Asylum and Immigration Tribunal

MA (Disputed Nationality) Ethiopia [2008] UKAIT 00032

THE IMMIGRATION ACTS

Heard at Field House
On 10 September 2007

Before

SENIOR IMMIGRATION JUDGE STOREY
SENIOR IMMIGRATION JUDGE ALLEN
MR M G TAYLOR CBE

Between

MA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Fripp, instructed by North Kensington Law Centre
For the Respondent: Ms L Giovannetti and Mr R Kellar, instructed by the Treasury Solicitor

DETERMINATION AND REASONS

In any case of disputed nationality the first question to be considered should be: "Is the person de jure a national of the country concerned?". This question is to be answered by examining whether the person fulfils the nationality law requirements of his or her country. Matters such as the text of nationality laws, expert evidence, relevant documentation, the appellant's own testimony, agreement between the parties and Foreign Office letters may all legitimately inform the assessment. In deciding the answer to be given, it may be relevant to examine evidence of what the authorities in the appellant's country of origin have done in respect of his or her nationality.

If it is concluded that the person is de jure a national of the country concerned, then the next question to be considered is purely factual, i.e. "Is it reasonably likely that the authorities of the state concerned will accept the person, if returned, as one of its own nationals?".

This decision replaces MA (Ethiopia – mixed ethnicity – dual nationality) Eritrea [2004] UKIAT 00324

1. The appellant was born in Ethiopia to parents of Eritrean ethnicity. The question of her nationality has been a matter of some uncertainty and difficulty throughout the time she has been in the United Kingdom: we shall deal with the specifics later in this determination.

2. She arrived in the United Kingdom on 24 March 1999 and claimed asylum on arrival. Her application was refused in a decision of 4 July 2001 refusing leave to enter. At that time removal directions associated with that decision were for Eritrea.

3. The appellant appealed against that decision to an Adjudicator, Dr M S W Hoyle, who heard her appeal on 4 March 2002. He noted that the essential account given by her to the Immigration Officer was that she was married and was born in Addis Ababa and was a Muslim and her current nationality was Eritrean. In further detail to the Home Office she said that she feared return to Ethiopia and Eritrea. She and her husband were of Eritrean nationality but had been living in Ethiopia. She said that her husband was a member of the Eritrean Liberation Front (ELF) and as a result was deported from Ethiopia to Eritrea. She herself was not then deported because she was at the time in Dire Dawa where she had gone to give birth in February 1999. She feared that if she went to Eritrea she would, like her husband, be jailed because of his ELF membership. If she went back to Ethiopia she would be deported to Eritrea. When she had gone from Dire Dawa to Addis Ababa her neighbours told her the authorities were looking for her to deport her to Eritrea.

4. The appellant in a witness statement before the Adjudicator said that her parents had come to Ethiopia from Eritrea before her birth. She had never lived in Eritrea. Her main language was Amharic. She understood some Tigrinya, the language spoken in Eritrea, but did not speak it herself, and was easily identifiable as someone from central Ethiopia or Addis Ababa.

5. She said that she had never considered herself to be an Eritrean national as opposed to someone of Eritrean ethnic origin resident in Ethiopia and Ethiopian by nationality. She had never been issued with any ID card, passport or any other documents by the authorities of independent Eritrea, nor had she contributed money to related causes or taken part in community activities in Addis Ababa supportive of independent Eritrea. She confirmed to the Adjudicator that she had an Ethiopian passport. When she was asked about nationality she said that the answer she gave to the Immigration Officer in the United Kingdom was that she was of Eritrean origin. The Adjudicator commented that she gave him the impression in the way that she answered the question that she did not understand that she had had her nationality noted as Eritrean. In cross-examination she acknowledged that she had left Ethiopia with a valid Ethiopian passport in her name and had used it to gain access to Kenya. She had not claimed asylum in Kenya because the person with her had told her he would take her to a safe place. She had not known she was going to the United Kingdom. She had last seen her Ethiopian passport when she gave it to the person who had helped her. He had left her at immigration in England and did not come back.

6. The Adjudicator considered her claim in the context of return to Eritrea. He found that on the evidence before him the appellant was entitled to Eritrean nationality. He

did not consider that the appellant would face a real risk of persecution or breach of Article 3 on return to Eritrea. Her husband had not told her he was in the ELF and there was no evidence that he was nor, if he were, at what level he was in that organisation. Background material did not support an assertion that ELF members per se would face a real risk of persecution or breach of Article 3 on return or that unmarried partners of such people would face such a risk either. The Adjudicator noted that the appellant had held a validly issued Ethiopian passport on which she travelled out of her country of residence through Kenya to the United Kingdom. He considered that the background material did not support the assertion that an Ethiopian citizen, albeit of Eritrean nationality who was born in Addis Ababa and had never been to Eritrea nor taken any part in Eritrean independence activities, would face a real risk of persecution or breach of Article 3 on return.

7. The appellant sought permission to appeal to the Immigration Appeal Tribunal. The Vice President who considered the application commented that it appeared clear that the appellant had no connection whatsoever with Eritrea beyond the fact that her parents were of Eritrean origin. He also noted that as she had been issued with an Ethiopian passport it would appear that she was a citizen of that country but there was no proposal for her removal there but rather to Eritrea. He considered that there were arguable issues as to the proposed destination.

8. The Immigration Appeal Tribunal considered the matter on 12 June 2002. At paragraph 3 the Tribunal said that it appeared that the Adjudicator was misled into thinking that it was sufficient for him to decide whether the appellant had a well-founded fear of persecution in Eritrea, the country to which the Secretary of State proposed to remove her. The Tribunal commented that the appellant's status as a refugee or not must depend upon whether she could establish a well-founded fear of persecution in Ethiopia, the country of which she appeared to be a national. Despite the fact that the removal directions were for Eritrea it was considered that the appellant's status as a refugee, by reference to her country of nationality, was likely to be a crucial part of assessing her claim. The Tribunal further commented that with one reservation concerning the Adjudicator's statement that the background material put in to support the case was not specific to the appellant was incorrect, otherwise entirely endorsed what he said in setting out his approach to the evidence which had been put in deriving from the expert Mr Gilkes. The Tribunal ordered that the appeal be considered afresh by a different Adjudicator.

9. The fresh hearing took place on 9 October 2002 before the Adjudicator Mrs Woolley. The Adjudicator found the appellant's evidence credible allowing for misunderstandings which could arise in interpretation. She accepted that the appellant's husband was arrested and deported to Eritrea taking into account the background country evidence, and accepted that the appellant's in-laws and her son were presently there also. She accepted, taking into account the appellant's age, inexperience of travel and likely state of confusion at the time particularly bearing in mind recent childbirth, that she would not have queried handing her passport or travel documents of whatever nature to the person who brought her to the United Kingdom, and might well have done so. The nature of the documents was not explored at the hearing.

10. In considering the appellant's nationality, the Adjudicator accepted that when in the asylum interview the appellant claimed to be Eritrean there could have been a misunderstanding over this and she may have meant "of Eritrean blood" especially taking into account problems that could arise with interpretation. She noted that in the original notice of appeal the appellant claimed to be Eritrean and the grounds said it was doubtful as to which she was and it was unlikely either would take her back. In her subsequent appeal she claimed to be a national or former national of Ethiopia.

11. As regards Eritrea, the Adjudicator noted that the removal directions were to Eritrea. No attempt had been made by the appellant to obtain a passport or travel documents from the Eritrean or Ethiopian embassies. She concluded on the evidence before her that the appellant was entitled to citizenship of Eritrea, it seems essentially on the basis that Eritrean nationality was available to those born in Eritrea or born abroad if either of their parents was of Eritrean origin. The Adjudicator said that even if the appellant's husband was a member of the ELF, and this was uncertain, there was no evidence whatsoever that he was high profile and would now be of interest to the authorities there. The appellant 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. It appeared that returning members of the ELF who had held high profile positions in the ELF and had taken part in activities considered to be of a terrorist nature would experience problems but not other ELF members and none of this appeared to apply to the appellant's husband. The Adjudicator did not think that there was a real risk that the appellant would be deported to Ethiopia were she to be sent to Eritrea, and that she would be accepted in Eritrea.

12. As regards Ethiopian nationality, the Adjudicator found on the evidence that the appellant was also Ethiopian, basing her views essentially on the evidence of Dr Poole. She did not accept that the appellant faced a real risk of persecution or breach of her Article 3 rights on return to Ethiopia.

13. The appeal having been dismissed, the appellant again sought permission to appeal to the Immigration Appeal Tribunal. The Vice President who considered the application identified two particular issues of significance. The first of these was the issue of whether the appellant had Eritrean nationality (as well as Ethiopian) or whether she merely had the de jure right to apply for it, and the second issue was whether she would be protected by the authorities there. Permission to appeal was accordingly granted.

14. The matter came again before the Immigration Appeal Tribunal on 9 August 2004. It was heard together with two other cases and subsequently became a country guidance case, **MA and Others** (Ethiopia – mixed ethnicity – dual nationality) Eritrea [2004] UKIAT 00324.

15. The Tribunal was not satisfied that the 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. The Tribunal accepted however that if the reality of the situation for an individual claimant was that he or she was effectively deprived of citizenship which led to treatment which would properly be categorised as persecution then, subject to the other requirements of the Convention,

there was a right to claim refugee status. The Tribunal referred to the judgment of Hutchinson LJ in **Lazarevic** [1997] 1 WLR 1107 that if a state arbitrarily excluded one of its citizens, therefore cutting him off from enjoyment of all those benefits and rights enjoined by citizens and duties owed by a state to its citizens, then there was no difficulty in accepting that such conduct could amount to persecution. The Tribunal commented that the deprival of citizenship by itself was not necessarily persecutory but it was the consequences of the deprivation of citizenship which might in the particular circumstances of the case amount to persecution. If it led to treatment which could properly be categorised as causing serious harm, it would amount to persecution. One such consequence might be that if returned to Ethiopia there would be a risk of deportation or repatriation to Eritrea. The Tribunal was not satisfied that there was now a government policy of mass deportations and it must follow that there was now no real risk for people of Eritrean descent generally of deportation on return though this did not preclude an individual in a particular case being able to show that there were specific reasons personal to him putting him at risk of deportation by the Ethiopian authorities. Again depending upon the individual facts of each appeal it might be shown that some Ethiopians of Eritrean descent remaining in Ethiopia might be at risk of persecution because of their ethnicity.

16. The Tribunal went on to consider whether, if the claimants were at risk of persecution in Ethiopia, they did not qualify as refugees because they could look to the Eritrean authorities for protection. In the course of discussion the Tribunal considered what had been said in **YL** (nationality – statelessness – Eritrea – Ethiopia) Eritrea CG [2003] UKIAT 00016 quoting the relevant paragraphs as follows.

> "44) Since it is common ground that the appellant is not as yet recognised as a national of Eritrea, it may be asked, why is it 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* [1994] Imm AR 359, 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 also 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 Art 1A(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 *Tatiana Bouianova v Minister of Employment and Immigration* [1993] FCJ No 576, a case dealing with statelessness, "[t]he definition should not be interpreted in such a manner as to render some of its words unnecessary or redundant."
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> 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 be 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 that the claimant has 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 1979 UNHCR Handbook does not require a different position to be taken: paragraph 93 clearly contemplates a case-by-case approach."

17. In each case it would be an issue of fact whether a claimant was a national of a particular state. In the present appeal there was, on the face of the Eritrean legislation, an entitlement to nationality. As regards the particular appellant, the only grounds of appeal on which permission had been granted related to the issue of whether she could reasonably be expected to look to the Eritrean authorities for protection and whether she would be at risk there. The Tribunal was satisfied that the Adjudicator was entitled, on the evidence before her, to find that the appellant could look to the Eritrean authorities for protection and would not be at risk of persecution there. The Tribunal noted that the Secretary of State had indicated that he was cancelling the removal directions for Eritrea and intended to set any future removal directions for Ethiopia. Since the Secretary of State no longer intended to remove the appellant to Eritrea there was no purpose to the Tribunal assessing whether there would now be a risk on return there. The Tribunal concluded that the Adjudicator's conclusions were properly open to her on the evidence.

18. The appellant thereafter sought permission to appeal to the Court of Appeal. Permission was granted by the Tribunal on the basis of issues relating to Eritrean citizenship and whether the Tribunal should have addressed the issue of risk in Eritrea. The appeal was allowed on 1 February 2006 on the basis that the appeal was remitted to the Asylum and Immigration Tribunal with the direction that it consider only the appellant's asylum and human rights appeals on the basis of proposed removal to Ethiopia. At a hearing on 9 November 2006 it was clarified that the subsequent hearing would be a stage two hearing, the error of law effectively having been identified in the order of the Court of Appeal. At a hearing on 16 January 2007, as a result of discussions with the representatives, the Tribunal issued a memorandum clarifying the issues that would be before the Tribunal and making a number of directions.

"**MEMORANDUM TO THE PARTIES**

We have decided to adjourn the hearing fixed for today in view of the fact that the respondent had not had sight until today of the appellant's expert reports or skeleton argument. However, we are grateful to the representatives for assisting us in seeking to clarify the issues needing to be addressed at the full hearing. As a result of discussions with the parties the following are agreed:

The Factual basis
The Adjudicator's findings of fact relating to the appellant's personal history and experiences were found to be sustainable by the Tribunal in *MA* and are to be treated as the factual basis upon which this second-stage reconsideration will proceed. However such findings are not to be taken as including those relating to her (claimed loss of) nationality, as that are clearly a disputed matter.

The removability question
Our understanding is that the respondent has cancelled the original removal directions, which were made to Eritrea, and replaced them with removal directions to Ethiopia. Whilst the need for such directions is not a matter for us, we have been tasked by the Court of Appeal with considering only 'the Appellant's asylum and human rights appeals on the basis of the proposed removal to Ethiopia'. Accordingly the respondent is expected to clarify whether removal of this appellant to Ethiopia would only be proceeded with if she were found to be a national of Ethiopia or whether it would be proceeded with on some other statutory basis.

Relevant Ethiopian law
In determining the issues relating to Ethiopian nationality which arise in this case, the relevant Ethiopian law is:

(i) the Ethiopian Nationality Law 1930 (formally repealed in 2003);
(ii) the Ethiopian Constitution, 1995;
(iii) the Proclamation on Ethiopian Nationality No 378/2003 (23 December 2003);
(iv) The Directive of January 2004.

In the absence of any specific indication by the parties to the contrary, we shall assume this to be the relevant legal framework.

The legal principles
(i) Arbitrary exclusion from, or deprivation of, nationality can amount to persecution ('the *Lazarevic* principle');
(ii) If exclusion from, or deprivation of, nationality is persecutory in nature, then persecution arises.
(iii) Exclusion from, or deprivation of nationality which is persecutory in nature will generally mean that the persecution is by reason of a Refugee Convention ground of nationality. If the appellant is able to show a well-founded fear of persecution in this case, the Tribunal is prepared to accept that it would be persecution for such a Refugee Convention reason;
(iv) In order to show she is a refugee/is at real risk of serious harm (under para 339C of Cm6918) or of ill treatment contrary to Article 3, it is necessary for the appellant to show she faces a current risk. The principal focus, so far as determining her nationality is concerned, is also on her current nationality or her current entitlement to Ethiopian nationality under Ethiopian law;
(v) Even if the appellant cannot be removed to Ethiopia for practical reasons she is entitled to a decision on whether her removal would be

> contrary to the United Kingdom's obligations under the Refugee Convention, or the Human Rights Convention or would be not in accordance with paragraph 339C of the amended immigration rules (Cm69128).

In the light of agreement on these principles we see no purpose to any further submissions covering the above.

The issues

It is agreed that the appellant qualified as a national of Ethiopia under the 1995 Constitution by virtue of her birth in Ethiopia. She is only no longer a national of Ethiopia is something has happened to deprive her of it.

1) The first main issue is therefore whether by operation of Ethiopian law the appellant has lost her Ethiopian nationality. The sub-issues which arise here include whether those of Eritrean background effectively lost their nationality in 1999 by failing to register with the Ethiopian Security and Immigration Refugee Affairs Authority; whether the provisions of the 2003 Proclamation preserve Ethiopian nationality for such persons so long as they have not taken active steps to acquire another nationality; and whether the provisions of the 2004 Directive do not preserve Ethiopian nationality for those who have not taken active steps to acquire another nationality.

1A) Assuming the appellant has lost her Ethiopian nationality by operation of Ethiopian law, then the next issue is whether that deprivation gives rise to a well-founded fear of persecution. Examination of that issue will need to cover both the position of the class of persons of Eritrean background who have lost their nationality by operation of Ethiopian law and sub-categories of persons who have additional characteristics which may give rise to risk (e.g. a political profile, a history of deportation, relatives who have been deported etc).

1B) A possible sub-issue arising here is whether a person of Eritrean background with a history of having lived in Ethiopia as an Ethiopian national but who has now lost Ethiopian nationality may nevertheless be able to return as an alien and reside in Ethiopia under the yellow card system.

2) The second main issue, which only arises if the appellant is found not to have lost her Ethiopian nationality, is whether she would still face a real risk on return by virtue of the removal process, seen as encompassing both dealing with the Ethiopian Embassy in the UK (seeking to obtain a passport or travel document) and with the situation that would face such a person if returned and any relevant risk factors (e.g. onward deportation is suggested by the appellant's representatives to be one such a factor).

Directions

We indicated to Mr Fripp that we would be greatly assisted if steps were taken by the appellant's representatives to obtain a report separate from those already before us, ideally one from Cedric Barnes, such a report to cover both the general issues we have identified and the issues particular to this appellant's history and circumstances (as found by the Adjudicator).

We indicated to Ms Brown that we would be assisted by action being taken on the part of the respondent to make enquiries of the Ethiopian Embassy in London consisting in the following questions:

Questions to the Ethiopian Embassy:

1. If a person is an Ethiopian national under Ethiopian nationality law, but of Eritrean background, will he now be entitled to Ethiopian nationality?

2. Would a person who was born and lived in Ethiopia until 1999 and then left and who is of Eritrean parentage, his parents having been Ethiopian nationals at the time of his birth, now be entitled to an Ethiopian passport or other recognition of Ethiopian nationality?

3. What are the requirements (apart from proof of identity) for such a person (see Question 2) being able to obtain an Ethiopian passport or other recognition of Ethiopian nationality?

4. Since 1999 and particularly since January 2004, has your Embassy granted or issued any such person in the UK (see Question 2) with an Ethiopian passport or travel document?"

19. The appeal was heard by us on 10 and 11 September 2007.

20. Mr Fripp referred to the second witness statement of Anne Scruton of the Border and Immigration Agency, together with the fax from Sylvia Rosenbaum of the International Organisation for Migration (IOM) and the attached email of Mr Ajeti also of the IOM. Mr Fripp argued that given the late production of these documents they should not be allowed in as evidence, but if they were then permission should be granted for them to be put to the expert Herr Schröder for him to comment.

21. Ms Giovannetti said that the fax from Ms Rosenbaum and the email from Mr Ajeti were not put in because they were relied on but to exhibit what was said in order to be fair to the appellant and to present the fullest picture to the Tribunal. The second paragraph of Ms Rosenbaum's statement in fact did not assist the Secretary of State at all. There was no question concerning the appellant's IND card in this case, but it would have been improper to keep it back. Therefore they properly asked for Mr Ajeti's views. It was mainly a problem for the Secretary of State and therefore Ms Giovannetti would object to further expert evidence from the appellant's side. What was relied on from the IOM was in and attached to Ms Scruton's first witness statement and could have been objected to at any time.

22. After consideration we concluded that we would proceed with the evidence as it was before us. We saw no good reason either to exclude the most recent evidence or to adjourn so that Herr Schröder or any other expert could consider it.

The Evidence of Mr Beaumont

23. Ms Giovannetti then proceeded to call her witness, Nigel Beaumont of the Returns Group Documentation Unit (RGDU) of the Border and Immigration Agency. Mr Beaumont had put in two statements, the first dated 19 July 2007 and the second dated 6 September 2007. He had read through them both again and had nothing to clarify or amend. Statement two represented a degree of clarification in itself. At paragraph 10 of his first statement there were identified a number of cases where emergency travel documents (ETDs) had been issued by the Ethiopian authorities. These were samples, as on removal the unit did not keep the file. They were taken from a sample of some 20 to 25 cases where it was agreed the person was to be removed. The others had not had mixed parentage. These examples were consistent with his working experience.

24. Mr Beaumont had brought with him and produced copies of an Ethiopian laissez passer, and of the bio data form completed by or on behalf of applicants and the bio data forms for the people listed at paragraph 10 of his first statement.

25. Mr Fripp was content for these documents to be put in, subject to copies being provided.

26. As to the stage in the claims process where Mr Beaumont's job linked in, applications came to his unit usually when appeal rights had been exhausted and there was no barrier to removal. It was done then, as he understood it, as it would be illegal to remove a person while they had an outstanding claim in the United Kingdom. It could be different with the new asylum model as those were received after the initial appeal.

27. Applications would come to his unit and were computerised and the appellant would be sent with a letter to the relevant embassy. In the last two or three months they had had an agreement with the Ethiopian Embassy as was set out at paragraph 6 of his first statement that, where the criteria set out there were met, a person could be removed on the basis of an EU letter where there was conclusive supporting documentation. The EU letter was a one way travel document. When a person was removed on an EU letter, it was for immigration control in the country in question to carry out any further checks that they might have and if they found that the person was not of that nationality the United Kingdom would accept them back. This was part of the EU letter process. It had only been a pilot so far and they only did it when they were confident about the documents. He agreed that there should not be a need for checks where a person was subjected to the process of an interview and the embassy issued a laissez passer. In such circumstances again there was an agreement that they would be taken back if they were not accepted and again this would be at the United Kingdom's expense.

28. The Ethiopians had confirmed that they were content to accept laissez passers for older cases if a person had got a laissez passer before and then made a further appeal. There were also cases where they had applied for a laissez passer before the EU letter agreement. The cases listed at paragraph 10 of the first statement were fresh claims made after an ETD application had been made. The unit did not withdraw the travel document application but would not remove until the barriers to removal had gone. The Ethiopians only interviewed people on two days in a week. Interviews could be scheduled some three or four weeks in advance. After the

interview the unit would contact the embassy on the next day to get the result and they would give a verbal confirmation. A formal confirmation was not needed. The unit would contact the case owners to set the removal directions and fix the flight and would collect the travel documents from the embassy usually after about five days and they would get the documentation a couple of days before the flight.

29. He was asked whether he was surprised about the fact that the appellant's solicitors had written to the Embassy to confirm her situation and had had no reply and nor had the Treasury Solicitor. Mr Beaumont said it could depend on the embassy in question. They had links with a good number of embassies and good relations with most. There had been a change some three or four months ago at the Ethiopian Embassy and that could explain why there were a few problems as the person who had come in was new to the role. Mr Beaumont had met this person and he was very cooperative with his unit.

30. On cross-examination Mr Beaumont was asked by Mr Fripp whether he knew about Ethiopia returning anyone sent to that country. He said that the unit would normally be told. The case owners would tell them if there was a problem with a removal, and the unit would ask the embassy what had happened. If it was an escorted removal they would give a report to say why the person was refused entry. He was not aware of this happening with Ethiopia. He had been in his job since April 2004 and had been concerned with Ethiopia for the last two years as one of the countries for which he had responsibility. He was unaware of any failures with the use of the EU letter. It was dealt with by a different department, but it was rare to have problems if a laissez passer was issued.

31. About 80 people worked in his unit. He was responsible for about twelve countries. Before April 2007 the unit had eight country teams each of which was responsible for five or six countries. There were about 59 countries in total. He had been responsible for two teams. In April 2007 they had reorganised when the former ISDU became the RGDU and was split into three larger teams which were, broadly speaking, concerned with particular continents. He had been asked to go on the African team. There were four separate teams within that, each responsible for five to six countries. He covered two of those smaller teams and Ethiopia was in one of them. In total they were Algeria, Zimbabwe, Sudan, Rwanda, Gambia, Ethiopia, Angola, Eritrea, the Ivory Coast, Senegal, Egypt and Liberia. He agreed that there had been a lot of Zimbabwean, Sudanese and Eritrean cases recently. He was asked what proportion of the overall cases of the two teams were Ethiopian. He said that each team had two or three larger countries and the Ethiopian team also had the Ivory Coast and Angola. It was one of the busiest countries in terms of cases and there were a number of applications received in that team for emergency travel documents. There had been a recent drop in numbers since the EU pilot letter project, as the unit did not deal with those but they were dealt with by RESCU which was a separate department which would book flights for removals and work on pilots including EU letters. He could outline their processes but could not say at first hand what they did.

32. He was asked how many Ethiopians applied for asylum and said he did not know. He could find out the numbers received in the last two months. They had only begun to keep statistics of numbers received around two and a half years ago from about

December 2005. Therefore he could not say about the number of Ethiopians or people of Ethiopian and Eritrean heritage. They did not record that information for their statistical purposes but could only give the cases that he had given as cases which they had.

33. He was asked whether he could say when the people in question came to the United Kingdom. He said no, the RGDU would not deal with that but only the details on the emergency travel document application. With regard to the nature of their claims, he could only say something about that if he looked at the files. His unit did not disclose the fact of an asylum claim or a criminal conviction in the United Kingdom, but they could not control embassy interviews. The embassies were aware of their policy in that regard.

34. As to who would carry out the interviews, he was told by their contact there that there would be a panel of three or four embassy officials with varying functions. It was one of the higher numbers of interviewers of the countries of which he knew. A lot would do telephone interviews only, and it could be an Immigration Officer would be available to answer questions that the embassy official had. If they interviewed in person then it would usually be one to two people. It was not usual for anyone from his department to attend such interviews. Occasionally they might: if there was a specific project then a person from the RGDU could be present. Usually it would just be embassy staff. There could be escorts and there could be an Immigration Officer but usually no-one from his unit and certainly not from his department. He was asked about whether it would be different if there were a pilot project and he said, yes. He could not recall this ever happening with Ethiopia. His unit had always had this process in place up to the EU pilot letter scheme. He could not say what proportion of cases was dealt with in that way as his unit did not handle the EU letter cases.

35. He was asked whether physical returns to Addis Ababa were also within his responsibility. He said the flight booking would be done by RESCU. He thought the escorts were usually Group 4 security people. There would be a risk assessment of each individual. This would be the same with medical escorts. He believed that Group 4 were contractors but his unit were not involved with arranging it, though they got the documentation. He was not personally aware of people who had been returned to Ethiopia and then sent back on ETDs without looking at their records or in decided cases. Usually they would be told of such cases so they could pursue them with the embassy. He was not aware of any cases in this regard concerning Ethiopia.

36. His unit did not deal with voluntary returns. Assisted voluntary returns (AVR) dealt with those. This was the unit of which Ms Scruton was Acting Head. Mr Beaumont's unit dealt with what was considered enforced removal. A removal could switch from them if it became voluntary. The IOM would help such people sometimes. He was unaware of any such cases involving Ethiopians. The IOM dealt with Ms Scruton's department. It would be possible for figures to be provided about the number of people rejected by the Ethiopian Embassy, but they did not give a reason except that they did not accept they were Ethiopian. He could not say how often that happened. He was referred to the laissez passer form that he had provided and said it had been filled out and stamped by the Ethiopians. It was suggested to him that the fact that it

referred to the transitional government of Ethiopia at the top left suggested that it was quite an old document and he said he did not know and it was the one currently used. They spoke to the embassy and they got the document. He agreed that the main facts were those as set out in the cases at paragraph 10 at statement 1 and that information was mainly taken off the bio data form. It was completed by the appellant or on their behalf if they were non-compliant which was often the case, from information they had given.

37. On re-examination Ms Giovannetti asked Mr Beaumont, with regard to the details at paragraph 10 of the first statement, whether there was any further information other than what was contained there about any of these cases. He said there was only such information for case 1. He had been asked to give the date of the Ethiopian passport issue and he had got that and it said 17 June 2005 and case number 23463 on the pass but was issued on 15 September 1992. For case 27915 the passport was issued on 21 June 2005. His unit was not concerned with whether it was a current passport or not but with whatever documentation was likely to help get a travel document, and there would be records the Ethiopians could check. He was asked whether he knew if anyone could get statistics about the family background of people who had been rejected for emergency travel documents. He was not aware of this. He said it could be that the statistics department held such information but he doubted it. Mainly such information would be likely to be on the individual person's paper file. He was asked whether there were any underlying reasons behind a person being rejected simply because the Embassy did not accept a person was an Ethiopian national. He said that no such information would be given by the Ethiopians. They would say they were not persuaded or the person was not very compliant at interview and did not want to be removed and would not comply so as to avoid removal, and they could be told that the person had given no information. If that happened then they went back to the case owner to try and provide any supporting evidence they might have. He was asked whether they could get them documented if there was no supporting evidence and the person said they were Eritrean. He said no, they did not have documents about Eritrea. There was nothing they could do with that. It would be possible to go for an assisted voluntary removal with financial help on return or if there were a need to return urgently.

38. We asked Mr Beaumont whether there were differences between the procedures adopted by his unit and those of the AVR. He said that, if there were an enforced removal, the person would be escorted to the plane and there could be an escort on the flight also. Usually the airline staff were given the travel documents. There would be no direct contact between his unit and the appellant. The case owners and the embassy dealt with that kind of issue. We asked him how his unit would find out whether there was a change of policy direction in the Ethiopian Embassy, for example with regard to the issue of the EU letters. He said that his unit liaised with the International Delivery Directorate and their Special Operations Unit and they tried to set up return agreements with various countries setting up memoranda of understanding. They had close relations with the Foreign and Commonwealth Office. His unit had learned that the Ethiopians would accept EU letters.

39. We asked Mr Beaumont whether ever anything other than Ethiopian would be put as the nationality on a laissez passer and he said he would not have thought so. The bio data forms contained the information taken from what the appellant had said and

not from what the Home Office said. The person would complete it, although it would be based on information that they had previously given. His unit would not tend to submit the form if the person did not say they were Ethiopian, as it would just annoy the embassy. It could be completed on their behalf, based on the information they had given earlier and they could put a covering note or sheet with the form. There was also the possibility of prosecution under Section 35 for non-compliance which could be held out as a threat. A person could not be allowed to stay just because they refused to give information. We asked him about the IND card and he said he thought it was the ARC card used by asylum seekers in the United Kingdom to get benefits, based on the nationality they claimed to have on entry to the United Kingdom. He was asked how the embassy would get to see it and he said it could be information used by the IOM to get information from the embassy.

40. We asked him what the new EU letter procedure would entail with regard to new cases that his unit got and whether they would no longer ask for laissez passers. He said that if the person had good supporting evidence and was of Ethiopian nationality RESCU would deal with them. The EU letter cases never came to his unit. But if there were no such evidence, the application would come to them and they would go through the interview process. The embassy would not interview EU letter people, but they would be interviewed by an Immigration Officer when returned to Ethiopia. The IND card could be the same as a landing card in a particular case.

41. Mr Beaumont was asked about people who could seek to frustrate the process and give a different nationality, for example in the new bundle he had put in today at page 8, where there was reference to a person whose nationality was recorded as Ethiopian on the bio data form, though they were said to claim to be Eritrean. He was asked whether it was worth sending such a form to the Ethiopian Embassy if there was this contrast. He said that they had a copy of the Ethiopian passport in that case so there was good supporting evidence, and a travel document had been issued. With regard to page 1 of that bundle, he reiterated that he had never seen an Ethiopian laissez passer saying anything other than that the person was of Ethiopian nationality. It was the case that if there was not good supporting evidence then the case would come to his unit rather than being an EU letter case. He was asked whether if there was no supporting documentation it helped if in the bio data form he could say for example when the passport had been issued. He said not so with regard to Ethiopia, as they interviewed, but it could help with some countries. With Ethiopia it was mainly a question of what happened at the interview and that would determine what the embassy would do.

42. On re-examination by Mr Fripp Mr Beaumont confirmed that his team did not sit in on interviews and very little information was given to them by the embassy. They would not therefore know if the person was cooperative or not. The embassy could possibly tell them. With regard to the database he referred to, the RDS system, there were no fields with regard to such matters as parentage and family details. The situation from December 2005 was local to his unit and before that they did not count the number of applications or details. There was a system under which the whole of the United Kingdom Immigration Service could access SID which was a very large database.

43. The Special Operations Section in the International Delivery Directorate might have changed its name. They dealt with questions of policy and assisted his unit with the documentation process. He was asked whether there was any formal document setting out the basis of the agreement with regard to the EU letter. He said there might be but he was not aware of a formal document with the Ethiopians. There were memoranda of understanding with other countries and they usually referred to documentation processes. They would include such matters as timescales and documentation expectations etcetera. He was not sure when the bio data forms were usually completed. He thought that under the new asylum model it was at the time of the claim and it was kept, but only went to his unit after the initial adverse decision. This went with the ETD applications and this was fairly standard information.

Submissions

44. This concluded Mr Beaumont's evidence. Ms Giovannetti was able to clarify in respect of the IND card that this was the ARC card referred to by Mr Beaumont and it was given to a person when they claimed asylum and this would entitle them to benefits.

45. Mr Fripp referred to pages 1 to 4 of the supplementary bundle and also 5 to 6 concerning the documentation seeking information on behalf of both sides from the Ethiopian Embassy. In each case there had been no further attempt to chase a response and no response to either party.

46. Ms Giovannetti was also able to clarify that, since 1 December 2005, 166 applications had been submitted to the Ethiopian Embassy up to today's date, and fourteen had been rejected as not Ethiopian. There was no breakdown of these figures.

47. In his submissions, Mr Fripp was content to accept those figures without further enquiry. He accepted that Appendix A to the Secretary of State's skeleton was a fair summary of the appellant's history and claim. With regard to item U, he understood the appellant to have been to both embassies, and there was a witness statement with regard to her visit to the Ethiopian Embassy. The Adjudicator had found that she had family in Ethiopia and left when the deportations were continuing.

48. The first issue was whether the appellant had lost her nationality by operation of Ethiopian law. It was common ground that she possessed de jure nationality. Mr Fripp accepted that, before 1998, the appellant was entitled to Ethiopian nationality under the 1930 Ethiopian Nationality Law and, after 1995, she was entitled under the 1995 Ethiopian constitution, Article 6. Article 33 of the same constitution gave protection against arbitrary deprivation of nationality. Ethiopia had not accepted dual nationality with any other country. Mr Fripp noted that this question was raised before the Eritrea/Ethiopia Claims Commission (the Commission) as to whether a post-1993 memorandum to the states entailed that a person opting for Eritrean nationality under Eritrean law lost their Ethiopian nationality. This remained an open

question, as the Commission had concluded it was impossible to judge the status of the memorandum. But no proper steps had been taken by Ethiopia to deal with the bar on dual nationality. However, there was no need to tackle the dual nationality issue, as the appellant had done nothing to opt for Eritrean nationality, for example by participating in the referendum. As she had evident de jure entitlement to continuing Ethiopian nationality, she was a national of Ethiopia.

49. The only problem was the attitude of the Ethiopian authorities. War broke out in May/June 1998, and after that the Ethiopians had a project of removing the nationality of many of their citizens if they were partly or wholly of Eritrean background. The evidence tended to show a campaign against people who were entirely or partly Eritrean nationals, or of that regional background, as, for example, could be seen in the Human Rights Watch Report at Section E2, Section (iv). This campaign had been marked by arbitrariness, and there had been no due process. They were not Ethiopian nationals, but were said to be Eritrean nationals, and this was said to be the case by Ethiopia. It was questionable whether this was so arbitrary that people who were not Eritrean were swept up in this. Often, heads of family were seized initially and there was pressure on their dependants to follow them. It was close to compulsion.

50. As of 2003, more than two years after the end of the war, none of the deportees had been permitted to return from Eritrea, and the Human Rights Watch Report again dealt with this. In his report, Mr Gilkes made the point that the criteria for judging those affected by the policy were quite indiscriminate, for example possession of Eritrean documentation would suffice. This included family origin, and it could be as little a connection as one Eritrean grandparent. The procedure was relatively unplanned and quite chaotic and arbitrary.

51. Mr Fripp referred to the standard of proof employed by the Commission and argued that it had been very high and that also the limited mandate of the Commission should be borne in mind. Although the appellant perhaps retained de jure entitlement to Ethiopian nationality, de facto that had been terminated as she was a member of a class whose rights had been thus terminated. The nature of nationality in international law went beyond de jure nationality, as could be seen from the **Nottebohm** case (Second Phase) [1955] ICJ Rep 4, and this was referred to at page 15 of Mr Fripp's skeleton. The 2004 Directive, at paragraph 2, limited its ambit to people who were in Ethiopia in June 2004, having been there continuously since 1993.

52. Mr Fripp argued that, though **EB** (Ethiopia) [2007] EWCA Civ 809 did not present a direct factual precedent, deprivation of nationality, if arbitrary and a decision of the executive alone and for a Convention reason, was sufficient to amount to persecution. Mr Fripp argued that the application of the 2004 Directive to Determine the Residence Status of Eritrean Nationals Residing in Ethiopia ('the 2004 Directive') was quite limited, and that this was supported by what was said by Professor Cliffe, Mr Gilkes, Herr Schroeder and Mr Barnes. The protection of Article 33 of the 1995 Constitution and protection against arbitrary deprivation was nugatory, as could be seen in the Commission report, so it was necessary to look at the reality and practice and not the position on paper. Mr Barnes' evidence was relevant in this regard. Mr Beaumont had been unable to assist as to what happened in the interviews at the

Ethiopian Embassy, except with regard to the decision. It was not possible to say whether the cases to which Mr Beaumont referred had remained in Ethiopia between 1993 and 2004 and would therefore benefit from the 2003 Proclamation and the 2004 Directive. The IOM evidence was very ambivalent. In any event, the IOM was involved only in voluntary returns, and was unrepresentative of the position across the board. Whether or not the appellant had de jure nationality was irrelevant if the evidence tended to show a de facto refusal. The matter required to be considered against all the background evidence, including the Ethiopian attitude to Eritrean residents since 1998. On the **EB** approach, there was a de facto deprivation of nationality. The evidence of the experts supported the argument that rights attaching to nationality were widely withheld in Ethiopia in cases concerning people of Eritrean background. The risk factor of the appellant's husband being an ELF member should be borne in mind, and also the references in the Human Rights Watch Report to the numbers of people who had been involved in removals from Ethiopia on account of Eritrean ethnicity.

53. Mr Fripp argued that cases would be very fact sensitive. The evidence showed the arbitrary nature of the actions of the Ethiopian government in victimising people, and the expert evidence bore this out. If a person was of Eritrean descent then it was fact sensitive and relevant if there was nothing adverse and they had had a continuing presence in Ethiopia during the war, but usually there would be problems if a person had at least one Eritrean parent.

54. With regard to the question of whether a person would be persecuted if returned on the basis that they were not an Ethiopian national under the yellow card scenario but had a history of birth and residence there, Mr Fripp argued that they would face a continuing deprivation of nationality and a lack of the attached rights to which they were entitled under Ethiopian law. As had been held by the US Supreme Court in **Trop v Dulles** (1957) 356 US 86, even an alien had some rights. But, on return to Ethiopia, such a person would not be in that position, as they would suffer a lack of due process or rights as an alien in Ethiopia. Herr Schroeder's evidence at page 89 was relevant to this. So, even if the appellant got to Ethiopia, she would be at risk of persecution. It was accepted that an alien in Ethiopia with a history of residence would not be at risk, but this should be contrasted with the position of a non-national who was not entitled to nationality, as, in that case, there would not be an entitlement to all the rights of a citizen of Ethiopia.

55. In her submissions Ms Giovannetti reminded us firstly of the fact that there has to be a current well-founded fear of persecution, and that although an arbitrary deprivation of nationality for a Convention reason might amount to persecution, that would not always necessarily be the case. It would in most cases however, as it would amount to serious harm. It was argued however on behalf of the Secretary of State though that on the evidence relating to the appellant it could not be put higher than that the appellant at some point in the past faced a risk of arbitrary deprivation of nationality.

56. The decision in **EB** was very much on its own facts. It did not say that Ethiopians of Eritrean family or ethnicity would in general be deprived of their nationality. The critical findings of fact were at paragraphs 8, 9, 11 and 12 and also at 62 and 63. The crucial finding there was that active steps had been taken to deprive the appellant of her nationality. There were serious consequences arising from the loss

of nationality even if the appellant in **EB** could go back as had been said, and there was no rebuttal evidence.

57. With regard to the instant appeal, it was clear that the appellant had de jure Ethiopian nationality. There was no identifiable provision of Ethiopian law under which she could have lost her nationality and nor was there any identifiable executive or administrative act to the effect that she was not an Ethiopian national. The same was true with regard to de facto nationality. There was no clear evidence that the Ethiopian authorities would refuse to accept her as an Ethiopian national or that they had ever done so. They had not taken away her documents and had not deported her.

58. The appellant's case was based mainly on expert evidence to the effect that the Ethiopian authorities would not accept an Ethiopian national of Eritrean parentage. The essence of that evidence was at page 9 of Professor Cliffe's report. It could be that what Professor Cliffe said there was very specific about being granted citizenship, as that was not what the Ethiopian Embassy did: it did not grant passports but one would get travel documents only. There was clear evidence from the IOM that, as long as a person said they wanted to go back to Ethiopia and could show that they were de jure an Ethiopian national, they would be documented as an Ethiopian national and would be returned. The thrust of the expert evidence was anecdotal. It should be borne in mind that an asylum seeker or human rights claimant was very likely not to want to return. Mr Beaumont had said in his evidence that it was much easier if a person wanted to go back. It was right to say, as Mr Fripp had, that there was no corroboration, but that cut both ways, as it was as likely that people were uncooperative as it was that the Ethiopians acted arbitrarily. Mr Beaumont's evidence was inconsistent with any Ethiopian practice of granting travel documents to people they did not accept as Ethiopian nationals. His first report was in particular relevant to paragraphs 4 and 7 to 9. He had said that the Ethiopians might give a person travel documents if they did not accept nationality, but this would be exceptional. It was clear in the round that the effect of the laissez passer was to confirm nationality. The IOM documentation was consistent with that. Mr Ajeti's letter was also relevant. More importantly, this was inconsistent with the proposition that the Ethiopian Embassy would reject a person if of Eritrean heritage. Professor Cliffe's point was not right, given the IOM's evidence.

59. From Mr Beaumont's evidence it could be seen that there were 166 applicants since December 2005 and only fourteen had been rejected as not being Ethiopian. It was necessary to look at the statistics in the light of the cases set out at paragraph 10 of Mr Beaumont's first statement. As he had explained, he looked at twenty or so files currently in the unit and found eight which contained an element of Eritrean origins and they were a variety of cases. The results of his survey were completely inconsistent with the anecdotal evidence that being of Eritrean ethnicity meant deprivation of nationality.

60. It was significant, Ms Giovannetti continued, that the IOM evidence was consistent with the Home Office evidence. The IOM was independent, though it had some Home Office funding, but it was clearly very anxious to be, and to be seen to be, independent and impartial. This was demonstrated by the fact that they had shown they were initially unhappy to give information and also the fact that they had

eventually notified Ms Scruton about the problem case. If the appellant went to the Embassy then the same would be the case. It was clear that they would consider the nationality on the IND card. However a newer IND card could be issued bearing in mind that the Home Office knew that the appellant was Ethiopian and that that was her claim also. There was also one of the cases in Mr Beaumont's list where the person had claimed to be Eritrean but had been given documentation for Ethiopia. Mr Beaumont had good relations with the Embassy and it was highly likely that the matter could be sorted out as on the evidence it could not safely be concluded that the appellant would be rejected on the basis of an IND card alone.

61. This tied into another point, namely that if a country refused to recognise a person as a national if they were genuinely not satisfied that he or she was not a national then this would not be arbitrary and would not be persecution. Reference was made to the decision in **Chen** in the bundle as an example of a case where it could be very difficult to get confirmation of nationality. If a state was not satisfied that a person was a national then it was entitled to refuse to issue documents, and the word "arbitrary" was relevant.

62. Mr Beaumont's evidence was also consistent with what the appellant said. From Appendix A(j) to the skeleton, it could be seen that this was part of the appellant's accepted evidence that she had never considered herself as an Eritrean national as opposed to someone of Eritrean ethnic origin resident in Ethiopia and Ethiopian by nationality. It could not be explained why, if the appellant genuinely wanted Ethiopian nationality to be recognised and believed that they would turn her down that she would go to the embassy and say she was Eritrean and had come for an Ethiopian passport, which was her evidence in the statement. Mr Fripp had not chosen to call the appellant to speak to this and what she said had not been qualified in any way. Mr Fripp had submitted that before the first Adjudicator the appellant had said she was not Eritrean but meant that she was of Eritrean blood. That was five years ago and the circumstances were very different now. She had not suggested that her statement was a mistake. She did not say she was Ethiopian of Eritrean background. There was a lot of anecdotal evidence and claims that there had been rejections. It was hardly surprising given that she had been told to go the Eritrean Embassy and she had only spoken to the receptionist. As Mr Fripp said, she had done this for the purpose of the litigation only and there had been no point in going earlier for the reasons he gave. The appellant said that she was at risk of persecution on the grounds of deprivation of nationality, so why had she not asked for the passport she was entitled to months ago? Whatever the Home Office said, she had said she was Ethiopian all along.

63. As regards the evidence as to what had happened in Ethiopia between the 1990s and 2000, Ms Giovannetti accepted that there was some risk, at some point in the past, of arbitrary deprivation of nationality. On the evidence properly analysed, even that had been a low risk. The most helpful document was the Commission report. Ms Giovannetti referred to the relevant paragraphs in that report. With regard to dual nationals they had been accepted as being of Eritrean nationality also. Though the standard of proof employed by the Commission was high, if read as a whole it was quite clear that there were areas where the Commission had felt that the evidence simply did not come up to proof, for example at paragraph 72, and paragraph 157 was another example of this. The erroneous identification of individuals was not the

same as an arbitrary process done simply because of family background. The references in this regard in **EB** at paragraph 5 and also at paragraph 75 of the Commission report were relevant. Paragraph 75 did not deal with people in the appellant's position but "yellow card" people. The appellant had had nothing to do with the referendum so that had no bearing on this case. So a possible risk of erroneous deprivation of nationality in the past for the appellant was not a real one as she would not have been someone likely to be deported. It would have been arbitrary had it happened and currently she was a de jure Ethiopian national and there was no evidence of a real risk of refusal as such, as long as she cooperated in the process. If she did not cooperate then she would perhaps be refused an emergency travel document. She had held an Ethiopian passport before, as could be seen from Dr Hoyle's determination where he had simply recorded her evidence.

64. Mr Fripp said that it was accepted that the appellant had travelled on an Ethiopian passport in her name but he was told it had been obtained for her by an agent and it had been used for exit from Ethiopia. It was not conceded that she necessarily had an Ethiopian passport properly issued and it was known that it was not issued to her.

65. Ms Giovannetti argued that there was no acceptable evidence that a person with an Eritrean family background in Ethiopia was persecuted, unlike the situation in **EB** where there had been previous persecution. She referred to the Operational Guidance Note at pages 112 to 113, paragraphs 3.82, 3.83 and 3.88. Mr Fripp had not taken the Tribunal to any evidence showing that a person of an Eritrean family background was currently at risk in Ethiopia. His case was essentially that there was ill-treatment some years ago and the general human rights situation in Ethiopia was problematic and there were reports of increased Ethiopian/Eritrean tension as seen in Mr Barnes' evidence and what the BBC said, but with regard to the former that had been a year earlier so it was nothing new and not a real risk and it was a matter of speculation only. The Commission report was at the heart of Ms Giovannetti's submissions. The Commission had reviewed a mass of evidence, having set out the evidence it reviewed at page 8. Human rights organisations sometimes were less than critical in their approach. Especial weight should be attached to this report. There must have been a lot of documentation and evidence from a lot of people on both sides. By contrast the evidence of the experts provided on behalf of the appellant was largely anecdotal.

66. The ambit of the 2004 Directive was not really central to Ms Giovannetti's case. She accepted what was said by Mr Barnes that it was unclear what the ambit of the Directive was. On the continued residence point this was referred to under the heading of "objective" and it was unclear if that defined the effect of the Directive. On its words it was capable of applying to people such as the appellant. But in any event it was argued on behalf of the Secretary of State that the appellant did not need to reapply for nationality as she had not been deprived of it. Mr Fripp accepted that she was an Ethiopian national though his argument was that there was nothing to justify application of the law denying her. The appellant had not lost her nationality. The lack of documentation did not preclude her meeting the requirements of Ethiopian nationality law. Even if she could not, it would not be arbitrary but it would be justified and legitimate. It would mean that they could not be satisfied that she was an Ethiopian national.

67. As regards the reference to **GH**, the situation in that case was different as there were practical problems preventing return which were nothing to do with actions by the receiving state. It was not a case of a refusal, but of obstacles and dangers. So it would not be appropriate to leave out the difficulties of return, the question was what would happen if the appellant got there. It was not enough if a person could not get a passport but they would also need to show persecution on return. **GH** was mainly directed to the question of whether the mechanics or route of return would put a person at risk, in contrast to this case. Ms Giovannetti agreed with Mr Fripp that it had little bearing on this case. As regards the pure hypothetical approach which had been touched on in **EB**, it was suggested by Longmore LJ at paragraph 70 that it was not necessary to look at the situation on return but at paragraph 71 there was the key question of the hypothetical approach and this was a difficult decision to understand in this regard. Paragraph 75 perhaps had to be read in the light of the earlier paragraphs in Longmore LJ's judgment as to why deprivation of nationality was usually persecution, and therefore the court had looked at whether there were clear findings of arbitrary deprivation of citizenship. The reasoning was brief as the court had decided there was past persecution.

68. The appellant was a de jure Ethiopian national and on the evidence before the Tribunal there was nothing to show any substantial risk that the Ethiopian authorities would refuse to acknowledge that in a de facto sense. If she cooperated she would be recognised as a national by the Ethiopian authorities in the United Kingdom, and there was no reason to believe it would be different on return. The purely hypothetical approach was not urged on the Tribunal but it should make findings of fact as to whether the evidence demonstrated a practice of arbitrary refusal of recognition of nationality of an Ethiopian national of Eritrean background, in the United Kingdom. It would be risky to adopt the purely hypothetical approach given what was said in **EB**. **EB** focussed on the real not hypothetical chance of deprivation of nationality and that was the proper approach for the Tribunal. As regards what was said in Mr Fripp's skeleton about **IK** and the question of whether a person was expected to lie at interview, it was a matter of the Tribunal having to predict what an individual would say or do if asked, and Mr Fripp might say that a lot could depend on what the appellant said about her husband's background etcetera. There was no material to show that this would be determinative at all, even if she told the truth, but in any event her case was not that her nationality would not be recognised on account of her links with her husband, but that she had been or would be deprived of her nationality on ethnic grounds. The only relevant question was whether she would tell the truth about her parents' nationality and equally as to where her husband was born and whether he was Eritrean. There was no evidence that what she said would make any difference.

69. As to the question of what rights non-Ethiopian nationals who were Eritrean would have, if the Tribunal agreed with Mr Fripp that the 2004 Directive only applied to continuing residents, then Ms Giovannetti argued that the Tribunal should find that there was no clear evidence. There was however the reference at paragraph 3.8.2, which had to be a reference to people who did not come within that interpretation of the Directive, as they had been repatriated. Mr Barnes and others said there were no reports of ill-treatment of Ethiopians of Eritrean background. That was not the same as saying they possessed a bundle of rights, but what was said in **EB** and the bundle of rights that went with citizenship should be borne in mind. There was no

evidence that the appellant would be able to vote in such circumstances or get a travel document to come and go, insofar as those were central. There was no evidence that she would not be able to work or access state benefits and it should be questioned whether what she would be denied amounted to persecution or serious harm.

70. The respondent's case was not however put on that basis. It was argued that she would get a travel document and would not be treated as a non-Ethiopian. If she cooperated, her de jure nationality would be recognised and she would go back as such. There was no evidence as to how she would get a passport, but nationality being recognised helped.

71. Mr Fripp clarified that he was not saying that if the appellant was recognised de facto as an Ethiopian national and returned, she would per se face a relevant risk on return or thereafter.

72. Ms Giovannetti referred to what was said in the OGN about evidence of returns from Sudan and Eritrea of people of Eritrean origins to Ethiopia. She argued that that together with the Directive and the 2003 document tended to show a far more positive approach on the part of the Ethiopian authorities to people of Eritrean family background. There was a consistent increase in recognition of rights and openness to returnees.

73. By way of reply, Mr Fripp addressed first of all paragraph 3.8.2 of the OGN. The appellant was not an Ethiopian facing adverse action in Eritrea. As regards paragraph 3.8.3, it was difficult to see from where the Eritreans referred to were being repatriated and it was assumed it was from Eritrea. He agreed with Ms Giovannetti that there was no need to consider hypothetical return though it had been done by the Court of Appeal in **EB** in a belt and braces way. A de facto deprivation was the basis, and paragraphs 71 and 75 in that decision were important. Regard should be had to the decision in **Lazarevic** and to the Canadian cases referred to in his skeleton. A person denied nationality who nevertheless had every benefit of a national would nevertheless be suffering from persecution. That would not be persecutory in itself, but the nature of the deprivation had to make it persecutory and there were questions of process and legality and it was not a matter of consequences. It was very extreme but probably the answer was no. The majority in **EB** had not wanted to go on and consider hypothetical returns. Insofar as they did, once the prior findings had been reached, they were able to deal with it quite swiftly. The pure hypothetical approach was inconsistent with **EB** and the case law cited there and it would be an error of law to base the decision on that approach. **EB** should be treated as a starting point. Paragraphs 51, 54, 56, 61, 63, 66, 67, 70 and 75 were of particular relevance. It was necessary to contrast the facts in **EB** with those of the instant case. In **EB** the appellant had come to the United Kingdom in the early 2000s whereas the appellant in the instant appeal had arrived during the war when deportations etcetera were being actively instituted by the Ethiopian state. She had had every reason to believe that she was identified and had been told she was being looked for with a view to deportation. Her background was consistent with that of a person being targeted at the time. That continued to the present position. It was not argued that every Ethiopian of Eritrean ethnicity faced the relevant risk, but Ms Giovannetti had said nothing to show the present situation was not as it had been put

by the appellant. It was necessary to look at the past and reference was made to the Human Rights Watch report at E2 page 18, especially page 19. The Commission report on this and on the Human Rights Watch Reports was relevant. Some NGOs, for example Human Rights Watch and Amnesty International, depended on their credibility and they would be very careful as to what they said. They did not have the limited mandate or high standard of proof of the Commission and also had a broader basis of submissions. Page 20 at paragraph 2 and also page 26 on the Commission report were referred to. Expellees had not been permitted to return and therefore the government policy had been discriminatory in 1998 and there was also a UNHCR letter cited at paragraph 31 in **EB**. Deportees had not been allowed to return by 2003. Family members had been picked out.

74. The 2004 Directive reinforced the de facto position. Some Eritreans had gone to Eritrea, and others to third countries and others had remained. The state was aware of this when the Directive was drafted, and hence its ambit. The statement of policy was not ambiguous, having been made by the SIRAA Director. There was no evidence of any apology by Ethiopia. Before the Commission it had defended its position as consistent with its own nationality law. The Commission had concluded that there were significant breaches. There had been no response by the embassy to correspondence from both sides, and this demonstrated the pattern. The appellant was a member of the group that had attracted adverse attention between 1998 and 2002. A universal practice did not have to be shown. A critical factor was the adverse attention she attracted between 1998 and 1999. It was clear that she was within the potentially affected group in 1998 and, even if not so, there was a lot of room for the inference that her departure when she left would be seen as an implicit admission of being an alien.

75. It was true that there was no identified provision under which nationality was lost, and it was common ground that she had de jure entitlement to nationality, but de facto there was a history of victimisation and exclusion affecting a lot of people and this penetrated even to the IOM's evidence. These were self-selecting cases involving people who had volunteered to return, and the sample reflected that. There was no evidence of how many cases the IOM had dealt with. Ethiopia had not been identified as a main country to which returns were assisted. A lot of the people the IOM helped seemed to be from those top few states. Sylvia Rosenbaum's email reflected the embassy's attitude where there was evidence of an Eritrean background and was linked to the BBC evidence concerning the risk of renewal of the war. Until the hearing before the IAT, the Secretary of State had persisted in intending to return to Eritrea. The appellant was not stamped with the nationality the Secretary of State initially decided on, but it showed the relevance of the Eritrean connection. Mr Ajeti's second communication was significant.

76. It was unclear how many of the 166 Ethiopian cases referred to were relevant claims. The reference to **Chen** was not appropriate as it was a very different situation. There was continuous evidence of discrimination against the appellant's group for some time. Ms Giovannetti emphasised attendance at interview by the appellant, but she was of Eritrean background. It was the case that she had said all along she was Ethiopian but there were two parties and there was scope for confusion where there were divisions between nationality in the international and national senses. The appellant did not consider herself to be Eritrean. The finding by the Commission that

there had been a few errors suggested a lot more errors on a more liberal standard of proof. The position for dual nationals was different. The IOM evidence showed that some lines were being drawn not on the basis of de jure entitlement and if that was being applied by Ethiopia together with the additional restraints that seemed to attach weight to whether people wanted to go to Ethiopia as the IOM evidence showed. The appellant had good reasons not to go to Ethiopia. There was nothing to say that what was said by Mr Barnes at page 62 did not extend to the class affected by arbitrary selection after 1998. The appellant was not in the same position as a person of Eritrean ethnicity continuously resident in Ethiopia.

77. Ms Giovannetti clarified that since the appellant was not an Eritrean national, then on her argument the Directive was not relevant.

78. Mr Fripp said that his main point was that the Directive showed that it was limited to the people who had remained in Ethiopia and there had been a lot of deportations and resettlement and that it was limited to the untargeted. As regards the ARC card this was not Mr Fripp's best point as the Home Office could adjust it, as had been said, and he did not seek to hang anything on it. On the appellant's history it would come to light as it identified her.

79. We reserved our determination.

Discussion

80. As can be seen from the summary of the submissions above, a significant aspect of the argument before us concerned the contrast between de jure and de facto nationality. Since de facto nationality is not nationality as a legal fact, we see only limited value to this distinction. Nevertheless this terminology serves a useful purpose in demarcating a two stage approach which is helpful in cases such as this where there is an issue as to whether persecution or serious harm will arise from a state's attitude to a person's nationality or lack of nationality.

The Issue of De Jure Nationality (Stage 1)

81. In any case of disputed nationality the first question to be considered should be "Is the person a de jure national of the country concerned?" That is a necessary element of the definition of a refugee contained in Article 1A(2) of the Refugee Convention and is exclusively a legal question. This question is to be answered by examining whether a person fulfils the nationality law requirements of his or her country. The ways in which nationality must be assessed are the subject of guidance given by the Tribunal in **Smith** (00/TH/02130), where the Tribunal considered that a hierarchical approach to evidence on nationality was not appropriate, disagreeing with what had been said in **Tikhonov** (V0052; 17 July 1998) and commenting that the approach in that case took too far reliance on rules of evidence and proof which had been forged in non-refugee law contexts, the context of conflict of laws and the United Kingdom immigration and nationality context in particular. Thus relevant documentation, the appellant's own testimony, agreement between the parties, Foreign Office letters and the text of nationality laws, as well as expert evidence, could all legitimately inform the assessment.

82. That having been said, however, it may be relevant, in deciding what is the legal answer to be given, to examine evidence regarding what the authorities in the appellant's country of origin have done in respect of an individual's nationality; thus there may be questions of whether they have issued a passport or whether, as was the case in **EB**, they have taken steps to deprive the appellant of the documentary means of proving nationality.

83. What is concerned in determining whether a person has de jure nationality is essentially the question of whether they plainly fulfil the mandatory criteria governing, for example, the acquisition of nationality by birth and/or parentage. In such cases it would be irrelevant whether the person holds documents confirming their nationality. However, where the eligibility for nationality depends upon discretionary criteria under the nationality laws of that country, providing, for example, for naturalisation depending upon such matters as character, conduct, long residence or other similar grounds, then the question of whether or not they could take (or have taken) the appropriate steps to obtain nationality will be of relevance. To that extent, the previous case law of the Tribunal, which affirms the importance of a claimant taking reasonable steps, remains valid since in such cases the answer to the legal question depends upon the exercise by the country concerned of discretion under its nationality laws.

84. If the answer to the question of de jure nationality is that it has not been shown that the person is a de jure national of the country concerned, then they will either be a national of another country or will be stateless. If the latter, but they are a person for whom the country concerned is their country of former habitual residence, then the same analysis as is set out below with regard to de facto nationality will have to be carried out.

The De Facto Nationality Issue (Stage 2)

85. If it is concluded that the person is a de jure national of the country concerned then the next question to be considered is the purely factual question, i.e. "Is it reasonably likely that the authorities of the state concerned will accept the person concerned if returned as one of its own nationals?" This is the hypothetical approach, which focuses exclusively on the person's position upon return. That this approach was approved by the Court of Appeal can be seen from paragraph 71 of **EB** in the judgment of Longmore LJ.

86. At the outset we consider that if the person is a de jure national, there is a presumption that the country concerned will afford him the same treatment as any other national. Following on from this, it may also be presumed that the person concerned will have obtained travel documentation to enable them to be returned. If it transpires that they cannot in fact obtain such documentation, then they will not be returned and therefore no refoulement issues will arise in any event. Disputes concerning such matters may arise on judicial review (in the context of the enforcement of removal directions) or under asylum support legislation relating to whether a person has taken reasonable steps to obtain travel documentation, but they are not normally part of the jurisdiction of this Tribunal, though, as was suggested by Hooper LJ in **AG and Others v Secretary of State for the Home Department** [2006] EWCA Civ 1342 at paragraph 123, in a country guidance case it

may well be helpful for all concerned to know the dangers inherent in a method of return that is likely to be used, if known, since these dangers can then inform the Secretary of State when or if removal directions are made.

The Appellant's Case

87. Turning to the appeal before us, in the course of argument it emerged that it was common ground that the appellant is de jure an Ethiopian national. She qualified as a national of Ethiopia under the 1995 Constitution by reason of her birth in Ethiopia. Article 33(1) of the Ethiopian Constitution provides that no Ethiopian national shall be deprived of his or her nationality against his or her will. It is provided at Article 17 of Proclamation number 378/2003 on Ethiopian nationality (repealing the Ethiopian Nationality Law of 1930) that no Ethiopian may be deprived of his nationality by the decision of any government authority unless he loses his Ethiopian nationality under Article 19 or Article 20. Article 19 is concerned with renunciation of Ethiopian nationality, which may be done by an Ethiopian who has acquired or has been guaranteed the acquisition of the nationality of another state, and Article 20 is concerned with loss of Ethiopian nationality, the acquisition of other nationality. It has not been contended that either of these Articles applies to the appellant.

88. It was said by the majority in **EB** that if the appellant in that case had been deprived of her citizenship by the arbitrary action of state employees that would prima facie have been persecution within the terms of the Refugee Convention. The reasons for this were said by Longmore LJ, with whom Jacob LJ agreed, to be as follows:-

> "67. The reason is that, if a state by executive action deprives a citizen of her citizenship, that does away with that citizen's individual rights which attach to her citizenship. One of those most basic rights is to be able freely to leave and freely to re-enter one's country. (There may well be others such as the right to vote.) Different considerations might arise if citizens were deprived of their nationality by duly constituted legislation or proper judicial decision but a deprivation by executive action will almost always be arbitrary and, if EB had in fact been deprived of her citizenship by the removal of her identity documents by state agents, it would certainly have been arbitrary."

89. In that case the Tribunal had found that armed police had taken the appellant's ID cards and school papers and also identity documents including her birth certificate had been removed and had not been returned. The Tribunal also found that such removal of identity documents was specifically directed at people such as **EB** so that she would have difficulty in future in proving her Ethiopian nationality. The Tribunal followed **MA** (the earlier decision of the IAT in this case) where it was said "There must be other treatment [in addition to loss of nationality] which would lead to persecution", and the Court of Appeal in **EB** commented that there the Tribunal appeared to have failed to have regard to the consequences of effective loss of citizenship which may amount to persecution. Longmore LJ at paragraph 70 commented that the Tribunal in **MA** was in his view wrong to conclude that some further (presumably physical) ill-treatment was required. It was the arbitrary nature of the state employees' actions which distinguished the case from **Revenko v SSHD** [2001] QB 601.

90. It is clear that the facts in the case before us are somewhat different from those in **EB**, since there has been no removal of the appellant's documents. The only relevant document that appears to have been referred to is the appellant's passport which, as we have set out above from the determination of Dr Hoyle, was described by her as being a valid Ethiopian passport in her name which was kept by the agent after he brought her to the United Kingdom. Mr Fripp, as we have seen, did not concede that the appellant necessarily had an Ethiopian passport properly issued. He said that it was known that it was not issued to her. That does not however emerge from her evidence before Dr Hoyle. There she is noted as having said that she had an Ethiopian passport and that she had left Ethiopia with a valid Ethiopian passport in her name. There was no reference to the basis upon which it was obtained. In any event the most important aspect of this is that the appellant had what she said was a valid Ethiopian passport in her name. It was not taken from her by the authorities and nor indeed was any other material documentation and that, as we say, is a clear point of distinction between this case and the situation in **EB**.

91. Otherwise, in the context of the hypothetical approach, both counsel attached significant weight to the report of the Commission. The Ethiopia-Eritrea Claims Commission was established and operates pursuant to Article 5 of the agreement signed in Algiers on 12 December 2000 between the governments of the State of Eritrea and the Federal Democratic Republic of Ethiopia. The Commission was directed to:-

> "Decide through binding arbitrational claims for loss, damage or injury by one government against the other, and by nationals (including both natural and juridical persons) of one party against the government of the other party or entities owned or controlled by the other party that are (a) related to the conflict that was the subject of the Framework Agreement, the Modalities for its Implementation and the Cessation of Hostilities Agreement, and (b) result from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law."

92. There were five members of the Commission, the President, and four other members, two appointed by Ethiopia and two appointed by Eritrea. It was common ground before us that they were all distinguished international arbitration specialists. The claims in question covered expellees, civilian detainees and "persons of Eritrean extraction living in Ethiopia" and were brought to the Commission by the State of Eritrea against the Federal Democratic Republic of Ethiopia in which the claimant asked the Commission to find the respondent liable for loss, damage and injury it suffered, including loss, damage and injury suffered by Eritrean nationals and a large number of other persons, resulting from alleged infractions of international law in the treatment of civilian Eritrean nationals and other persons by Ethiopia in connection with the 1998 – 2000 international armed conflict between the two parties. It is relevant to note that at paragraph 35 the Commission stated that as in the parties' prior case it had required proof of liability by clear and convincing evidence and that as a consequence conflicting yet credible evidence had perhaps resulted in fewer findings of unlawful acts than either party might have expected. With regard to Eritrea's claim for deprivation of nationality, the Commission at paragraph 62 noted that the evidence indicated that Ethiopia appeared to have made at least a few errors

in the process of its determination of whether or not its nationals or any of its nationals had acquired Eritrean nationality. There is a section from paragraph 65 onwards concerned with dual nationals deprived of their Ethiopian nationality and expelled for security reasons. It is said at paragraph 66 that Ethiopia said it did not view Eritrean nationality alone as sufficient to deem anyone a security threat subject to loss of nationality and expulsion, but that additional ties or actions were required, indicating a possible threat to Ethiopia's security, and the principal indicators were such matters as raising money on behalf of Eritrea or participating in organisations promoting Eritrean government interests or encouraging closer links between expatriate Eritreans and Eritrea. The overall structure and direction of the security effort was the responsibility of Ethiopia's national security agency, SIRAA. At paragraph 72 the Commission made the point that Ethiopia faced an exceptional situation since it was at war with Eritrea, and thousands of Ethiopians with personal and ethnic ties to Eritrea had taken steps to acquire Eritrean nationality. Some of these participated in groups that supported the Eritrean government and often acted on its behalf. In response Ethiopia devised and implemented a system applying reasonable criteria to identify individual dual nationals thought to pose threats to it or its wartime security. Given the exceptional wartime circumstances, the Commission found that the loss of Ethiopian nationality after being identified through this process was not arbitrary and contrary to international law, and Eritrea's claims in this regard were rejected.

93. We do not agree with Mr Fripp that these findings should be regarded with some scepticism given the high standard of proof employed. The remarks at paragraph 72 would be equally applicable in a situation where the standard of proof was one of real risk. The comments seem to us to be entirely appropriate comments on a particular situation for the reasons given, and we do not consider that any less weight should be attached to the Commission's findings in this regard on account of the standard of proof employed. We accept that, as was pointed out by Ms Giovannetti, the appellant was not a person who was liable to be deported since she was not a person who had taken part in the Eritrean independence referendum, and therefore the strictures of the Commission concerning Ethiopia's actions in that regard would never have applied to the appellant. She would not have been a yellow card person as discussed in paragraph 75 of the Commission's report. She would not have been required to register, because she had not taken part in the Eritrean independence referendum.

94. It was suggested that the appellant had been told that she was at risk of deportation. The Commission considered the issue of family members who were expelled after being identified through Ethiopia's security process. The evidence was not clear regarding the nationality of many family members and it was mixed also regarding the circumstances of family members of departers. It did indicate that some family members were forcibly expelled, and, to the extent that family members who did not hold Eritrean nationality were expelled, the expulsions were contrary to international law. Given the limitations of the evidence however, the Commission could not determine the extent to which this occurred. It is important to note the conclusion that Ethiopia was liable to Eritrea for, among other things, erroneously depriving at least some Ethiopians who were not dual nationals of their Ethiopian nationality.

95. This is of course relevant to the issue of the likely treatment of the appellant now, her de jure nationality having been established. Ms Giovannetti emphasised that at best the appellant could show that she might have been faced with a risk of arbitrary deprivation of nationality at some point in the past. That at least must be right in the light of what the Commission found. But it is important to look to the present and to bear in mind in this regard, as Ms Giovannetti also reminded us, that there is no identifiable provision of Ethiopian law under which the appellant could have lost her nationality and nor is there any identifiable executive or administrative act to the effect that she is not an Ethiopian national.

96. We have been provided with a copy of the 2004 Directive Issued to Determine the Residence Status of Eritrean Nationals Residing in Ethiopia, and it is considered in some detail at 6.5 of Cedric Barnes' report, which also quotes a number of provisions of the Directive. Its object is stated to be to enable persons of Eritrean origin, who were resident in Ethiopia when Eritrea became an independent state [1993] and continued to maintain a permanent residence in Ethiopia up to the issuing of the Directive, to confirm whether they have acquired Eritrean nationality, and determine their residence status in Ethiopia. The Directive notes that no Ethiopian shall be deprived of his or her nationality according to Article 33(1) of the Ethiopian Constitution, though the government can deprive individuals of their nationality if they lose their nationality through their own will. Section 4.2 of the Directive provides that a person of Eritrean origin who has not opted for Eritrean nationality shall be deemed as having decided to maintain his or her Ethiopian nationality and his or her Ethiopian nationality shall be guaranteed.

97. We turn next to consider the relevance to the appellant's case of what was said by the experts in their various reports. Professor Lionel Cliffe, who is an Emeritus Professor of Politics in the University of Leeds, provided a main report of 11 January 2007 and also a supplementary report. In the first report he expresses the view that the appellant is in a position where she has lost her right of citizenship. He quotes a statement to be found in the COI Report on Ethiopia for 2006 at paragraph 6.125 that people who had not voted for Eritrean independence in the 1993 referendum and had lived in Ethiopia uninterrupted would be granted permanent Ethiopian citizenship but this would be terminated, among other circumstances, if they stayed out of Ethiopia for more than a year and were found undesirable to the nation. He also quotes paragraph 6.126 to the effect that the right to citizenship could only benefit those who lived in Ethiopia permanently, and that this reading of the 2004 Directive was supported by an authority quoted by Cedric Barnes who had provided a report commissioned by the UNHCR in May 2006. He also quotes the Ethiopian Director of Immigration and Nationalities Authority, Girma Balcha, that the recently issued Directive will benefit only Eritreans who lived in Ethiopia permanently and that the Directive, and especially its provisions for Eritreans reacquiring Ethiopian citizenship, does not apply to Eritreans who were expelled after the war began nor to Eritreans coming from another country. He states that he has not heard of a single case where someone with Eritrean origins who considered herself or himself an Ethiopian citizenship [sic] was in fact granted citizenship by the embassy.

98. In his supplementary report, which is undated, Professor Cliffe refers to the Claims Commission report and the 2003 Proclamation, which repealed the former citizenship law and clarified that those who were of Ethiopian parentage were Ethiopian, but also

provided for the acquisition of citizenship through application, a right which, according to the legal provisions, would have been available to the claimant if she were still in the country. It also seemed that under such provisions someone who had been out of the country could make such an application. However he considers that the provisions of the Directive of 2004 make that prospect unlikely. He refers to the fact that certain sections of that seem to confer Ethiopian citizenship on anyone born there of Eritrean origins who did not specifically claim Eritrean citizenship and that might seem to apply to the claimant. He considers however that certain stipulations and interpretations by officials, cited in paragraph 4 of the first report, strongly suggest that those who have not remained resident are precluded from this eligibility. He refers to the interpretation of the Directive in the UNHCR document where it is said that it appears to infer that rights to Ethiopian citizenship of those expelled before the 2004 Directive were not recognised by the Directive, would clearly apply to someone like the appellant's husband, but not explicitly to someone in her position of leaving the country. He considers however that there is a strong implication that it is likely to be interpreted to exclude her and that that conclusion is supported by evidence that seems to indicate that in the actual practice of applying for the right to confirm or reapply for citizenship, through such avenues as the Ethiopian Embassy in London, any applicant with any Eritrean connections is routinely denied that right to apply and therefore all people from Ethiopia with Eritrean origins seem in effect to be denied entitlement to Ethiopian citizenship. Accordingly, it seems that Professor Cliffe's view as expressed in the latest statement is that though the appellant may, as we have noted above was common ground before us, have de jure Ethiopian citizenship, but it is not likely to have de facto citizenship.

99. Herr Günther Schröder has provided a report dated 11 March 2007. Herr Schröder is by training an historian and social anthropologist who has been working for many years as an independent researcher and consultant and has made regular visits to Eritrea and Ethiopia. Having considered the background situation in some detail, Herr Schröder comments first that since the appellant had never applied for an Eritrean national ID card or in any other way exercised the Eritrean nationality conferred upon her by the Eritrean nationality law of 1992 she had not given up her Ethiopian citizenship. However he considered that by listing her for deportation to Eritrea the Ethiopian authorities treated her as a "hostile Eritrean national" and thus deprived her de facto of her Ethiopian citizenship. As she managed to escape deportation and make her way to the United Kingdom, she is in a position where she has de facto lost her right of Ethiopian citizenship not only through the past actions of the Ethiopian government against her but also according to the 2004 Directive and the current administrative practice of the Ethiopian authorities within Ethiopia and abroad. If she succeeded in returning to Ethiopia in any other way but through being officially reinstated into her Ethiopian citizenship she would only have the option of acquiring Ethiopian citizenship documents by "unofficial" ways and that would expose her, in the case of being uncovered, to the serious risk of being labelled as an illegal "Eritrean national". He also considers that even if she were readmitted to Ethiopian citizenship and thus given the opportunity to return legally to Ethiopia, she could claim to be justifiably concerned about her security and life if she were returned from the United Kingdom to Ethiopia. He considers that people of Eritrean descent have every reason to be distrustful of the Ethiopian government given the past experiences, and that though Ethiopia has laws there is still no well-established rule of law in Ethiopia, and the government and governmental organs at all levels often

apply the laws in a highly arbitrary manner or openly violate them. It is said that its citizens and foreign nationals residing within Ethiopia have no real protection against all forms of misuse of state power and human rights violations are still rampant.

100. As regards the evidence of Professor Cliffe, and, in particular, the suggestion in his evidence that the rights guaranteed to Eritreans in possession of residence permits in the 2004 Directive apply only to those who were in continued residence in Eritrea up until the issuing of the Directive, we note that the provision in the Directive, upon which this appears to be based, Article 2, is entitled "objective" and does not purport to define the exclusive scope of the Directive. It is relevant, as Ms Giovannetti argued in her skeleton, to note that the Directive thereafter specifically notes the operative and relevant provisions of the Constitution and of the 2003 Proclamation which are clearly of generalised application. There is no indication that paragraphs 4 to 6, which relate to registration and entitlement to a residence permit, are limited in the way suggested by Professor Cliffe. With regard to what Professor Cliffe says (and indeed to what Mr Barnes and Herr Schröder say) with reference to the remarks of Girma Balcha, the Ethiopian Director of Immigration and Nationality Authority, the interpretation placed by Mr Balcha does not appear to have been promulgated in any official Directive or any other official document. It is also, and again we are grateful to Ms Giovannetti for the quotation to this effect in her skeleton, to be contrasted with other reports such as the reference quoted at paragraph 21.44 in the August 2006 COIR from the ruling party-owned Walta Information Centre, that permanent Ethiopian citizenship would be terminated if individuals attempted to produce fake documents or stayed outside Ethiopia for more than a year and were found undesirable to the nation. There is no indication that this would apply to the appellant.

101. With regard to Herr Schröder's evidence, his suggestion of an ongoing risk of discrimination or persecution for those of Eritrean origin is essentially supported by references to the historic treatment of Eritreans during war and generalised assertions, rather than being based on current evidence of such a policy or practice.

102. Taking all the evidence together, we conclude that, responding to the question that we set out above, that it is reasonably likely that the authorities of Ethiopia will accept the appellant, if returned, as one of its own nationals. We therefore dismiss the appeal on all grounds.

103. Though that disposes of the appeal, it will, we think, be helpful for us to set out the evidence concerning the issue of travel documentation and our views on it.

The Issue of Travel Documentation

104. We also have evidence from the International Organisation for Migration (IOM). In the witness statement of Anne Scruton, of the Border and Immigration Agency as Acting Head of Unit for the Assisted Voluntary Returns Team (AVR Team), there is reference to a telephone call on 13 July with Sylvia Rosenbaum of the IOM who was asked whether the IOM experienced any difficulties in obtaining documentation for Ethiopian nationals, wishing to return to Ethiopia, who had an Eritrean family background. Ms Rosenbaum said that provided the person wished to return to Ethiopia there should be no problems with documentation. There is a fax of 17 July

2007 from Besim Ajeti, Head of Operations of the IOM in the United Kingdom, who states that in general terms if an applicant with an Eritrean family background was born in Ethiopia and says in the interview that he or she is happy to return to Ethiopia, then the embassy is likely to issue a travel document. It is said that even if the person was born in Ethiopia they are not considered automatically an Ethiopian national. If they said in the interview they did not wish to go to Ethiopia the embassy would not issue a travel document. Mr Ajeti emphasises that each case is individual and has its own specifics. Thereafter Mr Ajeti sent a further fax on 3 September 2007 to Ms Scruton, stating that there have been cases in which people born in Ethiopia of Ethiopian/Eritrean parentage were given travel documents to return to Ethiopia and other cases where applicants with the same background were not, either because they said at interview they did not want to return to Ethiopia or they were unable to provide supporting documentation concerning their right to Ethiopian citizenship.

105. There is also a copy of an email from Sylvia Rosenbaum to Anne Scruton of 15 August 2007 concerning a case of an applicant born in Ethiopia with an Eritrean father and Ethiopian mother. When she claimed asylum in the United Kingdom her nationality was stated as Eritrean on her IND card. She attended an interview at the embassy and they refused to give her a travel document solely because on the IND card her nationality was stated as Eritrean. She thought that this could potentially affect a considerable number of applicants who were in this situation. In the past they had been able to help Eritrean applicants to return to Ethiopia regardless of what is stated on the IND card, as long as they fulfilled the language and family requirements but it seemed that this would no longer be the case.

106. As can be seen from above we clarified the situation of the IND card with the assistance particularly of Ms Giovannetti. It was not a matter that Mr Fripp wished to pursue since, as he realistically pointed out, there was nothing to stop the Home Office issuing to the appellant a new IND card making it clear that her claimed nationality is Ethiopian. Mr Fripp also made the point that the IOM are dealing only with voluntary returns, though he did not dissent from the submission of Ms Giovannetti that they are an independent organisation and, from the nature and content of their communications, are clearly anxious to demonstrate their independence.

107. Next there is the evidence of Mr Nigel Beaumont. It was of considerable assistance not only to have Mr Beaumont's statements but also his oral evidence which clarified a number of aspects of the process. Among other matters he was able to clarify the different processes which now apply and show that in a case where there is supporting evidence in the form of such matters as a copy or expired passport, ID card, birth certificate, etcetera, that an individual can be removed to Ethiopia on a European Union letter. Such cases do not require the person to go and be interviewed at the Ethiopian Embassy. It is, we think, common ground that the appellant does not have such documentation. Otherwise a person such as the appellant would have to be interviewed at the Ethiopian Embassy with perhaps three interviewers carrying out the interview, and this would, if successful, lead to the provision of a laissez passer enabling return to Ethiopia. Mr Beaumont provided a list of cases of people, one of whose parents was Eritrean, who had all had emergency travel documentation agreed and in some cases a successful removal had taken place. In one case, reference 29985, the person in question claimed to be Eritrean.

This person is noted as being of Ethiopian nationality, the mother having been born in Ethiopia and the father in Eritrea. It seems that a copy of an Ethiopian passport was provided as supporting evidence. The person was interviewed by the embassy and an emergency travel document was issued in December 2005 but a judicial review application had thus far prevented removal.

108. In case 37774 there was no supporting evidence but the bio data indicated an Eritrean father and an Ethiopian mother and this person was interviewed by the embassy and an emergency travel document was issued in September 2006 but removal had been delayed following the discovery that the applicant had an Ethiopian wife and child in the United Kingdom, and travel documents were awaited so the family unit could be removed at the same time. There are two other examples, 19944 and 23145 of cases where there was no supporting evidence but the bio data indicated in each case an Eritrean and an Ethiopian parent. Both were interviewed or at least it is clear in the form that there was an interview at the embassy, and emergency travel documentation was issued in both cases. In the former case a second judicial review had delayed removal but in the latter the appellant was successfully removed on 14 April 2006.

109. Taking this evidence as a whole, we conclude that a person in the appellant's position who does not have relevant documentation to enable removal on a European Union letter, and who would be expected to attend an interview at the Ethiopian Embassy, where the embassy would have been provided with the bio data information which in the appellant's case would show that her parents were born in Eritrea and she herself was born in Ethiopia, would be likely to be issued with emergency travel documentation. It would seem from the IOM evidence that she would not however be likely to be issued with a travel document by the Ethiopian Embassy if she said in the interview she did not want to return to Ethiopia. If she were willing to return then it would seem that she would be given travel documentation. In this regard, we do not ignore what was said by Girma Balcha (against which however has to be set the actual wording of the 2004 Directive, and what we say above at paragraph 102, and of course we take full account of what was said by the experts, but we consider to be particularly compelling the specific examples that we have been given by Mr Beaumont, and the evidence of the IOM.

Conclusions

110. In cases of disputed nationality, it is necessary to consider first whether the person concerned is a de jure national of the country in question. This essentially involves the need to decide whether the person fulfils the mandatory nationality law requirements of that country. If it is concluded that the person is a de jure national of the country concerned, it will then be necessary to consider the factual question of whether it is reasonably likely that the authorities of the state concerned will accept the person if returned as one of its own nationals (the hypothetical approach). There is a presumption that a de jure national of a country will be afforded the same treatment as any other national. What we say in this determination about the proper approach in cases of disputed nationality supplants what the Immigration Appeal Tribunal said on this point in **YL** (Nationality – statelessness – Eritrea – Ethiopia) Eritrea CG [2003] UKIAT 00016.

111. The appellant is a de jure national of Ethiopia. Taking the evidence relevant to the hypothetic approach as a whole, we find that it s reasonably likely that the authorities of Ethiopia will accept her, if returned, as an Ethiopian national.

112. The appeal is dismissed.

Signed

Senior Immigration Judge Allen

Documents Submitted

Submitted by the appellant:

Expert Reports:

1. ‘Ethiopia: A socio-political Assessment’ Cedric Barnes: May 2006

2. ‘Report on background to appeal re asylum claim’: Professor Lionel Cliffe: January 2007.

3. Supplementary report (undated): Professor Lionel Cliffe

4. Report by Günter Schröder: March 2007

5. ‘Refugees and Asylum Seekers from Mixed Eritrean-Ethiopian Families in Cairo’: Louise Thomas: June 2006.

6. Supplementary Report: Louise Thomas: April 2007

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2. 2nd witness statement of Nigel Beaumont: 6 September 2007
3. 1st witness statement of Anne Scruton: 18 July 2007
4. 2nd witness statement of Anne Scruton: 31 August 2007.
5. Constitution of the Federal Democratic Republic of Ethiopia.
6. **Ethiopian Nationality Law 1930.
7. ** Proclamation No. 378/2003
8. **Directive to Determine the Residence Status of Eritrean Nationals residing in Ethiopia.
9. Ethiopia Assessment – April 2000
10. Ethiopia Assessment - October 2000
11. Ethiopia Assessment - April 2001
12. Ethiopia Assessment - October 2001
13. Ethiopia Assessment - April 2002
14. Ethiopia Assessment - October 2002
15. Ethiopia Country Assessment – April 2003
16. Ethiopia Country Assessment – October 2003
17. Ethiopia Country Report – April 2004
18. Ethiopia COIS Report – October 2005
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21. Ethiopia COIS Report – April 2007
22. Ethiopia OGN – April 2007
23. US Department of State Report on Ethiopia (released 6 March 2007)