Date: 20040930

Docket: IMM-1420-04

Citation: 2004 FC 1329

Ottawa, Ontario, this 30th day of September, 2004

Present: THE HONOURABLE MR. JUSTICE von FINCKENSTEIN

BETWEEN:

TENDZIN CHOEZOM

Applic
ant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respond
ent

REASONS FOR ORDER AND ORDER

[1] The 30 year old Applicant is the daughter of Tibetan refugees. She was born in India, where her family continues to reside, but is considered to be a citizen of the People's Republic of China.

[2] From the time of her birth until 1994, the Applicant, as all other Tibetan residents of India, was required to obtain a Registration Certificate (RC), which was renewed annually. In 1994, when she travelled to the United States for the purposes of study and employment, she was issued an Identity Certificate (IC), which she continues to renew periodically. The Applicant must obtain a visa and carry her IC with her if she wishes to visit India. If she were to return to reside in India, she would need to have a valid IC, a visa and would need to first obtain a NORI (No Objection for Return to India). Once back in India she would need to obtain a new RC . While living in India, Tibetans are not permitted to travel to many locations in India without permission from local authorities or the police,

[3] The Applicant resided in the United States until 2003. During this time, she did not claim asylum. Instead she travelled to Canada in 2003 where she claimed refugee protection on numerous grounds, including race and religion.

[4] The determinative issue before the Board was whether or not the Applicant was a refugee by virtue of the exclusionary clause set out in Article 1(E) of the Refugee Convention. In its Reasons the Board noted:

1. The Applicant has consistently been able to obtain identification documents which provided her with a right to reside in and return to India;

2. The Applicant has been freely able to work in her profession of choice;

3. The Applicant would have been able to pursue schooling if she had not decided to move to the United States; and

4. The Applicant has been provided with the same food rations and medical services as Indian citizens.

[5] Accordingly, the Board concluded that the Applicant had the normal rights and obligations of an Indian citizen and therefore was excluded from the definition of convention refugee pursuant to Article 1(E) of the Refugee Convention. The Applicant now seeks judicial review of this decision.

ISSUE

[6] Did the Board err in concluding that the Applicant was excluded from the definition of Convention Refugee pursuant to Article 1(E) of the Refugee Convention?

[7] **RELEVANT LEGISLATION**

Immigration and Refugee Protection Act, R.S.C. 2001, c. 27 (IRPA)

Exclusion - Refugee Convention	Exclusion par application de la Convention sur les réfugiés
98. 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.	98. La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.

Convention relating to the Status of Refugees, Article 1

Article 1. - Definition of the term "refugee"	Article premier. -- Définition du terme "réfugié"
E. 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.	E. Cette Convention ne sera pas applicable à une personne considérée par lesautorités compétentes du pays dans lequel cette personne a établi sa résidencecomme ayant les droits et les obligations attachés à la possession de lanationalité de ce pays.

STANDARD OF REVIEW

[8] The standard of review for decisions as to whether or not an applicant falls within Article 1(E) of the Refugee Convention was considered by Blais J. in *Hassanzadeh v. Canada (M.C.I.)*, [2003]_F.C.J. No. 1886 at para 18 ;

The standard of review is that of the patently unreasonable decision, or an error of law, or a denial of natural justice. The applicant has not argued the latter possibility, and thus we are left with needing to find a patently unreasonable finding of fact or an error of law to overturn the decision.

[9] Whether or not an individual will be excluded pursuant to Article 1(E) requires an examination of all of the circumstances of the case, including:

a) right to return to and reside for an unlimited period of time in the country of residence,

b) the right to study,

c) the right to work; and

d) the right to access basic social services in that country.

See *Shamlou v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 1537; *Kanesharan v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 1278).

[10] It is fairly self evident that the most relevant factor is the right of return and the nature of the residence.

[11] In other cases involving Indian-born Tibetans the Board consistently has held that Article 1(E) does not apply. See C.R.D. (Re) [2000] C.R.D.D. No. 160, F.F.X. (Re) [2000] C.R.D.D. No. 159.

[12] In *Kroon v. Canada (M.C.I.)*, [1995] F.C.J. No. 11) MacKay J held that:

In my view, the purpose of Article 1E is to support regular immigration laws of countries in the international community, and within the Immigration Act of this country to support the purposes of that Act and the policies it seeks to legislate, by limiting refugee claims to those who clearly face the threat of persecution. If A faces such a threat in his own country, but is living in another country, with or without refugee status, and there faces no threat of persecution for Convention reasons, or put another way, A there enjoys the same basic rights of status as nationals of the second country, the function of Article 1E is to exclude that person as a potential refugee claimant in a third country. (Underlining added)

[13] IRB Document IND33125.X, dated December 23rd, 1999, and IRB Document IND22524.E, dated December 21, 1995, provide evidence regarding the requirements for RC's IC's, visas, NORI's and the internal travel restrictions imposed on Tibetans regarding certain locations. The Board itself did not take issue with this evidence. It, however, came to the following conclusion:

Based upon the claimant's counsel's admissions and the documentary evidence before me, I find on a balance of probabilities that the claimant has a right of return to India, her former country of residence, that Indian authorities would issue her a Registration Certificate for Tibetans upon her return to India, and that she would not be at risk of being deported to Tibet. In making this finding, I also refer to claimant's testimony at the hearing. Prior to her departure from India to the United Sates, her father was a member of the Tibetan Government in Exile Assembly, and her mother was a cabinet minister with the Tibetan Government in Exile. Her parents who continue to reside in India travelled abroad frequently and to her knowledge they experienced no difficulties in returning to India after travelling abroad. In addition, the claimant testified that she experienced no difficulties in returning to India from the United States in 1993.

[14] I find it difficult to accept this conclusion. On the basis of this evidence, it is self evident that the Applicant (with respect to the fundamental right of return and the nature of the residence in India) does not have the same rights as an Indian citizen. The need for annual RC's, IC's, visas, NORI's and the prohibition to visit certain locations within India are all antithetical to the 'basic rights of status as nationals'. All of these rights are not permanent and their renewal is at the discretion of the Indian government. It may be changed at any time for political, geopolitical (i.e. the need for good relations with China) or security reasons. The fact that there is no evidence that the Indian government has so far refused to issue RC's, IC's, visas or NORI's does not mean it has given up the right to do so. The Tibetans' existence in India is thus at the sufferance of the Indian government. As right to stay at sufferance does not amount to 'the same basic rights of status as nationals' of India enjoy. In my view the Board erred in concluding that the Applicant falls within the exclusion set out in Article 1(E) of the Refugee Convention.

[15] The Respondent argued as an alternative justification for the Board's decision that Tibetans may apply for Indian citizenship. However, the evidence on this point is inconclusive and the Board itself was ambivalent on this point,

Generally, Indian citizenship is not available to Tibetan refugees. There are, however, some exceptions to this rule, whereby second-generation Tibetans who are born in India may apply for Indian nationality. Some sources, however, suggest that there are formal barriers to Tibetan refugees applying for citizenship, as with all other foreign residents, but the application is likely to be refused.

[16] Given this finding there is no need for me to address this point.

[17] In light of the foregoing reasons this application will be allowed.

ORDER

THIS COURT ORDERS that the decision of the Immigration and Refugee Board dated December 10, 2003, is set aside and the matter is referred back to another panel for reconsideration.

"K. von Finckenstein"

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-1420-04

STYLE OF CAUSE: TENDZIN CHOEZOM v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: CALGARY, ALBERTA

DATE OF HEARING: September 16, 2004,

REASONS FOR :

DATED: September 30, 2004

APPEARANCES:

Mr. G. Michael Sherritt	FOR APPLICANT
Mr. Robert Drummond	FOR RESPONDENT

SOLICITORS OF RECORD:

Sherritt Greene Calgary, Alberta	FOR APPLICANT
Morris Rosenberg, Deputy Attorney General of Canada (Edmonton Regional Office) Edmonton, Alberta	FOR RESPONDENT