Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI-2021-000921

on appeal from PA/02877/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 29 March 2023

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

A H A A (IRAQ)
[ANONYMITY ORDER MADE]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Ms Camille Warren of Counsel, instructed by Paragon Law
For the respondent: Ms Susana Cunha, a Senior Home Office Presenting Officer

Heard at Field House on 1 August 2022

DECISION AND REASONS

1. The appellant appeals with permission from the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision on 11 March 2020 to refuse him international protection pursuant to the Refugee Convention, humanitarian protection or leave to remain on human rights grounds, with reference to paragraphs 336 and 339F of HC 395 (as amended).

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2. **Anonymity order.** Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. **Failure to comply with this order could amount to a contempt of court.**

3. **Vulnerable appellant.** The appellant was a child at the First-tier Tribunal hearing and was treated as a vulnerable person in accordance with the Joint Presidential Guidance No 2 of 2010: Child, Vulnerable Adult and Sensitive Appellant Guidance. He remains very young and should now be treated as a vulnerable adult.

4. **Mode of hearing.** The hearing today took place face to face.

Background

5. The appellant is a citizen of Iraq of Kurdish ethnicity, from Kirkuk. He was born in 2022 and is 20 years old now. It is his case that his flight from Iraq in June 2018 was the first time he had ever left his home country.

6. His core account is that he left Iraq because of a blood feud between his family and another family. His father had sold land through an agency to people whom the appellant cannot identify: he did not believe that his father knew who they were either.

7. Nevertheless, after the sale the buyers confronted his father and wanted their money back. During the confrontation, the appellant was told that his father had killed one of the unknown people, thereby triggering the blood feud. The appellant did not see the events: he relied on what his mother told him.

8. The appellant's father was arrested in March 2018 and the appellant, with his mother and sister, went to live with a maternal uncle, about 10 minutes away but still in Kirkuk. The appellant self-isolated in his uncle's home, though on one evening he helped his uncle fix the uncle's car.

9. During the period of his self-isolation, the appellant was attacked, again by people he did not know, and sustained a substantial injury to his arm. He spent some time recovering, then his uncle arranged for him to leave Iraq in June 2018. They were 'in a big rush' and the appellant left his passport and CSID in Iraq, failing to note down any contact details for his family members who would remain there.

10. The appellant travelled through several countries that he cannot identify, arriving in the UK clandestinely in a lorry on 13 July 2018. He asserts that he remains at risk from the unidentified people who are the family of the man his father killed.

11. The appellant claimed asylum on 7 August 2018 and was treated as an unaccompanied asylum seeking child, as he was then only 16.

Refusal letter

12. On 11 March 2020, the respondent refused the appellant's protection claim. She accepted that membership of a family can amount to membership of a particular social group, citing the country guidance given by the Upper Tribunal in *EH (blood feuds) Albania CG* [2012] UKUT 348 (IAC). She also accepted his nationality and ethnicity, and that he came from Kirkuk.

13. The respondent rejected the core account. By using EURODAC, she had discovered that a person with the appellant's name had been fingerprinted in Austria on 28 July 2015 and in Greece on 22 April 2018. She relied on the decision of the Upper Tribunal in *RZ (Eurodac – fingerprint match – admissible) Eritrea* [2008] UKAIT 00007. The appellant had been given an opportunity to explain the inconsistency in his travel timeline, but his response in the asylum interview was 'I cannot say anything because my solicitor has interfered and she knows' and when given an opportunity after the interview, the solicitor responded on his behalf that she had not taken the appellant's instructions 'as he has never changed his statement about the date that he left Iraq'. The respondent considered the appellant's credibility to be damaged by this reticence.

14. The respondent identified other inconsistencies in the appellant's account as to the weapon used, his reaction to the attack, the extent of his injuries, and whether he knew of it in advance. She also considered that the other family had an opportunity to kill the appellant while he was staying with his maternal uncle, which on his account he had done for two or three months while recovering from the attack. Photographs of an injured upper left arm did not show the face of the person photographed and might not be of the appellant. Applying *Tanveer Ahmed,* the respondent gave them little weight.

15. The respondent relied on *SMO and others* (Article 15(c); identity documents) Iraq CG [2019] UKUT 00400 (IAC). Kirkuk was no longer a contested area. The appellant was not an oppositionist, had no disability or medical issues, was no longer a child and was continuing to 'conform to Islamic mores'. His Iraqi passport and CSID were at home in Kirkuk. The respondent rejected the appellant's claim to have lost contact with his family in Kirkuk and considered that the appellant would be able to obtain a new CSID in the UK.

16. The appellant appealed to the First-tier Tribunal.

First-tier Tribunal decision

17. The First-tier Judge gave significant weight to a country expert report dated 3 December 2020 from Dr Rebwar Fatah of Middle East Consultancy Services, and a medical report dated 10 November 2020 from Dr Juliet

Cohen MA MB BS Dip RACOG MRCGP FFFLM which dealt with the appellant's mental health and bodily scarring. He applied the guidance in *AM (Afghanistan) v Secretary of State for the Home Department* [2017] EWCA Civ 1123.

18. The First-tier Judge accepted Dr Cohen's assessment that the appellant was a vulnerable young person with a memory impairment and no formal education. He accepted that the appellant had a significant scar which could have been caused by an attack with a weapon, as Dr Cohen stated, but rejected the core account for the reasons set out at [65]-[76] of his decision, and in particular, the allegation that the appellant had lost contact with his family members in Iraq. Medical treatment and family support would be available to help him when he was returned.

19. In relation to Article 8 ECHR outside the Rules, the Judge applied part 5A of the Nationality, Immigration and Asylum Act 2002 (as amended) and held that the appellant's private life in the UK could be given little weight as it had all been established when he was in the UK unlawfully or precariously: see section 117B(4) and 117B(5).

20. The First-tier Judge dismissed the appeal.

21. The appellant appealed to the Upper Tribunal.

Permission to appeal

22. The appellant advanced three grounds of appeal: first, that the respondent had refused to provide fingerprint evidence for his independent expert to consider, and there were patent issues with the dates of the fingerprinting in Austria in 2015, and Greece in 2018, as well as no explanation as to what the respondent considered the appellant to have been doing during those three years; second, that the First-tier Judge made a *Mibanga* error in rejecting the medical evidence on the basis of a negative conclusion on credibility which he had already reached, rather than considering the totality of the evidence before making findings of fact and credibility; and third, that the 'sliding scale' approach recommended by the Upper Tribunal in *SMO* had not been applied.

23. Permission to appeal was granted by Upper Tribunal Judge Stephen Smith, primarily on the basis of ground 1 in the grounds of appeal, that the First-tier Judge had failed to address the appellant's submissions that:

> "(i) if the fingerprint evidence were accurate, the appellant would have been 13 or 14 years old when fingerprinted in Austria in 2015;
>
> (ii) the dates in the letter relied upon by the respondent (see AB 116) concerning the Austria fingerprints were internally inconsistent; and
>
> (iii) that the respondent had failed to provide any further evidence concerning the finger prints themselves. …

> arguably there were key factual issues the Judge failed to resolve. …"

24. Grounds 2 and 3 were not excluded, although Judge Smith considered them to be less meritorious.

Rule 24 Reply

25. There was no Rule 24 Reply from the respondent.

26. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

27. At the Upper Tribunal hearing, Ms Warren confirmed that she had not filed a skeleton argument and would rely on her grounds of appeal and on the decision in *RZ (Eurodac).* Those instructing her had sought to obtain and verify the fingerprint evidence at the asylum interview and subsequently, but had not requested an adjournment of the First-tier Tribunal hearing. The disclosure given by the respondent had problems as to conflicting dates and the respondent had not disclosed the actual fingerprints, which would have enabled the appellant's expert to verify whether the person fingerprinted in 2015 in Austria, and in 2018 in Greece, was the appellant.

28. Ms Cunha agreed to disclose within 7 days the email sending the Eurodac evidence to the appellant's representatives.

29. I reserved my decision as to whether there is any material error of law in the decision of the First-tier Tribunal, to be made in the light of that evidence.

Analysis

30. The Eurodac evidence when received did not include any fingerprints. The respondent now accepts that she has not disclosed to the appellant the fingerprints of the person(s) who gave biodata in Austria in 2015 and in Greece in 2018 and that therefore the appellant has not had an opportunity through a fingerprint expert to verify whether he is that person or persons.

31. I remind myself of the guidance given in 2008 by the Upper Tribunal in *RZ (Eurodac):*

> "*1. Evidence of a fingerprint match obtained from the Eurodac system is admissible not only when considering which Member State is responsible for examining an application for asylum but also when examining the application itself.*
>
> *2. The safeguards within the Eurodac system are such that in the absence of cogent evidence to the contrary,*

> *(a) fingerprint images held in the system and data as to where, when and why those fingerprints were taken should be accepted as accurate and reliable; and*
>
> *(b) evidence of a fingerprint match identified by the system and confirmed by the Immigration Fingerprint Bureau should be regarded as determinative of that issue.*
>
> *3. Where there is a dispute about whether there is a fingerprint match, the burden of proof is on the respondent and the standard of proof is the balance of probabilities*."

32. I am satisfied that in this appeal, there was a clear dispute about whether there was a fingerprint match and that it went to the heart of the credibility of the appellant's account of the alleged blood feud.

33. I find that the First-tier Judge erred in not applying the correct burden of proof on the respondent, requiring her to show that the person(s) fingerprinted in Austria in 2015 and in Greece in 2018 were indeed this appellant. The respondent has not given the appellant the opportunity to seek to verify that information either.

34. Accordingly, there is a material error of law in the decision of the First-tier Tribunal. It is appropriate for the decision in this appeal to be remade in the First-tier Tribunal. The finding that the appellant is an Iraqi Kurd from Kirkuk, which is not disputed by the respondent, are preserved. No other findings of fact or credibility are to be preserved.

DECISION

35. For the foregoing reasons, my decision is as follows:

    The making of the previous decision involved the making of an error on a point of law.

    I set aside the previous decision. The decision in this appeal will be remade in the First-tier Tribunal on a date to be fixed.

Signed Judith AJC Gleeson Date: 9 August 2022
Upper Tribunal Judge Gleeson