Case No: 1.C4/2004/0078 & 0078A
Case No: 2. C4/2004/0609

**Neutral Citation Number: [2004] EWCA Civ 1419**
**IN THE SUPREME COURT OF JUDICATURE**
**COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE IMMIGRATION APPEAL TRIBUNAL**
**Appeal Number HX/35231/2002**
**Appeal Number HX/23523/2002**

Royal Courts of Justice
Strand, London, WC2A 2LL
Thursday, 28 October 2004

**Before :**

**LORD JUSTICE CLARKE**
**LORD JUSTICE SEDLEY**
and
**LORD JUSTICE GAGE**

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**Between :**

**DARJI**
**Appellant**
**- and -**
**SECRETARY STATE for the HOME DEPARTMENT**
**Respondent**

**GURUNG**
**Appellant**

**and**
**SECRETARY of STATE for the HOME DEPARTMENT**
**Respondent**

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(Transcript of the Handed Down Judgment of
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**Mark Mullins** (instructed by **Gillman-Smith Lee**) for the **Appellant**
**Parishil Patel** (instructed by **Treasury Solicitor**) for the **Respondent**

**Mark Braid (**instructed by **Gillman-Smith Lee)** for the **Appellant**
**Parishil Patel** (instructed by **Treasury Solicitor**) for the **Respondent**

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# Judgment

**Lord Justice Sedley:**

1. This is the judgment of the court.

2. These two cases come before us as applications for permission to appeal, the appeal to follow if permission is granted. In each case we grant permission to appeal. What follows is the judgment of the court on the substantive appeals.

3. Both cases concern asylum-seekers of Nepalese ethnicity whose country of habitual residence is Bhutan. Each has sought asylum in this country on the ground of a fear of persecution, and of human rights abuses, arising out of policies of ethnic cleansing being pursued by the indigenous Bhutanese majority. But as argued before us, both cases raise the important and difficult issue of statelessness. Each claimant now says that he cannot be returned or removed, either legally or in practice, because he is a citizen neither of Bhutan nor of any other state.

4. In brief, the situation disclosed by the in-country evidence is that Bhutan, a Buddhist state, is a constitutional monarchy in which minorities are represented in Parliament. The largest minority, about 35% of the population, are Hindu Nepalese who over many years have settled the southern part of the country. Although the monarch seeks to act inclusively, the Parliament has passed nationality laws which make the position of many Nepalese precarious or untenable. In consequence, tens of thousands of Nepalese have been dispossessed of their land in Bhutan (which has then been allocated to Buddhists from the north of the country) and now live in refugee camps in Nepal.

**Mr Darji's case**

5. Mr Darji's account was that he was born in 1980 to Nepalese parents, and that he was a Bhutanese national. His claim before the adjudicator was that he had a well-founded fear of persecution because of a history of police raids, arrests and torture related to his father's activity in the Bhutanese People's Party. The family home had been burned and their crops destroyed. He had finally fled via India to the United Kingdom.

6. The adjudicator disbelieved his entire account. She dismissed both his asylum and his human rights claims. But leave was given by the IAT to appeal on the ground that it was arguable that "the adjudicator failed properly to consider whether the applicant's removal would breach either Convention, given the facts she had found".

7. Before the adjudicator, the possibility of statelessness had been raised at a late stage by Mr Darji's counsel but the adjudicator had declined to entertain it. The IAT, without suggesting that she had been wrong to exclude the issue, permitted it to be run as the principal ground of appeal. But the facts on which they had to proceed were extremely limited: the adjudicator's only positive finding was that Mr Darji was a young man from Bhutan who was ethnically Nepalese.

8. The IAT concluded that Mr Darji was indeed stateless. The Home Secretary accepted that if this point were reached, return would be impracticable and would not be attempted. But for this, the construction of paragraph 1A(2) of the 1951 Refugee Convention decided by this court in *Revenko v Home Secretary* [2000] Imm AR 610 would still have required proof of a well-founded fear of persecution in the country of habitual residence, Bhutan.

9. The IAT did in fact go on to find that the discriminatory treatment which would await Mr Darji on return would amount to persecution and to a breach of his human rights. In the light of the Home Office's concession about non-return, nothing now turns on this if Mr Darji is stateless. But if he is held not to be stateless and therefore, in effect, to be a Bhutanese citizen, his counsel, Mr Mullins, relies upon the finding as separately entitling him to this country's protection.

10. The IAT therefore allowed Mr Darji's appeal and directed that he be granted leave to enter and remain for two years. Against this decision the Home Secretary appeals.

11. The Home Secretary's case, as advanced by Mr Patel, is that the material before the IAT fell short of proof that an ethnic Nepalese born in Bhutan in 1980 was rendered stateless by Bhutanese law. If this is right, he goes on to submit that the finding of prospective persecution falls too, since it is predicated entirely on the consequences of statelessness.

12. It is accepted by the claimant that the burden of establishing statelessness rests on him. It is accepted by the Home Secretary that the standard to which it must be proved is reasonable likelihood, not a balance of probability. We have consequently not had to hear argument on either of these questions.

13. Mr Patel submits, rightly in our judgment, that although the IAT directed themselves in accordance with what we have just set out, they visibly failed to apply it. They begin at paragraph 15 by saying that despite the adjudicator's statement that Mr Darji is a citizen of Bhutan, "we are not satisfied that he is". They have, in other words, reversed the burden of proof.

14. They go on to support this conclusion, first, by pointing out that "no documentary evidence showing that he is a citizen of Bhutan has at any time been produced". This too reverses the burden of proof, though it is fair to say – as we shall indicate later – that there seems

to be a ready source of verification in Bhutan's register of citizenship, to which neither side has apparently sought recourse. But while production by the Home Office of documentary evidence of Mr Darji's citizenship would have put an end to the argument, the want of such evidence did not help to prove the converse.

15. Next the IAT point out that Mr Darji had not himself claimed to be a Bhutanese citizen. "If Mr Darji had been a citizen of Bhutan, it is to be expected that he would have said so, and have given details of how he had acquired his citizenship." This seems to us to be speculation of a high order. It would no doubt have harmed Mr Darji's case if his evidence had been that he was a Bhutanese citizen; but its omission to do so does not begin to prove the contrary.

16. Everything therefore turns on what the IAT go on to consider in some detail, namely the Bhutanese nationality laws.

*Bhutanese nationality law*

17. The IAT had in evidence a number of recent reports of the U.S. State Department and the Home Office's Country Information and Policy Unit. They also had material which seems to have been culled from the internet, including an apparently well-informed report by Dr Chandrasekharan, a former Indian diplomat or civil servant and director of the South Asian Analysis Group, published in the Kathmandu Post in 2000 and 2001. But neither party placed before the IAT an expert's account of Bhutan's nationality laws. What the IAT did have was some textual evidence of the Bhutanese nationality laws of 1958 and 1985, together with some explanatory material. From it the following emerged.

18. The Citizenship Law of 1958 provided that the child of a father who himself was a resident Bhutanese national "can become a Bhutanese national" (s.3a). It then provided (s.4a) that an adult foreigner who had been resident in the state for more than 10 years and owned agricultural land there might apply to be "re-enrolled" as a Bhutanese national. Women married to Bhutanese nationals were also eligible to be "enrolled" (s.4b). People who had renounced, forfeited or been deprived of their Bhutanese nationality might recover it only with the monarch's approval (s.4c). The law went on to provide (s.6.iv) that a person "registered as a Bhutanese national" who left his agricultural land or ceased to reside in the kingdom should forfeit his nationality; and (s6.v) that a person "being a bona fide national" who ceased to reside in the kingdom or failed to observe the laws "as per his national certificate" should likewise lose his nationality.

19. S.7d provided (according to the available translation):

> If both the parents are Bhutanese and in case of the children leaving the country of their own accord, without the knowledge of the Royal Government of Bhutan, and their names are also not

recorded in the citizenship register maintained in the Ministry of Home Affairs, then they will not be considered as citizens of Bhutan.

20. It is not clear from this text whether anybody, and if so who, was deemed without more to be a Bhutanese citizen, and who had to apply either for citizenship or for registration as a citizen. The governing reference to "becoming" a citizen, and the apparent contrast between a registered national and a "bona fide" national, may depend on other laws not in evidence. From Dr Chandrasekharan's article it would seem that this was nevertheless a liberalising measure, affording citizenship to a large segment of the population which, though settled for generations in Bhutan, had not previously been accorded citizenship.

21. Mr Darji was born while the 1958 law was in force. The 1985 law, on the more limited information we have about it, provided (s.6c) for naturalised – not native – Bhutanese to be deprived of their citizenship for disloyalty. It seems also, however, to have narrowed the qualifications for citizenship and possibly to have deprived some Nepalese retrospectively of their rights under the 1958 Act. This at least is the purport of the 2001 State Department report. It suggests that both parents now have to be Bhutanese citizens in order to confer citizenship by birth, and that parental citizenship by residence must now be proved back to at least 1958. It also suggests that people "who lost citizenship under the 1985 law" needed now to prove 15 years' residence in order to requalify.

22. By s.6d the 1985 law reproduced s.7.iv of the 1958 law. It thus seems clear that a citizenship register has throughout these years been maintained by the state. We do not know whether entry in it is necessary to the proof of citizenship, but from an evidential point of view it will certainly be sufficient. We see no reason why in future cases where Bhutanese citizenship is in issue inquiries should not be made of the Bhutanese Ministry of Home Affairs. Entry on the register will ordinarily make proof of statelessness impossible. Non-entry, however, will not necessarily have the opposite effect. In such cases, more information will be needed than the IAT had before it in this case.

23. The information which the IAT did have gave strong support to the argument that the situation of many Nepalese in Bhutan was now precarious. The 2001 State Department report went on to recount that in the wake of the 1985 law the Government had declared all non-citizens to be illegal immigrants and from 1988 had been expelling large numbers of such people. The extended CIPU bulletin for 2002 reported:

> "Under the census nationality classification, there is a category known as 'F2 – returned migrants'. These people are held to have

invalidated their Bhutanese nationality by having left Bhutan and then re-entered."

24. The bulletin records that this process is not known to have been used except against people of Indian or Nepalese origin. It notes that it was southern Bhutanese who had previously been frequent migrants across the country's southern border. The State Department report for 2000 gave fuller background, describing a large-scale process of repression and expulsion starting in 1988 in reliance on the citizenship law. Those who were either expelled or who left the country in fear became automatically debarred from re-entry. This flow appears, however, to have slowed down or stopped after 1993. Return, however, has according to the 2001 State Department report, been blocked not only by the forfeiture of citizenship but by the resettlement, meanwhile, of large number of ethnic Bhutanese on the land vacated by the Nepalese.

*Is Mr Darji stateless?*

25. Where does this leave the issue of Mr Darji's citizenship? First of all, it is clear that a person who could be but is not registered as a citizen cannot rely on his non-registration as evidence of statelessness. As to whether Mr Darji is entitled to registration, the evidence before the adjudicator and the IAT was minimal. There was no suggestion that his parents were post-1958 migrants into Bhutan or that they were otherwise ineligible for citizenship, nor therefore that Mr Darji had not been born a Bhutanese citizen. There was nothing to suggest that they or he had forfeited or been deprived of their citizenship. Mr Darji himself, notwithstanding the deplorable history of mass expulsions, had not been expelled or refused re-entry.

26. In short, neither the citizenship laws themselves, so far as they were in evidence, nor anything that had happened to Mr Darji under them, made it likely that he was stateless. It was certainly not correct for the IAT to hold, as they did, that the mere fact that Mr Darji originated from Bhutan did not make it reasonably likely that he was, or had been, a citizen. In our view the contrary was the case: on the little evidence that there was before the IAT, the likelihood was that Mr Darji, being of Bhutanese origin, was a Bhutanese citizen.

27. The IAT also held that, under both the 1958 law and the 1985 law, Mr Darji would in any event by now have lost his citizenship by leaving the country. This overlooks the fact that the material clause applies only to emigrants whose names are not recorded in the citizenship register. There is no evidence that Mr Darji is in this class. Even if he were, this would have constituted a further claim to be a refugee *sur place,* at a point far too late to be admissible

*Did Mr Darji nevertheless face a real risk of persecution?*

28. When the IAT turned, albeit obiter, to the risk of persecution, they concluded, in summary, that were he to be returned, and were he to be admitted to Bhutan, Mr Darji faced a reasonable likelihood of persecution as an ethnic Nepalese because any land he had owned (there was no evidence of any) would have been taken and resettled, and because as a Nepalese national (i.e. a non-citizen of Bhutan) he would be debarred from working. On similar grounds they concluded that, if returned, Mr Darji would face a denial of his human rights under Article 8, rather than Article 3, of the ECHR (a surprising view, since to be methodically rendered stateless, homeless and jobless sounds very much like inhuman and degrading treatment).

29. All of these risks spring, and spring solely, from the premise that Mr Darji would be returning as a stateless person. They have no independent foundation upon which Mr Mullins can rely by way of cross-appeal. Once the finding of statelessness goes, the risks associated with it go too.

*Conclusion*

30. It follows that the Secretary of State's appeal in Mr Darji's case succeeds, with the result that Mr Darji's appeal against the refusal of asylum, and his challenge to the decision to remove him to Bhutan, fails.

**Mr Gurung's case**

31. Mr Gurung also originates from Bhutan. He put himself forward as a citizen of Bhutan, and satisfied the adjudicator that as an ethnic Nepalese he had a well-founded fear of persecution on the grounds of his ethnicity should he be returned there. He had, the adjudicator accepted, been detained by the police for distributing leaflets for the Bhutan People's Party and been quite severely beaten up before being left in a forest, from where he had fled directly to India. The police, before releasing him, had threatened that he would be killed. The adjudicator concluded that there was a likelihood, were he returned, both of persecution on grounds of ethnicity and of treatment contrary to Articles 3 and 8 of the ECHR.

32. The Home Secretary obtained leave to appeal against this decision on its merits. Before the IAT, perhaps opportunistically, Mr Gurung's counsel, Mr Braid, adopted the same line of argument as in *Darji* and submitted that his client was stateless. The IAT rejected this, and he now appeals against the rejection, adopting the arguments advanced by Mr Mullins on the Home Secretary's appeal in Mr Darji's case.

33. There was no special evidence about Mr Gurung's nationality. Reliance was placed purely on the in-country evidence. For the reasons we have given in Mr Darji's case, this does not by itself establish a likelihood that any individual of Nepalese ethnicity who until fleeing to this country was ordinarily resident in Bhutan was or is stateless. The IAT reasoned their way to the same conclusion, and we respectfully endorse it.

34. What remained, however, was the adjudicator's finding of a well-founded fear of persecution unrelated to the issue of citizenship and statelessness (which had not been an issue before him). The IAT touched only briefly on this, even though it had been the basis of the grant of leave to appeal, no doubt because the argument before them had been sidetracked into the citizenship issue.

35. They record that Mr Braid had accepted that the adjudicator's Article 8 decision was not properly reasoned, but this did not matter given the adjudicator's other findings. Nowhere, however, do the IAT deal with these. In their final paragraph they hold that "in the light of the background evidence that the adjudicator's conclusion is unsustainable", and give the following by way of explanation:

> "We do not see anything to support the submission that the claimant faces persecution or breach of his human rights in Bhutan because of his Nepalese ethnicity, and we can see no basis for a contrary finding."

36. Had this issue been the focus of the argument, it is unlikely that the IAT would have contented itself with this minimal reasoning about it. Given the way the appeal was dealt with on Mr Gurung's behalf, it is nevertheless entirely understandable that their decision took the shape it did. But what now remains is a decision of the adjudicator in Mr Gurung's favour on orthodox persecution grounds and an unreasoned decision oversetting it – for, whatever may be said against the adjudicator's decision, it is not self-evidently unsustainable.

37. In these circumstances we have the choice of allowing Mr Gurung's appeal on the ground that the IAT has failed to give any proper reasons for oversetting the adjudicator on the merits, or of remitting the appeal to the IAT to determine the issue. It was entirely the doing of Mr Gurung's counsel that the IAT, and evidently the Home Office presenting officer too, were sidetracked into the citizenship issue. But the IAT, as is clear from its final brief paragraph, had not forgotten that if Mr Gurung failed on that issue there remained the substantive issue on which the Home Secretary had obtained his leave to appeal; and they purported to deal with it.

38. We have considered with care the possibility of remitting the case to a differently constituted IAT for a properly reasoned decision on the appeal issue, but we have concluded that we are obliged to deal with

the IAT's decision on the issue as it now stands. Mr Gurung is entitled to the benefit of finality. The reasons given by the IAT for oversetting the adjudicator's decision in Mr Gurung's favour do not justify their conclusion that the latter was unsustainable. Moreover, we are not satisfied that, given the adjudicator's acceptance and evaluation of Mr Gurung's account, any such conclusion was open to them.

39. It follows that Mr Gurung's appeal succeeds and that the adjudicator's decision is restored.