

Federal Court



Cour fédérale

**Date: 20191022**

**Docket: IMM-3747-18**

**Citation: 2019 FC 1320**

**Ottawa, Ontario, October 22, 2019**

**PRESENT: The Honourable Mr. Justice Southcott**

**BETWEEN:**

**LOBSANG WANGCHUK**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. Overview**

[1] The Applicant seeks judicial review of a decision by the Refugee Protection Division [RPD] dated June 26, 2018 [the Decision], finding that he was neither a Convention refugee, nor a person in need of protection, under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27. The Applicant fears persecution in China, his country of citizenship. The RPD's rejection of his refugee claim turned on its conclusion that the Applicant,

who was born in India, had not provided sufficient evidence of any circumstances preventing him from seeking or acquiring Indian citizenship.

[2] As explained in more detail below, this application is allowed, because I have found the RPD breached its obligations of procedural fairness by making a material credibility finding without first giving the Applicant an opportunity to comment on the evidence that resulted in such finding.

## II. **Background**

[3] The Applicant, Lobsang Wangchuk, is a Chinese citizen who was born in India on May 3, 1975, to Tibetan-born parents. He arrived in Canada on December 27, 2012 and sought refugee protection on the basis that he is a member of the Tibet Youth Congress, an organization that advocates for a free Tibet. He fears that, if he returns to India, he will be deported to China, where he will be persecuted for his political activities.

[4] In an earlier decision issued on April 4, 2013, the RPD rejected the Applicant's refugee claim, finding that he was able to seek Indian citizenship as a result of his birth in that country, under the *Indian Citizenship (Amendment) Act 2003*, section 3(1)(a) [*Citizenship Act*]. However, in *Wanchuk v Canada (Citizenship and Immigration)*, 2014 FC 885 [*Wanchuk*], Justice O'Reilly set that decision aside and remitted the claim to the RPD. The Court held that the RPD's decision was unreasonable because it failed to take into account obstacles to the Applicant obtaining Indian citizenship.

[5] Before the newly constituted panel of the RPD, the Applicant submitted that he would not be able to obtain Indian citizenship under the *Citizenship Act*, even though he was legally entitled to same as a result of his birth in that country. He argued that the Indian government would not grant him a passport, because he did not possess the requisite documents to apply for one. Following a hearing before this panel, the RPD again rejected the Applicant's claim, in the Decision that is the subject of this application for judicial review.

### III. Decision Under Review

[6] The Decision relies on the principle that a claimant cannot be given refugee protection when they have citizenship that is available to them in another safe country and it is within the claimant's power to acquire said citizenship. The RPD noted that section 3(1)(a) of the *Citizenship Act* provides every person born in India between January 26, 1950 and July 1, 1987 shall be a citizen of India by birth; however, the RPD acknowledged a division in applicable jurisprudence as to whether Tibetans born in India between those dates have a right to Indian citizenship.

[7] The RPD considered the first RPD decision, which found, *inter alia*, that the Applicant has a birth certificate issued by the Central Tibetan Administration [CTA] and that the Indian government accepts such birth certificates for purposes of issuing identity documents. The RPD concluded in its first decision that the Applicant had not discharged his burden of establishing that he could not obtain citizenship in India.

[8] The RPD then reviewed *Wanchuk*, which found obtaining Indian citizenship was not within the Applicant's control, and therefore he had only a mere possibility of obtaining citizenship, because:

- A. The CTA must approve his passport application before the Indian government will grant it, and the CTA is reluctant to grant such approval for political reasons;
- B. The *Dolkar* decision of the Indian High Court in New Delhi (affirming a Tibetan's right to citizenship in India) was not binding on all courts in India; and
- C. The Applicant may well have to litigate his claim for citizenship.

[9] The RPD observed that, subsequent to *Wanchuk*, the Delhi High Court has ordered the Ministry of External Affairs to recognize Tibetans as Indian citizens if they meet the requirements under the *Citizenship Act*. The RPD concluded that, despite some resistance in the past, High Courts in Delhi have ruled consistently that Tibetans born in the relevant time period are entitled to Indian passports and that it was clear from the country conditions that there had been very significant progress in this area.

[10] With reference to the division in Canadian jurisprudence, the RPD noted cases holding that acquisition of citizenship in India by Tibetans is neither automatic nor fully within the control of the applicant, including *Wanchuk*, but that in *Tretsetsang v Canada (Citizenship and Immigration)*, 2015 FC 455 [*Tretsetsang*], aff'd 2016 FCA 175 [*Tretsetsang FCA*], the Court

expressly declined to follow *Wanchuk*. In *Tretsetsang*, Justice Mosely found that, although litigation may be necessary to secure citizenship, a right which is enshrined in legislation and has been enforced by the Indian courts amounts to more than a mere possibility of obtaining citizenship. In the Decision, the RPD followed the reasoning in *Tretsetsang*, finding that it is incumbent upon an individual to make reasonable attempts to avail oneself of citizenship that is available to them and that obstacles and inconvenience are insufficient to overcome this obligation.

[11] The RPD then considered the Applicant's attempts to apply for an Indian passport but concluded those efforts were superficial and meant to demonstrate that he cannot obtain the requisite document that would grant him citizenship. The RPD noted the lack of documentary evidence of his efforts and found that such efforts represented insufficient evidence of reasonable attempts to seek Indian citizenship. While noting the Applicant may have to seek legal redress to overcome hurdles in obtaining a passport, the RPD found such remedies were not unreasonable.

[12] Turning to the Applicant's claim that any attempts to obtain an Indian passport were futile, because he did not have the required supporting documents, the RPD considered legal opinions submitted by the Applicant from two Indian lawyers. The RPD acknowledged that one of the lawyers, Simarpal Singh Sawhney, had knowledge in the area. However, it afforded little weight to his conclusion that the Applicant did not have the documents required to apply for a passport, finding that Mr. Sawhney did not have all the facts about the documentation in the Applicant's possession because the Applicant did not provide to Mr. Sawhney his birth certificate issued by the CTA. The RPD also noted that the Applicant has a driver's license,

which Mr. Sawhney indicated is the type of document that can prove an applicant's date of birth and can support an Indian passport application.

[13] The RPD concluded that the Applicant's failure to disclose his CTA birth certificate to Mr. Sawhney undermined his credibility. While the Applicant testified he was asked only to send government-issued documents, the RPD found it was not clear whether the CTA birth certificate would have resulted in a different opinion from Mr. Sawhney. The RPD also noted the Applicant's testimony that he did not have any of the secondary documents required for a passport mentioned in Mr. Sawhney's opinion. The RPD concluded that, given the Applicant's failure to disclose other documents he did have, that assertion was neither reliable nor trustworthy.

[14] The RPD briefly considered the legal opinion of the second lawyer, Kamar Ahmed, but afforded it little weight as well, because he did not indicate his expertise or knowledge of matters concerning acquiring citizenship in India. It also considered letters discussing unsuccessful passport applications by other Tibetans. However, while accepting that some Tibetans may have difficulties in their attempts to apply for a passport, the RPD found that such difficulties do not invalidate the requirement for a claimant to pursue citizenship when it is available.

[15] In conclusion, the RPD found the Applicant's consultation with legal counsel did not constitute an attempt to avail himself of Indian citizenship and he had not provided sufficient evidence of circumstances that had prevented or would prevent him from acquiring citizenship. The RPD noted that, in *Tretsetsang*, the claimant did not possess an Indian birth certificate but

had other government-issued documents that established his date and place of birth. The Court in *Tretsetsang* found it reasonable for the RPD to conclude that such circumstances would not “negate” Indian citizenship rights, and the RPD in the present case agreed.

#### IV. Analysis

[16] While the Applicant’s Memorandum of Fact and Law lists issues for the Court’s consideration, his written and oral argument did not particularly track those issues. However, one argument that he advances both in writing and orally, and upon which my decision turns, is that the RPD erred by drawing an adverse credibility conclusion from the Applicant’s failure to disclose that he held a driver’s license. The Applicant submits that principles of procedural fairness required the RPD to raise this issue with him, and give him an opportunity to respond to it, before relying on it to impugn his trustworthiness. Issues surrounding procedural fairness are reviewable on a standard of correctness.

[17] It appears that the driver’s license to which the RPD refers in its Decision was not submitted by the Applicant to the RPD in support of his refugee claim. Rather, it was obtained by the RPD from the Canada Border Services Agency as part of the documents provided by the Applicant when he entered Canada. In support of his procedural fairness argument, the Applicant states in his affidavit filed in this application for judicial review that the driver’s license is not genuine. He asserts he did not provide the license to Mr. Sawhney for purposes of assessing his prospects of obtaining a passport, because he assumed the license would be identified as a false document by the Indian authorities. The RPD did not ask him about the driver’s license during the hearing or before relying on it in the Decision.

[18] The Respondent argues that the Applicant had the onus of establishing impediments to exercising his right to Indian citizenship and that he had made reasonable but unsuccessful efforts to overcome them. As expressed by the Federal Court of Appeal in *Tretsetang FCA* at paragraph 72:

72 ...[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.

[19] I agree with the Respondent's submission as a matter of law, but I do not consider it to assist the Respondent in addressing the Applicant's procedural fairness argument. In rejecting the Applicant's refugee claim, the RPD concluded that the Applicant was not credible in testifying that he had none of the secondary documents of the sort that Mr. Sawhney's opinion explained could be used to support a passport application. The RPD based this conclusion, at least in part, on the fact the Applicant had not disclosed that he was in possession of a driver's license. The credibility finding was material to the RPD's reasoning, as it relied on *Tretsetsang* for the proposition that an individual who does not possess a birth certificate, but possesses other government-issued documents establishing his date and place of birth, has not negated the ability to acquire Indian citizenship. The RPD clearly considered, based on its adverse credibility



finding, that the Applicant may be in possession of other government issued documents, which he had not disclosed, and upon which he could rely to obtain a passport.

[20] While the RPD does not expressly refer to *Tretsetang FCA*, I read its analysis as applying the test prescribed by in the Federal Court of Appeal in that case. Considering the first element of the test, while the Respondent is correct that the RPD concluded that the Applicant had not met his onus, that conclusion relied on the credibility finding. In my view, it was a breach of its obligations of procedural fairness for the RPD to make this finding without affording the Applicant an opportunity to address its concern that he had failed to disclose his possession of a driver's license (see, e.g., *Zhou v. Canada (Citizenship and Immigration)*, 2015 FC 5 at para 19).

[21] As the *Tretsetang FCA* test is conjunctive, the procedural unfairness impacting the RPD's finding on the first element would not amount to a reviewable error if the RPD's finding on the second element was not similarly impacted. However, the RPD found that the Applicant's consultation with legal counsel did not represent an attempt to avail himself of Indian citizenship. As noted in *Tretsetang FCA* at paragraph 73, what will constitute reasonable efforts to overcome an impediment to citizenship in any particular situation can only be determined on a case-by-case basis; a claimant will not be obliged to make any effort to overcome such an impediment if they establish that it would not be reasonable to require such an effort. In applying that principle, Justice MacTavish explained in *Namgyal v Canada (Citizenship and Immigration)*, 2016 FC 1060, that the RPD must consider whether it is reasonable to expect someone to take additional steps after obtaining a legal opinion that Indian citizenship would not be available to them (at para 38). In the present case, the RPD's adverse credibility finding,

which stemmed from procedural unfairness, affected its analysis of Mr. Sawhney's legal opinion and therefore the question whether it was reasonable for the Applicant to rely on the opinion. As such, I find the procedural unfairness underlying the credibility finding affected the analysis required under the second element of the *Tretsetang FCA* test.

[22] For the reasons set out above, my conclusion is that the Decision demonstrates a reviewable error and that this application for judicial review must be allowed. Neither party proposed any question for certification for appeal, and none is stated.

**JUDGMENT IN IMM-3747-18**

**THIS COURT'S JUDGMENT is that** this application for judicial review is allowed, and the matter is returned to a differently constituted panel of the Refugee Protection Division for redetermination. No question is certified for appeal.

“Richard F. Southcott”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-3747-19

**STYLE OF CAUSE:** LOBSANG WANGCHUK v THE MINISTER OF  
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