

Federal Court



Cour fédérale

Date: 20160107

Docket: IMM-716-15

Citation: 2016 FC 17

Ottawa, Ontario, January 7, 2016

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

**TENZIN SANGMO, KARMA TSEWANG,
SONAM CHOKEY**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Tenzin Sangmo and her minor children, Karma Tsewang and Sonam Chokey, claimed refugee protection in Canada based upon an alleged fear of persecution in China due to their Tibetan ethnicity and their worship of the Dalai Lama. They have brought an application for judicial review pursuant to s 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27

[IRPA] of a decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board. The RAD upheld the determination of the Refugee Protection Division [RPD] that Ms. Sangmo and her children are neither Convention refugees under s 96 of the IRPA, nor persons in need of protection as defined by s 97 of the IRPA.

[2] For the reasons that follow, I have concluded that the RAD's decision is internally inconsistent, and therefore unreasonable. The application for judicial review is allowed.

II. Background

[3] Ms. Sangmo was born in India on September 6, 1972. Her parents were Tibetan nationals who fled Tibet in the 1950s following China's occupation of the territory. Ms. Sangmo's son, Karma Tsewang, was born in India on September 14, 2006, and her daughter, Sonam Chokey, was born in India on June 16, 2011.

[4] Ms. Sangmo possesses a Tibetan "Green Book" as well as a Registration Certificate, which is a document that enables non-citizens of India to work, travel and remain in the country. Ms. Sangmo's two children have Indian birth certificates.

[5] Ms. Sangmo never applied for a passport or any other proof of citizenship in India. She says that a lawyer advised her that the process would take eight to nine months, and would require her to obtain numerous documents in support of her application.

[6] Ms. Sangmo left India with her two children on November 2, 2013, and entered Canada using a false passport. She made a claim for refugee protection on December 15, 2013.

[7] The Minister of Citizenship and Immigration [the Minister] intervened in Ms. Sangmo's hearing before the RPD. The Minister argued that Ms. Sangmo is an Indian citizen by birth, and that her children are entitled to Indian citizenship pursuant to the *Indian Citizenship (Amendment) Act*, 2003.

III. The RPD's Decision

[8] In a decision dated April 23, 2014, the RPD rejected Ms. Sangmo's claim on the ground that she and her children are citizens of India, not China, and they have no well-founded fear of persecution in India.

[9] The RPD applied the test outlined in *Canada (Minister of Citizenship and Immigration) v Williams*, 2005 FCA 126 [*Williams*], and considered whether it was within Ms. Sangmo's control to acquire the citizenship of a country in which she had no well-founded fear of persecution. The RPD concluded that Ms. Sangmo had an automatic right to Indian citizenship under s 3.1(a) of the *Indian Citizenship (Amendment) Act*, 2003 because she was born in India between January 26, 1950, and July 1, 1987, and that her children had access to citizenship by virtue of their mother's citizenship.

[10] The RPD relied on a decision of the High Court of Delhi which affirmed that Tibetans born in India have an automatic right to obtain Indian citizenship (*Namgyal Dolkar v*

Government of India (Ministry of External Affairs) [2010] INDLHC 6118, CW 12179/2009 (22 December 2010) [*Dolkar (Indian High Court)*]). The RPD acknowledged that Tibetans continue to face challenges in securing citizenship, but was satisfied that obtaining Indian citizenship was within Ms. Sangmo's control.

[11] The RPD rejected Ms. Sangmo's claim that the country of reference for her claim should be China. The RPD noted that Ms. Sangmo had not submitted any documents attesting to her Chinese citizenship. It found that China would not recognize Ms. Sangmo or her children as Chinese citizens, because dual nationality is not recognized under Chinese law.

IV. The RAD's Decision

[12] The RAD dismissed Ms. Sangmo's appeal on January 27, 2015. The RAD disagreed with the RPD that Ms. Sangmo and her children have an automatic right to Indian citizenship. It relied on documentary evidence which confirmed that Tibetans face numerous legal and financial obstacles to obtaining citizenship. However, the RAD observed that acquiring citizenship always requires some effort on the part of an applicant.

[13] The RAD agreed with the RPD that Ms. Sangmo and her children are not nationals of China, because China does not recognize dual nationality.

V. Issue

[14] The sole issue raised by this application for judicial review is whether the RAD reasonably concluded that Ms. Sangmo and her children were not entitled to refugee protection because they “should reasonably have been granted the automatic citizenship in the Indian High Court decision, or have made an effort to obtain citizenship.”

VI. Analysis

[15] The RAD’s determinations of law are reviewable by this Court against the standard of correctness. So long as the law is stated correctly, the RAD’s findings of fact and the application of the law to those facts are reviewable against the standard of reasonableness (*Dolker v Canada (Minister of Citizenship and Immigration)*, 2015 FC 124 at para 7).

[16] I am satisfied that the RAD cited the correct legal test for determining a claimant’s country of nationality for the purpose of assessing a refugee claim, *i.e.*, whether “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” (*Williams* at para 22).

[17] In *Tashi v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1301 at para 13 [*Tashi*], Justice Mactavish observed that 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 Ms. Sangmo and her children. Justice Mactavish then discussed three cases that

she regarded as particularly worthy of consideration: *Wanchuk v Canada (Minister of Citizenship and Immigration)*, 2014 FC 885; *Tretsetsang v Canada (Minister of Citizenship and Immigration)*, 2015 FC 455; and *Dolma v Canada (Minister of Citizenship and Immigration)*, 2015 FC 703 [*Dolma*].

[18] In *Dolma*, Justice Tremblay-Lamer dealt with this Court's conflicting jurisprudence as follows:

[32] In my view, 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 refugee definition in the *1951 Convention Relating to the Status of Refugees* and section 96 of the 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.

[19] Justice Mactavish did not reject Justice Tremblay-Lamer's analysis in *Dolma*. However, in order to decide whether the Board's decision in *Tashi* was reasonable, she held that it was 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 to determine whether or not it supported the Board's conclusion that the situation in India had changed. Justice Mactavish concluded as follows (at para 38):

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.

[20] This may be contrasted with the RAD's decision in the case of Ms. Sangmo and her children. At para 21 of its decision, the RAD found that the "automatic right to citizenship" in India for Tibetans is not automatic, in that it requires legal support and funds. The RAD also accepted that the "automatic right to citizenship" is not demonstrated by the behaviour of the Indian authorities. The RAD acknowledged, based on the evidence presented, that Tibetans face many obstacles to acquiring Indian citizenship.

[21] I am unable to reconcile the RAD's factual findings in para 21 of its decision with the conclusion it reached in para 27 that Ms. Sangmo "should reasonably have been granted" automatic citizenship pursuant to *Dolker (Indian High Court)*, or should have made an effort to obtain citizenship. The RAD's decision is internally inconsistent, and this alone renders it unreasonable.

VII. Conclusion

[22] The application for judicial review is allowed, and the matter is remitted to a differently-constituted panel of the RAD for re-determination. Because the determinative issue in this application is the internal inconsistency of the RAD's decision, no question is certified for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed;
2. No question is certified for appeal.

“Simon Fothergill”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-716-15

STYLE OF CAUSE: TENZIN SANGMO, KARMA TSEWANG, SONAM
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