

Federal Court



Cour fédérale

Date: 20150723

Docket: IMM-6986-14

Citation: 2015 FC 897

Ottawa, Ontario, July 23, 2015

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Applicant

and

NAGWANG JENPA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA or the Act] of a decision by the Refugee Protection Division [RPD] concluding that Mr. Nagwang Jenpa [the Respondent] is a Convention refugee.

II. Background

[2] The Respondent alleges that he was born in Tibet and became a monk after completing primary school. In 1991, he left Tibet for India due to restrictions on religious practices that had been established by Chinese authorities.

[3] The Respondent also alleges that initially he continued to live as a monk in India, but later left religious life and married. He alleges that he participated in demonstrations in India for a free Tibet and that India intended to deport him to China due to these political activities. The Respondent submits that he has no right of citizenship in India.

[4] The Respondent entered Canada on August 11, 2012 and applied for refugee protection on September 13, 2012, on the basis that he fears persecution for his political opinions and religious beliefs.

III. Impugned Decision

[5] The RPD found that, on a balance of probabilities, the Respondent is a Tibetan national and does not have a right to status in India similar to its nationals, so there is a possibility that he would be returned to China if he is returned to India.

[6] The RPD also found that the objective documentary evidence indicated that, amongst other risks, there is ongoing cultural and religious repression in Tibetan areas by the Chinese authorities and human rights violations against ethnic Tibetans.

[7] The RPD found that, on a balance of probabilities, the Respondent would suffer persecution should he be returned to China and that state protection would not be forthcoming. As such, the RPD concluded that the Respondent is a Convention refugee and accepted his claim.

[8] The Applicant seeks judicial review of the RPD decision and submits that the RPD's failure to consider the elements of the test for refugee protection is a determinative error.

IV. Issues

[9] The following issues arise in this application for judicial review:

(a) Did the RPD err by failing to consider the elements of the test for refugee protection?

V. Standard of Review

[10] The applicable standard of review is reasonableness.

VI. Analysis

[11] The parties agree that the country of reference is China and not India. The parties also agree that the RPD erred in stating that despite the Respondent "not having the basic tenets necessary to acquire refugee status", Canadian law states that Tibetan nationals are stateless and

are to be declared refugees in Canada if they are able to prove their identity. The Applicant submits that this error is determinative of this application.

[12] The Respondent submits that the RPD's misstatement of the law is not fatal to its decision, since not every error of law is fatal to a tribunal's decision (citing *Ramirez v Canada (Minister of Employment and Immigration)*, [1992] 2 FC 306, 89 DLR (4th) 173 (FCA) [*Ramirez*], *Schaaf v Canada (Minister of Employment and Immigration)*, [1984] 2 FC 334 [1984] FCJ No 157 (QL) (FCA) [*Schaaf*]). It is the Respondent's view that the RPD's statement was general and not specific to his claim, and argues that the RPD conducted a reasonable assessment of the evidence and did not base its positive decision on its mistaken understanding of the law regarding Tibetans as stateless persons.

[13] The Court agrees with the parties that Canadian jurisprudence does not support the RPD's proposition that Tibetan nationals must be conferred refugee status once their identities are established. Further, the jurisprudence cited by the Respondent is distinguishable and not applicable. The Court in *Ramirez* found that it was unclear what legal test was applied by the Refugee Division and further that the appellant's case, which was based on an extensive record, as being even near the borderline. The matter before the Court in *Schaaf* was concerned with a procedural failure and the Court found that the conduct of the applicant and his counsel indicated that an allegation was not contested such that any failure was not a matter of which the applicant complained.

VII. Conclusion

[14] The Court agrees with the Applicant that the RPD's legal error went to the very heart of the analysis, raising concerns that affected the extent of the analysis, including a potential failure to consider all the evidence and undertake a proper analysis. While the failure of the RPD to include all the arguments, statutory provisions, jurisprudence or other details that may have been preferred by the reviewing court is not determinative in and of itself, I find that the absence of this in its reasons may be the result of a predetermined outcome of the RPD based on an erroneous principle of law.

[15] The Court further agrees with the Applicant that the RPD's reliance on this incorrect proposition demonstrates that the very basis of its determination was erroneous and that the RPD misapprehended the test that the Respondent needed to meet.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is allowed and the matter is to be remitted to a different panel of the RPD for a re-determination of the Respondent's claim.

"Peter Annis"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6986-14

STYLE OF CAUSE: THE MINISTER OF CITIZENSHIP AND
IMMIGRATION v NAGWANG JENPA

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APPEARANCES:

Amy King

FOR THE APPLICANT

D. Clifford Luyt

FOR THE RESPONDENT

SOLICITORS OF RECORD:

William F. Pentney
Deputy Attorney General of
Canada
Toronto, Ontario

FOR THE APPLICANT

D. Clifford Luyt
Barristor & Solicitor
Toronto, Ontario

FOR THE RESPONDENT