Upper Tribunal
(Immigration and Asylum Chamber)

Gekhang (Interaction of Directives and Rules) [2016] UKUT 00374 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 February 2016	**On 18 May 2016**

Before

THE HONOURABLE LORD BURNS
DEPUTY UPPER TRIBUNAL JUDGE G A BLACK

Between

MR TENZIN SAMDUP GEKHANG
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Jorro (Counsel instructed by Wilson Solicitors LLP)
For the Respondent: Mr P Wilding, Home Office Presenting Officer

The interaction of paragraph 334 of the Immigration Rules is subject to the Qualification Directive and the Procedures Directive.

DECISION AND REASONS

1. The appellant, whose date of birth is 12 February 1985, is an ethnic Tibetan from the People's Republic of China. He has appealed against a decision dated 30 September

2014 to remove him to India consequent to the refusal of his protection claim (for asylum made on 25 January 2013). The appellant appeals on the basis that he is a refugee whose removal from the UK would breach the UK's obligations under the Refugee Convention and/or that such removal would be unlawful as incompatible with his human rights.

2. This matter comes before us for a hearing de novo. In a decision and reasons promulgated on 6 January 2016 Deputy Upper Tribunal Judge Shaerf found that there had been a material error of law by the First-tier Tribunal and directed that the First-tier Tribunal decision be set aside in its entirety and for the appeal to be heard afresh. At the hearing before us both representatives confirmed that they had no objection to the appeal being heard before this Tribunal. Mr Jorro took specific instructions from his client and confirmed that they were ready for the hearing to proceed and were content for the matter to be dealt with by the Upper Tribunal.

Appellant's claim

3. The appellant claims that as an ethnic Tibetan from China he faces a real risk of persecution on return (SP & others (Tibetan- Nepalese departure – illegal- risk) Peoples Republic of China CG [2007] UKUT 00021). He argues that the exclusionary provisions in Article 1E (Refugee convention) and the Qualification Directive (339C) do not apply as he is unable to return to India and would not be recognised as having the same or equivalent rights to an Indian National. The burden is on the respondent to show that he could be readmitted to India where there would be sufficient protection available.

Reasons for refusal

4. In a letter dated 30.9.2014 the respondent accepted the reason (race) for claiming asylum as valid but did not accept that the appellant faced a fear of persecution in India. The respondent accepted that the appellant was from China. The respondent did not accept that the appellant had obtained a registration certificate (RC) through an agent and/or that he obtained using on false information in 2001. It was not accepted that the appellant was born in Tibet and went to India at the age of 7 years. As to readmission to India, the respondent considered that the appellant would be able to return to India relying on the stamp in his I certificate (IC) which showed his legal residence as a Tibetan refugee.

5. The respondent did not accept the appellant's claim to have protested outside the Chinese embassy in Delhi, when considered against the background material.

6. As to fear of return to China the respondent relied on the Swiss FMO cited at paragraph 64 of the refusal letter and in the COIR which stated that there were no reported deportations of Tibetan refugees to China and that the Indian government provided protection. The respondent considered that the appellant faced no risk as a failed asylum seeker in India. Section 8 Asylum & Immigration (Treatment of claimants etc) Act 2004 was relied on because of the delay in claiming asylum in the

UK. Human rights were considered under the Rules and outside of the rules, and rejected.

Grounds of appeal

7. The appellant's detailed claim is set out in a skeleton argument. As a Tibetan from China the appellant does not have the rights and obligations which are attached to Indian nationality or equivalent rights and obligations. Accordingly he ought not to be excluded from the benefits of the Refugee Convention pursuant to Article 1E and the Qualification Directive (Directive 2004/83/EC) (QD) pursuant to Article 12(1). The appellant claims that he is a refugee in accordance with the Refugee Convention and pursuant to the Qualification Directive chapters (ii) and (iii) and that therefore he should be granted refugee status pursuant to the Qualification Directive Article 13. Further the Immigration Rules at paragraph 334(v) sets out the requirements for a grant of refugee status cannot lay down any conditions for a grant of refugee status in the UK that are "less generous" than or are more restrictive than, or are incompatible with, the conditions for a grant of refugee status in the EU as per the Qualification Directive and the Procedures Directive (Directive 2005/85/EC) (PD). Paragraph 334(v) envisages a person who is a refugee nonetheless being refused refugee status on the basis that such refusal would not require him to go, in breach of the Geneva Convention, to a country in which his life or freedom would be threatened on account of race, religion, nationality, political opinion or membership of a particular social group, must be applied and interpreted in compliance with the Procedures Directive Sections (ii) Articles 25 to 27.

The Hearing

8. For the hearing the appellant produced a lever arch file containing authorities listed from tab one to tab eight. The bundle for the hearing consisted of bundle A, an updated bundle index to the appellant's documents and Sections A to D. That bundle included a skeleton argument dated 10 June 2015 and some updated evidence from pages 1 to 7 including a witness statement from Emma Terenius dated 17 February 2016. A supplementary bundle sent on 19 February 2016 included the appellant's supplementary witness statement, email correspondence, an application form Nepal 1992 and the appellant's mother's Chinese ID card together with certificate and translation. Additional evidence was produced by way of a letter dated 22 February 2016 which included an addendum to expert report by Dr Anand dated 21 February 2016, photographs of the appellant. Counsel produced a detailed skeleton argument dated 19 February 2016 which contained all the relevant legal provisions including the Refugee Convention, the Qualification and Procedures Directives and the Immigration rules paragraph 334. We refer to the same and have not reproduced that material in this decision.

9. The respondent's bundle included the Reasons for Refusal Letter, the appellant's screening interview and substantive interview. Mr Wilding relied on MA (Ethiopia) [2009] EWCA Civ 289 and a Swiss report from Focus entitled "The Tibetan Community in India" dated 30 June 2013.

10. We heard oral evidence from the appellant who relied on his witness statements and the evidence given to the FTT in June 2015. In addition there was written evidence from Mrs Hodgson and Miss Terenius which was not challenged. The appellant relied on an expert report from Dr Anand. Mr Jorro relied on his skeleton argument. Mr Wilding made oral submissions on the evidence from the appellant and prepared written submission on the legal issues. We have received those written submissions together with submissions in response from Mr Jorro.

The Appellant's Evidence

11. The appellant relied on his previous witness statements and the responses made in Home Office interview. He relied on his witness statement responding to the Reasons for Refusal Letter dated 30 September 2014. He confirmed that he had told the truth at the previous hearing before the First-tier Tribunal in June 2015. He relied on his third witness statement dated 19 February 2016 in which gave an explanation as to how he obtained further documentation and photographic evidence.

12. He identified himself in the photographs shown with the Dalai Lama. The photograph was taken in Oxford. Other photographs showed the appellant at a protest demonstration in Central London. He referred to page 55 bundle C which showed a photograph taken in Calcutta of him with Denzin Dsundu taken in 2005/2006.

13. In cross-examination the appellant confirmed that the identification certificate (IC) allowed him to travel internationally and he used it as a passport. That document stated incorrectly that he was born in India. He did not have a copy of his registration certificate (RC) which was left in India, having been submitted to the local authority in support of his application for an exit permit to go abroad. The procedure had changed since 2005. In 2012 he came to the UK with an exit permit. He had come to the UK with the intention to claim asylum.

14. When he obtained his RC he had given false information that he was born in India and that his parents were dead. In support of his application he produced a letter from his school which confirmed the false details and he paid some bribe money through an agency. He had also handed in an exam certificate. He acknowledged that the school had supported the lie on his behalf. He explained that there were a few Tibetan students who did not have permanent residence in India and were forced to do this in order to get a residence certificate.

15. He acknowledged that a more recent letter from the school (tab A page 2) confirmed that he was a student in India, he was from Lassa, Tibet, his date of birth and place of birth. He had applied for a RC in 2001. He did not know whether he could have applied at an earlier time. He used his RC in order to obtain his IC. For that application he had stated that he was born in India. He was assisted by an agent to fill out the form. He believed that the agent was working in the registration office where he had seen him on several occasions. The appellant did not use an agent for

any other applications. He would get his certificate renewed yearly by taking the book and money for payment.

16. The appellant attended the Indian High Commission in London on two occasions and on both occasions had not got past the security officer. He had given details about his case and the security officer had told him that they would not be able to help him because he had committed a fraud. The appellant confirmed that he had not requested a new identification certificate. His letters (tab C pages 2 and 3) contained requests for information about re-admission to India only. The appellant confirmed that he had a better human rights projection in the UK than in India.

17. He referred to his green booklet which was issued by the Tibetan authorities to show his Tibetan identity.

18. He attended at protest demonstrations outside the Chinese Embassy in 2008. He confirmed that he had climbed over half of a wall. The police attended the demonstration. He and two friends were detained for a period of five or six days. After that he had attended vigils but with different friends and he tried to keep a low profile. He had been able to renew his registration certificate two or three times and had not experienced problems with renewal or with obtaining an exist visa.

19. He obtained new documentation (in part A of the bundle) by making contact by email and telephone. He asked whether there was any record of him in Tibet; he gave his details and copies of his green book. He had then received the letter in response.

Oral Submissions

20. Mr Wilding submitted that the central issue was whether or not the appellant could return to India. Having heard the appellant's evidence it was accepted that the appellant was born in Tibet and left Tibet to go to India. In the light of the country guidance case Mr Wilding accepted that the appellant was a refugee from China. He conceded that if the appellant was not re admitted in India the decision to remove him would effectively be unlawful. He would be relying on MA (Ethiopia) and the Swiss NGO report. He proposed to set out his submissions in writing to deal with Article 1E, 334(v) and Article 33(1) of the Refugee Convention.

21. Mr Jorro submitted that the rights the appellant may or may not have did not exclude him under Article 1E. The respondent having now conceded that the appellant was a refugee, the issue was whether there was a country to which the appellant could be removed (paragraph 334(v)) which has to be read in accordance with Article 26 of the Directive. MA (Ethiopia) was of relevance to the question of the bona fide efforts made by a claimant to see if he could go elsewhere, and focused on nationality. The main issue for consideration and response by the Secretary of State was set out in the skeleton argument as issue D from paragraph 32. Mr Jorro submitted that the evidential burden was upon the respondent to demonstrate that an exclusion clause such as under Article 1E/Article 12(1)(b) applied and that the respondent failed to discharge this burden with any evidence. He submitted that the

weight of the evidence produced by the appellant demonstrated that Tibetans in India do not have rights that come remotely close to those attached to possession of Indian nationality or equivalent to the same. Reliance was placed on the expert report and background reports on Tibetans in India. These included being considered as foreigners, living in a state of legal limbo, not being able to open an account without obtaining Reserve Bank approval, lacking civil and political rights and having limited or closed employment opportunities. Reliance was placed on the Federal Court of Canada judgment in Tendzin Choezom v MCI [2004] FC 1608. Given the current position that the appellant was in the UK as an asylum seeker with no Indian residence documents he would face major problems in the event of a return to India as a Tibetan without a registration card. It was submitted on that basis that the appellant could not be excluded under Article 1(8) or Article 12(1)(b).

22. The UK's obligations under the Refugee Convention must be met having regard to the concession that he is effectively a refugee qua China – his only country of nationality – prior to his claim for asylum in the UK. In terms of the Procedural Directive and Articles 25 to 27 he submitted that Article 25 had no bearing as the appellant's application has not been treated as inadmissible. Under Article 27 India was not a party to the Refugee Convention and there was no possibility for the appellant to request refugee status and receive protection in accordance with the Convention. There was no evidence to indicate that India is a country to which the UK has applied the safe third country concept.

23. Mr Jorro submitted that Article 26 treating India as a "first country of asylum" did not apply. The expert and background evidence established that the appellant would not enjoy sufficient protection in India if he were returned there now. The burden in terms of Article 26 as to re-admissibility to India lies on the respondent. The respondent needed to demonstrate that India can be considered to be a first country of asylum for the appellant and to that end to demonstrate that he will be readmitted to India.

The Respondent's Written Submissions

24. In submissions dated 10 March 2016 it was accepted that the appellant is a Chinese national who travelled from Tibet to India in 1992 and following the country guidance case (SP and Others (Tibetan – Nepalese departure – illegal – risk) People's Republic of China CG [2007] UKAIT 00021) the appellant is a refugee from China. The respondent did not advance submissions that the appellant was excluded from protection because of Article 1E. The written submissions therefore focused on the question of whether the appellant can return to India for the purposes of paragraph 334(v) of the Immigration Rules and under Article 33(1) of the Refugee Convention. It was accepted that the appellant was not an Indian national. Article 26 of the Procedures Directive was directly analogous with Article 33(1) of the Refugee Convention.

25. It was submitted that the appellant has lived in India from 1992 to 2012 and has since 2001 had an RC meaning that he was lawfully living in India. He obtained an IC which has since expired. The appellant would be able to return to India and resume

residence there. He failed to take reasonable steps to pursue enquiries as to whether or not he could apply to renew his identity card and/or residence card. The respondent contended that it was for the appellant to show that he was unable to return to India, on the balance of probabilities (MA (Ethiopia) v SSHD [2009] EWCA Civ 289). The appellant has not made any application to be re-admitted to India and has relied on evidence that is insufficient to demonstrate that the Indian authorities will not re-admit him. Reliance was placed on the Swiss report which states that it is possible to renew or extend an IC in India foreign missions.

26. As to sufficiency of protection in India it was submitted that the background material points to the situation that the Indian authorities currently have no interest in removing Tibetans unlawfully in the country. Little weight should be placed on the expert report which did not consider the question of whether the fact that the Appellant has lived in India since 1992 the RC would be able to be renewed. The respondent submitted that there was no corroboration of the appellant's claim that he obtained the RC using false information and in any event it would seem unlikely the authorities would refuse such an application given that the appellant can show residence since 1992 having moved from Tibet.

The Appellant's Written Submissions in Reply dated 17 March 2016

27. The submissions set out in detail the contentious issues as per submissions E to H in the skeleton argument and with reference to paragraph 334(v) upon which the respondent relies. It was submitted that the respondent and indeed the Tribunal were bound to apply the terms of the two EU Directives; the QD and the PD, and that the inter relationship between the Directives was relevant to the appellant's submission that the burden of proving the appellant's re-admissibility to India as an asserted "first country asylum", lies on the respondent. It was submitted that if the respondent asserts that India is to be treated as a first country of asylum for the appellant then it was for the respondent to establish on the evidence that the relevant conditions required by Article 26 apply, namely that he (otherwise than as a recognised refugee) enjoys sufficient protection in India, including benefiting from the principle of non-*refoulement*; and that he will be re-admitted to India. Given that the appellant is now a refugee and has been accepted as so by the respondent, it was for the respondent to prove and establish that the appellant's claim for asylum was in effect inadmissible pursuant to Article 26 and Section (ii) of the Procedures Directive.

28. The evidence, on the balance of probabilities, established that the appellant was not re-admissible to India. Reliance was placed on the appellant's unchallenged evidence that he handed over his RC to the Indian authorities in order to obtain an IC to travel out of India. That IC was obtained on the basis of documents falsely asserting that the appellant was born in India. Reliance was placed on the expert evidence of Dr Anand (paragraph 9) where it was made clear that Tibetan organisations in India will assist Chinese born Tibetans to obtain documents such as the RC on a fraudulent basis by falsely stating that the person was born in India. In support reliance was placed on the evidence from the appellant as to approaches made to the Indian authorities in the United Kingdom together with that from his solicitors representative, which was unchallenged. Secondly, there was the expert

evidence of Dr Anand which makes clear that the Indian High Commission will not re-issue the appellant with an IC because they are aware that it was obtained through false information. The respondent' submissions on the issue of re-admissibility were predicated on the basis that the appellant resided legally in India and legitimately obtained his residence and identification certificates. In conclusion the respondent cannot demonstrate that India is a "first country of asylum" for the appellant because it cannot demonstrate on the evidence that he will be re-admitted to India.

29. The respondent dealt with sufficiency of protection by considering whether or not the appellant would benefit from the principle of non-*refoulement*. Such protection was not limited to protection from *refoulement* under Article 33. Reference was made to the rights and protections guaranteed under the Convention (paragraph 26 of the submissions). Reliance was placed on evidence that Tibetans in India were at best tolerated and subjected to restricted rights (skeleton argument paragraph 17). Furthermore reliance was placed on the expert evidence that the appellant individually will be at particular risk on return to India owing to his now known history of having obtained identity documents on a false claim to have been born in India. This would render him open to prosecution and persecution and he will not find it possible to get a RC and his status will be that of a paperless and stateless alien which would make it impossible to secure employment or basic social services in any legal manner.

Discussion and Decision

30. We have decided to allow the appellant's appeal on asylum grounds. We accept the arguments put in the appellant's skeleton argument and the written submissions in reply. The respondent has accepted that the appellant is of Tibetan ethnic origin and was born in China (Tibet) to Chinese national (Tibetan) parents. The respondent has conceded that the appellant is outside of China owing to a well-founded fear of being persecuted for a Convention reason and is a refugee. Furthermore it is accepted that he is not a citizen of India and cannot be excluded from protection under Article 1E/ Qualification Directive Art 12(1)(b) because the background evidence does not show that a Tibetan in China has the "rights and obligations which are attached to the possession of the nationality " of India, or equivalent. The determinative issue that we have considered is whether the appellant can return to India pursuant to paragraph 334(v) and Article 33 Refugee Convention. In other words will he be re admitted to India and/or is there a sufficiency of protection either against persecution in India or from refoulement to China? We take the view that the burden is on the respondent and the standard is the balance of probabilities. We adopt the argument put by Mr Jorro (paragraph 11 written submissions) that this appeal is distinct from MA(Ethiopia) which focused on nationality. We conclude that the two limbs of Article 26 have not been showed to have been met.

31. In terms of fact finding we find the appellant's account to be entirely credible. We find that he was born in Lhasa on 12 February 1985 and in 1992 at the age of 7 was sent by his parents to go to India to join the Tibetan exile community. He attended school in India and was sponsored by an English woman named Mrs Hodgson. In 2001 at the age of 16 he used an agent to obtain an Indian RC. He obtained RC by

making a false assertion that his parents were dead and that he was born in India. He was able to obtain an IC by relying again on false information. He became active in Tibetan politics whilst in India and took part in various protests outside the Chinese Embassy in Delhi. He was also arrested and detained in 2008. He married in October 2011. He entered the UK as a visitor in August 2012 and claimed asylum in January 2013. Prior to that claim his solicitors wrote to the Indian High Commission and returned his identification certificate (IC). In that correspondence it was admitted that he was not entitled to the IC because he had obtained it using false information. He sought confirmation from the High Commission as to whether he would be re-admitted to India. The IC was returned to the appellant on 26 February 2013. His solicitors wrote again on 28 February 2013, 2 February 2015 and on 18 May 2015 in the same terms. In June 2015 the appellant went in person with his wife to the Indian High Commission but did not gain entry beyond having a conversation with a security guard. He attended again on 24 August 2015 together with his solicitors' representative Miss Terenius. We accept the account given by the appellant and his legal representative. He spoke to the same guard who made clear that the appellant was "not going to get anything from the Indian High Commission and that he would not be re-admitted to India".

32. We find that the appellant came to the UK from India where he had previously lived illegally. We find that as a Tibetan exile from China he does not have the rights and obligations which are attached to Indian nationality or rights and obligations equivalent to those and accordingly he benefits from the Refugee Convention. Article 1E and the Qualification Directive pursuant to Article 12(1)(b) do not apply on the grounds that he is not recognised by the Indian authorities as having such rights. We find that the appellant is a refugee in accordance with the definition in Article 1 and pursuant to the Qualification Directive chapters (ii) and (iii). We conclude that he should be granted refugee status under the Qualification Directive Article 13.

33. We reject the respondent's submission that the Qualification Directive and Procedures Directive draw their own status from the Refugee Convention. We accept the appellant's position that these Directives impact on the interpretation of the Refugee Convention and that paragraph 334 must be read in line with the Directives.

34. We find that the appellant has acted bona fide (by telling the truth about his previous deception) and taken all reasonable and practical efforts have been made both in terms of personal visits and by way of correspondence to pursue enquiries with the Indian Embassy as to whether or not he would be re-admitted to live in India. We place weight on the expert evidence of Dr Anand (paragraph 9) who concluded that the Embassy will now not reissue an IC because of the past falsehood and the appellant will be vulnerable. He also states that the appellant would not be able to get an IC/RC through legitimate means. We are satisfied that contrary to the submissions made by the respondent that the appellant lived illegally in India because he used false information as to his background details, in order to obtain his RC and IC. The Indian authorities are aware that the appellant used deception in the past and this would fundamentally impact on his readmission to India. We find no evidence to establish that the Indian authorities would turn a blind eye to the past

deception and illegal residence and agree to readmit him. We consider that the respondent's position is premised on the fact that the appellant was treated as living legally in India whereas we have found significantly that his residence was unlawful and that he used deception. These facts have been brought to the attention of the Indian Embassy and the evidence of the visits to the Embassy is that the appellant will not be readmitted. We accept that his IC has now expired and that he has made no specific formal application for a renewal of the same or his RC. We are satisfied that such applications would be considered in the light of his past illegal residence from 1992 -2012 and use of deception. We place weight on the expert evidence of Dr Anand. The Swiss report focuses in the main on the treatment of Tibetans who have legal residence in India.

35. We further conclude that in the context of paragraph 334(v) of the Immigration Rules, the appellant's application for refugee status has not been considered to be inadmissible as per Article 25. Secondly, India cannot be treated as a safe third country as per Article 27. Thirdly India is not a first country of asylum as per Article 26 and finally that in any event the respondent, upon whom the burden is placed, has not shown on balance of probabilities that the appellant is re-admissible to India. On the evidence before us we find that the appellant is not re-admissible to India.

36. As to sufficiency of protection we again accept the submissions made on behalf of the appellant in this regard. The appellant cannot be recognised as a refugee in India as India is not a party to the Convention. We adopt the argument as to the extensive scope of protection provided by the Convention under Articles 2-34. We are satisfied that such protection extends beyond *refoulement* to China. We conclude that the evidence fails to establish that the appellant otherwise enjoys sufficient protection in India. We accept that the Swiss report does show that in general undocumented Tibetans are not deported and those without valid RC's in general face arrest and fines. However, the respondent has cited from the Swiss report one instance where the Indian authorities arrested a Tibetan exile, without a valid RC, on criminal charges and left him at the border with China. Dr Anand also cites similar examples where deportation has in practice occurred and it is his view that there is a recent trend towards deportation (paragraph 10). We conclude that the given the appellant's circumstances that his residence in India was unlawful there is no basis to support the respondent's view that he would simply be readmitted because of his past "lawful" residence. We place weight on the expert (paragraph 5 & 11) and background evidence that demonstrates effectively that Tibetans in India are at best tolerated and do not have rights that come remotely close to those attached to the possession of Indian nationality or equivalent to the same. The expert report and UNHCR ref World Report set out the circumstances of Tibetans living in India including being considered as a foreigner and which establish those persons as living in a state of legal limbo, being subject to restrictions in terms of buying property and lacking civil and political rights and having limited or closed employment opportunities. We also accept the evidence of Dr Anand at paragraphs 12 to 14 where consideration is given to the appellant's specific situation in the event of him returning to India in the light of the fact that it is known that he has made a false claim in the past. Dr Anand concluded that this would cause him to face significant

problems and difficulties on return given the resultant paperless and stateless circumstances.

37. In conclusion we conclude that the respondent has failed to show on both limbs that India is a first country of asylum. We are satisfied that the appellant's removal from the UK to either India or to China would breach the UK's obligations under the Refugee Convention. We allow the appeal.

Notice of Decision

The appeal is allowed.

No anonymity direction is made.

Signed Date 12.5.2016

GA Black
Deputy Upper Tribunal Judge G A Black

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed Date 12.5.2016

GA Black
Deputy Upper Tribunal Judge G A Black