Federal Court  Cour fédérale

Date: 20230720

Docket: IMM-8889-21

Citation: 2023 FC 998

Toronto, Ontario, July 20, 2023

PRESENT: Madam Justice Go

BETWEEN:

TENZIN NORSANG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Born in India in 1993, Mr. Tenzin Norsang [Applicant] is a Tibetan citizen of China. His mother was also born in India in 1966, while his father was born in Tibet.

[2] The Applicant alleges fear based on his political opinion as a supporter of a free Tibet and his religion as a follower of His Holiness the Dalai Lama.

[3] The Refugee Protection Division [RPD] rejected the Applicant's claim in April 2021 after finding that India, not China, is the country of reference for the Applicant, as citizenship is available to him and within his power to acquire. On appeal to the Refugee Appeal Division [RAD], the Applicant argued that his citizenship hinges on the citizenship status of his parents, and is thus outside of his control.

[4] In a decision dated November 4, 2021, the RAD confirmed that the Applicant is neither a Convention refugee nor a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Decision]. Based on its review of India's *Citizenship (Amendment) Act*, 2003 [*Act*], the RAD found that the Applicant's mother, having been born in 1966, is an Indian citizen by birth. The RAD also found that the Applicant is a citizen of India both by virtue of his birth there and his mother's Indian citizenship. Based on these laws and the lack of contrary evidence suggesting that his mother must formally apply for citizenship, the RAD rejected the Applicant's submission that his access to citizenship is outside of his control.

[5] The Applicant seeks judicial review of the Decision. For the reasons set out below, I grant the application.

II. Issues and Standard of Review

[6] The only issue before this Court is whether the RAD's determination that India is the appropriate country of reference for the Applicant's claim is reasonable.

[7] The parties agree that the Decision is reviewable on a reasonableness standard, per *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[8] A reasonable decision "is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker": *Vavilov* at para 85. The onus is on the Applicant to demonstrate that the Decision is unreasonable: *Vavilov* at para 100. To set aside a decision 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": *Vavilov* at para 100.

III. Analysis

[9] Under the *Act*, the Applicant cannot acquire citizenship by birth in his own right. However, pursuant to paragraph 3(1)(a) of the *Act*, the Applicant's mother is granted citizenship of India by birth, as she was born after January 26th, 1950 and before July 1st, 1987. By virtue of paragraph 3(1)(b), the Applicant should also be granted citizenship based on his mother's citizenship.

[10] Before the RPD, the Applicant submitted an affidavit sworn by his mother [Mother's Affidavit], in which she states that she applied for Indian citizenship twice in 2019 at a government office in Dharamsala. Even though she was born in 1966, she was not allowed to petition for citizenship. As the Applicant's mother explained:

> … it was revealed by the authorities that there is no order has been issued [*sic*] by the Government of India to issue Indian Citizenship to the Tibetan Refugee or to start process of it.

[11] The Applicant submitted that the RAD erred in confirming that the Applicant is a citizen of India by virtue of his mother being a citizen of India at the time of his birth, contrary to the evidence he submitted.

[12] Specifically, the Applicant submits that the RAD unreasonably focused on the letter of the law when it found that the Applicant's mother had a "standalone right" to Indian citizenship under paragraph 3(1)(a) of the *Act*.

[13] In so finding, the Applicant submits that the RAD ignored substantive country conditions evidence demonstrating that historically, Tibetans were neither recognized by government policy nor by the bureaucracy, who refused to comply with the law and policy. The Applicant notes that the Court has acknowledged this contextual reality in cases such as *Tretsetsang v Canada (Citizenship and Immigration)*, 2016 FCA 175 [*Tretsetsang*]*; Wanchuk v Canada (Citizenship and Immigration)*, 2014 FC 885 at paras 9-10; *Phuntsok v Canada (Citizenship and Immigration)*, 2020 FC 1110 at paras 33-34; and *Namgyal v Canada (Citizenship and Immigration)*, 2016 FC 1060 at paras 31-33.

[14] Citing case law, the Applicant reiterates that it is not enough for a claimant to have citizenship status on paper. Rather, the country of potential citizenship must afford the claimant the state protection due to a citizenship in order for that citizenship to be meaningful in practice:

Tretsetsang at paras 70-72; *Yalotsang v Canada (Citizenship and Immigration)*, 2019 FC 563 at para 12.

[15] The Applicant submits that the RAD erred by simply assuming, and without examining, whether the Indian authorities would recognize the Applicant's mother's citizenship.

[16] Finally, by determining that recognition is not necessary, the Applicant argues that the RAD erred by ignoring the evidence that his mother tried twice but failed to acquire her Indian citizenship.

[17] I agree with the Applicant's submissions and find that the RAD erred by assuming that the Applicant is a citizen of India by virtue of his mother's presumed citizenship at birth.

[18] In *Tretsetsang*, the Federal Court of Appeal [FCA] affirmed that the test for determining whether a claimant has a "country of nationality" is the control test as set out in *Williams v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 126 [*Williams*]. The FCA explained at para 67 of *Tretsetsang*:

> … We also agree that the onus is on the appellant to establish the existence of the asserted impediment and that it would result in the appellant not having the power to control whether India will recognize him as a citizen of India and provide state protection to him. In our view, a country of nationality includes a country where the claimant is a citizen and where the claimant may face an insignificant or minor impediment to accessing state protection from that country but may not include a country where the claimant is a citizen and faces a significant impediment to accessing state protection from that country.

[19] At para 72 of *Tretsetsang*, the FCA set out the applicable test in determining whether the claimant has established that they are unable to avail themselves of the protection of their country of nationality or unwilling to do so because of fear of persecution:

> [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.

[20] In the context of this case, the Applicant submitted the Mother's Affidavit, which indicates that, contrary to section 3 of the *Act*, the Indian authorities refused to recognize her as a citizen of India. Since the Applicant's nationality necessarily depends on his mother's citizenship under paragraph 3(1)(b) of the *Act*, the Applicant submits, and I agree, that the Indian authorities' position that his mother is not a citizen could constitute a "significant impediment" to his ability to obtain Indian citizenship.

[21] The Decision made no mention of the mother's failed attempts to acquire her citizenship in India. Instead, the RAD selectively referenced the Mother's Affidavit by noting that she was issued a Registration Certificate [RC] indicating she was born in India between 1950 and 1987, and concluding that this alone was sufficient for the Applicant to prove that he is an Indian citizen. The RAD then concluded that just because the Applicant derives his citizenship from his

mother's birth in India during a specific period, it does not mean that his access to citizenship is not within his control.

[22] I conclude that the RAD made two reviewable errors. First, the RAD selectively relied on one aspect of the Mother's Affidavit to support its findings, yet ignored evidence in the same document that ran contrary to its conclusion, namely the mother's failed attempts to acquire citizenship. Second, the RAD misapplied the test in *Tretsetsang*, which confirms that the decision-maker must first consider whether there exists a significant impediment that may reasonably be considered capable of preventing the claimant from exercising their citizenship rights: at para 72. In asserting that the Applicant's access to citizenship is "within his control", the RAD failed to consider whether the evidence of his mother's failed attempts to acquire citizenship constitute "significant impediments", contrary to *Tretsetsang* at para 70.

[23] The Respondent argues that the RAD's Decision is reasonable. Based on the *Act,* the Respondent reiterates that the Applicant's mother was a citizen by birth at the time of his birth and notes that she has an RC showing her year of birth, which establishes that the Applicant is also an Indian citizen. The Respondent highlights the RAD's findings that the Applicant never tried to obtain citizenship or a passport, and that he is well-travelled and sophisticated in making applications.

[24] The Respondent submits that the Applicant bore the burden to establish that a presumptive legal right to citizenship was being denied through administrative practices: *Tretsetsang* at paras 28, 39 and 67. The Respondent asserts that the Applicant failed to make out

that access to Indian citizenship is not within his control, as required by *Tretsetsang* at para 67 and *Williams* at paras 21-22. The Respondent maintains that it was reasonable for the RAD to expect someone with his level of sophistication to take additional steps to having his citizenship recognized.

[25] I reject the Respondent's arguments, which merely adopt the faulty analysis of the RAD.

[26] At the hearing, the Respondent further submitted that the RAD was cognizant of the fact that the mother was refused citizenship when the RAD stated at para 9 of the Decision:

> The [Applicant] argues that as long as his mother is not recognized as a citizen, the [Applicant] has no basis for requesting citizenship as he does not meet the criteria.

[27] I find that the Respondent's additional submission has no merit. As the Applicant notes, there is no express acknowledgement in the Decision of the mother's failed attempts to apply for citizenship. More importantly, given that the RAD assumed the mother has a "standalone" right to citizenship, whether or not the mother has tried to apply for citizenship was rendered irrelevant by the RAD based on its assumption.

[28] Finally, as the Applicant acknowledges, and I agree, the RAD was not obliged to find that the Indian authorities' repeated refusal to recognize his mother's citizenship was so significant an impediment that it amounted to a reasonable explanation for his failure to apply for citizenship himself. However, by failing to address the impediment altogether, the RAD could not have assessed whether the Applicant acted reasonably by not applying for citizenship. This constitutes a reviewable error that warrants the granting of the application.

[29] In view of my findings above, I need not address the other arguments raised by the Applicant.

IV. Conclusion

[30] The application for judicial review is allowed.

[31] There is no question to certify.

JUDGMENT in IMM-8889-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The decision under review is set aside and the matter referred back for redetermination by a different decision-maker.

3. There is no question to certify.

"Avvy Yao-Yao Go"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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