Judgment

Title: B.D.(Bhutan and Nepal) -v- The Minister for Justice and Equality & ors

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[2018] IEHC 461

THE HIGH COURT

JUDICIAL REVIEW

[2010 No. 1188 J.R.]

BETWEEN

B.D. (BHUTAN AND NEPAL)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY, THE REFUGEE APPEALS TRIBUNAL AND THE ATTORNEY GENERAL

RESPONDENTS

AND

THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

AMICUS CURIAE

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 17th day of July, 2018

1. The applicant was born in Bhutan in 1975, of Nepali ethnicity. He appears to have been a citizen of Bhutan, by birth. He says that the Bhutan regime began expelling as many Nepalese as possible. He says he was involved in 1990 in a protest against the Bhutanese government. He claims his father was involved, and claims that the father was later killed and his mother disappeared. The applicant then fled to Nepal. It is clear from the papers that there is evidence of a practice whereby Bhutan revoked the citizenship of many members of the Nepalese minority, including those who left the country.

2. He left a refugee camp after about a month and was living in Nepal without legal status for a period of about 20 years up to 2010. He then went to India and ultimately came to Ireland. En route he changed ships three times, although he never identified

the ports in his asylum questionnaire. In due course he claimed and was refused asylum and an appeal was dismissed by the Refugee Appeals Tribunal on 6th July, 2010.

3. While the applicant had submitted at para. 1.3 of his written submissions to the tribunal that he was not stateless and was Bhutanese he also submitted country information which referred to endeavours by the Bhutanese state "*to deprive the Nepalese speaking population of their citizenship"* : before para 1.7. The decision of the tribunal quoted country information which makes clear that "*more than 100,000 ethnically Nepali Bhutanese are in Nepal as stateless refugees"*. It concluded that *"the legal and* de facto *situation in relation to citizenship in Bhutan would appear to suggest that the appellant would not be granted citizenship were he to return to Bhutan nor would he be considered to be a citizen of that state. His own evidence is along the same lines. Accordingly, the Tribunal is of the view that the appellant is a stateless person"*. Thus the tribunal held that the applicant had no nationality and that his claim for refugee status was to be assessed by reference to Nepal.

4. Following the tribunal decision he instituted the present proceedings seeking *certiorari* of that decision. A related issue was raised in another case, *D.T. v. Refugee Appeals Tribunal* [2011 No. 295 J.R.], in which leave to appeal to the Supreme Court was granted on 21st December, 2012 (see *D.T. v. Refugee Appeals Tribunal (No. 2)* [2012] IEHC 562 (Unreported, O'Keeffe J., 21st December, 2012)). That appeal was dismissed by the Supreme Court some four and a half years later on 14th June, 2017 (see *D.T. v. Refugee Appeals Tribunal* [2017] IESC 45 (Unreported, Supreme Court, 14th June, 2017)). That development explains a considerable amount of the lapse of time in progressing the present proceedings.

5. I have received helpful submissions from Mr. Michael Lynn S.C. (with Ms. Patricia Brazil B.L.) for the applicant, from Ms. Siobhán Stack S.C. (with Ms. Kilda Mooney B.L.) for the respondents and from Mr. Colin Smith B.L. for the UNHCR who were added by consent as *amicus curiae.*

Ground 1: effective remedy
6. As pleaded, this was an opaque ground and it is hard to ascertain what exactly was being alleged but Mr. Lynn has clarified that this is not being pursued.

Ground 2: where statelessness derives from a persecutory deprivation of nationality, should that deprivation be disregarded
7. I will deal with this issue separately later in this judgment.

Ground 3: allegation that the tribunal erred in determining that Nepal was a country of former habitual residence
8. The applicant was in Nepal for 20 years. There is no basis whatsoever to disturb the finding by the tribunal in this regard. Ground 3 as pleaded accepts that there is no evidence of likely *refoulement* from Nepal to Bhutan. It asserts that no allowance was made for the possibility that the applicant would not be readmitted to Nepal but that seems duplicative of ground 4 and is best dealt with under the following heading.

Ground 4: failure to consider whether the applicant could be returned to Nepal
9. This was not argued in the applicant's written submissions to the tribunal. Mr. Lynn says he does not believe it was argued orally either. An applicant cannot challenge a decision on a point that was not argued. Furthermore, the evidential basis for this submission was not laid. There has to be an explicit averment that some factual submission was made that was not dealt with, or that some evidential basis that the point was put before the decision-maker and was not dealt with. Separately there was some discussion at the hearing as to whether a legal right to return to the country in

question has to be demonstrated. That was rejected in *B.D.R. v. Refugee Appeals Tribunal* [2016] IEHC 274 (Unreported, Faherty J., 25th May, 2016). But the submission about the tribunal not identifying whether there was a legal right to return is not pleaded.

10. Paragraph 4 of the statement of grounds pleads failure to consider whether the applicant could "*realistically*" be returned having regard to his legal status. That is not a plea that the tribunal failed to consider whether there was a legal right to be readmitted. In any event the point as now pleaded was not actually put to the tribunal and to argue it in judicial review proceedings is pure gaslighting of the decision-maker. Indeed, it represents a tiresomely repetitive feature of the asylum and immigration list, and seems to be accepted almost as par for the course, that applicants can load a statement of grounds with points that they did not bother to submit to the decision-maker. Such a misconceived practice has to be stamped out if the court processes are to have any credibility.

Ground 5: failure to address the applicant's case of persecution in Bhutan.
11. If the tribunal correctly applied the refugee definition to the facts of this particular case, then the applicant's status as a refugee was to be determined by reference to Nepal rather than Bhutan. Thus this question is essentially a reformulation of the critical point in the case, namely whether the refugee definition was correctly applied. Mr. Lynn also submits that ground 5 covers the allegation that the tribunal should have considered the applicant to be habitually resident in Bhutan. However, it does not. Ground 5 as drafted relates to persecution, not that the applicant was unable to return to a country of former habitual residence. In any event, on the facts of this particular case Bhutan was not a country of habitual residence of the applicant *at the time that he was stateless.* Therefore, the assessment of whether the applicant is a refugee as a stateless person falls to be assessed by reference to Nepal rather than Bhutan, assuming that the refugee definition was applied correctly by the tribunal. Thus, the submission now sought to be made is simply not pleaded in ground 5, but in any event it is without substance.

Ground 6: allegation that "*the above averments raise direct and important issues of European Union as well as domestic law*".
12. Pleas in a statement of grounds are not averments. That they raise issues of EU law is not as such a ground for relief. Ground 6 does not add much to the arguments, acknowledging of course that the definition of a refugee also falls to be considered under the Geneva Convention and the qualification directive 2004/83/EC.

The definition of a refugee
13. The most relevant provisions of the Refugee Convention for present purposes are arts. 1A(2) and 1E. Article 1A(2) provides in pertinent part that a refugee is a person who "*owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. 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 the person shall not be deemed to be lacking the protection of the country of his nationality if without any valid reason based on well-founded fear he has not availed himself of the protection of one of the countries of which he is a national".*

14. Article 1E provides that "*This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence*

as having the rights and obligations which are attached to the possession of the nationality of that country."

15. Nationality for these purposes should be construed in a harmonious manner with the related Convention on Statelessness of 1954, art. 1 (1) of which provides that "*for the purpose of this Convention the term 'stateless person' means a person who is not considered as a national by any state under the operation of its law".*

Does the determination of nationality have to be arrived at by reference to the law of the country as applied by it or by reference to international law?

16. Professors Zimmerman and Mahler in their chapter on art. 1A(2) of the Convention in Zimmerman ed., *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP Oxford, 2011) observed that "*the* 'not having a nationality' *clause applies only to de jure stateless persons*", that is persons who are not considered nationals by the laws of the country in question. Mr. Lynn submits that a deprivation of citizenship should not be recognised as *de jure* where that deprivation is manifestly in breach of international law. That submission essentially conflates two separate questions: firstly, whether the law recognises someone as a citizen or not, and secondly, whether that law would stand up to international human rights scrutiny. Hathaway and Foster, *The Law of Refugee Status*, 2nd ed. at p. 50 comment that "*citizenship is a universally recognised basis for jurisdiction over individuals*". It would, to an extent, throw that universal recognition into question if other states can disregard the law of the country at issue for asylum purposes. The UNHCR *Handbook on Protection of Stateless Persons* (Geneva, 2014) at p. 23 says that "*Bestowal, refusal, or withdrawal of nationality in contravention of international obligations must not be condoned. The illegality on the international level, however, is generally irrelevant for the purposes of Article 1(1)"* of the statelessness convention.

17. Such an interpretation is most certainly not to condone arbitrary deprivation of nationality. The Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, 1930 at art. 1 provides that "*It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality*." This principle was applied in *Liechtenstein v. Guatemala* [1955] I.C.J. 1 (the *Nottebohm* case) (6th April, 1955) but that is in a different context where the conferral of nationality on the person was being relied on as against another state. It seems to me not to have any real relevance to a situation where no interests of the "*receiving*" state are in issue. Hathaway and Foster at p. 54 note 217 state that if "*the putative state of citizenship denies that the applicant is its national*" this is "*ordinarily a fatal finding*" and that the onus is on the applicant to establish such citizenship.

18. The applicant also faces the hurdle of a certain amount of existing adverse authority. In *S.B. v. Refugee Appeals Tribunal* [2009] IEHC 270 (Unreported, High Court, 18th June, 2009), Feeney J. dealt with a similar question, although he did not specifically address the precise point here as to whether the citizenship law of a particular country should be disregarded if contrary to international law. Rather, he seems to have proceeded on the assumption that the law of the country in question was to be accepted: see para. 17. In *T.D.K. v. Refugee Appeals Tribunal* [2010] IEHC 438 (Unreported, High Court, 3rd December, 2012) Cooke J. at para. 21 states that "*However questionable the policy of the Bhutanese authorities might be in international law, there is no doubt that the intention and practical effect was to deprive the applicant and his family of citizenship of that country".*

19. The decision of O'Keeffe J. in *R.B.V. v. Refugee Appeals Trib*unal (Unreported, High Court, 7th February, 2012) is consistent with such an approach. *In D.T. v. Refugee*

Appeals Tribunal (No. 1) (Unreported, O'Keeffe J., 18th July, 2012), a finding along the lines that the law of the country in question should essentially be taken at face value was upheld on the basis that there was "*nothing irrational*" in such a finding: see para. 34, although the key point now being made was not expressly dealt with in that judgment. In *D.T. v. Refugee Appeals Tribunal (No. 2)* [2012] IEHC 562 (Unreported, High Court, 21st December, 2012) O'Keeffe J. granted leave to appeal on the issue of whether citizenship deprivation should be disregarded if in breach of international law. However, that never came to fruition as the appeal was struck out on other grounds (*D.T. v. Refugee Appeals Tribunal* [2017] IESC 45 (Unreported, Supreme Court, 14th June, 2017)). For what it is worth, the certified question in that case is not recorded as having being raised in that form in the original judgment. Ms. Stack, who appeared in the case, said she contended that leave to appeal should not have been granted for that reason and while that is certainly a point that is perhaps not entirely without merit, because a losing side cannot dream up new points as a basis to seek leave to appeal having received and cogitated upon a judgment, it is procedurally water under the bridge as far as that case is concerned.

20. The argument was made on behalf of Mr. Lynn that deprivation of citizenship could in itself amount to persecution and that may very well be the case if we are concerned with the position, and in particular only with the position, in the country that deprives the person of citizenship. That was the case in *E.B. (Ethiopia) v. Secretary of State for the Home Department* [2007] EWCA Civ 809 [2009] Q.B. 1. However, the argument becomes circular in a context such as the present where the deprivation of citizenship means that the asylum claim is to be determined by reference to a country other than the country of former citizenship: see O'Keeffe J.'s view in *D.T. (No. 1)* at para. 31.

21. An argument as to an exceptional possible qualification to the general rule that the discriminatory and persecutory nature of a deprivation of citizenship should be disregarded emerges from fn. 40 at p. 23 of the UNHCR *Handbook on Protection of Stateless Persons* (Geneva, 2014), which says that "*the exception to the general approach may be situations where the breach of international law amounts to a violation of a peremptory norm of international law … The exact scope of this obligation under customary international law remains a matter of debate*." Mr. Smith says that the purpose of this footnote is "*acknowledging general academic and political debate*" but says that para. 56 of the handbook is the primary source for understanding the issue. Essentially, the contention is that possible theoretical exceptions do not detract from the general position as set out by the UNHCR.

22. In Eric Fripp, *Nationality and Statelessness in the International Law of Refugee Status* (Hart, Oxford and Portland, Oregon, 2016) p. 208, the question is posed: "*is an unlawful and arbitrary deprivation of nationality, based on discrimination on the basis of race or some other Convention reason, and effective under domestic law, to be recognised so that the denationalising State ceases to be the country of reference for the purposes of Article 1A(2)".* Mr. Fripp goes on to say that in many cases this "*does not make a difference, because the country which has denationalised the claimant is in any event the country of former habitual residence*". An example of this is *E.B. (Ethiopia) v. Secretary of State for the Home Department* [2007] EWCA Civ 809 [2009] Q.B. 1. That however is also the situation in the primary case relied on behalf of the applicant, the decision of the Federal Administrative Court 10 C 50.07 (BVerwG 26th February, 2009) where the court acted on the basis that a persecutory deprivation of citizenship could be relevant or at least should not be disregarded in the context of determining whether the deprivation could amount to persecution *by the denationalising state*. That case dealt with complainants who are born in Azerbaijan and Russia, who were ethnic Armenians and who applied for asylum in Germany. The judgment notes that the complainants lived in Azerbaijan (and Russia) before coming to Germany. The first complainant lost her Azerbaijani citizenship under the law of that state and the

second complainant never acquired such citizenship. Thus it was a case where the applicants were claiming persecutory or discriminatory nationality law in respect of Azerbaijan. In that situation the German court said that the deprivation of nationality could itself be persecution. It specifically cited *E.B. (Ethiopia)* in this regard (at para. 19), which only goes to underline the difference with the present case. The one aspect of the decision which is particularly opaque is that of whether, and if so why, the question of persecution was to be judged by reference to Azerbaijan rather than elsewhere (see para. 25 onwards) but it can at least be pointed out that the court did not expressly generalise from the denationalisation-is-persecution theory to say that arbitrary deprivation of nationality should be disregarded in determining whether an applicant was still a national of a country other than that of his or her habitual residence.

23. There are three possible ways of approaching the question at issue here. Firstly, that nationality deprivation should be taken at face value in accordance with the internal law and practice of the state concerned, disregarding, for this purpose only the question of whether it amounts to discrimination or persecution. That is essentially the submission made by the UNHCR. Option two is that nationality deprivation should be disregarded if contrary to international human rights law. This is what was argued by the applicant before the tribunal. The third option is that nationality deprivation should be disregarded unless it amounts to a breach of a peremptory norm of international law going well beyond mere discrimination or even persecution. That specific argument was not made to the tribunal. No argument was addressed to the tribunal that the nationality deprivation here violated a peremptory norm of international law. The case was not made that the discriminatory or persecutory nature of a deprivation of nationality should be regarded as irrelevant excepting only the case of a breach of such a peremptory norm. Nor was any evidence adduced bringing the detail of the Bhutanese law within that category. Thus the point cannot be raised now. An applicant must be confined in the points he or she actually made to the decision-maker. It may be an interesting point, probably something of an academic one, and certainly the UNHCR does no more than note it as an academic possibility. Neither in its handbook nor in legal submissions was this possible exception endorsed; but however interesting the point may theoretically be, it has to be one for another case. Thus option three does not arise because it was not argued before the tribunal. However, even if it did arise, no definite conflict in the jurisprudence has been demonstrated because the German court was dealing with a different aspect of the matter for the reasons I have set out. Had it arisen I would have accepted the UNHCR submission that *"any alternative interpretation would mean that an individual who has been deprived of his or her nationality in a manner inconsistent with international law would nevertheless be considered a national without the related rights and obligations attained with that status. Such a situation would be at variance with the object and purpose of both the 1954 Convention and the 1951 Convention and would run counter to the raison d'être of the protection framework for stateless persons and refugees"* (para. 24 of written submissions).

24. The UNHCR submissions were to the effect that not only is an interpretation that a discriminatory or persecutory nationality law must be disregarded contrary to the Geneva convention on a correct interpretation but it is also not consistent with the protective purpose of the convention and has the effect of, as put in submissions, *"fixing someone with the nationality of a country whose protections they don't actually enjoy"*. The UNHCR makes clear that it is not in any way endorsing discrimination or persecutory deprivation of nationality and neither quite obviously is the court but their submissions are simply making the point that the discrimination or persecutory nature of such deprivation should be disregarded for the purposes of art. 1(1) of the Statelessness Convention and likewise for related purposes of the Refugee Convention. That is, however, just as relevant and valid a point as it applies to egregious denationalisations contrary to a peremptory norm of international law as it is to the

merely discriminatory or even the persecutory. Mr. Lynn descends into hyperbole by submitting that if the court upheld the UNHCR submission then the court would be "*absolving states from their international law obligations*". That is fundamentally misconceived. International human rights law stands in its entirety. The only question is whether the discriminatory and persecutory nature of a law depriving persons of nationality is relevant to the determination of citizenship for the purposes of refugee status or statelessness. It is not.

Steps required in applying the refugee definition

25. Thus the appropriate questions to be asked by the decision-maker in this regard are as follows:

> (i). Does the applicant have one or more nationalities assessed in terms of the law of the countries concerned as that law is applied by such country (as opposed to the question of whether such law meets international human rights standards).
>
> (ii). If so, is the applicant unable or unwilling to avail himself of the protection of all of these countries due to a well-founded fear of persecution for a convention reason.
>
> (iii). If the applicant has no nationality does he or she have one or more countries of former habitual residence.
>
> (iv). If so is the applicant unable or unwilling to return to any of those countries due to a well-founded fear of persecution for a convention reason.
>
> (v). If the answer to questions 2 or 4 is yes, is he or she recognised by the competent authorities of any country in which he or she has taken residence as having the rights and obligations attaching to the possession of nationality of that country (the UNHCR guidance note on this issue accepts that those rights should be those of citizenship "*possibly with limited exceptions*" (para. 2 of guidance note)).

Application of those principles to the present case.

26. Applying those tests here I conclude as follows:

> (i). Question 1. The applicant was deprived of Bhutanese nationality by Bhutanese law, and even assuming *arguendo* that such law is contrary to international human rights standards, the applicant must be regarded as stateless, as found by the tribunal.
>
> (ii). Question 2. This therefore does not arise.
>
> (iii). Question 3. The applicant's country of former habitual residence as a stateless person and the only such country is Nepal as found by the tribunal. To clarify, Bhutan is not a country where the applicant was formerly habitually resident *as a stateless person.*
>
> (iv). Question 4. The applicant is not unable or unwilling to return to Nepal due to a well-founded fear of persecution for a convention reason as found by the tribunal. That finding does not seem to have been

effectively challenged, but in any event no basis for upsetting that finding has been made out.

(v). Question 5. Does not arise having regard to the foregoing.

Order

27. The contribution of the UNHCR was particularly helpful in clarifying the position and would have been appropriate for that reason, but also having regard to the fact that at one stage the question of a reference to the CJEU was up for discussion. Following receipt of helpful submissions from all parties, it seems to me that the European law point does not in fact arise for the reasons set out, but even if it did, no conflict in jurisprudence or other lack of clarity has been identified because the German decision and *E.B (Ethiopia)* deal with a different point. Thus those decisions do not in fact contradict or undermine the conclusions I have reached here supportive of the UNHCR submission. Thus the question of a reference to the CJEU does not arise.

28. For the reasons set out in this judgment, the application is dismissed.