

**THE HIGH COURT  
JUDICIAL REVIEW**

**[2010 No. 1317 J.R.]**

**BETWEEN**

**R. S. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND H. S.)**

**APPLICANT**

**AND**

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

**RESPONDENTS**

**JUDGMENT of Mr. Justice Mac Eochaidh delivered on the 13th day of February 2014**

1. The minor applicant was born in Ireland on 5th April 2010. His claim for asylum was presented by his mother. An interview pursuant to s. 8 of the Refugee Act 1996 was conducted on 1st June 2010, which records that "the applicant's reason for seeking asylum is based on [the mother's] own application". The mother's claim for asylum was rejected on the basis of significant negative credibility findings. These negative findings are repeated, in part, in the mother's application for subsidiary protection which resulted in refusal.

2. The short decision in respect of the minor applicant is, in relevant part, in the following terms:

"The applicant's mother was afforded every opportunity to express and to outline fears she might have for her child in Somalia, however, it was noted by the Tribunal that the infant applicant's mother failed to avail of this opportunity so to do. The applicant's mother's claim was heard and determined (69/427/08) and she failed to satisfy the Tribunal that she had a well-founded fear of persecution on any Convention ground. Further issues in relation to her nationality were raised and it was determined that she was not a Somali national. A language analysis carried out stated that the applicant's mother did not speak the Bajuni dialect. The applicant's mother claims to not know the father of the applicant as she was seeing two men at the time of his conception, a Nigerian national and a Congolese national. Not having advanced any further reasons or fears for her son's safety in Somalia and in the light of the decision given in respect of the infant applicant's own mother's claim, this infant has not satisfied the Tribunal that he has a well-founded fear of persecution on any Convention ground. That being so, the applicant is not a refugee and accordingly the decision of the Commissioner is upheld."

3. The principal complaint made on behalf of the applicant in respect of this finding is that the Tribunal Member allegedly failed to determine the nationality of the applicant. The applicant referred to the decision of Cooke J. in *E.S. v. The Refugee Appeals Tribunal* [2009] IEHC 335, where the learned judge said:

"23. It is axiomatic that the establishment of the country of origin of a claimant to refugee status is fundamental to the assessment of the claim because it is otherwise impossible to determine whether the claimant is outside that country owing to a Convention based fear of persecution. That is not infrequently an extremely difficult exercise and while the onus of establishing refugee status is on the claimant, the UNCHR handbook points out at paragraph 196:

"While the burden of proof in principle rests with the applicant, the duty to ascertain and evaluate all relevant facts is shared between the applicant and the examiner. Indeed, in some cases it may be for the examiner to use all means at his disposal to produce the necessary evidence in support of the application".

...

24. The ambiguity and uncertainty in the Contested Decision in this case lies in the fact that on the one hand it gives the clear impression that the Tribunal Member comes to the same view as the authorised officer in the Section 13 Report namely, that the applicant is not a national of Zimbabwe, but the decision contains no conclusion to that effect in express terms; on the other, it also and somewhat inconsistently proceeds to examine and to rule in express terms on the claims to fear of forced marriage in Zimbabwe as well as the claim first raised in the further submissions that the applicant feared persecution as an opponent to the ruling Zanu PF regime in Zimbabwe, notwithstanding the absence of any basis for that fear in the applicant's own evidence."

4. Relying on that authority, the applicant argues that the Tribunal Member unlawfully failed to make a clear finding as to the applicant's nationality. No complaint is made in these proceedings that the minor applicant's claim for asylum was determined by reference to the result of his mother's claim. Instead, the applicant suggests that the mother's claim is based on error. The respondent says that the decisions of ORAC, the RAT and on subsidiary protection were never challenged and that the applicant is not entitled to mount a collateral attack on the validity of these decisions in this case. In addition, the respondent opened those decisions and related documents in some detail to persuade the court as to the cogency and correctness of those findings.

**The Mother's Claim**

5. It is necessary to briefly examine the minor applicant's mother's claim and the manner in which it was determined. The mother says she is a Somali national of Bajuni ethnicity. Due to the Civil War in Somalia, it is almost impossible for persons claiming to be Somali to produce State papers such as Birth Certificates, Identity Cards or Passports in support of the claim. It is not uncommon for decision makers in Ireland to rely on language analysis experts to assist with an assessment of whether the person claiming to be of Bajuni ethnicity and Somali nationality can speak Bajuni and whether they have knowledge of Bajuni culture and society. The Office of the Refugee Appeals Commissioner commissioned a language analysis of the applicant's mother in connection with her claim.

6. An interview was conducted with a person skilled in analysing Swahili (Bajuni). He concluded that the applicant spoke Swahili of the sort spoken in Kenya to mother tongue level and that her Bajuni was deficient. The Swahili spoken by Bajuni people and the Swahili spoken in Kenya appear to be dialects of the same language. The expert assessor noted as follows:

"The person, a woman, speaks Swahili on the recording. She speaks the language to the mother tongue level. She says she comes from Koyama, an island in Somalia. She speaks a variety of Swahili with certainty not spoken in Somalia. She speaks a variety of Swahili with certainty found in Kenya.

The person is asked which dialect she speaks on the recording and she says she speaks Bajuni and Swahili. She is not consistent in her pronunciation and choice of words and generally speaks a variety of Swahili typical of the language usage in Kenya. She does not speak any Somali. The person says that she cannot speak any other language apart from Bajuni and some Swahili.

When asked to speak Bajuni, the person continues to speak Swahili, consistently claiming that it is Bajuni which is incorrect. When asked about some basic words in Bajuni, she is unable to explain the meaning of these. In some cases, she confuses the meaning of the words and interchangeably uses them in a wrong way."

7. The Refugee Appeals Tribunal, on 5th February, 2010, rejected the mother's credibility as to how it was she came to speak Swahili to mother tongue level. In addition, credibility was rejected because it was discovered that, contrary to what the mother had claimed, she had obtained a visa on a Tanzanian Passport in Dar es Salaam, Tanzania to enter and study in the United Kingdom. The Tribunal Member concluded:

"The applicant was presented with the falsification and the lacunas in many aspects of her a claim for asylum in this jurisdiction and gave manifestly and unclear explanations as to how these situations came about. Nothing the applicant has stated has convinced me that she has a well-founded fear of persecution on any Convention grounds. That being said, the applicant is not a refugee and, accordingly, the decision of the Commissioner is upheld."

8. Following the failure of the mother's claim at the Refugee Appeals Tribunal, application was made for subsidiary protection. On 28th April 2010, the Repatriation Unit from the Irish Naturalisation and Immigration Service wrote to the mother indicating that, notwithstanding the basis of her claim for subsidiary protection, the Minister for Justice intended to process the application on the basis that she was a Tanzanian national. The mother's solicitors replied to this letter indicating that the Tanzanian Passport was false and insisting that the mother was a Somali national.

9. An interview pursuant to s. 11 of the Refugee Act 1996 was conducted on 1st July 2010, in respect of the minor applicant's claim. The cover sheet indicates that the language the interview was conducted in was Bajuni. The s. 13 report from ORAC rejected the contention that the minor applicant was a national of Somalia on the basis that the mother's claim to be Somali had previously been rejected. The s. 13 report indicated, incorrectly, in my view, that "the language analysis [stated] that she did not speak Bajuni or a dialect found in Somalia". In my view, this is a mischaracterisation of the language analysis report which found that she spoke Swahili of the sort spoken in Kenya and "often uses the Kenyan and Bajuni variations of the same word interchangeably." There was no finding that she did not speak Bajuni. (I also accept that the Tribunal Member similarly errs in saying that "a language analysis carried out stated that the applicant's mother did not speak the Bajuni dialect". As indicated, the language analysis did not say this. No complaint as to error of fact is maintained in these proceedings. In any event, even though the language report in question does not make that finding, it makes a very clear finding that the applicant speaks Swahili of the Kenyan type and deficient Bajuni. If she were a Somali national of Bajuni ethnicity she would speak mother tongue Swahili of the sort spoken by the Bajuni in Somalia on the islands. No irrationality could attach to a conclusion that Somali nationality had not been established when such a conclusion is based upon that language analysis report)

10. On 16th June 2010, the Minister for Justice, Equality and Law Reform refused the mother's application for subsidiary protection on the basis that it was not accepted that she was a Somali national of Bajuni ethnicity. The Minister also concluded that the applicant was considered to be a Tanzanian national. One of the grounds of appeal pursued in respect of the minor applicant was that it was irrational to conclude that he was not a Somali national based on the language analysis test, having regard to the fact that the mother conducted her s. 11 interview in Bajuni. The applicant makes complaint in these proceedings that the Tribunal Member failed to take any account of the fact that the mother conducted both s. 11 interviews (her own and the one she conducted on behalf of the minor applicant) in Bajuni.

11. I agree with the *dicta* of Cooke J. cited above, to the effect that it is imperative that a finding of nationality be made as it is impossible to declare a person a refugee unless a decision maker has determined the nationality of the asylum claimant. However, this could not mean that in a case where an asserted claim as to nationality is rejected, the Tribunal Member or decision maker must then identify the nationality of the claimant. Such a finding would serve no purpose in circumstances where an asserted claim as to nationality is rejected. In those circumstances, the applicant's credibility as to the very core of a claim is rejected and no further analysis of any aspect of the claim is required. Therefore, I reject the argument made by Ms. Brazil B.L. for the applicant that the failure to identify the nationality of the minor applicant or his mother constitutes a legal flaw in the decision making process.

12. It is argued that there is no clear rejection of the asserted Somali nationality in the decision of the Tribunal. When this is put alongside the failure to identify an alternative nationality, a serious gap in the decision making process emerges, according to the applicant's counsel. I agree that the language deployed by the decision maker in this case could have been clearer. It is noteworthy that the Tribunal Member who decided the mother's claim and the minor applicant's claim is the same person. It is beyond doubt that the decision maker bases the rejection of the minor applicant's asylum claim on the earlier rejection of the mother's claim to be Somali. The decision maker says "the applicant's mother's claim was heard and determined (69/42/08) and she failed to satisfy the Tribunal that she had a well-founded fear of persecution on any Convention ground". It is clear that the mother's failure to persuade the decision maker that she had a well-founded fear of persecution is based, in significant part, on her failure to persuade the Tribunal Member that she was a person of Bajuni ethnicity.

13. Additionally, the Tribunal Member in this case says "in the light of the decision given in respect of the infant applicant's own mother's claim, this infant has not satisfied the Tribunal that he has a well-founded fear of persecution . . ." In my view, this conclusion can only mean that the son's asserted nationality was wholly dependent on the mother's asserted nationality and because her credibility as to this fact was rejected, the son's claim must also fail.

14. I refuse leave to seek judicial review.

