YL (Nationality-Statelessness-Eritrea-Ethiopia) Eritrea CG [2003] UKIAT 00016

IMMIGRATION APPEAL TRIBUNAL

Dates heard: 25 June 2002 and 16 August 2002
Date notified: 30.06.2003

Before:-

DR H H STOREY (CHAIRMAN)
MRS J CHATWANI

Between

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DETERMINATION AND REASONS

1. The appellant, who claims to be either a national of Ethiopia or stateless is of Eritrean ethnicity. She has appealed with leave of the Tribunal against a determination of Adjudicator, Mr Andrew Jordan, dismissing the appeal against the decision of the Secretary of State refusing leave to enter on asylum grounds. Directions were given for her removal to Eritrea presumably because she had originally stated her nationality to be Eritrean. Ms K Cronin of Counsel instructed by Gill & Co. Solicitors appeared for the appellant. Mr C Buckley appeared for the respondent.

2. The hearing of this appeal took place on two separate dates, one in June 2002 and one in August 2002. The first hearing had been adjourned in order for the parties to seek further materials relating to the nationality issues. After the second hearing the parties were invited to address issues arising out of the case of *Zaid Tecle* [2002] EWCA Civ 1358 (C/2002/1285). In reply the appellant`s representatives sent further submissions together with two statements relating to a visit by the appellant to the Eritrean Embassy on 23 August 2002. These we

admitted as evidence. We apologise for the delay in promulgating this determination caused in part by our concern to ensure that we had all relevant information relating to the issue of Eritrean nationality.

3. We have also had sight of one further item, a UNHCR letter of 18 December 2002 headed Return of mixed parentage Ethiopian and Eritrean individuals to Eritrea, to which we shall make limited reference. Since nothing significant relating to this appeal turned on this letter, we did not see any need to seek comments from the parties as to its contents.

4. The appellant`s evidence was that she had been born in Asmara which is now part of Eritrea. She had left there in 1988 and thereafter lived in Addis Ababa. The Ethiopian authorities had deported her father to Eritrea in 1998 and in early 1999 they had then detained her for nearly 4 months. In June 1999 she was released on condition that she report every week. They had told her they would be deporting her to Eritrea soon. Being averse to doing military service in Eritrea, she made arrangements to leave Ethiopia and soon after arrived in the UK.

5. As regards Eritrea, the basis of her claim was that she was not a national of that country and if sent back there would be at risk of persecution because she would be required to perform military service in spite of her conscientious objections to war. Furthermore, she would be seen as a traitor and sent to prison. She had heard that her father, whom the Ethiopian authorities had deported to Eritrea in 1998, now lived there in destitution.

6. As regards her situation in Ethiopia, she considered she was a national of that country notwithstanding that at one point they had threatened to strip her of Ethiopian nationality. In her statement of additional grounds she said she would be ill-treated by the Ethiopian security forces in circumstances which would amount to inhuman or degrading treatment or punishment.

7. The Secretary of State did not accept the appellant`s account of her experiences in Ethiopia, noting that on her own account she had obtained an Ethiopian passport for travel purposes and had left Ethiopia without difficulties. He did not consider that, if her account were true, she would have been able to bypass stringent security checks in operation at Addis Ababa airport. The Secretary of State also found it difficult to accept that, if the authorities were intent on deporting her, they would have released her shortly beforehand.

8. He noted further that the border conflict between Ethiopia and Eritrea had now ceased.

9. The first hearing before an adjudicator took place before Mrs M E Austin on 30 May 2001. That was confined to the preliminary issue of whether the appellant was a national of Eritrea or of Ethiopia or stateless. According to the representatives` note, Mrs Austin decided there was insufficient evidence to

show that the appellant was a national of Ethiopia but, by virtue of the fact that her father was of Eritrean origin, she was to be treated as a national of Eritrea "by operation of law". With agreement of the parties, she delivered an oral, not a written determination, to that effect. The appeal was then listed for hearing as a substantive appeal on 2 July 2001.

10. At the hearing before Adjudicator Mr A Jordan the appellant`s representatives, relying on a report which had become available from country expert Mr Gilkes, asked him to reverse Mrs Austin`s decision on the preliminary issue and determine the issue of the appellant`s nationality afresh by making a finding that the appellant was a national of Ethiopia. He refused to do so. He considered himself bound by Mrs Austin's determination. Among the reasons he gave for taking that view was that Mrs Austin's conclusion on nationality was a "final determination" of the issue and could not be re-opened except on appeal. He concluded:

> "It is an overriding interest of justice to achieve finality, subject only to a right of appeal in an appropriate case. That goal is flouted if a determination fails to achieve that. There is no difference in principle if the determination is restricted to a preliminary issue".

11. Having maintained the preliminary ruling (which he deemed a "final determination") that the appellant was a citizen of Eritrea, the adjudicator then proceeded to consider whether in that country she had a well-founded fear of persecution. So far as the appellant`s objections to military service were concerned, the adjudicator concluded, following *Sepet and Bulbul* [2001] Imm AR 452 (CA), that these could not establish a real risk of serious harm.

12. Alluding to the appellant`s further claimed fear based on UNHCR sources stating that there was an obstructive attitude on the part of the Eritrean authorities to those returning, he concluded that such obstruction fell short of a risk that the appellant would be persecuted. As to the appellant`s claimed difficulties in gaining acceptance as Eritrean from the Eritrean authorities because she lacked documents dealing with her identity or the identity of her parents, the adjudicator concluded that these difficulties did not amount to persecution: "the most that is likely to happen to her is that she will be refused entry and will then have to return to the United Kingdom". The adjudicator saw this eventuality as fatal to both the appellant`s asylum and human rights grounds of appeal.

13. The grounds of appeal contended that the adjudicator was wrong to consider himself bound by the previous adjudicator's preliminary ruling to the effect that the appellant was a national of Eritrea. He should also, they submitted, have concluded she was either a national of Ethiopia or stateless. Even assuming the appellant were considered as a national of Eritrea, the adjudicator was wrong to conclude she would not be persecuted upon return there; such a conclusion, the

grounds continued, was contrary to the contents of the US State Department report of February 2001.

14. Further submissions by Mrs Cronin at the hearing made the following points.

15. Since in her 27 August 2002 submission Mrs Cronin conceded that the adjudicator's adverse findings regarding risks upon return to Eritrea were open to him on the evidence, we omit recital of the points that were raised regarding these.

16. As regards the nationality issue, Mrs Cronin contended that the most recent evidence indicated that there were concrete obstacles to persons in the position of this appellant being recognised as a national of Eritrea. This was the view of country expert Mr Gilkes. The FCO claim that only a "small number" would have difficulties was not reflective of the background sources. The Washington Embassy assessment was that "many" were often unable to obtain citizenship. There was a loyalty requirement based on whether a person voted in the 1993 referendum. But the requirement to register to vote was in turn tied to verification of Eritrean nationality. One had to produce evidence from 3 people of Eritrean nationality. Whereas the appellant in this case had neither identity documents nor any means of obtaining them. Even accepting that voting in the 1993 referendum was not a necessary condition which had to be fulfilled, it was an important evidential factor. The principle set out in *Bradshaw* [1994] Imm AR 359 was clearly not intended to establish that a person should be required to take steps to establish nationality even if in doing so he would meet insuperable obstacles. And even to require insuperable obstacles or manifest pointlessness would set the test too high. The criterion should be that there were concrete obstacles.

17. Accordingly, argued Mrs Cronin, the adjudicator should have concluded (in the absence of clear evidence of Ethiopian nationality) that the appellant was stateless. Applying the principles set out in *Revenko* [2000] Imm AR 610, the appellant's country of former habitual residence would be Ethiopia. In respect of the latter country, the appellant had satisfactorily shown that she had a well-founded fear of persecution there. She had been detained in circumstances close to persecutory and would be at risk of renewed detention of deportation or both. There was evidence that expulsions by the Ethiopian authorities of persons of Eritrean ethnicity were still taking place in June 2001. She would face poor facilities and confiscation of any property she acquired. But in any event the adjudicator had plainly failed to consider risk there and so if her account were not accepted, the proper course would be to remit the appeal.

18. Mr Buckley accepted that the respondent had never considered the issue of risk upon return to Eritrea. But there was sufficient evidence before the adjudicator and the Tribunal to show that the appellant was in fact a national of Eritrea and that she would not face serious difficulties in that country. The fact that some persons might have encountered difficulties in securing Eritrean

nationality did not demonstrate that if the appellant took genuine steps to avail herself of Eritrean nationality she would not obtain it. It had also to be borne in mind that the Eritrean authorities and Eritrean people were not entirely negative towards returnees, even if the initial jubilation at the returns had faded. The evidence did not establish that voting in the 1993 reference was a necessary condition for obtaining nationality. The general attitude of the government in Eritrea towards returnees was facilitative.

19. In a further written submission Mrs Cronin maintained that the Tribunal should not consider that the Court of Appeal in the case of *Tecle* had settled that Eritrean nationality was obtainable in relatively straightforward fashion. There was additional, less sanguine, evidence in this appeal consisting in the INS document. Furthermore, whereas Ms Tecle had lived in Eritrea after it achieved independence in 1993 and retained ties there, the appellant in this case had left there in 1988 and had no ties there. She added:

> "Subsequent to the hearing in this appeal, the Appellant and her instructing solicitor attended at the Eritrean embassy to apply for citizenship papers for the Appellant. Their evidence concerning the refusal of citizenship is set down in Statements of Truth sent to the Tribunal by separate cover. This evidence was prepared for submission to the Secretary of State, as it was assumed that it was obtained too late for admission before the Tribunal….
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> …there is now fresh evidence that the Appellant has been denied Eritrean citizenship for lack of proof of her status…the Appellant`s only proof of her Eritrean connection is her language facility, and this does not meet the more exacting standards of proof set by the Eritrean authorities."

20. As already noted we decided to admit the further evidence to which Counsel here refers.

The adjudicator's treatment of the previous preliminary issue determination.

21. We consider the adjudicator was wrong to conclude he was bound to maintain the previous preliminary issue ruling made by another adjudicator on the appellant`s nationality, even though further evidence had been produced before him regarding this issue in the form of an expert report.

22. Insofar as preliminary issues were regulated at the relevant time by the Immigration and Asylum Appeals (Procedure) Rules 2000, Rule 12 headed "Preliminary issues" is confined to cases in which there is an allegation by the respondent that an appellant is not entitled to appeal or the notice of appeal is out of time. It provides for the adjudicator to determine the validity of the

allegation as a preliminary issue and, where he considers it just by reason of special circumstances to do so, to allow the appeal to proceed.

23. Plainly that type of preliminary issue is not raised by this case. However, Rule 30 headed “Conduct of appeals” provides at paragraph (4) that directions which may be given to regulate the procedure to be followed in relation to the conduct of any appeal may:

> “…(c) provide for –
> (i) a particular matter to be dealt with as a preliminary issue”.

24. Two features of Rule 30 are important here. One is that such directions are confined to the regulation of the conduct of an appeal. The other is that there is no restriction on the subject-matter of such directions.

25. Also relevant are Rules 2 and 15. Rule 2 defines a determination as the decision of the appellate authority to allow or dismiss an appeal and the reasons for that decision. Rule 15 requires that “Written notice of the adjudicator’s determination shall be sent to every party and the appellant`s representative (if he has one)”. The only reference to “final determination” is in Part IV of the Rules which deal with appeals from the Tribunal (Rule 26). There is no provision in these Rules for a purely oral determination.

26. Having regard to what is required by these Rules, it is clear that Mr Jordan was wrong on two counts: he was wrong to treat Mrs Austin`s oral preliminary ruling as a determination and wrong to treat it as being in any way final.

27. However, he was right to point to judicial policy considerations making it normally undesirable for preliminary issue rulings to be re-opened. As he rightly observed, there is a public interest in the finality of judicial decisions. In the case of a preliminary issue ruling that an appeal is out of time it is arguable that that effectively disposes of the appeal and thus that a decision on such a preliminary issue amounts to a determination: see *Jaayeola* (14819). However, in the context of an appeal which is in time, it requires a written determination, even if that is simply to the effect that in view of the preliminary issue ruling the appeal for briefly stated reasons must be allowed or dismissed. A fortiori, in any asylum and human rights appeal, the essential task of the adjudicator remains that of giving a reasoned judgment on whether the decision appealed against is contrary to the Refugee Convention or the Human Rights Convention. Mrs Austin’s preliminary issue ruling did not undertake that task.

28. Furthermore, so long as there remains no “final determination” of that appeal (which presupposes a determination at Tribunal level), it cannot be in the interests of justice or of sound judicial policy that an adjudicator automatically refuses to reconsider a preliminary issue ruling despite the submission of further relevant and compelling evidence.

29. Mr Jordan’s understandable concerns about riding roughshod over previous adjudicator rulings do, however, need to be addressed by any adjudicator confronted with the situation he faced. In this regard we find useful guidance by analogy in the approach set out by the Tribunal in the starred determination of *Devaseelan* [2002] UKIAT 00702. Essentially some deference is due to the decision reached by the previous adjudicator. The start-point should be that the decision reached by the previous adjudicator was based on the evidence and should not be re-opened unless there is cogent evidence - which will normally have to be served in accordance with IAA directions - pointing in a contrary direction.

30. In this case we consider there was certainly sufficiently cogent evidence pointing in a contrary direction for the adjudicator to have assessed whether it justified him taking a different view.

31. However, we do not see this error on the part of the adjudicator as fatally flawing his determination. That is because, having reviewed the issue for ourselves, we consider that his finding that the appellant was a national of Eritrea was correct. Furthermore, irrespective of the correct answer to the questions raised by this case as to nationality, we cannot see that the appellant demonstrated that she faced a real risk of serious harm in the only two countries of possible relevance: Eritrea and Ethiopia. There was no basis, therefore, for allowing the appeal on either asylum or human rights grounds.

The appellant`s nationality

32. As the parties agreed, there was a real issue to be decided in this case as to the appellant`s nationality or lack of it. Since the adjudicator did not assess that issue for himself and since we do not know the precise reasons on which Mrs Austin relied, we must tackle it for ourselves in the light of the evidence and submissions made to us.

33. Here we find ourselves confronted, as adjudicators often are, with a situation where the claimant claims to be a national of one country, yet removal directions are set for another. It is unwise to seek to fix hard and fast rules for how to analyse such cases. In some cases it may be possible to go straight to the issue of whether the appellant is a national of the country to which removal directions are set, since, if it is found he is a national of that country but does not face a real risk of serious harm upon return there, that may be all that is necessary to determine the appeal. The Immigration and Asylum Appeals (Procedure) Rules 2003 espouse the need for judicial economy. However, in other cases the appeal may be more effectively determined, given the nature and extent of the arguments about a person`s true nationality or lack of it, by going through the various permutations. This can particularly assist in cases where the nationality issues are complex. Adjudicators cannot be expected to be nationality law

experts and asylum hearings are not intended to be a judicial forum for determining nationality in the abstract, so that an approach which covers the possibilities rather than opting for just one legal solution can sometimes ensure fairness to the claimant at the same time as actually aiding speedy resolution of relevant issues. Dealing inclusively with all the possibilities may also help avoid unnecessary future litigation, should an adjudicator or the Tribunal be considered wrong in the ruling made on one nationality. It is the inclusive approach which we considered most appropriate in this case.

34. In the case of this appellant there are only four real possibilities. We use the phrase "real risk of serious harm" to cover both well-founded fear of persecution under the Refugee Convention and real risk of ill treatment under Art 3 of the Human Rights Convention.

> a). If she is Ethiopian and not Eritrean, then it is only necessary to consider whether she faces a real risk of serious harm in relation to Ethiopia;
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> b) If she is Eritrean and not Ethiopian then it is only necessary to consider whether she whether she faces a real risk of serious harm in relation to Eritrea;
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> c). If she is both Ethiopian and Eritrean, then it is necessary for her to demonstrate that she faces a real risk of serious harm in relation to both countries;
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> d). If she is neither Eritrean nor Ethiopian and is stateless, then on the evidence in this case it is necessary to consider whether she faces a real risk of serious harm in relation to her country of former habitual residence. Since she has never lived in Eritrea, her country of former habitual residence is plainly Ethiopia.

35. We shall address each of these possibilities in turn.

Ethiopia

36. The appellant has reiterated her claim that she is a national of Ethiopia.

37. We think the adjudicator was right to conclude that the appellant had failed to discharge the burden of proof on her to show she was a national of Ethiopia. However, let us suppose she is a national of that country. What follows in terms of her appeal?

38. There is a preliminary difficulty here, arising from the possibility that the Ethiopian authorities might not accept the appellant as a national or as a resident

with a right to return. If they would not then arguably she would not be at real risk of serious harm, at least under the Human Rights Convention. This is a matter we deal with below, in paragraphs 57-65. But we may pass over it here by assuming for the moment difficulties in being accepted as returnable would not obviate risk to the appellant.

39. On the assumption, therefore, that the appellant would be accepted back by the Ethiopian authorities, would she face a real risk of serious harm there? Mrs Cronin has submitted that since the adjudicator failed to deal with the issue of the risk the appellant would face upon return to Ethiopia, if we found she was a national of Ethiopia we should remit the case for an adjudicator to consider this issue. Mrs Cronin did, however, make submissions as to why the appellant would face a real risk in Ethiopia. Mr Buckley asked us, should we be minded to deal with the matter ourselves, to uphold the reasoning of the Secretary of State.

40. Despite the fact that the adjudicator did not address risk in Ethiopia, we consider we are in a position to make a finding on this issue without the need for remittal. The appellant's claim to asylum was based on her being Ethiopian and on what had happened to her there and why she considered she would face real risks there. We also know the Secretary of State`s assessment of risk she would face in Ethiopia since, although classifying her as "Eritrean", he in turn confined himself largely to her situation in Ethiopia. As already noted, he did not accept that she had been detained in that country nor did he accept she would be faced with a real risk of deportation from that country, since if they had intended to deport her they would not have released her shortly before the deportation on condition she report. He also noted that she had managed to leave Ethiopia on her own passport and without difficulty, despite stringent controls at Addis Ababa airport.

41. In her grounds of appeal the appellant did refer to a risk of her being ill-treated by the Ethiopian security forces; but she wholly failed to address the Secretary of State`s reasons for rejecting her account of having been detained and ordered to be deported from there to Eritrea. The grounds of appeal to the Tribunal focussed mainly if not wholly on the issue of Eritrean nationality. Neither in those grounds nor in subsequent submissions has there been any real attempt to impugn those reasons. Mrs Cronin set out why the appellant would be at risk in Ethiopia but in doing so she did not address the Secretary of State`s reasons. Apart from reiterating that the claimant would be at risk of future persecution because she had been detained in circumstances close to persecutory, the only point she added was that there was evidence that expulsions of persons of Eritrean ethnicity were still taking place in June 2001. However, whilst the latest objective country materials do not contradict that contention, the latter contains no indication that such expulsions continue to be wide-scale or routine. Bearing in mind that all that can be accepted about the appellant in this case is that if returned she would be known to have been born in Asmara of an Eritrean father who was (or was said to be) deported, we cannot see that this would place her at

real risk serious harm in the form of deportation or detention. She may well face significant discriminations, but these would not cross the threshold of serious harm.

42. In such circumstances we are satisfied that the appellant has failed to establish that she would face a real risk of serious harm in Ethiopia, either from the Ethiopian authorities or from non-state actors. Neither the Refugee Convention nor the Human Rights Convention avails her.

Eritrea

43. That brings us to the second possibility, that the appellant is a national of Eritrea. As already noted, given that removal directions were set for Eritrea, this is obviously the central issue.

44. Since it is common ground that the appellant is not as yet recognised as a national of Eritrea, it may be asked, why is it legitimate to even consider whether she is a national of Eritrea? Fortunately in order to answer this question we do not need to embark on an analysis of the complexities of nationality law. That is because, following *Bradshaw* [1994] Imm AR 359, we consider it settled law that when a person does not accept that the Secretary of State is correct about his nationality, it is incumbent on him to prove it, if need be by making an application for such nationality. That is all the more necessary in the case of someone claiming to be a refugee under the Refugee Convention. Under that Convention, establishing nationality (or statelessness) cannot be left as something that is optional for the claimant. The burden of proof is on the claimant to prove his nationality (or lack of it). To leave it as an optional matter would also make it possible for bogus claimants to benefit from international protection even though in law they had nationality of a country where they would not be at risk of persecution – simply by not applying for that nationality. Furthermore, leaving it as an optional matter would render unnecessary key provisions of the definition in Art 1A(2) which require a person to be outside the country of his nationality or outside the country of his former habitual residence and which place special conditions on persons who have more than one nationality. As was said by Rothstein J in the Canadian Federal Court case of *Tatiana Bouianova v Minister of Employment and Immigration* [1993] FCJ No 576, a case dealing with statelessness, "[t]he definition should not be interpreted in such a manner as to render some of its words unnecessary or redundant."

45. Bearing in mind that the burden of proof rests on the claimant, it is always relevant to enquire in such cases whether a person has taken steps to apply for the nationality of the country in question or, if they have taken steps, whether they have been successful or unsuccessful.

46. We would accept that in asylum cases the Bradshaw principle has to be qualified to take account of whether there are valid reasons for a claimant not

approaching his or her embassy or consulate - or the authorities of the country direct - about an application for citizenship or residence. In some cases such an approach could place the claimant or the claimant's family at risk, because for example it would alert the authorities to the fact that the claimant has escaped pursuit by fleeing the country. However, by no means can there be a blanket assumption that for all claimants such approaches would create or increase risk. It is a matter to be examined on the evidence in any particular case. The 1979 UNHCR Handbook does not require a different position to be taken: paragraph 93 clearly contemplates a case-by-case approach.

47. As noted earlier, we now have the judgment in the Court of Appeal in *Zaid Tecle* [2002] EWCA iv 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."

48. The only issue as we see it is therefore whether the appellant would be accepted as a national of Eritrea. We shall come back to the issue of what follows if she would not. But if she would, then it is necessary to consider whether within Eritrea itself she would face a real risk of serious harm.

49. Much effort has been spent by experts and others in analysing the nationality law and practice of Eritrea. In this case we had before us, inter alia, a report from Mr Gilkes and also an INS document. However, we now have the Court of Appeal assessment of this issue as set out in *Zaid Tecle* which treats the latest position as being that as set out in a letter from the Embassy of the State of Eritrea in London dated 29 August 2002. This states:

> "1. A person who was born in Eritrea with an Eritrean father WOULD BE ELIGIBLE for Eritrean nationality.
>
> 2. The political views of 3 witnesses are NOT RELEVANT to establishing eligibility for nationality and obtaining an Eritrean passport.
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> 3. The political views of the applicant for nationality are NOT RELEVANT to establishing eligibility for nationality and obtaining an Eritrean passport.
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> 4. The voting in the 1993 Referendum is NOT A NECESSARY CONDITION to establishing nationality.

> 5.Paying a 2% tax on nationals overseas is NOT A PRECONDITION to establishing eligibility for nationality and obtaining an Eritrean passport.
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> 6. Claiming refugee status overseas DOES NOT PRECLUDE ELIGIBILITY for Eritrean nationality or obtaining an Eritrean passport.
>
> 7. All application forms are filed in person by the applicant at the Embassy`s consular section. No application forms out of the standard provided by the Embassy are accepted."

50. Brooke, LJ went on to glean from this that:

> "What is required is the signature of 3 witnesses who know the applicant and can testify that she was in fact born in Eritrea with an Eritrean father. Whatever might have been the position during the unsettled period before the war, or during the war, there is now no requirement that the political views of the three witnesses should be looked at. It has got to be three witnesses of appropriate standing who can simply testify that the appellant is who she says she is."

51. In our view Brooke LJ`s assessment based on very recent evidence is conclusive of this issue. Certainly we do not see the INS document as justifying the Tribunal taking a different view. We also consider that Tribunal cases which pre-date *Tecle* (such as *Kule* and *Seleba*) or which post-date it but did not have their attention drawn to *Tecle* (such as *Yudit Germany* [2002] UKIAT 07099) should no longer be followed.

52. There has been no suggestion of asylum-related concerns in this case about the claimant approaching the Eritrean Embassy as regards Eritrean nationality: indeed we have evidence the appellant actually visited. Thus the only relevant question is whether this appellant can find 3 witnesses of appropriate standing to say that she is who she says she is, i.e. a person born in Eritrea with an Eritrean father.

53. We think it reasonably likely the appellant can find three such witnesses. We appreciate that she has been to the Eritrean Embassy, although it may or may not be significant that her visit predates the letter of 29 August already cited. We also appreciate that it appears she was asked a number of questions relating to whether she had a referendum ID card and whether she paid 2% of her earnings to the Eritrean Authorities and whether she had paid £500 toward border defence costs. We also appreciate that she was told her application could not succeed. However, there is nothing in these statements of truth to suggest that the appellant was told that possession of a referendum ID card and payment of 2% of her earnings or £500 towards border defence costs were necessary preconditions to be eligible for Eritrean nationality. And the reason she was

refused was stated as being that she could not provide evidence which can vouch for her Eritrean identity regardless of whether she can speak Tigrigna. Plainly, in our view, refusal in these terms was entirely consistent with the position as set out in the Embassy`s 29th August 2002 letter. Not having identified 3 witnesses, her application had to fail.

54. However it does not follow that it was not reasonable likely she could find three witnesses and then re-apply. Having to do so would not amount to any kind of "concrete obstacle" (to use Mrs Cronin`s chosen phrase for expressing the test of what should count as excusing a person from having to diligently apply for and obtain nationality). Given that the appellant was born in Asmara in 1973 and lived there with her mother and family until 1988 (when the family moved to Addis Ababa to join her father), we consider that there must be persons of standing who would know from direct knowledge who the appellant was and where she was born and who her father was. On the appellant`s own evidence, her father (said to be now in Eritrea) and her remaining family (said to be last seen in Addis Ababa) are still alive and so in a position to help locate witnesses. She says she has lost contact with her family. We find that difficult to accept. But even if for some reason she has not made or had contact, it should not be practically difficult to find 3 witnesses either by causing inquiries to be made in Asmara or making inquiries amongst the (sizeable) community of persons in the UK who were born and lived for some time in Asmara. The appellant`s father ran a supermarket in Addis Ababa, so that would mean he would be known to more people who had moved from Amhara to live in Addis Ababa than if he had lived and worked in relative isolation.

55. Accordingly we consider that the appellant should be assessed as someone who is a national of Eritrea.

56. The question then arises, has the appellant demonstrated that she faces a real risk of persecution or serious harm in Eritrea?

The returnability issue

57. In the case of Eritrea the appellant had never resided there. If she was to be able to return there, it would have to be on the basis that she had been accepted by the Eritrean authorities as either a national of Eritrea or as entitled to some type of identity document conferring a right of entry or residence. Our understanding is that even if a person is not accepted as a national of Eritrea or as entitled to an Eritrean passport, there are arrangements in place whereby different types of identity card can be issued resulting in them being legally permitted to return. However, we do not need to go into this aspect of returnability on the particular facts of this case.

58. Although we have just decided that the appellant, armed with 3 witnesses, should not have particular difficulties in applying for and obtaining Eritrean nationality, we shall for the sake of completeness address Mrs Cronin`s other

submission that the difficulties the appellant would face in being accepted as Eritrean or as entitled to live in Eritrea were factors going directly to establish the severity of the harms she would face and so either on their own or in combination with other factors were demonstrative that she would face a real risk of serious harm in Eritrea.

59. Mr Buckley, by contrast, contended that difficulties in admission to the country would in practice be irrelevant in the UK context. That was because of the Home Office policy in relation to the return of failed asylum seekers. This was clearly set out in the text of Mr Jordan's determination as follows:

> "In his submissions to me Mr Buckley submitted that the appellant had to show a well-founded fear of persecution in Eritrea and referred me to paragraph 101 of the Handbook. He told me that the procedure for the return of a person to the country of their nationality was the same for every country. Eritrea was no exception. The process required the appellant to be documented. The nature of the documentation varies and some countries, for example, use a EU letter. The documentation requires the consent of the receiving country. If there is no consent there can be no removal. If the appellant feared that he might not be given a right of entry into Eritrea because she had not made contributions to Eritrea in the past or had not taken part in the referendum, that might lead to her being refused entry but it would not result in her being persecuted. If she is not admitted to Eritrea on arrival, she will be returned to the United Kingdom and given leave to enter here. However, she would not simply arrive and find these consequences are visited upon her".

60. Assuming for the moment the appellant would face serious difficulties in obtaining Eritrean nationality or some type of right of entry/residence, what effect do they have on the issue of real risk under the Refugee Convention and the Human Rights Convention?

61. Here we think the answer will differ depending on which Convention is in issue.

62. Whilst in relation to the asylum grounds of appeal Mr Buckley`s approach was also that taken by the Tribunal in a number of previous decisions, most notably *Sensitev* (01/TH/1351) and whilst it is also an approach followed in a leading New Zealand case, Refugee Appeal No. 72635/01[1], we have concluded after reflection that it is incompatible with the judgment of the Court of Appeal in

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[1] The NZ Refugee Status Appeals Authority reasoned that Article 33 dictates that focus be placed on the act of expulsion or return and so the issue of whether return is possible is a matter of fact, not a matter of law. According to this approach, if there is a denial of entry, there is no risk of persecution: such a risk cannot exist where entry is, as a matter of fact, not going to happen.

Saad, Diriye and Osorio [2001] EWCA Civ 2008 [2002] INLR 34. The judgment in that case clearly holds that the existing appeal structure governing appeals against refusal of asylum entitles appellants to a decision in relation to refugee status. In each case the decision facing the appellate authority is the hypothetical one of whether removal would be contrary to the Convention at the time of the hearing – i.e. on the basis of the refugee status of the appellant at that time. Accordingly, even if there are practical obstacles in the form of a refusal by the authorities of the receiving state to re-admit an appellant, the appeal on asylum grounds nevertheless requires substantive consideration on the hypothetical basis of whether – if returned – an appellant would face a real risk of persecution.

63. However, we cannot see that the same principle applies in respect of human rights grounds of appeal. The decision appealed against is one and the same but, in contrast the position under the Refugee Convention, success in a human rights appeal does not in itself result in any status at international law, nor indeed in domestic law. Furthermore Strasbourg jurisprudence considers that practicalities in relation to return are of central importance. If the threat of removal is not imminent then there can be no violation of the Convention: see *Vijayanathan and Pushparajah v France* (1993) 15 EHRR 62. Plainly if Home Office policy is either not to remove or to return to the UK persons whom destination countries will not accept as entitled to return, there is no meaningful sense in which there can be said to be an imminent threat of removal in the case of persons falling under this policy.

64. Accordingly, in relation to the asylum grounds of appeal we must decide on risk in Eritrea irrespective of whether we thought she would not be re-admitted. But in relation to the human rights grounds of appeal, the issue of whether there would be serious obstacles to re-admission must remain central to the question of whether there is a real risk of serious harm.

65. We have already concluded that there would be no serious or concrete obstacles to the appellant being accepted back by Eritrea. Given our assessment of what steps the appellant could be expected to take to obtain Eritrean nationality, we do not think it is arguable that such difficulties would significantly add anything to the level of difficulties posed overall to the appellant by return to Eritrea.

66. In relation to risk otherwise upon return to Eritrea, we can be very brief. That is because Mrs Cronin conceded in her 27 August 2002 submission that the conclusion that the appellant did not face a real risk there was open to the adjudicator. That was a realistic concession: in view of the judgment in *Sepet and Bulbul* (now upheld by the House of Lords), the claimant`s conscientious objections to conscription in that country could afford no proper basis for a claim to refugee status. Nor on the same reasoning could it put her at risk of serious harm since having to perform military service despite conscientious reasons for not doing so does not offend against any basic human rights.

67. As regards the appellant`s other concerns, that she would be seen as a traitor and be sent to prison, although the adjudicator did not address these as such, we can find no evidence that this is how the authorities in Eritrea routinely treat those who had lived in Ethiopia albeit being born in Asmara with an Eritrean father.

68. Hence the appellant has not established that she faces a real risk of serious harm if returned to Eritrea.

Dual nationality of Ethiopia and Eritrea

69. In relation to the third possibility outlined earlier, we can be quite brief because, even if the appellant is both Eritrean and Ethiopian, she cannot qualify under Art 1A(2) unless she can show a real risk of serious harm in both countries. As we have seen, she has failed to show a real risk in either.

Statelessness

70. That brings us to the fourth possibility, that she is stateless.

71. Since we have already found the appellant is a national of at least one country (Eritrea), it is not strictly necessary for us to deal with this other possibility. However, we would note, as the parties conceded, that even if she were accepted as stateless, she would still not be able to succeed in her appeal unless she could show that she faces a real risk of serious harm in her country of former habitual residence: see *Revenko* [2000] Imm AR 610. In this case there is no dispute that her country of former habitual residence is Ethiopia, she having moved to Addis Ababa in 1988. However, we have already found that in Ethiopia she does not face a real risk of serious harm.

72. From our analysis of the only four nationality possibilities in this case, it is evident that the appellant`s appeal on asylum and Art 3 grounds must fail because she has not established a real risk of serious harm in either Ethiopia or Eritrea.

73. For the above reasons this appeal is dismissed.

DR H H STOREY
VICE-PRESIDENT