*] at para 72:

72 Therefore, a claimant, who alleges the existence of an impediment to exercising his or her rights of citizenship in a particular country, must establish, on a balance of probabilities:

- (a) The existence of a significant impediment that may reasonably be considered capable of preventing the claimant from exercising his or her citizenship rights of state protection in that country of nationality; and

(b) That the claimant has made reasonable efforts to overcome such impediment and that such efforts were unsuccessful such that the claimant was unable to obtain the protection of that state.

[27] *Tretsetsang* further explained, at paragraph 73, that what will constitute reasonable efforts to overcome a significant impediment in any particular situation can only be determined on a case-by-case basis.

[28] Subsequently, in *Namgyal v Canada (Citizenship and Immigration)*, 2016 FC 1060 [*Namgyal*], this Court elaborated upon the explanation in *Tretsetsang* of the second part of the test by identifying that it is necessary for the tribunal, when applying this part of the test, to consider the specific attributes of the particular claimant. In *Namgyal*, the claimant was a woman with a grade three education who had received legal opinions advising her that she was not entitled to Indian citizenship under Indian law. The Court found that the Refugee Appeal Division had erred by failing to perform the sort of case-by-case analysis mandated by *Tretsetsang*, asking whether it was reasonable to expect someone with claimant's specific attributes, including a limited education, to take additional steps to attempt to have her Indian citizenship recognized, once she had obtained an adverse legal opinion.

[29] In the case at hand, the Applicant argues that the Decision demonstrates the same error as was identified in *Namgyal*, in that the RPD failed to consider her specific attributes (a young farmer with a high school education who had consulted a lawyer and obtained an adverse opinion), in concluding that the Applicant had failed to make reasonable efforts to obtain recognition of her Indian citizenship.

[30] I cannot conclude that the RPD erred in conducting its analysis under the second part of the *Tretsetsang* test. The RPD observed that the Applicant is not uneducated or unsophisticated, that she had experience with foreign travel and residence, and that she is resourceful. It found that she has the wherewithal to seek documents that would allow her to apply for a passport and that, should she require assistance in applying for the passport, she has the wherewithal to do so. While the RPD did not reference *Namgyal*, it conducted precisely the sort of case-specific analysis, considering the Applicant's personal attributes, that *Namgyal* requires.

[31] Relying on her occupation, level of education, and receipt of the adverse legal opinion, the Applicant disputes the reasonableness of this analysis. The Applicant also refers to the evidence provided to the RPD as to unsuccessful efforts by her and others to obtain citizenship subsequent to the Indian High Court decisions. However, I agree with the Respondent's position that these arguments amount to disagreement with the RPD's assessment of the evidence, which is not a basis for the Court to intervene in conducting judicial review.

[32] I have considered, in particular, the Applicant's argument that, in assessing whether the Applicant has made reasonable efforts to overcome the impediment to recognition of her citizenship, the RPD did not consider the adverse legal opinion. I agree with the Applicant that the Decision does not include any express consideration of that document in this portion of the analysis. However, elsewhere in the Decision, the RPD expressly refers to the lawyer's letter, describing it as indicating that the Applicant cannot become a citizen of India because her birth was not registered, but finding that other evidence is inconsistent with that opinion. It is therefore not possible to conclude that this evidence was overlooked. In the Applicant's particular

circumstances, as found by the RPD, the absence of an express reference to the lawyer's letter when applying the second part of the *Tretsetsang* test does not render the Decision unreasonable.

[33] Having considered the Applicant's arguments and finding no reviewable error in the Decision, this application for judicial review must be dismissed. Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT IN IMM-3304-17

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

No question is certified for appeal.

"Richard F. Southcott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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