Federal Court  Cour fédérale

Date: 20210209

Docket: IMM-2553-17

Citation: 2021 FC 131

Ottawa, Ontario, February 9, 2021

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

JAMPA LOBSANG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondents

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant, Jampa Lobsang, seeks judicial review of a decision of the Refugee Protection Division [RPD], dated May 11, 2017, which held that he was neither a Convention refugee nor a person in need of protection, as defined by sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The determinative issue in this case was the

Applicant's country of reference for his claim. He was born in India but claimed protection against China.

[2] The Applicant indicated at the RPD hearing that his name is properly considered to be one word but it appears as two words throughout the documentary record. I will refer to him as Applicant in this judgment.

[3] For the reasons that follow, the application will be dismissed.

II. **Background**

[4] The Applicant is an ethnic Tibetan who was born in the Republic of India on June 13, 1969. Both of his parents were born in Tibet, China. Prior to two years before his arrival in Canada, the Applicant lived in India. He trained for and became a monk in the Gelug-pa Buddhist order, the same order as the Dalai Lama. He was an instructor in Buddhism as practiced by his order and an executive member in a local assembly of exiled Tibetans in the town of Mundgod, India. He has never lived in or travelled to China. While living in India, he had never applied for citizenship. However, he held an Indian Identity Certificate which bore a "No Objection to Return to India" stamp. He also possessed a Registered Foreigner Card.

[5] In 2011, the Applicant sought a visa to come to Canada to visit his sister, a Canadian citizen, in Toronto. The application was denied.

[6] In April 2013, he travelled to the United States using his Identity Certificate as a travel document to take up a teaching post at his order's monastery in Long Beach, California. The U.S. authorities granted the Applicant a two-year visa. When his term expired, the Applicant travelled to the Canadian border and sought refugee protection at the Fort Erie, Ontario, Port of Entry on May 7, 2015.

[7] The Applicant claimed protection against China on the basis of his political beliefs and his activism against China's annexation of Tibet and also on the basis of his religious beliefs as a Tibetan Buddhist who follows the Dalai Lama. The Applicant further claimed that he does not have a right to return to India. The Identity Certificate expired on August 11, 2015. The Applicant made no efforts to renew it either in the U.S. or in Canada stating that he was unable to do so outside of India.

[8] In support of his claim, the Applicant submitted a legal opinion from a lawyer in India on the possibility of obtaining a passport and exercising his citizenship rights. The lawyer's opinion letter concludes:

> Tibetans who do not possess a documentation of proof of birth and are not officially registered their birth in the Indian government registry will be denied the citizenship of India.

[9] In addition, the Applicant submitted extensive documentary evidence respecting the circumstances of Tibetans in India, photographs, and other records of his life there.

[10] On May 11, 2017, the RPD found that the Applicant is an Indian citizen and is entitled to all the benefits and privileges which accompany citizenship, including being issued a passport. The RPD concluded that the Applicant failed to establish that there is a significant impediment to the exercise of his rights to that citizenship as an Indian national. He has not made significant efforts to overcome any perceived or actual impediments to the exercise of his rights to that citizenship.

[11] The Applicant filed this application for judicial review on June 8, 2017. On December 1, 2017 a temporary stay of the proceedings was granted pending the outcome of another matter before the Court which could have been dispositive of the application. That matter was determined on May 4, 2018: *Kreishan v Canada (Citizenship and Immigration)* 2018 FC 481. A further stay was granted pending the outcome on an appeal in *Kreishan.* The appeal was dismissed on August 19, 2019, (2019 FCA 223) and leave to appeal to the Supreme Court of Canada was denied on March 5, 2020.

III. **Issue**

[12] The central issue in this matter is whether the RPD's decision is reasonable.

IV. **Relevant Legislation**

[13] The following provisions of the *Immigration and Refugee Protection Act*, SC 2001, c 27 are relevant to this judicial review:

Convention refugee	**Définition de réfugié**
96 A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	**96** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or	**a)** soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	**b)** soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

V. **Standard of Review**

[14] As determined by the Supreme Court of Canada in *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 30, reasonableness is the presumptive standard for most categories of questions on judicial review, a presumption that avoids undue interference with the administrative decision maker's discharge of its functions. While there are circumstances in which the presumption can be set aside, as discussed in *Vavilov*, none of them arise in the present case.

[15] The court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it. A court applying the reasonableness standard does not ask what decision it would have made in place of the administrative decision maker, attempt to ascertain the range of possible conclusions, conduct a new analysis or seek to determine the correct solution to the problem. Instead, the reviewing court must consider only whether the decision made by the decision maker, including both the rationale for the decision and the outcome to which it led, was unreasonable (*Vavilo*v at para 83).

VI. **Analysis**

[16] While section 3 of the Indian *Citizenship Act, 1955*, provides that every person born in India between January 26, 1950 and July 1, 1987 is a citizen of India, the Applicant contends that he has not been recognized as an Indian citizen and access to an Indian passport is not within his control. He argues that the 2016 Delhi High Court decision in the matter of Phuntsok Wangyal,

and earlier decisions which recognized entitlement to citizenship to persons in his situation, do not reflect an effective and substantive change in the policy or implementation of citizenship laws in India.

[17] The Applicant submitted to the RPD a document titled “Announcement of Passport Rules” issued by the Indian Ministry of External Affairs [MEA guidelines], which sets out alternative documents to prove birth when submitting a passport application without a birth certificate. The Applicant testified that he did not have any of the documents listed as alternatives. The RPD erred in dismissing the importance of this document, the Applicant submits, when it found that it applied only to applicants born on or after January 26, 1989. On its face, the guidelines apply to all passport applicants irrespective of their birthdates.

[18] The RPD erred in faulting the Applicant for his expired Identity Certificate, the Applicant submits, and erred in its assessment of the objective evidence regarding the possibility of renewal of such certificates abroad. In addition, the Applicant testified that he had been told it was not possible.

[19] When a claimant alleges the existence of an impediment to exercising his or her right of citizenship in a particular country, they 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: *Tretsetsang v Canada (Citizenship and Immigration)*, 2016 FCA 175 [*Tretsetsang*].

[20] In *Namgyal v Canada (Citizenship and Immigration)*, 2016 FC 1060 [*Namgyal*], the Court noted that the question that must be asked is whether it was reasonable to expect someone in the applicant's position "with her specific attributes" to take additional steps to have her Indian citizenship recognized.

[21] The Applicant says that he is an impecunious monk who has lived in a monastery since the age of 15. Therefore, based on his circumstances, he says that it was reasonable for him to rely on the lawyer's legal opinion and to not take further action to acquire an Indian passport.

[22] In contrast to the applicant in *Namgyal*, the Applicant in these proceedings is a relatively sophisticated individual with a high degree of education in Tibetan Buddhism. By his own testimony he ranks high in his order. He worked as a teacher both in India and at the Long Beach monastery. He was a member of a local assembly and participated actively in debates and other community activities.

[23] The Applicant testified before the RPD that he had obtained the lawyer's opinion letter before travelling to the U.S. in 2013. It is dated May 19, 2015, more than a week after he had

entered Canada and sought protection. That appears to have escaped the attention of the RPD. The tribunal gave the letter little weight because the author was not called upon to testify, by telephone if necessary, and the opinion predates the 2016 Wangyal decision from the Delhi High Court.

[24] It is well-established that there is no onus on a refugee claimant to require the attendance of the authors of corroborating documentary evidence: *Oria-Arebun v Canada (Citizenship and Immigration)*, 2019 FC 1457 at paras 51-52. I note, however, that in *Dakar v Canada (Citizenship and Immigration)*, 2017 FC 353 at paras 26-28, a finding that a similar letter should be given little weight was upheld on the ground that it was immaterial to the central issue; namely whether the applicant could obtain alternative identity documents to acquire a passport. In this instance, the apparent error on the part of the RPD in imposing a requirement that the lawyer testify by some means is not determinative. The RPD provided other reasons for discounting the letter.

[25] In *Sangmo v Canada (Citizenship and Immigration)*, 2020 FC 478 [*Sangmo*] a similar legal opinion supplied by an Indian lawyer did not address whether an Identity Certificate or a Registered Foreigner card could have been used to facilitate the acquisition of a passport via obtaining alternative forms of identification in lieu of a birth certificate: *Sangmo* at paras 33, 42-43. Similarly here, the opinion did not indicate significant impediments to the acquisition of citizenship. It simply stated that it would be difficult to obtain an Indian passport given the Applicant’s lack of a birth certificate.

[26] Similarly, the RPD's misinterpretation of the Foreign Ministry's guidelines was not fatal. It was reasonable for the RPD to conclude that even if the Identity Certificate was not one of the alternative documents described in the guidelines, the Applicant should have at least approached the Indian consulates in the US or Canada to inquire about securing travel documents to return to India to renew it. He is, after all, a citizen of India according to the legislation and its interpretation by the High Court. The documents he had in his possession established that he was born in India in 1969.

[27] The burden is on the Applicant to establish that access to citizenship is not within his control: *Canada (Citizenship and Immigration) v Williams*, 2005 FCA 126 at paras 21-22, 27 [*Williams*]; *Tretsetsang* at paras 6-7, 67.

[28] Where citizenship in another country is available, claimants are expected to attempt to acquire it. This approach is consistent with the principle that international protection is to serve as surrogate protection and that the only valid reason for a potential refugee to be unwilling to avail himself of the protection of a country of nationality is based on a well-founded fear of persecution in that country: *Williams* at para 27; *Tretsetsang* at 68-71.

VII. **Conclusion**

[29] The Applicant failed to demonstrate that he had made reasonable efforts to have his citizenship recognized or to obtain acceptable alternative documents that would allow him to acquire an Indian passport. Put simply, the Applicant's passivity is not a basis for a refugee claim.

[30] Accordingly, I find no reason to interfere with the RPD's decision. While flawed in some respects, it is overall reasonable.

[31] No questions were proposed for certification.

JUDGMENT IN IMM-2553-17

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

No questions are certified for appeal.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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