MA and others (Ethiopia – Mixed ethnicity-dual nationality.) Eritrea
[2004] UKIAT 00324

Heard at Field House
On 9 August 2004

IMMIGRATION APPEAL TRIBUNAL

Date Determination notified:
22 December 2004

Before:

Mr H J E Latter – Vice President
Mr P S Aujla

Between

APPELLANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

and between

SECRETARY OF STATE FOR THE HOME DEPARTMENT
APPELLANT

and

RESPONDENT

and between

APPELLANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

Representation:

For the Claimants: Mr E Fripp of Counsel
For the Secretary of State: Ms J Anderson of Counsel

DETERMINATION AND REASONS

1. There are three appeals before the Tribunal. In CC/47612/2001, the appellant ("the first claimant") appeals against the determination of an Adjudicator, Mrs J Woolley, issued on 8 November 2002, who dismissed her appeal on both asylum and human rights grounds against a decision made on 4 July 2001 refusing her leave to enter following the refusal of her claim for asylum and giving removal directions for Eritrea. In HX/71515/2002 the Secretary of State appeals against the determination of an Adjudicator, Mr P Brenells, issued on 5 March 2003, who allowed the respondent's ("second claimant's") appeal on both asylum and human rights grounds against a decision made on 14 August 2001 giving removal directions to Ethiopia. In CC/13744/2003 the appellant (the "third claimant") appeals against the determination of an Adjudicator, Mr A M Baker, issued on 8 July 2003, who dismissed his appeal on both asylum and human rights grounds against a decision made on 24 November 2001 refusing him leave to enter following the refusal of his claim for asylum and giving removal directions for Eritrea.

The First Claimant

2. The first claimant arrived in the United Kingdom on 24 March 1999 and claimed asylum on arrival. She gave her current nationality as Eritrean. Her claim for asylum was based on a fear of persecution in both Ethiopia and Eritrea. It was her claim that she and her husband were of Eritrean nationality but had been living in Ethiopia. Her husband was a member of the Eritrean Liberation Front (ELF) and as a result he had been deported from Ethiopia to Eritrea. She had not been deported because she was in Dire Dawa at the time as she had gone there to give birth in February 1999. When she returned to Addis Ababa from Dire Dawa her neighbours told her that the authorities had been looking for her to deport her to Eritrea. Her application was refused by the Secretary of State.

3. The Adjudicator heard the appeal against this decision on 9 October 2002. In her evidence to the Adjudicator she confirmed her belief that her husband was a member of the ELF although she said she could not be certain because he had never told her this. She had seen some papers which he kept from her. When she returned to Addis Ababa she found her husband's parents preparing to return to Eritrea taking her son with them. She did not get on with them as they were Christian and she Muslim. She felt unable to go to Eritrea as she considered she would be arrested like her husband. She stayed with neighbours. At this time a

lot of her friends and neighbours were being deported. A friend helped her leave Ethiopia via Kenya where she stayed for ten or eleven days before travelling on to this country. The Adjudicator found that the first claimant, being entitled to citizenship of Eritrea, should be considered for Refugee Convention purposes as a national of Eritrea.

4. As regards Eritrea, the Adjudicator was not satisfied that the background information supported her claim that she would have a well-founded fear of persecution there. She herself had never been politically involved and there was no evidence to support an allegation that her husband's possible political beliefs would be attributed to her. Returning members of the ELF had been given posts in government. There was no real risk that the first claimant would be deported to Ethiopia were she to be sent to Eritrea. The Adjudicator went on to consider the issue of Ethiopian citizenship. She found that the first claimant was Ethiopian. She noted that she had a family in Ethiopia and had never experienced trouble there previously. She had taken no part in politics and did not vote in the referendum. She was not satisfied that the first claimant would be persecuted for a Convention reason in Ethiopia.

The Second Claimant

5. The second claimant based her claim on the following facts. Her father was Eritrean and an officer in the Ethiopian Army. He was taken prisoner by Eritrean rebels in around 1990. She went to Eritrea in 1995 to try and find him and for this reason the authorities in Ethiopia came to suspect that she had taken secret military training there. She claimed that in September 1999 the Ethiopian authorities went to her house and took her to a prison where she remained until 25 November 1999. She was ill-treated when in detention but released on bail on condition that she reported for deportation on 17 January 2000. With the help of an agent she was able to leave the country on 4 January 2000 and travelled to the United Kingdom.

6. Her claim was refused by the Secretary of State. He did not believe her account of events. However, the Adjudicator did believe the second claimant's evidence. He considered that her Eritrean links gave the Ethiopian authorities ample reason to distrust her whether or not they thought she had received military training in Eritrea when she went there to trace her father. He noted in the background evidence concerns about the treatment of Eritreans in Ethiopia and the possibility that the second claimant might still be deported to Eritrea on return to Ethiopia. He found that there would be a considerable risk of deportation for her particularly in light of the fact that during the period of custody she had experienced real and not just threatened persecution and because of the circumstances surrounding the disappearance of her father and her mixed ethnicity.

The Third Claimant

7. The third claimant based his claim on a fear of persecution because he had distributed leaflets for the All Amhara People's Organisation (AAPO). He claimed that he had been arrested in December 1998 by security forces and

detained for two days because he was an Eritrean. He was released but arrested a week later and detained for three days because he helped the Eritreans and distributed AAPO leaflets. He was beaten badly in detention. He was taken to a hospital but managed to escape. He left Ethiopia by car and travelled to Kenya with a forged passport. He later travelled to Tanzania, Mozambique, Swaziland and then to South Africa where he claimed asylum but was refused. He then travelled on to the United Kingdom arriving on 18 May 1999.

8. The Adjudicator found that the essential core of the third claimant's story was credible although there were elements of embellishment. The removal directions were for Eritrea. He noted the reasons given by him for not wanting to go to Eritrea and commented that he did not regard the "arbitrary allocation" (as the Adjudicator described it) of the third claimant being proposed by the respondent as being remotely satisfactory or acceptable. He commented that if in effect Eritrea was being treated as a safe area of Ethiopia to which the third claimant could be safely and conveniently relocated, he would regard that as unduly harsh.

9. However, the Adjudicator was not satisfied that there would be a real risk of persecution if the third claimant were to return to Ethiopia. He had left four years prior to the Adjudicator's determination. The situation for ethnic Eritreans had significantly changed. There had been a peace accord and a cessation of border hostilities. The atmosphere had changed and repatriations had virtually ceased. His assessment of the future risk was that it was so low that he did not consider there would be a real risk of persecution on return to Ethiopia.

Features common in all three appeals

10. In summary all the claimants originate from Ethiopia but are partly or wholly of Eritrean ethnic background. These appeals all raise the issue of whether nationals or former nationals of Ethiopia face persecution as a result of their ethnicity arising from a risk of discriminatory withdrawal of their nationality and a risk of deportation to Eritrea. The appeals also raise the issue of whether an entitlement to Eritrean nationality deprives a claimant of a right to protection under the 1951 Convention. As the appeals raise common issues of fact and law, they are being heard together pursuant to the provisions of Rule 51 of the 2003 Procedure Rules with the consent of all parties.

The Grounds of Appeal

11. The first claimant was granted permission to appeal on the issues of whether the fact that she had a lawful claim to Eritrean nationality meant that she would not be entitled to the protection of the Convention and whether she would in practice be afforded protection by the Eritrean authorities. In the appeal concerning the second claimant, the Secretary of State was granted permission to appeal on the ground that the Adjudicator had not given adequate or proper reasons as to why the second claimant would be at risk of deportation. It is argued that the Adjudicator had not referred to any objective evidence to support his findings. The third claimant was granted permission to challenge the Adjudicator's findings on the risk in Ethiopia including the argument that he had been the

subject of a continuing denial of Ethiopian nationality and its benefits which amounted to persecution and that he had wrongly assessed the risks to returnees of Eritrean or part Eritrean background.

12. The Secretary of State has indicated that it is his intention to grant indefinite leave to remain to the third claimant. By operation of law his appeal will be treated as abandoned on the grant of such leave but, in the light of the history of these appeals and the issues raised, the Tribunal does not think it right to adjourn his appeal until the grant of indefinite leave. So far as the first claimant is concerned, by letter dated 2 August 2004 the Secretary of State has indicated that he is cancelling the removal directions set for Eritrea and intends to set any future removal directions in the case for Ethiopia. However, the current decision to issue removal directions stands but we take note of the fact that there is now no intention of returning the first claimant to Eritrea. The appeals relating to the first and second claimants fall within the provisions of the Immigration and Asylum Act 1999 whereas the appeal by the third claimant is pursuant to section 101 of the Nationality Immigration and Asylum Act 2002 and is limited to a point of law.

<u>The submissions made on behalf of the claimants</u>

13. Mr Fripp has set out his submissions in his skeleton argument entitled General Submissions. They can briefly be summarised as follows. His core submission for each of the claimants on the issue of asylum is that:

    (i) They are effectively former nationals of Ethiopia following de facto removal of Ethiopian nationality on a basis of discrimination against those of part or whole Eritrean extraction;

    (ii) They are not Eritrean nationals, and even in the event of de jure entitlement cannot lawfully be disbarred from protection given the absence of certainty of effective national protection;

    (iii) Accordingly they are refugees under Article 1(A)(2) 1951 Convention;

    (iv) They cannot lawfully be removed to Eritrea.

    On the issue of human rights the core submission is:

    (i) Statelessness per se does not require a finding that exclusion from the United Kingdom would breach relevant provisions of the ECHR. However the effect of exclusion may render the excluding state in breach of ECHR provisions. On the facts removal from the United Kingdom either to Ethiopia or Eritrea would in each case breach relevant provisions.

14. Mr Fripp submitted that being Ethiopians of Eritrean descent meant that the claimants would face the following risks. Firstly, each had been subject to or

continued to face the risk of discriminatory withdrawal of Ethiopian nationality (denaturalisation) contrary to the Ethiopian constitution. This process and the withdrawal of associated rights amounted to persecution: see *Lazarevic v SSHD* [1997] Imm AR 251. Secondly, if removed to Ethiopia, each individual faced a risk of onward deportation, exclusion from that country or detention. Thirdly, even if admitted to Ethiopia upon arrival at Addis Ababa, the effect of denaturalisation meant that they would remain in Ethiopia on sufferance, their position being transformed to one of residence as registered aliens on temporary permits.

15. In support of the first risk it was common ground that between mid 1998 and late 2000 large numbers of ethnic Eritreans and part Eritreans were expelled from Ethiopia. The numbers recently estimated as remaining indicated a large exodus of individuals who had either gone into hiding or had accepted voluntary repatriation under various forms of economic or social duress. Many of those removed were in fact entitled to Ethiopian nationality as the children of an Ethiopian parent. The removals were indiscriminate. There was continuing evidence of denaturalisation and deportation. The unlawful removal of nationality on a discriminatory basis had been at the core of the Ethiopian government's actions even though there was an attempt to defend this conduct as legitimate state action.

16. Mr Fripp accepted that large scale deportations from Ethiopia of ethnic or part ethnic Eritreans had greatly reduced or ceased although exclusionary pressures remained. However, there was no evidence indicating that the Ethiopian authorities were willing to permit the return of or resumption of nationality by those who had been deported. In January 2004 directives dealing with the status of Eritrean nationals residing in Ethiopia only dealt with those who had continued to maintain permanent residence. The Ethiopian authorities did not permit return on an EU return letter. The acquisition of a relevant travel document required a personal approach to the Ethiopian Embassy in London. An applicant was required to disclose his reasons for seeking such a document and to give details which would clearly identify if one or both of an applicant’s parents had originated in Eritrea.

17. As to the second risk, whether the claimants would be at risk of removal to Eritrea, Mr Fripp argued that the Tribunal had reached different conclusions in different cases, probably explicable by the evidence which had been produced in each appeal.

18. If the claimants were permitted to remain in Ethiopia, continued Mr Fripp, they would be treated as temporarily tolerated aliens entirely without protection, given the Ethiopian government’s justification of previous deportation. The evidence showed that daily life was becoming more precarious for people of Eritrean origin in Ethiopia after the Alien Registration Order went into effect. Mr Fripp submitted that the claimants were not nationals of Eritrea. The reality was that the Eritrean authorities appeared not to offer any objective publicly disclosed standard for the grant of citizenship. In any event there would be a risk in Eritrea for those of mixed Ethiopian/Eritrean families where a member had remained in Ethiopia in fear of the risks of moving to Eritrea.

19. Mr Fripp argued that the fact that a claimant could seek another nationality would not disqualify him from protection under the Convention. The issue was whether he already possessed such nationality. He referred to *Canada v Ward* [1993] 103 DLR 1 and *Bouianova v MEI* [1993] FCJ 576. He argued that *L (Ethiopia)* [2003] UKIAT 00016 and *Tecle* [2002] EWCA Civ 1358, whilst not addressing the point directly had been consistent with the need for a pre-existing nationality rather than the right to seek a fresh nationality. The requirement to apply for a nationality to which a claimant might be entitled as envisaged in *Bradshaw* [1994] Imm AR 359 was to avoid wilful statelessness. In *R v IAT ex parte Tewelde* (unreported heard 18 May 2000) Sullivan J accepted that a failure to make enquiries was excusable where other credible evidence clearly showed that the result would be negative. The authorities requiring enquiries to be made reflected a general view that self-imposed or "wilful" statelessness provided no sufficient foundation for reliance upon international surrogate protection. Reasonable steps towards a certain or almost certain positive outcome could be expected. This confirmed that any recognised or underlying nationality must be an accessible and effective one.

20. None of the claimants possessed pre-existing Eritrean nationality. Reliance upon a presumed ability to seek a nationality which did not predate the refugee claim could not vitiate a Convention claim: if a claimant is barred from protection by such presumed ability, Mr Fripp asked, would he be barred from protection by an ability to apply as an aspiring immigrant to any other country? An ineffective or purely formal nationality did not disbar an individual from refugee status: *Jong Kim Koe v MIMA* [1997] 306 FCA. The issues of law raised in this appeal were not raised in *G (Ethiopia)* [2003] UKIAT 00091. Removal to Eritrea for these claimants would be a decision made not in accordance with the law and would be contrary to the Convention. Mr Fripp submitted that even if the claimants could be returned to Eritrea, there continued to be a risk of human rights violations in that country including a risk of refoulement to Ethiopia.

<u>The submissions made on behalf of the Secretary of State</u>

21. Ms Anderson submitted that the position in Ethiopia and Eritrea was unique. The populations had been mixed. When hostilities commenced and the separate nation state of Eritrea came into existence, it was important for both states to determine who their citizens were. In each case a current well-founded fear had to be shown. *Lazarevic* provided a very tenuous basis for an argument that deprival of citizenship would amount on the present facts to persecution. She submitted that no general risk arose for all Ethiopians of Eritrean ethnic origin. Each case must be looked at to see whether there was a specific individual risk. In any event there was a different situation now that hostilities had ended. It was impossible to say that all Ethiopians of Eritrean or part Eritrean background fell into a category of individuals who faced expulsion. There was now no general risk.

22. The Convention provides that an asylum applicant must seek the protection of any country of which he is a citizen. The principle in *Bradshaw* should apply in

refugee law. There was nothing unreasonable, Ms Andrew added, in expecting someone to apply for citizenship if they could avoid the risk of persecution in one country by obtaining citizenship of another. The only exception to *Bradshaw* was the narrow exception that someone could not reasonably be expected to apply for citizenship if that brought with it a risk of persecution.

The Background Evidence

23. The Tribunal will now turn to the background evidence. The claimants have produced two bundles: A1 containing folders A-X and bundle A2 enclosing folders Q-A1. The respondent produced a bundle R indexed and paginated 1-205. This bundle contains the Ethiopia CIPU Report April 2004 at R4-102 and the Eritrea April 2004 Report R103-194.

24. The background to the creation of the state of Eritrea is set out in the Eritrea report at paragraphs 4.1-12. The border conflict with Ethiopia between 1998-2004 is summarised in paragraphs 4.13 – 4.20 and there is a parallel report in the Ethiopia CIPU Report at paragraphs 4.10-4.21 of the conflict between the two states. It is common ground that following the outbreak of war in 1998, the Ethiopian authorities began a process of expelling 70,000 Eritreans and the Eritrean authorities subsequently expelled a similar number of Ethiopians from Eritrea. Paragraph 4.13 of the Ethiopia report refers to an Amnesty International Report of January 1999 stating that Ethiopia's policy of deporting people of Eritrean origin after war between the two countries broke out in May 1998 had by then developed into a systematic countrywide operation to arrest and deport anyone of full or part Eritrean descent. A full analysis of the expulsions between Eritrea and Ethiopia is set out in the Human Rights Watch Report of January 2003 (at A1J). The expulsions by Ethiopia are covered in the report at pages 18 to 30 and by Eritrea at pages 30 to 36. At page 30 it is recorded that expulsions from Ethiopia continued after May 2000 but gradually decreased over time. During 2000 911 Eritrean nationals were returned to Eritrea under the auspices of the ICRC delegation. There was a protest about the forced expulsion in June 2001 of 704 residents of Eritrean origin from Tigray to Eritrea. The Ethiopian government claimed that the group consisted of persons who had forfeited their Ethiopian citizenship and had left voluntarily. It was promised that this would not happen again. A further 312 people of Eritrean origin were deported in November 2001. This group consisted of residents of Addis Ababa who had sought "voluntary" deportation to join relatives deported in earlier groups. A group of 100 people of Eritrean origin were later deported in March 2002.

25. Repatriations and forced expulsions of Ethiopians from Eritrea substantially accelerated in July and August 2000. The exodus continued in 2001 but decreased dramatically in the first quarter of 2002 from a weekly average of 1000 repatriations during the corresponding period in 2001 to a few dozen. In February 2002 a group of 134 people left for Ethiopia under the auspices of the ICRC and the agency repatriated another group of 144 people in March 2002.

26. There is an issue between the parties as to whether there is a continuing risk of deportation. In the 2004 Ethiopia CIPU Report the question of deportations and repatriations is dealt with at paragraphs 6.133-136. It is recorded at paragraph

6.136 that in June 2003 a total of 153 Ethiopians and 75 civilians were repatriated to their respective countries under ICRC auspices in two operations in June 2003. The issue is also dealt with in the Eritrean report at paragraphs 6.177-184. Repatriation of approximately 380 Ethiopians to Ethiopia is noted in paragraph 6.183. The issue of deportations is covered in the expert reports of both Mr Gilkes and Professor Cliffe. It is accepted that the main flow of deportations has come to an end but according to Mr Gilkes deportations or repatriations have certainly not stopped. In paragraph 2.12 of his report he refers to the repatriations in June 2003. He records that in October 2003 another 198 people crossed from Eritrea to Ethiopia and more recently another 155 from Eritrea to Ethiopia.

27. It is Mr Gilkes' view that the evidence suggests that both Ethiopia and Eritrea are steadily continuing to deport each other's citizens. Although numbers have certainly fallen substantially since their high point between 1998 and 2001, there has been no indication that either country is prepared to bring policies of deportation or repatriation, however implemented, to an end. This view is shared by Professor Cliffe who makes the point that when the Ethiopian government had been challenged about expulsions after June 2000 it had claimed that such groups consist of "persons who had forfeited their Ethiopian citizenship". This information is sourced to Human Rights Watch (HRW).

28. The other background evidence relating to the treatment of Ethiopian citizens of Eritrean or part Eritrean ethnicity is more mixed. The overall picture which emerges is this. Initially the expulsions of those of Eritrean origin from Ethiopia was justified on the basis of national security but in July 1999 the Ethiopian government issued a press release declaring that those who had registered to vote in the 1993 referendum on Eritrean independence had thereby acquired Eritrean citizenship and the government was justified in rescinding their citizenship rights: HRW January 2003 Report at page 20. In August 1999 the government ordered people of Eritrean origin between 18 and older who had voted in the 1993 referendum as well as those who had formally acquired Eritrean citizenship to register for alien residence permits. This report records that daily life became more precarious for people of Eritrean origin in Ethiopia after this order. Their identity cards had to be renewed every six months so that people of Eritrean origin remained uncertain of their ability to reside permanently in Ethiopia and discrimination by local authorities and private individuals became more pervasive. There was an intense atmosphere of hostility towards people of Eritrean origin in Ethiopia. In the USINS Report at A1C it is recorded that while the actions of the Ethiopian authorities had caused great harm and suffering to people of Eritrean origin, the response of the Ethiopian public appeared to have been mixed. Some were sympathetic to the plight of their neighbours whilst others were not. This issue is also considered by Mr Gilkes in paragraphs 4.8-4.11 of his report. He notes that Ethiopians of Eritrean origin remain possible targets for harassment and in his view there are no indications that attitudes have generally changed for the better.

29. Professor Cliffe was asked to consider the position of these claimants and to offer an opinion as to whether they remained protected by their right of citizenship in Ethiopia. It is his view that they technically remained Ethiopian

citizens until leaving that country but like many of those who were cited as Eritreans after the beginning of the war between the two countries, their rights of citizenship were in practice unilaterally derogated. To all intents and purposes such people have been stripped of their Ethiopian citizenship and have lost the basic right of being able to live in what they consider to be their own country. Without a valid passport and given their residence in the United Kingdom, they would have to go through a process of reclaiming citizenship and a positive outcome cannot be guaranteed. They might well hesitate to embark on that process as the treatment and the general situation of those dubbed Eritreans in Ethiopia mean that they can no longer rely on the protection that being a citizen normally guarantees. There is no likelihood that they would be allowed back or given identity documents.

30. Professor Cliffe makes the point that a change in the status of those with Eritrean origins at present living in Ethiopia was signalled in the Ethiopian government directive in January 2004 for determining the residence status of Eritrean nationals in Ethiopia. However this directive only applies to a person of Eritrean origin who was a resident in Ethiopia when Eritrea became an independent state and had continued to maintain permanent residence in Ethiopia until the directive was issued. The Tribunal has also been referred to evidence from the Ethiopian community centre in the UK: A1W. It is the experience of this organisation that claimants who actually attend the Ethiopian Embassy are refused if they have an Eritrean background, which cannot be kept secret because it is apparent from the passport application forms which require information about parents origins and birth places. A copy of the application form appears at A1K.

Conclusions : the risks arising from mixed ethnicity

31. The Tribunal would summarise its conclusions from the background evidence as follows. We are not satisfied that the evidence shows that Ethiopians of Eritrean or part Eritrean ethnicity fall within a category which on that basis alone establishes that they have a well-founded fear of persecution. However, the Tribunal accepts that if the reality of the situation for an individual claimant is that he or she is effectively deprived of citizenship which leads to treatment which can properly be categorised as persecution then, subject to the other requirements of the Convention, there is a right to claim to refugee status. This is really no more than saying that the facts relating to each individual must be carefully assessed in the light of all the evidence.

32. The Tribunal was referred to the judgments of the Court of Appeal in *Lazarevic*. In his judgment, Hutchinson L J said:

> "If a state arbitrarily excludes one of its citizens, thereby cutting him off from enjoyment of all those benefits and rights enjoined by citizens and duties owed by a state to its citizens, there is in my view no difficulty in accepting that such conduct can amount to persecution. Such a person may properly say both that he is being persecuted and that he fears [continued] persecution in the future. I see no reason given the scope and objects of the Convention, not to accept Professor Hathaway's

formulation; and I am encouraged to do so by the fact that Simon Brown LJ cited it in terms which at least implied approval in *Ravichandran* [1996] Imm AR 97 at 107."

33. The point Hutchinson LJ sought to emphasise is that such behaviour can amount to persecution. The deprival of citizenship by itself is not necessarily persecutory. It is the consequences of the deprivation of citizenship which may in the particular circumstances of the case amount to persecution. If it leads to treatment which can properly be categorised as causing serious harm, it will amount to persecution. In summary, an effective deprival of citizenship does not by itself amount to persecution but the impact and consequences of that decision may be of such severity that it can be properly categorised as persecution.

34. One such consequence may be that if returned to Ethiopia there would be a risk of deportation or repatriation to Eritrea. Although the number of deportations has dropped drastically in recent years, there is evidence that they have not stopped altogether. The numbers are certainly very small in comparison with what they were between 1998 and 2000 and although some level of deportation remains, the Tribunal is not satisfied that is now a government policy of mass deportations and it must follow that there is now no real risk for persons of Eritrean descent generally of deportation on return. This does not mean that on the particular facts of an individual case a person will not be able to argue that there are specific reasons personal to him why he is at risk of deportation by the Ethiopian authorities.

35. The Tribunal accept that some Ethiopians of Eritrean descent remaining in Ethiopia may be at risk of persecution because of their ethnicity. This depends upon the individual facts of each appeal. Our conclusions in this respect follow on and are inevitably interlinked with our conclusions on the issues arising from the deprival of nationality. The Tribunal accepts that the risk categories identified by Mr Fripp are capable of giving rise to a claim under the Refugee Convention. We do not accept, however, that they apply as a matter of course to anyone who can show that he is an Ethiopian of Eritrean ethnicity albeit they may apply in the individual circumstances of a particular claimant.

36. Mr Fripp referred the Tribunal to *L (Ethiopia)*, *Amha and Amha* [2002] UKIAT 08171, *G (Ethiopia)* [2003] UKIAT 00091, *A (Ethiopia)* [2003] UKIAT 00113, *A (Ethiopia)* [2004] UKIAT 00046 and *W (Ethiopia)* UKIAT 00074. In none of these cases was the *Lazarevic*/deprivation of Ethiopian nationality point raised before the Tribunal or seen as having the legal effect argued for by Mr Fripp. Insofar as these cases relate to a risk on return to Ethiopia, they were decided on their own facts on the basis of the information put before the Tribunal. In our judgment that was the right approach. In any event even if one or more could be read as intending a more general position, those findings would depend on the country conditions as at the date of the hearings.

Entitlement to dual nationality

37. The Tribunal will now turn to the issue of whether if the claimants are at risk of persecution in Ethiopia, they do not qualify as refugees because they can look to

the Eritrean authorities for protection. The starting point is in the provision of Article 1(A)(2) of the Convention which provides that in the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

38. In the UNHCR Handbook paragraphs 106 and 107 read as follows:

> "106. This clause, which is largely self-explanatory, is intended to exclude from refugee status all persons with dual or multiple nationality who can avail themselves of the protection of at least one of the countries of which they are nationals. Wherever available, national protection takes precedence over international protection.
>
> 107. In examining the case of an Applicant with dual or multiple nationality, it is necessary however to distinguish between the possession of a nationality in the legal sense and the availability of protection by the country concerned. There will be cases where the Applicant has the nationality of a country in regard to which he alleges no fear, but such nationality may be deemed to be ineffective as it does not entail the protection normally granted to nationals. In such circumstances the possession of the second nationality would not be inconsistent with refugee status. As a rule, there should have been a request for and a refusal of, protection before it can be established that a given nationality is ineffective. If there is no explicit refusal of protection, absence of a reply within reasonable time may be considered a refusal."

39. Mr Fripp has referred the Tribunal to Hathaway, the Law of Refugee Status and in particular to pages 57-59. In this passage two points are made. The first is that a major caveat to the principle of deferring to protection by a state of citizenship is the need to ensure effective rather than merely formal nationality. It is not enough for a claimant to carry a second passport from a non-persecutory state if that state is not in fact willing to afford protection against return to the country of persecution. The second point is that dual nationality is not to be equated with the right to claim a second nationality. After referring to a case involving an apparent right to qualify for British nationality as well as Irish nationality in circumstances where the claimant had never been admitted to British territory outside Northern Ireland and gave uncontradicted evidence that entry into the United Kingdom had been refused to other persons similarly situated, Hathaway goes on to write as follows:

> "The dilemma here is a logical extension of the concern to ensure effective nationality before assessing the adequacy of a refugee claim: only the degree of risk in those states that are known to be obliged to allow the re-entry of the Claimant is relevant, as it is to one of those states that the putative refugee would in most cases be sent back if not admitted to the country of refuge."

40. In *Canada v Ward* the Supreme Court of Canada considered the issue of dual nationality. Mr Fripp submitted that the court drew a distinction between cases where it was clear that a person was in fact a national of a given country and situations which provided that a person had a right to apply for citizenship. He submitted that the question of obtaining protection in a given country would only be relevant with respect to those countries where the person actually had acquired citizenship at the date of the hearing. In our view this proposition cannot be drawn from the judgment of the court. La Forest J accepted that the appeal board must consider whether a claimant was unable or unwilling to avail himself of the protection of each and every country of nationality. When commenting on the benefits which flowed from Convention refugee status in Canada, La Forest J said: "None of these provisions requires assurance that the claimant has exhausted his or her search for protection in every country of nationality". We are not satisfied that the court was holding that a person entitled to a second nationality but who had not taken up that entitlement could not be regarded as having dual nationality. The comment deals with the extent of the evidential burden on a claimant holding dual nationality when assessing the ability of the country of second nationality to provide protection. It must also be read in the context of the court's view that a country should be presumed capable of providing protection for its nationals subject to rebuttal of that presumption by cogent evidence.

41. In the subsequent Canadian case of *Bouianova* judicial review was sought of a Board decision holding that a Latvian citizen was not a Convention refugee because she also held Russian citizenship and there was no evidence of persecution against her in Russia. It was argued that the applicant was not a Russian citizen because she had to apply to request that citizenship and have her passport stamped. Rothstein J held that the applicant, by simply making a request and submitting her passport to be stamped, became a citizen of Russia. There was no discretion by the Russian officials to refuse her citizenship. He did not think that the necessity of making an application which in those circumstances was nothing more than a formality meant that a person did not have a country of nationality just because they chose not to make such an application. The applicant by virtue of her place of birth was entitled to be a citizen of Russia. Having regard to the changes that had taken place in the former USSR there were obviously consequential new arrangements for citizenship in the countries formally comprising the USSR. Such arrangements entitled the applicant to be a citizen of Russia by filing an application and submitting her passport for stamping. That was sufficient to take her out of the category of "not having a country of nationality".

42. In *L (Ethiopia)* now styled *YL (Nationality – Statelessness-Eritrea-Ethiopia) Eritrea CG,* the Tribunal dealt with the application of *Bradshaw* stating in paragraph 44 as follows:

> "44. Since it is common ground that the Appellant is not yet recognised as a national of Eritrea, it may be asked why it is legitimate to even consider whether she is a national of Eritrea? Fortunately in order to answer this question we do not need to embark on an analysis of the complexities of nationality law. That is because, following

Bradshaw we consider it settled law that when a person does not accept that the Secretary of State is correct about his nationality, it is incumbent on him to prove it, if need be by making an application for such nationality. That is all the more necessary in the case of someone claiming to be a refugee under the Refugee Convention. Under that Convention, establishing nationality, or statelessness, cannot be left as something that is optional for the Claimant. The burden of proof is on the Claimant to prove his nationality (or lack of it). To leave it as an optional matter would make it possible for bogus Claimants to benefit from international protection even though in law they had nationality of a country where they would not be at risk of persecution – simply by not applying for that nationality. Furthermore, leaving it as an optional matter would render unnecessary key provisions of the definition in Article 1(A)(2) which require a person to be outside the country of his nationality or outside the country of his former habitual residence and which place special conditions on persons who have more than one nationality. As was said by Rothstein J in the Canadian Federal Court case of *Bouianova* a case dealing with statelessness, "the definition should not be interpreted in such a manner as to render some of its words unnecessary or redundant".

45. Bearing in mind that the burden of proof rests on the Claimant it is always relevant to enquire in such cases whether a person has taken steps to apply for the nationality of the country in question or, if they have taken steps whether they have been successful or unsuccessful.

46. We would accept that in asylum cases the *Bradshaw* principle has to qualified to take account of whether there are valid reasons for a Claimant not approaching his or her embassy or consulate – or the authorities of the country direct – about an application for citizenship or residence. In some cases such an approach could place the Claimant or the Claimant's family at risk, because for example it would alert the authorities to the fact the Claimant had escaped pursuit by fleeing the country. However, by no means can there be a blanket assumption that for all Claimants such approaches would create or increase risk. It is a matter to be examined on the evidence in any particular case. The UNHCR Handbook does not require a different position to be taken: paragraph 93 clearly contemplates a case by case approach."

43. In each case it will be an issue of fact whether a claimant is a national of a particular state. The issue is not so much whether the application for citizenship is determinative of status rather than declaratory of a pre-existing status; the relevant distinction is rather between situations where there is an entitlement to nationality as opposed to a possibility of a nationality being granted in line with a particular immigration policy. It is this distinction which was highlighted in Mr Fripp's rhetorical question as to whether a claimant should be barred from protection by an ability to apply as an aspiring immigrant to a country to which

he has had no previous connection. The answer to that submission is that in respect of those countries there is no evidence of entitlement to nationality.

44. In the present appeals there is on the face of the Eritrean legislation an entitlement to nationality. The situation in Ethiopia and Eritrea is similar in at least one important respect to the situation *Bouianova* where the constituent parts of the former USSR made new arrangements for citizenship. Following the establishment of Eritrea as an independent state within the territory of what had previously been the state of Ethiopia, both countries made provisions for citizenship. The claimants assert that they have been effectively deprived of their Ethiopian citizenship. The reason for this is their Eritrean background. If in fact they qualify for Eritrean citizenship and there are no serious obstacles to their being able to apply for and obtain such citizenship, there is no reason in principle why they should not look to the Eritrean authorities for protection. In our judgment it is not open to a claimant by doing nothing and by failing to make an application for citizenship to defeat the provisions of the Refugee Convention.

45. In summary the Tribunal is satisfied that if the evidence shows that a claimant is a national or is entitled to nationality of a country, the provisions of Article 1(A)(2) apply. He shall not be deemed to be lacking the protection of the country of his nationality if without any valid reason based on a well-founded fear he has not availed himself of the protection of that country. In most cases this will involve making an application for his nationality to be recognised. Putting it simply a claimant cannot decline to take up a nationality properly open to him without a good reason, which must be a valid reason based on a well-founded fear. A claimant cannot benefit from his own inaction unless that inaction has a proper basis because he is fearful of the consequences.

46 The Tribunal accepts that the protection offered by a state of second nationality must be "effective" as envisaged in the UNHCR Handbook and in *Jong Kim Koe* which endorsed a comment from Professor Hathaway's book that there is a need to ensure effective rather than formal nationality and that it is not enough that the claimant carries a second passport from a non-persecutory state if that state is not in fact willing to afford protection. It must therefore be a question of fact in each case whether a claimant has a nationality which will provide him with effective protection.

<u>The facts of the three appeals: the first claimant</u>

47. The Tribunal must now apply these principles to the facts of the three appeals before us. The first claimant was found not to be at risk in Ethiopia. It was for the Adjudicator to assess whether there was a real risk of deportation. She noted that the first claimant had had no problems until her husband was deported and that her mother and sister had not apparently been troubled despite being of Eritrean origin. She had family in Ethiopia, had not experienced trouble there previously, took no part in politics and did not vote in the referendum. In these circumstances the Adjudicator's findings and conclusions are properly sustainable on the evidence. She went on to find that the first claimant was

entitled to citizenship of Eritrea. She commented at paragraph 58 of her determination that, not having been refused protection of that country, she may be held to be a citizen. Certainly there had been no refusal of protection because there had been no application for citizenship. However, the Adjudicator was entitled to find that the first claimant was entitled to citizenship and she went on to find that in any event she would be at no real risk in Eritrea.

48. The only grounds of appeal on which permission was granted relate to the issue of whether the first claimant could reasonably be expected to look to the Eritrean authorities for protection and whether she would be at risk there. Removal directions were made to Eritrea. There was power in law to do so. The Tribunal is satisfied that the Adjudicator was entitled on the evidence before her to find that the first claimant could look to the Eritrean authorities for protection and would not be at risk of persecution there. As the Tribunal have already noted the Secretary of State has indicated that he is cancelling the removal directions for Eritrea and intends to set any future removal directions for Ethiopia. Mr Fripp was certainly unaware that this was the Respondent's intention until the beginning of the hearing. However, the Tribunal cannot ignore the fact that the Secretary of State no longer intends to remove this claimant to Eritrea. In these circumstances there is no purpose in the Tribunal assessing whether there would now be a risk on return to Eritrea. In summary the Adjudicator's conclusions were properly open to her on the evidence and on the basis that there will not be a removal to Eritrea the first claimant's appeal is dismissed.

The second claimant

49. The second case relates to the Secretary of State's appeal against the Adjudicator's determination allowing the appeal on both asylum and human rights grounds. The grounds essentially take issue with the Adjudicator's reasoning that the second claimant would be at considerable risk of deportation. The grounds refer to an authority which held that deportations from Ethiopia had stopped and argue that no adequate reason was given why those findings were not followed. As the Tribunal have already indicated we are satisfied that there is evidence albeit on a much smaller scale of deportation and repatriation between Ethiopia and Eritrea. The Adjudicator accepted the second claimant's version of events which he noted was corroborated not only by her own brother but by another witness. The Adjudicator came to the view that deportation to Eritrea could not be ruled out. It does seem to us that he based his decision on an assumption that all persons of Eritrean descent were at risk of deportation. On the contrary, he took into account the circumstances in which the second claimant had been detained, the fact that her father had been sent to Eritrea and that during a period of detention the second claimant had suffered ill-treatment which the Adjudicator clearly regarded as persecutory. The Tribunal is satisfied that the Adjudicator's reasoning is both clear and adequate. He has explained why he took the view that on the facts of this particular case there was a real risk of deportation. Removal directions are to Ethiopia and no issue is raised in the grounds that the second claimant could look to the Eritrean authorities for protection. Accordingly, the appeal by the Secretary of State is dismissed.

The third claimant

50. The Tribunal will deal briefly with the third appeal in the light of the indication that this claimant is to be granted indefinite leave to remain. The Adjudicator was not satisfied that there would be a real risk of persecution on return to Ethiopia. That finding was properly open to him on the evidence but the removal directions were to Eritrea. His reasoning when dealing with this issue is certainly confused, as highlighted by the Vice President when granting permission to appeal. There is no question of Eritrea being treated as a safe area of Ethiopia. The point made by the Secretary of State is that the third claimant was entitled to Eritrean citizenship and there was no reason why he could not look to the authorities in that country for protection. The findings made by the Adjudicator do not deal with that issue but with the consequences of being returned to a country where the third claimant had not previously lived. The Tribunal is satisfied that the Adjudicator did err in law by failing to deal adequately with whether there was a real risk of persecution or treatment contrary to article 3 on return to Eritrea. We would allow this appeal to the extent of remitting it for a fresh hearing on these issues but we also note the reality of the position that this appeal will be treated as abandoned on the grant of indefinite leave.

Decisions

51. In summary the appeal of the first claimant is dismissed. In relation to the case of the second claimant, the Secretary of State's appeal is dismissed. The appeal of the third claimant is allowed and remitted for a fresh hearing but will be treated as abandoned on the grant of leave.

H J E LATTER
VICE PRESIDENT