Federal Court Cour fédérale

Date: 20150625

Docket: IMM-4907-14

Citation: 2015 FC 787

Montréal, Quebec, June 25, 2015

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

TENZIN PALDEN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Background

[1] This is a judicial review of a decision of the Refugee Appeal Division (RAD) of the Immigration and Refugee Board (IRB) pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], rendered on May 29, 2014, dismissing the applicant's appeal against the decision of theRefugee Protection Division (RPD) of the IRB that the applicant is not a Convention refugee or a person in need of protection.

[2] The applicant was born in India to Tibetan parents in 1984, but he alleges that he does not have citizenship in India. The applicant alleges that he fears deportation from India to China where he could be persecuted for being a follower of the Dalai Lama and an activist for the Tibetan cause. He alleges that the passport he used when he travelled to Canada was fraudulent.

A. *The RPD's decision*

[3] The RPD considered that the applicant was entitled to Indian citizenship as the *Citizenship Act of India* and Indian jurisprudence provide that those who were born in India between January 26, 1950, and July 1, 1987, are citizens of India by birth. The RPD judged that the applicant came to Canada with what appeared to be a genuine Indian passport that was carefully vetted at both the Canadian and Indian airports. The applicant alleged that he could not provide this passport (to support his allegation that it was fraudulent) because he destroyed it on the instruction of his agent. The RPD found that this was unlikely because the applicant's agent was registered with the Canadian government, and it was therefore unlikely that he would have provided such advice. For those reasons, the RPD found, on the balance of probabilities, that the applicant was born as an Indian citizen and had a genuine passport, and therefore the appropriate country of reference for his refugee claim was India. Given that the applicant made no claim against India, the RPD denied his claim for refugee protection.

B. *The RAD's decision*

[4] Based on *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] and the factors outlined in *Newton v Criminal Lawyers' Association*, 2010 ABCA 399, the RAD applied the standard of reasonableness in reviewing the RPD's decision. In determining which standard of review should

apply, the RAD considered that the following three factors were the most significant: (i) the respective roles of the RPD and the RAD in the context of the *IRPA*, (ii) the expertise and advantageous position of the RPD member compared to that of the RAD, and (iii) the nature of the question in issue. Given the limitations imposed on the RAD by the *IRPA* with respect to assessment of the evidence (subsections 110(3) and (4) of the *IRPA*; section 57 of the *Refugee Appeal Division Rules*, SOR/2012-257), the RAD considered that it must show deference with respect to factual and credibility findings.

[5] The RAD found that the RPD reasonably considered that the applicant's passport was genuine. The RAD found that the applicant provided no evidence, aside from an affidavit of counsel who represented him before the RPD (which was rejected pursuant to subsection 110(4) of the *IRPA*), to support his argument that the RPD had confused his registered Canadian consultant with the agent who allegedly obtained his false Indian passport. The RAD found that (i) the vetting of the passport by both the Canadian and Indian authorities, (ii) the fact that the applicant destroyed the passport after entering Canada, and (iii) the absence of evidence of the fraudulent nature of the passport, were sufficient to establish the reasonableness of the RPD's conclusions with respect to the genuineness of the applicant's passport.

[6] With respect to the applicant's right to Indian citizenship, the RAD found that the Indian jurisprudence of the High Courts of Delhi and Karnataka supported the RPD's finding that individuals of Tibetan origin born in India between January 26, 1950, and July 1, 1987, (which includes the applicant) are Indian citizens by birth regardless of the nationality of their parents.

The RAD also found that the applicant exercised his right of citizenship to obtain a genuine passport.

II. Questions

[7] This matter raises the following issues:

1. Did the RAD err in its standard of review analysis?
2. Did the RAD err in concluding that the applicant is a citizen of India?

III. Analysis

A. *The standard of review*

[8] There are two standards of review at issue: (i) the standard of review that the RAD applied in reviewing the RPD's decision (the RAD's standard of review), and (ii) the standard of review applicable by the Court to the RAD's decision (the Court's standard of review).

(1) The RAD's standard of review

[9] The applicant argues that the RAD erred in applying the reasonableness standard to the RPD decision. The respondent disagrees.

[10] There is some disagreement within this Court as regards the degree of deference that should be shown by the RAD on an appeal from the RPD: see *Huruglica v Canada (Citizenship and Immigration)*, 2014 FC 799 at paras 35 to 56 [*Huruglica*]; *Spasoja v Canada (Citizenship and Immigration)*, 2014 FC 913 at para 40; *Alyafi v Canada (Citizenship and Immigration)*, 2014 FC 952; *Akuffo v Canada (Citizenship and Immigration)*, 2014 FC 1063 at paras 28 to 39

[*Akuffo*]; *Djossou v Canada (Citizenship and Immigration)*, 2014 FC 1080 at paras 38 to 55; *Green v Canada (Citizenship and Immigration)*, 2015 FC 536 at paras 26 to 32; *Denbel v Canada (Citizenship and Immigration)*, 2015 FC 629 at paras 31 to 39 [*Denbel*]. However, there does appear to be a consensus that the RAD owes deference to the RPD in cases in which the credibility of a witness is critical or determinative, or where the RPD enjoys a particular advantage over the RAD in reaching a specific conclusion: *Huruglica* at paras 37, 55; *Yetna v Canada (Citizenship and Immigration)*, 2014 FC 858 at para 17; *Akuffo* at para 34; *Ali v Canada (Citizenship and Immigration*), 2015 FC 500 at para 6.

[11] There is also consensus that, because the proceeding before the RAD is an appeal (as opposed to judicial review), it is an error for it to apply a standard of review of reasonableness, which concerns judicial review proceedings, not appeal: *Huruglic*a at para 54; *Ozdemir v Canada (Citizenship and Immigratio*n), 2015 FC 621 at paras 2 to 3; *Ching v Canada (Citizenship and Immigration)*, 2015 FC 725 at para 48.

[12] In my view, the RAD was correct to use deference in its review of the RPD's findings that were based on the credibility of the applicant's testimony. Though the RAD erred in referring to the standard of review of the RPD decision as reasonableness, I am satisfied that this error did not negatively affect its assessment of the applicant's credibility. Even if the RAD had applied a "palpable and overriding error" test, the result would not have changed in my view: *Denbel* at paras 34 to 36; *Brodrick v Canada (Citizenship and Immigration)*, 2015 FC 491 at para 31.

[13] Because of my conclusions below, it is not necessary to consider other aspects of the RAD's review of the RPD decision.

(2) The Court's standard of review

[14] There are also differences of opinion within the Court with regard to the appropriate standard of review to be applied by the Court to the RAD's selection of its standard of review. However, because I have concluded that the RAD's selection in this regard did not negatively affect its decision, it is not necessary for me to decide on the Court's standard of review.

B. *Did the RAD err in concluding that the applicant is a citizen of India?*

[15] The applicant argues that the RAD erred in concluding that the applicant's passport was genuine. The applicant underlines that his sworn testimony is presumed to be true unless there is a reason to doubt its truthfulness: *Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 at 305 (FCA). The applicant also notes that the proliferation of false Indian passports – which was recognized by the RAD – illustrates that the vetting of passports by Canadian and Indian authorities is defective.

[16] In my view, there were several reasons to doubt the truthfulness of the applicant's testimony that the Indian passport used was fraudulent. Firstly, he did not need a fraudulent passport to leave India and travel internationally. He admits that he already had a genuine Identity Certificate (IC) which can be used for travel outside India. The applicant's counsel argued at the hearing that it might have been easier for him to obtain his student visa based on a

fraudulent Indian passport than a genuine IC. The applicant did not direct me to any evidence or authority in support of this argument, and I find this argument questionable.

[17] The applicant also argues that the IC is a document specifically intended for use by non-citizens, such that a person would have an IC only if they do not have, and are not entitled to, a passport. In my view, the likelihood that a person would have both an IC and a genuine Indian passport is a matter requiring expertise. I defer to the RAD's conclusion on this point.

[18] A second reason to doubt that the applicant's passport was fraudulent is that it was vetted by authorities in both India and Canada on several occasions: when obtaining the applicant's student visa, when leaving India, and when entering Canada. Though it is no doubt possible to travel internationally using a fraudulent Indian passport, the foregoing steps are nevertheless reasons to doubt that the passport was fraudulent.

[19] A third reason to doubt the applicant's testimony is that he himself destroyed the passport in question, thus eliminating a key piece of evidence that could have either corroborated or contradicted his version of the events. In these circumstances, it is quite reasonable to draw an inference that the passport itself, if it had been put in evidence, would not have assisted the applicant's case.

[20] Because the applicant's testimony is a matter of credibility, on which the RAD was correct to defer to the RPD, and because there was no other evidence that the applicant's passport was not genuine, I conclude that the RPD's conclusion that the applicant had a genuine

Indian passport should stand. Accordingly, the applicant's claim that his citizenship in India is not recognized by Indian authorities cannot succeed.

[21] This conclusion alone is sufficient to dismiss the present application for judicial review.

[22] The parties also devoted an important part of their argument to the question of whether, assuming that the applicant did not have a genuine Indian passport, he had it within his control to obtain one.

[23] In *Canada (Minister of Citizenship and Immigration) v Williams*, 2005 FCA 126, the Federal Court of Appeal stated at paras 19, 23 and 27:

> [19] It is common ground between counsel that refugee protection will be denied where it is shown that an applicant, at the time of the hearing, is entitled to acquire **by mere formalities the citizenship** (or nationality, both words being used interchangeably in this context) of a particular country with respect to which he has no well-founded fear of persecution.
>
> […]
>
> [23] The principle enunciated by Rothstein J. in Bouianova [*v Minister of Employment and Immigration*, [1993] FCJ No. 576] was followed and applied ever since in Canada. Whether the citizenship of another country was obtained at birth, by naturalization or by State succession is of no consequence provided it is **within the control of an applicant to obtain it**.
>
> […]
>
> [27] […] what the case law has established is that, 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 power to acquire that other citizenship.
>
> [Bold emphasis added]

[24] The parties are agreed that the applicable Indian statute and caselaw clearly indicate that the applicant is entitled by birth to Indian citizenship. However, the parties are also agreed that government policy in India makes it very difficult for those born in India of Tibetan parents to have their citizenship recognized. The applicant cites evidence that the only people in that position known to have obtained an Indian passport are the two who pursued legal action to that end against the Indian government.

[25] The parties disagree as to whether, in these circumstances, it is within the applicant's control to obtain citizenship in India.

[26] There is also disagreement within the Federal Court on this point. Justice O'Reilly, in *Wanchuk v Canada (Citizenship and Immigration)*, 2014 FC 885, held that the obstacles to people in the applicant's position are such that there is only a "mere possibility" of obtaining Indian citizenship, and that obtaining Indian citizenship is not within their control. More recently, Justice Tremblay-Lamer followed the position of Justice O'Reilly in *Dolma v Canada (Citizenship and Immigration)*, 2015 FC 703 at para 23. On the other hand, Justice Mosley, in *Tretsetsang v Canada (Citizenship and Immigration)*, 2015 FC 455, referring to the decision of Justice Hughes in *Dolker v Canada (Citizenship and Immigration)*, 2015 FC 124, expressly disagreed. He held that the obstacles to having Indian citizenship recognized in that case were insufficient to conclude that citizenship was not within the applicant's control, especially since citizenship had not even been sought in that case (as is the case here).

[27] Because of my earlier conclusions, it is not necessary for me to decide between the competing views on this point.

IV. Conclusion

[28] In my opinion, the application for judicial review should be dismissed.

[29] Because the disputed legal questions in the present application concerning (i) standard of review and (ii) whether Indian citizenship was within the applicant's control were not determinative of the result, I decline to certify a question for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The present application is dismissed.

2. No serious question of general importance is certified.

"George R. Locke"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

D. Clifford Luyt	FOR THE APPLICANT
Ildiko Erdei	FOR THE RESPONDENT

SOLICITORS OF RECORD:

D. Clifford Luyt Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT