Federal Court  Cour fédérale

Date: 20110228

Docket: IMM-1839-10

Citation: 2011 FC 235

Toronto, Ontario, February 28, 2011

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

NYIMA LHAKYI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Ms. Lhakyi entered Canada through Pearson International Airport on December 11, 2006, using an Indian passport and was granted visitor status for six months as she said that she wanted to visit her brother in Toronto.

[2] The applicant subsequently claimed refugee protection. She filed a Personal Information Form (PIF) and had an intake examination on January 12, 2007. In both she stated that the Indian Passport that she used to enter Canada was fraudulent, that her place of birth was Dalhousie, India, and that her country of citizenship was China, as she was a Tibetan. In her PIF she stated that she feared persecution in China and that she could not return to India as she had no status there.

[3] The passport the applicant used to enter Canada was forensically examined and was determined to be genuine. The Refugee Protection Division of the Immigration and Refugee Board of Canada conducted a hearing of her refugee claim on March 17, 2010. The Board found "on a balance of probabilities, that the claimant is a citizen of India and that she can return to India using her Indian passport." No issue is taken by the applicant with that finding of fact. The applicant's concern lies with what the Board did, or failed to do, after making that finding.

[4] The Board concluded, based on its finding that the applicant was a citizen of India, that she was excluded from the application of the *Convention relating to the Status of Refugees*, July 28, 1951, [1969] Can. T.S. No. 6 (Refugee Convention) by virtue of Article 1(E), which provides as follows:

> This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

[5] Article 1(E) is incorporated into Canada's *Immigration and Refugee Protection Act*, SC 2001, c 27, which provides, at s. 98, that "A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection."

[6] The Board concluded that as the applicant was a citizen of India she had the right to return to India and live there. In other words, she was not in need of surrogate protection.

[7] The applicant submits that the Board erred. Counsel for the applicant, relying on *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, expressed the error to be the following:

> The Board confused the notion of exclusion under Article 1(E) with the notion of dual or multiple citizenships and that led it to follow a procedure that was wrong and unfair because it follows a finding of exclusion under Article 1(E) that an inclusion hearing is precluded. In cases of dual citizenship an inclusion hearing must be held and the refugee claim must be assessed under each country of citizenship.

In short, the applicant submits that the Board was obligated to conduct an evaluation of whether the applicant had a fear of persecution in India, but that having found that she was excluded from protection in China and having rejected her claim, such an assessment was not conducted.

[8] I am not convinced that *Ward* assists this applicant. Mr. Ward was born in Northern Ireland where he joined the Irish National Liberation Army (INLA). He ran afoul of the INLA and was confined and tortured by them as a suspected collaborator with the police. He was tried by the INLA and sentenced to death. He subsequently fled Ireland and claimed refugee status in Canada based on his fear of persecution as a member of a particular social group, the INLA. It was admitted before the Supreme Court that Mr. Ward had dual citizenship: he was a citizen of the Republic of Ireland and of Britain. It is true, as the applicant submits, that the Supreme Court stated that the Refugee Convention "requires consideration of the availability of protection in <u>all</u> countries of citizenship." However, the Court also noted that it is the claimant who has the burden of

establishing that he or she has a well-founded fear of persecution in all countries of which he or she is a national and that "[t]he fact that Ward's life will be in danger should he be returned either to Ireland or to Great Britain is not disputed by anyone …" In short, in *Ward*, the Board was obliged to consider the claimant's refugee claim as against both Ireland and Britain because allegations of fear of persecution and inability to seek protection had been raised vis-à-vis both jurisdictions.

[9] Ms. Lhakyi only raised a fear of persecution relating to return to China; she raised none concerning a return to India. Furthermore, there is nothing apparent on the facts of this case to suggest there was any fear of persecution in India, given that she lived and worked in India and had participated in pro-Tibet demonstrations there without incident. The onus of raising a claim of a well-founded fear of persecution rests with the applicant, not the Minister or the Board. Absent any such allegation, the Board was not required to conduct an examination of her need for protection in India.

[10] The application will be dismissed. Neither party proposed a question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is dismissed and no question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1839-10
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PLACE OF HEARING:	Toronto, Ontario
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APPEARANCES:

D. Clifford Luyt	FOR THE APPLICANT
Amy King	FOR THE RESPONDENT

SOLICITORS OF RECORD:

CONSTANCE NAKATSU Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
MYLES J. KIRVAN Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT