

Federal Court



Cour fédérale

**Date: 20190503**

**Docket: IMM-4191-18**

**Citation: 2019 FC 563**

**Ottawa, Ontario, May 3, 2019**

**PRESENT: Madam Justice Mactavish**

**BETWEEN:**

**PEMA YALOTSANG  
RAFAEL YALOTSANG  
SAMPA LEDUP YALOTSANG**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

[1] Pema Yalotsang and her two children seek judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board refusing their application for refugee protection. The application focusses on the situation of Ms. Yalotsang, as no evidence was provided to the Board suggesting that her children would be at risk in the United States - the country of their birth.

[2] Although Ms. Yalotsang was born in India, she asserts that government authorities in that country do not recognize people of Tibetan ancestry as Indian citizens. As a result, she contends that if she were sent back to India, she would be deported to China, where she claims to fear persecution because of her Tibetan ethnicity and the fact that her family are followers of His Holiness the Dalai Lama.

[3] The Board found there were serious concerns with respect to Ms. Yalotsang's credibility. It further found that Ms. Yalotsang was entitled to citizenship in India by virtue of her birth in that country, with the result that her claim for refugee protection was refused.

[4] Ms. Yalotsang submits that the Board erred in its assessment of her credibility and that the Board further erred in finding that it was within her control to have her Indian citizenship recognized by the Indian government. Finally, Ms. Yalotsang submits that the Board disregarded evidence demonstrating that individuals in her situation whose residency cards have expired risk deportation to China by the Government of India.

[5] For the reasons that follow, I am satisfied that the Board erred in its treatment of the citizenship issue. As this issue is determinative of the outcome of this case, it is unnecessary to deal with Ms. Yalotsang's other two arguments, and her application for judicial review will be granted.

#### **I. The Board's Treatment of the Citizenship Issue**

[6] There have been a number of cases dealing with refugee claims brought by people of Tibetan ancestry who were born in India, and the entitlement of such individuals to Indian citizenship and the protection of the state.

[7] The most recent appellate authority involving such individuals is the Federal Court of Appeal's decision in *Tretsetsang v. Canada (Citizenship and Immigration)*, 2016 FCA 175 at para. 72, 398 D.L.R. (4th) 685. There the Court held that the test for determining whether a refugee claimant has a particular "country of nationality" is the control test that was set out in *Williams v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 126, [2005] 3 F.C.R. 429.

[8] In *Williams*, the Federal Court of Appeal held that an individual will not be entitled to refugee protection in Canada where his or her acquisition of citizenship in a safe country is a matter of mere formality, or is within the control of the individual: at paras. 19-23. The Court went on to hold that where citizenship in a safe country is available, an applicant will be expected to make efforts to acquire it: *Williams*, above at para. 27.

[9] The majority of the Federal Court of Appeal held in *Tretsetsang* that a "country of nationality" will include a country where the claimant is a citizen, even if they may face an insignificant or minor impediment to accessing state protection. It may not, however, include a country where the claimant is a citizen if they face a significant impediment to accessing state protection.

[10] In this case, the Board considered whether Ms. Yalotsang was a citizen of India. It observed that paragraph 3(1)(a) of the Indian *Citizenship (Amendment) Act*, 2003 states that every person born in India between January 26, 1950 and July 1, 1987 is a citizen of India by birth. Given the uncontroverted evidence that Ms. Yalotsang was born in India in 1972, the Board concluded that she was an Indian citizen as of right.

[11] However, the majority of the Federal Court of Appeal went on at paragraph 67 of *Tretsetsang* to observe that the question is not just whether someone is a citizen of a particular country, but also whether the country in issue would recognize the individual as a citizen and provide them with state protection.

[12] Although the Board found there to be numerous problems with Ms. Yalotsang's credibility, it accepted that she was indeed born in India in 1972, leading it to conclude that she was a citizen of that country as of right. It did not, however, consider whether Indian authorities would in fact recognize Ms. Yalotsang as a citizen of India, and whether it would provide state protection to her. This constitutes a reviewable error.

[13] Instead of considering whether the Indian authorities would recognize Ms. Yalotsang's Indian citizenship, the Board proceeded to consider the sufficiency of the efforts that she made to obtain an Indian passport. After discussing the steps that she did take, the Board concluded that she had not discharged the onus on her to show that she had taken sufficient steps to exercise her citizenship rights.

[14] However, the reasonableness and sufficiency of the steps that have been taken by a refugee claimant to assert his or her citizenship rights in a given country will depend on the nature and significance of whatever impediment to accessing state protection may exist in the case in question.

[15] Ms. Yalotsang provided the Board with substantial evidence relating to the impediments that are faced by individuals in her position in having their Indian citizenship recognized by Indian authorities. Amongst other documents was a legal opinion from a lawyer in India who had

evidently been involved in a number of Court cases in which people of Tibetan ancestry who were born in India have endeavoured to obtain Indian passports.

[16] The lawyer acknowledges that the Indian Courts have held that people in Ms. Yalotsang's situation are indeed citizens of India as of right, by virtue of their birth in that country. However, the lawyer then goes on to discuss the numerous impediments that continue to be faced by such individuals in trying to have their citizenship recognized by Indian authorities.

[17] Amongst other impediments, the lawyer describes the difficulties that are encountered by people in Ms. Yalotsang's situation in obtaining the identification documents that are required to obtain Indian passports, as well as the general unwillingness of Indian passport officials to accept that Tibetans born in India are indeed Indian citizens.

[18] Although the Board made a passing reference to "the affidavits" submitted by Ms. Yalotsang in support of her argument, it did not engage with this evidence in any way. Indeed, there is no mention whatsoever of the legal opinion in the Board's decision, apart from the cryptic reference to "the affidavits" submitted by Ms. Yalotsang.

[19] It is true that administrative decision-makers are presumed to have considered all of the evidence before them, and that they are not required to refer to each piece of evidence in their reasons: *Hassan v. Canada (Minister of Employment and Immigration)* (1992), 147 N.R. 317, [1992] F.C.J. No. 946 (F.C.A.); *Florea v Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 598 at para.1, 1993 CarswellNat 3983 (F.C.A).

[20] The Supreme Court of Canada has, moreover, made it clear that decision-makers are not required to discuss all of the arguments, evidence, statutory provisions, jurisprudence or other

details raised in a particular case, nor are they required to make explicit findings with respect to each constituent element of a case, however subordinate, leading to their final conclusion:

*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para. 16, [2011] 3 S.C.R. 708.

[21] That said, the more important the evidence that is not specifically mentioned and analyzed in a tribunal's reasons, the more willing a court may be to infer that it made an erroneous finding of fact without regard to the evidence: see *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35 at paras.14-17, [1998] F.C.J. No. 1425.

[22] The documentary evidence adduced by Ms. Yalotsang (including the legal opinion) was central to her case. As such, the Board was required to engage with it, and to explain why it was accepting or rejecting the evidence, or was assigning it little weight, whatever the case may be. Its failure to do so means that the decision lacks the justification, transparency and intelligibility required of a reasonable decision, constituting a further reason why the application for judicial review will be granted.

## **II. Certification**

[23] I agree with the parties that the case is fact-specific and does not raise a question that is suitable for certification.

**JUDGMENT IN IMM-4191-18**

**THIS COURT'S JUDGMENT is that:**

1. This application for judicial review is allowed and the matter is remitted to a differently constituted panel of the Refugee Protection Division for re-determination.

"Anne L. Mactavish"

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Judge

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

**DOCKET:** IMM-4191-18

**STYLE OF CAUSE:** PEMA YALOTSANG, RAFAEL YALOTSANG, SAMPA  
LEDUP YALOTSANG v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** APRIL 29, 2019

**JUDGMENT AND REASONS:** MACTAVISH J.

**DATED:** MAY 3, 2019

**APPEARANCES:**

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