Federal Court of Appeal

Cour d'appel fédérale

Date: 20160609

Docket: A-260-15

Citation: 2016 FCA 175

CORAM: **RYER J.A.**
WEBB J.A.
RENNIE J.A.

BETWEEN:

CHIME TRETSETSANG

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Heard at Ottawa, Ontario, on February 11, 2016.

Judgment delivered at Ottawa, Ontario, on June 9, 2016.

REASONS FOR JUDGMENT BY: RYER J.A.
WEBB J.A.

DISSENTING REASONS BY: RENNIE J.A.

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REASONS FOR JUDGMENT

RENNIE J.A. (Dissenting Reasons)

I. Introduction

[1] Under international law, refugee protection is surrogate protection. It is available only when a person's country of nationality is unable or unwilling to protect against risks identified by the *1951 Convention relating to the Status of Refugees* (Convention). In consequence, refugee claimants with multiple nationalities must prove that none of their countries of nationality will

protect them. Consistent with this principle, foreign nationals seeking refugee protection in Canada must establish that they either have no country of nationality or that their country of nationality will not offer them protection against the threats identified in sections 96 or 97 of *Immigration and Refugee Protection Act* (S.C. 2001, c. 27) (IRPA): *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689.

[2] The genesis of this appeal lies in decisions of the Federal Court with respect to the legal test and evidentiary burdens engaged in establishing that a claimant has, or does not have, a "country of nationality" as contemplated by section 96 of the IRPA. In each of these cases, the applicant possesses an entitlement to a foreign citizenship as a matter of law, but has argued that the foreign state does not in practice recognise them as a citizen, such that their ability to access the state's protection by virtue of that citizenship is uncertain. The question that arises is whether, in such circumstances, the foreign state is a country of nationality.

[3] In a series of decisions, the Federal Court has considered this issue and arrived at different conclusions. The apparent conflict, and I use the term decidedly, presented itself in this case, prompting the Federal Court (*per* Justice Mosley, 2015 FC 455) to certify the following question in his Judgment issued May 11, 2015:

> 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?

[4] For the reasons that follow, it is apparent that the certified question does not lend itself to the categorical answer anticipated by certified questions. This is because the answer to the

question is highly dependent on the facts. The question also assumes, by way of example, that citizenship carries with it a right to a passport. This not necessarily the case. A passport may be denied, or required to be surrendered for any number of reasons, all of which are consistent with continued citizenship: Canadian Passport Order, SI/81-86 sections 9-11.

[5] As a general proposition, a question that cannot be answered will result in dismissal of the appeal on the basis that the right of appeal is contingent on a certified question having been properly identified. Nevertheless, the Court's consideration is not constrained by the language of the question and it may reformulate the question to align with the issue: *Canada (Citizenship and Immigration) v. Ekanza Ezokola*, 2011 FCA 224. Certification is merely the means by which appellate review is enabled, and the appeal is at large: *Canada (Public Safety and Emergency Preparedness) v. Khalil*, 2014 FCA 213. In this case, it is clear from both the certified question and the reasons of the Federal Court that this appeal raises an issue which is ripe for determination.

II. Judicial history of the issue

[6] In 2005, this Court determined that the question of whether a claimant has a "country of nationality" is answered by asking whether access to citizenship is within the claimant's "control": *Canada (Minister of Citizenship and Immigration) v. Williams*, 2005 FCA 126, at para.22. If so, the claimant is expected to rely on that country for protection. Referencing the reasoning of Rothstein J. (then of the Federal Court) in *Bouianova v. Canada (Minister of Employment and Immigration)* (1993), 67 F.T.R. 74, Justice Décary wrote:

> I fully endorse the reasons for judgment of Rothstein J., and in particular the following passage at paragraph 12:

> The condition of not having a country of nationality must be one that is beyond the power of the applicant to control.
>
> The true test, in my view, is the following: if it is within the control of the applicant to acquire the citizenship of a country with respect to which he has no well-founded fear of persecution, the claim for refugee status will be denied. While words such as "acquisition of citizenship in a non-discretionary manner" or "by mere formalities" have been used, the test is better phrased in terms of "power within the control of the applicant" for it encompasses all sorts of situations […]

[7] The burden is on the claimant to establish that they do not have control and that the *Williams* test is therefore unmet. But what suffices to establish this? A number of Federal Court decisions have reached different conclusions. A review of the cases indicates that the answer to this question is highly dependent on the unique legal and factual circumstances of each case.

[8] In *Khan v. Canada (Citizenship and Immigration)*, 2008 FC 583, at paras. 19-21, citizenship officials in Guyana possessed a statutory discretion to deny citizenship acquired by marriage. Because acquisition of citizenship by marriage was the basis of the applicant's claim to citizenship in Guyana, this negated the existence of control. In *Canada (Citizenship and Immigration) v. Hua Ma*, 2009 FC 779, the Court determined that in light of evidence that the claimants would have to pay large fees and possibly undergo sterilization as they already had a child, it would "impose an intolerable burden" to require the claimants to first apply for citizenship in China, and that this established that the *Williams* test was unmet.

[9] In *Wanchuk v. Canada (Citizenship and Immigration)*, 2014 FC 885, the Court concluded that citizenship was "a mere possibility" for the applicant, on the basis that to establish

citizenship would require litigation in the foreign country, since that foreign country was not recognising the applicant's citizenship rights. In *Dolker v. Canada (Citizenship and Immigration)*, 2015 FC 124, at para. 27 the Court concluded that no Canadian authority requires that an applicant must first seek and then be refused citizenship in a safe country where they are entitled to do so before claiming refugee status.

[10] In *Dolma v. Canada (Citizenship and Immigration)*, 2015 FC 703, on facts very similar to those under appeal, the Federal Court concluded that the existence, as a matter of foreign law, of the legal right to citizenship, or the status of citizenship, was not, in and of itself, sufficient to establish that country as a country of nationality. The Court reasoned, at paragraphs 32 and 33, that imposing, through the *Williams* test, an obligation on refugee claimants to show that they applied for and were refused citizenship in a particular country would constitute a narrowing of the definition of refugee in the Convention and section 96 of IRPA:

> The 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. This 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.

[11] In *Tashi v. Canada (Citizenship and Immigration)*, 2015 FC 1301, decided after the decision under appeal but relied on by the respondent, the Federal Court noted that the Refugee Protection Division (RPD) of the Immigration and Refugee Board of Canada (the Board) had found as of May 2014 that "more recent evidence indicated that the Government of India was moving towards recognizing citizenship for individuals." Thus the Federal Court found that even

if the approach from *Dolma* was to be applied, the Board was reasonable in reaching the conclusion that Tibetans had not just *de jure* but also *de facto* citizenship and thus citizenship was within their control.

[12] To conclude this review of the application of the *Williams* test, two comparable applications for judicial review have been decided by the Federal Court since *Tashi*. In *Sangmo v. Canada (Citizenship and Immigration)*, 2016 FC 17 the Court followed *Dolma* and allowed the application for judicial review, finding that because the Refugee Appeal Division (RAD) had recognised that "legal support and funds" were necessary to make good on what was presumptive and an "automatic right to citizenship", citizenship was not actually within the applicant's control. The Court in *Sangmo* noted that *Tashi* did not actually decline to follow *Dolma*'s legal approach; rather, in that case the RAD had found on the facts that the Indian Government was in fact recognising ethnic Tibetans as citizens. Finally, in *Sangpo v. Canada (Citizenship and Immigration)*, 2016 FC 233 the Federal Court allowed an application for judicial review, following *Dolma*.

[13] With this background, I turn to the facts in this appeal.

III. The facts

[14] The appellant is an ethnic Tibetan. He was born in India to Tibetan parents on October 5 1968. His parents had fled to India when the Chinese Government invaded and occupied Tibet in 1959.

[15] The appellant is a follower of the Dalai Lama and fears persecution from Chinese authorities for his religious beliefs and political activities. He arrived in Canada on a fraudulent passport in 2013 and made a refugee claim. He contended that he was stateless and would be deported to China on arrival in India.

[16] The appellant has neither a passport nor a birth certificate issued by the Government of India. He does have an "identity certificate" issued by the Indian Government establishing his birth in India in 1968. He also has a "No Objection To Return" stamp on his identity certificate, issued by the Government of India. His identity certificate, however, expired in 2001. The RPD noted that the appellant's evidence was that the registration certificate was seized by Indian authorities in 2009; this evidence was uncontroverted and the registration certificate does not form part of the record.

[17] Under the Indian *Citizenship Act*, *1955*, a person born in India between January 26, 1950 and July 1, 1987, is an Indian citizen irrespective of the nationality of his or her parents. The appellant was born during that period. The appellant has taken no steps however, to establish or confirm his citizenship with the Government of India or its High Commission in Canada.

A. *Immigration proceedings*

[18] The RPD accepted the appellant as a Convention refugee. The RPD found that he had a well-founded fear of persecution in China. This finding is not challenged. The RPD concluded that he was not a national of India despite the *Citizenship Act, 1955*. It reached this conclusion on the basis of country condition reports establishing that Tibetans have "experienced difficulties" in applying for citizenship and that "relatively few" Tibetans have been successful in obtaining

citizenship. It also found that Indian Government officials may not recognise the appellant's legal right to citizenship and that an ethnic Tibetan in the appellant's position lacks a secure right to residence in India.

[19] The Minister appealed to the RAD. The Minister submitted new evidence to establish that the appellant did have access to citizenship. He relied on news reports of decisions from two of India's High Courts where ethnic Tibetans had litigated the question of birthright citizenship and the courts had ruled that they were entitled to citizenship.

[20] The RAD allowed the appeal. It noted with concern the fact that the appellant lacked a birth certificate, but found that there was insufficient evidence to conclude that the "registration certificate" in the appellant's possession could not be used to establish his birth in India during the relevant time. I note that it is unclear whether the RAD meant to refer to the expired "identity certificate" given that there is no registration certificate in the record, and the RPD had mentioned that the appellant testified that Indian authorities had seized the registration certificate. As such, the lack of a birth certificate was not found to be a reason that citizenship was outside of the appellant's control.

[21] Based on the news reports of the decisions of the two Indian High Courts, the RAD concluded that the test for citizenship articulated in *Williams* was met. Paragraph 55 contains the entirety of the RAD's analysis of the issue:

> The Respondent [Mr. Tretsetsang] submits that the evidence highlights the difficulties that Tibetans face in obtaining citizenship in India and that these difficulties establish that it is not within their control to obtain citizenship. The RAD is not persuaded by the Respondent's argument. It is clear from the

> decisions of the High Court that, as an ethnic Tibetan born in India between January 26, 1950 and July 1, 1987, the Respondent is an Indian citizen by birth, irrespective of the nationality of his/her parents, and that there is no need to apply for citizenship as citizenship is automatically acquired by birth. The RAD notes that these cases reveal that there have been difficulties for some ethnic Tibetans in acquiring passports; however, these cases do not serve to establish that citizenship is not in their control. Having considered the evidence, the RAD finds, on a balance of probabilities, that the Respondent is a citizen of India.

[22] It rejected the appellant's alternative argument that the decision should be remitted to the RPD so that he could submit new evidence in respect of risks he would face in India. The RAD concluded that the *Williams* test was met; the claimant had control over whether he would attain citizenship.

B. *The Federal Court decision*

[23] In the Federal Court both the appellant and the Minister agreed in broad terms that *Williams* was the applicable test; the parties diverged, however, as to the legal elements of the test and the nature of the burden associated with its proof.

[24] The judge found that the appellant was, by virtue of the *Citizenship Act, 1955*, a citizen of India or at least had, as a matter of law, the legal right to acquire Indian citizenship. In respect of the evidence of administrative practices which may frustrate the ability of ethnic Tibetans to obtain Indian citizenship, the judge concluded that the *Williams* standard was satisfied even in circumstances where a claimant has to litigate in order to access his citizenship rights. Further to this, he held that a claimant is expected to take "reasonable steps" to enforce the citizenship rights before asserting that citizenship is not available to them.

[25] In reaching this conclusion, the judge found that *Khan* was distinguishable because in that case the Guyanese citizenship authorities had, by law, discretion whether to grant citizenship arising from marriage to a Guyanese citizen. He found that while the decision in *Wanchuk* was factually similar to the appellant's case, it could not be followed because it failed to follow the binding decision in *Williams*. The judge concluded that *Williams* establishes that if a claimant is – by law – a citizen of a country, they are required to take reasonable steps to attempt to access those citizenship rights. Absent such efforts, a claimant cannot establish that access to citizenship is beyond their "control."

IV. Issue on appeal and standard of review

[26] The question on appeal has two components. The first concerns whether a formal legal entitlement to foreign citizenship is dispositive of the question of whether the claimant has a country of nationality; the second is whether, in the particular case of the appellant, the RAD committed a reviewable error in applying the test to his situation.

[27] With respect to the standard of review, this is an appeal from a judgment ruling on an application for judicial review; as such, this Court must step into the shoes of the court below and select and apply the correct standard of review: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559. I accept the submission that as a question of a mixed fact and law the judge correctly identified the standard of review as being reasonableness.

V. Analysis

A. *The applicable law*

[28] The primary question at issue in this appeal is whether a legal entitlement to citizenship is dispositive of the issue of control, or whether other or extralegal barriers must also be considered in deciding the issue. If a legal entitlement is not dispositive of control, a further issue is what it means for the test of control if a claimant will need to litigate in the foreign state to enforce their legal right to citizenship. Finally, there is the question whether it is incumbent on a claimant to take steps to attempt to acquire protection via citizenship before claiming that such protection via citizenship is outside their control.

(1) Legal v. extra-legal discretion

[29] It will be remembered that in *Khan*, the Guyanese citizenship authorities had – by law – discretion on whether to allow the claimant's application for citizenship. Put another way, because the executive of the foreign state had the lawful authority to deny the claimant citizenship, citizenship was held to be outside of the applicant's control. Neither the judge nor the respondent suggest that *Khan* was wrongly decided. Instead, both distinguish *Khan* on the basis that there was no right to citizenship at law.

[30] The appellant argues that there is no meaningful difference between discretion that exists as a matter of law, and discretion that the foreign state simply arrogates to itself. If the foreign state chooses not to comply with its own laws, then that poses the same risk that the foreign state will not protect the claimant, making Canada's surrogate protection necessary. He argues that his circumstances are precisely this.

[31] I agree with the appellant's view. If a claimant's ability to access the protection via citizenship in the foreign state is sufficiently uncertain that it is not within their control, it makes no difference what the source of the uncertainty is. The claimant is equally insecure in their protection in either case. However, as I will explain later, it does have an effect on the evidentiary burden on the claimant.

[32] Therefore, what the RPD and RAD must turn their attention to is the degree of uncertainty in a claimant's pursuit of protection via citizenship of the potential country of nationality. Control may be vitiated where the state expressly reserves a discretion to reject a claim of citizenship (*Khan*), or upon sufficient proof of administrative impediments (*Dolma*, *Sangmo*). But, in the latter case, the burden will be on the claimant to displace the otherwise prevailing and dispositive presumption that the domestic law of the country of nationality granting nationality will be respected.

(2) When citizenship is contested

[33] The respondent contends that if a claimant has a legal right to protection via citizenship, and the state fails to recognise that right, the fact that a claimant may have to go to court in the foreign state to enforce the legal right does not place protection via citizenship outside of the claimant's control. In effect, if this argument is accepted, then there actually is a distinction between discretion which exists at law (*Khan*) and discretion which the state exercises extralegally, because the latter can be corrected via litigation.

[34] If it is necessary for a person to litigate before the foreign state will recognise their citizenship rights, then citizenship is presumptively, outside of their control. Several factors lead

to this conclusion. First, the fact that the claimant must litigate against the foreign state is evidence that the foreign state does not recognise their citizenship rights, and is in fact actively resisting them. Second, there is no guarantee that a claimant will obtain a favourable result. Third, a claimant may not have the resources to be able to afford to litigate. In many cases this factor may be of the most practical importance.

[35] The likelihood that a claimant would need to litigate to establish their citizenship is a factual matter: If, for example the claimant can prove, on a balance of probabilities, that they *will* in fact need to litigate to establish that which the domestic law of their country would appear to grant, or, if a claimant could establish that the foreign government has a policy of always resisting the citizenship claims at issue. On the other hand, if the likelihood or probability of litigation is not established beyond a balance of probabilities, that is equally dispositive. As noted, the control test is presumptively satisfied on proof of a legal entitlement.

(3) A requirement of reasonable steps

[36] The *Williams* test requires a claimant to prove that they do not have control over the outcome of their attempt to acquire protection. Control means sufficient influence over the outcome such that, if the claimant were to genuinely endeavour to acquire the foreign citizenship, the reasonably foreseeable outcome would be success. I have explained in what circumstances proof of a need to litigate can displace a *de jure* entitlement to citizenship. But what of other circumstances?

[37] Where administrative or policy impediments are raised, the burden will be on the claimant to make reasonable attempts to acquire citizenship. The fact that a claimant has tried to

acquire the foreign state's protection, and failed, is probative evidence that protection via citizenship is outside their control. In many cases, this evidence may make-or-break their case. Conversely, the consequence of a failure to take reasonable steps may be that the claimant's refugee claim is denied.

[38] What those reasonable steps are is highly fact-specific, however, it may be observed that a failure to request passports, travel documents or other indicia of nationality will be a highly relevant consideration, particularly when the country of nationality has an embassy or High Commission in Canada. Indeed, it would seem odd if an apparent legal entitlement could be so easily defeated by simply not asking that the apparent right of citizenship be respected.

(4) Summary on the law

[39] By way of summary, I arrived at the following general conclusions:

a) If there is entitlement to citizenship on the face of the law (i.e. there is no legal discretion to deny citizenship) then citizenship is within the claimant's control.

b) If discretion to deny the claimant citizenship exists as a matter of law then access to citizenship is not within the claimant's control.

c) If there is entitlement to citizenship on the face of the law, but there is evidence which establishes on a balance of probabilities that the state or its officials are – notwithstanding the law – exercising an administrative discretion to thwart recognition of that legal entitlement to citizenship (*Dolma*, *Tashi*, *Sangmo*), then citizenship is outside of the claimant's control. This includes scenarios where the claimant may need to litigate in order to bring the executive's conduct in line with

the law. The burden will be on the claimant to establish that a presumptive legal right to citizenship is being denied through administrative practices.

d) In consequence, a claimant will, as a general proposition, be required to take reasonable steps to establish his right of citizenship. It is open to the Board to draw reasonable inferences from the failure to take reasonable steps. Where the claimant claims that he faces administrative barriers, that assertion should be tested as it is material and relevant on the question of control.

[40] I note that the burden of establishing that situations (b) and (c), and to take reasonable steps (d) rests with the claimant. In the case of situation (b), this is relatively straightforward: simply show (as the claimant did in *Khan*) that the foreign law provides discretion. In the case of an allegation of situation (c) (as in the present case), the evidence required is invariably going to be more complex, establishing the existence of administrative practices and policy for the conduct of foreign officials that they are exercising discretion contrary to law. One of the primary ways for a claimant to demonstrate this is to take *bona fide* steps to attempt to acquire citizenship. A claimant may also use other evidence to demonstrate that discretion is being exercised contrary to law.

B. *Application of the law to the RAD's decision*

[41] In the present case there is no discretion as a matter of law. Under India's *Citizenship Act, 1955*, the appellant is a citizen of India.

[42] The question is therefore whether the RAD reached a reasonable answer as to whether, notwithstanding the letter of the statutory law, discretion was being exercised on the part of India's officials so as to take protection via citizenship outside of the appellant's control. As noted, this is an evidentiary matter, the burden of establishing which rests with the appellant.

[43] Consequently, if the appellant proved that he needed to litigate, and the RAD found as much, then it would be unreasonable for the RAD to nonetheless find that citizenship was within his control. To do so would be an error of law. As I have explained, if judicial recourse is required, control cannot be established. The outcome is in the hands of the court. On the other hand, if the RAD decided that in this particular case there was insufficient evidence of a need to litigate, there was no reviewable error.

[44] Thus, the reasonableness of the RAD's decision turns on the reason for its rejection of the appellant's position. I return to the RAD's reasons:

> It is clear from the decisions of the High Court that, as an ethnic Tibetan born in India between January 26, 1950 and July 1, 1987, the Respondent is an Indian citizen by birth, irrespective of the nationality of his/her parents, and that there is no need to apply for citizenship as citizenship is automatically acquired by birth. The RAD notes that these cases reveal that there have been difficulties for some ethnic Tibetans in acquiring passports; however, these cases do not serve to establish that citizenship is not in their control.

[45] The RAD acknowledges the evidence that some Tibetans have had to litigate in order to establish that which the laws of India grant, their citizenship, but concludes that this does not mean that citizenship is not within the appellant's control. However, the RAD does not say how it reached this conclusion.

[46] If the RAD reasoned that a need to litigate in the Indian courts was consistent with the existence of control, then it made a legal error. If, on the other hand, the RAD reasoned that the Government of India, twice defeated, would concede the claimant's citizenship, then it needed to say so, and explain the basis upon which it reached this conclusion. In this regard, it is an equally reasonable inference that the Government of India, having advanced the argument in 2010 and then resurrected it in 2013, would continue to do so.

[47] The RAD relied on newspaper reports of the *Dolkar v. Government of India (Ministry of External Affairs)*, W.P. 12179/2009 decision. It did not have the reasons of the Indian High Court before it. Those reasons were, on consent, before this Court.

[48] Those reasons indicate that the Indian Ministry of External Affairs considers Tibetans to be stateless persons, and for that reason, they are issued identity certificates, and not passports. I note that the appellant falls squarely within the argument advanced by India in the *Dolkar* case as to why the *Citizenship Act 1955* did not apply – an identity certificate disentitles the person to citizenship as it declares the holder to be Tibetan.

[49] It is no answer to say that the burden remains on the claimant throughout to establish his claim for protection. That is understood. The question here, however, is whether the RAD evaluated the appellant's case against the correct legal test of "control." It was incumbent on the RAD to explain the basis on which it concluded that "these cases do not serve to establish that citizenship is not within [his] control."

[50] In concluding as such, I am mindful of the Supreme Court of Canada's words in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, at para. 16, [2011] 3 S.C.R. 708:

> Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, 1973 CanLII 191 (SCC), [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.
>
> (Emphasis added)

[51] The reasons do not meet this standard.

[52] A legal entitlement to citizenship will usually dispose of the issue of whether protection via a foreign state's citizenship is within the claimant's control. However, the claimant is entitled to argue that, notwithstanding the law, the foreign state's behaviour indicates that they will not be protected. The RPD and RAD are obligated to evaluate refugee claims accordingly in light of that argument and to critically assess the evidentiary foundation which underlies the argument. In this case, it is impossible to determine whether the RAD turned its attention to the question of whether the appellant needed to litigate, or assumed that if he had to litigate he would be successful. Therefore I would answer the certified question in the affirmative, allow the appeal and remit it to the RAD for redetermination in accordance with these reasons.

[53] I conclude briefly on the points of divergence between my colleagues and I.

[54] To the extent that my colleagues' reasons suggest that even where a lack of control has been established, it may nonetheless be defeated by a failure to take reasonable steps, I disagree. This is a modification of the *Williams* test, and transforms what is a relevant evidentiary inquiry into an independent legal test. Any intention to modify the test in *Williams* should be done expressly, not implicitly.

[55] A second point flows from the first. If it is agreed that a failure to take reasonable steps is not invariably fatal, it follows, as a matter of law, and logic, that the RAD was obliged to consider the counter-argument, whether there was a need to litigate, as litigation vitiates control. The RAD was silent on this point.

[56] Finally, the RAD found that it was of no consequence that the appellant lacked a birth certificate, because he could use his registration certificate to prove his date of birth. This finding is crucial to the RAD's decision.

[57] The problem with the RAD's finding on this issue, and it is a fatal problem, is that the RAD relied on the appellant's registration certificate for the conclusion that he would be able to prove his date of birth. The RAD notes that he tendered his registration certificate to the RPD. However, the appellant did not tender his registration certificate to the RPD. The uncontroverted evidence before the RPD was that his registration certificate had been seized by the Indian authorities. The RAD confused the registration certificate with the expired identity certificate, which is a different document. We also know from the reasons of the two Indian High Court

decisions that these documents have, from the perspective of the Indian Government, different legal consequences. Because the RAD misapprehended the evidence before it, the RAD did not turn its attention to whether the expired identity certificate would suffice to substitute for a birth certificate. This error is clear on the face of the record. The appellant is entitled to have his case decided on the evidence.

[58] Finally, the reasons of the RAD fall short of the *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 SCR 339 criteria. The reasons are not reasons. They state a conclusion. A reader is left to speculate as to how that conclusion was reached. The RAD is an appellate tribunal, and its failure to provide analysis on the critical point is more acute when it reverses the decision of the RPD, which did give reasons. In concluding that the appellant did not discharge his evidentiary onus, my colleagues presume an outcome on the evidence.

"Donald J. Rennie"

J.A.

RYER J.A. and WEBB J.A.

[59] We have reviewed the reasons of our colleague Justice Rennie (the "Reasons") and we are in agreement with many of his conclusions. However, with the greatest respect, we are unable to agree with all of his conclusions and with his disposition of the appeal.

[60] Since this is an appeal from a decision of the Federal Court on an application for judicial review, the issue for this Court is:

> Did the application judge choose the correct standard of review and apply it properly? (*Agraira*, paragraph 47)

[61] In our view, the Federal Court judge chose the correct standard of review (reasonableness) and applied it properly.

[62] For ease of reference and in the interest of economy, we will adopt all of the defined terms contained in the Reasons.

[63] The certified question that is the subject of this appeal (the "Certified Question") arises out of a decision of the Federal Court in which Justice Mosley upheld the RAD's decision to deny the appellant's claim for Convention Refugee or protected person status, pursuant to sections 96 and 97 of IRPA, on the basis that the appellant was an Indian citizen and had not alleged any fear of persecution in India.

[64] This is an unusual case because the appellant, in his memorandum of fact and law, asked this Court to decline to answer the Certified Question. The Minister, in his memorandum of fact

and law, argued that the question was not a proper certified question. As a result, both parties submitted that this Court should decline to answer the Certified Question.

[65] We agree with the comments in paragraph 4 of the Reasons that the Certified Question cannot be answered with a simple yes or no. Therefore, we are unable to agree with the conclusion in paragraph 53 of the Reasons that the Certified Question should be answered in the affirmative. We agree that the answer to the Certified Question, as posed, is "highly dependent on the facts." The Certified Question also links the relevant citizenship rights to the right to obtain a passport. In our view, the relevant right of citizenship for the purposes of section 96 of the IRPA is not the right to obtain a passport but the right that would entitle the claimant to the state's protection.

[66] The Certified Question, in our view, should be reformulated as follows (the "Reformulated Certified 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*?

[67] We agree that the test for determining whether a claimant has a "country of nationality" is the control test as set out in *Williams*. We also agree that the onus is on the appellant to establish the existence of the asserted impediment and that it would result in the appellant not having the power to control whether India will recognize him as a citizen of India and provide state protection to him. In our view, a country of nationality includes a country where the claimant is a citizen and where the claimant may face an insignificant or minor impediment to

accessing state protection from that country but may not include a country where the claimant is a citizen and faces a significant impediment to accessing state protection from that country.

[68] In *Williams*, Justice Décary also adopted the following passage from the earlier decision of Justice Rothstein in *Bouianova*:

> …This "control" test also reflects the notion which is transparent in the definition of a refugee that the "unwillingness" of an applicant to take steps required from him to gain state protection is fatal to his refugee claim unless that unwillingness results from the very fear of persecution itself. Paragraph 106 of the *Handbook on Procedures and Criteria for Determining Refugee Status* emphasizes the point that whenever "available, national protection takes precedence over international protection," and the Supreme Court of Canada, in *Ward*, observed, at p. 752, that "[w]hen available, home state protection is a claimant's sole option."
>
> (emphasis added)

[69] This requirement that a claimant take steps to gain state protection is reflected in paragraph 39(d) of the Reasons. We agree that this principle of requiring a claimant to take reasonable steps should also apply in this case where citizenship was granted by the Indian *Citizenship Act, 1955* but the appellant claimed that India would not recognize his citizenship rights. We also agree with the comments in paragraph 39(d) above that:

> It is open to the Board to draw reasonable inferences from the failure to take reasonable steps. Where the claimant claims that he faces administrative barriers, the failure to test the strength of that assertion is material and relevant evidence on the question of control.

[70] If a claimant alleges that he or she is unable to access state protection from the country of which he or she is a citizen and fails to take any steps to confirm whether that country will

recognize the claimant as a citizen of that country, such inaction, in the absence of a reasonable explanation, would be fatal to that person's refugee claim.

[71] As noted, the onus is on the claimant to establish that he or she is unable to avail himself or herself of the protection of his or her country of nationality or unwilling to do so because of fear of persecution in that country. Any impediment to realizing the rights of state protection granted to citizens must be a significant impediment. As a result, in our view, the answer to the Reformulated Certified Question would be no, as the impediment must be significant and the claimant must make reasonable efforts to overcome any such impediment.

[72] Therefore, 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.

[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.

[74] In this case, there is no dispute that the text of the applicable provision of the Indian *Citizenship Act, 1955* is clear and that it provides that every person born in India during a stipulated period (within which the appellant was born) is a citizen of India. The appellant alleges, however, that, notwithstanding the clear statutory language of the Indian *Citizenship Act, 1955*, India will not recognize him as a citizen of India. The appellant referred to some reports that indicated that the Government of India would not recognize Tibetans born during this period as citizens of India.

[75] In their submissions to the RAD, the parties referred to only two decisions of the courts in India. In *Dolkar*, the High Court of New Delhi confirmed that anyone who is a citizen by birth is not required to apply for citizenship. This case was followed by the High Court of Karnataka at Bangalore in a case decided in 2013 (*Ripoche v. Government of India (Ministry of External Affairs),* W.P. 15437/2013).

[76] The essence of the appellant's argument is that the impediment that he faces in being recognized as a citizen of India is that he will be required to enforce this right by bringing an application to the court in India. However, the appellant did not take any steps to determine whether India would recognize his right of citizenship granted by the Indian *Citizenship Act, 1955* without requiring *him* to litigate this issue and, in particular, whether the documentation that the appellant has would be sufficient to establish, without litigation, that he was born in

India during the relevant period. The appellant did not provide any explanation for his failure to take any such steps.

[77] In paragraphs 55 and 56 of its reasons, the RAD concluded that the appellant had Indian citizenship and had failed to establish that his Indian citizenship rights would not provide him with state protection.

[78] In our view, these conclusions are reasonable. The Indian statute clearly establishes the appellant's Indian citizenship and the only decisions of the Indian courts that were referred to by the parties support that view. Because the appellant did not take any steps at all to determine whether India would recognize him as a citizen without requiring him to litigate this matter, it follows that he has failed to establish that there was any impediment, much less any significant impediment, to his ability to access the state protect rights inherent in his Indian citizenship.

[79] In conclusion, we would answer the Reformulated Certified Question as follows:

> **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*?
>
> **Answer:** No.

[80] As a result, we would dismiss the appeal.

"C. Michael Ryer"
J.A.

"Wyman W. Webb"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE FEDERAL COURT DATED May 11, 2015, Docket No. IMM-67-14 (Reasons 2015 FC 455)

DOCKET:	A-260-15
STYLE OF CAUSE:	CHIME TRETSETSANG v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 11, 2016
REASONS FOR JUDGMENT BY:	RYER J.A. WEBB J.A.
DISSENTING REASONS BY:	RENNIE J.A.
DATED:	JUNE 9, 2016

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