Federal Court Cour fédérale

Date: 20151123

Docket: IMM-1117-15

Citation: 2015 FC 1301

Ottawa, Ontario, November 23, 2015

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

LHAM TASHI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Lham Tashi's refugee claim was based upon his fear of persecution in China because of his Tibetan ethnicity. The Refugee Protection Division of the Immigration and Refugee Board dismissed the claim on the basis that Mr. Tashi did not require the surrogate protection of Canada because he was entitled to citizenship in India by virtue of his birth in that country.

[2] For the reasons that follow, I have concluded that the Board's decision was reasonable.

I. Background

[3] Mr. Tashi was born in India on November 14, 1985 to parents who had fled to India when the Chinese government took control of Tibet in 1959. Mr. Tashi is a citizen of China and currently has no legal status in India.

[4] Indian citizenship legislation provides that persons born in India between 1950 and 1987 are Indian citizens regardless of the nationality of their parents. Mr. Tashi has never applied for Indian citizenship, however, explaining that he knows of other Tibetans born in India who have done so and been refused. Mr. Tashi also does not have a birth certificate documenting his birth in India. He did, however, hold an Indian "Registration Certificate for Tibetans" that had to be renewed each year, which has now expired.

[5] Mr. Tashi entered Canada on August 1, 2012, travelling on an Indian passport issued in his own name, which he says was fraudulent. Mr. Tashi sought refugee protection claiming to fear persecution in China because he is an ethnic Tibetan who has advocated for Tibetan freedom, and because he is a follower of the Dalai Lama.

[6] Mr. Tashi did not claim refugee protection against India, although he says that he fears that India will send him to China because his Registration Certificate for Tibetans has expired and he has heard of several other Tibetans who have not had their Certificates renewed.

II. The Board's Decision

[7] The Board noted that paragraph 3(1)(a) of the Indian *Citizenship (Amendment) Act*, 2003 states that every person born in India from January 26, 1950 and July 1, 1987 is a citizen of India

by birth. Because Mr. Tashi was born between the applicable dates, the Board found that he was entitled to Indian citizenship.

[8] The Board found that the question for determination was whether the acquisition of Indian citizenship was a matter within Mr. Tashi's control. The Board recognized that in *Wanchuk v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 885, [2014] F.C.J. No. 900, this Court had determined that the resistance of the Indian Government to allowing Indian-born Tibetans to acquire Indian citizenship meant that Indian citizenship was not a matter within the control of persons in Mr. Tashi's position.

[9] The Board was nevertheless satisfied that the situation for Indian-born Tibetans was evolving, and that more recent evidence indicated that the Government of India was moving towards recognizing citizenship for individuals such as Mr. Tashi. As a result, the Board was satisfied that obtaining Indian citizenship was indeed a matter that was within Mr. Tashi's control.

[10] Given that Mr. Tashi was a citizen of India and had not asserted a fear of persecution in that country, his claim for refugee protection was dismissed.

[11] Mr. Tashi submits that the evidence relied upon by the Board to find that the acquisition of Indian citizenship was a matter within his control does not support such a finding, and that, as a result, the Board's decision was unreasonable.

III. Analysis

[12] In *Williams v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 126, [2006] 3 F.C.R. 429, 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] The issue of the availability of Indian citizenship for Indian-born Tibetans has been considered by this Court on several occasions, and the Court has divided on the question of whether Indian citizenship is a matter within the control of individuals in the position of Mr. Tashi. Three decisions require particular consideration.

[14] As noted earlier, in *Wanchuk*, above, Justice O'Reilly determined that the resistance of the Indian Government to allowing Indian-born Tibetans to acquire Indian citizenship meant that Indian citizenship was not a matter within the control of persons such as Mr. Tashi.

[15] Justice Mosley subsequently faced the same issue in *Tretsetsang v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 455, [2015] F.C.J. No. 479. Although the facts in *Tretsetsang* were indistinguishable from those in *Wanchuk*, Justice Mosley declined to follow *Wanchuk* on the basis that the Court in *Wanchuk* had failed to properly adhere to the teaching of the Federal Court of Appeal in *Williams*: *Tretsetsang* at para. 21.

[16] In coming to this conclusion, Justice Mosley noted that applicants for refugee protection "are expected to take reasonable steps to acquire or enforce any citizenship rights which are available to them" and that "[a] right which is enshrined in legislation and has been enforced by the courts amounts to more than a 'mere possibility'". He concluded that "[t]here is nothing

unreasonable about expecting the applicant to take legal action if his state of nationality attempts to deny his rights": at para. 31.

[17] In dismissing Mr. Tretsetsang's application for judicial review, Justice Mosley certified the following question:

> Do the expressions "countries of nationality" and "country of nationality" in Section 96 of the *Immigration and Refugee Protection Act* include a country where the claimant is a citizen but where he may face impediments in exercising the rights and privileges which attach to citizenship, such as the right to obtain a passport?

[18] The conflict in the jurisprudence was then addressed by Justice Tremblay-Lamer in *Dolma v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 703, [2015] F.C.J. No. 735. In adopting the reasoning in *Wanchuk*, Justice Tremblay-Lamer held that requiring refugee claimants to show that they had applied for, and had been refused citizenship "would constitute a narrowing of the refugee definition in the … *Refugee Convention* and section 96 of *Immigration and Refugee Protection Act*": at para. 32.

[19] According to Justice Tremblay-Lamer, "[t]he proper question is whether, on the evidence before the Board, there is sufficient doubt as to the law, practice, jurisprudence and politics of the potential country of nationality such that the acquisition of citizenship in that country cannot be considered automatic or fully within the control of the applicant, not whether they have tried and been refused.". She went on to explain that were it otherwise, it would "exclude from refugee protection all individuals that did not apply for citizenship prior to their time of need for any number of reasons, including the financial inability to pay for a citizenship application or litigation in respect thereof": at para. 32.

[20] Justice Tremblay-Lamer found that the evidence that was before the Board in *Dolma* did not establish that the claimant's request for Indian citizenship would be granted, leading her to conclude that it was thus not something that was within the claimant's control to obtain.

[21] The Board in this case reviewed the evidence relating to the resistance of the Indian Government to allowing Indian-born Tibetans to acquire Indian citizenship. It found that the evidence on this issue had evolved significantly since *Wanchuk* was decided with the result that *Wanchuk* was no longer binding on it. In order to decide whether the Board's decision was reasonable, it is therefore necessary to have regard to the evidence that was considered in the cases previously decided by this Court, and to then review the additional evidence that was relied upon by the Board in this case in order to determine whether or not it supports the Board's conclusion that the situation in India had changed.

[22] Despite the apparently clear wording of the Indian *Citizenship Act*, the Indian Government has historically refused to grant citizenship to Indian-born Tibetans. However, 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).

[23] Justice O'Reilly considered the effect of the *Dolkar* decision in *Wanchuk*, concluding that it did not establish that obtaining Indian citizenship was a matter within Mr. Wanchuk's control because *Dolkar* only applied in New Delhi, and was not binding in other regions of India. Moreover, no Indian-born Tibetans had been granted Indian citizenship in the three years since

Dolkar was decided. Finally, before he could apply for Indian citizenship, Mr. Wanchuk may have had to obtain a letter of 'no objection' from the Central Tibetan Authority, the self-proclaimed Tibetan government-in-exile. While the official position of the CTA was that it would not withhold approval for Tibetans seeking Indian citizenship, it was in fact reluctant to grant such approval because of its belief that Tibetans in India should remain refugees so as to encourage them to eventually return to an independent Tibet.

[24] By the time that Justice Mosley decided *Tretsetsang* approximately six months after *Wanchuk*, a second decision by the Indian High Court had been located, this time from Karnataka, again finding 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). What is particularly noteworthy about this decision is that the Court deciding *Rinpoche* had jurisdiction over the city of Bangalore, which is where Mr. Tashi ordinarily resided.

[25] Justice Tremblay-Lamer decided *Dolma* two months after *Tretsetsang*. Her decision refers to the *Dolkar* decision, as well as to an Immigration and Refugee Board *Response to Information Request* dated August 15, 2013, a 2012 newspaper report and a letter from a representative of the Dalai Lama.

[26] The Board's RIR states that "despite the Delhi High Court's decision, the executive branch continues to treat Tibetans born in India from 26 Jan 1950 to 1 July 1987 as foreigners, not citizens". The document further notes that there was "a large gap" between the right that had been recognized by the Court in *Dolkar*, and people actually being able to have that right recognized. The Board's own research revealed that the practical reality was that "Tibetans in

India who were born within the correct time period in India are still unable to have their status as citizens officially recognized". The RIR also referred to the unwritten policy of the CTA to deny No Objection Certificates to would-be applicants for citizenship as a further obstacle to the acquisition of Indian citizenship by Indian-born Tibetans.

[27] The letter from the representative of the Dalai Lama and the news report indicated that notwithstanding the successful Court challenges by Indian-born Tibetans, the Government of India was still resisting granting citizenship to such individuals, and that each person seeking formal recognition of his or her Indian citizenship had to launch his or her own Court case, a process that is both long and costly.

[28] This evidence led Justice Tremblay-Lamer to conclude that the Board in *Dolma* had focussed "solely on the legal entitlement to citizenship and not on the practical reality and need to have that citizenship recognized by the relevant authorities": at para. 40. In contrast, in this case, the Board found that more recent evidence indicated that the Government of India was moving towards recognizing citizenship for individuals such as Mr. Tashi.

[29] The core question for determination is thus whether the new evidence relied on by the Board reasonably supported its conclusion that the situation in India had changed sufficiently that the acquisition of Indian citizenship was indeed now a matter that was within Mr. Tashi's control.

[30] The Board's decision in this case pre-dated this Court's decision in *Dolma*, and thus no consideration was given to Justice Tremblay-Lamer's analysis in that case. The Board did, however, have regard to this Court's decision in *Wanchuk*, explaining why, in the Board's view,

the facts had changed so significantly since *Wanchuk* was decided that the decision was no longer binding on it.

[31] The Board started its analysis by observing that since *Wanchuk* was decided, the Indian Justice Minister had declared to a group of Indian-born Tibetans in February of 2014 that the Government had given them both the right to vote and the right to citizenship, and that they could now register themselves as citizens of India. The Board found this to be significant, as it was the first time that an Indian Government official had acknowledged that Indian-born Tibetans were entitled to citizenship as of right under the Indian *Citizenship Act*.

[32] The Board also noted that the Court had discounted the significance of the *Dolkar* decision in *Wanchuk* on the basis that it was only binding within New Delhi. It noted that since then, *Rinpoche* had been decided, creating a binding authority in the jurisdiction governing Bangalore, where Mr. Tashi had resided. While recognizing that there was no evidence as to whether the applicant in *Rinpoche* had ultimately been issued a passport, there was also no evidence that a passport had not issued, and the Board found that it was speculative to assume that this was the case.

[33] After the decision in *Rinpoche* came down, the Election Commission of India directed that all Indian states and territories register Indian-born Tibetans to vote, voting being an attribute of citizenship. The Board found that there was evidence to suggest that Tibetans did indeed enroll on the voters list, and that there was evidence that hundreds of Indian-born Tibetans voted during the May 7, 2014, election by presenting evidence that they were born in India during the relevant period.

[34] Moreover, since *Wanchuk* was decided, another case relating to the citizenship rights of Indian-born Tibetans had gone before the Indian Courts. In *Phuntsok Topden v. Union of India*, [2014] INDLHC, WP 1890/2013 (16 December 2014), the Government of India conceded that the applicant in that case was entitled to citizenship by virtue of the fact of his birth in India during the relevant period. The Board found the Government's concession in *Topden* to be particularly significant.

[35] Finally, the Board noted that a CTA representative had stated in an interview with *The Guardian* that "it is entirely up to the individual Tibetan to avail themselves of the rights as obtained under any Indian law".

[36] None of this evidence was before the Court in *Wanchuk*, and other than the *Rinpoche* decision, none of the evidence relied upon by the Board in this case to find that there had been a change in circumstances appears to have been before the Court in *Dolma*.

[37] The Board is not bound by the decisions of this Court where it is presented with different evidence that allows it to distinguish this Court's previous findings. The Board is required to determine the claim before it in light of its particular factual circumstances, including the most recent country conditions. Thus, new or different evidence may lead to a different decision from an earlier decision by this Court in a similar factual situation.

[38] That is precisely what occurred in this case. None of the earlier decisions of this Court dealing with the question of whether the acquisition of Indian citizenship was a matter within the control of Indian-born Tibetans had precisely the same documentary evidence that was before

the Board here, and the evidence that was before the Board in this case reasonably supported its finding that the acquisition of Indian citizenship was now a matter within Mr. Tashi's control.

[39] Mr. Tashi takes issue with the Board's finding, arguing that he would not be able to get Indian citizenship because he does not have an Indian birth certificate. There is no evidence that Mr. Tashi ever attempted to obtain a birth certificate, and he did, however, have a Registration Certificate for Tibetans - a Government-issued identification card that confirmed his birth in India during the relevant period. There was no evidence before the Board, apart from Mr. Tashi's own vague and anecdotal evidence, that he would not be able to have his Registration Certificate renewed if he were to return to India, nor have I been directed to any evidence that the Registration Certificate for Tibetans would not be accepted as proof for the purposes of acquiring recognition of his Indian citizenship.

[40] Mr. Tashi also argues that he may well have to litigate in order to have his entitlement to Indian citizenship recognized, and that Justice Tremblay-Lamer found in *Dolma* that this meant that Indian citizenship was not a matter within his control. However, not only did Justice Mosley come to the opposite conclusion in *Tretsetsang*, the Board's finding that recent evidence indicated a softening of the Indian Government's attitude towards the recognition of citizenship for Indian-born Tibetans was one that was reasonably open to the Board on the record before it.

[41] On this point, Mr. Tashi submits that the fact that the Indian Electoral Commission recognized the right of Indian-born Tibetans to vote does not mean that the Government is now accepting that Indian-born Tibetans were citizens of India as of right. In support of this contention, he points to the fact that the Indian Government challenged the Electoral Commission's decision. However, the Board expressly acknowledged that different branches of

the Indian Government may be taking different positions on this issue, but it reasonably concluded that the Government's May 2014 attempt to challenge the Electoral Commission's decision had to be viewed in light of the Justice Minister's more recent concession in *Topden*.

[42] Mr. Tashi also contends that the Board misapprehended the evidence regarding a purported change in the position of the CTA, as it had always officially taken a neutral position with respect to the right of Indian-born Tibetans to seek Indian citizenship. However, although not explicitly stated in the Indian Court decisions, the applicants in *Dolkar*, *Rinpoche* and *Topden* had all presumably been able to obtain letters of 'no objection' from the CTA, supporting the view that the CTA was relaxing its historical opposition to Indian-born Tibetans seeking Indian citizenship.

[43] Mr. Tashi discounts the significance of the Government's concession in *Topden*, observing that more than two years after *Dolkar* was decided, the Government of India was still resisting granting citizenship to Indian-born Tibetans, and that the statements by the Minister of Justice had not been followed by any concrete action.

[44] At the end of the day, however, all of Mr. Tashi's submissions essentially take issue with the weight that the Board ascribed to the evidence before it regarding the evolving situation in India for Indian-born Tibetans. The Board assessed the evidence that was before it, and contrasted it with the evidence that had been before the Court in *Wanchuk*. It concluded that Mr. Tashi is a citizen of India as of right, and that in light of recent events it was now within his power to obtain formal recognition of this fact. This was a conclusion that was reasonably open to the Board on the record before it.

IV. Conclusion

[45] For these reasons, the application for judicial review is dismissed. I agree with the parties that the case is fact-specific, and does not raise a question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"Anne L. Mactavish"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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