IN THE HIGH COURT OF DELHI AT NEW DELHI

W.P.(C) 12179/2009

Decision on: December 22, 2010

NAMGYAL DOLKAR ..... Petitioner
Through: Dr. Roxna S. Swamy, Advocate.

versus

GOVERNMENT OF INDIA, MINISTRY OF EXTERNAL AFFAIRS ..... Respondent
Through: Mr. Sachin Datta with
Mr. Manikya Khanna and
Mr. Sandeep Bajaj, Advocates.

CORAM: JUSTICE S. MURALIDHAR

1. Whether Reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in Digest? Yes

JUDGMENT
22.12.2010

1. By a letter dated 1st September 2009 the Regional Passport Officer, Delhi ('RPO') informed the Petitioner that a decision had been taken by the Ministry of External Affairs ('MEA') that a passport could not be issued in her favour under Section 6(2)(a) of the Passports Act, 1967 ('PA') as she could not be treated as an Indian national under Section 3(1)(a) of the Citizenship Act, 1955 ('CA'). The said decision has been challenged in this writ petition. The Petitioner further seeks a declaration that she is an Indian citizen.

2. The Petitioner was born on 13th April 1986 in Kangra, Himachal Pradesh and claims that she is an Indian citizen by birth. Admittedly,

both her parents are Tibetan refugees, born in Tibet. A copy of her birth certificate is enclosed with the writ petition.

3. The Petitioner states that on 21st April 2005 pursuant to an application made by her, an Identity Certificate bearing no. 025942 was issued to her. Inter alia, the certificate stated as under:

> "This certificate is issued for the sole purpose of providing the holder with identity papers in lieu of a national passport. It is without prejudice to and in no way affects the national status of the holder. If the holder obtains national passport, this certificate ceases to be valid and must be surrendered to the nearest Indian Passport Issuing Authority"

4. On 10th March 2008, the Petitioner applied to the Delhi office of the RPO for an Indian passport. In Column 14 in response to a question "Are you a citizen of India by birth/descent/registration/naturalisation?" the Petitioner indicated that she is a citizen by birth. In response to a question "if you have ever possessed any other citizenship?", she answered: "No".

5. The Petitioner states that a long drawn out enquiry was carried out by the RPO and on 12th November 2008 the following letter was issued to her:

> "Please furnish your explanation for suppression of material information about your earlier application for passport to this office and also meet the concerned PRO/Superintendent to clarify or to pay the penalty as applicable."

6. In response to the above letter, the Petitioner replied stating that she had never ever earlier applied for a passport and therefore, the question of suppression of material information about such application did not arise. The Petitioner states that on 16th December 2008 she appeared in person before the RPO and was informed that her passport application would be granted provided she did not retain her Tibetan identify certificate. The Petitioner states that she expressed her "willingness to give up this identity certificate". On 18th December 2008 when the Petitioner returned with her identity certificate, the concerned officer of the RPO refused her application with the endorsement: "the applicant has stated her parents are Tibetan. Advised to apply for I/C". A notice dated 20th December 2008 was sent by the Petitioner to the RPO demanding that she be issued the passport to which she was entitled as an Indian citizen. This was followed by a further legal notice dated 24th January 2009.

7. When nothing was heard from the Respondents the Petitioner filed Writ Petition (Civil) No. 7706 of 2009 in this Court seeking a direction to the Respondents to issue her an Indian passport. The said writ petition was disposed of by this Court by an order dated 24th March 2009, the relevant portion of which reads as under:

> "The Respondent is hereby directed to complete such enquiries as are necessary in this regard and communicate the response either accepting the application in which case, issue passport or if there are grounds to deny the same, do so through an appropriate order but in accordance with law within six weeks from today."

8. Thereafter when the passport was still not issued, the Petitioner filed Civil Contempt Petition No. 654 of 2009 in this Court. During the pendency of the said contempt petition, the impugned order dated 1st September 2009 was passed whereby the Petitioner was informed that she could not be treated as a citizen of India under Section 3(1)(a) of the CA. The Petitioner relies upon the very same provision to urge that she is an Indian citizen by birth.

9. Dr. Roxna Swamy, learned counsel appearing for the Petitioner submitted that in terms of the Citizenship (Amendment) Act, 1986, enacted on 28th November 1986 (the date of commencement of which was notified as July 1987) every person born in India prior to the amendment is an Indian citizen. She referred to the Statement of Objects and Reasons ('SOR') appended to the Bill as well as the debates that took place both in the Lok Sabha and the Rajya Sabha when the said amendment Bill was discussed and passed. She submitted that the legislative intent was to make the amendment to Section 3(1)(a) CA prospective. In this case the Petitioner was born on 13th April 1986. She was an Indian citizen by birth in terms of the said amendment.

10. Secondly it is submitted that under the PA and the Rules made thereunder, no Indian citizen could be denied a passport except on the specific grounds set out thereunder. Learned counsel for the Petitioner relied upon the decisions of the Supreme Court in ***Satwant Singh v. A.P.O., New Delhi AIR (1967) SC 1836*** and ***Maneka Gandhi v. Union of India AIR (1978) SC 597***. It is submitted that rejection of the

Petitioner's application for passport is in violation of her fundamental rights under Articles 14, 19 and 21 of the Constitution of India.

11. Thirdly, it is submitted that the Petitioner has complied with all the necessary formalities under the PA; in particular, Section 5 (1), (1A) and (1B) thereof. Under Section 5(3) where the passport authority makes an order under Clause (b) or (c) of sub-section (2) and refuses to issue a passport, it should mandatorily record a brief statement of its reasons and furnish to the applicant on demand a copy of the same. This was not done in the instant case. Since the order was passed by the MEA, i.e. the Central Government, no statutory appeal was maintainable under Section 11 PA.

12. In reply, it is submitted by Mr. Sachin Dutta, learned counsel appearing for the Respondent, that under Section 6(2)(a) of the PA only an Indian citizen was eligible for a passport. It is stated that in an application made by the Petitioner under the Registration of Foreigners Act, 1939 she indicated her present nationality as 'Tibetan'. It is submitted that since on her own understanding, the Petitioner did not consider herself to be an Indian citizen, she could not be granted an Indian passport. Secondly, it is submitted that during the processing of her application for the passport, the system in the office of the RPO detected that she was already in possession of an identity certificate dated 20th April 2007, which was a travel document under Section 4(2) of the PA. It is stated that an identity certificate is issued to "'stateless' persons resident in India" including Tibetan refugees. In terms of Rule

13 of the Passports Rules, 1980 a person is eligible to hold only one passport or travel document. The MEA was consulted and it had opined that the Petitioner was a stateless person and was already holding an identity certificate issued under the PA and therefore, she could not be treated as an Indian citizen under Section 3(1)(a) of the CA. The counter affidavit of the MEA further stated that according to a policy decision taken by the Ministry of Home Affairs (MHA), a Tibetan national who entered India after March 1959 will not be granted citizenship by naturalization under Section 6(1) CA. However, Tibetan nationals married to Indian citizens would be considered for citizenship under Section 5(1)(c) CA.

14. During the course of hearing of the present petition on 19th September 2010 an adjournment was sought by Mr. A.S. Chandhiok, learned Additional Solicitor General appearing for Union of India stating that the entire matter would be re-examined. The Court was then informed on the next date, i.e. 20th October 2010, that an inter-ministerial meeting was scheduled for the second week of November for discussing the issues arising out of this writ petition. At the next hearing on 14th December 2010 Mr. Sachin Datta, learned counsel appearing for the Respondents submitted that the Petitioner should apply for a citizenship under the CA and on such application being made, appropriate orders would be passed on such application in accordance with law.

15. Learned counsel for the Petitioner in reply pointed out that since the Petitioner's case was that she was an Indian citizen by birth, the question

of her having to apply for Indian citizenship did not arise. Moreover, in the impugned order dated 1st September 2009 the MEA had already taken a stand that the Petitioner could not be treated as an Indian national under Section 3(1)(a) of the CA. Therefore, it was pointless to require the Petitioner to apply afresh under the CA for grant of Indian citizenship.

16. The above submissions have been considered. It is not in dispute that the Petitioner was born in Kangra, Himachal Pradesh, India on 13th April 1986 and both her parents are Tibetans. The case of the Petitioner essentially is based on Section 3(1)(a) CA.

17. Prior to its amendment in 1986 by the Citizenship (Amendment) Act, 1986, Section 3 CA read as under:

> "**3. Citizenship by birth** - (1) Except as provided in sub-section (2) of this Section, every person born in India on or after the 26th January, 1950, shall be a citizen of India by birth.
>
> (2) A person shall not be such a citizen by virtue of this Section if at the time of his birth—
>
> (a) his father possess such immunity from suits and legal process as is accorded to an envoy of a foreign sovereign power accredited to the President of India and is not a citizen of India; or
>
> (b) his father is an enemy alien and the birth occurs in a place then under occupation by the enemy."

18. On 16th October 1986 the Citizenship (Amendment) Bill 1986 was tabled in Parliament. The SOR appended to the Bill read as under:

"A large number of persons of Indian origin have entered the

territory of India from Bangladesh, Sri Lanka and some African countries and they are residing in India. Government has taken a serious view of the entry of persons clandestinely into India and with a view to making the provisions of the Citizenship Act relating to the grant of Indian citizenship more stringent it is proposed *inter alia* to make the following changes in the Citizenship Act, 1955, namely –

(i) under the existing provisions, every person born in India on or after the 26th day of January 1950, shall be a citizen of India by birth. With a view to preventing automatic acquisition of citizenship of India by birth, it is proposed to amend the Act to provide that every person born in India after the commencement of the amending Act will become a citizen of India by birth only if at the time of his birth either of his parents is a citizen of India;

(ii) under the Act, certain categories of persons may apply for citizenship by registration. One such category is those persons of Indian origin who are ordinarily resident in India and have been so resident for six months immediately before making an application for registration. Another category is women who are, or have been, married to citizens of India. These provisions are proposed to be made more stringent by providing that a person would be eligible for citizenship by registration only if he is ordinarily resident in India and have been so resident for five years immediately before making an application for registration. It is also proposed to change the word "women" by "persons" in the latter category so that the eligibility of citizenship through marriage to citizens of India now admissible to women only is extended to men also.

(iii) under the Act, a person who is not a citizen of a Commonwealth country referred to in the First Schedule to the Act may apply for the grant of a certificate of naturalization if he had resided in India for the period of at least five years. It is proposed to increase this period to ten years.

2. The Bill seeks to achieve the aforesaid objects."

19. The bill was first taken up for discussion in the Lok Sabha on 19th November 1986. The Minister for State for Home Affairs Mr. P. Chidambaram explained that the proposed amendment was intended to inter alia achieve the following:

"(i) The persons born in India after the amendment will become citizens of India by birth only. If at the time of his birth either of his parents is a citizen of India as against the existing provisions of accrual of citizenship of India to every person born irrespective of his parentage."

20. In response to the discussion that ensued, the Minister further explained as under:

"A large number of people for various reasons have come into India and are coming into India. I would not set store by any statistics because these figures are far from accurate, but some figures are incontrovertible. While the overall increase of population in the whole of West Bengal is around 22 per cent, we find that in some of the border districts the rate of increase is as high as 29 per cent, 30 per cent and in some cases even 37 per cent. Why is this so? It is so because India today, in this part of the world, is looked upon as a country of great opportunity and people are coming into this country.

> While it is the primary responsibility of the Central Government to prevent such clandestine entry, this responsibility cannot be discharged without the willing cooperation of the border States. That cooperation, I am sorry to say, is not always forthcoming. We have our own problems. Not that we are not generous to people who want to come to this land. But we cannot be generous at the cost of our own people, at the cost of our own development and we cannot bear the burden of clandestine entry of a large number of people. You call them refugees, you call them deprived people. We cannot bear that burden for very long. Therefore, I think the time has come to tighten up our citizenship laws. I am not saying that this is the end of the exercise. But the place to begin is to tighten up our citizenships laws, and tell the world that India will grant citizenship only under very strict conditions; our laws are being made more stringent. This is all that the Bill does."

21. Thereafter, the Minster proceeded to explain that the amendment was meant to be prospective. The relevant statement made by the Minister reads as under:

> "I have already answered the arguments that this Bill is not unconstitutional. Yet if some hon. Members wish to persist with that argument, all I can say is that this is not the forum to decide it, and a forum, I am sure, will decide this at the opportune moment if the question is raised. But let me say this. If we had made this Bill retrospective, then this would be a negation of human rights. We are not making it retrospective. On the contrary, we have categorically said that the distinction we make between children born before the commencement of the Act and the children born after the commencement of the Act gives us a certain flexibility to

> fix a date for the commencement of the Act which will be reasonably after the Bill is passed by both the Houses of Parliament and it receives the assent of the President so that no undue hardship is caused to anyone who is born during this period when the Bill is being debated. That is why, we have deliberately introduced the device of fixing the date of the commencement of the Act. When we fix the date for the commencement of the Act we shall take into account the views expressed by the hon. Members regarding possible hardship to the children who may be born during this period when the Bill is being debated. Once the date of the commencement of the Act is announced sufficiently in advance, then I think, there cannot be any argument of hardship to anyone who has a child after the date of the Act."

22. When the Citizenship (Amendment) Bill was discussed in the Rajya Sabha on 19th November 1986 the Minster reiterated what he had stated in the Lok Sabha. On the question of retrospectivity, the Minister clarified as under:

> "The honourable Member Mr. Jaswant Singh asked: is this Bill not retrospective? I can assure him that this Bill is not retrospective. In fact, if we had made this Bill retrospective, it would have been a negation of human rights. This Bill deliberately provides a date of commencement of the amending Act and when we fix the date of commencement of the Act; we will ensure that we will fix it after giving people reasonable notice so that people will know that children born after that date will not acquire citizenship by birth as a matter of right. There will be some problems. For example for a person applying for citizenship whose application is pending today and citizenship is granted to him six months from today or one year from today, what happens to a minor

child which is born before that date? I have given this assurance in the Lok Sabha and I give this assurance now. In the case of minor children born before a person has acquired the citizenship under this Act, we will confer citizenship on the minor children also. I do not think that a father can be granted citizenship and an earlier born child can be denied citizenship. But children born after the date of commencement of the Act will acquire citizenship by birth only if either of his parents is a citizen."

23. The amended Section 3(1)(a) reads as under:

"**3. Citizenship by birth**:- (1) Except as provided in sub-section (2), every born in India, -

(a) on or after the 26th day of January 1950, but before the 1st day of July, 1987."

(b) .....

(c) .....

Shall be a citizen of India by birth."

24. A plain reading of the above provision shows that a cut-off date was introduced by the Parliament for recognition of citizenship by birth. Except as provided by Section 3(2), "every person born in India on or after the 26th January 1950 but before the 1st day of July 1987" shall be a citizen of India by birth. Admittedly, in the present case, none of the prohibitions contained in Section 3(2) CA are attracted. The case of the Petitioner is within the ambit of Section 3(1)(a) since she was born in India on 13th April 1986, i.e., after 26th January 1950 but before 1st July 1987. The SOR accompanying the amendment Bill of 1986, by which the above provision was introduced and discussed in the Lok Sabha and

Rajya Sabha, makes it clear that the change brought about by the amendment was to be prospective. The rationale behind introduction of a 'cut-off' date was that the position prior to 1st July 1987 was not intended to be disturbed.

25. Learned counsel for the Petitioner is right in her submission that there is no need for a person who is an Indian citizen by birth, to have to apply for citizenship. Unlike certain other provisions, like Section 5 and Section 6 CA which require an application to be made for grant or recognition of citizenship, no such application process is envisaged in Section 3(1) CA.

26. The grounds for the refusal of a passport to the Petitioner may next be examined. The ostensible ground is Section 6(2)(a) PA whereunder an application for passport can be refused if the applicant is not a citizen of India. The impugned communication dated 1st September 2009 states that the passport has been refused on the ground that the Petitioner is not an 'Indian national' under Section 3(1)(a) CA. At the outset it must be observed that the concept of an Indian 'national' is not recognised by the CA. The term 'national' is not defined under the CA. It has obviously been used in a loose sense in the communication dated 1st September 2009.

27. What is now held against the Petitioner is that in her application for a passport she did not disclose that she held an identity certificate. Further, in her application for the grant of an identity certificate she declared herself to be of Tibetan 'nationality'. This, according to the Respondents,

implied that she did not consider herself to be an Indian citizen.

28. In the considered view of this Court, the above ground for rejection of the Petitioner's application for passport is untenable. As already noticed, the concept of 'nationality' does not have legislative recognition in the CA. The Petitioner's describing herself to be a Tibetan 'national' is really of no legal consequence as far as the CA is concerned, or for that matter from the point of view of the policy of the MEA. The counter affidavit makes it clear that the MEA treats Tibetans as 'stateless' persons. Which is why they are issued identity certificates which answers the description of travel documents within the meaning of Section 4(2)(b) PA. Without such certificate, Tibetans face the prospect of having to be deported. They really have no choice in the matter. It must be recalled that when her attention was drawn to the fact that she could not hold an identity certificate and a passport simultaneously, the Petitioner volunteered to relinquish the identity certificate, if issued the passport. That was the correct thing to do, in any event. The holding of an identity certificate, or the Petitioner declaring, in her application for such certificate, that she is a Tibetan national, cannot in the circumstances constitute valid grounds to refuse her a passport.

29. The policy decision of the MHA not to grant Indian citizenship by naturalisation under Section 6(1) CA to Tibetans who entered India after March 1959 is not relevant in the instant case. Having been born in India after 26th January 1950 and before 1st July 1987, the Petitioner is undoubtedly an Indian citizen by birth in terms of Section 3(1)(a) CA.

The fact that in the application form for an identity certificate the Petitioner described herself as a Tibetan national will make no difference to this legal position. There cannot be waiver of the right to be recognized as an Indian citizen by birth, a right that is expressly conferred by Section 3 (1) CA. The Petitioner cannot be said to have 'renounced' her Indian citizenship by birth by stating that she is a Tibetan national. Renunciation can happen only in certain contexts one of which is outlined in Section 8 which reads as under:

> "8. **Renunciation of citizenship:** (1) If any citizen of India of full age and capacity, makes in the prescribed manner a declaration renouncing his Indian citizenship, the declaration shall be registered by the prescribed authority, and, upon such registration, that person shall cease to be a citizen of India.
>
> Provided that if any such declaration is made during any war in which India may be engaged, registration thereof shall be withheld until the Central Government otherwise directs.
>
> (2) Where a person ceases to be a citizen of India under sub-section (1) every minor child of that person shall thereupon cease to be a citizen of India:
>
> Provided that any such child may, within one year attaining full age, make a declaration in the prescribed form and manner that he wishes to resume Indian citizenship and shall thereupon again become a citizen of India."

30. Clearly the Petitioner's case is not covered by Section 8 CA. She has not expressly or impliedly renounced her Indian citizenship by birth. The

provisions of Section 9 CA relating to termination of citizenship are also not attracted. The said provision reads thus:

> "9. **Termination of citizenship:** (1) Any citizen of India, who by naturalisation, registration otherwise voluntarily acquires, or has at any time between the 26th January 1960 and the commencement of this Act, voluntarily acquired the citizenship of another country shall, upon such acquisition or, as the case may be, such commencement, cease to be a citizen of India.
>
> Provided that nothing in this sub-section shall apply to a citizen of India who, during any war in which India may be engaged, voluntarily acquires, the citizenship of another country, until the Central Government otherwise directs.
>
> (2) If any question arises as to whether, when or how many citizen of India has acquired the citizenship of another country, it shall be determined by such authority, in such manner, and having regard to such rules of evidence, as may be prescribed in this behalf."

31. The Petitioner was born in India on 13th April 1986, i.e. after 26th January 1950 and before 1st July 1987, and is an Indian citizen by birth in terms of Section 3(1)(a) CA. She cannot therefore be denied a passport on the ground that she is not an Indian citizen in terms of Section 6(2)(a) PA.

32. For all the aforesaid reasons, the decision of the MEA communicated to the Petitioner by the impugned letter dated 1st September 2009 of the RPO is erroneous and is hereby quashed. The Petitioner's prayer to be declared an Indian citizen is allowed. The RPO will now process the

Petitioner's application for issuance of a passport once again and take a decision thereon in terms of this judgment within a period of eight weeks from today.

33. The writ petition is allowed in the above terms with costs of Rs. 5,000/- which will be paid by the Respondent to the Petitioner within a period of four weeks from today.

S. MURALIDHAR, J.

DECEMBER 22, 2010
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