C/2002/1285

Neutral Citation Number: [2002] EWCA Civ 1358

IN THE SUPREME COURT OF JUDICATURE

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE IMMIGRATION APPEAL TRIBUNAL

Royal Courts of Justice

Strand

London WC2

Date: Friday, 6th September 2002

B e f o r e:

LORD JUSTICE BROOKE

LORD JUSTICE TUCKEY

- - - - - -

ZAID TECLE

Applicant

- v -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- - - - - -

(Computer Aided Transcript of the Palantype Notes of

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Official Shorthand Writers to the Court)

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NICHOLA BRAGANZA (Instructed by Ziades Solicitors, Brixton Road, SW9 8EN) appeared on behalf of the Applicant.

MISS J ANDERSON (Instructed by Treasury Solicitor, Queen Anne's Chambers, London SW1H 1JS) appeared on behalf of the Respondent.

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J U D G M E N T

1) LORD JUSTICE BROOKE: This is an application by Zaid Tecle for an extension of time for appeal and for permission to appeal against a determination by the Immigration Appeal Tribunal on 11th March 2002 whereby it refused her appeal against a decision from an adjudicator on 23rd September 2001 who had refused her appeal against a decision of the Secretary of State on 12th May 2001 refusing her application for asylum.

2) The appellant was born in Asmara, in Eritrea, in August 1976. Her father was Eritrean and her mother Ethiopian. Eritrea was at that time a province of Ethiopia. Her father joined the Eritrean Liberation Front in 1977 and fought for it, but he eventually surrendered to the Ethiopian Government in 1981, and thereafter continued his business career in Eritrea.

3) It appears that there were two parties in Eritrea concerned with obtaining independence, the Eritrean Liberation Front ("the ELF"), and the Eritrean Peoples Liberation Front ("the EPLF"), who fought each other in addition to fighting against the Ethiopians for independence.

4) In 1991 the EPLF entered Asmara and in that year Eritrea became de facto an independent state. Later that year her father was arrested and he has not been heard of since. Her paternal uncle was deported to Ethiopia. The adjudicator found that the appellant and her mother were not troubled by the authorities during the next three years, during which the appellant finished her education. Although the appellant spoke of disapproval and abuse from neighbours and school teachers, the adjudicator found that she and her mother left for Addis Ababa in 1994 because her maternal uncle invited them to live with him. The adjudicator declined to find that the appellant's experiences in these years amounted to persecution.

5) In 1993, following a referendum supervised by the United Nations, Eritrea became an independent state de jure, with its own constitution.

6) In 1998 war broke out between Eritrea and Ethiopia. The appellant was arrested by the Ethiopian authorities on several occasions. She then went into hiding, and with the help of her uncle she moved to Kenya. She arrived in this country on 20th May 2000 and applied for asylum on arrival. She maintains that she would be persecuted if she were to be returned to Eritrea. She does not have an Eritrean passport and she maintains that she is stateless and would have difficulty in obtaining Eritrean citizenship.

7) Following the refusal of her asylum application by the Secretary of State she appealed. In his determination the adjudicator rejected certain parts of her evidence which related to her treatment by the authorities in Ethiopia before her departure from that country.

8) He rejected her claim that she would have a well-founded fear of persecution in Eritrea based on her mixed ethnicity. He said she qualified for nationality because of her father's Eritrean origins. She spoke the language and was educated there. Failure to participate in the referendum in 1993 (when she was too young to do so) and failure to subscribe to the war effort subsequently were not factors to disqualify her from the nationality to which she was entitled, as the experiences of thousands of returning Eritreans deported from Ethiopia since 1998 proved. In this respect the adjudicator appears to have relied on a letter from the British Embassy in Addis Ababa which was in front of him. This indicated that, following the cessation of hostilities between Ethiopia and Eritrea, there was in progress a vast movement of people displaced by the war and social conditions, and that only twelve of those leaving Ethiopia to reassume Eritrean nationality and residence had been unable to prove their eritrean origins satisfactorily. The letter went on to say that there were no preconditions attached to Eritrean nationality. In particular, participation or

otherwise in the referendum 1993 would have no bearing on any nationality decision.

9) When the matter came before the Immigration Appeal Tribunal it appeared that the appellant had made no attempt to contact the Eritrean Embassy in London with a view to obtaining Eritrean citizenship, notwithstanding the evidence from the British Embassy in Addis Ababa which had been before the adjudicator. Instead, reliance was placed on her behalf on the report written by Professor Gilkes, who has studied the politics of the Horn of Africa since 1964 and has written two books about various aspects of the politics of Ethiopia, Somalia and Eritrea. This report was written for a client of the Refugee Legal Centre in October 1999. In September 2000 Professor Gilkes said in a short follow-up letter that to the best of his current knowledge the situation in Ethiopia and Eritrea, and their laws and practice on citizenship and military service had not changed significantly since June 1999.

10) The gist of Professor Gilkes' two reports, so far as they related to Eritrea, was to the effect that since 1993 by Article 3 of the new Constitution of Eritrea any person born of an Eritrean father or mother qualified for Eritrean citizenship by birth. The Constitution provided, however, that details concerning citizenship would be regulated by law, and Professor Gilkes said that the relevant regulations, not yet promulgated, appeared to include limitations already incorporated in the earlier National Proclamation 1992, which was issued during the two years of Eritrean de facto independence. This proclamation allowed for the removal of citizenship rights from those who collaborated with the previous Ethiopian regime (and any other foreign powers) or from those who violated Eritrean rules or norms. These norms had not been legally specified and appeared to be at the discretion of the authorities. Anyone applying for naturalisation had to be cleared of suspicion of involvement in “anti-people” activities.

11) Professor Gilkes added that these wide-ranging citizenship clauses had been supplemented by additional critera, which included a pledge of loyalty to the current laws of Eritrea as well as the need to provide proof of the ethnic origin of parents, including witnesses or sworn statements where appropriate. Applicants for passports were expected to show that they had paid various obligations, including “voluntary” payments demanded during the independence struggle. These included a 2% tax on earnings charged on those overseas. Taking part in an independence referendum in April 1993, when a referendum ID card had been issued, had been identified as an important test of loyalty to the new Eritrean state. If someone was under age at that time, a failure to comply with this criterion would be unlikely to be held against her.

12) After independence in 1993 up to half a million people born in Eritrea were able to live and work freely in Ethiopia. However, the war broke out in 1998 and this war lasted until 2000. During the war thousands of people born of Eritrean parents were deported from Ethiopia and sought citizenship in Eritrea.

13) The United States Department of State Country Report on Human Rights Practices in Eritrea for the year 2000 recorded that people of Eritrean citizenship generally have the right to return, although they have to show proof that they have paid a 2% tax on their annual income to the Government of Eritrea while living abroad in order to receive Government services on their return to the country. Instances in which citizens living abroad ran foul of the law, or contracted a serious contagious disease, or were declared ineligible for asylum by other governments, were considered on a case by case basis.

14) That report showed that after the outbreak of war in 1998 as many as 75,000 Eritreans, or Ethiopians of Eritrean origin were deported from Ethiopia. They would be given documents valid

for six months which identified them as deportees, and if during that time deportees could find three Eritrean witnesses willing to testify to their Eritrean ties, the Government issued them with documentation of Eritrean nationality. Special provision was made for a very small minority of deportees who could not demonstrate Eritrean ties. They were allowed to stay in the country with special documentation.

15) The Assessment of Eritrea by the Country Information and Policy Unit published in April 2001 dealt with these matters much more briefly. In paragraph 5.6(2) it said quite simply that the rules governing eligibility for Eritrean nationality were contained in the 1992 Nationality Proclamation to which Professor Gilkes referred. People were Eritrean by birth if they were born in Eritrea and if their father was of Eritrean origin.

16) That was the material before the Immigration Appeal Tribunal. They had material which related to the war period. They also had the adjudicator's reference to the position after the war in July 2001, when what was required was evidence to prove Eritrean origin satisfactorily. In other words there were no pre-conditions attached to Eritrean nationality.

17) The Tribunal also had access to two earlier decisions of the Tribunal, one in Samuel and the other in Hagos, which dealt with applicants comparable to that of the present appellant and made it clear that the onus of proof was on the appellant to show that she was stateless or not entitled, or not likely, to receive appropriate documentation to evidence her Eritrean nationality.

18) The Immigration Appeal Tribunal on this point concluded that if the appellant maintained she was not entitled to Eritrean citizenship and is stateless, the onus was on her to establish that fact. They said:

> "On the basis of the evidence before us we do not consider that she has discharged that burden. We find she is not stateless and is entitled to Eritrean citizenship. The position might have been somewhat different if she had attended the Embassy in London and applied for citizenship and been refused, the reasons for refusal having been given to her by the Embassy."

19) It appears that after the hearing the appellant went to the Embassy on a couple of occasions and she says she was told things by the people she saw at the Embassy which made it clear that she would not get Eritrean nationality. She relied on those matters when she sought permission to appeal to this court from the Immigration Appeal Tribunal. The Immigration Appeal Tribunal refused permission to appeal, saying, extremely briefly, that the grounds raised no arguable points of law.

20) Mr Braganza maintains that the Tribunal ought to have decided to reopen the case under its powers under rule 27 once it saw this new evidence. Miss Anderson, who appears for the Secretary of State, said that, in any event, this was not what rule 27 was all about. Rule 27 gave the Immigration Appeal Tribunal the chance to decide whether there were arguable grounds of appeal arising from its decision which were fit for argument in the Court of Appeal. It also gave it the opportunity to have another look at the matter itself to see if it was persuaded that there were arguable grounds rather than delay while the matter came up to this court. Miss Anderson says that, in any event, given that new evidence is being relied on, or is sought to be relied on, the Secretary of State should equally be entitled to rely on a letter from the Embassy of the State of Eritrea in London, written as recently as 29th August 2002, which states:

> "1.A person who was born in Eritrea with an Eritrean father WOULD BE ELIGIBLE for Eritrean nationality.
>
> 2.The political views of 3 witnesses are NOT RELEVANT to establishing the nationality of the applicant.
>
> 3. The political views of the applicant for nationality are NOT RELEVANT to establishing eligibility for nationality and obtaining an Eritrean passport.
>
> 4. The voting in the 1993 Referendum is NOT A NECESSARY PRECONDITION to establishing nationality.
>
> 5.Paying a 2% tax on nationals overseas is NOT A PRECONDITION to establishing eligibility for Eritrean nationality and obtaining a passport.
>
> 6. Claiming refugee status overseas DOES NOT PRECLUDE ELIGIBILITY for Eritrean nationality or obtaining an Eritrean passport.
>
> 7.All application forms are filled in person by the applicant at the Embassy's consular section. No application forms out of the standard provided by the Embassy are accepted."

21) From that it appears that what the British Embassy in Addis Ababa reported last year relating to the post-war period is now being confirmed by the Eritrean Embassy in London. What is required is the signature of three witnesses who know the applicant and can testify that she was in fact born in Eritrea with an Eritrean father. Whatever might have been the position during the unsettled period before the war, or during the war, there is now no requirement that the political views of the three witnesses should be looked at. It has got to be three witnesses of appropriate standing who can simply testify that the appellant is who she says she is.

22) Even if there was not this new evidence, in my judgment the proposed appeal has no real prospect of success in this court. In my judgment the material which was before the Tribunal was quite different from the material which was before a special adjudicator in the case of Tewelde (Crown Office transcript 18th May 2000) where Sullivan J was critical of the Immigration Appeal Tribunal for not giving permission to appeal to it on the special facts of that case, which were very different from the present case. I remind myself that in Koller [2001] EWCA Civ 1267 this court drew attention to the fact that the Immigration Appeal Tribunal was a specialist tribunal, and that although the strict rule set out by Hale LJ in Cooke v Secretary of State Social Security (now reported in the All England Reports) would not be followed, properly reasoned, well-structured judgments of the IAT will normally mark the end of the road unless there is some uncertainty about the applicable law. It made it clear that this court will be reluctant to permit a second appeal if the IAT sets out the relevant principle of law correctly and sets out the facts clearly before applying the law to the facts.

23) In my judgment, given the material from the British Embassy which was before the adjudicator and the Tribunal in this case, the Tribunal was entitled, having regard to that and having regard to the CIPU report, to take an adverse view of the fact that the appellant, on whom the burden of proof lay, had not contacted the Eritrean Embassy in London and made an application, supported by the appropriate witnesses, for citizenship.

24) In my judgment this application raises no reasonable prospect of success. I would grant an

extension of time and dismiss the application.

25) LORD JUSTICE TUCKEY: I agree.

Order: Application dismissed. Detailed assessment and public funding certificate of the Applicant's costs.