

Federal Court



Cour fédérale

Date: 20170407

Docket: IMM-3062-16

Citation: 2017 FC 353

Ottawa, Ontario, April 7, 2017

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

TENZIN DAKAR

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Tenzin Dakar, was born in Mundgod, Karnataka, India on November 13, 1985. His parents were both born in Tibet. They left Tibet for India in 1959 in response to China's occupation of Tibet.

[2] Mr. Dakar arrived in Canada via the United States on February 2, 2016 and claimed protection at the border. He alleges that he fears deportation to China from India and in turn fears persecution in China on the basis of: (1) his political beliefs and activism against China's annexation of Tibet; and (2) his religious beliefs as a Tibetan Buddhist. He alleges he lacks permanent status in India and thus has no right to return to that country.

[3] The Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada determined that Mr. Dakar is not a Convention refugee or person in need of protection. The RPD found that India was an appropriate country of reference and that it was in Mr. Dakar's control to address his status as a citizen of India thereby eliminating his fear of deportation to China. The RPD further noted arguments were not made respecting a serious possibility of persecution in India and the evidence did not establish such a possibility.

[4] Mr Dakar asks that this Court set aside the RPD's decision and return the matter for re-determination by a differently constituted Panel. He submits that the RPD's country of reference determination was unreasonable.

[5] Having considered the parties' written and oral submissions, I am not persuaded that the RPD's decision was unreasonable.

II. Decision under Review

[6] The RPD was satisfied that Mr. Dakar had established his personal identity and that he had been born in India in 1985. The RPD then noted that the determinative issue was national identity/country of reference.

[7] In considering the issue, the RPD outlined the Indian legislative framework. The RPD found that on the face of the legislation, Mr. Dakar, a Tibetan born in India between 1950 and 1987, had a right to Indian citizenship by birth. However, the RPD recognized and considered the practical realities that impact the recognition of citizenship. In addressing the evidence on the country conditions as they related to recognition of the citizenship rights of Tibetans born in India between 1950 and 1987, the RPD reviewed the National Documentation Package [NDP] and noted Mr. Dakar's country condition documents. Regarding the latter, the RPD noted some documents were dated and therefore of limited value and the more recent documents echoed the information from the NDP.

[8] The RPD addressed a number of documents and particularly relied on a *Response to Information Request*, No. IND105133.E, 30 April 2015 [RIR]. It noted that Indian authorities have, at least historically, been reluctant in recognizing Indian citizenship of Tibetans. The RPD noted the RIR identified a number of instances where Indian passports were refused to Tibetans and that India's High Courts had intervened in three reported instances in 2010, 2013 and 2014. The RPD further noted that despite judicial intervention the evidence indicated the authorities continued to deny passports and relief through the courts was at a cost that was not realistically

available to most Tibetan's. The RPD concluded that various actors within the Indian government appear to hold different views on the Tibetan citizenship question. The Judicial Branch and electoral authorities recognized the right of citizenship, but within the Executive Branch approaches differed with the Ministry of External Affairs taking a more accommodating approach than the Ministry of Home Affairs.

[9] The RPD concluded its assessment at paragraph 18 of the decision noting: "... what is clear on the country conditions is that there is a rapid evolution in the area. The trend is in the direction of recognition of citizenship for those ethnic Tibetans born between 1950 and 1987, given the series of favourable Indian High Court decisions in 2010, 2013 and 2014, as well as the Election Commission's Instruction to state governments to permit voting in February 2014."

[10] The RPD then considered Mr. Dakar's actions in trying to obtain Indian citizenship. The RPD noted that he had not applied for citizenship and that Mr. Dakar explained he did not possess an Indian birth certificate and could not obtain one as he was born at home, instead of at a hospital and that no alternative identity document would suffice in applying for citizenship.

[11] The RPD considered an opinion letter from an Indian lawyer stating that without a birth certificate, a citizenship application would be denied. The RPD gave this document little weight and provided reasons for doing so. First, the opinion letter did not address relevant legislation, jurisprudence or other circumstances that would support its conclusion. Second, the opinion letter failed to address the possibility of an applicant relying on alternative documentation to support the citizenship application where a birth certificate could not be obtained, a live issue in

this case. Finally the RPD noted the author of the opinion letter was not placed before the RPD as a witness by way of telephone or other means.

[12] The RPD then reviewed and noted a division in the Canadian jurisprudence on the issue of citizenship recognition in respect of Tibetans born in India between 1950 and 1987. The RPD noted a number of decisions found that acquisition of citizenship by Tibetans in India was not fully within the control of the applicant, such as *Dolma v Canada (Citizenship and Immigration)*, 2015 FC 703. However other decisions recognized developments respecting the citizenship issue and found it was reasonable to conclude that Tibetans born in India between 1950 and 1987 have a right to citizenship (*Tashi v Canada (Citizenship and Immigration)*, 2015 FC 1301 [*Tashi*], *Dolker v Canada (Citizenship and Immigration)*, 2015 FC 24). The RPD quoted extensively from the judgment of Justice Richard Mosely in *Tretsetsang v Canada (Citizenship and Immigration)*, 2015 FC 455 at para 30 [*Tretsetsang* FC], where he held that it was not unreasonable to expect an applicant to take legal action where a country of nationality attempts to deny a right to citizenship.

[13] Having reviewed the jurisprudence, the RPD was of the view that *Tretsetsang* FC gave the fullest effect to the Federal Court of Appeal decision in *Canada (Citizenship and Immigration) v Williams*, 2005 FCA 126 [*Williams*]. At paragraph 29 of the decision, the RPD noted that while there is no *prima facie* obligation upon a refugee claimant to first apply for citizenship that is available, it remains incumbent upon an individual to make an “attempt to avail oneself of citizenship that is available to him or her.”

[14] In the same paragraph, the RPD concluded that the "... Claimant here has taken no active steps toward availing himself of the citizenship conferred upon him by statute. Consultations with acquaintances, and even legal counsel, are not attempts at availing oneself of citizenship." The RPD further noted that, as per *Tretsetsang FC*, the possibility of litigation is an insufficient obstacle to take the access to citizenship outside of the applicant's control, reiterating that the applicant did not engage in active steps to pursue the matter directly with the Indian government.

III. Standard of Review

[15] The issue raised engages questions of a mixed fact and law. The RPD's conclusions will be reviewed against a standard of reasonableness (*Tretsetsang FC* at para 10, *Tretsetsang v Canada (Citizenship and Immigration)*, 2016 FCA 175 at para 61 [*Tretsetsang FCA*]).

IV. Analysis

[16] Mr. Dakar submits that while the RPD found the situation in India to be rapidly evolving, it failed to recognize that the evidence had changed. The changing evidence he submits caused the RPD to inappropriately rely on the decision of Justice Anne Mactavish in *Tashi* to conclude it more likely than not that the applicant would be granted Indian citizenship if an application were made. In this respect Mr. Dakar points to a document updated in June 2015 by the Tibet Justice Center entitled: "*Tibet's Stateless Nationals II: Tibetan Refugees in India 2014*" [Tibet Justice Center's document]. He submits that this document demonstrates Tibetans continue to be denied citizenship, despite two Indian High Court decisions, thus contradicting the RPD's

conclusion that there was a real possibility of citizenship being granted if an application were made.

[17] Mr. Dakar also relies on *Tretsetsang FCA* to argue that an applicant does not have a duty to litigate should Indian citizenship be refused.

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

[18] Shortly after the RPD's decision, the majority of the Federal Court of Appeal in *Tretsetsang FCA* considered the following question:

Is any impediment that a refugee claimant may face in accessing state protection in a country in which that claimant is a citizen sufficient to exclude that country from the scope of the expressions "countries of nationality" and "country of nationality" in section 96 of the *Immigration and Refugee Protection Act*?

[19] In answering the question in the negative the Court held that the test for "country of nationality" is the control test set out in *Williams* and that the onus is on the applicant to establish an impediment that would result in the applicant not having control (*Tretsetsang FCA* at para 67). The majority then set out the following test at paragraph 72:

[72] Therefore a claimant, who alleges the existence of an impediment to exercising his or her right 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.

[20] Reasonable efforts are to be determined on a case by case basis. Where a claimant establishes it would not be reasonable to make such efforts, no efforts need be made (*Tretsetsang* FCA at para 73).

B. *Did the RPD misapprehend the evidence?*

[21] Applying the principles set out *Tretsetsang* FCA, I am unable to conclude that the RPD failed to recognize or consider changing evidence or that the decision was unreasonable.

[22] In considering whether the recognition of Mr. Dakar's Indian citizenship was within his power and control the RPD acknowledged the historical challenges faced by Tibetan's in Mr. Dakar's circumstances. The RPD expressly noted at paragraph 14 of the decision that "...Indian authorities remained resistant and continued to routinely deny passports." In acknowledging this to be the case the RPD referenced the Tibet Justice Center's document.

[23] However the RPD weighed this evidence against evidence of progress relating to the recognition of citizenship rights. The RPD noted that the right to vote had been recognized by the Election Commission of India, that the Ministry of External Affairs was more accommodating in recognizing citizenship and that in turn, the Judicial Branch had consistently recognized a right to citizenship for ethnic Tibetans born in India between 1950 and 1987. It was on the basis of weighing this evidence that the RPD concluded there was a trend in the direction of recognition of citizenship. This conclusion was reached after consideration of all of the

evidence. I am unable to find that the RPD conclusion inappropriately relied on the factual findings in *Tashi* or that the evolving nature of the situation in India including the most recent evidence was not considered.

C. *Did the RPD come to an unreasonable conclusion?*

[24] Having reasonably concluded that the evolving situation in India was trending in the direction of recognition of citizenship, the RPD then considered Mr. Dakar's specific circumstances. It recognized that Mr. Dakar faced obstacles and inconvenience in having his citizenship rights recognized, the first element of the *Tretsetsang* FCA test. It then noted that Mr. Dakar had an obligation to take steps to avail himself of the citizenship conferred on him under Indian law.

[25] While the RPD did not have the benefit of *Tretsetsang* FCA it did turn its mind to the second element of the test – had Mr. Dakar made reasonable efforts to overcome the impediments or obstacles to citizenship?

[26] In assessing this element the RPD considered Mr. Dakar's consultations with acquaintances and a lawyer but noted he made no effort to approach the Indian government in pursuit of citizenship recognition. The RPD noted that while Mr. Dakar did not possess a birth certificate, he made no effort to pursue the possibility with government officials that his Identity Certificate, a document issued by the Indian government setting out his date and place of birth, might be sufficient.

[27] Unlike the situation in *Namgyal v Canada (Citizenship and Immigration)*, 2016 FC 1060 [*Namgyal*], where Justice Mactavish found that the RAD did not undertake the case by case analysis required by the Federal Court of Appeal in *Tretsetsang FCA*, the RPD did undertake that analysis here. The RPD addressed Mr. Dakar's explanation for not applying for a birth certificate, it outlined its concerns with the legal opinion provided and, based on those concerns, gave the opinion little weight. Moreover, whereas in *Namgyal* the applicant had a grade three education, Mr. Dakar's evidence of his studies and experience in dentistry in India grounded the RPD's finding that he was a sophisticated individual and that there were no circumstances that prevented Mr. Dakar from approaching the Indian government to secure recognition of his citizenship despite peacefully residing in India for thirty years. The RPD noted that instead he relied on reported obstacles to conclude any such attempt would be unsuccessful.

[28] Finally, the RPD did not hold that Mr. Dakar was required to litigate rather it held that reasonable efforts in this case required some indication of having taken active steps to secure citizenship recognition. That conclusion was reasonably open to the RPD on the record before it.

V. Conclusion

[29] The RPD's analysis was consistent with the test set out in *Tretsetsang FCA* and the outcome is within the range of possible, acceptable outcomes defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190 at para 47).

[30] The parties have not proposed a question for certification and none arises.

JUDGMENT

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

No question is certified.

"Patrick Gleeson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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