Neutral Citation Number: [2009] EWCA Civ 289

Case No: C5/2008/1827

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM ASYLUM & IMMIGRATION TRIBUNAL
Senior Immigration Judge Allen
CC/47612/2001

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/04/2009

Before :

LORD JUSTICE MUMMERY
LORD JUSTICE STANLEY BURNTON
and
LORD JUSTICE ELIAS

- -

Between :

	MA (ETHIOPIA)	**Appellant**
	- and -	
	SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

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Mr RICHARD DRABBLE QC and Mr ERIC FRIPP (instructed by North Kensington Law Centre) for the Appellant
Ms LISA GIOVANNETTI and Mr ROBERT KELLAR (instructed by Treasury Solicitors) for the Respondent

Hearing dates : 11 March 2009

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Judgment**LORD JUSTICE ELIAS :**

1. This is an appeal against the decision of the Asylum & Immigration Tribunal, in which it upheld the decision of the Secretary of State dated 4 July 2001 that the appellant should be refused asylum. There is an extremely lengthy history to this case and the decision under challenge is the third occasion on which the AIT (or its predecessor the IAT) has had to consider the appellant's case.

The background.

2. The Appellant is an Ethiopian of Eritrean origin. Both her parents were Eritrean but she was born in Ethiopia and had always lived there. Her main language was Amharic. She arrived in the United Kingdom almost ten years ago on 24 March 1999 from Addis Ababa. She said she was married to an Eritrean national and that he, his in-laws and her son had all been sent back to Eritrea by the Ethiopian Government. This was in the period 1998-2000 when many persons of Eritrean origin were forcibly deported there by the Ethiopian authorities following the breakaway of Eritrea from Ethiopia. She only avoided being sent with them because she was in Dire Dawa giving birth. Neighbours told her that the authorities were looking for her. She was in fear of being sent to Eritrea and escaped from Ethiopia via Kenya with the help of an agent. She gave him her passport which she acknowledged was a valid Ethiopian passport in her name.

3. She appealed the Secretary of State's refusal to grant her refugee status. At that stage the intention of the Secretary of State was to return the appellant to Eritrea. Indeed, the assumption of the adjudicator hearing the first appeal was that the appellant was an Eritrean national. He concluded that she would not suffer any risk of persecution were she to be returned to Eritrea.

4. She sought leave to appeal to the Immigration Appeal Tribunal. The vice-president noted that she appeared to have no link with Eritrea, save that her parents were of Eritrean origin, and granted permission to appeal. The IAT upheld the appeal in June 2002 on the grounds that the adjudicator had been misled as to her nationality. The real issue was whether she could establish a well-founded fear of persecution were she to be returned to Ethiopia, the country of which she appeared to be a national.

5. There was a fresh hearing on 9 October 2002. The new adjudicator, Mrs Woolley, found essentially the same facts. There was still some confusion about her nationality, which the adjudicator accepted could have been a genuine misunderstanding, but the appellant was claiming to be Ethiopian. However, the appeal was unsuccessful because the adjudicator considered that the appellant had a right to become a national of Eritrea by virtue of her parents' Eritrean origin, and that she would not be persecuted if she were to return there. The adjudicator also found that the appellant had maintained her Ethiopian nationality and would not face a risk of persecution if returned to Ethiopia.

6. Permission to appeal was again given. The only ground on which leave was given was whether she could be expected to look to the Eritrean authorities for protection, and whether she would be at risk there. The matter came before the AIT for the second time on 9 August 2004. It was heard with two other cases and became a 'country guidance' case: *MA & Others* [2004] UKIAT 00324. The Tribunal described one of the issues before them in the following terms:

> "Whether nationals or former nationals of Ethiopia face persecution as a result of their ethnicity arising from a risk of discriminatory withdrawal of their nationality and a risk of deportation to Eritrea."

7.It was alleged that Ethiopians of Eritrean descent faced the withdrawal of their Ethiopian nationality, contrary to the Ethiopian constitution, and would in effect be treated as registered aliens. This in itself, it was submitted, amounted to persecution within the meaning of Article 1(A)(2) of the Convention relating to the Status of Refugees.

8.The Tribunal did not accept that all Ethiopians of Eritrean origin were at risk of having their nationality withdrawn. However, they accepted that in reality if an Ethiopian was deprived of his nationality that may well lead to treatment which could properly be categorised as persecution, and that would in turn confer a right to refugee status. Reliance was placed on the judgment of Hutchison LJ in *Adan, Nooh, Lazarevic and Radivojevic v Secretary of State for the Home Department* [1997] 1 WLR 1107, 1126 (hereafter referred to as *Lazarevic*, as it was below) where he said this:

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

9.The AIT focused on the word "can" in particular and held that this indicated that withdrawal of nationality did not necessarily amount to persecution. In short, it was not the deprivation of citizenship itself but its consequences which have to be considered. They could be of such gravity as to put the person at risk of persecution.

10.The Tribunal also found that if someone seeking asylum had the right to apply for nationality from a country which would provide safe harbour, then they would be obliged to apply for it. They could not defeat the provisions of the Convention by their own inaction. Support for this principle was found in a decision of the Outer House of the Court of Session in *Bradshaw* [1994] Imm AR 359 and an earlier AIT decision in *YL (Nationality-Statelessness-Eritrea-Ethiopia) Eritrea CG* [2003] UK IAT 00016 which followed it. In this case the AIT held that the appellant could look to the Eritrean authorities for protection and that she would not be at risk of persecution if returned there. However, the Secretary of State had indicated during the course of the hearing that he was cancelling the removal directions for Eritrea and was intending to make any future directions to Ethiopia. The adjudicator had found that she was not at risk there, and the Tribunal concluded that that was a conclusion open to her (although it was not strictly an issue in the appeal.). The AIT dismissed the appeal.

11.The appellant sought leave to appeal to the Court of Appeal and that was granted. The Court of Appeal remitted the matter so that the AIT should consider the appellant's asylum and human rights appeals only on the basis of the proposed removal to Ethiopia.

12. So the matter was considered by the AIT a third time. It is that decision which is now the subject of this appeal.

13. The analysis of the Tribunal is very detailed. It is not necessary to explore that detail because much of the judgment concerns matters no longer in issue between the parties. The appellant was contending that she would be persecuted if returned to Ethiopia, that persecution taking the form of the denial of her nationality.

14. The Tribunal summarised its approach to the issues in paragraphs 80-86 of its decision. It noted that the arguments had drawn a sharp contrast between de jure and de facto nationality, and stated that it saw only a limited value in the distinction. However. it considered that the concepts were useful in cases like this where the issue was whether the alleged persecution results from the state's attitude to nationality.

15. The Tribunal envisaged two stages. The first question, at least in any case of disputed nationality, is to determine whether a person is a de jure national of the state concerned. If he is, then the second stage is engaged. That was described in the following terms in paragraphs 85 and 86:

> "**The De facto Nationality Issue (Stage 2)**
>
> 85. If it is concluded that the person is a de jure national of the country concerned then the next question to be considered is the purely factual question, i.e. "Is it reasonably likely that the authorities of the state concerned will accept the person concerned if returned as one of its own nationals?" This is the hypothetical approach, which focuses exclusively on the person's position upon return. That this approach was approved by the Court of Appeal can be seen from paragraph 71 of **EB** in the judgment of Longmore LJ.
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> 86. At the outset we consider that if the person is a de jure national, there is a presumption that the country concerned will afford him the same treatment as any other national. Following on from this, it may also be presumed that the person concerned will have obtained travel documentation to enable them to be returned. If it transpires that they cannot in fact obtain such documentation, then they will not be returned and therefore no refoulement issues will arise in any event. Disputes concerning such matters may arise on judicial review (in the context of the enforcement of removal directions) or under asylum support legislation relating to whether a person has taken reasonable steps to obtain travel documentation, but they are not normally part of the jurisdiction of this Tribunal…"

16.Following this approach, the Tribunal first considered whether the appellant was legally a national of Ethiopia. Curiously, notwithstanding the history of this case, there was still apparently some dispute about that. The Tribunal observed that it had become common ground during the hearing that she was.

17.They then went to the second stage and posed what they termed the "hypothetical question" - which was in fact the term used by Longmore LJ in *EB* at paragraph 71 - namely whether the appellant would suffer persecution for a Convention reason if she were to be returned. Again, it became clear during the course of the hearing that the appellant was not contending that she would now suffer persecution if the Ethiopian authorities were prepared to allow her to return. She accepted - and Mr Drabble QC. her counsel, accepts that it can fairly be described as a concession - that if they would provide the documentation to enable her to return, there was no reason to believe that she would now be treated improperly once in Ethiopia. Whatever justification she might have had for believing that she would be ill treated in Ethiopia, her fears would be allayed if the authorities now allowed her to return. However, her case was that the Ethiopian authorities would refuse her the relevant documents which would enable her to return to Ethiopia precisely because they were not prepared to give effect to her rights as a national of Ethiopia. The treatment she had received when in Ethiopia, and the refusal to provide her with the requisite documents to enable her to return, were all of a piece. Although she was de jure a national of Ethiopia, she would not in practice be afforded the rights of a national, and one way in which that denial of nationality would be made manifest was by denying her the right to return.

18.In view of the concession, it might have been thought that the essential issue was whether the claimant would be permitted to return or not. Nevertheless, the Tribunal considered the evidence relevant to what they termed the hypothetical question, namely whether the appellant would be at risk of persecution if returned to Ethiopia. In this connection they relied upon the decision of this court in *EB (Ethiopia) v Secretary of State for the Home Department* [2007] EWCA Civ 809; [2008] 3 WLR 1188 in support of the proposition that the denial of nationality would constitute persecution.

19.*EB* was in some respects similar to the facts here, although there were also material differences. As in this case, the applicant was an Ethiopian national of Eritrean origin who claimed asylum on the basis that she was being denied her rights as a national of Ethiopia. The AIT rejected much of her evidence that she had been targeted and ill treated, but did accept that all the documents necessary for her to obtain a passport had been wrongfully taken from her by the authorities. There was also evidence that she was being denied the right to return by the Ethiopian authorities. She had twice visited the embassy and been refused a passport because of the lack of documentation. She submitted that the refusal to permit her to return in itself amounted to persecution; it did not merely give rise to it. She was denied the basic rights which go with nationality. In support of this proposition, reliance was placed upon the dictum of Hutchison LJ in the *Lazarevic* case, reproduced above. Both counsel appear to have argued the case on the basis that denial of nationality might constitute persecution, depending on the circumstances. This involved construing *Lazarevic* as the AIT had in *MA*. Lord Justice Pill clearly adopted that approach and observed (para 54):

> "I am not prepared to hold that a deprivation of nationality, whether de facto or de jure, in itself necessarily gives rise to refugee status."

He would have remitted the case to a fresh tribunal because he did not think that the AIT in that case had properly addressed the question whether, on the facts, the consequences of the denial of nationality did have that effect.

20. Longmore LJ disagreed with Pill LJ as to the result of that case. He agreed with a concession of the Secretary of State that the arbitrary deprivation of citizenship in practice did "prima facie" constitute persecution, and that the removal of documents was sufficiently analogous to that situation as to constitute persecution also (para 70). However, he expressly held that the AIT in *MA* had wrongly construed the effect of Hutchison LJ's dictum in *Lazarevic* and that it was not necessary to focus on the consequences of deprivation of nationality. The assumption appears to be that he considered that denial of nationality would, without more, constitute persecution. On the facts found by the AIT in that case he thought that there was only one sensible answer to the question whether asylum should be granted, namely that it should. Jacob LJ agreed with Longmore LJ and also held that, absent evidence to the contrary, someone who is deprived of nationality will suffer persecution. Interestingly, none of the judges appears to have placed significance on the fact that the appellant in that case was being prevented from returning to Ethiopia, although it was a point which was strongly relied upon by the appellant.

21. The AIT in this case recognised that there was a distinction between the instant case and *EB*, namely that there was evidence in *EB* that documents had been removed by the authorities. That was not so here; the appellant had been able to leave under her own passport.

22. The Tribunal considered extensive evidence concerning the treatment of Ethiopians of Eritrean origin, including the opinions of a number of experts relied upon by the appellant. Having done so, the AIT concluded that it was "reasonably likely" that Ethiopia would treat the appellant as one of its own nationals if she were to return. They considered that this finding disposed of the appeal. Perhaps influenced by the approach in *EB*, they did not consider it necessary in order to resolve the case to have regard to the likely attitude of the Ethiopian authorities with respect to the appellant's return to Ethiopia.

23. However, notwithstanding that on the Tribunal's own analysis it was not relevant to consider that issue, they in fact chose to do so. They described their views with respect to this matter, which they considered under the heading "The issue of travel documentation", as being "strictly obiter."

24. Their analysis of this issue was as follows. It was accepted that the appellant did not have any documents. Had she been in possession of documentary evidence supporting her nationality, she could have been issued with a European Union letter which would

have enabled her to return to Ethiopia. However, without such documentation she had to go to the Ethiopian embassy to obtain the travel documents. The Tribunal heard extensive evidence, including expert evidence, on the attitude of the Ethiopian embassy to requests for travel documents from Ethiopians of Eritrean ethnicity. They concluded that she would be likely to be issued with emergency travel documentation were she to take make that application.

25. The Tribunal recorded in its decision some of the steps which had been taken to determine directly from the Ethiopian embassy what its attitude to her application to return would be. At a directions' hearing the Tribunal itself requested the Secretary of State to pose certain questions to the Ethiopian embassy to assist it in determining the case. We were informed by counsel that she did so but received no response, although that is not a matter referred to in the decision itself. The Tribunal also noted that the appellant herself went to the embassy but told them she was of Eritrean nationality. Not surprisingly, she apparently did not get beyond reception

The grounds of appeal.

26. There were extensive and somewhat discursive grounds of appeal lodged. Lord Justice Sedley provisionally gave permission on paper on a single point, namely that the AIT may have erected a false distinction between de facto and de jure nationality. He did, however, permit the Secretary of State to apply in writing to set aside the grant of permission "on knock out grounds only". That is what the Secretary of State did, and Sedley LJ sent the matter to a full hearing to determine first whether permission should be granted and if so, to determine the appeal.

27. In fact, some of the arguments developed in the course of oral submission bore little, if any, relation to the grounds permitted by Sedley LJ. However, we decided that we should hear them all, particularly given the nature of the case, and Ms Giovannetti, counsel for the Secretary of State, did not object to this course.

28. Mr Drabble submits that the fundamental approach of the Tribunal, as identified in paragraphs 85-86 set out above, was misconceived. There were numerous errors of law which, both independently and cumulatively, rendered the decision unsafe. The claim should be remitted for a fresh hearing.

29. First - and this reflects the ground on which permission was given - he says that the Tribunal created a false distinction between *de jure* and *de facto* nationality. It was confusing and unnecessary for the Tribunal to take that approach.

30. A second and related ground is that there was in any event no justification for making what the AIT described as a "presumption" that someone with *de jure* nationality would be treated properly and in accordance with his or her rights as a citizen. It would place an unfair burden on the asylum seeker to have to prove a negative and establish that he or she would not be treated in the same way as other nationals.

31. Third, he says that the formulation of the second stage question, namely "Is it reasonably likely that the authorities of the state concerned will accept an asylum seeker as a national?" alters the standard of proof which should apply in asylum cases. The question ought to be, in the context of this case, whether the asylum seeker can satisfy the Tribunal that he has a reasonable apprehension that the authorities concerned will *not* accept him or her as a national (on the assumption that to deny nationality constitutes persecution.) It is not whether it is reasonably likely that they will. This was not a question of an isolated misstatement by a tribunal which had in substance applied the right test. It informed the whole of the AIT's reasoning. The Tribunal's conclusion that the appellant would not be at risk in Ethiopia was cast in terms that it was "reasonably likely" that she would be afforded the full rights of a national.

32. Fourth, the AIT was wrong to treat the question of return as irrelevant to the issue they had to decide. It was at the very heart of the determination they had to make, which was to decide the appellant's refugee status. Yet the Tribunal dealt with it only by obiter remarks at the end of their judgment. Furthermore, even with respect to that issue, they again applied the wrong test for the burden of proof, concluding again that it was "reasonably likely" that the relevant documentation would be granted. They ought to have asked whether there was a real risk that they would not.

33. Mr Drabble submits that, following *EB*, the refusal of the state to provide travel documentation to allow the appellant to return will of itself constitute an act of persecution, as well as supporting her contention that she would in practice be deprived of her rights as a national on return. He submits that the effect of *EB* is that the deprivation of nationality of itself necessarily amounts to persecution. The Tribunal could not simply dismiss the issue of return as immaterial by concluding that in any event, even if travel documents were not made available by the Ethiopian authorities, then no issue of refoulement would arise. It is true that the appellant would not then suffer any persecution in Ethiopia itself simply because she could not get there, but the AIT had to determine her refugee status. The effect of the AIT's approach was that it was seeking to decide whether the appellant was at risk of persecution resulting from the denial of her nationality by focusing on part only of the potentially relevant evidence.

34. Ms Giovannetti conceded that the AIT decision did indeed display some of the errors identified by Mr Drabble. However, she submitted that when considered as a whole, it was plain that the AIT had reached conclusions on the essential questions which were sustainable on the evidence, and which justified the conclusion that asylum should be refused.

35. She rejected the contention that the distinction drawn between *de jure* and *de facto* nationality was of itself an error of law. She pointed out that it simply reflected language which had been used by this court in the case of *EB*. She also submitted that it was perfectly appropriate for the Tribunal to start from the assumption that persons with *de jure* nationality would be treated properly by the state, and therefore it was not unjust for the court to assume in the normal way that they would receive the appropriate travel documents to return to their home country.

36. By employing these terms, the Tribunal was not seeking to suggest that there was any presumption in law or anything of that nature. All they were doing was identifying that the burden was on the applicant to establish a well founded fear of persecution. Once the relevant *de jure* nationality was established, it was for the appellant to show that she was at risk of persecution if returned to Ethiopia. Where the appellant's case was that the persecution involved deprivation of nationality, it was for her to show that there was a real risk that this would occur. This did not involve requiring the appellant to prove a negative, as Mr Drabble submitted. It merely required her to show that there was a real risk that she would be discriminated against in the way she alleged, and that was entirely in line with the proper approach to asylum cases.

37. Ms Giovannetti did, however, accept that the Tribunal had, in its formulation of the principles in paragraph 85, placed too high a standard of proof on the appellant. She agreed that the test must be whether there was a real risk that the appellant would be denied her right to nationality; it was not whether there was a real likelihood that the state would deprive her of it. This meant that the AIT's analysis that the appellant would not face persecution if returned was defective. However, she said that this did not matter in this case given the concession that if the appellant were now allowed to return, she would not suffer persecution.

38. The Secretary of State also accepted, as the appellant had contended, that the question whether the appellant would be allowed to return to Ethiopia was a central issue for the Tribunal to determine. It was an error of law for the AIT to treat this as irrelevant to the question of the appellant's refugee status. Indeed, in view of the concession, she accepted that it was really the only material question. However, Ms Giovannetti submitted that although the Tribunal had treated that issue as though it were merely an addendum to the main judgment, nevertheless they had dealt with it clearly and cogently after a careful assessment of all the material evidence, and it was plain what their decision would have been had they treated it, as they should, as being an essential building block of their decision.

39. Accordingly, since it is well-established that this court will only remit a matter to the AIT if there is a realistic prospect that the decision might be different (see e.g *N v Secretary of State for the Home Department* [2004] 1 WLR 1182 per Laws LJ, paras 25-26) there would be no purpose in remitting this case. The error was not a material one, given the clear and unequivocal findings of fact by the Tribunal. Although Mr Drabble had sought to float the possibility that the finding on this point was irrational and against the weight of evidence, that was not a matter raised in the appeal and there was a clear finding by the Tribunal, after a careful analysis of the evidence, which the court should loyally accept.

40. Furthermore, Ms Giovannetti submitted that when dealing with the question of whether the authorities would permit the appellant to return, the Tribunal had adopted a proper approach and had not misdirected themselves. The appellant had not been able to show that she had had her application to return arbitrarily refused for a Convention reason, and in those circumstances, the Tribunal had to determine whether she was from a class of persons - in this case Ethiopians of Eritrean origin - who were being systematically

mistreated by being denied the right to return. This required her to establish a consistent pattern of mistreatment (see the observations of Laws LJ in *Hariri v Secretary of State for the Home Department* [2003] EWCA Civ 807 para 8, followed *in AA (Zimbabwe) v Secretary of State for the Home Department* [2007] EWCA Civ 149 per May LJ) and this the claimant was unable to do. The AIT was satisfied that someone in the appellant's position would be likely to be issued with emergency travel documentation to enable her to return to Ethiopia.

Discussion and conclusions.

41. I would accept that the use of the concepts of *de jure* and *de facto* nationality did not of itself involve any error of law, and indeed, as I have said, it was understandable that the Tribunal should approach the matter in this way, since that is how this court analysed matters in the factually similar case of *EB*. In so doing the AIT was simply, in my view, adopting convenient shorthand descriptions. *De jure* nationality was what the appellant was entitled to as a matter of law; *de facto* nationality was the status she would actually be afforded by the Ethiopian state. I accept the submission of Ms Giovannetti that the Tribunal was doing no more than saying that if someone like the appellant has de jure nationality, then the onus will be on her to show that she would be denied that status in a manner constituting persecution on Convention grounds. In my judgment, the language used by the AIT was not erecting, or intending to erect, any fresh conceptual legal analysis

42. Having said that, I do not think that it is either necessary or desirable for these concepts to be employed as they were. The issue in asylum cases is always whether the applicant has a well founded fear of persecution on return, and she will have that well founded fear if there is a real risk that she will face persecution. In this case the issue was perceived to be whether she 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. To have recourse to concepts of de jure and de facto nationality is likely to obscure rather than to illuminate that question. Indeed, it may have been the reason why this experienced body applied the wrong test for the standard of proof. That particular error in turn, as is conceded by the Secretary of State, meant that the analysis of what the AIT called the "hypothetical question", namely how she would have been treated if returned to Ethiopia, was wrong in law. I consider below the relevance, if any, of that error.

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.

The core of the case.

44. In view of the various admissions and the concession, it became clear that the principal area of dispute between the parties is this: is the Secretary of State entitled to rely upon the “strictly obiter” findings which the Tribunal did make about the prospects of the appellant being authorised to return to Ethiopia? If so, did the Tribunal apply the right test when determining that question?

45. As I have said, Ms Giovannetti submits that the AIT’s findings on the issue of return are sufficiently safe to be relied upon, notwithstanding that the AIT erred in treating them as immaterial to its decision. Moreover, the Tribunal’s approach to the burden of proof was appropriate in relation to this question.

46. Mr Drabble counters that it would be wrong to allow this part of the decision to save what is otherwise a fundamentally erroneous legal analysis. It cannot be said with confidence that the AIT gave this aspect the same careful consideration that it would to what it perceived to be the real meat of its decision. More importantly, even if it had not been relegated as an issue in the way that it was, the AIT’s approach would in any event have been defective. The Tribunal looked at the central issue of risk by improperly compartmentalising the evidence. They first considered the risk of persecution if returned, and then the question of return quite separately, and they compounded the error by applying the wrong standard of proof throughout. Had they looked at the issue in the round, applying the proper standard of proof, then it is obvious that they may have reached a different result. Accordingly, the appeal should succeed on that basis and the matter remitted for a fresh consideration.

47. More specifically, Mr Drabble does not accept that the AIT should adopt any different test to the question whether the appellant would be likely to be returned to Ethiopia than it should to other aspects of its determination on risk. The fact that the appellant herself could remove, or possibly remove, the need to speculate on that question by making an application to the authorities did not justify adopting any different approach. The central issue is whether there is a real risk of persecution on return. That is a single question which must be answered by a consideration of all the evidence. That evidence will necessarily include what steps have been taken by the appellant herself to seek to obtain the necessary travel documents, and no doubt any failure to try to secure the documents will be a material - and potentially a highly material - consideration for the Tribunal. But the test of real risk remains the same. It is not legitimate to subdivide what is a single issue into a number of different issues attracting different standards of proof.

48. I would accept that normally if a Tribunal adopts the wrong legal approach with respect to part of its decision, that error will infect all related aspects of the decision. So if the AIT were correct to seek to determine the issue of return by predicting what the embassy would be likely to do, that would have to be assessed in the light of the whole of the evidence, including the treatment of the appellant in Ethiopia. It could not be assessed independently of her own circumstances. To that extent I would agree with Mr Drabble

that the question of risk must be looked at in the round, and the issues relating to it should not be compartmentalised.

49. However, this is a highly unusual case in which it became apparent during the hearing before the AIT that the outcome depended upon whether the Ethiopian 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 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.

50. In my judgment, where the essential issue before the AIT 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. There may 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. There is no reason why the appellant should not herself visit the embassy to seek to obtain the relevant papers. Indeed, as I have said, she did so but wrongly told the staff there that she was Eritrean.

51. I am satisfied that there is no injustice to the appellant in this approach: it does not put her at risk. The real risk test is adopted in asylum cases because of the difficulty of predicting what will happen in the future in another country, and because the consequences of reaching the wrong decision will often be so serious for the applicant. That is not the case here. As Ms Giovannetti pointed out, there is no risk of ill treatment if an application to the embassy is made from the United Kingdom, even if it is refused.

52. Furthermore, this approach to the issue of return is entirely 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*, to which I have made reference. It can be seen as an aspect of the duty placed on an applicant to co-operate 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* is an example of such a case. The issue was whether the applicant was stateless. Lord MacLean held that before a person could be regarded as stateless, she should make an application for citizenship of the countries with which she was most closely connected.

53. Any other approach leads, in my view, to absurd results. To vary an example given by my Lord, Lord Justice Stanley Burnton in argument: the expert evidence might show that three out of ten in the appellant's position were not allowed to return. If that evidence were accepted it would plainly be enough to constitute a real risk that the appellant would not be successful in seeking authorisation to return. 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. She could refuse to put to the test whether she might be one of the seven who would be successful. 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.

54. It is clear that the Tribunal did not approach matters in this way. In the absence of evidence as to how she would have been treated had she made a proper application, they sought to resolve the issue by considering whether someone in her position was likely to be allowed to be returned or not. In adopting this approach they were apparently approaching the matter in line with the submissions of the parties. Nevertheless, for the reasons I have given, in my judgment this means that they erred in law. They ought not to have engaged on this inquiry without first establishing that the appellant had taken all reasonably practicable steps to obtain authorisation to return.

55. In the normal case, remittal in those circumstances would be appropriate. However, we know what the position is with respect to her efforts to obtain permission. She said in her witness statement that she had gone to the embassy and asked for a passport, but having told the staff there that she was Eritrean. That could not constitute a bona fide attempt to obtain the necessary authorisation. In the light of this evidence, which is the totality of the evidence on this matter, I can see no basis on which it would be open to the AIT to find that she had acted in good faith and taken all reasonably practicable steps to obtain a passport. Accordingly, any remission would be futile.

56. I would therefore dismiss the appeal.

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 [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.

Two miscellaneous matters.

58. There are two further matters which deserve mention. The first is that it may be said with some force that what the appellant wishes is to be refused authorisation to return to Ethiopia, and it is therefore fanciful to suggest that denial of re-entry constitutes any persecution at all. How can it be persecution if a state denies you the right to do what you do not want to do? This is a deceptively attractive argument, but I think it is 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 Article 1(A)(2) of the 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 that he can sustain a better standard of living for himself and his family in England.

59. Second, an issue raised in this case was what precisely is the effect of the decision in *EB*. Mr Drabble submitted that the judgments of the majority clearly establish that someone deprived of his nationality for a Convention reason thereby necessarily suffers persecution within the meaning of the Convention. I accept that there are passages which support that interpretation, although there are also indications to the contrary (such as the reference in Longmore LJ's judgment to "prima facie" persecution). In any event, for reasons given by Stanley Burnton LJ, with which I entirely agree, I do not think that it is 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. More significantly perhaps, I doubt whether a state would say in terms that it was depriving someone of the benefits of being a national. Rather it is likely to take practical steps which treat someone less favourably than a person afforded the full rights and benefits of nationality. That 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.

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 Article 8 of the ECHR.

Lord Justice Stanley Burnton:

61. There has been an unfortunate tendency in the law of asylum to treat findings of fact as decisions on points of law, and binding authority in subsequent cases. This is such a case: the decision of the Court of Appeal in *EB (Ethiopia)* 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 Article 1(A)(2) of the Convention relating to the Status of Refugees, entitles that person to refugee status. This understanding of the effect of *EB* was, I think, largely responsible for the unnecessary length of the Tribunal's determination and the complexities of its reasoning.

62. I am troubled by this proposition. What is the meaning of persecution in Article 1(A)(2) is a question of law. It has been the subject of helpful exegisis, as by Laws LJ in *Amare* [2005] EWCA Civ 1600, in a judgment with which the other members of the Court agreed. Thus what ill treatment is capable of being persecutory is a question of law. But whether ill treatment in a particular case constitutes persecution is a mixed question of fact and law: it is the application of the denotation of persecution to the particular facts.

63. Before a court or tribunal in this country, issues of foreign law are issues of fact. Thus what are the rights conferred by nationality under a foreign law, or, to put it conversely, what are the rights of which a person is deprived by depriving her of that nationality, are questions of fact. In most cases, there is a presumption that foreign law is the same as English law, but that rule is not applied inflexibly, and it would not be appropriate to apply it where it is obvious that the foreign law is not the same or is unlikely to be the same as our law: see *Shaker v Al-Bedrawi* [2002] EWCA Civ 1452, [2003] Ch 350 at [64]. The present appeal is one in which the Appellant's case is that the foreign state, here Ethiopia, does not apply its nationality law in the way that we do. If so, it seems to me to be inappropriate to assume that the foreign law is the same as our law. Furthermore, the consequences of statelessness may be affected by the law or practice of the state in question. In this country, indeed internationally, there are many stateless persons. They may be entitled to work, to access social security benefits, and to own property. A laissez-passer or other travel document may entitle him to leave this country and to return. Their disabilities are not serious. They are not the subject of ill treatment.

64. It should be noted that a stateless person in this country is not as such a refugee: see the decision of this Court in *Revenko v Secretary of State for the Home Department* [2000] EWCA Civ 500. In that case the issue was, in the words of Pill LJ at [1]:

> ". … whether a stateless person who is unable to return to the country of his former habitual residence is, by reason of those facts alone, a refugee within the meaning of the 1951 Convention relating to the Status of Refugees ("the 1951 Convention"), as modified by the 1967 New York Protocol ("the 1967 Protocol"). The Tribunal found, and the Secretary of State for the Home Department ("the Secretary of State") contends, that it is also necessary to establish a present well-founded fear of persecution for reasons of "race, religion, nationality, membership of a particular social group or political opinion" ("the Convention grounds")."

The Court of Appeal upheld the Secretary of State's contention and dismissed the appeal against the Tribunal's decision. The decision of the Court of Appeal is binding authority for the proposition that a denial of return is not of itself persecution.

65. Entitlement to refugee status does not as such confer a right to British nationality. It is not suggested that a refusal to confer nationality on a non-national here is ill treatment, let alone serious ill treatment, for the purposes of Article 3 or even Article 8 of the European Convention on Human Rights. That is because a refugee recognised as such is granted the rights required by the Refugee Convention and the EC Qualification Directive 2004/83/EC of 29 April 2004.

66. I have no difficulty with the proposition that the deprivation of a person's nationality *can* amount to persecution. It will do so if the consequences are sufficiently serious. And clearly, deprivation of nationality may be one aspect of ill treatment by the state that in its totality amounts to sufficiently serious ill treatment as to constitute persecution. But the above considerations are inconsistent with the proposition that a deprivation of foreign nationality is, as a matter of English law, necessarily sufficiently serious as to amount to persecution. If free from authority, I would hold that the question whether deprivation of nationality constitutes persecution, assuming the deprivation is for reasons referred to in Article 1(A)(2), will depend on the consequences of the deprivation for the person in question in the state in question. The legal and practical consequences for any person of the deprivation of nationality in a foreign state are questions of fact, and the decision of the Court of Appeal in a particular case is not binding authority in a subsequent case on such questions. In *Lazard Brothers v Midland Bank* [1933] AC 289, a question arose as to the law of the USSR. Lord Wright, in a speech with which the other members of the Appellate Committee agreed, said at 297 to 298:

> "What the Russian Soviet law is in that respect is a question of fact, of which the English Court cannot take judicial cognizance, even though the foreign law has already been proved before it in another case. The Court must act upon the evidence before it in the actual case."

67. There is another important legal principle applied in asylum cases. It is that the burden of proof is on the person who claims to be a refugee. What that person must show in order to satisfy that burden, i.e. the standard of proof, is something I consider below.

68. Although inability to return to one's country of habitual residence or nationality is not necessarily persecution, it is relevant to the determination of refugee status. Article 1A(2) is as follows:

> "Article 1A: For the purposes of the present Convention, the term "refugee" shall apply to any person who:
>
> …

> (2) Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

69. As can be seen, and as was held in *Revenko*, 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 *Adan, Nooh, Lazarevic and Radivojevic v Secretary of State for the Home Department* [1997] 1 WLR 1107 Simon Brown LJ, in a judgment with which Hutchison LJ agreed, 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".

70. The second part of the appeal in *Adan, Nooh, Lazarevic and Radivojevic* concerned two Yugoslav citizens who had evaded military service by coming to this country and could not return because Yugoslavia refused to accept the return of asylum seekers. Thus they were denied what Longmore LJ in *EB* described as a basic individual right conferred by nationality. If they returned, however, they would be safe from persecution. Hutchison LJ said, in a judgment with which both Simon Brown LJ and Thorpe LJ agreed, said, at 1126:

> "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; and I am encouraged to do so by the fact that Simon Brown L.J. cited it in terms which at least implied approval in *Sandralingam v. Secretary of State for the Home Department, Rajendrakumar v. Secretary of State for the Home Department* [1996] Imm. A.R.97,107. 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? …"

71. The emphases are in the original. I have 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 render a mixed question of fact and law into one of law. In *EB*, Longmore LJ suggested 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 Article 1(A)(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?"

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 to render it more difficult to identify their nationality. In the present case, the Appellant was able to leave Ethiopia on her own Ethiopian passport. On arrival here, she gave it up to her agent, presumably so that he could use it to assist someone else to leave Ethiopia and to come here; but if she had kept it, 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.

73. I also point out that *Adan, Nooh, Lazarevic and Radivojevic* was not concerned with deprivation of nationality. It concerned inability to return. Deprivation of nationality may lead to inability to return to one's country of nationality, but they are not identical.

74. Miss Giovanetti, in her clear submissions, said that *EB* is a difficult case. I agree. It is necessary to analyse just what it decided. The findings of the Tribunal were summarised by Pill LJ at [62]. EB's identity documents had been removed from her arbitrarily when she was in Ethiopia when her father, an Ethiopian of Eritrean ethnicity, was forcibly deported to Eritrea "so that she would have difficulty in future proving her Ethiopian nationality". She had in effect lost her Ethiopian nationality, and she could not return to Ethiopia. The Tribunal found that she had never been ill treated, other than by the removal of her identity documents and her loss of nationality. However, she contended that the Tribunal's findings of fact could not stand. It was accepted on her behalf, presumably on the basis of that the findings of fact would be upheld, that if effective nationality were restored, she would cease to be a refugee. Mr Blake QC on her behalf submitted that the refusal of the Ethiopian government to permit EB's return was itself persecution. It is, I think, impossible to reconcile that submission with the last sentence of the above citation from Hutchison LJ's judgment in *Lazarevic*. Pill LJ's conclusion, was:

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

75. Pill LJ would have remitted the case back to the Tribunal for full reconsideration, including a reassessment of EB's credibility. Longmore and Jacob LJJ disagreed with him. They were clearly concerned that the long period during which her status had been uncertain should come to an end. Longmore LJ referred to the concession made on behalf of the Home Secretary:

> "61. Mr Eicke for the Secretary of State appeared to accept that, if EB had in fact been deprived of her citizenship by the arbitrary action of state employees, that would have *prima facie* been persecution within the terms of the Refugee Convention but he submitted that mere removal of identity documents did not constitute persecution."

76. This curious concession was, in my view, the basis of Longmore LJ's judgment. I say curious 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. Longmore LJ expressed his agreement with the concession, but the fact remains that it was not the subject of argument. It was followed by Longmore LJ when, at [70], he formulated the question for decision before the Court. That too was the way that Jacob LJ regarded the matter in his judgment in which he agreed with Longmore LJ's judgment and added:

> "75. Once a claimant for refugee status has established that their

> country of origin has taken away their nationality on the grounds of race, they in my view have established a prima facie case for such status. It is true that the decision maker must ask: would they have a well founded fear of persecution if they were returned today? But *in the absence of contrary evidence*, someone who has been deprived of nationality because of race would, if returned, be in a near-impossible position – unable to vote, to leave the country or even unable to work. They may well be treated as pariahs precisely because they had their nationality taken away. They have "lost the right to have rights." (Chief Justice Warren's vivid words) And they have already been put in the position that their home state will not let them in – they cannot even go home.
>
> 76. In this case *there is no rebuttal evidence* showing that the appellant would not suffer from being stateless in the ways I have identified. …"

The italics are mine. It appears that the serious consequences of loss of nationality referred to be Jacob LJ - inability to vote, to leave the country or even unable to work - had either been found by the Tribunal as facts or were assumed by him, subject to evidence to the contrary. In so far as they were found by the Tribunal as facts, there are no comparable findings in the present case, and none was contended for. In so far as an assumption was made, it was based on Mr Eicke'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. In a case in which loss of nationality involves the consequences assumed by Jacob LJ it may well be persecutory. But all depends on what loss of nationality involves: does it involve the loss of the right to work, to access social security (if there be such), to leave and to return, to vote, and so on?

77. Turning to the present case, it is again necessary to focus on precisely what facts have been found. There is no evidence that the Appellant has been deprived of her Ethiopian nationality. She left Ethiopia on an Ethiopian passport in her name, and surrendered it to her agent voluntarily. It was conceded that if she returns, she does not face ill treatment on account of her ethnicity or otherwise. Having given away her passport, she needs a travel document in order to return. There is no evidence that she has 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 own account in her witness statement, she said she was Eritrean. The lack of response to the correspondence with the Embassy is understandable given the terms of the letters written. The Tribunal were entitled to find that other Ethiopians have successfully obtained travel documents from the embassy here. I see no reason why the Appellant should not be required to take reasonable steps to do so.

78. There was debate before us as to the standard of proof to be applied in a case in which a person contends that he is unable to obtain in this country the passport or emergency travel document that is her right as a national of her country of origin. In my judgment, it is not the "real risk" test.

The “real risk” test applies to the question whether the fear is well-founded: it is well-founded if there is a real risk of persecution. Thus a person who is unwilling to return owing to a fear that is so justified is entitled to refugee status. Inability to return is not qualified in the Convention by the words “owing to such fear”, and like the majority of the Court of Appeal in *Adan, Nooh, Lazarevic and Radivojevic* I see good reason why it is not. Inability to return can and should be proved in the ordinary way, on the balance of probabilities.

79. There are, as Miss Giovannetti submitted, good reasons other than the wording of the Convention for this conclusion. Most importantly is the nature of the risk. If a person is returned when there is a real risk of persecutory ill treatment on his return, that risk may eventuate with commensurately serious consequences. To require a person here to take reasonable steps to apply for a passport or travel document, or to establish her nationality, involves no risk of harm at all. I take into account that there may be cases in which the application to the foreign embassy may put relatives or friends who are in the country of origin at risk of harm. If there is a real risk that they will suffer harm as a result of such an application, it would not be reasonable for the person claiming asylum to have to make it. The present is not such a case.

80. Secondly, the application of a “real risk” test leads to absurdity. It would mean that a person could establish that he could not return to his country of origin by showing that a significant number of persons in a similar position had been refused a travel document, even if the majority had obtained one and been able to return without fear of ill treatment.

81. The third reason why the “real risk” test is inappropriate is that it is easy for the facts in issue to be proved. The person claiming asylum can give evidence of her application to her embassy or consulate, including any application made in person and of the refusal or other response (or lack of it) of her embassy. Her solicitors can write to the embassy on her behalf and produce the correspondence. By contrast, it may be difficult for a person here to prove what is happening in her country of origin, let alone what may happen to her in the future if she returns.

82. The fourth reason is that if leave to remain is refused on the ground that the applicant can and should obtain her foreign passport and recognition of her nationality, and it turns out that she cannot, she can make a fresh claim based on the refusal.

83. Lastly, 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, or refuses or fails to take reasonable steps to obtain recognition and evidence of her nationality.

84. I agree that the Tribunal erred in its formulation of the test to be applied to the treatment of the Appellant by the Ethiopian authorities on her return. However, given the concession that if she returned she would not face ill treatment, and in the absence of evidence that she had been refused or had been unable to obtain a travel document or otherwise been refused recognition of her nationality, she could not succeed in her

appeal.

85. For the above reasons, which are in substance the same as those of Lord Justice Elias, I would dismiss MA's appeal. She has put forward a separate Article 8 claim that has not been the subject of a decision by the Secretary of State and is not before us. If she is refused a travel document by the Ethiopian embassy, or is unable to obtain one having taken reasonable steps to obtain it, she will have a fresh claim. But her present claim has been properly and fairly refused.

86. I assume that MA has established that she 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 had no well-founded fear of persecution if she returned, it is a pre-condition 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: see paragraph 68 of the determination of Mrs Adjudicator Woolley. But making this assumption, I reserve my 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. For the reasons I have set out above, whether MA will qualify as a refugee should be considered in due course having regard to the circumstances of that refusal, including the reasons for it and its consequences for her. I also bear in mind the evidence before the Tribunal of Nigel Beaumont of the Returns Group Documentation Unit of the Border and Immigration Agency, who said that the Ethiopian Embassy gave as a reason for refusing to accept a person as a national that he had said that he did not want to be removed or had not provided information. According to the fax referred to in paragraph 104 of the determination from Mr Ajeti, the Head of Operations of the International Organisation for Migration, there were cases of Ethiopians of Ethiopian/Eritrean parentage who were not given travel documents to return to Ethiopia because they said at interview with Embassy officials that they did not want to return to Ethiopia or were unable to provide supporting documentation concerning their right to Ethiopian citizenship. Such persons have not by reason of the refusal of a travel document suffered persecution.

Lord Justice Mummery:

87. I agree with both judgments. The appeal is dismissed.