Federal Court  Cour fédérale

Date: 20201202

Docket: IMM-5729-19

Citation: 2020 FC 1110

Ottawa, Ontario, December 2, 2020

PRESENT: Mr. Justice Pentney

BETWEEN:

TSERING PHUNTSOK

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Tsering Phuntsok, is an ethnic Tibetan who was born in India in 1976. Under the law of India, he is a citizen of India by virtue of being born there. However, the Applicant claims refugee status in Canada because he says Indian authorities will not recognize his citizenship, therefore placing him at risk of being sent to China where he will face persecution as a Buddhist, a follower of the Dalai Lama, and a supporter of a free Tibet.

[2] The Refugee Protection Division (RPD) rejected his claim in a decision dated March 6, 2019. It found that there had been an evolution of the situation for Tibetans in India. The prior

reluctance of officials to recognize the Indian citizenship that had been granted by law had begun to shift, following decisions of the courts in India that confirmed the rights of ethnic Tibetans born in India between January 26, 1950, and July 1, 1987, as recognized by the Indian *Citizenship (Amendment) Act, 2003*.

[3] The RPD concluded that given the recent changes in India, the Applicant would be granted an Indian passport if he returned to India and applied for one. He had obtained travel documents from Indian authorities and did not demonstrate that he had made reasonable efforts to have his citizenship rights recognized as he had not actually approached Indian authorities to ask for documentation to substantiate his citizenship. The RPD therefore concluded that the Applicant was not a Convention refugee nor a person in need of protection under sections 96 or 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[4] On August 21, 2019, the Refugee Appeal Division (RAD) dismissed the Applicant's appeal of this decision. The RAD found that the RPD had not erred in applying the legal test that governs the situation where a refugee claimant argues that he or she faces a serious impediment to obtaining recognition of citizenship rights in another country. It found that the Applicant had not provided persuasive evidence that he would not be issued a passport if he returned to India. Based on its review of the evidence, the RAD concluded that the Applicant had the documents he needed to obtain travel authorization to return to India, and to apply for a passport.

[5] The Applicant relied on newspaper reports to support his claim that despite official pronouncements from central authorities in India, in practice he would face significant impediments from local authorities. The RAD accepted the evidence that a number of Tibetans

applying for passports had been required to resort to litigation in the courts in order to overcome the resistance of local officials, but it noted that in all of the reported instances the courts had decided in favour of the individuals.

[6] Based on the jurisprudence on the point, the RAD found that the Applicant had not demonstrated that he had made reasonable efforts to overcome the impediments he faced in obtaining recognition of his citizenship. The RAD also considered the Applicant's personal situation, taking into account his education, employment, and travel history, as well as his demonstrated ability to be resourceful and obtain information when he needed it. The RAD concluded it was not unreasonable to expect the Applicant to take further steps to obtain recognition of his citizenship in India, and that even if he had to seek legal recourse to do so, the evidence confirmed that he would be able to access that citizenship. The RAD therefore dismissed his appeal.

[7] The Applicant seeks judicial review of the RAD's decision.

I. Issues and Standard of Review

[8] The only issue is whether the RAD's decision is unreasonable. The Applicant's primary argument is that the RAD ignored the documentary evidence showing he would face significant impediments to obtaining recognition of his citizenship. He also submits that the RAD failed to look carefully enough at his personal circumstances in making its determination that he had the capabilities to pursue litigation in order to enforce his right to citizenship.

[9] This is a question of mixed fact and law, and there is nothing to rebut the presumption that reasonableness is the standard of review (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16-17 [*Vavilov*]).

[10] When reviewing for reasonableness, 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). The analysis in the decision must be internally coherent, and display a rational chain of analysis (*Vavilov* at para 85).

[11] Based on this framework, a decision will likely be found to be unreasonable if the reasons read in conjunction with the record do not enable the Court to understand the decision-maker's reasoning on a critical point (*Vavilov* at para 103). The burden is on the applicant to show that the decision is unreasonable (*Vavilov* at para 100).

[12] Before a decision can be set aside on this basis, 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." Any flaws or shortcomings alleged to taint the decision "must be more than merely superficial or peripheral to the merits of the decision" and "[i]t would be improper for a reviewing court to overturn an administrative decision simply because its reasoning exhibits a minor misstep." Rather, "the court must be satisfied that any shortcomings or flaws relied on by the party challenging the decision is sufficiently central or significant to render the decision unreasonable" (*Vavilov* at para 100).

[13] The *Vavilov* framework "affirm[s] the need to develop and strengthen a culture of justification in administrative decision making" by endorsing an approach to judicial review that is both respectful and robust (*Vavilov* at para 2, see also paras 12-13).

II. Analysis

A. *The legal framework*

[14] In 2005, the Federal Court of Appeal confirmed that the question of whether a refugee claimant has a "country of nationality" is to be assessed by asking whether access to citizenship is within the claimant's "control" (*Canada (Citizenship and Immigration) v Williams*, 2005 FCA 126 at para 22 [*Williams*]). If so, the claimant is expected to rely on that country for protection, because under international law, refugee status is meant to be secondary protection, offering refuge to those who cannot rely on the protection of their home country (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at 752).

[15] In *Tretsetsang v Canada (Citizenship and Immigration)*, 2016 FCA 175 [*Tretsetsang*], a majority of the Federal Court of Appeal ruled that the *Williams* test continues to apply. The majority underlined that if a claimant alleges an inability to access state protection in a country in which he or she is a citizen, but fails to take any steps to confirm whether or not that country will recognize the claimant as a citizen, "such inaction, in the absence of a reasonable explanation, would be fatal to that person's refugee claim" (*Tretsetsang* at para 70). The onus is on the claimant to establish the inability to obtain state protection or to explain the reason for fearing persecution in doing so (*Tretsetsang* at para 71).

[16] The Federal Court of Appeal elaborated on the test in the following passage:

> [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.

[17] Subsequent decisions have emphasized that the decision-maker must take into account the "specific attributes" of the individual claimant (*Namgyal v Canada (Citizenship and Immigration)*, 2016 FC 1060 at para 38 [*Namgyal*]). Thus, for example, it was found to be unreasonable to expect a street vendor with a modest education who had lived his entire life in a Tibetan refugee settlement to give up his right to work, his home and community, and numerous other benefits in order to pursue his claim to Indian citizenship (*Pasang v Canada (Citizenship and Immigration)*, 2019 FC 907 at para 20). On the other hand, a decision denying refugee status to a claimant with significant education and experience in dentistry in India, who did not demonstrate having taken efforts to obtain citizenship, was found to be reasonable (*Dakar v Canada (Citizenship and Immigration)*, 2017 FC 353 at para 27).

B. *The parties' positions*

[18] The Applicant submits that the RAD's decision is unreasonable because it ignored evidence that contradicted its conclusion on the determinative finding about the nature and significance of the impediments he would face in seeking recognition of his Indian citizenship (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35, 83 ACWS (3d) 264) at paras 14-17 [*Cepeda-Gutierrez*]). He argues that the evidence he had provided to the RAD met the test set out at paragraph 73 of *Tretsetsang* that he was not required to make any effort to overcome the impediments he faced because "it would not be reasonable to require [the Applicant] to make any such effort."

[19] The Applicant points to an article from the Tibetan Sun newspaper written by Lobsang Wangyal, the plaintiff who won the landmark Indian High Court case that confirmed the citizenship rights of persons of Tibetan origin who were born in India. The article states: "Tibetans applying for Indian passport [*sic*] continue to face various forms of discrimination and harassment, and are left with no choice other than appealing in the courts for relief" (Application Record at 36).

[20] More particularly, the Applicant notes that the RAD completely failed to mention a report from the Immigration and Refugee Board's National Documentation Package on China. The report refers to the legal provisions granting legal citizenship rights to Tibetans born in India, but notes: "[i]n reality, it has proved virtually impossible for these Tibetans to acquire passports to prove their status as citizens, and thus they remain foreigners in India" ("Tibet's Stateless

Nationals III: The Status of Tibetan Refugees in India", IRB NDP Item 13.7, Application Record at 55).

[21] The Applicant submits that the RAD failed to address this evidence in its decision. He argues that the RAD erred by relying on Indian court decisions and the policy declarations of central authorities in India, while ignoring the evidence showing that, in practice, local officials continue to take steps to make it virtually impossible for people of Tibetan origin to obtain recognition of their citizenship.

[22] The Applicant also contends that the RAD failed to engage in any meaningful analysis of his personal circumstances when it concluded that he could go to court to enforce his right to citizenship. The RAD did not examine whether he would have the financial resources to pursue litigation, and instead simply speculated that he would be able to do so given his years of education and employment. He submits that the RAD failed to consider that his education was obtained in the traditional Tibetan community and is not officially accepted in India, nor did it recognize that he had lived and taught in a Tibetan monastery and thus did not have experience or opportunity in the wider Indian economy.

[23] The RAD noted that the Indian government had recently set out requirements for Tibetans to acquire Indian citizenship, including that they (a) relinquish their Registration Certificate and Identity Certificate; (b) vacate designated Tibetan refugee settlements; (c) forgo benefits and subsidies received from the Central Tibetan Authority; and (d) submit a declaration that they no longer receive privileges or subsidies associated with holding a Registration Certificate. The Applicant claims that the RAD discounted the impact of these requirements on

Tibetans when it stated that they "must make a personal choice" and that while they would be forced to give up certain identification documents and benefits, this did not constitute a significant impediment to acquiring citizenship (RAD Decision at para 17, Certified Tribunal Record (CTR) at 8).

[24] The Applicant submits that the RAD failed to consider the impact of forcing Tibetans to give up the benefits they receive from the Central Tibetan Authority, as well as their connection to their community. This is a more pronounced problem given the widespread discrimination against Tibetans in the wider Indian community, which makes it difficult to obtain housing or employment. The Applicant contends that the RAD did not consider whether he would be allowed to continue to live or work at the monastery since it was connected to the Central Tibetan Authority.

[25] The Applicant submits that the evidence of practical obstacles is sufficient to make it unreasonable to require him to take steps to apply for citizenship. In addition, he argues that the RAD failed to conduct the type of individualized inquiry that is required by the jurisprudence.

[26] The Respondent argues that the decision is reasonable. It submits that the Applicant's arguments about his educational background, whether he could continue to live in the monastery or participate in the Tibetan community, and about his capacity to seek legal assistance, were not made before the RAD.

[27] The Respondent contends that it was reasonable for the RAD to examine the evidence and arguments submitted to it, and to conclude that the Applicant did not take reasonable steps to

seek to obtain recognition of his citizenship in India, and that he did not face significant impediments in doing so given his educational and work background. In his Basis of Claim form, the Applicant states that he speaks Tibetan, Hindi, and English, that he pursued a university degree and post-graduate studies, and that he has significant work experience. In addition, he provided a positive reference letter from his employer.

[28] The Respondent argues that the RAD acted reasonably in taking these elements into account, and it was not required to go further in examining his capacity to retain a lawyer. The evidence put forward by the Applicant confirmed that in every case where a Tibetan had gone to court the decision had been favourable, and therefore it was reasonable for the RAD to conclude that the Applicant would also succeed if he had to pursue litigation to enforce his rights.

C. *Discussion*

[29] The starting point for any analysis of this question is the guidance set out by the Federal Court of Appeal in *Williams* and *Tretsetsang*, which is rooted in the fundamental principle that refugee protection is surrogate protection, available only when a person's country of nationality is unable or unwilling to protect against the risks identified in sections 96 and 97 of the *IRPA*. This is why the test from *Williams* focuses on whether obtaining citizenship is within a claimant's control; it is also why the majority in *Tretsetsang* emphasized the onus on a claimant to show that he or she had taken steps to acquire citizenship, including going to court to enforce his or her rights, unless doing so would itself expose the person to a risk of persecution.

[30] In this case, in applying the *Vavilov* framework for reasonableness review, and considering the guidance of *Williams* and *Tretsetsang*, I am unable to accept the arguments

advanced by the Applicant. There is no debate about the fact that the Applicant is, as a matter of law, a citizen of India. The only question is whether the RAD's decision is unreasonable because it faulted him for not taking steps to obtain recognition of that right in India, in view of the situation in that country and considering his personal circumstances.

[31] As set out above, under the *Vavilov* framework for reasonableness review, the "Court's role is to review the reasons given by the administrative decision maker and determine whether the decision is based on an internally coherent chain of reasoning and is justified in light of the relevant legal and factual constraints" (*Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at para 2). In this regard, one consideration is whether the RAD was responsive to the most important evidence and arguments advanced by the Applicant (*Vavilov* at paras 127-28).

[32] The Applicant argues that the RAD's decision is unreasonable because it does not mention a crucial piece of evidence that shows the practical impediments facing Tibetans seeking recognition of their citizenship in India. He says that this fails to meet the requirements set out in *Cepeda-Gutierrez*, and is therefore unreasonable.

[33] I am not persuaded. The RAD's decision specifically refers to the two articles submitted by the Applicant from the Tibetan Sun newspaper that address the impediments facing Tibetans, and the extent to which local authorities continue to ignore both the order of the Indian High Court and the subsequent directions of central authorities. The RAD's findings in this regard are telling:

> The RAD has reviewed both articles and finds that it further indicates that a number of Tibetans who are applying for passports have found it necessary to seek legal assistance in order to advance their passport application. The RAD further finds that in all of these situations the courts have decided in favour of the applicants.
>
> [RAD Decision at para 20, CTR at 8.]

[34] In light of this, I do not find it fatal that the RAD did not specifically discuss the third document relied on by the Applicant, namely the "Tibet's Stateless Nationals III" report. This is not a case where the decision-maker ignored all evidence that contradicted its key findings, nor is it a situation where the RAD failed "to meaningfully grapple with key issues or central arguments raised by the parties" (*Vavilov* at para 128). Rather, the RAD acknowledged that Tibetans seeking recognition of their Indian citizenship continued to face hurdles, but it concluded that the evidence showed that such individuals had succeeded in enforcing their rights when they had gone to court. In view of the specific findings by the majority in *Tretsetsang* on this point, the fact that a claimant may have to pursue legal remedies is not, in and of itself, a sufficient impediment to excuse a claimant from taking steps to seek to acquire or enforce citizenship rights.

[35] The crux of the RAD's decision is its finding that the Applicant did not demonstrate that he had taken reasonable steps to seek recognition of his Indian citizenship. The Applicant did not provide proof of any concrete steps he had taken to try to obtain his passport beyond an application he made in 2003 and more recent conversations with some friends. He did not provide any evidence of having made any more recent applications or inquiries, nor did he provide any evidence that he had sought legal advice on that matter. Rather, the Applicant

submitted that he faced such significant impediments that it would not be reasonable to expect him to undertake these efforts.

[36] The RAD examined the Applicant's personal circumstances, as it was required to do by the case law. It found that it was not unreasonable to expect the Applicant to take steps to obtain recognition of his citizenship in India, in light of his extensive education, work history, and his demonstrated resourcefulness in obtaining the necessary travel documents to come to Canada and pursuing his refugee claim here.

[37] The Applicant contends that the RAD's analysis was superficial and based on assumptions. I do not agree, particularly having reviewed the evidence and arguments submitted by the counsel who represented the Applicant before the RAD. I agree with the Respondent that the RAD cannot be faulted for failing to examine more closely whether or how the Applicant's education or work experience might limit his opportunities in the wider Indian community, or whether he would be forced to leave his home and work because of his connection to the Central Tibetan Authority, because these matters were not raised before the RAD, and there is no evidence in the record that indicates that he will be forced to leave his home or his job if he seeks Indian citizenship.

[38] I find that the RAD's decision reflects the type of individualized analysis mandated by the case law. It specifically considered whether it was reasonable to expect someone in the Applicant's position, with his specific attributes, to take additional steps to have their citizenship recognized (*Namgyal* at para 38; see also *Sangmo v Canada (Citizenship and Immigration)*, 2020 FC 478 at para 35 [*Sangmo*]). The RAD cannot be faulted for failing to consider aspects of the

evidence or arguments that were not put before it. I do not find that the RAD's decision unfairly relied on a one-sided review of the evidence, or that it ignored critical evidence. For this reason, I am not persuaded by the Applicant's reliance on *Cepeda-Gutierrez* (see the discussion in *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319 at para 39).

[39] Furthermore, I find that the lack of evidence that the Applicant took concrete steps to seek to obtain recognition of his citizenship can be contrasted with the facts of cases such as *Namgyal* (at para 15) and *Yalotsang v Canada (Citizenship and Immigration)*, 2019 FC 563 at paras 15-17 where the claimant had sought out legal advice on their prospects of success. In this respect, the facts of this case more closely resemble those in *Khando v Canada (Citizenship and Immigration)*, 2018 FC 1223, *Sangmo*, and *Tretsetsang*.

[40] For all of these reasons, I am unable to accept the arguments of the Applicant. The RAD decision is reasonable: it engaged with the evidence and concluded that it was not unreasonable to expect that someone in the Applicant's position could undertake efforts to obtain recognition of his citizenship in India, and that such efforts would succeed. Its decision is clear and comprehensible.

[41] The onus was on the Applicant to demonstrate that he had taken reasonable steps to have his citizenship recognized, and it was open to the RAD to draw reasonable inferences from his failure to do so. In addition, the RAD examined whether the Applicant faced such significant impediments that it would be unreasonable to expect him to take steps to seek such recognition. These are conclusions that were open to the RAD on the evidence and arguments before it, and I

cannot fault the RAD for failing to take into account evidence or arguments that the were not submitted to it by the counsel who acted for the Applicant at that time.

III. Conclusion

[42] The application for judicial review is dismissed.

[43] The parties did not propose any question of general importance for certification, and none arises in light of the fact-specific nature of the issue in this case.

JUDGMENT in IMM-5729-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question of general importance for certification.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Phillip J.L. Trotter	FOR THE APPLICANT
Nadine Silverman	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lewis & Associates Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT