Neutral Citation Number: [2009] IEHC 270

THE HIGH COURT

JUDICIAL REVIEW

2007 1034 JR

IN THE MATTER OF AN APPLICATION PURSUANT TO THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT, 2000

BETWEEN

S.B.

APPLICANT

AND

DENIS LINEHAN (SITTING AS THE REFUGEE APPEALS TRIBUNAL)

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

Judgment of Mr. Justice Feeney delivered on the 18th day of June, 2009.

Factual Background

1. The applicant was born on the 1st February, 1967 in Bhutan. He is of Nepalese ethnicity and is a Hindu. His family were originally farmers who farmed their own land in Bhutan. The applicant avers that Bhutanese persons of Nepali origin were persecuted in Bhutan by the authorities since the mid-1990s. As a result of such persecution both he and his extended family were forced to flee from Bhutan in 1992 and take up refuge in Nepal. The exodus from Bhutan was such that the UNHCR had to set up eight camps for persons fleeing from Bhutan. The applicant and his family were accommodated in one of those camps known as Beldangi II Refugee Camp for a period of fourteen years from 1992 up to 2006. The applicant indicates that during that period both himself and his family were provided with food and rations but were not legally entitled to work. Notwithstanding that restriction the applicant secured an "illegal job" in 2001 working in a shop some short distance from the camp. The applicant continued in that job for a period of five years but in April 2006 an incident occurred which it is claimed caused the applicant to leave Nepal.

2. On the 21st April, 2006 the applicant states that Maoist rebels came to the shop where he was working to demand money from the owner and the applicant contacted the police who came to the shop and shot one of the Maoists. The applicant states that the Maoists became aware that he had contacted the police and threatened to kill him for being a spy and that as a result of this he felt that he was no longer safe or able to remain in the camp and he fled to India with the assistance of his employer. The applicant travelled to India on the 23rd April, 2006.

3. The applicant stayed in India for a period of four months but since he was not able to legally remain in India he arranged with the assistance of an agent to travel to Europe. He eventually arrived in Ireland via Frankfurt, London and Belfast.

4. The applicant, in pursing his application for asylum, identified that he was of Bhutanese nationality. As part of the asylum process he responded to certain questions and therein he indicated that though of Bhutanese nationality, he was not entitled to a Bhutanese passport and confirmed that along with other persons of Nepalese ethnicity he was forced to leave Bhutan in 1992.

Nature of application

5. The Refugee Applications Commissioner, in his s. 13 report of the 22nd February, 2007 stated at para. 4.5:

> "'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] U.K. IAT 00025 (Appendix A):
>
> 'That if an asylum claimant is in truth stateless, it is important to asses his 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.'
>
> 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, as per the 2005 U.S. State Department Report on Nepal (Appendix B) there is no reason to believe that he would have faced refoulement to Bhutan."

The Refugee Applications Commissioner went on to make a number of adverse determinations in relation to the applicant's credibility and ultimately determined that he was satisfied that the applicant had failed to establish a well-founded fear of persecution and recommended that the applicant should not be declared a refugee.

6. The Refugee Applications Commissioner in effect found that the applicant was a stateless person and determined his claim on the basis that Nepal was the applicant's country of habitual residence.

7. The applicant appealed to the Refugee Appeals Tribunal and an oral hearing was conducted on the 28th May, 2007 at which the applicant was present and represented. During the course of that hearing the applicant stated that he could not obtain any protection from the government forces in Nepal, and that if he was to return to Bhutan he would be subject to discrimination and ill treatment as he had been in the past, and that his citizenship of Bhutan had been revoked prior to his departure from that country in 1992. The applicant's claim of lack of protection from the government forces in Nepal was based upon his contact with the Maoist rebels in April, 2006. He maintained a continued fear of lack of protection notwithstanding that he had worked for a period of five years prior to leaving Nepal and had not come to any harm during that period. The applicant also confirmed that he and his family were safe in the refugee camp while they lived together up to 2006 and that since then his family remained in the camp. The applicant continued to express fear of retaliation from Maoist rebels notwithstanding that the Maoists had joined the interim government in Nepal. It was also expressly put to the applicant that following inquiries with the authorities that it appeared that a person with the name of S.B. continued to reside in the camp. Mr. B. responded by indicating that somebody was using his identity. It was also confirmed that the applicant's wife and children continued to reside in the refugee camp in Nepal as of the date of the appeal.

8. The applicant claimed that he was entitled to refugee status on the grounds of persecution in Bhutan. The Tribunal was requested to determine the applicant's claim on the basis that he was originally from Bhutan and that accordingly his claim should be assessed on the basis of persecution in Bhutan. The Tribunal determined that the appropriate legal principle to apply was that identified in the United Kingdom Immigration Appeal Tribunal decision referred to in the s. 13 report, which was on the basis that if an applicant for asylum was stateless then the application for asylum had to be judged by reference to the country of former habitual residence and that country was Nepal. The Tribunal therefore considered the applicant's claim by reference to Nepal. The Tribunal concluded, that having considered the facts of the particular case and the current country of origin information, and having taken into account the previous decisions of the Tribunal which the applicant had referred to, that the recommendations of the Refugee Applications Commissioner should be affirmed and the applicant's application for refugee status was therefore refused.

Arguments advanced on behalf of the applicant
9. It is claimed that the Refugee Appeals Tribunal failed to consider the applicant's claim fully and subjectively with reference to the legal definition of a refugee under s. 2 of the Refugee Act 1996 (as amended) and this claim is made with specific reference to the facts of the applicant's case and to the issues of nationality and former habitual residence. It is contended on behalf of the applicant that the Refugee Appeals Tribunal committed an error of law by determining the applicant's claim for refugee status by reference to Nepal as it is claimed that such country was not the applicant's country of nationality nor his country of habitual residence. It is claimed that there was a failure to make a reasoned decision on why the applicant does not have Bhutanese nationality and that there was also a failure to make a reasoned decision on why Bhutan was not the applicant's country of former habitual residence by reference to the facts of the applicant's claim. It is on these grounds that the applicant seeks leave for judicial review. The application is made pursuant to s. 5 of the Illegal Immigrants (Trafficking) Act 2000 (as amended by ss. 10 and 13 of the Immigration Act 2003).

The Legal Standard
10. The standard to be applied by this Court in a leave application is set down in

s. 5(2)(b) of the Illegal Immigrants (Trafficking) Act 2000, namely, that the applicant is required to establish substantial grounds. Substantial grounds have been identified as being equivalent to "reasonable", "arguable" and "weighty" and that such grounds must not be "trivial or tenuous". This approach was identified in *McNamara v. An Bord Pleanála* (Unreported, High Court, Barr J., 10th May, 1996) Carroll J., who was the learned High Court Judge expanded on the standard to be applied by the Court:

> "… In order for a ground to be substantial it must be reasonable, it must be arguable, it must be weighty. It must not be trivial or tenuous …".

Decision
11. It is clear that in considering the issues of nationality and former habitual residence that regard must be had to the facts of the individual applicant's circumstances. This stems from the fact that a person's location of habitual residence is a question of fact. In situations where a claimant is found to be without nationality, the convention inquiry is as to that person's country of former habitual residence. That approach arises from the fact that refugee law exists to provide a system of protection where a domestic government fails to protect an individual. The position of a stateless person is anomalous and has resulted in the development of the concept of the country of former habitual residence. Thus, where a stateless person has been admitted to a particular country with a view to continuing residence of some duration, that country can become a person's country of habitual residence. Thus where a claimant is without nationality the convention inquiry considers the conditions in an applicant's country of former habitual residence and the UNHCR has described that as being "the country in which he had resided and where he had suffered or fears he would suffer persecution if he returned". It is clear that a person's location of habitual residence is a question of fact which falls to be considered when a claimant is without nationality or stateless.

12. In this case the Refugee Appeals Tribunal determined that the applicant's country of former habitual residence was Nepal. The facts upon which that determination were based included the information that the applicant had been stripped of his Bhutanese citizenship, and had not been in that country since 1992 and had resided safely in Nepal for some fourteen years. He had also worked for a number of years in Nepal and his family continued to reside in safety in that country. As a person's location of habitual residence is always a question of fact, the Court must consider whether the applicant has established substantial grounds to suggest that such finding as to former habitual residence is irrational or *ultra vires*. Given the facts available to the Refugee Appeals Tribunal, the Court is satisfied that there is no basis for contending that the determination of Nepal as the applicant's country of former habitual residence is irrational or *ultra vires*. There were compelling and cogent facts available to support such contention. It was from Nepal that the applicant had left and he claimed that such flight was due to fear of what would occur in Nepal and he claimed to be unwilling to return to that country.

13. In considering the issues of nationality and former habitual residence the Court accepts the contention made on behalf of the applicant that the refugee definition requires an analysis of the subjective as well as the objective circumstances in each appeal. The applicant claims that the Refugee Appeals Tribunal failed to make a reasoned decision as to why it determined that the applicant did not have Bhutanese nationality. However, the facts set out in the documentation makes it clear that the applicant had fled from Bhutan in 1992 and by that date his citizenship had been revoked and he was not entitled to a Bhutanese passport. Those facts taken together with the fact that the applicant had continuously resided in Nepal from 1992 to 2006 and that it was from that country that he fled, represent material which provide a reasoned basis for the Refugee Appeals Tribunal's decision that the applicant did not have Bhutanese nationality and that by 2006 he was, in effect, a stateless person in Nepal. The Court is satisfied that it cannot be contended that the first named respondent failed to make a reasoned decision on why he did not believe the applicant to have Bhutanese nationality given the undisputed facts outlined above.

14. The applicant further contends that the Refugee Appeals Tribunal failed to make a reasoned decision as to why Bhutan was not the applicant's country of former habitual residence with reference to the particular factual circumstances of the applicant's claim. It is clear that each individual case must be considered on its own facts. The facts of this case demonstrated a prolonged period of residence in Nepal, a *de facto* rather than a legal entitlement to work, the continued residence of the applicant's family in Nepal together with consideration of the applicant's ability to continue to reside in Nepal. Within the decision of the 20th June, 2007 it is stated that any conclusion in relation to country of habitual residence must take into account the individual facts relating to an applicant and the most up to date country of origin information relevant thereto. The decision of the Refugee Appeals Tribunal demonstrates that that is what occurred in this case. The findings within the decision and the facts identified provide a rational basis for the Tribunal's finding that the earlier decisions of the Tribunal relied upon by the applicant were not of "sufficient relevance". The applicant relied on the earlier decisions of the Refugee Appeals Tribunal relating to persons born in Bhutan, who had been exiled since the late 1980's or early 1990's outside Bhutan, but in both cases those applicants had left the refugee camps where they were living and returned to Bhutan and after being put in fear, fled from Bhutan. Those cases demonstrated different facts from this case.

15. The applicant contended that the Refugee Appeals Tribunal should have approached this matter on the basis that an applicant can have multiple countries of habitual residence. The applicant contends in this case that the Refugee Appeals Tribunal failed to make a reasoned decision as to why it held that Bhutan was not the applicant's country of former habitual residence. It was acknowledged that the applicant had left his country of birth, namely Bhutan, because of persecution and was unable and unwilling to return thereto or to avail of the protection of that country and that therefore he remained a refugee from Bhutan but the facts demonstrated that the applicant had a country of habitual residence which offered effective protection, namely Nepal.

16. The Court accepts that a person such as this applicant may have a relationship with more than one country which is capable of being described as a country of former habitual residence. On the facts of this case there was clear evidence sufficient to support a finding that Nepal offered effective protection. There were no matters identified to suggest that he would not be treated in the same manner in Nepal as he had been prior to his departure in 2006. The Court is therefore satisfied that there was sufficient evidence available to allow and permit of the conclusion that for the purpose of consideration of the applicant's refugee status, the applicant's country of habitual residence was Nepal.

17. The applicant makes a further complaint that the Tribunal member did not make it clear in his finding as to whether or not the applicant did or did not have Bhutanese citizenship. However, consideration of the decision identifies that the Tribunal member expressly referred to the fact that the applicant's citizenship had been revoked by the Bhutanese government and that he had fled Bhutan as a refugee. There was a rational basis for considering that after such flight to Nepal, he had developed a location of habitual residence therein and it was therefore correct to consider whether such country offered effective protection.

18. The decision of the Refugee Appeals Tribunal is based upon a consideration as to what would happen to the applicant if returned to Nepal. On the facts of this case where the applicant's Bhutanese citizenship had been revoked, where he had resided in Nepal for an extensive period of time, had worked in that country, had fled from Nepal and where his family continued to reside therein, this Court is satisfied that, on the facts of this particular case, there was a rational basis for the Refugee Appeals Tribunal proceeding on the premise that the applicant could return or be removed to Nepal without any breach of the applicant's rights.

19. This Court is satisfied that consideration of a person's location of habitual residence is always a question of fact and in this case the personal circumstances of the applicant were such that there was a rational basis for the Refugee Appeals Tribunal determining that Nepal was the applicant's country of former habitual residence and that fact taken together with the evidence that Nepal offered effective protection allowed and permitted of a rational and *intra vires* decision that the applicant was not a refugee. Section 2 of the Refugee Act 1996 provides:-

> "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....."

In applying that section the Refugee Appeals Tribunal was obliged to do so by reference to the particular facts of the applicant's case. There was evidence which allowed and permitted the Tribunal to determine that the applicant had, in effect, no nationality and, therefore, the Tribunal was required to consider whether the applicant had a country of former habitual residence, and, if so, whether or not he was able to return to that country and obtain effective protection.

20. This is an application for leave in relation to judicial review. As pointed out in a number of judgments, judicial review is not a form of appeal but is a process to provide a form of supervision in relation to decisions made and actions taken by lower courts and by administrative bodies such as the Refugee Appeals Tribunal. The scope of judicial review was identified by O'Hanlon J. in *Lennon v. District Judge Clifford* [1992] 1 I.R. 382 (at p. 386):

> "... the High Court is not available as a court of appeal from decisions of other tribunals except where it is given

such a function by statue, and that the scope for challenging the validity of orders made by lower courts by way of judicial review proceedings is confined to those cases where reliance can be placed on want of jurisdiction, or excess of jurisdiction; some clear departure from fair and constitutional procedures; bias by interest; fraud and perjury; or decisions containing an error of law apparent on the face on the record."

Judicial review is concerned, not with the decision, but with the decision making process. Unless that restriction on the power of the Court is observed, the Court would, under the guise of preventing an abuse of power, be itself guilty of usurping power. This Court is, therefore, limited in its consideration to the decision making process and has regard as to whether the applicant has been afforded fair procedures as to whether the Refugee Appeals Tribunal has acted unreasonably or in excess of jurisdiction. As is apparent from the foregoing, this Court is satisfied that there has been no want of fair procedures nor has it been shown that the Refugee Appeals Tribunal either acted unreasonably or in excess of jurisdiction.

21. The applicant has failed to establish any substantial ground for challenging the decision of the Refugee Appeals Tribunal. The Court is satisfied that the Tribunal neither acted in an irrational or *ultra vires* manner in determining that the applicant's country of former habitual residence was Nepal.

22. For the above reasons the Court refuses the applicant the leave sought.