Federal Court  Cour fédérale

Date: 20161017

Docket: IMM-699-16

Citation: 2016 FC 1153

Ottawa, Ontario, October 17, 2016

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

TENZING YESHI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Defendant

JUDGMENT AND REASONS

[1] The Applicant, Mr. Yeshi, seeks judicial review of the decision of the Refugee Appeal Division of the Immigration and Refugee Board (RAD) that confirmed the decision of the Refugee Protection Division (RPD) and found that he was neither a Convention refugee nor person in need of protection.

I. Overview

[2] The Applicant claims to be a stateless person of Tibetan ethnicity. He was born in India, but claims he does not have Indian citizenship. He states that he is a follower of the Dalai Lama and fears deportation to China, where he would be persecuted for his religious beliefs and political opinion. He also claims that he would face discrimination in India and would be denied an Indian passport

[3] The RAD found that the Applicant is a citizen of India by birth and that his decision not to exercise his right to Indian citizenship precludes him from seeking protection in Canada. The RAD also found that he does not have a well-founded fear of persecution in India.

[4] On judicial review, the Applicant argues that the RAD breached procedural fairness by relying on the Federal Court decision in *Tashi v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1301, [2015] FCJ No 1412 (QL) [*Tashi*], which was rendered after he perfected his appeal, and by relying on evidence not on the record before the RAD. Alternatively, the Applicant argues that the decision is unreasonable because the RAD erred in its analysis of whether access to citizenship was within his control in light of the recent decision of the Court of Appeal in *Tretsetsang v Canada (Minister of Citizenship and Immigration)*, 2016 FCA 175, 398 DLR (4th) 685 [*Tretsetsang* (CA)].

[5] For the reasons that follow, the application for judicial review is dismissed.

[6] I find that there was no breach of procedural fairness arising from the RAD's reference to and consideration of *Tashi*. The RAD's consideration of *Tashi* did not raise a new issue. The Applicant knew the issues on appeal and made submissions to the RAD, including on the issue of his ability to access citizenship in India. The reasons demonstrate that the RAD's decision was based on the evidence on the record.

[7] I also find that the RAD's decision is reasonable. Although the RAD was guided by the Federal Court decision in *Tretsetsang v Canada (Minister of Citizenship and Immigration)*, 2015 FC 455, [2015] FCJ No 479 (QL) [*Tretsetsang* (FC)], the RAD's decision is consistent with the guidance of the Court of Appeal in *Tretsetsang* (CA) regarding the analysis to determine whether the right to citizenship is within the control of the Applicant. The RAD did not ignore evidence in the National Documentation Package (NDP). The RAD noted recent documents describing the changing conditions for Tibetans seeking Indian citizenship and acknowledged varying views.

II. Background

[8] The Applicant was born in India, in 1990. His parents are Tibetan. His father fled Tibet following the Chinese invasion and the Applicant's mother was born to Tibetan parents in India, in 1969.

[9] The Applicant has an Indian Birth Certificate, a Registration Certificate, which allows him to work, travel and reside in India, and an Identity Certificate stamped "no objection to return," which permits him to travel outside India.

[10] He arrived in Canada on January 17, 2015, and claimed refugee protection—first against Nepal, and then against China.

The RPD decision

[11] The RPD made several specific negative credibility findings which extended to all relevant evidence. Despite concerns regarding the Applicant's identity and his credibility, the RPD assessed the claim.

[12] The RPD concluded that the Applicant is a citizen of India by birth and does not face any risk in India, including deportation to China.

[13] The RPD noted the decision of the Federal Court of Appeal in *Canada (Minister of Citizenship and Immigration) v Williams*, 2005 FCA 126, 253 DLR (4th) 449 [*Williams*] which establishes that refugee protection will not be granted where acquisition of citizenship in a safe country is within the control of the claimant. The RPD also cited subsequent decisions that have applied the *Williams* test.

[14] The RPD noted that *The Citizenship Act, 1955*, (India), No 57 of 1955 [*Citizenship Act, 1955*] provides that:

> 3. Citizenship by birth.—(1) Except as provided in sub-section (2), every person born in India,
>
> (a) on or after the 26th day of January, 1950, but before the 1st day of July, 1987;
>
> (b) on or after the 1st day of July, 1987, but before the commencement of the Citizenship (Amendment) Act, 2003

> and either of whose parents is a citizen of India at the time of his birth;
>
> …
>
> shall be a citizen of India by birth.

[15] The RPD found that the Applicant was born in India in 1990, and that his mother was born in India in 1969. In accordance with paragraph 3(1)(a) of the Indian *Citizenship Act, 1955*, the Applicant's mother is a citizen of India, and the Applicant, born to a citizen of India in India, is a citizen of India pursuant to paragraph 3(1)(b). The RPD acknowledged that the Applicant may have some difficulties having his citizenship recognized. However, the RPD reviewed the objective country condition evidence regarding the situation of Tibetans in India and ultimately concluded that the Applicant is a citizen of India and that he does not face any risk in India.

III. The RAD Decision Under Review

[16] The Applicant's submissions to the RAD addressed the RPD's credibility findings, the RPD's determination that he could acquire citizenship in India, and the RPD's assessment of the Chinese citizenship.

[17] The RAD found that the new evidence submitted by the Applicant was not admissible in accordance with subsection 110(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

[18] The RAD found that the determinative issues were: (i) whether it is within the control of the Applicant to access citizenship in India, and (ii) if so, whether the Applicant has a well-founded fear of persecution in India.

[19] The RAD noted that the Applicant acknowledged that he would have a legal right to citizenship in India if his mother were a citizen at the time of his birth in 1990. However, he disputes that his mother had such citizenship. The issue of whether a Tibetan, in this case the Applicant's mother, born in India between 1950 and 1987, is a citizen by birth, or whether it is within her control to acquire such citizenship, has been addressed in decisions that apply the *Williams* test. The RAD referred to four specific decisions of this Court reflecting two lines of reasoning.

[20] The RAD favoured the reasoning in *Tretsetsang* (FC) and *Tashi.* In both decisions, the Court found that the decision-maker reasonably concluded, on the facts of those cases, that it was within the power of the applicant to exercise his right to citizenship and that an applicant must take some steps to access citizenship rather than speculate that such steps would be futile.

[21] The RAD found that the National Documentation Package (NDP) provided additional clarity about decisions of the Indian High Courts that deal with applications for citizenship by Tibetans. The RAD noted the distinguishing features of those decisions, along with the information provided in the Response to Information Requests (RIR) in the NDP.

[22] The RAD found that the Applicant had speculated that he could not acquire Indian citizenship and that it was reasonable to expect that he take steps to exercise his right "rather than rely on the untested supposition." Noting that he had a Birth Certificate to establish he was born in India and an Identity Certificate stamped "no objection to return," the RAD found that he would be able to establish his basis for citizenship to the Indian authorities. The RAD added that citizenship would provide the Applicant with state protection against any fear or risk of deportation to China.

[23] The RAD concluded, in light of all the evidence, that the Applicant is a citizen of India by birth and does not have a well-founded fear of persecution in India.

IV. The Issues

[24] The Applicant argues that the RAD breached its duty of procedural fairness and that the decision is not reasonable.

[25] The Applicant submits that the RAD breached its duty of procedural fairness: first, by failing to provide him with an opportunity to comment on *Tashi,* which the RAD relied on and which was rendered after he perfected his appeal; and, second, by basing its findings on the evidence presented to the RPD in *Tashi,* rather than the evidence on the record in the present case.

[26] Alternatively, the Applicant argues that the RAD's determination that it was within his control to access citizenship is unreasonable, as its analysis of the evidence did not conform to

the test established by the Court of Appeal in *Tretsetsang* (CA). The Applicant submits that the likelihood of needing to litigate in order to acquire citizenship is a significant impediment, which was not considered by the RAD. He argues that there was no obligation to take reasonable steps to obtain citizenship because such steps would have been futile.

V. The Standard of Review

[27] There is no disagreement in the present case that the standard of review to be applied by the Court on judicial review to issues of procedural fairness is correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43, [2009] 1 SCR 339).

[28] The RAD's findings of fact or mixed fact and law are reviewed on the reasonableness standard. The reasonableness standard focuses on "the existence of justification, transparency and intelligibility within the decision-making process" and considers "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190).

VI. Did the RAD Breach its Duty of Procedural Fairness?

A. ***Did the RAD breach its duty of procedural fairness by failing to provide the Applicant with an opportunity to comment on Tashi, a decision rendered after the Applicant perfected his appeal?***

[29] The Applicant argues that, given the division in the jurisprudence, the RAD breached its duty of procedural fairness by relying on *Tashi* without giving him an opportunity to respond. The Applicant characterizes the RAD's reliance on *Tashi* as analogous to raising a new issue. He

points to jurisprudence which has found a breach of procedural fairness when the decision-maker raised a new issue without giving the affected party an opportunity to respond. See *Ojarikre v Canada (Minister of Citizenship and Immigration)*, 2015 FC 896 at paras 22-23, [2015] FCJ No 909 (QL) [*Ojarikre*]; *Husian v Canada (Minister of Citizenship and Immigration)*, 2015 FC 684 at paras 10-11, [2015] FCJ No 687 (QL) [*Husian*]; *Ching v Canada (Minister of Citizenship and Immigration)*, 2015 FC 725 at paras 70-71, [2015] FCJ No 722 (QL) [*Ching*]; *R v Mian*, 2014 SCC 54 at para 30, [2014] 2 SCR 689 [*Mian*].

[30] The Respondent disputes that there was any breach of procedural fairness arising from the RAD's reference to *Tashi.*

[31] The Respondent notes that the cases relied on by the Applicant relate to situations where the decision-maker raised new issues or made additional credibility findings without offering the affected party an opportunity to address the issues. In the present case, the Applicant was aware of the issue before the RAD, the issue did not change, and the Applicant had a full opportunity to advance his arguments on the issue. The Applicant also had an opportunity to comment on the two lines of jurisprudence in his submissions and did so.

[32] The Respondent alternatively argues that, if the Court finds that the RAD breached its duty of procedural fairness, it would be pointless to remit the case to the RAD for redetermination because the same outcome is inevitable (*Mobil Oil Canada Ltd v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202, 111 DLR (4th) 1).

[33] The Respondent explains that the RAD's finding that the Applicant failed to take reasonable steps to access his right to citizenship, without an explanation, is consistent with *Tretsetsang* (CA). This finding is fatal, regardless of whether or not the Applicant had the opportunity to address *Tashi*. The Respondent contends that the RAD's conclusion that the Applicant could access citizenship in India is based on an assessment of the entire record, including the evidence in the NDP. An opportunity to comment on *Tashi* would not have impacted this assessment.

> *The RAD did not breach its duty of procedural fairness by failing to provide the Applicant with an opportunity to make submissions on Tashi*

[34] I agree with the Applicant that where an appellate tribunal or court raises and relies on a new issue, an opportunity should be given to the appellant to address that issue. I do not agree, however, that the RAD raised or relied on a new issue in this case.

[35] The Supreme Court of Canada considered what would constitute a "new issue" in *Mian*. *Mian* was a criminal case, but the principles have been applied in other proceedings, including the administrative context (see *Ching* at para 71).

[36] In *Mian* (at para 30), the Supreme Court defined a new issue as follows:

> An issue is new when it raises a new basis for potentially finding error in the decision under appeal beyond the grounds of appeal as framed by the parties. Genuinely new issues are legally and factually distinct from the grounds of appeal raised by the parties (see *Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712, at para. 39) and cannot reasonably be said to stem from the issues as framed by the parties. It follows from this definition that a new

> issue will require notifying the parties in advance so that they are able to address it adequately.
>
> [Emphasis added]

[37] In *Ojarikre* (at paras 20-24), this Court found that the RAD cannot base its decision on an issue, in that case an Internal Flight Alternative, that was not relied upon by the RPD and was not the subject matter of the applicant's appeal. The RAD must grant the applicant an opportunity to file new documentary evidence and submissions on the new issue.

[38] In *Husian*, this Court found that the RAD had erred by making additional substantive findings, which were not the findings of the RPD, and were not addressed by the applicant, without providing the applicant an opportunity to make additional submissions.

[39] The present circumstances are quite different. The issue before the RAD was the same issue before the RPD: whether access to Indian citizenship was within the Applicant's control. The RAD noted the reasoning in *Tretsetsang* (FC) and in *Tashi*, both of which addressed the division in the jurisprudence on the application of the *Williams* test.

[40] In his submissions to the RAD, the Applicant addressed the RPD's finding that he could obtain citizenship in India. He canvassed the two lines of jurisprudence and argued that *Tretsetsang* (FC) should not be followed. He further submitted that the divergence in the jurisprudence was immaterial because his citizenship was dependent on his mother's right to citizenship, which had been refused.

[41] The RAD did not raise a new issue by referring to *Tashi*; it raised a recent decision that addressed the issue considered by the RPD. *Tashi* reflects one line of jurisprudence on this central issue, of which the Applicant was aware.

[42] In *Mian* (at para 30), the Supreme Court noted that new issues are legally and factually distinct from the grounds of appeal raised by the parties. In the present case, the issue remained legally and factually the same.

[43] Given that no new issue was raised, there was no duty of procedural fairness to bring the *Tashi* decision to the attention of the Applicant and to invite submissions. Although this may have been a good practice in light of the evolving jurisprudence, in the present case, it was not an error warranting judicial intervention.

B. ***Did the RAD breach its duty of procedural fairness by basing its finding that the Applicant could access citizenship in India on the evidence considered by this Court in Tashi, rather than the evidence on the record in the present case?***

[44] The Applicant argues that the RAD erred in relying on evidence not before it to conclude that he has access to Indian citizenship. He submits that the RAD adopted the evidence relied on by this Court in *Tashi* that showed a change in country circumstances and a softening of India's approach towards Indian-born Tibetans.

[45] The Applicant acknowledges that, in *Tashi*, Justice Mactavish cautioned that a claim should be determined on the record (at paras 37-38). However, he argues that, in the present case, the RAD selectively relied on the RIRs, ignored evidence of the need to litigate, and

extensively cited *Tashi* to conclude that his Indian-born mother could now apply for Indian citizenship, which would assure his own citizenship.

[46] The Respondent submits that the RAD relied only on the record before it. The Respondent notes that RAD decisions often include lengthy quotes from the jurisprudence and this does not signal reliance on the evidence in that jurisprudence. The Respondent points out that the RAD specifically states that it assessed the record, including the 2015 NDP and the more recent High Court decisions in India.

The RAD did not rely on evidence which was not on the record before the RAD

[47] In *Tashi*, Justice Mactavish emphasized that the tribunal is required to determine the claim based on the particular factual circumstances of each case, including the most recent country conditions (at para 37).

[48] The RAD's decision reflects this guidance. The RAD noted the most recent NDP for India (2015) provided additional clarity about the 2010 and 2014 Delhi High Court and 2013 Karnataka High Court rulings on the right to citizenship by birth. The RAD noted, for example, that in the Delhi Court case, in which regional authorities denied a passport to a petitioner who was born in India in the relevant time period, the petitioner had indicated that his nationality was Tibetan and that this is what led to the passport denial.

[49] The RAD also referred to the decision of the Karnataka High Court, which noted the distinction between an Identity Certificate and Passport. The RIR stated that an individual

holding an Identity Certificate would not be precluded from making a claim of citizenship by birth. The RAD made more detailed references to other decisions of the Karnataka High Court and a more recent decision of the Delhi High Court, which found that the petitioner, born in 1979, could not be denied a passport on the basis of his parents' Tibetan origin. The RAD referred to other recent Court decisions regarding the inclusion of eligible Tibetans on the voters' registration list for 2014-15, as well as the objections of the Ministry of Home Affairs, which takes the position that Tibetans must first apply for Indian citizenship because they cannot be both refugees and citizens at the same time. The RAD acknowledged the tension in views, but concluded that granting voting rights is further evidence of India's willingness to confer citizenship to eligible Tibetans.

[50] The RAD also acknowledged the opinion of Professor Narain, although it did not accept her report as new evidence. The RAD noted that the report was similar to evidence included in the record as was the Professor's opinion that claiming citizenship may be a difficult and costly process with bureaucratic obstacles and that it will be determined on a case-by-case basis.

[51] The 2015 RIR, which the Applicant argues was ignored, was specifically cited by the RAD. This is what provided "clarity" to the RAD regarding the various decisions in the High Courts in India. The 2015 RIR is more recent that the 2013 RIR relied on by the Applicant, which describes obstacles that may remain for Tibetans seeking citizenship. The 2015 RIR does not contradict the 2013 RIR—both note the evolution of the approach towards Tibetans in India and that tensions remain—but the RAD was entitled to rely on and give more weight to the more current RIR (*Tashi* at para 37). Moreover, the RAD noted that the Applicant's circumstances

differ from the circumstances described in the 2013 RIR. For example, he has an Identity Certificate bearing a “no objection to return” stamp.

[52] Therefore, the RAD did not ignore the evidence on the record that some impediments to citizenship exist, or base its decision on evidence not on the record. The RAD considered and weighed the evidence on the record before it and the reasons reveal the information the RAD relied on to base its findings. As in *Tashi*, the record supports the reasonableness of the finding that, due to changing country conditions, access to citizenship is within the control of the Applicant.

VII. Is the RAD’s decision reasonable?

[53] The Applicant alternatively argues that the RAD erred in finding that access to Indian citizenship is within his power and control.

[54] The Applicant notes that the RAD relied on the decision of Justice Mosley in *Tretsetsang* (FC). He submits that his claim should now be considered in light of the Court of Appeal’s two-step analysis in *Tretsetsang* (CA), and that his need to litigate is a significant impediment to the exercise of his right to citizenship.

[55] The Applicant submits that in *Tretsetsang* (CA), Mr. Tretsetsang failed to establish any impediment because he had not taken any steps to determine whether India would recognize him without having to litigate. The Applicant argues that his circumstances are different. The Indian government did not recognize his mother’s right to citizenship, which shows it is not within his

mother's or his own control to acquire citizenship in India. The Applicant now also argues that he would need to litigate his right to citizenship and this impediment takes his right to citizenship out of his control.

[56] The Applicant acknowledges that in *Tresetsang* (CA), the Court of Appeal agreed that a claimant bears the onus of showing a significant impediment to acquiring citizenship and must take reasonable steps to overcome the impediment.

[57] The Applicant adds that *Tretsetsang* (CA) follows the logic of *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, 103 DLR (4th) 1, with respect to state protection. Although a claimant has the onus to show a lack of state protection, a claimant's failure to take any steps to engage state protection is not fatal when seeking state protection would be a futile exercise.

[58] The Applicant points to the dissenting reasons of Justice Rennie in *Tretsetsang* (CA), and Justice Rennie's finding that the need to litigate should be considered in determining whether access to citizenship is out of an applicant's control. He submits that the majority decision in *Tretsetsang* (CA) also supports the view that the need to litigate would be a significant impediment.

[59] The Applicant submits that the record provides evidence to support his position that litigation would be necessary, litigation is a significant impediment, and that such a significant impediment means his failure to take steps to access citizenship was not fatal to his claim.

[60] The Respondent submits that although the RAD's decision was rendered before *Tretsetsang* (CA), the RAD's decision is consistent with the Court of Appeal's two-part analysis. The Applicant's failure to take any steps to determine whether India would recognize him as a citizen is fatal to his claim for refugee protection. The RAD found that it was reasonable to expect that he take steps, rather than rely on an untested supposition. This approach has now been confirmed in *Tretsetsang* (CA). The need to litigate is not the issue, because the Applicant did nothing that may or may not have led to a need to litigate.

[61] The Respondent also notes that Justice Rennie, in his dissenting reasons, agreed that failure to take any steps is fatal and that what constitutes reasonable steps is fact specific. Justice Rennie also noted that the applicant must show on a balance of probabilities that they will need to litigate to acquire citizenship in order to establish or assert that they need not take any steps.

The RAD's decision is reasonable; it reflects the approach of the Court of Appeal in Tretsetsang (CA)

[62] Based on its review of the record, the RAD found that the environment in India had changed with respect to Tibetans. The RAD considered, among other things, the recent decisions in the Indian High Courts, the changes with respect to voting rights, and the provisions of the Indian *Citizenship Act, 1955.*

[63] The RAD found that the Applicant had speculated that he could not acquire Indian citizenship and that it was reasonable to expect that he take steps to exercise his right "rather than rely on the untested supposition." Noting that the Applicant had a Birth Certificate to

establish he was born in India, and an Identity Certificate stamped “no objection to return,” the RAD found that he would be able to establish his basis for citizenship. The RAD added that citizenship would provide him with state protection against any fear of risk of deportation to China.

[64] Although the Applicant did not raise the issue of the need to litigate before the RAD, he now submits that this should have been considered by the RAD in light of the Court of Appeal’s decision in *Tretsetsang* (CA). He asserts that the need to litigate is a significant impediment which absolves him of the onus to take any steps to exercise his right to citizenship, because, in his view, it would be futile to do so.

[65] The Applicant relies on the NDP, in particular the 2013 RIR—which refers to reports of Tibetans who were required to litigate to pursue citizenship—and submits that the RAD ignored these references.

[66] As noted above, I do not agree with the Applicant that the RAD selectively relied on evidence or ignored evidence. I do not agree that the RAD erred by failing to explain why it rejected contradictory evidence contrary to the principle established in *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 (QL), 157 FTR 35. The NDP was voluminous and the RAD is not required to refer to each document in that large package. The RAD identified the documents it relied on, including the most recent, and acknowledged remaining tensions and differing opinions regarding the obstacles faced by Tibetans in India. As indicated above, the RAD distinguished the Applicant’s circumstances

from those described in the 2013 RIR and noted the recent decisions of the Indian High Courts described in 2015 RIR.

[67] The RAD decision is reasonable in light of both the Federal Court's approach and the Court of Appeal's approach in *Tretsetsang* (FC) and *Tretsetsang* (CA). Contrary to the Applicant's submission, the facts of his case are analogous to the facts in *Tretsetsang*.

[68] In *Tretsetsang* (FC), Justice Mosley noted that the applicant did not dispute that he was legally entitled to Indian citizenship by virtue of his birth. Justice Mosley declined to follow other jurisprudence which found that obtaining citizenship was only a possibility because it may require litigation.

[69] At para 30, Justice Mosley stated:

> [30] If the applicant requests citizenship documents in India, such as a passport, and is denied, he can bring a court challenge similar to the ones described in the documentary evidence. In *Williams*, at para 27, the Court of Appeal held that an applicant must make attempts to acquire citizenship in any safe country where it is available to him. The same would seem to apply to the enforcement of rights to which the applicant is entitled by law, as a citizen, notwithstanding efforts at obstruction by officials. By the applicant's own admission at the RPD, he has never made any attempt to acquire or enforce rights of Indian citizenship. He merely speculates that he will not be able to succeed, despite the legislation and jurisprudence in his favour. In my view, he cannot claim protection in Canada without making any effort to avail himself of Indian nationality, to which he is entitled as a matter of law in that country.

[70] Justice Mosley clearly found that the onus on an applicant to make attempts to acquire citizenship includes pursuing litigation. In *Tretsetsang*, as in the present case, the applicant did not take any steps to enforce his rights.

[71] In *Tretsetsang* (CA), Justice Rennie, in his dissenting reasons, considered how the need to litigate should be addressed in the application of the *Williams* test. He found that if it is necessary for a person to litigate before the state will recognize their citizenship rights, then citizenship is *presumptively* out of their control (at para 34). He clarified that the onus is on the claimant to establish on a balance of probabilities that they will be required to litigate (at para 35).

[72] Justice Rennie summarized his conclusions at para 39. The majority of the Court of Appeal noted its agreement with para 39(d):

> (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, the failure to test the strength of that assertion is material and relevant evidence on the question of control.

[73] Justice Rennie ultimately found that the RAD's decision was not reasonable because it did not explain its reasoning and only set out its conclusions.

[74] The majority noted their agreement with some of Justice Rennie's conclusions but did not agree with his disposition of the appeal. The majority noted that the relevant right of citizenship

for the purpose of a section 96 refugee claim was the right that would entitle the claimant to state protection and restated the certified question as follows, at para 66:

> 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*?

[75] The majority answered the question in the negative and explained that only a significant impediment would do so (at para 67).

[76] The majority agreed with Justice Rennie's conclusion that the RAD can draw reasonable inferences from the failure to take reasonable steps. In addition, the majority found that a claimant's failure to take any steps to determine whether a country will recognize the claimant as a citizen, without a reasonable explanation, would be fatal to the refugee claim (at para 70).

[77] The majority then set out the analysis that should be conducted in applying the *Williams* test at para 72:

> [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.

[78] The majority explained that what constitutes reasonable efforts can only be determined on a case-by-case basis, adding that "[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" (at para 73).

[79] Although the majority does not specifically state how the need to litigate should be considered within the two-part test, they did consider this issue in assessing Mr. Tretsetsang's arguments. In my view, the majority decision reflects that the need to pursue litigation to access citizenship may constitute a "significant impediment," but this must be established by the claimant on a balance of probabilities, as would any other impediment asserted. The claimant must also establish on a balance of probabilities that he or she has made reasonable efforts to overcome that impediment.

[80] Whether the need to litigate is such a significant impediment that it would exempt the claimant from taking any steps to acquire citizenship is also a question of fact, which the claimant must establish on a balance of probabilities.

[81] In *Tretsetsang* (CA), the Court addressed Mr. Tretsetsang's argument that he would be required to bring an application to the Indian court and noted at para 76:

> [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.
>
> [Emphasis in original]

[82] Therefore, the Court of Appeal found, on facts very similar to the present case, that Mr. Tretsetsang's failure to take any steps to enforce his right to citizenship, and his lack of explanation, was fatal to his claim. He could not simply raise the possible impediment of litigation without doing something to advance his rights. The Court of Appeal concluded that Mr. Tretsetsang "failed to establish that there was any impediment, much less any significant impediment, to his ability to access the state protect[ion] rights inherent in his Indian citizenship" (at para 78).

[83] In the present case, the Applicant raised two impediments: (i) his mother's passport denial in 2000, and (ii) the need to litigate to exercise his right to citizenship.

[84] The RAD did not accept as new evidence the affidavit of the Applicant's mother but noted that, if it had, it would not overcome the RAD's findings regarding recent developments in India. In other words, the Applicant's mother's efforts over 16 years ago—whatever they may have been—were not reasonable efforts on the part of the Applicant to exercise his own right to citizenship in 2015. On the basis of *Tretsetsang* (CA), the RAD's finding is analogous to finding that the Applicant had not established a significant impediment, nor had he taken any steps to overcome such impediment.

[85] The Applicant did not establish on a balance of probabilities that he would need to litigate to access citizenship. He only speculates that this would be so. He did not take any steps, even short of litigation, to enforce his legal right.

[86] The Applicant's related arguments that the RAD ignored evidence of the need to litigate to access citizenship and that the need to litigate removes the onus of taking reasonable steps to access citizenship, are without merit. As noted above, the RAD was entitled to rely on the most recent RIR, which clarified the decisions of the Indian High Court. The RAD reasonably concluded that this evidence did not establish, on a balance of probabilities, that litigation is required. The RAD acknowledged opinions that bureaucratic obstacles to citizenship in India remain. However, it concluded that in the particular circumstances of this case—including the fact that the Applicant has a Registration Certificate and an Identity Certificate stamped "no objection to return"—the Applicant should have made some effort to exercise his right to citizenship.

[87] In conclusion, the RAD's decision is reasonable and consistent with the guidance provided by the Court of Appeal in *Tretsetsang* (CA). The RAD's decision falls within the range of reasonable outcomes which are justified on the facts and the law.

JUDGMENT

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

No question is proposed for certification.

"Catherine M. Kane"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-699-16
STYLE OF CAUSE:	TENZING YESHI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	AUGUST 24, 2016
JUDGMENT AND REASONS:	KANE J.
DATED:	OCTOBER 17, 2016

APPEARANCES:

Ronald Shacter	FOR THE APPLICANT TENZING YESHI
Eleanor Elstub	FOR THE DEFENDANT THE MINISTER OF CITIZENSHIP AND IMMIGRATION

SOLICITORS OF RECORD:

Silcoff, Shacter Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT TENZING YESHI
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE DEFENDANT THE MINISTER OF CITIZENSHIP AND IMMIGRATION