Federal Court  Cour fédérale

Date: 20160919

Docket: IMM-5687-15

Citation: 2016 FC 1060

Ottawa, Ontario, September 19, 2016

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

CHIME NAMGYAL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Chime Namgyal claims to fear persecution in China because of her Tibetan ethnicity. The Refugee Protection Division rejected her claim on the basis that Ms. Namgyal is not a citizen of China. The Board further found that Ms. Namgyal is entitled to citizenship in India by virtue of her birth in that country. The Refugee Protection Division's decision was subsequently upheld by the Refugee Appeal Division of the Immigration and Refugee Board.

[2] Ms. Namgyal now seeks judicial review of the RAD's decision. Ms. Namgyal submits that the test applied by the RAD in determining that it was within her control to have her Indian citizenship recognized by the Indian government did not accord with that prescribed by the Federal Court of Appeal in *Tretsetsang v. Canada (Minister of Citizenship and Immigration)*, 2016 FCA 175, [2016] F.C.J. No. 615 (*Tretsetsang* FCA). As a consequence Ms. Namgyal submits that the RAD's decision was unreasonable.

[3] For the reasons that follow, I agree with Ms. Namgyal that the RAD erred as alleged, and that its decision was not reasonable. Consequently, her application for judicial review will be granted.

I. Background

[4] Ms. Namgyal was born in India on December 10, 1973. Her Tibetan parents had fled China fearing persecution because they were followers of His Holiness the Dalai Lama. Ms. Namgyal's claim for refugee protection was based on her own religious beliefs as a follower of the Dalai Lama, and her opposition to China's occupation of Tibet. Ms. Namgyal fears that she will be deported to China if she returns to India, as she says that she has no right to citizenship or permanent residence in India.

[5] Paragraph 3(1)(a) of the *Indian Citizenship (Amendment) Act*, 2003 states that every person born in India between January 26, 1950 and July 1, 1987 is a citizen of India by birth. In accordance with this provision, Ms. Namgyal should therefore be entitled to Indian citizenship as of right.

[6] Notwithstanding this legislation, the Government of India has resisted recognizing people in Ms. Namgyal's position as citizens of India, and ethnic Tibetans have encountered significant difficulties in securing recognition of their Indian citizenship. Several individuals have, however, succeeded in having their Indian citizenship recognized by the Indian Courts.

[7] In 2009, the High Court of Delhi found an ethnic Tibetan born in India in 1986 to be an Indian citizen by virtue of birth, and to be thus entitled to an Indian passport. The Court further held that a person who is an Indian citizen by birth is not required to apply for citizenship: *Namgyal Dolkar v. Government of India, Ministry of External Affairs*, [2010] INDLHC 6118, CW 12179/2009 (22 December 2010).

[8] In a second decision by the Indian High Court, this one from Karnataka, the Court once again held that an Indian-born Tibetan was entitled to Indian citizenship as of right: *Tenzin Rinpoche v. Union of India, Ministry of External Affairs*, [2013] INKAHC, WP 15437/2013 (7 August 2013).

[9] Finally, in *Phuntsok Topden v. Union of India*, [2014] INDLHC, WP 1890/2013 (16 December 2014), the Government of India ultimately conceded that the applicant in that case was entitled to citizenship by virtue of the fact that he was born in India during the relevant period.

[10] Moreover, in February of 2014, India's Justice Minister declared to a group of Indian-born Tibetans that the Government of India had given them both the right to vote and the right to citizenship, advising them that they could now register themselves as citizens of India. That said, the Office of Tibet in New York City (which represents the Dalai Lama and the

Central Tibetan Administration in North America) has stated that it is not aware of any case where an individual has had their Indian citizenship recognized by the Government of India solely by virtue of their birth in that country during the relevant period.

II. The Refugee Protection Division's Decision

[11] The Refugee Protection Division rejected Ms. Namgyal's claim to refugee protection on the basis that she was a citizen of India, and not China, and that she would not have a well-founded fear of persecution if she were returned to her country of nationality.

[12] Despite the difficulties discussed earlier in these reasons, the RPD found that obtaining Indian citizenship was a matter within Ms. Namgyal's control, thus satisfying the test set out in *Williams v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 126, [2005] 3 F.C.R. 429. In *Williams*, the Federal Court of Appeal held that an individual will not be entitled to refugee protection in Canada where his acquisition of citizenship in a safe country is a matter of mere formality, or is within the control of the individual: at paras. 19-23. The Court went on in *Williams* to hold that where citizenship in a safe country is available, an applicant will be expected to make efforts to acquire it: at para. 27.

[13] In finding that having her Indian citizenship recognized was a matter within Ms. Namgyal's control, the RPD adopted the reasoning in *Tretsetsang v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 455, [2015] 4 F.C.R. 521. There Justice Mosley concluded that if the Indian authorities refused to give someone in Ms. Namgyal's position a passport, he or she could bring a court challenge similar to the ones described above. Justice Mosley noted that in *Williams*, the Federal Court of Appeal held that an applicant must make attempts to acquire citizenship in any safe country where it is available to him: *Williams* at

para. 27. According to Justice Mosley, the same principle should apply to the enforcement of the right to citizenship to which the applicant is entitled by law, notwithstanding efforts at obstruction by Indian officials: para. 30.

[14] Mr. Tretsetsang had evidently made no effort to enforce his right to Indian citizenship. He merely speculated that any such attempt would be unsuccessful, despite the legislation and jurisprudence in his favour. According to Justice Mosley, Mr. Tretsetsang could not claim protection in Canada without making any effort to avail himself of the Indian nationality to which he was entitled as a matter of law.

[15] In contrast, in this case, Ms. Namgyal took steps towards having her Indian citizenship recognized. She consulted a lawyer in India who advised her that Tibetan refugees in India are not entitled to Indian citizenship under Indian law. Ms. Namgyal provided the Board with copies of two written opinions from the lawyer. The first stated that Tibetan refugees in India are not entitled to Indian citizenship, and that there is, moreover, no provision for dual citizenship under Indian law. The second opinion stated that Ms. Namgyal lacked the documents necessary to qualify for Indian citizenship.

[16] The Refugee Protection Division chose to give no weight to the legal opinions produced by Ms. Namgyal, in part, because there was no evidence that the author was an expert in Indian citizenship law, and in part because the Board had concerns with respect to the timing of the production of the letters. Although the reasons of the RPD are not entirely clear on this point, it appears that it may have had some concerns with respect to the genuineness of the documents.

III. The Refugee Appeal Division's Decision

[17] Applying the standard of review identified by this Court in *Huruglica v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 799, 461 F.T.R. 241, aff'd 2016 FCA 93, 396 D.L.R. (4th) 527, the RAD determined that the RPD's decision should be upheld.

[18] Re-examining the evidence as it was required to do, the RAD came to a different conclusion with respect to the significance of the legal opinions obtained by Ms. Namgyal than did the RPD. The RAD chose to give little weight to the opinions, rather than no weight whatsoever. The RAD's reasons for this are also not as clear as they might be, but the fact that it chose to give some, albeit little, weight to the documents suggests that it was not concerned about their genuineness. The RAD stated that it was giving them little weight because nothing precluded Ms. Namgyal "from renouncing her foreign status in [India]". The RAD did not address the statement in the lawyer's opinion that Ms. Namgyal lacked the documents necessary to qualify her for Indian citizenship.

[19] Because Ms. Namgyal had never applied for an Indian passport or "made other efforts to exercise other rights of her Indian citizenship", the RAD stated that it was not known whether the Indian authorities would have refused her application. As a result, the RAD held that "she has not tested whether or not it is within her control to obtain the rights of Indian citizenship".

[20] The RAD noted that this Court had provided conflicting decisions as to whether having one's Indian citizenship recognized was something that was within the control of individuals in Ms. Namgyal's position. The RAD nevertheless adopted Justice Mosley's reasoning in *Tretsetsang*, and held that it was reasonable to have expected Ms. Namgyal to have taken

additional steps to have her Indian citizenship recognized, rather than simply relying on the "untested" legal opinions she had obtained.

[21] In coming to this conclusion, the RAD reviewed the evidence discussed earlier with respect to the Indian court decisions involving the citizenship rights of Indian-born Tibetans, and the granting of voting rights to them. The RAD concluded that Ms. Namgyal was a citizen of India by birth, and that "her decision not to exercise her right to Indian citizenship precludes her from the protection of Canada". Ms. Namgyal's appeal to the RAD was thus dismissed.

IV. The Federal Court of Appeal's Decision in *Tretsetsang*

[22] After the RAD rendered its decision in this case, the Federal Court of Appeal released its decision in *Tretsetsang* FCA. In a split decision, the Court upheld Justice Mosley's judgment.

[23] In his dissenting judgment, Justice Rennie held that if it is necessary for a person to litigate before a foreign state will recognise their citizenship rights, then citizenship is presumptively outside of that individual's control. Justice Rennie noted that there were several factors that led him to this conclusion. The fact that a claimant must litigate against the foreign state is evidence that that state does not recognise the individual's citizenship rights, and is, in fact, actively resisting them. There is, moreover, no guarantee that a claimant will obtain a favourable result. Finally, a claimant may not have the resources necessary to litigate: *Tretsetsang* FCA, above at para. 34.

[24] The majority agreed with Justice Rennie that test for determining whether a claimant has a "country of nationality" is the *Williams* control test. The majority went on to hold that the onus is on the refugee claimant to establish the existence of the asserted impediment that results in the

claimant not having the power to control whether India will recognize his or her Indian citizenship. The majority further held that a minor impediment will not suffice to take the matter outside of the individual's control; rather, the impediment must be significant: *Tretsetsang* FCA, above at para. 67.

[25] The majority adopted the statement in *Williams* that the unwillingness of a refugee claimant to take reasonable steps to gain state protection will be fatal to his or her refugee claim. The majority further agreed that as citizenship was granted to Mr. Tretsetsang by the *Indian Citizenship Act, 1955*, it was open to the Board to draw reasonable inferences from his failure to take reasonable steps to have his citizenship recognized, and that his failure to do so is material and relevant evidence on the question of control: *Tretsetsang* FCA, above at para. 69.

[26] The majority decision further held that if a refugee claimant fails to take any steps to confirm whether the country in question will recognize him or her as a citizen of that country, such inaction will, in the absence of a reasonable explanation, be fatal to that person's refugee claim: *Tretsetsang* FCA, above at para. 70.

[27] The majority also held that where a refugee claimant alleges the existence of an impediment to exercising his or her rights of citizenship in a particular country, the claimant must establish, on a balance of probabilities that:

a) There is a significant impediment that may reasonably be considered capable of preventing the claimant from exercising his or her citizenship rights in that country of nationality; and

b) That the refugee 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 FCA, above at para. 72.

[28] The Court concluded by holding that what will constitute "reasonable efforts" to overcome a significant impediment in a particular situation can only be determined on a case-by-case basis. A refugee claimant will not be obliged to make efforts to overcome an impediment if they can establish that it would not be reasonable to require them to do so: *Tretsetsang* FCA, above at para. 73.

[29] Mr. Tretsetsang had not taken any steps to determine whether India would recognize his right to citizenship under the *Indian Citizenship Act, 1955* without requiring him to litigate the issue, and he had not provided any explanation for his failure to do so. As a consequence the majority held that he had failed to establish that there was any impediment, much less any significant impediment, to his ability to access the state protection rights inherent in his Indian citizenship. Consequently, Mr. Tretsetsang's appeal was dismissed.

V. Analysis

[30] The issue raised by this case involves a question of a mixed fact and law. As a result, the standard of review to be applied to the RAD's decision is that of reasonableness: *Tretsetsang* FCA, above at para. 61. The question for determination is thus whether the RAD's decision in this case was reasonable in light of the Federal Court of Appeal's decision in *Tretsetsang*.

[31] The RAD found that in accordance with Indian citizenship legislation, Ms. Namgyal was a citizen of that country by virtue of her birth in India during the relevant time period. The RAD did not, however, make a specific finding as to whether Ms. Namgyal would face a significant impediment in trying to have her Indian citizenship recognized by the Indian government. This is problematic, especially in light of the evidence that was before the Board from the Office of Tibet in New York City. It will be recalled the Office was not aware of a single case where an individual in Ms. Namgyal's position has had his or her Indian citizenship recognized by the Government of India solely on the basis of their birth in India during the relevant period.

[32] If the RAD was of the view that, in light of the decisions of the Indian Courts, the Indian government had abandoned its historical opposition to recognizing the Indian citizenship of Tibetan refugees born in India, and would recognize Ms. Namgyal's Indian citizenship without the need for her to litigate the issue, then it needed to say so. It would then also have to explain how it came to that conclusion in light of the evidence from the Office of Tibet in New York City.

[33] If, on the other hand, the RAD was of the view that Ms. Namgyal would be able have her Indian citizenship recognized through litigation, then it had to explain why this did not constitute a "significant impediment" that could reasonably be considered to be capable of preventing Ms. Namgyal from exercising her citizenship rights in India.

[34] The second part of the *Tretsetsang* FCA test required the RAD to consider whether Ms. Namgyal had made reasonable efforts to overcome the impediments to her citizenship being recognized.

[35] Ms. Namgyal is a woman with a grade three education. She wanted to have her Indian citizenship recognized by the Indian Government, and she sought the assistance of a lawyer in this regard. Ms. Namgyal then received written legal opinions advising her that she was not entitled to Indian citizenship under Indian law.

[36] The question is not whether the legal opinions were correct, or whether they were provided by a lawyer with expertise in Indian citizenship law. The question for determination by the RAD was whether it was reasonable for Ms. Namgyal to have relied upon the legal opinions that she received, or whether she should reasonably have been expected to do anything further to try to have her Indian citizenship recognized.

[37] Applying this Court's decision in *Tretsetsang*, the RAD held that because Ms. Namgyal had never applied for an Indian passport or made any other attempt to exercise other rights associated with her Indian citizenship, it was not known whether the Indian authorities would have refused her application. As such, she had not tested whether or not it was in her control to obtain the rights of citizenship. Consequently, her refugee claim was dismissed.

[38] However, the RAD did not do the sort of case-by-case analysis mandated by the Federal Court of Appeal in *Tretsetsang* FCA. That is, it never expressly asked itself whether it was reasonable to expect someone in Ms. Namgyal's position, with her specific attributes (including her limited education), to take additional steps in attempting to have her Indian citizenship recognized, once she obtained a legal opinion advising her that she was not entitled to Indian citizenship under Indian citizenship law.

[39] The RAD cannot be faulted for failing to ask itself this question as it did not have the benefit of the decision in *Tretsetsang* FCA when it made its decision. However, the effect of its failure to do so is that it did not consider whether the steps that were taken by this particular individual, with her limited education, were reasonable and sufficient in all of the circumstances.

VI. Conclusion

[40] For these reasons, the application for judicial review is allowed. I agree with the parties that in light of the case-by-case analysis mandated by *Tretsetsang* FCA, the case does not raise a question of general importance that is suitable for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed and the matter is remitted to a differently constituted panel of the RAD for re-determination in accordance with these reasons.

"Anne L. Mactavish"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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