Federal Court  Cour fédérale

Date: 20220719

Docket: IMM-1712-21

Citation: 2022 FC 1074

Ottawa, Ontario, July 19, 2022

PRESENT: Mr. Justice McHaffie

BETWEEN:

HIRA NAZ
SALMA MURIEL
HADDEN CHRIST
AQUEENA CARMEL BRAGANZA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] To qualify for refugee protection in Canada, a claimant must face persecution or risk in each of their "countries of nationality." A "country of nationality" is generally a country where the claimant has citizenship. However, it may also include a *potential* country of citizenship if

the claimant has, at the time of the hearing, an entitlement to obtain citizenship through steps within their control. Conversely, a country where the claimant has citizenship will not be considered a country of nationality if a significant impediment prevents them from exercising their citizenship right to the protection of the state.

[2] The Refugee Appeal Division (RAD) of the Immigration and Refugee Board of Canada found that India was a "country of nationality" for Hira Naz, even though he is a citizen of Pakistan and not a citizen of India. It drew this conclusion because Indian law allows Mr. Naz to obtain citizenship after being sponsored by his Indian wife, Salma Muriel, and residing in India for seven years. The RAD therefore assessed Mr. Naz's refugee claim with reference to India and not Pakistan, and concluded he was not entitled to refugee protection. The refugee claims of Ms. Muriel and their children were also materially affected by this finding. Mr. Naz and his family now seek judicial review of the RAD's decision.

[3] For the reasons set out below, I agree with the applicants that the RAD's decision was unreasonable. In considering Mr. Naz's potential to obtain citizenship, the RAD unreasonably applied the "significant impediment" standard that is applicable to the exercise of *existing* citizenship rights. However, the RAD did not reasonably assess whether Mr. Naz had, at the time of the hearing, a right to citizenship that is within his control. I conclude it is unreasonable to consider the potential to obtain citizenship in seven years, in circumstances that depend on an ongoing matrimonial relationship over that time, to constitute an entitlement to citizenship at the time of the hearing, or to be a right to citizenship within Mr. Naz's control.

[4] The application for judicial review is therefore allowed and the family's appeal will be remitted to the RAD for redetermination.

II. Issue and Standard of Review

[5] The applicants raise a single issue on this application: Did the RAD err in concluding that India was a country of nationality for Mr. Naz?

[6] The parties agree the RAD's decision is reviewable on the standard of reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25; *Phuntsok v Canada (Citizenship and Immigration)*, 2020 FC 1110 at para 9. On this standard, the Court must review the decision and the reasons for it as a whole, in the context of the record and the parties' submissions, to assess whether it shows the requisite justification, transparency, and intelligibility, and whether it is justified in relation to the relevant factual and legal constraints that bear on it: *Vavilov* at paras 91, 99–107, 125–128. The legal constraints that bear on a decision include the governing statutory scheme and any binding precedent that governs the matter: *Vavilov* at paras 108–112.

III. Analysis

A. *Countries of nationality and claims for refugee protection*

[7] Sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] provide the foundation for refugee protection in Canada. These sections require consideration of the persecution, dangers or risks a refugee claimant may face in each of their countries of

nationality or, if they do not have a country of nationality, their country of former habitual residence:

Convention refugee	**Définition de *réfugié***
96 A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	**96** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	**a)** soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	**b)** soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
Person in need of protection	**Personne à protéger**
97 (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	**97 (1)** A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
[…]	[…]
[paragraphs 97(1)(*a*) and (*b*) set out the relevant dangers and risks]	[les alinéas 97(1)*a)* et *b*) énoncent les risques et les menaces pertinents]
[Emphasis added.]	[Je souligne.]

[8] Refugee protection is designed to serve as "surrogate" shelter that comes into play upon failure of protection by a person's home state: *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at pp 709, 752. Even when the statutory definition of Convention refugee referred only to a single "country of nationality," the Supreme Court of Canada recognized that it was incumbent on a refugee claimant to show that they faced persecution in "all countries of which the claimant is a national": *Ward* at p 751. As the Federal Court of Appeal noted in *Williams*, this concept is now expressly incorporated into the *IRPA* through the reference in section 96 to "each of their countries of nationality" and in section 97 to "country or countries of nationality": *Canada (Minister of Citizenship and Immigration) v Williams*, 2005 FCA 126 at para 20.

[9] In *Williams*, the Federal Court of Appeal confirmed that the term "country of nationality" includes "potential countries of nationality" where it is shown that the claimant, at the time of the hearing, is entitled to acquire a country's citizenship: *Williams* at paras 19–21, 25. That case involved a Rwandan citizen who was entitled to reacquire Ugandan citizenship by renouncing his Rwandan citizenship. At issue was whether Uganda, where he was not currently a citizen, was a "country of nationality" for purposes of sections 96 and 97 of the *IRPA*: *Williams* at paras 1–4. The Court of Appeal held that it was.

[10] In doing so, the Court of Appeal endorsed the reasoning of Justice Rothstein, then of this Court, in *Bouianova v Canada (Minister of Employment and Immigration)* (1993), 67 FTR 74. As the Court of Appeal described it, *Buoianova* held that:

> […] if, at the time of the hearing, an applicant is entitled to acquire the citizenship of a particular country by reason of his place of birth, and if that acquisition could be completed by mere formalities, thereby leaving no room for the State in question to

> refuse status, then the applicant is expected to seek the protection of that State and will be denied refugee status in Canada unless he has demonstrated that he also has a well-founded fear of persecution in relation to that additional country of nationality.
>
> [Emphasis added; *Williams* at para 21.]

[11] The Court of Appeal approved in particular of Justice Rothstein's adoption of a "control" test for assessing whether a claimant has an entitlement to citizenship. The Court noted that terms such as "mere formalities" and "acquisition of citizenship in a non-discretionary manner" had been used, but that the test was better phrased as whether the acquisition of citizenship is within the control of the claimant. It described the "true test" as being "if it is within the control of the applicant to acquire the citizenship of a country with respect to which he has no well-founded fear of persecution, the claim for refugee status will be denied" [emphasis added]: *Williams* at para 22. On this test, even if additional steps are required by the claimant—in the case of Mr. Williams, renouncing Rwandan citizenship—a country was a country of nationality if the ability to obtain citizenship was within the claimant's control: *Williams* at paras 26–27.

[12] Subsequent to *Williams*, various cases addressed the question of when obtaining citizenship in a country was in a claimant's "control." In *Khan*, Justice Lemieux concluded that where a country had a legal discretion whether or not to grant citizenship, this placed the issue outside the claimant's control: *Khan v Canada (Citizenship and Immigration)*, 2008 FC 583 at paras 19–21. In *Dolma*, Justice Tremblay-Lamer recognized that even where there is a legal right to citizenship, practical uncertainty that a country would recognize that citizenship could place the matter outside the claimant's control: *Dolma v Canada (Citizenship and Immigration)*, 2015 FC 703 at paras 14, 32–34. In *Sangmo*, Justice Fothergill found that requiring legal support and

funds to acquire citizenship was inconsistent with automatic citizenship: *Sangmo v Canada (Citizenship and Immigration)*, 2016 FC 17 at paras 20–21.

[13] These cases address two different situations, and thus two different questions, within the notion of control. In the first, seen in *Williams* and *Khan*, the claimant does not currently have citizenship, and the question is whether *obtaining* that citizenship is within their control. In the second, seen in *Dolma* and *Sangmo*, the claimant *has* legal citizenship or at least a right to it, and the question is whether there are practical impediments such that the claimant does not have control of the *recognition* of their citizenship.

[14] The Federal Court of Appeal addressed the second situation in *Tretsetsang v Canada (Citizenship and Immigration)*, 2016 FCA 175, lv to app dismissed, 2017 CanLII 4176 (SCC). Like *Dolma* and *Sangmo*, *Tretsetsang* involved an ethnic Tibetan born in India. Having been born in the country, India's *Citizenship Act* granted Mr. Tretsetsang Indian citizenship. However, he argued he would have difficulties getting authorities in India to recognize his citizenship, although he had made no efforts to this end: *Tretsetsang* at paras 14–17, 74–76. The majority of the Court of Appeal found that Mr. Tretsetsang's unexplained failure to take steps to seek recognition of his Indian citizenship was fatal to his argument that India should not be considered a country of nationality: *Tretsetsang* at para 70.

[15] All members of the Court of Appeal reaffirmed the control test from *Williams*: *Tretsetsang* at paras 6, 67. All members of the Court of Appeal also confirmed that even where a claimant has citizenship or a legal right to it, significant impediments to exercising those rights,

and in particular the right to state protection, could mean the country is not a "country of nationality": *Tretsetsang* at paras 31–32, 37–39, 66–67. However, the Court divided on whether it was legally necessary for the claimant to have made reasonable efforts to overcome the impediments.

[16] Justices Ryer and Webb, the majority, found it was legally necessary. They held that to show that a country where a claimant is a citizen is nonetheless not a "country of nationality," the claimant had to meet a two-part test:

> […] 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.
>
> [Emphasis added; *Tretsetsang* at para 72.]

[17] Justice Rennie, in dissent, recognized the relevance of failing to take reasonable steps—the second part of the majority's test—but felt it should be considered a matter of evidence and inference, rather than an independent legal requirement: *Tretsetsang* at paras 37–40, 53–55. Justice Rennie's dissent also undertook a broader review of the two different situations described above, confirming prior case law regarding the existence of legal discretion, including *Khan*: *Tretsetsang* at paras 39–40.

[18] It is important to underscore that *Tretsetsang* was dealing with the situation of a claimant who was recognized at law to be a citizen, and the issue was whether authorities would recognize their citizenship rights. The majority's two-part test, including in particular the "significant impediment" standard, applies in assessing whether a refugee claimant is able to exercise existing legal rights to citizenship. As the majority stated, "a country of nationality […] may not include a country where the claimant is a citizen and faces a significant impediment to accessing state protection from that country" [emphasis added]: *Tretsetsang* at para 67; *Phuntsok* at para 15.

[19] This Court has subsequently applied *Tretsetsang* to such cases, namely where a refugee has citizenship but asserts there are significant impediments to exercising the citizenship right of state protection. These cases have often involved ethnic Tibetans born in India: see, *e.g.*, *Namgyal v Canada (Citizenship and Immigration)*, 2016 FC 1060; *Yeshi v Canada (Citizenship and Immigration)*, 2016 FC 1153; *Yalotsang v Canada (Citizenship and Immigration)*, 2019 FC 563; *Phuntsok*; *Tsering v Canada (Citizenship and Immigration)*, 2021 FC 1190; *Nyinjey v Canada (Citizenship and Immigration)*, 2022 FC 505.

[20] However, as I read *Tretsetsang*, the majority did not purport to amend the "control" test of *Williams* as it related to the question of obtaining citizenship. Nor did it disagree with Justice Rennie's summary of the case law applying *Williams*, including *Khan*. Justice Grammond recently reached the same conclusion, finding that the "duty of refugee claimants to take steps to obtain citizenship from another country arises only if it is established that they have the right,

pursuant to the laws of the country, to acquire citizenship": *Wassmer de Aguirre v Canada (Citizenship and Immigration)*, 2021 FC 382 at paras 9–10, citing *Tretsetsang* at para 39.

[21] To summarize, I agree with Mr. Naz that there are, in essence, two questions that flow from *Williams* and *Tretsetsang*: (1) Does the claimant currently have citizenship, or a legal right to citizenship that is within their control and not in the discretion of the authorities? (2) If so, has the claimant shown (a) there is a significant impediment to exercising that citizenship right of state protection, and (b) they have unsuccessfully made reasonable efforts to overcome the impediment?

B. *The RAD's decision*

[22] In the current case, the RAD was faced with a situation akin to that in *Williams* and *Khan*, namely a refugee claimant who did not currently have citizenship in a potential country of nationality. Mr. Naz, a Christian, claims he faces persecution by the Lashkar-e-Taiba in Pakistan, where he was accused of blasphemy against Islam and where a fatwa was issued against him. The RAD did not assess Mr. Naz's claim of persecution in Pakistan, since it concluded India was a country of reference—that is, a country of nationality—for Mr. Naz.

[23] The RAD found that India's *Citizenship Act* provides that a person may be registered as a citizen if they are married to a citizen of India and are ordinarily resident in India for seven years before applying for registration. The RAD noted that Mr. Naz is married to Ms. Muriel, and would therefore meet the requirements after residing in India for seven years. The RAD also

found that Mr. Naz would be eligible to enter India on an extendable visa since he is the spouse of an Indian citizen, so he could reside in India for the requisite period of residence.

[24] The RAD cited the control test from *Williams* as well as the two-part test to show an impediment to exercising rights of citizenship established in *Tretsetsang*. The RAD concluded that Mr. Naz had not established that "a significant impediment exists that may reasonably be considered capable of preventing him from exercising his citizenship rights in India," thereby not meeting the first part of the *Tretsetsang* test. It therefore concluded Mr. Naz had a right to acquire citizenship in India.

[25] Having reached this conclusion, the RAD assessed the family's claim as it related to India. It concluded the family did not have a well-founded fear of persecution in India, on various grounds that are not contested here. Since Mr. Naz did not have a well-founded fear of persecution in all of his countries of nationality, it was unnecessary for the RAD to assess his refugee claim as it relates to Pakistan.

[26] Although the RAD assessed the family's claims related to India generally, given its finding that India is a country of nationality for Mr. Naz, it did not assess the claims of Ms. Muriel and her daughter that they would be subject to gender-based persecution if they returned to India without Mr. Naz's protection.

C. *The RAD's decision is unreasonable*

[27] In my view, the RAD's analysis is unreasonable, as it does not comply with the legal constraints bearing on it, in particular the jurisprudence described above: *Vavilov* at para 112.

[28] The RAD applied the two-part test from *Tretsetsang*, concluding that there were no "significant impediments" capable of preventing Mr. Naz from "exercising his citizenship rights" in India. However, Mr. Naz does not currently have any citizenship rights in India. While he might have a right to enter India and reside there as Ms. Muriel's husband, that does not give him citizenship rights. As set out above, the two-part test in *Tretsetsang* applies where a claimant has an existing right to citizenship and the issue is whether there are impediments to their exercise of those rights. The RAD appears to have recognized this, noting that *Tretsetsang* applies "because government authorities may not always act in compliance with citizenship laws." Nonetheless, the RAD proceeded to apply this test to Mr. Naz's situation, in which he does not have citizenship or a current right to citizenship.

[29] The result is that the RAD did not actually apply *Williams*. The RAD assessed neither whether obtaining citizenship was within Mr. Naz's control nor whether he had an entitlement to citizenship "at the time of the hearing." Rather, the RAD's analysis focused on whether there were "barriers" to the grant of Indian citizenship, and whether there were significant impediments to the exercise of the citizenship rights.

[30] On the RAD's own analysis, Mr. Naz could meet the provisions of India's *Citizenship Act* "after residing there for seven years," presumably while remaining married to Ms. Muriel. To the extent the RAD concluded, implicitly, that this placed Indian citizenship within Mr. Naz's control—a conclusion *Williams* requires it to reach to find India was a country of nationality—it was in my view not reasonable to do so. I say this for two reasons. First, it cannot be said that remaining married to another person for a period of seven years is something within a person's "control." Second, and more importantly, the RAD appears to accept the potential of citizenship rights in the distant future as determinative of the current risk analysis for purposes of sections 96 and 97 of the *IRPA.* This is inconsistent with the nature of the risk analysis inherent in the determination of a refugee claim.

[31] Determination of a refugee claim involves an assessment of the prospective risk of persecution or danger based on evidence of past experiences and current in-country conditions. The assessment of a refugee claim is performed at the time the claim is decided, *i.e.*, at the date of the hearing: *Mileva v Canada (Minister of Employment and Immigration)*, [1991] 3 FC 398 (CA) at pp 404; *Kabengele v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 16629 (FC) at para 25; *Vera v Canada (Citizenship and Immigration)*, 2021 FC 189 at para 12. It is inconsistent with this principle to assess a refugee claim with reference to current conditions in India based on the potential that a claimant may obtain citizenship there in seven years.

[32] Importantly, the Court of Appeal in *Williams* specified that the control test requires that the claimant be entitled to acquire citizenship "at the time of the hearing": *Williams* at paras 19, 21. The Court of Appeal has recently reaffirmed this, citing *Williams* as holding that the principle that a claimant must show a well-founded fear of persecution in relation to each

country of nationality "extends to cases where, at the time the claim is heard, the claimant is entitled to acquire the citizenship of a particular country" [emphasis added]: *Canada (Public Safety and Emergency Preparedness) v Bafakih*, 2022 FCA 18 at para 33. While this may entail the completion of certain steps within the control of the claimant, including "mere formalities" and steps such as renunciation of other citizenship, I cannot read *Williams* as extending the concept of "country of nationality" to countries where citizenship may be obtained in the distant future.

[33] I therefore conclude that the RAD's analysis was not consistent with the approach laid out in *Williams* and *Tretsetsang*. By not assessing whether Mr. Naz, at the time of the hearing, had Indian citizenship or an entitlement to Indian citizenship that was within his control, the RAD attributed to Mr. Naz a country of nationality that he could not be reasonably said to have. This error in turn affected its analysis of the claims of the other applicants. The RAD's decision is therefore unreasonable and must be set aside.

[34] Having reached this conclusion, I need not address Mr. Naz's argument that the RAD unreasonably failed to consider whether India's *Citizenship Act* gave Indian authorities a discretion in granting citizenship that would take it out of his control. However, I note that the Refugee Protection Division found there was no discretion under Indian law and Mr. Naz did not challenge this finding before the RAD. This may explain why the RAD did not independently assess this issue.

IV. Conclusion

[35] The application for judicial review is therefore granted. The decision of the RAD is quashed and the applicants' appeal is remitted for redetermination by a differently constituted panel of the RAD.

[36] Neither party proposed a question for certification. I agree that no question meeting the test for certification arises in the matter.

JUDGMENT IN IMM-1712-21

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted and the applicants' appeal to the Refugee Appeal Division is remitted for redetermination by a differently constituted panel.

"Nicholas McHaffie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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