



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006573

First-tier Tribunal No: PA/51970/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 25 September 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE SKINNER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AH

(ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr A. Basra, Senior Home Office Presenting Officer

For the Respondent: Mr T. Hussain, counsel (instructed by Halliday Reeves Solicitors)

Heard at Field House on 4 September 2023

Order Regarding Anonymity

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

DECISION AND REASONS

Introduction

1. The Respondent to this appeal, AH, is a man in his late 20s of Hazara ethnicity who claims to be a national of Afghanistan at risk from the Taliban if returned there. AH's nationality (and claim more broadly) is disputed by the Appellant, the Secretary of State, who considers that he is a citizen of Pakistan as a result of information said to have been provided in November 2015 to Finnish authorities by someone whose fingerprints were identified by Eurodac as matching AH's.

2. Accordingly, the Appellant refused AH's protection and human rights claim by a decision dated 12 October 2021 ("the Refusal") and AH appealed the Refusal to the First-tier Tribunal. By a decision dated 10 January 2022 ("the Decision"), First-tier Tribunal Judge Ali ("the Judge") allowed AH's appeal. The Secretary of State now appeals, with permission to appeal granted by First-tier Tribunal Judge Beach dated 1 July 2022.
3. The Judge did not make an anonymity direction on the basis that none was requested or required. No reasons are given as to why no anonymity direction was required, but it may have been that the Judge considered that, as decisions of the First-tier Tribunal are not routinely made public by publication to the Tribunal website, absent an unlikely application to the Tribunal for a copy of the decision, the only persons who would have access to the content of the Decision would be the parties, who would be unlikely to provide it to anyone who might put AH at risk. Given that this (and all Upper Tribunal decisions) are published on the Tribunal's website, I take a different view. AH claims to be at risk of the Taliban because of his claimed work for the Afghan police, which is the sort of allegation that could in principle give rise to a risk if it became known. It is therefore appropriate to make an anonymity direction in the terms set out above, notwithstanding the importance of the open justice principle.
4. The hearing of this appeal took place remotely. There were no technical difficulties and I was satisfied that the Tribunal and both representatives could hear and communicate with one another without difficulty.

The Decision

5. After having set out the background, the approach required of decision-makers in protection appeals and the issues to be determined, the Judge set out his findings.
6. At para. 27 the Judge noted that the first issue to be determined was the AH's nationality. He then stated as follows:

"27. ...The Respondent at paragraph 24 of the refusal letter states the following, 'Attempts to verify the authenticity of this document have been unsuccessful'. However, beyond that there is a complete absence of what attempts were made and/or how they were made. At the hearing during discussions with both representatives, I asked Mr Appleby [who appeared for the Secretary of State] if he could assist the court by furnishing information about what attempts to verify the authenticity of the documents had been made. Mr Appleby informed me that he was not sure what steps were done before going on to say that the Respondent has not been in a position to verify documents as no Afghan documents were being taken in at the time and the attempts of being unsuccessful may be referring to that. The Respondent then goes on to make various sources where she allures [sic] to the fact that Afghan Tazkiras can be fraudulently obtained both from Afghanistan and from Europe and so this all leads to the submission that the Tazkira the Appellant has provided should not be relied upon.

28. I find that I am in complete disagreement with the Respondent in regards to whether the Tazkira should be relied upon or not. In producing a copy of his Tazkira the Appellant has taken steps to submit evidence to corroborate his Afghan Nationality. The Respondent on the other hand has done nothing but make bare assertions without backing this up with any real evidence or information. Those bare assertions as to the genuineness of the Tazkira are not sustainable and by making bare assertions the Respondent has simply failed to discharge the burden that is placed upon

her in reference to false documentation. I therefore attach weight to the Tazkira that the Appellant has submitted."

7. As explained further below, the Secretary of State takes issue with the approach the Judge took in these paragraphs to the weight to be given to the Tazkira.
8. The Judge then turned to the information obtained as a result of the fingerprint match on the Eurodac database. As the Secretary of State's second ground of appeal takes issue with the Judge's approach in this regard it is necessary to set out the Judge's reasons on this in full. He stated:

"29. The second basis upon which the Appellant [sic] Nationality was rejected was as a result of a Eurodac Match where it [sic] asserted by the Respondent that the Appellant was fingerprinted in Tornio in Finland. The Appellant's position has always been that he has never been to Finland nor has he any been fingerprinted in Finland. The Respondent provided evidence of this in the 4 page supplementary bundle. That evidence was as follows, the first page was a printout from the Home Office's own records of the Appellant when he claimed asylum and this has a photo of him and his nationality is noted as Afghanistan. Then there is reference to a match which has a case ID of (FI12268019), sex of person (Male), Place of Apprehension (Tornio - unknown value), Date of Apprehension (18/11/2015-22.00.00), Marked (No). The second page repeated the same information. The third page was a page taken from his PIQ form where he lists the places he has lived prior to coming to the UK and information about his education. The fourth page is printouts of email communication between a Home Office representative in the UK and an [sic] person whose title is a Liaison Officer who is based in the British Embassy in Berlin. The person from the UK has sent an email with the Appellant's details and stating that they have been fingerprinted in Finland and then makes a request for confirmation that he has claimed asylum in Finland. The Liaison Officer responds with the following, 'I can confirm that the person in question told the Finnish authorities that he is a citizen of Afghanistan, but he was born in Pakistan'. Once again I am troubled by the evidence which the Respondent seeks to persuade me to rely upon to conclude that the Appellant is not an Afghani National. In the chain of evidence there is no reference to the name of the individual who was fingerprinted, there is no reference to the persons date of birth and there is no photographic evidence of the person who was allegedly apprehended in Finland. Further, the Liaison Office fails to provide any information about what enquires they made in order for them to conclude that the person whose fingerprints were allegedly taken in Finland is indeed the Appellant. I therefore find that the evidence the Respondent seeks to persuade me to rely upon is simply not good enough and does not stand up to scrutiny and therefore I do not attach any weight to those documents.

30. In taking this matter further at the hearing I asked Mr Appleby if he could furnish any further information about the Eurodac Match and if there was any photographic evidence of the person whose fingerprints were taken in Finland. I afforded him sufficient time to make any necessary enquiries. Mr Appleby after making those enquires informed me that after speaking to a Senior Caseworker he was informed that Eurodac does not hold any photographs and if someone wanted to request any further information a request would need to be made to the FCO and that he could not provide any further information."

9. The Judge then set out his conclusions on the question of AH's nationality. He considered that the Secretary of State had not provided evidence to corroborate her "assertions" that the Appellant is not a national of Afghanistan and she had not discharged the burden of proof on her. In light of the Respondent's failings, and taken together with the fact that the Appellant has provided a copy of his Tazkira, and the fact that he is of Hazara Ethnicity, the fact that he speaks Dari (a language of Afghanistan), and the fact that out of the 38 questions he was asked about his nationality he answered the significant majority correctly, only getting 7 of those wrong, the Judge found that AH to be a national of Afghanistan.
10. I interpose to note that, although not part of the Secretary of State's grounds of appeal, the burden in respect of a claimed refugee's nationality is not on the Secretary of State, but on the putative refugee. I also note that the Judge's assessment of AH's knowledge of Afghanistan appears to be no more than a quantitative exercise, considering the number of questions he answered correctly. Any rational assessment of the questions asked must, in my view, entail a qualitative assessment of the nature of the information he got right and that which he got wrong, an exercise in which the Judge failed to engage.
11. Having concluded that AH was an Afghan citizen, the Judge turned to the credibility of AH's account of his problems in Afghanistan. The Secretary of State's main basis for concluding that AH's account was not credible was the issue in relation to his nationality. Having already rejected the Secretary of State's case in that regard, the Judge went on to conclude that AH was a credible witness and accepted his account. He therefore allowed the appeal on asylum and human rights grounds.

Appeal to the Upper Tribunal

Grounds of appeal

12. By her notice of appeal, the Secretary of State has appealed on two grounds, which may be summarised as follows:
 - a. First, in paragraphs 27-28 of the Decision, the Judge has wrongly assumed that the Secretary of State was challenging the genuineness, rather than the reliability of the document, and has accordingly erred in placing the burden on proof on the Secretary of State;
 - b. Second, that in considering whether the Eurodac fingerprint match was reliable, the Judge failed to apply the AIT's decision in RZ (Eurodac - fingerprint match -admissible) Eritrea [2008] UKAIT 00007.

Permission and new material

13. As noted, Judge Beach granted permission to appeal on 1 July 2022.
14. On 1 September 2023 (i.e. the working day before the hearing) at 10.26, the Tribunal received an email from AH's solicitors enclosing a letter from the Jafaria Society. No explanation was given as to why it was sent, let alone sent so late, and no application as required by r.15(2A) of the Upper Tribunal Procedure Rules 2008 was filed. At the hearing, Mr Hussain said that he did not understand why it had been sent and he did not seek to rely on it. For the purposes of this error of law decision, it seems to me to be wholly irrelevant, and I decline to admit it.
15. Also on 1 September 2023, albeit later in the day, the Tribunal received a Rule 24 response directly from Mr Hussain. Quite apart from its lateness (rule 24 responses are due no later than one month after AH was notified that permission to appeal was granted, which, given how long ago permission was granted, I anticipate was many months ago), there are two oddities to note about this. First,

the document is unsigned. Second, the email address from which this was sent was Mr Hussain's Hotmail account. Yet later that day, AH's solicitors emailed a further copy of the rule 24 response. This was unnecessary and, given the pressure on Tribunal staff caused by the large volume of, often urgent, emails received by the Tribunal each day, unhelpful. Notwithstanding the above, Mr Basra did not object to my considering the rule 24 response, it is a helpful document and so I extend time so that it can be considered.

Ground 1

Submissions

16. Mr Basra submitted that the Secretary of State's case had always been that the document was not reliable, not that it was not genuine, and that accordingly the Judge had been required to consider whether weight could be put on it (which was an appellant's burden to show), rather than, as he did, consider whether the Secretary of State had demonstrated that it was not genuine. He also submitted that the Judge was wrong to take into account or give weight to the fact that no verification check had been successfully undertaken in light of QC (verification of documents; Mibanga duty)[2021] UKUT 33 (IAC).
17. Mr Hussain, in his rule 24 response, reminded the Tribunal of (in summary) its limited role in relation to factual and evidential matters, that the Tribunal cannot simply substitute its own view for that of the Judge and the need to assume that the Judge considered all the evidence before it and knew and applied the relevant authorities unless compelled to conclude otherwise.
18. Mr Hussain submitted orally that this ground was a "red herring", because document verification reports were only ever designed to test whether documents were genuine, not whether they were reliable. He also made the overarching submission that the Judge was entitled to find as he did in relation to his nationality, taking into account his (accepted) Hazara ethnicity, his ability to speak Dari and his ability to answer 38 of 45 questions about nationality correctly.
19. In both his rule 24 response and orally, Mr Hussain described the Secretary of State's grounds as "disingenuous". I pulled him up on that language, which carries with it implications of a lack of belief in the truth or merit of what is being put forward and therefore bad faith in so doing. On my doing so, Mr Hussain quite properly retracted his use of the word, apologised for the improperly made allegation and sought to substitute it with the word "misconceived". He was right to withdraw the bad faith allegation implicit in the use of "disingenuous", which in my judgment had no proper basis and should not have been made.

Discussion

20. In my judgment, Mr Basra put his case too high, but is nevertheless correct. On a fair reading of the Refusal and the Judge's summary of the way in which the Secretary of State's case was put before him, it seems tolerably clear to me that the Secretary of State was alleging that AH's Tazkira was not a genuine document. It is also clear however that the Secretary of State was maintaining that, even if it was genuine, no weight could be put on it:
 - a. The evidence cited at paras. 25-27 of the Refusal is indicative of the ability to obtain genuine Tazkiras containing false information and as a result the Secretary of State considered that the Tazkira could not be considered to be reliable.
 - b. In the Respondent's Review before the First-tier Tribunal, at para. 6, the Secretary of State submitted that it was for AH "to demonstrate that the

*documents on which he seeks to rely can be relied upon, **Tanveer Ahmed** [2002] UKIAT 00439 STARRED applies."*

21. It therefore followed that the Judge was required, first, to consider the question of genuineness, and second, to consider, even if the document was genuine, whether any weight could be placed upon it in light of his view of the evidence viewed in the round. That is, however, not the approach he adopted in paras. 27-28 of the Decision. Rather, having concluded that the Respondent had not discharged her burden in showing that the Tazkira was not genuine, he considered that "therefore" weight was to be attached to it. That however is not a logical conclusion to draw simply from the fact that the document is genuine and fails to apply *Tanveer Ahmed*.
22. I do not agree that this ground is a "red herring", as Mr Hussain suggested. While it is correct that various factors were at play in the Judge's decision as to AH's credibility, the Secretary of State's first ground of appeal identifies an error of law in relation to one of the most significant issues in the appeal, which ground I have concluded is made out.
23. As the reliability of the Tazkira is a central issue in determining HA's credibility in relation to his nationality and potentially more broadly, it seems that this error is material and that the Decision as a whole should be set aside. Given that the remaking of this appeal will require the full facts to be redetermined de novo, the appeal will be remitted to the First-tier Tribunal.
24. Before leaving this ground, I would note one aspect of the Judge's analysis on the Tazkira issue that troubled me, though it does not form part of the grounds of appeal. The question of whether a document is genuine or reliable does not depend on which parties took more steps to try to prove the relevant issue. The comparison between the steps taken by the parties in relation to obtaining evidence relevant to the question of AH's nationality is therefore irrelevant at best and liable to lead one into error at worst. Moreover, the Judge was plainly unimpressed by the Secretary of State's failure to verify the Tazkira, but there was in my judgment no duty on her to do so in the first place. *QC*, cited above, makes clear that the duty to verify applies only exceptionally, and in particular, only where, *inter alia*, it can be easily authenticated and where authentication is unlikely to leave any live issue as to the reliability of its contents, neither of which, it seems to me, is the case here.

Ground 2

25. Given my conclusions on ground 1, I can deal with ground 2 relatively briefly.
26. There are in my judgment two separate, albeit related, questions in relation to which AH's alleged previous fingerprinting in Finland is relevant. First, there is a question of whether he was fingerprinted in Finland in 2015 at all. Second, there is a logically distinct question whether, if he was fingerprinted in Finland as the Secretary of State claims, he told the Finnish authorities that he was born in Pakistan (in contrast to the account given to the Secretary of State of having been born in Afghanistan). Neither the Judge nor the parties sought to distinguish between these in any significant way in their treatment of the issues, yet the data stored on Eurodac does not include (according to what is said in *RZ*, cited above) matters communicated by an asylum seeker to the authorities in a country in which they have previously claimed asylum. The question of the approach to be taken to whether AH was to be accepted as having claimed asylum in Finland, potentially provable through the Eurodac match, and the question of whether he had told the Finnish authorities, provable only by virtue of the email exchange between different parts of the Home Office (presumably, although there is no

evidence of this, by virtue of having sought information from the Finnish authorities).

27. In relation to the latter of these issues, it seems to me that a judge, properly directing themselves, could properly have considered they could not give much or any weight to the email exchange, given the paucity of information in it. However in relation to the first issue, in my judgment the Judge was required to consider and apply RZ, which he failed to do.
28. In RZ, this Tribunal held that Eurodac fingerprint data is admissible for broader purposes than simply determining an individual's country of first entry into the EU for Dublin III purposes. Although, where there is a dispute about whether there is a fingerprint match, the burden of proof is on the Secretary of State, the safeguards in the Eurodac system are such that in the absence of cogent evidence to the contrary, 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 evidence of a fingerprint match identified by the system and confirmed by the Immigration Fingerprint Bureau should be regarded as determinative of that issue.
29. It may be that, on proper analysis, RZ did not apply because there is no evidence that the fingerprint match identified by the system has been confirmed by the Immigration Fingerprint Bureau, but that was not something that was canvassed by the Judge, and the evidence did nonetheless include data as to where and when AH's fingerprints were said to have been taken, which should on their face be taken as accurate. The Judge however did not consider any of this and appears to have overlooked RZ altogether. Instead of applying what I described in the hearing as the RZ presumption, at para.29, set out above, he adopted a Tanveer Ahmed approach to assessing the documents provided by the Respondent, which is also an error of law.
30. From having carefully considered the decision in RZ it would appear that there may be more information available to the Secretary of State from Eurodac (such as the fingerprints themselves) than that which was adduced in her supplementary bundle before the Judge. As this case is to be remitted, she may wish to consider whether to adduce any such further evidence of what occurred in Finland (both in relation to data contained within Eurodac and information provided to the Finnish authorities) so that the First-tier Tribunal is able to make its decision on this appeal with the benefit of all the relevant evidence which is within the parties' possession or control, and so that AH can, if he so wishes, seek to show that the fingerprints are not his.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law.

The decision is set aside and remitted to the First-tier Tribunal for *de novo* hearing with no preserved findings.

Paul Skinner
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

7 September 2023