Neutral Citation Number: [2007] EWCA Civ 809

Case No: C5/2006/2355

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM The Asylum and Immigration Tribunal
HX133122002

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2007

Before :

LORD JUSTICE PILL
LORD JUSTICE LONGMORE
and
LORD JUSTICE JACOB

- -

Between :

EB (Ethiopia)	**Appellant**
- and -	
Secretary of State for the Home Department	**Respondent**

- -
- -

Nicholas Blake QC, Eric Fripp and Sandra Akinbolu (instructed by **Messrs White Ryland**) for the **Appellant**
Tim Eicke and Neil Sheldon (instructed by **Treasury Solicitors**) for the **Respondent**

Hearing dates : 21 and 22 May 2007

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Approved Judgment

Lord Justice Pill :

1. This is an appeal against a decision of the Asylum and Immigration Tribunal ("the Tribunal") promulgated on 9 October 2006 whereby the Tribunal dismissed EB's appeal against the refusal of the Secretary of State for the Home Department ("the Secretary of State") to grant her asylum and to allow her to remain in the United Kingdom on human rights grounds. The appellant is, at present, within the United Kingdom on temporary admission. The appeal is claimed to give rise to a general issue about the treatment of persons with Eritrean ancestral connections who have left the state of Ethiopia.

2. EB is 35 years old and was a national of Ethiopia. She, and her parents, were born and lived in Ethiopia, her mother being Ethiopian. Her father was of Eritrean background, his father having been born in Eritrea. She acquired Ethiopian nationality on her birth.

3. At the time of EB's birth, Eritrea was effectively a province of Ethiopia, having been annexed in 1962. In 1993, Eritrea separated from Ethiopia following a referendum which approved Eritrean independence. EB's father was a Captain in the Ethiopian army and a supporter of the inclusion of Eritrea within Ethiopia. The family remained in Ethiopia after 1993. On the evidence both she and her father were loyal Ethiopians.

4. In 1998, war broke out between Ethiopia and Eritrea. Ethiopia initiated a large scale programme of forced deportation of Eritrean nationals resident in Ethiopia and those who retained Ethiopian nationality but had an Eritrean family background. However, the situation improved in 2000 when peace agreements were reached between the two states. EB left Ethiopia in December 2001, using a forged passport, and with the help of an agent in circumstances to be considered. She sought asylum in the United Kingdom soon after arrival.

5. A five member Eritrean Ethiopian Claims Commission was set up in 2001 to consider, amongst other things, claims by Eritrea for loss, damage and injury suffered by Eritrean nationals and other persons resulting from alleged infraction of international laws in connection with the 1998-2000 armed conflict between the two parties. The Commission issued a partial award at The Hague on 17 December 2004. Amongst the findings on liability, it was held that Ethiopia was liable to Eritrea for a violation of international laws in "erroneously depriving at least some Ethiopians who were not dual nationals of their Ethiopian nationality." At paragraph 75 the Commission had stated:

> "Considering that right to such benefits as land ownership and business licenses, as well as passports and other travel documents, the Commission finds that this wide-scale deprivation of Ethiopian nationality of persons remaining in Ethiopia was under the circumstances arbitrary and contrary to international law"

The Commission declined jurisdiction to consider "claims regarding the alleged forcible expulsion from Ethiopia of 722 persons in July 2001".

6. The appellant made a written statement in December 2001 and two further witness statements which were before the Tribunal. She gave evidence and also relied on an expert report from Professor L Cliffe, dated 30 August 2006, and other written material. A substantial amount of material about the situation in Ethiopia over the years was placed before the Tribunal.

7. EB was cross-examined at length. She claimed to be a Jehovah's Witness, having been baptised in Ethiopia three years before she came to the United Kingdom. There had been earlier proceedings to which it is not necessary to refer for present purposes.

8. The Tribunal set out and analysed the evidence in considerable detail. EB claimed that her father had been taken from the house and deported in May 2000 and that, in February 2001, armed police raided her house, accused her of being an Eritrean spy and took her ID cards and school papers and the identity card and papers of her brother. In April 2001, the garage business, which she had continued to run after her father's departure, was raided, the licence revoked and all the goods confiscated. Further documents, including EB's school documents, were taken in August 2001 and she was imprisoned, interrogated and tortured. She was released on bail on 9 November 2001 because her mother was gravely ill. Her mother died soon afterwards and her paternal uncle arranged for her departure from Ethiopia.

9. The appellant said that she had twice visited the Ethiopian Embassy in the United Kingdom. Ms W.A. Woldearegay gave evidence that she had accompanied the appellant on one of those occasions. The appellant was refused a passport. She did not have the documents necessary to obtain a passport. These had been taken from her in Ethiopia.

10. The Tribunal found that there were serious inconsistencies in the appellant's account of her claimed detention and threatened deportation which undermined her credibility. Reference was made to alleged implausibilities and discrepancies. They found that she was vague and evasive on occasions when giving evidence.

11. The Tribunal accepted that the appellant's father had been detained and deported but held that it was much more likely that the events, including the closure of the business, had taken place in 1999 or early 2000. They added, at paragraph 52:

> "We have also accepted her evidence that her father was deported. If that were the case it is also likely that the children's identity documents, birth certificates and the like were removed from the home at the time of her father's deportation or shortly thereafter. Again, the objective material clearly shows that this was the way that the Ethiopians were operating and that it was specifically directed to people like the

> appellant so that she would have difficulty in the future proving her Ethiopian nationality".

The Tribunal accepted the appellant's evidence of her visit to the Ethiopian Embassy. At paragraph 55, they stated:

> "We will accept that the appellant is most likely to have lost her Ethiopian nationality . . . On this basis all the expert and objective evidence seems to indicate that the appellant has lost her Ethiopian nationality".

12. As to Eritrea, the Tribunal stated, at paragraph 57:

> "We therefore find that the evidence shows it is reasonably likely the appellant could not prove Eritrean nationality. She is stateless".

13. The Tribunal also considered the appellant's treatment in Ethiopia. At paragraph 50, the Tribunal found:

> "For all the reasons and looking at the evidence in the round we do not accept that the appellant was ever detained or targeted for deportation by the Ethiopian authorities. We reject that evidence as a fabrication."

14. The Tribunal concluded:

> "58 Having made these findings of fact we must now consider whether they form the base of a claim that the appellant has a present well-founded fear of persecution if returned to Ethiopia. We accept that this is a largely hypothetical exercise as the appellant has lost her Ethiopian nationality and may not be admitted to that country. However jurisprudence shows that the question of actual returnability to a country is not one that should be considered by this Tribunal but merely the likelihood of persecution if she returns.
>
> 59 Our findings of fact show that the appellant did not suffer persecution in Ethiopia in the past. On the basis of our findings the appellant and her family continued to live in Ethiopia from the date of her father's deportation in 1999 until the end of 2001. They appear to have survived notwithstanding the closure of the father's business. We do not accept that any of them were arrested or harassed by the authorities. It may well be that the appellant suffered the sort of discrimination and rejection by her neighbours that she claims. However such discrimination

> does not constitute persecution. Furthermore we do not accept that this is an appellant who was ever at risk of forcible repatriation to Eritrea. We do not accept her account of being targeted for deportation. The objective evidence does not show any wide scale deportations of persons in her circumstances. Therefore we do not find that when she left Ethiopia she was at risk of ill treatment".

15. The Tribunal purported to rely on the decision of a differently constituted tribunal in *MA (Ethiopia) and another v SSHD; SSHD v RG (Ethiopia-Eritrea-Mixed ethnicity-dual nationality)* [2004] UKIAT 00324. They did so, at paragraph 60, to reject the submission that "the mere deprival of her nationality in the context of the Ethiopia/Eritrea situation in itself constitutes persecution". They stated, at paragraph 60, that loss of nationality on its own is not sufficient: "There must be other treatment which would lead to persecution".

16. The Tribunal expressed their general conclusion at paragraph 63:

> "In this case we find that the appellant's deprivation of nationality actually arises because of her having left Ethiopia. Although we accept that to be exacerbated by the appellant's inability to provide documents about her nationality because those were taken by the Ethiopian authorities we do not find that was an activity in itself which resulted in ill-treatment to her whilst she was in Ethiopia. If at the height of the problems and the greater likelihood of deportation this was not an appellant who was targeted and there is no reason to believe that her mere loss of nationality afterwards constitutes treatment which could make her a refugee. We therefore find that, given the particular facts of this case, her deprivation of nationality in itself is insufficient to make her a refugee. In the light of that and our previous findings about the likelihood of any ill-treatment if she returned to Ethiopia we find that the appellant has failed to provide that she has a well-founded fear of persecution because of her mixed Ethiopian Eritrean ethnicity if she were returned to Ethiopia. We dismiss the asylum appeal."

On the human rights claim, the Tribunal concluded, at paragraph 64:

> "If the appellant were returnable to Ethiopia on the basis of what happened to her in the past we do not accept that she would be at risk of cruel, inhuman or degrading treatment on return"

17. There is no doubt that there was a large scale expulsion of persons with an Eritrean background from Ethiopia, at least in 1998/1999. In 2004, the Ethiopian Government issued a Directive which has alleviated the position of Ethiopian residents with an Eritrean background. Paragraph 2 of the Directive provided:

> "The objective of this Directive is to provide the means to any person of Eritrean origin who was a resident in Ethiopia when Eritrea became an independent State and has continued maintaining permanent residence in Ethiopia up until this Directive is issued to confirm whether he or she has acquired Eritrean nationality, and to determine his or her status of residence in Ethiopia."

In paragraph 3 of the Directive, reference is made to the constitution of the Federal Democratic Republic of Ethiopia which provides that no Ethiopian national shall be deprived of his or her Ethiopian nationality against his or her will. Article 33(2) guarantees that any national has the right to change his or her Ethiopian nationality. Article 17 of what is described as the new nationality law provides:

> "No Ethiopian may be deprived of his or her nationality by the decision of any government organ unless he or she loses his or her Ethiopian nationality on his or her own will."

18. For the appellant, Mr Blake QC, relies on the absence in the Directive of provision for people, such as the appellant, who left Ethiopia before 2004. No provision is made for their readmission or reinstatement.

19. Mr Eicke, for the Secretary of State, accepts that the appellant cannot currently be removed from the United Kingdom but, subject to judicial intervention, she would be removed if arrangements could be made with the Ethiopian Government for her return to Ethiopia. The Secretary of State does not accept that, upon such return, there would be a risk of persecution.

20. Mr Blake submits that the findings of fact of the Tribunal cannot stand. They have failed to have regard to relevant evidence. Further, they have not applied the correct test when considering whether the appellant is a refugee. The appellant is a refugee within the meaning of article 1A(2) of the Convention. The court should make a finding that the appellant has refugee status because of her effective (*de facto*) deprivation of Ethiopian nationality on ethnic grounds.

21. Mr Eicke stresses that his submissions are based on the facts found by the Tribunal. The reason the appellant has lost her Ethiopian nationality is that she decided to leave Ethiopia. She was not at risk of persecution at the time she left and her voluntary departure does not make her a refugee. If she were able to return, she would not be at risk of persecution on return.

22. Under article 1A(2) of the Convention relating to the Status of Refugees (1951), a person is a refugee if:

> "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable, or, owing to such fear, is unwilling to return to it."

23. It is submitted that arbitrary deprivation of nationality with destruction of documents of identity attesting to nationality constitutes persecution as a sufficiently severe denial of core human rights. Further, it is Convention persecution because it is directed against Ethiopians with Eritrean ancestry and thus based on race or membership of a particular social group.

24. As to the facts, it is submitted that the Tribunal could not properly find that the appellant's father was deported between June 1998 and the late summer of 1999, rather than in May 2000, in the face of evidence before them of conditions in Ethiopia and of expulsions in 2000. The Tribunal had held, at paragraph 36:

> "The Human Rights Watch Report and the INS Report of January 2002 . . . indicate that the great wave of expulsions took place between June 1998 and February 1999. There was a further wave of expulsions which continued into June 1999. However, by January 2000 the Ethiopian Foreign Ministry gave a pledge to refrain from further deportation. Certain deportations did occur thereafter but they were relatively small. There were 1,500 expelled in December 1999 but there have been no reports of large scale expulsions in early 2000."

Mr Blake has referred to the postscript to the INS report of January 2002:

> "In an apparently serious violation of the peace agreement, the Ethiopian government deported 722 Eritreans from Ethiopia in late June 2001, which, according to the ICRC, "was the first involuntary repatriation since the two countries signed an accord to end their border war". Reference is made to an UNHCR letter of 22 January 2001, cited by Mr P Gilkes in his expert report, of involuntary departure continuing after the cessation of hostilities agreement of 18 June 2000 and the comprehensive peace agreement of 12 December 2000."

25. Before expressing conclusions on that issue, I turn to the main submission on which the appellant relies to challenge the Tribunal's decision. It is that arbitrary and discriminatory measures to deprive citizens of their nationality, deport them or leave

them stateless and in exile amounts to persecution, where the discriminatory treatment is related to a Convention concern such as ethnicity, or perceived ethnicity. The appellant is not merely stateless but a refugee because her statelessness is a consequence of the persecution involved in a continued deprivation of nationality and the rights attached to it. Her departure from Ethiopia being voluntary is immaterial; the appellant effectively was deprived of the rights which go with nationality while still in the country. While she may have retained her nationality in law (*de jure*) she had lost her effective (*de facto*) nationality.

26. In support of that submission reference is made to the decision of this court in *Lazarevic v Secretary for the Home Department* [1997] 1 WLR 1107, decisions in other jurisdictions, and academic writings. The finding of the court in that case that it was not necessary to the establishment of refugee status for an applicant to have a current well founded fear of persecution provided the fear or actuality of past persecution still played a causative part in his presence in the United Kingdom, was subsequently rejected by the House of Lords in *Adan v Secretary of State for the Home Department* [1999] AC 293. The other issues before this court were whether Yugoslav draft evaders, who were outside their country of nationality and whose country was unwilling to accept their return were, for that reason, refugees. It was held both that there was no Convention reason behind their fear of persecution and that they had not fled for a Convention reason.

27. However, reliance is placed on the judgment of Hutchison LJ at page 1126E:

> "If a state arbitrarily excludes one of its citizens, thereby cutting him off from enjoyment of all those benefits and rights enjoyed by citizens and duties owed by a state to its citizens, there is in my view no difficulty in accepting that such conduct *can* amount to persecution. Such a person may properly say both that he is *being* persecuted and that he *fears* (continued) persecution in the future." (emphasis supplied)

28. The refusal of admission in the present case, it is submitted, not merely gives rise to persecution, it is the persecution itself. The conduct contemplated by Hutchison LJ includes denial of the ability to return to the country of nationality. When a person is denied the basic rights which go with nationality, that person is being persecuted.

29. Mr Blake has referred to international instruments which recognise the importance of possessing nationality. Article 15 of the Universal Declaration of Human Rights (1948) provides: "Everyone has the right to a nationality" and "No one shall be arbitrarily deprived of his nationality". Article 12 of the International Covenant on Civil and Political Rights (1966), having referred to the right of everyone lawfully within the territory of a state to "liberty of movement and freedom to choose his residence", provides: "No one shall be arbitrarily deprived of the right to enter his own country".

30. The UN Convention on the Reduction of Statelessness (1961) provides, by article 8(1), that a person shall not be deprived of nationality if to do so would make him or her stateless and, by article 9, that a contracting state may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds. Qualifications to article 8(1) are made in article 8(2). The Convention has been ratified by the United Kingdom but not by Ethiopia. By acting as it has, Ethiopia is in breach of well-established principles of international law, it is submitted.

31. In a letter of 17 July 2000 to the US Immigration and Naturalization Service, a senior official of UNHCR stated: "Ethiopian citizens expelled from Ethiopia to Eritrea on the ground of ethnic origin would have a claim for refugee status if they do not possess another nationality … If, as a result of the deprivation of nationality, these persons become stateless, they would be entitled to recognition as refugees … as Ethiopia would be their country of former habitual residence".

32. As to academic writings, Atle Grahl-Madsen, in *The Status of Refugees in International Law* (1966), stated, at page 215: "As de-nationalisation (deprivation of citizenship) for political, ethnic, or similar reasons incurs loss of civil rights, that too may be classified as persecution". G. Goodwin-Gill in *The Refugee and International Law* (2nd edition 1996), stated, at page 70:

> "Certain measures such as the forcible expulsion of an ethnic minority or of an individual will clearly show the severance of the normal relationship between citizen and state, but the relation of cause and effect may be less clear in other cases. For example, expulsion may be encouraged indirectly either by threats or by implementation of apparently unconnected policies".

33. The opinion of Professor Hathaway was cited by Lord Hope of Craighill in *Horvath v The Secretary of State* [2001] 1 AC 489, at 495:

> "This purpose has a direct bearing on the meaning that it is to be given to the word "persecution" for the purposes of the [Refugee] Convention. As Professor James C Hathaway in *The Law of Refugee Status* 1991, page 112 has explained, "persecution is most appropriately defined as the sustained or the systemic failure of state protection in relation to one of the core entitlements which has been recognised by the international community". At page 135, he refers to the protection which the Convention provides as "surrogate or substitute protection", which is activated only upon the failure of protection by the home state. On this view the failure of state protection is central to the whole system. It also has a direct bearing on the test that is to be applied in order to answer the question whether the protection against persecution which is available in the country of his nationality is sufficiently lacking to enable the person to obtain protection internationally

> as refugee. If the principle of surrogacy is applied, the criteria must be whether the alleged lack of protection is such as to indicate that the home state is unable or unwilling to discharge *its* duty to establish and operate a system for the protection against persecution of its own nationals".

34. Council Directive 2004/83/EC of 29 April 2004 provides minimum standards for the qualification and status of third country nationals or stateless persons as refugees. States are required to comply with the Directive before 10 October 2006 (article 38). Article 9 defines what are capable of being acts of persecution and these include, under article 9(2)(b): "Legal, administrative, police and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner".

35. Reliance is placed on the decision of the United States Supreme Court in *Trop v Dulles, Secretary of State* (1957) 356 US 86. By a majority of 5 to 4 the court held that a provision in the Nationality Act 1940, as amended, which provided that a citizen "shall lose his nationality", following conviction for an offence of deserting the military or naval forces of the United States in times of war, was unconstitutional as being cruel and unusual punishment. Chief Justice Warren stated at page 101:

> "There may be involved no physical mistreatment, no primitive torture. There is instead a total destruction of the individual's status in organised society . . . the punishment strips a citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself . . . In short the expatriate has lost the right to have rights".

Brennan J, concurring, stated, at page 110, that expatriation constituted an especially demoralising sanction and the person would become "an outcast in his own land".

36. Because of the prominence given in the judgments in this case to the majority opinions in *Trop,* it is appropriate in this context to refer to the powerful joint dissenting opinion delivered by Frankfurter J. Having observed that self-restraint, in relation to Acts of Congress, is "of the essence of the observance of the judicial oath" (pages 120 and 128), and having stated that "to insist that denationalization is 'cruel and unusual punishment' is to stretch that concept beyond the breaking point" (page 126), Frankfurter J stated, at page 127:

> "Nor has Congress fallen afoul of that prohibition on cruel and unusual punishment because a person's post-denationalization status has elements of unpredictability. Presumably a denationalized person becomes an alien *vis-à-vis* the United States. The very substantial rights and privileges that the alien in this country enjoys under the federal and state constitutions puts him in a very different condition from that of an outlaw in

> fifteenth-century England. He need not be in constant fear lest some dire and unforeseen fate be imposed on him by arbitrary governmental action - certainly not "while this Court sits" (Holmes, J., dissenting in *Panhandle Oil Co. v. Mississippi ex rel. Knor,* 277 U. S. 218, 223). The multitudinous decisions of this Court protective of the rights of aliens bear weighty testimony. And the assumption that brutal treatment is the inevitable lot of denationalized persons found in other countries is a slender basis on which to strike down an Act of Congress otherwise amply sustainable."

37. In *Maarouf v Canada* [1994] 73 FTR 211 (FCTD), Cullen J stated that "the claimant does not have to be legally able to return to a country of former habitual residence as denial of a right of return may in itself constitute an act of persecution by the State". In *Altawil v Canada* [1996] 114 FTR 241 (FCTD), Simpson J stated:

> "While it is clear that a denial [of] a right to return may, in itself, constitute an act of persecution by a state, it seems to me that there must be something in the real circumstances which suggests persecutorial intent or conduct".

38. The question arises as to the relevance, in circumstances such as the present, of risk on return. Mr Blake submits that, while statelessness does not necessarily confer refugee status, the denial of the right to return to the country of habitual residence is itself a denial of state protection and amounts to persecution. It is an element of the effective denial of nationality which has occurred. The appellant is entitled to the surrogate protection contemplated by Lord Hope in *Horvath.*

39. In *Adan*, the House of Lords, by reference to article 1A(2) of the Convention, whether a current fear of persecution is required to found refugee status. Lord Lloyd of Berwick, with whom Lord Goff of Chieveley, Lord Nolan and Lord Hope of Craighead agreed, stated, at page 305:

> "A broad approach is what is needed, rather than a narrow linguistic approach.
>
> But having said that, the starting point must be the language itself. The most striking feature is that it is expressed throughout in the present tense; "is outside", "is unable", "is unwilling". Thus in order to bring himself within category (1) Mr Adan must show that he is (not was) unable to avail himself of the protection of his country. If one asks "protection against what?" the answer must surely be, or at least include, protection against persecution. Since "is unable" can only refer to current inability, one would expect that the persecution against which he needs protection is also current (or future) persecution. If he has no current fear of persecution it is not easy to see why he

> should need current protection against persecution, or why, indeed, protection is relevant at all.
>
> But the point becomes even clearer when one looks at category (2), which includes a person who (a) is outside the country of his nationality owing to a well-founded fear of persecution and (b) is unwilling, owing to such fear, to avail himself of the protection of that country. If fear in (b) is confined to current fear, it would be odd if "owing to well-founded fear" in (a) were not also confined to current fear. The word must surely bear the same meaning in both halves of the sentence."

Lord Lloyd added, at page 308:

> "So far as I am aware the suggestion that anything other than a current fear of persecution will suffice has never even been muted".

40. Lord Slynn of Hadley stated, at page 301:

> "I am satisfied, however, that the Geneva Convention, in article 1A(2), does not confer that status. The first matter to be established under paragraph (2) of the article is that the claimant *is* outside the country of his nationality owing to a well-founded fear of persecution. That well-founded fear must, as I read it, exist at the time his claim for refugee status is to be determined; it is not sufficient as a matter of the ordinary meaning of the words of the paragraph that he had such fear when he left his country but no longer has it. Since the second matter to be established, namely that the person "*is* unable or, owing to such fear, *is* unwilling to avail himself of the protection of that country" (emphasis added) clearly refers to an inability or unwillingness at the time his claim for refugee status is to be determined, it seems to me that the coherence of the scheme requires that the well-founded fear, the first matter to be established, is also a current fear. The existence of what has been called a historic fear is not sufficient in itself, though it may constitute important evidence to justify a claim of a current well-founded fear."

41. Mr Blake submits that the refusal to permit re-entry, and thus to prevent the exercise of civil rights upon entry, is itself the persecution. The persecution is not merely feared, it has materialised.

42. In *Revenko v Secretary of State for the Home Office* [2001] QB 601, the applicant was born in that part of the USSR which, in 1991, became the independent state of Moldova. Under new rules of citizenship, he was not considered a citizen of Moldova and was unable, having left the country on a visit to the United Kingdom, to return

there. It was held that he was not entitled to refugee status. The main issue was upon the construction of article 1A(2), and whether the entire paragraph was governed by the need to show a well- founded fear of persecution on Convention grounds or whether the second part of the paragraph is self-contained so that a stateless person unable to return to the country of his former habitual residence, by reason of those facts alone, is a refugee. It was held that "the entire paragraph should be governed by the need to establish a well-founded fear of persecution on a Convention ground. The existence of a well-founded fear was intended to be a pre-requirement to refugee status" (Pill LJ, at page 623C). Clarke LJ stated, at page 631G: "The scheme of the Convention intended a person to be a refugee only if he had a well-founded fear of persecution on a Convention ground".

43. The case for the appellant was not argued in the way EB's case has been argued but the decision is authority for the proposition that statelessness does not necessarily confer refugee status. The second part of the article 1A(2) deals specifically with persons "not having a nationality" and the facts of the particular case will need to be considered in the light of it.

44. Mr Blake accepts that, if effective nationality were to be restored, the appellant would cease to be a refugee. Until that happens, she is entitled to refugee status. The fact finding Tribunal should ask itself why the appellant is outside Ethiopia. The correct answer is that she was persecuted in Ethiopia, and feared even more serious persecution. She was arbitrarily deprived of those rights for ethnic reasons. Inability to enjoy the ordinary civil rights of an Ethiopian national persists. There is no justification in the evidence, it is submitted, for the removal of those documents necessary to assert civil rights. While the appellant had a *de jure* constitutional right to Ethiopian nationality, she was treated as a non-Ethiopian and that was why she left. She was "an outcast in (her) own land" (*Trop*). The right not to be deprived of nationality on racial or ethnic grounds is well-established. A right to state protection and to basic civil rights must be available to a national and to deprive a person of them may amount to persecution which can consist of or include discriminatory administrative measures.

45. For the Secretary of State, Mr Eicke submits that the case turns on the Tribunal's findings of fact. These were comprehensive and sufficiently reasoned. They found that the appellant was not persecuted prior to her departure and did not reasonably fear persecution. Her departure was voluntary and it was that voluntary departure which caused the loss of civil rights in Ethiopia. If she could return, there would be no risk of persecution on return, as required by *Adan* if refugee status is to be established. Her current inability to exercise that right did not create a current risk of persecution.

46. When considering the regime under the Asylum and Immigration Appeals Act 1993, Lord Phillips of Worth Matravers MR, giving the judgment of this court in *Saad, Diriye and Osorio v Secretary of State for the Home Department* 2001 EWCA Civ 2008, stated, at paragraph 58:

> "All [relevant] asylum appeals are hypothetical in the sense that they involve the consideration of a hypothesis or assumption, which is reflected in the wording of each of the sub-sections of section 8 [of the 1993 Act], namely that the applicant's removal or requirement to leave (as the case might be) '*would be* contrary to the United Kingdom's obligations under the Convention.'"

Thus, submits Mr Eicke, on asking that question on the basis of the Tribunal's findings of fact, there is no risk of persecution and no entitlement to refugee status.

47. The mere denial of nationality by other states of habitual residents cannot, without more, he submits, give rise to refugee status. There is no causal link between the taking of the identity documents in 1999 and the effective loss of nationality by inability to obtain entry documents in 2001.

48. Thus the respondent's case turned on the Tribunal's findings of fact, notably that the appellant had not been persecuted prior to departure and had departed voluntarily. Mr Eicke accepts that a deprivation of nationality may amount to persecution. Deprivation of nationality in 1999 would have been capable of placing EB within a category of persons becoming refugees, a status which can flow from loss of the rights of citizenship. On the present facts, however, the necessary current risk of fear of persecution was not established on asking, on the basis of the Tribunal's findings, the hypothetical question: "What would happen to EB on return to Ethiopia?"

49. Mr Eicke accepts that there is substantial evidence of pressure having been put on people of Eritrean origin in the late 1990s but submits that the in-country evidence shows it as applying only to those who had voted in the 1993 referendum on Eritrea's independence. It had not been established that EB, whose mother was wholly Ethiopian, had been badly treated.

50. It is necessary to consider the conclusions of the Tribunal in the light of those principles and of the submissions made. The in-country material was more than usually complex in this case. I would commend the care and detail with which the Tribunal sought to analyse the factual evidence. It was, however, a case where the greatest care was require in relating the oral evidence of EB to the situation in Ethiopia, as revealed in the substantial amount of in-country information available. The situation was fluid and substantial improvements undoubtedly occurred in 2000 and 2001, and before EB left Ethiopia. The Tribunal were entitled to conclude, in paragraph 36, that "although there was some evidence of deportation in recent years that had dropped dramatically". There was, however, evidence of at least one substantial deportation having occurred in 2001.

51. I would be reluctant to quash the decision of the Tribunal on the ground that insufficient consideration was given to that evidence when considering the father's departure, especially as the date of his deportation is probably not crucial to the Tribunal's central findings. The criticisms made of the Tribunal's factual analysis need to be considered,

however, in the context of the other criticisms. Given the nature of some of EB's complaints about her treatment, including the removal of her documents, it appears to me that the Tribunal have insufficiently considered the principle that, in addition to physical violence, deportation and threatened deportation, persecution may take the form of administrative and other measures which are discriminatory or are implemented in a discriminatory manner (paragraph 34 above). Measures which deprive a national of the opportunity to conduct a business, follow employment and retain the documentation on which the conduct of ordinary life often depends was an aspect of EB's case not specifically or sufficiently considered by the Tribunal. They concluded that, when EB left Ethiopia, she was not "at risk of ill- treatment". This was a partial approach to the case presented by EB which relied also on the loss of ordinary civil rights.

52. Further, when the reasons for EB leaving Ethiopia were considered, and the likely position if she could return, the expression "ill treatment", which suggests physical ill-treatment or restraint was used twice more (paragraph 63). Her case that she would be deprived of the benefits of citizenship was insufficiently considered.

53. The Tribunal in *MA*, cited by the present Tribunal, stated, at paragraph 31:

> "However the Tribunal accepts that the reality of the situation for an individual claimant is that he or she is effectively deprived of citizenship which leads to treatment which can be categorised as persecution then, subject to other requirements of the Convention, there is a right to claim refugee status."

The Tribunal in *MA* there accepted the possible consequences of an effective deprivation of citizenship. When the present Tribunal stated that "there must be other treatment [in addition to loss of nationality] which would lead to persecution", they appear to have failed to have regard to the consequences of effective loss of citizenship which may amount to persecution. I accept that those consequences may be such as amount to persecution within the meaning of article 1A(2) of the Convention.

54. It is necessary to consider the circumstances in which the statelessness has occurred. I am not prepared to hold that a deprivation of nationality, whether *de facto* or *de jure*, in itself necessarily gives rise to refugee status. Neither does a voluntary departure, unconnected with persecution, followed by refusal to allow re-entry necessarily give rise to refugee status, though it may be a breach of international law. An analysis is required of the circumstances including the loss of rights involved in the particular case and the causes and consequences of them. I am not pre-judging possible future findings of fact in the present case but where persecution of the type now alleged has led to the departure from the state of habitual residence, which then either refuses to permit re-entry, or permits it only in circumstances where the former conditions will continue, it is possible for refugee status to be established. On the first premise, the persecution is in the loss and continued loss of civil rights and, on the second, the fear of such continued treatment on return.

55. I would allow the appeal and remit the case to the Tribunal for a full reconsideration. That would involve a reassessment of the appellant's credibility. The question of credibility was considered by the Tribunal in a context different from that now proposed and reassessment is appropriate.

56. It would appear that the prospects in Ethiopia for those with Eritrean ancestry or partial Eritrean ancestry have now improved considerably. The present case has arisen because the 2004 Directive does not apply to those, such as the appellant, who left Ethiopia before the Directive was issued. The appellant has sought a passport which would enable her to return but the Ethiopian Government have not, as yet, been prepared to grant it. Of course, it is to be hoped that a return to Ethiopia of the appellant, and others in the same position, on the basis that they will enjoy their civil rights there, can be achieved.

57. Since preparing this judgment, I have had the opportunity to read in draft the judgments of Longmore LJ and Jacob LJ. I am much attracted by the proposal that the court should finally dispose of the appellant's application for asylum, particularly because of the now protracted history of her application and because there are others, we are told, in a similar position. Because of its obvious attractions, I propose to say briefly why I consider allowing the appeal and remittal to the Tribunal is the correct outcome.

58. Whether the appellant was persecuted in Ethiopia is a question of fact to be considered by a fact finding Tribunal and, in my view, in the manner indicated in paragraph 54 of this judgment. Though the legal test they applied to the facts was flawed, the Tribunal made findings of fact. They concluded that the appellant was neither persecuted, nor at risk of persecution in Ethiopia, that her deportation was unconnected with persecution and that her voluntary departure was the cause of her effective loss of nationality. She has not been, in the Tribunal's view, an outcast in her own land.

59. Whether the removal of documents in this case constituted persecution is essentially a question for a fact finding Tribunal and this court should not assume facts, as Jacob LJ has done, contrary to the findings of the Tribunal. That would be to arrogate to this court the role contemplated by Parliament for the Tribunal. This court could only finally reverse the decision of the Tribunal if it held, as a matter of law, that removal of documents necessarily constituted persecution and that is not a step, for the reasons I have given in my judgment, I am prepared to take. Moreover, it would involve establishing a proposition of law, both nebulous and elusive, because not based on clear and appropriate findings of fact, but which Tribunals would be expected to apply.

Lord Justice Longmore:

60. The point at issue between EB and the Secretary of State is apparently a narrow one. Mr Blake QC on behalf of EB submits that EB "effectively" lost her nationality or her citizenship when her identity documents were removed by the action of the executive

arm of the state of Ethiopia. That constituted persecution by the state and therefore EB had a well-founded fear of persecution when she left Ethiopia and now has a continuous well-founded fear of persecution if she were to return. She is therefore a refugee within Article 1(A)(2) of the Refugee Convention.

61. Mr Eicke for the Secretary of State appeared to accept that, if EB had in fact been deprived of her citizenship by the arbitrary action of state employees, that would have *prima facie* been persecution within the terms of the Refugee Convention but he submitted that mere removal of identity documents did not constitute persecution. The AIT decided in terms that EB suffered no ill-treatment while she was in Ethiopia. They were thus entitled to conclude that EB would not be at risk of ill-treatment on return. She could not, therefore, now have a well-founded fear of persecution and was not entitled to the status of a refugee, despite the fact that she cannot currently be removed to Ethiopia, since Ethiopia does not recognize her as an Ethiopian citizen.

62. In these circumstances the precise findings of the AIT assume considerable importance. They can be summarised as follows:-

(1) EB was born on 27th September 1971 the daughter of a father of Eritrean origins and an Ethiopian mother;

(2) after war broke out between Ethiopia and Eritrea in 1998, Ethiopia deprived many people of Eritrean origin of their Ethiopian citizenship and detained, mistreated or deported many such persons;

(3) EB's father was one such person who was forcibly deported to Eritrea;

(4) at or about the same time EB's identity documents including her birth certificate were removed and have not been returned;

(5) such removal of identity documents was specifically directed at people such as EB "so that she would have difficulty in future proving her Ethiopian nationality" (para. 52); but the taking of the documents was not "an activity in itself which resulted in ill-treatment" to EB while in Ethiopia" (para. 63);

(6) EB entered the United Kingdom on 9th December 2001 and claimed asylum 3 days later;

(7) EB has now lost her Ethiopian nationality (para. 55);

(8) That loss of nationality arose "because of her having left Ethiopia" (para. 63).

63. To my mind the important finding is that the removal of EB's identity documents was not an activity which resulted in ill-treatment to EB while in Ethiopia. What the AIT do not appear to have considered is whether the removal of the documents was itself ill-treatment, done as it was with the motive of making it difficult for EB in future to prove her Ethiopian nationality. The reason why the AIT did not consider this is because they considered that even loss of nationality was not sufficient to constitute persecution. If that is right it would no doubt follow that for a state merely to make it difficult to prove one's nationality would not be persecution either. The AIT considered that the previous decision of the AIT in *MA* [2004] UKIAT 00324 compelled their conclusion. *MA* was itself based on the decision of the Court of Appeal in *Lazarevic* reported together with *Adan* in [1997] 1 WLR 1107.

64. *Lazarevic* was a case in which the state (Yugoslavia) refused to allow evaders of the draft to return to Yugoslavia. They had evaded military service for personal rather than conscientious reasons: although an amnesty had been declared, this court proceeded on the basis that it was sufficient for the applicants to have had a well-founded fear of persecution when they left Yugoslavia. This was held to be wrong when the House of Lords decided that the well-founded fear had to subsist at the time of the application for asylum ([1999] 1 AC 293). Nevertheless this court held that, even on the basis of a well-founded fear when the applicants left Yugoslavia, they could not be considered refugees since the apprehended persecution was not for what may be called a "Convention" reason viz persecution for reasons of race, nationality, membership of a particular social group or political opinion. Whereas a genuine conscientious objector who was refused re-admission to Yugoslavia might be persecuted by reason of his membership of a social group or his political opinion, an ordinary draft evader could not be regarded as being persecuted for such a reason. Hutchison LJ (with whom Simon Brown LJ agreed) quoted Professor Hathaway's definition of persecution in The Law of Refugee Status (1991) page 104:-

> "persecution may be identified as the sustained or systemic violation of basic human rights demonstrative of a failure of state protection"

And then said:-

> "If a State arbitrarily excludes one of its citizens, thereby cutting him off from enjoyment of all those benefits and rights enjoyed by citizens and duties owed by a State to its citizens, there is in my view no difficulty in accepting that such conduct <u>can</u> amount to persecution. Such a person may properly say both that he is being persecuted and that he fears persecution in the future." [Emphasis supplied.]

65. In *MA* the Asylum and Immigration Tribunal emphasised the word "can" and then proceeded (para. 33):-

> "The deprival of citizenship by itself is not necessarily persecutory. It is the consequences of the deprivation of

> citizenship which may in the particular circumstances of the case amount to persecution. If it leads to treatment which can properly be categorised as causing serious harm, it will amount to persecution. In summary, an effective deprival of citizenship does not by itself amount to persecution but the impact and consequences of that decision may be of such severity that it can be properly categorised as persecution."

This is to read more into *Lazarevic* than was said or (I would respectfully add) intended by Hutchison LJ. The reason why the act of the Yugoslav state in refusing re-entry was not persecutory in fact was because it was not persecution for a Convention reason, not because it did not lead to treatment constituting "serious harm". In the present case there can be no doubt that the reason why EB's identity documents were removed was a Convention reason (whether one calls it reasons of "race" or "membership of a particular social group") and no one has ever suggested otherwise. The question is whether the removal of identity documents itself constituted persecution for a Convention reason or could only be such persecution if it led to other conduct which could itself be categorized as ill-treatment.

66. I have already recorded the Secretary of State's apparent acceptance that if EB had, in fact, been deprived of her citizenship by the arbitrary action of state employees, that would have *prima facie* been persecution within the terms of the Refugee Convention. That is certainly my own view, but it is worth pausing for a moment to understand why this must be the position.

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.

68. These propositions are virtually self-evident but are buttressed by Article 15 of the Universal Declaration of Human Rights stating both that "Everyone has the right to a nationality" and that "No one shall be arbitrarily deprived of his nationality". Similarly and more particularly Article 12 of the International Covenant on Civil and Political Rights 1966 states:-

> "No one shall be arbitrarily deprived of the right to enter his own country".

69. In *Trop v Dulles* 356 US 86 (1957) the question arose whether an Act of Congress authorising a court-martial to deprive of their nationality deserters in time of war contravened the prohibition of "cruel and unusual punishments" contained in the 8th

Amendment to the United States Constitution. That is, of course, a different question from that which arises in the present case but the judgments necessarily considered the effect of a deprivation of citizenship. Warren CJ describes denationalisation (page 101):-

> "There may be involved no physical mistreatment, no primitive torture. There is, instead, the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself. While any one country may accord him some rights and, presumably, as long as he remained in this country, he would enjoy the limited rights of an alien, no country need do so, because he is stateless. Furthermore, his enjoyment of even the limited rights of an alien might be subject to termination at any time by reason of deportation. In short, the expatriate has lost the right to have rights."

And Brennan J, describing it as expatriation, said (page 110):-

> ". . . it can be supposed that the consequences of greatest weight, in terms of ultimate impact on the petitioner, are unknown and unknowable. Indeed, in truth, he may live out his life with but minor inconvenience. He may perhaps live, work, marry, raise a family, and generally experience a satisfactorily happy life. Nevertheless it cannot be denied that the impact of expatriation - especially where statelessness is the upshot - may be severe. Expatriation, in this respect, constitutes an especially demoralizing sanction. The uncertainty, and the consequent psychological hurt, which must accompany one who becomes an outcast in his own land must be reckoned a substantial factor in the ultimate judgment."

It is considerations such as these that have persuaded me that, if EB had been deprived of her citizenship by reason of her father's Eritrean origins, she would be entitled to the status of a refugee.

70. The question, therefore, is whether the fact that EB had her identity documents taken from her in Ethiopia with the aim of making it difficult for her in future to prove her nationality and the fact that she has now indeed lost her nationality *prima facie* entitles her to refugee status on the basis that the taking of identity documents constituted persecution when it happened and constitutes persecution for as long as that deprivation lasts. It seems to me that there can be no difference between such circumstances and an actual deprivation of citizenship. The precariousness is the same; the "loss of the right to have rights" is the same; the "uncertainty and the

consequent psychological hurt" is the same. In these circumstances the taking of EB's identity documents was indeed persecution for a Convention reason when it happened and the AIT in *MA* were, in my view, wrong to conclude that some further (presumably physical) ill treatment was required. It is the arbitrary nature of the state employees' action that, in my view, distinguishes this case from Revenko v SSHD [2001] QB 601 where, as my Lord says, the arguments were, in any event, very different. On this aspect of the case I therefore consider that the AIT in the present case erred in law although only for the understandable reason that it was following its previous decision in *MA*.

71. That does not, of course, conclude the question since the hypothetical question whether EB would suffer persecution (or would have a well-founded fear of such persecution) on her return is the critical question which has to be addressed. The question is hypothetical because Ethiopia will not currently allow EB to be returned but the question must be answered now, not as at some date in the unknowable future when Ethiopia might change its mind and decide to re-admit EB for some reason which cannot be currently predicted. Once it is clear that EB was persecuted for a Convention reason while in Ethiopia, there is no basis on which it can be said that that state of affairs has now changed. I would therefore conclude that EB has a well-founded fear of persecution for a Convention reason and that she is now entitled to the status of a refugee.

72. As can be seen, I agree with almost all of my Lord's judgment. Where we differ, as I see it, is that it seems to me that the relevant primary facts have been found by the Tribunal who have, however, made an error of law in requiring there to be further ill-treatment over and above the taking of EB's identity documents, with the refusal to return them. Once that error of law is identified, it is for the Court to determine whether EB is entitled to asylum status, unless further facts need to be found. I do not believe they do.

73. It is worth pointing out that the AIT or its predecessor (the IAT) has already considered EB's case on four separate occasions (in September 2002, November 2004, March 2006 and October 2006). It is time for some finality to be reached. I would allow the appeal.

Lord Justice Jacob:

74. I agree wholeheartedly with the judgment of Longmore LJ. Since the court is divided I add only a few words of my own

75. Once a claimant for refugee status has established that their country of origin has taken away their nationality on the grounds of race, they in my view have established a prima facie case for such status. It is true that the decision maker must ask: would they have a well founded fear of persecution if they were returned today? But in the absence of contrary evidence, someone who has been deprived of nationality because of race would, if returned, be in a near-impossible position – unable to vote, to leave the country or even unable to work. They may well be treated as pariahs

precisely because they had their nationality taken away. They have "lost the right to have rights." (Chief Justice Warren's vivid words) And they have already been put in the position that their home state will not let them in – they cannot even go home.

76. In this case there is no rebuttal evidence showing that the appellant would not suffer from being stateless in the ways I have identified. The matter has been considered below enough times and such evidence, if had been forthcoming, could have been provided. So I think the case should not be remitted, as Pill LJ proposes. It has gone on long enough. I would hold that, on the materials before the tribunals below and us, the appellant does have refugee status. And that the appeal should be allowed.