NEUTRAL CITATION [2012] IEHC 562

THE high COURT

JUDICIAL REVIEW

Record No.: 2011/295 J.R.

Between

D. T. (NO.2)

-AND-

APPLICANT

THE REFUGEE APPEALS TRIBUNAL AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

DECISION OF MR JUSTICE O'KEEFFE, delivered on the 21st day of December 2012

1. By decision dated 18th June 2012 the applicant was refused leave to apply for judicial review of the decision of the respondent Tribunal dated 21st January 2011 to make a negative recommendation in relation to his asylum application. The applicant now seeks a certificate of leave to appeal to the Supreme Court pursuant to s. 5(3) of the Illegal Immigrants (Trafficking) Act 2000. The applicant contends that it may be necessary for this Court to request a preliminary ruling from the Court of Justice of the EU under Article 267 TFEU in order to determine whether a certificate of leave to appeal should be granted.

2. The narrative which the applicant presented to the asylum authorities was as follows. He was born in Bhutan in 1964 and is a member of the minority Brahmin I Nepali ethnic group. His brother was a founding member of the Bhutan People's Party (BPP) of which the applicant was also a member. In 1989 his brother was murdered by the Bhutanese authorities and thereafter the applicant became a BPP leader in his area. In 1990 he was detained and tortured in a police station for five days arising from a demonstration which he had organised in his district. He was released only after signing an agreement to leave Bhutan. In the days immediately after his release, he and his family were subject to further threats of torture and detention and so within four days they fled to Nepal. He and his family, together with a large number of other Bhutanese citizens who had also been expelled to Nepal, were stripped of their Bhutanese citizenship. From then on, he lived in Beldangi 1 refugee camp in eastern Nepal where he remained active in the BPP. He and his wife and children returned to Bhutan only in 2010, following international pressure on the Bhutanese government. Attempts to settle on his land again were unsuccessful, however, and he was arrested, detained and tortured for a period of three months before he escaped and fled to India and from there he travelled to Ireland via Moscow.

3. The Refugee Applications Commissioner accepted that the applicant was a Bhutanese refugee but determined his application on the basis that he was stateless and that his country of former habitual residence was Nepal. Adverse credibility findings were made and it was concluded that he had not established a well-founded fear of persecution. The applicant appealed to the Refugee Appeals Tribunal which adopted the same approach as the Commissioner in relation to his nationality and found, like the Commissioner, that he had not given any cogent evidence that he had suffered persecution for a Convention reason in Nepal or that there was a risk of any such persecution in the future. Negative credibility findings were also made in relation to his account of his return to Bhutan in 2010 and his failure to contact the Red Cross or to make a better effort to find out about his family's alleged detention in Bhutan.

4. The primary submission made on behalf of the applicant at the pre-leave hearing was that the Tribunal Member erred in law in holding that he was stateless given that the applicant had at all times maintained that he was of Bhutanese nationality. It was argued that the Tribunal Member ought to have assessed the applicant as a Bhutanese national or alternatively as a stateless person whose country of former habitual residence was Bhutan. It is apparent from the judgment of the Court of Appeal in *E.B. (Ethiopia) v. Secretary of State for the Home Department* [2009] 1 Q.B. 1 that the denial of citizenship may amount to persecution within the meaning of the Convention. Additional submissions were made with regard to the manner in which the Tribunal Member considered country of origin information relating to the treatment of Bhutanese refugees in Nepal, and the reasons given for the credibility findings drawn.

5. By decision dated 18th June 2012 this Court granted an extension of time but refused to grant the applicant leave to seek judicial review. Having considered the specific facts of this case and having examined the approach taken by Cooke J. in *TB.K.v. The Refugee Appeals Tribunal* [2010] IEHC 438; Feeney J. in *S.B. v. The Refugee Appeals Tribunal* (Unreported, High Court, 18th June 2009) and this Court in *R.B.B. v. The Refugee Appeals Tribunal & Another* (Unreported, High Court, 7th February 2012), which concerned situations factually comparable to the present, the Court found that there was nothing irrational in the conclusions that the applicant was stateless and that Nepal was his country of former habitual residence. The Court also found that there was nothing irrational about the conclusion that while the country of origin information indicates that discrimination occurs against Bhutanese refugees in Nepal, this does not amount to persecution. Finally, the Court rejected the arguments advanced with respect to the credibility findings made by the Tribunal Member.

6. The applicant now seeks leave to appeal to the Supreme Court on three grounds:

> *a. Is the arbitrary removal of a person's citizenship an act which constitutes "a severe violation of human rights" for the purpose of Article 9(1) and (2) of Directive 2004/83/EC?*
>
> *b. Is the arbitrary removal of a person's citizenship an act which constituted persecution for the purpose of s. 2 of the Refugee Act 1996?*

c. Where the executive agencies of a State arbitrarily deny a person his or her citizenship, is it correct to assess that person's claim to refugee status on the basis that that State is his or her "country of nationality" for the purposes of Article 2 of Directive 2004/83/EC and Article 1A(2) of the 1951 Geneva Convention relating to the Status of Refugees and its 1967 Protocol, or is it correct to regard that person as "stateless"?

7. Section 5(3) of the 2000 Act provides that where an applicant has been refused leave to apply for judicial review of a decision of the Refugee Appeals Tribunal, among other such bodies, *"no appeal shall lie from the decision of the High Court to the Supreme Court in either case except with the leave of the High Court which leave shall only be granted where the High Court certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court. "* It is common case that this is quite a high threshold. It has been established in a series of judgments- including the judgments of Clarke J. in *Arklow Holidays Ltd v. An Bord Pleanala* [2007] 4 I.R. 112 (in the context of s. 50(4) (f) of the Planning and Development Act 2000) and Cooke J. in *IR. v. The Minister* [2009] IEHC 510 in the context of s. 5(3), on which reliance was placed in this case- that the two requirements identified in s. 5(3) are separate and independent.

Moreover, there must be a genuine uncertainty as to the point of law certified; the importance of the point must transcend beyond the individual facts of the case; it must be in the common good that the uncertainty be resolved for the benefit of future cases; and the point of law concerned must arise from the decision and not merely out of some discussion at the hearing.

8. The Court cannot accept the contention that grounds (a) and (b) set out above arise from the judgment of this Court dated 18th June 2012. It followed from the manner in which the Commissioner and subsequently the Tribunal approached the question ofthe applicant's nationality that the issues to which grounds (a) and (b) relate did not arise for consideration by those authorities. In essence, as it was found that the applicant is stateless and that Nepal is his country of former habitual residence, it was immaterial whether or not he was discriminated against or persecuted by the Bhutanese authorities in the past. Therefore leave to appeal cannot be granted on grounds (a) and (b).

9. There remains ground (c), which relates to the question of whether in circumstances such as the present, where a person has been arbitrarily stripped of his citizenship, the applicant's country of birth remains his country of nationality or whether he ought to be regarded as stateless. Mr Lynn B.L. on behalf of the applicant impressed upon the Court that this is the key issue on which there is uncertainty. The Court accepts that this is an issue of law which arises from its judgment of 18th July 2012 which addressed issues of nationality, statelessness and habitual residence. These are substantial issues of refugee law. The approach applicable to Bhutanese persons expelled to Nepal has been considered by the High Court on a number of occasions and it is clear that the judgments of the High Court point consistently in the same direction. However, a different approach appears to be advocated in a leading textbook (Zimmerman, *The 1951 Convention: A Commentary*, 2011), based on a distinction between *de jure* and *de facto* statelessness. It is noteworthy that the said textbook was published after the judgments of the High Court in S.B. and T.B.K were delivered. The applicant further contends that a divergent view was also taken in *E.B. (Ethiopia) v. SSHD* [2009] 1 Q.B. 1 which this Court distinguished on the facts. A degree of discord is indeed identifiable between the authorities cited and the Court therefore considers that there is uncertainty as to the point of law and that it would be in the common good for the Supreme Court to deliver an authoritative determination on the subject. As far as this Court is aware, the issue identified in ground (c) is not a matter which the Supreme Court has considered to date. Finally the Court is satisfied that this is a matter which transcends the facts of this particular case. It is clear that this is a question which has arisen in several cases involving Bhutanese nationals stripped of their citizenship and expelled to Nepal. However, the issue of statelessness is a global phenomenon and is unfortunately not confined to Bhutan -pockets of stateless persons can be found throughout the world arising from exclusionary and discriminatory state policies, the breakup of states and the creation of new independent nations along geographical, religious and ethnic lines, and arising also from environmental factors. It is a matter which has serious consequences for large numbers of people throughout the world. It would therefore be desirable in the public interest for a certificate to be granted.

10. The Court is not convinced that circumstances akin to *HID. and B.A.* arise in this case such that it would be necessary to obtain a preliminary ruling from the CJEU on this issue before deciding whether a certificate of leave to appeal should be granted.

11. For the foregoing reasons the Court is satisfied that the separate and independent requirements set out ins. 5(3) of the 2000 Act are fulfilled and that it is appropriate to grant leave to appeal to the Supreme Court on the following ground, as amended to take account of an objection raised by the respondents:-

"Where the executive agencies of a State arbitrarily deny a person his or her citizenship, is it correct to assess that person 's claim to refugee status on the basis that that State is his or her "country of nationality" for the purposes of Article 2 of Directive 2004/83/EC and s. 2 of the Refugee Act 1996, or is it correct to regard that person as "stateless"?"

12. Accordingly, the Court certifies that this is a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court.