

**THE HIGH COURT  
JUDICIAL REVIEW**

**2008 1180 JR**

**BETWEEN**

**Q. F. C., A. M. C. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND Q. F. C.)**

**APPLICANTS**

**AND**

**REFUGEE APPEALS TRIBUNAL**

**THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM**

**THE ATTORNEY GENERAL AND IRELAND**

**RESPONDENTS**

**AND**

**2008 1181 JR**

**BETWEEN**

**I. C. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND Q. F. C.)**

**APPLICANT**

**AND**

**THE REFUGEE APPEALS TRIBUNAL**

**THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM**

**THE ATTORNEY GENERAL AND IRELAND**

**RESPONDENTS**

**JUDGMENT of Mr. Justice Cooke delivered the 12th day of January 2012**

1. These are two separate but related cases in which the first named applicant in the case bearing Record No. 2008/1180J.R. ("the first case") is the mother of both the second named applicant in that case and of the applicant in case Record No. 2008/1181 J.R. ("the second case"). The cases were heard together and the applicants seek judicial review of decisions of the Refugee Appeals Tribunal given on the same date, 24th September, 2008.

2. The mother claims to be a national of Somalia and to have fled from there to Ethiopia. In the report of the Commissioner under s. 13 of the Refugee Act 1996, ("the Act of 1996") it appears to have been accepted that this part of her claim was true. It was also accepted that she was a member of the Tunni clan although not that this particular ethnic group was a minority clan as she maintained. (See paragraph 10 below.) Notwithstanding the very extensive findings of lack of credibility subsequently made by the Tribunal however, it does not appear to be doubted or disputed that the mother does indeed come from Somalia.

3. The significance of this as a starting point for these applications is that of the many countries from which asylum seekers in this jurisdiction arrive, Somalia is possibly the most notoriously dysfunctional. It is a failed state. As the country of origin information exchanged throughout the asylum process in the present cases indicates, it has for many years been without effective central government other than in a small area of central Mogadishu and even that area has been affected by continuing internal conflict. Somalia has been afflicted by famine and has continuously been the source of piracy and kidnappings.

4. It might well be said therefore that these cases epitomise one of the most acute dilemmas that can face decision makers in the asylum process and which, as a result, stretch the limits of the principles covering judicial review when their decisions are sought to be challenged before the High Court.

5. The reason for his difficulty is that the challenged appeal decisions are based mainly upon extensive and even trenchant findings of lack of credibility with, particularly in the case of the mother, findings influenced by her demeanour and evasiveness both in the s. 11 interview as recorded in the s. 13 report of the Commissioner and at the appeal hearing. It is well settled law that it is the exclusive function of the decision makers in the asylum process to assess credibility and the High Court cannot substitute its own view of credibility when reviewing such decisions in exercise of its jurisdiction in judicial review. Because of the undoubted fact that Somalia is notoriously a dysfunctional and failed state and a place of internal conflict and a source of international lawlessness, it follows that any decision maker faced with a claim for asylum based upon a risk of persecution of any applicant who is accepted as being from Somalia must proceed with extreme caution and must reject a claim upon grounds of lack of personal credibility only when it is compellingly necessary to do so.

6. It must also be borne in mind when considering the validity of decisions in the asylum process based on lack of credibility, that the

evaluation of the claim to refugee status involves not only the assessment of the truth and reality of the claim made on the basis of alleged past persecution or serious harm previously suffered but may also require a prospective assessment to be made of the likelihood of future persecution or serious harm in the event of repatriation to the country of origin in question. The particular story told by the asylum seeker may correctly be disbelieved but it may yet be important to examine the possibility that the person in question may nevertheless have a valid Convention based reason for being unable or unwilling to return to the country of origin especially where it is known to be a place of internal conflict or of prevalent violence. In its judgment in *A. v. RAT & Ors* [2011] IEHC 147 (at para 17) this Court, having reviewed the case-law therein cited, described the correct approach in these terms:

"The sole fact that particular facts or events relied upon as evidence of past persecution have been disbelieved will not necessarily relieve the administrative decision-maker of the obligation to consider whether, nevertheless, there is a risk of future persecution of the type alleged in the event of repatriation. In practical terms, however, the precise impact of the finding of lack of credibility in that regard upon the evaluation of the risk of future persecution must necessarily depend upon the nature and extent of the findings which reject the credibility of the first stage. This is because the obligation to consider the risk of future persecution must have a basis in some elements of the applicant's story which can be accepted as possibly being true. The obligation to consider the need for 'reasonable speculation' is not an invitation or pretext for gratuitous speculation: it must have some basis in, and connection to, the apparent circumstances of the applicant."

It is against the background of this approach that it is necessary to consider the grounds raised in these two cases.

7. The first named applicant in the first case ("the mother") is stated to have arrived in the State in August 2003, and to have made her asylum application on the 1st September, 2003, so as to include the second named applicant, her Ethiopian-born daughter. The applicant in the second case is a daughter born to the mother in Ireland on the 10th August, 2006. The mother claimed to have five children in Somalia and not to know the whereabouts of her husband or of those children. She said she was a member of the Tunni tribe. She claimed that members of that tribe were persecuted, killed and raped. She and members of her family were shopkeepers and she claimed that her father had been beaten and robbed in his shop by members of another tribe and that in 1999 her husband was similarly beaten and robbed by members of another tribe in his shop.

8. As already indicated, the mother's application was rejected on grounds of lack of credibility first in the s. 13 Report of the Commissioner dated the 18th November, 2004. At para. 5.3 of that Report, a number of the statutory considerations under s.11B of the Act of 1996 relating to credibility were identified:-

- The applicant had not provided a reasonable explanation for the absence of any identity documents;
- No reasonable explanation was given for her claim that Ireland was the first safe country in which she arrived, given that she had spent several months in Ethiopia and given birth to a daughter there;
- A full account of her journey to Ireland had not been given;
- She provided no travel documents to confirm how or when she arrived in the State and did not apply for asylum immediately upon arrival;
- She had given manifestly false evidence in support of her application;
- This related to contradictory evidence she gave as to the age of her mother and her siblings.

9. In para. 5.5.1, of the Report it was recognised that because of the nature of the applicant's claim state protection was possibly not available to the applicant given that factional fighting continued unabated in central- southern Somalia. Nevertheless, given that the applicant had lived in Mogadishu where local administration was in place, it was observed that she had made no attempt to seek protection from the authorities there.

10. The Authorised Officers did however accept some parts of her story. The Report said: "Given the depth and detail of the applicant's knowledge of Somalia, it is clear that she is from there. She also displays a good knowledge of the political situation and was familiar with local political and security issues which was (sic) central to her claim of persecution". The Report also stated: "The applicant claims she belongs to the minority ethnic group Tunni. Based on the information provided by the applicant and her good knowledge of the Tunni claim, it is clear that she belongs to this minority clan, however, country of origin does not indicate that this particular ethnic group is a minority clan." (para. 5.6.2)

11. In para. 5.7.1, the Authorised Officer examined the personal credibility of the mother in recounting the facts and events she relied upon as past persecution. They found *inter alia*, that :-

- The manner in which she claimed to have escaped from detention by militia was not believable;
- The description of being brought by the militia to a shop to buy sugar when the militia had stolen all the groceries they needed previously was not credible;
- Her account of walking alone through Mogadishu for more than an hour and her account of getting to Madina, when she had never been there before, was not to be believed;
- Her claim that her father had been killed; that the family fled the house and that she had not tried to contact him since undermined the validity of the claim.

12. The Authorised Officers then concluded in relation to the applicant's credibility as follows:-

"The applicant's credibility was undermined by the fact that she was vague and evasive in how she allegedly escaped from her captors after two weeks. There were inconsistencies and implausibilities in her account. There was no evidence to suggest that the applicant's family had experienced any kind of trouble by reason of their race. The applicant's account of her detention by the militia and her eventual escape was not believable. The applicant's credibility was further undermined by her insistence that the Tunni were a minority tribe in Somalia and that there was no safe place in the country for them. This was contrary to the objective evidence. In fact the applicant did belong to the Tunni tribe which is a large tribal confederacy of mixed clans, including the Hawiye. Her claim that she faced persecution from the Hawiye by

reason of being a Tunni was not credible.”

13. In the second case a separate report was made under s. 13 on the application of the child. The negative recommendation contained in that report was effectively based upon the following conclusion:-

“The applicant’s mother claimed that she had nowhere to go as her home had been destroyed and had no money to provide for the applicant. While the applicant and her mother may struggle financially if they were to return to Somalia, it does not appear that she would be persecuted by her husband. This element of the applicant’s claim does not appear to be relevant to any of the Convention grounds. . . . The applicant’s mother stated that the applicant’s claim for asylum is based on her own asylum application and that the greatest risk of persecution to (the child) is his (sic) ethnicity ie. being a member of the Cabdimaxed sub tribe. This was also the basis of her asylum application. . . . Her claim has been investigated and a recommendation has been made . . . that she should not be declared to be a refugee. I therefore make a similar recommendation in this case.”

14. Both appeals to the Tribunal were heard on the 28th February, 2008, and a single decision was given by the Tribunal member on the two appeals dated the 24th September, 2008. The appeal in the second case was very briefly dealt with at the end of the decision in the following terms:-

“The applicant continued in a separate portion to give evidence on behalf of the infant. Having already found her evidence not to be plausible or credible and the infant’s application resting on her mother’s application I do not believe that (the child) is a person in need of protection in circumstances where the applicant’s mother’s evidence is, in my view, neither plausible nor credible.”

15. In section three of the decision (“The Applicant’s Claim”) the Tribunal member sets out the claim made by the mother in a comprehensive and detailed summary extending over eleven pages. It covers the questions she was asked and the answers given during the course of the hearing. The questioning of her evidence dealt with the facts and events she relied upon as the basis of her past persecution; the killing of her brother by rebels; the harassment of the family and the stealing of the contents of their shop; her detention by militia for fifteen days in 2000 and her account of what happened to her during that period and how she made her escape. She was also examined about the events leading to her departure from Mogadishu and her travel to Ethiopia and then her account of using gold to pay an agent in Addis Ababa US\$3,000 to arrange her trip to Ireland.

16. In section six of the decision (“Analysis of the Applicant’s Claim”) the Tribunal member identified a series of factors upon which the overall finding of lack of credibility is then based. These include:-

(a) In relation to her account of escaping after fifteen days when she was taken to the shop to get sugar: “This portion of her evidence went on culminating in the applicant saying that she wanted to repeat from where her brother was killed and she was confused and there was a five minute break in the hearing. Having the portion of evidence that had taken place prior to this break and having observed the demeanour of the applicant, I arrived at the conclusion that the applicant had learned her story and had become confused in giving the story and the sequence and was more comfortable when dealing with the story from one end to the other, rather than dipping in or out of portions that were of interest in the hearing. Having heard the evidence and having observed the demeanour, I reached the conclusion that the applicant’s evidence was not plausible nor credible and she was simply repeating a story which had an air of unreality to it and lacked the type of detail one would have expected from a person who had been through such a traumatic event. I find this undermines the applicant’s credibility.”

(b) Following a break in the hearing further questions about the escape were put and the Tribunal member observes: “Having heard this evidence and observing her demeanour, I found this evidence had an air of unreality to it and I found it to be neither plausible nor credible. I reach this conclusion based on observing the demeanour of the applicant and hearing the evidence and taking into account the sequence which occurred subsequent to this evidence in which the applicant was asked how far is Madina from her home and her reply was that Madina is an area in Mogadishu. The applicant was asked was it north, south, east or west and her reply was that it was in the region where the sun goes down. It appeared to me that the applicant simply did not wish to answer questions which require a detailed knowledge of the city in which she contended she lived. I find that this undermines her credibility”.

(c) In relation to questions put to her about inconsistencies as to her date of birth, the date of her abduction etc. the Tribunal member again says:- “Having heard this evidence and observed the applicant’s demeanour, I reached the conclusion that the applicant simply did not wish to address these issues in a meaningful way. There was no coherent reply to the inconsistencies and I find that this undermines the applicant’s credibility”.

(d) The Tribunal member then refers to the lack of clarity in her responses in the s. 11 Interview. “The applicant was referred to p. 4 of the interview in which she had said she was raped three times, but today in her evidence she said she was raped five times and her response to this was the interpreter at the interview got it wrong. However, she did agree that the pages are read back and she signed them. Having heard the applicant’s evidence and observed her demeanour in relation to these inconsistencies and the fact that the applicant was given ample opportunity to address the issues, which in my view she did not do, but simply sought to avoid them, or in the latter case transferred the blame, I found her evidence to be neither plausible nor credible and I find that it undermines her credibility”.

(e) In relation to the applicant’s account of how she had travelled from Mogadishu to Dolo and her inability to remember anything, other than the name of the person who brought her, the Tribunal member says: “I find it to be neither plausible nor credible that she could contend that she could not remember the name of the neighbour who had taken care of her gold and driven her from her country of origin as she alleged. I found this evidence to be neither plausible nor credible and I find that it undermines her credibility”.

(f) The Tribunal member says that her description of escaping from a shop through one door while gunmen were at another door “stretched credibility to its furthest”.

(g) Finally, the Tribunal member refers to her having been in Ethiopia for two months without seeking asylum and finds that this country is not the first safe country in which she had arrived since departing Somalia.

17. It will be noted, accordingly, that the affirmation of the s. 13 Report by the Tribunal member is based exclusively upon this series of findings as to the lack of credibility in the specific events recounted by the applicant regarding her personal history in Somalia and

her flight from that country. The Tribunal member does not in any sense disagree with the acceptance by the Commissioner of her Somali nationality or her membership of the Tunni clan. The assessment of the Tribunal member amounts, in effect, to a conclusion that the facts and events recounted by the applicant as the basis of her claim to fear persecution in Somalia did not happen.

18. Neither in relation to the mother, however, or the minor applicant in the second case, is there any prospective analysis of what they might likely face if now repatriated to that country. This issue had been raised as ground No. 11 to the notice of appeal:-

"The Refugee Applications Commissioner failed to properly consider whether there is a reasonable degree of likelihood that the applicant would be persecuted on her return to Somalia. It is submitted that the applicant and her child will be exposed to persecution if they were to return to Somalia and in the absence of any internationally recognised or accountable *de jure* authority in Somalia, they would not be afforded the protection and promotion of their fundamental human rights which they are entitled to."

19. In moving the present application for leave and in challenging the findings of lack of credibility, counsel for the applicants has relied particularly upon the element of delay in that the period which elapsed between the oral hearing on the 28th February, 2008, and the making of the report on the 24th September, 2008, is said to be so excessive as to warrant that the decision be quashed. In the judgment of the Court this submission raises no substantial ground which would warrant the grant of leave on that basis. It is well settled law that the delay as such, does not necessarily invalidate an administrative or quasi judicial decision of this kind, unless the lapse of time is so egregious as to render it unjust that it be permitted to stand. (See for example the judgment of Finlay Geoghegan J. in *Messaoudi v Refugee Appeals Tribunal* (Unreported, High Court, 29 July 2004.) In *F.K.S. v RAT* (Unreported, High Court, 24 January 2005,) Dunne J. said: "I am not of the view that delay *per se* should as a general proposition, give rise to the quashing of a decision of the Tribunal. There may be cases of such egregious delay that it would be untenable to permit the decision to stand but they must be few and far between. This is not such a case."

20. The element of delay may, on the other hand, by implication provide an explanation for some mistake or other flaw in the decision as given. In the present cases, however, no such factor arises. No complaint is made as to the accuracy of the very lengthy and detailed summary of the applicant's evidence given in section three of the decision as described above. Having regard to the detail of that summary and the extent to which the Tribunal member is obviously influenced in the analysis in section six by the manner in which the applicant gave her evidence, particularly her calls for suspension of the hearing when faced with difficulties in giving answers or when becoming confused, it is clear that whenever the Tribunal member drafted the decision eventually signed on the 24th September, 2008, he had a clear recollection of what had occurred at the hearing. This is not a case in which there is any note of the questions and answers at the appeal hearing other than that given in the decision itself. Thus, no case has been made that the summary in question is contradicted or put in question by the contents of a contemporaneous note.

21. In the absence therefore, of any element suggesting that the Tribunal member had a faulty recollection or was mistaken in his appraisal of the applicant's demeanour, the Court is satisfied that delay as such cannot constitute a basis for the grant of leave in this case.

22. It has also been argued that the conclusion reached by the Tribunal member as the basis for the decision in the mother's case is unreasonable, irrational and flies in the face of common sense in that the specific points upon which credibility has been doubted are peripheral; that there has been over-reliance upon the first named applicant's demeanour and that there has been a failure to allow for her state of trauma and anxiety. In the judgment of the Court these submissions too are unfounded. In the judgment of the Court the findings in question are all directed at material events and explanations given by the applicant as the basis of her claim to fear persecution as a result of her past experience in Somalia. It is, in that sense, precisely the sort of exercise which is entrusted to the experienced decision makers in the asylum process. It must also be borne in mind that this is a case in which credibility has been assessed, not only by reference to these facts and events as doubted at the appeal hearing, but also, in the case of the s. 13 Report by reference to the statutory considerations mentioned in paragraph eight above, in accordance with the requirement of s. 11B of the Act of 1996. In circumstances where an asylum seeker has no identity documentation; has given a questionable account of travel arrangements to this country; and has both passed through another country in which asylum might have been claimed and then delayed in claiming asylum on arrival here, the decision maker must necessarily assess the plausibility of the facts and events relied upon in the light of those statutory question marks.

23. For these reasons, the Court is satisfied that the findings of lack of credibility in the Tribunal member's appeal decision are findings which were open to him and, as such, are not findings with which this Court could interfere.

24. There remains however the fact that the examinations of the asylum applications in these cases have been confined entirely to the past persecution elements of the claims. Having regard to the fact that the mother is accepted as having fled from Somalia and the observations made by the Court in paras. 2 and 3 above, the Court is satisfied that there is a substantial reason for questioning whether the negative recommendations are adequately based upon a full examination of the asylum applications and particularly upon consideration of the likelihood of the applicants being exposed to any form of persecution or serious harm if now repatriated to that country. In particular, in the mother's case, it would appear to be arguable as a substantial ground that there is a need in this case to consider what she is likely to face if repatriated to Somalia in the conditions that now prevail there, given that she will be returning with a child born in this jurisdiction to a man who is not her husband, when her husband is or may be alive on her return. This issue was in fact raised with the applicant at the appeal hearing and she is recorded in the section three summary of the claim as having replied that "it is very bad and it is dangerous for her. She will be beaten with stones to death". Given that this is a factor in her personal circumstances which has arisen since she arrived here, it is not necessarily excluded as a possible basis for a fear of persecution in the future by the lack of credibility in her claim to have suffered persecution in the past.

25. As indicated above, the separate application of the minor applicant in the second case was disposed of in the Tribunal decision on the basis that it fell because of the finding of lack of credibility in the mother's case. (See paragraph 13 above). In section three of the decision, the Tribunal member records her response to the question as to what problems the child would face if returned to Somalia: "She said she feels it is very difficult, because if she goes back, she is married and she has to tell people that this is another child from another man, even if her husband is dead, they will kill her and they will not leave her alone because she has a child from another man". Accordingly, the Court is satisfied that a substantial ground is also raised as to the adequacy of the consideration given to the claim of the minor applicant in the second case.

26. Leave will therefore be granted to apply for an order of *certiorari* in each case quashing the Tribunal decision. In the first case leave will be allowed on the basis of a single ground as follows:

"The decision of the first named respondent dated 24 September 2008 is invalid in law in that the Tribunal member failed to consider and determine the applicants' claim to a well founded fear of future persecution if repatriated to Somalia in

their current personal circumstances and having regard to conditions currently prevailing in that country.”

Leave will similarly be granted in the second case on the basis of one ground as follows:

“The decision of the first named respondent dated 24 September 2008 is invalid in law in that the Tribunal member failed to consider and determine the minor applicant’s distinct claim to be at risk of future persecution if returned to Somalia as a female infant born to her mother by a father who is not her mother’s husband and having regard to the conditions prevailing in that country.”