

Federal Court



Cour fédérale

Date: 20190710

Docket: IMM-6585-18

Citation: 2019 FC 907

Ottawa, Ontario, July 10, 2019

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

THINLEY PASANG

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Thinley Pasang was born in India in 1972. However, he claims to be ineligible for Indian citizenship because both of his parents were born in Tibet. They left Tibet following the Chinese occupation and settled in India. Mr. Pasang has only limited status in India pursuant to a Registration Certificate [RC], which must be renewed every five years.

[2] Mr. Pasang travelled to Canada on August 24, 2015 using an Identity Certificate [IC] issued by the Indian government and a Canadian visitor's visa. He made a refugee claim shortly after his arrival, alleging a well-founded fear of persecution in China as a Tibetan Buddhist who follows the Dalai Lama, and as an activist who opposes the Chinese occupation of Tibet.

[3] The Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB] rejected Mr. Pasang's refugee claim on the ground that he is eligible for Indian citizenship. The RPD's determination was upheld by the Refugee Appeal Division [RAD] of the IRB. Mr. Pasang seeks judicial review of the RAD's decision.

[4] For the reasons that follow, the RAD failed to consider the personal implications for Mr. Pasang of applying for Indian citizenship, given his modest education, his employment as a street vendor, his residence in a Tibetan refugee settlement, and his potential reliance on benefits conferred pursuant to his RC and IC or provided by the Central Tibetan Administration [CTA]. The RAD's decision was therefore unreasonable. The application for judicial review is allowed.

II. Background

[5] Mr. Pasang's father was active in the Tibetan freedom movement, and Mr. Pasang has followed in his footsteps. He has engaged in peaceful demonstrations and hunger strikes. He says that during the Beijing Olympics in 2008, he was arrested and detained by the Indian authorities for seven days.

[6] The RPD acknowledged that the authorities in India have been reluctant to confer citizenship on Tibetans born in India between 1950 and 1987 (Response to Information Request IND 105133.E 30, April 2015). According to the US Department of State, “Tibetans reportedly sometimes faced difficulty acquiring citizenship despite meeting the legal requirements.”

[7] The RPD noted that India’s High Court has recognized the right of Tibetan applicants to citizenship in decisions issued in 2010, 2013 and 2014. Nevertheless, the Indian authorities remain resistant to granting their applications for passports.

[8] In March 2017, India’s High Court directed all passport-issuing authorities to process the applications of eligible Tibetan refugees “or be liable for contempt of court.” The Indian Ministry of External Affairs [MEA] responded by issuing a new policy to “all passport offices in India and abroad to process pending applications of Tibetan Refugee applicants born in India between 26/01/1950 to 01/07/1987 for the issue of passports, and treat them as Indian citizens by birth.”

[9] However, the MEA also imposed several new preconditions for Tibetans applying for Indian passports. Applicants who meet these requirements are not assured that a passport will be issued; only that their applications will be processed. Tibetans who wish to apply for an Indian passport must:

- (a) relinquish their RC and IC;
- (b) vacate designated Tibetan refugee settlements;

- (c) forgo CTA benefits; and
- (d) submit a declaration that they are not in receipt of benefits, including subsidies, granted pursuant to an RC or IC.

[10] The RPD nevertheless found that Mr. Pasang was eligible for Indian citizenship, and had made insufficient efforts to obtain it.

III. Decision under Review

[11] The RAD upheld the RPD's determination, reasoning as follows:

The RAD notes that as a Tibetan (refugee) in India, the evidence indicates one is provided with certain benefits in association with the State. The RAD finds it makes sense that if an individual wishes to attain the benefits of being an Indian citizen, one would have to forfeit certain subsidies and government identification as a Tibetan, as that individual would no longer be a refugee. The RAD further notes that the evidence confirms that individuals who seek to obtain passports which confer Indian Citizenship give up the ability to obtain subsidies from the Central Tibetan Authority (CTA), but not necessarily the right to participate in CTA activities.

[12] The RAD characterized compliance with the preconditions as a personal choice, and not particularly onerous:

The RAD finds the new evidence does not confirm the Appellant's statements that this process is onerous for the average Tibetan in India and poses a significant impediment to accessing a passport. The RAD finds the documents indicate that Tibetans must make a personal choice and they face a dilemma surrounding the loss of

certain documents that identify them as Tibetans in India. The RAD finds this is not an impediment to citizenship.

[13] The RAD accepted that Tibetans who apply for passports in India may still encounter difficulties. However, these potential difficulties were found to result from personal choices and the challenge of obtaining documentation. The RAD held that this did not rise to the level of serious impediment, noting that successful refugee claimants in Canada may also have to relinquish their rights elsewhere:

The Appellant argues that should he seek to obtain an Indian passport that [*sic*] he will be forced to give up certain benefits associated with his identity as a Tibetan refugee in India. The RAD notes that the Appellant has come to Canada in order to seek refugee protection. The RAD notes that in doing so, should he be successful in his quest, that [*sic*] he would be giving up his right to reside on a Tibetan refugee settlement in India, and receive benefits associated with the Central Tibetan Authority.

[14] The RAD was satisfied that the RPD had properly applied the Federal Court of Appeal's decision in *Tretsetsang v Canada (Citizenship and Immigration)*, 2016 FCA 175 [*Tretsetsang*], and dismissed Mr. Pasang's refugee claim.

IV. Issue

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

V. Analysis

[16] The RAD's findings of fact and its application of the law to those facts are subject to review by this Court against the standard of reasonableness (*Tretsetsang* at para 61).

[17] In *Tretsetsang*, the Federal Court of Appeal prescribed the following test for refugee claimants who say they are unable to obtain citizenship in another country (at para 72):

[...] 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.

[18] The Federal Court of Appeal expanded upon the meaning of "reasonable efforts" at paragraph 73:

What will constitute reasonable efforts to overcome a significant impediment (that has been established by any particular claimant) in any particular situation can only be determined on a case-by-case basis. A claimant will not be obligated to make any effort to overcome such impediment if the claimant establishes that it would not be reasonable to require such claimant to make any such effort.

[19] In *Yalotsang v Canada (Citizenship and Immigration)*, 2019 FC 563 at paragraph 14, Justice Anne Mactavish confirmed that “the reasonableness and sufficiency of the steps that have been taken by a refugee claimant to assert his or her citizenship rights in a given country will depend on the nature and significance of whatever impediment to accessing state protection may exist in the case in question.”

[20] Although the record is not entirely clear, it appears that Mr. Pasang was born in a Tibetan refugee settlement and lived there his entire life before arriving in Canada. He worked as a street vendor in India. If Mr. Pasang had applied for Indian citizenship, he would have lost his right to work, his home, his community and numerous other benefits.

[21] This case may be distinguished from *Khando v Canada (Citizenship and Immigration)*, 2018 FC 1223, where there was no evidence that the applicant, who had been studying in Japan, had ever depended on benefits conferred pursuant to an RC or IC or provided by the CTA. It bears a closer resemblance to *Namgyal v Canada (Citizenship and Immigration)*, 2016 FC 1060, where Justice Mactavish held that the RAD had failed to perform the case-by-case analysis mandated by the Federal Court of Appeal in *Tretsetsang* (at para 38):

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.

[22] Mr. Pasang applied unsuccessfully for Indian citizenship in 2009, and then made no further efforts to acquire it. He submitted a brief, undated letter from an Indian lawyer, who expressed the view that he would not qualify for Indian citizenship.

[23] The RAD did not consider the personal implications for Mr. Pasang of applying for Indian citizenship, given his modest education, his employment as a street vendor, his residence in a Tibetan refugee settlement, and his potential reliance on benefits conferred pursuant to his RC and IC or provided by the Central Tibetan Administration. Its decision was therefore unreasonable.

[24] The Respondent notes that Mr. Pasang has not applied for an Indian passport since arriving in Canada. Mr. Pasang says that if he were to relinquish his RC and IC in order to apply for Indian citizenship from within Canada, and if his refugee claim were refused, he would be left in an invidious position. I agree. In any event, this is not the basis upon which the RAD denied his refugee claim.

VI. Conclusion

[25] The application for judicial review is allowed, and the matter is remitted to a differently-constituted panel of the RAD for redetermination. Neither party proposed that a question be certified for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, and the matter is remitted to a differently-constituted panel of the RAD for redetermination.

“Simon Fothergill”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6585-18

STYLE OF CAUSE: THINLEY PASANG v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JUNE 27, 2019

**REASONS FOR JUDGMENT
AND JUDGMENT:** FOTHERGILL J.

DATED: JULY 10, 2019

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