

**THE HIGH COURT  
JUDICIAL REVIEW**

**2008 372 JR**

**BETWEEN/**

**T.D.**

**APPELLANT**

**AND**

**REFUGEE APPEALS TRIBUNAL AND THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM**

**RESPONDENTS**

**JUDGMENT of Mr. Justice Cooke delivered on the 28th day of April, 2010.**

1. This is an application for leave to seek judicial review of a decision of the Refugee Appeals Tribunal dated 22nd January, 2008 in which the Tribunal Member (Michelle O’Gorman) affirmed a report and negative recommendation dated 28th April, 2007, which had been made under s. 13 of the Refugee Act 1996 (as amended) by the Refugee Applications Commissioner.

2. The applicant is a national of Eritrea who arrived in the State as an unaccompanied minor aged seventeen years in October 2006. She made an application for asylum at the beginning of January 2007. Her claim to asylum was based upon the mistreatment she alleged she had suffered in Eritrea in 2006 as a member of the Kale Hiwot religion. The negative recommendation of the Commissioner and the appeal decision of the Tribunal turn entirely on the issue of credibility. Although both decision makers accepted the unquestionable effect of extensive country of origin information as to the suppression of that church and the arrest and harassment of its members and the eventual confiscation of all of its properties, each came to the conclusion that the applicant was not personally credible in the particular account she gave of the events in the years 2002 to 2006 which led to her flight first to Khartoum in Sudan and from there to Ireland.

3. The application for judicial review seeks to challenge the basis upon which the conclusion as to lack of credibility in the appeal decision has been reached by the Tribunal member. The legal hurdle which faces such a challenge is well known and hardly needs repetition. This Court endeavoured to summarise some of the relevant principles in its judgment of 24th July 2009 in *I.R. v. MJELR*. The appraisal of the personal credibility of an asylum seeker is the function of the administrative decision makers. The determination as to whether a claim to a well founded fear of persecution is credible falls to be made under the Refugee Act 1996 by the administrative decision makers and not by the Court. The High Court on judicial review must not succumb to the temptation or fall into the trap of substituting its own view for that of the primary decision makers. On judicial review, the function and jurisdiction of the High Court is confined to ensuring that the process by which the determination is made is legally sound and not vitiated by any material error of law, infringement of any applicable statutory provision or of any principle of natural or constitutional justice. Any finding of lack of credibility must be based on correct facts, untainted by conjecture or speculation; and the reasons drawn from such facts must be cogent and bear a legitimate connection to the adverse finding.

4. Although the present application for leave is confined to seeking review of the decision of the Appeal Tribunal, it is relevant to consider first the approach taken to this issue by the authorised officer in the s. 13 report both because the report is confirmed by the appeal decision and because the Tribunal member places reliance upon the evidence derived from the s. 11 interview of the applicant which had been looked at in the report.

5. The applicant told how she had lived with her family in the village of Tukul about seven kilometres from Dekemhare which was about 40 kilometres from Asmara. She and her family were members of a pentecostalist church, the Kale Hiwot. She had attended its primary school in Dekemhare until 2003 and then went to Dekemhare secondary school until she left Eritrea in late 2006. She described how the church had been banned by the government in 2002 and the school she attended taken over although, following the takeover, it continued to operate as a school but without religion. From that point in 2003 they used to go to a house in the village belonging to the Gebru family where Mr. Gebru taught religion. In January 2006 her father was arrested while attending a big wedding. He was held in a camp and apparently tortured until released in August 2006. She said she and other children were arrested at the Gebru home in August 2006 and all the children were taken to the police station. Mr. Gebru was apparently not in the house when the police arrived. Thereafter her father arranged with Mr. Gebru to have her leave Eritrea and she was taken to Khartoum where, with an agent, she boarded an aeroplane which took them to Dublin stopping once en route. While some other passengers left the plane at the stopover she and the agent did not.

6. The authorised officer identified a number of specific points in that account as giving rise to doubts as to credibility:

(a) A search of country of origin information resources failed to disclose any record of the mass arrest said to have taken place at the large wedding in January 2006 although reports were found of similar mass arrests at another wedding associated with the Kale Hiwot church in 2005.

(b) Further consultation of country of origin information confirmed that the Eritrean government had indeed confiscated all property and assets of the Kale Hiwot church but in September 2006. The officer noted that the applicant had not been affected in her attendance of the school and said:

"While there are credible reports of Kale Hiwot and other Pentecostal church members being persecuted, I am not convinced that it is so in the case of the applicant, nor that she would be singled out should she return to her

country of origin.”

(c) The officer made a specific finding by reference to s. 11B of the 1996 Act to the effect that the applicant had not provided a full and true explanation of how she travelled to and arrived in the State. This is because an investigation of her account of the flight disclosed that there are no such direct flights between Khartoum and Dublin.

7. In essence, the Tribunal Member adopts a very similar approach to the issue of credibility. In particular, although it is mentioned at the very end of the decision, the Tribunal Member makes the same finding by reference to s. 11B (c) of the Act based upon the absence of any flights of the kind described between Khartoum and Dublin. In the earlier part of the “Analysis of the Applicant’s Claim”, in section 6 of the decision, the Tribunal Member identifies particular facets of the personal history as the basis for doubting credibility.

8. First, the evidence as to the mass arrest of those (including the applicant’s father) attending the large wedding is considered and the Tribunal Member says: “It is surprising that no reference can be found in country of origin information in relation to the mass arrest at a wedding or the arrest of a preacher at Dekemhare at a wedding in January 2006.”

9. Secondly, the applicant’s account of the takeover of the school by the government is referred to and the Tribunal Member says:

“During the appeal hearing the applicant said her school had been confiscated after the government banned the Kale Hiwot church. Country of origin information on file states the Eritrean government confiscated all property and physical assets of the Kale Hiwot church in September 2006 ... the applicant’s testimony in relation to the confiscation of her school does not accord with country of origin information.”

10. The applicant had given evidence of the circumstances in which she and the other children had been arrested at the Gebru house and taken to a police station before being later released. The Tribunal Member says: “It is difficult to believe that none of the children’s parents attended at the school to find out what the situation was regarding their children.”

11. Next, the Tribunal member finds a lack of credibility in the applicant’s description of how Mr. Gebru (who helped arrange her escape) did not apparently flee from Eritrea at the same time: “It is difficult to believe that Gebru would not have fled from Eritrea immediately after the children were arrested at his home as he would be of greater interest to the authorities.”

12. As already indicated, the challenge to the validity of the decision is based upon the proposition that this approach to the assessment of credibility is vitiated by irrationality, error of fact and a failure to take into account all relevant considerations.

13. Before addressing each of the four points raised in this manner, it is important to identify as a starting point the precise nature of the task which faced the Tribunal Member in this appeal. As already indicated, a very specific finding for the purpose of s. 11B had been made in the s. 13 report and this was not challenged in the appeal. Although that section sets out a list of various matters which the decision makers are required to have regard to in assessing credibility, it does not stipulate what the effect of making such a finding will be. It is clear, however, that the presence of such a finding in any given case is intended by the statute to put the decision maker on inquiry as to whether the asylum seeker is personally credible. Nevertheless, it is equally clear from the law that the mere existence of one or more such findings does not necessarily preclude the existence of a well founded fear of persecution for a Convention reason. A genuine refugee may well have cogent reason to lie about how they managed to leave a country of origin and travel to the place of refuge.

14. This finding having been made in the s. 13 report, the Tribunal Member was faced with the situation in which this element of untruth in the applicant’s personal story was undisputed at the outset of the hearing. Furthermore, no explanation appears to have been offered or attempted as to why it was necessary for the applicant to give that account of her travel when it was clearly untrue.

15. The second significant feature of this case at the outset of the hearing so far as concerned the Tribunal Member was, obviously, that extensive country of origin information undeniably showed that the Kale Hiwot church and its members had been harassed and suppressed over a period of years by deliberate action of the Eritrean authorities. Accordingly, if the applicant was indeed a member of that church, a clear basis existed for a valid claim to fear persecution upon that ground. The country of origin information confirmed that the assets and properties of the church had indeed been confiscated formally in September 2006 and various reports confirmed incidents of arrest of church members including pastors and even mass arrests taking place at weddings. In effect, therefore, the question facing the Tribunal Member at this appeal was whether the applicant was personally credible when she gave her account of the events happening to herself and her father or whether, given that she was known to have lied about how she travelled to the State and arrived here, she was someone who was carefully constructing a claim to refugee status around events apparently corroborated by country of origin information when, in reality, she herself had not been involved in them.

16. That, accordingly, was the issue which faced the Tribunal Member when determining whether the appeal was to succeed or the negative recommendation of the Commissioner was to be affirmed. In arriving at the conclusion on lack of credibility, the decision, as already indicated, relies upon three particular parts of the evidence:

(a) The absence of any confirmation of the account of mass arrest at the wedding in country of origin documentation;

(b) the discrepancy between the applicant’s evidence as to her continuing in her school following the confiscation and the information derived from country of origin documentation upon the formal confiscation of church property in September 2006; and

(c) the fact that Mr. Gebru had arranged the applicant’s flight from Ethiopia when she had been arrested in his house but did not apparently himself flee the country when he would have been of greater interest to the authorities.

17. The issue before the Court upon the present application, therefore, is whether a conclusion thus based upon an appraisal of the applicant’s evidence can be said, in terms of the usual test, to be fundamentally at variance with reason or common sense bearing in mind, of course, that the Tribunal Member has had the benefit of observing the applicant at the hearing and listening to her answers to questions. The Court must also be wary of falling into the mistake of regarding a finding as unsound because, when its basis is dissected, questions can be raised as to the reasonableness of individual steps by which it has been reached. What is at issue is the soundness of the overall appraisal that has been made of the asylum seeker’s personal credibility. That is not necessarily impugned by questioning separately isolated elements in the analysis exposed in the decision. It remains true, however, that the cumulative effect of a series of undoubted errors in the process of analysis leading to the conclusion may be sufficient to jeopardise the overall soundness of the decision.

18. It is convenient to examine first the arguments raised as regards the third of the facets of evidence above – the fact that Mr. Gebru did not also flee Eritrea – as it appears to be one of the central points in the section 6 analysis leading to the conclusion. The argument raised here is that the Tribunal Member has engaged in pure personal conjecture by relying on her own personal view of what Mr. Gebru ought to have done.

19. The Court cannot agree. Clearly, this evidence as to how the applicant herself came to be forced to flee from Eritrea is at the heart of her testimony. She was, in effect, saying that following the action taken by the authorities against the school, she and other children were forced to receive their religious education in Mr. Gebru's house and, as a result of the continuing suppression directed at the church, they were arrested there and taken to a police station. The children are later released and the Tribunal Member observes:

"It is difficult to believe that Gebru would not have fled from Eritrea immediately after the children were arrested at his home as he would be of greater interest to the authorities."

20. In the Court's judgment that does not involve any element of personal conjecture or speculation. It is the logical application of common sense scepticism to the likelihood or probability of what is being claimed. In line with the country of origin information, the applicant is invoking the undoubted determination of the authorities to suppress this church and stamp out the practice of the religion. Although these children were in the house in order to be taught by Mr. Gebru, it happens that, by chance, Mr. Gebru is not present when the police arrive and make the arrests. It is entirely logical for the decision maker to question why the police would not pursue the adult who is the organiser of this activity. Instead, the children are released, Mr. Gebru is said to have arranged the flight out of Eritrea but remains behind himself and there is no indication that the authorities pursued him further. In the view of the Court, this was an entirely correct basis for the assessment of the truth of this evidence to be assessed. It is a finding which was clearly open to the decision maker and one with which the Court could not interfere.

21. As there appears to be no flaw in the basis upon which the applicant's evidence was assessed in relation to the crucial event which brought about her reason for leaving Eritrea; and when that finding is placed beside the unquestioned lack of credibility in the evidence as to travel to and arrival in Ireland, it is unlikely that even an obvious mistake in one or other of the remaining parts of the evidence relied upon, could serve to justify a quashing of the decision.

22. In relation to the absence of any reference to the mass arrest claimed to have taken place at the large wedding attended by the applicant's father, it is submitted that this finding is erroneous in law and made in breach of fair procedures. It is pointed out that in one of the more detailed sources of information before the Tribunal namely a United Kingdom Home Office bulletin of July 2006 on the subject of the treatment of unregistered churches in Eritrea, an Amnesty International Report is quoted as observing:

"Undoubtedly there have been many more cases not reported."

It is submitted that it ought not, accordingly, have been a matter for surprise leading to doubt as to credibility that the particular wedding in question cannot be found to be similarly reported.

23. It would, of course, be wholly unreasonable to approach the issue on the basis that an asylum seeker's account based upon such events must be found to be lacking in credibility unless corroborated by some third party account found in an independent source or report. The Court is satisfied, however, that was not the approach of the Tribunal Member here. What is striking about the large body of relevant country of origin information which was available to the Tribunal is the extent and detail of the contemporaneous material relating to the steps taken by the authorities to suppress various Pentecostal churches, to harass and arrest members and especially pastors and to confiscate church properties and assets. As already indicated above, the issue faced by the Tribunal Member in the light of this evidence from the applicant was, in effect, to ask the question:

"Is it likely or probable that a mass arrest at a wedding in an important centre such as Dekemhare would go unreported given the existence of reports of similar incidents; or is it possible that this applicant, knowing that such incidents had occurred and that such reports had been made, is seeking to lend credibility to her claim by placing her father at such an occasion?"

Given the range of the country of origin information available and having regard to the fact that the applicant's father was said to be part of a mass arrest at a large gathering and then held in detention for 7 months, it could not be said to be unreasonable for the Tribunal member to have expressed surprise that the event went without mention. In the Court's judgment this was an appraisal which was open to the Tribunal Member to make and it would be particularly difficult for the Court to treat it as unreasonable or without any foundation when the office of the Commissioner had taken the same view in the s. 13 report. Again, it is the particular function of these administrative decision makers, based on their familiarity with the assessment of conditions by reference to country of origin information and their experience in judging the likelihood or probability of accounts given, to make these appraisals.

24. Finally, there is the lack of credibility found in the discrepancy between the evidence as to the confiscation of the applicant's school and information to the effect that a formal confiscation of all property and assets of the Kale Hiwot church took place in September 2006. When the Tribunal Member states that "the applicant's testimony in relation to the confiscation of her school does not accord with country of origin information", the Court understands her to be making a point that there is a timing discrepancy between what the applicant had testified and the evidence in the documentation to the effect that a formal expropriation of church assets was made by confiscation order of the Eritrean government in September 2006 immediately before the applicant fled. It is submitted that there is no necessary conflict between what the applicant said and that evidence. It said that it is clear from country of origin information that the authorities had been interfering with church activities and properties including schools since at least 2002. It is possibly true, as counsel for the applicant submitted, that there is no necessary contradiction between the applicant's account and the fact that a formal expropriation was made in September 2006. The authorised officer, who dealt with the same point, did not appear to treat it as an obvious contradiction demonstrating of itself lack of credibility but nevertheless considered it worthy of comment in the course of the analysis. It is perhaps prudent to bear in mind that the applicant gave her evidence through an interpreter at the interview. The interpreter recorded her as saying:

"The school used to belong to the church. However the government confiscated it and it is still working. After the government took it away, it continued."

The Tribunal Member's view that there was a lack of concordance may read too much into the interpreter's use of "confiscation" if it is regarded as equivalent with a formal expropriation. The applicant's evidence appears to have been to the effect that government authorities intervened to exercise some form of control over the school and prohibited the teaching of religion. Other education, however, still continued but without church involvement. However, even if one treats the Tribunal Member as reading more into the

applicant's evidence on this point than might be justified, the Court considers that it could not be regarded as being a clear and fundamental error in the overall appraisal of the applicant such as would jeopardise the soundness of that assessment.

25. Finally, the Tribunal Member comments in relation to the arrest of the children:

"It is difficult to believe that none of the children's parents attended at the police station to find out what the situation was regarding their children."

The complaint here is that the Tribunal Member misunderstood or failed to take into account the full explanation given by the applicant as to why the parents did not come to the police station while the children were detained. It is said the Tribunal mistakenly understood that their reason for not coming was that they knew the children would be released while the applicant testified that they stayed away because they ran a risk of being arrested.

26. The Court does not consider that there is any error or misunderstanding in this regard. The sentence just quoted is not so much a finding as to lack of credibility as a comment upon one aspect of the account of the arrest leading to her flight in the course of the analysis that leads to the conclusion in the following paragraph. The Tribunal Member's observation or comment is an understandable one given the circumstances described. The credibility of the account as a whole does not appear to be affected by the issue as to whether one or other explanation for the parents staying away from the police station is the correct one. The conclusion reached by the Tribunal Member is that the particular event giving rise to the applicant's flight was not believable namely that she was one of a number of children attending a religious lesson in the house of the Gebru family and arrested. The basis for the Tribunal Member's assessment of that story as lacking credibility is essentially the vagueness of the role played in it by Mr. Gebru.

27. For all of these reasons the Court is satisfied that this is not a case in which it would be justifiable to interfere with an assessment of credibility in which the Tribunal affirms a negative recommendation from the Commissioner based upon a very similar approach to the same issue. Leave must accordingly be refused.