

Federal Court



Cour fédérale

Date: 20200402

Docket: IMM-968-19

Citation: 2020 FC 478

Ottawa, Ontario, April 2, 2020

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

PEMA SANGMO

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This case concerns the decision of the Refugee Appeal Division (“RAD”) dated January 21, 2019, dismissing an appeal from the Refugee Protection Division’s (“RPD”) decision dated November 21, 2016, which determined that the Applicant is neither a Convention refugee nor a person in need of protection.

[2] The Applicant is a Tibetan national born in India in 1987. The Applicant's refugee claim was rejected by the RPD on the basis that she had access to Indian citizenship and had failed to show that access to such citizenship was outside of her control. On appeal, the RAD upheld the RPD decision.

[3] In January 2018, this Court set aside the first RAD decision and remitted the matter back for redetermination before a differently constituted panel.

[4] On January 21, 2019, the RAD dismissed the appeal again and upheld the decision of the RPD. The Applicant seeks judicial review of this second RAD decision.

[5] For the reasons below, I find that the RAD decision is reasonable. Accordingly, this application for judicial review is dismissed.

II. **Facts**

A. *The Applicant*

[6] Ms. Pema Sangmo (the "Applicant") is a 32-year-old Tibetan national born in India on June 20, 1987. The Applicant made a refugee claim in Canada for fear of persecution from the Chinese government because she is a follower of the Dalai Lama. The Applicant stated that she has to renew her Registration Certificate ("RC") every year, and cannot travel freely in India without permission from the foreigner's registration office.

[7] Section 3 of the Indian *Citizenship Act* provides that every person born in India between January 26, 1950 and July 1, 1987, is a citizen of India. In 2006, the Applicant was advised by a lawyer that a birth certificate was required in order to have her citizenship recognized for a passport. However, the Applicant was born at home and her parents never registered her birth. In 2014, the Applicant's father asked a lawyer again and was told that it would be difficult to obtain citizenship or a passport without a birth certificate. Having no birth certificate, the Applicant did not take further steps to apply for a passport or citizenship.

[8] The Applicant's refugee hearing was held by the RPD on May 25, 2016. On November 21, 2016, the RPD rejected the Applicant's claim on the basis that the Applicant had access to Indian citizenship and she had failed to show that access to such citizenship was outside of her control.

[9] The RPD determined that the Applicant had not taken steps to determine whether India would recognize her as a citizen without requiring her to litigate. The RPD found that the Applicant thus failed to demonstrate on a balance of probabilities that there was any impediment to her ability to access Indian citizenship, and that access to Indian citizenship was outside of her control. The Applicant appealed the RPD decision. On appeal, the RAD confirmed the RPD decision.

[10] On January 29, 2018, this Court set aside the RAD decision and remitted the matter back for redetermination before a differently constituted panel (*Sangmo v Canada (Citizenship and Immigration)*, 2018 FC 96 (CanLII)).

[11] On January 21, 2019, on redetermination, the RAD dismissed the appeal and confirmed the decision of the RPD. The Applicant now seeks judicial review of the second RAD decision.

B. *Second RAD Decision*

[12] For the second RAD appeal, the Applicant submitted new evidence as referred to in subsection 110(4) of the *Immigration and Refugee Protection Act, SC 2001, c 27* (“*IRPA*”) and requested that an oral hearing be held pursuant to subsection 110(6) of the *IRPA*. The Applicant submitted the following items of new evidence: two National Documentation Packages (“NDPs”); a letter from a lawyer in India; and the Applicant’s father’s RC issued in India, confirming that he was a resident of Tibet and born in China.

[13] The NDP documentation was assumed to be in evidence, and not necessary to admit as new evidence for purposes of the appeal. The RAD admitted the RC card into evidence. After reviewing the letter from the lawyer in India, the RAD noted that the letter was dated January 22, 2016 and that no other date was visible on the letter. The Applicant submitted that she obtained the opinion of the lawyer following the rejection of her claim before the RPD. The RAD found that the Applicant may have obtained the letter just prior to submitting her RAD appeal, but that the Applicant did not explain why the letter was not in evidence before the RPD if the letter was issued in January 2016. Ultimately, the RAD found that the lawyer’s letter did not meet the basic requirements of subsection 110(4) of the *IRPA*, as it did not arise following the rejection of the Applicant’s RPD claim. Thus, the RAD rejected the letter as new evidence in the appeal.

[14] The determinative issues for the RAD were whether the Applicant would be able to obtain citizenship in India and whether the Applicant had made reasonable efforts to confirm her citizenship.

[15] The RPD had found that the Applicant did not take necessary steps to determine whether the documentation in her possession, i.e. the Identity Card (“IC”) and RC provided for her refugee claim, would be sufficient to establish that she was born in India during the relevant period to be recognized as an Indian citizen. Although the Applicant submitted that she had consulted a lawyer in 2006 and in 2014, and received verbal advice, the RPD did not accept the Applicant’s explanations because her Basis of Claim (“BOC”) document did not mention any efforts to obtain a birth certificate or speak to a lawyer.

[16] The RAD found that the Applicant’s response did not address the reason for failing to include information about consulting a lawyer in the BOC document. The RAD agreed with the RPD’s findings that the Applicant’s explanations were unreasonable and detracted from her credibility.

[17] The RAD noted documentary evidence, which stated that possessing a voter ID card would “help” Tibetans acquire Indian citizenship. The RAD found that the Applicant held the ability to acquire a voter’s card as a means to confirm her date of birth. The RAD also noted that the Aadhaar card was another document that the Applicant could obtain in order to establish her date of birth.

[18] Upon reviewing the record, the RAD acknowledged that the Applicant had an IC card, a U.S. visa, a memorandum from Citizenship and Immigration Canada with confirmation of entries into the USA, a RC that had been granted on three occasions, and a No Objection to Return to India granted on the return visa each time. All of these documents confirmed the Applicant's date of birth, and the RAD stated that it "could only assume" a verification process was carried out by the government authorities involved. Thus, the RAD found that the Applicant had a number of means to establish her date of birth to apply for an Indian passport to establish her Indian citizenship.

[19] The RAD noted that the Applicant had acquired identity documentation that confirmed her date of birth and location. The RAD found that the Applicant did not put forward any evidence that she had approached authorities in India utilizing her current documentation as proof of her birth and residence to determine whether India would recognize her as a citizen without requiring her to litigate the matter. The RAD found that even if it were to accept the Applicant's evidence that a lawyer had told her she could not obtain Indian citizenship without a birth certificate, this assertion was not supported by the record.

[20] The RAD also found that the Applicant's attempts were made many years ago and was not reflective of the current circumstances in India: the most up-to-date documentation confirmed the Indian High Court's directions for authorities to issue passports to Tibetan refugee applicants born in India between January 26, 1950 and July 1, 1987.

[21] In considering the Applicant's personal circumstances, the RAD found, on a balance of probabilities, that the Applicant had not established the existence of a significant impediment that may reasonably be considered capable of preventing the Applicant from exercising her citizenship rights of state protection in India. The RAD also found that the Applicant did not make reasonable efforts to overcome these impediments, and that these efforts were unsuccessful such that the Applicant was unable to obtain the protection of that state.

III. Issue and Standard of Review

[22] The issue on this application for judicial review is whether the RAD decision is unreasonable, and in particular:

- A. Whether the RAD erred in its assessment of new evidence; and
- B. Whether the RAD erred in its application of the *Tretsetsang* (FCA) test.

[23] Prior to the Supreme Court's recent decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (CanLII) [*Vavilov*], the reasonableness standard generally applied to the review of RAD decisions: *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 (CanLII) at paras 30, 34-35; *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 (CanLII) at para 29. There is no need to depart from the standard of review followed in previous jurisprudence, as the application of the *Vavilov* framework results in the same standard of review: reasonableness.

[24] As noted by the majority in *Vavilov*, “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). Furthermore, “the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency,” (*Vavilov* at para 100).

IV. Analysis

A. *Assessment of New Evidence*

[25] The Applicant submits that the RAD misread the date on the lawyer’s letter and that the letter met the criteria of subsection 110(4) of *IRPA* because it arose after the RPD decision and addressed the possibility of alternative documents to prove birth other than birth certificates.

[26] This letter was from Mr. Simanchal Karjee, a member of the Bar Association Mohana, Gajapati Odisha and a member of the State Bar Council Odisha. In the letter, Mr. Karjee states that because the Applicant does not have a government-issued birth certificate, a voter identity card issued by the Election Commission of India, a ration card issued by the Odisha government, or an “adhar card”, she does not have acceptable evidence to prove her birth in India, which is required to obtain a passport and citizenship.

[27] The Applicant submits that the RAD misread the letter because the letter is dated “22/12/16” (December 22, 2016), not “January 22, 2016” as the RAD stated. The Applicant

notes that the letter was clarified by the affidavit of the Applicant, which was appended to the letter.

[28] The Applicant relies on *Maldonado v Canada (Minister of Employment and Immigration)* (1979), [1980] 2 FC 302, [1979] FCJ No 248 (CA) for the proposition that a presumption of truth applies to the evidence of a refugee claimant. The Applicant submits that there was no valid reason to doubt the Applicant's affidavit evidence.

[29] The Respondent submits that the copy of the letter provided in the Application Record is unclear and although the Applicant stated that she received the letter by email on December 22, 2016, that does not confirm the date of the letter.

[30] I agree with the Respondent. The RAD did not err in rejecting the lawyer's letter as new evidence on appeal. However, even if the RAD had made an error with the date, the error is immaterial and the admitted evidence would not have changed the reasonableness of the RAD decision. First, as the Respondent notes, the receipt of the letter by email on December 22, 2016, does not confirm that the lawyer's opinion is from that date. Also, the copy of the letter on record does not show a clear date.

[31] More importantly, even if the letter had been dated as December 22, 2016, the lawyer's letter is not determinative or informative on analyzing the key issue, namely, whether the Applicant could obtain alternative identity documents to acquire a passport. The lawyer does not

provide an opinion on whether the Applicant would not be able to obtain the requisite alternative identity documents in order to facilitate obtaining the passport.

[32] The RAD reasonably relied on country condition evidence to find that the Applicant could obtain her Indian citizenship and a passport using a number of identity documents other than a birth certificate. For example, the RAD found that the Applicant had the ability to acquire a voter's card or an Aadhaar card, which could then be used to obtain a passport. However, no evidence was presented by the Applicant to show that she could not obtain these alternative documents, i.e. the voter's card or Aadhaar card.

[33] The record indicated that the Applicant had access to other genuine documentation, such as her IC and RC, which indicate the Applicant's date and place of birth, that could have been used (or at least attempted) to facilitate the acquisition of a passport.

B. *Application of Tretsetsang (FCA) Test*

[34] The Applicant notes that the applicable test as articulated by the Federal Court of Appeal in *Tretsetsang v Canada (Citizenship and Immigration)*, 2016 FCA 175 (CanLII) [*Tretsetsang*] at paras 72 to 73 is as follows:

[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.

[35] This test was further clarified in *Namgyal v Canada (Citizenship and Immigration)*, 2016 FC 1060 (CanLII) [*Namgyal*], where the Court noted that the question is whether it was reasonable to expect someone in the claimant's position "with her specific attributes" to take additional steps to have her citizenship recognized (*Namgyal* at para 36).

[36] The determinative issue in the case at bar is whether the Applicant made reasonable efforts to obtain citizenship in India.

[37] Although the RAD found that the Applicant could obtain alternative documents—such as a voter ID card or an Aadhaar card—to establish her birth in India and fulfill requirements to obtain a passport, the Applicant submits that U.S. and Canadian documents are unhelpful in establishing her Indian birth and are not enumerated on the list issued by the Indian Ministry of External Affairs.

[38] The Applicant also submits that the RAD ignores findings of the IRB's Research Directorate, "RIR IND105133.E" ("RIR"), which reported that voting Tibetans still carry foreigner RCs despite having been extended voting rights. The Applicant notes that voting rights and citizenship rights do not go hand in hand for Tibetans born in India.

[39] The Applicant argues that the RAD erred by ignoring such evidence and by rejecting the new evidence of the lawyer's letter, which indicated the existence of significant impediments to the acquisition of citizenship for the Applicant.

[40] On the other hand, the Respondent argues that it was within the Applicant's control to have her Indian citizenship recognized and that it was reasonable to expect that she would have taken simple steps to obtain one of the alternative identity documents and then apply for a passport. The Respondent submits that the Applicant has not articulated the relevance of the RIR to her submissions because the RIR does not contradict the RAD's findings that there are no impediments to obtaining Indian citizenship.

[41] In my view, the RAD decision is reasonable. While the RIR noted instances where voting Tibetans still carry their RCs, this discussion took place in the context of articles, which indicated that some Tibetans do not wish to surrender their RCs, and the Indian Ministry of Home Affairs' position is that Tibetans cannot concurrently hold refugee status and citizenship. The RIR did not speak to the impediments faced by Tibetans to obtain an Indian passport or citizenship.

[42] Furthermore, the lawyer's letter did not indicate significant impediments to the acquisition of citizenship. The letter formed an opinion that it would be difficult for the Applicant to obtain an Indian passport given her lack of birth certificate, voter ID card, ration card or Aadhaar card. However, it did not provide an opinion as to the possibility of the Applicant's acquisition of alternative identity documents, such as a voter ID card or an Aadhaar card, given her existing IC and RC documentation.

[43] I note that although the Applicant argued her U.S. and Canadian documents would be unhelpful in establishing her Indian birth, she made no submissions on whether her IC and RC documentation would assist her in obtaining the alternative identity documents. Since the IC and RC documentation indicate the Applicant's date and place of birth, these documents may have facilitated the Applicant in acquiring the alternative identity documents.

[44] Moreover, the record indicates that the Applicant was able to travel to the U.S. with a passport from India on multiple occasions with no issues. The Applicant also travelled with visas and a facilitation document.

[45] Therefore, the RAD reasonably found that the Applicant did not establish the existence of significant impediments to the Applicant's exercise of citizenship. Even if there had been significant impediments, the RAD decision reasonably found that the Applicant did not make reasonable efforts to overcome them. The Applicant received legal opinions in 2006 and in 2014, which did not rise to the level of having made reasonable efforts to overcome significant impediments.

V. **Certified Question**

[46] Counsel for each party was asked if there were any questions requiring certification.

They each stated that there were no questions for certification and I concur.

VI. **Conclusion**

[47] For the foregoing reasons, I find that the RAD decision is reasonable. This application for judicial review is dismissed.

JUDGMENT IN IMM-968-19

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

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