

ILF-Nepal

The International Legal Foundation – Nepal

CASE NOTES – March 2009

Editor's note: ILF-Nepal has been challenging illegal detention orders by the CDO since it opened in August 2008. In this edition of the Case Notes, ILF-Nepal is happy to report that the Supreme Court is showing a willingness to order the CDO to follow the rules. Unfortunately our juvenile client, Bipen Sutihar, remains in adult custody. His case illustrates the tragic consequences of the absence of internationally recognized standards to determine age in countries where birth records are not readily available

Government of Nepal v. Bipen Sutihar (ILF-Nepal 7) (Adv. Bimala Yadav)

ILF-Nepal has been discussing this case since its December Case Notes. Our client worked for his uncle in a carpentry shop. One evening, he got into a dispute with his cousin over a DVD. The dispute escalated; our client allegedly grabbed a piece of wood and hit his cousin who died a few days later. Our client was arrested in August and accused of murder. He has been in adult custody ever since. ILF-Nepal appeared on his behalf for the first time, at the second remand hearing, and provided the court with a VDC age certificate showing that he is 15. The District Court put the certificate in the file without considering the evidence.

ILF-Nepal filed a habeas corpus petition seeking our client's release. While the case was pending and endless adjournments granted, the prosecutor filed a charge sheet. The habeas corpus petition was then denied due to "changed circumstances." In the meantime, on the day of the charge sheet, the prosecution filed an age assessment by an expert opining that our client was between 16 and 18 and in all likelihood 17. Although Juvenile Regulations Rule 15 makes it clear that the VDC certificate trumps such an age assessment, the district court, the Patan appellate court and the Supreme Court have ignored the rule, left our client in adult custody, and ordered different proceedings that are endlessly adjourned.

On January 6, 2009, the Supreme Court sent the case back to the District Court for a hearing on the validity of the expert's age assessment despite the clear language of Rule 15. At the hearing, the expert testified that our client was over 16 based on X-Rays. His testimony was legally, under Rule 15, and factually insufficient to rebut the presumption of the VDC birth certificate. Indeed, medical age assessments are particularly unreliable since they vary considerably between different ethnic groups, nutrition, childhood diseases etc... Nevertheless, the court delayed adjudication yet again and asked for a verification of the validity of the VDC certificate. Instead of presuming that our client is a juvenile and placing him in juvenile custody, the court remanded him to adult custody again.

Government of Nepal v. Ajay Sharma, (ILF-Nepal 135) (Adv. Ajay Shankar Jha)

Our client was in detention and charged with a public offense. The case was before the KTM CDO. As mentioned in prior Case Notes, Section 4 of the Public Offense Act requires the CDO to issue a charge sheet within seven days of the incident in non-FIR cases, and 14 days from the incident in cases started by an FIR. In FIR cases, the time can be extended to 35 days but only if reasonable grounds are shown to necessitate additional time. When ILF-Nepal met our client, he had been incarcerated for 13 days and the office filed a habeas corpus petition in the Supreme Court. The office had raised this issue repeatedly and unsuccessfully since it opened in August 2008.

This time, the Supreme Court granted the writ, ordering the CDO to provide reasonable grounds for additional time to complete the investigation and charge our client. The Court asked for the reasons why our client was "remanded for seven days with the order" and why the investigation extended for 35 days in this simple case. The court added that "what is clearly specified in the law should be properly followed." "Anything that has not been followed accordingly cannot be interpreted as being legal."

Government of Nepal v. Rudra Bahadur Magar, (ILF-Nepal 138) (Adv. Ajay Shankar Jha)

The Supreme Court granted another writ of habeas corpus in a case pending before the CDO. Section 5(1) of the Public Offense Act provides in pertinent part that: "The CDO shall have original jurisdiction to try and hear cases prescribed by this Act." The CDO often allows his assistant to preside over jail/bail hearings in violation of the Local Administration Act, Article 11, Section 4. That section allows the CDO to delegate his power of authority in a certain instances but specifically prohibits the CDO from delegating hearing authority. ILF-Nepal has been challenging this practice repeatedly. The Supreme Court finally held that the detention was illegal because the assistant CDO had not been given the authority to act under SPO Section 5(1) and the Local Administration Act.

Government of Nepal v. Mithun Yadav, (ILF-Nepal 155) (Adv. Shyam Bishwakarma)

Our client, a nine-year-old child, was charged with simple theft, based on a police report. No FIR was ever filed. He had been detained for 8 days when ILF-Nepal first appeared on his behalf. Under the Child Act Section 11 (1) a child under the age of ten (10) cannot be charged with a crime. ILF-Nepal informed the public prosecutor's office and CDO that it was filing a writ of habeas corpus in the Supreme Court. After the writ was filed, the public prosecutor decided not to prosecute the case. Our client was released from custody and the Supreme Court ordered that the child be placed in the custody of the Nepal Ministry of Women, Children, and Social Welfare for transportation to his native India. A division of that Ministry placed the child in the National Center for Children at Risk and the child was returned to his home.

Jiwan Rae v. CDO (Lalitpur) (ILF-Nepal 168) (Adv. Ajay Shankar Jha); Ajay Sharma v. CDO (KTM) (ILF-Nepal 135) (Adv. Ajay Shankar Jha); Bikki Das v. CDO (KTM) (ILF-Nepal 167) (Adv. Surya Pandey)

In these three cases, the charge sheets were not filed within the statute of limitations. As mentioned above, under the Public Offense Act, the charge sheet must be filed within 7 days of the incident or 14 days from the time of the incident in cases begun with an FIR. Furthermore, in cases begun by an FIR, the statute of limitations may be extended up to thirty-five days for **reasonable cause**.

In these cases the charge sheets were not filed on time and there was no finding of reasonable cause for the delay. ILF-Nepal filed writs of habeas corpus in the Supreme Court. The Court found that since the statute had been violated and no reasonable cause was found the cases had to be dismissed and the defendants must be released.

**Natalie Rea, Executive Director
ILF-Nepal
April 10, 2009**

The ILF wants to thank Dan Alterman, International Fellow from January to March, for his contribution to the office. Dan is being replaced by Roxanne Vachon, a public defender from Vancouver, British Columbia, who has volunteered for the ILF every year since 2005, and who will be in Nepal until July.