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Heard at Field House
On 28 August 2002

APPEAL NO HX14413-2002
DK (Ethiopian - Eritrean - Return - Eritrea) Eritrea CG [2002] UKIAT 05243

IMMIGRATION APPEAL TRIBUNAL

Date Determination notified:

.....13 November 2002.....

Before:

MR H J E LATTER (CHAIRMAN)
MR P ROGERS, JP
MR A F SHEWARD

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

APPELLANT

and

Debru Kadane

RESPONDENT

Appearances:

For the appellant: Ms J Sigley, Home Office Presenting Officer
For the respondent: Mrs F Webber of Counsel
instructed by Brighton Housing Trust Immigration Legal Service

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State against the determination of an Adjudicator (Mr D C Gerrey) who allowed the respondent's appeal against the decision made on 13 February 2002 refusing to grant him leave to enter following the refusal of his claim for asylum. In this determination the Tribunal will refer to the respondent as the applicant.

2. The background to this appeal can be set out quite shortly. The applicant was born on 9 September 1983 in Shashemem in Ethiopia.

He speaks Amhirc. His parents are both of Eritrean origin. They went to live in Ethiopia when they were young adults and never returned. In his witness statement the applicant says that he considers himself to be Ethiopian and has no connection with Eritrea. He has never been there and he has no living relatives there. In his evidence to the Adjudicator he said that he thought his father was aged 50 to 55 and his mother 45 to 50 but he did know their dates of birth. He continued to live in Shashemem until he left Ethiopia travelling by air to the United Kingdom on 8 November 2000.

3. According to the applicant until the war between Ethiopia and Eritrea started in 1998, his father had been a successful businessman importing and exporting cars. In August 1999 the Ethiopian army/police came to his home looking for his father. He was taken away and the applicant has not seen him since. His mother made efforts to try and find out what had happened to him but to no avail. The applicant used to see the police and army searching for Eritrean families during the night. They would take one family member first and then later take another. In July 2000 the police returned saying that they had come to take everyone away. The applicant escaped through the back door and out of the garden. He does not know what happened to his mother but assumes that she was taken along with his younger brother and sister. The applicant went to hide in the home of an Ethiopian school friend. With the help of his family he was able to make arrangements to leave Ethiopia.

4. The applicant does not have a passport. He says that he considers himself to be Ethiopian but the Ethiopian authorities would not now recognise him as such because he has Eritrean parents. If he was returned to Eritrea he would be forced to undertake military service. He had never been to Eritrea and had no connection with it. He says that he could not get an Eritrean passport because he would not be able to prove that he was an Eritrean. He has no witnesses to support such a claim.

5. The Adjudicator accepted that the applicant was an honest and credible witness. He accepted his evidence as to where he had lived all his life, his lack of knowledge of his family and his total lack of any connection with anyone of Eritrean origins who would be able to support a claim for Eritrean citizenship. The Adjudicator said that it was plain to him that the Ethiopian authorities would regard the applicant as Eritrean and would not grant him Ethiopian citizenship. He was equally satisfied that the applicant did not have sufficient evidence available to support an application for Eritrean citizenship even if he wished to apply for it. He was satisfied that the applicant was effectively stateless.

6. On that basis he went on to assess the applicant's claim on the basis that Ethiopia was his country of former habitual residence. He was satisfied on the basis of the evidence he heard that the applicant had

suffered persecution for a Convention reason prior to his departure from Ethiopia. He was also satisfied that he would have a fear of persecution in the event of return to Ethiopia. He noted that the removal directions were for Eritrea but he commented that the applicant did not have evidence available to support an application for citizenship of that country. It was far from clear that the applicant would be accepted by Eritrea. He summarised his conclusions on the asylum appeal by saying that he was satisfied that the applicant currently had a well-founded fear of persecution if sent to Ethiopia and he did not see how he could be removed to Eritrea.

7. He went on to consider the claim on human rights grounds. He was satisfied that whether in Eritrea or Ethiopia the applicant would suffer treatment which would not acknowledge his basic rights and where he would be denied all rights normally incidental to citizenship. He was satisfied that if the applicant was sent to either to Eritrea or Ethiopia there was a serious possibility that he would be imprisoned without charge and denied very basic human rights. He was satisfied that there would be a breach of Article 3. The Secretary of State appeals against this determination.

8. Ms Sigley indicated that she only relied on grounds 2 and 4 of her grounds of appeal. Ground 2 argues that the Adjudicator in stating that the applicant did not have enough evidence to support an application for Eritrean citizenship was speculating on the approach that might be taken by the Eritrean authorities. He made no reference to any evidence having been obtained from those authorities and in these circumstances his findings were unfounded and flawed. Ground 4 asserts that the Adjudicator has not given any reasons or identified the objective evidence he is relying on for his belief that there is a serious possibility that the applicant would be imprisoned without charge in Eritrea. He had not set out the objective evidence from which he believed the applicant would be denied basic citizenship in Eritrea.

9. Ms Sigley confirmed that it was not the Secretary of State's intention to attempt to return the applicant to Ethiopia. She submitted that there was no adequate basis for finding that the applicant would be at risk of persecution or ill treatment in Article 3. It was open to him to apply for Eritrean citizenship and he could reasonably be expected to do so. He could not be regarded as stateless until he had made an application for citizenship and that application had been refused: Bradshaw (1994) AIMMR 359. The Adjudicator was wrong to say that the applicant was effectively, currently stateless. He was either stateless or he was not. She referred to the CIPU report for Eritrea and the conditions of citizenship in paragraph 5.69. It was clear from A24 that an enquiry had been made of the Eritrean Embassy but it had not been said that he had no claim to Eritrean citizenship. It would be reasonably easy for him to find evidence of his Eritrean ethnicity so that he could qualify. There was no adequate evidence that he would be at risk of persecution or ill treatment in Eritrea. If he objected to military service,

that did not provide a Convention ground for a claim. There was no reasonable likelihood that he would be deported from Eritrea to Ethiopia.

10. Ms Webber submitted that the applicant was Ethiopian. Looking at paragraph 5.69 of the CIPU report he did not qualify for Eritrean citizenship as it could not be shown that his parents were resident there in 1933. There was no further evidence as to what requirements may be necessary in order to qualify. It was not open to the Secretary of State to argue that his appeal should be allowed on the basis that an obligation should be put on the applicant to acquire citizenship of a country he did not wish to go to. The applicant could not be returned to Eritrea. There was no reason to believe that he would be admitted. In any event there was evidence that there was a risk of refoulment.

11. There were two appeals before the Adjudicator. The first was on asylum grounds under Section 69(1) and the second on human rights grounds under Section 65. There was no appeal against the removal directions. By reason of the provisions of Section 59(4) and Section 67 there can only be an appeal objecting to the country to which the applicant would be removed in accordance with the directions if a different country is specified by him. The removal directions have been made for Eritrea on the basis that the Secretary of State understands that the government of Eritrea would be prepared to accept him as an Eritrean national on the basis of the information provided about his family background: see paragraphs 3 and 11 of the reasons for refusal letter dated 5 February 2002.

12. The initial issue to be considered in assessing the claim under the refugee Convention is the applicant's citizenship or nationality. The Convention is founded on the principle that national protection when it is available takes precedence over international protection. An applicant for asylum is normally expected to look to his own state for protection. Where an applicant has dual or even multiple nationality he must show that he is unable to look to each of the countries of which he is a national for protection before he is entitled to international protection. This principle is clear from the wording of Article 1A(2). It is only where an applicant cannot look to his country or countries of nationality for protection that he is entitled to look to the international community. For the sake of completeness the Tribunal note that this is not an absolute principle as the Convention recognises that there may be circumstances in which an applicant is unwilling to avail himself of the protection of his country or countries of nationality.

13. It is therefore essential when there is a dispute about nationality for that issue to be resolved before an asylum claim can properly be assessed. It is by reference to the country or countries of nationality that an applicant's claim must be assessed. It is only if there is no country of nationality that a claim is assessed by reference to the country of habitual residence.

14. Although the Adjudicator took the view that the applicant was effectively stateless, the Tribunal are satisfied that he was not in fact stateless. There is no doubt that he is an Ethiopian citizen. There is no evidence to show that he has been formally deprived of citizenship. However, the Adjudicator did go on to assess the applicant's claim in relation to Ethiopia on the basis that it had been his country of habitual residence. For the reasons which he gave and with which the Tribunal agree, the Adjudicator was satisfied that the applicant would be at risk of persecution were he to be returned to Ethiopia.

15. In substance the Secretary of State contends that the applicant is also a citizen of Eritrea and that he is not entitled to asylum unless he also shows that he would be at risk of persecution in Eritrea and is unable to look to the Eritrean authorities for protection. The applicant accepts that he is of Eritrean ethnic origin but says that he is not a citizen of Eritrea. It may be open to him to apply for citizenship but he has made it clear that he does not wish to do so. Enquiries have been made on his behalf by his representatives. The results of this enquiry are set out at A124. Ms Jessop, his representative, was advised by the Eritrean Embassy that there were two possibilities. If the applicant could get witnesses in the United Kingdom who he knew in Ethiopia and who could be trusted by the Embassy to show that they were Eritreans and to witness that his parents were Eritreans, then they would consider an application. If that was not possible then if he could find a relative in Eritrea who would provide statements they would consider an application for Eritrean documentation to enter the country. Ms Jessop was advised that many Ethiopians wanted to use the opportunity to come to Eritrea and they were very strict but once they had proved that they were Eritrean they could obtain a passport although the Embassy not yet started issuing them.

16. Ms Sigley points to paragraph 5.69 of the CIPU report. This records that the rules governing eligibility for Eritrean nationality are contained in the Eritrean Nationality Proclamation number 21/1992. People are Eritrean by birth if they are born in Eritrea or where born abroad if their father or mother is of Eritrean origin, which is defined as meaning any person resident in Eritrea in 1933. The proclamation goes on to contain provisions for the acquisition of Eritrean nationality by naturalisation. The applicant was not born in Eritrea. He was born in Ethiopia. The evidence before the Adjudicator was that the applicant's parents were indeed born in Eritrea but even taking his father's age as 55 and his mother as 50, they were certainly not resident in Eritrea in 1933. As it is the Secretary of State who asserts that the applicant is Eritrean, the onus is on him to establish that. On the basis of the evidence before us, we are not satisfied that the applicant is entitled to Eritrean citizenship still less that he is now an Eritrean citizen. The Tribunal was referred to Bradshaw. In that case it was held that before a person could be regarded as stateless there must have been an application made for citizenship of those countries with which the

person was most closely connected and those applications must have been refused. That principle makes obvious sense in the context of that case. The issue before the court was whether a person could be said be stateless within the terms of the definition of the Convention on the Status of Stateless Persons (1954) which provided that a stateless person meant a person who is not considered as a national by any state under the operation of its law. It is clear why the court took the view that someone could not be regarded as stateless if they failed to make an application to a state which might consider an applicant to be its national. However, the applicant in this appeal does not assert that he is stateless. He asserts that he is a citizen of Ethiopia whereas the Secretary of State says that he is also a citizen of Eritrea. It may be and the Tribunal would not wish to express a final view on it that there could be circumstances in which the Secretary of State could rely on this principle that it is reasonable to expect an application to be made for citizenship to a country where there is clear prima facie evidence that citizenship would be acknowledged. The position in our view is rather different when the evidence shows at best a possibility and certainly not a probability of a grant of Eritrean citizenship and where the applicant is saying he does not wish to return to Eritrea for good reason even though the reasons may not amount to a well founded fear of persecution or treatment contrary to the Human Rights Act.

17. The Tribunal will therefore proceed on the basis that it is not shown that the applicant is a citizen of Eritrea. We must consider the effect in this appeal of the fact that the removal directions are for Eritrea. It is conceded by Mrs Webber both in her skeleton argument and her oral submissions that there was no adequate evidential basis for the Adjudicator's finding that the applicant would be at risk of persecution in Eritrea. However, to return the applicant to Eritrea would be to return him to a country of which he is not a national or a citizen. On the basis of the evidence before us, the Tribunal are not satisfied that the government of Eritrea would be prepared to accept the applicant as an Eritrean citizen. This by itself does not mean that the Secretary of State would not be entitled to return the applicant to Eritrea. The United Kingdom's obligation under the Convention is not to return a refugee to the frontiers of territories where his life or freedom would be threatened for a Convention reason. This includes an obligation not to return a refugee to a country from which he might be returned to a country where he would face persecution without a proper consideration of his claim under the Convention.

18. It would therefore be permissible for the United Kingdom to return the applicant to Eritrea provided he is not at risk of persecution in Eritrea and provided he is not returned to Ethiopia by the Eritrean authorities. It is not contended that the applicant would be at risk of persecution in Eritrea. It was argued that there was a risk that the Eritrean authorities would return him to Ethiopia. Reliance is placed on documents on A4-5. However the Tribunal do not accept this contention. The concern expressed in this evidence is that those of Ethiopian ethnic origin might

be returned by the Eritreans to Ethiopia. The Tribunal do not find there is any reasonable degree of likelihood on the evidence before us that if the applicant is accepted as an Eritrean citizen because of his Eritrean background that he would then be returned to Ethiopia.

19. However, this is speculation as we are not satisfied that the applicant would be accepted into Eritrea as an Eritrean citizen. The practical situation seems to us to be that he is not likely to be allowed into Eritrea in the first place. If the Secretary of State is relying in effect on a safe third country removal, he must of course produce evidence that he has the statutory power to remove the applicant to the proposed third country. His powers are set out in paragraph 8(1)(c) of Schedule 2 of the 1971 Act. The Tribunal are not satisfied that Eritrea is a country of which the applicant is a national or a citizen. He did not embark from Eritrea for the United Kingdom. He does not hold an Eritrean passport or a document of identity. The only remaining ground is whether Eritrea is a country or territory to which there is reason to believe that he will be admitted. Looking at the evidence as a whole we do not believe that there is reason to believe that he will be admitted. If he fell within the rules governing eligibility for Eritrean nationality in paragraph 5.69, there probably would be reason to believe that he would be admitted but on the evidence before us he does not fall within that category. As the power to remove to Eritrea is not proved, the issue of a third country removal does not arise.

20. Parliament has provided a specific procedure for certifying removals to third countries where the removal is to take place without a consideration of the merits of the asylum appeal. It cannot have been Parliament's intention that by the use of removal directions under Section 69(1) or (5) that third country appeals could be dealt with without the matter being certified within the provisions of Sections 11 and 12. The Tribunal are not suggesting that the Secretary of State is seeking any such circumvention in the present appeal as the removal directions are made to Eritrea on the basis that the applicant is or is entitled to Eritrean citizenship. If in any particular appeal it is to be argued that a third country is safe and removal there will not be a refoulment that issue must be clearly identified in the decision letter so that a party has a proper opportunity of dealing with the issue.

21. A number of difficulties relating in particular to removal directions have arisen because of the way section 69 of the 1999 Act has been drafted. An asylum appeal can only be made following the one of the immigration decisions identified in S69(1)-(5). It is important not to be side-tracked in an asylum appeal into considering the technical validity of the immigration decision when the real issue is whether an applicant is entitled to be recognised as a refugee. This is assessed by reference to Article 1A(2) of the Convention. If the Secretary of State asserts that the removal of a refugee (i.e. someone who has shown that he falls within Article 1A(2)) will not be a breach of the Convention under articles 32 or 33, the onus lies on the Secretary of State to

establish this. If he seeks to make a third country removal without consideration of the merits of the claim under Section 11 or 12 of the 1999 Act, he must follow the procedure set out in those sections.

22. In conclusion, in the view of the Tribunal, the applicant's claim for asylum is entitled to succeed on the basis that he is a citizen of Ethiopia who has a well-founded fear of persecution on return. It is not shown that he is a citizen of Eritrea and so he is not able to look to the Eritrean authorities for protection. The Secretary of State has not sought to establish that he is entitled to return the applicant to Eritrea under either the provisions of Articles 32 or 33 nor has he sought to establish that Eritrea is a safe third country within the provisions of Section 12 of the 1999 Act.

23. In these circumstances this appeal is dismissed.

Mr H J E Latter
Vice President