Federal Court  Cour fédérale

Date: 20160209

Docket: IMM-1230-15

Citation: 2016 FC 160

Ottawa, Ontario, February 9, 2016

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

TENZIN WANGCHUK

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*Act*] for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada [Board] dated February 18, 2015 [Decision], which rejected the Applicant's claims for refugee protection pursuant to ss 96 and 97(1) of the *Act*.

II. BACKGROUND

[2] The Applicant is a 41-year-old Tibetan citizen, born in India. His parents fled Tibet after it was invaded by China. The Applicant was educated in India where he has lived all of his life. He is a member of the Tibetan Youth Congress and a follower of the Dalai Lama.

[3] The Applicant alleges that he cannot return to either Tibet or India. Were he to live in Tibet, he claims that he would be persecuted by the present Chinese Government for his ethnicity, his political and religious opinions, and his family membership as his uncle, Samdhong Rinpoche, was the former Prime Minister of Tibet until his exile in 2011.

[4] He also asserts that he cannot return to live in India as he cannot renew his expired Registry Certificate.

[5] The Applicant claims that his goal was always to come to Canada and claim refugee protection, but he decided to stop first in the United States. He travelled on May 13, 2012 to attend his sister's graduation at Columbia University. He remained in the United States for five months.

[6] He was issued a Registry Certificate during his time in India which expired on October 8, 2012. Two days after its expiration, the Applicant made a refugee claim at the Canada-United States border on October 10, 2012.

III. DECISION UNDER REVIEW

[7] The Board rejected the Applicant's claim, finding that he is neither a Convention refugee nor a person in need of protection. In the Decision, the Board indicates that it is aware that by reviewing the refugee claims of Tibetan nationals who reside in India, it is required to carry out a legal analysis of the Applicant's legal status in India. However, the Board limited itself to the issue of the Applicant's failure to apply for asylum in the United States during the five months he spent there.

[8] The Board states that the Applicant only came to Canada after the expiry of his Registry Certificate. When asked why he had not applied for asylum in the United States, the Applicant replied that he had always intended to come to Canada. This explanation was rejected. The Board indicated that Canada is not the only nation where refugee claims can be made; it is not the goal of asylum seekers to pick and choose which country best suits their needs prior to making a claim. Rather, the goal of a claimant, which should be pursued with diligence and haste, is to find refuge in a host country and to leave the alleged country of persecution. The claimants in *Gebetas v Canada (Citizenship and Immigration)*, 2013 FC 1241 at para 32, offered a similar reason as the Applicant for their delay. There, the Federal Court held that "this explanation, in the Court's view is an unacceptable reason to delay seeking asylum in another country and strongly indicates a lack of subjective fear of persecution."

[9] The Applicant told the Board that he had learned about the Canadian refugee system through his sister, who resides in Canada, and that he had remained in the United States for five

months as he was waiting for his documents to arrive. The Board also rejected this explanation. When he arrived in the United States, the Applicant had his Registry Certificate which would prove his alleged lack of status in both India and Tibet – enough to initiate an application. Only after its expiration did the Applicant decide to file a claim for refugee protection.

[10] The Board found most troubling that, on a balance of probabilities, the Applicant made no effort to seek asylum in the United States. The Federal Court has held that this is a legitimate factor to be considered in assessing the subjective aspects of a claim: *Garavito Olaya v Canada (Citizenship and Immigration)*, 2012 FC 913 at para 55 [*Olaya*]. A person who does not seek asylum at the first opportunity cannot be said to have a genuine subjective fear: *Huerta v Canada (Employment and Immigration)* (1993), 157 NR 225 (FCA). According to the Board, if the Applicant truly feared returning to either India or Tibet, he would have filed an asylum claim in the United States as soon as he arrived there as there was no legal impairment preventing him from doing so. The fact that this step was not taken immediately, particularly given the Applicant's precarious international situation and alleged lack of security in two countries, calls into question the genuineness of his fear.

[11] The Board noted that its decisions have been upheld by the Federal Court when making a finding of lack of subjective fear based on the failure of a claimant to make a refugee claim in a country that is, like the United States, a signatory of the United Nations Refugee Convention: *Ortiz Garzon v Canada (Citizenship and Immigration)*, 2011 FC 299; *Cortes v Canada (Citizenship and Immigration)*, 2008 FC 254. In *Bobic v Canada (Citizenship and Immigration)*, 2004 FC 1488, the Court stated that an applicant's reasons for not claiming refugee status in a

foreign country must be valid in order to avoid adverse inferences from the failure to pursue asylum.

[12] The Board held that the Applicant did not establish a subjective basis for his fear, nor any other element of the material aspects of his claim.

IV. ISSUES

[1] The Applicant has raised the following issues in this proceeding:

1) Did the Board err when it found the Applicant lacked subjective fear because he did not claim asylum in the United States?

2) Did the Board err when it dismissed the claim without assessing whether or not the Applicant had established any other element of the material aspects of his claim?

V. STANDARD OF REVIEW

[2] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[3] The standard of review on the assessment of both issues raised is reasonableness: *Dunsmuir*, above; *Uyucu v Canada (Citizenship and Immigration)*, 2015 FC 404 at para 21; *Cornejo v Canada (Citizenship and Immigration)*, 2010 FC 261 at para 17.

[4] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at para 47, and *Khosa v Canada (Citizenship and Immigration)*, 2009 SCC 12 at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

VI. STATUTORY PROVISIONS

[5] The following provisions of the *Act* are applicable in these proceedings:

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	(*a*) soit se trouve hors de tout pays dont elle a la nationalité

unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or

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.

Person in need of protection

Personne à protéger

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée:

(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(*a*) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(*b*) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or

(iii) la menace ou le risque ne

incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.	(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.
…	…
No credible basis	**Preuve**
107. (2) If the Refugee Protection Division is of the opinion, in rejecting a claim, that there was no credible or trustworthy evidence on which it could have made a favourable decision, it shall state in its reasons for the decision that there is no credible basis for the claim.	107. (2) Si elle estime, en cas de rejet, qu'il n'a été présenté aucun élément de preuve crédible ou digne de foi sur lequel elle aurait pu fonder une décision favorable, la section doit faire état dans sa décision de l'absence de minimum de fondement de la demande.

VII. ARGUMENT

A. *Applicant*

(1) Delay in claiming

[6] The Applicant argues that while a delay in making a claim for refugee status is a relevant factor for the Board to consider, it is not decisive in itself: *Huerta v Canada (Employment and Immigration)*, [1993] FCJ No 271. Any reasonable explanation for a delay in claiming status must be considered: *Hue v Canada (Employment and Immigration)*, [1988] FCJ No 283. Furthermore, the jurisprudence has established that the failure to seek asylum in another country may affect credibility but cannot be determinative of a lack of subjective fear: *Gavryushenko v Canada (Citizenship and Immigration)*, [2000] FCJ No 1209 at para 11 [*Gavryushenko*]; *Gonzales v Canada (Citizenship and Immigration)*; 2010 FC 1292; *Lopez v Canada (Citizenship and Immigration)*; 2014 FC 102; *Sosa v Canada (Citizenship and Immigration)*, 2014 FC 428; *Sun v Canada (Citizenship and Immigration)*, 2015 FC 387 [*Sun*].

[7] The Applicant submits that the Board erred in imposing a duty of seeking refugee protection at the first available opportunity, as no such duty exists at law: *Rodriguez v Canada (Citizenship and Immigration)*, 2012 FC 4 at para 7; *Gavryushenko*, above. Professor Hathaway has written that the Convention does not require "that a refugee seek protection in the country nearest her home, or even in the first state to which she flees." It is not necessary that a claimant travel straight from a country of first protection to the place she or he plans to seek long-term protection: James C. Hathaway, *The Law of Refugee Status*, (Toronto, Butterworths, 1991), at 49.

[8] A failure to claim in the first country of arrival is not grounds for refusing refugee protection:

> Despite the widespread belief that a refugee should seek protection in whatever safe country she first reaches, failure to claim protection in one's region of origin or in the first safe country of arrival is not grounds for refusing to recognize refugee status. There are often good reasons why a refugee may travel beyond the first safe state she reaches, including outside her own region.
>
> …
>
> Whatever one's views on this broader policy question, the text of the Refugee Convention makes clear that refugee status may only be denied on the basis of the possibility of seeking protection elsewhere in the two situations mentioned in Arts. 1(D) and 1(E) – those being access to UN (other than UNHCR) protection or assistance, and access to protection as a *de facto* national of a country of former residence
>
> James C. Hathaway and Michelle Foster, *The Law of Refugee Status*, 2nd ed (Cambridge: Cambridge University Press, 2013), at 31-33 [*The Law of Refugee Status, 2nd ed*].

[9] An inquiry that equates failure to claim in an intermediate country with a lack of subjective fear is flawed. The relevant subjective fear is one of being persecuted in the country of origin; an applicant's prolonged stay in an intermediate country might, at most, reveal a lack of fear with respect to conditions in that particular country: *The Law of Refugee Status,2nd ed*, at 98-99.

[10] Furthermore, the Board failed to properly consider the explanations provided by the Applicant. As regards his failure to claim refugee status in the United States, the Applicant explained that it was always his intention to seek refuge in Canada. With respect to the delay of five months in entering Canada, the Applicant explained that he had to wait for documents to

arrive, including his birth certificate, which he had been told would be required documentation for entry.

[11] The Applicant's sister is in Canada, having arrived through spousal sponsorship. The Court has held that reuniting with family is a valid reason for not seeking refugee protection in the first country of arrival when travelling to Canada: *Gopalarasa v Canada (Citizenship and Immigration)*, 2014 FC 1138 at paras 32-35 [*Gopalarasa*].

[12] Following the lead of *Gopalarasa*, the Court in *Alekozai v Canada (Citizenship and Immigration)*, 2015 FC 158, addressed an applicant's failure to claim refugee status in the United States during a two-month period spent there. The Court accepted that the applicant had never considered claiming in the United States because he had intended to make Canada his country of refuge, as he had two sisters living there: "…while the United States is a safe third country, one of the exceptions to the application of the safe third country rule is transit through a safe country to claim in a country where the applicant has close family members" (at para 12).

[13] The Applicant argues that he provided reasonable explanation for his failure to come to Canada before October 10, 2012. The Applicant may have been able, as indicated by the Board in its reasons, to initiate his claim with the documents already in his possession. However, the Applicant submits that he was advised differently and believed that he could not proceed with his plans to initiate a refugee claim in Canada without a birth certificate. The Applicant relied on the information provided to him by the Vive La Casa, an agency that advises on immigration, and –

as the Applicant's counsel noted at his refugee hearing – had he not had his birth certificate, the agency staff could have refused to make him an appointment to launch his refugee claim.

[14] The Board erred by reaching a conclusion that there was no subjective basis for the Applicant's fear of persecution based solely on the Applicant's failure to claim in the United States. The Board imposed a duty on the Applicant to seek refuge at the first available opportunity in a third country when no such duty exists at law. The Board also erred by disregarding the Applicant's reasonable explanations.

(2) Failure to assess other evidence

[15] The Applicant says that the Board further erred in dismissing the Applicant's claim without considering its other elements. The Court has held that even if the Board made an adverse credibility finding based on the delay in making a refugee claim, it was still required to consider the central, broader question of well-founded fear: *Papsouev v Canada (Citizenship and Immigration)*, [1999] FCJ No 769 at paras 20-21:

> [20] No doubt many authorities support the position that a Board may take into account the delay in making a claim for refugee status to impugn a claimant's credibility but all of the jurisprudence cited in referring to this principle does not assist since it was not the primary reason for denying the claim. It is usually a corollary reason to what is considered to be more central for refusing a claimant.
>
> [21] Therefore, even if the Board found that the applicants were not credible and rejected their account of what happened to them in Russia because of their delay in making their refugee claim, it still had to consider or comment on the central question of whether or not the applicants had a well-founded fear of persecution in Russia as a result of their religion; or, in Mr. Papsouev's case, as a result of being associated with Jews. In fact, the documentary evidence

> on the situation of Jews in Russia may tend to support the applicants' allegations that Jewish persons are at risk in Russia.

[16] The Board did not consider the other elements of the Applicant's claim, including evidence of the Applicant's political, religious and family profile, along with country documents regarding the mistreatment of politically active Tibetans in China and in India. The Applicant has participated in demonstrations and comes from a politically-engaged family with a link to the Tibetan Government in exile. This evidence should have been considered with reference to s 96 and s 97 risks: *Li v Canada (Citizenship and Immigration*), 2005 FCA 1 [*Li*].

B. *Respondent*

(1) Failure to establish subjective fear

[17] The Respondent submits that the Board's finding that the Applicant lacked a subjective fear of persecution, based on his failure to seek asylum in the United States, was reasonable. Failure to seek asylum in a signatory country that one travels through prior to arriving in Canada is a relevant consideration in rejecting a claim: *Olaya*, above, at paras 52-54.

[18] Someone who was truly fearful would claim refugee status at the first opportunity, and delay in claiming is an important factor that the Board is entitled to weigh: *Cruz v Canada (Employment and Immigration)*, [1994] FCJ No 1247 at paras 10-12; *Castillejos v Canada (Citizenship and Immigration)*, [1994] FCJ No 1956 at para 11.

[19] The Respondent says that, contrary to the Applicant's submissions, it was not his delay in making a claim for asylum that was determinative, but rather his failure to make a claim at the first chance he had. The Board reasonably concluded, based on the evidence that was before it, that the Applicant lacked a subjective fear of persecution based on his failure to pursue asylum in the United States. This was enough to deny the Applicant protection.

[20] The explanations of the Applicant were considered and ultimately rejected. The Board dismissed the Applicant's explanation for delay (that it was his intention to seek refugee protection in Canada) and noted that Canada is not the only country that accepts refugees. Similarly, the Applicant's statement that he was waiting for documentation was found to be weak, as he had in his possession enough to prove his alleged lack of status in Tibet and India, and could have initiated his claim with his Registry Certificate.

[21] The lack of a satisfactory explanation in making a claim can be fatal even where there is no other reason to doubt credibility. The Applicant's assertion that it was always his intention to come to Canada was considered, but not accepted. The Board's analysis here was not unreasonable: *Guarin Caicedo v Canada (Citizenship and Immigration)*, 2010 FC 1092 at para 21.

[22] The failure to claim refugee status during time spent in the United States is conduct that reflects a claimant's state of mind, and does not suggest the attitude of someone who has a genuine fear of persecution, where his first and only consideration is protection against return to his home country, no matter where that protection is secured: *Pillai v Canada (Citizenship and*

Immigration), 2001 FCT 1417 at para 28; *Sellathamby v Canada (Citizenship and Immigration)*, [2000] FCJ No 839 at paras 8-10; *Bogus v Canada (Employment and Immigration)*, (1993) 71 FTR 260 (FCTD) at para 5; aff'd [1996] FCJ No 1220 (FCA).

[23] The Respondent says that *Gavryushenko* and *Sun*, both above, are of no assistance to the Applicant. While in those cases the Court held that a failure to claim asylum cannot form the sole basis for a negative credibility finding, here the Applicant lacks a subjective fear of persecution based on his failure to claim asylum.

(2) Lack of subjective fear is determinative

[24] In order to be successful, a refugee claimant must establish a subjective fear of persecution. The Court stated in *Kamana v Canada (Citizenship and Immigration)*, [1999] FCJ No 1695, that "the lack of evidence going to the subjective element of the claim is a fatal flaw which in and of itself warrants dismissal of the claim, since both elements of the refugee definition – subjective and objective – must be met" (at para 10).

[25] It has been established by the Supreme Court of Canada that to establish fear of persecution, a claimant must subjectively fear persecution, and this fear must be objectively well founded. Therefore, a lack of evidence that speaks to the subjective element of the claim will cause it to fail: *Canada (Attorney General) v Ward*, [1993] 2 SCR 689; *Tabet-Zatla v Canada (Citizenship and Immigration)*, [1999] FCJ No 1778 (TD). In the present case, the Board found that the Applicant simply did not satisfy the subjective component of the test, and his claim was denied as a result.

VIII. ANALYSIS

[26] The Board's whole analysis focusses on the Applicant's failure to make a refugee claim in the United States before coming to Canada:

> He remained in the United States for five months, waits until his RC [Registry Certificate] from India expires, and then travels to Canada to make a claim for refugee protection. The panel has a difficult time accepting this course of action as indicative of a subjective fear.
>
> (Decision, at para 17)

[27] The Decision is based upon the Applicant's failure to establish "subjective fear" to the satisfaction of the Board. In my view, there are significant problems with the way the Board treats the Applicant's explanations for his stay in the United States before he came to Canada. For example, the Board does not really take into account the evidence that the Applicant was advised by Vive La Casa that he could not proceed to the Canadian border to initiate a refugee claim without a birth certificate. The Board also appears to think that having family in Canada is no excuse for not making an immediate claim in the United States. This Court has held that reuniting with family can be a valid reason for not seeking refugee protection in the first country of arrival while en route to Canada. See *Gopalarasa*, above, at paras 32-35. However, there is no point in referring to these problems in any detail because the Decision simply ignores any s 97 claims and does not even mention this provision, which does not require an applicant to establish subjective fear. See *Li*, above, at paras 32-33.

[28] The Applicant is a Tibetan citizen, born and raised in India. He is a follower of His Holiness the Dalai Lama and a member of the Tibetan Youth Congress. He claimed that he fears

returning to Tibet where he would be persecuted for his ethnicity, his political and religious opinions, as well as an important family connection – his uncle, Sandhong Rinpoche, who was Prime Minister of the Tibetan Government in exile until 2011 and presently works in the private offices of His Holiness the Dalai Lama. Sandhong Rinpoche is a wanted man in China. None of this was questioned by the Board. There were no adverse credibility findings on these issues. Clearly, the Applicant has an objective profile that could put him at significant risk of he returns to Tibet. Yet the Board chose to ignore these aspects of the claim entirely, never mentioning s 97 at all. This is unreasonable and the matter must be returned for reconsideration.

[29] Counsel agree there are no questions for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1) The application is allowed. The Decision is quashed and the matter is returned for reconsideration by a different Board Member.

2) There are no questions for certification.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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