

THE HIGH COURT**JUDICIAL REVIEW****2007 1309 JR****BETWEEN****T. B. K.****APPLICANT****AND****DENIS LINEHAN (ACTING AS THE REFUGEE APPEALS TRIBUNAL) AND THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM****RESPONDENTS****JUDGMENT of Mr. Justice Cooke delivered the 3rd day of December 2010**

1. By order Edwards J. of 12th February, 2010, leave was granted to the applicant to bring the present application for judicial review of an appeal decision (the "Contested Decision") of the first named respondent ("the Tribunal") of the 27th August 2007, which had confirmed a recommendation in a report under s. 13 of the Refugee Act 1996 (as amended) by the Office of the Refugee Applications Commissioner ("ORAC") that the applicant should not be declared to be a refugee. Although leave was granted on the basis of grounds which were itemised as three distinct grounds, the issue effectively turns upon that stated in the first ground as follows:-

"The first named respondent erred in law and/or fact and/or acted in breach of fair procedures and/or irrationally in (i) failing to engage the primary claim of the applicant in his evidence, the notice of appeal and the submissions and arguments, that he was of Bhutanese nationality (as opposed to being stateless).

2. The personal history of the applicant demonstrates that in practical terms he has been a refugee since 1992 in the sense that he has been living in a UN refugee camp in Nepal since he fled from Bhutan, the country in which he was born in that year. However, the issue which is raised by the above ground is a technical one which turns upon the interpretation of the definition of "refugee" in the Geneva Convention of 1951 as enshrined in s. 2 of the Act of 1996. In effect, the question posed by this ground is whether the applicant ought in law to be considered to be a refugee who has fled persecution in Bhutan as his country of nationality or, as the Tribunal member held, as being a stateless person who is outside the last country of his habitual residence namely Nepal, and who has failed to establish any basis for fearing persecution if returned to that country.

3. That personal history given by the applicant since he applied for asylum has never been questioned throughout the asylum process. He and his parents were born and lived in Bhutan, but were of Nepalese ethnicity. He says his family lived in Bhutan for many generations and owned land which they farmed. He worked with his father on the family farm and engaged in trade in produce, paying taxes and pursuing a peaceful way of life until he was 23 years of age. His account, as confirmed by country of origin information, is that in the mid 1980s the Bhutanese authorities changed the citizenship and nationality laws in a way designed to discriminate against people of Nepalese ethnicity living in the country. In particular, residents of Nepalese descent who were unable to prove 15 years continuous residence in Bhutan prior to 1958 were declared to be illegal migrants and effectively deprived of citizenship.

4. The applicant says that he and his father joined the Bhutanese Peoples Party to protest against this discrimination and denationalisation as a result of which he was arrested following a demonstration and detained in prison where he was beaten and tortured. In May 1992, he was released, but only upon signing a document in which he undertook to leave Bhutan and never return. As a result, he, his wife and children and his father (his mother had died,) were effectively expelled from Bhutan and having travelled through India, arrived in Nepal and were accommodated along with very many other Bhutanese in the same situation in a refugee camp established by the United Nations. There they have lived since. Although confined to the camp and not entitled to seek employment officially, the applicant managed to work illegally. Eventually with the help of his employer he says that he was able to leave in 2006, because he had been threatened by Maoist activists who sought to pressurise him into becoming involved in their military struggle. He claimed asylum in this jurisdiction on the 21st June, 2006.

5. As indicated, the single ground upon which the RAT decision is sought to be challenged is directed at the proposition that the Tribunal member dealt with the appeal upon the basis that the applicant was to be treated as a stateless person who is outside his country of habitual residence (namely, Nepal) and thus could only claim refugee status if he established a well founded fear of persecution if returned to Nepal. It is argued that the Tribunal member wrongfully failed to consider the "primary claim" made that the applicant was a national of Bhutan and was outside that country having been expelled from it for reasons which constituted persecution on grounds of ethnic origin. The ground relied upon employs an expression not normally encountered in the vocabulary of judicial review – "failed to engage the primary claim of the applicant" – which the Court interprets as meaning that the Tribunal member failed to consider and to decide whether or not the applicant was a national of Bhutan and instead proceeded on the basis that the applicant was claiming to be stateless.

6. The statutory context of this issue is the definition of "refugee" in s. 2 of the Act of 1996, which is drawn from the definition of the same term in Article 1 of the Geneva Convention. In essence a "refugee" is a person who, owing to a well founded fear of persecution for a Convention reason, "is outside the country of his or her nationality" or who "not having a nationality [is] outside the country of his or her former habitual residence" and is unable or unwilling to return etc. Thus, the need to examine or identify a country of former habitual residence arises only where it is first clear that the asylum seeker does not have a nationality.

7. As Edwards J. pointed out in his judgment granting leave on the 10th February, 2010, a great deal of the difficulty in the present case appears to have originated in some doubt or confusion as to the precise basis upon which the appeal against the s. 13 report of ORAC was brought and presented. In the first place, when the asylum application was made and the questionnaire completed, the question "What is your current nationality/citizenship?" was answered "Bhutanese". In the s. 11 interview the difficulties faced by the

family in the 1980s when the citizenship laws were changed in Bhutan was described. Reference was made to a government circular about the changes and he said that: "Also included in that circular was that everybody should show proof they were living in Bhutan before 1958. In 1985 there was an amendment to the circular, I and my family did not have proof of residency." Later he described how, although they were Bhutanese citizens, their documentary evidence of citizenship was "snatched". "Everything was snatched: I had documents but they were snatched: because everybody who went against the government circular, their citizenship was seized".

8. The opening line of the s. 13 report reads: "The applicant's case is based on a stated fear of persecution in Bhutan for reasons of his ethnicity." In examining the well founded fear, however, paragraph 4.2 of the report observes:

"As an undocumented Bhutanese national living in Nepal it could be argued that the applicant is in fact stateless. The British Immigration Appeal Tribunal found in "SG (stateless Nepalese: refugee? Removal directions) Bhutan" (2005) UK IAT0025 "The if an asylum claimant is in truth stateless, it is important to assess the claim by reference to his country of former habitual residence, which will not necessarily be the country of which he has previously said he was a national."

The officer then continued:-

"It is established that the applicant's case for asylum in Ireland must be based on the events recounted during his time in Nepal, the country of his habitual residence from where there is no reason to believe he would have faced refoulement to Bhutan."

The report goes on to consider country of origin information relating to the Maoist uprising against the government and concludes that the conflict in question had ceased with the admission of the Maoists to the Nepalese government. "The conflict has ceased, therefore the applicant's fear is not well founded."

9. Clearly, therefore, the ORAC report is based upon the finding that the applicant's original Bhutanese nationality had been lost and that he was to be treated as a stateless person and accordingly by reference to the existence of any fear of persecution if returned to his former country of habitual residence, namely Nepal.

10. An appeal was taken against the ORAC report and, unlike many notices of appeal which rely upon generic grounds stated in general terms, this particular notice of appeal contained 11 grounds directed in some detail at the contents of the ORAC report. No ground sought to challenge the finding made in the report that the applicant was to be treated as fearing persecution by Maoists in his former country of habitual residence rather than as a national of Bhutan fearing persecution on grounds of ethnicity. On the contrary, ground 4 included: "The applicant's claim is that he is a stateless person which is apparently conceded by the RAC in that they conclude that his claim is to be considered in relation to the country of his former habitual residence". Ground 5 was: "As a stateless person, the applicant is outside the country of his former habitual residence, he is unable or, owing to such a fear, is unwilling to return to it. The applicant fears persecution by Maoists in Nepal". In ground 11 access was demanded to previous decisions of the Tribunal namely "positive decisions concerning persecution on the grounds to ethnicity and political opinion in Nepal, particularly re: stateless persons". Several other grounds also turn upon the basis for fearing the Maoists in Nepal.

11. There can be no doubt, accordingly, that the appeal thus taken was based upon an explicit acceptance of the finding in the ORAC report to the effect that the applicant was a stateless person fearing persecution if returned to Nepal.

12. Immediately prior to the hearing before the Tribunal, however, a memorandum of "Additional Submissions" was lodged as the basis for the case to be made at the appeal hearing. Much of the debate at the present application and before Edwards J. on the leave application sought to focus upon a single paragraph on p. 5 of those submissions under the heading "Benefit of the doubt". It read: "The fundamental claim of the applicant is that he has a well founded fear of persecution in his country of origin Bhutan, which is his country of nationality following his arrest, detention, torture and subsequent expulsion. Also, in relation to his time in a refugee camp in Nepal, the applicant also claims a well founded fear because of threats from Maoists".

13. This, therefore, is the basis for the assertion that the Tribunal member failed to "engage the primary claim of the applicant". In the judgment of the Court this assertion owes more to retrospective reconsideration of the case that might have been made than to any logical appraisal of the case as it was understood to be made by the Tribunal member.

14. First, the proposition is inconsistent with the explicit contents of the Notice of Appeal as already indicated. Secondly, it does not sit well with any overall reading of the memorandum in question as a whole. To read the sentence in question as indicating the primary ground of the appeal and thus a radical departure from the detailed terms of the notice of appeal, involves distorting the general tenor of everything else in the memorandum.

15. That this is so can be illustrated by simply quoting a series of extracts from the memorandum under its different headings as follows:

Facts

"The applicant was threatened by Maoists to work for them and to return to Bhutan and participate in activities in Bhutan which would destabilise the authorities there. The applicant refused and fled Nepal fearing for his safety in July 2006 and fled to Ireland."

Well Founded Fear

"Two points were made: His treatment in Bhutan establishes a legal presumption of a well founded fear of persecution for a Convention reason in Bhutan, the applicant's country of nationality; and also there is evidence in relation to threats from the Maoists 'equally established a legal presumption of a well founded fear of persecution in Nepal'."

State Protection:

"It is submitted that the applicant's evidence is that as essentially a non person without any civil or political rights in Bhutan following the citizenship laws of the 1970s - 1980s in Bhutan, he is unable to avail of any state protection in Bhutan."

It was also claimed "that the applicant's evidence is that as essentially a non person without any civil or political rights in Nepal, he is unable to avail of any state protection in Nepal if threatened."

Internal Relocation

Under this heading he was described as being “a non person without any civil or political rights in either Bhutan or Nepal.”

Stateless – Former Habitual Residence

The submission was made that “in relation to the country of nationality and to the country of former habitual residence, the facts of this applicant’s case lend themselves to several different approaches”.

Two different approaches are then described.

First it was submitted that: “There is authority for considering both Nepal and Bhutan as the former habitual residences and for assessing the applicant’s claim not just in relation to Nepal as a former habitual residence but also considered Bhutan as a former habitual residence”.

The same passage contained the submission “that if the Tribunal determines the applicant is a stateless person the Tribunal is not precluded from considering Bhutan as a country of former habitual residence”.

16. The second approach was headed “Bhutan” and contained the submission: “Alternatively . . . the applicant has a claim for refugee status arising out of his original nationality and his original country of origin Bhutan, and the circumstances of his departure. Clearly the evidence amounts to a legal presumption of fear of persecution. Fifteen years later is not necessarily a bar to a valid claim. It is submitted that when he was born, he had a nationality, he continued to have it for 23 years, his parents also that this nationality, their status might have been somewhat different from Bhutanese, but they enjoyed identical rights – civil, political, right to work, education, participation in all areas of social, political and cultural life”.

17. In the view of the Court these submissions were clearly formulated with a view to keeping the applicant’s options open by covering a number of possibilities. These included: a claim for refugee status based on

- (a) “His original nationality and his original country of origin” on the basis that this could still be made 15 years after he had departed Bhutan;
- (b) The fact that he was “essentially a non person without any civil or political rights” in Bhutan, but that it was nevertheless his former place of habitual residence; and
- (c) That he was also “essentially a non person” without any rights in Nepal and that this was his former place of habitual residence; and
- (d) That both Bhutan and Nepal were former places of habitual residence and that he first faced persecution if returned to either one.

18. There can be no doubt but that the Tribunal member in the Contested Decision was fully aware of the variety of submissions thus being made. In the first place, the third section of the decision under the heading “The Applicant’s Claim” accurately describes the history which the applicant had given. It describes his life in Bhutan for 23 years and the circumstances in which he left including the confiscation of the family land and assets. It states: “Also, the government retained whatever documentation would support this applicant’s claim to residency Bhutan. However, he did state that his citizenship was not revoked before he left Bhutan”. Later the Tribunal member records: “He said he could not go back to Bhutan because he no longer owned any property there and he said that he did not have any legal status within that country”. Again, “He said, in cross examination, that he, together with his father were citizens of Bhutan. However, all records relating to that status had been retained by the Bhutanese government”.

19. In the fourth section of the Contested Decision, “Submissions”, some of the points already mentioned above are recorded, including that: “there was a possibility that this applicant may be “stateless”. It was suggested that the applicant had a dual residence that would apply to either Bhutan or Nepal”.

20. The Tribunal member then analyses the applicant’s claim in the sixth section. He refers to the applicant having lived in Bhutan until 23 years of age and then living in Nepal where he experienced difficulties with the Maoists. “It has been suggested to this Tribunal that this man may be stateless and, accordingly, his claim should be assessed insofar as his former habitual residence is concerned. It has also been suggested that this man may have a former habitual residence both in Nepal and Bhutan.” The Tribunal member then refers to the “SG case” in which a Bhutanese born asylum seeker who had fled that country at the age of nine years and lived thereafter in Nepal was decided to be stateless with his former habitual residence in Nepal. The Tribunal member considered that there was no material distinction in the two circumstances based only on the fact that this applicant had lived in Bhutan for 23 years while the asylum seeker in the SG case had left at the age of nine. He then makes the finding: “I find that this man’s former habitual residence was Nepal. I intend to assess his claim on the basis of his former habitual residence in that country. It has been suggested to me by counsel on behalf of the appellant that this man may be stateless. I accept that proposition and, accordingly, I must assess his claim on the basis of his former habitual residency in Nepal”. At the end of the section a final conclusion is given: “Taking the forward looking view into account and the changed circumstances since this man left Nepal, I am of the view that he would not be persecuted if he returned to that country which is the country of his former habitual residence”.

21. In the judgment of this Court the Contested Decision thus contains a clear and explicit finding that the applicant was stateless. It is also a finding that Nepal was his place of former habitual residence. That finding is not inconsistent with the case that was made to the Tribunal member at the appeal hearing, because precisely those possibilities were canvassed in the “several different approaches” put forward in the written additional submissions. Having regard to the fact that the Contested Decision also refers expressly in its title to the applicant’s nationality as being “Bhutanese” and the country as being “Bhutan” as well as clearly recording that the applicant was born in Bhutan of Bhutanese parents and lived there for 23 years, the finding that he was stateless is necessarily a finding which rejects the proposition that he had retained the nationality of Bhutan since leaving it in 1992. Furthermore, that finding was clearly open to the Tribunal member on the evidence before him. As already indicated above, the applicant had testified that his family had been unable to provide the proofs of residency required by the changed nationality laws, thereby becoming treated as illegal immigrants. However questionable the policy of the Bhutanese authorities might be in international law, there is no doubt that the intention and practical effect was to deprive the applicant and his family of citizenship of that country. It follows, accordingly, that even if, notwithstanding the terms of the Notice of Appeal, the memorandum of “Additional Submissions” as well as the oral submissions made at the hearing are taken as maintaining a claim based upon Bhutanese nationality, the Contested Decision did not fail to “engage” a claim but made an explicit finding which can only be interpreted as a rejection of it.

22. For these reasons the Court considers that the ground for which leave was granted has not been sustained and the application must therefore be dismissed.