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IMMIGRATION APPEAL TRIBUNAL

FA (Eritrea – nationality)Eritrea CG [2005] UKIAT 00047

Date of Hearing : 14 December 2004

Date Determination notified:

18/02/2005

Before:

Mr Justice Ouseley (President)
Dr H H Storey (Vice President)
His Honour Judge G Risius CB (Vice President)

[ ]

APPELLANT

and

Secretary of State for the Home Department

RESPONDENT

Appearances: Mr E Fripp of Counsel, instructed by Powell & Co. for the appellant; Mr N Andrews, Home Office Presenting Officer, for the respondent

DETERMINATION AND REASONS

1. The appellant, who claims to be a national of Ethiopia, appeals against a determination of Adjudicator, Miss C G Hamilton, notified on 11 December 2003, dismissing her appeal against the decision of 25 June 2002 refusing to grant asylum but granting limited leave to remain until 20 June 2004. Her appeal arose under s.69(3) of the 1999 Act. As the Adjudicator's determination was promulgated after 9 June 2003 our jurisdiction is confined to that of a material error of law.

2. The appellant claimed to have been born in Asmara on 21 June 1986 when it still formed part of Ethiopia, but to have moved to live in Ethiopia when aged one-and-a-half. Her father had been killed when she

was one year old. She had been told that the Ethiopian authorities had accused him of being a spy for the Eritrean Independent Movement. Later on her mother went missing. She believed the authorities had deported her to Eritrea. Her aunt had also had problems. It was these events which led her aunt to arrange for the appellant to depart Ethiopia in May 2002.

3. The respondent in the refusal letter had found the appellant to be a national of Eritrea who would be able to return there in safety. At the hearing the appellant disputed this. She relied on the terms of the 1992 Eritrean Nationality Proclamation (No. 21/1992) which sets out those who were entitled to Eritrean citizenship by birth. Although Article 2(1) of the Proclamation states that:

> "Any person born to a father or mother of Eritrean origin in Eritrea or abroad is an Eritrean national by birth.

Article 2(2) then defines Eritrean origin thus:

> "A person who has 'Eritrean origin' is any person who was resident in Eritrea in 1933."

4. Why the appellant considered these provisions excluded her from Eritrean nationality is best set out by quoting from paragraph 3 of the grounds of appeal to the Tribunal:

> 'The appellant's account of her background, the truthfulness of which appears to be accepted by [the Adjudicator], was that she was the child of a father of Eritrean regional origin born about 1940 and of a mother of Ethiopian origin born in the late 1940s. The appellant was resident in what later became the territory of independent Eritrea from birth to the age of 2½ years, thereafter living entirely in Ethiopia.'

5. We note there is a minor discrepancy over the exact age of the appellant when she left Asmara (1½ or 2½), but nothing hangs on that.

6. The Adjudicator accepted that Article 2(2) of the Nationality Proclamation appeared to confine nationality by birth to those whose parents were of Eritrean origin and who were resident in Eritrea in 1933, but considered that this text had to be read 'in conjunction with the clarifications offered by Mr Tewolde in the Home Office fact finding report' (paragraph 18).

7. The Home Office IND report to which she referred headed "7. Nationality: Laws and Their Application" does not bear a clear date but appears to have been prepared or revised some time after October 2002. It describes Tewolde (full name Gebratnsae Tewolde) as Operations Chief in the Department of Immigration and Nationality for Eritrea, a department responsible for all question of immigration citizenship, passports and visas. It goes on to state:

> '7.1.2 The Eritrean Nationality Proclamation No. 21/1992 published in April 1992 details the criteria and law as regarding Eritrean Nationality. Nationality in this document is split into several sections: Nationality by Birth; Naturalisation; Adoption and Marriage.
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> 7.1.3 According to Tewolde, "many people misunderstand the Nationality Proclamation, this is understandable as we are a new country and are trying to be as inclusive as possible to all our citizens born in years of foreign domination. Basically if your parents or grandparents were born in Eritrea you will certain be entitled to Eritrean nationality but will have to prove this, as you would anywhere in the world".
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> 7.1.4 The source further explained that "If you are born in Eritrean territory [regardless of who it belonged to at the time] then you will also be eligible. Many people have also returned to Eritrea since independence. They are very welcome regardless of the circumstances as we try to rebuild our nation after years of domination and war".
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> 7.1.5 According to the Nationality Proclamation, current Eritrea regard to naturalisation takes the year 1933 as the starting point. This is the year in which the Italian colonial government registered the population of the colony and declared those registered as legal residents. Therefore, these persons who have an absolute right to Eritrean citizenship are all those *who were themselves or who are the descendants of persons* resident in Eritrea prior to 1933.' (emphasis added)

8. In the light of this information the Adjudicator was satisfied that the appellant was entitled to Eritrean nationality by virtue of being a descendant of persons resident in Eritrea prior to 1933.

19. This finding of Eritrean nationality essentially caused the Adjudicator to dismiss the appeal on the strength of the appellant's own acceptance elsewhere that she did not have a well-founded fear of persecution in Eritrea.

10. The Adjudicator nowhere addressed the appellant's claims to fear persecution if returned to Ethiopia.

11. At the outset of the hearing Mr Fripp requested an adjournment on the basis that there was a determination imminent in a number of test cases heard together by a Tribunal chaired by Vice President Mr J. Latter*. In that determination, he said, the Tribunal was due to reach conclusions on 'similar points' bearing on the appeal before us.

12. We refused this request. As we explained to Mr Fripp, although the determination to which he referred had yet to be promulgated, we had seen it and satisfied ourselves that it did not address or decide the relevant issues in this appeal. We also bore in mind that in the appeal before us the Adjudicator had not addressed the issue of whether the appellant would face risk if returned to Ethiopia. So far as we were concerned, the only issue in this appeal was whether the Adjudicator had erred in law in concluding that the appellant was a national of Eritrea. If it was accepted there was no such error, then the appeal would have to fail, since the appellant herself did not claim to face a real risk of serious harm in Eritrea. If however we accepted there was such an error, then we would remit the appeal, so that an Adjudicator could make findings on whether the appellant would face a real risk of persecution if returned to Ethiopia, whether as a national of Ethiopia or as a stateless person having Ethiopia as her (evident) country of former habitual residence.

13. We should also mention at this stage that Mr Fripp referred at several points to material (e.g. an Amnesty International Report May 2004) that were not before the Adjudicator. However, as we pointed out to him, the Court of Appeal judgment in CA [2004] EWCA Civ 1165 prevented taking post-promulgation materials into account unless there was a material error of law. Furthermore, such material had not been submitted in accordance with Tribunal directions in this case. We were prepared because of apparent overlap to consider his skeleton argument drafted for the appeals in the cases shortly to be promulgated by Mr Latter, but we did not consider we could or should admit any further evidence not properly served.

14. We notice that in deciding this case the Adjudicator did not cite any court or Tribunal authorities dealing with nationality. That is unfortunate in

*That decision is now reported as MA and Others (Ethiopia – mixed ethnicity – dual nationality) Eritrea [2004 UKIAT 00324]

that it has meant having to piece together what her approach was. However, it is clear that the materials placed before her included a number of leading cases. We can only identify legal error on her part if satisfied she applied erroneous legal principles.

15. We shall not set out Mr Fripp's submissions strictly in the order he did, since his oral submissions digressed from his written grounds, taking in points (with our leave) from the skeleton argument already mentioned. But the following summary is intended to capture what we take to be his principal points.

16. Firstly, he submitted that the Adjudicator had made a finding contrary to a plain reading of the 1992 Eritrean Nationality Proclamation. Properly construed, he said, the latter excluded both of the appellant's parents from the category of those entitled to citizenship by birth to a father or mother of Eritrean origin, they being born *after* 1933. This was an error, he said, because his reasoning effectively treated the Proclamation as having no weight at all as evidence of Eritrean nationality entitlement.

17. Mr Fripp's second submission is difficult to discern in his written grounds, but we are prepared to treat these as raising it implicitly. As amplified by him, it was that the Adjudicator was wrong to accept the Home Office report 'clarification' as a reliable source of evidence as to how Eritrean nationality law was understood by the Eritrean authorities. He pointed out that paragraph 7.8.11 of this report quoted a certain Paulos Kahsay, Director General at the Ministry of Transport and Communications as representing that the group of persons deported by Malta to Eritrea in late 2002 were not detained, something which had since been demonstrated to be false. The need for caution in placing reliance on assertions and representations made by Eritrean officials, whether Mr Tewolde, the Ambassador at the Eritrean Embassy in London, or Mr Kahsay, was reinforced, said Mr Fripp, by what was objectively demonstrated by US State Department Reports, namely that the current regime in Eritrea was responsible for numerous human rights abuses and marked by arbitrariness. Hence what was claimed by government officials was not to be taken at face value.

18. The third main ground relied on by Mr Fripp was that the Adjudicator had wrongly failed to consider 'substantial obstacles to an effective extension of Eritrean nationality to [the appellant] as opposed to a notional future claim'. The first aspect of this failure was said to be her erroneous assumption that a future grant of nationality by a state where an individual does not already have a concrete entitlement satisfies the requirements of the Refugee Convention. The second aspect of this failure was, he said, her failure to recognise that the Home Office report itself indicated that in any event the appellant would not be able to prove her

entitlement to Eritrean nationality on the tests identified by Eritrean officials. The Home Office report depicted those officials as viewing Eritrean nationality in the context of being able to demonstrate association with other Eritreans, 'the practical embodiment of which is the requirement to produce three recognised Eritrean citizens to an individual's origins'. In particular Mr Fripp dwelt on what was quoted in paragraph 7.2.8 as being said by Ghimnal Ghebremanon, Ambassador, Embassy of the State of Eritrea, London:

> '... His view is that these witnesses should not be hard [sic] to provide as a proof of nationality *'they will be in groups of other Eritreans, if Eritrean is what they are. So proving Eritrean nationality is easy. Much more so than for a British or American citizen*.'

19. This, said Mr Fripp, effectively reduced the test applied in respect of Eritrean nationality to one of community association with other Eritreans. Such a test was not an objective or properly legal one and so was bound to have arbitrary effects in practice. Even if the test itself had legal efficacy, it could not avail this appellant because her father was dead, her mother was missing, and she herself had left Asmara when only 1½ years old.

Evaluation and Conclusions

20. We are not persuaded by Mr Fripp's first ground. The Adjudicator did not fail to attach weight to the 1992 Nationality Proclamation. She simply had recourse, in deciding what it meant in practice, to supplementary sources. We would accept that on the rules of construction familiar to an English lawyer, those covered by Article 2(1) appear restricted by Article 2(2) to persons born in Eritrea having parents of Eritrean ethnic origin themselves resident there in 1933. But the Home Office report, on which the Adjudicator relied, simply reflected a proper recognition that in considering questions of entitlement to the nationality of a foreign state, it is necessary to have regard to both law and practice in that state. Such an approach also reflects the essential principle of international law, as set out for example in Articles 1 and 2 of the 1930 Hague Convention that

> '**1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws**
>
> Article 1
>
> It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions,

international custom, and the principles of law generally recognised with regard to nationality ...

Article 2

Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State.'

21. Thus the Adjudicator did not prefer the Home Office report to the test of the Proclamation; rather she simply used the former to cast light on how the latter was interpreted and applied by the authorities of the state in question. Plainly Eritrean authorities favoured an 'inclusive' interpretation. We would add that in considering the 1992 Proclamation in this way, she adopted an approach wholly in line with that taken by the Court of Appeal in Zaid Tecle [2002] EWCA Civ 1358 and the Tribunal in cases such as YL (Nationality, Statelessness – Eritrea – Ethiopia) Eritrea CG [2004] UKIAT 00016 (formerly L (Ethiopia) [2003] UKIAT 00016). (Indeed, if we understood Mr Fripp's own remarks correctly, his own position was that the legal text in this case (the 1992 Proclamation) could not safely be read in isolation from legal practice since two expert reports known to him from other cases had concluded that matters came down very largely to 'executive fiat'). Moreover, in our view there was a further reason for looking behind the bare text of the 1992 Proclamation, at least in the form of the translation placed before the Adjudicator. If taken literally it was a provision which within a relatively short period of (generational) time would prevent anyone being able to qualify for Eritrean nationality on the grounds of a combination of birth and parentage. The youngest parent now covered, for example would have to be no less than seventy-one years old. Such a reading defied common sense.

22. Turning to Mr Fripp's second ground, we would observe first of all that the Home Office report was primarily a summary of the evidence available regarding Eritrean nationality law drawn from a number of sources. For reasons already given, one would expect it to accord prominence to evidence as to determination and application given by Eritrean officials, but the nine page report also draws on a US State Department Report, a report by Dr Gilkes and materials provided by a number of international organisations including UNHCR, ICRC and ERREC.

23. Mr Fripp has asserted that the report should have been treated with much more caution than it was, at least to the extent that it relied on statement by Eritrean officials. We can readily accept that how much weight should be attached to statements by the government officials of a

particular country will vary depending on a number of factors, including the extent to which the government in question complies or does not comply with international human rights guarantees. But there was nothing placed before the Adjudicator by Mr Fripp (who also represented the appellant below) to show that what was said about *Eritrean nationality law and practice* by the officials cited was false. Even if the Adjudicator had known that what was said by Mr Kahsay about the returnees from Malta was false, that was not enough on its own to cause him to attach less weight to what said by Mr Tewolde or by the Eritrean Ambassador in relation to an entirely different issue.

24. The third ground in its first limb highlighted a point which, as Mr Fripp conceded, has been raised by him in a number of previous cases. It encapsulates what might be termed the 'present nationality' approach. However, as Mr Fripp should well know, that approach has been consistently and emphatically rejected in leading cases before the Court of Appeal and the Tribunal. This proper approach to nationality determination has been set out in some detail by the Tribunal in the YL case 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 provisions of the definition in Article 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."

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 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.

47. As noted earlier, we now have the judgment in the Court of Appeal in Zaid Tecle [2002]EWCA Civ 1358 published on 6 September 2002 as well as Mrs Cronin's submissions on it. We note that what it says about nationality in relation to a claimant who was also born in Asmara with an Eritrean father, supports the view we have taken here. Brooke, LJ, stated at paragraph 23:

> "In my judgment, given the material from the British Embassy which was before the Adjudicator and the Tribunal in this case, the Tribunal was entitled, having regard to that and

> having regard to the CIPU Report, to take an adverse view of the fact that the appellant, on whom the burden of proof lay, had not contacted the Eritrean Embassy in London and made an application, supported by three appropriate witnesses, for citizenship."'

25. No doubt in recognition of the fact that legal authority was against him, Mr Fripp's submission sought to rely on a fall-back argument at this point. Even if it is right to take a 'putative nationality' approach in some cases, he contended, this was only valid when the recognised or underlying nationality was an accessible and effective one. In the Canadian case of Bouianova v MEI [1993] FCJ 576 the applicant was a citizen of Russia by birth. He was merely asking for recognition of a pre-existing status based on the operation of Russian law and an application to the Russian Consulate. Recognition of a person in this type of situation as a national (of Russia) made sense. But that was because there were minimal procedural steps involved. Thus, argued Mr Fripp, Bouvianova principles should only apply to the situation of a person who in order to have citizenship conferred would have to undertake 'equivalent minimal procedural steps'.

26. We think this submission goes too far. In YL the Tribunal identified the proper test as one of serious obstacles. Mr Fripp on the other hand advocated a test that would virtually require access which was obstacle-free. To reduce it thus would mean that a claimant could avoid by choice being recognised as a national of his country whenever the procedure for applying and obtaining nationality was not wholly straightforward. He would not have to exercise due diligence. Such a test would place the decision as to nationality in the control of the claimant and so give him an ability in certain contexts to manipulate his nationality (or lack of it) in order to achieve recognition as a refugee. But that would be to undermine the foundation principle of surrogate protection. (We note that our approach also accords with that contained in Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees who otherwise need international protection (the Qualification Directive) which at Article 4(3)(e) requires assessment of an individual application to take into account, inter alia: "whether the applicant could reasonably be expected to avail himself of the protection of another country where he could assert citizenship".)

27. As regards Mr Fripp's reliance on a test of "effective nationality" as identified by Tamberlin J in the Australian case, Jong Kim Koe v MIMA [1997] 306 FCA, that was concerned with a situation of a person with

more than one nationality. For reasons already explained, that is not the issue we have before us in the context of this appeal.

28. Mr Fripp's next point under this head was that the Adjudicator was wrong to consider it reasonably likely the appellant would be accepted as Eritrean by the Eritrean authorities since the Home Office report in its description of the three witnesses test applied by the Eritrean authorities made clear that only those who had a community association with other Eritreans could surmount it.

29. The significance of the three witnesses test has previously been considered by the Court of Appeal in Zaid Tecle and by the Tribunal in YL and other cases. What underlines these decisions is the view that a claimant should be expected to use due diligence in respect of such a test. It is true that in this case the appellant's parents were dead and missing and that she herself was unlikely to have been known as someone who had resided in Asmara, since she left there when 1½ (or 2½) years old. However, as accurately reflected in the comments of the Eritrean Ambassador in London, there is an Eritrean community in the UK (which is part of a larger Eritrean disapora abroad). As noted at paragraph 7.2.7, 'It is a matter of history that those in Ethiopia kept close contact with family in Eritrea, even those that stayed in Ethiopia after independence'. There was no evidence to suggest that the appellant in this case had isolated herself from other Eritreans in the UK or that fellow Eritreans here would not include those who knew directly of her own family history.

30. As for Mr Fripp's contention that the statements from Eritrean officials disclosed a nationality law and practice lacking any real objective criteria, we fail to see that this is demonstrated by the Home Office report or any other evidence placed before the Adjudicator. It may be that the Eritrean nationality law is sometimes misapplied or not applied in some instances, but there are identifiable criteria which appear roughly comparable with nationality tests in a number of other countries and which have not been seen by courts or tribunals n this country to lack sufficient objectivity as tests in this type of subject area. There is no evidence before us of a consistent pattern of abuse of these criteria by Eritrean officials, or of commonplace but random abuse.

31. Accordingly, we do not think that the Adjudicator erred in finding it reasonably likely, by virtue of her parentage and birth in Asmara, that this appellant was, or should be considered for Refugee Convention purposes, to be a national of Eritrea.

32. For the above reasons this appeal is dismissed. It is reported for what we say about nationality in general and Eritrean nationality in particular.

H.H. STOREY
VICE PRESIDENT