

**THE HIGH COURT**  
**JUDICIAL REVIEW**

**[2009 No. 659 J.R.]**

**BETWEEN**

**K.R.**

**APPLICANT**

**AND**

**THE REFUGEE APPEALS TRIBUNAL, THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, ATTORNEY GENERAL AND IRELAND**

**RESPONDENTS**

**JUDGMENT of Mr. Justice McDermott delivered on the 2nd day of December, 2014**

1. This is an application for leave to apply for judicial review quashing the decision of the first named respondent (the Tribunal) dated 30th April, 2009, which rejected the applicant's appeal against a negative finding of the Refugee Applications Commissioner (ORAC) dated 25th November, 2008.

**Background**

2. The applicant claims that he was born in Bhutan on 6th May, 1971, and lived there between 1971 and 1976. From 1986 to 1990, he lived in India as a student of Sanskrit. His father was ethnically Nepalese and his mother was Bhutanese. He claimed that his father was a long time member of the Bhutanese Peoples Party and was arrested in 1989 by the Bhutanese authorities, after which he disappeared. The family home was burned at the time. He heard that his mother had fled to a refugee camp in Nepal. He travelled there and found his mother in 1990. They lived on the street for a year. He then found a job as a hotel cleaner. His mother died in 1994, and he married a Bhutanese girl with whom he had two children. He remained there until 2002 working as a labourer.

3. In or about 1994, the applicant claimed that Maoist insurgency was growing and that he worked for rebels in Myagdi for a year collecting information on police/army movements in the town.

4. In 2002 he moved to Kathmandu where he obtained work as an assistant to a motor mechanic. He left his wife and two daughters in Myagdi. He used to visit every two to three months. On 21st March, 2003, the Maoists attacked Myagdi. He feared for his wife and children and returned to the town where he was arrested by the police, interrogated and beaten. The police were suspicious that he had been involved in the attacks on the town, but having satisfied themselves that he had no involvement, he was released after 25 days and told to leave Myagdi and return to Bhutan. He did not take any steps to search any further for his wife and children, but returned to Kathmandu where he remained working until he left Nepal on 17th June, 2007.

5. He claimed that while living in Kathmandu he was always fearful of encountering the police because they might arrest him, given that he had no documentation or identification papers and return him to Bhutan where he feared his life would be in danger.

6. He also complains that as a Bhutanese he was paid lower wages than a Nepalese and was, therefore, discriminated against because of his Bhutanese origins. He did not complain of any further arrests by the Nepalese authorities between 2003 and his departure in June, 2007, though he later complained of continuing harassment by the police in Kathmandu.

**The Section 13(1) Report**

7. The Refugee Applications Commissioner (ORAC) having considered the case recommended that the applicant should not be declared a refugee. It noted that no documentation was submitted in support of his identity or nationality. It concluded in accordance with para. 101 of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status that the applicant was stateless and that consequently, his "country of nationality" must be deemed to be his "country of habitual residence". Furthermore, it noted that para. 103 of the guidelines stated that not all stateless persons are refugees but must also satisfy the conditions of the refugee definition.

8. The applicant's claim that he and his mother could not stay in a refugee camp because they did not have documentation was thought to be unlikely since the UNHCR, who were administering the camps, did not refuse entry on the basis of lack of documentation. It was also noted that he did not appear to have any fear about living in or visiting Myagdi between 1994 and 2003. Furthermore, it was thought that if the police were intent on sending him to Bhutan they would have sent him there following his period in custody, rather than release him. The report notes that he remained for a further four years in Kathmandu. The conclusion was reached that the applicant had not demonstrated a well founded fear of persecution in Nepal. Though it was noted that he was not entitled to Nepalese citizenship and that he claimed to be afraid of the police, because he told them that he would leave Nepal, there was no reason to believe that he could not continue to live without serious interference in Nepal as he had done for many years.

**The Tribunal Decision**

9. Following an oral hearing on 31st March, 2009, the Tribunal delivered its decision on 30th April. The decision summarises the applicant's claim accurately. In the course of the oral hearing significant additional evidence emerged.

10. The applicant gave evidence that he had encountered the police at least once a week in Kathmandu following his return in March, 2003. He claimed that on each occasion he told them that he was leaving Nepal imminently which appeared to satisfy them and, as a result, they did not arrest him or attempt to effect his forced deportation. The decision notes that he claimed that he had no rights in Kathmandu and could not continue to live there. A rather odd aspect of the case is that he had tried unsuccessfully to return to Bhutan several times after 2003 but had been stopped by the Nepalese police. However, the Tribunal also noted that he had a fear of

returning to Nepal because he would be sent back to Bhutan where he would be jailed or, perhaps, killed.

11. The Tribunal decision states that the applicant mentioned, for the first time, at the oral hearing that whilst working for the Maoists in 2002 he was asked to carry bombs and on discovering this, he ceased working for them. He claimed that he was not a Maoist himself, but had been compelled by circumstances to work for them. He claimed that the Maoists were unaware that he had left them. The Tribunal concluded that the fact that he mentioned the carrying of bombs on behalf of the Maoists for the first time at the appeal hearing, undermined his credibility in the absence of any explanation for same.

12. The Tribunal accepted that the appellant was a stateless person and examined his case in respect of his country of habitual residence, Nepal, where he lived between 1990 and 2007, which was most of his adult life. He claimed to have a fear of serious harm at the hands of Maoist insurgents, locals and/or the police in Nepal.

13. The Tribunal had serious doubts concerning the objective element of the fear of persecution which he claimed, because having been arrested in March, 2003 he was released and, having encountered the police in Kathmandu on a weekly basis, he suffered no consequences arising out of these encounters of the type which he feared namely, a forced return to Bhutan. The Tribunal was not satisfied that because of his lack of identification papers he lived in constant fear of coming into contact with the authorities, or that he hid from the police when they searched for him. This claim contradicted his earlier evidence given to the effect that he had encountered the police in Kathmandu on a frequent basis without serious consequences.

14. The Tribunal also noted that the applicant claimed that the police in Myagdi held him in prison and tortured him in order to compel him to leave Nepal because he had no papers and was an illegal immigrant. However, the applicant stated at the appeal hearing that the reason he was held by the police was to establish whether he had any involvement with the Maoist attack, and that once it had been established by them that he had no such involvement, he was released. Despite the fact that he was given an ultimatum to leave Nepal following his release, no attempt was made to deport him.

15. The Tribunal was satisfied to adopt the Commissioner's findings concerning the applicant's stated fear of persecution at the hand of the Maoists, in that it was not well founded because he had returned to Myagdi on several occasions to visit his family after moving to Kathmandu. Reference to persecution from "locals" was first mentioned at the appeal hearing.

16. The Tribunal was satisfied that cumulatively the issues of credibility which it identified in the decision undermined the applicant's claim. The court is not satisfied that any of these findings were unreasonable or that the conclusion reached by the Tribunal was not open to it on the evidence.

### **The Challenge**

17. This case contains 24 grounds upon which relief is sought. The applicant seeks an extension of time for the bringing of the application. Most of the grounds relate to the conclusion reached by the Tribunal concerning the credibility of the applicant's claim and suggested failures in taking certain evidence into account and taking into account evidence that was not relevant or given.

### **Grounds (i), (ii), (vii), (viii) and (xiv)**

18. Some of these grounds are unstateable. The applicant contends that his evidence to the effect that during his detention in police custody in Nepal he was tied with a rope, beaten and subjected to torture, was not taken into account or was inadequately considered. This submission was also made in respect of evidence that the applicant's presence in Nepal was illegal and that he was unaware of the asylum process when he arrived in the State. The court has considered the decision and the materials submitted in the course of the asylum process, together with the note of oral evidence furnished on behalf of the applicant, and finds no substance in these contentions. The Tribunal clearly considered the issues raised by this evidence and came to a conclusion adverse to the applicant.

19. It was also submitted that the evidence given that following his release from custody in Myagdi in March, 2003 and his return to Kathmandu, the police used to come looking for him at one to two month intervals and beat him, was not considered. It was claimed that the Tribunal did not conduct any or any adequate assessment of the applicant's claim concerning the alleged risk posed to him by the Maoist insurgents for whom he worked in Myagdi.

20. The Tribunal decision clearly refers to the encounters which the applicant had with police in Kathmandu between 2003 and 2007. There was no evidence furnished by the applicant of ill-treatment by the police in Kathmandu during these encounters when described in the questionnaire and the s. 11 interview. This arose for the first time in oral evidence when he described how he hid from the police in a park when they came looking for him every one to two months and that if found, he was beaten. However, there was no evidence that the police arrested him or attempted to initiate a deportation process against him. He would promise them that he would leave Nepal and was then allowed to go free. At his s. 11 interview he simply said that he was afraid that the police might ask him for identification. The furthest the matter was put in the written submissions was to the effect that the applicant instructed his solicitors that he lived in constant fear of coming into contact with the authorities and hid from the police when they searched for him. There was a clear contradiction between the more benign description given of these encounters at the initial stages of the asylum process and that given in oral evidence. The Tribunal was entitled to take this into account in assessing the credibility of the claim.

21. No serious attempt was ever made to remove the applicant from Nepal to Bhutan and none was described by the applicant in any of the accounts given whether in the questionnaire, the s. 11 report or the oral evidence to the Tribunal. His encounters with the police usually ended by his undertaking to leave Nepal, but no steps were ever taken by them to ensure that this took place.

### **Grounds (iii), (iv), (v) and (vi)**

22. The applicant claims that the Tribunal's finding that he did not suffer any consequences between March, 2003 and 2007 failed to take any account of the fact that he alleged he had been beaten or tortured in police custody in March, 2003 and had been beaten regularly by police in Kathmandu in the years prior to his departure from Nepal. It was claimed that the evidence that he used to hide when the police came looking for him, was ignored. Furthermore, it was submitted that the Tribunal acted unreasonably in rejecting the applicant's stated fear that the police would take action against him if they found him in Nepal on the basis that they had not done so in their almost weekly or fortnightly encounters with him in Kathmandu. This was said to ignore the violent behaviour of the police towards him on these occasions.

23. It is important to recall that the jurisdictional limit in this court is to assess the manner in which the decision was reached. The court is not a court of appeal in relation to the merits of the case. Many of the grounds advanced in this case are simply arguments that a contrary conclusion might or ought to have been reached on the merits. They are attempts to deconstruct the decision of the Tribunal and to invite the court to substitute its own view for that of the primary decision maker. This is contrary to the guiding

principles set down at para .11 of the judgment of Cooke J. in *I.R. v. the Minister for Justice, Equality and Law Reform and the Refugee Appeals Tribunal* [2009] IEHC 353. In particular, it is important to realise that the assessment of credibility is to be made by reference to the full picture emerging from the available evidence and information taken as a whole "when rationally analysed and fairly weighed". For that reason the decision on credibility must be read in the round and as Cooke J. noted:-

"The court should be wary of attempts to deconstruct an overall conclusion by subjecting its individual parts to isolated examination and disregard of the cumulative impression made upon the decision maker especially where the conclusion takes particular account of the demeanour and reaction of the applicant when testifying in person."

Furthermore, there is no general obligation to refer in a Tribunal decision in respect of credibility to every item of evidence and every argument advanced provided the reasons stated enable the applicant and the court to understand the substantive basis for the conclusion on credibility and the process of analysis or evaluation by which it has been reached.

24. The fundamental fear advanced by the applicant at all stages was that the police in Nepal harassed him and might attempt to deport him to Bhutan, but the overriding reality was that despite the many encounters which the applicant had with the police, they never made such an attempt and never detained him for that purpose. It is this reality which lay at the core of the Tribunal's decision. It was entirely rational and reasonable to reach that conclusion on the evidence.

#### **Ground (x)**

25. The applicant claims that the Tribunal acted unreasonably in holding that his credibility was undermined by the fact that he mentioned that he carried a bomb on behalf of the Maoists for the first time during the appeal hearing, and that his failure to mention this fact at a prior stage was not explained by him. The Tribunal, summarising the applicant's case, noted that when asked by the presenting officer:-

"The appellant stated that whilst working for the Maoists he was asked to carry bombs and on discovering this, he ceased working for them. It was put to the appellant that this was the first occasion in the course of his asylum application that he had mentioned that he had been carrying bombs for the Maoists, which he did not deny. He said that he was not a Maoist himself but had been compelled by circumstances to work for them. He said that the Maoists were unaware that he had left them."

In the analysis of the claim the Tribunal stated:-

"Another element which undermines the credibility of the appellant is that he mentioned carrying a bomb on behalf of the Maoists for the first time in the course of his asylum application at the appeal hearing. His failure to mention it at a prior stage was not explained by him."

The fact remains that the applicant did not refer to the carrying of bombs in the questionnaire or the s. 11 interview. In oral evidence he said that the Maoists asked him to get information and carry bombs. He used to collect information against the Nepalese security forces. He initially said that he simply gathered information but was later asked to carry bombs. He said he sometimes realised there was a bomb in the bag. When he realised that he was being asked to carry bombs, he left the Maoists. The court is not satisfied that the conclusion reached by the Tribunal in this matter was in any sense unreasonable or irrational. The applicant was represented by counsel at the hearing and was legally advised throughout the process. No explanation was offered for the withholding of this information at the earlier stages of the asylum application or at the hearing. The Tribunal was entitled to take that into account in respect of credibility.

#### **Ground (xi)**

26. The applicant complains that his evidence at the oral hearing that he travelled to Myagdi at night and early in the morning because he feared encountering the Maoists during the day, was disregarded. In fact, when he was asked why he travelled at night to Myagdi, he replied that it was easier to travel at night because there were less security checkpoints at night than during the day, which seemed to refer to the security forces fear of Maoists and not his. This evidence was not specifically referred to in the decision, but there is no basis to conclude that the Tribunal disregarded it and, as noted earlier, there is no general obligation to refer to every item of evidence and every argument advanced in the course of a decision, or to accept the applicant's interpretation of the evidence. This ground also fails.

#### **Ground (xiii)**

27. This relates to the negative credibility finding made in relation to s. 11B(b) of the Refugee Act 1996, which requires the Tribunal to have regard to a number of factors, including the applicant's possession of identity documents, whether the applicant has provided a full and true explanation of how he travelled to and arrived in the State, and when the application was made other than at the frontiers of the State whether the applicant has provided a reasonable explanation as to why he did not claim asylum immediately on arriving at the State's frontiers. The Tribunal noted that the applicant confirmed that he did not claim asylum in Ireland until a garda raid on the house in which he had been living in Donegal brought to light his illegal presence in the State. He said that the reason he had not claimed asylum previously was that he could not speak English properly and that he had been living in a friend's house in Donegal. He had been working in Donegal for some time. He applied for asylum on 28th June, 2007, having arrived in Ireland on 17th June. The Tribunal did not accept that the language barrier was so insurmountable as to prevent him from applying for asylum in the State at the earliest opportunity, having regard to the fact that he was living with friends in Donegal and was able to avail of their assistance in preparing his claim for asylum. The court is satisfied that the Tribunal did not give disproportionate weight to this matter. It forms only a small part of the decision and is one of a number of matters which caused the Tribunal to doubt the credibility of the claim.

#### **Balance of Grounds**

28. The remaining grounds (iii), (ix), (xi), (xii), (xiv), (xvi), (xvii), (xviii), (xix), (xx), (xxi), (xxii), (xxiii) and (xxiv) have no substance and some are stated in the most general form which without further particularisation are not amenable to relief by way of judicial review.

#### **Delay**

29. The applicant is approximately one week outside the fourteen day period prescribed by s. 5(2) of the Illegal Immigrants (Trafficking) Act 2000, and though the extension of time required is quite short, nevertheless having regard to the fact that the court is not satisfied that the applicant has demonstrated any substantial grounds upon which leave might be granted in this case, the court does not consider it to be in the interests of justice to extend the time and would, in any event, refuse leave to apply for judicial review on all of the grounds advanced.

**Conclusion**

30. For the reasons set out above, this application is refused.