CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 43136/02
by Milan BASNET
against the United Kingdom

The European Court of Human Rights (Fourth Section), sitting on 24 June 2008 as a Chamber composed of:

Lech Garlicki, *President,*
Nicolas Bratza,
Giovanni Bonello,
Ljiljana Mijović,
David Thór Björgvinsson,
Ledi Bianku,
Mihai Poalelungi, *judges,*

and Lawrence Early, *Section Registrar*,

Having regard to the above application lodged on 10 December 2002,

Having regard to the interim measure indicated to the respondent Government under Rule 39 of the Rules of Court,

Having regard to the decision to grant priority to the above application under Rule 41 of the Rules of Court,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mrs Milan Basnet, is a Nepalese national who was born in 1960 and lives in Middlesex in the United Kingdom. She was represented before the Court by Mr S. Chhokar of Chhokar & Co.

Solicitors, a lawyer practising in Southall. The United Kingdom Government ("the Government") were represented by their Agent, Mr D. Walton of the Foreign and Commonwealth Office.

A. The circumstances of the case

2. The facts of the case, as submitted by the parties, may be summarised as follows.

1. The applicant's arrival in the United Kingdom and her asylum claim

3. Either on 15 May or 15 October 2000 the applicant arrived in the United Kingdom and claimed asylum shortly thereafter.

4. On 13 December 2000, with a friend's assistance, the applicant completed a Statement of Evidence form in which she detailed the reasons for her asylum request. She claimed that she had been ill-treated by Nepalese Government forces since her husband was a canvassing secretary and an active member of the Maoist Party of Nepal ("CPN") since 1996. He had been arrested by the police on several occasions. In April 2000 her husband went missing and her son went missing six weeks later. Neither has been seen since, both presumably have been either arrested or abducted. Since the police were the source of the problem, she could not report these matters. She replied in the negative to a standard question as to whether there were outstanding charges against her or a member of her family.

5. On 13 June 2001 the applicant was interviewed by an immigration officer. As appears from the hand-written record of that interview, the applicant stated that she had claimed asylum on the basis of a fear of persecution by the Nepalese Government because of her husband's activities with the CPN. She recalled his disappearance seventeen to eighteen months previously, visits and threats by the police who were looking for her husband both at her home and at her son's school, her ill-treatment on two occasions by plain-clothed men who came to her home looking for her husband and her son's disappearance, approximately six weeks after that of her husband.

6. By letter dated 15 June 2001 the applicant was notified that the Secretary of State had refused her asylum application under Articles 2, 3, 5 and 14 of the Convention. He considered that the harm the applicant claimed she would suffer on return to Nepal would not constitute "persecution" within the meaning of the UNHCR Handbook. He pointed out that the unidentified plain-clothed persons whom she claimed ill-treated her could not be considered "agents of persecution within the meaning of the Geneva Convention". Her claims did not demonstrate a "sustained pattern or campaign of persecution" against her which was tolerated by the authorities or in respect of which the authorities were unable or unwilling to protect her. In particular, she could have attempted to seek redress through

the proper Nepalese authorities. She had alleged a fear of return to only certain parts of Nepal and could therefore be returned to other parts of Nepal. The Secretary of State also noted significant discrepancies in her evidence relating to whether her husband had been arrested or had "disappeared" and when that had taken place, and concerning her allegations of her own ill-treatment. On the basis of all of the above, there was no "reasonable likelihood of (her) fear being realised".

7. The Secretary of State did not consider that Articles 2 and 5 (her claim that she would be detained without trial and/or killed on return to Nepal) had extra-territorial effect. Therefore the United Kingdom was not the State responsible for those aspects of her claim. Her evidence disclosed no substantial grounds for believing that there was a real risk of ill-treatment contrary to Article 3 on her return. Her Article 14 claim did not constitute sufficient grounds for asylum. In light of all of the evidence, the Secretary of State concluded that she had not established a well-founded fear of persecution on return to Nepal.

8. On 4 July 2001 the applicant sent a letter of protest, through the Nepalese Embassy in London, to the monarch of Nepal in support of Prince Dipendra who had been accused of killing members of the royal family in June 2001. The applicant accused the monarch's son (Prince Paras) and a military chief of being involved in these crimes.

2. The applicant's appeal to the Special Adjudicator

9. The applicant then appealed to the Special Adjudicator ("SA"). While the applicant was legally represented before the SA, the only document submitted containing grounds of appeal to the SA appears to have been prepared by her. She made numerous submissions concerning the situation in Nepal and her fear of persecution. She alleged that she had been arrested and tortured in the past and that she had been detained, had escaped from prison and had left Nepal to save her life as soon as her trip to the United Kingdom had been arranged. She claimed that her friends and relatives were being arrested and tortured in Nepal because of her, that she was receiving threatening letters and that she was on the Nepalese security forces' list of targets.

10. On 2 November 2001 the applicant sent a further letter of protest through the Nepalese Embassy to the monarch of Nepal protesting against the proposed accession of his son to the throne.

11. On 12 December 2001 the SA rejected the applicant's appeal. He considered that, even allowing for her relative lack of sophistication, language problems and cultural differences, the number and nature of the inconsistencies between her accounts were such that her evidence was unreliable in important respects including in relation to her date of departure from Nepal and the circumstances of her husband's and son's disappearances. In this latter respect, he found that it was speculative as to

whether they had left home voluntarily or not and he noted that the applicant had accepted that members of the CPN were in hiding. She had also accepted that the police did not threaten her thereafter. The SA did not accept her evidence that she had been assaulted by unknown persons as there were a notable number of inconsistencies about this in her previous evidence.

12. The SA noted the situation between the CPN and the Nepalese authorities but did not consider that there was any evidence that a wife, with no involvement in politics or public affairs, was likely to have her husband's political opinions imputed to her; nor was there any evidence to suggest that a wife was likely to be targeted, detained, tortured, ill-treated or killed. In the opinion of the SA, there was no reasonable likelihood of the applicant suffering in any of these ways on return to Nepal. Even if she had a subjective fear, it was speculative and not well-founded. Accordingly, there was no reasonable risk of the United Kingdom's Convention responsibility being engaged by her expulsion.

3. Leave to appeal to the Immigration Appeal Tribunal

13. On 27 February 2002 the IAT gave the applicant leave to appeal against the SA's decision. Her grounds of appeal contested the SA's conclusions, and reiterated her account of her husband's and son's past involvement in the CPN, and of their arrest by the police and gave details of the threats and assaults by the plain-clothed persons who came to her house. The applicant accepted in paragraph two of her grounds of appeal that "it is true that I was not an active political lady but my husband was (a) very active worker of the Maoist party." In the document the applicant further asserted that inconsistencies were to be explained by language and translation issues and stressed that spouses of activists had been arrested and tortured, giving specific examples. The applicant was not represented before the IAT. Having summarised the SA's findings, the Tribunal stated:

> "The grounds restate the applicant's case at length. Documentary evidence is produced annexed to the grounds none of which appears to have been put in front of the [SA]. In these circumstances on balance I am satisfied that this appeal does not merit further consideration by the [IAT]. The [IAT] will require an explanation for the failure to produce the documentary evidence before the [SA]. Accordingly, leave to appeal is granted."

14. Her letter dated 11 April 2002 addressed to the IAT indicated that she could not attend the hearing fixed for 19 April 2002 as she was ill. She asked for her case to be decided on the basis of her documents and explained that she had not been able to submit the documents to the SA as she had not yet received them at that stage from Nepal. She enclosed a medical certificate dated 8 April 2002 which indicated that she was unwell and had been started on anti-hypertension medication. She was unable to work for eight weeks and required rest.

15. On 19 April 2002 the IAT heard and rejected her application. The applicant was not present or represented at the hearing. The decision of the IAT was sent to her on 30 April 2002. The IAT held:

> "Leave was given on the basis of various credibility points made in the grounds of appeal, and of further documentary evidence submitted with them. This evidence has neither been filed in triplicate for the use of the [IAT], as directed, not has any explanation been given, as also directed, for the failure to put it before the [SA]. We have not considered it.
>
> The [applicant] and her solicitors were sent notice of hearing on 27 February: [the solicitors] withdrew by letter on 17 April, while she has given no explanation for her failure to appear before us. As required by r. 41.3 of the Procedure Rules, we have gone ahead with the hearing. While the grounds of appeal assert that the [applicant] arrived here on 15 October 2000, the statement attached to the statement of evidence form, apparently forwarded by the [applicant's] own solicitors, not only says she did so on 15 May [2000], but gives circumstantial details of what is said to have happened then. There has been no explanation ..., either before the [SA] or us, for this serious discrepancy, and he [the SA] must be regarded as justified in the view he took of the [applicant's] credibility."

4. Leave to appeal to the Court of Appeal against the Immigration Appeal Tribunal's decision

16. The applicant applied to the IAT for leave to appeal to the Court of Appeal and lodged detailed grounds of appeal. As to her non-attendance at the IAT hearing, she repeated that she had been ill with hypertension and had been advised by her doctor to rest. She had not been able to pay her lawyers so they had to withdraw from her case. Accordingly, she had requested the IAT to decide her case on the basis of the documents presented. It was unfair to reject her asylum claim because she had not lodged documents in triplicate: she would have done so had she been told that it was necessary. As for the inconsistencies referred to by the IAT, she referred to her lack of knowledge of the English language, her memory losses due to the traumas she had suffered and differences between the English and Nepalese calendars which made for confusing calculations. Indeed her first interpreter spoke Hindi but was not familiar with the Nepalese calendar: when the applicant indicated that she could not follow, the interpreter reassured her that it did not matter as she would have the chance to change her statement at the Home Office. Nor could she follow the Home Office interpreter, as the latter spoke Newari (another language spoken in Nepal) and not Nepali. She went on to describe again her experiences in Nepal, the current situation there and why she feared persecution. She indicated that her husband and son were being tortured in prison and that three close relatives had been recently killed by the police on the basis of involvement with the CPN.

17. On 12 May 2002 she addressed a further detailed letter of protest to the "Premier of Nepal" through the Nepalese Embassy in London.

18. On 12 July 2002 the IAT refused leave to appeal on the basis that there was no arguable point of law and that her grounds of appeal did not address the reasons for the IAT's decision.

19. On 20 July 2002 the applicant applied to the Court of Appeal for leave to appeal against the IAT decision. She submitted further detailed grounds of appeal: she explained that she could not afford a lawyer for the IAT proceedings, that she was unwell, that she was suffering from depression and that she had language difficulties and difficulties with legal procedures. She explained that she had been unable to submit certain documentation to the SA as it was impossible to bring the documents with her when she left Nepal and she had to wait until friends could deliver them to her. She again explained why there were inconsistencies in her evidence as to her date of arrival in the United Kingdom. She pointed out that not all of the circumstances of her case had therefore been taken into account and she again described the situation in Nepal, her experiences there and her fears about being returned there. In particular, she claimed that her husband and son had been incarcerated and that she had learnt from friends that they were being "tortured very much" and that all her "fellow comrades" were being arrested, tortured and killed every day by the Nepalese government. She also explained that one of the reasons for any inconsistencies in her account was her fear of the United Kingdom authorities following her bad experiences in Nepal.

20. On 19 November 2002 a single judge of the Court of Appeal heard her application. The applicant was present with an interpreter. The judge rejected her application. The Court considered that her appeal had no prospects of success because:

> "No error of law was made by the IAT. The [SA] did not believe the applicant's claim as to her historic persecution, and was not satisfied that there was evidence that she might be at risk if she returned to Nepal. In the circumstances before it, the IAT was within the permissible limits of its practice not to look at the new material. Although, in the unusual circumstances of Ms Basnet's allegations, the court made enquiries of her former solicitors, any unreasonable failure by them to assist her (which the court does not find demonstrated) cannot be found an error by the IAT. The explanation for not producing the new material before the [SA] is not satisfactory, particularly as some of it (e.g. some of the material about protests in the U.K.) must have been in Ms Basnet's hands at the time of the hearing. I have also to express some scepticism as to whether someone who signs long letters in good English as "Chair, London Protest Committee" was as incapable of attending to her own defence as Ms Basnet claims to have been.
>
> If Ms Basnet can demonstrate by the new material that her situation is markedly different from that which was before the IAT her only course is to approach the [Home Secretary]: although I must not be taken to have formed any view as to whether that course would be justified or successful."

21. On 5 December 2002 the House of Lords confirmed that no appeal lay to it from a refusal by the Court of Appeal to grant leave to appeal.

22. By notice dated 7 December 2002 the applicant was served with removal directions, the removal being foreseen for 10 December 2002.

5. The application to the European Court

23. On 10 December 2002 the applicant lodged an application against the United Kingdom with this Court, submitting a document dated 12 December 2001 in Nepalese and its translation. It is said to be a letter from her lawyer in Nepal to her and the translation reads as follows:

> "This office has [received] this arrest warrant against [the applicant] on the instruction of the Kathmandu District Police ... dated 16/11/01 on the charge of treason. I am unable to prepare, ... plead and [proceed with] her case because of ... harassment [by] the police, court officers and judges and fear of being arrested ... myself due to her protest letters against the present Royal family, government and army on the direction of [the CPN]. Now her son and husband are in Birgunj and Syanza jails, respectively. Now the Government has declared a state emergency against the [CPN]. All ... human Rights are being suspended and [the] press totally are being censored. It is certain that Mrs Basnet will be arrested, tortured, killed or disappeared at the airport on her arrival to this country. Her protest letters against the royal massacres and against Crown Prince ... have really increased her threat of life."

24. The document referred to in that letter was also submitted in Nepalese together with its translation. It is described as an arrest warrant issued by the Nepalese Ministry of Home Area Police Office and dated 16 November 2001 and its translation reads as follows:

> "On the instructions of the Kathmandu District Police Office Hamumandhoka, hereby this office issues an arrest warrant [in] the name of Mrs Milan Basnet - 41 of Ka. Ma. Na. Pa. Ward no. 34 [who is] 5' 3'' [in] height [and has] olive complexion, black hair and one broken tooth on the charge of treason. It is ordered to search and arrest and bring her to this office without letting her escape on the way until the withdrawal of this arrest warrant. If she is not arrested in seven days time except[ing] the period of your journey, be active to arrest her after delivering this arrest warrant to her home on the eight day until her arrest."

25. The applicant also submitted to this Court a medical certificate dated 10 May 2002 which refers to her having undergone treatment for hypertension and cellulitis affecting her legs for which she had been treated in the accident and emergency service of a hospital and a letter dated 18 June 2002 from the CPN in Nepalese and its translation. It congratulated and thanked the applicant for her courage in protesting against the Nepalese Government.

6. The applicant's attempt to make a fresh claim for asylum

26. On 14 January 2004 the applicant submitted a request to the Home Office for further consideration of her case enclosing a copy of the warrant for her arrest, a copy of the letter from her Nepalese lawyer and a copy of the letter from the CPN dated 18 June 2002.

27. On 10 May 2005 the Home Office decided not to treat her representations as a fresh application. It found, *inter alia*, that the arrest warrant and the lawyer's letter had already been fully considered and dismissed by the domestic courts. Following further representations by the applicant, the Home Office conceded that the documents had not in fact been considered by the SA but maintained its refusal to consider the representations as amounting to a fresh application on 8 June 2005, explaining that as no reason had been given as to why the originals had not been submitted to them on this occasion, it was unable to examine the new evidence. It concluded that, having considered the findings of fact made by the SA and the ease with which such documents could be obtained and their timing and content, it was unable to place any reliance on them.

28. The applicant subsequently applied for permission for judicial review. On 21 February 2006, following an oral hearing, the High Court refused her application upon the assurance given by the Secretary of State that the applicant would not be removed by the Home Office if further representations were made to it within 14 days and until a decision was made on those representations.

29. On 7 March 2006 the applicant made further representations to the Home Office. Her arguments centred on the fact that the above mentioned documents (namely the copy of the warrant for her arrest in Nepal, letters from the CPN and a copy of a letter from her lawyer in Nepal) had never been considered. Her representatives asserted that she could not have produced these documents at the time of her first asylum claim as they were not then available to her. It was further contended that the applicant had become a marked person so far as the Government of Nepal was concerned due to her numerous protest letters against the Royal regime during her stay in the United Kingdom which had "doubled her risk to life as compared to her pre-arrival risk as a consequence of imputed political opinion". It was finally maintained that the Secretary of State had failed to consider the risk the applicant would face in the light of the changed political situation in Nepal. In particular, the Nepalese King's actions had "plunged the country into a human rights crisis and put any Maoists, even sympathisers, at a real risk of torture, disappearance or being killed."

30. On 16 October 2006 these representations were accepted as amounting to a fresh claim by the Home Office.

31. On 8 December 2006 a decision was made to refuse to grant the applicant asylum under paragraph 336 of HC 395 (as amended) and on 11 December 2006 a decision was made to refuse her leave to remain in the United Kingdom.

32. On 7 February 2007 the AIT heard the applicant's appeal, in the applicant's absence on medical grounds without the latter seeking an adjournment, and the appeal was refused on 23 February 2007. The presiding Immigration Judge did not find the applicant to be credible and

noted numerous inconsistencies in her account. In particular, he found that she had vacillated as to the exact date of her arrival in the United Kingdom and she had produced a letter attesting to the fact that she was the Chairperson of a Nepalese protest committee in the United Kingdom, yet, had answered that she was not the Chair but just a member when later questioned on this point. Furthermore, the fact that the applicant had not been cross-examined on the new evidence, thus depriving the Secretary of State of an opportunity to challenge her account, did little to enhance her credibility. It appeared also that the applicant had never taken part in any political activity in Nepal and that there had been no reason for the Nepalese authorities to issue an arrest warrant when she had left the country, let alone eighteen months later as the document she had proffered suggested. Ultimately, the AIT concluded that only in an exceptional case would a risk of persecution or treatment contrary to Article 3 be held to arise by virtue of being, or being perceived, as a Maoist and that the present was not such a case. Even assuming that the applicant's account was true, country guidance reflected the fact that there was no risk to individuals on the basis of imputed political opinion by way of association with family members and internal relocation to Kathmandu, Nepal's capital, appeared to be a viable option.

33. On 20 July 2007 the applicant's application for reconsideration of the AIT's decision under section 103A of the Nationality, Immigration and Asylum Act 2002 was refused by a Senior Immigration Judge sitting at the AIT on the basis that the grounds on which reconsideration was sought did not disclose any error of law.

B. Relevant domestic law and practice

34. Section 8 of the Asylum and Immigration Act 2003 (Treatment of Claimants, etc.) stipulates the following:

> (1) In determining whether to believe a statement made by or on behalf of a person who makes an asylum claim or a human rights claim, a deciding authority shall take account, as damaging the claimant's credibility, of any behaviour to which this section applies.
>
> (2) This section applies to any behaviour by the claimant that the deciding authority thinks—
>
> (a) is designed or likely to conceal information,
>
> (b) is designed or likely to mislead, or
>
> (c) is designed or likely to obstruct or delay the handling or resolution of the claim or the taking of a decision in relation to the claimant.
>
> (3) Without prejudice to the generality of subsection (2) the following kinds of behaviour shall be treated as designed or likely to conceal information or to mislead—

(a) failure without reasonable explanation to produce a passport on request to an immigration officer or to the Secretary of State,

(b) the production of a document which is not a valid passport as if it were,

(c) the destruction, alteration or disposal, in each case without reasonable explanation, of a passport,

(d) the destruction, alteration or disposal, in each case without reasonable explanation, of a ticket or other document connected with travel, and

(e) failure without reasonable explanation to answer a question asked by a deciding authority."

C. Relevant Country Background Information on Nepal

35. The AIT's country guidance case entitled *KG (review of current situation) Nepal CG* [2006] UKAIT 00076, after examining available country information, concluded the following as to the potential risks to Maoists upon return to Nepal:

"So far as the issue of risk on return to Maoists from the current government is concerned, we consider that the latest background evidence, which includes reference to the dropping of all terrorism charges against Maoist rebels and to a clear commitment from the interim government to include Maoists both in the interim government (at some stage) and in a new regular government following elections, demonstrates that even active members of the CPN and members of the PLA would not be at risk on return to Nepal. In our view it would only be in the exceptional case that an appellant could show a continuing risk of persecution or serious harm or treatment contrary to Article 3 by virtue of being, or being perceived as, a Maoist."

36. The United Kingdom Home Office *Country of Origin Information Key Documents* published on 6 May 2008 (*COI Key Documents*, 2008) cite at paragraph 2.06 the Foreign & Commonwealth Office's (FCO) Country Profile on Nepal, which was last updated on 8 June 2007 and which states (at paragraph 4a) the following as regards the current political climate in Nepal:

"A peace agreement between the Government of Nepal and the Maoists was signed in Kathmandu on 21 November 2006 thereby ending 11 years of conflict in Nepal. Under the terms of the agreement the Nepali Army and Maoist cadres will be confined to barracks and cantonments. Both sides agreed a permanent ceasefire and an arms management arrangement, which will be monitored by the UN. The agreement also provides for elections to a Constituent Assembly by June 2007 and for the Maoists to become part of the political mainstream as a legitimate political party. Subsequently an arms management agreement was signed on 28 November 2006 between the Maoists and the government under the auspices of the UN."

37. The COI key documents describe recent events and political developments in Nepal at paragraphs 2.07 and 2.08 as follows:

"The FCO Country Profile of Nepal, updated on 8 June 2007, observed that "On 15 January 2007 the House of Representatives was dissolved and the interim

parliament was formed, promulgating the interim constitution. On 1 April 2007, the interim government was formed which for the first time includes Maoist ministers..."

"The BBC Timeline for Nepal, updated on 2 May 2008, noted that the Constituent Assembly elections due in April 2007 were postponed in May until November that year. In September 2007 Maoists quit the interim government in order to press demands for the monarchy to be scrapped. The Maoist withdrawal from the government forced the postponement of November's constituent assembly elections. There was also a bomb attack in Kathmandu in September – the first since the end of the Maoist insurgency. In December 2007 Parliament approved the abolition of the monarchy as part of a peace deal with the Maoists, who agreed to re-join the government. In January 2008 the already postponed elections for the constituent assembly were set for 10 April 2008. Following the April polls, the former Maoist rebels won 220 of 601 seats in the constituent assembly, while the Nepali Congress Party and the Communist Party of Nepal won 110 and 103 seats respectively. The Maoists said they wished to include these "two other big parties" in a coalition government. (BBC News, 25 April 2008)...The Maoist leader, Prachanda, also confirmed that the first meeting of the assembly would abolish Nepal's monarchy."

38. On 28 May 2008 the Nepalese constituent assembly abolished the monarchy and declared the country a republic, with only four members of the 601 seat assembly opposing the change (see BBC News "Nepal votes to Abolish Monarchy", article of 28 May 2008).

COMPLAINTS

39. The applicant complained that her proposed expulsion to Nepal would give rise to a violation of her rights as protected by Articles 2, 3, 5, 6, 8, 10, 11 and 14 of the Convention and Article 1 of Protocol No.1 to the Convention.

40. In particular, she alleged that there was a real risk that she would be killed or subjected to ill-treatment contrary to Articles 2 and 3 of the Convention should she be returned to Nepal.

41. She maintained that there was a real risk that she would be detained arbitrarily upon return to Nepal, in violation of Article 5 of the Convention.

42. She complained that she would not receive a fair trial in Nepal and that the proceedings in the United Kingdom were not fair within the meaning of Article 6 of the Convention.

43. She alleged that the Nepalese Government had opened all her private correspondence, had bugged her telephones and had searched her house without a warrant in violation of Article 8 of the Convention.

44. She also invoked Article 10 about censorship in Nepal, Article 11 about the banning of the CPN in Nepal and Article 1 of Protocol No. 1 about the seizing of her property by the Nepalese Government.

45. She further contended that she would be discriminated against in violation of Article 14 of the Convention if returned to Nepal because of her

association with the CPN cause and because of her sex, race, caste and religion.

THE LAW

I. As regards the complaints under Articles 2 and 3 of the Convention

46. The applicant complained that her expulsion to Nepal would violate her rights under Articles 2 and 3 of the Convention as there was a real risk that she would be killed or ill-treated upon return.

Article 2 reads:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

Article 3 provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. Admissibility

47. The Government, in their submissions of March 2003, argued that the applicant had failed to exhaust domestic remedies since she had not sought permission to apply for judicial review of the Immigration Appeal Tribunal's (IAT) decision and had not attempted to make a fresh application for asylum by presenting the additional documentary evidence which she had submitted to this Court.

48. The applicant contested this argument.

49. The Court notes that since the submission of the Government's observations the applicant has both sought leave to apply for judicial review of the IAT's decision and submitted the additional documentary evidence as further representations to the Home Office, which were accepted as a fresh claim for asylum in March 2006. Accordingly, the Court considers that the applicant has availed herself of the remedies in question prior to the examination of her application by the Court (see for example, *Sağat,*

Bayram and Berk v. Turkey (dec.), no. 8036/02, 6 March 2007). It follows that the Government's objections as to the non-exhaustion of domestic remedies must be dismissed.

50. In view of the foregoing, the Court concludes that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. Nor have any other grounds for declaring them inadmissible been established. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

a) The applicant

51. The applicant submitted that country evidence supported her claim that individuals regarded as anti-State would be at risk of serious breaches of their human rights if returned to Nepal. She made reference to country reports from Amnesty International (2001), the United States (US) State Department (2002) and the United Kingdom Home Office (unspecified date) as evidence of a climate of general human rights violations in Nepal. The applicant asserted that such abuses were either carried out or condoned by the Nepalese authorities and that consequently she would not be able to avail herself of any protection from them. She contended that there was no evidence to suggest that the incidents that she recounted did not occur and no reason why she should not be believed. Finally, as the Nepalese State was the source of the applicant's fear of persecution, internal relocation would not be a feasible option.

b) The Government

52. The Government submitted that the applicant's account had been considered in detail by the Special Adjudicator (SA), who had the benefit of assessing her credibility firsthand. They argued that the applicant had sought to embellish her account following the SA's dismissal of her appeal, which diminished her credibility even further. They cited as particular examples of this, *inter alia*, that: (i) she had originally contended that she had been ill-treated on just two occasions by unidentified men in plain clothes. However, in her skeleton argument to the Court of Appeal for leave to appeal against the IAT's decision she had embellished her account by asserting, for the first time, that she had been "tortured very much" in Nepal; (ii) in her skeleton argument to the Court of Appeal she had also for the first time alleged that she had been inconsistent in her evidence due to her fear of the United Kingdom authorities, something she had omitted to mention to the SA; (iii) in the same skeleton argument she alleged again for the first time that her husband and son were being tortured "very much", however, her original case was that she had lost contact with them following

their disappearance; and (iv) her account had grown from that of being a wife and mother of Maoist activists to being an ardent Maoist in her own right. In her original asylum application and interview, she had based her claim on a fear of persecution as a result of her husband's membership of the Communist Party. It was only in her appeal against the decision of the IAT that she had alleged that she had been unlawfully arrested on two occasions and that she was a comrade.

53. The Government further submitted that the applicant had failed to particularise specific allegations relating to any alleged threat to her life and that her claims of risk of ill-treatment contrary to Article 3 were riddled with contradiction and inconsistency. The applicant's introduction of the alleged arrest warrant and letter from her lawyer was a later attempt to boost her credibility. In particular, the Government emphasised that there was no evidence that the alleged arrest warrant was authentic. The applicant had not credibly substantiated her contention that her life was at personal risk in Nepal as a generally unsettled political situation did not suffice in this respect (the Government here referred to *Vilvarajah and Others v. the United Kingdom*, judgment of 30 October 1991, Series A no. 215, § 108). The Government finally cited background country evidence from 2002 to support their position that low-level Maoist or Communist sympathisers were not at any particular risk in Nepal.

2. The Court's assessment

a) General principles

i) Responsibility of Contracting States in the event of expulsion

54. It is the Court's settled case-law that as a matter of well-established international law, and subject to their treaty obligations, including those arising from the Convention, Contracting States have the right to control the entry, residence and removal of aliens (see, among many other authorities, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, Series A no. 94, § 67, and *Boujlifa v. France*, judgment of 21 October 1997, *Reports of Judgments and Decisions* 1997-VI, § 42). In addition, neither the Convention nor its Protocols confer the right to political asylum (see *Vilvarajah and Others v. the United Kingdom*, § 102, and *Ahmed v. Austria*, judgment of 17 December 1996, *Reports* 1996-VI, § 38, cited in *Saadi v. Italy*, [GC], no. 37201/06, judgment of 28 February 2008, § 124).

55. However, expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3. In such a case Article 3 implies an

obligation not to deport the person in question to that country (see *Soering v. the United Kingdom*, judgment of 7 July 1989, Series A no. 161, §§ 90-91; *Vilvarajah and Others*, cited above, § 103; *Ahmed*, cited above, § 39; *H.L.R. v. France*, judgment of 29 April 1997, *Reports* 1997-III, § 34; *Jabari v. Turkey*, no. 40035/98, § 38, ECHR 2000-VIII; *Salah Sheekh v. the Netherlands*, no. 1948/04, § 135, 11 January 2007; and *Saadi*, § 125).

ii) Materials used to assess the risk of exposure to treatment contrary to Article 3 of the Convention

56. In determining whether substantial grounds have been shown for believing that there is a real risk of treatment incompatible with Article 3, the Court will take as its basis all the material placed before it or, if necessary, material obtained *proprio motu* (see *H.L.R. v. France*, cited above, § 37, and *Hilal v. the United Kingdom*, no. 45276/99, § 60, ECHR 2001-II). In cases such as the present the Court's examination of the existence of a real risk must necessarily be a rigorous one (see *Chahal v. the United Kingdom*, judgment of 15 November 1996, *Reports* 1996-V, § 96; and *Saadi*, cited above, § 128).

57. It is in principle for an applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he or she would be exposed to a real risk of being subjected to treatment contrary to Article 3 (see *N. v. Finland*, no. 38885/02, § 167, 26 July 2005). Where such evidence is adduced, it is for the Government to dispel any doubts about it.

58. In order to determine whether there is a risk of ill-treatment, the Court must examine the foreseeable consequences of sending the applicant to the receiving country, bearing in mind the general situation there and the applicant's personal circumstances (see *Vilvarajah and Others*, cited above, § 108 *in fine;* and *Saadi,* cited above*, §§* 128-129).

59. To that end, as regards the general situation in a particular country, the Court has often attached importance to the information contained in recent reports from independent international human-rights-protection organisations such as Amnesty International, or governmental sources, including the US State Department (see, for example, *Chahal*, cited above, §§ 99-100; *Müslim v. Turkey*, no. 53566/99, § 67, 26 April 2005; *Said v. the Netherlands*, no. 2345/02, § 54, 5 July 2005; and *Al-Moayad v. Germany* (dec.), no. 35865/03, §§ 65-66, 20 February 2007). At the same time, it has held that the mere possibility of ill-treatment on account of an unsettled situation in the receiving country does not in itself give rise to a breach of Article 3 (see *Vilvarajah and Others*, cited above, § 111, and *Fatgan Katani and Others v. Germany* (dec.), no. 67679/01, 31 May 2001) and that, where the sources available to it describe a general situation, an applicant's specific allegations in a particular case require corroboration by other evidence (see *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99

and 46951/99, § 67, ECHR 2005-I § 73; *Müslim*, cited above, § 68; and *Saadi*, cited above, § 131).

60. With regard to the material date, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of expulsion. However, if the applicant has not yet been extradited or deported when the Court examines the case, the relevant time will be that of the proceedings before the Court (see *Chahal*, cited above, §§ 85-86, and *Venkadajalasarma v. the Netherlands*, no. 58510/00, § 63, 17 February 2004). This situation typically arises when, as in the present case, deportation or extradition is delayed as a result of an indication by the Court of an interim measure under Rule 39 of the Rules of Court (see *Mamatkulov and Askarov*, cited above, § 69). Accordingly, while it is true that historical facts are of interest in so far as they shed light on the current situation and the way it is likely to develop, the present circumstances are decisive (see, *Saadi*, cited above, § 133).

iii) The concepts of "inhuman or degrading treatment"

61. According to the Court's settled case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see, among other authorities, *Price v. the United Kingdom,* no. 33394/96, § 24, ECHR 2001-VII; *Mouisel v. France*, no. 67263/01, § 37, ECHR 2002-IX; and *Jalloh v. Germany* [GC], no. 54810/00, § 67, 11 July 2006).

b) Application of the above principles to the present case

62. The Court notes the numerous inconsistencies in the applicant's account to the domestic authorities, as underlined by the Government in their observations (see, in particular, paragraph 52 above). It further takes note of the applicant's failure to explain or address directly those inconsistencies in her reply to the Government's observations, relying rather on the reasoning that there was no evidence to suggest that the incidents she relied on did not occur or that she should not be believed (see paragraph 51 above).

63. The Court finds that the applicant's account was duly considered by the domestic authorities. The credibility of her account was found to be marred by inconsistencies on several occasions, including by the Special Adjudicator (SA) when assessing her first asylum claim in December 2001 (see paragraph 11 above); by the Immigration and Asylum Tribunal (IAT) in April 2002, when examining her appeal against the SA's decision (see paragraph 15 above); and ultimately by the Asylum and Immigration

Tribunal (AIT) when dismissing her appeal against her fresh claim for asylum in February 2007 (see paragraph 32 above).

64. It would also appear that the applicant sought to expand the risk she allegedly faced by impugning the Nepalese monarchy and the Government in power at the time, while in the United Kingdom. The perceived dangers to her resulting from her protests against the Nepalese authorities were also duly considered by the domestic authorities in the consideration of her fresh asylum claim (see paragraphs 29 and 30 above), which concluded that country background information did not support the applicant's claims to be at risk if returned to Nepal (see paragraph 32 above).

65. In addition to considering the country background information on Nepal which was referred to by the parties at the time of the submission of their observations in 2003, the Court has also taken into consideration material obtained *proprio motu* and has examined the applicant's position in the light of the circumstances at the time of the proceedings before it.

66. The most recent country information on Nepal shows a marked change in the political circumstances applicable in 2003 when the parties were invited to submit their observations. Account must be taken in this connection of the findings of the AIT in their country guidance case *KG* published in 2006 (see paragraph 35 above) that "even active members of the CPN ... would not be at risk on return to Nepal" following the "dropping of all terrorism charges against Maoist rebels and ... a clear commitment from the interim government to include Maoists both in the interim government ... and in a new regular government following elections".

67. Furthermore, more recent country evidence reveals that a peace agreement has since been reached between the Government of Nepal and the rebel Maoists in December 2007. Moreover, the April 2008 elections saw the Communist Party of Nepal win 103 seats and the former Maoist rebels win 220 of the 601 seats in the constituent assembly (see paragraphs 36 and 37 above).

68. Finally, since the Maoist-dominated constituent assembly abolished the monarchy in Nepal on 28 May 2008 (see paragraph 38 above), there appears to be no reason to suggest that the applicant, as a proclaimed Maoist sympathiser and activist, would be at risk from the State authorities in Nepal at the present time.

69. Therefore, after examining the individual circumstances of the applicant in the light of the current general situation in Nepal (see *Vilvarajah and Others*, cited above, § 108), the Court finds that no substantial grounds have been established for believing that she would be exposed to a real risk of treatment contrary to Articles 2 and 3 of the Convention in the event of her return to Nepal.

70. It follows that these complaints are manifestly ill founded and must be declared inadmissible in accordance with Article 35 §§ 3 and 4 of the Convention.

II. As regards the complaints under Articles 5 and 6 of the Convention

71. The applicant complained that her expulsion to Nepal would also violate Articles 5 and 6 of the Convention as there was a real risk that she would be detained arbitrarily or subjected to an unfair hearing upon return. She maintained further under Article 6 of the Convention that she had been denied a fair hearing by the domestic courts in the consideration of her asylum claim.

72. In so far as the applicant's complaints relate to her proposed expulsion to Nepal, the Court considers that no separate issue arises under Articles 5 and 6 of the Convention in the light of its findings under Articles 2 and 3 of the Convention.

73. It follows that these complaints are manifestly ill founded and must be declared inadmissible in accordance with Article 35 §§ 3 and 4 of the Convention.

74. As to the complaint concerning the alleged denial of a fair hearing in the domestic asylum proceedings, the Court reiterates that Article 6 § 1 of the Convention does not apply to proceedings regulating a person's citizenship and/or the entry, stay and deportation of aliens, as such proceedings do not involve either the "determination of his civil rights and obligations or of any criminal charge against him" within the meaning of Article 6 § 1 of the Convention (see, among other authorities, *Slivenko v. Latvia* (dec.) [GC], no. 48321/99, ECHR 2002-II (extracts), § 94; *Maaouia v. France* [GC], no. 39652/98, § 36-40, ECHR 2000-X).

75. It follows that this complaint is incompatible *ratione materiae* with the provisions of the Convention and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

III. As regards the complaints under Articles 8, 10, 11, 14 of the Convention and Article 1 of Protocol No. 1 to the Convention

76. The applicant complained also of a violation of her rights under Articles 8, 10, 11, 14, and finally, Article 1 of Protocol No. 1 to the Convention.

77. The Government contested these arguments.

78. The Court notes that the applicant's complaints under this heading appear to relate to the alleged activities of the Nepalese authorities and cannot be imputed to the Government of the United Kingdom.

79. It follows that these complaints are incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4. In so far as the applicant makes these allegations in support of the alleged risk to her life and physical integrity if removed to Nepal, the Court does not find that they add anything to her Articles 2 and 3 complaints and for that reason must be

considered inadmissible as being manifestly ill-founded pursuant to Article 35 §§ 3 and 4.

80. In view of the above, it is appropriate to discontinue the application of Rule 39 of the Rules of Court.

For these reasons, the Court unanimously

Discontinues the application of Rule 39 of the Rules of Court to this case; and

Declares the application inadmissible.

Lawrence Early
Registrar

Lech Garlicki
President