

## THE HIGH COURT

[2011 No. 585 J.R.]

BETWEEN

ZHARA MURKHTAR

APPLICANT

AND

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

**JUDGMENT of Mr. Justice Kevin Cross delivered on the 23<sup>rd</sup> day of March, 2012 Background**

1. The applicant claims to be a Somali national with a date of birth on 25<sup>th</sup> December, 1990. She had previously made a Visa application in person to the U.K. authorities in Kenya giving her date of birth as 1<sup>st</sup> January, 1982 and her name as Sahara Adn Manoor. The applicant apparently arrived in the State on 29<sup>th</sup> October, 2008.
2. The applicant claimed she was 17 years of age was accepted as an unaccompanied minor by the RAC and the HSE and with the assistance of the HSE applied for refugee status on 16<sup>th</sup> December, 2008.
3. The applicant's claim for refugee status failed at the Commissioner's stage as the Commissioner considered her not to be credible in that she had lied and how she came to Ireland saying that she came directly whereas she had travelled to the U.K. on a Kenyan passport with U.K. Multi-trip Business Visa and had remained in the U.K. for some two months prior to coming to Ireland. The language analysis report was relied upon which found that while her language was Somali that it stated "with certainty" that she was not from southern Somalia but was likely to be from Kenya.
4. A papers only appeal was made to the Refugee Appeals Tribunal which upheld the recommendations of the Commissioner finding that the applicant has applied as a Somali national with a fabricated story which she persisted with.
5. On 31<sup>st</sup> December, 2010, the applicant made an application for subsidiary protection and for humanitarian leave to remain. Apparently the application for leave to remain has not yet been disposed of but on 24<sup>th</sup> March, 2011, the applicant was notified that the Minister intended to process her application on the basis that she was a Kenyan national and afforded her fifteen days in which to make submissions as to why the Minister should process her claim on the basis that she was a Somali. The applicant's legal representative made such submissions on 7<sup>th</sup> April, 2011.
6. Earlier, the applicant had made an application through the Red Cross Restoring Family Links organisation in respect of persons claimed to be her mother and her husband.
7. Details of these persons claiming to be her mother and husband in Somalia were furnished to the applicant in 2009 but the applicant stated that she did not know that she could reply to her family and she did not submit these documents to either the ORAC or the RAT.
8. In May 2011, the applicant's solicitors wrote to the respondent with the updated submissions as to her subsidiary protection and leave to remain applications dealing with the issue of her nationality and included letters from the Irish Red Cross and enclosures indicating that the international Red Cross had located the applicant's family members in Afgoye in Somalia. It was submitted by the applicant's solicitors that this proved she was Somali rather than Kenyan and furthermore that she was from Afgoye as claimed.

The Irish Red Cross tracing file indicated that the applicant's mother and husband were still living in Afgoye and further showed they had been located using the applicant's given name, date-of-birth and nationality rather than the different details in the Kenyan passport used to obtain the U.K. Visa. It was indicative therefore of an independent corroboration of the applicant's claim of identity and nationality which had not been before the ORAC or the RAT but had been submitted to the respondent for the subsidiary protection and leave to remain applications.

**The Claim**

9. The argument of this claim was conducted with exemplary clarity and succinct brevity by Mr. Anthony Hanrahan of counsel on behalf of the applicant and by Ms. Ann Harrett-O'Connor of counsel, on behalf of the respondent.

10. The applicant's claim in essence is that the respondent erred in failing to give any weight to the corroborative evidence from the Red Cross and/or in rejecting the probative force of such evidence without giving any reasons for doing so.

11. The respondent submitted that the Minister dealt with the decision by indicating that the Red Cross documents were "not accepted as documentary evidence of the applicant's identity or nationality" and that this was for reasons of credibility. In essence, the respondent was saying that the overwhelming findings in relation to credibility contrary to the applicant or the RAT and ORAC were not overturned by these documents.

**The Decision**

12. The Minister in his subsidiary protection decision analysed country of origin information in relation to Somalia and concluded:-

"...if the applicant was a Somali of Ashraf ethnicity, as she claims, it is accepted that she is a civilian. Having considered country of origin information in relation to the armed conflict (currently taking place) in Somalia, if it was accepted that

the applicant is a Somali of Ashraf ethnicity, as she claims, it would be accepted that the indiscriminate violence to which she may be exposed in Somalia reaches such a high level that the applicant would face a real risk of being subject to a serious and individual threat to her life or person. The applicant would therefore run a real risk of serious and individual threat by reason of indiscriminate violence in a situation of internal armed conflict."

13. Counsel for the respondent accepts that if the applicant is indeed Somali, she is entitled to subsidiary protection in this case.

14. The decision maker then turned to the Red Cross documents in question and stated:-

"The applicant's legal representatives, Daly Lynch Crow and Morris, submitted documentation from the Irish Red Cross concerning the tracing of family members for the applicant namely Hassan Sharif Abdillahi (husband) and Fatuma Sharif Aden (mother). The correspondence indicates that these people were located in the Afgoye district of Shabelle region of Somalia. For reasons detailed below, this is not accepted as documentary evidence of the applicant's identity or nationality."

15. In point of fact, there is no stated or detailed reason or indeed any reason at all further on in the text as to why the documents were not accepted as "documentary evidence of the applicant's identity or nationality".

16. What follows, somewhat later, is consideration of the credibility issues which were before ORAC and the RAT and having quoted extracts from the RAT decision, the Minister goes on to state:-

"The applicant is not accepted as a Somali but is considered to be by Kenyan."

The Minister continues correctly:-

"The applicant despite being afforded an opportunity to do so has not claimed a risk of serious harm in Kenya."

17. Ms. Harnett-O'Connor on behalf of the respondent submits that to say that the Minister failed to give reasons for rejecting the documentary evidence is "nitpicking" as what the Minister was doing was indicating that the Red Cross documents did not outweigh the adverse credibility findings.

18. I cannot accept that submission. In the decision there is in fact no linkage between the conclusion that the documents were not accepted as documentary evidence of the applicant's identity or nationality with the subsequent adverse credibility findings. Even if I were to accept that linkage, the Red Cross documents may not be "documentary evidence of the applicant's identity or nationality" in the same way as a passport or a Visa or indeed a birth certificate might be, however, they are "documentary evidence" and they do give evidence suggestive of a Somali nationality or at least which ought to make a decision maker pause and question the issue. The adverse credibility findings of the RAT and ORAC cannot in any sense qualify the validity of the Red Cross documents as being documentary evidence. These documents stand on their own and the Minister should engage with them. He has not done so.

19. The credibility decisions of ORAC and the RAT were arrived at without the benefit of these documents. It may be that the RAT or ORAC would have come to a different credibility decision had they sight of these documents.

20. In any event, the decision the Minister has to make is not whether the applicant is a refugee, but whether she is entitled to subsidiary protection. As has been well stated in these courts, an applicant may be entirely un-credible in relation to his or her evidence but still qualify for subsidiary protection because of the nature of the country that he or she came from and is likely to be forced to return to.

21. The issue before the Minister was not whether the applicant was credible in her story (and clearly there were very many issues in which she had been validly found not to be credible) but rather whether she was from Somalia or from Kenya. The court finds that there was absolutely no engagement with this issue by the Minister in relation to the Red Cross documents which were new and had not been previously considered as part of the earlier decisions of the ORAC or the RAT.

22. I am referred to and apply the well known decision of Cooke J. in *I R. v. MJELR* [2009] IEHC 353:-

"Where, as here, documentary evidence of manifest relevance and of potential probative force is adduced and relied upon, the Tribunal member is under a duty in law to consider it and if it is discounted or rejected as unauthentic or unreliable or otherwise lacking probative value, there is a duty to state the reason for that finding."

23. The court is of the view that the decision maker had a duty to give consideration to the new corroboratory information received in relation to the applicant's identity especially as the only issue in the Minister's decision was whether the applicant was from Kenya or from Somalia. The failure of the Minister to consider the new corroboratory information, whether or not he regards it as being "documentary evidence of the applicant's identity or nationality" is a breach of the duty identified by Cooke J. in *JR*. (above) as is the failure of the Minister to state any reasons for discounting or rejecting as unauthentic or unreliable or otherwise lacking in probative value of those same documents.

## **Conclusion**

24. For the reasons as set out above, the applicant is entitled to an order of certiorari taking up and quashing the decision of the respondent of 30<sup>th</sup> May, 2011, that the applicant is not eligible for subsidiary protection under the terms of the European Communities (Eligibility for Protection) Regulations 2006 (S.I. 518 of 2006).

25. If any further ancillary orders are required, these can be discussed.