Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA115102016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 April 2017	**On 5 May 2017**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

BARZAN AHMADI
(ANONYMITY NOT DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr G Lee, Counsel, instructed by Barnes Harrild & Dyer Solicitors
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of Judge of the First-tier Tribunal Sweet (FtJ), promulgated on 02 December 2016, dismissing the appellant's appeal against the respondent's decision of 27th of August 2016 refusing his protection and human rights claims.

Factual Background

2. The appellant is a national of Iran, born on 21 March 1987. He is of Kurdish ethnicity. He entered the United Kingdom on 02 March 2016 and claimed asylum after being apprehended the same day. His asylum claim was based on his 4 year secret relationship with a Kurdish girl. He was caught by the girl's mother on 15 January 2016 (25 Dey 1394 in the Iranian calendar)) having sexual intercourse. He was reported to the authorities and the girl's family wished to kill him. The appellant's maternal uncle located an agent to take him to a safe country. The appellant left Iran illegally on the same date (15 January 2016). He travelled through Turkey and Italy before arriving in France where he was fingerprinted at which time he informed the French authorities that he was from Iraq.

3. The respondent rejected the appellant's claim to have been in a four-year relationship and to have been caught by her mother *in flagrante delicto*. This was because the respondent had conclusive evidence that the appellant had been fingerprinted in Greece on 19 December 2015. This was inconsistent with his claim to have never left Iran before 15 January 2016. The respondent additionally had conclusive evidence that the appellant had attempted to gain entry to the UK on 11 November 2007. The appellant had been fingerprinted in France on 3 February 2016 after being arrested attempting to enter the United Kingdom. On this occasion he gave his name as Barzan Ahmad, a date of birth of 1 January 1988, and claimed to be Iraqi. The fingerprints given on that day matched fingerprints he gave when he later entered the United Kingdom on 2 March 2016. The details he gave on 3 February 2016 also matched the details he provided when arrested on 11 November 2007. The respondent therefore concluded that the appellant had no fear of persecution in Iran.

The decision of the First-tier Tribunal

4. The appeal was heard on 23 November 2016. A bundle prepared by the appellant for the hearing contained, *inter alia*, an expert report from Prof Emile Joffe, dated 26 August 2016. Prior to the hearing the respondent had not served on the appellant any fingerprint evidence. In his oral evidence the appellant stated that he had not been fingerprinted in Greece in December 2015, and that he had never been to Greece.

5. During cross-examination two documents, 'IABS Search result' (Form A1a), and 'Eurodac Search Result' (Form B1a) were received by the Presenting Officer and served on the Tribunal and the appellant. These documents indicated that the appellant had been fingerprinted in Greece on 19 December 2015, and that he had been fingerprinted in Dunkirk on 3 February 2016 when he gave the name Barzan Ahmad, a date of birth of 1 January 1988, and claimed to be Iraqi.

6. As a result of the late provision of this evidence the appellant's representative, Mr Lee, who continued to represent him in the Upper Tribunal, made an adjournment application on the basis that the fingerprint evidence had not been served in accordance with directions, had not been addressed by the appellant in his statement or in his examination in chief, and had not been the subject of investigation or verification by the appellant's representatives. The FtJ declined to adjourn the hearing to another date. He reasoned that the appellant had already been given notice of the alleged fingerprinting in 2007 and 2015 and that there had been ample time for him to provide instructions to his solicitors in respect of these allegations. The FtJ nevertheless offered a short hearing adjournment on the day to enable Mr Lee to take further instructions and, if necessary, take a further witness statement as there was an interpreter from the solicitor's office present at the hearing. Mr Lee declined to take further instructions and the hearing continued.

7. In his decision the FtJ attached significant weight to the fingerprint evidence. Given that the appellant maintained that the incident that caused him to leave Iran only occurred on 15 January 2016 the FtJ concluded that the fingerprint evidence fundamentally undermined the appellant's credibility. The FtJ additionally attached weight to further documentation produced by the Presenting Officer indicating that the appellant had been fingerprinted in Calais on 11 November 2007 when he gave the same date of birth (1 January 1988), the same name (Barzan Ahmad) and also claimed to be Iraqi. The FtJ additionally took account of section 8 of the Asylum and Immigration (Treatment of Claimants, et cetera.) Act 2004 for his failure to claim asylum in Italy and France.

8. The FtJ considered whether the appellant would face a real risk of persecution if returned to Iran based on his Kurdish ethnicity. The FtJ considered the leading country guidance case of *SSH and HR (illegal exit: failed asylum seeker) Iran* CG [2016] UKUT 00308 (IAC) which established that an Iranian male in respect of whom no adverse interest had previously been manifested by the Iranian State did not face a real risk of persecution/breach of his article 3 rights on return to Iran on account of having left Iran illegally and/or being a failed asylum seeker. The FtJ accepted that *SSH* had not been argued on the issue of specific risk to Kurdish returnees as a result of their ethnicity. The FtJ did however refer to the consideration given by the Upper Tribunal to the position of Kurds, noting that they were disproportionately targeted for arbitrary arrest, were subject to prolonged detention and physical abuse, and that being Kurdish may be an exacerbating factor for a returnee otherwise of interest. Whilst making the briefest of references to the expert report from Prof Joffe the FtJ declined to depart from the findings in *SSH*. Whilst accepting that the appellant was at greater risk as a failed asylum seeker who was Kurdish the FtJ did not find this meant that the appellant was at risk on return, not least because he had already found the appellant's account to wholly lack credibility. The FtJ briefly stated that, for the same reasons, he did not accept that there were very significant

obstacles to the appellant's return to the wrong pursuant to paragraph 276ADE of the immigration rules. The appeal was dismissed.

The grounds of appeal and the grant of permission

9. The grounds of appeal contended firstly that the FtJ acted with conspicuous unfairness in admitting the fingerprint evidence and in refusing to adjourn to another day. Reliance was placed on *RZ (Eurodac - fingerprint match -admissible) Eritrea* [2008] UKAIT 00007 which indicated that, as a matter of fairness and natural justice, and appellant should have the opportunity of obtaining and calling his own evidence to rebut evidence relied on by the respondent. It was submitted that it was impossible for the appellant or his representative to respond meaningfully to the evidence served after the commencement of the hearing. It was submitted that the FtJ's conduct in any event fell afoul of the principal that justice not only had to be done but had to manifestly be seen to be done, as recently exemplified by the president of the Upper Tribunal in *Elayi (fair hearing – appearance)* [2016] UKUT 00508 (IAC). It was submitted that an impartial observer would not consider that the appellant had a fair hearing.

10. The grounds additionally contended that the FtJ failed to adequately engage with the expert report provided by Prof Joffe and failed to provide adequate reasons for refusing to depart from the findings in *SSH*. Prof Joffe's report suggested that Kurds returning to Iran faced an increased risk of persecution as a consequence of their ethnicity and, given the worsening situation for Kurds in the country, a Kurd who left illegally and who made an asylum claim had significantly diminished prospects of avoiding persecution.

11. It was finally contended that the FtJ failed to consider whether the significant discrimination faced by Kurds in Iran amounted to a very significant obstacle preventing his integration into the country under paragraph 276ADE.

12. Permission was granted on the basis that it was arguable there was unfairness in refusing an adjournment when the fingerprint evidence was produced so late and when the FtJ's adverse credibility findings turned mainly upon this evidence. Albeit with some hesitation permission was granted to argue the ground relating to the expert report. In granting permission the First-tier Tribunal stated that the ground relating to paragraph 276ADE was relevant only if the FtJ erred by preferring the country guidance decision to the expert report and so should not be considered arguable as a separate ground.

Submissions at the error of law hearing

13. Mr Lee relied on *Elayi* (and in particular paragraph 9) and submitted that the manner in which the hearing before the FtJ progressed was unfair and would give a clear impression of being unfair. The only fair outcome would have been for the FtJ to have given the appellant an opportunity to meet the new case

against him. It was submitted that the FtJ's assessment of the expert report was inadequate. The FtJ merely disagreed with the submission that he was entitled to depart from the country guidance case and did not otherwise engage with the content of the expert report.

14. Mr Bramble submitted that any error by the FtJ in refusing to grant the adjournment was not material to the outcome of the hearing in the absence of any subsequent evidence that the fingerprint evidence was not reliable. An impartial observer would be aware that the FtJ gave the appellant an opportunity to speak to his barrister and for an additional statement to be taken, and would know that the appellant had been aware of the allegation regarding his presence in Greece since August 2016. The expert report from Prof Joffe did not provide a sufficient basis to entitle the FtJ to depart from SSH. The reasoning given by the FtJ was sufficient.

Discussion

15. The Presidential case of *Nwaigwe (adjournment: fairness)* [2014] UKUT 00418 (IAC) contains an assessment of the relevant principles that should be considered when an adjournment request is made by one of the parties. The headnote to the decision reads;

> If a Tribunal refuses to accede to an adjournment request, such decision could, in principle, be erroneous in law in several respects: these include a failure to take into account all material considerations; permitting immaterial considerations to intrude; denying the party concerned a fair hearing; failing to apply the correct test; and acting irrationally. In practice, in most cases the question will be whether the refusal deprived the affected party of his right to a fair hearing. Where an adjournment refusal is challenged on fairness grounds, it is important to recognise that the question for the Upper Tribunal is not whether the FtT acted reasonably. Rather, the test to be applied is that of fairness: was there any deprivation of the affected party's right to a fair hearing? See SH (Afghanistan) v Secretary of State for the Home Department [2011] EWCA Civ 1284.

16. In *Elayi* the President commented on the importance that justice must not only be done but had to manifestly be seen to be done. The relevance of this fundamental principle to all cases is not in doubt. The perception of what is fair and just however is highly fact sensitive and will depend on a holistic assessment of a judge's conduct and on the particular factual matrix of each case. *Elayi*, for example, was a case in which the conduct of a judge was described, without controversy, as being unconventional and unorthodox. The judge engaged in a private conversation with the appellant's representative in the absence of the other party's representative, in the precincts of the courtroom, partly out of sight and earshot of the appellant and his spouse, and before the appellant's hearing began. The conversation related to the appellant's case and, other than a question about the appellant's religious adherents (which was irrelevant), was not divulged to the appellant. The Upper Tribunal concluded

without hesitation that the judge's conduct gave the impression of being unfair. At paragraph 9 of the decision the President said this.

> There is no scope in the present case for the view an unfair hearing having been found to have taken place this error of law may be immaterial, as other judgments of this Tribunal make clear. See in particular MM v SSHD [2014] UKUT 105 (IAC), at [14] – [18]. The issue is whether the hearing was fair. Once it is decided that the hearing was unfair the error of law is automatically a material one, unless the context is one of the greatest rarity. That also has consequences for the final order which we shall make. This is the first error of law which requires the determination of the First-tier Tribunal to be set aside.

17. With respect to the present appeal, no explanation has been proffered by the respondent as to why the Eurodac documentation was only provided halfway through the appeal hearing. It should have been included by the respondent in her bundle prepared for the First-tier Tribunal hearing and served on the appellant with sufficient time to enable him to assess that evidence and determine his position accordingly. The extremely late service of the fingerprint evidence clearly has the potential to be seen to be unfair and to be unfair.

18. The appellant had his substantive asylum interview on 23 August 2016. He confirmed at several points during his substantive asylum interview that he left Iran on 15 January 2016. At question 63 it was put to the appellant that he had been fingerprinted in Greece on 19 December 2015. The typed interview record also indicates that the appellant was shown a Eurodac match document. The appellant therefore knew since 23 August 2016 that fingerprint evidence existed indicating that he was in Greece in December 2015, even though he had not been formally served a copy of that documentary evidence.

19. Since the FTT hearing the appellant has not suggested the fingerprint evidence is inaccurate (indeed in his asylum interview the appellant accepted that he had been fingerprinted in Dunkirk, indicating at the very least that the information contained in the Form A1a was reliable) and he has not provided any evidence undermining the reliability of the fingerprint evidence, or indicated that any investigation or verification of the fingerprint evidence has been undertaken. It was open to the appellant to seek to adduce further evidence, pursuant to the Tribunal Procedure (Upper Tribunal) Rules 2008. In his submissions Mr Lee did not seek to undermine the reliability of the fingerprint evidence and focused instead on the perception of injustice in the First-tier Tribunal's refusal to adjourn the hearing. I note that the FtJ did give the appellant's representative a limited opportunity to take further instructions from the appellant and, if need be, to provide a further witness statement responding to the fingerprint evidence. The appellant's representative did not avail himself of this opportunity.

20. Having regard to the aforementioned considerations I am satisfied that the appellant was deprived of a fair hearing and that he would be perceived by an

informed observer as someone who was deprived of a fair hearing. Notwithstanding the absence of any post decision evidence rebutting the accuracy or reliability of the fingerprint evidence, or any indication that the applicant has or intends to undertake an investigation into the fingerprint evidence or instruct an expert, the refusal to grant an adjournment to enable the appellant to consider the details of fingerprint evidence that had only been served on him and his representatives during cross-examination at the actual hearing strikes at the very heart of an individual's right to a fair hearing. The opportunity given to the appellant's barrister to take instructions and provide a further witness statement later in the day cannot on any reasonable view rectify the deprivation of a proper opportunity to take stock of the technical nature of the fingerprint evidence or to consider the appropriateness of challenging that evidence, and, if so, on what basis.

21. Nor am I satisfied that the refusal to grant the full adjournment would inevitably have led to the same conclusion. The respondent has provided a two-page document entitled 'Eurodac Search Result Eurodac Match' (Form B1a) indicating the appellant's presence in Greece in December 2015. In *RZ* the Tribunal heard evidence to the effect that if the results show an automatic match with prints already on the database, the print matches are then visually examined by a fingerprint expert at IFB (the Immigration Fingerprint Bureau) to confirm the match before ASU is notified of the match result. The Tribunal held (at [45]) that if there was a dispute as to a match, that must be a question of fact to be determined on the available evidence but, in the light of the evidence the Tribunal heard about the Eurodac system and its accompanying safeguards, in its judgment "… *evidence of a match produced through the Eurodac and confirmed by* [the Immigration Fingerprint Bureau in Lunar House] *should be regarded as determinate of that issue in the absence of cogent evidence to the contrary*". There was before the Tribunal in *RZ* both a Eurodac Search Result Match and confirmation from the IFB. The Eurodac Search Result in the present appeal makes no reference to the IFB and it is unclear to me whether separate confirmation from the IFB was provided to the appellant or the First-tier Tribunal, or whether the IFB had already confirmed the match before ASU was notified. These are matters upon which clarification may have been sought if a full adjournment had been granted and which may have had a bearing on the FtJ's reliance on the fingerprint evidence and his ultimate conclusion that the appellant's claim was untruthful.

22. I am additionally, and independently of the 1st round, satisfied that the 2nd ground of appeal, relating to the inadequacy of the FtJs reasoning for refusing to depart from the country guidance case in light of the expert report, is made out. The FtJ did not consider the expert report in any detail. Although accepting the appellant was at greater risk being an Iranian Kurd returning as a failed asylum seeker, the FtJ found the appellant would not be at risk per se on return for this reason, particularly given his rejection of the core of the appellant's account.

23. In his report Prof Joffe spoke of the worsening security situation for Kurds in Iran and the increased domestic tensions following elections in May 2016 and the emergence of militant Sunni groups amongst Iran's own minorities. Prof Joffe concluded that, as a result of a number of factors leading to intensified repression of Kurds a Kurdish returnee whose conduct gave rise to suspicions of anti-regime behaviour, either whilst abroad by, for example, applying for asylum, or before he left Iran, would have his prospects of avoiding persecution upon return significantly diminished. The appellant made an asylum claim and is Kurdish. It was therefore incumbent on the FtJ to have at least shown that he 'got to grips' with the principal assertions in the expert report and the evidence relied on by the expert before rejecting the expert's conclusions. Whilst the FtJ may ultimately have been entitled to reject Prof Joffe's report and to follow the recent country guidance case he still needed to properly engage with the evidence and reasoning contained in the expert report.

24. Given that I have found material errors of law in relation to the 1st and 2nd ground, it is not necessary for me to comment on the 3rd ground of appeal. Having heard representations from both parties, and in light of my finding that the denial of a full adjournment deprived the appellant of a fair hearing, it is appropriate to remit the matter back to the first-tier Tribunal for a full fresh hearing, all matters at large, before a judge other that Judge Sweet.

Notice of Decision

The First-tier Tribunal decision is vitiated by a material error of law.
The appeal is allowed and the matter will be remitted back to the first-tier Tribunal to be heard by a Judge other than Judge of the first-tier Tribunal Sweet.

Signed Date 04 May 2017

Upper Tribunal Judge Blum