IAC-FH-NL-V2

Upper Tribunal
(Immigration and Asylum Chamber)

ST (Ethnic Eritrean – nationality – return) Ethiopia CG [2011] UKUT 00252(IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
on 18 to 20 January 2011	
	30 June 2011

Before

SENIOR IMMIGRATION JUDGE P R LANE
SENIOR IMMIGRATION JUDGE S WARD

Between

ST

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Eric Fripp and Emma Daykin, Counsel, instructed by Blavo & Co. Solicitors
For the Respondent: Sebastian Kandola, Senior Home Office Presenting Officer

LAW

(A) There is nothing in MS (Palestinian Territories) [2010] UKSC 25 that overrules the judgments in MA (Ethiopia) [2009] EWCA Civ 289. Where a claim to recognition as a refugee depends on whether a person is being arbitrarily denied the right of return to a country as one of its nationals, that issue must be decided on an appeal under section 82 the Nationality, Immigration and Asylum Act 2002 (paragraphs 69 to 72).

(B) Although the question of whether a person is a national of a particular state is a matter of law for that state, the question whether a national of a particular state has been lawfully or unlawfully deprived of the nationality of that state is a legitimate issue for a court or tribunal to determine, in the course of deciding a person's entitlement to international protection

(paragraph 74).

(C) Whether arbitrary deprivation of nationality amounts to persecution is a question of fact. The same is true of the denial of the right of return as a national; although in practice it is likely that such a denial will be found to be persecutory (paragraphs 76 and 82 to 89).

COUNTRY GUIDANCE

(1) Although the process established by the Ethiopian authorities in 1998 for identifying ethnic Eritreans who might pose a risk to the national security of Ethiopia, following the outbreak of war between the countries, was not arbitrary or contrary to international law, in many cases people were arbitrarily expelled to Eritrea without having been subjected to that process. Those perceived as ethnic Eritreans, who remained in Ethiopia during the war, and who were deprived of Ethiopian nationality, suffered arbitrary treatment, contrary to international law. Those who left Ethiopia at this time or who were then already outside Ethiopia were arbitrarily deprived of their Ethiopian nationality. Also during this time, the Ethiopian authorities made a practice of seizing and destroying identification documents of those perceived as ethnic Eritreans in Ethiopia (paragraphs 60 to 65).

(2) A person whose Ethiopian identity documents were taken or destroyed by the authorities during this time and who then left Ethiopia is as a general matter likely to have been arbitrarily deprived on Ethiopian nationality. Whether that deprivation amounted to persecution (whether on its own or combined with other factors) is a question of fact (paragraphs 76 to 78).

(3) The practices just described provide the background against which to consider today the claim to international protection of a person who asserts that he or she is an Ethiopian national who is being denied that nationality, and with it the right to return from the United Kingdom to Ethiopia, for a Refugee Convention reason. Findings on the credibility and consequences of events in Ethiopia, prior to a person's departure, will be important, as a finding of past persecution may have an important bearing on how one views the present attitude of the Ethiopian authorities. Conversely, a person whose account is not found to be credible may find it difficult to show that a refusal on the part of the authorities to accept his or her return is persecutory or based on any Refugee Convention reason (paragraphs 79 to 81).

(4) Although, pursuant to MA (Ethiopia), each claimant must demonstrate that he or she has done all that could be reasonably expected to facilitate return as a national of Ethiopia, the present procedures and practices of the Ethiopian Embassy in London will provide the backdrop against which judicial fact-finders will decide whether an appellant has complied with this requirement. A person who is regarded by the Ethiopian authorities as an ethnic Eritrean and who left Ethiopia during or in the immediate aftermath of the border war between Ethiopia and Eritrea, is likely to face very significant practical difficulties in establishing nationality and the attendant right to return, stemming from the reluctance of the Ethiopian authorities to countenance the return of someone it regards as a "foreigner", whether or not in international law the person concerned holds the nationality of another country (paragraphs 93 to 104).

(5) Judicial fact-finders will expect a person asserting arbitrary deprivation of Ethiopian

nationality to approach the embassy in London with all documentation emanating from Ethiopia that the person may have, relevant to establishing nationality, including ID card, address, place of birth, identity and place of birth of parents, identity and whereabouts of any relatives in Ethiopia and details of the person's schooling in Ethiopia. Failing production of Ethiopian documentation in respect of such matters, the person should put in writing all relevant details, to be handed to the embassy. Whilst persons are not for this purpose entitled to portray themselves to the embassy as Eritrean, there is no need to suppress details which disclose an Eritrean connection (paragraph 105).

(6) A person who left Ethiopia as described in (4) above is unlikely to be able to re-acquire Ethiopian nationality as a matter of right by means of the 2003 Nationality Proclamation and would be likely first to have to live in Ethiopia for a significant period of time (probably 4 years) (paragraphs 110 to 113).

(7) The 2004 Directive, which provided a means whereby Eritreans in Ethiopia could obtain registered foreigner status and in some cases a route to reacquisition of citizenship, applied only to those who were resident in Ethiopia when Eritrea became independent and who had continued so to reside up until the date of the Directive. The finding to the contrary in MA (Disputed Nationality) Ethiopia [2008] UKAIT 00032 was wrong (paragraphs 115 and 116).

(8) The 2009 Directive, which enables certain Eritreans to return to Ethiopia as foreigners to reclaim and manage property in Ethiopia, applies only to those who were deported due to the war between Ethiopia and Eritrea and who still have property in Ethiopia (paragraphs 117 and 118).

(9) A person who left Ethiopia as described in (4) above, if returned to Ethiopia at the present time, would in general be likely to be able to hold property, although the bureaucratic obstacles are likely to be more severe than in the case of Ethiopian citizens. Such a person would be likely to be able to work, after acquiring a work permit, although government employment is unlikely to be available. Entitlement to use educational and health services is, however, much more doubtful. At best, the person will face a bureaucratic battle to acquire them. He or she will have no right to vote (paragraphs 119 to 124).

(10) Such a person would be likely to feel insecure, lacking even the limited security afforded by the 2004 Directive. Tensions between Ethiopia and Eritrea remain high (paragraph 125).

(11) The following CG cases on Ethiopia are superseded or replaced, as the case may be, by the present determination: GG (Return – Eritrean) Ethiopia CG [2002] UKIAT 05996; NB (Mixed Ethnicity – Ethiopian – Eritrean) Ethiopia CG [2002] UKIAT 06526; AA (Children – Eritrean) Ethiopia CG UKIAT 06533; TG (Mixed Ethnicity) Ethiopia CG [2002] UKIAT 07289; and DA (Ethnicity – Eritrean – Country Conditions) Ethiopia CG [2004] UKIAT 00046.

DETERMINATION AND REASONS

A. PRELIMINARY

1. Senior Immigration Judge Susan Ward and I heard evidence and submissions in this case over three days in late January 2011. Tragically, three days later my colleague suffered a cerebral

haemorrhage and it was therefore decided, with the agreement of the parties, that the determination would be mine alone. Susan died on 27 May.

2. Prior to the hearing, this case had been identified by the Upper Tribunal as suitable for giving country guidance in the case of certain persons from Ethiopia whose claims to be refugees involved the assertion that, whether or not entitled to Ethiopian nationality as a matter of international law, they have been denied such nationality by the Ethiopian authorities.

3. The Tribunal has benefited from detailed written and oral submissions from the representatives. We heard oral evidence from a legally qualified witness, as regards the dealings between the appellant and the Ethiopian Embassy in London. We also heard oral evidence from two expert witnesses. A summary of the oral evidence is set out in Appendix A to this determination.

B. THE APPELLANT AND HIS APPEAL

4. The appellant was born in Ethiopia on 1 October 1979. At the time of his birth Eritrea was a province of Ethiopia, having been annexed in 1962. Both of the appellant's parents were Ethiopian nationals. His father was Oromo but his mother was Tigrina with her roots in Eritrea, a fact which was to have important consequences for the appellant.

5. For some years prior to 1991, an armed struggle for Eritrean independence had been waged by the Eritrean People's Liberation Front (EPLF). In that year, the Marxist dictatorship known as the Derg, which had ruled Ethiopia since 1974, was overthrown by the Ethiopian People's Revolutionary Democratic Front (EPRDF). The EPRDF had close links with the EPLF and, as a result, arrangements were made for a referendum on Eritrean independence. The referendum took place in May 1993. Amongst those who voted were ethnic Eritreans living in Ethiopia, otherwise than within the then province of Eritrea. The vote was overwhelmingly in favour of independence, which occurred in the same year.

6. The appellant's father had died in 1992. Thereafter, the appellant lived with his mother. She owned and operated a bar in Addis Ababa, which was frequented by Eritreans and from which she ran a form of savings club known as a "Eqoob".

7. Following independence, relations between Eritrea, run as a one-party state by the popular Front for Democracy and Justice (essentially the EPLF under another name), and the Tigre-dominated government of Ethiopia deteriorated. In May 1998 war broke out between the two countries, with serious consequences for many ethnic Eritreans living in Ethiopia. Large numbers were rounded up, held in camps and forcibly removed across the border to Eritrea. One of these was the appellant's mother. At the time, the appellant believed that she had been taken as a result of neighbours informing the authorities about her clientele and the financial activities being carried on in the bar.

8. On 24 July 1999, the appellant was detained by the Ethiopian authorities. He was held in harsh conditions, interrogated and beaten. The appellant was released on 28 August 1999, subject to reporting and residence conditions. On 6 September 1999 he was summoned back by the authorities but preferred to go into hiding, before leaving Ethiopia for the United Kingdom, which he reached in late September 1999.

9. The appellant claimed asylum on 30 September 1999 and was interviewed by the respondent in respect of that claim on 20 February 2001. The respondent decided on 7 February 2005 to refuse the appellant's application but the appellant became aware of that decision only in April 2006. His subsequent notice of appeal against the decision was treated by the Asylum and Immigration Tribunal as being out of time, which in turn led to judicial review proceedings. As a result of those proceedings, the AIT accepted the notice of appeal and the appellant's case came before Immigration Judge Sullivan at Hatton Cross on 2 May 2008.

10. The Immigration Judge found the appellant's account of his family background and experiences in Ethiopia to be credible. The one matter in respect of which she did not make an express finding was whether (as the appellant alleged) his Ethiopian ID card had been taken from him by the authorities, following his detention. Mr Fripp urged us to regard the Immigration Judge's positive findings as encompassing what the appellant had said about his ID card. Mr Kandola did not demur; and I accordingly do so.

11. Despite those positive findings, Immigration Judge Sullivan dismissed the appellant's appeal. She did so because, following the country guidance determination in MA (Disputed Nationality) Eritrea [2008] UKAIT 00032, she found that:-

> "41. …There is a presumption that a State will treat a de jure national as one of its own. In addition there is the Appellant's own evidence that the local Ethiopian authorities had a record of his dual nationality and that he had held an Ethiopian identity card confirming that dual nationality. I am satisfied that it is reasonably likely that he will be accepted as an Ethiopian national.
>
> 42. The appellant has given evidence, supported by Mr Woubeshet, that he approached the Ethiopian embassy in London for a passport on 23 April 2008. He was asked for documentary evidence but had none. He was asked if he had family in Ethiopia who could go to his local authority there to ask about his nationality. He said that he had no family in Ethiopia and was told that the embassy could not issue him with a passport. In my view his account falls short of evidence that the Ethiopian authorities do not accept him as an Ethiopian national. It is evidence in my view that the information he was able to give the Embassy staff on 23 April 2008 was not sufficient to prove his nationality".

12. The Immigration Judge went on to find that, upon his return to Ethiopia as a national of that country, the appellant would not face a real risk of persecution or other serious harm. Rightly observing that, given his past persecution, there had to be "good reasons to consider that such persecution will not be repeated", the Immigration Judge found such reasons in the cessation of the hostilities between Ethiopia and Eritrea and the absence of evidence to suggest that the Ethiopians had the same level of suspicion regarding those of part-Eritrean descent as they had in 1999 (paragraph 49). The Immigration Judge was also not satisfied that the appellant was at risk of detention by the authorities, given the passage of time and the fact that the appellant himself had not been the focus of the 1999 investigation (which had concentrated on his mother's alleged activities).

13. Reconsideration of the Immigration Judge's decision was ordered under section 103A of the Nationality, Immigration and Asylum Act 1992 but, following a hearing before Senior Immigration Judge Moulden on 17 December 2008, the AIT found that there was no material error of law in the determination of Immigration Judge Sullivan.

14. Permission to appeal to the Court of Appeal was granted by that court on 14 July 2009. The

reason was the very recent judgment in MA (Ethiopia) [2009] EWCA Civ 289 (see below). In the light of MA (Ethiopia), Moses LJ considered that there was "a real prospect that the applicant will establish that both IJ and SIJ erred in law in applying a presumption that he was not at risk of being denied status as a national by reason of his legal right to be regarded as a national, particularly in the context of his accepted ill-treatment in the past".

15. Following the grant of permission, agreement was reached between the parties that the appeal should be allowed, to the extent of its being remitted to (now) the Upper Tribunal, to make such findings as necessary but, however, so as "not to disturb any previous finding by the Tribunal, unaffected by this appeal, accepting the credibility of the history provided to it or the past persecution of the Appellant". A consent order to that effect was made on 14 October 2009. Thus it was that the case came before us for hearing on 20 January 2011.

C. ETHIOPIAN LEGISLATION

16. Whilst the appellant's appeal against the 2005 decision has been pending, there have been a number of decisions from the AIT and the Court of Appeal in Ethiopian cases of the kind with which we are concerned. Before turning to those decisions, however, it is necessary to refer to some provisions of Ethiopian legislation regarding citizenship and the position of Eritreans living in Ethiopia.

Proclamation on Ethiopian Nationality (22 December 2003)

17. For our purposes, the relevant provisions are as follows:-

> "2. Definitions
>
> …. 'Foreigner' means a person who is not an Ethiopian national;
>
> 'Domicile' means the residence of a person as defined under Article 183 of the Civil Code of Ethiopia;
>
> 'Authority' means the Security, Immigration and Refugee Affairs Authority.
>
> ACQUISITION OF ETHIOPIAN NATIONALITY
>
> 3. Acquisition by descent
>
> 1/ Any person shall be an Ethiopian national by descent where both or either of his parents is Ethiopian.
>
> ……
>
> 4. Acquisition By Law
>
> Any foreigner may acquire Ethiopian nationality by law in accordance with the provisions of Articles 5-12 of this Proclamation.
>
> 5. Conditions to be fulfilled.
>
> A foreigner who applies to acquire Ethiopian nationality by law shall:

1/ have attained the age of majority and be legally capable under the Ethiopian law;

2/ have established his domicile in Ethiopia and have lived in Ethiopia for a total of at least four years preceding the submission of his application;

3/ be able to communicate in any one of the languages of the nation/nationalities of the country;

4/ have sufficient and lawful source of income to maintain himself and his family;

5/ be a person of good character;

6/ have no record of criminal convictions;

7/ be able to show that he has been released from his previous nationality or the possibility of obtaining such a release upon the acquisition of Ethiopian nationality or that he is a stateless person; and

8/ be required to take the oath of allegiance stated under Article 12 of this Proclamation.

6. Cases of Marriage

……

7. Cases of Adoption

……

8. Special Cases

A foreigner who has made an outstanding contribution in the interest of Ethiopia may be conferred with Ethiopian nationality by law irrespective of the conditions stated under Sub-Articles (2) and (3) of Article 5 of this Proclamation.

9. Children of a Naturalised Person

……

10. Submission of an application for naturalisation

1/ An application to obtain Ethiopian nationality by law shall be accompanied with relevant documents and shall be submitted to the authority.

2/ …..

11. Examining and Deciding upon an Application

1/ An application to obtain Ethiopian nationality by law shall be examined by the Nationality Affairs Committee established under Article 23 of this Proclamation.

2/ The Committee shall submit its recommendation to the authority, following the examination of the application and documents submitted to it as well as such other additional information furnished on its demand.

3/ Where the recommendation of the Committee for Naturalisation obtains the approval of the authority, the applicant shall be required to appeal before the Committee to take the oath of allegiance stated under Article 12 of this Proclamation and shall be issued with a certificate of naturalisation.

12. Oath of Allegiance

.....

13. National Identity Card

1/ Any Ethiopian national, if he has attained the age of majority, shall be issued with a national identity card.

2/ Minor children shall be entered in the national identity cards of their parents.

3/ National identity cards shall be issued by the authority or by any office delegated by the authority.

RIGHTS OF NATIONALITY

14. State Protection

1/ The State shall protect the rights and lawful interests of its nationals.

2/ The State shall take such measures as may be necessary to ensure the protection of the rights and lawful interests of its nationals residing abroad.

15. Non-Extradition

No Ethiopian national may be extradited to another state.

16. Change of Nationality

Any Ethiopian national shall, subject to the provisions of Article 19 of this Proclamation, have the right to change his nationality.

17. Non-Deprivation of Nationality

No Ethiopian may be deprived of his nationality by the decision of any government authority unless he loses his Ethiopian nationality under Article 19 or 20 of this Proclamation.

18. Equality of Nationals

All Ethiopian nationals shall have equal rights and obligations of citizenship regardless of the manner in which nationality is obtained.

LOSS OF ETHIOPIAN NATIONALITY

19. Renunciation of Ethiopian nationality

1/ Any Ethiopian who has acquired or has been guaranteed the acquisition of the nationality of another state shall have the right to renounce his Ethiopian

nationality.

……

3/ The renunciation of the nationality of a minor child pursuant to Sub-Article (1) of this Article shall be effected by the joint decision of his parents or, where one of his parents is a foreigner, by the decision of the Ethiopian parent.

……

6/ Any Ethiopian who is not issued with a certificate of release in accordance with Sub-Article(5) of this Article shall have the right to appeal to the competent court.

20. Loss of Ethiopian Nationality upon Acquisition of Other Nationality

1/ Without prejudice the provisions of Article 19(4) of this Proclamation, any Ethiopian who voluntarily acquires another nationality shall be deemed to have voluntarily renounced his Ethiopian nationality.

2/ Any Ethiopian who requires another nationality by virtue of being born to a parent having a foreign nationality or by being born abroad shall be deemed to have voluntarily renounced his Ethiopian nationality unless he has declared to the authority his option to retain it by renouncing his other nationality within one year after attaining the age of majority, or unless there has been an earlier express renunciation of his Ethiopian nationality pursuant to Article 19(3) of this Proclamation.

3/ An Ethiopian who acquires, in the absence of his own initiative, another nationality by the operation of the law in connection with any ground other than those specified under Sub-Article/2/ of this Article shall be deemed to have voluntarily renounced his Ethiopian nationality, if he:

1. starts exercising the rights conferred to such acquired nationality or

2. fails to declare his option to the authority to retain his Ethiopian nationality by renouncing his other nationality within a period of one year.

4/ A person who retains another nationality in addition to Ethiopian nationality shall be considered solely an Ethiopian national until the loss of his Ethiopian nationality pursuant to Sub-Articles (2) or (3) of this Article.

21. Effects of Loss of Nationality on Spouses and Children

A person’s loss of Ethiopian nationality shall have no effect on the nationalities of his spouse and children.

22. Re-admission to Ethiopian Nationality

1/ A person who was an Ethiopian national and who has acquired foreign nationality by law shall be re-admitted to Ethiopian nationality if he:

a) returns to domicile in Ethiopia;

b) renounces his foreign nationality; and

c) applies to the authority for re-admission.

2/ The provisions of Sub-Article (1) of this Article shall also apply to a person who has lost his Ethiopian nationality pursuant to Article 20(2) of this Proclamation.

23. National Affairs Committee

[Composition]

2/ The Committee shall have the following powers and duties to

a) examine applications to obtain Ethiopian nationality by law;

b) examine evidences submitted by a person for the rebuttal of his presumed renunciation of Ethiopian nationality pursuant to Article 20 of his Proclamation;

c) ascertain that the requirements stated under Article 22 of this Proclamation are fulfilled when an application for re-admission to Ethiopian nationality has been submitted.

3/ The Committee shall consider any case in accordance with Sub-Article (2) of the Article when it is referred to it by the authority. The Committee shall also submit its findings and recommendations to the authority.

……

25. Repeal

The Ethiopian Nationality Law of 1930 (as amended) is hereby repealed.

26. Transitory Provisions

Any person who has retained, until the coming into force of this Proclamation, his Ethiopian nationality pursuant to the former Nationality Law shall continue to be an Ethiopian national.

……."

Directive issued to determine the Status of Eritrean Citizens residing in Ethiopia (23 January 2004)

"**1. <u>Introduction</u>**

When Eritrea became an independent country by the Referendum held in Eritrea in 1993, persons of Eritrean origin who were Ethiopian nationals became Eritrean nationals or their right to Eritrean nationality was established. Numerous persons of Eritrean origin have continued to reside in Ethiopia since long before the Eritrean independence. Since it has been found necessary to determine the residence status of those Eritrean nationals who have continued to live in Ethiopia, the Security, Immigration and Refugee Affairs Authority has issued this Directive.

2. <u>Objective</u>

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.

3. Basic Assumptions of the Directive

3.1 With regard to nationality, based on Article 33(1) of the Constitution of the Federal Democratic Republic of Ethiopia that states that no Ethiopian national shall be deprived of his or her Ethiopian nationality against his or her will and Article 33(2) that guarantees that any national has the right to change his or her Ethiopian nationality;

3.2 Pursuant to Article 17 of the new Nationality Law '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';

3.3 Based on the Universal Declaration of Human Rights, adopted by Ethiopia, that provides under Article 15(2) that no one shall be arbitrarily deprived of his or her nationality nor denied the right to change his or her nationality;

3.4 As it is established by the experience of other countries that according to international custom when a State secedes from another under any circumstances, in order to resolve conflicts regarding nationality between the new and the existing country, individuals are given a limited period to chose their nationality;

3.5 As stipulated under Article 20 of the Ethiopian Nationality Law an Ethiopian who acquires another nationality is deemed to have voluntarily renounced Ethiopian nationality and loses his or her Ethiopian nationality;

3.6 As it is necessary to consider the historical situation whereby, before Eritrea was recognised as an independent State, its people, as they had Ethiopian nationality, established their residence all over Ethiopia and acquired wealth and property, and have also established strong ties through marriage with Ethiopians and having raised children and grandchildren;

The abovementioned laws and situations have been taken as the basis for the issuance of the Directive.

4. Issues of Nationality

4.1 A person having an Eritrean passport or any document conferring Eritrean nationality or a person serving the Eritrean government in the sector reserved exclusively for Eritrean nationals is considered as having Eritrean nationality.

4.2 A person of Eritrean origin who has not opted for Eritrean nationality shall be deemed as having decided to maintain his or her Ethiopian nationality and his or her Ethiopian nationality shall be guaranteed.

4.3 An Eritrean registered in accordance with this Directive and who desires to regain his or her Ethiopian nationality may be readmitted to his or her Ethiopian nationality based on Article 22 of the new Nationality Proclamation.

5. Registration

5.1 The following persons shall be registered with the authority.

In accordance with this Directive, a person whose Eritrean nationality has been established based on Article 4.1 has to be registered in a place and time to be notified by the authority.

5.2 Registration procedure for Eritreans who were required to register in accordance with this Directive:

(a) An Eritrean resident in Addis Ababa, in accordance with the time schedule to be announced by the Main Department for Immigration and Nationality Affairs, shall appear and register in person before the Main Department.

(b) An Eritrean who resides in the Regions shall appear and register in person before the branch offices of the Main Department for Immigration and Nationality Affairs or before a delegated organ.

6. Residence Permit and Travel Document

6.1 An Eritrean person residing in Ethiopia will be granted permanent residence permit in accordance with the Immigration Proclamation.

6.2 Having the permanent residence permit, if he or she is unable to obtain a travel document from his or her country, he or she may be issued a foreigner passport for the purpose of travel.

7. Cancellation of Residence Permit

7.1 Residence permit may be cancelled for the following reasons:

(a) where the residence permit was acquired by submitting fraudulent information;

(b) where the bearer of the residence permit is found to be an undesirable foreigner.

7.2 In addition to the reasons mentioned in Article 7.1, if he or she resided continuously for more than a year outside Ethiopia.

7.3 Returning resident's permit

An Eritrean who has been issued a residence permit and who leaves Ethiopia permanently shall return the residence permit to the Authority.

8. Ownership of Immovable Property and the Rights to Use the Property

8.1 The right to own a house and immovable property shall remain guaranteed.

8.2 The right to use the agricultural land, for a person resident in a rural area, shall be respected.

9. Conditions of Work

9.1 For Government employment, he or she shall be treated in accordance with the law

applicable for any foreign national.

9.2 He or she has the right to engage in a private employment without being required to have a work permit. However, he or she is not permitted to engage in private employment that may be connected with security.

10. <u>Social Services</u>

- The right to use educational and health services shall be afforded in the same manner as the nationals of the country.

11. <u>Service Charges</u>

- The permanent residence permit holder shall be treated in the same manner as the nationals of the country with respect to charges for different services.

…"

Council of Ministers Directive to Enable Eritreans Deported from Ethiopia due to the War Launch[ed] by the Eritrean Government on Ethiopia [to] Reclaim and Develop their Properties in Ethiopia (May 2009)

18. The following is an unofficial translation of what, for our purposes, are the relevant provisions of the 2009 Directive:-

"WHEREAS, it has become necessary to facilitate the condition whereby Eritreans who, due to the invasion of Ethiopia by the Eritrean Government, were deported from Ethiopia upon being deemed a threat to national security could reclaim their properties which currently are under the custody of their agents in Ethiopia, under the administration of government organs and in blocked bank accounts as well as to settle the problems that had been encountered in this regard;

The Council of Ministers has issued this Directive.

Short Title

This Directive may be cited as the 'Council of Ministers Directive to Enable Eritreans Deported from Ethiopia due to the War Launch[ed] by the Eritrean Government on Ethiopia [to] Reclaim and Develop their Properties in Ethiopia'.

2. Scope of Application

1. This Directive is applicable to Eritreans who, due to the invasion of Ethiopia by the Eritrean government, were deported from Ethiopia upon being deemed a threat to national security.

2. Notwithstanding the provision of sub-article one of this article, this Directive is not applicable to Eritreans who have close ties with commercial and security entities which are particularly administered by the Eritrean government.

3. Property Administration

Eritreans deported from Ethiopia who used to own property or a business enterprise in Ethiopia can, pursuant to Article 5, carry on commercial activities upon presentation of the necessary proof, if the property or the business has not been sold or wound up and it is

being managed by their agents.

4. Money Deposited in Banks

Ethiopians deported from Ethiopia are entitled to:

1. Operate bank accounts wherein they have personally deposited money upon presentation of the relevant evidence;

2. Received the proceeds from the sale of their property by government administration [organs] and deposited in blocked bank accounts without interest in Ethiopian currency upon presentation of proof.

3. Property or money can be restituted pursuant to sub-articles 1 and 2 of this Article after a government-owned debts are paid without interest and penalty.

5. Engage in Investment

Eritreans deported from Ethiopia are:

1. Entitled to engage in commercial and investment activities as local investors in Ethiopia by virtue of Article (5) of Proclamation No. 280/2002;

2. Duty-bound to operate their money through an accredited bank in accordance with a procedure to be laid down by the committee established under Article 8.

6. Issuance of Visa

The National Information and Security Service shall issue visa and residence permit [sic] to Eritreans deported from Ethiopia on the basis of the powers vested in it and its procedures.

7. Identifying Eritreans not Covered by the Directive

The National Information and Security Service shall investigate whether Eritreans who apply to benefit from this Directive used to or still work in collaboration with Eritrean and security entities located in Eritrea or other countries prior to or after the war and submit [its findings] for a decision to the Committee established under Article 8; it shall implement this Directive in accordance with the Committee's decision.

8. Application of the Directive

…

2. A four-member Committee … shall be established to implement this Directive.

9. Powers and Duties of the Committee

…

10. Effective Date

This Directive shall enter into force as of May 15, 2009."

D. RELEVANT CASE LAW

MA & Others (Ethiopia – mixed ethnicity – dual nationality (Eritrea) [2004] UKIAT 00034

19. The AIT was not satisfied that the evidence before it showed that Ethiopians of Eritrean or part Eritrean ethnicity fell within a category which on that basis alone established they had a well-founded fear of persecution. However the Tribunal accepted that if the reality of the situation for an individual was such that he or she was effectively deprived of citizenship which led to treatment which can properly be categorised as persecution then, subject to the other requirements of the Refugee Convention, there would be a right to refugee status. The Tribunal considered that the case of Lazarevic v SSHD [1997] Imm AR 251 established that arbitrary deprival of citizenship can but did not necessarily amount to persecution. It was "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" (paragraph 33).

20. The AIT then went on to consider the issue of whether, if the three appellants before them were at real risk of persecution in Ethiopia, they did not qualify as refugees because they could look to the Eritrean authorities for protection. The Tribunal found that it would be an issue of fact in each case as to whether a claimant was a national of a particular state. If the evidence showed a claimant was such a national or entitled to nationality of a country, then he would not be deemed to be lacking the protection of the country of his nationality, if without any valid reason based on a well-founded fear, he had not availed himself of the protection of that country. In most cases that would involve making an application for his nationality to be recognised. "Putting it simply a claimant cannot decline to take up a nationality properly open to him without a good reason, which must be a valid reason based on a well-founded fear. A claimant cannot benefit from his own inaction unless that inaction has a proper basis because he is fearful of the consequences" (paragraph 45). The Tribunal accepted that the protection offered by a state of second nationality must be "effective", as envisaged in the Australian case of Jung Kim Koe [1997] 306 FCA (2nd May 1997).

EB (Ethiopia) [2007] EWCA Civ 809

21. The appellant in EB was a female Ethiopian national whose father was of Eritrean origin. On appeal, the Asylum and Immigration Tribunal found that EB had been deprived of her identity documents by the Ethiopian authorities, prior to her departure from that country, and that the reason for the deprivation had been to make it more difficult for EB to prove her Ethiopian nationality. The AIT concluded that EB was, consequently, stateless but dismissed her appeal on the ground that the removal of identity documents had not itself resulted in ill-treatment and she was not otherwise at risk of such treatment, if returned to Ethiopia.

22. Longmore LJ identified the issue between the parties as follows. EB contended that she had effectively lost her nationality or citizenship when her identity documents were removed by the action of the executive arm of the state of Ethiopia (albeit not in the manner described by the appellant). The Secretary of State, whilst accepting that deprivation of citizenship by arbitrary action would prima facie constitute persecution, submitted that the mere removal of identity documents did not constitute persecution. The AIT had found that EB suffered no ill-treatment whilst she was in Ethiopia and she would accordingly not have a well-founded fear of persecution if she were hypothetically returned there (albeit that this could not currently happen). Longmore LJ continued as follows:-

> "63. To my mind the important finding [of the AIT] is that the removal of EB's identity documents was not an activity which resulted in ill-treatment of 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 Immigration Appeal Tribunal in *MA (Ethiopia) v Secretary of State for the Home Department* [2004] UKIAT 324 compelled their conclusion. *MA (Ethiopia)* was itself based on the decision of the Court of Appeal in *Lazarevic v Secretary of State for the Home Department* [1997] 1 WLR 117."

23. In Lazarevic the Court of Appeal held that, even if draft evaders from Yugoslavia had a well-founded fear when they left that country, they were not to be considered refugees since their apprehended persecution was not for a Refugee Convention reason. A genuine conscientious objector would have such a reason, based on membership of a particular social group or political opinion, but an ordinary draft evader would not. The arbitrary deprivation of citizenship, however, was capable of constituting persecution, for the reason given by Professor Hathaway:-

> "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* (continuing) persecution in the future." The Law of Refugee Status (1991) pp104-105 (original emphases).

24. In the light of Lazarevic, Longmore LJ considered that the Immigration Appeal Tribunal had erred in MA (Ethiopia) in concluding that 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" (paragraph 33). Longmore LJ explained that the reasoning in Lazarevic, properly interpreted, was that Yugoslavia's refusal of re-entry to draft evaders failed to be persecutory because it was not "persecution for a Convention reason, not because it did not lead to treatment constituting 'serious harm'". In EB's case, the removal of her identity documents was plainly for a Refugee Convention reason, whether categorised as "race" or "membership of a particular social group".

25. Longmore LJ explained that the reason why actual deprivation of citizenship by arbitrary action would prima facie amount to persecution was that such action "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 would 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" (paragraph 67).

26. Longmore LJ considered these "virtually self-evident" propositions to be buttressed by Article 15 of the Universal Declaration of Human Rights, that "everyone has the right to a nationality" and that "no-one shall be arbitrarily deprived of his nationality", and by the USA

authority of Trop v Dulles (1958) 356 US 86. That case concerned the constitutionality of legislation authorising a court marshal to deprive deserters in time of war of their US nationality. Warren CJ described denationalisation as follows:-

> "There may be involved no physical mistreatment, no privative torture. There is instead the total destruction of the individual's status in organised 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 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" (pp101-102).

27. Returning to the facts of EB's case, Longmore LJ considered that there could be "no difference between" the seizure of her identity documents to make it more difficult for her to prove nationality in the future "and an actual deprivation of citizenship. Her 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". The IAT in MA (Ethiopia) were in Longmore LJ's view "wrong to conclude that some further (presumably physical) ill-treatment was required" (paragraph 70).

28. At paragraph 71, Longmore LJ recognised that this did not conclude the question "since the hypothetical question whether EB would suffer persecution … on her return is the critical question which has to be addressed". This was so, notwithstanding that the matter was hypothetical because Ethiopia would not currently allow her to return to its country. "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 refugee."

29. Jacob LJ agreed with the judgment of Longmore LJ. Notwithstanding the prima facie establishing of refugee status, the question still had to be asked, whether EB would have a well-founded fear of persecution if 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' (Warren CJ'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." There being "no rebuttal evidence showing that the claimant would not suffer from being stateless in the ways I have identified", and given the length of time that EB's appeal had been pending, Jacob LJ did not consider it necessary or desirable for her appeal to be remitted to the AIT (paragraph 75).

30. Although agreeing on the legal issues raised in the appeal, Pill LJ dissented on whether EB's appeal should be allowed outright or, as he considered to be appropriate, remitted to the AIT. This was because the question of whether the removal of documents constituted persecution "is essentially a question for a fact- finding Tribunal and this Tribunal 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" (paragraph 59).

***MA* (Disputed Nationality) Ethiopia [2008] UKAIT 00032**

31. I now come to the case Immigration Judge Sullivan sought to apply in the appeal of the present appellant. The AIT's determination in MA (Disputed Nationality) Ethiopia [2008] UKAIT 00032 replaced in March 2008, the guidance in MA & others (Ethiopia – Mixed Ethnicity – Dual Nationality), insofar as that guidance held good in the wake of EB (Ethiopia). The appellant in MA (Disputed Nationality) had also been an appellant in MA and Others. She had arrived in the United Kingdom in March 1999, claiming that both she and her husband were ethnic Eritreans from Ethiopia. Her husband had been deported to Eritrea from Ethiopia. If returned to Ethiopia, MA said that she feared deportation to Eritrea, in respect of which country also she asserted a fear of persecution.

32. The AIT heard evidence from Nigel Beaumont of the Returns Group Documentation Unit of the Border and Immigration Agency. In the present proceedings, it is relevant to mention that the issue of whether Mr Beaumont would give evidence was raised. In the light of the respondent's decision that he would not be called, Mr Fripp expressed concerns as to the extent to which Mr Beaumont's evidence, as given to the Tribunal in 2007, could properly play a part in the present determination. The record of his evidence (including cross-examination by Mr Fripp) is nevertheless set out at paragraphs 23 to 43 of the reported determination. There is no reason for me not to have regard to what is there recorded. What relevance it might play in the determination of the present appeal is, however, another matter.

33. Mr Beaumont's duties involved seeking to obtain travel documentation that would enable persons from Ethiopia to be removed to that country from the United Kingdom. This normally happened when appeal rights had been exhausted and there was no barrier to removal. Where certain criteria were met, the Ethiopian authorities would permit a person to be removed on the basis of an EU letter, which meant that it was for immigration control in the country of return to carry out any further checks they might wish to make. If the person in question was found not to have the nationality of that country, then the United Kingdom would accept them back. At the time of giving his evidence, the EU letter process was a pilot scheme. It was to be distinguished from the process of *laissez passer*, which followed a process of interview at the embassy, and which in Mr Beaumont's view did not need to later involve nationality checks at the point of return. Nevertheless, there was an agreement that such a person would be taken back by the United Kingdom, if not accepted. There were also cases involving emergency travel documents (ETDs).

34. Paragraph 37 records that Mr Beaumont:-

> "… was asked whether there were any underlying reasons behind a person being rejected simply because the embassy did not accept the person was an Ethiopian national. He said that no such information would be given by the Ethiopians. They would say they were not persuaded or the person was not very compliant at interview and did not want to be removed and would not comply so as to avoid removal, and they could be told that the person had given no information. If that happened then they went back to the caseowner to try and provide any supporting evidence they might have. He was asked whether they could get them documented if there was no supporting evidence and the person said they were Eritrean. He said no, they did not have documents about Eritrea. There was nothing they could do with that."

35. At paragraph 39, Mr Beaumont said that his unit "would not tend to submit the form if the person did not say they were Ethiopian, as it would just annoy the embassy. It could be

completed on their behalf, based on the information they had given earlier and they could put a covering note or sheet with the form. There was also the possibility of prosecution under section 35 [of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (deportation or removal: cooperation)] for non-compliance which could be held out as a threat. A person could not be allowed to stay just because they refused to give information." At paragraph 41, Mr Beaumont indicated that, in one case where a person was claiming to be Eritrean, the United Kingdom authorities had a copy of the Ethiopian passport which was "good supporting evidence, and a travel document had been issued". He had never seen an Ethiopian *laissez passer* saying anything other than that the person was of Ethiopian nationality. At paragraph 42, Mr Beaumont was recorded as telling Mr Fripp that his team did not sit in on interviews at the embassy and very little information was given to his team by that embassy.

36. At paragraph 81, the Tribunal held that in a case of disputed nationality the first question to be considered was "Is the person a de jure national of the country concerned?" That was a legal question, to be answered by examining whether a person fulfilled the nationality law requirements of his or her country. It might, nevertheless, be relevant in deciding what was the legal answer to that question to see whether the authorities had issued a passport to the person concerned or whether, as in the case of EB, they had taken steps to deprive the person of the documentary means of proving nationality. If a person had not been shown to be a de jure national of the country concerned, then he or she would either be a national of another country or be stateless.

37. If, however, it was concluded that a person was a de jure national, the next question would be a purely factual one: "Is it reasonably likely that the authorities of the state concerned will accept the person concerned if returned as one of its own nationals?" That was the approach said to have been approved by the Court of Appeal in EB (paragraph 85). There was a presumption that the country concerned would afford a de jure national of the same treatment as any other national. In EB, armed police had taken the appellant's ID cards and school papers, together with identity documents including a birth certificate. That had been found by the Tribunal to have been carried out, as against people such as EB, first to make it more difficult for them in the future to prove their Ethiopian nationality. The MA (Disputed Nationality) Tribunal observed that the Court of Appeal had found the earlier MA Tribunal to have been wrong in assuming some further (presumably physical) ill-treatment was required.

38. At paragraph 90, the Tribunal found that the facts of the case before them were different from EB. There had been "no removal of the appellant's documents". The Tribunal refused to accept the submission on behalf of the appellant that her Ethiopian passport in her own name, which she had used to travel, was not in fact validly issued to her.

39. Turning to the findings of the Claims Commission in The Hague regarding the international law ramifications of the border war between Eritrea and Ethiopia, the Tribunal found that, in response to the exceptional situation facing it at the outset of the war, Ethiopia had devised and implemented a system which applied reasonable criteria to identifying individual dual nationals thought to pose threats to Ethiopia and that the loss of Ethiopian nationality after being identified through this process was not "arbitrary and contrary to international law" (paragraph 92). The Tribunal accepted that the appellant before them was not a person who was liable to be deported since she was not a person who had taken part in the Eritrean independence referendum. She would not have been required to register, because she had not taken part in the referendum. Whilst the Claims Commission found that some family

members had been forcibly expelled, contrary to international law, because those family members did not hold Eritrean nationality, the Commission could not determine the extent to which this had happened; although Ethiopia was adjudged liable to Eritrea for erroneously depriving at least some Ethiopians who were not dual nationals of their Ethiopian nationality.

40. At paragraph 95, the Tribunal accepted the Secretary of State's submission that the best appellant MA could show was that she might have been faced with a risk of arbitrary deprivation of nationality at some point in the past but, as regards the present, "there is no identifiable provision of Ethiopian law under which the appellant could have lost her nationality and nor is there any identifiable executive or administrative act to the effect that she is not an Ethiopian national". Considering the 2004 Directive issued to determine the resident status of Eritrean nationals residing in Ethiopia, the Tribunal found there was nothing in paragraphs 4 to 6 of the Directive, concerning registration entitlement to a residence permit, which were limited in a way suggested on behalf of the appellants (namely, that they applied only to persons who were in continued residence in Eritrea up to the issuing of the Directive). At paragraph 102, the Tribunal concluded that "it is reasonably likely that the authorities of Ethiopia will accept the appellant, if returned, as one of its own nationals".

41. At paragraph 107, the Tribunal commented on the evidence of Mr Beaumont. Where there was supporting evidence in the form of a copy or expired passport, ID card, birth certificate, etc, then "an individual can be removed to Ethiopia on a European Union letter. Such cases do not require the person to go and be interviewed at the Ethiopian Embassy." The appellant did not have such information and would therefore need to be interviewed. At paragraph 109, the Tribunal concluded that appellant MA, after such an interview, in respect of which the embassy "would have been provided with the biodata information which in the appellant's case would show that her parents were born in Eritrea and she herself was born in Ethiopia," would be likely to be issued with emergency travel documentation. That would not be the case, however, if she said at interview that she did not want to return to Ethiopia.

MA (Ethiopia) [2009] EWCA Civ 289

42. MA appealed from the AIT to the Court of Appeal. In April 2009 that Court unanimously dismissed her appeal. There were two reasoned judgments, of Elias LJ and Stanley Burnton LJ. Mummery LJ agreed with both.

43. Elias LJ held that it was neither necessary nor desirable for the concepts of de jure and de facto nationality to be employed as they had been by the AIT. The issue in asylum cases was always whether the applicant had a well-founded fear of persecution on return and she would have that well-founded fear if there was a real risk of persecution. In the case of MA (Disputed Nationality) the issue was perceived to be whether MA would face the risk of being denied her status as a national, it being assumed that this would, if established, constitute persecution to the requisite standard. In those circumstances "to have recourse to the concepts of de jure and de facto nationality is likely to obscure rather than to illuminate that question" (paragraph 42). Owing to what was accepted by both parties to be the application of the wrong standard of proof, the AIT's analysis of what it called the "hypothetical question" of treatment if returned to Ethiopia was wrong in law. The question, however, was whether that error was material. It had also been necessary for the Tribunal to engage with the question of the denial of the right of return, given that the appellant's case was that this was part of the persecution itself (paragraph 43). The question of risk needed to be looked at in the round, and the issues relating to it should not be compartmentalised (paragraph 48).

However, Elias LJ considered that it had become apparent during the hearing before the AIT that the outcome "depended upon whether the Ethiopia authorities would allow the appellant to return to Ethiopia. I do not accept the appellant's submission that the AIT simply had to determine this question to the usual standard of proof. It is a question which can, at least in this case, be put to the test. There is no reason why the appellant should not herself make a formal application to the embassy to seek to obtain the relevant documents. If she were refused, or if she came up against a brick wall and there was a failure to respond to the request within a reasonable period such that a refusal could properly be inferred, the issue would arise why she had been refused. Again, reasons might be given for the refusal. Speculation by the AIT about the embassy's likely response, and reliance on expert evidence designed to assist them to speculate in a more informed manner about that question, would not be necessary" (paragraph 49). Where the essential issue is whether someone will or will not be returned, "the Tribunal should in the normal case require the applicant to act bona fide and take all reasonably practicable steps to seek to obtain the requisite documents to enable her to return". Elias LJ acknowledged that there might be cases where it would be unreasonable to require this "such as if disclosure of identity might put the applicant at risk, or perhaps third parties, such as relatives of the applicant who may be at risk in the home state if it is known that the applicant has claimed asylum. That is not this case, however."

44. Such an approach was, Elias LJ considered, consistent with the well-established principle that, before an applicant for asylum can claim the protection of a surrogate state "he or she must first take all steps to secure protection from the home state. That was the approach adopted in *Bradshaw* [R v Secretary of State for the Home Department ex-parte Bradshaw [1994] Imm AR 359] …. It can be seen as an aspect of the duty placed on an applicant to cooperate in the asylum process. Paragraph 205 of the UNHCR Handbook expressly states that an applicant for asylum must, if necessary, make an effort to procure additional evidence to assist the decision maker." Bradshaw involved an assertion of statelessness, but the court held that the person making that assertion should make an application for citizenship of the countries with which she was most closely connected.

45. Elias LJ and Stanley Burnton LJ were in agreement that the use of the "real risk" test in such circumstances would produce "absurd results". If the expert evidence showed that three out of ten in the appellant's position were not allowed to return, that would constitute a real risk "but it would be strange if by the appellant's wilful inaction she could prevent the Tribunal from having the best evidence there is of the state's attitude to her return … it would in my view be little short of absurd if she could succeed in her claim by requiring the court to speculate on a question which she was in a position actually to have resolved" (paragraph 53).

46. Elias LJ held that the Tribunal had erred by not first establishing that the appellant had taken all reasonably practicable steps to obtain authorisation to return. Although remittal would in such circumstances be appropriate, in the present case, MA's witness statement indicated that she had gone to the embassy to ask for a passport but got nowhere "having told the staff that she was Eritrean. That could not constitute a bona fide attempt to obtain the necessary authorisation" (paragraph 55). That meant her appeal had to be dismissed. Elias LJ's judgment continued as follows:-

> "57. I should add, however, that she would still now be able to make an application to the embassy for the requisite papers, and if her application were refused, she could make a fresh application for asylum on the basis of the new evidence. Whether that would succeed would depend on the reason for refusal. I respectfully agree with the

observations of Stanley Burnton LJ at para [87] that if the reasons were that she did not want to return, or the embassy was genuinely not satisfied that she could establish her status or, I would add, that she had misled them over her nationality, then she would not establish that she was being deprived of any rights relating to nationality at all, let alone for a Convention reason, and her claim would fail. However, absent any such explanation or reason given, it would plainly be open to the Tribunal to infer that the reason for the refusal would be related to her Eritrean origins, and would therefore constitute a denial of her nationality for a Convention reason. Of course, if she were permitted to return, it is conceded that she would have no asylum claim based on a well-founded fear of persecution open to her."

47. Elias LJ concluded by dealing with "two miscellaneous matters". The first was whether the refusal of authorisation to return to Ethiopia could constitute persecution if, as in the case of MA, she had no wish to return to that country. Elias LJ considered this "deceptively attractive argument" to be wrong. "The question is whether objectively there is a real risk of persecution on return. If there is not, then of course her unwillingness to return is not founded on any fear of persecution and she falls outside Art 1A(2) of the Refugee Convention. If there is, and she is unable to return, she falls within the terms of the Article even if she would prefer not to return even if there were no such risk. There must be numerous cases where someone genuinely fears persecution in his own country but is not unhappy that that should be so if it means he can sustain a better standard of living for himself and his family in England" (paragraph 58).

48. The second miscellaneous matter concerned what the effect was of the decision of the court in EB. For appellant MA, it was contended that the majority judgments "clearly establish that someone deprived of his nationality for a Convention reason thereby necessarily suffers persecution within the meaning of the Convention". Although Elias LJ accepted there were passages in the judgments in EB that supported that interpretation, he did not think it was possible to state as a universal proposition "that deprivation of nationality must be equated with persecution. Persecution is a matter of fact, not law. Whether ill-treatment amounts to persecution will depend upon what results from refusing to afford the full status of a de jure national in the country concerned." Treating someone less favourably than a person afforded the full rights and benefits of nationality "would be discrimination, but discrimination does not necessarily amount to persecution. That would be a matter of fact in each case depending upon the nature and degree of the disadvantage suffered. Generalised references to 'deprival of nationality' will often tend to obscure rather than illuminate what is in issue" (paragraph 59).

49. However, an arbitrary refusal of the right to return to Ethiopia was of a different order:-

> "60. In my judgment, however, the correctness or otherwise of *EB* does not arise directly in this case since if the appellant were able to establish that she has been arbitrarily refused the right to return to Ethiopia for a Convention reason, that would in my view amount to persecution. It would negate one of the most fundamental rights attached to nationality, namely the right to live in the home country and all that goes with that. Denial of that right to abode would necessarily prevent the applicant from exercising a wide range of other rights – if not all – typically attached to nationality, as well as almost inevitably involving an interference with private and/or family life in breach of Art 8 for the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (European Convention)." (paragraph 60)

50. Stanley Burnton LJ began by noting the "unfortunate tendency in the law of asylum to treat

findings of fact as decisions on points of law, and binding authority in subsequent cases". Such was the case with EB (Ethiopia), which was "regarded as authority for the proposition that the removal of a person's nationality by the authorities of his or her home state is as a *matter of law* sufficiently serious ill-treatment as to constitute persecution which, if done for reasons referred to in Art 1A(2) of the Convention Relating to the Status of Refugees 1951, entitles that person to refugee status" (paragraph 61).

51. Stanley Burnton LJ was "troubled by this proposition". What is meant by persecution is a question of law but whether ill-treatment in a particular case constituted persecution "is a mixed question of fact and law: it is the application of the denotation of persecution to the particular facts". He did not consider that a refusal to confer nationality could without more be regarded as persecutory; although it could do so "if the consequences are sufficiently serious" (paragraph 66). Furthermore, deprivation of nationality could be "one aspect of ill-treatment by the state that in its totality amounts to sufficiently serious ill-treatment as to constitute persecution".

52. At paragraph 69, Stanley Burnton LJ noted that a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion "is a prerequisite of refugee status. The second requirement is that the person is either unable or, owing to such fear, is unwilling to avail himself of the protection of the country of his nationality or former habitual residence. In … *Lazarevic* ... Simon Brown LJ … addressed the question whether inability to return is qualified by the need to establish a current fear of persecution. He held that it is not but that 'an asylum seeker unable to return to his country of origin may indeed be entitled to recognition as a refugee provided only that the fear or actuality of past persecution still plays a causative part in his presence here'."

53. Stanley Burnton LJ observed that Lazarevic concerned Yugoslav citizens who had evaded military service "and could not return because Yugoslavia refused to accept the return of asylum seekers". Although they were thus denied the basic individual right conferred by nationality, if they were to be returned they would be safe from persecution. Hutchison LJ said at 11.26:

> "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. I see no reason, given the scope and objects of the Convention, not to accept Professor Hathaway's formulation … however, even accepting that refusal to permit return can constitute persecution for a Convention reason, I would not myself accept that that would be so in the case of those who, like these applicants, are anxious at all costs not to return: how can they be said to be harmed by such a refusal? …"

54. At paragraph 71, Stanley Burnton LJ had no doubt that when Hutchison LJ held arbitrary exclusion could amount to persecution "he did not mean to say that it *does* amount to persecution". That would be inconsistent with the general principle and would render a mixed question of fact and law into one of law. Stanley Burnton LJ was not persuaded by Longmore LJ's suggestion in EB that Hutchison LJ used the word "can" because it is only if ill-treatment is for a Convention reason that it constitutes persecution. "That explanation, with respect, fails to take into account the wording of Art 1A(2), which requires *both* 'persecution' and that the persecution should be 'for reasons of race…' etc. In other words there are two questions to consider under the Convention: was the ill-treatment sufficiently

serious to amount to 'persecution' and, if so, was it for a Convention reason? Hutchison LJ was considering only the former, as the very next heading in his judgment demonstrates: it is 'Persecution for a Convention Reason?'"

55. At paragraph 74, Stanley Burnton LJ turned to analyse the judgments in EB. What had happened to appellant EB in Ethiopia, including the removal of her identity documents, meant that she had "in effect lost her Ethiopian nationality". Nevertheless, if effective nationality were restored, it was accepted that she would cease to be a refugee. It was submitted on her behalf "that the refusal of the Ethiopian Government to permit EB's return was itself persecution". Stanley Burnton LJ considered this submission was "impossible to reconcile … with the last sentence of the above citation from Hutchison LJ's judgment in *Lazarevic*".

56. At paragraph 76, Stanley Burnton LJ considered the concession made by the Secretary of State in EB, that deprivation of citizenship by arbitrary action "would have prima facie been persecution within the terms of the Refugee Convention", as a "curious concession". It was, nevertheless, the basis of Longmore LJ's judgment. The curious nature of the concession arose "because it is implicit in it that once a person claiming asylum has shown to the appropriate standard that she has in fact been deprived of her citizenship, it is for the Secretary of State to show that that deprivation did not amount to persecution. But it is trite law that it is for the claimant to prove persecution or a well-founded fear of it, not for the Secretary of State to prove that there has not been persecution" (paragraph 76). So far as Jacob LJ's judgment was concerned, Stanley Burnton LJ assumed that the serious consequences of the loss of nationality, such as inability to vote, leave the country or inability to work, "had either been found by the Tribunal as facts or assumed by him, subject to evidence to the contrary". If found as facts, there were "no comparable findings in the present case"; insofar as it was an assumption, it was based on the Secretary of State's concession "and in any event could not be binding on subsequent courts or Tribunals because, as I stated above, it related to questions of fact rather than law" (paragraph 76).

57. In MA's case there was no evidence that the appellant had been deprived of her Ethiopian nationality. She left Ethiopia on an Ethiopian passport in her name. It was conceded that she would not face ill-treatment on account of her ethnicity or otherwise on return. Needing a travel document, having given away her passport to her agent, the appellant had adduced no evidence that she had been unable to obtain one "let alone evidence that she is unable to do so for Convention reasons. She did go to the embassy, but not surprisingly did not get beyond the receptionist because, on her account in her witness statement, she said she was Eritrean." Stanley Burnton LJ saw no reason why the appellant "should not be required to take reasonable steps" to obtain travel documentation (paragraph 77). As with Elias LJ, he found that to require a person to take reasonable steps to apply for a passport or travel document "involves no risk of harm at all. I take into account that there may be cases in which the appellant to a foreign embassy may put relatives or friends who are in the country of origin at risk of harm. If there is a real risk they will suffer harm as a result of such an application, it would not be reasonable for the person claiming asylum to make it. The present is not such a case." Refugee status 'is not a matter of choice. A person cannot be entitled to refugee status solely because he or she refuses to make an application to her embassy" (paragraph 83).

58. At paragraph 86, Stanley Burnton LJ assumed that MA had established he left Ethiopia owing to a well-founded fear of persecution for a Convention reason "I say that I assume this because, given that she accepted that she had no well-founded fear of persecution if she returned, it is a precondition of her claim, but was not the subject of this appeal, and it is not

clear to me that there was a finding in her favour on this". However, making that assumption in MA's favour, Stanley Burnton LJ reserved his opinion "as to whether, if MA is ultimately refused a passport or emergency travel document by the Ethiopian authorities in this country, she will qualify as a refugee". The matter needed to be considered in due course "having regard to the circumstances of that refusal, including the reasons for it and its consequences for her".

E. DISCUSSION

1) The weight to be given to the expert evidence

59. At this point it is necessary to consider the weight that I should place on the evidence of the two experts. Mr Schröder's expertise in Ethiopia is, I find, well-established (paragraphs 81, 114, and 118 of Appendix A). Dr Campbell's expertise was challenged by Mr Kandola but I consider him, like Mr Schröder, to be someone well qualified to speak with the required authority on the subject matter of this appeal (paragraphs 38, 56, 60 to 66, 70 and 75 of Appendix A). Both experts have, where appropriate, provided satisfactory information regarding the sources of the views they have formed. To a material extent, their opinions are compatible with those of other informed observers (see eg. paragraphs 61 to 66 below). I have given the evidence of each of them significant weight.

2) The actions of Ethiopia following the outbreak of war with Eritrea in 1998

60. The events following the outbreak of war between Ethiopia and Eritrea in 1998 have been the subject of considerable judicial attention, both in the United Kingdom and elsewhere, but nevertheless require some analysis here. This is particularly so because, as we shall see, what happened to a person in Ethiopia at that time may have an important bearing upon whether, in 2011, that person is able to make good a claim to be a refugee.

61. As far as events in 1998 and 1999 are concerned, the expert evidence is essentially in line with the published reports, including the Human Rights Watch 2003 Report "Eritrea and Ethiopia – the Horn of Africa War: Mass Expulsions and the Nationality Issue". Given the close links between the then newly established Ethiopian Government and the independence movement in Eritrea, it is wholly believable that a significant number of ethnic Eritreans were encouraged to vote in the referendum of 1993, without any attention being drawn to what (under the terms of the then current 1930 Nationality Law) were the serious consequences of being regarded as having become a national of another state; namely, loss of Ethiopian nationality.

62. The Ethiopia-Eritrea Claims Commission, established pursuant to an agreement signed in Algiers in December 2000 between Eritrea and Ethiopia, made its "partial award" in December 2004. In MA (Disputed Nationality), the Secretary of State relied upon the finding in paragraph 72 of the award. This concerned "dual nationals deprived of their Ethiopian nationality and expelled for security reasons". The Award described a process instituted by Ethiopia, after the outbreak of war, whereby Ethiopian residents who had acquired Eritrean nationality were scrutinised, with a view to expelling to Eritrea those

considered to pose a threat to Ethiopia's security. At paragraph 66 of the Award, it is said that "Ethiopia insisted that it did not view Eritrean nationality alone as sufficient to deem anyone a security threat subject to loss of nationality and expulsion". Additional ties and actions were required. The principal indicators "were raising money on behalf of Eritrea or participating in organisations promoting Eritrean government interests or encouraging closer links between expatriate Eritreans and Eritrea. Involvement in two organisations drew particular scrutiny" (paragraph 66). The first of these was the Popular Front for Democracy and Justice (PFPJ); the second was the system of Eritrean community associations. Ethiopia's national security agency (SIRAA), using a "decentralised structure" involving "a complex process by which a tier of security committees, including committees at the wereda, tabia and kebele level, identified persons meeting the criteria as potential security threats. SIRAA officials apparently reviewed recommendations and controlled this process." Those identified were individually detained, taken to collection centres and then expelled. Noting the deprivation of nationality was a serious matter and should not be undertaken arbitrarily, the Commission, at paragraph 72, recognised the "exceptional situation" faced by Ethiopia at the time and found "that the loss of Ethiopian nationality after being identified through this process was not arbitrary and contrary to international law".

63. In my view, too much should not be read into this finding of the Commission. It is a striking feature of the Human Rights Watch Report that, in very many cases, people were identified to the local authorities merely as being "Eritrean" and that this label, without any of the indicators described in the Claims Commission's Award, was often enough for a person to be expelled. Indeed, at paragraph 78, the Commission made it quite plain that its findings at paragraph 72 were limited to those who had been through the process overseen by SIRAA. The Commission rejected Ethiopia's assertion "that no-one was expelled except for holders of Eritrean nationality found to be security risks through the process previously described". On the contrary, the evidence showed "an unknown, but considerable, number of dual nationals were expelled without having been subject to this process".

64. In any event, the Claims Commission found that the treatment of Ethiopian/Eritrean dual nationals who remained in Ethiopia during the war, and who were deprived of Ethiopian nationality, being required to register as aliens (the so-called "yellow-card people"), was "arbitrary and contrary to international law" (paragraph 75). There was no evidence that dual nationals in this group threatened Ethiopian security, according to the Commission, and given the rights associated with citizenship, the wide-scale deprivation of Ethiopian nationality of such persons could not be accepted as lawful.

65. Similarly, at paragraph 76, the Claims Commission found that dual nationals who were in third countries "or who left Ethiopia to go to third countries" at this time were determined by Ethiopia no longer to be Ethiopian nationals. The evidence showed that those who went to Ethiopian diplomatic or consular establishments abroad, in order to seek clarification or assistance, "were sent away". Members of this group "were also arbitrarily deprived of their Ethiopian citizenship in violation of international law".

66. The fact that the Ethiopian authorities, during this time, seized and destroyed identification documents of Eritreans has been judicially accepted, as can be seen from the case of EB. Dr Campbell said in oral evidence that during his interviews in Ethiopia in 2010 he had, in fact, come across some people whose papers had not been so removed; but the clear thrust of his and Dr Schröder's evidence was that the practice of document destruction was widespread.

67. It was no doubt for these reasons that Mr Kandola, for the respondent, very reasonably accepted that the Immigration Judge's positive findings of fact in relation to the present appellant properly extended to that part of his evidence, which concerned his ID card being removed by the authorities who detained him.

68. The terms upon which the present appeal has been remitted require the preservation of the credibility findings of Immigration Judge Sullivan. It is, however, necessary to place those positive findings within the context of the circumstances appertaining in Ethiopia at the relevant time. In the light of the findings of the Claims Commission, it is quite possible that the detention and expulsion of the appellant's mother, and what must be assumed to be the associated deprivation of her Ethiopian nationality, were carried out pursuant to the process described in paragraph 72 of the Award and thus were not undertaken arbitrarily, for the purposes of international law. Even if her involvement with the savings scheme had not, in reality, been undertaken with a view to helping the Eritrean authorities (including associated organisations), the appellant's own evidence includes his uncle learning from the kebele "concrete information about his mother's involvement with the EPLF". But none of that, of course, provided a justification for the detention and ill-treatment of the appellant and the seizure of his ID card, or for the continued interest in the appellant, which prompted to him ignore his reporting conditions and flee abroad. In other words, what happened to the appellant was not the ordinary application of the process described in paragraph 72 of the Award.

3) The approach to refugee claims based on deprivation of nationality

69. As can be seen from the synopses above of the case law, there are difficult legal issues that arise from the judgments in EB (Ethiopia) and MA (Ethiopia). Before I come to those, however, it is necessary to deal with a submission of Mr Kandola, regarding the Supreme Court judgments in MS (Palestinian Territories) [2010] UKSC 25. In essence, Mr Kandola submitted that the effect of MS (Palestinian Territories) had been impliedly to overrule MA (Ethiopia), insofar as that case permitted or required the Tribunal to concern itself with the process of removal, in determining the appeal of a person in the position of the appellant.

70. MS (Palestinian Territories) involved an attempt, by means of an appeal under the Nationality, Immigration and Asylum Act 2002, to challenge removal directions made under paragraph 8(1)(c)(iv) of Schedule 2 to the Immigration Act 1971, on the basis that the place to which MS was to be removed was not a country or territory to which there was reason to believe he would be admitted. Confirming the determination of the AIT and, later, the Court of Appeal, the Supreme Court held that an appeal under the 2002 Act did not encompass such a challenge.

71. I do not find that MS (Palestinian Territories) has any effect upon the status of MA (Ethiopia). Unlike MA and the present appellant, MS did not assert that any refusal or failure on the part of those controlling return to the Palestinian Territories to admit him constituted persecution or was otherwise relevant to a claim to refugee status. MS's wish was to appeal the decision to make removal directions, on the basis that such directions could not, in his case, lawfully be made. By contrast, MA and the present appellant made the issue of ability to return a central feature of their claims to be refugees from Ethiopia. As Elias LJ said:-

> "**(43)** I also accept, as Ms Giovannetti concedes, that the tribunal should have dealt with the

> question of Ethiopia's attitude to return as part of its assessment whether there was a real risk of persecution. It is true that the tribunal will not generally be concerned about the process of removal; it must determine asylum status without regard to that issue, which is a matter for the Secretary of State. So the fact that it may, for example, prove to be impossible in practice to return someone seeking asylum has no relevance to the determination of their refugee status. But where the applicant contends that the denial of the right to return is part of the persecution itself, the Tribunal must engage with that question."

72. I need now to turn to the correct approach to cases of the present kind, in the light of the relevant case law. In this regard, it may be helpful to set out Article 1A(2) of the Refugee Convention:-

> "Article 1A: For the purposes of the present Convention, the term 'refugee' shall apply to any person who –
>
> …
>
> (2) owing to a 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."

(a) Did the applicant hold the nationality of the state in question prior to the alleged deprivation?

73. Although not an issue between the parties in the present case, it is worth reiterating that a person who claims to be a refugee from the country of his or her asserted nationality bears the burden of proving that he or she has, or had, that nationality. This is plain from the starred (binding) decision in Asif Khan [2002] UKIAT 04412. What is less clear is whether the standard of proof is the balance of probabilities or that there is merely a reasonable likelihood of the appellant being of the nationality asserted. A third possibility, in the light of Karanakaran [2000] EWCA Civ 11, is that there is no particular standard of proof, the ultimate question being whether, in the light of all the evidence, there is a reasonable likelihood or real risk of persecution, if effect is given to the immigration decision. The matter may fall for decision in due course; but it is not an issue in the present case because it is common ground that, under the then extant Nationality Law of 1930, the appellant at birth was an Ethiopian national and remained so until the events of 1998/1999.

(b) Did the applicant suffer arbitrary deprivation of his nationality, such as to constitute persecution and/or suffer other persecution, causing him to be outside the country of his nationality/former habitual residence?

74. Although the question of whether a person is a national of any particular state is a matter of law for that state (KK and Others (Nationality: North Korea) [2011] UKUT 92 (IAC), the question whether a national of a particular state has been lawfully or unlawfully deprived of the nationality of that state is a legitimate issue for a court or tribunal in another state to determine, in the course of deciding a person's entitlement to international protection. This is evident from the judgments in EB (Ethiopia) and MA (Ethiopia).

75. In Adjami and Harrington "*The scope and content of Article 15 of the Universal Declaration of Human Rights*", Refugee Survey Quarterly [2008] 93 at 101-103, it is said that:-

> "Article 15(2) of the UDHR does not expound upon what constitutes the arbitrary deprivation of nationality. Implicit in Article 15(2) however, is a distinction between the deprivation of nationality – which is the withdrawal of nationality already conferred, protected by human rights standards – and the denial of access to nationality. Various human rights norms have developed to give content to the right to be free from arbitrary deprivation of nationality. International law recognises some permissible grounds for the deprivation of citizenship. But deprivation of nationality even on permitted grounds must be accompanied by important procedural and substantive safeguards. Since the concept of arbitrariness is a standard of reference in international law, it usefully provides guiding principles to interpret the prohibition on arbitrary deprivation of nationality enshrined in Article 15 of the UDHR. As set forth below, arbitrariness encompasses both procedural and substantive prohibitions.
>
> First and foremost, the prohibition against arbitrariness mandates procedural fairness and due process to constrain states from taking unilateral action in denationalising individuals or groups in such a way as to violate the right to due process. …
>
> The notion of arbitrariness, however, comprises more than procedural fairness. International jurisprudence interpreting what constitutes arbitrary action in various contexts instructs that standards of necessity, proportionality and reasonableness are relevant to the enquiry…
>
> In the context of nationality, the substantive scope of prohibited arbitrariness includes at least two elements: the prohibition against ethnic discrimination and the prohibition against statelessness.
>
> The prohibition of racial and ethnic discrimination is found in Article 2 of the UDHR and every major international and regional human rights instrument, and also represents a rule of customary international law. It therefore limits state discretion in deprivation of nationality: any deprivation of nationality based on racial or ethnic discrimination will be judged arbitrary…
>
> Other UN human rights organs have upheld the principle that the prohibition of racial and ethnic discrimination constrains the deprivation of citizenship. The former UN Commission on Human Rights has stated that 'arbitrary deprivation of nationality on racial, national, ethnic, religious, political or gender grounds is a violation of human rights and fundamental freedoms'."

76. It is plain that the circumstances in which the appellant was deprived of his ID card were, particularly when read against the background and expert evidence, such as to make it very likely that this was done with a view impeding his ability to establish Ethiopian nationality in the future. On the authority of EB (Ethiopia), removal of the ID card was itself ill-treatment that was capable of amounting to persecution. As a matter of law, no further ill-treatment needed to be found; but, in the light of MA (Ethiopia), the act of removing identity documents in these circumstances *can* but *need not as a matter of law* constitute persecution.

77. Although not referred to in either of the Court of Appeal cases, it is helpful at this point to remind ourselves that Article 9 of the Qualification Directive (2004/83/EC) has this to say about what constitutes persecution:

Article 9

Acts of Persecution

Acts of persecution within the meaning of Article 1A of the Geneva Convention must:

(a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or

(b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a).

Acts of persecution as qualified in paragraph 1, can, *inter alia*, take the form of:

(a) acts of physical or mental violence, including acts of sexual violence;

(b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;

(c) prosecution or punishment, which is disproportionate or discriminatory;

(d) denial of judicial redress resulting in a disproportionate or discriminatory punishment;

(e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in Article 12(2);

(f) acts of a gender-specific or child-specific nature."

78. I have to say that I find it difficult to decide whether the mere removal of the appellant's ID card crossed the threshold of persecution. What I am sure about, however, is that when one puts that act in the context of what was happening to ethnic Eritreans in the summer of 1998 and views it by reference to the attitude evinced by the Ethiopian authorities since that time towards persons in the appellant's position, the removal of the card is part of an ongoing deprivation of nationality that has had a very serious effect upon the appellant. Seen in that light, which is the only sensible way in which it can be seen, the action was persecutory. Even if that were not so however, when one combines it with the detention and beating the appellant received, it is undoubtedly the case that he suffered persecution prior to his departure from Ethiopia. The persecution was for a Convention reason, namely, race, nationality, membership of a particular social group and political opinion (actual or imputed).

79. It might be thought that, in cases of this kind, everything turns on the present attitude of the Ethiopian authorities, as regards recognition of the appellant in 2011 as a refugee. It is, of course, the case that, as counsel for EB accepted in the Court of Appeal, "if effective nationality were to be restored, the claimant would cease to be a refugee" (paragraph 44). However, findings as to the credibility and consequences of events in Ethiopia, prior to departure, will be highly important to the determination of an appeal of the present kind.

80. On the one hand, a finding of past persecution of this kind may have an important bearing on how one views the present attitude of the authorities. A person who is found to have suffered arbitrary deprivation of citizenship may find it relatively easy to show that present bureaucratic problems are, in reality, part of a continuing pattern of hostility towards that

person and that the deprivation of nationality for Convention reasons is, thus, ongoing. It may also inform the view that a judicial fact-finder takes of difficulties that the person is reasonably likely to face on a hypothetical return, leading to a finding that the person would, in fact, face ill-treatment amounting to persecution on such a return.

81. On the other hand, a person whose account is found to be wholly incredible may well fail to demonstrate that they are an ethnic Eritrean, who suffered difficulties in the aftermath of the 1998 conflict. In short, there may not be any Eritrean element at all. In such circumstances, a person's claimed lack of documentation and/or contacts in Ethiopia may be found to be wholly unbelievable. As a result, a refusal on the part of the Ethiopian authorities (including the London Embassy) to accept the return of the person concerned may well be found not to be persecution or based on any Refugee Convention reason.

(c) The "Right to Return"

82. It is clear from the judgments in EB (Ethiopia) and MA (Ethiopia) that the refusal to permit a person to return to a state of which that person is a national or would be a national (but for arbitrary deprivation of nationality) is a denial of one of the basic rights stemming from nationality. More difficult, however, is the question whether refusal of the right to return is *necessarily* persecutory for the purposes of the Refugee Convention.

83. At para 60 of MA (Ethiopia), having just found, for the reasons given by Stanley Burnton LJ, that deprivation of nationality does not necessarily amount to persecution, Elias LJ said this:-

> "**[60]** In my judgment, however, the correctness or otherwise of *EB* does not arise directly in this case since if the appellant were able to establish that she has been arbitrarily refused the right to return to Ethiopia for a Convention reason, that would in my view amount to persecution. It would negate one of the most fundamental rights attached to nationality, namely the right to live in the home country and all that goes with that. Denial of that right of abode would necessarily prevent the applicant from exercising a wide range of other rights – if not all – typically attached to nationality, as well as almost inevitably involving an interference with private and/or family life in breach of Art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (European Convention)."

84. That passage appears to indicate that arbitrary refusal of the right to return to Ethiopia is persecution, in every case. However, Stanley Burnton LJ, at paragraph 70, relied upon the judgment of Hutchison LJ in Lazarevic, who had held that arbitrary exclusion "*can* amount to persecution" but that "even accepting that refusal to permit return can constitute persecution for a Convention reason, I would not myself accept that that would be so in the case of those who, like these applicants, are anxious at all costs not to return: how can they be said to be harmed by such a refusal?" (p1126).

85. At paragraph 71, Stanley Burnton LJ had "no doubt that when Hutchison LJ said that arbitrary exclusion can amount to persecution, he did not mean to say that it *does* amount to persecution. The latter statement would be inconsistent with the general principle to which I have referred: it would be to render a mixed question of fact and law into one of law." The thrust of Stanley Burnton LJ's judgment is clear. Even as regards the aspect of nationality that concerns the right to return home, the question whether denial of that right constitutes persecution will be one of fact. Furthermore, that factual question may turn on whether the

person concerned truly wants to return home. Picking up on the last sentence of p1126 in Lazarevic, Stanley Burnton LJ said:-

> "**[72]** The last sentence of the above citation is also, in my respectful view, very good sense. Those who claim asylum in this country do not wish to return to their country of origin, sometimes because they do have a genuine fear of persecution but also, as the many cases determined by the Tribunal demonstrate, because life is better here. They are economic migrants. They therefore do not want their nationality of origin, if that means that they will have to return. Many deliberately dispose of their passports on arrival in this country, in order to render their return more difficult, and sometimes render it more difficult to identify their nationality…"

86. His Lordship went on to say that, if appellant MA had kept her passport "there would have been no difficulty in her proving her nationality and it would be difficult, if not impossible to see on what basis, consistent with the concession made on her behalf, she could be entitled to refugee status as someone who was unable to return to her country of origin". Elias LJ, however, at paragraph 58, rejected the "deceptively attractive argument" that denial of re-entry could not constitute persecution if the appellant "wishes…to be refused authorisation to be returned to Ethiopia". Elias LJ considered the question to be whether objectively there was a real risk of persecution on return. If not, the appellant's unwillingness would not be founded on any fear of persecution and she would fall outside Art 1A(2) of the Refugee Convention. However, if there was such an objective risk, and she was unable to return, then she fell within the terms of the Article "even if she would prefer not to return even if there were no such risk. There must be numerous cases where someone genuinely fears persecution in his own country but is not unhappy that that should be so if he can sustain a better standard of living for himself and his family in England."

87. The first point to make about refusal of the right to return is that it matters not whether a person who has been arbitrarily deprived of their nationality is, as a result, regarded as stateless or as a person who, in terms of international law, still possesses that nationality, albeit that the rights associated with it cannot in practice be exercised. The challenging issue is whether deprival of the right of return is per se persecution.

88. Since Mummery LJ agreed with both Elias LJ and Stanley Burnton LJ, the apparent tension between the two reasoned judgments means we need to look beyond MA (Ethiopia) in order to seek the answer. The passage from Hutchison LJ's judgment in Lazarevic, referred to by Stanley Burnton LJ, would seem to lend support to the proposition that a denial of the right to return can, but need not, amount to persecution. Less helpful, perhaps, is Revenko v Secretary of State for the Home Department [2001] QB 601, which held that a stateless person who was unable to return to the country of his former habitual residence was not, by reason of those facts alone, a refugee. It was also necessary to establish a present well-founded fear of persecution for a Convention reason. Stanley Burnton LJ considered the case of Revenko authority "for the proposition that a denial of return is not of itself persecution" (paragraph 64). In EB (Ethiopia), however, Pill LJ considered the same case to be "authority for the proposition that statelessness does not necessarily confer refugee status". The key point in Revenko, it seems, was that the new rules of citizenship of the newly independent state of Moldova, on whose geographic territory the applicant had been born when Moldova was part of the USSR, did not admit the applicant to citizenship of Moldova. There does not appear to have been any issue regarding the arbitrary deprivation of a relevant nationality, such as is the case here.

89. Given that the right of return is, in the circumstances with which we are concerned, one of the "bundle" of rights associated with nationality, and since there was no express or implied disagreement amongst the court in MA (Ethiopia), regarding Stanley Burnton LJ's finding that deprival of citizenship itself is not per se persecutory, I consider that it is necessary to read what Elias LJ said at paragraph 60 of the judgments in such a way as to be compatible with the views of Stanley Burnton LJ (with which Mummery LJ agreed). Accordingly, I conclude that whether the denial of a right of return will be persecutory is an issue of fact, to be decided in all the circumstances of the particular case. However, whilst strenuously avoiding concepts of prima facie persecution, I find that, compatibly with paragraph 60, the denial of a right of return is very likely to constitute persecution, in very many cases.

90. In a case such as the present, where persecution caused a person to leave the country of his nationality, the present denial of a right of return falls to be viewed as part of the overall ill-treatment of the person concerned, even though he would not today be at real risk of the kinds of persecutory treatment (here, detentions and beatings) that forced him to leave. Accordingly, in the case of the appellant I have no hesitation in concluding that, viewed in this light, a denial of his right of return would be persecutory.

91. I make that finding, notwithstanding it is plain that the appellant does not, in fact, want to return to Ethiopia. It is probable that, in saying what he did at paragraph 72 of MA (Ethiopia), Stanley Burnton LJ had in mind a wholly bogus claimant for asylum. As we have already seen, in the circumstances of Ethiopian cases, such a person may well face very considerable difficulties in persuading a judicial fact- finder that a refusal by the Ethiopian embassy to process his or her claim is persecution for a Refugee Convention reason. So viewed, paragraph 72 is, I find, not incompatible with the clear exposition by Elias LJ at paragraph 58 of what many would in any event have regarded as representing the law.

4) Refusal of Right to Return

92. Having established that (a) the deprivation of a person's right to return to the country of his or her nationality can be persecution and (b) it would be persecution on the facts of the appellant's case, I need to determine whether the appellant has, in fact, been deprived of that right. As we have seen, MA (Ethiopia) is binding authority for the proposition that, where an applicant contends that the denial of the right of return is part of the persecution itself, then the Tribunal deciding the appeal must engage with that question.

93. MA (Ethiopia) establishes that a person seeking to rely upon the denial of a right of return from the United Kingdom to his or her home country must take "all reasonably practicable steps to seek to obtain the requisite documents" to facilitate the person's return (paragraph 50 of the judgments). The test is not whether the applicant has shown there is a real risk that he or she would be refused a right of return for reasons engaging the Refugee Convention. Instead, the applicant must show, on the balance of probabilities, that all reasonable steps have been taken. It is then for the Tribunal to make findings as to the reasons for the embassy of the country concerned to enable the applicant to return as a national (paragraph 57).

94. On this basis, it is important to make plain the ambit of any country guidance to be given by the Upper Tribunal on this issue. The general attitude and practices of the Ethiopian Government, operating through its London Embassy, as disclosed by the evidence in the

present case, are no more than the backdrop against which each individual claimant in an Ethiopian asylum case of the present kind must take all reasonably practicable steps on a bona fide basis to secure Ethiopian acknowledgement of his or her Ethiopian nationality. That attitude and practice will also, of course, inform judicial fact-finders in deciding whether an individual has, in fact, taken all such steps.

95. Although not an expert witness, Mr Hart has considerable experience of attending at the Ethiopian Embassy in connection with applications by persons asserting a well-founded fear of persecution as regards Ethiopia. Mr Hart's evidence, as to his visit with the appellant to the embassy on 10 December 2010, his telephone conversation with Mr Haileselassie on 24 December and his description of other visits to the embassy, was not shaken under cross-examination. I regard his evidence as entirely credible.

96. There is no doubt that the receptionist, seated behind the "window" dividing the public area from the private area of the relevant room of the embassy, was an unhelpful individual, who merely said that without a birth certificate or kebele ID card, there was "no way" that the appellant could obtain recognition of his Ethiopian citizenship. When pressed, the receptionist "explained that the embassy are not able to help those of Eritrean ethnicity who approached them who claim a right to live in Ethiopia based on previous residence there".

97. owever, However, as is often the case in life, it is necessary to get beyond the unhelpful receptionist. This is what Mr Hart did, by speaking on the telephone from within the embassy to Haileselassie Suba. As is apparent from paragraph 25 of Appendix A, an ID/birth certificate would be expected by the embassy, in connection with an application for return as a citizen, failing which the situation "becomes much more difficult", in that the relevant kebele would need to make enquiries about family in Ethiopia, failing which information as to the applicant's last permanent address would be needed, so that that could be verified. The efficiency of kebele record keeping, as regards house numbers and who live in those houses, has been attested by the expert witnesses.

98. At this point, when Mr Hart asked the appellant for the permanent address, the appellant indicated that he had this but did not have the details with him. As I understood Mr Kandola's submissions, the Secretary of State's position was that, at this point, the appellant was not doing all that could reasonably be expected of him, since he should have given the address there and then. In the circumstances of the present case, I do not consider that anything of significance turns on this. Given that Mr Hart was conversing on the telephone with Mr Haileselassie and having to attempt at the same time to converse with the appellant, whose knowledge of English was limited, it was reasonable of Mr Hart to have proceeded as he did. I also do not consider that the appellant can be criticised for what he said.

99. In any event, the production of the appellant's address on 24 December did not take matters further. Mr Haileselassie chose instead to introduce further requirements, comprising details of next of kin and evidence of "substantial contact in Ethiopia", which had not featured in his previous conversation with Mr Hart. On the contrary, the new information contradicted the indication given on 4 December that details of an address at least provided one possible avenue for the Ethiopian authorities to take the matter further. Now, by contrast, Mr Hart was told that having an address did not count and "writing to the relevant local authority in this case would not help" (paragraph 29 of Appendix A). Mr Haileselassie rejected the possibility of a meeting with the consular section of the embassy, in the case of the appellant. Mr Hart's evidence was also that he told Mr Haileselassie on 24 December that, in addition to

place of residence, he now had details of the appellant's school, place of birth and appellant's father. None of this, however, made any difference.

100. The interchange between the appellant and Mr Hart and the Ethiopian Embassy in December 2010 fits well with the expert evidence, both as to the procedures and attitudes of the London Embassy and elsewhere. In particular, it chimes with the evidence of Mr Schröder, that the authorities "had no interest whatsoever in getting back the 10,000 to 15,000 Eritreans who had fled Ethiopia for third countries" (paragraph 96 of Appendix A). The evidence of Mr Hart and the appellant is also compatible with the interviews held by Dr Campbell with Messrs Tesfaye and Haileselassie Suba.

101. The letters from the embassy, like the Nationality Proclamation, appear unremarkable on the surface. However, as the experts explained, in practice a very different view has often been taken by the authorities of what is meant by acquiring a foreign nationality, leading to the loss of Ethiopian citizenship. Those whom the authorities regard as ethnic Eritreans are often viewed as foreign and as has having lost Ethiopian nationality, in circumstances that can only be described as arbitrary. The appellant's own position is a good instance. He was not old enough to vote in the independence referendum or to make any informed view as to acquiring Ethiopian citizenship. Yet, over ten years after the events that compelled him to flee Ethiopia, there appears to be no recognition in practice on the part of the Ethiopian authorities that he, and others in his position, are anything other than "foreigners". The tendency of Ethiopian officials to blur the issues of ethnicity and nationality was a common thread in the evidence of both experts. Accordingly, not only is it wrong to expect, without more, that the Ethiopian authorities will today apply their laws to persons such as the appellant, in the way we would expect those laws to be applied if the relevant decisions under them were being made by the respondent and her officials in the United Kingdom; the fact that they will not is compatible with the arbitrary way in which the Ethiopian authorities have acted in the past.

102. There was some discussion at the hearing about what kinds of application forms those in the position of the appellant might be expected to complete. The evidence on this issue did not take matters very far. It did, however, highlight a point of some importance. In a case where the claim to international protection rests on the arbitrary deprivation or denial of nationality, a decision by the state concerned to permit the individual to return as a national of that country will be a complete answer to that claim. If, however, the result of the approach to the embassy is merely that the state will facilitate the return of the individual, but not as one of its nationals, then the issue will be whether the effects of the arbitrary deprivation of nationality are such, in all the circumstances, as to constitute persecution. As we shall see, it appears to be the case that, at present, the Ethiopian authorities will not accept the return of a person in the position of the appellant, unless they consider that person to be a national.

103. Accordingly, the requirement identified in MA (Ethiopia) to take all reasonable steps to obtain the requisite documentation for return must, I find, involve taking all such steps to procure documentation (ideally, but not necessarily, in the form of a passport) that will effect return on the basis of the individual concerned being recognised as a national of Ethiopia.

104. In the present case, I find the appellant has, on the basis of the law and guidance as it was at the date of the hearing, taken all reasonably practicable steps to that end. He sought to put himself forward as a national of Ethiopia. Unlike the appellant in MA (Ethiopia) he did not present himself as an Eritrean national or as someone who regarded themselves in the broader sense as Eritrean, as opposed to Ethiopian. Albeit not at the initial visit, it was made clear on

the appellant's behalf that he had details of his last address in Ethiopia, his school, place of birth and information regarding his father. The terms on which Mr Haileselassie conducted the conversation with Mr Hart on 24 December made it plain that these details were not going to get the appellant anywhere. The expert evidence of Mr Schröder suggested that, in the intervening period, Mr Haileselassie may well have consulted Addis Ababa and been informed about the appellant's detention in 1998. That is possible; but the evidence strikes me more forcibly as an example of the way in which Ethiopian officials can (again, according to Mr Schröder) give an initial appearance of helpfulness, only to turn negative when met with persistence. I infer that the reason for the appellant's failure is rooted in the perception of him by Mr Haileselassie and the government he represents as an ethnic Eritrean or "foreigner" who, owing to a disregard or, at best, arbitrary application of the nationality laws of Ethiopia, is not regarded by the authorities there as one of its nationals or, indeed, as a person whom it wishes to see return in any capacity.

105. For the future, I consider that it would in general be reasonable to expect a person asserting deprivation or denial of Ethiopian nationality, in order to make good a claim to international protection to approach the Ethiopian Embassy in London with all documentation emanating from Ethiopia that the person may have, including ID card, address, place of birth, identity and place of birth of parents, identity and whereabouts of any relatives in Ethiopia and details of schooling in Ethiopia. Failing production of Ethiopian documentation in respect of such matters, the person concerned should put in writing all relevant details, to be handed to the embassy. Plainly, the requirement to take all reasonable endeavours does not entitle a person to portray themselves as Eritrean. On the other hand, if supplying the details that I have just described discloses an Eritrean connection (for example, place of birth of parent), there is no reason why that should be suppressed.

106. I accept the evidence of the expert witnesses regarding birth certificates. Most Ethiopians in Ethiopia do not procure such documentation, since the relevant information is held at kebele level. In the circumstances of a person who has a relative in Addis Ababa able and willing to undertake the task, the requirement of reasonable steps may well include the obtaining from the embassy of a power of mandate for that relative to approach the relevant office in Ethiopia. A person without a suitable relative would, on the evidence, be unlikely to secure the services of a lawyer in order to obtain the certificate. In any event, given the interaction between SIRAA and the kebeles, it will in most cases be unnecessary for an individual to take such steps to obtain a birth certificate, particularly where other information is available.

107. It may well be sensible for the respondent, in cases of this kind, to require under section 35 of the 2004 Act the co-operation of the claimant, at an earlier stage in the process, so that the respondent can liaise with the Ethiopian embassy before the case reaches the First-tier Tribunal (if indeed it ever does). Such a course would not, of course, be appropriate in every case; for instance, where there needs to be an independent judicial assessment of whether such contact might put the applicant or third parties at risk. But, apart from such cases, it is difficult to see why the respondent could not assist in this regard.

5) Re-acquisition of Ethiopian nationality

108. Since I have found the appellant is, in 2011, being deprived of his Ethiopian nationality and of the associated right of return, in circumstances that amount to persecution for a Refugee Convention reason, the appellant is entitled to recognition as a refugee. However, since Senior Immigration Judge Ward and I heard detailed evidence about other issues within the ambit of

the proposed country guidance, it is necessary to make findings about them. This is particularly so, given that the question whether deprivation of nationality and/or of the right of return amounts to persecution turns, ultimately, on the facts.

109. The first such issue concerns the possibility that an ethnic Eritrean, such as the appellant, might be able to re-acquire Ethiopian nationality.

110. The 2003 Nationality Proclamation replaced the Ethiopian Nationality Law of 1930. It contains a code which in many respects is unremarkable. For example, it lays down that a person is to be an Ethiopian national where both or either of the parents is Ethiopian. It also contains provisions relating to acquisition of Ethiopian nationality by a process of naturalisation. The code contains what in effect is a prohibition on dual nationality; but there is nothing arbitrary or even exceptional about that. Many countries have such a prohibition.

111. Article 22 (readmission to Ethiopian nationality) was the subject of some discussion at the hearing. Article 22 appears to provide that a person has a right to be readmitted to Ethiopian nationality, having lost it as a result of acquiring a foreign nationality, if the person concerned returns to domicile in Ethiopia and renounces his foreign nationality. Mr Schröder's report, however, stated that it appears in practice that the conditions in Article 5 in respect of naturalisation are applied by SIRAA, in respect of an application under Article 22. Amongst those conditions are that the applicant has established domicile in Ethiopia and lived in that country "for a total of at least four years"; has sufficient and lawful income to maintain himself and his family; is a person of good character and has no record of criminal convictions; as well as being able to show "that he has been released from his previous nationality or the possibility of obtaining such a release upon the acquisition of Ethiopian nationality or that he is a stateless person".

112. Mr Schröder said he had established that persons who had gone back to Ethiopia and who wanted to re-acquire Ethiopian nationality had been told that they should wait for four years, although "in some cases a four year requirement might not be imposed". He was also categorical that the reacquisition of citizenship could not be achieved from abroad.

113. Given the evidence we have already encountered about the arbitrary behaviour of the Ethiopian authorities, together with the evidence concerning the behaviour of embassy staff, and in the light of the background evidence, which discloses a generally problematic approach to the rule of law in Ethiopia, I find that there is considerable force in Mr Schröder's evidence regarding the way in which Article 22 of the 1999 Proclamation is applied in practice. The terms of Article 22(1)(a), requiring a return to "domicile" in Ethiopia, confirm Mr Schröder's understanding, that a person cannot be readmitted to Ethiopian nationality from abroad. Then there is the difficulty of Article 22(1)(b), which requires the renunciation of the applicant's foreign nationality. It is not a part of the Secretary of State's case in the present appeal that the appellant is, or is entitled to be, a citizen of Eritrea. In the circumstances, there may well therefore be difficulties in him demonstrating to the Ethiopians that he has renounced the Eritrean nationality, which the Ethiopians regard him as having. Particularly given the uncertainty as to what might be meant by returning to domicile, it is likely, in my view, that a person who sought to utilise Article 22 would find that, notwithstanding the apparent language of entitlement, he or she would have to live in Ethiopia for a significant period of time, and that the reference to four years in Article 5(2) is, in many cases, likely to provide a yardstick. Furthermore, given the previous conflict between Ethiopia and Eritrea, and the unchallenged evidence that, in 2011, relations between the countries are far from

ideal, it is difficult to believe that SIRAA would readmit to Ethiopian nationality a person who, in their eyes at least, might constitute some kind of security risk.

6) Ability to return to Ethiopia as a non-national

114. As with the issue of re-acquiring Ethiopian nationality, the appellant's entitlement to refugee status means that it is not strictly necessary in his case to decide what his position might be, if her were able to return to Ethiopia as a non-national. However, one of the consequences of holding that a denial of a person's right of return can, but need not be, persecution is that it might, on the facts of a particular case, be necessary to consider the position where a person, although being denied the *right* of return he or she possesses as a national, may nevertheless be able to return to their country as a non-national.

(i) 2004 Directive for Determining Status of Eritrean Citizens in Ethiopia

115. The evidence of the experts regarding the 2004 Directive is summarised at paragraphs 48, 51 to 54 and 92 to 97 of Appendix A. Both witnesses were categoric that the 2004 Directive, which provided a way for Eritreans in Ethiopia to obtain registered foreigner status in that country, or in some cases a route to the reacquisition of Ethiopian citizenship, applied only to those who were resident in Ethiopia when Eritrea became independent and who had continued so to reside up until the date of the Directive. That, after all, is exactly what Article 2 (objective) indicates. It is confirmed by the high-level source in SIRAA, referred to by Mr Schröder in paragraph 71 of his second report (paragraph 97 of Appendix A); the same official who had in 2000 signed Mr Schröder's own deportation order. The fact that the 2004 Directive was so restricted is further borne out by the evidence, which I accept, from the experts, to the effect that the opportunities in Ethiopia itself for making use of the 2004 Directive were extremely limited, with registration being possible only between March and June 2004.

116. My finding in this regard directly contradicts that in paragraph 100 of the determination in MA (Disputed Nationality). I consider that I have had the benefit of more extensive evidence than was available to the AIT in that case. On the strength of that evidence and of the plain wording of the provision regarding the Directive's objective, I find that the appellant, and others in his position, are unable to avail themselves of the 2004 Directive.

(ii) 2009 Directive Enabling Deported Eritreans to Reclaim and Develop their Properties in Ethiopia

117. The experts' evidence on this Directive is summarised at paragraphs 55 to 63, 72, 74, 98, 115 and 116 of Appendix A. As the title to the Directive indicates, and as was confirmed to Dr Campbell by the letter of 2 December 2009 from the Ethiopian Ambassador to London, the 2009 Directive, enabling certain Eritreans to return as foreigners to Ethiopia to reclaim and manage their property, applies only to those who were deported due to the war between Ethiopia and Eritrea. For that reason, I find that it would not assist the appellant or persons in his position to return in 2011 to Ethiopia. I accept the evidence regarding the genesis of the 2009 Directive, which was that the Ethiopians saw it as a means of improving their country's international position and of undermining the position of Eritrea, by encouraging its wealthier residents to leave.

118. Even if the appellant had been a person deported to Eritrea as a security risk, I find that he would still have significant difficulties, if he were unable to demonstrate that he was a citizen of Eritrea or some other country, since a passport would in practice be required for the issuance of a visa. There is also the obvious fact that, in order to make use of the 2009 Directive, a person will have to show that they have property in Ethiopia, since the purpose of the Directive is to reconnect people with such property.

7) The position of the appellant, were he to be returned today to Ethiopia, as a person not regarded by the Ethiopian authorities as one of its nationals

119. Mr Beaumont's evidence to the AIT in MA (Disputed Nationality) (paragraphs 31 to 35 above) suggests that, in 2007 at least, the Ethiopian authorities would not take back anyone who was not regarded by them as a national. In the present case, we heard no evidence to the contrary. For the purposes of giving country guidance it is, nevertheless, necessary to consider the position of a person, such as the present appellant, on the assumption that he is returned to Ethiopia as a non-national. There are two reasons for this. First, despite what appears at present to be the practical position, things may change and it may transpire that returns can be effected without the Ethiopians recognising the returnee as one of their nationals. Secondly, despite my findings in the present case and the general likelihood of a denial of the right to return being found to be persecutory, there might be cases where the assessment of whether a person is a refugee requires a judicial fact-finder to hypothesise that the person concerned has returned, in order to assess whether his or her circumstances would be so problematic as to amount to persecution.

120. We have already seen that the 2004 and 2009 Directives are not applicable to a person in the position of the appellant, returning to Ethiopia today. A much more difficult question, however, is whether notwithstanding this, the appellant would be able to work and own property. There is nothing in the evidence of the expert witnesses or otherwise that clearly points to the appellant being unable to do so. Notwithstanding what I have said about the inapplicability of the 2009 Directive, it is pertinent to observe that Article 8 of that instrument states that the right to own a house and immovable property shall *remain* guaranteed. In the light of this, having hypothesised that the Ethiopians would have let the appellant return as a non-national, I consider that the evidence points towards him and others in his position being able to hold property. Nevertheless, here as elsewhere, it is plain from the evidence regarding the problematic way in which Ethiopian bureaucracy operates, that the appellant is likely to experience more practical impediments in the field of owning property than would be the case if he were an Ethiopian citizen.

121. So far as employment is concerned, the 2009 Directive carries with it the right to engage in private employment "without being required to have a work permit" (Article 9.2). It is, accordingly, likely that the appellant would be permitted to work, albeit only after acquiring a work permit.

122. The right to use educational and health services, however, appears to be much more doubtful. The 2009 Directive guarantees this, for persons falling within its ambit but I do not consider it has been shown to be likely that these rights would be extended automatically to the appellant. At best, he would face a bureaucratic battle to acquire them and, given the common thread of the evidence, it is likely that the eventual result would be somewhat arbitrary.

123. Even under the 2009 Directive, it is apparent that government employment would be unlikely to be available. Viewed on its own, however, that effective prohibition is highly unlikely in any case to constitute persecution.

124. Nowhere in the evidence is there any suggestion that, as someone regarded as a foreigner, the appellant would have the right to vote. Such a right is plainly a significant element of the "right to have rights" as a citizen of a particular country (Trop v Dulles).

125. Overlying all of this is the insecurity which the appellant and others like him are, I find, highly likely to experience, as persons perceived as Eritreans in Ethiopia in 2011. Such persons would lack even the limited security of registration under the 2004 Directive. As I have already found, tensions between Ethiopia and Eritrea remain high. There are unresolved issues regarding the border. Eritrea is a repressive regime, haemorrhaging population, particularly young people seeking to avoid its draconian form of military service. All of this is highly likely, in my view, to aggravate the feeling of insecurity of someone in Ethiopia in the position I am here hypothesising. Of course, in the event of a resumption of armed conflict between the two countries, it is by no means clear that ethnic Eritreans who have been formally recognised as Ethiopian citizens will not face difficulties. Nevertheless, it is apparent that, in such a scenario, ethnic Eritreans who are not citizens would have more to fear.

126. In the scenario presently under consideration, I find that the appellant's history of detention is, at worst, likely to increase the bureaucratic obstacles he is likely to face in establishing himself in employment but I do not find there is a reasonable likelihood that it would entirely negate his prospects of undertaking economic activity. The same is true of the appellant's failure to continue his reporting conditions. However, the fact that the authorities are likely to have a record of his detention etc (as to which I accept the expert evidence regarding the authorities' predilection and ability for record keeping) would be a feature which is likely to aggravate the appellant's anxieties as to his position, should hostilities between the two countries resume. Whether such hostilities will break out is, of course, no more than speculation; what matters, however, is the effect of such a fear on a person in the appellant's hypothetical position.

127. Such, I find, is the state of affairs that the appellant would face, if returned today to Ethiopia in the circumstances I have described. Does that state of affairs constitute persecution? It is common ground that, at the present time, a person in the appellant's position would not face a real risk of physical ill-treatment, whether from the authorities or non-state elements, such as to constitute Article 3 ill-treatment or persecution. Nevertheless, looking at matters overall and acknowledging that the threshold for persecution is a high one, I have concluded that the state of affairs would be persecutory for this appellant. Notwithstanding that he is relatively young and apparently able-bodied, the accumulated difficulties he would face, arising from what ex hypothesi is an arbitrary deprivation of citizenship/refusal to recognise citizenship, based on the discriminatory grounds of the appellant's ethnicity, crosses the persecution threshold by some margin, applying Article 9 of the Qualification Directive (see paragraph 77 above).

LEGAL AND COUNTRY GUIDANCE FINDINGS

128. Before setting out the country guidance findings, it may be helpful to summarise the relevant

law. Both here and in paragraph 129, references to paragraphs are to paragraphs of this determination.

(A) There is nothing in MS (Palestinian Territories) [2010] UKSC 25 that overrules the judgments in MA (Ethiopia) [2009] EWCA Civ 289. Where a claim to recognition as a refugee depends on whether a person is being arbitrarily denied the right of return to a country as one of its nationals, that issue must be decided on an appeal under section 82 the Nationality, Immigration and Asylum Act 2002 (paragraphs 69 to 72).

(B) Although the question of whether a person is a national of a particular state is a matter of law for that state, the question whether a national of a particular state has been lawfully or unlawfully deprived of the nationality of that state is a legitimate issue for a court or tribunal to determine, in the course of deciding a person's entitlement to international protection (paragraph 74).

(C) Whether arbitrary deprivation of nationality amounts to persecution is a question of fact. The same is true of the denial of the right of return as a national; although in practice it is likely that such a denial will be found to be persecutory (paragraphs 76 and 82 to 89).

129. The country guidance is as follows.

(1) Although the process established by the Ethiopian authorities in 1998 for identifying ethnic Eritreans who might pose a risk to the national security of Ethiopia, following the outbreak of war between the countries, was not arbitrary or contrary to international law, in many cases people were arbitrarily expelled to Eritrea without having been subjected to that process. Those perceived as ethnic Eritreans, who remained in Ethiopia during the war, and who were deprived of Ethiopian nationality, suffered arbitrary treatment, contrary to international law. Those who left Ethiopia at this time or who were then already outside Ethiopia were arbitrarily deprived of their Ethiopian nationality. Also during this time, the Ethiopian authorities made a practice of seizing and destroying identification documents of those perceived as ethnic Eritreans in Ethiopia (paragraphs 60 to 65).

(2) A person whose Ethiopian identity documents were taken or destroyed by the authorities during this time and who then left Ethiopia is as a general matter likely to have been arbitrarily deprived on Ethiopian nationality. Whether that deprivation amounted to persecution (whether on its own or combined with other factors) is a question of fact (paragraphs 76 to 78).

(3) The practices just described provide the background against which to consider today the claim to international protection of a person who asserts that he or she is an Ethiopian national who is being denied that nationality, and with it the right to return from the United Kingdom to Ethiopia, for a Refugee Convention reason. Findings on the credibility and consequences of events in Ethiopia, prior to a person's departure, will be important, as a finding of past persecution may have an important bearing on how one views the present attitude of the Ethiopian authorities. Conversely, a person whose account is not found to be credible may find it difficult to show that a refusal on the part of the authorities to accept his or her return is persecutory or based on any Refugee Convention reason (paragraphs 79 to 81).

(4) Although, pursuant to MA (Ethiopia), each claimant must demonstrate that he or she has done all that could be reasonably expected to facilitate return as a national of Ethiopia, the present procedures and practices of the Ethiopian Embassy in London will provide the backdrop against which judicial fact-finders will decide whether an appellant has complied with this requirement. A person who is regarded by the Ethiopian authorities as an ethnic Eritrean and who left Ethiopia during or in the immediate aftermath of the border war between Ethiopia and Eritrea, is likely to face very significant practical difficulties in establishing nationality and the attendant right to return, stemming from the reluctance of the Ethiopian authorities to countenance the return of someone it regards as a "foreigner", whether or not in international law the person concerned holds the nationality of another country (paragraphs 93 to 104).

(5) Judicial fact-finders will expect a person asserting arbitrary deprivation of Ethiopian nationality to approach the embassy in London with all documentation emanating from Ethiopia that the person may have, relevant to establishing nationality, including ID card, address, place of birth, identity and place of birth of parents, identity and whereabouts of any relatives in Ethiopia and details of the person's schooling in Ethiopia. Failing production of Ethiopian documentation in respect of such matters, the person should put in writing all relevant details, to be handed to the embassy. Whilst persons are not for this purpose entitled to portray themselves to the embassy as Eritrean, there is no need to suppress details which disclose an Eritrean connection (paragraph 105).

(6) A person who left Ethiopia as described in (4) above is unlikely to be able to re-acquire Ethiopian nationality as a matter of right by means of the 2003 Nationality Proclamation and would be likely first to have to live in Ethiopia for a significant period of time (probably 4 years) (paragraphs 110 to 113).

(7) The 2004 Directive, which provided a means whereby Eritreans in Ethiopia could obtain registered foreigner status and in some cases a route to reacquisition of citizenship, applied only to those who were resident in Ethiopia when Eritrea became independent and who had continued so to reside up until the date of the Directive. The finding to the contrary in MA (Disputed Nationality) Ethiopia [2008] UKAIT 00032 was wrong (paragraphs 115 and 116).

(8) The 2009 Directive, which enables certain Eritreans to return to Ethiopia as foreigners to reclaim and manage property in Ethiopia, applies only to those who were deported due to the war between Ethiopia and Eritrea and who still have property in Ethiopia (paragraphs 117 and 118).

(9) A person who left Ethiopia as described in (4) above, if returned to Ethiopia at the present time, would in general be likely to be able to hold property, although the bureaucratic obstacles are likely to be more severe than in the case of Ethiopian citizens. Such a person would be likely to be able to work, after acquiring a work permit, although government employment is unlikely to be available. Entitlement to use educational and health services is, however, much more doubtful. At best, the person will face a bureaucratic battle to acquire them. He or she will have no right to vote (paragraphs 119 to 124).

(10) Such a person would be likely to feel insecure, lacking even the limited security afforded by the 2004 Directive. Tensions between Ethiopia and Eritrea remain high (paragraph 125).

(11) The following CG cases on Ethiopia are superseded or replaced, as the case may be, by the present determination: GG (Return – Eritrean) Ethiopia CG [2002] UKIAT 05996; NB (Mixed Ethnicity – Ethiopian – Eritrean) Ethiopia CG [2002] UKIAT 06526; AA (Children – Eritrean) Ethiopia CG UKIAT 06533; TG (Mixed Ethnicity) Ethiopia CG [2002] UKIAT 07289; and DA (Ethnicity – Eritrean – Country Conditions) Ethiopia CG [2004] UKIAT 00046.

Decision

130. I re-make the decision in this appeal by allowing the appellant's appeal on Refugee Convention grounds. The appellant is not entitled to the grant of humanitarian protection.

Signed

Date

Senior Immigration Judge P R Lane
(Judge of the Upper Tribunal)

Appendix A

SUMMARY OF ORAL EVIDENCE

The Appellant

1. The appellant was asked about his two written statements, dated respectively 23 April 2008 and 11 January 2011. In his first statement, the appellant said that his mother was Eritrean and his father Ethiopian. The appellant had been born in Addis Ababa. The appellant's father died in December 1992, following a career as a high school teacher. His mother used to own a bar in Ethiopia. At the outbreak of way between Ethiopia and Eritrea in May 1998, the appellant was 18 years old. Although he had passed his school exams and hoped to go to university, the appellant could not do so because, following the outbreak of hostilities, students in Ethiopia were required to provide evidence of nationality and the appellant's ID could not be renewed because of his dual nationality. He therefore turned to assisting his mother run her bar, which she was able to do until 22 July 1999, when the appellant returned to find his mother missing.

2. On 24 July, the appellant was at home when he was arrested by the authorities and taken to a detention centre, where he was held in unsanitary conditions. He was interrogated on three occasions about his mother's involvement with the EPLF. During these interrogations, the appellant was beaten. He remained detained for over a month. Further beatings and interrogations followed.

3. The appellant did not know whether or not the appellant had been involved with the EPLF, although she did have good contacts and relationships with Eritreans. She took part in a cultural system of saving called "ekued", which was common in Ethiopia, and which led to many people, including Eritreans, visiting her bar. The appellant got to know that the local authority had been informed by neighbours about gatherings at the bar. During his interrogations, the appellant was accused of collaborating with his mother, by raising money for Eritreans, in order to topple the Ethiopian regime. The appellant denied the allegations and was eventually released on condition that he signed on once a week at the local police station. On 3 September 1999, however, the appellant's uncle learned that the local authority had gained concrete information about his mother's involvement with the EPLF, following the arrest, detention and confession of a lady who had also been part of the saving system. On his uncle's advice, the appellant went into hiding, before leaving Ethiopia on 26 September 1999.

4. The uncle who assisted the appellant was pure Ethiopian. The appellant learned that his mother had been deported to Eritrea in 1999. The appellant's old ID card had been confiscated whilst he was in prison and he said that he would need a new one in order to live in Ethiopia. However, he would be unable to do this as the local authority still had information on him.

5. On 23 April 2008 the appellant attended the Ethiopian Embassy in London, together with a witness, Mr DW. The appellant enquired as to whether the Ethiopians would issue him with an Ethiopian passport. He was given a form, which he completed and handed to the receptionist. Asked for evidence to confirm he was an Ethiopian, the appellant produced an ARC card which he was told was unacceptable. He was asked for a birth certificate, driving licence or old passport. He did not have any of these documents. He was then asked whether he had family in Ethiopia who could confirm he was Ethiopian or who would be able to go to the local authority in his local area to enquire about him. He told the receptionist his mother had been deported to Eritrea and his father was dead. He had no siblings and did not know anyone in Ethiopia. He was then told the Embassy would not be able to issue him with a passport. Mr DW asked to speak to someone in a higher authority, and was told that this was Mr Haile Selassie. The request was unsuccessful.

6. In the statement of January 2011, the appellant described attending the Ethiopian Embassy again, on 10 December 2010, in the company of Mr Durand Hart, with a view to getting confirmation of the appellant's citizenship. Before the visit, the appellant had spoken to Mr Hart and provided him with background information.

7. When they arrived at the Embassy, Mr Hart spoke to the receptionist. The appellant was only spoken to once by the receptionist, who did so in Amharic and asked the appellant whether he had proof of nationality. He replied he did not. After this point, it was Mr Hart who "did all the talking with both the receptionist and Mr Haileselassie Subba" (paragraph 6).

8. The appellant said that he had not had contact with anyone in Ethiopia since 2005/2006, at which point his mother was in Eritrea. He had no remaining family in Ethiopia. A feeling that his life was "in limbo" had made the appellant depressed and an insomniac.

9. Cross-examined, the appellant confirmed that his old ID card had been confiscated whilst he had been in detention and that there had been an ID card issued by the local authority. It was of a standard form, such as was issued to all Ethiopians.

10. The appellant was shown document R2, described as an application form for Ethiopian nationals who left Ethiopia without a travel document and requesting passport. The appellant said that the form he had completed when in the London Embassy in 2008 had not been this form. He had thought that the one he had been given had been a visa and travel application. He did not believe that he had been asked to state which schools in Ethiopia he had attended. Nor had he been asked about previous employers or close relatives in Ethiopia. The form had asked for his full name and address, house number and kebele (local district). Having signed it, he returned the form to the receptionist. The appellant said the form had asked whether he had got documents to prove nationality.

11. When the appellant recently attended the Embassy with Mr Hart, he had not been given a form. In 2008, the appellant said that he had taken details of his permanent address with him. It was put to the appellant that Mr Hart's statement indicated that he had asked the appellant for a permanent address in Ethiopia but had not been provided with one. The appellant replied that in 2010 he had had only minimal conversation with the receptionist. The 2008 form had asked him to provide an ID card and birth certificate. The appellant said he had never had a birth certificate. He did not know whether a death certificate had been issued in respect of his father. The appellant's uncle had died in 2001, by which time the appellant was in the United Kingdom.

12. The appellant was asked whether he could get birth and death certificates from the registers in Ethiopia. He said when his father had died, his mother should have approached the authorities and that when his uncle died, the appellant was already here. Mr Hart had advised the appellant regarding documents that might be acceptable to the Ethiopian Embassy, but the appellant was unable to produce any. Asked if he had got his school documents, the appellant said that when he fled the country in fear of his life he did not take these with him. He had left with a passport, that had been furnished by an agent.

13. The appellant said that when his father had married his mother, his father's family had not approved and contact had not been maintained with that side of the family. Only one particular uncle had remained close. His mother's family had remained in Ethiopia but were not there now. Again, they had not approved of the marriage and had nothing to do with the appellant and his parents.

14. Re-examined, the appellant confirmed that on his second visit to the Embassy he had not been given a form. The receptionist had been reluctant to give them her name. In 2008, the receptionist had handed the appellant a form which she obtained from a rack near to her window.

15. The uncle to whom the appellant had made reference as being close was a paternal uncle.

16. In answer to a question from the Tribunal, the appellant confirmed that in December 2010 when he went to the Embassy, he knew that the Ethiopian authorities required an ID card and birth certificate to establish identity. Asked whether, since he knew he did not have these documents, he might have tried to obtain them, the appellant said that he did not know how to get the documents, given that his

uncle had died. Although he had not taken information regarding his address in Ethiopia, he had been prepared to tell the authorities what it was, had they asked.

17. In answer to further questions from Mr Kandola, arising out of the Tribunal's questions, the appellant said he would have been able to remember his address. It was put to the appellant that paragraph 8 of Mr Hart's statement indicated that Mr Hart had asked the appellant whether he could provide a permanent address but Mr Hart understood that the appellant "didn't have the details with him". The appellant said that this must have been referring to documentation, which he did not have. Asked if he had told Mr Hart in advance that he knew his address in Ethiopia, the appellant said that he had. The appellant then said that he had told Mr Hart that he could provide the information but did not have documentation.

18. In answer to questions arising from Mr Fripp, the appellant confirmed that in his 2008 statement he said that he had been born at home. The birth had not been registered.

Mr Hart

19. Mr Durand Hart spoke to his witness statement of 10 January 2011. There, he explained that he was a non-practising barrister, employed as an advocate by Lawrence Lupin Solicitors of Wembley. In the course of his work he had dealt with many Ethiopian disputed nationality cases. He had been instructed by the appellant's solicitors to attend the Ethiopian Embassy on Friday 10 December 2010, together with the appellant, in order to ascertain the position of the Ethiopian Embassy regarding the appellant's eligibility for Ethiopian citizenship. Mr Hart had visited the Ethiopian Embassy on many occasions and had become familiar through his visits with the procedures. Nevertheless, he was conscientious of the need to maintain an open mind on each occasion.

20. Prior to his visit with the appellant, Mr Hart had read the appellant's account and met the appellant outside the Embassy building. The pair walked down the road and Mr Hart took instructions from the appellant concerning his history. He asked the appellant if he had any proof of his Ethiopian nationality. The appellant explained he used to have an Ethiopian ID document, but that had been ceased by the authorities in 1999. The appellant told Mr Hart that he identified himself as Ethiopian. Asked about any further proof that could be provided, the appellant said he had no documentary evidence due to his flight and the seizure of his documents but he might be able to provide witnesses who had known him in Ethiopia. However, some of those witnesses would be of Eritrean origin.

21. The pair then went to the Ethiopian Embassy. Mr Hart had a conversation with the receptionist, who would not give her name, and told her that he was there to help the appellant apply for confirmation of Ethiopian citizenship by way of a passport or otherwise. He told the receptionist that the appellant was born in Ethiopia and had grown up in Addis Ababa. He said that the appellant's father was Ethiopian, from Wolega City and that his mother was Eritrean. He did not explain that the appellant's mother had been deported. Mr Hart emphasised that the appellant genuinely considered himself Ethiopian.

22. There was then a short conversation between the receptionist and the appellant in Amharic and the receptionist then told Mr Hart that if the appellant had proof he was Ethiopian, he could get Ethiopian citizenship but, if not, then he could not. Mr Hart asked what proof was acceptable to the Embassy and was told that the appellant needed either a birth certificate or a kebele ID card and that if he did not have these documents there was "no way that he could obtain recognition of Ethiopian citizenship". Pressed on this, and being told that the appellant might be able to provide witnesses, the receptionist alluded to problems between Ethiopia and Eritrea and "explained that the Embassy are not able to help those of Eritrean ethnicity who approach them who claim a right to live in Ethiopia based on previous residence there".

23. Mr Hart was then asked to call Mr Haileselassie Subba on his internal extension, which he did. Mr Hart had spoken on previous occasions with this gentleman. He was the Head of Legal Affairs at the

Embassy. At the second attempt, Mr Hart was able to speak on the telephone to Mr Haileselassie, explaining to him his purpose in coming to the Embassy on that day. He told Mr Haileselassie the background, including that the appellant's father, who had died in 1992, was Ethiopian and his mother had been an Eritrean, deported in 1999.

24. Mr Haileselassie identified two possible issues: the first was supplying documents to Ethiopian nationals; the second issue was naturalising foreign people "which he said was a long process just as in Britain". Mr Haileselassie said that the appellant was entitled to choose to take Ethiopian nationality through his father, as the appellant was now an adult. The appellant could choose the nationality of either parent, but not both, since under Ethiopian nationality law there was no concept of dual nationality. But if the appellant considered himself to be Eritrean "he would not be eligible for Ethiopian citizenship". Mr Haileselassie would not comment on Mr Hart's question as to whether it was possible that the appellant, as a minor, would have been deemed to have taken his mother's nationality and therefore be treated as an alien. However, Mr Haileselassie expressed scepticism that the appellant would have had relevant documents seized from his house by the Ethiopian authorities in the way described. Officially, there was a proper process to go through and if citizenship was taken away, this would always be done "formally". Mr Haileselassie made it clear that he was "talking about a point of law on a theoretical basis".

25. Mr Hart was told by Mr Haileselassie that the appellant should bring proof of his Ethiopian citizenship to the Embassy by way of an ID/certificate. These documents were said to be "the most important factor" and if the appellant did not have them then "the situation becomes much more difficult". In the absence of documentation, the local administration in Addis Ababa could make enquiries, if the appellant had family in Ethiopia; but if he did not, then he should provide his last permanent address, which could be verified. Without any of this, it would be difficult to accommodate the appellant.

26. It was at this point, according to Mr Hart, that he asked the appellant if he could provide a permanent address. The appellant indicated that he could but "I understood that he didn't have the details with him". Mr Hart told Mr Haileselassie that there was an address, which would follow.

27. Mr Haileselassie addressed the second issue, explaining that people often approached the Embassy and did not tell the truth about their background. It was possible that the appellant was not telling the truth about his background, despite the details provided, and that the Embassy might, therefore, be dealing with possible naturalisation of a foreigner who may have resided in Ethiopia. In order to qualify for naturalisation one had to reside in Ethiopia for at least four years continuously and to have travelled to Ethiopia with their own documents. Given the absence of documentation held by the appellant, this scenario was considered to be "more theoretical than practical".

28. Mr Haileselassie described the appellant's as "a difficult and unusual case".

29. On 24 December 2010 Mr Hart received details of the appellant's last address in Ethiopia. The same day he telephoned Mr Haileselassie and explained the purpose of his telephone call, recapping the details of the case. Mr Haileselassie said he remembered. Mr Hart said he had details of the appellant's address and offered to supply this to the Embassy, asking what the next steps were for acquiring confirmation of citizenship. Mr Haileselassie "began by explaining that it was not just address details that were required but also details of next of kin and evidence of substantial contact in Ethiopia". He then asked for a moment and Mr Hart was put on hold, before Mr Haileselassie came back on the telephone to say that "without all of these details the Embassy could not [be] satisfied that [the appellant] was not a foreigner who had simply been living in Ethiopia". Simply having an address did not count and that "writing to the relevant local authority in this case would not help". Mr Haileselassie said he did not know whether the appellant's mother had been deported. Mr Hart took this "as defensiveness…on the issue of deportations of Eritreans from Ethiopia as I had simply mentioned this as a fact of the case and had not drawn particular attention to it". Mr Haileselassie explained that in some cases it was possible to arrange a meeting at the consular section of the Embassy but that in this case "he was not prepared to waste the very limited resources of the Embassy

by pursuing the matter". Considering that Mr Haileselassie was unprepared to assist further, Mr Hart terminated the call.

30. Mr Hart said that he had not seen the document R2 before the hearing on 19 January. He said that there was in the public area of the Embassy a stand with some documents in it but he had not seen an application form for recognition as an Ethiopian national. The forms he had seen were more to do with visa applications. Mr Hart formed the view that the Embassy was not prepared to help those they regarded as Eritreans. He had seen the same receptionist on other occasions, when she had been more explicit in this regard than she had been in the case of the appellant. She had made it clear that, as Eritreans, they were not welcome at the Embassy. Asked about Mr Haileselassie referring to the "second issue" of "naturalising foreign people", Mr Hart said that he would have to speculate, that this was to do with the appellant's mother being Eritrean, in the eyes of Mr Haileselassie. Again, Mr Hart could only speculate as to Mr Haileselassie's refusal to comment and whether the appellant would have been taken to have assumed his mother's nationality.

31. Cross-examined, Mr Hart said he had visited the Embassy on many occasions and was familiar with its procedure. He had gone there around twenty times in all. Mr Hart accepted that the vast majority of those with whom he had gone to the Embassy considered themselves to be Eritrean but that this was because they had been put in a position where they had to choose one nationality or the other. When pressed, many such people would ultimately say that they were Eritrean. Asked how the Embassy distinguished between Eritrean ethnicity and Eritrean nationality, Mr Hart said he thought that they looked at ethnicity and citizenship as being the same, contrary to how such matters were viewed in the United Kingdom.

32. None of the other people with whom Mr Hart went to the Embassy had been given application forms, primarily, he thought, because they considered themselves to be Eritrean. The present appellant, however, in Mr Hart's view considered himself to be Ethiopian. In the case of the appellant, the intention was to take matters as far as one could and, although the initial conversation with Mr Haileselassie had been unpromising, Mr Hart had tried to pursue the matter by providing further details, in the form of the private address, but had hit a "brick wall".

33. Although not an expert, Mr Hart said that he had become familiar with the approach of the Embassy to disputed nationality cases. However, in the other cases with which he had been concerned, they had not even reached the stage of ascertaining what documents might be required. Pressed on this, Mr Hart said he could not remember in the other cases what documents had been said to be necessary although there had, he recalled, been similar comments regarding ID cards and birth certificates. Although in some cases the applicants had had these, they had not resulted in things being taken any further.

34. Re-examined, Mr Hart said that he had never been given a form by the Embassy and that the Embassy had never produced a written indication or response in respect of an applicant for recognition as an Ethiopian citizen. He had asked; but had never been given such a thing. Mr Hart was unsure whether such a request had been made to Mr Haileselassie as opposed to those on reception, but had there been any merit in asking, Mr Hart would have done so. In some previous cases, those concerned had considered themselves to be Eritreans and the Embassy accordingly would not deal with them, regarding them as possessing already a nationality. Mr Hart recalled an instance in 2007 when a young man who had been born in Ethiopia of Eritrean parents had in fact taken documentation with him to the Embassy and Mr Haileselassie was "positive at first about a confirmation of Ethiopian citizenship". However, on hearing the facts, which included that the father had been deported to Eritrea, Mr Haileselassie indicated that it would not be possible to confirm Ethiopian citizenship, as the appellant "considered himself to be Eritrean". The young man concerned did not have an Eritrean passport or ID card, had never lived in Eritrea and did not have formal Eritrean citizenship.

35. In the past, Mr Haileselassie had been more forthcoming about Eritreans living in Ethiopia without status and there having been deportations from Ethiopia. Now, however, Mr Hart regarded Mr

Haileselassie as adopting a more "formal" line.

36. In answer to questions from the Tribunal, Mr Hart confirmed that he had told Mr Haileselassie on 24 December that he told Mr Haileselassie that he now had details of the appellant's school and place of birth of the appellant's father. As he had already indicated, however, Mr Hart said that this did not elicit any positive response from Mr Haileselassie.

37. Mr Hart said that he did not know of what arrangements might be made for obtaining birth certificates in Ethiopia, in respect of a person in the United Kingdom, where there were no family members in Ethiopia.

Dr John Campbell

38. Dr Campbell spoke to his expert report of 28 November 2010, commissioned in respect of the present proceedings. Dr Campbell is the Head of Department and a Senior Lecturer in the Anthropology of Development, School of Oriental and African Studies, University of London. His previous posts include time spent at universities in Ghana and Tanzania. Between 1987 and 1988 he was Project Manager for Oxfam UK in Ethiopia. Between 2007 and 2009, he was in receipt of a research grant from the UK Economic and Social Research Council in respect of a project entitled "Refugees and the Law: an Ethnography of the British Asylum System".

39. Dr Campbell's instructions were to:-

    (i) set out the background to expulsions, and flight, of persons of Eritrean or part-Eritrean background from Ethiopia after the outbreak of war in 1998;

    (ii) discuss the present situation of relevant persons inside and outside Ethiopia, in relation to the implementation of the 2004 "Directive issued to determine the residence status of Eritrean nationals residing in Ethiopia";

    (iii) assess whether the account given by the appellant is consistent with known events in Ethiopia at the time;

    (iv) assess what prospect arises for the appellant on the background facts, as to whether the Ethiopian authorities would accept him as a citizen and afford relevant core rights and protection on return; and

    (v) assess whether the appellant, if admissible to Ethiopia, faces any other significant difficulty in that country, given his part-Eritrean heritage and other accepted aspects of his personal history.

40. Dr Campbell summarised his evidence as follows. As regards Ethiopia's treatment of persons of Eritrean or part-Eritrean or part-Eritrean background, after the outbreak of war in 1998:-

    (a) Ethiopia violated national and international law in its treatment of such individuals;

    (b) in effect Ethiopia deprived many thousands of individuals of their nationality, specifically:-

        (i) those who had fled the country or were in a third country during the war, and who had applied to the Ethiopian Embassies/Consulates for assistance, but who were refused recognition as Ethiopians; and

        (ii) those who remained resident in Ethiopia during and following the war, who were specifically stripped of their entitlement to nationality and some of whom were eventually registered as aliens with a permanent right to reside and work in Ethiopia, under the 2004 Directive.

41. Based on "objective evidence", and the expert's own research in Ethiopia in April 2010, the present situation is that:-

    (a) the Ethiopian government has failed to provide any information about the process, number or legal status of persons registered under the 2004 Directive;

    (b) an unknown but probably very large number of Eritreans have not been registered under the 2004 Directive;

    (c) Ethiopia stopped registering persons under the Directive some years ago; and

    (d) those who were not registered face continued ethnic and political discrimination and, as such, remain vulnerable to abuse of their human and civil rights, due to statelessness, with a risk of deportation, should hostilities resume between Ethiopia and Eritrea.

42. Apart from the "minor exception" of the appellant's claims regarding his treatment whilst in detention, Dr Campbell regarded the appellant's account as consistent with the objective evidence. Dr Campbell considered there was no prospect that the Ethiopian authorities would accept the appellant is entitled to Ethiopian nationality and, even if the appellant lied regarding his ethnicity (suppressing the fact that he is part-Eritrean), the information he would be required to provide would be scrutinised by the federal police in Addis Ababa who, in all likelihood, would find the arrest warrant in respect of the appellant, as a result of which he had been taken into detention. Even if he somehow was allowed to return, the appellant would on arrival be rendered stateless, since the authorities were no longer registering Eritreans under the 2004 Directive.

43. In oral evidence, Dr Campbell was asked if he had ever seen the form identified as R2. He said that he had not. Dr Campbell had downloaded copies of forms from the Ethiopian Embassy website, which he said were completely different. He produced a document, labelled A5, sourced from the Embassy website on 23 September 2009, concerning "replacement of lost or stolen Ethiopian passports".

44. Dr Campbell described the background to the 2004 Directive. Before the border war in 1998, agreement had been reached between Ethiopia and Eritrea, whereby Eritreans who had been enjoyed Ethiopian citizenship would be required to choose their nationality. This agreement, however, had not been implemented before the border war erupted in May 1998. The Ethiopians began to arrest, detain and deport a wide range of individuals of Eritrean ethnicity, including those who had voted in the 1993 referendum on Eritrean independence, was born in Eritrea or who had at least one parent born there and those regarded as supporters of the Eritrean government. Asked to comment on the Human Rights Watch Report on Eritrea and Ethiopia, entitled "The Horn of Africa War: Mass Expulsions and the Nationality Issue" (January 2003), Dr Campbell said that the report was well researched. It was a reliable document.

45. Dr Campbell said that the categories of those who were expelled by the Ethiopians widened, so that it included a number who had no real connection with Eritrea, to the point where the exercise became arbitrary. He described Ethiopia as being a xenophobic society, involving denunciation of individuals by neighbours, sometimes as a result of jealousy or a desire to get hold of the property of Eritreans. Asked to comment on the appellant's account, involving his mother's activities at the bar, Dr Campbell said that what the appellant had described, and which had been accepted by the Immigration Judge, would in his view definitely put someone within the categories subject to deportation in 1998. During the detention and deportation process, the Ethiopian authorities removed and/or destroyed the identity documents and other papers held by those regarded as Eritreans. Dr Campbell said, however, that he had come across in the course of his interviews in Ethiopia in 2010 some people whose papers had not been so removed. Decisions to remove were very rarely rescinded, although Dr Campbell was aware of a particular village that had remained loyal to Ethiopia and whose inhabitants did, in

fact, secure a "reprieve". Documents had been seized in part to make it difficult or impossible for those concerned to return to Ethiopia. Minor officials often seized the property of those who had been deported. Money held in banks went to the government, albeit that this was portrayed as a failure on the part of the person concerned to pay taxes.

46. Dr Campbell was asked about the parts of his report concerning the legal measures taken by the Ethiopian government in relation to nationality, in the first decade of the 21st Century. The proclamation of December 2003 entitled "Proclamation on Ethiopian Nationality" set out the right to citizenship for dual nationals, including Ethiopians of Eritrean origin and Eritrean citizens. This decree formally repealed the Nationality Law of 1930 and redefined an individual's entitlement to citizenship of Ethiopia, solely by reference to whether both or either parent was "Ethiopian". Certain classes of individuals were deemed to have renounced their entitlement to citizenship; specifically "dual nationals" who were deemed to have "voluntarily" acquired another nationality if they were born abroad or born to a parent having foreign nationality and/or if they continued to retain foreign nationality. Dr Campbell said that those deported to Eritrea from Ethiopia were amongst those deemed to have acquired Eritrean nationality and, thus, to have lost Ethiopian nationality. Many of those so deported were, in the event, actually given Eritrean citizenship by the government of that country.

47. Children under the age of 16 were not required to have an ID card. Child deportees, now of adult age, were not regarded as having an entitlement to Ethiopian citizenship. Birth certificates were not routinely issued by the Ethiopians and most inhabitants would not possess them. Nevertheless, the kebele, covering a group of 500 to 600 households, would know a good deal about the inhabitants of those households, including who was eligible for conscription. There was, however, no compulsory military service in Ethiopia at the present time. Information of the kind described was, however, still gathered by the kebele.

48. Dr Campbell then turned to the 2004 "Directive issued to determine the resident status of Eritrean nationals residing in Ethiopia". The Directive was made because the 2003 Directive had not assisted Eritreans living in Ethiopia. The status of these people needed to be clarified. However, the 2004 Directive dealt only with those Eritreans who had lived in Ethiopia prior to Eritrean independence and who had continued to do so thereafter. Accordingly, it did not cover those outside Ethiopia.

49. Dr Campbell was asked about the Eritrea-Ethiopia Claims Commission's decision, done at The Hague on 17 December 2004; in particular, paragraph 76, which concerned dual nationals who were in third countries or who left Ethiopia to go to third countries. According to the report, the government of Eritrea contended that an undetermined number of persons found by the Commission to be dual nationals had been present in other countries when Ethiopia determined they would no longer be accepted as Ethiopian nationals. The Commission found that there was no evidence indicating that such people could reasonably be presumed, merely by reference to their presence in third countries, to be security threats. The only means by which they could contest their treatment was to approach Ethiopian diplomatic or consular establishments abroad "and the evidence showed that those who did so to seek clarification or assistance were sent away". The Commission found that such people had been arbitrarily deprived of their Ethiopian citizenship in violation of international law.

50. Dr Campbell endorsed these findings, stating that they were consistent with everything else that he had seen.

51. Returning to the 2004 Directive, Dr Campbell said that its objective was to provide the means to any person of Eritrean origin who was resident in Ethiopia and who had remained residing in Ethiopia up until the Directive was issued, to confirm whether they had acquired Ethiopian nationality and to determine their status of residence in Ethiopia. Such Eritreans could apply to the immigration authority for a "permanent residence permit". This entitled the holder to own property, use agricultural land, engage in private employment and enjoy education and health services. It did not, however, amount to the grant of Ethiopian citizenship. The person concerned was allowed to reside

in Ethiopia as a "foreign national" or "alien". Thus, they did not possess political rights, such as the right to vote.

52. The ability to take advantage of the 2004 Directive was subject to a temporal limitation. Dr Campbell believed that the period in question had expired at the latest in 2006/2007. At the time that the Directive ceased to operate, there were still those trying to make use of its provisions. Anyone who persisted with such attempts was detained for three months and then released without being given the relevant documentation. In fact, Dr Campbell categorised the way in which the 2004 Directive had been implemented as arbitrary. A huge amount of discretion lay in the hands of local officials, some of whom were susceptible to bribery. Dr Campbell knew of a particular instance where a woman and her mother had wished to be registered but had been jailed for their pains. Eventually, a judge had ordered that the woman was entitled to a kebele card, pursuant to the Directive.

53. Dr Campbell was asked about the part of his report concerning the present situation of ethnic Eritreans, inside and outside Ethiopia, in relation to the implementation of the 2004 Directive. So far as those outside Ethiopia were concerned, Dr Campbell had formed the view that the evidence was that Ethiopian Embassies/Consulates had, from 1998 to the present day, refused to recognise Ethiopian-born, ethnic Eritreans as their nationals. This had been documented by the Claims Commission and Refugees International and had also been documented in many countries including Sudan, Egypt, Australia, Kenya, India, the USA and the United Kingdom.

54. It was put to Dr Campbell that the respondent's case was that applicants who did the right thing should not be turned away by an embassy or consulate. Dr Campbell said that that had not been his experience.

55. Dr Campbell turned to the Directive of April 2009, issued by the Ethiopian Council of Ministers, but not published in any official government gazette or similar publication. The Directive purported to allow deported Eritreans to reclaim their property in Ethiopia. A literal reading of the Directive suggested that deported Eritreans might be allowed to return to Ethiopia; certainly, in Dr Campbell's evidence, that was how the Directive was understood in Ethiopia, where it was criticised as a "move that could endanger nationality security".

56. In May 2009 Dr Campbell wrote to the Ethiopian Embassy in London asking for an interview to discuss the 2009 Directive. Having spoken with the First Secretary of the Embassy, who could speak only in general terms about the Directive and was unable to provide Dr Campbell with a copy, the latter wrote to the Prime Minister of Ethiopia, enquiring about the Directive. Dr Campbell's letter, which had been sent via the Embassy, was intercepted by the Ambassador who replied to Dr Campbell in a letter dated 2 December 2009, a copy of which was annexed to the report. The letter stated that steps had been taken to implement the Directive, for example, "necessary visas have been issued by the Ethiopian immigration, Ethiopian Embassies and Consulates abroad". The letter went on to assert that Ethiopia had deported Eritreans who were deemed a threat to national security during the 1998-2000 border war, a conflict "that was launched by the Eritrean government". Ethiopia had ensured as much as possible that every deportee had delegated an agent who could administer their property in Ethiopia. After a decade, when it was felt the threat of most of these people to national security was "minimal or manageable", Ethiopia issued Directives "that will allow deportees to claim properties which were under the custody of their agents in Ethiopia" etc. The letter went on to say that "Ethiopia did not deport its own nationals, nor was there any property of Ethiopians confiscated". If it were the case that Eritreans had been deported who claimed to be Ethiopians "then we will be forced to consider them as Eritreans as dual citizenship is not permissible under the current nationality laws". The letter denied that Ethiopia had confiscated Eritrean deportees' property. If the government had undertaken the custody of such a property, then that was in the absence of any legal representative of the deportee having been appointed. Any request for Ethiopian citizenship would "proceed in accordance with the current Ethiopian nationality law. Eritreans opting for Ethiopian citizenship shall be treated accordingly."

57. Dr Campbell considered that the reference to Ethiopia not deporting its own nationals depended upon the Ethiopian authorities' view that ethnic Eritreans were in fact foreigners, thus blurring the distinction between ethnicity and citizenship. The letter displays a lack of remorse or even understanding that Ethiopia had violated international law, even though the Claims Commission had so found.

58. The background to the 2009 Directive could be seen, according to Dr Campbell, in a visit to the USA of the Ethiopian Prime Minister, who had been faced with a plea from wealthy Eritreans that they should be able to reclaim their property in Ethiopia. The timing of the Directive was also calculated to undermine the regime in Eritrea by wooing rich Eritreans out of Asmara. Although on the face of it, it looked as if foreigners could return to reclaim their property, the important point was that, in order to make use of the Directive, one had to have another nationality, so as to enter Ethiopia as a foreign national. Some Eritrean citizens had, Dr Campbell said, returned to Ethiopia pursuant to the Directive.

59. As a general matter, Dr Campbell considered that a person in the position of the appellant, approaching the Ethiopian Embassy, if saying anything regarded by that Embassy as constituting a "statement of Eritrean-ness", would be unable to make the necessary application.

60. A person wishing to take advantage of the 2009 decree would have to have a passport. He or she would also need to provide proof of ownership of the relevant property. The information supplied would be coordinated by the authorities in Ethiopia, who might grant a temporary visa, which one would take to the Ministry of Foreign Affairs in Addis Ababa in order to get a further temporary visa. That Ministry would seek to verify the applicant. According to Dr Campbell's source, 30 applications under the 2009 Directive had been approved by the Council of Ministers. 70 further cases were pending. Dr Campbell had asked to interview people who had returned to Ethiopia pursuant to the Directive but this had not happened. Again, Dr Campbell's investigations suggested that the process had ended up being somewhat arbitrary.

61. A footnote to Dr Campbell's report dealt with a discussion he had had with an official of the International Organisation for Migration, who handled the voluntary assisted returns programme to Ethiopia. She told Dr Campbell that failed Ethiopian asylum seekers were specifically told not to identify themselves as Eritrean or as Ethiopians of Eritrean origin, because it was widely known that the Embassy would refuse to assist them. Dr Campbell said that he understood the IOM were unable to assist such a person in connection with a third or subsequent attempt to obtain documentation from the Embassy.

62. On 17 June 2009 Dr Campbell interviewed Mr Retayeh, First Secretary at the London Embassy. The interview was recorded and later transcribed. Dr Retayeh chaired the Embassy committee that interviewed/screened all documented and undocumented individuals who applied for travel documents in order to return to Ethiopia. Mr Retayeh believed that the 2009 Directive applied to deported Ethiopians and also those who fled in anticipation of being expelled during the war. The last assumption is a false one, as was made clear by the letter from the Ambassador, to which Dr Campbell had earlier referred.

63. The interview dealt with the 2004 decree and the 2009 Directive. Mr Retayeh confirmed that those registered under the 2004 decree were not registered as Ethiopian citizens, but as Eritreans. Mr Retayeh considered that such people would be able to apply to reacquire their property, pursuant to the 2009 Directive. Those registered under the 2004 decree could live and work in Ethiopia but as far as citizenship was concerned, they were Eritreans and not Ethiopians.

64. At paras 104 to 132, Mr Retayeh described what he said were the procedures employed for someone seeking through the Embassy to establish their Ethiopian citizenship. If such people did not have documents, then Mr Retayeh said it was difficult to ascertain if they were Ethiopian or Eritrean, given that they spoke the same language and they looked the same. Accordingly, the procedure adopted

was to interview the person concerned, asking where they were born, where they grew up, where they went to school "and the whole thing in Ethiopia". This information would then be sent to Addis Ababa, to the local authorities (kebele) to say whether the person concerned was from the area in question. If a positive response was received, then they could confirm that a person was Ethiopian. If not, they were not Ethiopian. Asked whether this could mean that the person was Eritrean but not necessarily from Eritrea, Mr Retayeh responded by saying that his own ancestors were from Eritrea but he had been born in Addis Ababa. The information obtained would be passed on to the "immigration office" (described by Dr Campbell as SIRAA) in order to check out. If both the local authorities and the immigration authorities had no record, then the person concerned would not be treated as Ethiopian. The kebele system was based upon a register of house numbers, together with their occupants.

65. In the light of this, Dr Campbell inferred that, were the appellant's details to get as far as SIRAA, then the fact of his having been arrested and detained would become apparent.

66. At paragraph 124, Mr Retayeh said that every Wednesday and Thursday the Embassy had an arrangement with the Home Office, who would bring people for an interview and the same procedure would be adopted, asking which kebele the person came from and which house number they were living in, as well as telephone numbers "and everything". There was a registration system for schools and students were registered. If the Embassy got the go-ahead from Addis Ababa, then they would issue "the document they want. Otherwise it's very difficult…that guy may be an Eritrean and not an Ethiopian."

67. Dr Campbell said the deportation of Eritreans by Ethiopia had been deliberate and clear. Victims that had been identified by voting records or had been informed on by neighbours or were interrogated in detention centres and Dr Campbell accordingly expected that a record of those so held would have been kept by the authorities. This had been confirmed during his 2010 visit to Ethiopia.

68. Dr Campbell was asked to comment on the evidence of Mr Hart. He said this was the first occasion when he had encountered such an elaborate response by the London Embassy; but the end result had been the same. The outcome was entirely consistent with his own interviews with Ethiopian officials and he was not surprised about it in the least. The application forms would be sent to Addis Ababa, assuming one had got that far; and then SIRAA would look at it, together with the other relevant organisations. Tesfaye Yetayeh had been dealing with undocumented cases at the London Embassy for three years. Dr Campbell considered that it was plain that, if one was found to be an ethnic Eritrean and/or to have been deported, the application would be refused.

69. Cross-examined, Dr Campbell was asked whether the appellant would have been deemed to have lost his nationality. Dr Campbell said that there were different levels. If one could not produce the necessary documentation, the assumption is that there was no entitlement to nationality. Also if any document contained the word "Eritrean", one would be refused an application form. If one did manage to get as far as filling in the form, it would be sent to Addis Ababa. Document A5 made it plain that precise details were required, including the house and house number where the person had lived in Ethiopia. Accordingly, one had to submit correct information. The kebele would have a record of house numbers and the relevant inhabitants. If the appellant got this far, the authorities would discover about his mother and his own detention and he would be refused.

70. Dr Campbell said that his two year ESRC grant had involved studying Ethiopians and Eritreans in the UK asylum system. This had required him to interview officials, Home Office Presenting Officers, judiciary, Treasury Solicitor and other officials. He hoped that the work would eventually be published in the International Journal of Refugees Law. Dr Campbell had visited Ethiopia in 1987, 1991, 1996 and April 2010. His earlier visits had been to do with his role in development. He had interviewed in 2010 some 40 individuals in Ethiopia. Having ascertained that the Ethiopian authorities were not interested in helping him in this regard, Dr Campbell had used contacts with researchers and had contacted potential interviewees by telephone, being able to set up interviews in

most if not all cases.

71. Dr Campbell said that he had spoken with Mr Tesfaye on 16 June 2009 and with Mr Haileselassie Subba on 5 February 2010. The latter conversation had not been recorded. However, Haileselassie Subba's statement was identical to that of Mr Tesfaye.

72. Dr Campbell was asked about paras 82 and 83 of the record of the conversation with Mr Tesfaye. Here, Dr Campbell asked about a person of Eritrean ethnicity in Ethiopia who had documentation to show that he had not been involved with the Eritrean regime, that he had property in Ethiopia and that he was not a security problem and had been allowed to return (it would seem, under the 2009 Directive). Mr Tesfaye said that such a person "will not be a citizen of Ethiopia. He will be an Eritrean. He will be registered." He then, however, added "If you renounce [presumably, citizenship of Eritrea], as any other countries or nationals are doing, to renounce your previous nationality and claim and Ethiopian nationality, then according to the law that case will be considered". Meanwhile, pursuant to the 2009 Directive, the person concerned would be allowed to work and would have their property in Ethiopia returned. The application for Ethiopian nationality would be considered "and at the end of the day you will be granted maybe an Ethiopian nationality".

73. Dr Campbell said that such an application for Ethiopian nationality had to be made. However, one had to have a nationality that one could renounce, so as to be considered for Ethiopian nationality.

74. So far as the Ethiopian bureaucracy was concerned, Dr Campbell said that his meeting with Haileselassie Subba arose because Dr Campbell had applied for a visitor's visa to go to Ethiopia to undertake research but this had been caught up in the bureaucracy and got lost in the system. He considered that the relevant ministry had not been sure how to respond to the application. The meeting with Haileselassie Subba had come about because the Ethiopian authorities wanted to know why Dr Campbell sought a meeting with officials in Addis Ababa. There was concern about Dr Campbell's questioning of ethnic Eritreans; but after their conversation, he obtained his visa. The interview with Tesfaye Yetayeh had been formally set up in order to discuss the Directives of 2004 and 2009 and the issue of the Diaspora. Dr Campbell had asked permission to record the interview. It was known that Dr Campbell was an academic who was intending to publish his results, albeit that he had not told them that the interview might be used in legal proceedings.

75. Re-examined, Dr Campbell said that he was planning a book on stateless Ethiopians, as well as a pending article in the IJRL. The funding for his research had been in the sum of £400,000. During the time of his full-time research, he had not produced expert reports but he had been producing such reports for the Tribunal since 2002/3. He had been an expert in HB (Ethiopia) and indirectly in MA (Eritrea).

76. Although the distinction between ethnicity and nationality appeared to be acknowledged by the Ethiopians in the 2009 decree, in the broader sense Dr Campbell said that they did not acknowledge any such dichotomy. Many embassies refused to acknowledge an individual who was regarded as of Eritrean ethnicity. The official view was that the deportees and their offspring were foreigners. This was part of the xenophobia prevalent in Ethiopia. The Claims Commission found that extensive "mistakes" had been made in connection with the deportation process. The Ethiopian government had not acknowledged any of the negative things said about them in the Claims Commission's findings, preferring to focus instead on various awards under which Eritrea had been ordered to pay Ethiopia sums of money.

77. In answer to a question from the Tribunal, Dr Campbell said that, "if the person concerned was suspected to be Eritrean, the fact that he or she was seeking to go voluntarily to Ethiopia would not make a difference. Footnote 21 of his report stated that in the USA, Ethiopia would only issue travel documents to persons who proved that their parents were born in Ethiopia, provided proof of birth in Ethiopia, were able to speak the language and proved that they had family still residing in Ethiopia. This had proved to be a particular [problem in relation to 108 detained immigrants and 4452

non-detained criminal and non-criminal cases.

78. Requested by Mr Fripp, Dr Campbell said that he was unable to assist in answering the question of what would happen where an Ethiopian claimant made a false claim to the embassy to be Eritrean. It would depend upon what the individual had told the officials at the reception window. Mr Fripp asked what attitude the Ethiopians would take to a finding by the United Kingdom Tribunal that a person was not Eritrean. Dr Campbell replied in similar terms. If such a person went with the IOM for an interview, and if they did not disqualify themselves by making a reference to being Eritrean, they would be allowed to fill out the application form and the authorities in Addis Ababa would consider it.

79. Asked if in such a case he would expect a clear or unequivocal answer to emanate from Addis Ababa, Dr Campbell said that in most cases the refusal came at the "window" in the embassy. He was not aware of any written communication to the effect that an application had been refused. Mr Hart's evidence had been in conformity with what Dr Campbell regarded as past practice by the embassy.

80. Finally, Dr Campbell said that all of this had been compatible with what Mr Beaumont had said in the case of MA.

Mr Günter Schröder

81. Mr Schröder spoke to his reports of 22 April 2008 and 6 December 2010. He concentrated on the more recent report. Mr Schröder is by training a historian and social anthropologist who has worked for many years as an independent researcher and consultant, following events in the Horn of Africa since 1965. He first visited Eritrea in 1983 and Ethiopia in 1985. He had been called upon in more than 200 cases by the German courts, lawyers and social services to provide an expert's opinion relating to asylum requests by Eritreans and Ethiopians. Since 2006 he has also provided such opinions for asylum cases in Switzerland, Belgium and the United Kingdom. Mr Schröder keeps up to date on developments in countries of the Horn through local contacts and information sources with the respective Diaspora communities. He has an extensive network of resource persons with various political and social backgrounds from and in Eritrea and Ethiopia. He also scrutinises scholarly publications and the internet. He was stationed in Ethiopia from 1991 to 2000 and in Eritrea from 2003 to 2004. This enabled him to have personal knowledge of the operational methods of the security services of the current Ethiopian government.

82. At paragraph 64 of the 2010 report, Mr Schröder dealt with the Eritrean Nationality Law of 1992. This conferred Eritrean citizenship on all persons having lived in Eritrea before 1 January 1993 and their descendants in the male or female line. Eritrean nationality had to proved to the Eritrean authorities through documents or reliable witnesses. Accordingly, many ethnic Eritreans in Ethiopia approached the Eritrean diplomatic office in Addis Ababa and applied for an Eritrean ID card as proof of nationality. Before 24 May 1993, this had no international consequences and did not lead automatically to the loss of Ethiopian nationality under the then existing 1930 Nationality Law of Ethiopia. Under that law, the mere filing of nationality with another country automatically led to the loss of Ethiopian citizenship. Accordingly, Mr Schröder said that – although this view was not shared by everyone – after 24 May 1993, anyone in Ethiopia who had an Eritrean ID card should, in law, have lost Ethiopian nationality under the 1930 law. However, the Ethiopian authorities at first did not follow up on this point and many of those who took out ID cards did so without realising what the consequences might be. On the contrary, Mr Schröder said that such persons were encouraged to obtain ID cards and to take part in the referendum. In 1991, the Ethiopian government had in fact been allied with the Eritrean Liberation People's Force, who took power in Eritrea. The two governments were allies and needed each other. Eritreans needed the recognition of independence, through the referendum and wanted the endorsement of the Ethiopian government, so as to gain international recognition. Conversely, the TPLF in Ethiopia was a minority political force and needed the military and political support of Eritrea. Being from the minority Tigre population (5 out of 55 million people), the TPLF was short of qualified personnel to run the country and relied on

Eritreans to "fill the gaps". This was the reason why the Ethiopians did not raise the issue of loss of nationality at that time.

83. Mr Schröder was not able to say whether the appellant's mother had voted in the referendum. Some 60,000 Eritreans in Ethiopia did so, however. The appellant himself would have been too young to vote. At the time, some 250,000 ethnic Eritreans lived in Ethiopia. A substantial number of these did not take out an Eritrean ID card. There were various reasons for this, including a fear by some that there might be a backlash from non-Eritrean Ethiopians. Others were so deeply assimilated into Ethiopian life as not to regard themselves as Eritrean. The mother of the present Prime Minister of Ethiopia was Eritrean, as was the Ambassador to Germany. Their citizenship of Ethiopia was not questioned.

84. Asked about the Human Rights Watch Report at appellant's bundle 3, page 37, Mr Schröder disputed the figure of 50,000 Eritreans residing in Ethiopia in 1998. He put the figure as lower. He said there was a general tendency to overestimate the size of the community. In part, this was due to the fact that Eritreans were a mainly urban people, operating in professions such as banking, transportation and civil construction, and were as a result highly visible. This meant that Ethiopians tended to exaggerate the number of Eritreans in Ethiopia. Mr Schröder estimated some 100,000 ethnic Eritreans had acquired Eritrean nationality before May 2003. From 1994, ethnic Eritreans scaled down their expressions of Eritrean identity in Ethiopia. The new kebele cards listed citizenship and then "nationality", which Mr Schröder said meant ethnic community. These cards posed problems for people of mixed origin. Most ethnic Eritreans who obtained the new cards entered Tigre or Amhara as their ethnicity. The 1994 census reflected what Mr Schröder called this "ethnic mimicry".

85. The Amharic community in Ethiopia, which formed the old elite, found themselves disenfranchised with the rise of the Tigreyans. They resented this and tended to look with hostility at the Eritreans in Ethiopia. In particular, they thought it unfair that the Eritrean authorities were expelling Ethiopians from Eritrea, whilst in Ethiopia, ethnic Eritreans were being recruited to play a major role. Meanwhile, the Amharic business community considered that ethnic Eritreans gained an unfair advantage by not abiding by official exchange rates.

86. Turning to the outbreak of war in 1998, Mr Schröder agreed with what the Human Rights Watch had to say at Article 3, P38 and went further. The problems had not started in 1998. The TPLF and the EPLF had had problems, even when they were both fighting the Dirk regime. It had always been an alliance of convenience and thus Eritrean investors had been refused licences to invest in Ethiopia, even before the border war. Meanwhile, before the war, files had begun to be collected on Eritreans in Ethiopia. They included such information as who had voted in the referendum and travelled to Eritrea. Accordingly, when the deportations began, the Ethiopian authorities were not starting from scratch. Some of those deported were not, Mr Schröder said, innocent but had been political organisers in Ethiopia.

87. As soon as the border war had started, there was a 180 turn by the Ethiopian authorities regarding their relationship with Eritrea. Everything changed officially in two days. Mr Schröder knew this because he was there at the time. Official sanction was given to the already present anti-Eritrean sentiment in the country and this explained the denunciation of ethnic Eritreans by their neighbours.

88. Putting all this in the context of the appellant's case, Mr Schröder said that the activities of the appellant's mother, running a bar frequented by Eritreans and organising a savings scheme, would have been viewed with mistrust even before the outbreak of war. The authorities would most likely have had a file on her. She would not have been popular with the public, as bar owners tended to be associated with prostitution; whilst any evident prosperity on her part would have been viewed with envy. It was easy to allege in these circumstances that the appellant's mother had been collecting money bound for Eritrea.

89. In 1994, the Ethiopian government said that anyone who had exercised rights of Eritrean nationality

had as a result lost Ethiopian citizenship. This meant taking out an ID card, voting in the referendum or even working as local staff with the Eritrean Embassy. These views were, according to Mr Schröder "retrospective".

90. Mr Schröder was asked about paragraph 66 of his second report, concerning mixed marriages and the offspring of such relationships. In a mixed marriage, he said that the Ethiopians considered that Eritrean citizenship took precedence as regards the status of the child, over Ethiopian citizenship. This was because of the actions of the parent. This view was not confined to minor children. Again, the stance on the part of the Ethiopians was retrospective. The Eritrean ethnicity of a parent, evidenced by such things as voting in the referendum, could well have occurred whilst the child was a minor. Thus, by the actions of a parent, a child could be categorised as Eritrean. Such a view could well have been behind the detention of the appellant, as described by him. When the appellant left Eritrea, Mr Schröder said he would not have been regarded as an Ethiopian citizen. His release from detention could well have been only a temporary reprieve, so far as the authorities were concerned, and he could well have been earmarked for deportation. Listening to TV and radio in Ethiopia during this time, Mr Schröder had been shocked at the language being used, which reminded him of the Nazis' behaviour towards the Jews.

91. Amongst those deported had been people who had not taken out Eritrean ID cards, and even the Ethiopian spouses of persons regarded as Eritrean. Of the 75,000 or so deported. Mr Schröder said 45,000 to 50,000 would have had ID cards. Mr Schröder reiterated that he was convinced that the authorities would have regarded the appellant as Eritrean at the time he had left the country.

92. Turning to the 2004 Directive, Mr Schröder said that this followed immediately the December 2003 Nationality Proclamation. That Proclamation had not specifically dealt with the Eritrean issue and so the Directive was issued by the Ministry, rather than the Council of Ministers. It was not officially published. It needed to be read as a Directive of August 1999, which required all Eritreans in Ethiopia to register. A substantial number of Eritreans who had not taken out an Eritrean ID card wanted to register, as they felt insecure and thought it was better to do this than to live in limbo in Ethiopia. This meant, however, that a number of people who had not previously been regarded by the Ethiopians as Eritrean were now so regarded because they had registered under the 2004 Directive. Some who went to register were turned away on the basis that they did not need to do so since they had not voted or been given an Eritrean ID card. This confusing picture could be attributed to the fact that much depended on the whim of the officer in charge of the registration process in a particular place.

93. The 2004 Directive also resulted in a large number of Eritreans being registered who, in fact, had already registered under the 1999 Directive. Others who registered had not done so in 1999 but had either hidden their Eritrean background or gone into hiding to see how matters developed. The 2004 Directive provided an opportunity for this class of person to legalise their status in Ethiopia. There were announcements as to when and where people could register. It was possible to register only in Ethiopia, for those living there. Registration was possible only between March and June 2004, on a national basis. In any particular place, however, registration lasted only for two weeks. Some of those who had registered in 1999 had, by 2004, decided that they wanted to get their Ethiopian nationality back. Those who did register in 2004, however, as Eritreans were given a special residence permit, unlimited in time (as opposed to being six months or one year). Mr Fripp asked whether these were the so-called "yellow card people". Mr Schröder did not know.

94. Those who in 2004 asked for Ethiopian nationality, as opposed to registration, were in fact also given an unlimited residence permit and allowed to apply under paragraph 22 of the 2003 Proclamation for readmission to Ethiopian nationality.

95. Some people who had not registered in 1999 now asked to have recognition of their Ethiopian citizenship. Some of these were referred to the Nationality and Immigration Department (SIRAA); but sometimes they were just given a paper there and then, confirming that they were Ethiopian.

96. Mr Schröder was asked why there were no equivalent "liberalisation" processes provided for people outside Ethiopia. Mr Schröder said that the 2004 Directive had been intended for international consumption. Foreign governments had not been pleased with the deportations undertaken by Ethiopia and behind the scenes had been advising Ethiopia to do something. The Directive took the "steam out of the discussion". The Ethiopians were able to say that they had taken all necessary steps. However, the authorities had no interest whatsoever in getting back the 10,000 to 15,000 Eritreans who had fled Ethiopia for third countries. The authorities were not bothered about such people and no general amnesty relating to them was therefore published.

97. Mr Schröder was asked about paragraph 71 of the second report, where he quoted the Head of the Immigration and Nationality Affairs main department of SIRAA whilst confirming that the Directive excluded Eritreans deported to Eritrea or living in third countries. Mr Schröder said that the source of this information was reliable and that the person in question was a high official in SIRAA. The official in question had, in fact, signed the deportation order in respect of Mr Schröder in 2000. Mr Schröder had several discussions with this person. SIRAA was directly under the Prime Minister's office and issues relating to Eritreans were taken at the highest level. The official in question had lost his position two years after making the statement, as he was regarded as too lenient in respect of other issues.

98. Mr Schröder was asked about the 2009 Directive. He said that this did not deal with nationality and residence issues and was of a different quality. It referred to property. He considered that the appellant in the present appeal would not qualify under it as he did not have sufficient property in Ethiopia. People who could return in order to file claims to regain property would enter Ethiopia as a kind of visitor. They would not have residence rights. They would be regarded as visiting aliens. Previously, Eritreans could not even visit Ethiopia, if they had a different nationality. If Eritreans wanted to remain and invest in Ethiopia, including administering a business, then they were able to file for resident status as a foreign investor. Nowhere in the 2009 Directive was it stated that anyone could obtain citizenship. However, a person who had resided in Ethiopia for four years would be able to file get Ethiopian citizenship, under the ordinary citizenship laws.

99. Mr Schröder said that security is one of the biggest areas in the Ethiopian government. There was no Ministry of the Interior in Ethiopia. All passport applications would be scrutinised by the security office, which had a large electronic database, as well as fingerprinting. Applications from those abroad would be very carefully vetted. Any such application would have to be cross-checked for a "possible Eritrean skeleton in the cupboard". Anyone applying from abroad who was able to get through the relevant embassy would be scrutinised in Addis Ababa. If the kebele were to think that an application for a kebele ID card had an Eritrean background, the application would have to be approved by the security department. Such kebele ID cards, if issued, would record the holder's ethnicity as "Eritrean".

100. Anyone found to have obtained an ID card through illegal means could be arrested, fined or sent to a refugee camp for illegal residents.

101. There was a network of informants at kebele level but, with the growth of population, Mr Schröder thought that it was possible for people to hide their ethnic origin by going to a new area. However, if caught in a police raid and their files accessed, then the truth could emerge.

102. Mr Schröder said that he thought that a person with the background of the appellant would have a record, kept in Addis Ababa. In 1999 the security apparatus would have created a record in respect of him, both as regards his mother's deportation and his own arrest. There would definitely be a record of the latter. It would not disappear and would, according to Mr Schröder, be electronic. Mr Schröder thought that in the appellant's case Haileselassie Subba in the London Embassy had probably checked back with Addis between the first and second telephone conversations with Mr Hart: hence, his unhelpfulness in the second conversation.

103. Asked if the evidence given by Mr Hart was surprising, Mr Schröder said that Ethiopian officials were very polite and did not want to give a positive answer, adopting a diplomatic approach. If pressed they would procrastinate before, at the end of the day, giving a flat refusal, which would not be in writing. Anyone who persisted would be stopped abruptly and the official in question would become unfriendly. Such officials were, according to Mr Schröder, more direct in their dealings with their own nationals.

104. At para 139 of his second report, Mr Schröder said that it "still is the general policy of the Ethiopian authorities not to take back Ethiopian citizens of Eritrean origin living in third countries, whose asylum request had been denied. Officials of Ethiopian diplomatic missions never would state this position officially to foreign government officials but it is the applied practice." The report went on to state that, according to a confidential statement of an Ethiopian diplomat in Germany, the Ethiopian government would sometimes authorise a mission to issue a travel document, allowing such a person to return to Ethiopia "in order to appease Western governments". The official, however, made it plain that this did not mean that the person concerned would be reinstated into Ethiopian nationality. He/she at best would be treated as a foreign national with residence in Ethiopia or sent to a refugee camp for Eritreans. It was made clear by the source that such exceptions to the general rule "are kept as low as possible and in no way signify that Ethiopia would open her doors again to this 'riff-raff', which did not 'make it' in the western world".

105. Mr Schröder said in this regard that the culture of Ethiopia in part accounted for this attitude. It did not want to be seen to have made mistakes and so their line was that they had deported only those who had renounced Ethiopian citizenship or were a security risk. A formal written statement that a person was not wanted back in Ethiopia would cause problems with the foreign government concerned, and so the people at the embassy would never produce a written communication to that effect.

106. Asked if foreign governments were, nevertheless, not aware of the true position, Mr Schröder said that this was so; but the Germans, for example, considered it a minor issue compared with the generally good relationship that they had with Ethiopia. The Germans were content, as in the United Kingdom, for cases to go through the relevant courts. Ethiopian diplomats tended to regard other diplomats as gullible. Mr Schröder's contact, source of the confidential statement just referred to, came as a result of his longstanding relationship with the Horn of Africa and the body of contacts he had built up over the years. The source in question was the son of one of the Protestant church ministers whom Mr Schröder had met in Ethiopia, whilst working as a consultant. In Ethiopia, Mr Schröder said that he had access to information not normally available to a researcher, as a result of his contacts.

107. Mr Schröder said that anyone who had been out of Ethiopia for ten years could not be expected to be taken back. The authorities would regard the matter as "closed". Birth certificates were not usual in Ethiopia. At the age of 18, one would go to the kebele for an ID card. 95% of the population were not registered at birth. In most interactions, a birth certificate was not needed, for example, to go to school. The majority of birth certificates which were issued to Ethiopians were issued to persons abroad. A person who was abroad and needed a birth certificate could send a relative to the relevant office in Addis Ababa, provided the relative had a power of mandate. Such a power of mandate had to be legalised by the embassy. This was usually offered only to Ethiopia's own citizens. In the case of the appellant, Mr Schröder considered it was unlikely that the embassy would give him such a mandate, although he really did not know. Asked whether he could mandate a lawyer, Mr Schröder said one needed three witnesses acceptable to the registration office in order to register a birth. Thus, in the appellant's case, the chances of him getting a birth certificate were "pretty much nil". Mr Schröder knew of a person who had no problems regarding mixed nationality but had still taken four years to get a birth certificate.

108. In the case of the Claims Commission, various financial payments ordered to be made by one side or the other, resulted in Ethiopia being entitled to "a few million dollars". There was, however, no machinery for financially compensating those who had been deported. The Ethiopians were,

however, pleased with the finding of the Commission that Eritrea had started the war.

109. Asked about paragraph 28 of Dr Campbell's report, concerning ethnic Eritreans from Ethiopia being refused recognition as nationals, as regards various countries, including Australia, the USA and the United Kingdom, Mr Schröder said this was correct and the policy was consistently applied internationally by the Ethiopians. There were some 15,000 to 20,000 people in this position in third countries and the Ethiopians would not, as a matter of principle, accept them. Although a general amnesty was always possible at some point in the future, it was not on the horizon.

110. The letter to Dr Campbell from the Ambassador in London was regarded by Mr Schröder as consistent with what he had understood to be the case. It reflected the position of the Ethiopian government. Whatever evidence a person might seek to produce in connection with showing Ethiopian citizenship, the authorities would deny it.

111. Asked about the letter from Haileselassie Subba to the UKBA (P1 in respondent's bundle), Mr Schröder said that this letter left out "all the complicated issues".

112. Mr Schröder was asked if there might be people who had registered in 1999 but had not reregistered in 2004. Mr Schröder said he was not aware of anyone. He considered that the 2004 Directive applied to all Eritreans, even those who had registered under the 1999 Directive. However, some had been too frightened to go and register in 2004.

113. Cross-examined, Mr Schröder was asked about his evidence to the effect that a record would definitely have been kept of an arrest. He was asked if this applied to a mere arrest, not leading to a charge, some ten years ago. Mr Schröder said that such a record would be kept, in respect of any matter that was considered to be politically sensitive. If the appellant had been arrested, it must have meant that there was already information in the system and so he would have been "picked up". The kebele applications for ID cards had to be approved by the security authorities, which presupposed that records existed.

114. Asked as to the sources of his knowledge, Mr Schröder said that some was in the public domain. For example, budgets, published since 1997, indicated that 30 million bil had been allocated for the computerisation of the National Security Department from 1997 to 2005. The security apparatus was 80% staffed by Tigreyans, who were ex-freedom fighters, with whom Mr Schröder had longstanding contact. Mr Schröder had been deported from Ethiopia in 2000 for alleged Eritrean activities. At the time he had an Ethiopian wife who had stayed on after the deportation. When she had wanted to leave, the kebele would not give her the requisite clearance because they knew that Mr Schröder had been deported, even though his deportation had been communicated only to him. His wife needed high placed contacts to enable her to leave Ethiopia. Another instance of which Mr Schröder was aware concerned a woman from Aroma who, returning to Ethiopia from the USA, had been shown a thick file on the activities of her and her sister whilst in the USA and Germany over the past ten years. Mr Schröder himself had seen his own file and had seen in it lists of people who had visited him, as well as his contacts.

115. Asked why the appellant had been released from detention instead of being bussed to the Eritrean border, Mr Schröder said that the deportation process had not been uniform. Some had been released because the detention camps were full. It was unlikely in Mr Schröder's view that the reason for the release was because the authorities were unsure of his nationality status. In the climate of the day, they would have considered him to be an Eritrean national. His mother's nationality would have been assumed to have conferred such nationality on the appellant. Even though Human Rights Watch had not spoken of releases of this kind at the time, Mr Schröder said that it did happen. The appellant would have had very little opportunity, following release on 28 August, to register under the 1999 Directive.

116. Asked whether it was surprising that the 2009 Directive had not been made available, Mr Schröder

said he thought it had been published by the Council of Ministers and therefore should have appeared in the gazette but it had been "delayed". He said that this sometimes happened. On certain occasions, materials were published years later. Asked about the sources mentioned in the footnotes to paragraph 28(b) of Dr Campbell's report, Mr Schröder said that he was aware of the sources but had not cited them in his own report. Asked whether these sources had suggested that embassies refused Ethiopian nationality and gave reasons why people were refused, Mr Schröder said he would have to check but he believed that the sources indicated that the embassy officials had acted in line with what was described in the present appeal before the Tribunal: that is to say, they had refused to deal with the matter.

117. Mr Schröder said he knew of instances in Germany where applicants had not been given application forms to fill in. In other cases, ethnic Eritreans had been unable to get an extension of their Ethiopian passports.

118. Asked if he was pro-Eritrean, Mr Schröder said that he had been the first foreign national banned from the newly established country of Eritrea as they had not liked one of his reports. That was not, however, until Mr Schröder had subsequently been deported from Ethiopia. After that, he had been invited to Eritrea to celebrate the ten year anniversary of independence. He kept his own personal opinions separate from his report. Mr Schröder said that as well as Eritrea and Ethiopia, he had been banned from Libya, Afghanistan, Iran and Iraq; but that this "comes with the job". He harboured no grudge against the Ethiopians for deporting him.

119. Asked about paragraph 66 of his second report, concerning persons of mixed origins, and whether a child could opt at age 18 to take Ethiopian nationality, Mr Schröder said that if the Eritrean parent had been politicised or done anything else that the Ethiopians regarded as "Eritrean", then the child would be regarded as Eritrean. This was especially the case with the appellant, whose father was deceased at the relevant time.

120. Asked about paragraph 84, concerning the 2004 Directive, where Mr Schröder said that all those registered as Eritrean nationals under the registration exercise had the option to apply for reinstatement of Ethiopian citizenship, Mr Schröder explained that persons registering in the "window" of time afforded by the Directive had the option of asking for a reinstatement of citizenship. That process of reinstatement began after the registration under the 2004 Directive. The majority of Eritreans who so registered did so ask for reinstatement and of those, the majority were granted citizenship, after a process lasting three or four years.

121. There were some 50,000 Eritreans present in Ethiopia as refugees, including those expelled but returned to Ethiopia and were considered not to come within the terms of the 2004 Directive. These people only had temporary residence, with refugee status. Mr Schröder was unable to say why this class of person had not been covered by the 2004 Directive, although he considered that it showed the general attitude of the Ethiopians towards Eritreans.

122. Mr Schröder was asked about paragraph 93 of the report, concerning the Nationality Law of 2003, where he said that "it appears that in practice the Regulations of §5 of this Proclamation are actually also applied in the case of applications for readmission into Ethiopian citizenship". Mr Schröder said this referred to persons who had acquired Eritrean citizenship and gone back to Ethiopia and who wanted to reacquire Ethiopian nationality. They were told that they should wait for four years. The readmission provisions did not actually state the length of time in Ethiopia to be spent before readmission to citizenship. In some cases a four year requirement might not be imposed.

123. Mr Schröder's attention was drawn to paragraph 110 of his report where he said that "open legal discrimination of persons of Eritrean descent living in Ethiopia has largely ceased". Persons readmitted into Ethiopian citizenship, however, were said according to that paragraph to be barred from servicing government offices including elected bodies and that in this important aspect such citizens were only second class citizens. Mr Schröder was asked whether this cessation of

discrimination extended to those seeking the reacquisition of Ethiopian citizenship. Mr Schröder said that there was no longer a legal basis for reacquiring citizenship if one was Eritrean. The matter was considered closed with the 2004 Directive. Thus, the ordinary Nationality Law applied. Reacquisition of citizenship could not be achieved from abroad.

124. Mr Schröder was asked about the source cited in a report of 2008 that "those who moved to Canada or the US are okay". Mr Schröder said this was in the context of the informant describing how Eritreans who had Ethiopian citizenship nevertheless did not feel secure. Things could change again at any time.

125. Re-examined, Mr Schröder thought that the source quoted in paragraph 112 would have been a person who had reacquired citizenship through the process of the 2004 Directive. The person concerned having in fact gone to Kenya because he did not feel secure in Ethiopia. Eritrea and Ethiopia were still at loggerheads. Those involved in the events from 1998 to 2004 were often still shattered. There was still anti-Eritrean feeling in Ethiopia. Eritreans in Ethiopia now realised that one could not rely on the law to protect them if things went wrong again. There were frequently round-ups of Eritreans, whenever a particular event, such as a bomb, occurred. These round-ups were not large but enough to engender insecurity.

126. Under the 2003 Proclamation, readmission to citizenship required a return to domicile.

127. Asked about paragraph 4.2 of the 2004 Directive, which states "A person of Eritrean origin who has not opted for Eritrean nationality shall be deemed as having decided to maintain his or her Ethiopian nationality and his or her Ethiopian nationality shall be guaranteed", Mr Schröder said that although this looked positive, Ethiopian provisions of this kind were famous for what was not said in them. It was not explained by what was meant by having "not opted for Eritrean nationality". That was accordingly open to a wide interpretation. Only after enquiry by the security apparatus if it were concluded that the claim was true, would nationality be confirmed. Thus, taking the case of a young adult whose mother had been deported, approaching the authorities under the 2004 Directive and seeking to use Article 4.2, it would be very difficult for him to prove that he had not opted for Eritrean nationality. It might come down to the toss of a coin. Mr Schröder thought, nevertheless, that quietly, the authorities might have thought that they had on occasions made mistakes and so had given nationality back to certain people. It had been said that deportees and third country nationals had not been included in the registration process under Regulation 5 of the Directive. The 2004 Directive had clearly been addressed to people in Ethiopia and not to deportees.

128. Mr Schröder was asked about the Human Rights Watch Report (Article 3/39) that stated "Finally, on August 14 1999, the Ethiopian government ordered people of Eritrean origin aged 18 and older, who had voted in the 1993 referendum on Eritrea's independence, as well as those who had formally acquired Eritrean citizenship, to register for alien residence permits with the Security, Immigration and Refugee Affairs Authority within two weeks or face unspecified legal action. Prior to this time, the Ethiopian government had not applied the alien registration rule to Eritreans in Ethiopia. The order seems to have been motivated in part by the desire to justify after the fact the deportation of people or Eritrean origin by formally categorising them as aliens, as well as to drive those of Eritrean origin who remain in Ethiopia to leave."

129. Mr Schröder was asked whether a failure to obey the 1999 Directive, in the case of someone who did not see themselves as Eritrean, would be seen as some sort of admission by the authorities. Mr Schröder said that the appellant probably would not have heard of the Directive after his release. However, it would have been unwise for him to seek to register under it, as he did not want to have more contact with the authorities, in view of his experiences in detention. In any event, registering under this Directive was not a protection against deportation, as some individuals found out. It also meant that one was admitting one was Eritrean. Others, however, thought that registration might afford some form of protection, against their better knowledge. Finally, it would be unrealistic to

have expected the authorities detaining the appellant to have told him about the 1999 Directive.

APPENDIX B

DOCUMENTARY MATERIAL

Item	Document	Date
1	United Nations Development Programme Asmara-Eritrea, "Update on Deportees 12-19 July 1998"	22 July 1998
2	A Legasse, "The Uprooted: Case material on Ethnic Deportees from Ethiopia concerning Human Rights Violations"	26 July 1998
3	Eritrean Relief and refugee Commission, "A Preliminary Report on the Eritrean nationals Expelled from Ethiopia During June-July 1998 (A Synopsis of their Social Characteristics and Manners of	27 July 1998

	Deportation)”	
4	N Klein, “Mass Expulsion from Ethiopia: Report on the Documentation of Eritreans and Ethiopians of Eritrean origin from Ethiopia, June-August 1998”	August 1998
5	Amnesty International, "Human Rights Abuses in a year of armed conflict"	21 May 1999
6	C Calhoun, Politics Abroad, “Ethiopia’s Ethnic Cleansing”	Winter 1999
7	Home Office form, “SEF (Self-Completion)”	12 January 2001
8	Home Office form, “SEF (Interview)”	20 February 2001
9	Eritrea-Ethiopia Claims Commission, "The Commission's Mandate/Temporal Scope of Jurisdiction"	01 August 2001
10	H Byrne, INS Information Resource Center, “Eritrea and Ethiopia: Large-scale Expulsions of Population Groups and Other Human Rights Violations in Connection with the Ethiopian-Eritrean Conflict, 1998-2000”	January 2002
11	Human Rights Watch, “The Horn of Africa War: Mass Expulsions and the Nationality Issue (June 1998 – April 2002)”	January 2003
12	US Department of State, "Ethiopia Country Reports on Human Rights Practices 2002	31 March 2003
13	Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia, “Proclamation No. 378/2003. A Proclamation on Ethiopian Nationality”	23 December 2003
14	Ethiopian nationality Proclamation No. 378/2003	23 December 2003
15	Letter from the Ethiopian Community Centre in the UK	19 March 2004
16	Letter from the Ethiopian Community Centre in the UK	04 August 2004
17	Constitution of Ethiopia	08 December 2004
18	Eritrea-Ethiopia Claims Commission, "Partial Award: Civilian Claims/Eritrea's Claims 15, 16, 23 and 27-31 Between the State of Eritrea and the Federal Democratic Republic of Ethiopia"	17 December 2004
19	Home Office letter, “Reasons for Refusal”	28 January 2005
20	M Lynch, Refugee’s International, “Lives on Hold: The Human Cost of Statelessness”	February 2005
21	Home Office letter, “Notice of Decision”	07 February 2005
22	C Barnes, Writenet, “Ethiopia: A Sociopolitical Assessment”	01 May 2006
23	L Thomas, FMRS, “Refugees and Asylum Seekers from Mixed Eritrean-Ethiopian Families in Cairo ‘The Son of the Snake’”	June 2006

24	Home Office, Letter Sent to the Ethiopian Embassy in case of MA	02 February 2007
25	North Kensington Law Centre, Letter Sent to the Ethiopian Embassy in case of MA	07 February 2007
26	Tsol, Letter sent to the Tribunal in case of MA	27 February 2007
27	Tsol, Letter sent to the Tribunal in case of MA	30 March 2007
28	UK Border Agency, "Country of Origin Information Report: Ethiopia"	18 January 2008
29	Expert Report of Günter Schröder, "Expert Report Re" appellant (dob 01/10/1079)" [sic]	22 April 2008
30	Witness Statement of appellant	23 April 2008
31	M Lynch and K Southwick, Refugees International, "Ethiopia-Eritrea: Stalemate takes its toll on Eritreans and Ethiopians of Eritrean Origin"	30 May 2008
32	Determination of IJ R Sullivan	01 July 2008
33	Refugees International, "Ethiopia-Eritrea Voices: No longer stateless but Still in Limbo	07 July 2008
34	Letter from Haileselassie Subba, Head of Legal and Consular Affairs, Embassy of the Federal Democratic Republic of Ethiopia, London	26 February 2009
35	UK Border Agency, "Operational Guidance Note: Ethiopia"	01 March 2009
36	M Lynch and K Southwick, Refugees International, "Nationality Rights for All: A Progress Report and Global Survey on Statelessness	March 2009
37	Appellant's Grounds of Application for Permission to Appeal to Court of Appeal	05 March 2009
38	United Nations Committee on the Elimination of Racial Discrimination, "Reports Submitted by States Parties under Article 9 of the Convention: Ethiopia"	11 March 2009
39	Open Society Justice Initiative, "Discrimination in Access To Nationality	01 April 2009
40	Consent Order and Statement of Reasons	06 October 2009
41	Determination of SIJ Moulden	23 December 2009
42	Human Rights Watch, "World Report Events of 2009, Ethiopia"	20 January 2010
43	US Department of State, "Ethiopia Country Reports on Human Rights Practices 2009	11 March 2010
44	Expert Report of John Campbell, "Expert Report" – appellant	01 December 2010

45	Expert Report of Günter Schröder, "Expert Report Re appellant	06 December 2010
46	Letter to the Ethiopian Embassy	17 December 2010
47	Letter to the Home Office Presenting Officer's Unit	21 December 2010
48	Witness Statement of Durand Hart	10 January 2011
49	Email from Marney Morgan, Returns Liaison Unit, UK Border Agency	11 January 2011
50	Supplementary Witness Statement of appellant	11 January 2011
51	Witness Statement of Derege Woubeshet	23 February 2011
52	Eritrea-Ethiopia Claims Commission, summary from http://www.pca-cpa.org/showpage.asp?pag_id=1151	undated
53	Directive Issued to Determine the Residence Status of Eritrean nationals Residing in Ethiopia, 2004	undated