Neutral Citation Number: [2008] IEHC 399

THE HIGH COURT

2006 957 JR

BETWEEN

M. O. O. S.

APPLICANT

AND
THE REFUGEE APPLICATIONS COMMISSIONER
AND
THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

Judgment of Mr. Justice Birmingham delivered on the 8th day of December, 2008

1. This is an application for leave to seek judicial review of the decision/ recommendation of the Refugee Applications Commissioner, dated 31st May, 2006.

The nature of the proceedings

2. The route that these proceedings have taken is a slightly unusual one, and it is proper that I should refer to this. The notice of motion, seeking leave to apply for judicial review, refers to the fact that a declaration is sought that s. 13(5) of the Refugee Act 1996, is in breach of the provisions of the European Convention on Human Rights and a declaration is also sought that s. 13(5) of the Refugee Act 1996, as amended, is in breach of the provisions of Bunreacht na hÉireann. However, the written submissions filed did not address questions of any unconstitutionality or any incompatibility with the European Convention. It is not all that unusual that the originating documentation should raise issues relating to the constitutionality of some provisions of the refugee code but that these issues would then not be pursued with the arguments focusing instead on issues that were specific to the situation of the applicant. However, at the hearing, it became apparent that counsel on behalf of the applicant was anxious to pursue these issues. That raised a difficulty in that neither the Attorney General nor the Human Rights Commission was on notice of this fact. In these circumstances, the proceedings were adjourned in order that both the Attorney General and the Commission could be notified. The Attorney General indicated that he was happy that the proceedings should continue but requested that some additional submissions be made on his behalf by counsel who had originally been instructed on behalf of the Refugee Applications Commissioner and the Minister. While the Commission was also notified, it did not seek to participate.

The factual background to the proceedings

3. The applicant, who states that he is a national of Somalia, arrived, with his father, in this State on 21st April, 2005, and both applied for asylum in the ordinary way. In the Office of the Refugee Applications Commissioner (hereinafter ORAC) questionnaire, and at interview, the applicant stated that he had not applied for asylum in any other State and that after leaving Somalia in 2003 he and his father had lived in Kenya until 2005. In fact, both he and his father had applied for asylum in the United Kingdom in 2003, having only spent three months in Kenya. It seems that the applications in the United Kingdom were processed and refused and that appeals on their behalf were rejected.

4. Upon discovering that the applicant had made a previous application for asylum, ORAC decided that the United Kingdom was responsible for examining the applicant's claim and the Minister made a transfer order in respect of him. The applicant commenced judicial review proceedings which were settled with the result that the applicant was allowed to have his claim determined in Ireland. It appears that the fact that the applicant's father is blind was relevant to the decision to permit both applications to be processed in Ireland.

5. On 27th February, 2007, the applicant made a new application for asylum. At interview on 7th April, 2006, the applicant explained that he and his father were concerned that their claims were not being properly addressed in the United Kingdom and it was on this basis that they decided to come to this State.

Factual background to the asylum claim

6. As I have indicated, the applicant states that he is a national of Somalia. He says that he is a member of the Asharaf clan, which is a minority group in Somalia, and that until 2003, he lived in the town of Marka in the lower Shabelle region of Somalia. He says that the Habr Gedir clan, a majority group, was in control of his hometown.

7. It is the applicant's case that in 2003, he and his father were abducted, beaten, and threatened with death by approximately ten armed militiamen, who were members of the Habr Gedir clan. According to the applicant, the militia men were acting on the mistaken belief that his family were wealthy. It appears that his father had been a successful business man in earlier years. The applicant claims that he and his father managed to escape when their captors were distracted by a gunfight.

8. The applicant states that having escaped, he and his father found out that the Habr Gadir clan were looking for them, and, after first hiding in a mosque, they travelled to the coast and from there by boat to Kenya. After about a fortnight there, they say that they met a friend of the applicant's father who then arranged for the sale of a car that they had left behind in Somalia. Thereafter their friend helped them to get to the United Kingdom where, as I have said, they first applied for asylum.

The ORAC decision

9. A negative decision was issued in respect of his application on 31st May, 2006, and was communicated to the applicant by letter dated 26th June, 2006. It is this decision that is the subject of the present challenge. In the decision, the authorised ORAC officer accepted that country of origin information supported the possibility that the applicant might, as a member of a minority clan in Somalia, be at risk of persecution. It was also accepted that the applicant had injuries that might be construed as having been inflicted intentionally by another person, but the officer noted that this, in itself, was not proof of past persecution. The officer went on to make several negative credibility findings in respect of the applicant, primarily based on what the officer contended was a lack of knowledge of matters set out in country of origin information which was appended to the s. 13 report. Having concluded that there were grave credibility issues surrounding the claim, and recommended that he not be declared a refugee, the ORAC officer found that because the applicant had lodged an application in another state party to the Geneva Convention that s. 13(6)(d) of the Refugee Act 1996, as inserted by s. 7(h) of the Immigration Act 2003, applied. This conclusion triggered the application of s. 13(5) of the Act of 1996, as inserted by s. 7(h) of the Immigration Act 2003, to the applicant. In effect, therefore, the applicant was precluded from having an oral appeal before the Refugee Appeals Tribunal ("RAT") but instead, was confined to an appeal on the papers.

The issues in the case

10. The applicant's challenge to the ORAC decision is based on a number of inter-related grounds which I would summarise as follows.

The applicant complains that the ORAC officer's treatment of credibility was based on a flawed interpretation of the country of origin information. In light of this, the application of s. 13(5) of the Refugee Act 1996, to the applicant was impermissible and constitutes a breach of fair procedures and constitutional justice. If s. 13(5) of the Refugee Act 1996, properly interpreted, denies the applicant an entitlement to a full appeal by way of rehearing and confines him to an appeal on the papers then the provision is unconstitutional and incompatible with the European Convention on Human Rights.

11. At the outset, I would note that the conclusions in relation to credibility were not an issue that featured to any extent in the written submissions. The latter focused entirely on the absence of an oral appeal hearing. Indeed, it must be said that the criticisms of the approach to credibility are not spelt out in any detail in the statement to ground this application for judicial review or in the grounding affidavit. Such references as the applicant says are contained in the pleadings, could be fairly described as cryptic.

12. This causes Mr. David Conlon-Smith, counsel for the respondent, to protest that the applicant is seeking to advance arguments now for the first time, at a stage when he is very seriously out of time. I do believe that there is substance to that protest. However, insofar as the applicant has made it clear that he is not suggesting that there is an ever present right to an oral hearing, but rather, that the particular circumstances of the present case, and, in particular, the manner in which credibility was dealt with, require access to an oral hearing as a matter of fairness and constitutional justice, it was understandable that there would be a degree of focus on the details of the ORAC decision. In these circumstances, I have not regarded it as appropriate to constrain the applicant from advancing the arguments that he wishes to make and I propose to consider this aspect of the challenge.

13. In his decision, the officer deals with the question of credibility in six individual paragraphs. However, the recommendation makes clear that it is when these paragraphs are considered cumulatively that the view is formed that, on balance, the applicant's credibility was considerably short of what would be required for him to be given the benefit of the doubt.

14. As the individual paragraphs are the subject of criticism, it is appropriate to consider these paragraphs one by one. At the outset, however, I would note that as has been held in many cases, such as the decision of Kelly J. in *Camara v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, 26th July, 2000), and Peart J. *in Imafu v. Minister for Justice, Equality and Law Reform* [2005] I.E.H.C. 416, this Court is not entitled to put itself in the shoes of the decider of facts or to substitute its own assessment as to credibility for that already arrived at.

Paragraph A - The Sub-Clan
15. Paragraph A considers the significance of the fact that the applicant was unable to name the sub-clan of the Habr Gedir that controlled his home town. The ORAC officer's interest in the identity of the sub-clan in question was clearly signalled during the applicant's interview. The applicant was not only asked which subsection exercised control of the town but was directly challenged on his lack of knowledge; the officer prefaced a question by saying "surely everyone in the town would know".

16. The applicant had his chance to explain his lack of knowledge and he took it, referring to his status as a member of the minority Asharaf clan. I cannot see how more could possibly be expected of the ORAC officer. Having raised the issue, and having given the applicant every opportunity to address the subject, it was then for the ORAC officer to assess the response he received and to decide what significance was to be attached to it.

Paragraph B – The Floods
17. Paragraph B deals with what is suggested to be a lack of knowledge on the applicant's part in relation to flooding of the Shabelle River. The applicant claimed to have lived in the Shabelle area in close proximity to that river. Paragraph B contains the following sentence:-

> "Country of Origin information, however, indicates that, though there was massive flooding in the region in 1997, the Shabelle River also flooded in May and June of 2000, affecting around 200,000 people in the area."

18. The applicant suggests that in referring to 200,000 affected people, the ORAC officer erred in the interpretation of the country of origin information that he had accessed. This is based on the applicant's belief that the ORAC officer had transposed into para. B a reference, that had appeared in the Country Guide to Somalia, to the 200,000 people that were made homeless in 1997.

19. I am not at all convinced that this criticism is well founded as an EM-DAT (International Emergency Disaster Database) *Country Profile for Natural Disasters* refers to 220,000 people being affected by floods in Somalia in July, 2000. An AFP (Agence France-Presse) report of the 22nd May, 2000, quotes a local official as saying that 900 families or about 6,000 people had been displaced by flooding after the Shabelle River burst it banks. This is consistent with a reference to 6,000 persons being displaced by the flooding of the Shabelle River in 2000, that appears in the Forced Migration Online (hereinafter FMO) *Country Guide to Somalia*.

20. The real significance is not how many people were displaced or affected. It should be noted these terms are not interchangeable, as is evidenced by the fact that the FMO Country Guide refers to 200,000 made homeless in 1997, while the EM-DAT Country *Profile for Natural Disasters* records 1.23 million people as being affected by the 1997 floods. The issue is whether there was in fact floods post-1997, and more specifically, whether there was significant flooding in 2000, given that the applicant was claiming to have left Somalia only in 2003. This appears very clearly if one considers how the question of flooding is dealt with (as emerges from the pages of the ORAC interview notes). In response to question 75, as to whether there was serious flooding of the Shabelle River region after 1997, the applicant is recorded as saying "I did not hear it. No there was not any flooding after 1997 before I left Somalia". A little later, at question 80, it was specifically put to the applicant that according to country of origin information, there was serious flooding between 1997 and 2003. The applicant responded "No, it did not flood. Unless it flooded after 2003. Between 1997 and 2003, there was no flooding".

21. Reading the interview notes and the treatment of the issue in the decision/recommendation, I cannot see that there was any substantial unfairness, any irrationality or any material irregularity in how this issue was dealt with.

Paragraph C – The Medical Report
22. Paragraph C involves a reference to a medical report from a GP, submitted on behalf of the applicant, which refers to a previous elbow fracture and scars to the applicant's lip and left hand. The ORAC officer observes that:-

> "Such past injuries or scars do not, however, represent proof of persecution and, therefore, must be viewed in the light of the applicant's overall testimony."

23. It seems to me to be clear, almost to the point of being beyond argument, that it was for the ORAC officer to determine what weight was to be attached to the medical report. It will be noted that the report is a brief one, and in effect is confined to a

statement that the applicant has a deformed left elbow, consistent with an old fracture that had not healed properly, and a scar on the left hand and lower lip consistent with an old laceration injury. The doctor is careful to avoid expressing a view as to whether the injuries were consistent with the account given of how the injuries were sustained, and still less to avoid suggesting that the injuries were, as a matter of probability, caused in the manner claimed.

24. The situation in the present case could hardly be more different than that considered by Edwards J. in *Simo v. The Minister for Justice, Equality and Law Reform* [2007] IEHC 305. Edwards J. was considering a case where a particular form of ill-treatment was complained of, and the applicant presented with injuries that were described by the doctor as "highly consistent" with the account given. I can see no basis whatever for suggesting that the ORAC officer erred, in his treatment of this issue, in a manner giving rise to judicial review. That, of course, is not to say that another decision maker would necessarily be obliged to reach the same conclusion.

Paragraph D – The Worthless Vehicle
25. At interview, the applicant first stated that the family's motor vehicle was worthless, but later suggested that it had been sold for $10,000 with the help of his father's friend in Mombasa. The ORAC officer noted "this does not make sense and raises legitimate credibility concerns". It seems to me that there is an obvious inconsistency between saying on the one hand that a vehicle was worthless, and on the other that its sale realised US$10,000.

26. I can see no basis for the suggestion that there was any impropriety on the part of the officer in his treatment of this issue.

Paragraph E - The Extent of Knowledge of Islam
27. The applicant was asked to list the Five Pillars of Islam in the correct order. The ORAC officer considered that the applicant did not list the Pillars in the correct order. Counsel for the applicant suggests that the officer failed to have regard to discrepancies within the country of origin information before him as to the appropriate order of the Pillars. Counsel suggests that on one reading of the information before the officer, the applicant was, in fact, correct and that therefore, the officer misconstrued the information available to him.

28. When asked to name the fifth Caliph to Muhammad, the applicant denied that there was a fifth. The ORAC officer contended that country of origin information suggested that the Asharaf, the applicant's clan, are renowned religious scholars who claim to be direct descendents of Hasan, grandson of the prophet Muhammad. The officer referenced information on the history of Islam that indicated that the same Hasan contested the fifth Caliphate. In these circumstances, it is not at all clear to me that the ORAC officer misinterpreted or misapplied the information that is available to him. In any event this is quintessentially a matter that is appropriate for appeal. It is a matter that is eminently capable of being dealt with by the submission of a report from an Islamic scholar.

Paragraph F – The False Representations
29. Paragraph F deals with the fact that the applicant initially told lies in denying that he had applied for asylum elsewhere and claimed to have been resident in Kenya over a twenty month period while he was, in fact, living in Britain.

30. This was an issue to which the ORAC officer was required to have regard under s. 11B(f) of the Refugee Act 1996, as inserted by s. 7(f) of the Immigration Act 2000. The ORAC officer specifically raised these untruths with the applicant and gave him an opportunity to comment. He availed of this opportunity to the extent that he said that he had not mentioned the prior claim initially, because he had experienced many problems in the UK.

31. The officer was not only entitled to have regard to the lies told but was obliged to do so by statute and I cannot identify any unfairness whatsoever, in the way in which this issue was approached.

The Overview of the Treatment of Credibility
32. I have dealt individually with the six areas that were listed by the officer as causing him to reach the conclusions that he did. However, reading the interview notes as a whole, the impression one has is of an interview conducted with conspicuous fairness. Apart from the specific areas ultimately relied on, the officer explored a number of other areas where he had difficulty accepting the applicant's account, including the fact that the applicant and his father were fortunate to escape from captivity when their captors were distracted by a gunfight; that they were able to make their way to the coast where they came across a boatman who was kind enough to offer free passage to Kenya and, indeed, make a cash payment to them; that in Mombasa, the applicant and his father were fortunate enough to encounter a friend and former colleague of the applicant's father, who took them in, and who took on the task of selling a motor vehicle that they had left behind in Somalia in a broken down state; which they had described as worthless, and was able to secure a price of US$10,000.

33. In his grounding affidavit, the applicant protests that his interviewer continually suggested to him that he was lying which he found disturbing. There is nothing in the notes, each page of which the applicant signed, to suggest that the interviewer was challenging, confrontational or aggressive in an inappropriate manner.

34. For my part, I am inclined to read the interview notes as indicating that the various elements of the applicant's account with which the officer was finding problems were drawn to the applicant's attention. Had he failed to do this, he would have been subjected to legitimate criticism. In summary, I do not believe there are any substantial bases for contending that the ORAC officer's conduct of the interview, or his treatment of the issue of credibility, were unsatisfactory.

The form of appeal
35. The applicant then goes on to complain that certain findings by the ORAC officer denied him the right to a full and satisfactory appeal. Before coming on to consider the statutory context in which the applicant was confined to an appeal on the papers, it is appropriate to pause to consider to what extent the issues that would appear to arise on an appeal are of a nature that are capable of being dealt with by way of a written appeal. In that context, it is worth looking again at the paragraphs that cumulatively led to the conclusion that his account was not credible.

The Sub-Clan
36. As I have noted the applicant has offered as an explanation as to why he was ignorant about the sub-clans of Habr Gedir, the fact that he was born to another clan. Try as I do, I cannot see how the applicant is in any real way disadvantaged by being prevented from repeating this explanation orally before the RAT. From the applicant's point of view, the reality is that if this matter is to be advanced, it will not be by mere repetition of what has already been said, but by pointing to independent information – whether by way of statements from Somali nationals, country of origin information or otherwise – which would explain why someone was ignorant as to what sub-clan controlled his home town. Such an explanation might be found in terms of the degree of segregation between the clans or the extent of the marginalisation of minority groups.

Paragraph B – the Floods
37. The question of the extent of flooding between 1997 and 2003, is one that would seem incapable of being advanced by the oral evidence of the applicant. Now that he is aware of the area of concern, and the manner in which what he had to say was regarded as deficient, the situation could really only be improved upon by putting forward information that the floods of 2000 were not widespread, were localised to particular areas which excluded the applicant's claimed home town, or that coastal areas – as the applicant's home area apparently is – were immune from the effects.

38. In so far as paras. A and B read together were regarded as casting doubts on whether the applicant was from the town of Marka at all, these issues would seem capable of being dealt with by way of written submissions.

Paragraph C – The Medical Report
39. This aspect of the case was always being dealt with by way of a written report. That will, in reality, remain unchanged whether there is to be an oral hearing or not.

Paragraph D – The Worthless Vehicle
40. This is an area that has already been explored in an extensive fashion. The applicant's difficulty is that whether the appeal is oral or otherwise, the account is not a probable one and depends on good fortune. I do not accept that by reason of the applicant not having an oral appeal he is denied an opportunity to create a particularly strong impression on the adjudicator; thereby displacing any scepticism that would otherwise remain.

Paragraph E – The Extent of Knowledge of Islam
41. It was entirely understandable that the officer would want to explore this aspect. I reject any suggestion that the applicant was unfairly treated or taken by surprise. The officer's focus on the extent of the applicant's knowledge of people and events in his home town and the tenets of his religion only make sense in a situation where the origins of the applicant were being examined. The applicant must have been aware of that.

42. As I flagged during the course of argument, and as I have already referred to, it seems to me that this issue as to the extent of knowledge of the Islamic faith is pre-eminently a matter that can best be advanced by a statement from an Islamic scholar who can deal authoritatively with the question of whether there is one correct way only of listing the Five Pillars of Islam, with the question of how many Caliphs there have been and whether, as has been suggested may be the case, there is a difference between the beliefs of Sunni and Shia Muslims as to the number of Caliphs who have held office and the like.

43. I realise, of course, that probably any appellant would prefer an oral appeal, or certainly would like to have that option. However, it does seem to me that if one considers the issues that contributed to the adverse conclusion at the ORAC stage, that it cannot be said that an appeal on the papers is an ineffective one.

The Statutory Framework for a Restriction on the Form of Appeal
44. Sections 13(5) and 13(6) of the Refugee Act 1996, as amended, provide as follows:-

> 13(5) "where a report under subsection (1) includes a recommendation that the applicant should not be declared to be a refugee and includes among the findings of the Commissioner any of the findings specified in subsection (6) then the following shall, subject to subsection (8), apply [Subsection 8 has no application in the present case]:
>
> > (a) the notice under paragraph (b) of subsection (4) shall, notwithstanding that subsection, state that the applicant may appeal to the Tribunal under section 16 against the recommendation within ten working days from the sending of the notice, and that any such appeal will be determined without an oral hearing.
>
> 13(6)(d) The applicant had lodged a prior application for asylum in another state party to the Geneva Convention (whether or not that application had been determined, granted or rejected)".

45. On its face this is a very clear provision which has the effect of withdrawing an entitlement to an oral hearing in certain circumstances including the situation where a prior application for asylum had been lodged. In *S.O.M. v. RAC* (Unreported, High Court, Clarke J., 23rd June, 2005), certain difficulties to which the subsections could give rise were identified. In particular, Clarke J. noted that the options open to the RAT on the hearing of the appeal, seemed to be confined to either allowing the appeal or affirming the recommendation. He went on to point out that difficult questions were raised if the tribunal found that a finding under s. 13(6) was not justified but nonetheless had doubts about the applicant's credibility. However, it will be noted that Clarke J. was speaking in the context of a finding at first instance, that the application for asylum showed either no basis, or only a minimal basis, for the contention that the applicant is a refugee. It must be also noted that Clarke J. was careful to differentiate that situation from one where the operation of the subsection was triggered by a prior application.

46. On behalf of the applicant it is submitted that notwithstanding the terms in which the subsections appear to be expressed, there remained vested in the respondent a discretion to permit a full oral appeal, in order that fair procedures could be afforded.

47. I reject the contention that the Statute preserves or creates a discretion vested in the respondents to permit an oral appeal, or any discretion to disapply the operation of the subsections. The language is clear and unequivocal and there is simply no scope for ambiguity. I am firmly of that view and that would have been so even had I not concluded that there was no irregularity in the treatment of the issues of credibility so as to make an oral hearing particularly desirable.

Unconstitutional and/or incompatible
48. In these circumstances the applicant, as a further alternative, contends that the sections are unconstitutional and/or incompatible with the European Convention on Human Rights. In that context the applicant points to decisions of the European Court of Human Rights in support of the proposition that the entitlement of a person at an appeal stage will vary depending on the context and what the issues are. An inadequate appeal it is said may violate the provisions of article 6 of the Convention.

49. So far as the argument that there has been a violation of article 6(1) of the European Convention is concerned, the difficulty facing the applicant is that in a series of cases, including *Mamatkulov and Askarov v. Turkey* (2005) 41 E.H.R.R. 25., where earlier decisions are referred to at paras. 81 and 82, the ECHR Court has consistently held that decisions regarding entry, stay and deportation of aliens do not concern the determination of the applicant's civil rights or obligations or of a criminal charge.

50. So far as the applicant's arguments in relation to the Constitution are concerned, the applicant faces an even more formidable hurdle in the form of the Supreme Court decision *in V.Z. v. The Minister for Justice, Equality and Law Reform and Ors* [2002] 2 I.R.

135. In the judgment of the court in that case, McGuinness J. dismissed the claim of the applicant that the failure to provide for an oral hearing for an asylum claim which was found to be manifestly unfounded was unconstitutional. The court upheld the decision of the High Court (Finnegan J.) to the effect that the requirements of constitutional and national justice did not require that an appeal against such a finding would have to include an oral hearing. At p. 161 of the report, McGuinness J. observed as follows:-

> "Here I would accept the submission on behalf of the respondents that there is no authority to establish that an oral hearing on appeal is necessary in all cases. The applicant is not in the position of an accused person facing prosecution. There are no witnesses against him. He is not in a position to cross examine the assessors of his claim and it is difficult to see how in these circumstances a right to cross examine is relevant. He may certainly wish to expand on either his own evidence or independent evidence concerning the conditions prevailing in his country of origin but it is open to him to provide this information in writing."

51. I realise of course that McGuinness J. was speaking in the context of an earlier set of procedures, the Hope Hanlan Procedures, but the principles she sets out seem entirely unaltered. I am fortified in my view in that regard by the decision of McMahon J. in *P.S. (A Minor) v. Refugee Applications Commissioner* [2008] I.E.H.C. 238. His views on the issue emerge very clearly from the judgment, and that is so notwithstanding that leave was granted in a situation where various grounds were interconnected.

52. It seems to me that it is a matter for the Oireachtas to determine the scope and form of an appeal. So far as s. 13(6)(d) of the Act of 1996 is concerned the subsection is directed to a legitimate policy objective of discouraging forum shopping. In this case the country where the prior application was made is Britain, a signatory to the European Convention on Human Rights and a fellow member of the European Union. In the course of argument the point has been made that there may be some very unpleasant regimes indeed around the world that have signed the Geneva Convention. While it is possible that may be so, it seems less than probable that an individual would make an application to such a regime and then follow up on that with an application here in Ireland. It does not seem to me that invoking a hypothetical set of facts, that may never arise, assists the applicant.

53. In summary then, I am of the view that the applicant has not established substantial grounds for contending that the procedure at the ORAC stage was so flawed as to require intervention by way of judicial review. I am of the view that insofar as the recommendation of the ORAC officer referred to the fact that there had been a prior application for asylum that this meant that by statute any appeal would be other than an oral one. I am not satisfied that any arguable grounds have been established for suggesting that the statute that so provides is unconstitutional, or incompatible with the European Convention on Human Rights, and in these circumstances I propose to refuse leave.