THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 787 J.R.]

A. A. S.

APPLICANT

AND

THE REFUGEE APPEALS TRIBUNAL AND THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

JUDGMENT of Mr. Justice Colm Mac Eochaidh delivered on the 7th day of February 2013

1. This is an application for judicial review following the grant of leave by Clark J. on 17th May 2012, permitting the applicant to pursue the following complaints:

> (i) The decision of the Refugee Appeals Tribunal is flawed by reason of the failure of the Tribunal to assess whether the applicant has a well-founded fear of persecution in Somalia due to his Bajuni ethnicity.
>
> (ii) The decision of the Tribunal is flawed by reason of the failure of the Tribunal to engage with or make a specific finding as to whether the applicant was Bajuni and Somali.
>
> (iii) The Tribunal placed reliance on a significant error of fact when it stated that the applicant "*had not provided any documentation in support of his claim where certain documentation had been submitted*".

2. Certain features of this case are worth mentioning at the outset. Firstly, no oral hearing of the applicant's appeal to the Tribunal took place.

3. Secondly, the decision in suit is the fourth occasion on which the Refugee Appeals Tribunal has sought to assess the application for international protection. Two of its previous decisions were agreed by the Tribunal to have been deficient without litigation. The third decision resulted in a grant of leave to seek judicial review on 15th September 2010, and the decision was set aside with the consent of the parties the following day.

4. Thirdly, before his Irish application, the applicant applied for refugee status in Luxembourg, appealed that decision and then sought a court review. He lied about these facts when he sought refugee status in Ireland.

5. Section 11A(I)(b) of the Refugee Act 1996 (as amended) triggers a presumption that an applicant is not a refugee where that applicant "*had lodged a prior application for asylum in another State party to the Geneva Convention*". Thus, in accordance with s. 11, the applicant, if he were to succeed in his asylum application, needed to dislodge the negative presumption which acted against him by operation of law. But s. 11A(3) of the Act provides that it is for the applicant "*to show that he or she is a refugee*". The presumption that one is not a refugee by virtue of having made an earlier application for refugee status is clearly rebuttable on proof that one is a refugee. Thus the negative presumption is without significant effect in circumstances where the proof required to establish refugee status will rebut the negative presumption and the burden of proof applied is the same with or without the presumption that the applicant is not a refugee. It need hardly be said that the Tribunal should not confuse the presumption which arises from the fact that an earlier asylum application was made, with a lack of candour about the earlier application. There may be understandable reasons for such lack of candour. The fact that an applicant has been untruthful about such a matter or indeed any relevant matter does not disentitle such person from a declaration of refugee status or from subsidiary protection..

Background Facts

6. Briefly stated, the applicant's asserted status is that of a national of Somalia who fears persecution because of his minority Bajuni ethnicity. That Bajuni people suffer persecution from majority clans was not in any real controversy in this case. The applicant claims that his parents were murdered and that he escaped from Somalia in 2003 and arrived as an unaccompanied minor in Ireland.

7. It is of central significance in this case that the applicant has always maintained his Bajuni ethnicity and Somalian nationality. That he spoke Bajuni was noted on an Unaccompanied Minor's Referral Form. On the ASY1 Form, it was noted that "*the Bajunian interpreter was present during this interview ... this applicant stated that he left Somalia on the 5/10/2003*". In addition, the applicant's Section 11 interview was conducted in Bajuni and with the aid of a Bajuni interpreter. In this regard I have been shown the 'Interview-Interpreter Form' which instructs the interpreter that "*where an interpreter encounters any difficulty in interpreting during an interview, such as happens with dialect, this should clearly be stated to the interviewer*". The form is signed by the interpreter and there is no indication that there was any difficulty with dialect or any other matter during the course of the interpretation of the interview said to have been conducted in Bajuni. Letters from the Irish Bajuni Somali Association attesting to the applicant being Bajuni were submitted to the Tribunal.

8. The applicant admits that he failed to disclose the fact of his application for asylum in Luxembourg when he sought international protection in Ireland. Central to the Luxembourg application was the assertion by the applicant that he was a national of Burundi and not of Somalia. He says the reason for his application as a Burundian was that he was so advised by the agent or facilitator who had arranged his transit from his home to Luxembourg.

9. The Office of the Refugee Appeals Commissioner found that the applicant had applied for asylum' in Luxembourg as a Somali. This was an important negative finding which the applicant would be required to overturn on appeal if he were to have any chance of obtaining a favourable decision. If the applicant could establish that he had applied for asylum as a Burundian, then it would be open to him to argue that his refugee status had never been determined on the basis of true facts because his real fear of persecution was related to his Bajuni minority ethnicity and his Somalian nationality.

10. The applicant's Irish lawyers contacted the applicant's former legal adviser in Luxembourg who confirmed that the applicant had applied for asylum in Luxembourg as a Burundian. The correspondence confirming this was sent to the Refugee Appeals Tribunal.

11. I wish to refer to the judicial review of the third decision of the RAT in respect of this applicant and to the decision of Birmingham J. on the leave application of 15th September 2010.

12. Birmingham J. describes the decision of the Tribunal which he was addressing as follows:

> *"It amounts to just over a page, perhaps a page and a third, and I suppose, even within that, the bones of it are to be found in three paragraphs. And the first of these paragraphs is in these terms: 'the applicant, in my view, has not provided the Tribunal with a reasonable explanation to substantiate his claim that this is the first safe country he has arrived in since departing his country of origin. It would appear that he spent over a year in Luxembourg, and I am of the view that residing in Luxembourg for over a year and not taking any step with regard to regularising his position or making any application in Luxembourg, that this is not the indicia a person who is fleeing persecution. In this respect, regard is had to s. 11B(b) of the Refugee Act 1996, as amended, and I find that this undermines the applicant's credibility."*

13. The learned judge found that the paragraph contained a significant error of fact when it asserted that no attempt had been made to regularise his position when the evidence was that he had sought asylum in Luxembourg.

14. Paragraph 2 of the decision of the RAT being addressed by Birmingham J. is set out as follows:

> *"I reach this conclusion in circumstances where it would appear he told the Luxembourg authorities that he was from an entirely different State ... he provides no plausible or credible explanation for this information, and I reach the conclusion that the applicant has made false representations prior to this, and in this respect, regard is had to s. 11B of the Refugee Act 1996, as amended, and I find that this undermines the applicant's credibility."*

Birmingham J. in response to this noted that an explanation for what had happened in Luxembourg had been presented by the applicant.

15. The third paragraph of the RAT decision referred to by Birmingham J. was the finding by the RAT that the account of the applicant's travel to Ireland was not credible. In relation to the decision of the RAT, Birmingham J. found as follows:

> *"In any event, those are the three operative paragraphs, and what is lacking is any specific finding whether the applicant is or is not a Somali and any specific finding as to whether he is or is not of Bajuni ethnicity. Now it seems to me that that is really quite disturbing. The applicant, in his written submissions, contended at paragraph 11 that treatment of Bajuni is so bad in Somalia that if somebody establishes that they are a Bajuni from Somalia, then without more, and no matter what narrative that they have given, that they are entitled to refugee status. Now, without in any way endorsing that very emphatic statement, it certainly seems to be the case that establishing that one was a Somali of Bajuni ethnicity would be a major step, a very major step on the road towards achieving refugee status. "*

Birmingham J. concludes his decision to grant leave as follows:

> *"Overall, the view I have formed is that the question of ethnicity and nationality was absolutely central to the case that the applicant was going to advance. If he was accepted as being of Somali nationality and Bajuni ethnicity, then even if the specific account that he gave of the events in 2003 on the island and of the circumstances in which his parents came to lose their lives is disbelieved, then the fact that, even though he was disbelieved, he was nonetheless of the claimed nationality and ethnicity would have provided a significant substantial basis why his claim had to be considered And it seems to me that a decision that leaves one guessing as to whether or not that was the view of the Tribunal Member is arguably, in the sense that there were substantial grounds for contending that such a decision is inherently flawed. And in those circumstances I propose to grant leave."*

16. I have referred extensively to the decision of Birmingham J. because it appears to me that some of the matters which were of concern to him in September 2010 are of equal concern to me on this occasion. The applicant's ethnicity is the single most important fact in his application for international protection. A clear decision on this point is what one would expect from the Refugee Appeals Tribunal. That the matter was of central significance is evidenced by the language analysis carried out by the Irish authorities for the purposes of establishing whether he was truly a Bajuni speaker. Such language analysis resulted in a negative expert opinion which was contested in the appeal to the Refugee Appeals Tribunal. In this connection, it was argued by the applicant that the so-called expert was not a Bajuni speaker and could not have determined the fluency or lack thereof of the applicant in the Bajuni language. By reference to this documentation and these arguments, it is clear that the applicant made significant efforts to persuade the Refugee Appeals Tribunal as to his (persecuted) minority ethnicity.

17. The decision of the Refugee Appeals Tribunal at issue in these proceedings is dated 30th May 2011, and its main finding is in six short paragraphs. At paragraph 2, the Tribunal asserted that the appellant/applicant had not provided any documentation in support of his claim. This is undoubtedly an erroneous finding. At the very least, the applicant had provided correspondence with his lawyer from Luxembourg which confirmed that he had applied for asylum in Luxembourg as a Burundian national. In addition, the applicant had supplied two letters from the Irish Bajuni Friendship Association which asserted that he was a native Bajuni speaker and that he appeared to the Association to be of Bajuni ethnicity. But this finding does not appear to be the central matter which was of concern to the Tribunal, and if this were the only mistake made by the Tribunal, I doubt if I would be willing to set its decision aside on this basis.

18. The Tribunal went on to say as follows:

> *"The applicant initially provided manifestly false information in relation to his asylum application. Only when he was presented with concrete information that he had, in fact, applied for asylum in another EU State did he admit to the fact and amend his evidence accordingly. The applicant made a prior claim for asylum in Luxembourg and he stated that that application was rejected because he applied as a Burundian and the appropriate authorities responsible for assessing that claim said his 'case was not that strong'. It appears that not only had he been afforded the benefit of an appeal hearing from the first instance asylum decision there, but that he had also pursued the equivalent of this jurisdiction 's judicial review application which had also been rejected. He then made a fresh application for asylum in that jurisdiction which was deemed inadmissible. The applicant may or may not have applied as a Somalia national in one or other of those applications. The Tribunal is willing to afford him the benefit of the doubt on that. However, what is clear is that he had the benefit of a review of the first application by their 'Superior Courts' and made a fresh application which was deemed inadmissible. It cannot be said that he did not have access to full and fair procedures in another EU State. Indeed, he*

had the benefit of legal advice and representation in that State who should have advised him of the necessity to be full and frank when providing information to substantiate a claim for asylum. His explanation to the authorities in this jurisdiction, that he produced a manifestly false application in another EU State on the basis of advice from his trafficker is deemed not to be reasonable or credible in those circumstances."

In my view, this paragraph is to be read by reference to the finding by ORAC that the applicat had sought asylum in Luxembourg as a Somali and by reference to the evidence adduced on behalf of the applicant (the letter from the Luxembourg lawyer) that in fact he had applied as a Burundian national. It seems to me that the Tribunal says that it grants him the benefit of the doubt that he did not apply for asylum in Luxembourg as a Somali.

19. No reason is given by the Tribunal why the explanation for the false application as a Burundian is not reasonable or credible. I find nothing inherently unreasonable or incredible about an explanation given by an unaccompanied minor that he made a false application using a false nationality because this is what his facilitator or agent told him to do. That, to my mind seems, at least on the face of it, to be an entirely plausible explanation for having made an application under a false identity and a false nationality.

20. Mr. Devally S.C., on behalf of the respondents, has urged an entirely different interpretation of the passage I have just quoted from the Refugee Appeals Tribunal. He has urged upon the court that the passage is to be understood as a finding of fact that the applicant was not a Somali. Thus, when the Tribunal found that the applicant did not apply for asylum as a Somali in Luxembourg, the reason, according to the respondent for this finding is that they do not believe that he is a Bajuni Somali at all. In other words, according to the respondent, the paragraph quoted is a finding on the central controversy with respect to the applicant *i.e*. his ethnicity. As indicated earlier, it was of central importance to the applicant that he establish his Bajuni ethnicity and Somalian nationality. It is the first matter in respect of which the applicant makes complaint in these proceedings *i.e*. that the Tribunal failed to make a finding on this issue of ethnicity. Mr. Devally's interpretation would, if accepted, be a full answer to the applicant's first and, probably, main complaint in these proceedings. But in my opinion, this contention must be rejected. If the quoted paragraph is indeed a finding that the applicant was not of Somali nationlaity and/or Bajuni ethnicity, it is in terms so opaque and obscure as to render such finding undetectable to me. It is noteworthy that these proceedings do not comprise a complaint that the Refugee Appeals Tribunal erroneously found that the applicant was neither Bajuni nor Somali. It seems to me that had such a finding been made, it would have been the first port of call for the applicant in any challenge to the decision of the RAT. Though I disagree with the respondent that the decision of the Tribunal rejects the applicant's asserted Somali nationality, if I am wrong on that, then I find that the decision is flawed by reference to the standard of decision making required in these cases as described by Murray C.J. in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3: *"An administrative decision affecting the rights and obligations of persons should at least disclose the essential rationale on foot of which the decision is taken. That rationale should be patent from the terms of the decision or capable of being inferred from its terms and its context. Unless that is so then the constitutional right of access to the Courts to have the legality of an administrative decision judicially reviewed could be rendered either pointless or so circumscribed as to be unacceptably ineffective. In my view the decision of the Minister in the terms couched is so vague and indeed opaque that its underlying rationale cannot be properly or reasonably deduced*." If the Tribunal's decision is one rejecting Somali ethnicity, it is of no legal effect because of its opacity. In rejecting the respondents' case, I uphold the applicant's complaint that the Tribunal failed to decide the central controversial issue which was before it - the ethnicity and nationality of the applicant. On the facts of this case, it seems to me that such a decision was required in clear and reasoned terms. The evidence advanced by the applicant in support of his ethnicity and nationality required assessment and commentary-though not necessarily on each item. Rejecting the respondents' interpretation of the decision and upholding the applicant's complaint that the Tribunal did not assess whether the applicant had a well-founded fear of persecution in Somalia due to his Bajuni ethnicity and failed to make a specific finding on the issue of his ethnicity and nationality, I order that the decision in suit be quashed.

21. In passing, I note that the complaint in these proceedings and one of the main the complaints which led to the grant of leave by Birmingham J. in September 2010 are very closely related. It is regrettable that the decision maker in this case does not appear to have had access to the decision of Birmingham J. or to an account of it. It seems to me that in any case which is remitted to a decision maker from the High Court, the decision maker ought to be concerned with the views of the High Court on how the matter was first handled. Unless this happens, the mistake or error which led to the first set of proceedings might be repeated. This appears to be what has happened in this case. Therefore, for the avoidance of doubt, I order that the matter be remitted to the Refugee Appeals Tribunal with a direction that this judgement be placed on the relevant file and that the next decision of the RAT be taken in accordance with the views I have expressed and with such guidance as the decision maker may glean from the remarks I have made. I also direct that the file contain reference to the fate of each of the decisions of the RAT with respect to this applicant. It is regretable that the appeal to the RAT on behalf the applicant dated the 9th of December 2005, more than seven years ago, is still outstanding, bearing in mind that asylum seekers in Ireland are not permitted to work, usually live in very basic acommodation and receive an allowance of about €19.10 per week.