

THE HIGH COURT
JUDICIAL REVIEW

Record No. 2011/237 J.R.

Between:/

A. M. S. J. [SOMALIA] [No. 2]

APPLICANT

-AND-

THE MINISTER FOR JUSTICE, EQUALITY AND DEFENCE AND THE REFUGEE APPEALS TRIBUNAL (Paul Christopher)

RESPONDENTS

JUDGMENT OF MS JUSTICE M. H. CLARK, delivered on the 1st day of November 2012.

1. By order of Cross J. dated 24th February 2012 the applicant was granted leave on three grounds to apply for an order of certiorari quashing the decision of the Refugee Appeals Tribunal dated 25th February 2011 to make a negative recommendation in relation to his claim for refugee status. The applicant was refused leave to challenge the credibility findings made by the Tribunal Member. The substantive hearing took place on 3rd October 2012. Mr. David O'Neill B.L. appeared for the applicant and Ms. Helen Callanan B.L. appeared for the respondents.

2. The Court is familiar with the facts of the applicant's claim as it dealt with a previous challenge brought by the applicant in *A.F.S.J. v. The Refugee Appeals Tribunal* [2010] IEHC 144. In brief the applicant is a 60-year old man from Somalia. He claims to be a member of the Ashraf clan which is a part of the minority Benadiri grouping of ethnic peoples of coastal Somalia. His surname, if genuine, connects him to the Ashraf tribe. He says that he grew up in the troubled Shangani district of Mogadishu where Benadiri traditionally lived. Until the civil war began in 1991, he worked in a mechanic shop. He married his wife in 1985 and they had nine children born between 1987 and 2000. He applied for asylum in March 2005 and described numerous instances of ill-treatment which he alleged he and members of his family suffered at the hands of Hawiye and Habar Gidir militia over some 15 years.

3. This description of persecution was not found credible by either the ORAC or the Tribunal. Ignoring, for a moment, the flaws in his detailed narrative which were found implausible, his claim at its most basic and constant level is that as a member of a minority tribe, he is without protection in Somalia and not only has he suffered persecution in the past, but he will also face persecution if returned.

4. Country of origin information (COI) reports confirm that minority tribes are subject to extreme forms of persecution in Somalia. Since the civil war in 1991/1992 there has been widespread destruction of the clan structures and of the identity of the minor tribes and ethnic groupings who fall under the umbrella of the Benadiri. The Ashraf who are one of those minority groupings are said to be religious scholars descended from two of the Prophet Mohammed's sons. The applicant was asked a series of questions at his s. 11 interview in relation to his claimed ethnic grouping and his religion. The answers he provided led to a rejection of his claim to be a member of the Ashraf. The key finding was that while elements of his testimony in relation to the Ashraf clan were correct, "he was unable to give objectively consistent detail or information regarding key aspects of Ashraf and Benadiri identity and culture". His particular story of having been the victim of persecution because he was of the Ashraf clan or group was therefore rejected. He appealed to the Refugee Appeals Tribunal, arguing inter alia that the Commissioner had erred insofar as he found that the applicant was not Ashraf. Following an oral hearing, the Tribunal Member found:

"The Tribunal was not generally satisfied as to the applicant's credibility in relation to the particular claim for asylum advanced by him. Some of his evidence just ran contrary to common sense and it was implausible and on other occasions his evidence was contradictory. It found him to be a generally poor and sometimes uncooperative witness."

5. The decision then listed a series of inconsistencies in his account of his past persecution and his travel to and entry into Ireland. The Tribunal Member saw no reason to upset the conclusions reached in the s. 13 report based on the "human rights violations alleged" and he affirmed the recommendation made by the Commissioner. He made no finding on the applicant's clan/ethnic identity.

The Court's Assessment

6. The first of the three grounds on which leave was granted is as follows:-

"The Applicant's claim contained the following elements namely that (i) he is from Mogadishu, (ii) he is Ashraf, (iii) he was subjected to past persecution as set forth in his evidence, and (iv) on the hypothesis that he could be returned to Somalia he faced a real risk of future persecution. In the unusual and particularly severe conditions of Somalia, even if (iii) was rejected, it would have been possible for the second named Respondent to reach a decision favourable to the Applicant on points (ii) and (iv), combined with point (i), and it was therefore incumbent on the second named Respondent in the circumstances of this case to address these points discretely in its decision, which it failed to do".

7. The applicant contends that while it is clear that the Tribunal Member rejected his account of past persecution on credibility grounds, it is unclear what his finding was in relation whether the applicant was of the Ashraf / Benadiri ethnic grouping. Counsel for the applicant attempted to argue that the Tribunal Member did in fact accept that the applicant was Ashraf when at a late stage of his decision he found that "Reliable country of origin information on file is to the effect that the Ashraf can be found in IDP camps in northern Somalia according to the UN". He argues that the only logical inference is that the Tribunal Member accepted his asserted Ashraf ethnicity.

8. The respondents argue that the decision is clear: the Tribunal Member accepted that the applicant is from Somalia but was not satisfied that he is Ashraf. They argue that it follows from the Tribunal Member's express affirmation of the Commissioner's recommendation that he adopted all of the Commissioner's findings. It is the view of the Court that this is not a necessary inference

to draw from such affirmation as experience shows that the Commissioner's recommendation is frequently affirmed on totally different findings. Further, the silence of a Tribunal Member on certain issues does not necessarily imply acceptance of the Commissioner's findings. In this case, the short quotation relied on by the applicant to establish that the Tribunal Member accepted the applicant's ethnicity was introduced by the applicant himself in his appeal submissions. This seems to have been done to disprove the s. 13 finding that most Ashraf had left Somalia in 1991-1992 due to persecution and that it was therefore unlikely that the applicant could have suffered persecution in later years.

9. The Court is not persuaded by the applicant's arguments that the reference to Ashraf being found in IDP camps in Northern Somalia is evidence of a finding that the applicant was Ashraf. However it is not at all clear what the sentence means as in the same paragraph the Tribunal Member states that because of the applicant's lack of credibility he was not required to consider COI but nevertheless he does in fact go on to address COI which he considered to be of more recent vintage than that presented by the applicant. He does not explain his reliance on the quotation.

10. The reasoning of that part of the appeal decision is not apparent either from reading the decision as a whole or from its individual part and does not provide desirable clarity on the fundamental issue of whether the applicant was Ashraf / Benadiri. In the view of the Court, this was a fundamental issue which had to be addressed to establish whether the applicant would face a risk of persecution if returned to Somalia. As this question was never actually explored, the Court is satisfied that the applicant should succeed and the decision should be quashed.

11. This conclusion is supported by a number of factors. First, the Tribunal Member does not appear to have addressed the following argument, made in the applicant's notice of appeal:

"It is submitted that the Refugee Applications Commissioner was incorrect in his conclusion that the Applicant was not Benadiri / Ashraf having based his conclusion mainly on the Applicant's knowledge of the history of Benadiri / Ashraf clan. We refer to an extract from the report on minority groups in Somalia which indicated that Benadiri do not put much weight on genealogical descent as do the Somali clans (Appendix F)."

12. At appendix F in the applicant's appeal submissions is an extract from a report prepared in 2000 following a *Joint British, Danish and Dutch fact-finding mission to Nairobi, Kenya 17 to 24 September 2000*, which repeats the claim contained in the submission. The relevance of this passage to the appeal was that it addressed and sought to overturn the Commissioner's finding that the applicant showed a lack of knowledge of the customs and culture of the Benadiri and therefore was not Ashraf. However, it was not a matter which was addressed at the oral hearing. The handwritten note taken by the RLS attending officer at that hearing (the contents of which are not contested by the respondents) indicates a strong focus on the detail of the appellant's account of past persecution and especially how he escaped from captivity, how he obtained the means to travel and how he travelled to Ireland. The only question recorded which bore upon the applicant's claimed tribe or clan was when the Presenting Officer asked him why he had not known about his religion when questioned by the Commissioner when COI indicates that Ashraf know about religion. The applicant replied that he knew some things about his religion and had learned more at the mosque in Ireland. That line of questioning was not pursued any further.

13. The Tribunal Member's decision focuses almost entirely on the detail and specifics of the applicant's account of past persecution, his alleged escape and his ability to obtain the funds to leave Somalia. Beyond recording at the outset that the applicant claims to be from the Ashraf tribe, the decision does not address the question of the applicant's ethnic background which is all important in claims from Somalia as ethnicity and tribal origins appear to be one of the root causes of persecution in that State. The decision simply states that the Tribunal Member was not satisfied as to the appellant's credibility in relation to the claim advanced by him. The reader is thus left wondering whether the Tribunal Member adopted the Commissioner's finding that the applicant was not Ashraf or Benadiri (a description which covers many of the ethnic groups who are perceived by the powerful clans as being of foreign origin) or whether he was so unimpressed by the claim made that he simply did not address his mind to the question of ethnicity at all.

14. This creates particular problems for the assessment of protection claims from Somalia, where the crucial issue is whether an applicant is from the failed state at all and if so, whether he forms part of a vulnerable and persecuted clan or whether he enjoys the protection of one of the major clans or is part of one of those groupings. If, as the respondents accept, the applicant is from Somalia then what is his status there? The Commissioner found that he was not Ashraf or Benadiri. What then was he? A member of a majority clan in Somalia or a member of a minority clan other than the Ashraf / Benadiri? Did the Tribunal Member consider that he was not a victim but an aggressor being a member of the Hawiye or a supporter of the then unformed Al Shabaab? If not Ashraf or Benadiri what was he and what risk did he face if returned to Somalia?

15. In the view of the Court, if a protection decision-maker wishes to reject an applicant's core claim that he was persecuted because he belongs to a particular minority clan which objective evidence shows to be cruelly persecuted, such as the Ashraf / Benadiri in Somalia, then the decision maker must make clear whether or not the applicant is accepted to be a member of the particular clan. It is insufficient to reject such a claim simply because his personal account of past events was not plausible. This is important for two reasons. First, unless the clan aspect of the claim is clearly addressed, the Tribunal Member cannot properly apply a prospective risk assessment (the forward looking test), which he is required to do under s. 2 of the Refugee Act 1996.

16. While it is very important for an asylum seeker to tell the truth, it is also important for the protection decision-maker to separate those aspects of an applicant's narrative which have been found not to be plausible or credible from those aspects of the case which are accepted. Thus, a decision-maker may be satisfied as to the origins of the applicant but might reach the conclusion that the narrative of past persecution is implausible and lacking credibility. The decision-maker must provide a reasoned determination on the issue that notwithstanding the accepted origins of the applicant, the claim is not sustainable. For instance, an applicant may be originally of a tribe which has been persecuted but he has never actually lived in Somalia. There may be many reasons found but they must be clearly stated.

17. It is well settled that a finding that an applicant has lied about past experiences does not necessarily foreclose upon the need to consider the future risk of persecution. In that regard in *M.A.M.A. v. The Refugee Appeals Tribunal & Others* [2011] 2 I.R. 729, Cooke J. had regard to the findings made by Peart J. in *Da Silveira v. The Refugee Appeals Tribunal and Another* [2004] IEHC 436 and held as follows:-

"17. [...] 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 for gratuitous speculation: it must have some basis in, and connection to, the apparent circumstances of the applicant.

18. It must be borne in mind that in making an asylum claim there is a basic onus of establishing the fundamental elements of a claim which rests with the applicant even if the examination of the claim is strongly investigative in character on the part of the asylum authority and is to be carried out in cooperation with the applicant. Furthermore, one of the crucial elements in the definition of "refugee" as stated in s. 2 of the Act of 1996 based upon Article 1A of the Geneva Convention, is that the asylum seeker "is outside the country of his or her nationality" owing to a well founded fear of persecution for one of the Convention reasons. The assessment of the fear claimed thus involves identifying a country of origin. Accordingly, if the finding on credibility goes so far as to reject a claim that the asylum seeker has a particular nationality or ethnicity or that he or she comes from a particular region or place in which the source of the claimed persecution is said to exist, there may be no obligation upon the decision-maker to engage in "reasonable speculation" as to the risk of repatriation in the case. On the other hand, if the decision-maker concludes that the asylum seeker is opportunistically seeking to place himself in the context of verifiable events in a particular place but decides that while such events did occur, the asylum seeker was not involved in them, the risk of future persecution may still require to be examined if there are elements (the language spoken or obvious familiarity with the locality for example,) which establish a connection with that place. Thus, opportunistic lying about participation in events involving previous persecution will not necessarily foreclose or obviate the need to consider the risk of future persecution provided there are some elements which furnish a basis for making that assessment."

18. This Court took a similar view in *C.B. (DR Congo) v. The Refugee Appeals Tribunal & Another* (Unreported, High Court, 26th June 2012). Thus, where some elements of an applicant's story are believed to be true, for example where he comes from, a prospective assessment of risk must be carried out based on those elements which are believed. It follows that in this case, if the applicant was believed to be Ashraf from Somalia, it was almost immaterial that his account of past persecution and how he got to this State was disbelieved. The key question for the Tribunal Member was whether objective evidence shows that Ashraf returned to Somalia from Europe have a well-founded fear of persecution. While forward-looking submissions were made by the applicant at the oral hearing insofar as he said that both as a member of the Ashraf tribe and as a Somali person, he feared both Al Shabaab and the transitional government if returned to Somalia from Europe, the Tribunal Member considered he would be of no interest to these parties without actually saying why, apart from the underlying premise that his narrative was not believed. The Tribunal Member is obliged by the terms of the *ECs (Eligibility for Protection) Regulations 2006* (S.I. 518 of 2006) to consider all up to date, relevant country of origin information and the relevant facts and circumstances of the applicant which in the view of the Court includes the risk to minority tribes.

19. The Court accepts that in many cases credibility findings are such that the assessment of future risk can be disposed of in a line or two. For instance, if the applicant comes from a state where only one identified group is persecuted and it is found that the applicant does not form any part of that group, it is not necessary to apply a forward looking test. For instance, if an applicant from Pakistan whose sole fear of persecution arises from the claim that he was an Ahmadi has been found not in fact to belong to that faith but rather to the Sunni majority, then it follows that he will not face risk of persecution on his return to Pakistan by reason of his religion. The situation in Somalia, where wholesale persecution and ethnic cleansing of minority clans occurs, is more complex and requires an assessment of whether - even if the details of specific past persecution are rejected - the applicant does in fact come from one of the persecuted and at risk groups and if so, whether he can safely return to Somalia.

20. The second reason why a clear determination is required on the core elements of the applicant's claim is that without such determination, the applicant may be prejudiced at the next stage of the protection process and in particular if he is refused a declaration of refugee status and seeks subsidiary protection. This has been acknowledged in a number of cases (see e.g. *A.S.O. v. The Tribunal* [2009] IEHC 607). The difficulty is that the applicant will find himself without a determination as to his ethnic / clan grouping which could establish eligibility for subsidiary protection and / or grounds for humanitarian leave to remain. In the absence of new evidence, the Minister's officials do not generally engage in fact-finding at the post-asylum stage and so they will be in the unsatisfactory position of having to speculate as to whether the applicant is Ashraf. Alternatively they may simply assume that the negative credibility findings encompass his claim to be Ashraf. That is wholly unsatisfactory and Tribunal Members must be careful to avoid disadvantaging a protection applicant in such a fashion.

Conclusion

21. The Court is satisfied that the decision ought to be quashed on ground one as set out at paragraph 6 above. An order of certiorari will be granted quashing the decision of the Tribunal and remitting the matter to another Tribunal Member for fresh consideration. It is therefore unnecessary for the Court to consider the other two grounds.