

ILF-Nepal

The International Legal Foundation – Nepal

CASE NOTES – FEBRUARY 2009

Editors Notes: This issue illustrates the reluctance of the courts to take any action without a specific statutory provision specifically permitting it. As a result, the constitutional rights to counsel and a fair trial are limited by statute. Troubling.

Nepal Government v. Gyanu Pokharel (ILF-Nepal 59) (Adv. Surya Bahadur Pandey)

This human trafficking case was discussed in the January Case Notes. Our client was released because there was no evidence against her and in fact, the police had evidence showing she had nothing to do with the crime. The Police, however, refused to turn over the exculpatory evidence and our office filed a writ of mandamus seeking an order the police to turn over the evidence. The registrar refused the petition on the grounds that it had been signed by the lawyer and not the client. ILF-Nepal appealed the rejection by the registrar to the Supreme Court on the grounds that it violated our client's right to counsel under the Interim Constitution section 24(2), (7), (8), and (10). Unfortunately, the Supreme Court ruled that there was no authority in the law requiring the registrar to allow an attorney to file a pleading on behalf of his/her client and affirmed the registrar's decision. A new application was filed signed by our client.

Dhawa Lama v. Government of Nepal (ILF-Nepal No. 139) (Adv. Mohan Shashanker)

Our client is being detained for allegedly committing the crime of theft and burglary as set forth in the Crimes against Property Statute, Country Code, Chapter on Theft No. 12 and No. 14 . At the time of remand, ILF-Nepal sought access to the file in possession of the investigative authorities pursuant to the provisions of the Interim Constitution which provide for the right to be defended by counsel and the right to a fair trial. For illustrative purposes, ILF-Nepal cited the Rules of Criminal Procedure of the state of Massachusetts, which provides for early discovery. The district court denied our request.

On appeal, ILF-Nepal- argued again that the right to a fair trial provided for in the Interim Constitution, Section 24, and the International Covenant on Civil and Political Rights, Article 14 require prompt discovery of the “nature and cause of the charge against him.” In addition, we cited to Court Management Rule 211 which provides that “the duplicate copy of the documents enclosed in the file which is at the office which hears the cases must be given to any concerned people if they ask for it.”

Uma Bhawan 1st Floor
Surya Marg #19
Babar Mahal, Kathmandu Nepal
Tel: 422-3545

The appeal is pending. A positive ruling from the Appellate Court would certainly represent a major step forward in giving meaning to the right to counsel and a fair trial.

Bishnu Century v. Nepal Government (ILF Nepal 120) (Adv. Shyam Kumar Bishwokarma)

Bishnu Century was arrested on January 15, 2009 (2065/10/02) and charged with drug possession. ILF-Nepal appeared on his behalf for the first time in Lalitpur District Court after a second remand hearing on February 9, 2009. Under Section 22(c) of the Drugs Act 2033, the police have up to 3 months to file the charge sheet and can detain a suspect during that time.

ILF-Nepal filed a written application seeking access to the investigative file in order to be able to oppose the police request for additional detention. The court denied the application on the grounds that since “there is no clear legal provision that a copy of the investigation file must be handed over to the defendant by the police, . . . the Court cannot issue such a directive according to the law.” After ILF-Nepal filed an appeal to the Appeals Court challenging the district court's order, the police immediately filed the charge sheet.

While our discovery applications have been denied, they have had the practical effect of speeding up the filing of the charge sheet and theoretically, limiting arbitrary baseless detentions.

ILF-Nepal has obtained a few good results for three juveniles.

Nepal Government v. Raju Tamang a/k/a Thulo Bhai, et. al., (ILF-Nepal 108) (Adv. Ajay Shankar Jha) (Theft); Nepal Government v. Raj Kumar Nepali, (ILF-Nepal 122) (Adv. Mohan Sashankar) (attempted murder); Nepal Government v. Anisha Lama, (ILF-Nepal 100) (Adv. Neelam Poudel) (counterfeiting).

These three cases involved juvenile clients who were released to the custody of their families during the investigation. Section 50 of the Children Act gives the court specific authority to place a juvenile in the custody of his/her family during the investigation of a case and Court Management Section 47 provides that “Except in those cases in which the Act says that the defendant is to be detained, the defendant must be kept on court date immediately after he appears before the court.” Nevertheless, because defendants are rarely represented at remand, these children are often remanded during the investigation period. In these three cases, the court ordered that our clients be handed over to the custody of their families based on CM 47.

Finally, this Arms and Ammunition case raises an interesting issue.

Prabesh Rai A/k/a Sagun Rai v. Kathmandu Central District Officer (ILF Case 19) (Adv. Pawan Kumar Jaisawal)

Uma Bhawan 1st Floor
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The question is whether charges brought under the arms and ammunition Act are bailable or not.

The Arms and Ammunition Act, as amended, Section 20(1) provides for punishment of a fine of 3-5 years imprisonment **or** a fine. In turn, Court Management Section 118(2)(b) provides that an offense is not bailable if the offense carries a sentence of imprisonment of three years or more. Charges under the Arms and Ammunitions Act are under the jurisdiction of the CDO. ILF-Nepal argued that bail should be set because our client faces the possibility of no imprisonment and simply a fine but the CDO rejected the argument. On appeal, we argued again that the offense was bailable because there was a possibility that our client would not serve any time in detention in the event of a conviction. The Appellate Court disagreed, ruling that since the Arms and Ammunition Act (2019) Section 20 (a), as amended, provided for a possible sentence of three years or more, our client could not be admitted to bail.

Natalie Rea, ILF-Nepal Director
February 28, 2009

We remain unable to announce a decision in the previously-discussed case of Bipin Sutya, our 15 year old client in adult custody. ILF-Nepal wants to thank its current Fellows, Daniel Alterman and Kenneth Plotz for their contribution.

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Surya Marg #19
Babar Mahal, Kathmandu Nepal
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