

THE HIGH COURT

JUDICIAL REVIEW

[2012 No. 959 J.R.]

BETWEEN

B.L. (NEPAL)

APPLICANT

AND

THE REFUGEE APPEALS TRIBUNAL (CONSTITUTED OF BERNARD MCCABE BL, TRIBUNAL MEMBER) AND THE MINISTER FOR
JUSTICE EQUALITY AND LAW REFORM

RESPONDENTS

JUDGMENT of Mr. Justice Eagar delivered on the 28th day of July, 2015

1. This is a telescoped hearing of an application of an order for *certiorari* quashing the decision of the first named Respondent dated 2nd November 2012 which affirmed the recommendation of the Refugee Applications Commissioner that the Applicant should not be declared a refugee and that the Applicant had failed to establish a well-founded fear of persecution as defined under s. 2 of the Refugee Act, 1996 (as amended) (hereinafter called "the Act").

2. The statement of grounds in this case were verified by the affidavit of the Applicant who stated that he was a national of Nepal who was forced to flee because he was persecuted on the basis of imputed political views. He said his brother was a prominent Maoist and that he was killed in and around 2003 by the then government forces. At the same time the police started to pursue him as did his brother's former colleagues in the Maoist party. He said that he looked like his brother and that the Maoists wanted to recruit him into their party but he did not wish to get involved. They became aware that he was unwilling to join them and from this they started to believe that he was a government spy. After that he started to receive threats and as it was not safe he fled to India. There he had relatives who permitted him to work casually on their farm in exchange for food and board. During the six years approximately that he spent in India, he made approximately five or six trips over the border to see his wife. Eventually he could no longer remain living off his relatives and obtained a visa through an agent to travel to the UK. He stayed there for a number of months before coming to this State and applying for asylum on the advices of the agent. He said he was initially the subject of a Dublin Convention transfer order. He stated "However I heard that other Nepalese nationals who had been returned to the UK were returned to Nepal shortly afterwards". He believed that a similar fate would happen to him and so he evaded the implementation of the transfer order and eventually his asylum application was processed in Ireland. A notice of appeal was lodged with submissions, country of origin information and additional documents. He said that an oral appeal was heard by the first named Respondent on 20th September, 2012 and the report of the first named Respondent was dated 2nd November, 2012, which affirmed the recommendation of the Refugee Applications Commissioner. He received the decision on or around the 12th November, 2012 and the application for relief was made on 23rd November, 2012, within the time period as required by s. 5(2) of the Illegal Immigrants (Trafficking) Act, 2000.

3. The grounds upon which the relief of *certiorari* were sought are as follows:-

(1) The first named Respondent, in dealing with the Applicant's substantive credibility in relation to the specific persecution he suffered, held that the Applicant's evidence "lacked detail and lacked the type of detail that would lead one to believe that there is any credibility to this story" without setting out any particulars of:-

(a) What details were not present?

(b) What details were present but were so vague that they could not lead to believe in the Applicant's credibility?

(c) What type of details would have otherwise lead to a favourable determination?

(d) Which specific areas of his evidence were insufficient?

(e) Any inconsistencies between the details given and the country of origin information.

(f) Whether any particular answers given by the Applicant appeared to be vague.

(g) Whether he was assessing the Applicant on the basis of demeanour or on the basis of any details which he was able to provide.

(h) Whether a request was made by the first named Respondent and/or the presenting officer for further details which was answered by the Applicant.

In so doing, the first named Respondent was *ultra vires*, irrational and in breach of fair procedures.

(2) Without prejudice to the foregoing, it is insufficient to find the Applicant merely lacking in credibility in a general sense and the obligation on the first named Respondent to consider which aspects of the Applicant's claim are not believed and the specific reasons for same. By reason of the foregoing, it is impossible to determine the *ratio* of the first named Respondent's decision of credibility and which part of the Applicant's claim he does, or does not, accept and thus the decision of the first named Respondent is *ultra vires* and irrational.

(3) The first named Respondent failed, notwithstanding the finding that the evidence of past persecution on behalf of the Applicant was not credible, to consider the prospective risk of future persecution. It is accepted that he is from Nepal, but it is not clear which other parts of his claim were accepted and which were rejected. It was accepted at the oral hearing by both the presenting officer and the first named Respondent, that his identification was correct and that his brother was a prominent Maoist, who had been killed by the then government. The first named Respondent, in any event, determined that there was no future risk of persecution because the Applicant's persecutors (the Maoists) were now in charge of the Nepalese state. It is not clear from the first named Respondent's decision whether he is asserting that the Applicant's persecutors will now offer him state protection or whether there is some reason as to why they will not persecute the Applicant, but in circumstances where he is persecuted because they believed him to be a government (now opposition) spy, this finding is irrational and unreasonable and contrary to the tests by this Honourable Court in *M.A.M.A. v. Refugee Appeals Tribunal* [2011] 2 IR 729.

(4) Without prejudice to the foregoing the Applicant gave clear evidence that he was not a member of the Maoist party (p. 5 of the interview), but that they attempted to recruit him. In finding that the Maoist party could provide protection, or at least cease persecuting the Applicant once they achieved their goals, suggests that the first named Respondent irrationally took the view that the Applicant was a member of the Maoist party.

(5) If (which is not clear) the first named Respondent held that India could provide protection to the Applicant, given that India is not a signatory to the Refugee Convention, and has no national protection framework for the protection of refugees, such protection is not sufficient to meet the standard such as the Refugee Convention and the EU Directives. By reason thereof, the finding that the Applicant left the country which would afford him protection is irrational.

(6) The first named Respondent failed to have due regard to the Applicant's subjective view as to why he was unwilling to return to the UK for the processing of his asylum application. He gave clear evidence that he was afraid because he was aware of other people who had been sent to the UK and, after one week, they were sent to Nepal. Thus the Applicant gave clear subjective evidence as to his view, albeit one which may be without objective foundation. The first named Respondent was thus irrational in determining that the Applicant's unwillingness to cooperate with the transfer was not indicative of someone who was 'fleeing persecution who was in need of protection'.

4. The hearing before the first named Respondent took place on 20th September, 2012 and the decision was handed down on 2nd November, 2012. The first named Respondent set out the Applicant's claim at para. 3 of his decision. Again, in this case, the court is provided with the full detail of the ASY1 form, the full detail of the questionnaire, the full detail of the s. 11 interview, the full detail of the recommendation of the Refugee Appeals Tribunal and the full notice of appeal. Once again, this court is without a formal recognised record of the evidence given before the Tribunal. Helpfully, the solicitor on behalf of the Applicant, has written and typed notes. This court is well aware, despite the best efforts of solicitors in these circumstances taking notes that they do not tend to record the exact detail of the evidence and a formal record should be provided to this court if this court is to correctly exercise its jurisdiction by way of judicial review.

5. The first named Respondent set out the Applicant's claim. The Applicant was born on 6th March 1969 in Bethen, Nepal. He resided in Bethen since he was born until he left Nepal. He is a Buddhist and he speaks Nepalese. He was married and has three children. The Applicant was asked to explain the reasons why he was afraid to go back to his country. The Applicant stated that he is wanted by a terrorist group in Nepal and he is not safe if he returns. He had to leave Nepal because of the Maoists. The Maoists group are connected to the government now. The Applicant stated that his brother was a member of the Maoists. The Applicant stated that the Maoists group held a meeting and then the army came in and captured all of them. They tied their hands behind their back and took them into the jungle and they were all shot, including the Applicant's eldest brother. His brother was a high profile Maoist member. He was like a district chief. After his eldest brother died, and because they looked alike, the Nepalese police are still after the Applicant. The Applicant said that both the police and the Maoists are after him. The Applicant was asked why the Maoists were following him after his brother's death. The Applicant stated that subsequent to his brother's death, the Maoists wanted to take his position in the Maoists. The Applicant said he did not want to, but even at that the Maoists came looking for him to replace his brother. The Applicant was asked about the arrest warrants the government had issued against him. There was a warrant issued for the Applicant and the Applicant stated that he was in the village when the warrant was issued. Subsequently the village chief took the warrant and put it around the village so the Applicant could not go back. He was asked when he did leave the country and he said two or three months after the receipt of the letter from the Maoists. He was asked where did he go and he said he went to India. He said he stayed there for six years. The Applicant was asked why did he decide to come to Europe and he stated that he stayed in India with his relatives for six years and he cannot go back to Nepal. He stated he met an agent who gave him information about how to get to Europe. He gave him 5 lakhs (about €10,000) to fly him from India to Europe. He was asked why he did not stay in India and he said he stayed there with relatives for six years and he felt he was a burden on them and he was bored staying with them all the time. He said he had a connection with an agent who provided him with an opportunity to fly here and he thought this was the best idea. The Applicant was asked if he had a right to work and become legal in India and he said that in India there is no barrier to work there. He said that after six years he did not feel like staying with them, as it was a long time. The Applicant was asked to comment on the fact that he travelled to Nepal on a few occasions to see his family. The Applicant said during the six years he met his wife on occasions close to the border. He said that only himself and his wife would know about this. The Applicant was asked when did he apply for his passport and he said in 2009. He was asked where did he get the passport and the Applicant said he got it in Nepal from the Nepalese authorities. The Applicant was asked if he was wanted by the Nepalese, why they would issue a passport to him. The Applicant stated that the passport was not issued from his district; he went to another district. It was put to the Applicant, by the presenting officer, that his home address and date of birth are on it so the authorities would have the information if they were looking for him. The Applicant stated that the sector of passport issuing service is not connected to the police. The presenting officer asked the Applicant was he saying that the Maoists wanted to replace his brother as a leader and the Applicant stated yes. The Applicant stated that they then thought he was a spy for the government. At that time the Maoists were fighting the government to take control of Nepal. The Applicant was asked would he agree that the Maoists are now in power and he said "Yes, they are in power". The Applicant was asked why they would want to kill him now they are in power as he was not a threat to them anymore. The Applicant stated that the Maoists are in the ruling party, and the Maoists are two groups. He said there are too many sub-divided groups. He was asked why they would still want him and the Applicant stated they are still looking for him to replace his brother and he does not want to do that. The Applicant was asked did he go and visit his wife on the border of Nepal and he said yes. He was asked why his wife could come across the border into India and visit him and he said he could call his wife to come over to India, but if his wife left the country and came to India, they would know where he was. It was put to the Applicant that she left the border to go and see him so they would have known she was gone and the Applicant stated that there were instances where the Maoists have sent people into India and some people were killed so he did not want people to know he was hiding in India. The Applicant was asked could the Maoists have followed his wife to the border if they had any interest in the Applicant. The Applicant said that only he himself and his wife knew they were meeting. The Applicant was asked did the Maoists ever come and threaten him in the six years he was in India and he said no. The Applicant was asked was he saying that he had to leave

India because he felt he was a burden to his relatives and he said yes, that was why he left. The presenting officer asked the Applicant could he not have got a job rather than being reliant on his relatives. The Applicant stated he did not get an opportunity. He was asked why he decided to leave India and come to Europe and he said he met the agent, and the agent was trying to do his best to help him. The Applicant was asked why he would move thousands of miles away from India, where he could see his wife, after six years of relative peace in India. He replied that due to his personal issues he felt he had no choice, as he did not want to live in India as he felt he was a burden on his relatives who had a small farm and were supporting him. The Applicant was asked does he remember filling it out in his own language when he applied for asylum. He said he orally said it and someone wrote it. The Applicant was asked why his date of birth was recorded as 6th March, 1970 when his passport said something different. The Applicant said he did not have the passport with him and it was just a mistake. He said he was a little terrified and that it was a simple error. The Applicant said he tried to call numerous times to correct it.

6. It was put to the Applicant that in relation to his brother's death his questionnaire stated his brother was killed in 2059 and he was asked to clarify this in his interview on p.5 and he again said 2059 but today he said he was sure it was 2060. The Applicant stated that the papers say 2059 and his wife had given him documents which said 2060. It was put to the Applicant that in his interview he gave the impression that it was the papers that got it wrong yet today it would seem that the papers are right and he was wrong concerning the date. He was asked to clarify the confusion/contradiction. The Applicant replied that at the time he was sure his date was correct but now he realised that he was wrong and he was confused about the date. It was put to the Applicant that today he stated he left Nepal in 2061 but in his questionnaire on at least three occasions he wrote 2060. The Applicant said this is a long time back and he might be confused. The presenting officer put it to the Applicant that these dates were relevant and why was he so confused. The Applicant said there were numerous things incorrect as there were a lot of things on his mind and he could be incorrect on a lot of things. The Applicant stated he initially applied for asylum in June 2010 and he filled out his questionnaire in 2010. He was then informed that he would be dealt with under the Dublin Convention and he would be transferred to the UK. The Applicant said he knew through his solicitor that he would be sent back to the UK. The Applicant was asked why did he not go back to the UK. The Applicant said he knew he was going to be sent back and his solicitor asked was he going back or staying here and the Applicant thought this was the best place for him, so he reapplied to be a refugee here. The presenting officer said to the Applicant that by absconding, after he was given the deportation order, would be considered that he was not cooperating with the authorities. The Applicant said the officers came to Baleskin to pick up people to bring them back to the UK and after one month they were sent back to Nepal. The presenting officer said to the Applicant that he had his own reasons and the reasons of the people in Baleskin could have been different. The Applicant said he did not know what their story was and he was just thinking that if they got sent back so would he. It was put to the Applicant that he had a visa for the UK, and the Applicant said he flew from Nepal to Bahrain and onto the UK. He said he stayed in London for a few months and he was moving around. He said he took a taxi from Belfast to Dublin and it cost €150. The Applicant was asked how did he support himself and he said everything was done by the agent. He paid him 5 lakhs. He was asked where he got the 5 lakhs from and he said his wife and relatives all supplied money.

7. It is clear that very substantial evidence was given in relation to this case. Yet there is an incomplete record of what took place at the Tribunal. This court is left to depend on the account of the evidence given by the first named Respondent, who is the person whose decision is being judicially reviewed. Judicial reviews of the Refugee Appeals Tribunal involve the State exercising and complying with Irish and European Union legislation, arising from the Irish Constitution, and also international human rights instruments, in the determination of a person who seeks to be recognised as a refugee in Ireland. As Hathaway & Foster describe in their introduction to the *Law of Refugee Status* (2nd Ed, published in 2014):-

"Refugee Law may be the world's most powerful international human rights mechanism. Not only do millions of people invoke its protection every year in countries spanning the globe, they do so on the basis of a self actuating mechanism of international law (the court's emphasis) which quite literally allows at-risk persons to vote with their feet."

8. The European Court of Justice in the decision *HID, BA v. the Refugee Applications Commissioner, Refugee Appeals Tribunal, the Minister for Justice Equality and Law Reform, Ireland and the Attorney General* (C-175/11) dealt with the issue as to whether Article 39 of Directive 2005/85 must be interpreted as precluding national legislation, in asylum matters, establishing a system relating to the procedure for granting refugees with various features of an administrative or organisational nature. In para. 91 of that decision, the Court of Justice stated:-

"Furthermore, in accordance with section 16(10) and (11)(a) and (c) of the Refugee Act, the Refugee Appeals Tribunal may also hold a hearing during which it may direct any person whose evidence is required to attend, and hear both the Applicant and the Refugee Applications Commissioner present their case in person or through a legal representative. As a consequence, each party has the opportunity to make the Refugee Appeals Tribunal aware of any information necessary to the success of the application for asylum or to the defence."

9. At pg. 92 the Court of Justice stated:-

"In addition, section 16(16) provides that, before deciding an appeal, the Refugee Appeals Tribunal must consider, among other things, the report of the Refugee Applications Commissioner, any observations made by the latter or by the United Nations High Commissioner for Refugees, the evidence adduced and any representations made at an oral hearing, and any documents, representations in writing or other information furnished to the Refugee Applications Commissioner."

10. At para. 102, the Court of Justice further stated:-

"Nonetheless, as the second sentence of recital 27 in the preamble to Directive 2005/85 states, the effectiveness of the remedy, with regard to the examination of the relevant facts, depends on the administrative and judicial system of each Member State considered as a whole. It is therefore necessary to assess as a whole the Irish system of granting and withdrawing refugee status in order to determine whether it is capable of guaranteeing the right to an effective remedy as provided for under Article 39 of that directive."

11. The Court finally held:-

"it must be concluded that the criterion of independence is satisfied by the Irish system for granting and withdrawing refugee status and that that system must therefore be regarded as respecting the right to an effective remedy."

12. It appears to me that the failure to record the evidence in chief, the cross-examination and the questions by the Tribunal raises the question as to whether or not the system presently operated could be regarded as respecting the right to an effective remedy. No criticism was made by the Applicant in relation to this matter however, and this court is not in this case making a decision to reject the decision of the Tribunal on this basis at this time.

The analysis of the Applicant's claim by the first named Respondent

13. In this case there was a very substantial hearing by the first named Respondent of the claim by the Applicant both by way of presentation of the Applicant's claim, cross examination by the presenting officer and in particular questions raised by the first named Respondent. The first named Respondent said the Applicant in this case has spent six years in India with his wife's mother living on a farm. It was accepted during the course of the hearing (of which we note little) that he was not under any threat at that time and received no threat from the Maoists. He accepted that he was able to live there legally: "It seems to me that the Applicant has left a country in which he was entitled to live in and in which he was perfectly safe in this regard. I am of the view that Article 1(a)(2), para. 2 of the 1951 Convention in the UNHCR Handbook is applicable. He resided there and made no request". This court notes that there are many UNHCR Guidelines and yet the first named Respondent does not identify the Handbook of the UNHCR and does not quote same.

14. Further the first named Respondent said the Applicant resided in the UK for four months and did not seek refugee status. He was of the view that this action is inconsistent with a person fleeing persecution. He provided no logical, plausible or credible reason for not seeking refugee status in the UK. Having regard to s. 11B(b) of the Refugee Act, 1996 (as amended) he was of the view that the Applicant has not provided a reasonable explanation to substantiate his claim that this was the first safe country in which he arrived in since departing the country of origin. He was in the UK for an extended period of time and did not seek refugee status and he has not provided a reasonable explanation to the Tribunal for not doing so. This is a view of the Respondent that undermines the credibility of the Applicant's claim. The Applicant was issued with a passport in the year of 2009. This runs counter to his contention that he is in some danger from the authorities. The first named Respondent was of the view that if he was in any danger from the authorities, they would not have provided him with a passport. This runs counter to the Applicant's contentions and in the view of the first named Respondent undermines the credibility of the Applicant's claim.

15. The Applicant was asked why did he leave India in which he was safe and he replied that he felt he was a burden on his relatives. The first named Respondent was of the view that this is not indicative of a person fleeing persecution and runs counter to his contention and this undermines the credibility of his claim. Issues arose with regard to dates when the Applicant left Nepal as to whether it was 2060 or 2061. No clarity was brought to this issue by the Applicant.

16. The Applicant contends that the Maoists wished him to take over as leader in place of his brother. This story provided by the Applicant lacked detail and lacked the type of detail that would lead one to believe that there is any credibility to this story. Even if there was some credibility in this story, which the first named Respondent did not accept there was, the Maoists are now in power in Nepal, and in those circumstances, the first named Respondent found it neither plausible nor credible that he is in any danger from Maoists in circumstances where they have achieved their objectives. Further, members of his family, his wife and children, together with his brother, who is a teacher, continued to reside in Nepal and apparently do so without any difficulty. Taking all these factors into account, the first named Respondent was of the view that it ran counter to the Applicant's contentions that he is in any danger in Nepal and as a consequence this undermines the Applicant's credibility.

17. With regard to the issue of the Dublin Convention decision, the Applicant accepted that he had absconded and not cooperated with the authorities, his reason being that he was aware of other Nepalese people who had been deported to the UK, dealt with and then deported to Nepal. However it was pointed out to the Applicant that the circumstances are different. The Applicant did accept that he had been informed by a solicitor, not necessarily the solicitor on record in this matter, but there was a decision in the Dublin Convention application and he will be obliged to comply with it. Nonetheless he chose to abscond until the time limits had elapsed for his deportation. This in the view of the first named Respondent indicates that he was not cooperative with the Irish authorities and is not indicative of a person fleeing persecution with the need for protection.

18. The first named Respondent concluded by saying that it had considered all the relevant documentation in connection with the appeal, including the notice of appeal, country of origin information, the Applicant's asylum questionnaire and the replies given in response to the questions by or on behalf of the Commissioner on the report made pursuant to s. 13 of the Act.

Submissions of counsel for the Applicant

19. The Applicant was represented by Ms Sunniva McDonagh, S.C. together with Mr John Noonan, B.L. instructed by KOD Lyons. Ms McDonagh indicated that the Applicant would rely on *Meadows v. The Minister for Justice Equality and Law Reform* [2010] 2 IR 701 and *Rawson v. The Minister of Defence* [2012] IESC 26 and *EMI (Ireland) Ltd v. The Data Protection Commissioner* [2013] IESC 34 setting out the correct test for irrationality and judicial review. A decision must be proportionate and the reasons given must flow logically from the facts presented. She quoted Regulation 5 of the European Communities (Eligibility for Protection) Regulations 2006 under the heading of "Assessment of Facts and Circumstances" and provides that certain matter shall be taken into account by a protection decision-maker for the purpose of making a protection decision. She contended that the statutory obligation to assess facts and circumstances in a particular manner has also received judicial consideration and, in particular, *I.R. v. The Minister for Justice Equality and Law Reform* [2009] IEHC 353, a decision of Cooke J. She further argued that the reasons for the rejection of credibility must be clearly set out and not merely addressed in general terms and quoted *T.M.A.A v. Refugee Appeals Tribunal* [2009] IEHC 23 where Cooke J. held that the duty to give reasons was to enable an Applicant to know in detail, and with clarity, the reasons for its decision and also so that the High Court can properly exercise its review function and the subjective and objective factors must be clearly stated and any rejection of any part of the narrative must also be clearly stated and the reasons for rejecting same must be set out.

20. She also indicated that the Applicant would rely on a number of decisions in relation to the principles that the first named Respondent must consider the core claim and any credibility findings must relate to that. All aspects of his claim must be assessed and if any particular aspect is capable of belief, the first named Respondent must consider the forward looking test, as regards what would happen to him if he returned to Nepal.

21. Counsel for the Applicant submitted that the first named Respondent did not deal directly with the Applicant's core claim by giving reasons for rejecting it. She indicated that an explanation for the failure to deal with credibility in any meaningful way could be found in the misapprehension that the first paragraph of the analysis of the Applicant's claim. The written submissions of the Applicant quote Article 1(A)(2). This Article identifies and cites the Convention Protection and also provides as follows:-

"In the case of a person who has more than one nationality the term 'the country of his nationality' shall mean each of the countries of which he is a national and a person shall not be deemed to be lacking the protections of the country of his nationality without any valid reason based on well-founded fear he has availed himself of the protection of one of the countries of which he is a national."

22. Counsel for the Applicant indicated that the first named Respondent appeared to believe that the Applicant is a person who has more than one nationality and that the Respondent believes that the Applicant is an Indian national, or is otherwise entitled to Indian

nationality. She stated that the Respondent fell into error in so finding, which error has vitiated the entire of his judgment.

23. With regard to issues of credibility, counsel for the Applicant said that the first named Respondent stated that the "story provided by the Applicant lacked detail and lacked the type of detail that would lead one to believe that there is any credibility to the story". The first named Respondent does not state what type of detail is missing, whether the Applicant was asked about same and/or the relevance of same. This is not a case where a vague assertion such as a general sense of discrimination, has been claimed. The Applicant gave a very specific account of the reasons why he left Nepal and the reasons why the Maoists have sought him.

24. Counsel for the Applicant said it is absolutely essential to set out exactly what aspects of the claim are lacking in detail. This is to enable the High Court to assess those reasons on review and so that an assessment maybe made as to whether notwithstanding certain parts of the narrative may be considered to lack credibility other aspects of the claim are capable of belief. She stated that when assessing the decision of the first named Respondent, to see whether he considered the core claim and gave reasons for rejecting same, there is no analysis of the plausibility of narratives given, nor any reasons as to how it may be considered objectively implausible. At the same time if the Applicant is to be disbelieved on the basis of subjective factors, this must be justified on more than a simple assertion that the Applicant lacked detail. One specific point, that was raised according to counsel for the Applicant, was in relation to whether his brother was killed in 2059 or 2060. The first named Respondent stated that "no clarity was brought to this issue by the Applicant". Counsel argued that it was for the court to assess whether there was in fact a reasonable explanation for the confusion. There was a reasonable explanation given that does not appear to have been considered by the first named Respondent and if it was considered, no reasons are set out for disbelieving that explanation.

25. The first named Respondent also stated that because his other brother, his wife and children continued to reside in Nepal without any difficulty, this ran counter to his claim that he was in danger in Nepal. However, the Applicant explained to the Refugee Applications Commissioner, that he was targeted because he looked like the brother that was killed and his other brother was very small and disabled so they did not want him. The first named Respondent did not consider this issue at all and presumed that if the other members of the Applicant's family were safe then the Applicant would be safe. This is to fail to consider the Applicant's direct evidence in relation to the issue and to weigh and assess the reasons given by the Applicant.

26. Counsel for the Applicant then made submissions in relation to the Maoists now in power. She suggested that it was not clear whether the first named Respondent considered that, now that the Applicant's persecutors had taken power, they would somehow be able to provide state protection to him or whether it is suggested they will simply give up looking for him. However, neither of the possible interpretations is supported by country of origin information which shows that there are significant human rights abuses and corruption in Nepal since the Maoists came to power. In particular, there were numerous reports that the government or its agents committed arbitrary or unlawful killings and disappearances. She also stated that the requirements of Article 4.4 of the Qualification Directive states that past persecution is a serious indication of the likelihood of further persecution. The first named Respondent had rejected the Applicant's credibility on vague grounds without specifying which parts of his evidence (if any) are accepted and goes on to state that, in any event, the acts of past persecution (which were not accepted) are unlikely to be repeated.

27. Counsel for the Applicant also dealt with failure to claim asylum in India or the UK. She firstly stated that although the Applicant spent six years living in India and did not make a request for protection, India is not a signatory to the UN Convention for the Protection of Refugees. If the first named Respondent considers whether protection would be available in that country, he would have to consider the position there and this was not done. She also submitted that it was not sufficient to merely assert that because the Applicants had lived there peaceably with relatives for six years, that he could continue to live there peaceably. He gave evidence that he had become a burden on his family and could not remain there. In *K.N.Q v. Refugee Appeals Tribunal* [2013] IEHC 117 Clark J. considered the issue of people of Kurdish ethnicity applying for asylum in Turkey and quashed that decision, stating that the Tribunal ignored the explanation offered by the Applicant for not applying for asylum there and no reasons were given for the Tribunal's decision to disregard his seemingly reasonable explanation. Likewise in respect of the UK in this case, the Applicant stated he was advised to come from the UK to Ireland and evaded transfer because he heard about a person who was brought back to the UK, he was kept there for about a month and then returned to Nepal. It was submitted that it was not sufficient to assess whether a theoretical person might have stayed in India, or the UK, but rather the Applicant had a reasonable explanation as to why he did not seek protection there. The first named Respondent does not appear to consider the Applicant's explanations at all and no reasons are given for rejecting same.

Submissions on behalf of the Respondent

28. Ms. Denise Brett, B.L., on behalf of the Respondents, submitted that the first named Respondent drew attention to the areas of the Applicant's evidence that he accepted and those that he did not. He accepted that the Applicant was from Nepal and was a Buddhist who had lived in Nepal most of his life. He accepted that the Applicant's brother was a Maoist leader who was killed by government forces. It was not accepted that his story was true, as it lacked detail or that the Applicant believed he was in danger from the authorities, as he had applied for a passport. It was not accepted that he was in danger in Nepal, as his family were living there without difficulty and it was not accepted that he had any real reason to leave India. The reasons given for not seeking refugee status while in the UK were not accepted and his actions did not indicate a person in need of protection.

29. Counsel for the Respondent cited the well known principles of Cooke J. in *I.R. v. Minister for Justice Equality and Law Reform* [2009] IEHC 353 and the decision of MacEochaidh J. in *Omidiran (an infant) v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, 20th December 2012). She also cited the decision of MacEochaidh J. in *CA v. Minister for Justice Equality and Law Reform & Anor* [2012] IEHC 564.

30. Counsel on behalf of the Respondents said that the analysis of the Applicant's claim was found in part 6 of the decision:-

1) In respect of the Applicant's evidence concerning his main claim of specific persecution by the Maoists, the first named Respondent found that this lacked sufficient detail to be credible.

2) The Applicant asserts that the Tribunal should have particularised the detail missing or what areas were vague, and the type of details that would have lead to a favourable determination. It is not the function of the first named Respondent to suggest details that would result in a favourable determination. It can only decide on the material before it.

31. The Applicant left for India, where he lived without threats from the Maoist party for six years, returning to Nepal on at least five or six occasions during that time. Neither he, nor his family who remain in Nepal ever experienced any difficulties over this time and the Respondents submitted that it is clear the Tribunal found the entire of the Applicant's evidence, on this issue, to be lacking in sufficient detail to be credible.

32. Counsel submitted that the Tribunal found that the Applicant lacked credibility as a result of his failure to apply for asylum in the UK despite being there four months before coming to Ireland, and the Tribunal expressly stated that it believed this inaction on the Applicant's part, to be inconsistent with the persons carrying out the persecution.

33. Further, counsel for the Respondent found that the issue of a passport, by the Nepalese authorities, undermined the Applicant's credibility, as it ran counter to his contentions that he was in danger from the authorities. She further indicated that the confusion over dates was put to the Applicant who sought to explain it on the basis that it was a long time ago and he had a lot of things on his mind.

34. The first named Respondent also found that the Applicant was lacking in credibility as an asylum seeker, because he voluntarily left India, the country in which he was entitled to live and work, and he was perfectly safe for six years, prior to coming to Europe.

35. Counsel for the Respondent said that the Applicant claimed that the first named Respondent failed to consider the prospective risk of future persecution, and the first named Respondent had stated that, as the Maoists were now in power, he found it neither plausible, nor credible, that he was in any danger from the Maoists in circumstances where they achieved their objective.

36. Counsel for the Respondent also referred to the 1950 Indo-Nepal Treaty of Peace and Friendship, in which Nepalese and Indians can move freely across the Indo-Nepal border without a passport and can live and work in either country, something similar to the common trade area between Ireland and the UK.

37. Counsel also dealt with the Applicant's family situation and the finding of the first named Respondent that the safety of his family undermined the Applicant's credibility. She further submitted that the credibility finding in relation to non-cooperation with the Irish authorities, and that the Applicant's application for relief should fail.

Discussion

38. The European Communities (Eligibility for Protection) Regulations 2006 (S.I. 518/2006) set out the minimum standards for protection to persons claiming refugee status and gives effect to EU Council Directive 2005/83/EC of 29th April, 2004. They provide the legal basis of the assessment of facts for the protection decision-maker in relation to an application for refugee status. Article 5 of the Regulations provides:-

"5. (1) The following matters shall be taken into account by a protection decision-maker for the purposes of making a protection decision:

(a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application for protection, including laws and regulations of

the country of origin and the manner in which they are applied;

(b) the relevant statements and documentation presented by the protection Applicant including information on whether he or she has been or may be subject to persecution or serious harm;

(c) the individual position and personal circumstances of the protection Applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the Applicant's personal circumstances, the acts to which the Applicant has been or could be exposed would amount to persecution or serious harm;

(d) whether the protection Applicant's activities since leaving his or her country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for protection as a refugee or a person eligible for subsidiary protection, so as to assess whether these activities will expose the Applicant to persecution or serious harm if returned to that country;

(e) whether the Applicant could reasonably be expected to avail himself of the

protection of another country where he or she could assert citizenship.

(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.

(3) Where aspects of the protection Applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation when the following conditions are met—

(a) the Applicant has made a genuine effort to substantiate his or her application;

(b) all relevant elements at the Applicant's disposal have been submitted and a

satisfactory explanation regarding any lack of other relevant elements has been given;

(c) the Applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the Applicant's case;

(d) the Applicant has applied for protection at the earliest possible time, (except where an Applicant demonstrates good reason for not having done so); and

(e) the general credibility of the Applicant has been established."

39. The analysis of the Applicant's claim in this regard is a series of findings of credibility issues.

40. I accept that the examination of credibility issues must not be done by looking at a single strand, or a single factor, but looking at the totality of the evidence and factors as presented to the Tribunal. But where adverse or negative findings and credibility are made, the Tribunal is required to ensure that the findings are based upon facts objectively found and that there are cogent reasons for reaching the findings and that the legislative requirements of Article 5 of the legislative provisions of the European Communities (Eligibility for Protection) Regulations, 2006 are complied with and in particular Article 5 of same.

India

41. The first named Respondent said that it was accepted that he was not under any threat when he was in India. He was accepted that he was able to live there legally. However, the first named Respondent did not refer to the fact that India was not a country which recognised by law the Convention relating to the status of refugees. While this is certainly not fatal to his decision, it undermines, in my view, the first named Respondent's assertion that he was perfectly safe and clearly his indication that he had made no request for protection, but was meaningless in the context of India.

42. The first named Respondent indicated that when the Applicant resided in the UK for four months he did not seek refugee status and stated that he provided no logical, plausible, or credible reason for not seeking refugee status in the UK. In fact, in the s. 11 interview he was asked as to why he did not apply for refugee status in the UK. He said that he did not have very good English there, that he did not do anything at all as the agent had told him they would find him a job, but they hadn't done so. The agent did not have any idea how he would settle in there. He said the agent had advised him to come to Ireland to seek asylum, which he did. The Applicant was not questioned about this in the hearing before the first named Respondent. The first named Respondent had documents, including the s. 11 interview, and according to the first named Respondent's note of the evidence, he was not asked that question. It seems to me that he has provided an explanation to substantiate his claim as to why he did not seek refugee status. In those circumstances, this court is of the view that the decision of the first named Respondent fails to give reasons for his conclusions in relation to this aspect of the claim. The error, outlined in a number of cases by Cooke J., that the findings are based upon facts objectively found and that there are cogent reasons for reaching those findings. It appears to this court, that the approach by the first named Respondent appears to be based on gut feeling, rather than reasoned decision-making, and is in marked contrast to the Tribunal decision in the judgment *K.M.A. (Algeria) v. Refugee Appeals Tribunal & Anor* (High Court, 16th July 2015) in which the process of decision-making is clear, cogent and involves discussing the issues and the findings with the Applicant in that case.

43. The first named Respondent, however, argues that s. 11B(b) of the Act applies on the basis that the Applicant had not provided a reasonable explanation to substantiate his or her claim that the State was the first safe country in which he or she has arrived, since departing from his or her country of origin or habitual residence. The Commissioner, or the Tribunal, may consider this in assessing the credibility of the Applicant and whilst the Applicant has provided a reason for not seeking refugee status, it is reasonable, and appropriate, for the first named Respondent to apply s. 11B(b) of the Act.

44. The first named Respondent then indicated that the Applicant was issued with a passport in the year of 2009, and said it runs counter to his contention that he is in some danger from the authorities and runs counter to the Applicant's contention. However, the first named Respondent does not give either the Applicant's reasons as to why he obtained a passport in 2009, nor did the first named Respondent give reasons for his decision to take the view that he was in no danger from the authorities, having regard to that explanation.

45. The first named Respondent said the Applicant was asked why he left India in which he was safe and he replied he felt he was a burden on his relatives. The first named Respondent took the view that this was not indicative of a person fleeing persecution and runs counter to his contention and undermined the credibility of his claim.

46. The Applicant could not have applied for refugee status in India. Hathaway and Foster state:-

"Despite the widespread belief that a refugee should seek protection whatever safe country she first reaches, failure to claim protection in one's region of origin or in the first safe country of arrival, is not grounds for refusing to recognise refugee status. There are often good reasons why a refugee may travel beyond the first safe state she reaches, including outside his or her own region."

There is also no requirement for a refugee to "flee" persecution. There is only a requirement in the Convention that the person is outside the country of his nationality and the emphasis on fleeing persecution is incorrect and in my view unreasonable.

47. The next issue mentioned by the first named Respondent was the date and whether it was 2060 or 2061 and that no clarity was brought to this issue by the Applicant. However, according to the first named Respondent in the course of the hearing before the Tribunal, he was asked about dates, and in particular he was asked to clarify "the confusion/contradiction". The Applicant, however, stated that he realised that the date is wrong and he is confused about the date. There were numerous things incorrect because there were a lot of things on his mind and he could be incorrect on a lot of things. Again his explanation is not contained in the decision, nor are there any reasons set out as to why his explanation is not reasonable. This, in itself, is unreasonable.

48. The next issue is the Applicant's contention that the Maoists wished for him to take over as a leader in place of his brother. The first named Respondent said that the story, provided by the Applicant, lacked detail and lacked the type of detail that would lead one to believe that there is any credibility to the story. Even if there was some credibility which he did not accept, the Maoists are now in power in Nepal and he found it neither plausible, nor credible, that there is any danger from the Maoists in circumstances where they have achieved their objectives. It appears to me that the core claim of the Applicant is that he is fearful of going back to Nepal on the basis of his refusal to assist and join the Maoists, after his brother was killed, and the country of information appears to show difficulties with the Maoists as part of the government in Nepal. In *T.M.A.A. v. Refugee Appeals Tribunal & Ors* [2009] IEHC 23 Cooke J. indicated:-

"Where adverse or negative findings on credibility are made, the adjudicator is required to ensure that the findings are based upon facts objectively found and that there are cogent reasons for reaching the findings."

This court finds that the decision is defective in failing to explain adequately, or indeed at all, the core claim of the Applicant which appeared not to have been considered.

49. The next issue of incredibility relates to the fact that members of his family, his wife and children continued to reside in Nepal and apparently do so without difficulty. However, again this is a failure to understand, on the part of the first named Respondent, the principles of the Refugee Convention. The Applicant is not applying for refugee status for his family and children or his brother. It is he who is applying for asylum and the fact that his wife and children and brother have not been persecuted does not mean that he is no longer in any danger in Nepal. A finding that this is a factor which might be taken into account in the assessment should not,

therefore, be read as undermining the credibility of the Applicant, rather than a decision on the objective issue.

50. With regard to the issue of the Dublin Convention decision, the Applicant gave a reasonable reason why he had not cooperated with the authorities to enable the authorities to have him dealt with in the UK. It is notable that the Refugee Applications Commissioner did not, having regard to his delay in applying for asylum, deem the matter to be suitable to be dealt with pursuant to s. 13(5)(a) and determined without an oral hearing.

51. Counsel for the Respondent in her written submissions refers to the 1950 Indo-Nepal Treaty of Peace and Friendship. This court is surprised as this is not mentioned at all by the Tribunal and it is important that just as the court's role is not to substitute its own view for that of the decision-maker, it is also the duty of counsel not to also do so.

Decision of the court

52. This court is satisfied that the first named Respondent failed to comply with Article 5 of the European Communities (Eligibility for Protection) Regulations 2006 and in particular failed to take into account the relevant statements and documentation presented by the protection Applicant, including information as to whether he or she may have been or may be subject to persecution or serious harm, and the individual's position and personal circumstances of the protection Applicant, including factors such as background, gender and age, so as to assess whether on the basis of the Applicant's personal circumstances, the acts to which the Applicant has been, or could be, exposed would amount to persecution or serious harm.

53. The decision of the court is as follows:-

- 1) This court is satisfied that the first named Respondent erred in not giving reasons for rejecting the explanation of the Applicant in relation to his not applying for refugee status in the UK.
- 2) The first named Respondent erred in not considering the Applicant's evidence in relation to obtaining a passport and ran counter to his contention that he is in some danger from the authorities.
- 3) The first named Respondent gives no reasons for his decision to take the view that he was in no danger from the authorities.
- 4) The first named Respondent erred in believing that it was a requirement for a refugee to "flee persecution". This does not form part of the refugee Convention.
- 5) The first named Respondent erred in not giving reasons for the Applicant's evidence that there were numerous things that were incorrect and instead holds that he was asked "to clarify the confusion/contradiction" and failed to do so. The evidence clearly establishes that he did give an explanation and a decision to reject that explanation has to be clear and reasoned.
- 6) The first named Respondent failed to deal with the core claim of the Applicant and the decision is defective for failure to explain adequately, or indeed at all, the core claim of the Applicant.

54. For the reasons set out above, I formally grant leave to the Applicant and given that these are telescoped proceedings, I will make an order quashing the decision of the first named Respondent and will make an order remitting the matter for a *de novo* hearing before a different member of the Refugee Appeals Tribunal.

Ms. Sinniva McDonagh, S.C. and John Noonan BL
Instructed by KOD Lyons, Solicitors
for the Applicant

Ms Denise Brett, B.L
Instructed by the Chief State Solicitor
for the Respondents