Neutral Citation Number: [2003] EWCA Civ 654
IN THE SUPREME COURT OF JUDICATURE C1/2002/2427
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE IMMIGRATION APPEAL TRIBUNAL

Royal Courts of Justice
Strand
London WC2

Thursday, 1st May 2003

B e f o r e :

LORD JUSTICE WARD
LORD JUSTICE BUXTON
and
LORD JUSTICE RIX

SHYAM BAHADUR GURUNG

Appellant

-v-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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Mr J Onuaguluchi (instructed by Messrs Ikie, London SE13) appeared on behalf of the Appellant.

Miss P Whipple (instructed by the Treasury Solicitor) appeared on behalf of the Respondent.

J U D G M E N T
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LORD JUSTICE WARD:I will ask Lord Justice Buxton to give the first judgment.

LORD JUSTICE BUXTON:

1. This is an appeal from a determination of the Immigration Appeal Tribunal in the case of the appellant, Mr Shyam Gurung, that was reached on 9th October 2002. For reasons to become apparent, that date is of some slight importance.

2. The facts can be comparatively shortly stated and are most conveniently to be taken by quotation from the Immigration Appeal Tribunal's determination. In paragraph 6 it set out the facts found by the adjudicator, which it noted were substantially those put before him by the appellant, since the adjudicator found the appellant to be credible. In paragraph 7 the Immigration Appeal Tribunal said:

> "The Appellant became a member of the Communist Party of Nepal - Maoist (CPN) on 10 January 1996. In February 1997 he became the General Secretary of the student branch of the party at the Pokhara Pritchibi Narayan Campus for a period of three years. He says he does not believe or participate in violence himself and considered that this was the work of extremists. At all events, he was arrested by the police on 26 August 1999 for distributing party newsletters and brochures. He was subjected to verbal abuse but was released after payment of a fine. Three months later there was a fire on the campus and the police declared him and other Maoist activists as the culprits. As a result he stopped going to college and went into hiding. The police visited his home several times to look for him and questioned his parents and little sister. A warrant for his arrest was issued and served at his home. It was a nationwide warrant which meant that he would be arrested anywhere in Nepal. The warrant was produced to the Adjudicator. It made no reference to a fire at the campus but referred to the Appellant causing an obstruction to peace and security and cited his support of the Maoists."

3. It is also relevant in this context to cite some further observations about the appellant's particular situation that were made by the Immigration Appeal Tribunal in paragraph 19 and the beginning of paragraph 20 of its determination. It said this:

> "In this appeal the Appellant was not merely a sympathiser of CPN. He was a member from 1996. Then he became the leader of CPN students in his college campus from 1999, three years after the insurgency began. In national terms his office would be seen as low level, but locally it would be significant and would be bound to attract the attention of the authorities. The Appellant said he was not in favour of violence. With all due respect he could not, at least by 1999, have been under any illusions as to the extreme violence undertaken by his party in pursuance of its insurgency, or credibly pretend ignorance that his active support for it, even if personally non-violent, advanced its cause and was illegal. In claiming now that he would continue his support if returned, he shows that even after having access in the United Kingdom to information about the true nature of CPN, he would still participate in a party that commits murder. He would also be supporting a party that is trying to subvert the elections in November.
>
> If there was a fire on his campus in 1999 - and the Appellant confirmed that there was - it is perfectly reasonable that the authorities would link it to CPN. Murder and sabotage is its hallmark. He would be a natural object of suspicion."

4. The appellant, as noted, had been arrested in 1999, but he had not been ill-treated on that occasion and had only been fined and then released. The arrest warrant referred to was addressed

to alleged obstruction of peace and security and membership of a banned organisation, the CPN. It did not in terms refer to the fact that he was suspected of the serious offence of arson, albeit arson allegedly for a political motive.

5. The appellant's application for asylum and, more particularly, the promotion of that case in front of the adjudicator and the Immigration Appeal Tribunal has taken an unsatisfactory course, as indeed have the proceedings before this court. A number of complaints were originally made about the determination of the Immigration Appeal Tribunal which, in my judgement, were unfounded. The first was that in some way the tribunal had applied the terms of Article 1F of the Convention to the appellant, so as to exclude him from consideration for asylum because of his connections with a terrorist organisation. It is quite clear that the tribunal did not do that. Its references to his association with the CPN and to the nature of that organisation, some part of which I have quoted, were not advanced in the context of Article 1F, but advanced as part of the background explaining why the authorities in Nepal were, or might be, interested in the appellant.

6. Secondly, the tribunal found, and in my judgement was entirely entitled to find, that, were this gentleman to be arrested under the warrant that had been issued in his absence and from which he was now fleeing, that would be a legitimate step on the part of the authorities and would be an act of prosecution rather than persecution: to put the matter in conventional asylum law terms. At the end of paragraph 20 of its determination the Immigration Appeal Tribunal said, and was entitled to say:

> "In the context of the campaign of violence being waged by CPN, the Adjudicator was fully entitled to find that the authorities would have a legitimate interest in the Appellant. Given his admitted membership of CPN, and the fire on the campus, they would have a legitimate basis for investigation and potentially prosecution if there was sufficient evidence. Such a prosecution cannot in the view of the Tribunal be characterised as persecutory per se as claimed."

7. It is at the next stage of the investigation of what is likely to happen if Mr Gurung returns to Nepal that the real issues in this case arise. The Immigration Appeal Tribunal rightly went on, in paragraph 21, to consider whether the courts in Nepal, faced with a prosecution, would nonetheless impose unjustified, excessive or persecutory sentences upon the appellant because of his political views. It came to the conclusion that a fair trial would be available from the courts in Nepal, which are seen as independent of government, and there are no grounds for going behind that decision either.

8. Thirdly, however, there was the further question of whether Mr Gurung, as a detainee with Maoist connections, would be subject to relevant ill-treatment, either in the context of the Refugee Convention or in the context of the European Convention on Human Rights, were he to find himself in prison in Nepal. The Immigration Appeal Tribunal addressed that matter in paragraph 22 of its determination as follows:

> "There is a mention in the objective material of the use of torture on occasion to extract information and confessions from detainees, but there is no evidence that this is widespread or endemic. The Appellant was not ill treated when he was arrested earlier in 1999 having been caught distributing CPN literature. The Appellant has been out of the country since late 1999 and has never been engaged in any acts of violence. He has been in the UK throughout the period of the state of emergency. He was only involved with CPN as a student. Given his stated opposition to violence he would not engage in it on return. He does not have the profile that might expose him to any real risk of significant adverse interest or ill-treatment in detention. Nor, given his profile and history, is there any real risk that he would be seen as sufficiently important by the police that there would be a real risk he would be targeted personally or disappear in detention, or otherwise face

persecution or ill-treatment in breach of his human rights."

We do not know and have not been shown in any detail the objective material upon which that conclusion was reached, but on its face it is a conclusion of the kind that is well within the jurisdiction of the tribunal to reach, granted that it is an assessment by an expert tribunal of the state of affairs in the country of return, and of the particular impact upon this appellant, with his history, of that state of affairs.

9. If the matter rested there, there would be no ground for this court to intervene. The matter is, however, considerably complicated by the existence of another decision of the Immigration Appeal Tribunal, reached only five days after the decision in Shyam Gurung: that is to say, the decision of a division of the tribunal presided over by the President, Mr Justice Collins, in another Nepalese Maoist case, Indra Gurung v SSHD [2002] UKIAT 04870. Two things must immediately be said about that case. The first is that a very large part of the determination, and the respect in which it was treated as a starred case, related to Article 1F of the Convention. As I have already indicated, that Article is not in issue in our case. Secondly, the observations that the tribunal made about the general position of Maoists in Nepal cannot possibly be treated as laying down any form of legal principle; and the preparation and argument of this appeal was considerably handicapped by the mistaken argument advanced on behalf of the appellant in our case that Indra Gurung in fact laid down some form of rule of law. Plainly it cannot do so. But at the same time it has a good deal to say about the general position facing persons with Maoist connections in Nepal.

10. The tribunal in Indra Gurung, at paragraph 138, said this:

> "If the Nepalese authorities saw the appellant as a member of the CPN (Maoist) party, it was difficult to see that they would limit themselves to a legitimate process of prosecution. Going by the objective country materials placed before us, we see no reason to differ from the conclusions reached by the Tribunal in Rajesh Gurung and subsequent cases such as Prakesh Sharma [2002] UKIAT 02943 and Hane [2002] UKIAT 03945. Indeed, in our view the more comprehensive and in some respects more recent objective materials placed before us serve only to confirm the findings of fact reached by the Tribunal in these cases to the effect that someone currently viewed as a Maoist would face persecution rather than simple prosecution."

The tribunal continued, at paragraph 139:

> "... these materials do indicate that the use of torture, disappearances, and arbitrary detention remains widespread, particularly in areas affected by the Maoist insurgency. Whilst extrajudicial killings have not been widespread, most of those concerned were suspected of being sympathisers with the Maoists. ... Reports of government excesses against Maoists in the early part of 2002 in the context of police and military drives against the Maoists are particularly alarming."

At paragraph 140 the tribunal said:

> "In view of the considerable body of evidence showing that Maoists are far more likely to experience torture and ill treatment in detention, such persecution would also demonstrably be for a Convention reason of political opinion."

11. Those observations are couched in very general terms. Miss Whipple, in her submissions for the Secretary of State, urged on us that they should be looked at in the context of the particular facts of Indra Gurung and in the context of the particular facts of the cases that preceded it which are quoted in that determination. That, of course, is an approach that one must always have carefully in

mind. Nonetheless, it is necessary to look at what the tribunal actually said; and the passages that I have ventured to quote do not really make any effort at all to limit themselves to the facts of the case immediately before them.

12. True it is, as I have already said, that Indra Gurung lays down no rule of law. True it is also that one tribunal is not constrained by the factual findings of another tribunal if there are grounds upon which its case differs from that before the other tribunal. In this case Miss Whipple argues, and argues strongly, that Mr Shyam Gurung, our appellant, was recognised by the Immigration Appeal Tribunal as being a low level member of the CPN who, because of the essentially local nature of his prominence, would not be of interest to the national authorities were he to return to Nepal. Those conclusions are set out in paragraph 22 of the determination that I have already read. I am far from saying that such a conclusion would not be legitimately open to the Immigration Appeal Tribunal, having considered all the available material and the particular thrust of the objective country material with regard to Nepal. But the unfortunate aspect of this case is that on its face I really do not find it possible to reconcile the observations in our case with the very broadly stated observations of a different constitution of the same tribunal in Indra Gurung, observations that in terms relate to Maoist sympathisers generally. We simply do not know in what detail this aspect of the matter was pursued before our tribunal. If it was pursued, however, it should have been reasoned out much more fully than it was in the tribunal's decision. One certainly cannot be confident that the tribunal had available to it the proper range of information and views that it needed to bring to bear upon Mr Shyam Gurung's case, particularly in the light of conclusions reached by other of its colleagues in a similar case: a range of material that is necessary if the anxious scrutiny that is appropriate to every asylum case is to be achieved.

13. For those reasons, therefore, I consider that the reasoning upon which this tribunal proceeded cannot be confidently enough said to have been correct or to have taken into account all the material that was available to the Immigration Appeal Tribunal as a whole. Granted, in particular, that this is an asylum case, that is, in my view, a reason in itself for allowing this appeal.

14. I would order that this case be remitted to the Immigration Appeal Tribunal for rehearing. I hesitate to formulate that as a direction, but I would certainly hope that the matter will be referred to the President of the Immigration Appeal Tribunal, so that he can decide, first, what should be the constitution of the tribunal to hear the remitted case; and, secondly, what further directions should be given to the parties, so that, when the matter comes back before the Immigration Appeal Tribunal, that tribunal can be confident - and, in its turn, this court can be confident - that everything that should properly be considered in the context of Mr Shyam Gurung's position in relation to the events likely to occur if he returns to Nepal has in fact been considered.

15. On those terms, therefore, I would allow this appeal.

LORD JUSTICE RIX:

16. I agree.

LORD JUSTICE WARD:

17. Read alone, the decision of the Immigration Appeal Tribunal has a coherence which would be difficult to fault. It is only when it is set alongside the other decisions of the tribunal that doubts begin to creep into my mind. The observations in paragraphs 138 to 140 of Indra Gurung, expressed, as they are, in wide, general terms, sit so uneasily alongside those in paragraphs 21 and 22 of the decision before us today that I am driven to conclude that if Mr Batiste, the Chairman, had been aware that his colleagues were about to hand down the decision five days later, he would have wanted -indeed, he would have needed - to spell out whether (and if so, how) his case could be distinguished from theirs.

18. I appreciate that Indra Gurung was starred for a wholly different purpose, but there are the other decisions of Rajesh Gurung, Krishna Hane and Prakesh Sharma which are also, perhaps, at odds with ours.

19. I therefore agree with my Lords that the matter must be remitted. I also agree that the President, Mr Justice Collins, should have the opportunity to consider how this rehearing should be conducted.

20. In the result, we give permission to appeal, allow the appeal and remit the matter back to the tribunal, with a direction that the President consider how it be conducted.

Order: permission to appeal granted; appeal allowed and matter remitted back to the IAT with a direction that the President consider the conduct of the rehearing.