KA (statelessness: meaning and relevance) Stateless [2008] UKAIT 00042

ASYLUM AND IMMIGRATION TRIBUNAL

THE IMMIGRATION ACTS

Heard at: Newport (Columbus House) Date of Hearing: 13 September 2007

Before:

Mr C M G Ockelton, Deputy President of the Asylum and Immigration Tribunal
Immigration Judge S J Hall

Between

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellant: Mr. E. Fripp, instructed by South West Law
For the Respondent: Miss T. Powell, Home Office Presenting Officer

1. Statelessness does not of itself constitute persecution, although the circumstances in which a person has been deprived of citizenship may be a guide to the circumstances likely to attend his life as a non-citizen. 2. The Refugee Convention uses nationality as one of the criteria of the identification of refugees: there is no relevant criterion of 'effective' nationality for this purpose.

NOTE

1. This appeal has an exceptionally long history, which has been unnecessarily (although in the circumstances only fractionally) extended by us, for which we apologise. It raises a number of issues, some of which are difficult in themselves. The difficulty has been compounded by the fact that at various stages the Tribunal has not been very fully addressed on precisely the issues that need to be decided.

© CROWN COPYRIGHT 2008

2. The question lying at the heart of this appeal, as in many others, is that of the appellant's nationality. He was born in Ethiopia of Eritrean parents. He claims that he has lost his Ethiopian nationality, because of his parentage; and he says that any claim that he might have to Eritrean nationality is ineffective because of the Eritreans' attitude toward those who come from Ethiopia. But it is not easy to establish any of those propositions, and none of them has yet been established in judicial proceedings that have not been successfully appealed. There is, in addition, a procedural difficulty which relates to the notice of the decision against which the appellant appeals and which unfortunately has the capacity of further prolonging the course of the process.

3. The appellant arrived in the United Kingdom on 22 September 1999. He had no travel documents. He applied for asylum. He was interviewed, nearly two years later on 23 July 2001. After another interval of nine months he was issued with a notice of refusal of leave to enter. In that notice the Immigration Officer proposed his removal to Eritrea. The appellant appealed. The appeal was heard by an adjudicator, who dismissed it. Having obtained leave to do so, the appellant then appealed to the Immigration Appeal Tribunal which adjourned the hearing on a number of occasions at the appellant's request. Following the commencement of the appeals provisions of the 2004 Act, the appeal to the Immigration Appeal Tribunal continued as a reconsideration before this Tribunal. At a hearing on 17 November 2005 the respondent conceded that the adjudicator's determination, sent to the parties on 3 April 2003, contained material errors of law and that a rehearing would be necessary. (If that is the case, it is very difficult indeed to see why the concession was not made years earlier.) The appeal was then reheard by a panel of this Tribunal, who dismissed it. There was an application for permission to appeal to the Court of Appeal, which was refused by the Tribunal, but renewed to the Court of Appeal, who granted it. The substantive appeal to the Court was then settled by consent, with an order that the appellant's appeal be heard again.

4. We should point out that in the statement of reasons submitted to the Court, it is said that the appellant's claim was "refused by the respondent on 26 July 2001", and that, by the time of the hearing before this Tribunal, the respondent "now proposed to remove the appellant to Eritrea". Both of those statements are correct, but both are misleading. The date given is the date of the letter giving the Secretary of State's reasons for refusing the claim, but, as we have said, the notice of the decision against which the appellant appealed was issued some months later. And although the letter is written in terms suggesting that the appellant could and should be removed to Ethiopia, the destination specified in the notice of decision is Eritrea. The respondent has not sought to change it. This is a point to which we revert later.

5. The appellant's appeal has been run on Refugee Convention and Human Rights grounds. The advent of the Qualification Directive 2004/83/EC and the regulations made under it does not affect the substantive issues to be determined and we are therefore content to continue to look at the position under those two Conventions.

6. So far as the Refugee Convention is concerned, the appellant is a refugee if he has a well founded fear of persecution for one of the five "Convention reasons" in his country of nationality. It follows that his nationality has to be determined as part of the process of determining his status as a refugee or otherwise. If he has no nationality, his status has to be determined by his country of former habitual residence, which is certainly Ethiopia. It does not look as though he can have dual nationality, because neither Ethiopia nor Eritrea appears to permit dual nationality. But he may still have the Ethiopian nationality that he certainly had when he was born; and, if he does not have Ethiopian nationality, he may have become entitled to have Eritrean nationality. If he is stateless or if he has Ethiopian nationality, Ethiopia is the appropriate State of reference for the purposes of refugee status determination. But if he has, or is entitled to have, Eritrean nationality, Eritrea is probably the appropriate State.

7. We say "probably", because Mr. Fripp raises the issue of "effective nationality", which has featured in a number of other cases. It is said, in the writings of Hathaway and some others, and in the jurisprudence of some other countries, that refugee status is to be determined not by nationality or access to nationality as such, but by reference only to such nationality as may be "effective". It is argued that a nationality that is acquired, or that can be acquired, on a purely formal basis, but which gives no substantive rights to the person acquiring it, ought not to be considered as nationality for the purposes of refugee status determination. We have very considerable doubt whether we should adopt that notion. It appears to us to insert a quite unnecessary construct into the clear provisions of the Refugee Convention. If a claimant's nationality is such that it does not afford him protection from persecution for one of the "Convention reasons", he may be able to establish his refugee status by reference by that nationality: not on the basis that the nationality is "ineffective", but because, as a person of that nationality, he does not have protection from persecution in his country of nationality. In circumstances where dual nationality is permitted, the formal possession (or possibility of acquiring) a second nationality will operate in precisely the same way. If a person is at risk of persecution in one of his countries of nationality the possession (or the possibility of acquiring) nationality of another country will only prevent him from being a refugee if he is not at risk of persecution there or at risk of being returned to the first country from there. That, again, will depend on whether the second nationality is nationality of a country where he has a well founded fear of persecution: it does not depend on whether the nationality has an additional feature of "effectiveness". A person is stateless only if he has no nationality

available to him. If a notion of effectiveness of nationality were to be incorporated into the definition of a refugee, it would, first, cause some individuals who had (or had access to) nationality to be treated as stateless, which is inherently undesirable. It would, further, cause the refugee status of a person who had a nationality to be determined not by reference to the State of which he was a national (that State having been excluded from consideration on the ground that the nationality was "ineffective"), but by reference instead to the country of former habitual residence. We cannot see that the Refugee Convention has any such intention.

8. Looking at the matter of the point of view of this case, if the appellant is, or is entitled to be, a national of Eritrea, his refugee status has to be assessed by reference to Eritrea. He cannot claim that it should be assessed by reference to Ethiopia, his country of former habitual residence, on the ground that he is stateless. He is not stateless if he is entitled to Eritrean nationality. If the position is that, although he is entitled to Eritrean nationality, he will be treated there in a way that amounts to persecution within the Convention, then he is, by reference to Eritrea, a refugee. If he cannot show that his treatment in Eritrea would amount to persecution for one of the "Convention reasons", he cannot show that he is a refugee: nothing is added by saying that that shows that his nationality of Eritrea would not be "ineffective". If he is not entitled to nationality of Eritrea, his status must be determined with reference to Ethiopia, either because he is a national of Ethiopia, or because he is stateless and Ethiopia is his country of former habitual residence. Although the question is the same in either case, the answer may be different: it may be that the risks in Ethiopia to Ethiopian nationals (albeit of Eritrean ancestry) are different from the risks to stateless persons of Eritrean ancestry.

9. Mr. Fripp's principal submission to us was that Eritrea should be excluded from consideration, because Eritrean nationality would be "ineffective" in the appellant's case. He also submitted that the appellant had been effectively stripped of Ethiopian nationality. We cannot accept that if the appellant has lost his Ethiopian nationality he should be regarded as stateless if he is entitled to Eritrean nationality. A person who has an entitlement to a nationality should not be regarded as stateless. The incidents of the nationality to which he is entitled may have an effect on whether he is at risk of persecution, but they cannot make him stateless.

10. We should say that the evidence on the question whether the appellant is entitled to Eritrean nationality is very far from establishing anything. It appears that the position since 1992 is that a person like the appellant born of Eritrean parents is a national of Eritrea by birth. The appellant made, in 2004, what may described as a rather half-hearted attempt to secure documentation evidencing his Eritrean nationality, but decided to take the matter no further when he heard of the fees

charged at the Eritrean Embassy in London and of the need to provide evidence from three individuals as well as his parents' birth certificates.

11. So far as Ethiopia is concerned, Mr. Fripp submitted to us that the appellant's status as a refugee was essentially settled by the decision of the Court of Appeal in EB (Ethiopia) v SSHD [2007] EWCA Civ 809. That was a case in which the evidence established that the appellant had had her Ethiopian nationality revoked by destruction of her identity documents whilst she was in Ethiopia. There was also evidence that the Ethiopian Embassy in the United Kingdom would not issue her with documents attesting Ethiopian nationality. There was accordingly no doubt that she was to be treated as a person who was not, and could not become, a citizen of Ethiopia. Although she had an Eritrean father, no real consideration appears to have been given to the possibility that she should be treated as a national of Eritrea. Her refugee status was determined by reference to Ethiopia, and the Court of Appeal decided, by a majority, that the material available to it was sufficient to establish that the deprival of her nationality was itself sufficient to establish a well founded fear of persecution in Ethiopia. A number of features of the case make it not entirely easy to understand how the decision in EB (Ethiopia) should be applied to future similar cases. All the members of the court appear to have thought in principle that, at any rate in the circumstances of that case, the question of whether the appellant had at the present time a well founded fear of persecution could be answered solely by reference to her experiences in the past. That is no doubt right in some cases, but it cannot be universally right. Further, Longmore and Jacob LJJ (but not Pill LJ, who dissented rather strongly) seem to have thought that the deprival of nationality of itself amounted to treatment which was, and continued to be persecution, without any inquiry of any consequences to such deprival. That, although no doubt merited on the facts of the particular case, is again surprising. Many countries have a long and honourable history of affording benefits to non-citizens. The Refugee Convention as a whole is structured around a predicate that the refugee will be in a country of which he is not a citizen. It simply cannot be suggested without more that life without citizenship is a life of persecution.

12. In any event, however, we do not think that it is right to say that the decision of the Court of Appeal in EB (Ethiopia) concludes anything that is certainly an issue in this appeal; and it is certainly not right to say, as Mr. Fripp did say, that the facts of the present case are in all material respects identical to those of EB (Ethiopia). Even if Eritrea were to be excluded from consideration, as Mr. Fripp submits that it should be, this appellant's experiences are quite different from those of EB. The evidence is that this appellant's father may have been deprived of his Ethiopian nationality, but the appellant himself, although arrested and detained briefly, was released on his assertion that he was an Ethiopian national. There is little or nothing in the appellant's account of his own history that could amount to a claim that the appellant has been an individual victim of a deprivation of citizenship.

Indeed, Mr. Fripp appeared to concede before us that the appellant had Ethiopian nationality de jure, and was not able to point to any evidence that he had been stripped of it de facto. If he has been deprived of his citizenship in some way, it must be as the result of the operation of law. There is some evidence that some Ethiopian nationals of Eritrean background have been deprived of nationality, but it is very far from clear that such difficulties are universal and they may not at present be widespread; further, the appellant's own experiences during his arrest may show that the risk is substantially reduced in his case. As has been pointed out in other judgements in this appeal, if the Ethiopian authorities wanted to take action against him, it is surprising they did not do so when he was in their hands: the fact that they did not do so tends to show that there is little risk in his case.

13. For the foregoing reasons we reject both the principal matters put by Mr. Fripp in his skeleton argument. We are not prepared to decide refugee status on the basis of "effective" rather than actual nationality or access to nationality; and we are not prepared to say that the decision of the Court of Appeal in EB (Ethiopia) resolves this appeal. Given that the previous judgements have all been set aside, it appears to us that the appellant's position in relation to citizenship will need to be determined on up to date and reliable evidence of that position vis-à-vis both Ethiopia and Eritrea.

14. As we have said, the proposal is to remove him to Eritrea. Whether or not that is the country of which he is a citizen, he is entitled to resist removal there if removal to Eritrea would breach any of his rights under the Human Rights Act 1998. It is submitted on his behalf that if he is Ethiopian, then even if he has no well founded fear of persecution in Ethiopia, he will be ill treated in Eritrea as an Ethiopian. If he is stateless, it is said he will similarly be ill treated as a perceived traitor to the Eritrean State. The Consent Order of the Court of Appeal acknowledges that the previous Tribunal did not properly consider whether removal to Eritrea, as proposed by the respondent, would breach the appellant's human rights. That is a further matter which, if this appeal proceeds as it has done, will need to be considered, and on which evidence will need to be taken before a final judgement is reached.

15. We must return to the procedural aspects of this case. On hearing Mr. Fripp's submission that the appellant ought not in any circumstances to be regarded as effectively connected with Eritrea, Miss Powell, who appeared for the respondent, suggested that the appellant ought to be returned to Ethiopia. She said on the respondent's behalf that she intended to therefore change the destination. We directed that if that were to happen she was to lodge a new notice within 7 days and we would then consider whether, in consequence, the decision presently under appeal survived. Shortly after the hearing another Presenting Officer wrote to the Tribunal. The effect of that letter was not, at that time, entirely understood, and it is for that reason (for which we take responsibility) that the writing of this

determination has been delayed: it is fair to say that we expected a new notice to be issued. The letter reads as follows:

> "Further to directions, I am writing to confirm the following: —
>
> If the Tribunal find as a fact that the above appellant is an Ethiopian citizen, who can be removed to Ethiopia without facing a breach of his human rights, the SSHD will set removal directions to Ethiopia in pursuance of his powers under 10(1) of Schedule 2 to the Immigration Act 1971, as per the verbal undertaking given by Miss Powell at the hearing on 13th September 2007."

With the greatest respect, that letter appears to indicate the worst of both worlds. If Mr. Fripp is right and Eritrea is to be excluded, and if the respondent is right in saying that the appellant has no well found fear of persecution or risk of ill treatment in Ethiopia, which is what the respondent has said ever since issuing the letter giving reasons for refusal, in July 2001, then a notice with a new destination will be issued. A decision to refuse leave to enter is one which, under the provisions of the Immigration (Notices) Regulations 2003 (SI 2003/658: see reg 5(1)(b)) is required to indicate the country of proposed removal. Previously, and because of the terms of the notice of the decision against which he is appealing, the appellant has run this appeal on the basis that, although he says that Ethiopia is the only country by reference to which his claim to refugee status should be assessed, he does not have to deal with the consequences of return to that country, because the Secretary of State did not propose to return him there. Having, by the terms of the notice, effectively confined the issues in the appeal to the legality of removal to Eritrea, we apprehend that the Secretary of State could not remove him to Ethiopia without more ado. It may be that she is not formally required to reissue the notice of decision with the new destination specified; but if she attempts to remove the appellant to Ethiopia following an appeal required only to deal with Eritrea it is highly likely that she will be challenged by way of Judicial Review.

16. So far as we are aware, it is not suggested in this appeal that the appellant can lawfully be removed if he establishes that he is a refugee. We have indicated above the issues which will have to be determined in the course of deciding if he is a refugee. If he fails to establish that he is a refugee, he is nevertheless entitled to succeed in his appeal if he establishes that what the Secretary of State proposes to do to him will breach his human rights. The clear present position is that the Secretary of State proposes to remove him to Eritrea. In practice, if she wishes to retain the option of removing him to Ethiopia, she needs to issue a new notice of decision specifying Eritrea and Ethiopia as alternatives, under reg 5(b)(ii) of the Notices Regulations. In any event, the appellant is entitled to succeed if he shows that the proposed removal will breach his human rights.

17. So far as procedure in this Tribunal is concerned, the position as we see it is that the order of the Court of Appeal, made by consent, establishes for the purposes of rule 31 that the previous Tribunal materially erred in law. It is clear that there will have to be a further hearing on the merits, and it is important, given the history of this case, that at that hearing all relevant matters are determined with as much finality as possible. It is for that reason that we have done our best to give our views of the legal arguments advanced by Mr. Fripp on the appellant's behalf and to identify the issues with which the Tribunal will be concerned at that further hearing. Given that there has to be another hearing, it may be that the Secretary of State wishes to take the opportunity to withdraw the notice against which the appellant now appeals (thus bringing this appeal formally to an end) and issue a new notice, naming all possible removal destinations, and carrying a new right of appeal. That is a matter for her, but, for the reasons we have given, without a new notice it is unlikely that even a new hearing will resolve with finality the issues raised here.

18. Whether as a continuation of the present reconsideration or in relation to a new appeal, the Tribunal will take this Note into account in deciding how to proceed to determine the issues which are relevant. We do not seek to impose any restrictions on the evidence which may be adduced, provided it is relevant; nor do we suggest that any previous findings of fact be regarded as inviolable. It is, however, in the highest degree unlikely that the Tribunal will entertain further submissions on the matters of law raised in Mr. Fripp's arguments before us and resolved by this note.

C M G OCKELTON
DEPUTY PRESIDENT
Date: