Neutral Citation: [2016] IEHC 274

THE HIGH COURT

[2015 No. 185 J.R.]

BETWEEN

B. D. R.

APPLICANT

AND

REFUGEE APPEALS TRIBUNAL

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

JUDGMENT of Ms. Justice Faherty delivered on the 25th day of May, 2016

1. The applicant seeks judicial review by way of an order of certiorari of the decision of the first named respondent which affirmed the Refugee Appeals Commissioner's recommendation not to declare him a refugee.

Background

2. The applicant arrived in this State on 9th March, 2007. He sought asylum on 16th March, 2007. In support of his claim he set out as follows: He was born on 5 January, 1972 in Bhutan to parents of Nepalese ethnicity. Because of his ethnic background he was denied citizenship of Bhutan. He states that he was forced to flee Bhutan in 1990 when he was around 18 years of age after his family home was set on fire. His parents were killed in the blaze and he himself suffered burn injuries. He states that he fled to India where he then resided. The applicant met his wife in India in and around 1995 and they had two children. His wife was Nepalese. He claims that his wife left him in and around 2002 and returned to Nepal with the children of the marriage. The applicant did not want to remain in India thereafter as he was tired of living his life with no prospect of being regularised in India. He subsequently arranged with a trafficker to get him out of India.

3. The applicant underwent a s.11 interview on 25th June, 2007. His application for asylum was refused at first instance by the Refugee Applications Commissioner by decision notified on 22nd August, 2007 and thereafter on appeal by decision of the Refugee Appeals Tribunal dated 30th June, 2009. The decision was quashed by the High Court by Judgment of 4th July, 2013 and the applicant's appeal was remitted for de novo consideration before a different member of the Tribunal.

4. At the hearing of the remitted appeal on 11th November, 2014 the Tribunal requested written legal submissions on the issue of the correct approach to the determination of a refugee application from a stateless person with more than one country of former habitual residence. Written legal submissions were duly filed on behalf of the applicant. By decision dated 24th February, 2015, as notified to the applicant by letter of 24th February, 2015, the Tribunal refused the applicant's appeal.

5. The salient findings were as follows:

(i) On the balance of probabilities it was accepted that the applicant is stateless.

(ii) The Tribunal found an analysis of credibility unnecessary, stating "for reasons explained, it is only in circumstances where I find that the Appellant is in fact able to return to his country of former habitual residence that I must consider whether he is at risk of persecution for a Convention reason there."

(iii) Under the heading "Analysis of well found fear", the Tribunal next proceeded to analyse whether the applicant is someone "who, not having a nationality and being outside the country of his or her former habitual residence, is unable or owing to such fear, is unwilling to return to it". The Tribunal was satisfied, consistent with country of origin information, that the applicant was not entitled or able to return to Bhutan.

(iv) As the applicant's circumstances indicated more than one country of habitual residence (Bhutan and India) the Tribunal considered that the applicable analysis in such circumstances was as set out by the New Zealand Refugee Appeal Authority in Refugee Appeal No. 72635/01 which in turn considered a decision of the Canadian Federal Court of Appeal – *Thabet v. Canada (Minister of Citizenship and Immigration)* [1998] 4 F.C.21.

(v) The Tribunal then quoted at length from the New Zealand Decision Refugee Appeal No. 72635/01 and laterally quoted six principles identified by the New Zealand Refugee Appeal Authority:

> *"[152] First, statelessness per se does not give rise to a claim to refugee status. The Refugee Convention distinguishes sharply between stateless persons and refugees.*
>
> *[153] Second, before a stateless person can be recognised as a refugee, that person must establish that owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion he or she is outside the country of his or her former habitual residence and is unable or, owing to such fear, is unwilling to return to it.*
>
> *[154] Third, "habitual residence" does not mean domicile, but merely residence of some standing or duration. That is, the claimant must show that he or she has in fact taken up residence and lived in the country for a period which showed that the residence had become, and was likely to continue to be, habitual. The requisite period of residence is not fixed and the question whether habitual residence had been established is a question of fact to be determined on all the circumstances of each case, but the individual should be able to show that he or she has made it his or her abode or the centre of his or her interests.*

[155] Fourth, where a stateless person has habitually resided in more than one country, in order to be found to be a Convention refugee, such person must show that he or she has a well-founded fear of being persecuted for a Convention reason in at least one country of former habitual residence, and that he or she is unable or, owing to such fear, is unwilling to return to each of his or her other countries of former habitual residence. In short, the well-founded fear of being persecuted for a Convention reason must be established in relation to each and every country of former habitual residence before a State party to the Convention has obligations to the stateless person.

[156] Fifth, the protection afforded by Article 33(1) of the Refugee Convention is protection from the act of expulsion or return, whether that act is "legal" under the domestic law of either the sending or the receiving State. The issue of return to a country of former habitual residence is therefore an issue of whether return is possible as a matter of fact, not as a matter of law. Article 33 prohibits return "in any manner whatsoever", not in any legal manner whatsoever.

[157] Sixth, if a stateless person cannot, as a matter of fact, return or be returned to a country of former habitual residence in relation to which a fear of being persecuted is claimed to exist, the claim to refugee status must fail as the fear is not a well-founded fear and past persecution alone is insufficient to establish a claim to refugee status."

The Tribunal Member duly found:

"that the Appellant cannot as a matter of fact return to Bhutan (where he has a fear of being persecuted on grounds of his race) as he will be refused admission. The consequence of this is however that his fear of being persecuted there is not well-founded. Secondly, as regards India, the Appellant left there voluntarily and does not claim to fear persecution on any Convention ground there, as he stated at hearing he left there as he was alone and lonely.

I appreciate that this leaves the appellant in a difficult predicament, however it was for precisely such circumstances that the Convention relating to the Status of Stateless Persons, 1954 and the Convention on the Reduction of Statelessness, 1961 were devised. Ireland is a signatory to both."

6. The decision-maker went on to conclude " I have considered whether compelling reasons arise in this case. Given the practical impossibility of returning the Appellant to Bhutan I find that compelling reasons cannot arise in this case."

7. By order of 13th April, 2015, MacEochaidh J. granted the applicant leave to seek judicial review of the decision.

8. In summary, the grounds upon which leave was granted are:

"(i) The decision is *ultra vires* s.2 of the Refugee Act 1996 and/or Article 1(A) of the Convention relating to the Status of Refugees 1951;

(ii) The Tribunal erred in law in assessing the applicant's refugee appeal on the basis that it was only in circumstances where the said respondent found that the appellant was in fact able to return to his country of former habitual residence that the Tribunal must consider whether he was at risk of persecution for a Convention reason there;

(iii) The Tribunal erred in law in refusing the applicant's refugee appeal on the basis that, as a stateless person, his inability to return to the country of his habitual residence meant that his fear of persecution there was not well-founded;

(iv) The Tribunal failed to determine whether the applicant could not return to Bhutan because of a Convention reason;

(v) The Tribunal failed to consider whether the arbitrary removal/denial of the applicant's citizenship by reason of his race and/or ethnicity and/or membership of a particular social group was an act which constitutes persecution for the purpose of s.2 of the Refugee Act 1996 and/or "a severe violation of human rights" for the purposes of Article 9(1) and (2) of Directive 2004/83/EC and/or Regulation 9(1) and (2) of the European Communities (Eligibility for Protection) Regulations 2006 ("the 2006 Regulations");

(vi) The decision is contrary to the approach advocated by paras. 101-105 of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status;

(viii) The decision is unlawful and ultra vires the 2006 Regulations;

(ix) The Tribunal failed to comply with the obligations to assess the applicant's appeal with reference to Regulation 5 (1) (a) and/or (b) of the 2006 Regulations;

(x) The Tribunal failed to comply with the obligations to assess the applicant's appeal with reference to the principle that past persecution gives rise to a presumption of future persecution as provided for by Regulation 5 (2) of the 2006 Regulations; and

(xi) The Tribunal failed to have any or any proper regard to and/or consider the country of origin information submitted on behalf of the applicant as part of his refugee appeal.

10. In the course of the oral hearing in the within proceedings, counsel for the applicant distilled the challenge to three grounds.

11. Firstly, the Tribunal Member applied the wrong legal test and thus erred in law in finding that the applicant's inability to return to Bhutan meant that he did not have a well-founded fear of persecution there. Secondly, when focusing on whether the applicant could return to Bhutan and given that he could not return there the Tribunal Member should have assessed whether that of itself constituted persecution for a Convention reason. Thirdly, it is contended that the Tribunal Member erred in law in failing to consider, in accordance with Regulation 5 (2) of the European Communities (Eligibility for Protection) Regulations 2006 (the "2006 Regulations) whether compelling reasons arose from the previous persecution of the applicant such as may warrant a determination that the applicant is eligible for protection.

Alleged error of law in determining that the applicant's inability to return to Bhutan meant that he did not have a well-founded fear of persecution there

12. Counsel for the applicant submits that the Tribunal Member made a fundamental error of law in stating that it was only in circumstances where she would find that the applicant was able to return to his habitual country of residence that she must consider

whether he is at risk of persecution for a Convention reason. She found as a matter of fact that the applicant could not return to Bhutan. Thus, applying her view of the law to his circumstances, the Tribunal Member concluded that as he could not go back to Bhutan he could not have a well-founded fear of persecution there.

13. In formulating the principle set out at para. 5.2 of the decision, upon which she ultimately found against the applicant, the Tribunal Member had regard to the decision of the New Zealand Refugee Status Appeals Authority in Refugee Appeal No. 72635/01.

14. In the course of its decision, the New Zealand Appeals Authority stated, inter alia,

> *"[N]o fear can be well-founded for the purpose of the Convention unless the evidence indicates a real ground for believing that the applicant for refugee status is at risk of persecution… If, for whatever reasons, there is no risk of persecution in the country of origin, or if the risk is but conjecture or surmise, the fear of being persecuted is not well-founded. It follows that if the country of origin refuses to admit or accept the return of the refugee claimant, the fear of being persecuted is similarly not well-founded in that country".*

Counsel for the applicant argues that the fact that the applicant may not be returnable to Bhutan does not defeat his claim. The approach adopted by the New Zealand Appeals Authority in Decision No. 72635/01 was expressly not followed by the New Zealand Refugee Status Appeals Authority in Refugee Appeals No. 73861 and 73862, upon which the applicant relies.

15. On behalf of the respondents, it is accepted that Decision No. 73861 and 73862 of the New Zealand Refugee Status Appeals Authority took a different view to the position adopted in Decision No. 72635/01 on the question of the absence of a well-founded fear by reason of the inability to be returned to a country of origin. However, counsel submits that the issue for this court is whether the principle identified by the Tribunal Member is correct or not. The fact that the later New Zealand decisions departed from Decision No. 72635/01 is neither here nor there as neither of the approaches adopted by the New Zealand Appeals Authority are binding on this Court. It is also argued that if the fundamental test in the Convention is forward-looking (notwithstanding Regulation 5 (2) of the 2006 Regulations) and if it is utterly impossible for the applicant to return to Bhutan then the question is what is the nature of the fear which the applicant can establish vis-à-vis Bhutan?

16. The respondents maintain that one of the reasons as to why Hathaway (1st Ed.) proposed that, for the purposes of the Convention, a stateless person had to be formally returnable to the country of habitual residence was that it would be nonsensical to embark on any enquiry under the Convention as to the existence of a well-founded fear if there was no legal right of return. While the proposition of a legal right of return has not found favour in the courts and decision-makers now look to the factual position and not to the legal position, and while the Tribunal Member here has found that the applicant as a matter of fact cannot return to Bhutan, the question the court has to address is if as a matter of fact the applicant is not going back to Bhutan, can there be any basis upon which there can be a well-founded fear if the applicant will not be returning to Bhutan? It is thus argued by the respondents that on first principles the approach of the Tribunal Member is not legally erroneous. If it is factually impossible for the applicant to return to Bhutan (as found by the Tribunal Member) the applicant can have no well-founded fear of persecution in Bhutan.

17. The starting point for any consideration of the question has to be the provisions of s.2 of the Refugee Act 1996, as amended. It states:

> "2.—In this Act "a refugee" means a person who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his or her nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country; or who, not having a nationality and being outside the country of his or her former habitual residence, is unable or, owing to such fear, is unwilling to return to it.."

> 18. In *Thabet v. Canada (Minister of Citizenship and Immigration)* [1996] 1 F.C. 685, the Canadian Court of Appeal (Lyndon J.) addressed the question of stateless and the Convention, as follows:

> "..There is no question that stateless persons may qualify as refugees; the definition acknowledges this explicitly. However, people are not refugees solely by virtue of their statelessness. They must still bring themselves within the terms of the definition set forth in the Convention. And they must still comply with those other sections of the Act which restrict access to the refugee determination process. Statelessness does not give a person an advantage over those refugees who are not stateless.

> However, it is important to note the key distinction between the two groups of people so that neither advantages nor disadvantages are created. This distinction is contained in the wording of the refugee definition itself. In the case of nationals, it talks of the claimant being "unwilling to avail himself of the protection of that country". In the case of stateless persons it talks only of an unwillingness to return to that country. In this latter case the question of the availment of protection does not arise. The definition takes into account the inherent difference between those persons who are nationals of a state, and therefore are owed protection, and those persons who are stateless and without recourse to state protection. Because of this distinction one cannot treat the two groups identically, even though one should seek to be as consistent as possible."

19. In *Revenko v. Secretary of State for the Home Department* [2001] QB 601, the English Court of Appeal considered an argument that the first clause of Article 1(A)(2) – requiring a demonstration of a well-founded fear of being persecuted – applies only to persons with a nationality, whereas stateless persons are entitled to refugee status if they are, for any reason, unable to return to the country of former habitual residence. The UK court determined, however, that such a de-contextualised reading could not stand. It stated:

> *"The paragraph in article 1A(2) should be read as a whole and does, in my judgment, set out a single test for refugee status. When the words in the first part of the paragraph "is unable or, owing to such fear, is unwilling" were repeated in the second part of the paragraph, it was intended that the entire paragraph should be governed by the need to establish a well-founded fear of persecution on a Convention ground. The existence of a well-founded fear was intended to be a pre-requirement of refugee status. It is significant that both categories, nationals and stateless persons, were dealt with in the same paragraph and indeed in the same sentence. I cannot conclude that, by the order of words in the last part of the paragraph, the need for the fear was intended to be excluded in the case of what could be a large category of persons."*

20. It seems to me that the provision in the 1996 Act (which adopts the Convention definition of a refugee) represents the primary

authority for the parallel treatment of nationals and the stateless provided of course that, like those with a nationality, the stateless can show a well-founded fear of persecution. As Hathaway & Foster (2nd Ed.) puts it:

> "Despite their clear rejection of the proposal to deem all stateless persons to be refugees, the drafters of the Convention were equally emphatic that stateless persons could, in some situations, qualify as refugees. Specifically, where a stateless person satisfies the requirements of the refugee definition, she is both a stateless person and a refugee, entitled to invoke the protections of both regimes.
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> …
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> Committed to providing surrogate national protection to persons denied their primary protective relationship with a state due to the risk of being persecuted there, the drafters sensibly assimilated stateless persons who had a habitual residence – and hence whose enforced departure from their home denied to them benefits akin to those enjoyed by citizens – to the more usual category of refugees. The Refugee Convention thus provides that whereas a person with a citizenship qualifies by reference to risk in the country of citizenship, a stateless person's case is to be established in relation to her 'country of … former habitual residence'."

21. The question is however if a protection applicant cannot return to their country of habitual residence how is the well-founded fear to be made manifest for the purposes of satisfying the definition of a refugee as set out in the Convention? In answering this question, I am satisfied to adopt the approach of the New Zealand Refugee Status Appeals Authority in Decision 73861 and 73862. In that case the Appeals Authority rejected the notion that the fact of not being able to return to one's country of habitual residence negated the concept of a well-founded fear:

> *"[76] Clearly the drafters of the Refugee Convention had in mind a notion of 'unable' informed by the historic European experience of the first half of the 20th century that statelessness was intimately connected with persecution especially of ethnic minorities subject to denationalisation and/or expulsion. These obvious victims of persecution were unable to return to their former homes because of the risk of persecution of which their statelessness or expulsion was one manifestation.*
>
> *[77] That 'unable', which the drafters associated primarily with stateless refugees, was ultimately also employed for those with a nationality, came from a recognition that even those with a nationality might be unable to return to their country of nationality through the persecutory actions of their own government falling short of denationalisation such as refusing a passport. Conversely it was presumably thought that some – albeit a small number – of stateless refugees, despite their lack of nationality, might be permitted to return to a country of former habitual residence but would be unwilling to do so because of a fear of persecution.*
>
> *[78] In the context of the present discussion what is important is that the actual wording of Article 1A(2), reflecting the apparent intention of the drafters of the Convention, clearly contemplates that a stateless refugee may be unable to return to his or her country of former habitual residence. It cannot be, therefore, that every stateless person who is unable to return home is not a refugee since the inclusion clause contemplates some at least will be. Any attempt therefore to construct a definition of 'country of former habitual residence' or 'well-founded fear' that automatically excludes from the protection of the Convention every stateless person who is unable to return would appear to be at odds with the wording of Article 1A(2) and the underlying objectives and purpose of the Convention.*
>
> *…*
>
> *[84] It has of course never been suggested in our jurisprudence or anywhere else that if, as a matter of fact, a person with nationality is unable to return or be returned to the country of origin "she cannot qualify as a refugee because she is not at risk of return to persecution" or that to grant refugee status in such circumstances would be to rely on past persecution.*
>
> *[85] In my view there is no logical basis for making the ability to return or be returned as a matter of fact a pre-requisite for a well-founded fear of being persecuted irrespective of the status of the claimant, provided the inability to return has a Convention nexus.*
>
> *[86] The test for a well-founded fear of being persecuted adopted by this Authority "is there a real chance of the appellant being persecuted if returned to the country of nationality" is not the same as asking is a person "at risk of return to persecution" let alone "is it factually possible for that person to return" Refugee Appeal No 72635 at [134] or can the person "as a matter of fact return or be returned" ibid at [157] or whether "re-entry is, as a matter of fact, not possible" or is the person "at risk of being refouled" ibid at [149] or "sent back" ibid at [126].*
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> *[87] In the first "if returned" test the risk to be assessed is the present or prospective risk of being persecuted in the relevant country. In the second it is the possibility of being returned to a particular country. It readily follows from the second formulation (and its abovementioned variants), but clearly not the first, that if a person cannot be returned he or she "is not at risk of return to persecution". To ask though about the risk of return is fallacious: it is not a requirement of this Authority's test for a well-founded fear and is far removed from the wording of Article 1A(2)."*

22. Having regard to the parties' submissions, I am satisfied that the proposition advanced by counsel for the respondent, namely that the Tribunal Member was correct in law in finding that by virtue of the applicant's inability to be returned to Bhutan he could have no well-founded fear of persecution in Bhutan, runs counter to the weight of judicial and academic authority on the issue, and indeed the Convention itself.

23. For all of the foregoing reasons I am satisfied that the challenge to the decision on the basis of the Tribunal Member's erroneous reliance on New Zealand decision 72635, and her conclusion that the fact that the applicant is outside of Bhutan and cannot return there demonstrates that his fear cannot be well-founded, has been made out.

24. A question arises as to whether notwithstanding the Tribunal's erroneous approach on this issue the decision should nevertheless stand by reason of the decision-maker's finding regarding India.

25. The present case is one where there is more than one habitual country of residence, the applicant having resided in India for approximately 16 years after he fled Bhutan in 1990. As acknowledged by Hathaway & Foster, the Convention fails to stipulate how

cases are to be handled when a protection applicant has more than one country of habitual residence. Over the years and across jurisdictions various approaches to how to resolve the claim of a stateless person with more than one country of former habitual residence have been considered. The various approaches fell to be considered by the Canadian Federal Court of Appeal in *Thabet*. In that case, the court determined that, *"stateless people should be treated as analogously as possible with those who have more than one nationality" and that "there is no obligation to a person if an alternate and viable haven is available elsewhere".*

26. The court went on to state that "so long as the claimant does not face persecution in a country of former habitual residence that will take him or her back, he or she cannot be determined to be a refugee."

27. I find the approach in Thabet persuasive and I am satisfied that the ratio of Thabet is best set out in the following extract from the decision:

> *"The Test to be Applied: Any Country Plus the Ward Factor*
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> *While I am somewhat attracted to Professor Hathaway's views, the best answer to this riddle is really a variation of the "any country" solution. When Professor Hathaway talks about refugee determination by reference to "any and all" countries of former habitual residence, this is really relevant to the latter part of the Convention refugee definition. Where a claimant has two nationalities he or she does not have to show two separate instances of persecution. It will suffice to show that one state is guilty of persecution, but that both states are unable to protect the claimant. Likewise, where a claimant has been resident in more than one country it is not necessary to prove that there was persecution at the hands of all those countries. But it is necessary to demonstrate that one country was guilty of persecution, and that the claimant is unable or unwilling to return to any of the states where he or she formerly habitually resided. While it may appear burdensome to impose this duty upon all stateless claimants, we must, in the light of Ward, properly take into account the situations where claimants have other possible safe havens."*

Hathaway & Foster describe the Thabet test thus:

> *"So conceived, this test is a helpful means of avoiding the conceptual weakness of the UNHCR position, even as it embraces its core content. The Thabet test ensures that refugee status is recognised in the case of a stateless person denied the ability to continue to live in 'her own' country owing to a risk of being persecuted there, yet respects the equally critical principle that surrogate protection is not owed when the applicant has a country fairly understood to be 'her own' that is both able and willing to afford national protection."*

28. Counsel for the applicant submits that insofar as the Tribunal Member relied on New Zealand Decision No. 72635/01 which states, *inter alia,* that *"in short, the well-founded fear of being persecuted for a Convention reason must be established in relation to each and every country of former habitual residence before a state party to the Convention has obligations to the stateless person."* That, counsel says, is an incorrect interpretation of Thabet and he argues that what the applicant has to establish is that he has a well-founded fear of persecution in one country of habitual residence and that he is unable to return to the second country of habitual residence owing to a fear that international protection will not be available there.

29. Counsel submits in any event, that notwithstanding the Tribunal Member making reference to the *Thabet* test (albeit misinterpreting the second part of the test), she did not in fact go on to apply the *Thabet* test in any proper sense. This is because the Tribunal Member had already shut the door to the applicant's claim by her finding that as he could not go back to Bhutan he could not establish a "well-founded" fear of persecution there. Yet, given that the Tribunal Member accepted that the applicant had a fear of persecution in Bhutan on account of his race, that part of the *Thabet* would appear to have been satisfied by the applicant, save that the Tribunal Member did not analyse the claim of persecution because of the absence of the "well-founded" element of the applicant's claim vis-à-vis Bhutan.

30. Counsel also submits that there was no attempt by the Tribunal Member to answer the question as to whether the applicant could return to India for the purposes of determining whether the applicant met the second part of the *Thabet* test. That required an analysis of whether the applicant could return to India (his other country of habitual residence) in the practical sense in order to get protection there. The key question is whether the applicant is able to return to India. It is contended however that the applicant is not able to return to India as he has no status there. As he cannot return there, he cannot get protection in India. It is submitted that the Tribunal Member made no finding that the applicant could return to India. Nor was there any analysis of whether the applicant could get effective protection in India. Thus, the only sensible inference, based on a reading of the Tribunal Member's finding at para. 5.2 of the decision, is that she found that the applicant could not return to India.

31. Counsel for the respondents submits that contrary to what is suggested by counsel for the applicant, it is not sufficient for the applicant to establish that he fears persecution in Bhutan and that he cannot return to India; there has to be an inability within the meaning of the Convention to return to both. What the applicant has to establish is a well-founded fear of persecution on return to Bhutan and a failure by India to protect him. It is argued that *Thabet* underscores this requirement by its reference to the Ward factor and the principle of surrogacy. As stated in *Thabet*:

> *"It is unlikely that many countries of former habitual residence will grant their former residents the right to return, but there may be lands that do normally accept back former habitual residents. In such cases, this would affect a claim for refugee status. So long as the claimant does not face persecution in a country of former habitual residence that will take him or her back, he or she cannot be determined to be a refugee."*

It is submitted by the respondents that it is difficult to see how counsel for the applicant can take issue with the Tribunal Member's reliance on how the *Thabet* test is formulated in New Zealand Decision No. 72635/01 when *Thabet* is read its full context.

32. The respondents contend that the inability to return to the second country of habitual residence is a question of fact and the inability must be linked to a failure to protect in that country. It is argued that the applicant did not give such evidence with regard to India and it is submitted that in these proceedings no challenge has been made to the Tribunal Member's finding with regard to India.

33. Insofar as the record demonstrates, the applicant, in the course of his s.11 interview, was questioned as follows:

> "Q 50 When did you decide to leave Delhi, and why did you decide to leave at this time?
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> A Three years ago I left Delhi, I had lived there ok for some time but the behaviour of the people was not normal and I

didn't want to live a life of shame all my life. I was treated better in the prison in Ireland than I was in Delhi.

Q 51 So how did your situation dis-improve in Delhi if things had been ok for some time. What happened?

A I got money alright but my life there was miserable. So I wanted to leave, I met an agent and he said he would bring me to a better place, that he would bring me to Europe.

Q 52 You stated that you did not discuss leaving Delhi in going to Nepal with your wife over the years even though you were both illegal, as you were earning money. Did things get worse in some way, did something happen that caused you to leave when you did?

A The reason I left then was that I was all alone and did not want to live in that place anymore, even my wife had left me. That is why I left when I left."

34. Later, when questioned as to what he would fear if he was sent back to India the applicant stated:

> "It is not that someone would kill me in India or anything like that. But there is no life for me in India, no future. It is also possible that the Indian authorities might catch us and send us back to Bhutan."

Asked if he had any problems with the Indian authorities during the years he lived in Delhi the applicant stated: "No, I had no contact with them at all as I did not do anything wrong."

35. The respondents submit that the height of the applicant's claim with regard to India is that he had a miserable life there and while he surmised that India might send him back to Bhutan, that was only speculation on his part; That was the totality of the evidence which the Tribunal Member had to assess.

36. In written submissions to the Tribunal the applicant's legal advisor stated,

> "The appellant was a refugee the day he fled his former habitual residence of Bhutan owing to his well-founded fear of persecution relating to his nationality/ethnicity and/or membership of a particular social group, and that this fact cannot be altered by his extended unlawful residence in India, a country to which he has no legal connection and no right of return"

and,

> "It is submitted that the appellant has demonstrated that, on a balance of probabilities, he would suffer persecution [sic] his country of former habitual residence i.e. Bhutan; and that he cannot return to his other country of former habitual residence, India, because he has never enjoyed any legal right of residence there. It is therefore respectfully submitted that the appellant is entitled to refugee status."

37. It is argued by the respondents that the test set out in those submissions is not the test which the applicant has to meet. On the *Thabet* principle, there has to be a deficiency in both countries i.e. the applicant is at risk of persecution in one and an inability or unwillingness of the other to protect him. They assert that the nub of the present case is that the Tribunal Member accepted that the applicant could not go back to Bhutan. However, she then went on to make the following finding with regard to India: "As regards India, the appellant left there voluntarily and does not claim to fear persecution on any Convention ground there, as he stated at hearing that he left there as he was alone and lonely."

38. The respondents make the case that the Tribunal Member would not have made that finding if she was not satisfied that the applicant could go back to India. Accordingly, the finding made by the Tribunal Member was reasonable in all the circumstances. It is submitted that if the Tribunal Member's finding regarding India is correct the applicant has not met the *Thabet* test for refugee status.

39. By way of rebuttal of the respondents' submission, counsel for the applicant pointed to the applicant's fear that he would be deported from India to Bhutan. It is therefore argued that the only implied finding regarding India as can be gleaned from the decision is that the applicant cannot go back to India. It is submitted that the extract from the s.11 interview relied on by the respondent's counsel cannot be determinative of the issue in the absence of a record of the evidence tendered by the applicant before the Tribunal. It is further submitted that it is not for the respondent's counsel to argue that the applicant is not a refugee as he can go back to India, given that that finding was not made by the Tribunal Member.

40. There were extensive submissions on what the *Thabet* test means and whether it was properly applied in the present case. To a greater or lesser extent, both sides acknowledge that the Tribunal Member did not really apply the *Thabet* approach to the question of the applicant's two countries of habitual residence. This is because as far as Bhutan is concerned, the applicant fell at the first hurdle given that the decision-maker found that the fact he could not go back to Bhutan he could not be said to have a "well founded" fear of persecution there, an approach which this court has found to be erroneous. While I accept counsel for the respondent's argument that as regards India it is for the applicant to demonstrate that India is unable or unwilling to afford him national protection and that it is not just a question of the applicant having no legal status in India as the applicant's submissions to the Tribunal suggested, it seems to me nevertheless that the decision cannot be sustained on the basis of the finding made with regard to India. I so find because in the first instance, the applicant's opportunity to establish a claim for refugee status on a Convention ground vis a vis Bhutan was foreclosed on by the Tribunal Member, given her erroneous finding that he could not have a "well founded" claim as he could not go back there. The failure to get beyond the "well founded" hurdle deprived the applicant of the opportunity to make his case of fear of persecution in Bhutan on grounds of race.

41. Had he been afforded this opportunity potentially he could satisfy the first part of the *Thabet* test by dint of his claim to fear persecution in Bhutan on grounds of race. It would then remain for him to satisfy the second part of the test, namely that he could not get protection in India. While I accept counsel for the respondents' general proposition that the decision could be upheld if the court accepts that the finding made vis a vis India is correct in law, I do not accept that the finding on India can be upheld. Firstly, the Tribunal Member appears to have proceeded from the standpoint that the applicant had to establish a fear of persecution in India; That is not in conformity with the *Thabet* test. Secondly, there is no express finding that India is both willing and able to afford national protection. Even assuming that such a finding could be implied from the finding actually made as regards India, it remains the case that that particular finding is tainted by reason of the Tribunal Member appearing to require the applicant to claim persecution in India on "any Convention ground", a threshold the applicant was not required to meet if he satisfied that particular threshold in the

context of Bhutan. Furthermore, the applicant testified that he feared being returned to Bhutan by the Indian authorities. That assertion was required to be weighed by the decision-maker in the context of assessing India's willingness or ability to protect the applicant. This was not done. Thus, for the reasons set out above the court cannot be satisfied that the Tribunal Member actually or properly applied the second aspect of the Thabet test. Accordingly, the finding as regards India cannot save the decision.

Error of law in the approach to nationality and statelessness

42. The second limb of the challenge to the decision is the Tribunal Member's failure to analyse whether the applicant's inability to return to Bhutan was of itself persecutory. Counsel for the applicant submits that arbitrary deprivation of nationality may, depending on its effects, constitute persecution under the Refugee Convention. If it does, it will then fall to the decision-maker to examine whether the deprivation was imposed for reasons relating to race, nationality, religion, political opinion or membership of a particular social group. It is submitted that this issue was required to be addressed by the Tribunal Member but was not. In this regard, counsel for the applicant relies on the decision of McMahon J. in *A.A.A.A.D. v. RAT* [2010] 1 I.R. 213:

> *"[17] The applicant's submissions, however, do not end here. The more nuanced argument advanced on his behalf, even if the Revenko v. Home Secretary [2001] Q.B. 601 position prevails, is to the following effect: even if the applicant cannot show a well-founded fear of persecution for a Convention reason within the state of Kuwait because he will not be allowed back there, nevertheless the applicant argues that the reason he is outside Kuwait is because he is being refused entry for a Convention reason, and this refusal itself amounts to "persecution". It has been accepted by the member of the first respondent that the applicant will not be accepted back into Kuwait because he is a Bidoon and this, according to the applicant's argument, amounts to persecution for a Convention reason.*
>
> *[18] It seems to me that the very thorough analysis and the ultimate decision of the first respondent did not focus on this last point and for this reason I grant leave to bring judicial review proceedings on that single issue only."*

43. Counsel submits that arbitrary deprivation of nationality such that it constituted persecution was the conclusion reached by the UK Court of Appeal in *E.B. (Ethiopia) v. Secretary of State for the Home Department* [2009] 1 QB 1. In that case, the claimant an Ethiopian national whose father was Eritrean sought asylum in the UK. Prior to her departure from Ethiopia, the Ethiopian government removed her identity documents in order to make it more difficult for her, as an Ethiopian with Eritrean ancestry, to prove her Ethiopian nationality. The UK Asylum and Immigration Tribunal found her to be stateless as a result but dismissed her appeal on the basis that the removal of her identity documents had not in itself resulted in ill-treatment and, given that she had not been at risk of other ill-treatment in Ethiopia, she did not have a well-founded fear of persecution within the meaning of Article 1A(2) of the Convention. The UK Court of Appeal however determined that an arbitrary deprivation of nationality for a Convention reason constituted persecution within the meaning of Article 1A(2). In the course of his judgment, Longmore LJ. stated:

> *"66 I have already recorded the Secretary of State's apparent acceptance that if EB had, in fact, been deprived of her citizenship by the arbitrary action of state employees, that would have prima facie been persecution within the terms of the Refugee Convention. That is certainly my own view, but it is worth pausing for a moment to understand why this must be the position.*
>
> *67 The reason is that, if a state by executive action deprives a citizen of her citizenship, that does away with that citizen's individual rights which attach to her citizenship. One of those most basic rights is to be able freely to leave and freely to re-enter one's country. (There may well be others such as the right to vote.) Different considerations might arise if citizens were deprived of their nationality by duly constituted legislation or proper judicial decision but a deprivation by executive action will almost always be arbitrary and, if EB had in fact been deprived of her citizenship by the removal of her identity documents by state agents, it would certainly have been arbitrary.*
>
> *…*
>
> *71 That does not, of course, conclude the question since the hypothetical question whether EB would suffer persecution (or would have a well-founded fear of such persecution) on her return is the critical question which has to be addressed. The question is hypothetical because Ethiopia will not currently allow EB to be returned but the question must be answered now, not as at some date in the unknowable future when Ethiopia might change its mind and decide to readmit EB for some reason which cannot be currently predicted. Once it is clear that EB was persecuted for a Convention reason while in Ethiopia, there is no basis on which it can be said that that state of affairs has now changed. I would therefore conclude that EB has a well-founded fear of persecution for a Convention reason and that she is now entitled to the status of a refugee."*

44. The applicant submits that the approach of the Tribunal Member in the present case was the polar extreme of the approach adopted by the UK Court of Appeal. While it is acknowledged that unlike *E.B. (Ethiopia),* the applicant in these proceedings was not a citizen who has been made stateless nonetheless counsel submits that even a stateless person has the right of return to a country of habitual residence. In this regard, counsel relies on a decision of the UN Human Rights Committee in Nystrom (Consideration Number 1557/2007) as support for the proposition that the scope of one's "own country" is broader than the concept "country of nationality". In that case, the UN Committee stated:

> *"It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien. In this regard, it finds that there are factors other than nationality which may establish close and enduring connections between a person and a country, connections which may be stronger than those of nationality. The words "his own country" invite consideration of such matters as long standing residence, close personal and family ties and intentions to remain, as well as to the absence of such ties elsewhere."*

45. It is thus argued that in assessing the applicant's claim vis-à-vis Bhutan, the Tribunal Member should have analysed whether his inability to return there was persecution and if so was it based on his ethnicity. If those questions were answered in the affirmative, the applicant had a nexus to the Convention. However, none of this exercise was carried out as the Tribunal Member determined his claim on the sole basis that his fear was not well-founded.

46. On behalf of the respondents, it is submitted that the issue of whether the applicant meets the persecution element of the Convention was not addressed as the Tribunal Member determined the claim on the well-foundedness issue.

47. In those circumstances, the case made by the applicant's counsel as to whether denial of re-entry amounts to persecution does not arise for consideration in these proceedings. It is submitted that if the Tribunal Member's finding there was no well-founded fear is

valid, she did not then need to consider whether the denial of re-entry to Bhutan constituted persecution.

48. Without prejudice to the contention that the Tribunal Member's decision of well-foundedness was a valid decision, the respondents submit that the issue of what constitutes persecution has to be determined in light of Article 9 of the Qualification Directive, as transposed into Irish law by Regulation 9 of the 2006 Regulations. Counsel for the respondent submits that Article 9(1) sets a high threshold and none of the applicant's arguments address the issue as to whether the test set out in Regulation 9(1) is met by the applicant. Furthermore, the words "in particular" as contained in Article 9 of the Qualification Directive is not to be construed as meaning by way of example, rather it is a determinative phrase in the context of basic human rights and does not mean discriminatory administrative measures, however reprehensible they might be. Counsel submits that the applicant's reliance on E.B. (Ethiopia) has to be seen in the context of Regulation 9(1). This has been made clear by the UK Court of Appeal in *M.A. (Palestinian Territories) v. Secretary of State for the Home Department* [2008] EWCA Civ 304:

> *"21 The question that arises is whether a stateless person who will be denied entry on return to the country of his former habitual residence thereby becomes a victim of persecution. It was considered, but not decided, in AK v Secretary of State for the Home Department [2006] EWCA Civ 1117, [2007] INLR 195 , in which Richards LJ said, obiter, at para [47]:*
>
> *'That line of argument is beset with difficulties. I am far from satisfied that there is a true analogy between a state's denial of entry to one of its own citizens and denial of entry to a stateless person (who, unlike a citizen, has no right of entry into the country), or that denial of entry to a stateless person can be said to constitute a denial of his third category rights of sufficient severity to amount to persecution (especially given the possibility of his exercising those rights elsewhere).'*
>
> *…*
>
> *[T]he Qualification Directive (Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (2004) OJ L 304/12), art 9 of which provides that acts of persecution within the meaning of Art 1A of the Refugee Convention must be sufficiently serious to constitute a serious violation of human rights or an accumulation of various measures 'which is sufficiently severe as to affect an individual in a similar manner'.*
>
> *…*
>
> *26 It is now necessary to confront the question whether, in principle, it is persecutory without more, to deny a stateless person re-entry to 'the country of his former habitual residence'. In my judgment, it is not. The denial does not interfere with a stateless person's rights in the way that it does with the rights of a national. There is a fundamental distinction between nationals and stateless persons in that respect. It is one thing to protect a stateless person from persecutory return to the country of his former habitual residence (as the Refugee Convention does), but it would be quite another thing to characterise a denial of re-entry as persecutory. The lot of a stateless person is an unhappy one, but to deny him a right that he has never enjoyed is not, in itself, persecution. Stateless persons are themselves the subject of an international treaty, namely the Convention relating to the Status of Stateless Persons 1954. The UK is a party to that Convention but it has not been incorporated into domestic law and Miss Collier does not suggest that it protects the appellant in this case.*
>
> *…..*
>
> *29 I am satisfied that the AIT did not fall into legal error when it held that the denial of re-entry to a stateless person is not in itself persecutory under the Refugee Convention."*

49. Counsel for the respondent submits that the approach adopted in M.A. does not support the applicant's counsel's contention of an international right of the applicant to be allowed to enter Bhutan. Furthermore, even if such a right can be recognised it is not a basic violation of human rights for the purposes of Article 9(1) of the Qualification Directive. It is argued that, effectively, the applicant's counsel is asking this court to decide the issue, which is not permissible. Counsel for the respondent also relied on the UK Court of Appeal decision in *S.H. (Palestinian Territories) v. Secretary of State for the Home Department* [2008] EWCA Civ 1150 where *E.B. (Ethiopia)* was distinguished on the basis that the latter case was concerned with a person who had in fact been a citizen of Ethiopia. In S.H., the UK Court stated:

> *"35. It is therefore incumbent on the appellant to show she is outside the West Bank owing to a well founded fear of persecution and for that reason is unable or unwilling to return. Although the test is the same for stateless persons as citizens it seems to me clear, as Wilson L.J pointed out in argument, that when you come to apply it the different circumstances between citizens and stateless persons may well be relevant and therefore produce a different outcome.*
>
> *36. In order to establish refugee status the appellant must show not only a well founded fear of persecution but also that it is for a Convention reason. The Convention reason relied on by the appellant is race, namely that she is a Palestinian Arab, but the evidence does not establish that she will be or is likely to be refused re-entry for this reason. Additionally it must be shown that the conduct feared (i.e. refusal of re-entry) amounts to persecution.*
>
> *37. Even if the evidence did establish she was likely to be refused re-entry because she is a Palestinian Arab there is no finding that refusal to permit re-entry would be discriminatory and in my view there can be no viable complaint that there is no such finding."*

50. Counsel urges the foregoing decisions of the UK Court of Appeal on the court as persuasive jurisprudence on the issue. In particular, in *S.H.* the UK Court of Appeal found that the evidence established no more than that *S.H.* was a stateless Palestinian who was likely to be refused re-entry if she did not have travel documentation. There was thus an evidential vacuum in *S.H.* and counsel submits that there is also such a vacuum with regard to the applicant's claim in the present proceedings. It is submitted that the question to be asked is what would have been before the Tribunal Member had she embarked upon a consideration of whether denial of entry to Bhutan amounted to persecution. The applicant could only have referred to his situation in Bhutan in the 1990s, yet the Tribunal Member would be obliged to assess the issue on the date of re-entry. It is submitted that there is nothing in the record to suggest that the applicant gave evidence about the approach the Bhutan government might take.

51. By way of counter-argument, counsel for the applicant submits that the Qualification Directive requirements represent minimum standards only and it was open to the Court to determine the matter as a matter of Irish law. Furthermore, counsel for the applicant submits that the applicant's case can be distinguished from the line of authorities relied on by the respondent's counsel. The applicant is being denied citizenship by reason of his ethnicity. The respondent's statement of opposition itself acknowledges this as it states:

> "On the facts of this case, no arbitrary removal of citizenship was alleged. At all material times, the evidence was to the effect that the Applicant had been denied citizenship in Bhutan, and it was alleged, and accepted as a matter of fact, that this was arbitrary and was done by reason of his race and/or ethnicity."

52. It is argued that this puts the applicant's case in a different category to that of the applicants in the UK authorities relied on by the respondent.

The Tribunal Member did not engage on a consideration of whether the applicant's inability to be returned to Bhutan could itself constitute persecution. It seems to me that counsel for the applicant and respondent respectively request this court to embark on a consideration of whether the applicant's inability to return to Bhutan itself constitutes persecution. The applicant wants this answered in the affirmative and the respondent in the negative. It is not permissible in judicial review proceedings for the court to engage on such a consideration and accordingly the court declines to do so.

53. The issue to be determined is whether the Tribunal Member failed to exercise jurisdiction and or otherwise erred in failing to consider whether the applicant's inability to return to Bhutan of itself amounted to persecutory treatment. Firstly, I am not convinced from a perusal of the papers (the available record of the asylum claim including the Notice of Appeal and the subsequent submissions) that the arguments which were advanced in the within proceedings on the applicant's behalf were sufficiently canvassed either before the Commissioner or on appeal to the Tribunal. In particular, I note the summary of the applicant's claim to the Tribunal as set out in the decision: "[The applicant] made a claim for protection to ORAC on 16.03.2007 on the basis that if returned to Bhutan he would fear persecution on the basis of race, religion and language." This is consistent with the applicant's claim as set out in the Questionnaire. While I note that the applicant on being asked what he feared if returned to Bhutan stated "Firstly [we fear that] we would not be let back in..", I also note that the extensive submissions made to the Tribunal did not address the question of whether the applicant's inability to return to Bhutan of itself constituted persecution for a Convention ground. Does my finding in this regard dispose of the matter, or can it be said that once the Tribunal Member found that the applicant "cannot as a matter of fact return to Bhutan (where he has a fear of being persecuted on grounds of race)", it was incumbent on her to then embark on an analysis of whether that inability of itself amounted to persecution? I am of the view that absent any argument canvassed in the asylum proceedings similar to the arguments that made in the within proceedings it would be unfair to impugn the decision on the basis that the decision-maker did not consider the question of whether inability to return of itself constituted persecution. Thus, the court does not find it prudent to pronounce one way or another as to whether the applicant's circumstances in this regard could amount to persecutory treatment given that that question was not embarked on by the decision-maker through no fault of her own.

"Compelling reasons"- the third limb of the challenge

54. Because the Tribunal Member effectively rejected the applicant's fear of persecution in the absence of the well-foundedness of the applicant's fears vis-à-vis Bhutan, she found that "compelling reasons cannot arise in this case".

55. Regulation 5(2) of the 2006 Regulations provides:

> "(2) The fact that a protection applicant has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, shall be regarded as a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated, but compelling reasons arising out of previous persecution or serious harm alone may nevertheless warrant a determination that the applicant is eligible for protection."

In *M.S.T. v. Minister for Justice* [2009] IEHC 529 Cooke J. had occasion to consider the parameters of Reg. 5(2). He stated:

> *"In the present case, however, Article 4(4) has been fully transposed verbatim by Regulation 5 (2) but the Minister appears to have gone further by the inclusion of the additional wording. The common parts of Regulation 5 (2) and Article 4(4) could be paraphrased as follows:*
>
> *(i) A claim to face a real risk of suffering serious harm must be regarded as having substantial grounds if the applicant establishes as a fact that he or she has already been subject to serious harm or to direct threats of such harm;*
>
> *(ii) The claim need not, however, be so regarded if there are good reasons to consider that such serious harm or threats will not be repeated."*
>
> *29. The ordinary meaning of the additional wording appears to be that, what might be called a "counter-exception" to para (ii) above is created to the effect that, even if there is no reason for considering that the previous serious harm will now be repeated, the historic serious harm may be such that the fact of its occurrence alone gives rise to compelling reasons for recognising eligibility. While that appears to be the ordinary meaning of the additional wording it is not immediately clear how it is to be given effect in the context of the concept of subsidiary protection .....*
>
> *32. Notwithstanding the difficulties presented by the additional wording, there cannot be any doubt, in the Court's view, that the additional wording can only be construed as intending to permit some limited extension to the conditions of eligibility prescribed in Article 4(4) designed to allow some latitude in according subsidiary protection based exclusively upon the fact of previous serious harm when it is accompanied by compelling reasons. It is relevant to bear in mind that "serious harm" is defined as including "inhuman or degrading treatment" ....It is possible therefore to envisage a situation in which an applicant had escaped from an incident of mass murder, genocide or ethnic cleansing in a particular locality. Even if the conditions in the country of origin had so changed that no real risk now existed of those events happening once again, the trauma already suffered might still be such as to give rise to compelling reasons for not requiring the applicant to return to the locality of the earlier suffering because the return itself could be so traumatic as to expose the applicant to inhuman or degrading treatment."*

56. The applicant submits there was a failure on the part of the decision-maker to look at whether the grounds of the past persecution suffered by the applicant in Bhutan were sufficient to warrant the granting of refugee status. It is argued that the failure on the part of the Tribunal Member to consider this constitutes a fundamental error and that itself merits the quashing of the decision. Counsel points to the applicant's circumstances. He never had a status in Bhutan. His family home was attacked and his

parents killed and the applicant himself injured all on the basis of their Nepalese ethnicity which, it is submitted, constitutes persecution of the utmost gravity and thus constituted a real case for compelling reasons to grant the applicant refugee status. However, the Tribunal Member did not assess this at all when she found the applicant ineligible by virtue of her finding on the well-founded issue. It is submitted that the approach which the Tribunal Member should have taken on the issue of compelling reasons is found in the decision of this court in *N.B. v. Minister for Justice* [2015] IEHC 267. Moreover, the appeal submissions had specifically alerted the Tribunal Member that the circumstances merited protection under Regulation 5(2). It is submitted that the applicant's circumstances fall entirely within the realm of protection for which Regulation 5(2) was designed.

57. On behalf of the respondents, it is argued that the Tribunal Member did not misdirect herself on the question of compelling reasons. Insofar as the applicant's counsel asserts that compelling reasons can arise out of past persecution alone that is not the case and counsel contends that the provisions of Regulation 5(2) must be read in light of the Qualifications Directive and a method of assessing future risk. In this regard, counsel for the respondent relies on the dictum of Cooke J. in *M.S.T. v. Minister for Justice* [2009] IEHC 529:

> *"33. The Court is accordingly satisfied that the additional wording does have some limited effect in extending the possible scope of application of article 4.4. In particular, the wording appears to be designed to grant some latitude to the Minister to recognise eligibility for subsidiary protection in a case of proven previous serious harm giving rise to compelling reasons for according international protection notwithstanding the fact that there may exist some doubt as to the likelihood of risk of repetition of that previous serious harm.*
>
> *34. The Court's attention has been drawn to the judgment of Charleton J. in N. v. M.J.E.L.R. (High Court, 24th April, 2008). The Court would agree with the learned judge in the view he expressed that this additional wording does not operate so as to create a distinct new criterion for entitlement to subsidiary protection over and above that contained in article 4.4 of the Directive. Eligibility remains dependent upon it being established that there is a real risk upon return of suffering serious harm as defined. Regulation 5 is concerned with how a protection decision maker assesses the reality of the risk. Regulation 5(2) tells the decision maker that the fact of previous serious harms suffered, when proven, is a serious indication that the risk is real in such a case and if that harm gives rise to compelling reasons for considering that international protection is necessary, that fact alone may be enough even if it is possible that the same fact may not be repeated. The additional wording falls, as indicated above, to be regarded as facilitating the application of the basic provision contained in article 4.4 and elsewhere in Regulation 5 (2) by clarifying how evidence of facts and circumstances relating to incidents of previous serious harm may be assessed. It is purely facultative: "may nevertheless warrant …". The words to not give rise to a new entitlement as such. They merely allow the protection decision-maker the facility in a case of compelling reasons, to determine eligibility as established without being obliged to be fully satisfied that the harm runs a risk of being repeated.*
>
> *…*
>
> *54. It is possibly unnecessary to point out that while such a reconsideration involves an appraisal of past events so far as concerns the fact of previous serious harm, the test for a determination of eligibility for subsidiary protection remains a forward looking one. Thus, upon a reconsideration of the application, the appraisal of the "compelling reasons" will necessarily take account of any changes that have taken place since September 2008 both in relation to the progress made in the medical treatment of the applicants in this jurisdiction and the prevailing conditions faced by ethnic Serbs in Croatia."*

58. Counsel submits that the *ratio* of *M.S.T.* is that there is no entitlement to refugee status on the basis of past persecution but rather that Regulation 5(2) allows for a decision maker to conclude on the basis of past persecution if there is a doubt regarding future persecution. In the present case, the Tribunal Member did look back at the applicant's circumstances in Bhutan in the 1990s and accepted that his story was consistent with country of origin information as to what happened to the Nepalese in Bhutan. However, she did not find compelling reasons given her finding of the "practical impossibility of returning the [applicant] to Bhutan." It is thus argued that the Tribunal Member's approach accords with the approach adopted by Cooke J. in *M.S.T.*

59. It is clear to the court that the applicant made the case on appeal to the Tribunal that his circumstances merited the application of the "*counter-exception*" as provided for by Reg. 5(2). As such it was incumbent on the Tribunal Member to address the matter. It cannot be said that she failed to note the argument being made on the applicant's behalf as she refers to the issue of "compelling reasons" in the decision. However, her review of the issue was not a merit based review as she did not embark on a consideration of whether the previous persecution claimed by the applicant constituted compelling reasons such as might warrant a determination that he was eligible for protection. She alluded to the issue only in the context of finding that "compelling reasons" did not arise. The evidence given by the applicant and the submissions made on appeal on the issue did not founder because of the paucity or otherwise of the evidence (this of course being a matter solely for the decision-maker to assess), rather the consideration as to whether there were "compelling reasons" to warrant a determination that he was in need of protection never got off the starting blocks because the decision-maker was constrained by her earlier (erroneous) finding that the applicant's fear was not "well founded" because of "the practical impossibility" of returning the applicant to Bhutan. The consequence of the earlier finding was the forestalling of any substantive consideration of whether "compelling reasons" might arise. Thus, there is no question but that the erroneous approach adopted from the outset of the analysis of the applicant's claim undermines and indeed infects the conclusion reached with regard to "compelling reasons" and thus vitiates the decision. This challenge has been made out.

Summary

60. For the reasons outlined in this judgment, I am satisfied that an order of certiorari is merited and the matter is remanded to the first named respondent for de novo consideration before a different Tribunal Member.