

IMMIGRATION APPEAL TRIBUNAL

Appeal No: 00TH02130 HX-88505-97

Date heard: 09/06/2000 Date notified: 09/06/2000

Before: DR. H. H. STOREY (Chair) Miss S S Ramsumair Mrs S Hussain

AGARTHA SMITH Appellant

The Secretary of State for the Home Department Respondents

Determination and Reasons

[For case citations see end of the determination]

1. The main issues raised by this appeal are the extent of the duty on a Special Adjudicator to make a finding on the nationality of an appellant and the proper approach to proof of nationality in the context of an asylum claim.

2. The appellant, who claims to be a citizen of Liberia, appeals with leave of the Tribunal against the determination of a Special Adjudicator, Mr J Barnes, promulgated on 26 April 1999 dismissing her appeal against the refusal of the Secretary of State on the 16 June 1997 to grant her asylum under s.8(1) Asylum and Immigration Act 1993. Ms S Monaghan of Counsel instructed by Akainyah & Co appeared for the appellant. Mr J Galvin represented the respondent.

3. In amplification of the grounds of appeal Miss Monaghan argued that the Special Adjudicator had erred in declining to make a positive finding that the appellant was a national of Liberia. It was settled law that a finding should always be made on a person's nationality: *Ivanov*. Even if the *Ivanov* principle had been modified in *Prince*, this case could be distinguished from *Prince*. In contrast to the position in *Prince*, which was based purely on the oral evidence, there was evidence before the Special Adjudicator in the form of a birth certificate. Although this had not been authenticated, neither had it been shown to be inauthentic. When it was alleged, as here, that such a document was fraudulent, the burden was on the Secretary of State to prove it on the civil standard of the balance of probabilities to a high standard. Authority for that proposition could be found in *Khawaja and Kera* [1984] A.C.74, as well as in leading Tribunal determinations. That he who alleges fraud must prove it was a fundamental principle of law. The Special Adjudicator should not have rejected this item of evidence at paragraph 5 of his determination. That he erred in so rejecting it was confirmed by the evidence which the appellant had now adduced (at the behest of the Tribunal) relating to the citizenship laws of Liberia. This demonstrated that Liberia accorded automatic acquisition of citizenship to those born in that country: see Art 27(b). Had the Special Adjudicator examined nationality properly as a preliminary issue, he would have made a positive finding of Liberian nationality. The fact that the Special Adjudicator went on nonetheless to examine the appellant's risk by reference to Liberia did not cure this basic flaw in the determination. Neither the Special Adjudicator nor the Tribunal could view its powers as those of a judicial review court. Further our courts have held that if the Special Adjudicator does not accept a proposition, he should not go on to examine it anyway [in a subsequent letter to the Tribunal copied to the respondent she mentioned as authority for this proposition the case of *Kingori v Secretary of State for the Home Department* [1994] Imm AR 539 at 544]. In any event, the doubts concerning the appellant's credibility which the Special Adjudicator formed when examining her claim to be a national of Liberia made it

difficult for him to be objective when assessing her risk of persecution in Liberia.

4. Miss Monaghan argued further that it was crucial in this case for the Special Adjudicator to have decided the issue of citizenship because, had he decided this appellant was Liberian, the case would have stopped there. That was so because at that time the Secretary of State had a policy of not returning people to Liberia. The Special Adjudicator would then have had to re-examine the validity of directions for removal to Accra in Ghana. He would have had to discharge the burden of proof on him to show that Ghana would accept a Liberian national. He would further have had to show that Ghana did not refole Liberians to Liberia, thus potentially putting the appellant at risk of persecution by means of indirect refoulement. Whether direct or indirect, refoulement was prohibited by Art 33 of the Refugee Convention.

5. Miss Monaghan further urged the Tribunal to consider ill-founded the Special Adjudicator's adverse findings on the appellant's credibility.

6. Mr Galvin contended that in matters relating to nationality the onus was on the appellant to prove her nationality. Mere production of a birth certificate could not be conclusive and could be displaced by other types of evidence, where, as here, the appellant seemed otherwise to lack basic knowledge about her country. On the facts of this case the Special Adjudicator would have been entitled to say that the appellant had not shown that she was a national of Liberia. Nor had she shown she was stateless. In such a case an appellant could not rely on a failure to prove nationality as a way of avoiding directions for removal to another country.

7. In any event, added Mr Galvin, the appellant in this case could not succeed on the basis of the Special Adjudicator's failure to make a positive finding on nationality, because he had gone on to assess the appellant's risk of persecution by reference to Liberia in any case. In the instant case, therefore, his failure to make a positive finding on nationality was not an error (if it was an error) such as could affect the outcome of the determination. The Special Adjudicator had in effect fully complied with the main principles set out in Prince.

8. In the opinion of the Tribunal the determination of the Special Adjudicator was essentially sound and the appeal against it must be dismissed.

9. Whilst several questions concerning nationality and statelessness in refugee determination have yet to be fully settled in United Kingdom case law, it is well established that:

a) The issue of a claimant's nationality is integral to assessment of every claim to refugee status. That is clear from the text of Art 1A(2) of the 1951 Convention which requires that a claim to refugee status can only be assessed in relation to two categories of country: either the country(ies) of which the claimant is a national; or, as an alternative arising only if he is stateless, the country of his former habitual residence: *Ivanov* (R12583 a and b); *Tikhonov* G0052 [1998] INLR 737.

(b) In relation to nationality, the burden of proof is on the applicant throughout. There is no need for the Secretary of State to prove, either at first instance or on appeal, whether the applicant is a national of a particular country or stateless: *Ivanov* (R12583a) and *Tikhonov*. However that burden will not be onerous where there is corroborative evidence: *Zrilic* (171006).

c) The evidential burden, however, may shift throughout the case (*Ivanov*, op.cit.).

10. What the Special Adjudicator did in this case was to make a negative finding that :

"She has sought to claim asylum on the basis that she is a citizen of Liberia but there is no credible evidence to support that claim and I am unable to make any findings as to her true nationality".

11. In the light of the basic principles just outlined, the first question we need to ask is whether this finding of the Special Adjudicator was based adequately on the evidence.

12. The Special Adjudicator appears to have based this finding on the relative ignorance displayed by the appellant concerning some basic facts about her own country. Observing that it showed her date of birth as 20 May 1969 and that that would have made her twenty one when she fled Liberia, he did not find it credible that she would have been unaware of the currency of Liberia, the capital of Liberia, the colours of its national flag or the unique nature of its foundation by liberated slaves in the mid nineteenth century.

13. Findings of this sort, based on an appellant's ignorance of basic facts about his or her claimed country of nationality would in many cases be more than sufficient to sustain a conclusion that a person was not the national of the country concerned. In this respect Mr Galvin is quite correct to assert in general that this type of evidence - knowledge of basic facts about one's country of nationality - can displace documentary evidence as to nationality. However in this case the appellant had produced a birth certificate in corroboration of her claim to be Liberian. And the Special Adjudicator had expressly confirmed that it was not a false document, concluding that "there is no evidence before me to support such a contention" (emphasis added).

14. We would therefore agree with Ms Monaghan that the Special Adjudicator did not set about assessment of the appellant's nationality in wholly correct fashion. He correctly treated the burden of proof as being on the applicant throughout. But he failed to recognise that the production of a potentially decisive item of evidence as to nationality by the appellant had shifted the evidential burden. Produced before him was a copy of the appellant's birth certificate. That recorded not only that she was born in Liberia but that both her parents were Liberian. Given that he had raised no doubts as to whether or not a person born in Liberia of Liberian parents acquired nationality of that country by operation of law, he should therefore have recognised production of this birth certificate as creating - in the absence of fraud -- a presumption that the appellant was a national of Liberia, since it was an item of evidence that was potentially decisive at least of the issue of whether or not she was a national of Liberia.

15. What the Special Adjudicator overlooked was that in relation to nationality, documentation such as a birth certificate giving the citizenship of the parents can be highly material. Cases of fraud aside, how material will depend on the particular nationality laws of the country. In general, however, a birth certificate stating the names of the parents and their citizenship delineates two of the main modes of automatic acquisition of citizenship used by states in their nationality laws: citizenship based wholly or in part on birth (*ius soli*) and citizenship based wholly or in part on descent (*ius sanguinis*). In the instant case the Special Adjudicator expressed no doubts as to whether birth in Liberia of a person with Liberian parents gave rise to nationality of that country by operation of law. It was therefore incumbent on him not to ignore its materiality as an item of evidence concerning nationality. Not only did he have before him a birth certificate that had not been shown to be false. It was one which contained particulars that were *prima facie* decisive of her nationality. Accordingly he was wrong to assert that there was no or no credible evidence as to nationality. He should have recognised that the Secretary of State had not rebutted the presumption of nationality raised by the production of the birth certificate.

16. At the Tribunal stage a further missing piece of the nationality jigsaw has now come to light, following an adjournment of the hearing before the Tribunal for the purpose of obtaining more evidence concerning the nationality laws of Liberia. This consisted in an extract from the citizenship provisions of the current Constitution of Liberia. Miss Monaghan sought to rely on Art 27(b) as evidence that these provisions established a right to citizenship by birth. However that Article's wording, which refers to a right to citizenship by birth or naturalisation being available "only [to] "persons who are Negroes or of Negro descent", is unclear, although very similar wording has been the subject of a judicial "reading-down" in the Privy Council case of *Akar v Att.-Gen. of Sierra Leone* [1970] A.C.853. However at Article 28 it is stated unequivocally that:

"Any person, at least one of whose parents was a citizen of Liberia at the time of the person's birth, shall be a citizen of Liberia?"

17. As we have already noted, the birth certificate which was produced by the appellant in this case listed both her parents as Liberian. Hence this piece of further evidence fortifies the Tribunal in its conclusion that the Special Adjudicator fell into error in rejecting the issue of the genuine or false nature of the birth certificate as potentially decisive of the question of nationality. On his own assessment of the evidence he should have concluded that the presumption in favour of Liberian citizenship created by the production of the birth certificate had not been rebutted, the appellant's ignorance of some basic facts about her own country notwithstanding. Accordingly he should have made a positive finding that the appellant was a national of Liberia.

18. Concerning the appellant's ignorance of certain basic facts about Liberia, the Tribunal notes that in any event it was not in dispute that she had spent her last 5 years (prior to going by car to the Ivory Coast and then to Accra in Ghana in order to fly to the U.K.) in a mission in a different country (Sierra Leone). Such a lengthy period of absence spent in an apparently sheltered setting was, we think, sufficient to explain her ignorance. Whilst knowledge of basic facts about one's country of nationality is often an important indicator for assessment of nationality, the status of national of a country is not the same as that of resident and there will be many cases in which it is not necessarily an accurate indicator; this case being one of them.

19. It remains to be considered whether the Special Adjudicator's error in relation to determination of the appellant's nationality amounted to a fundamental flaw in his determination. In support of the contention that it does, Miss Monaghan has relied primarily on the general proposition that a Special Adjudicator is obliged to make a positive finding on nationality.

20. Unquestionably in this case the Special Adjudicator did not make a positive finding on nationality, he recording at one point that "I am unable to make any findings as to her true nationality".

21. However whilst in some cases failure to make a positive finding as regards nationality may be fatal to a determination, we do not consider that it will be so in every case; nor was it so in this case. That is because the Special Adjudicator (like the Secretary of State in the Reasons for Refusal letter) went on to consider her claim by reference to Liberia in any event and did so on the basis that, even if the appellant's own account were accepted as wholly credible, she still could not succeed in her appeal.

"Even had I believed here, however, this would not have altered that position [that the asylum

clam must fail]. At the time she claims to have left Liberia, it was in a state of civil war and, following the reasoning in Adan, she was in no greater danger than anyone else caught up in that civil war in which the forces of law and order had completely broken down. She would not, accordingly, have qualified for refugee status under the Convention at the time she left the country. No evidence has been adduced before me to show that, at the present time, as a result of anything that has taken place since that departure, anything has happened to give her a claim to be a refugee sur place with a current well founded fear of persecution if now returned there save the reference in the Human Rights Watch report to which Mr Akainyah drew my attention. That, however, relates to the situation in November 1997 shortly after President Taylor's election victory, which followed numerous accords intended to bring the civil war to an end, with substantial international input. The appellant makes no claim to have been other than a victim of the civil war and there is no evidence before me that currently her tribal origin would lead to a real possibility of persecution".

22. Notwithstanding the argument to the contrary set out in the grounds of appeal and amplified succinctly before us by Miss Monaghan, the Tribunal considers that the above did amount to an adequate treatment of the appellant's claim in relation to Liberia. It took fully into account her claim to have a well-founded fear of persecution there and it gave clear reasons for rejecting it; reasons based squarely on the appellant's own evidence taken in conjunction with objective country materials. In particular the Special Adjudicator had clearly borne in mind that on the appellant's own account she had fled Liberia in 1990 having witnessed her own house being burned, killing her parents and two brothers. Furthermore on her own account she had had no political involvement and these tragic events had happened because of the war. In the absence of any evidence that she herself would be targeted on return to Liberia because of her family or tribal identity, the Tribunal considers that the Special Adjudicator was quite correct to dismiss her claim by reference to the principles set out by the House of Lords in the case of Adan [1998] Imm AR 338 and conclude that she would not face risks over and above those facing all civilians exposed to a civil war.

23. For the sake of completeness we should clarify here that we do not for a moment accept Miss Monaghan's argument that there is something erroneous about a Special Adjudicator declining to make a positive finding as to nationality yet going on to consider the appeal on the basis of the nationality claimed by the appellant in any event. We know of no general principle of law which prevents such a step. Certainly the case of Kingori, which she invoked in support, does not outlaw it. Its ratio was that where credibility is wholly non-existent the need does not arise in the first place to consider the standard of proof. Indeed for reasons given below we see considerable virtues in the "belt and braces" approach taken first by the Secretary of State in his Reasons for Refusal letter and then by the Special Adjudicator (Mr Barnes) in his determination, since it ensures that regardless of the strict finding as to nationality the claimant receives a considered decision on his asylum claim by reference to his own claimed country of persecution. Extent of the need to determine a claimant's nationality

24. In view of the fact that we have not seen as fatal a refusal by a Special Adjudicator to make a positive finding on nationality, the Tribunal considers that it may be useful to clarify some of the principles that should govern determination of nationality, beyond those already mentioned at paragraph 9 above. In doing so we hope to resolve some of the existing divergencies in the Tribunal's approach.

25. As is often observed, within United Kingdom law the jurisdiction of Special Adjudicators in relation to claims for asylum is limited to appeals against different types of immigration

decisions: a decision to remove, a decision to require someone to leave, a decision to make a deportation order or to refuse to revoke such an order and a decision to make directions for a person's removal: see ss.8(1)-(4) Asylum and Immigration Act 1993. Once it is decided that a person is not protected by the Refugee Convention the question of his returnability becomes a matter solely for compliance with the provisions of the 1971 Immigration Act. The immigration authorities are empowered by para.8 of Schedule 2 of this latter Act to specify in directions removal to either: (i) a country of which a person is a national or citizen; or (ii) a country or territory in which he has obtained a passport or other document of identity; or (iii) a country or territory in which he embarked for the United Kingdom; or (iv) a country or territory to which there is reason to believe that he will be admitted. In the instant case directions for removal specified Ghana as the country, presumably under (iii) above, since that was the country from which her British Airways flight left for the U.K. For the most part this schema leaves considerable leeway to the immigration authorities. Had they been satisfied that she was a national of Liberia, however, they would have been prevented from directing her removal there under (i) or indeed any subsection of s.8 of Schedule 2 to the 1971 Act, by virtue of the existence at that time of a published policy set out in ADIs of July 1998 under the heading "Country Policies" which specified that: "Instructions to grant exceptional leave on the basis of nationality presently apply to: Liberia". However it is to be noted that in respect of each of these types of decision the protection afforded is that they not be "contrary to the United Kingdom obligations under the Convention". The significance of that phrase will be the subject of further attention below.

26. In the great majority of asylum appeals the nationality of the claimant is not in issue, but when it is put in doubt Special Adjudicators must address it. Failure to do so would offend the nationality logic that underlies the refugee definition set out in Art 1A(2).

27. In cases where it is in issue it may be appropriate to deal with it as a preliminary issue, although in some cases it may not be easy to decide it separately from hearing the entirety of the appellant's evidence.

28. A Special Adjudicator must always strive to make a positive finding as to a person's nationality or lack of it. He is enjoined to do so by the terms of the refugee definition set out at Art 1A(2) which requires that a claim be assessed in relation to a person's country of nationality (or country of former habitual residence if he is stateless). However it may not always be appropriate to do so. We accept Miss Monaghan's point that certain previous Tribunal determinations could be read as requiring such a finding in all cases. Thus in *Ivanov* (R12583b) the Tribunal stated:

" A critical preliminary issue in the case, in the Tribunal's opinion, was to determine whether the appellant was a citizen of Georgia or of Russia or is stateless. As was said in an earlier Ruling, it is necessary to determine that issue because of the wording of the definition of a refugee in Art 1A(2) of the Refugee Convention?"

In *Tikhonov* also it was stated that it was not possible to decide an asylum claim without identifying the claimant's country(ies) of nationality or statelessness.

29. However, in *Prince* (13751), it was clarified that these general principles do not mean that an adjudicator must always make a positive finding on nationality. As has the case before us, *Prince* concerned a person claiming to be Liberian, albeit in that case the Special Adjudicator had no documentary evidence before him and he had decided that the appellant was wholly lacking in credibility. He therefore concluded that there was insufficient evidence to show either that the appellant was Liberian or that he was stateless. Rather he was of "unknown

nationality". Professor Jackson who chaired the Tribunal in this case wrote:

"The contention in the present case is that it is incumbent on an adjudicator to make a finding on nationality but the need to identify the country of nationality has to be considered in the context of the claim made. In the present case the claim made focuses on Liberia and therefore the country of nationality is identified for the purpose of deciding the asylum claim. The adjudicator was not satisfied that the appellant was of Liberian nationality just as he was not satisfied on any material aspect of the appellant's claim. As the adjudicator was not satisfied the appellant was as he claimed to be a national of Liberia it would then follow that the appellant had failed to make the case he was seeking to make i.e. that he was outside the country of his nationality (Liberia) because of a well-founded fear of being persecuted for a Convention reason.

?In this case the Secretary of State intends to return the appellant to Nigeria and the appellant having failed to establish that he is outside the country of his nationality because of a well-founded fear of persecution for a Convention reason no third country issue arises.

We add only that it is perfectly clear from the adjudicator's determination that he was of the view that whatever the nationality of the appellant there was no well-founded fear of persecution in Liberia. The fallacy in the grounds of appeal seems to us with respect is to read the need the need to identify the country of nationality for the purpose of deciding an asylum claim as equated to the need to find positively that the appellant is a national of a certain country. As we have said the identification of the country depends upon the circumstances of each particular case.

As Mr. Graham said it follows from the burden of proof lying on the appellant that it is for him to establish his nationality or to establish that he is stateless. It is possible to envisage a case (such as this) in which the appellant fails to establish a link with any country but also fails to establish that he is stateless. This does not however relieve the adjudicator or any decision takes[sic] from identifying the country in relation to which the asylum appeal arises. That country in this case is clearly identifiable and the adjudicator decided the case focusing on that country i.e. Liberia".

30. The central point made in Prince is that it can only be sufficient for a Special Adjudicator to make a negative finding on nationality so long as the country whose nationality the appellant claims is specifically identified. That is to say, it is not enough to say "X has not shown he is a national of a country"; a Special Adjudicator must say "X has not shown he is a national of country X". This specificity requirement stems from the wording of Art 1A(2) which refers to "his country of nationality" and "?that country" (emphases added).

31. This Tribunal would endorse the clarification as set out in Prince save for at least two provisos. Firstly the negative finding must be understood to be negative only in the sense that it leave nationality (or statelessness) undetermined. It must not be equated with a finding as to status. At international law a person is either a national or he is stateless. A person who is a national may sometimes be a national of more than one country. A person who is stateless is defined as a person who has no nationality. Albeit international instruments exist that address the problem of persons of "indeterminate nationality", there is no in-between status of "unknown nationality".

32. The second proviso is that a negative finding may leave incomplete the determination of a claim to protection under the Refugee Convention. Even under the national / stateless person international law dichotomy, there are a number of permutations that can arise that are not

easily dealt with by application of the one rule which confines the duty of a refugee decision-maker to making a negative finding on nationality where evidence is lacking. A negative finding of nationality in relation to a particular country may not always be enough to establish that a person is not a refugee. One example would be a person who is in fact a national of another country where he may be at risk of persecution. Another would be a person not at risk of persecution in a third country but nevertheless at risk from that country refouling him to his country of claimed nationality. If in that country he may be at risk of persecution, it is no comfort for him to be told "But we do not accept that you are a national of your claimed country of nationality". In other cases where a person may be stateless, his claim has to be considered under the specific provisions contained in Art 1A(2) for stateless persons. Analogous difficulties can arise in some cases about identifying the country or countries of former habitual residence, as the Court of Appeal recognised in *Revenko v Secretary of State for the Home Department*, Times Law Report 8 September 2000..

33. In view of such possible permutations, we consider that despite its helpful warning against avoiding decisions on nationality in the abstract and its insistence that such decisions be made by reference to the concrete circumstances of each particular case, the logic underpinning *Prince* (and indeed *Ivanov* and *Tikhonov*) is too strict. According to this logic, if a person cannot prove that he is either a national of a particular country or stateless he falls outwith the Convention in every case.

34. Such a purely formalistic solution is fraught with legal and practical difficulties. The fact that he has no evidence to show that he is a national of a particular country may be a relevant piece of evidence in establishing whether he is stateless. It can be extremely difficult to sustain a distinction between a finding that he has not shown he is stateless and a finding that he is not a national of his claimed country of origin. In *Djurovic* (13021), for instance, the Tribunal held that a Special Adjudicator had erred in failing to take into account uncertainty regarding nationality in a case where statelessness was asserted.

34. There is also the fact that a claimant may be able subsequent to his appeal to obtain enough evidence previously unavailable to show that he is indeed a national of his claimed country of origin and so complain that he has not yet had a determination on the substance of his claim. Of course the legal restrictions on subsequent production of material evidence in relation to any issue are a general fact of life for refugee appellants; but in the case of an appeal dismissed a priori on nationality grounds alone, the resultant absence of any substantive hearing is more glaring.

35. It is the fact that this type of analysis can lead to a priori dismissal of a claim by a person who may have a well-founded fear of persecution in relation to one or more than one country which poses the greatest problem. One example would be a person who fails to show that he is a national of country A even though he has presented a credible claim to be at risk of persecution in country A.

The need for a broader approach

36. In the opinion of the Tribunal the key insight of *Prince* concerning identification of the country according to the concrete circumstances of the case needs to be taken a step further. Excluding wholly unmeritorious cases, the approach should be to ensure that each and every claimant has his claim to fear assessed not only by reference to his country of nationality considered objectively but also by reference to his country of nationality considered subjectively. Put another way a decision-maker may have to go beyond a (positive or negative) finding on nationality based on objective evidence and consider the claim in any

event by reference to the country of nationality subjectively identified by the claimant.

37. The Tribunal would accept that the 1951 Refugee Convention does not necessitate such a broader approach strictly speaking. Read in isolation Art 1A(2) can justify the rejection of an asylum claim based solely on the claimant's failure to prove his nationality (or statelessness). However, the Tribunal finds significant the wording of the absolute prohibition on non-refoulement set out at Art 33 (1). This states: "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion" (emphasis added).

38. This prohibition thus extends not only to the country of nationality (or of former habitual residence if stateless) but to any "territories". That this wording was intended to extend beyond country of nationality is confirmed by Professor G. Goodwin-Gill in his study, *The Refugee in International Law* 1996 (2nd ed) who notes at p. 120 that: "Apart from certain situations of exception, the drafters of the 1951 Convention clearly intended that refugees not be returned, either to their country of origin or to other countries in which they would be at risk".

39. Since Art 33 refers to non-refoulement of a "refugee" it must be strictly correct that it assists only those who fall within the definition of refugee set out at Art 1A(2). Yet it remains that the underlying purpose of Art 33 is clearly to prohibit non-refoulement except in danger-to-security cases specified in Art 33(2). If the non-refoulement protection afforded by the Convention to refugees goes wider than return to a country of nationality, then it is surely desirable that this protection should inform every part of the decision-making process, including the manner of going about the decision as to refugee status set out at Art 1A(2) insofar as this devolves on nationality.

40. Thus a refusal of a claim or appeal based solely on a person having failed to show he is a national of his claimed country of persecution may not be enough. In many cases it may suffice to show that he falls outwith Art 1A(2) and therefore outwith Art 33 also. But in other cases it could frustrate a correct assessment of a claim.

Accordingly, unmeritorious cases aside, rejection should only be based on a negative finding as to nationality in cases where the decision-maker is also satisfied that there is no territory return to which would place him at risk of persecution.

41. The Tribunal accepts that the Art 33 non-refoulement guarantee is not precisely the same thing as a requirement that risk is assessed by reference to the individual's claimed country of nationality. The test embodied in Art 33 is no less an objective test than the tests embodied in Art 1A(2). Yet it seems to us in practice to come much to the same thing. The "no territories" test will necessarily cover the person's country of nationality whether considered objectively or subjectively. The only way to be sure that a person whose claimed country of nationality is doubted is not failed by this test is to assess in any event the risk he faces in that country. We also consider that the subjective test of nationality proposed here as a supplement to the objective test receives partial backing from paragraph 88 of the 1979 UNHCR Handbook which states:

"Where, therefore, an applicant alleges fear of persecution in relation to the country of his nationality, it should be established that he does in fact possess the nationality of that country. There may, however, be uncertainty as to whether a person has a nationality. He may not know himself, or he may wrongly claim to have a particular nationality or to be stateless.

Where his nationality cannot be clearly established, his refugee status should be determined in a similar manner to that of a stateless person, i.e. instead of the country of his nationality, the country of his former habitual residence will have to be taken into account".

Given the difficulties that can also affect determination of a country of former habitual residence, we consider that the Handbook should have gone, as we have gone, a little further.

42. There is a further reason that can be adduced in support of our decision to go one step further than both Prince and the 1979 Handbook. At international law the determination of a person's nationality is a matter for each state to determine under its own laws subject only to the well-known "effective link" qualification set out by the International Court of Justice in the case of *Nottebohm* (ICJ Reports(1953), 23. This rule falls under the more general principle that it is the duty of each state to protect its own nationals. Yet it is of the very nature of an asylum appeal that a person's claim is bereft of protection from his own country of nationality. Moreover in relation to an asylum claim the decision-maker in the country of refuge cannot verify the claimant's nationality through normal avenues, for example by reference to that other country's nationality directorate or department or officials. He is largely thrown back on what the claimant says or what documents the claimant has produced. An asylum appeal hearing is not and can never be any kind of nationality court. Yet that appears to be the ultimate logic of Prince, Ivanov and Tikhonov. Deciding instead therefore to assess a claim by reference to the person's country of nationality as claimed by him in any event is a position which surmounts this verification obstacle without detriment to the substance of the appellant's claim.

43. Whilst, therefore, we would adopt a broader approach concerning nationality than that followed in previous Tribunal determinations, we would accept that it must remain limited by the principle that the burden of proof rests on the claimant. If a decision-maker decides that a claim is entirely lacking in credibility and substance, then the claimant will have failed to show that he is at risk of persecution upon return to any territory. In such a context there is no need to go further than a simple negative finding on nationality. That indeed was the scenario in Prince and one entirely justifying that Tribunal in going no further.

The issue of proving nationality 44. Given that in the instant case the Tribunal has based its conclusions largely on general assumptions about the nationality laws operated by modern states (including Liberia), we should explain the extent to which we consider its approach in this respect to conform with the actual practice followed in previous Tribunal determinations.

45. In order to decide questions of nationality Special Adjudicators will need to have recourse to a variety of sources. Without intending to place them in any order, we observe that previous decisions of the Tribunal have identified at least five different items as potentially relevant:

i. Relevant documentation. The relevant country of nationality may be established with documentation such as a passport or travel document In *Polivina* (18441), in which a claimant was adjudged to be Croatian, possession of a passport was held to create a strong presumption of citizenship which could only be displaced by weighty evidence to the contrary. However, other items of documentation may be relevant, e.g. letters from relevant authorities in the country concerned or (as in the instant case) birth certificates in respect of countries that operate qualified or unqualified *ius soli*. ii The claimant Where documentation is not available or admitted to be false, evidence from the claimant will be especially important. Relatives and friends may also have relevant evidence. Just because there is no documentary evidence to support the appellant's claimed nationality is not fatal if his word is

believed as to his nationality: Benda (13293). iii. Agreement between the parties (Tikhonov (G0052)). iv. Expert oral or affidavit evidence (Ibid.). v. Foreign Office letters. vi. Text of relevant nationality law of country(ies) concerned.

46. In Tikhonov a Tribunal consisting of three legal members (including the then President, Judge Pearl) appeared intent upon viewing at least some of these sources hierarchically. It ruled that nationality, being a question of foreign law, "can only be determined, in the absence of agreement between the parties, by the leading of expert evidence either in the form of oral evidence or by affidavit: see Bradshaw [1994] Imm AR 359, Lord McLean at p 366 and Professor Jackson, *Immigration Law and Practice*[1st ed] , pp.25-6". The Tribunal went on to say that translations of foreign laws unsupported by expert evidence would be given little or no evidential weight; likewise Foreign Office letters did not constitute expert evidence.

47. We respectfully differ from the approach taken by Tikhonov here to expert evidence, not least because it appears to run counter to the practice followed in Tribunal determinations otherwise. It is perfectly true that insofar as it involves foreign law the issue of country of nationality is a question of fact and it is open to the parties to adduce expert evidence as to that law: *Bumper Development Corporation v Commissioner of Police of the Metropolis* [1991] 1 WLR 1362; s.4(1) Civil Evidence Act 1972; P.Murphy, *Murphy on Evidence*, 5th Ed. P.320-1. But the approach in Tikhonov takes too far reliance on rules of evidence and proof forged in non-refugee law contexts, the conflict of laws context and United Kingdom immigration and nationality context in particular. The 1951 Convention, however, has been accorded primacy under United Kingdom law. In all its aspects it has to be interpreted purposively in accordance with Art 31 of the Vienna Convention on the Law of Treaties 1969. In the context of refugee determination, therefore, the overriding consideration has to be the necessity to undertake and complete an individual examination of each claim to asylum. To exclude a priori a claimant on the basis that he has failed to prove either a nationality or a statelessness could undo the purpose of the Convention as set out in its Preamble, to protect fundamental rights and freedoms. Above all, it could fail to prevent refoulement to any country or persecution whatsoever of a person who is in fact a refugee, as set out at Art 33(1). The Tikhonov approach also runs counter to paragraph 197 of the 1979 UNHCR Handbook which states:

"The requirements of evidence should thus not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself"

48. If followed in practice the Tikhonov approach would have the effect of placing undue restrictions on the ability of a Special Adjudicator to perform the task of determination of nationality. Since determination of nationality is but one part of the composite assessment of a refugee claim, it not only can but has to be determined on the basis of the available evidence, even if there is no agreement between the parties and no expert evidence led. Although sources pinpointed may not constitute "expert evidence" the question of what weight is to be given them will depend on the state of the available evidence. 49. We note in any event that apart from Tikhonov we are unaware of any other Tribunal determination that requires such strict proof of nationality. Furthermore, the view we have taken here accords with that of Professor Jackson in *Immigration Law and Practice* Professor Jackson 2nd Ed (1999) p.430 n.47 which says of the Tikhonov decision that "it seems to overplay the need for expert evidence for any reliance on foreign law and the need to apply to "states which might accept" an applicant as a national."

50. It remains only to clarify why reliance is properly placed on generalisations about modern nationality laws. In the instant case the Tribunal relied on generalisations about what could be inferred from a Liberian birth certificate naming the parents and their citizenship.

51. The sources relevant to decisions on nationality as listed earlier included: the texts of the nationality law of the relevant country. However it will be exceedingly difficult if not impossible to draw conclusions from such items of evidence unless they are considered together with acknowledged general principles governing nationality law.

52. Whilst, as already mentioned, it is a principle of international law that it is for each state to determine under its own laws who are its nationals, all states use common legal reference points and common parameters within which they construct their own criteria and guidance on nationality legislation and practice: see I. Brownlie, *Principles of Public International Law* 4th Ed 387ff; P. Weis, *Nationality and Statelessness in International Law* 1979. As summarised by C. Batchelor:

"To be considered as a national by operation of law means that, under the terms outlined in the State's enacted legal instruments pertaining to nationality, the individual concerned is *ex lege*, or automatically, considered a national. As a minimum, there must be a State, the constitution or laws of which make some provision for nationality. Those who are granted citizenship automatically by the operation of these legal provisions are definitively nationals of that State. Those who have to apply for citizenship and those the law outlines as being eligible to apply, but whose application could be rejected, are not citizens of that State by operation of that State's law. Wherever an administrative procedure allows for discretionary granting of citizenship, such applicants cannot be considered citizens until the application has been approved and completed and the citizenship of that State bestowed in accordance with the law" (p.171), C.A. Batchelor, "Statelessness and the Problem of Resolving Nationality Status" *IJRL* Vol.10 1998 157 at 158.

53. Tikhonov aside, we are satisfied that the approach adopted here of relying on acknowledged generalisations about nationality laws is equally consonant with that of the Tribunal in previous cases raising issues of proving nationality. Thus in *Kucero* (18075) where a question arose as to the circumstances in which the presumption that a passport proved nationality could be overcome, the Tribunal noted that the motive of the issuing state was irrelevant if there was clear evidence that on the laws of that state, having regard to the proven facts in the case, the applicant was not entitled to nationality of that state. In *Simunic* (14005) the Tribunal found the appellant to be a dual national after careful review of the Croatian and Bosnian nationality laws.

54. Adopting a more flexible approach to proof of nationality should considerably reduce the occasions on which a Special Adjudicator is compelled to conclude that nationality cannot be determined. Once it is recognised that an asylum hearing is not a nationality arbitration it becomes evident that in most cases the decision on nationality has to be made on the same basis as decisions on other elements of the refugee definition - decisions that is to say that are often based on very incomplete evidence. Bearing in mind the principles governing establishment of the facts as set out in paras 195-197 of the 1979 UNHCR Handbook, there can be no justification for declining to make a decision just because evidence is meagre. If there is some valid evidence that can be weighed in the balance even if meagre, then that may suffice to discharge the burden lying on the appellant to prove nationality (or statelessness).

55. The Tribunal would summarise its conclusions on the general issues raised by this appeal as follows:

a) In most appeals before Special Adjudicators the nationality of the claimant is not in issue, as is noted at paragraph 87 of the 1979 UNHCR Handbook. But where it is doubted Special Adjudicators must address it. Where it clearly is in issue it may be appropriate to deal with it as a preliminary issue, although in some cases it may not be possible to decide it separately from hearing the entirety of the appellant's evidence.

b) In order to comply with Art 1A(2) it is not always necessary to make a positive finding on nationality (or statelessness), but it is always necessary to attempt to do so. In going about this task Special Adjudicators should not treat an asylum hearing as a nationality court. Nor should they rely too strictly on any notion of a hierarchy of sources such as may be apt under classic rules on evidence dealing with questions of foreign law and expert evidence. As is demonstrated by our findings on this appeal, they should also give due weight to texts of a state's nationality laws read in conjunction with acknowledged general principles governing nationality law. Furthermore they should bear in mind that it is their duty to weigh all items of evidence in the balance, even if they are meagre and would not be enough to satisfy a body charged with responsibility for deciding on a person's nationality in the light of full particulars furnished by an applicant in accordance with normal civil law procedures.

c) Where, notwithstanding application of a flexible approach to establishing the facts, it remains the case that the appellant cannot discharge the burden of proof on him to prove his nationality because, for example, of a lack of even meagre evidence, then it will be in order for Special Adjudicators to record a negative finding as to nationality. Such a finding must not, however, be equated with recognition of any international law status: at international law there is no status of "unknown nationality".

d) However, where a negative finding of nationality cannot be avoided, the task of the Special Adjudicator should not always end there. Except in cases wholly lacking in credibility and substance, he or she should go on and assess the appellant's claim by reference to his claimed country of persecution. Such a "belt and braces" approach, whilst not strictly required under the Convention, best conforms to its primary purpose of preventing refoulement to those with a well-founded fear of persecution against which the state cannot protect them.

56. The appeal is dismissed.

DR H H STOREY (VICE-PRESIDENT)

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