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Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/03460/2012

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28 September 2015	**On 9 October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

A A M
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr G Lee, Counsel
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Somalia. He has appealed with the permission of the Upper Tribunal against a decision of Designated Judge of the First-tier Tribunal Shaerf, promulgated on 13 November 2013, dismissing his appeal against a decision of the respondent to remove him to Somalia, having refused his asylum application.

2. I continue the anonymity direction made by the First-tier Tribunal.

3. The appeal has a convoluted history. The history up to the point that Judge Shaerf heard the appeal in autumn 2013 is set out in paragraphs 3 and 4 of his determination. The appellant was then refused permission to appeal by the First-tier Tribunal and the renewed application to the Upper Tribunal was not admitted because it was out of time. The appellant applied for judicial review of the Upper Tribunal's decision and permission was granted by Singh J on 24 April 2014. The decision of the Upper Tribunal was then quashed on 19 May 2014. On 23 April 2015 Mr Ockelton, Vice President of the Upper Tribunal, granted permission to appeal in the light of the decision of the High Court.

4. The core of the appellant's asylum claim is that he came to the UK from Somalia in May 2007, aged 17. He said he was a member of the Reer Hamar minority clan. He had lived in the Hamar Weyne district of Mogadishu. He claimed his mother was threatened and robbed in 1997 and his brother and sister were killed. The appellant fled and became separated from his family. He was captured by the Habr Gedir together with his maternal uncle. He escaped in June 2006 when his uncle was killed. He stayed with his mother's relatives in Medina until he left Somalia. His maternal aunt in the US paid for an agent to bring him to the UK from Ethiopia.

5. Judge Shaerf heard the appeal over two days. In a detailed and thorough determination he set out the evidence and submissions made to him. At paragraphs 43 to 49 he considered the issue of the evidence which had been relied on by the respondent as showing that the appellant had had his fingerprints taken in the US in connection with the asylum claims he made there in 2005/2006. On balance, the judge found the fingerprints produced did relate to the appellant. He then went on to make an adverse credibility finding against the appellant. He found the appellant was from Mogadishu or Central or Southern Somalia but he was not a minority clan member. His account of being captured could not be true because he had been in the US at the time. He did not accept the appellant was entitled to humanitarian protection.

6. I heard submissions on whether the judge made a material error of law.

7. Mr Lee highlighted paragraph 10 of the judge's determination which makes clear that the appeal proceeded on the basis that the key issue was the reliability of the fingerprint evidence. In effect, the appellant's credibility turned on that finding. He submitted the judge's approach in respect of that evidence was unfair and for that reason the decision was unsafe. It is convenient therefore to set out the evidence, set out the cases relied on by Mr Lee and then examine the judge's approach in the light of the submissions made.

8. The reasons for refusal letter, dated 15 January 2011, stated that, in

view of the appellant's confirmation that he had applied under the US "asylum lottery" in 2001, a request was made to the US authorities as part of a Biometrics Data Sharing programme for any information they had about the appellant. The US authorities responded positively. Fingerprints taken from the appellant when he claimed asylum in the UK were compared with fingerprint records kept by the US. The UK fingerprints matched those of a Somali national who had given a different name and date of birth. The US authorities confirmed the fingerprints were taken when the individual applied for asylum as the dependant of his mother, which was refused on 9 October 2005. He then applied in his right own right, which was refused in May 2006. The reasons for refusal letter pointed out the appellant had been in the US at a time he claimed to have been held by the Habr Gedir or to have been escaping to stay with relatives in Medina. The evidence also contradicted the appellant's claim to have lost contact with his mother in 1997. The appellant denied ever having been in the US.

9. The following evidence was before Judge Shaerf.

10. There was a record of the appellant's fingerprints being taken on 7 May 2007 at Heathrow. The statement of John Roberts, a higher scientific officer, dated 28 February 2013, explained he had compared those prints with a set with the reference number 1085434419 and found them to have such number of ridge characteristics in agreement to leave him in no doubt that they were made by the same person. The statement of Kevin Patel, protocol manager for the exchange of data as part of the High Value Data Sharing Protocol between Australia, Canada, New Zealand, the UK and the US, dated 9 May 2013, stated that a Memorandum of Understanding had been signed between the Home Secretary and the US Department of Homeland Security. This enabled the exchange of date between participating countries. Under its terms the requesting country submits anonymised sets of fingerprints to the receiving country. Potential matches are examined and verified by fingerprint systems and experts. Where matches are confirmed both countries then exchange biographical data. Officials in the US had been sent the appellant's fingerprints, captured on 7 May 2007, on 17 January 2011. A match was found under reference 1085434419 and the biographical data was provided, including the dates of his asylum claims in the US. The US authorities also sent photographs. Finally, the appellant's solicitors obtained an expert report by Ronald Cook, dated 1 September 2013. He took a set of fingerprints from the appellant and then compared them to the sets provided by the Home Office and the US authorities. He found the prints were made by the same person in all three cases. However, in relation to the set emailed from the US, he noted that no details were provided on the fingerprint form to indicate its source or origin.

11. In *YI (Previous claims – Fingerprint match – EURODAC) Eritrea* [2007] UKAIT 00054, the issue was the treatment of EURODAC evidence

apparently showing the appellant had been claiming asylum in Italy at a time he said he was undertaking military service in Eritrea. The Immigration Judge had not been satisfied that there was sufficient evidence to take the point against the appellant. Upholding the judge's approach, the Presidential panel stated as follows:

> "15. Absent such an assessment of the system in general, an Immigration Judge, acting fairly, would need to be satisfied on the specific evidence in each case whether that appellant had indeed made a previous claim. The evidence could comprise not just fingerprints but other data from the alleged previous application, such as for example photographs, age, name and claim details. General evidence might also be properly admitted about the reliability of the EURODAC system and how it operates. We do not seek to be prescriptive about this. An Immigration Judge will also, as a matter of fairness, have to be satisfied that the appellant has had the facility to access information about the assertion against him that would enable him, if he so wishes, to make a meaningful forensic rebuttal beyond mere denial …
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> 16. … Indeed in all these circumstances it was, in our judgment, properly open to the Immigration Judge to conclude that the Respondent was still essentially relying upon the bare EURODAC assertion that there was a match without offering any corroborative evidence of it from the Italian claim. The Immigration Judge was not seeking to prescribe what was needed by way of evidence but was rather drawing attention to the sort of evidence that might have been available but had not been produced to him. Indeed a photograph of the Italian claimant if he resembled the Appellant, on top of the EURODAC fingerprint match, may well have sufficed. …"

12. In *RZ (EURODAC – fingerprint match – admissible) Eritrea* [2008] UKAIT 00007, the EURODAC system was analysed and the conclusion was reached that the safeguards were such that fingerprint matches should be regarded as accurate and reliable absent cogent evidence to the contrary. The reasons the system was found reliable are explained in paragraph 44, including the following:

> "If fingerprints are submitted by the United Kingdom authorities, the fingerprints are then visually examined at IFB initially by a technician and then by a more senior officer. We are satisfied that there are sufficient safeguards to identify when and why fingerprints have been taken and to ensure that the data recorded in and retrieved from Eurodac is only used for the purposes set out in the regulations. We accept that each country has an authority responsible for monitoring how the information is collected, stored and transmitted and there is also a joint supervisory authority to oversee the system on a pan-European level…"

13. The Tribunal noted that neither of the experts who had given evidence had known of a case of matching prints not coming from the same individual.

14. The case also confirmed the burden of proving a fingerprint match rested on the respondent and the standard of proof was a balance of probabilities. It reiterated the point that fingerprint evidence is capable of rebuttal and fairness and natural justice require than an appellant should have the opportunity of obtaining and calling his own evidence to rebut evidence relied on by the respondent. There was no requirement for corroboration of fingerprint evidence.

15. Mr Lee argued that the evidence in this case fell into the category of bare assertion by the US authorities and that there were not sufficient safeguards regarding the fingerprint evidence to entitle the judge to take the approach to it which he took. The effect of the MoU was that the respondent had relied upon "secret evidence" which the appellant had not been given a fair opportunity to rebut with evidence to show the prints did not belong to him and therefore that he was not in the US, as he maintained. Mr Lee contrasted the state of the fingerprint evidence in this case with the safeguards found in the EURODAC system in *RZ*. The judge had accepted the restrictions imposed by the MoU led to an unsatisfactory situation from an appellant's perspective and the letter from Mr Patel failed to allay those concerns. Mr Lee also argued the judge's reliance in paragraph 48 on the appellant's admission at his screening interview that he had applied for recognition as a refugee by the US was erroneous. The appellant was a minor when he was screened and he had not admitted to being in the US.

16. Mr Melvin relied on the respondent's rule 24 notice. He argued the judge was entitled to find the appellant lacked credibility.

17. Mr Lee suggested the issue had such importance that further guidance from the Tribunal or courts may be appropriate.

18. I agree with Mr Lee that the issue is an important one but I do not find on the particular facts of this case that the judge made a material error of law. I find the circumstances of the case do not fall into the category identified in *YI* and *RZ* in which the respondent relies on a bare assertion as to the provenance of fingerprint evidence which the appellant has not had the possibility of rebutting. My reasons are as follows.

19. Firstly, the appellant admitted at his screening interview that had been in Egypt in 2001. He was asked at question 7.39 whether he had had his fingerprints taken by anyone in the UK before or by anyone anywhere else. The recorded reply is as follows: "Egypt, when I applied for an Refugee to America, 2001". The judge noted that this had not been explained by the appellant. Whilst it is not an admission that the appellant had been in the US, it was an admission which nevertheless undermined his account of having been held captive by the Habr Gedir in Somalia. I agree with Mr Melvin that it is not sufficient to rely on the fact the appellant was only 17 years of age at

the time he made this admission. This was plainly something the judge considered and he was entitled to take account of for the reasons he gave in paragraph 48.

20. Secondly, the US authorities sent photographs with the fingerprints. These are copied in the respondent's bundle and the judge noted at paragraph 44 that the appellant had not challenged the fact these came from the US authorities. His only challenge was that there were too few safeguards regarding the subject individual. The fact photographs were submitted alongside the fingerprints and the images resemble the appellant takes the case towards the category identified in paragraph 16 of *YI.*

21. Thirdly, this is not a case in which the appellant had no opportunity to submit evidence in rebuttal. The bare assertion made in *YI* was that matching fingerprints were held by the Italian authorities without those prints being made available. The appellant in this case was able to instruct an expert to visit the Home Office to make comparisons. Both the UK and the US sets of fingerprints were made available. As the judge noted in paragraphs 45 and 46, the appellant's case was that there was room for significant doubt about the provenance of the fingerprints because there may have been an administrative error resulting in the sets of prints becoming mixed up. However, the appellant's own expert confirmed that the fingerprints supplied by the US authorities were indeed the appellant's. The comparison with the challenge to the EURODAC evidence in *YI* therefore fell away, as the judge noted. The inevitable consequence of Mr Cook's evidence was that the appellant had had his fingerprints taken by the US authorities. Even if this took place in Egypt, as opposed to the US, it still undermined his case in a significant way.

22. The judge concluded in paragraph 49 that it was more probable than not that the appellant had been in the US in 2005 and 2006 where he had made asylum claims. He was entitled to reach this conclusion on the available evidence, even after noting the absence of specific identification supplied with the US prints. He acknowledged the limitations of some of the evidence in paragraph 43 but that did not mean he could not reach the conclusion he reached by giving appropriate weight to admissible evidence. The effect of the admission at the screening interview, photographs and the report of Mr Cook was to overcome these concerns. That was a rational decision which it was open to the judge to reach. In focusing attention on what was not provided by the US authorities because of the restrictions imposed by the MoU, the appellant's submissions have lost sight of what was provided.

23. I have considered Mr Lee's alternative submissions on the appellant's claim to humanitarian protection. I raised with him at the beginning of the hearing whether any error on the judge's part with respect to the fingerprint evidence would be material to the outcome given the

change of circumstances in Somalia. I had in mind in particular the withdrawal of Al-Shabaab from Mogadishu and the economic improvement.

24. The judge dealt with this issue on the basis of his findings that the appellant's account of his clan membership and the dispersal of his family had not been truthful. Whilst the situation in Somalia has changed, as reflected in the more up to date country guidance of *MOJ & Ors (Return to Mogadishu) Somalia CG* [2014] UKUT 00442 (IAC), such that it is no longer the case that there is a general risk of Article 15(c) harm for the majority of those returning to Mogadishu after a significant period of time abroad (see the former position explained in *AMM & Ors (conflict; humanitarian crisis; returnees; FGM) Somalia CG* [2011] UKUT 445 (IAC)), there are still categories of claimants who might succeed in showing entitlement to humanitarian protection. They would include people with no clan or family support, who will not be able to receive remittances from abroad and who have no real prospects of securing access to a livelihood on return. Membership of a minority clan would be relevant to this. Mr Lee argued there was still scope to succeed on humanitarian protection grounds.

25. However, the consequence of my decision upholding the judge's findings on the appellant's credibility is that there is no scope for the appellant to succeed on humanitarian protection grounds. He is a young, healthy man who would be removed to Mogadishu. He is not a minority clan member and therefore he can look to family members and clan members for assistance in securing a livelihood. He has relatives in the US, possibly including his mother, as well as the UK. He was assisted before he came to the UK by relatives in Medina. Without the special features which could take the case outside the general position for returnees to Mogadishu, the claim cannot succeed. The judge made no error.

NOTICE OF DECISION

The Judge of the First-tier Tribunal did not make a material error of law and his decision dismissing the appeal shall stand.

Signed **Date 29 September 2015**

Judge Froom,
sitting as a Deputy Judge of the Upper Tribunal