Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/03859/2019

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre	**Decision & Reasons Promulgated**
On 19 December 2019	**On 10 January 2020**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

C B S
(ANONYMITY DIRECTION MADE)
Respondent

Representation:

For the Appellant: Ms S Rushforth, Home Office Presenting Officer
For the Respondent: Ms A Harvey instructed by Duncan Lewis & Co Solicitors

DECISION AND REASONS

Introduction

1. This appeal is subject to an anonymity order made by the First-tier Tribunal pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. Neither party invited me to rescind the order and I continue it pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

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2. Although this is an appeal by the Secretary of State, for convenience I will refer to the parties as they appeared before the First-tier Tribunal.

Background

3. The appellant was born in Mauritania on 15 July 1978. He claims to be a citizen of Mauritania.

4. The appellant arrived in the United Kingdom clandestinely on 5 December 2005. He initially made an asylum claim on 2 December 2008 having been served with notice of removal as an illegal entrant. His claim was refused on 16 March 2009 and his subsequent appeal was unsuccessful, as was a challenge in the High Court resulting in him becoming appeal rights exhausted on 21 October 2009.

5. Thereafter, in 2011 the appellant unsuccessfully made further submissions which were rejected under para 353 of the Immigration Rules (HC 395 as amended).

6. On 26 October 2016, the appellant was convicted on two counts of possessing/control of an identity document with intent at the Sheffield Crown Court for which he was sentenced to fourteen months and sixteen months respectively, those sentences to run concurrently.

7. On 17 November 2016, the appellant was served with a decision to deport him based upon those convictions. A deportation order was subsequently signed on 9 March 2017.

8. On 17 October 2017, the appellant again claimed asylum.

9. On 1 December 2017, a referral was made to the National Referral Mechanism on the basis that the appellant was a potential victim of trafficking and modern slavery. Following a positive Reasonable Grounds decision on 14 December 2017, on 6 February 2018 a Conclusive Grounds decision was made that he was a victim of trafficking.

10. The appellant was interviewed in relation to his asylum claim on 22 October 2018 and during 2018 and 2019 further written submissions were made to the Home Office.

11. On 3 April 2019, the Secretary of State refused the appellant's claims for asylum, humanitarian protection and on human rights grounds, in particular Art 8 of the ECHR.

12. The appellant appealed to the First-tier Tribunal. In a decision sent on 25 July 2019, Judge Page allowed the appellant's appeal.

13. The Secretary of State sought permission to appeal to the Upper Tribunal. On 19 August 2019, the First-tier Tribunal (Judge J K Swaney) granted the Secretary of State permission to appeal.

14. On 23 September 2019, the appellant filed a rule 24 response seeking to uphold Judge Page's decision.

15. At the hearing before me, the Secretary of State was represented by Ms Sian Rushforth and the appellant was represented by Ms Alison Harvey.

The Appellant's Claim

16. Before Judge Page, the appellant put his asylum claim on two bases.

17. First, he claimed that he was at risk on return to Mauritania from his former slave master from whom he has escaped (going to Senegal) when he was 12 years old. He claimed to fear reprisals from that individual because he stole a camel when he escaped to Senegal and had left his slave master's animals unattended.

18. Second, the appellant claimed that he is stateless, in that Mauritania would not recognise that he was a citizen of Mauritania. Relying upon expert evidence (from Dr Manby) the appellant claimed that, as a black African, the Mauritanian authorities discriminated against him by pursuing the Arabisation of the country and, in amending the nationality laws of Mauritania in 2010, had required him to establish his nationality through his father's status which discriminated against black African Mauritanians in their ability to establish their nationality.

The Judge's Decision

19. Judge Page rejected the first basis of the appellant's appeal. This basis had been rejected also in the appellant's earlier appeal in 2009. At [21] of his determination, Judge Page concluded that it was:

> "fanciful in the extreme to suggest that the appellant, who was a twelve-year old child when he abandoned some animals and rode off on a camel that was no[t] returned, would be remembered, or identified, now he is a 41 year old man who has not returned there since."

20. The appellant did not challenge that finding by seeking permission to appeal nor was it challenged in his rule 24 response drafted by Ms Harvey and she did not seek to challenge it in her oral submissions. I need, therefore, say no more about Judge Page's adverse finding on this aspect of the appellant's claim which stands.

21. As regards the second basis of his claim relating to his citizenship, Judge Page set out the issue before him at paras [13]–[14] as follows:

> "13. The essential issue in this appeal is whether the appellant would be recognised as a Mauritanian. If he he would not be recognised as such and granted any documents to confirm that, he is stateless. The Court of Appeal held in **EB (Ethiopia) v Secretary of State of State for the Home Department [2007] EWCA Civ 809** that the discriminatory removal of ID documents itself can constitute persecution within the meaning of the Refugee Convention if done by the state with the motive of making it difficult for a person in future to prove their nationality. The

Court of Appeal held that the ability to "freely to leave and freely to re-enter one's country" is a basic right and the inability "freely to leave and freely to re-enter one's country" on discriminatory grounds amounts to persecution. It follows that persons without nationality are entitled to be recognised as refugees if they can show that they have been arbitrarily deprived of their nationality for a discriminatory motive, linked to a Convention reason.

14. It is this appellant's case that he would be discriminated against as a black African by the Mauritanian authorities who are pursuing the Arabisation of that country, excluding black Africans where possible. This appellant is a black African."

22. In support of his claim that he had, in effect, been deprived of his nationality for a discriminatory motive, the appellant relied upon the expert evidence of Dr Bronwen Manby who is a Senior Fellow at the Centre for the Study of Human Rights at the LSE in London. In addition to her report dated 11 April 2018, Dr Manby gave oral evidence before the judge. Judge Page summarised her evidence at paras [16]–[17] as follows:

"16. Her premise was that the appellant has never held any Mauritanian identity document, including a birth certificate. The appellant has had two interviews during 2017 with the Mauritanian Embassy in London with a view to establishing his Mauritanian nationality and providing him with an emergency travel document. It has not been disputed by the respondent that the appellant has given the Mauritanian Embassy proper answers to all of the questions that he has been asked. However, the Mauritanian Embassy has not been able to confirm his nationality based on the information that the appellant has willingly provided. This raised the issue as to whether the appellant would ever be granted any documents to confirm his identity and nationality. In 2010, in advance of the new identification process which had been suspended from December 2010 when the Mauritanian government decided that the issue of all national identity documents will be put on hold as the national population register was replaced with a new biometric version, the government amended the nationality law.

17. The 2010 amendment produced (though did not remove) gender discrimination in nationality by descent, but at the same time removed all rights based on birth in Mauritania. The only exceptions that are now purely descent based was the existing protection for children of unknown parents. Dr Manby opined that the appellant would have to demonstrate that his father was a Mauritanian national. In the absence of proof of birth in the country, his father's status would be determinative in order for the appellant to obtain recognition of nationality himself. Given that the appellant has no detailed knowledge of his parents' status and unable to contact with them that he belongs to a minority ethnic group and does not speak Mauritanian Arabic, Dr Manby opines that it is "extremely unlikely" that the appellant would be able to establish recognition of nationality in Mauritania through the issue of a national identity card even if an emergency travel document were issued by the embassy. As the facts stand at the present time the Mauritanian authorities have not confirmed that they will issue such a document. Consequently, to take Dr Manby's report and conclusion shortly, it is her expert opinion that the appellant is a stateless person under the definition given in Art 1(1) of the 1954 Convention relating to the status of stateless persons, to which the UK is a party."

23. Judge Page reached his conclusions at [22]–[24] as follows:

> "22. As I have indicated above much has changed since; particularly the changes to the Mauritanian laws obtaining to nationality and recognition of nationality in 2010 as Dr Manby has detailed in her expert report. As I have said above on the authority of **EB** if the appellant has been made stateless as a result of discrimination against him as a black African in pursuance of the Arabisation of Mauritania, that is discrimination amounting to persecution and it would follow that if the appellant has shown this to the low standard of proof then he is a refugee. I am satisfied that Dr Manby's report and the evidence she gave before me is sufficient for the appellant to succeed in this appeal on that sole issue. I should say that Dr Manby added to her report in answer to questions from me at the end of the hearing to say that Mauritanian authorities had elections only last month and black Mauritanians were not allowed to vote in them. Dr Manby is a leading authority on Mauritania and is also a lawyer, though she no longer practises as a solicitor. I find myself in agreement with her opinion that the appellant would be unlikely to be granted any documents to show that he was a Mauritanian national as he is a black African that the Mauritanian authorities are discriminating against and seeking to exclude from their country under the policy of Arabisation.
>
> 23. I agree with the submission made on behalf of the Home Office by Ms Lewis that the appellant's claimed fear of his former slave master in Mauritania is more fanciful than real. I do not accept that the appellant would be identified upon return by anyone who would remember him as someone who fled on a camel leaving animals unattended when he was a child there. If he could be returned to Mauritania and admitted as a national of that country he would have no answer to the respondent's statutory duty to deport the appellant as a foreign criminal sentenced to more than twelve months' imprisonment under section 32(5) of the UK Borders Act 2007. The respondent has that statutory duty unless the appellant can show that he falls within one of the exceptions set out in section 33 of the Act.
>
> 24. The exception that the appellant contends for in this appeal is that he is a de facto refugee by reason of being stateless. I find on the balance of the evidence before me that the appellant has established that exception to the lower standard of proof. Upon that finding the appellant's appeal must be allowed. ...."

The Secretary of State's Grounds

24. The Secretary of State appealed on, essentially, two grounds.

25. First, in paras 2–3 of the grounds, the Secretary of State contended that the judge had based his finding that the appellant was de facto stateless on a mistake of fact:

> "2. It is respectfully submitted that the FTTJ has materially erred in law in coming to this conclusion and has erroneously assumed that the appellant has been twice interviewed by the Mauritanian embassy in 2017 [16], that has infected the rest of the determination.
>
> 3. Throughout 2017 the appellant was detained pending removal, there is no record of the appellant having had any interviews with the embassy only with immigration officials that includes bio data interviews."

26. Second, in paras 4 and 5 of the grounds, the judge had been wrong to find in the appellant's favour on the central issue of his statelessness in the absence of reasonable efforts made the appellant to the Mauritanian embassy to recognise his citizenship:

> "4. It is also of note that the appellant applied for asylum on 17/10/17 and as a consequence no further representations were made to the embassy from that date. Therefore the embassy has never refused to issue an emergency travel document (ETD) for the appellant and the ETD application of August 2017 is still outstanding, and given the passage of time will almost certainly have to be resubmitted.
>
> 5. It is therefore submitted that until confirmation is received from the embassy that it is unable to issue an ETD the appellant is not a de facto refugee by reason of being stateless [24]."

27. Whilst granting permission generally, Judge Swaney specifically concluded that the first ground was arguable.

Discussion

28. Turning first to that ground, on behalf of the appellant Ms Harvey accepted, both in her rule 24 response and oral submissions, that Judge Page had been mistaken when he stated in [16] that the appellant had attended two interviews at the Mauritanian Embassy in London in 2017. At that time, she accepted that he had been in detention and that the two interviews were with the Home Office in relation to seeking an Emergency Travel Document (ETD) from the Mauritanian Embassy. She indicated that the likely source of this error was in Dr Manby's report where she had wrongly stated in para 5(e) that he had been interviewed twice at the Mauritanian Embassy in 2017. I agree that that is the likely source of the mistake, perhaps understandably made, by Judge Page in setting out the background facts in [16] of his determination.

29. Ms Havey submitted that, nevertheless, this error was not material to Judge Page's conclusion. She submitted that he had relied upon Dr Manby's report which he had accepted in its entirety including her conclusion that the appellant was "extremely unlikely" under the amendments to the nationality law in effect from 2010 to be able to establish his nationality was Mauritanian even if an emergency travel document were issued to him. She submitted that Judge Page had been entitled to find, on the basis of that evidence at [22], that the appellant was, in effect, stateless and that that was an arbitrary deprivation of his nationality amounting to persecution and for a Convention reason.

30. I accept Ms Harvey's submission. It is plain from reading Dr Manby's report that her conclusion, that the appellant would be "extremely unlikely" to be recognised as a national of Mauritania because he would not have the relevant knowledge and documentation to establish it, was a conclusion reached by Dr Manby based upon her expertise in the citizenship law of Mauritania and its application. It did not, in any way, turn upon the fact that, albeit mistakenly, she believed that he had been

interviewed on two occasions by the Mauritanian Embassy and that the embassy had been unable to confirm his nationality. It is clear to me that Judge Page based his conclusion, in particular in [22], on Dr Manby's evidence to that effect.

31. In those circumstances, I reject the Secretary of State's first ground of appeal that the mistake transferred from Dr Manby's report to [16] of Judge Page's determination was a material error which made his finding in the appellant's favour unsustainable.

32. In relation to the second ground, Ms Rushforth relied upon paras 4 and 5 of the grounds and that, in the absence of reasonable efforts to have the Mauritanian Embassy recognise (or not) his citizenship, the appellant could not establish that he was de facto stateless.

33. During the course of submissions, I raised with the parties' representatives the Court of Appeal's decision in MA (Ethiopia) v SSHD [2009] EWCA Civ 289. That decision was not relied upon either before Judge Page (so far as I can tell) nor by the Secretary of State in the grounds of appeal. It does, however, have some resonance in the points made in paras 4 and 5 of the grounds. It raises the issue of whether an individual is able to establish that they are a de facto stateless unless the embassy has refused to recognise the individual as a citizen or issue them with an ETD. The essence of this point, perhaps finding a base in MA, is that in order for an appellant to establish that his claimed country of nationality will not recognise his citizenship (and thereby making him, in effect, stateless) he must do all that is reasonable to establish his citizenship, in particular by making approaches to the Embassy in the UK.

34. In MA, the Court of Appeal was concerned with an asylum claim by an Ethiopian of Eritrean origin. She claimed to be at risk if she were returned to Ethiopia. As part of that claim, the claimant said that the Ethiopian authorities would not allow her to return to Ethiopia, in particular they would not recognise her Ethiopian citizenship. She had unsuccessfully approached the Ethiopian Embassy in the UK but, as the Court of Appeal pointed out, that no doubt was because she claimed to be Eritrean. However, in the course of their judgments both Elias LJ and Stanley Burnton LJ referred to the importance of an individual making a reasonable attempt to establish their nationality, including by approaching the relevant Embassy in the UK. At [49]–[53], Elias LJ said this:

> "49. ... 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."

35. Then, at [54] referring to the approach that a Tribunal should adopt, Elias LJ added this:

"54. They ought not to have engaged on this inquiry without first establishing that the appellant had taken all reasonably practical steps to obtain authorisation to return."

36. At [55], Elias LJ concluded that the evidence did not establish in that case that reasonable practical steps had been taken:

> "55. ... 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."

37. In his judgment, Stanley Burnton LJ also touched upon this issue. At [77], dealing with the facts of the claimant's claim in MA, he said this:

> "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 obtain travel documents from the embassy here. I see no reason why the Appellant should not be required to take reasonable steps to do so."

38. At [79], Stanley Burnton LJ added:

> "79. ... 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."

39. Then, at [83] he concluded:

> "83. ... 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."

40. As I have said, MA was not directly relied upon as part of the Secretary of State's challenge to Judge Page's decision. It may, however, be seen as the source of the points raised in paras 4 and 5 of the grounds.

41. It does not seem to me that the Court of Appeal was laying down a 'hard and fast' rule that in order for a person to establish that they are either not a citizen of a particular country or that their citizenship will not be recognised by that country, it is essential in every case to seek to assert

the nationality claimed by approaching that country's authorities, in particular their embassy in the UK. Of course, it does provide a useful 'rule of thumb' as it will often be the reasonable, practical and obvious way to establish (or not) the core issue of the individual's claim. It would avoid the need for speculation on the authorities' response to the individual's claim to be a citizen.

42. Here, unlike in MA, there were a number of factors which the judge (through the evidence of Dr Manby) was fully entitled to take into account as establishing that the appellant would, in practice, not obtain recognition of his Mauritanian citizenship.

43. First, there was the expert opinion of Dr Manby which was based upon first, the requirements of Mauritanian nationality law since 2010 and secondly, the uncontested fact that the appellant lacks the relevant knowledge and documentation to establish his claimed Mauritian citizenship. Dr Manby is quite clear about that in her report at para 14 which the judge accepted. Dr Manby was not engaged in unwarranted speculation. Second, it was accepted before the judge by the respondent that the appellant had provided to the Home Office, as part of the ETD documentation process, all the material he could reasonably, or otherwise, be expected to provide. He had fully co-operated with the Home Office. He had, in my judgment, clearly done all that he reasonably could to establish his citizenship. That contrasts strongly with the position in MA where the appellant had approached the Ethiopian Embassy but had asserted that she was Eritrean. The Court of Appeal was plainly antithetical to an individual succeeding who had not co-operated or who was not acting *bona fide*. Thirdly, and this is connected to the second reason, the ETD process involved the Home Office (as it was explained to me at the hearing) passing on the information to the Mauritanian Embassy. The application was first made in 2011 and the most recent application had been outstanding since 31 January 2017. The appellant's two interviews with the Home Office took place in 2017, the second in September 2017. Although, and again I was told, the Home Office did not follow up the application for an ETD after October 2017 when the appellant claimed asylum, the Mauritanian Embassy had not replied by that time and, even if not chased up, they could have replied subsequently.

44. There is further evidence which Ms Rushforth sought to admit under rule 15(2A) if the decision was to be remade in respect of the ETD process and its outcome. However, that evidence, which she did not rely on, nor could she do so at the error of law stage, was not before Judge Page.

45. Fourthly, it is, no doubt, a matter of common sense that the appellant's history is likely to place him at a significant disadvantage in producing documentation. It is accepted that he was a child slave from the age of 8, when he lost contact with his family, until he escaped to Senegal. He has no knowledge of his parents' whereabouts or means of establishing their nationality, in particular his father's nationality.

46. It is no answer to the conclusion that the appellant has behaved reasonably in seeking to establish his nationality, for the Secretary of State to rely upon the fact that he was released from detention in January 2018 and has therefore had eighteen months in which he could have approached the embassy. He obviously could not do so prior to that when he was in prison or detention. The fact of the matter is that here, unlike in MA the appellant has co-operated with the Home Office and provided them with all the information and documentation that he reasonably could and that has not resulted in the Mauritanian Embassy issuing him with an ETD by the time that Judge Page reached his decision in July 2019.

47. Consequently, to the extent that the MA issue is encompassed in paras 4 and 5 of the Secretary of State's grounds, I do not accept that an error of law is established. The judge was entitled to rely upon Dr Manby's report and the appellant's circumstances to conclude that he had established that he was stateless, in the sense that the Mauritanian authorities would not recognise his citizenship.

48. The Secretary of State has not sought to challenge Judge Page's decision to allow the appeal if that finding is sustainable. It has not been suggested that he was not entitled to find that, if the appellant's citizenship was not recognised, the appellant had established that the consequence was that he would suffer persecution as a result of a Convention reason. Judge Page made findings in favour of the appellant on those matters by reference to the expert report, and oral evidence, of Dr Manby which included the background to the amendment to the nationality law and its impact upon black Africans such as the appellant (see, in particular [22] of the determination).

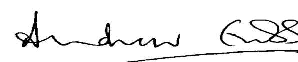
49. For all these reasons, therefore, Judge Page did not materially err in law in allowing the appellant's appeal on asylum grounds.

Decision

50. The decision of the First-tier Tribunal to allow the appellant's appeal on asylum grounds did not involve the making of an error of law and that decision stands.

51. Accordingly, the Secretary of State's appeal to the Upper Tribunal is dismissed.

Signed



A Grubb
Judge of the Upper Tribunal

6, January 2020