

Federal Court



Cour fédérale

Date: 20220428

Docket: IMM-5640-20

Citation: 2022 FC 623

Ottawa, Ontario, April 28, 2022

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

KARMA DHONDUP

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Karma Dhondup, seeks judicial review of a decision of the Refugee Appeal Division (“RAD”) dated September 21, 2020, confirming the determination of the Refugee Protection Division (“RPD”) that the Applicant is neither a Convention refugee nor a person in need of protection under section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (“IRPA”).

[2] The Applicant claims to fear persecution in China because he is a Buddhist Tibetan who opposes the Chinese occupation in Tibet and does not have citizenship in India. The RAD upheld the RPD's decision and dismissed the Applicant's claim on the basis that the Applicant is a citizen of India by birth and the Applicant had not established a significant impediment preventing him from exercising his citizenship rights in India.

[3] The Applicant submits that the RAD erred in its assessment of his ability to obtain citizenship in India and that the RAD failed to adequately consider the risk of deportation to China from India.

[4] For the reasons that follow, I find the RAD's decision is reasonable. Accordingly, this application for judicial review is dismissed.

II. **Facts**

A. *The Applicant*

[5] The Applicant is a 46-year-old Tibetan Buddhist who was born in a Tibetan refugee settlement in Mundgod, India run by the Central Tibetan Administration (the "CTA"). The CTA provided the Applicant with a home, schooling, and employment on the settlement.

[6] The Applicant's parents were both from Tibet and fled to India when the Chinese government invaded and occupied Tibet in 1959. The Applicant states that under Article 5 of China's *Nationality Law*, he is considered a Chinese national by China unless he has become a

national of another country. The Applicant claims that Tibetan refugees have limited rights in India, including temporary residency rights, as long as they continue to renew a Foreigner's Registration Certificate ("RC") issued by the Indian government. The Applicant holds an RC and a valid "identity certificate" issued by the Indian Government.

[7] In September 2016, India's High Court directed all passport-issuing authorities to process the applications of eligible Tibetan refugees "or be liable for contempt of court." In March 2017, the Indian Ministry of External Affairs responded by issuing a new policy requiring all Regional Passport Offices ("RPOs") to process applications of Tibetan applicants born in India between January 26, 1950 and July 1, 1987, and to treat them as Indian citizens (the "2017 MEA Policy").

[8] The Applicant claims that in practice, the 2017 MEA Policy is being ignored and Tibetans continue to face obstacles in exercising citizenship rights such as obtaining a passport. The Applicant also states that Tibetans seeking to acquire Indian citizenship are subjected to preconditions requiring them to move out of settlements and forgo benefits related to the CTA.

B. *The RPD Decision*

[9] In a decision dated November 6, 2018, the RPD found that the Applicant is not a Convention refugee or a person in need of protection. The determinative issue for the RPD was the Applicant's ability to acquire Indian citizenship. The RPD found that, according to the *Indian Citizenship Act*, the Applicant is a citizen of India by birth and did not establish that he faces a significant impediment to exercising his citizenship rights in India. The RPD also found that the Applicant has not made reasonable efforts to obtain the protection of India.

[10] The RPD considered country conditions documentation regarding a reluctance to recognize Indian citizenship of Tibetans born in India between 1950 and 1987, and instances of authorities refusing to issue passports to Tibetans born in this period. The RPD noted, however, that there have been several developments allowing the issuance of Indian passports to Tibetans such as the 2017 MEA Policy and court interventions in which India's High Courts recognized the Indian citizenship of Tibetan applicants and ordered the issuance of passports. The RPD found that the Applicant's concerns about leaving the Tibetan settlement do not justify his minimal efforts to seek Indian citizenship. Overall, the RPD was not satisfied that the Applicant would not be issued an Indian passport should he return to India and apply for one.

C. *Decision Under Review*

[11] The Applicant appealed the RPD's decision to the RAD on the grounds that the RPD erred in finding that he is a citizen of India. On September 21, 2020, the RAD dismissed the Applicant's appeal and upheld the RPD's decision that the Applicant is neither a Convention refugee nor a person in need of protection. The RAD found that the Applicant would not face significant impediments in exercising citizenship rights in India and did not make reasonable efforts to overcome existing impediments. In particular, the RAD made the following findings:

- The RPD was correct to find that by virtue of the *Indian Citizenship Act*, the Applicant – who was born in India in 1975 – is an Indian citizen by birth.

- The RPD was correct to note that since a decision from the Delhi High Court in September 2016, there has been significant progress for Tibetans and their citizenship rights are being recognized in India.
- The RAD acknowledge the reports of Tibetans facing discrimination by RPOs in processing their passport applications, as outlined in an October 3, 2017 article of the *Tibet Sun*. However, the RAD found that these reports are not sufficiently probative to call into question the general policies and procedures applicable when applying for a passport in India or that complications in passport applications are exclusive to the Tibetan community. Therefore, there is only a mere possibility that the Applicant would face harassment if he were to file a passport application and the Applicant did not establish, on a balance of probabilities, that he would personally face obstruction.
- The RPD correctly found that giving up Tibetan benefits from the CTA does not constitute a serious impediment to obtaining Indian citizenship. The RPD also correctly noted that by seeking Canada's protection, the Applicant would logically have to abandon the CTA's benefits.
- The RPD was correct to find that the Applicant did not establish that he would be unable to obtain an Indian passport in Canada.

[12] The RAD concluded that since the RPD correctly found that the Applicant is a citizen of India and there are no significant impediments to exercising his citizenship in India, it is not necessary to analyze the risk of deportation to China.

III. Issues and Standard of Review

[13] The issue in this application for judicial review is whether the RAD's decision is reasonable, and in particular:

- A. *Whether the RAD erred in its assessment of the Applicant's ability to apply for citizenship in India.*
- B. *Whether the RAD failed to adequately consider the risk of deportation to China from India.*

[14] Both parties submit that the applicable standard of review is reasonableness. I agree (*Adelani v Canada (Citizenship and Immigration)*, 2021 FC 23 at paras 13-15; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("Vavilov") at paras 10, 16-17).

[15] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker (*Vavilov* at para 85). Whether a decision is reasonable depends on the relevant administrative setting, the record

before the decision-maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[16] For a decision to be unreasonable, the applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). A reviewing court must refrain from reweighing evidence before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125). Flaws or shortcomings must be more than peripheral to the merits of the decision, or a “minor misstep” (*Vavilov* at para 100; *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156 at para 36).

IV. Analysis

A. *Whether the RAD erred in its assessment of the Applicant’s ability to apply for citizenship in India.*

[17] The Applicant submits that the RAD erred in finding that he does not face significant impediments in exercising citizenship rights in India.

[18] In *Tretsetsang v Canada (Citizenship and Immigration)*, 2016 FCA 175 (“*Tretsetsang*”), the Federal Court of Appeal held that the onus is on a refugee claimant to establish that they are unable to avail themselves of the protection of their country of nationality, or unwilling to do so because of a fear of persecution in that country, and that any impediment to state protection must be a significant one (at para 71). Paragraphs 72 and 73 of *Tretsetsang* state:

[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.

[73] What will constitute reasonable efforts to overcome a significant impediment (that has been established by any particular claimant) in any particular situation can only be determined on a case-by-case basis. A claimant will not be obligated to make any effort to overcome such impediment if the claimant establishes that it would not be reasonable to require such claimant to make any such effort.

[19] The Applicant argues that the RAD erred in finding that relinquishing CTA benefits in order to apply for an Indian passport is not a significant impediment. The evidence before the RAD outlined the preconditions that exist for Tibetan refugees applying for Indian passports, including the requirement that they move out of settlements and give up benefits from the CTA. The Applicant argues that he did not apply for citizenship in India because he did not want to lose his home on the settlement or lose his employment with the CTA. The Applicant also maintains that the country condition evidence supports his testimony that finding employment as a Tibetan outside the settlement is rare and difficult, even if one holds Indian citizenship.

[20] To support his position, the Applicant relies on this Court's decision in *Pasang v Canada (Citizenship and Immigration)*, 2019 FC 907 ("*Pasang*"). Like him, the applicant in *Pasang* only held an RC and made a refugee claim in Canada because of his uncertain status in India. In

Pasang, this Court found the RAD's decision unreasonable because the RAD failed to consider the personal implications of applying for Indian citizenship (at paras 23-24). The Applicant argues that, as in the case of *Pasang*, the RAD failed to consider the personal consequences he would face should he attempt to obtain an Indian passport. These consequences include being forced to leave the Tibetan settlement without a home, access to community, or government support while he awaits a passport. Additionally, the Applicant argues that the uncertainty of obtaining a passport, as well as the uncertainty of finding employment outside a Tibetan settlement amount to significant impediments.

[21] The Applicant further submits that the RAD disregarded the evidence on the record that Tibetans in India are largely viewed as foreigners and that even those who are considered citizens under Indian law face difficulty exercising their citizenship rights. The Applicant points to the evidence of discrimination against Tibetans trying to exercise their citizenship rights in India, as well as evidence that while some Tibetans have succeeded in obtaining passports, many have been obstructed in their attempts and forced to litigate refusals in court. The Applicant asserts that the evidence before the RAD demonstrates that Tibetans continue to be denied passports, in spite of the Indian High Court decision and the 2017 MEA Policy.

[22] The Applicant cites an October 3, 2017 article from the *Tibet Sun*, which notes: "Tibetans applying for Indian passport[s] continue to face various forms of discrimination and harassment, and are left with no choice other than appealing in the courts for relief." The Applicant argues that the RAD's erroneous dismissal of the article and its contents as "too vague" fails to account for how the article provides detailed examples of Tibetans who have

faced harassment and obstacles to obtaining passports in India. In support, the Applicant relies on *Yalotsang v Canada (Citizenship and Immigration)*, 2019 FC 563 (“*Yalotsang*”), in which this Court found that the RPD had erred in finding that it was within the applicant’s control to have her Indian citizenship recognized in India. At paragraphs 17 and 18 of *Yalotsang*, this Court found that the RPD had failed to engage with probative evidence of the impediments faced by Tibetans in acquiring citizenship in India, including a legal opinion from a lawyer:

[17] Amongst other impediments, the lawyer describes the difficulties that are encountered by people in Ms. Yalotsang’s situation in obtaining the identification documents that are required to obtain Indian passports, as well as the general unwillingness of Indian passport officials to accept that Tibetans born in India are indeed Indian citizens.

[18] Although the Board made a passing reference to “the affidavits” submitted by Ms. Yalotsang in support of her argument, it did not engage with this evidence in any way. Indeed, there is no mention whatsoever of the legal opinion in the Board’s decision, apart from the cryptic reference to “the affidavits” submitted by Ms. Yalotsang.

[23] The Respondent contends that the RAD correctly followed the Federal Court of Appeal’s holding in *Tretsetsang*. In doing so, the RAD came to a reasonable conclusion that the Applicant had not shown that he faces significant impediments to exercising his rights to Indian citizenship or that he made reasonable efforts to overcome any impediments. The Respondent argues that the Applicant failed to make any attempts to obtain citizenship in India, and that the RAD reasonably assessed the evidence to find that the Applicant had not demonstrated that he would be unable to obtain citizenship in India.

[24] Furthermore, the Respondent submits that it was reasonable of the RAD to find that the Applicant's argument regarding his fear of losing CTA benefits is circular: it makes sense that should an individual wish to acquire Indian citizenship, they would forfeit certain benefits provided to Tibetan refugees since they would no longer be a refugee. In seeking refugee protection in Canada, the Applicant does not have a choice whether he prefers to trade the benefits he receives from the CTA for India citizenship or refugee protection in Canada: if the Applicant is able to access his rights to citizenship in India, he is required to do so. The Respondent argues that even if the Applicant can demonstrate that he would in fact lose all CTA benefits, he has failed to reconcile why losing these benefits is amenable to him only if he receives status in Canada, but not if he receives Indian citizenship.

[25] I agree with the Respondent's position. I also find the Applicant's situation to be distinguishable from the case in *Pasang*. Unlike the applicant in *Pasang*, who had a modest education and was employed as a street vendor (*Pasang* at para 23), the Applicant holds a Bachelor of Commerce degree from Mysore University. Pursuant to the test laid out in *Tretsetsang*, I am convinced that the RAD in this case conducted an individualized assessment of the personal implications of applying for Indian citizenship, and reasonably concluded that the Applicant does not face significant impediments to exercising his citizenship rights in India, or that the Applicant has made reasonable efforts to overcome an impediment to obtaining Indian citizenship (at paras 71-73).

[26] With respect to the Applicant's argument that the RAD failed to mention evidence on the record related to the barriers faced by Tibetans in India, I note that administrative decision-

makers are presumed to have considered all of the evidence before them and are not required to refer to each piece of evidence in their reasons (*Yalotsang* at para 19). In discussing the evidence on the record, the RAD stated:

The Appellant also bases his argument regarding the CTA's issuing of NCOs on the case law, but these decisions predate major changes in country conditions. The courts and the executive branch of the Indian government have unequivocally affirmed that Tibetans born in India are citizens and that passport should be issued to them. Evidence presented by Appellant demonstrates that many Tibetans have obtained Indian passports since. The RAD gives more weight to the Ministry of External Affairs' (MEA) memorandum ordering the issuance of passports to Tibetans born in India during the relevant time period than to anecdotal reports in news articles.

[27] The *Tibet Sun* article outlines the impediments faced by Tibetans when attempting to obtain passports from RPOs in India. The article includes a quote from a lawyer outlining how the 2017 MEA Policy is being arbitrarily enforced at RPOs, and discusses how many Tibetans seeking to acquire an Indian passport have been forced to take their cases to court in order to have the policy enforced.

[28] In its decision, the RAD acknowledged that local officials continue to make it difficult for people of Tibetan origin to obtain recognition of their citizenship. However, the RAD dismissed the *Tibet Sun* article because it found it to be "[...] too vague and does not provide an indication of the scale of the problem."

[29] It strikes me as an onerous expectation to demonstrate the scale of the barriers faced by Tibetans in accessing citizenship in India, particularly given how the *Tibet Sun* article notes that

rules are enforced arbitrarily at the RPOs. Nevertheless, I recognize that deference must be shown to the RAD's assessment of the record, and it is not the role of this Court to re-weigh the evidence that was before the RAD. I also do not find the decision in *Yalotsang* to be particularly helpful to the Applicant's argument. I note that the Court in *Yalotsang* found that the RPD failed to engage with evidence in the form of a legal opinion that was central to the applicant's case (para 22). In this case, the RAD did in fact consider the evidence contained in the *Tibet Sun* article, yet decided to give it less weight. As such, I find that the Applicant has not demonstrated that the RAD failed to consider any evidence on the record.

[30] In light of the test advanced in *Tretsetsang* and the jurisprudence from this Court, it is my view that the RAD's decision adequately considered the Applicant's impediment to obtaining Indian citizenship, including the personal implications of applying for Indian citizenship, and his efforts to obtain Indian citizenship. I therefore find that the RAD's decision reflects a rational chain of analysis and is justified in light of the facts and the law (*Vavilov* at para 85).

B. *Whether the RAD failed to adequately consider the risk of deportation to China from India.*

[31] The Applicant submits that the RAD erred in finding it unnecessary to engage in an analysis of the risk that the Applicant could be deported to China from India. The Applicant states that the country condition documentation before the RAD provides details of three people, including one Tibetan born in India, who were deported to China pursuant to orders of Indian Courts because they did not have an RC. The Applicant notes that his RC is now expired and

that it would be difficult to renew. Given these circumstances, the Applicant argues that the RAD was required to consider the increased possibility of deportation to China.

[32] I do not find that the evidence submitted by the Applicant provides enough detail to support a conclusion that the Applicant would be deported to China or that he would suffer persecution in India. I therefore find that the Applicant failed to meet his burden of establishing his allegations of persecution and the risk of deportation to China and it was reasonable of the RAD not to engage in an analysis of the risk the Applicant faces in China.

V. **Conclusion**

[33] For the reasons above, I find the RAD's decision is reasonable. This application for judicial review is dismissed. No questions for certification were raised, and I agree that none arise.

JUDGMENT in IMM-5640-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. There is no question to certify.

"Shirzad A."

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5640-20

STYLE OF CAUSE: KARMA DHONDUP v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: BY VIDEOCONFERENCE

DATE OF HEARING: MARCH 24, 2022

JUDGMENT AND REASONS: AHMED J.

DATED: APRIL 28, 2022

APPEARANCES:

Phillip Trotter FOR THE APPLICANT

Rachel Hepburn-Craig FOR THE RESPONDENT

SOLICITORS OF RECORD:

Phillip Trotter FOR THE APPLICANT
Barrister and Solicitor
Toronto, Ontario

Attorney General of Canada FOR THE RESPONDENT
Toronto, Ontario