

Federal Court



Cour fédérale

Date: 20180129

Docket: IMM-2749-17

Citation: 2018 FC 96

Toronto, Ontario, January 29, 2018

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

PEMA SANGMO

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicant claims refugee protection on the basis that she is a citizen of Tibet and no other country, and fears persecution from the Chinese government. By decision dated November 23, 2016, the Refugee Protection Division (RPD) rejected the Applicant's claim, in part, on a finding that since she was born in India, the Applicant is a citizen of India. On appeal to the RAD the Applicant advanced new evidence to establish that, regardless of the fact that she was born in India, because her father was born in Tibet, she is a citizen of China.

[2] The interpretation of foreign law was a primary outstanding issue before both the RPD and the RAD. However, as described below, on a purely evidentiary basis, I find that the RAD's decision must be set aside because of fundamental reviewable error.

[3] Before the RPD the Applicant testified to her understanding that her father was born in Tibet, and was in possession of documentary evidence to establish this fact but did not have the evidence with her to produce into the record. However, when asked by her Counsel "if required can you produce copies of your parents' RCs [Registration Certificates]" the Applicant replied "yes, I can" (Audio Recording of the RPD hearing; 1:30.05+). The RPD did not request that the evidence be produced.

[4] Before the RAD, the Applicant supplied the following affidavit evidence:

At the [RPD] hearing the member asked about my father's RC (Registration Certificate). I did not know that this was required at the hearing and I did not know that I could submit a copy of it after the hearing. Attached as Exhibit B to this affidavit is a copy of my father's RC, Registration Certificate, which confirms that he was born in Pemakoe in Tibet, he is a Tibetan national and that he arrived in India by land route.

(Appellant's Affidavit, sworn December 30, 2016, Certified Tribunal Record, pp. 95-96)

[5] Counsel for the Applicant argued that the copy of the Registration Certificate should be admitted into evidence because "the appellant had no way of knowing that the [RPD] panel wished to see her father's Registration Certificate and did not know when it could be submitted" (Appellant's Memorandum, CTR, p. 107, para. 15). The manner in which the RAD handled the Registration Certificate is as follows:

The second item of new evidence was a photocopy of the, [sic] "Registration Certificate Number Residential Permit" (Exhibit P-2, Appellant's Record, Appellants [sic] Memorandum, at pp. 17-19) of the Appellant's father. The registration certificate indicates that her father was born in Tibet (China). The Appellant stated that she had no way of knowing that the [RPD] panel wished to see her father's Registration Certificate, and was unaware when it could be submitted. The first issue in any claim is identity, or personal and country of nationality. The Appellant was represented by an experienced and competent counsel at the RPD hearing. The RAD does not accept this new evidence in that it could reasonably have been before the RPD pursuant to section 110(4) of the IRPA. At the hearing, the issue of her nationality was explored. The Appellant was asked about documentation to show her parents' places of birth, and she mentioned that she did not happen [sic] to have it with her. The RPD hearing was on May 25, 2016, and the RPD's decision was rendered on November 21, 2016; a time period of almost six months. It is not reasonable or credible that this document could not have been presented to the RPD for its consideration prior to the decision. The RAD does not accept the Appellant's explanation, given that this was an issue for the RPD.

[Emphasis added]

[6] A foundational principle with respect to the making of a credibility finding is stated by Justice Heald in *Maldonado v Canada (Minister of Employment & Immigration)*, ([1980] 2 F.C. 302) (FCA) at paragraph 5:

When an applicant swears to the truth of certain allegations, this creates a presumption that those allegations are true unless there be reason to doubt their truthfulness.

[7] I find that there is absolutely no evidence on the record before the RAD to support the negative credibility finding and rejection of the Applicant's sworn evidence quoted in paragraph 4 above. For this reason, I find that the decision under review is unreasonable. It is concerning that, on a basis of such a capricious credibility finding, the RAD rejected the very evidence that

the RPD failed to request, and that the RAD could apply to determine the contentious issue of the Applicant's citizenship at the base of her claim, being fear of persecution should she be required to return to China.

JUDGMENT

THIS COURT'S JUDGMENT is that the decision under review is set aside and the matter is referred back for redetermination before a differently constituted panel.

There is no question to certify.

“Douglas R. Campbell”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2749-17
STYLE OF CAUSE: PEMA SANGMO v THE MINISTER OF CITIZENSHIP
AND IMMIGRATION
PLACE OF HEARING: TORONTO, ONTARIO
DATE OF HEARING: JANUARY 26, 2018
JUDGMENT AND REASONS: CAMPBELL J.
DATED: JANUARY 29, 2018

APPEARANCES:

Richard Wazana FOR THE APPLICANT
Nicole Paduraru FOR THE RESPONDENT

SOLICITORS OF RECORD:

WAZANALAW FOR THE APPLICANT
Barrister and Solicitor/Avocat et
Notaire
Toronto, Ontario
Attorney General of Canada FOR THE RESPONDENT