

**THE HIGH COURT
JUDICIAL REVIEW**

2008 804 JR

BETWEEN

A. M. S. J.

APPLICANT

AND

THE REFUGEE APPEALS TRIBUNAL (ELIZABETH O'BRIEN)

RESPONDENTS

JUDGMENT OF MS. JUSTICE M. H. CLARK, delivered on the 19th day of January, 2010.

1. The applicant claims to be a member of a minority clan from Somalia. This is his application for leave to apply for judicial review of the decision of the Refugee Appeals Tribunal (RAT), dated the 23rd June, 2008, to affirm the earlier recommendation of the Refugee Applications Commissioner that he should not be granted a declaration of refugee status. The hearing took place at the Kings Inns in Court No. 1 on the 13th November, 2009. Mr. David O'Neill B.L. appeared for the applicant and Mr. Anthony Moore B.L. appeared for the respondent.

Background

2. The applicant claims that he was born in 1950 and is a member of the Ashraf minority clan who are associated with the Benadiri minority clan from Somalia. He claims to have arrived in Ireland in March, 2005 when he made an application for asylum claiming to fear persecution at the hands of the majority Hawiye clan militia. He outlined his circumstances as a person who together with his wife and nine children had been previously mal-treated by the Hawiye. He said he fled Somalia after his release from captivity in early 2005 and came to Ireland.

3. The Refugee Applications Commissioner interviewed the applicant in August, 2005 and made a negative recommendation on the basis of a number of negative credibility findings. Doubts were expressed in the s. 13 report about his membership of the Ashraf clan. The applicant's solicitors, James Watters & Co.¹ lodged a Notice of Appeal to the RAT on his behalf appended to which were grounds of appeal and extracts from these country of origin information (COI) reports:

? Oxford House *Field research project on minorities in Somalia* (March, 2005)

? U.K. Home Office *Country Report – Somalia* (April, 2005)

? U.K. Immigration and Nationality Directorate report on Somalia (undated)

? *Report on minority groups on Somalia* (this appears to be an extract from section 7.1 of a report prepared by a *Joint British, Danish and Dutch fact-finding mission to Nairobi, Kenya*, 2001).

4. An oral hearing took place in February, 2008 at which the applicant was legally represented; a note of the hearing was kept by the applicant's solicitors and is before the Court. It records that the applicant stated that the majority Hawiye clan would kill him if they knew he came from outside. The Tribunal Member put it to him that since he left Somalia, the Hawiye clan had been having troubles of their own in that they were now targeted by the Darod. The applicant disagreed saying that when the majority tribes were fighting, the Benadiri were in the middle, vulnerable in every way. There seems to have been a measure of agreement that the focus of the Hawiye now was the Darod. At the end of the hearing the Tribunal Member indicated that she intended to rely on a U.K. Home Office *Report of Information Gathering Mission (May, 2007)* and *Operational Guidance Note for Somalia* (12th November, 2007)². She summarised their effect as being that the Darod were now in power and were targeting the Hawiye and as a result, minority clans were not receiving the same attention as they previously had.

The RAT Decision

5. A negative decision issued from the RAT on the 23rd June, 2008. That decision is challenged in these proceedings. The Tribunal Member expressed some difficulties with aspects of the applicant's account but for fear of being judicially reviewed she reluctantly accepted his account at face value. She summarised the applicant's account of his fairly appalling past experiences in Somalia at the hands of Hawiye clan members, many of which were in the distant past, and his evidence and submissions at the oral hearing. She then proceeded to consider his case from the point of view of future risk. She interpreted the COI which was before her as indicating a change of circumstances in Somalia in that there was no evidence that the Ashraf were being targeted in the struggle between the Darod and the Hawiye and concluded that the applicant therefore did not have a well-founded fear on an objective basis. She stated:-

"I put to the Applicant the general conclusion of the country of origin information that I reviewed, namely that the Darod clan are now effectively in power and that they have turned their attentions on the Hawiye, indeed COI points out that most IDPs are now from the Hawiye clan. TFG military actions (the TFG being compromised predominantly of the Darod) have deliberately targeted the Hawiye clans in general, and specifically the Hawiye sub-clans of the Habar Gidir Ayr, Habar Gidir Suleyman and Duduble. I did point out to the Applicant that the country of origin information points to a targeting of the Hawiye clans by the Darod, and that accordingly it was difficult to understand how the Hawiye clans would be in a position to exert the same influence that they had previously, in particular insofar as targeting minority clans would be concerned. The Applicant however claims that he would be caught up in the crossfire. It is indeed acknowledged in the country of origin information (up-to-date) that many minority clans are being caught up in the crossfire, however this is in the context of everyone else being caught up in the crossfire of the fighting that is occurring between the Darod and the Hawiye."

6. The Tribunal Member set out in full paragraphs 8.01 to 8.08 of the *Report on Information Gathering Mission (May, 2007)* under the chapter Security situation which related to an interview conducted in April, 2007 with a Swedish researcher of Somali descent. Those paragraphs detailed a situation of chaos in Somalia but did not address the position of minority groups. From those extracts the Tribunal Member drew this conclusion:-

"As is apparent from the above, the situation is one of chaos, however there is no evidence to suggest that members of the Applicant's clan are being targeted, indeed the situation now is that the predominantly Darod TFG members are exacting revenge on the Hawiye and that clans which were normally hostile to each other have joined forces against the common enemy – the Ethiopians and the Darods. While anyone being returned to Somalia will most likely encounter difficulties simply because of the current situation, that is not to say that members of the Applicant's clan are disproportionately affected by the hostilities so as to warrant a conclusion that there is a reasonable likelihood that an Asharaf will face persecution because they are Asharaf, the current country of origin information does not support such a conclusion. While that may have been the case when the Applicant left his country that is not the case now."

7. It is those findings which are the subject of this challenge to the applicant's failed appeal.

8. The applicant commenced the within proceedings by very fairly stating that the only issue to be determined was the question of whether the Tribunal Member erred in her interpretation of the COI and in particular the U.K. Home Office COI Report on Somalia. His complaints may be summarised as follows:

- a. The COI did not support the Tribunal Member's conclusion that the applicant would not be at risk of persecution in the future; and
- b. The Tribunal Member failed to take account of the past persecution suffered by the applicant.

9. Later as a subsidiary matter Mr O'Neill B.L., counsel for the applicant, argued that the applicant should not be refused refugee status simply because he has the alternative option of seeking subsidiary protection in the future particularly as, he submitted, the parameters of subsidiary protection will not necessarily extend to the situation of a person such as the applicant.

(a) Assessment of COI

10. Mr O'Neill stated that he had no complaint with the Tribunal Member's finding that as the Hawiye were now subject to persecution themselves they were unlikely to be a cause of problems for the applicant's minority clan. He argued that contrary to what was said by the Tribunal Member, the COI that was before her indicates that despite developments in fighting between the clans, the minority Ashraf clan remain at a particular and individual risk of persecution in Mogadishu because they are Ashraf and if caught in cross-fire, the applicant would be at a disadvantage and therefore less likely to be accepted into safe areas occupied by majority clans in that he might not the same access to medical treatment or hospitals. Minority groups including the Benadiri are still targeted *qua* minorities. Mr O'Neill opened paragraphs 20.10 to 20.15 and 20.29 of the U.K. Home Office *COI Report - Somalia* of the 12th November, 2007 and selected passages from the lengthy decision of the U.K. Asylum and Immigration Tribunal (A.I.T.) in *H.H. & Others (Mogadishu: armed conflict: risk)* [2008] UKAIT 00022. Those sources, he argued, demonstrate that the applicant *would* face a risk of persecution because he is a minority clan member and the Tribunal Member's conclusion is therefore not supported on a rational and cogent basis.

The Respondents' Submissions

11. Mr Moore B.L., counsel for the respondents argued that the Tribunal Member's findings that COI shows that people in the position of the applicant are not being targeted and that there is no forward-looking fear were rational findings on the basis of the evidence. The difficulties that the applicant claims he would face as a member of a minority clan (e.g. vulnerability and less access to resources such as medical treatment or hospitals) are far too remote to amount to persecution. Difficulties such as the possibility of being caught up in crossfire are speculative and hypothetical and do not support the contention that the applicant would be targeted as a minority clan member. There is no evidence that the applicant would have no access to medical treatment or hospitals and in fact, the COI indicates that the Red Crescent provides a level of healthcare for all. In any event, such difficulties would not amount to sufficiently severe human rights violations as to amount to an "act of persecution" within the meaning of Regulation 9 of the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No. 518 of 2006).

12. The COI indicates that the difficulties that members of the Ashraf minority clan might face are no different to the difficulties that other clans, majority or minority, might face. Mr Moore relied on paragraphs 20.14, 20.15 and 20.18 of the U.K. Home Office *COI Report – Somalia*. He argued that the applicant's asserted fear of persecution was at the hands of the Hawiye clan and that fear was disposed of by reason of a change of circumstances in Somalia which saw the Hawiye being targeted by the Darod. Thus minority clans are no longer at risk from the majority clans. Everyone was under threat, but this is not sufficient to entitle the applicant to refugee status. Mr Moore relied on the decision of the House of Lords in *Adan v. Secretary of State for the Home Department* [1999] 1 A.C. 293, where the applicant was a member of a sub-clan in Somalia. The House of Lords held that the applicant was at no greater risk of ill-treatment by reason of his clan or sub-clan membership than others who were also at risk in the war, and on that basis that killing and torture incidental to a clan and sub-clan based civil war did not give rise to a well-founded fear of being "persecuted" within the meaning of the Refugee Convention.

13. Mr Moore argued that in these circumstances an applicant might more appropriately instead seek subsidiary protection.

THE COURT'S ASSESSMENT

14. This being an application to which s. 5(2) of the Illegal Immigrants (Trafficking) Act 2000 applies, the applicant must show substantial grounds for the contention that the RAT decision ought to be quashed. It must be recalled that the case before this Court involves an assessment of the fear of persecution asserted by the applicant in his appeal documents, his oral evidence and his claim at the earlier stages of his asylum claim. That claim was that he feared persecution at the hands of the Hawiye clan in Mogadishu because of mal-treatment by them in the past and because they generally mistreated members of his clan. The Tribunal Member relied on COI being the U.K. Home Office COI Report on Somalia (12th November, 2007) and a U.K. Home Office *Report of Information Gathering Mission* (17th May, 2007). Having considered those reports it is clear that the situation in Somalia is evolving and had changed since the applicant left his country in that the Islamic front supported by the Hawiye had fallen, Ethiopian troops were assisting the unpopular transitional government supported by the Darod and in Mogadishu the main conflict seemed to be between government forces and the Islamist supporters that is, the Darod and Hawiye.

15. The Tribunal Member quoted from extracts in the U.K. Home Office *COI Report* and there is no dispute that she quoted correctly. However it is her conclusions and her failure to consider the position of civilians caught up in the crossfire who were minority clan members which are contested.

16. The Court was referred to the U.K. Home Office *COI Report* of the 12th November, 2007 in support of the contention that minority clan members in Somalia are in a more vulnerable position than majority clan members even though everyone is at threat in the civil war. That view has been supported in the U.K. AIT decision in *H.H. & Others (Mogadishu: armed conflict: risk)* [2008] UKAIT 00022 which was opened to this Court and which in turn relied on the House of Lords in *Adan v. Secretary of State for the Home Department* [1999] 1 A.C. 293. Although the position of the applicant in *Adan* was quite different to that asserted in this case, it is nevertheless of relevance that the House of Lords accepted as a principle in refugee law that "*victims of war and conflict are not refugees unless they are subject to differential victimisation*" on the basis of their civil or political status and that refugee status is generally refused to a person fleeing civil war if the risk that he / she fears was roughly equivalent for persons of all beliefs, opinions and ethnicities.

17. Applying those principles to this case the Court accepts that in view of the contents of Chapter 20 in the U.K. Home Office *COI Report* of the 12th November, 2007 it is arguable that the Tribunal Member should have addressed the question of whether the applicant would be subject to a differential victimisation and thus at a heightened risk of persecution or ill-treatment in Somalia because of his membership of a minority clan. The RAT decision does not disclose any consideration of this issue. I will therefore grant the applicant leave on this ground.

18. The applicant's second argument is that when assessing whether he would be at risk of persecution in the future, the Tribunal Member ought to have taken account of the applicant's experiences of persecution in the past. While the Court fully accepts that past persecution may be an indicator of a risk of persecution in the future, in the specific circumstances of this case the persecution suffered in the past is not of any relevance to the assessment of his future risk. As was held by the House of Lords in *Adan* (cited above), at p. 308:-

"a test which required one to look at historic fear, and then ask whether that historic fear which, ex hypothesi, no longer exists is nevertheless the cause of the asylum-seeker being presently outside his country is a test which would not be easy to apply in practice. This is not to say that historic fear may not be relevant. It may well provide evidence to establish present fear. But it is the existence, or otherwise, of present fear which is determinative."

19. Thus the assessment of whether the applicant will be at risk of persecution if returned to his or her country of origin is undertaken by means of a forward-looking test. Taken at face value, and ignoring for the present the fact that doubts were expressed as to his credibility by both the Commissioner and the Tribunal Member, the applicant's evidence was that he suffered 17 years of persecutory treatment at the hands of the majority Hawiye clan. The undisputed COI that was before the Tribunal Member when she was coming to her decision in 2008 was that the Hawiye were no longer in a position to target minorities because they had joined forces to fight against the Darod and the Ethiopians. Thus, the applicant would not face the same risk as he says he faced in the past if returned to Somalia. In the circumstances, the Court does not accept that the Tribunal Member erred by failing to attribute more weight to the applicant's past persecution. She outlined the evidence of his experiences in the past and applied a forward-looking test. The applicant's arguments on the second ground fail.

20. In the light of the foregoing, I am satisfied that the applicant has established substantial grounds in relation to the Tribunal Member's assessment of COI and accordingly, I propose to grant leave on the following ground:-

"Ms O'Brien failed to consider whether the civil war would have a differential impact on the applicant in his capacity as a minority clan member and whether that impact could amount to a risk of persecution within the meaning of s. 2 of the Refugee Act 1996."

1 Acting under the Legal Aid Board / Refugee Legal Service *Private Practitioner Scheme*

2 It transpires that instead of the O.G.N., she actually intended to rely on the U.K. Home Office *COI Report - Somalia* which was published on the same date as the O.G.N.