

Federal Court



Cour fédérale

**Date: 20181206**

**Docket: IMM-1130-18**

**Citation: 2018 FC 1223**

**Ottawa, Ontario, December 6, 2018**

**PRESENT: The Honourable Mr. Justice Fothergill**

**BETWEEN:**

**TENZIN KHANDO**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] Tenzin Khando seeks judicial review of a decision of the Refugee Protection Division [RPD] of the Immigration and Refugee Board. The RPD found that she was neither a Convention refugee nor a person in need of protection under ss 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] Ms. Khando makes valid criticisms of the RPD's analysis regarding the impediments she may face in attempting to obtain citizenship in India. However, the RPD's conclusion that she made insufficient efforts to overcome them is reasonable. The application for judicial review is therefore dismissed.

## II. Background

[3] Ms. Khando is an ethnic Tibetan who was born in Darjeeling, India on July 31, 1983. In August 2012, she used a false Indian passport to travel from Japan, where she was studying, to the United States of America. Ms. Khando then entered Canada using her Tibetan Green Book, an official document issued by the Central Tibetan Administration [CTA]. She claimed asylum in October 2012. Ms. Khando was able to pursue a refugee claim in Canada, despite arriving at a land point of entry from the United States, because her uncle is a successful refugee claimant in this country.

[4] In December 2017, Ms. Khando made enquiries of the Consulate General of India in Toronto regarding the acquisition of an Indian passport. The Consulate General informed her that she would need to present an Indian birth certificate. Ms. Khando asked her father, who was in India, if he could provide her birth certificate, but he could not.

III. Decision under Review

[5] Ms. Khando claims to fear persecution in China because she is a Buddhist Tibetan who follows the Dalai Lama and does not have a right to citizenship in India. She does not claim to fear persecution in India.

[6] The RPD refused Ms. Khando's refugee claim on February 13, 2018. It concluded that she has a legal right to Indian citizenship and that, despite the administrative barriers that often prevent ethnic Tibetans from obtaining Indian citizenship, she failed to make reasonable attempts to obtain it.

[7] Citing the Federal Court of Appeal's decision in *Canada (Citizenship and Immigration) v Williams*, 2005 FCA 126, the RPD stated that "[w]hen a claimant has citizenship available to her in another safe country or if it is within her power to acquire said citizenship, a claim for refugee protection may be denied." The RPD noted that Ms. Khando has *de jure* Indian citizenship under s 3(1)(a) of *The Citizenship (Amendment) Act, 2003* (India National Documentation Package, Item 3.1, September 14, 2017). However, the RPD acknowledged that *de jure* citizenship is not the same as *de facto* citizenship. The RPD therefore considered whether Ms. Khando faces obstacles to obtaining Indian citizenship and, if so, whether she made reasonable efforts to overcome them.

[8] The RPD found that Indian authorities are often reluctant to grant citizenship to ethnic Tibetans. Nevertheless, according to a Request for Information Report [RIR] dated May 12,

2017, the Delhi High Court ruled in *Wangyal v Union Of India & Ors*, 2016, High Court of New Delhi, WP(C) No 3539/2016 [*Wangyal*] that ethnic Tibetans born in India are entitled to Indian citizenship. The RPD accepted that, despite the decision, Indian authorities continue to deny ethnic Tibetans citizenship using various pretexts.

[9] The RPD acknowledged Ms. Khando's enquiries of the Consulate General of India in Toronto and her father's apparent inability to produce her Indian birth certificate. Ms. Khando said she did not learn of earlier decisions of Indian courts which confirmed the right of ethnic Tibetans to secure Indian citizenship until 2014, because she was studying in Japan when these cases were decided. The RPD rejected this testimony, finding that Ms. Khando's relatives were living in India at the time and would likely have been aware of these decisions.

[10] The RPD reviewed jurisprudence that addresses the availability of Indian citizenship to ethnic Tibetans. The RPD recognized that the prospect of citizenship is fact-dependent. This Court has sometimes found that citizenship was not available (*Wanchuk v Canada (Citizenship and Immigration)*, 2014 FC 885; *Dolma v Canada (Citizenship and Immigration)*, 2015 FC 703; *Sangpo v Canada (Citizenship and Immigration)*, 2016 FC 233), and sometimes that it was (*Tashi v Canada (Citizenship and Immigration)*, 2015 FC 1301; *Dolker v Canada (Citizenship and Immigration)*, 2015 FC 124; *Tretsetsang v Canada (Citizenship and Immigration)*, 2015 FC 455 [*Tretsetsang (FC)*]). The RPD acknowledged that the leading authority on this question is the decision of the Federal Court of Appeal in *Tretsetsang v Canada (Citizenship and Immigration)*, 2016 FCA 175 [*Tretsetsang (FCA)*].

[11] The RPD found that the impediments to obtaining Indian citizenship faced by ethnic Tibetans have decreased over the years and could not reasonably be said to prevent Ms. Khando from exercising her right to citizenship. The RPD also held that Ms. Khando had not made reasonable efforts to overcome the impediments that remain. The RPD therefore concluded that Ms. Khando could obtain Indian citizenship if she tried, and was neither a Convention refugee nor a person in need of protection.

#### IV. Issue

[12] The sole issue raised by this application for judicial review is whether the RPD reasonably found that Indian citizenship is available to Ms. Khando.

#### V. Analysis

[13] The RPD's conclusion that Indian citizenship is within Ms. Khando's control is a question of mixed fact and law and is subject to review by this Court against the standard of reasonableness (*Tretsetsang (FC)* at para 10; aff'd, *Tretsetsang (FCA)* at para 61; *Dakar v Canada (Citizenship and Immigration)*, 2017 FC 353 at para 15).

[14] In *Tretsetsang (FCA)*, the Federal Court of Appeal prescribed the following test for refugee claimants who say they are unable to obtain citizenship in another country:

[...] 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.

[15] The Federal Court of Appeal expanded upon the meaning of “reasonable efforts” at paragraph 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.

[16] Ms. Khando argues that the RPD unreasonably found there were no significant impediments to ethnic Tibetans obtaining Indian citizenship. She points to four articles submitted to the RPD that describe additional requirements imposed on ethnic Tibetans following the *Wangyal* decision. Passport officers now require ethnic Tibetans to cancel their registration certificates and identification certificates, vacate Tibetan refugee settlements, give up CTA benefits, and submit declarations that they have satisfied these requirements before a passport will be issued.

[17] Ms. Khando takes particular exception to the following paragraphs in the RPD’s decision:

[33] Counsel also submits that the claimant would have to give up some benefits as a Tibetan in India to apply for citizenship, without any guarantees that she would get Indian citizenship. I find, that if this is so, that the obligation is not onerous, as once she gets citizenship, the claimant would (no longer) be considered a refugee. Also if she does not obtain citizenship, there is no evidence that those benefits would not be restored to her.

[...]

[35] I find, given the recent changes in India, that the claimant, on a balance of probabilities, would be issued an Indian passport should she return to India and apply for one. I note that the claimant did not demonstrate that she made reasonable efforts in India to have her citizenship rights recognized as she did not approach Indian authorities to ask for citizenship. I find that the claimant did not make reasonable efforts to acquire Indian citizenship.

[18] Ms. Khando says there was no evidence before the RPD that ethnic Tibetans who try and fail to obtain Indian citizenship have their CTA benefits restored to them. She describes the RPD's conclusion that she would likely obtain an Indian passport if she returns to India and applies for one as "overly optimistic".

[19] Ms. Khando makes a valid point regarding the absence of any evidence that the CTA benefits she could enjoy as an ethnic Tibetan will be restored to her if she is unable to obtain an Indian passport. However, the onus was on Ms. Khando to demonstrate that the benefits would be irrevocably lost and, more fundamentally, that she depends on them to any significant extent. At the time she travelled to the United States, she was studying in Japan. There is no evidence that she has ever lived in a designated refugee settlement in India or that the renunciation of CTA benefits in order to obtain an Indian passport would affect her so adversely that it would not be reasonable to expect her to apply for one (*Tretsetsang (FCA)* at para 73).

[20] Ms. Khando's attempts to obtain Indian citizenship were limited to making enquiries of the Consulate General of India in Toronto shortly before the RPD hearing and asking her father whether he could produce her Indian birth certificate. She made no attempt to exercise her citizenship rights while in India, and no direct effort to obtain an Indian birth certificate following her enquiries of the Consulate General. The applicant in *Tretsetsang (FCA)* also argued that he could not obtain Indian citizenship because he did not have a birth certificate, but he was nevertheless expected to make reasonable efforts to overcome this impediment.

[21] I therefore conclude that the RPD's finding that Ms. Khando failed to make sufficient efforts to obtain Indian citizenship is reasonable and within the 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). Ms. Khando first attempted to obtain Indian citizenship more than five years after she arrived in Canada, just before the hearing into her refugee claim was scheduled to begin. It was open to the RPD to find that this did not constitute reasonable efforts.

[22] Ms. Khando must meet both parts of the test articulated by the Federal Court of Appeal in *Tretsetsang (FCA)* at paragraph 72. Even if there are shortcomings in the RPD's analysis of the impediments faced by Ms. Khando in obtaining citizenship in India, its conclusion that she made insufficient efforts to overcome them is reasonable. The application for judicial review is therefore dismissed.

[23] Neither party proposed that a question be certified for appeal.



**JUDGMENT**

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

"Simon Fothergill"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-1130-18

**STYLE OF CAUSE:** TENZIN KHANDO v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** NOVEMBER 21, 2018

**JUDGMENT AND REASONS:** FOTHERGILL J.

**DATED:** DECEMBER 6, 2018

**APPEARANCES:**

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