

THE HIGH COURT

JUDICIAL REVIEW

Record No. 2011/489 JR

BETWEEN

J.N.A.

APPLICANT

-and-

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

RESPONDENTS

JUDGMENT of Mr Justice O’Keeffe delivered on the 20th day of November, 2012

Background

1. The applicant in this case is a national of Somalia. His date of birth is given on his ASY1 form as 13th August 1989. He claims to be a member of the Reer Hamar clan, a minority group within Somalia whose members are vulnerable to attacks and serious human rights violations by dominant clan groups.
2. The applicant arrived in Ireland on 5th January, 2005. In his interview with the Office of the Refugee Applications Commissioner (ORAC) the applicant initially claimed to have travelled to Ireland by air via one unknown country. He claimed to have never left Somalia before January 2005. He also stated that he had never applied for asylum in any other country apart from Ireland. When it was put to him that there was evidence of him having been in the United Kingdom in 2004 the applicant admitted that this was correct. The applicant acknowledged, contrary to what he had previously stated, that he left Somalia in 2003 and had previously applied for asylum in the UK and the Netherlands. He denies that he ever applied for asylum in Italy.
3. In June, 2005 the applicant was refused refugee status by the ORAC who found that the applicant had adduced “manifestly false evidence” and that his testimony was “fundamentally lacking in credibility”. The Refugee Appeals Tribunal (the Tribunal) upheld this finding in June, 2008. That decision was the subject of judicial review proceedings and leave was granted by McGovern J. on 10th September, 2010. The appeal was remitted back to the Tribunal who again refused the applicant’s appeal on 27th May, 2011. Leave to apply for an order of *certiorari* was granted by Cooke J. on 18th April, 2012.

The Refugee Appeals Tribunal decision of 27th May 2011

4. The Tribunal agreed with the finding in the ORAC s.13 report that the applicant is “fundamentally lacking in candour and credibility”. The Tribunal report states that “no convincing argument has been forwarded that

the applicant had not adduced manifestly false evidence in support of his application.”

5. The Tribunal report says that despite the alleged persecution, the applicant’s family remain in Somalia, albeit relocated, and that “this element further objectively undermines his claimed subjective fear of persecution.”
6. The applicant’s failure to await the result of asylum applications in other EU states also damaged the applicant’s credibility.
7. The Tribunal stated it afforded no weight in the circumstances to “other documents personal to the appellant presented by him”.
8. The Tribunal concluded that the applicant’s claim was “lacking in credibility, particularly in relation to the core elements of the claim.”

The Applicant’s Submissions

9. The applicant is seeking an order of certiorari quashing the decision of the first named respondent.
10. The applicant’s submissions can be divided into three main grounds and these are briefly summarised below:

i. Failure of the Tribunal to analyse the risk of future persecution

The applicant contends that the Tribunal erred in law by failing to make an assessment of future risk of persecution faced by the applicant on return to Somalia. It was submitted that the Tribunal took no issue with the applicant’s nationality as Somali and made no finding that he was not from the Reer Hamar clan. The applicant had submitted a large amount of country of origin information detailing the persecution suffered by the Reer Hamaar clan. The applicant had also submitted correspondence from the Red Cross which was obtained by the HSE. The contents of these messages are discussed in greater detail below. The applicant relies on the decisions in *C. v. Refugee Appeals Tribunal* [2012] IEHC 4 and *A. v. RAT & Ors* [2011] IEHC 147 as authority for the requirement of the decision-maker to carry out an assessment of future risk, irrespective of an adverse credibility finding.

ii. Material errors of fact and unfair findings in the RAT decision

The applicant claims that the Tribunal made a number of material errors of fact which are grounds for granting the relief sought. The primary issue relates to the Tribunal’s conclusion that the applicant’s claim is undermined because his family remain in Somalia. The Tribunal report states that “the applicant’s family members remain in Somalia, albeit internally relocated. The Tribunal finds that this element further objectively undermines his claimed subjective fear of persecution”. The applicant describes this as a gross error of fact. He alleges that his family have suffered ongoing

persecution in Somalia since he left and that his father has been murdered and his sister kidnapped. It is submitted that the family have not voluntarily relocated within Somalia but rather they have been forced out of their home by a dominant clan group. Rather than undermining his claim, it is submitted that these factors support his claimed fear of persecution.

The applicant further claims that as this matter was not considered by the ORAC he should have had an opportunity to respond to it. It is submitted that failure by the Tribunal to put this issue to the applicant amounts to a breach of fair procedures.

iii. Failure by the Tribunal to give due regard to documents submitted by the applicant

This submission is related to the previous two grounds. The applicant says that the Tribunal afforded “no weight” to “other documents personal to the appellant”. It is submitted that it is not clear what the Tribunal meant by ‘other documents personal to the appellant’. Did the Tribunal mean documents of a personal character that were obtained by the applicant such as information furnished to the applicant by the Red Cross who had been requested by the HSE to carry out a tracing process of the applicant’s family. Or, alternatively, did it refer to information generally available such as country of origin information. If it meant the former, then the documents warranted careful consideration.

Of particular importance to the applicant are the documents obtained from the Red Cross containing messages from his family in Somalia. The messages detail the alleged persecution being suffered by the family:

“...militiamen attacked our house and looted everything we had. Now we are displaced and our living condition is poor.”
(Red Cross message, 2nd February, 2006)

“...the situation is still the same, no protection, no security, no jobs and still no education...”
(Red Cross message, 6th August, 2006)

“My son in the month of March last we were attacked by militia men belonging to the Agbal clan and they subjected us to looting and beatings...they know we belong to a minority clan and we don’t have protection...they also killed your father [N.] and they took with them your sister [F.]...”
(Red Cross message, 5th May, 2007)

The applicant claims that these documents, as well as other COI documents, are evidence of his well founded fear of persecution and that the Tribunal erred in failing to give them any weight.

The Respondent's Submissions

11. The respondent submits that the findings of the Tribunal were validly made and argues that there are a number of reasons for refusing the relief sought.

- i. The obligations on the applicant

Counsel for the respondent asserts that throughout the entire asylum process the importance of providing truthful and accurate information is reiterated to the applicant. Existing case law shows that the Court places a high degree of importance on the candour and credibility of applicants and counsel for the respondent submits that due to the applicant's dishonesty in relation to his passage to Ireland and previous asylum applications, the Tribunal was correct to treat his entire claim with a high degree of scepticism. It is submitted that relief has been refused in similar cases where the applicant told untruths. In support of these submissions the respondent relies on *MSA v Refugee Appeals Tribunal & Anor* [2009] IEHC 435 and *MH (Afghanistan) v. Secretary of State for the Home Department* [2009] EWCA 527.

- ii. Issue of the applicant's family members

The respondent submits that information about the applicant's family having relocated within Somalia was raised by the applicant and is therefore not a new finding by the Tribunal which should have been put to the applicant. It is claimed that there was therefore no breach of fair procedures.

- iii. All documents were given due consideration

The respondent relies on the decision of Cooke J. in *ZMH v. MJELR* [2012] IEHC 221 where it was held that decision makers should treat public documents from Somalia with a high degree of caution due to the chaotic nature of that State. Coupled with this is the applicant's dishonesty on his ASY1 form and at the ORAC interview. It is submitted that the Tribunal did consider all the information it had before it and was correct to attach little weight to certain documents.

Assessment

12. It is clear from the Tribunal letter dated 27th May 2011 enclosing the Tribunal's decision and the respondent's submissions that doubt surrounding the applicant's candour and credibility is the primary reason for refusing his appeal. He lied on his ASY1 form and at the s11 interview with the ORAC about his passage to Ireland and previous asylum applications and therefore his entire claim was treated with a high degree of scepticism thereafter. The Tribunal concluded that he did not have a genuine and well founded fear of persecution

and that overall his testimony was “lacking in credibility, particularly in relation to the core elements of the claim”.

Decision

13. The applicant’s untruths relate to his passage to Ireland and his previous asylum applications in other safe countries. It is accepted that he lied on the ASY1 form and at the s.11 interview. However, the applicant asserts that, once confronted with evidence that he had been in the UK, he provided a truthful account of his movements and volunteered additional information as to his whereabouts after leaving Somalia and prior to arriving in Ireland.

14. In *C & Ors. V. Refugee Appeals Tribunal & Ors [2012] IEHC 4* Cooke J. discussed the difficulties faced by decision makers when dealing with asylum applications of Somali nationals:

“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”.

15. Cooke J. went on to discuss the need for decision makers to carry out an assessment of future risk even where there are doubts as to the applicant’s credibility:

“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”

16. The obligation to consider future risk was also discussed by Cooke J. in *A v. Refugee Appeals Tribunal [2011] IEHC 147*:

“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.”

17. The respondent relies on the decision in *M.S.A. v. The Refugee Appeals Tribunal & Ors* [2009] IEHC 435 to argue that the Tribunal findings are valid. The facts of that case are similar to the present case. In *M.S.A.* the applicant, a national of Afghanistan, lied about his passage to Ireland and failed to inform the ‘ORAC’ that he had spent a year in Greece prior to his arrival here. Relief was refused and Clarke J. held that the Tribunal was ‘entirely correct to attach weight to the requirement for candour and cooperation when seeking refugee status and not to condone outright lying’. However, that case is distinguishable from the present case for a number of reasons. Firstly, in *M.S.A.* the applicant told untruths at the outset of his claim and persisted with them until he was advised not to do so by his solicitor before the oral hearing of the Tribunal. In the present case, the applicant acknowledged he had told an untruth at a very early stage in the process and volunteered additional information. Secondly, the effect of the applicant’s untruths in each case is very different. In *M.S.A.* the applicant’s untruths altered fundamental details of his claim including considerably changing the dates of key incidents of alleged persecution. In the present case, the applicant’s untruths, as reprehensible as they are, do not go to the core of his claimed fear of persecution and the reasons for it, which includes the treatment of members of his family in Somalia. Thirdly, in *M.S.A.* there were a number of other arguments which cast doubt on the applicant’s claim of a well founded fear. His story related to a particular individual seeking to exact revenge for a particular incident and a number of concerns were raised about the veracity of this allegation and how sustainable the applicant’s story was. In the present case, the applicant’s claimed fears relate to persecution of a very different nature. Rather than allegedly fearing persecution in relation to a specific incident, the applicant fears persecution by dominant clan groups and offers evidence that his membership of the Reer Hamar group creates a genuine risk of persecution and human rights violations. In addition, the times and dates the applicant alleges past incidents of persecution did occur have remained unaltered despite his untruths, in contrast with the applicant in *MSA*.
18. The facts of *M.H. v. The Secretary of State for the Home Department* are also distinguishable from the present case. There, the applicant engaged in an ‘elaborate charade’ which included assuming a false identity and persisting with his deception for almost a year. He only confessed to his untruths at a very late stage in the process when confronted with irrefutable evidence. Again, the applicant’s deception in *MH* is far more extensive than the present case and altered his claim in a fundamental way.
19. The Court accepts the decisions of Cooke J. in *Q.F.C. v Refugee Appeals Tribunal* and *A. v. Refugee Appeals Tribunal & Ors* above that even where an asylum applicant is found to have told an untruth or there are doubts as to their accounts of past persecution, there may still be an obligation on the decision maker to carry out a future risk assessment. Cooke J. (para. 17) stated that:

“...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”.

In the present case, while the applicant’s dishonesty should be condemned, his untruths did not go to the core of his claim in the same way as the cases relied upon by the respondent nor do they impact in a fundamental way upon the claims made by the Red Cross documents.

20. The court considers that the Tribunal did not assess whether the applicant would be at risk of persecution if repatriated to Somalia. As suggested by Cooke J. in *A v. Refugee Appeals Tribunal & Ors* and referred to herein, this is something that the Tribunal should have done in weighing its decision.
21. The applicant also submits that the Tribunal erred by failing to give due regard to certain documents submitted by the applicant. The respondent submits that the Tribunal did consider the documents and was correct to attach no weight to them because documents from Somalia should be treated with scepticism and because of the applicant’s previous dishonesty. Counsel for the respondent refers to the decision in *ZMH* where Cooke J said:

“Somalia has, for many years been a failed state devoid of any form of reliable civil administration including particularly public registries of births, marriages and deaths, with the result that no reliance can be placed upon any form of documentation in the nature of personal identification purporting to emanate from that state or from its embassies.”

22. The court finds that the Tribunal’s finding to afford “no weight” to “other documents personal to the appellant” lacks clarity and the decision should have been more specific. The potential ambiguity should not be construed in favour of the respondent. The court finds this conclusion unreasonable in light of the contents of the Red Cross messages. Moreover, these documents were not issued by the Somali state or its embassies as highlighted by Cooke J. in *ZMH*. Rather, they are documents obtained by the HSE who initiated a tracing process through the Red Cross.
23. In *Murkhtar v. MJELR* [2012] IEHC 123 it was alleged that the Minister failed to give due regard to Red Cross documents submitted by the applicant. It was argued on behalf of the respondent in that case that the Minister did so because the documents did not outweigh the adverse credibility findings of the RAT. Cross J did not accept that submission:

“The adverse credibility findings of the RAT and ORAC cannot in any sense qualify the validity of the Red Cross documents as being documentary evidence. These documents stand on their own and the Minister should engage them.”

This case supports the conclusions I have reached.

24. In the present case the adverse credibility findings of the ORAC and the Tribunal relate to untruths the applicant told about his passage to Ireland and previous asylum applications. These untruths do not relate to what is alleged in the documents obtained from the Red Cross and the Tribunal erred by failing to give them any weight.
25. Finally, the issue of the applicant's family members being relocated within Somalia was raised by the applicant in his submissions to the Tribunal and no breach of fair procedures arises.
26. For the reasons outlined above relief is granted on the following grounds:
 - Failure by the Tribunal to carry out an assessment of future risk
 - Failure by the Tribunal to give due regard to relevant documents

David O'Keefe