

Asylum and Immigration Tribunal

YI (Previous claims – Fingerprint match – EURODAC) Eritrea [2007] UKAIT
00054

THE IMMIGRATION ACTS

Heard at Field House
On 22 May 2007

Before

Mr Justice Hodge, President
Senior Immigration Judge Batiste

Between

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Sowerby, instructed by Messrs YVA,
Solicitors

For the Respondent: Mr S Ouseley, Presenting Officer

An Immigration Judge needs to be satisfied on the specific evidence in each case, including EURODAC evidence if available, whether the Appellant has made a previous claim. The evidence could comprise not just fingerprints but other data from the alleged previous application, 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. An Immigration Judge will also, as a matter of fairness, need 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. An Appellant may not want to use such a facility if the match is genuine and further evidence would only make matters worse for him. It is therefore the availability of the facility rather than the take-up that is needed in a fair system.

DETERMINATION AND REASONS

1. The Appellant is a citizen of Eritrea. The Respondent seeks reconsideration of the determination of Immigration Judge Talbot, allowing the Appellant's appeal against his decision on 23 Sept 2006 to remove the Appellant as an illegal entrant, asylum/human rights claim refused.
2. The key issue in this appeal is the Immigration Judge's approach to and assessment of the Respondent's evidence that there was a EURODAC fingerprint match between the Appellant and a person who made an asylum claim in Italy on 3 June 2005 at a time when the Appellant claimed he was undertaking military service in Eritrea from which he deserted. The material findings by the Immigration Judge are as follows.

"14. The primary credibility issue raised by the Presenting Officer was the Home Office allegation that the Appellant had claimed asylum in Italy in June 2005, which undermines the Appellant's claim to have been undertaking his military service in Eritrea until his departure in July 2006. This issue was discussed in some detail at the case management review hearing on 23 October 2006 before Immigration Judge Flynn. As a result of concerns raised by Counsel for the Appellant at that hearing, directions were issued by the Tribunal requiring the Respondent to provide evidence of all information sent to Italy to verify the Appellant's identity and show he claimed asylum there. The Home Office responded by providing an e-mail from Andy Ritchie, the Home Office caseworker who dealt with the Appellant's asylum application on behalf of the Secretary of State.

15. The sum of the information presented to me on this issue is as follows.

- (1) An e-mail dated 10 August 2006 sent to "ASULIVEURODACResults...." Headed "EURODACSearch Result". This e-mail refers to the Appellant by name and various identifying references and codes (including his nationality and date of birth) and the fact that he was fingerprinted on 10 August 2006. Below this there is another heading - "Identification List" with a "case ID" No. and Sex - M", "Place of Apprehension - Pozzallo" and "Date of Apprehension - 2.6.05".
- (2) A Home Office form with the same IFB reference number as on the above e-mail with the result "no matching records".

Also on the form are the various identifying references for the Appellant and his photograph.

- (3) A memorandum from Andy Ritchie dated 1.11.06 stating as follows.

"The fingerprint match from Italy in 2005 was a EURODAC trace that ASU Liverpool received on 10 August 2006 when the applicant's fingerprints were scanned in after a previously unsuccessful attempt on 27 July 2006. When an applicant's fingerprints are scanned into EURODAC, a result is e-mailed back to the ASU concerned - in this case there was a hit on the applicant's fingerprints that matches details as being previously fingerprinted in Pozzallo, Italy on 2 June 2005 (minute on file from ASU Liverpool dated 10.8.06 refers and copy e-mail..)

The memorandum then confirms that the photograph attached to the printout was taken by the ASU in Liverpool.

16. When a serious allegation of deception is made against an Appellant, this must be adequately supported by evidence. In a case of this nature, I would expect to see copies of matching data in the form of the fingerprints taken in Liverpool and Italy. I would also expect to have some further details of the person fingerprinted in Italy such as their name, nationality and/or photograph. Unfortunately none of this information has been supplied by the Respondent. The only evidence of the match comes in the form of the e-mail with the search results (quoted above). Even this evidence is undermined by the admission that a previous attempt at a match was unsuccessful (as appears to be reflected in the form stating "no matching records").

17. I have no concerns whatsoever as to the good faith of the Home Office in seeking to verify whether this Appellant had made a previous asylum claim in Europe, and I accept that information was fed into the computer which yielded a match with a person fingerprinted in Italy. Unfortunately, however, the Respondent has failed to back this up with adequate supporting evidence to satisfy me that the search result is accurate. I do not consider the evidence provided to adequately support the conclusion that this Appellant is the same person as the person fingerprinted in Italy in June 2005.

3. The Immigration Judge then went on to assess the other credibility issues taken by the Respondent against the Appellant's claim and found in the Appellant's favour. On this basis and in the light of the extant country guidance, the Immigration Judge proceeded to allow the Appellant's appeal.
4. The challenge to the determination made by the Respondent in his grounds of application was limited to the Immigration Judge's conclusions about the EURODAC evidence on the fingerprint match. The Respondent did not seek to challenge the Immigration Judge's reasoning for his other positive credibility findings. However, those other credibility findings would plainly be unsustainable if it were shown that the Appellant was in Italy at the time he claimed he was doing and deserting from his military service in Eritrea. The Respondent

in essence argued in the grounds that the Immigration Judge was wrong in law in not accepting the sufficiency of the evidence provided to him.

5. Before us, Mr Ouseley adopted the submissions in the grounds of application and expanded upon them. He argued that the error of law by the Immigration Judge was in his rejecting the evidence of a proper match without providing adequate reasoning. The Immigration Judge also erred in law in giving weight to the initial failure to match fingerprints without further inquiry. Mr Ouseley said that there had been problems over some asylum applicants inflicting deliberate damage to their fingertips to prevent matching. There was therefore a need to wait for the damage to heal and for a second attempt to make a match. He did not however suggest that there was any firm evidence that this was so in this case. Mr Ouseley also observed that the Appellant had not requested any detailed fingerprint data for independent analysis. Finally Mr Ouseley said that on second stage reconsideration further evidence could be produced concerning the safeguards in the EURODAC system.
6. Mr Sowerby submitted that the grounds amounted to no more than disagreement with the Immigration Judge's sustainable conclusions and that Mr Ouseley was seeking to give new oral evidence which should have been given to the Immigration Judge. In paragraph 14 of the determination there was reference to a Case Management Review where the inadequacy of the evidence concerning the fingerprints was flagged up and specific directions were made in the clearest terms requiring the Respondent to produce evidence to show why he maintained the Appellant had claimed asylum in Italy. Only limited documents had been provided in response to these directions, as identified by the Immigration Judge. There had been ample opportunity for the Respondent to produce further and better evidence. Indeed, there was no Rule 32(2) application before the Tribunal even today to consider any new evidence concerning the EURODAC system and Mr Ouseley was unable to say with any certainty what further evidence could be provided or when. With regard to the first and unsuccessful attempt to match fingerprints, the Immigration Judge was entitled to rely upon the evidence placed before him by the Respondent as described in paragraph 15 which confirmed that an unsuccessful attempt to match fingerprints had been made on 27 July 2006. There was no evidence or submission to the Immigration Judge to the effect that this had been as a consequence of deliberate obstruction by the Appellant.

7. In response Mr Ouseley acknowledged that it would have been better had more supporting evidence been provided to the Immigration Judge, and for the future the Respondent could provide evidence of the reliability of the system and the opportunity for aggrieved asylum applicants to obtain details from it. However he maintained that the Immigration Judge had erred materially in law in the ways he had described above.
8. In considering these submissions, we should first clarify three material matters.
9. First we note the terms of the specific directions issued in this case as a result of the Case Management Review. They were issued on 23 October 2006, some two weeks before the hearing before the Immigration Judge. They included the usual standard directions and in addition the following specific directions.

“Respondent to provide evidence of all information sent to Italy to verify the Appellant's identity and show he claimed asylum there.
Respondent to provide objective evidence referred to in paragraph 15 of RFR letter. All documents to be served on the Appellant and the AIT five days prior to the next hearing.”

10. It is the first of these two directions which relates to the fingerprints issue. The information provided in response was that described by the Immigration Judge in paragraphs 14 and 15 of the determination as set out above. He considered this information to be inadequate for the reasons described in paragraphs 16 and 17 of the determination, again as set out above.
11. Second, we have noted Mr Ouseley's submission that further evidence relating to the reliability of the EURODAC system can be provided at second stage reconsideration. However, second stage reconsideration cannot arise unless he can first demonstrate to us that the Immigration Judge made a material error of law. It might have been open to the Respondent to apply to us to admit fresh evidence. There would have been potential difficulties in the submission of fresh evidence at this stage, which would not normally be accepted. However given the assertion by the Respondent of fraud by the Appellant and of mistake of fact about the EURODAC system by the Immigration Judge, it might have been possible, having regard to the guidance of the Court of Appeal in cases such as A v Secretary of State for the Home Department [2003] EWCA Civ 175; [2003] INLR 249 and by the Tribunal in EB (fresh evidence – fraud – directions) Ghana [2005] UKAIT 00131. We cannot say: there has been no Rule 32(2) application to us on behalf of

the Respondent under the Asylum and Immigration Tribunal (Procedure) Rules 2005 to admit any fresh evidence at all.

12. Third is the applicable burden and standard of proof. EURODAC data is produced by the Respondent in cases such as this essentially to assert deception/fraud by an Appellant. The burden of proof rest with the person making the assertion and the standard of proof where fraud is asserted and where the consequences for the Appellant are correspondingly serious is the higher civil standard of “proof to a high degree of probability” – R v Secretary of State for the Home Department ex p. Khawaja [1982] UKHL 5; [1984] AC 74.
13. From this basis we now assess the submissions made to us. It is clear that a full assessment of EURODAC data is a matter of considerable general importance because a number of cases turn upon fingerprint evidence produced by this system of past claims in order to expose deception in current asylum applications.
14. Mr Ouseley’s primary submission is in essence that the EURODAC system is sufficiently reliable, and has sufficient safeguards, that evidence of a match of the kind provided to the Immigration Judge in this case should have been treated by him as satisfying the Respondent’s burden of proof, when the Appellant, though denying any previous claim in general terms, has not requested detailed fingerprint data in order to obtain and present independent forensic analysis. This may be an arguable and even sustainable proposition, but unfortunately no evidence to support it was produced either to the Immigration Judge or to us. We are therefore not now in a position to make a meaningful assessment of the system in general, though plainly it is of importance that this should be done by the Tribunal at the earliest possible opportunity.
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. Of course, an Appellant may not want to

use such a facility if the match is genuine and further evidence would only make matters worse for him. It is therefore the availability of the facility rather than the take-up that is needed in a fair system.

16. In this appeal, the parties were aware from the time of the CMR that there was concern over the adequacy of the evidence concerning the fingerprint match. The Respondent produced some further evidence but this fell short of what the Immigration Judge said he would have expected to see in the light of the directions issued at the CMR in order to make a meaningful evaluation. Moreover the new evidence showed that there had been a previous unsuccessful attempt to make a fingerprint match which was never explained to him, though the need to do so would we consider have been obvious. He was entitled to take this unexplained inconsistency into account. Indeed in all these circumstances it was, in our judgement, properly open to the Immigration Judge to conclude that the Respondent had not discharged his burden of proof. 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 him. Indeed a photograph of the Italian claimant if he resembled the Appellant, on top of the EURODAC fingerprint match, may well have sufficed. However this was not produced and the Immigration Judge was entitled to take the view he did on the evidence before him. There is no material error of law.

DECISION

17. The Immigration Judge did not make a material error of law and the original determination of the appeal shall stand.

Signed

Dated 24 May
2007

Senior Immigration Judge Batiste