

Federal Court



Cour fédérale

**Date: 20210823**

**Docket: IMM-2015-20**

**Citation: 2021 FC 863**

**Ottawa, Ontario, August 23, 2021**

**PRESENT: The Honourable Mr. Justice Fothergill**

**BETWEEN:**

**X NAMGYAL NORGAY (a.k.a. NAMGYAL NORGAY)  
X NAMGYAL SAMDUP (a.k.a. NAMGYAL SAMDUP)**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] The Applicants Namgyal Norgay and Namgyal Samdup are brothers. They were born in India to parents of Tibetan ethnic origin. They were raised in a Tibetan refugee settlement in India. The elder brother's wife and child continue to live in a Tibetan refugee settlement.

[2] The Applicants arrived in Canada on April 14, 2018 and claimed refugee protection shortly thereafter. The Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB] rejected their refugee claim on August 7, 2019. The RPD held that the Applicants were eligible for Indian citizenship, there were no serious impediments to their acquiring it, and they had not made reasonable efforts to do so.

[3] The Applicants appealed to the Refugee Appeal Division [RAD] of the IRB. The RAD accepted new evidence of the brothers' unsuccessful efforts to obtain Indian passports by visiting the Indian Consulate in Toronto in September 2019. The Applicants said they were turned back at the reception desk, and told they must apply for the passports in India.

[4] The RAD confirmed the decision of the RPD, and dismissed the appeal on March 11, 2020. The Applicants seek judicial review of the RAD's decision.

[5] The RAD reasonably found that the Applicants could acquire state protection from India, there were no serious impediments to their doing so, and they had made insufficient efforts to overcome any impediments that might exist. The application for judicial review is therefore dismissed.

## II. Background

[6] Prior to their departure from India, the brothers ran a clothing store in Assam. They say they encountered numerous difficulties due to their Tibetan ancestry. However, in their appeal to

the RAD, they did not challenge the RPD's determination that they lacked a well-founded fear of persecution in India.

[7] The RAD confirmed the RPD's finding that the Applicants had been able to open businesses and work both within and outside of Tibetan settlements. The Applicants were unable to establish a pattern of harassment or discrimination that could amount to a serious possibility of persecution. Nor could they establish, on a balance of probabilities, that they faced any of the risks enumerated in s 97 of *Immigration and Refugee Protection Act*, SC 2001, c 27.

[8] The RAD also confirmed the RPD's determination that there were no serious impediments to the Applicants' acquisition of Indian citizenship, and held that they had made insufficient efforts to overcome any impediments that might exist.

### III. Issue

[9] The sole issue raised by this application for judicial review is whether the RAD's decision was reasonable.

### IV. Analysis

[10] The RAD's decision is subject to review by this Court against the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov] at para 10). The Court will intervene only if "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). These criteria are met if the reasons allow the Court to understand why the decision was made, and determine whether the decision falls within the range of acceptable outcomes defensible in respect of the facts and law (*Vavilov* at paras 85-86, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[11] In *Tretsetsang v Canada (Citizenship and Immigration)*, 2016 FCA 175 [*Tretsetsang*], the Federal Court of Appeal ruled as follows (at para 70):

If a claimant alleges that he or she is unable to access state protection from the country of which he or she is a citizen and fails to take any steps to confirm whether that country will recognize the claimant as a citizen of that country, such inaction, in the absence of a reasonable explanation, would be fatal to that person’s refugee claim.

[12] The onus is on claimants to establish that they are unable to avail themselves of the protection of their country of nationality, or are unwilling to do so because of fear of persecution in that country. Any impediment to realizing the rights of state protection granted to citizens must be a significant one (*Tretsetsang* at para 71).

[13] Refugee claimants who allege the existence of an impediment to exercising their 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.

*(Tretsetsang at para 72)*

[14] Before the RAD, the Applicants argued that they faced two significant impediments to obtaining Indian passports: the Indian government's past and current treatment of passport applications from Tibetan refugees; and the requirement that they give up the benefits to which they are entitled by virtue of having a Tibetan registration certificate [RC] and identity certificate [IC].

[15] Norgay applied unsuccessfully for an Indian passport in 2001 and 2005. He enquired into the status of his application in 2016, and was told the file was closed. He was also made to pay a penalty for his delay in collecting the rejection letter. Samdup applied unsuccessfully for a passport in 2001.

[16] Despite the brothers' inability to obtain Indian passports in the past, the RAD found that there had been multiple legal and policy developments in recent years that improved access to passport services for Tibetan refugees born in India:

[17] The Appellants argue that the government has demonstrated a pattern of resistance against multiple court rulings ordering them to grant passport applications to this group of Tibetans and that this pattern is likely to continue into the future. However, I agree with the RPD that recent policy changes within the government itself represent a significant departure from this historical pattern. The Ministry of External Affairs (MEA) formally directed all passport offices to process pending applications of Tibetan refugees born in India during the relevant time period in March 2017 and again, in

September 2018. This is significant because previously it was the courts that were pushing a reluctant government to process these applications, while now the government itself is issuing policies internally to process them.

[17] The Applicants object that the MEA policy promulgated in March 2017, and again in September 2018, requires Tibetan refugees to relinquish their RCs and ICs in order to apply for passports. They must also vacate Tibetan settlements and forgo all benefits, privileges, and subsidies conferred by the Central Tibetan Administration. According to information contained in the National Documentation Package [NDP] for India, Tibetan refugees depend on RCs and ICs to receive education, healthcare, employment, banking services, housing, and to navigate life in general. Tibetan refugees without RCs face arrest, detention, extortion, fines, deportation, and “extreme legal vulnerability”.

[18] The Applicants allege that the RAD failed to consider the personal implications for them of surrendering their RCs and ICs (citing *Pasang v Canada (Citizenship and Immigration)*, 2019 FC 907 at para 23). They argue that the RAD unreasonably dismissed their reliance on RCs and ICs for the basic necessities of life as “a temporary inconvenience in order to secure an Indian passport”.

[19] The RAD found that the Applicants had adduced insufficient evidence to call into question the general policies and procedures that govern applications for Indian passports. The RAD acknowledged that the Indian bureaucracy responsible for the issuance of passports is complex and decentralized, but concluded: “there is no evidence that these new policies are not

being followed generally by the Indian government.” While many Indians may encounter complications when applying for passports, these are not exclusive to the Tibetan community.

[20] According to information contained in the NDP, it takes an average of one month to process passport applications, with higher wait times in certain areas where the Applicants have never resided. The RAD acknowledged that it might take a little longer for the Applicants to obtain passports, given the previous refusals and the recent implementation of the MEA policy. While the Applicants argue before this Court that the published wait times do not apply to Tibetan refugees, they have offered no evidence to support this assertion.

[21] The RAD acknowledged the necessity of having an RC to maintain a trade licence to operate the clothing store. However, the RAD reasonably found that the temporary inconvenience of not having an RC while the passport applications were being processed did not rise to the level of a significant impediment. It was clear from the MEA policy that other benefits, such as living in Tibetan settlements and receiving monetary subsidies, would only have to be relinquished once the passports were issued, not when the applications were made. Furthermore, the Applicants had previously resided and operated businesses both within and outside Tibetan settlements.

[22] The Applicants say there is no guarantee that their passport applications will be granted, or that their RCs and ICs will be returned if the applications are rejected. As the RAD found, these allegations are speculative and unsupported by evidence. The burden was on the Applicants

to demonstrate a serious impediment to exercising citizenship rights, and the RAD reasonably found that they had not done so.

[23] The RAD also found that the Applicants had not made reasonable efforts to obtain Indian passports. According to information contained in the NDP, an Indian national who wishes to obtain an Indian passport in Canada must apply on-line, and then make an appointment at the High Commission or Consulate.

[24] The RAD reasonably concluded that showing up at the Indian Consulate and simply asking a receptionist to see Consulate staff was not the correct procedure, and did not constitute reasonable efforts to obtain the state protection of India as contemplated in *Tretsetsang*. There was no indication that the Applicants had made any additional efforts to obtain Indian passports.

[25] The RAD is an expert tribunal, and its assessment of the evidence is owed deference by this Court. It is trite law that the decision maker may assess and evaluate the evidence before it. Absent exceptional circumstances, a reviewing court will not interfere with a tribunal's factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker" (*Vavilov* at para 125).

## V. Conclusion

[26] The application for judicial review is dismissed. None of the parties proposed that a question be certified for appeal.



**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application for judicial review is dismissed.

"Simon Fothergill"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-2015-20

**STYLE OF CAUSE:** X NAMGYAL NORGAY (a.k.a. NAMGYAL NORGAY) AND X NAMGYAL SAMDUP (a.k.a. NAMGYAL SAMDUP) v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** BY VIDEOCONFERENCE BETWEEN NORTH YORK, TORONTO AND OTTAWA, ONTARIO

**DATE OF HEARING:** JULY 20, 2021

**JUDGMENT AND REASONS:** FOTHERGILL J.

**DATED:** AUGUST 23, 2021

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