Federal Court Cour fédérale

Date: 20230725

Docket: IMM-9385-21

Citation: 2023 FC 1009

Ottawa, Ontario, July 25, 2023

PRESENT: Mr. Justice Norris

BETWEEN:

XXX BHUCHUNG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] In May 2006, the applicant made a claim for refugee protection in Canada. The applicant identified himself as Bhuchung, a citizen of Tibet (China) who was born in Dhingri, Tibet, on July 1, 1967. He sought protection on the basis of his fear of persecution in China because of his Buddhist faith and his support for a free Tibet. On February 23, 2007, the Refugee Protection

Division (RPD) of the Immigration and Refugee Board of Canada determined that the applicant is a Convention refugee and accepted his claim for protection.

[2] In May 2019, the Minister of Public Safety and Emergency Preparedness filed an application with the RPD under section 109 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*) to vacate the decision allowing the applicant's claim for refugee protection. The Minister alleged that the applicant is in fact Nanang (or Nawang) Chhokle Sherpa, a citizen of Nepal who was born in Kathmandu, Nepal, on June 24, 1975. The Minister contended that the decision allowing the claim for refugee protection should be vacated because the applicant obtained it by misrepresenting or withholding material facts relating to a relevant matter – namely, by identifying himself as Bhuchung, a citizen of Tibet (China), when in fact his true identity is Nanang (or Nawang) Chhokle Sherpa, a citizen of Nepal.

[3] In a decision dated November 25, 2021, the RPD allowed the Minister's application, deemed the applicant's claim for refugee protection to be rejected, and nullified the February 23, 2007, decision of the RPD.

[4] The applicant now applies for judicial review of this decision under subsection 72(1) of the *IRPA*. He contends that the decision should be set aside and the matter remitted for redetermination because the RPD breached the requirements of procedural fairness by refusing to accept the documentary evidence he submitted in response to the Minister's application to vacate. On the other hand, the Minister submits that the RPD did consider the applicant's

evidence and reasonably determined on the whole of the record that the misrepresentation allegation had been established.

[5] As I will explain in the reasons that follow, I agree with the applicant that, in determining whether the Minister had established the alleged misrepresentation, the RPD found that new evidence tendered by the applicant to establish his identity was inadmissible. I also agree with the applicant that this determination is based on an erroneous application of the principles governing the evidence that may be considered on an application to vacate. This reviewable error both undermines the reasonableness of the decision as a whole and effectively deprived the applicant of a meaningful opportunity to answer the Minister's case, something he was entitled to as a matter of procedural fairness. This application for judicial review will, therefore, be allowed and the matter will be remitted for redetermination.

II. BACKGROUND

A. *The Applicant's Claim for Refugee Protection*

[6] When he sought refugee protection in 2006, the applicant identified himself in his Personal Information Form (PIF) as Bhuchung, a citizen of Tibet (China) who was born in Dhingri, Tibet, on July 1, 1967. According to his PIF narrative, the applicant left Tibet in 1993 because of the oppressive conditions there and went to Nepal. (At his RPD hearing, the applicant stated that in fact he had left Tibet by foot in late 1990 and arrived in Nepal in early 1991. He attributed the discrepancy with the information in his PIF to a translation error.) The applicant stated that he then lived and worked in Nepal without status. He travelled regularly to

India, where he has family, including a wife and children. Since he travelled overland between the two countries, he was able to do so without proper identification. The applicant explained to the RPD that if he ran into any difficulties, he would simply bribe the border guards. Eventually the applicant came to fear that conditions for Tibetans in Nepal were deteriorating and decided to leave permanently. He left Nepal for Canada on April 26, 2006, arriving here the next day.

[7] The applicant did not claim refugee protection on arrival; rather, he made an inland claim on May 12, 2006.

[8] The applicant stated in his PIF that he travelled to Canada using a false Nepalese passport in the name of Sonam Lama. As originally submitted in June 2006, the applicant's narrative stated: "My father had purchased a false Nepalese passport so that I could travel to the United States. I returned the document to the agent who made the document." In December 2006, the applicant submitted a corrected version of the narrative in which, among other things, these two sentences were crossed out. At his RPD hearing, the applicant testified that in fact he had purchased the passport himself when he decided to leave Nepal. He also denied ever intending to travel to the United States. Once again, the applicant attributed the erroneous information in his narrative to translation errors.

[9] The applicant testified that he produced the false Nepalese passport in the name of Sonam Lama when he arrived in Canada at Pearson International Airport in Toronto. He assumed he must have had a visa because otherwise he would not have been permitted to enter the country. The applicant denied having any document that would allow him to return to Nepal.

According to the applicant, the only document he had showing his true identity was the Green Book he had obtained in Nepal. (A Green Book is an identity document issued by the Central Tibetan Administration to Tibetans in exile that documents their financial contributions to the organization. The applicant testified that he obtained his first Green Book in 1991, shortly after he arrived in Nepal from Tibet.)

[10] The applicant took the position before the RPD that, since he did not have any legal status in Nepal, the sole country of reference for his refugee claim was China.

[11] As noted above, on February 23, 2007, the RPD determined that the applicant is a Convention refugee. No reasons for the decision were given.

B. *The Minister's Application to Vacate*

[12] Section 109 of the *IRPA* states:

Applications to Vacate	**Annulation par la Section de la protection des réfugiés**
Vacation of refugee protection	**Demande d'annulation**
109 (1) The Refugee Protection Division may, on application by the Minister, vacate a decision to allow a claim for refugee protection, if it finds that the decision was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter.	**109 (1)** La Section de la protection des réfugiés peut, sur demande du ministre, annuler la décision ayant accueilli la demande d'asile résultant, directement ou indirectement, de présentations erronées sur un fait important quant à un objet pertinent, ou de réticence sur ce fait.

Rejection of application	**Rejet de la demande**
(2) The Refugee Protection Division may reject the application if it is satisfied that other sufficient evidence was considered at the time of the first determination to justify refugee protection.	**(2)** Elle peut rejeter la demande si elle estime qu'il reste suffisamment d'éléments de preuve, parmi ceux pris en compte lors de la décision initiale, pour justifier l'asile.
Allowance of application	**Effet de la décision**
(3) If the application is allowed, the claim of the person is deemed to be rejected and the decision that led to the conferral of refugee protection is nullified.	**(3)** La décision portant annulation est assimilée au rejet de la demande d'asile, la décision initiale étant dès lors nulle.

[13] The Minister alleged that the applicant is in fact Nawang Chhokle Sherpa, a citizen of Nepal born in Kathmandu on June 24, 1975.

[14] To establish this allegation, the Minister provided evidence from the United States Department of State, Bureau of Consular Affairs suggesting that on March 29, 2006, the applicant had been refused a US visitor's visa for which he had applied under the name Nawang Chhokle Sherpa using a Nepalese passport in this name issued in December 2001.

[15] According to the Minister, the applicant had identified himself in the visa application as a teacher at the Porong Pema Chholing Monastery in Kathmandu. It appears that this person was part of a group of individuals who had identified themselves as monks associated with a monastery in Kathmandu who intended to visit the United States beginning on April 5, 2006. Contact telephone numbers in Clark County, Nevada, were provided with the application. The

application was refused because the visa officer determined that the "local letter" – presumably a letter purporting to confirm the group's connection to the local monastery – was fraudulent.

[16] The Minister also provided evidence from the United States Department of State, Bureau of Consular Affairs that in June 2008 the applicant was denied a US visa for which he had applied under the name Bhuchung. It appears that US authorities linked this application to the 2006 visa application through a fingerprint match. The Minister relied on this link to establish that it was the applicant who had submitted the 2006 application, shortly before he came to Canada.

[17] Finally, the Minister provided evidence from the Canada Border Services Agency (CBSA) that an individual named Nanang Chhokle Sherpa had entered Canada at Pearson International Airport on April 24, 2006, using a Nepalese passport. The Minister alleged that, despite the minor variation in the spelling of the name in the CBSA record compared to the US record, the CBSA record reflected the applicant's arrival in Canada on the same passport as had been used in the 2006 US visa application and, further, that this confirmed that the applicant had arrived on April 24, 2006, and not on April 27, 2006, as the applicant had maintained in his refugee claim.

[18] Relying on this evidence, the Minister's position was that "it is more likely than not that the Respondent [the present applicant] is in fact Nanang Chhokle Sherpa (alias Nawang Chhokle Sherpa) and that he is genuinely a Nepalese citizen" (Minister's Written Submissions, para 29). According to the Minister, "at all material times, the Respondent failed to notify the RPD panel

of first instance that he was a national of Nepal, and also failed to advance a claim against Nepal" (Minister's Written Submissions, para 35). The fact that the applicant had admitted to using one Nepalese passport (in the name of Sonam Lama, which he contended was fraudulent) but did not admit to having used another one (in the name of Nanang (or Nawang) Chhokle Sherpa) "suggests that he sought to keep it from the panel for a specific reason, namely that this is his genuine identity, and that he is a Nepalese citizen" (Minister's Written Submissions, para 31). Thus, according to the Minister, the decision granting the applicant refugee protection should be vacated because the applicant had "obtained refugee protection as a result of directly or indirectly misrepresenting or withholding the material facts of his personal identity and nationality" (Minister's Written Submissions, para 35).

[19] For present purposes, it is important to underscore that the misrepresentation and withholding of material facts alleged by the Minister related to what the Minister maintained was the applicant's actual personal and national identity and not simply to his failure to disclose his possession and use of the Nepalese passport in the name of Nanang (or Nawang) Chhokle Sherpa.

[20] The Minister submitted that, as interpreted in *Canada (Public Safety and Emergency Preparedness) v Gunasingam*, 2008 FC 181 at para 7, subsection 109(1) of the *IRPA* has three elements: (a) there must be a misrepresentation or withholding of relevant facts; (b) those facts must relate to a relevant matter; and (c) there must be a causal connection between the misrepresenting or withholding on the one hand and the favourable result on the other.

[21] The Minister submitted that all three elements were met here (Minister's Written Submissions, para 38). First, there had been a misrepresentation or withholding of material facts – namely, the applicant's actual identity and nationality. Second, those facts relate to a relevant matter: "identity is foundational to every refugee claim and one must advance a claim against all countries of nationality." Third, there is a causal connection between the misrepresenting or withholding on the one hand and the favourable result on the other: "if identity is not established, the panel is not required to conduct further analysis before making a negative decision; also, failing to advance a claim against all of one's countries of nationality will be fatal to the refugee claim."

[22] The Minister also submitted that the applicant is not a credible witness and that the misrepresentation "has tainted all information provided at the time of the first determination" (Minister's Written Submissions, para 39). Consequently, under subsection 109(2), there is no other sufficient evidence considered at the time of the first determination to justify refugee protection.

[23] The Minister therefore requested that the application be allowed and the applicant's Convention refugee status be vacated.

C. *The Applicant's Response*

[24] The RPD heard the Minister's application on September 7 and October 7, 2021. In his testimony before the RPD, the applicant admitted that, contrary to what he told the RPD at his original hearing, he arrived in Canada on a Nepalese passport under the name Nanang Chhokle

Sherpa. The applicant stated that this passport had been in his possession from 2001 until 2006. He admitted that he had also used it when he travelled between Nepal and India to visit family and when he applied for a US visa in 2006. The applicant maintained, however, that it was not a genuine passport, that he is not Nanang Chhokle Sherpa, and that he is not a citizen of Nepal. As he told the RPD at the original hearing, he is Bhuchung, a citizen of China (Tibet).

[25] Prior to the hearing before the RPD, the applicant submitted the following documents:

(a) A letter dated August 15, 2021, from the Office of the Municipal Executive, Kathmandu Metropolitan City, attesting that Mr. Bhuchung is not a citizen of Nepal; that he was born in Dhingri, Tibet, on July 1, 1967; that "there is no legally citizen named Nawang Chhokle Sherpa (DOB 1975-June-24)"; and that the passport issued under the name Nawang Chhokle Sherpa (No. 880198) "is not genuine and was illegally obtained."

(b) A letter dated August 10, 2021, from a Settlement Officer with the Tibetan Refugee Community Office in Kathmandu certifying that Mr. Bhuchung "was a bona fide Tibetan refugee and resident of Boudha, Kathmandu, Nepal."

(c) A letter dated August 11, 2021, from the Chief Coordinator of the Tibetan Refugee Welfare Office in Kathmandu certifying that Mr. Bhuchung "was a bona fide Tibetan residing at Boudha, Kathmandu, Nepal." The letter also named the applicant's parents and provided his Green Book number. The letter bore a photograph of the applicant that the applicant acknowledged at the hearing had been taken recently with his cell phone.

(d) A letter dated August 13, 2021, from the Administration Manager of the Canadian Tibetan Association of Ontario stating that Mr. Bhuchung is a bona fide Tibetan. The

letter provided the applicant's Green Book number. The letter also stated that the applicant "takes active part in the various community events and programs and volunteers when ever he can."

(e) A letter dated August 24, 2021, from the Toepa Cultural Society of Ontario stating that Mr. Bhuchung is an active member of the society. The letter also describes ways the applicant has been active with the society. The applicant also provided a photo of himself with a Toepa dance group.

(f) Membership cards for the Tibetan Canadian Cultural Centre in the name of Bhuchung Bhuchung bearing the applicant's photograph.

(g) Letters from two long time friends of the applicant in Canada attesting that he (Mr. Bhuchung) is Tibetan.

(h) Letters from the Tibetan Reception Center in Kathmandu relating to the applicant's mother and one of his daughters.

[26] As the RPD recognized in its decision, the applicant had "tendered these documents in evidence in support of his Tibetan identity as Bhuchung." The RPD also noted that these documents "were not presented in evidence before the original RPD panel." The documents were marked collectively as No. 2 in the Consolidated List of Documents: "Disclosure – Personal Counsel August 30, 2021." In the decision, the RPD refers to them as Exhibit 2.

[27] At the hearing, the Minister's position regarding this documentary evidence was two-fold. First, since the hearing of an application to vacate under subsection 109 of the *IRPA* is not

a fresh hearing, the applicant was foreclosed from submitting evidence that was not before the original RPD panel. Second, even if this new evidence could be considered, most of the documents are likely fraudulent so their contents are unreliable. The Minister appears to have had concerns with the authenticity of the documents purporting to be from agencies in Nepal in particular.

III. DECISION UNDER REVIEW

[28] Looking first at the new identity evidence tendered by the applicant (the respondent before the RPD), the RPD states the following (at para 29):

> The panel finds persuasive the Minister's submission that the panel's role in determining an application under s. 109(1) is not to conduct a new hearing into the Respondent's identity but rather, to re-weigh the evidence used to establish the Respondent's Tibetan identity by the original RPD panel now that the Minister has evidence of his alternative Nepalese identity. The panel finds, therefore, that the Respondent cannot rely on new evidence of his purported identity to rebut his misrepresentation made before the original RPD panel.

[29] Although the RPD member does not say so expressly here, there is no issue that this "new evidence" is the documents the member refers to elsewhere as Exhibit 2.

[30] Earlier in the decision, after noting the Minister's submission that some of the applicant's new evidence is likely fraudulent and stating that these submissions were "persuasive", the member stated that she finds "most persuasive" the Minister's submissions regarding the "relevance and admissibility" of the new evidence "under either s. 109(1) or s. 109(2) of the IRPA" (Reasons for Decision, para 26). In particular, the Minister had contended that "the

hearing of a vacation application under s. 109(1) of the IRPA is not a fresh hearing" and that the applicant "is foreclosed from submitting evidence that was not before the original panel" (Reasons for Decision, para 28). As set out above, the RPD agreed with this submission.

[31] The RPD then finds, on a balance of probabilities, that the Nepalese passport confirms the applicant's identity as Nanang Chhokle Sherpa (alias Nawang Chhokle Sherpa). The RPD was satisfied that this is a genuine passport because it had "withstood government scrutiny" when the applicant used it to travel between Nepal and India, when he used it to apply for a US visa in 2006, and when he used it to enter Canada.

[32] The RPD next finds that, by not disclosing his true identity and status in his original claim for refugee protection and, instead, identifying himself as Bhuchung, a Tibetan citizen of China, the applicant had misrepresented or withheld material facts relating to relevant matters – namely, identity, country of reference, and his overall credibility. The RPD was also satisfied that there was a causal connection between the misrepresenting or withholding on the one hand and the favourable result on the other. The applicant obtained refugee protection on the basis of his status as a citizen of China/Tibet and his narrative of political and religious persecution as a Buddhist. The RPD finds that the material facts he misrepresented and withheld "are fundamental and call into question the credibility of his identity and his entire account for fearing persecution."

[33] Finally, the RPD finds under subsection 109(2) of the *IRPA* that it is not the case that the Minister's application to vacate should nevertheless be rejected because there was other

sufficient evidence considered by the original RPD panel to justify refugee protection. The material facts that the applicant misrepresented and withheld "are so fundamental as to call into question his identity and the credibility of his entire account for fearing persecution, such that there cannot be any remaining evidence to justify refugee protection" (Reasons for Decision, para 42).

[34] The RPD therefore allows the Minister's application. As a result, under subsection 109(3) of the *IRPA*, the applicant's claim for refugee protection is deemed to be rejected and the decision of the original RPD panel granting refugee protection is nullified.

IV. STANDARD OF REVIEW

[35] The applicant frames this application for judicial review exclusively in terms of procedural fairness. The respondent, on the other hand, defends the RPD's decision as reasonable.

[36] These issues invoke different standards of review, with questions of procedural fairness being determined on a standard akin to correctness, the ultimate question being whether the applicant knew the case to meet and had a full and fair chance to respond (*Canadian Hardwood Plywood and Veneer Association v Canada (Attorney General)*, 2023 FCA 74 at para 57, citing *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 54 and 56). In the particular circumstances of this case, however, the two issues converge in the Court's review of the RPD's finding that the applicant's new identity evidence is inadmissible. This is because, on the one hand, there is no issue that, if this finding is reasonable, it cannot have

resulted in a breach of the requirements of procedural fairness. A full and fair chance to respond to the Minister's case does not include the right to rely on inadmissible evidence. Nor, on the other hand, is there any issue that, if this finding is unreasonable, there must be a new hearing. It is of no moment whether this is because the finding resulted in a breach of procedural fairness (because it deprived the applicant of a full and fair chance to respond to the Minister's case) or because this was not a harmless error (because it cannot be said that the outcome of the application to vacate would inevitably have been the same if the evidence had been admitted). Either way, the result on this application for judicial review is the same.

[37] The determinative question, then, is whether the RPD's finding that the applicant's new identity evidence is inadmissible is unreasonable.

[38] 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" (*Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 85). A decision that displays these qualities is entitled to deference from the reviewing court (*ibid.*). For a decision to be reasonable, a reviewing court "must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that there is a line of analysis within the reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived" (*Vavilov* at para 102, internal quotation marks and citation omitted). On the other hand, "where reasons are provided but they fail to provide a transparent and intelligible justification [. . .], the decision will be unreasonable" (*Vavilov* at para 136).

[39] The onus is on the applicant to demonstrate that the RPD's decision is unreasonable. 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).

V. ANALYSIS

[40] I stated above that the determinative question is whether the RPD's finding that the applicant's new identity evidence is inadmissible is unreasonable. This framing of the fundamental issue entails that I do not accept the respondent's characterization of the RPD's decision as one in which the member "indeed considered the new evidence provided by the Applicant, but found that it did not establish that he had not committed a misrepresentation or withholding of a material fact" (Respondent's Further Memorandum of Argument, para 30).

[41] As set out above, the RPD held that the applicant "cannot rely on new evidence of his purported identity to rebut his misrepresentation made before the original RPD panel" (Reasons for Decision, para 29). In saying this, the RPD clearly and unequivocally held that the documents referred to collectively as Exhibit 2 are inadmissible and, as such, could not be relied on by the applicant or, by necessary implication, be considered by the RPD. The RPD's later statement that, in concluding that there had been a misrepresentation or withholding of material facts relating to the applicant's identity, it had "carefully considered . . . the evidence presented and testimony adduced at the hearing" (Reasons for Decision, para 35) must be read in light of this earlier determination. Although the RPD did comment in passing on the lack of authenticity

and reliability of some of the new evidence tendered by the applicant, that was not the basis on which the decision was made.

[42] In my view, the RPD's finding that the applicant's new evidence of identity is not admissible is based on an erroneous application of the principles governing the evidence that may be relied on in response to an application to vacate under section 109 of the *IRPA*. To explain why this is so, it is necessary to provide some legislative and jurisprudential background.

[43] Prior to the enactment of the *IRPA*, the vacation of a decision granting Convention refugee protection was dealt with under sections 69.2 and 69.3 of the *Immigration Act*, RSC 1985, c I-2 (as amended). Broadly speaking, subsection 69.2(2) of the *Immigration Act* corresponded to what is now subsection 109(1) of the *IRPA* and subsection 69.3(5) of the *Immigration Act* corresponded to what is now subsection 109(2) of the *IRPA*.

[44] Subsection 69.3(5) of the *Immigration Act* stated:

> The Refugee Division may reject an application under subsection 69.2(2) that is otherwise established if it is of the opinion that, notwithstanding that the determination was obtained by fraudulent means or misrepresentation, suppression or concealment of any material fact, there was other sufficient evidence on which the determination was or could have been based.

[45] The wording of this provision arguably left open the possibility that a party facing an application to vacate a decision granting Convention refugee protection could adduce new evidence to support the determination that they are a Convention refugee. However, in *Coomaraswamy v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 153, the

Federal Court of Appeal held that the determination under subsection 69.3(5) of the *Immigration Act* cannot be based on new evidence (i.e. evidence that was not before the RPD in the first instance). After interpreting the meaning of the text of the provision in both English and French, the Court went on to state the following (at paras 15-16):

> Any possible doubt about the interpretation of subsection 69.3(5) is resolved by asking what legislative purpose would be served by affording to claimants who succeed in deceiving the Board an opportunity to submit additional evidence in an attempt to prove *de novo* at the vacation hearing that their claims were genuine. No such opportunity is available to either truthful or deceptive claimants whose claims for refugee status are dismissed. To allow a claimant who succeeded in deceiving the Board a second bite at the cherry by introducing new evidence at the vacation hearing would reward deception and remove an incentive to tell the truth.
>
> For these reasons, subsection 69.3(5) should be interpreted as limiting the material that the Board may consider at a vacation hearing to what was before it when it allowed the refugee claim.

[46] This principle has now been included expressly in subsection 109(2) of the *IRPA*, which limits the RPD's assessment under that provision to the evidence that was considered at the time of the first determination.

[47] *Coomaraswamy* was also clear, however, that this limitation only applied to subsection 69.3(5) of the *Immigration Act* and not also to the determination under subsection 69.2(2) as to whether there had been misrepresentation. The Court stated (at para 17):

> Of course, when attempting to establish for the purpose of subsection 69.2(2) that a claimant made misrepresentations at the determination hearing, the Minister may adduce evidence at the vacation hearing that was not before the Board when it decided the refugee claim. Similarly, a claimant may adduce new evidence at the vacation hearing in an attempt to persuade the Board that she did not make the misrepresentations alleged by the Minister.

(Emphasis added)

[48] That this principle also applies to subsection 109(1) of the *IRPA* is confirmed by *Canada (Public Safety and Emergency Preparedness) v Bafakih*, 2022 FCA 18. In this decision, the Court endorsed the view stated in *Canada (Minister of Citizenship and Immigration) v Wahab*, 2006 FC 1554 at para 29, that the determination under this provision "involves consideration of all the evidence on file, including the new evidence presented by both parties" (*Bafakih* at para 40). The Court also cited paragraphs 16 and 17 of *Coomaraswamy*, quoted above. In short, while new evidence is not permitted under subsection 109(2) to uphold the original determination, it is permitted under subsection 109(1) to show that there was no misrepresentation.

[49] Viewed against this jurisprudential backdrop, the RPD's determination that the applicant could not rely on new evidence to establish that he is in fact Bhuchung and Tibetan is unreasonable. (Although the RPD did not have the benefit of *Bafakih*, this decision simply confirmed already well-established principles.) This is one of those circumstances where "it is quite simply unreasonable for [the] administrative decision maker to fail to apply or interpret a statutory provision in accordance with . . . binding precedent" (*Vavilov* at para 112).

[50] The Minister alleged that the applicant had misrepresented his identity when he sought refugee protection. The applicant denied the allegation and maintained that he had identified himself correctly in the original proceeding before the RPD. To determine under subsection 109(1) of the *IRPA* whether the Minister had established the alleged misrepresentation, the RPD had to determine who the applicant is. This required a hearing in

which all relevant evidence provided by the parties was considered. The RPD therefore erred in finding that its role was not to "conduct a new hearing into the Respondent's identity but rather, to re-weigh the evidence used to establish the Respondent's Tibetan identity by the original RPD panel now that the Minister has evidence of his alternative Nepalese identity."

[51] In precluding the applicant from relying on new evidence capable of confirming his identity, the RPD erroneously applied the restrictions applicable to subsection 109(2) of the *IRPA* to subsection 109(1). The applicant's new evidence is relevant to his personal and national identity. It was responsive to the Minister's allegation under subsection 109(1) that he misrepresented his personal and national identity when he identified himself in his original claim as Bhuchung and Tibetan when in fact he is Nanang (or Nawang) Chhokle Sherpa and Nepalese. If, as the applicant originally contended before the RPD, he is Bhuchung and Tibetan (and not Sherpa and Nepalese, as the now Minister alleged), then he did not misrepresent his identity, even if he did not disclose his use of the Nepalese passport. The applicant was entitled to adduce evidence relevant to this question and the RPD was required to consider it. Of course, whether the evidence the applicant adduced was sufficient to answer the Minister's allegation is a separate question that the RPD did not address.

[52] As I have already said, whether the RPD's erroneous determination is viewed through the lens of reasonableness or the lens of procedural fairness, the result is the same: there must be a new hearing.

VI. CONCLUSION

[53] For these reasons, the application for judicial review is allowed. The decision of the RPD dated November 25, 2021, is set aside and the matter is remitted for redetermination by a different decision maker.

[54] The parties did not propose any serious questions of general importance for certification under paragraph 74(d) of the *IRPA*. I agree that no question arises.

JUDGMENT IN IMM-9385-21

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed.
2. The decision of the Refugee Protection Division dated November 25, 2021, is set aside and the matter is remitted for reconsideration by a different decision maker.
3. No question of general importance is stated.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-9385-21
STYLE OF CAUSE:	XXX BHUCHUNG v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JANUARY 25, 2023
JUDGMENT AND REASONS:	NORRIS J.
DATED:	JULY 25, 2023

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