

Federal Court



Cour fédérale

Date: 20220407

Docket: IMM-5611-17

Citation: 2022 FC 505

Ottawa, Ontario, April 7, 2022

PRESENT: The Honourable Madam Justice Rochester

BETWEEN:

TENZIN NYINJEY

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Background

[1] The Applicant, Mr. Tenzin Nyinje, is an ethnic Tibetan who was born in the Republic of India in 1977. He seeks judicial review of a decision of the Refugee Protection Division [RPD] of the Immigration and Refugee Board dated November 2, 2017 [Decision] rejecting his claim for refugee protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] against the People's Republic of China.

[2] The Applicant fears that India will deport him to China, where he would be persecuted for his activities as a journalist and activist for a free Tibet. The determinative issue for the RPD was the Applicant's national identity as an Indian citizen. The RPD found that the Applicant, having been born in India, had a right to Indian citizenship, including all the benefits and privileges which accompany his citizenship. The RPD further found that the Applicant had failed to establish that there was a significant impediment to him exercising his rights of citizenship, or that he made reasonable efforts to overcome any perceived or actual impediment to him exercising that right.

[3] The Applicant submits that the Decision is unreasonable on the basis that the RPD erred by (a) failing to follow an earlier decision made by the RPD as to the nationality of the Applicant's brother, or to differentiate between the two siblings in clear and compelling reasons; (b) dismissing the obstacles faced by the Applicant when seeking to assert his citizenship; and (c) failing to address evidence in the record as to the practical obstacles faced by Indian-born Tibetans in general when applying for Indian passports.

[4] The Respondent submits that the RPD reasonably concluded that (a) the Applicant is an India citizen by birth and can return to India, where he is not at risk and (b) the Applicant had failed to establish any significant impediment to exercising his Indian citizenship rights. The Respondent further submits that there is no indication that the Applicant sought to establish before the RPD that he and his brother were identically-situated siblings to whom the same law and facts apply.

II. Issue and Standard of Review

[5] It is common ground between the parties, and I agree, that the standard of review in the present matter is reasonableness as set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. The sole issue is whether the Decision was reasonable.

[6] On judicial review, the Court “asks whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision” (*Vavilov* at para 99).

[7] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). As such, the approach is one of deference, especially with respect to findings of fact and the weighing of evidence. A reviewing court should not interfere with factual findings, absent exceptional circumstances, and it is not the function of this Court on an application for judicial review to reweigh or reassess the evidence considered by the decision maker (*Vavilov* at para 125).

III. Analysis

[8] The Applicant raises three arguments, the first of which is as follows. The Applicant submits that the RPD erred by either (a) not following a decision of the RPD that found his brother to be a Convention refugee or (b) by failing to explain why the Applicant’s case was being treated differently. The Applicant relies on *Losel v Canada (Citizenship and Immigration)*,

IMM-7989-14, October 9, 2015 [*Losel*] for the proposition that “when it comes to determining the nationality of two apparently identically-situated siblings to whom the same law and facts apply, it is not reasonable for the RPD to reach opposite outcomes”. Justice Brown in *Losel* concluded that the “RPD must follow the decision made by a previous panel concerning the nationality of an identically-situated sibling unless the second RPD differentiates the two in clear and compelling reasons”. In *Losel*, one sibling was found to be an Indian national and the other a Chinese national. Both siblings were ethnic Tibetans born in India.

[9] In the matter at hand, the Applicant’s brother was granted refugee status in 2009. The Applicant’s claim was refused in 2017. The Applicant acknowledges that there is an eight (8) year gap between the two decisions, but pleads that it was unreasonable for the RPD to treat two identically-situated siblings differently with no explanation as to the reasons for the differing outcome. To do so, in the Applicant’s view, is not in keeping with the requirement under *Vavilov* that a decision must be justified (at para 86).

[10] The Respondent’s argument is twofold. First, the Respondent submits that there is no indication that the Applicant provided the RPD with a copy of the decision in his brother’s case, placed any reliance on *Losel*, or made any effort to establish that he and his brother were identically-situated siblings to whom the same law and facts apply.

[11] Second, the legal and factual context regarding India’s acceptance of Indian citizenship for ethnic Tibetans has evolved since 2009. The Respondent highlights a number of Indian High Court decisions between 2010 and 2016 that recognized the rights of Tibetans born in India

between 1950 and 1987 to Indian citizenship. The RPD, in its reasons, relied upon the decision of *Phuntsok Wangyal* of the High Court of Delhi (September 22, 2016) for the proposition that not only is the Applicant an Indian citizen, he is entitled to all the benefits and privileges that company citizenship, including being issued a passport.

[12] I agree with the Respondent on both points. There is no indication that the issue of identically-situated siblings, or any argument in relation thereto, was put before the RPD or raised at the RPD hearing. When the Applicant presented himself at the Canadian port of entry in 2013, he did identify that he had a brother and sister who are citizens of Canada, and presented their identity documents along with a copy of his brother's personal information form from 2008. This is not, in my view, sufficient to constitute raising the issue of identically-situated siblings before the RPD. I find that the RPD did not err in failing to address the Applicant's brother's successful refugee claim in its reasons.

[13] Furthermore, and in any event, I do not find *Losel* applicable in the circumstances of this case. *Losel* may be described as applying in the context of two apparently identically-situated siblings to whom the same law and facts apply. My colleague Justice Southcott recently addressed this argument in the context of an ethnic Tibetan Indian-born applicant whose brother's refugee claim had been accepted in 2009 (*Tsering v Canada (Citizenship and Immigration)*, 2021 FC 1190). Justice Southcott found that the Indian High Court decisions "represent a change in the legal context (or possibly the factual context represented by foreign law) in which the two claims were decided" and as such the principle as expressed in *Losel* did not apply (para 22). I find that to be equally the case in the present matter.

[14] The Applicant's second argument is that he is not able to exercise his Indian citizenship rights to which he is entitled and that he has made unsuccessful but reasonable efforts to overcome the operational obstacles to do so. The Respondent submits the RPD reasonably concluded that the Applicant had failed to establish that there was a significant impediment to exercising his citizenship rights and that he failed to make reasonable efforts to overcome any such impediment. It is common ground between the parties that the applicable test for a claimant who alleges an impediment to exercising their citizenship rights is set out in *Tretsetsang v Canada (Citizenship and Immigration)*, 2016 FCA 175 [*Tretsetsang*] at paras 72-73:

[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.

[15] In the present case, the Applicant's Indian travel documentation had expired in 2016 and his Registered Foreigner's Certificate [RC] had expired in 2017. A copy of his Identity Certificate issued to him by the Indian government was included in the record, and a copy of his

Green Book, a document issued to Tibetans as proof of his Tibetan ethnicity, was provided to the RPD. At the RPD hearing, the Applicant had raised a concern that should he return to India he may be jailed or deported to China because his documentation has expired. At the RPD hearing, and in the present proceedings, the Applicant submitted that he had started to apply for his citizenship online but never completed the online form because he did not have an Indian birth certificate. The Applicant further highlighted that he did not possess the documentation required to apply for an Indian passport.

[16] The Applicant submits that the RPD erred by fixating on the Applicant's expired RC and Indian travel documentation. I disagree, as the RPD's reasons were responsive to the submissions made by the Applicant as to his fear that he would be deported to China due to the expired documentation or that he could not apply for his Indian citizenship. The RPD found that the Applicant allowed his documentation to expire, and made no efforts through official channels (i.e. approaching the Indian Consulate), when in the United States or Canada, about how to remedy the situation. The Respondent highlights the reasoning of Justice Rennie in *Tretsetsang*, which I find applicable here:

[38] What those reasonable steps are is highly fact-specific, however, it may be observed that a failure to request passports, travel documents or other indicia of nationality will be a highly relevant consideration, particularly when the country of nationality has an embassy or High Commission in Canada. Indeed, it would seem odd if an apparent legal entitlement could be so easily defeated by simply not asking that the apparent right of citizenship be respected.

[17] I see no error in the RDP's finding that the Applicant's actions were not reasonable, as the expiration of his documentation was the result of his inaction. The RPD's statement that the

Applicant was reasonably sophisticated is reflected in the record. The Applicant holds a Masters degree from a United States University, served as the speechwriter of the Sikyong (Prime Minister) of the Central Tibetan Administration, and used to act as the managing editor of the Tibet Journal. The RPD reasonably found that there were no circumstances, on the record, which prevented the Applicant from approaching the Indian government in pursuit of securing documents he needs to return to India.

[18] The Applicant pleads that his attempt to apply online demonstrates the impediment he faces because he does not have an Indian birth certificate. The same argument was raised in *Tashi v Canada (Citizenship and Immigration)*, 2015 FC 1301:

[39] Mr. Tashi takes issue with the Board's finding, arguing that he would not be able to get Indian citizenship because he does not have an Indian birth certificate. There is no evidence that Mr. Tashi ever attempted to obtain a birth certificate, and he did, however, have a Registration Certificate for Tibetans - a Government-issued identification card that confirmed his birth in India during the relevant period. There was no evidence before the Board, apart from Mr. Tashi's own vague and anecdotal evidence, that he would not be able to have his Registration Certificate renewed if he were to return to India, nor have I been directed to any evidence that the Registration Certificate for Tibetans would not be accepted as proof for the purposes of acquiring recognition of his Indian citizenship.

[19] There is nothing in the record that indicates that, following the High Court decision in 2016, the Applicant would be unable to obtain an Indian birth certificate, or that the RPD ignored such evidence. Ultimately, the RPD found that the attempt to apply online was superfluous because the Applicant already has citizenship by virtue of section 3(1) of the *Indian Citizenship (Amendment) Act*, 2003, and the Delhi High Court decision in 2016, which held that Tibetans

born in India are Indian citizens if they met the requirements in the Act. I see no reason to intervene.

[20] Finally, as to the third argument, the Applicant takes issue with the RPD's treatment of the evidence as to the obstacles faced by Tibetans seeking to obtain Indian passports, and in particular several articles from the Tibet Sun. While the reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it (*Vavilov* at para 126), that is not the case in the matter before me. The RPD acknowledged the country documentation provided by counsel for the Applicant and noted the inconsistencies, at times, in terms of issuing passports, but remained of the view that the Applicant has Indian citizenship. Absent exceptional circumstances, it is not the role of this Court sitting in judicial review to reassess or reweigh the evidence considered by the RPD (*Vavilov* at para 125). Consequently, I decline to intervene.

IV. Conclusion

[21] For these reasons, this application for judicial review is dismissed. Neither party proposes a question of general importance, and none arises.

JUDGMENT in IMM-5611-17

THIS COURT'S JUDGMENT is that:

1. The Applicant's application for judicial review is dismissed;
2. There is no question for certification.

"Vanessa Rochester"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5611-17

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