

# IMMIGRATION APPEAL TRIBUNAL

Date of Hearing: 8 November 2004  
Determination delivered orally at Hearing  
Date Determination notified:  
28/01/2005

Before:

Mr C M G Ockelton (Deputy President)  
Ms C Jarvis (Vice President)  
Mr K Kinnell

Between:

[ ]

APPELLANT

and

Secretary of State for the Home Department

RESPONDENT

For the Appellant: Mr M O'Donnell, instructed by Derby Law  
Centre  
For the Respondent: Ms A Holmes, Home Office Presenting  
Officer

*If an asylum claimant is in truth stateless, it is important to assess 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.*

## **DETERMINATION AND REASONS**

1. The Appellant who, at one stage, claimed to be of Bhutanese nationality, appeals, with permission, against the determination of an Adjudicator, Mr J W Miller, dismissing on asylum and human rights grounds his appeal against the decision of the Respondent on 22 May 2003 refusing him asylum and consequently refusing him leave to enter. We should say that the notice of decision includes also an indication that the Respondent proposes to remove the Appellant to Bhutan.
2. The Appellant's history is as follows. He was born in Bhutan on 29 August 1980 and is said to be of Nepalese ethnic origin. It is said

that his father and uncle became involved in the BPP in Bhutan, that that activity put him in some difficulties and that, as a result, the Appellant left Bhutan with his uncle and went to Nepal. That was on 3 August 1989. We have not been told a great deal about what happened in the successive eight years, but it is not said that the Appellant was ever in one of the refugee camps which have subsequently grown up to deal with the problem of ethnic Nepalese leaving Bhutan. On the contrary, the Appellant's uncle is said to have worked in a Nepalese Post Office and the Appellant, following his education in Nepal, began work as a teacher there. That was in 1997.

3. In the succeeding five years, we know of only two or possibly three events. In 1998, on an unspecified date, it is said that the Appellant was arrested on suspicion as he had no identification. He has claimed to have been badly beaten on that occasion and subsequently lost his sight in his left eye. Some four years later or so, on a date which has been variously specified as in January and as in October 2002, the Appellant was again arrested because he had no identification. The suspicion is said to have been that he was a Maoist. He was detained for a period of about two days, but was released after a friend intervened. He left Nepal on 27 November 2002, shortly after the last incident if it took place in October, but some ten or eleven months after the incident if it took place in January.
4. Following his claim for asylum, the Secretary of State, having refused it, issued a letter of reasons for refusal, dated 20 January 2003. The letter starts from the Appellant's claim, made and confirmed by him that he had Bhutanese nationality and says that the Secretary of State doubts the Appellant's Bhutanese nationality but that, in any event, he would not be at risk if returned to Bhutan.
5. Before the Adjudicator, those areas were both explored in detail and the skeleton argument which Mr O'Donnell has very helpfully put before us today duly deals with those matters, that is to say, firstly, the Appellant's nationality, and, secondly, the risk to him if he were returned to Bhutan.
6. It is right to say that the grounds upon which permission to appeal to the Tribunal was granted were on the following somewhat different terms:

"No authority beyond that of a well-known textbook is cited for the proposition that discrimination in civil rights may go so far as to amount to persecution. It is not easy to reconcile this with the decision of the Court of Appeal in AE & FE [2003] EWCA Civ 1032 and the question needs to be considered by the Tribunal. On this point only, permission to appeal is given."

7. That, however, is in the context of a determination which appears to describe the Appellant as unambiguously Bhutanese which is not now his case and is not the case which Mr O'Donnell sought to

emphasise arose from the Adjudicator's determination. In view of the fact that obvious points of Convention law arise from the Adjudicator's determination as a response to the material that was put to him, we have allowed, and indeed encouraged, Mr O'Donnell to expand on his submissions and we are very grateful to the assistance he has given us.

8. The Appellant claims to be a refugee. A refugee is a person who comes within the definition in Article 1A(2) of the Refugee Convention. He is a person who is outside his country of nationality or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to fear of persecution for what is usually called a Convention reason, unable to return there. It is beyond dispute that whether or not a person is a refugee, protected by the Refugee Convention, is a matter of status, it is not a matter of evaluating what a foreign government proposes to do with the individual. The status in question is to be evaluated by reference either to the person in question's country of nationality or, if and only if, he has no nationality, by reference to his country of former habitual residence. We pause there to emphasise that, although the Refugee Convention makes specific provision for a person who has more than one nationality, there is no suggestion that a person can have more than one country of former habitual residence. The primary question therefore in any refugee claim is to determine the country of nationality or former habitual residence. It is an obvious point of Convention law that the country, by reference to which the refugee claim is to be assessed, must be established.
9. In the present case, the Adjudicator, as Mr O'Donnell points out, drew the conclusion that not only is the Appellant not a national of Bhutan, but that he is not entitled to Bhutanese nationality either. Mr O'Donnell drew our attention to the Adjudicator's findings insofar as the Appellant's own history is concerned and also to material that was before the Adjudicator and is also before us, which relates to the attitude of the Bhutanese Government to those of Nepali ethnicity who are seen as an undesirable, albeit large, ethnic minority. The Adjudicator having concluded, as we think he must have done, that the Appellant was in truth not to be regarded as a Bhutanese national, should then have (we repeat the word without intending any criticism) obviously passed to consider what was the Appellant's country of former habitual residence.
10. On the basis of the facts before him, we do not think that he could properly have reached any conclusion other than that the Appellant's country of former habitual residence was Nepal. That is the country to which the Appellant went when he was aged about nine. It is the country in which he remained for the whole of the time when he was growing up and when he was training. It is the country in which he obtained employment and is the country from which he left for the United Kingdom. Further, in the course of his statement prepared for the hearing before the Adjudicator, he

wrote as follows, in paragraph 23, *"My fear is of the police in Nepal"*. After expanding on that, he went clearly as a secondary matter to say, in paragraph 24, *"I cannot return to Bhutan either"*.

11. In our view, there is no doubt at all that, insofar as the Appellant's status as a refugee comes to be considered, Nepal is the country which is in question: because the Appellant is stateless and his country of former habitual residence is Nepal. It follows that the Adjudicator's concentration on Bhutan for the purposes of assessing the Appellant's claim was entirely erroneous, although we accept that he was drawn into looking at Bhutan, not only by the Appellant's original claim but also, no doubt, by the material that was put before him. It follows from that that the Appellant's refugee claim has yet to be properly considered in detail and on the appropriate facts.
12. Mr O'Donnell's second principal line of argument is that, in any event, the Respondent's decision to return the Appellant to Bhutan is a decision which is not in accordance with the law and so cannot stand. Again, this was not a matter dealt with in the grant of permission but it is of sufficient importance for us to attempt to deal with it. As we have indicated, the decision against which the Appellant appeals was a decision refusing him leave to enter, but which also indicated the proposed removal to Bhutan. Because of the date of the decision, the right of appeal is under the 2002 Act. Under the 2002 Act, the rights of appeal are set out in ss 82 and 83 and the grounds of appeal in s 84. Section 82(1) reads as follows:

"Where an immigration decision is made in respect of a person, he may appeal to an Adjudicator."

13. Section 82(2) indicates what is meant by an immigration decision for those purposes. We do not need to set out the entire list. We draw attention only to the following.

- "82(2)(a) Refusal of leave to enter the United Kingdom.  
(g) A decision that a person is to be removed from the United Kingdom by way of directions under s10(1)(a)(b) or (c) of the Immigration and Asylum Act 1999 (removal of persons unlawfully in the United Kingdom).  
(h) A decision that an illegal entrant is to be removed from the United Kingdom by way of directions under paragraphs 8-10 of Schedule 2 to the Immigration Act, Control of Entry: Removal.  
(i) A decision that a person is to be removed from the United Kingdom by way of directions given by virtue of paragraph 10(a) of that Schedule."

14. It does not appear to us that any of the other paragraphs of that sub-section could conceivably apply to this Appellant. But, in fact, it is also clear that paragraphs (g), (h) and (i) do not apply to this Appellant: he is not an illegal entrant; he is not unlawfully here; he is proposed to be removed merely as a consequence of the refusal of leave to enter. His right of appeal is in respect of the immigration decision refusing him leave to enter.

15. If we pass to s 84, which sets out the possible grounds of appeal, there is a ground that the decision (that is to say, the immigration decision in question) is unlawful under s 6 of the Human Rights Act. There is a ground that the decision (that is to say, the immigration decision) breaches the Refugee Convention. There is also a ground (e) that the decision is otherwise not in accordance with the law.
16. Mr O'Donnell submitted to us that because the Appellant cannot properly or perhaps at all be removed to Bhutan either because he is not a citizen of Bhutan or because he will be ill-treated in Bhutan or perhaps because he will, if returned to Bhutan, need to attempt to take refuge in a neighbouring country, his return to Bhutan would breach his rights under the European Convention on Human Rights even if it does not breach his rights, if any, under the Refugee Convention.
17. In our view, there is no substance in that submission at all. The refusal of leave to enter to a person who is not a refugee is not a decision which, in this case or perhaps at all, is one which raises issues under the Human Rights Act. It may be that if the Appellant had a right of appeal which related to the destination named in the removal directions in this case, he would be able to show that Bhutan is not an appropriate destination for him. But it is quite clear to us that nothing in ss 82 and 84 of the 2002 Act gives this Appellant a right to appeal against the nomination of Bhutan in the proposed removal directions. He does not begin to show that his removal qua removal would breach either Convention. It does not appear to us that the destination is a matter which is capable of being the subject of an appeal under the 2002 Act.
18. For those reasons, we reject the submissions made by Mr O'Donnell on that ground, but the difficulty remains that the Appellant's real claim to be a refugee has not been properly assessed in the context of the appropriate country. For that reason alone, we have decided that the appropriate course is to remit this appeal for hearing afresh by another Adjudicator. We have carefully considered whether doing so would deprive the Appellant improperly of the present Adjudicator's findings of fact. It appears to us that the most appropriate way to deal with this is that which we have put to the parties in this hearing and which they have agreed: that is to say, that although the new Adjudicator is to make his own judgment of the credibility of the Appellant's story on the basis of all the evidence before him, he will do so having read Mr Miller's determination and he will no doubt wish to take that into account with all the other material in making his decision.
19. We therefore allow this appeal to the Tribunal and direct that the Appellant's appeal be considered afresh, albeit with reference to the earlier determination, on the basis that he is a person of no nationality, whose country of former habitual residence was Nepal, by an Adjudicator other than Mr Miller.

C M G OCKELTON  
DEPUTY PRESIDENT