Asylum and Immigration Tribunal

SI (reported cases as evidence) Ethiopia [2007] UKAIT 00012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 18 May 2006	**On 06 February 2007**

Before

Senior Immigration Judge Storey
Senior Immigration Judge Moulden

Between

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr G Denholm, Counsel, instructed by J D Spicer & Co.
For the Respondent: Miss K Lonsdale, Home Office Presenting Officer

Subject to one exception, country guidance cases continue to give authoritative guidance on the country guidance issue(s) identified for so long as they remain on the AIT website as CG cases.
However, the AIT Practice Directions make clear that a country guidance case may be departed from by an immigration judge, albeit only in strictly limited circumstances relating to fresh evidence.
Typically cases reported as country guidance serve a dual role: they contain summaries of background evidence; they also assess or evaluate that evidence. The obiter observations of Keene LJ in RG (Ethiopia) [2006] EWCA Civ 339 *concerned reliance as evidence of the background situation in a country on adjudicator determinations (in the old two-tier system); these observations are not authority for the proposition that country guidance cases cannot be cited for the summary of background country evidence they often provide.*

By contrast, cases which have in the past been reported for what they say about country conditions but were never designated as CG, whilst citable in certain circumstances for the summary of background country evidence they contain, are not precedents. An immigration judge who relies on such cases, not simply for the summary of facts they contain but for their assessment of the facts, will err in law unless that assessment accords with pre-existing country guidance.
As the AIT system of reported cases has evolved, it is now likely to be very rare indeed that a case will be reported for what it says about country conditions unless it is reported as a CG-designated case.

DETERMINATION AND REASONS

1. The appellant is a national of Ethiopia. On 9 June 2005 the respondent made a decision to refuse to grant asylum and on 27 June 2005 a decision was made to remove her as an illegal entrant. Directions were proposed for removal to Ethiopia. She appealed. The basis of her claim was that she had been born in Ethiopia to a father of full Eritrean descent and a mother of mixed Ethiopian/Eritrean descent. She voted for Eritrean independence in the 1993 referendum. In May 1998 her father was detained by the Ethiopian authorities, and has not been heard of since. On 12 November 1999 she was detained with a view to being deported to Eritrea. She remained in detention for approximately six months, during which time she was ill-treated. She was raped on one occasion and was the victim of an attempted rape on a second occasion. In April 2000 her mother secured her release from detention by bribery. She was in hiding in Ethiopia until January 2001, when she travelled to Sudan. She remained in Sudan for one year before travelling to the UK on 1 January 2002. In 2003 she was diagnosed as HIV positive. She attributes her HIV infection to the rape.

2. The hearing of her appeal took place on 6 September 2005 before Immigration Judge A.D. Baker. In a determination sent out on 15 September 2005 she accepted that the appellant was a generally credible witness. Whilst accepting therefore that she had suffered past persecution in Ethiopia for a Convention reason, she did not consider that the appellant would be of adverse interest to the authorities now.

3. The grounds for reconsideration were threefold.

4. First, it was submitted that the Immigration Judge erred in concluding that the appellant was an Ethiopian national or, alternatively, in failing to have regard to all the relevant materials relating to the issue of her nationality.

5. Secondly, it was contended that the Immigration Judge failed to make proper findings about the appellant's claimed attempt to apply for an Ethiopian passport. The Immigration Judge had found the appellant's evidence with regard to her passport application made in London only 'partly credible' and had stated that although the objective evidence suggested the appellant 'may have difficulty obtaining a passport', this did not discharge the burden of proof in seeking to establish that she would not be allowed to return to Ethiopia.

6. Thirdly, issue was taken with the Immigration Judge's approach to guidance given by the Tribunal in reported cases. It was argued that the Immigration Judge had wrongly

based her decision on the Country Guidance case of DA (Ethnicity-Eritrean - Country Conditions) Ethiopia CG [2004] 00046, a decision notified on 16 March 2004. Her reliance on this case was said to be erroneous because there had been a subsequent reported case, MA and Others (Ethiopia – mixed ethnicity – dual nationality) [2004] UKIAT 00324 notified on 22 December 2004. The Tribunal in MA had before it new evidence in the form of expert reports from Mr Patrick Gilkes and Professor L. Cliffe and evidence from the Ethiopian Community Centre in the UK. Accordingly the Immigration Judge should have treated MA as superseding DA. The Immigration Judge was said to have made no reference to considering the more recent evidence contained in MA.

7. The grounds drew specific attention to what the Immigration Judge said at paragraph 58:

> 'I have considered whether there is anything in the more recent objective evidence to suggest that she would be at particular risk of adverse attention from the authorities. I can find nothing and was not referred to any changes in the situation in Ethiopia since the cases of [DA] and MA were decided.'

8. In relation to this paragraph the grounds argued that:

> '[c]ontrary to the Immigration Judge's assertion, at paragraph 58, there was further evidence of relevance which was not considered in [DA] notably the Amnesty material .. .and the evidence considered by the AIT in MA..'

Our Assessment

9. Turning to the first ground of reconsideration, for a number of reasons we do not accept that the Immigration Judge erred in finding that the appellant is a national of Ethiopia. First of all there was ample evidence before the Immigration Judge to show that the appellant met the criteria for automatic acquisition of Ethiopian nationality by virtue of her birth in Ethiopian territory and the fact that her mother held Ethiopian nationality (see for example her answers to Q4 and Q5 of the SEF interview). The fact that the appellant's father was accepted as having been born in Eritrea did not alter this state of affairs. As Mr Denholm himself conceded, Ethiopian nationality law made clear that a person born to an Ethiopian parent of either sex was entitled to Ethiopian nationality. There was no suggestion of dual nationality, which Ethiopian law formally precludes in any event.

10. Secondly, the appellant herself in the SEF form had stated that her nationality was Ethiopian. At paragraph 46 of her asylum interview she had said that she never considered herself as Eritrean. It was only in her most recent statement and in cross-examination that she had begun to maintain that she was of Eritrean nationality, and to argue that in previous interviews she had never said she was a national of Eritrea and never said her mother was Ethiopian. Bearing in mind these facts, it was entirely open to the Immigration Judge to find her earlier evidence was to be preferred on this point.

11. We would agree that the Immigration Judge did not expressly address the issue of whether the appellant would have been stripped of her Ethiopian nationality prior to her leaving Ethiopia. However, we do not think this omission gave rise to any error of law on the part of the Immigration Judge. For one thing the appellant herself did not claim that she had been informed of a decision to strip her of Ethiopian nationality. Her evidence was that, although she had never held an Ethiopian passport, she had held a school certificate and a local authority identity card and had voted in the 1993 referendum. She had also

been arrested and detained. Cleary therefore she was a person on whom official records were kept by the Ethiopian authorities and as such someone whom they would have had every opportunity to serve a notice on of a decision stripping her of Ethiopian nationality at any point up to her release from detention on payment of a bribe. For another thing, the background evidence on which Mr Denholm relied did not demonstrate that the state policy at that time of stripping Ethiopian nationality from some categories of persons of (or perceived as being of) Eritrean ethnicity was done without any form or order of notification. The contrary evidence (as cited in paragraph 28 of MA) included the following:

> '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 residency permits'.

12. To reiterate, there was nothing to suggest that this appellant had received such an order to register. Hence the objective evidence did not demonstrate that the Ethiopian authorities had stripped this appellant of her Ethiopian nationality.

13. As to the second ground of reconsideration, we see no error in the Immigration Judge's conclusion that the appellant's evidence about her attempt to obtain a passport from the Ethiopian Embassy did not demonstrate a genuine attempt to obtain Ethiopian nationality. At paragraph 56 the Immigration Judge stated:

> 'The appellant's evidence with regard to the passport is partly credible. I agree with Ms Lloyd that the passport application has not been marked and would not appear to have been officially considered. It is not reasonably likely that a receptionist would have made a decision on whether or not a passport was to be issued and the appellant in her own evidence stated that she did not want Ethiopian nationality and had gone to the embassy on her solicitor's advice. if her solicitors had made contact with the embassy I would have expected there to be some reference to that in the papers. Whilst the objective evidence suggest that she may we have difficulty obtaining a passport, I do not find that this is proof to the required standard that she would not be allowed to return to Ethiopia."

14. As we pointed out to Mr Denholm, the form the appellant had filled in even described her as Eritrean. Mr Denholm was unable to show that the appellant's solicitors had contacted the embassy or pursued a formal application. We think that the Immigration Judge was quite entitled to find for the above reasons that the appellant had not taken adequate steps to apply for and obtain Ethiopian nationality.

15. Mr Denholm sought to argue that, even if the appellant were seen as not having taken adequate steps to apply for an Ethiopian passport, the objective evidence showed that someone in her position would be unable to obtain an Ethiopian passport, since she had been, and would again be, treated by the Ethiopian authorities as someone of (mixed) Eritrean ethnicity and as someone who had voted in the 1993 referendum. However, in the first place we do not think that the Immigration Judge hinged her assessment of risk on return wholly on the appellant being accepted by the Ethiopian authorities as an Ethiopian *national.* What she said was that 'I do not find this is proof to the required standard that she would not be *allowed to return* to Ethiopia' (emphasis added). The distinction is of some importance in view of the lack of evidence that this appellant, whilst still in Ethiopia, had been ordered to apply for registration as an alien and in view of the evidence contained in both DA and MA that in any event Ethiopia accords rights of residence to certain categories of non-nationals.

16. Be that as it may, we consider that the evidence before the Immigration Judge sufficed to show the appellant would be regarded as a national of Ethiopia by the Ethiopian authorities. To reiterate, she was a person who had an entitlement to Ethiopian nationality under Ethiopian law, by virtue of her mother's Ethiopian nationality.

17. We also reiterate the following point. Whilst it is true that there was expert evidence stating that persons who had voted in the 1993 referendum were told that they would be stripped of their Ethiopian nationality, nothing of the kind had been told to this appellant, even though they had chosen to detain her on account of her Eritrean ethnicity. We would also note at this juncture that Mr Denholm did not seek to demur from the general conclusions reached in MA; indeed he sought to rely on them.

18. That brings us to the third and final ground for reconsideration, which attacked the Immigration Judge's approach to the Tribunal's guidance on the situation of Ethiopians of mixed Eritrean ethnicity. She was said to have wrongly followed the Tribunal country guidance (CG) case of DA in preference to a subsequent reported case, MA. We do not think that this point gets off the ground. It depends on the contention that the Immigration Judge was wrong to follow DA since that decision had been superseded or at least significantly modified by the later reported case of MA in view of the further evidence which was before the latter. (It was not in dispute that at the date of hearing DA was listed on the AIT website as a CG case. It was also clear that MA has never been a CG case).

19. The argument here misunderstands the status of cases which are designated as 'CG'. In relation to such cases the Asylum and Immigration Tribunal Practice Directions April 2005 state that:

> "18.2 A reported determination of the Tribunal or of the IAT bearing the letters 'CG' shall be treated as an authoritative finding on the country guidance issue identified in the determination, based upon the evidence before the members of the Tribunal or the IAT that determined the appeal. As a result, unless it has been expressly superseded or replaced by any later 'CG' determination, or is inconsistent with other authority that is binding on the Tribunal, such a country guidance case is authoritative in any subsequent appeal, so far as that appeal:
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> (a) relates to the country guidance issue in question; and
> (b) depends upon the same or similar evidence.
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> 18.3 A list of current CG cases will be maintained on the Tribunal website. Both the respondent and any representative of the appellant in any appeal concerning a particular country will be expected to be conversant with the current 'CG' determinations relating to the country.
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> 18.4 Because of the principle that like cases should be treated in like manner, any failure to follow a clear, apparently applicable country guidance case or to show why it does not apply to the case in question is likely to be regarded as grounds for review or appeal on a point of law."

20. Mr Denholm's argument wrongly implies that a CG case cannot be affected by fresh evidence. On the contrary, the Practice Directions recognise that a CG case may be departed from by an Immigration Judge, albeit only in strictly limited circumstances: where in relation to the issue on which guidance has been given there is evidence which is not the same or which is not similar. This is pertinent because it seems to us that the

Immigration Judge fully recognised that the later MA decision contained fresh evidence relevant to the country issue raised by the facts of her case.

21. Plainly, therefore a country guidance case should continue to be treated as an authoritative finding on the country guidance issue(s) identified until it is removed from the AIT website list of CG cases. If a case remains on the website as a CG case, it continues to furnish country guidance unless a later case expressly supersedes or replaces it as CG. That does not, however, prevent that case not being followed on a relevant issue if, in the context of a particular case, there is fresh evidence compelling a different view, albeit "[t]he wider the risk category posited the greater the duty on an Immigration Judge to give careful reasons [for not following a CG case] based on an adequate body of evidence" (MK (AB & DM confirmed) Democratic Republic of Congo CG [2006] UKAIT 00001).

22. There is a very limited exception to this principle. It does not arise in this case, but we mention it here for completeness. If a case designated as country guidance (CG) is subsequently found by the higher courts to have been wrong in law because it is considered that the Tribunal's approach to the assessment of the *facts* was legally flawed, then the effect is that it was never right to follow its guidance (see OM (AA1 wrong in law) Zimbabwe CG [2006] UKAIT 00077).

23. We should perhaps also clarify at this point that a new *decision* of the Tribunal (whether of the old IAT or the AIT) is not of itself fresh evidence. If the decision in question is a reported one, that will generally be (to use the language of the Explanatory Notes to the previous IAT Practice Direction CA3 of 2003 on Citation of Cases) because it contains guidance as to the law or the facts, or both (a new principle of law or a matter of real and generally-applicable guidance to parties or assessment of facts of such generality that others ought to have regard to it). However, when the reported decision (whether CG or non-CG) is one reported for what it says about country conditions, it will often contain a summary of the background evidence, including the most recent evidence. Given the relative frequency with which country reports are updated, it would be odd if it were otherwise. This is a common occurrence. In this way, but in this way only, new reported decisions of the Tribunal can also be useful as a source of fresh evidence.

24. We emphasis this seemingly obvious point so as to lay to rest a misunderstanding which appears to have arisen in the context of a recent judgment in the case RG (Ethiopia) [2006] EWCA Civ 339. Although the point made is obiter, Keene LJ stated at [37]:

> "It follows from these and other authorities that, while a decision must show to the losing party why he has lost, it most certainly need not deal with all the evidence placed before the decision-maker. That must especially hold good when one is dealing with background material dealing with conditions in the country from which an asylum seeker has come. Such material is often voluminous and it would place an intolerable burden on adjudicators to expect them to refer expressly to all the relevant factual material. It is of course, a long-established principle of administrative law that it is not to be assumed that a decision maker has left a piece of evidence out of account merely because he does not refer to it in his decision. One also needs to bear in mind that the decision of an Adjudicator is not binding on other adjudicators: it is a decision simply reflecting the evidence before him, evidence dealing necessarily only with the situation in the country in question at a particular moment in time. Indeed, *even the IAT's decisions in cases not categorised as "Country Guidance" cases are not to be cited as evidence of the background situation in a country: Eshete [2002] UKIAT 01963*." [emphasis added]

25. Eshete was a determination of the IAT chaired by Mr J Freeman, then a Vice President. We do not know if Eshete was produced in full before the Court of Appeal in RG (Ethiopia). We suspect that all that may have been produced was the reference to it at paragraph 18.141 of Macdonald's Immigration Law & Practice (6th Edition). In any event the Court has apparently simply misunderstood its meaning since Eshete clearly does not assert that "even the IAT's decisions not categorised as 'Country Guidance' cases are not to be cited as evidence of the background situation in a country". In Eshete the IAT was faced with a submission (relating to the Mengistu regime in Ethiopia) *based on the decision of another adjudicator*. Eshete was written at a time when the Immigration Appellate Authority was a two tier system, with adjudicators on the first tier and the Immigration Appeal Tribunal on the second-tier. As the Tribunal noted, not only had a recent practice direction forbidden the citation of adjudicator decisions, but:

> "3. The decision in question is Tekleabe (CC 51192/99): the adjudicator was Ms AC McGavin. Mr Williams very frankly acknowledged that it was not based on any background evidence as to risk faced by family members of Dergue officers, but on a finding as to the credibility of the individual case, which was different from the present one in a number of ways. It concerned a much older lady, who had herself been a treasurer of the Mengistu party women's association, and involved with AAPO [All Amhara People's Association] since the fall of the Dergue. Though no doubt it was a decision the adjudicator was entitled to reach on the facts of the individual case, we do not think it shows any general risk for family members of Mengistu officers.
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> 4. It sometimes happens that adjudicators are asked to consider a whole raft of favourable decisions on appellants from the country in question which the industrious practitioner concerned has managed to secure from their colleagues. (The unfavourable ones are allowed to pass into obscurity). We do not consider this a proper practice: even though the decisions are being relied on as fact, not law, the adjudicator who wrote them will have had no opportunity of independent verification of the facts, as enjoyed by the various government and international organizations whose reports are familiar in these cases.
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> 5. If the decision which was to be relied on is based on background evidence, then that evidence itself should be produced; if not, it is no reliable guide to the general situation. While there may be a limited place for referring adjudicators to previous decisions on close family members or comrades of an appellant, where the findings of fact may have some actual bearing on the individual case concerned, *we do not think that adjudicator decisions should ever be cited as of general application, on the facts any more than on the law*."

26. Manifestly Eshete was not addressing the issue of the propriety of reliance on reported *IAT* decisions for their summaries of factual material. It was talking about *adjudicator* decisions. Furthermore, both the Practice Directions in force at the time and Tribunal case law had fully recognised the value of some reported decisions of the Tribunal not only as guidance on country conditions but also as containing summaries of factual evidence. In addition it would be very strange indeed for there to be any legal principle effectively preventing evidence of the background situation in a country from being admitted simply because it was contained within a legal decision. Of course, when contained in a legal decision it is one stage further from the source and is necessarily hearsay. Furthermore, since facts are decided by the evidence, it is important for the fact-finding Tribunal not to proceed as if it thought that facts were to be found in law books. For this reason, when reported cases are relied on as evidence, there may often be a need for the Tribunal to insist on the production of the original sources themselves – country reports, expert

reports and the like. But reported decisions of the Tribunal can generally be taken to contain accurate summaries of such items of evidence. Not to allow such summaries to be admitted into evidence would be likely to engender unnecessary and unwieldy bundles of documents. If a party to Tribunal proceedings considers that an IAT or AIT quotation from or summary of the background country materials is inaccurate, then it is open to that party to demonstrate this.

27. Having clarified this general point, we turn to the issue of whether the Immigration Judge failed to have regard to the fresh evidence contained in MA. We do not think there was any such failure on her part in this determination. At paragraph 47 she recorded Mr Denholm's submission that "whilst MA was not a Country Guidance case, it was more recent and contained a detailed analysis of the related country evidence." At paragraph 53 she accepted that:

> "MA is not a Country Guidance case but was decided post [DA]. It was accepted in that case that there was evidence of some continuing deportations but the numbers had dropped drastically in recent years. The IAT was not satisfied that the objective evidence showed that Ethiopians of Eritrean or part Eritrean ethnicity fell within a category which on that basis alone established that they had a well-founded fear of persecution. However, they accepted 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 refugee status."

28. It is clear from the context in which she set out her reasoning that at this point she was indeed taking into account the further evidence contained in MA.

29. At paragraphs 54 and 55 she adopted further conclusions drawn by the IAT in MA.

30. At paragraph 59 she then turned to consider what evidence there was post-dating both DA and MA. She concluded:

> "I have considered whether there is anything in the more recent objective evidence to suggest that she would be at particular risk of adverse attention from the authorities. I can find nothing and was not referred to any changes in the situation in Ethiopia *since the cases of [DA] and MA were decided*" [emphasis added]

31. Accordingly we consider that the Immigration Judge properly applied the Practice Directions. She properly recognised that in order to assess the appellant's case, she had to consider the DA case on the basis that there had been significant new evidence dealt with in MA, as well as some post-MA evidence. Further, she properly viewed the state of the evidence as it had developed as continuing to vindicate DA's assessment that persons of Eritrean ethnicity would not generally face risk on return to Ethiopia.

32. One question which might be asked in this context is whether any legal error arises from the fact that the Immigration Judge's reliance on MA was not simply for the summary it contained of further evidence, but also for that case's assessment of the evidence. The question is pertinent in this case because we think it clear that she did rely on MA for its assessment as well as for its summary of new evidence. Obviously if the assessment in MA had reached conclusions contrary to the existing CG case (DA), she would have erred in law: unless designated as CG, reported cases are not binding on country guidance issues. However, in our view MA, insofar as it consisted in assessment of the evidence, did not differ from the assessment in DA. Hence such reliance was not legally flawed. In any case,

nothing turns on this point in this case, since the only legal error asserted was failure to follow MA for what it contained by way of evidence.

33. For the above reasons we conclude that the Immigration Judge did not materially err in law and accordingly her decision to dismiss the appellant's appeal must stand.

Signed Date

Dr H H Storey
Senior Immigration Judge