Asylum and Immigration Tribunal

RZ (Eurodac – fingerprint match –admissible) Eritrea [2008] UKAIT 00007

THE IMMIGRATION ACTS

Heard at Manchester
On 6 November 2007

Before

SENIOR IMMIGRATION JUDGE LATTER
IMMIGRATION JUDGE BRUNNEN

Between

RZ

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr T Hussain, Counsel, instructed by White Ryland, Solicitors
For the Respondent: Mr J Hall, Counsel, instructed by Treasury Solicitors

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.

DETERMINATION AND REASONS

1. This is the reconsideration of an appeal against the respondent's decision made on 18 September 2006 to remove the appellant following the refusal of his claim for asylum. His appeal was originally dismissed following the hearing by Immigration Judge Khawar on 2 January 2007. Reconsideration was ordered on 27 February 2007 and on 25 May 2007 the Tribunal found that there was a material error of law in his determination and it was directed that the second stage of the reconsideration should be a full rehearing.

2. This appeal has raised the issue identified in YI (Previous claims – fingerprint match – Eurodac) Eritrea [2007] UKAIT 00054 where in paragraph 13 the Tribunal said:

> "13. ... 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."

We have heard evidence about the Eurodac system and submissions on whether fingerprint evidence obtained as a result of that system is admissible and if so the burden and standard of proof to be applied and the weight to be given to such evidence.

Background

3. The appellant is a citizen of Eritrea born on 24 April 1979. He arrived in the United Kingdom on 19 July 2006 making a clandestine entry by lorry. He applied for asylum on 20 July 2006. At his screening interview the appellant said that he was a Pentecostal Christian. He said that he had left Eritrea on 4 June 2006 arriving in Sudan on 5 June 2006. He had stayed in Kasala for two weeks with his uncle and then went to Port Sudan. He then had a 23 day journey by ship arriving in an unknown country from where he travelled by lorry to the United Kingdom, arriving on 19 July 2006. He said that he had met someone from his own country who let him stay overnight with him. The appellant was unable to identify where this was or who the person was. He had travelled with his uncle by truck to Port Sudan and his uncle had arranged with an agent for the appellant to travel by a cargo ship from Sudan. His uncle

had paid US$4,000. The appellant was asked where he had got the money from and he said he did not know but his uncle's son lived in the United States. The appellant said that his normal occupation was as a soldier. He had been in national service since November 1997 and had been detained from 10 October 2005 until he escaped on 4 June 2006. When asked his reason for coming to the United Kingdom, he replied that he had come here to claim asylum because of religious problems. He had been detained on 10 October 2005 because he was a Pentecostal Christian. He was asked whether he had had any problems prior to this and he replied that he had not. He confirmed that he had never left Eritrea before June 2006.

4. In accordance with normal procedure the appellant's fingerprints were taken on 20 July 2006 but they did not meet the quality threshold required for comparison by Eurodac and further fingerprints were taken on 3 August 2006. His prints were then automatically compared electronically with other fingerprints on the Eurodac database and the search results showed there was a match with fingerprints taken in Lampedusa e Linosa, Italy on 8 July 2005. Those fingerprints were taken following an illegal entry into Italy. We will deal more fully later in this determination with the Eurodac system and the procedures followed.

5. The appellant was interviewed about his claim on 6 September 2006. He was asked whether he had ever left Eritrea before June 2006 when on his account he travelled to the United Kingdom. He replied that he had not. It was put to him that his fingerprints had been taken in Italy on 8 July 2005. His response was that he had not been in Italy and no fingerprints were taken. It was put to him that fingerprints were unique to each individual but he maintained his assertion that in 2005 he was in Eritrea. He repeated that he had come directly to England and had never been to Italy. The appellant said that he had started his military service on 1 November 1997. It was supposed to last for eighteen months but because of the situation in Eritrea he remained in the army until June 2006. He was asked if he had deserted from the military and he replied no. He said that he could not return as he had escaped from prison and would be shot.

6. The basis of the appellant's claim for asylum as it emerged from his interview was that he was in fear of the government in Eritrea because of religious problems and because he had been a soldier. He had converted to the Pentecostal faith in September 2003 and was baptised on 2 May 2004. He started to attend secret prayer meetings in other believers' homes. He first encountered problems on 5 February 2005 when he was caught reading the bible by a squad leader. His bible was taken from him and he was told he would not be allowed to practise the faith and was given a warning. On 10 October 2005 when practising his faith with a group of five other believers he was arrested. He was detained and taken to a prison in Asseb. He was regularly beaten but he did not receive any injuries from the beatings. On 4 June 2006 the appellant was travelling in a lorry with thirteen prisoners and five guards

when the lorry overturned. The appellant was able to escape: none of the guards tried to follow him. He went on foot to Sudan and arrangements were made for him to leave and travel on to this country.

7. The respondent was not satisfied that the appellant was entitled to asylum. He took into account the fact that the appellant's fingerprints had been taken in Italy on 8 July 2005. Paragraph 9 of the Reasons for Refusal Letter of 12 September 2006 refers to the fingerprints being taken in Italy under the same name and date of birth as the appellant. This is not fully accurate as we will make clear later as the information retrieved from Eurodac does not identify the appellant by name or date of birth. The respondent did not believe that the appellant was a follower of the Pentecostal faith, that he was a deserter or that he would be considered as such if returned to Eritrea.

8. The appeal against this decision was heard by the Immigration Judge on 2 January 2007. The appeal was dismissed on asylum, humanitarian protection and human rights grounds. Following a hearing on 25 May 2007 the Tribunal (Senior Immigration Judge Jarvis) found that there was a material error of law in the judge's determination. The Tribunal's reasons were as follows:

> "1. The Appellant is a citizen of Eritrea whose date of birth is given as 24 April 1979. He claims to be a refugee and to be at real risk of other serious harm, by reason of his Pentecostal faith and by reason of his being a deserter from the military service aspect of National Service.
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> 2. On 18 September 2006 the Respondent refused his application for leave to enter the UK on refugee and human rights grounds and decided to give directions for removal to Eritrea. The Appellant appealed and by a determination issued on 30 January 2007 to the Appellant, Immigration Judge Khawar dismissed his appeal on asylum, humanitarian protection and human rights grounds, finding no article 3 ECHR rights would be breached on return.
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> 3. The Appellant applied for an order for reconsideration, and Senior Immigration Judge King, made an order on 27 February 2007 on the basis that the immigration judge had arguably erred in law as contended for in grounds:
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> ' The circumstances of this matter are somewhat unusual because the Respondent relied upon a Eurodac computer search carried out in relation to the Appellant's fingerprints such as to find a match in relation to an asylum claimant in Italy. What was significant about the particular match was that the claimant in Italy bore the same name and date of birth as the Appellant. This, of course, was significant and fundamentally undermined the Appellant's account of his experiences in Eritrea at or around the same time.
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> It is contended in ground one of the grounds for reconsideration that the evidential basis for such a report in its conclusions was not established to the requirement set out in RP (Proof of forgery) [2006] UKAIT 86. Although it is not entirely clear that this is the appropriate Tribunal

decision to quote it is clear that the more serious the nature of the allegation that has been made by the Respondent, the clearer the evidence in support thereof needs to be. The matter merits further reconsideration.

In addition the immigration judge has failed to consider with clarity the risk on return. There were no clear findings as to whether or not the Appellant is now of the Pentecostal faith and if so, whether that will pose a risk to him upon return. No consideration was given to the issue of being regarded as a draft evader upon return (query deserter? My emphasis) in accordance with country guidance decisions.

The other matters raised in the grounds for reconsideration are essentially those going to the merits of the decision.'

4. Mr T Hussain of Counsel instructed by White Ryland Solicitors appeared for the Appellant and Mr W Khan Presenting Officer appeared for the Respondent.

5. Mr Hussain relied upon the grounds. He submitted that of very real concern in relation to the information from Eurodac, was that no evidence had been lodged to show what has actually been produced to show an allegation of the match of identity. There was simply this print of a composite email, which appeared to comprise at least three documents and was a 'cut and paste' job with nothing to show what lay behind it.

6. Further, it is the Appellant's position that it was not open to the Respondent to use the Eurodac system for the purpose of seeking to discredit an asylum applicant within appeal proceedings. It was an unlawful misuse of the system. The Eurodac 275/2000 regulations have direct in effect in the UK, see article 27. They deal with its purpose and use, pursuant to the Dublin Convention, are very clear, and they do not permit the use to which the Respondent has put the information. There is nothing to show any consultation with Italy (see article 13(3) and 4(b). Further, the Appellant had had no opportunity to deal with any actual evidence in relation to this allegation so that all he could do was to refute it in his oral evidence.

7. The photograph in the email is not from Eurodac as Eurodac biometrics do not include photographs. It appears to be the photograph of the Appellant from his IND registration card. There has been no opportunity to challenge any fingerprint evidence. The Appellant has not seen any such evidence. The courts have given clear guidance on the approach to such evidence (see Mr Justice Collins in R v Robert John Buckley No.9802835/Y2 of 30 April 1999).

8. Mr Hussain submitted that at the case management review hearing he had requested that the immigration judge direct that at least a statement be produced by Andrew Heseltine, who had sent the email in question. The Appellant's position is that he has not been to Italy. The immigration judge ought not to have admitted this evidence. Or in the alternative, he ought not to have given it either the determinative or very heavy weight that he clearly did (see paragraph 23).

9. Mr Hussain relied upon the grounds and the order in relation to the additional errors of failure to find facts and failure to assess risk on return in accordance with the law.

10. Mr Khan was not able to produce argument or evidence to satisfactorily counter that of Mr Hussain, in particular I was concerned as to the photocopy of the email in terms of its cogency as evidence. It is, I find, an unexplained, compilation document. I find that whilst it may be that under the Dublin Convention and/or the related regulations, information from the Eurodac system is properly available in law, to the Respondent, to use in the way that he has done in these proceedings, I am unable to find that to be so on the basis of the unsatisfactory evidence that has been produced, which is in a form that is very difficult for the Appellant to respond to in a meaningful way. There is a manifest lack of continuity in the evidence that is purported to be presented in this copy email. Mr Khan agreed that a key issue was whether the Respondent was entitled to use the information from the Eurodac system as he had done.

11. Mr Khan further agreed that the immigration judge had fallen into error of law in relation to the other aspects that are highlighted in the grounds and the order.

12. I concur with Mr Hussain, for the reasons that he advances, in finding that the immigration judge erred in law in treating the photocopy email and its purported content (apart from the photograph, see 23 (d) as he did, and in giving it the heavy, if not determinative weight that the clearly did at paragraph 23, in particular, where he states that it appears to drive a 'coach and horses' through the entirety of the Appellant's account. Whilst he may ultimately be right in that, he has erred in law in coming to the decision that he made on the basis of the nature and quality of the evidence that he had before him.

13. I am, in addition, satisfied that the immigration judge has fallen into material error in relation to the remaining matters contained in the grounds, in the ways and for the reasons set out in the grounds, in the order and in Mr Hussain's submissions. I find that the correct way forward is for there to be a further full hearing at which all issues will be at large. It is directed that the matter be transferred to the Manchester Hearing Centre, to be listed for a further full reconsideration hearing before an immigration judge panel of judges other than Immigration Judge Khawar. The parties' time estimate is one day.

14. It is directed that the Respondent file and serve, no later than 21 days before the date fixed for the second stage hearing, a skeleton argument to include legal argument as to the object and purpose of the Dublin Convention and the relevant regulations, to include EC2725/2000 and EC407/2002; together with a statement from Andrew Heseltine to deal with the continuity issues in relation to the email of 3 August 2006, to include detail of its sources, including the photograph, and detail as to how the email was complied. That is to say, he needs to deal with everything that is in the main body of the email.

15. The Appellant is then to file and serve all evidence relied upon together with his skeleton argument, by no later than 7 days before the date of hearing."

Evidence

9. At the hearing before us we heard oral evidence from the appellant, Ms E M, a member of the Agape Eritrean Church in Chorlton, Manchester and Mr J MacCloud, a Fingerprint Consultant with Barclay Security Bureau. The respondent called three witnesses Ms K Giles a Senior Executive Officer Policy Adviser within the European Asylum Policy Unit, Mr Andrew Heseltine a Chief Immigration Officer and Mr Nicholas Jacques a Senior Scientific Officer in the Immigration Fingerprint Bureau (IFB) at Lunar House in Croydon. The relevant documents are set out in bundles produced by the appellant (A) with tabs A-C, 1-8 and by the respondent (R) with tabs 1-14. Both Mr Hussain and Mr Hall produced helpful and comprehensive skeleton arguments dealing with the issues arising from the use of data from the Eurodac system.

The Evidence of the Appellant

10. The appellant adopted his two witness statements of 8 December 2006 (R10, B3) and 13 September 2007 (R8). He confirmed that he was a Pentecostal Christian and had attended the Eritrean Church since 30 July 2006. Shortly after his arrival in this country he had been dispersed to Bury. He met fellow countrymen there and they took him to the church. He regularly attended the Agape Church on Wednesdays, Fridays and Sundays. He had attended meetings at the pastor's home in Openshaw. He explained that Friday was a special worship evening whereas Wednesday was a bible study. When he was in Eritrea he had been imprisoned during his military service. He had not been to Italy. The first time his fingerprints had been taken was in this country. When he left Eritrea he did not have permission to do so. If he had to return he would not be able to stop practising his beliefs.

11. In cross-examination the appellant confirmed that he had been caught reading the bible in February 2005. He had continued in his unit without any further problems until October 2005 when he was arrested. He confirmed that he had been in Eritrea at all times up until June 2006. If there was a match between his fingerprints and those taken in Italy, he had no explanation. He was asked about the evidence in Mr MacCloud's report that there appeared to be damage to the prints taken in the United Kingdom: the appellant said that he had never interfered with his fingers or damaged them. He had no explanation as to how this could have happened. He said that he had travelled from Sudan in very harsh conditions. If there was any damage to his fingers, it would be due to the conditions of travel. He had not had any accidents with his hands or other illnesses. He repeated that he had never been to Italy.

12. He said that his pastor, Mr M D, would not be coming to the hearing. The Pentecostal faith was banned in Eritrea. He would not be able to worship or pray with other believers there. He said that pastors had

been arrested and were still in prison. He had been able to escape when the vehicle he was travelling in overturned. He did not know what had happened to the others and could not say who was killed and who survived. He had not run away but had walked. He did not hear anyone shout 'stop' and there were no shots. No one followed him. He had not paid back his uncle the $4,000 and when asked how his uncle obtained this money, he said that it may have come from his son in America. He said that he had not left Eritrea legally.

13. In re-examination he confirmed that members continued to arrive at their church from Eritrea and others moved on when their claims had been resolved and they were relocated. He had not damaged his fingers. He was a genuine believer. He would not be able to worship publicly in Eritrea.

The Evidence of Ms E M

14. The witness confirmed that she had been granted refugee status by the respondent. She had not had to appeal. Her status papers were produced in evidence. She confirmed that she had known the appellant for over a year and that he had attended the Agape Church where the pastor was M D. She had been asked by the pastor to give evidence for the appellant and had been given permission to do so. She attended the church four days a week: one day for choir practice, bible studies on Wednesdays, the prayer programme on Fridays and the main act of worship on Sundays. The weekly bible study was at the pastor's house in Openshaw. The appellant had consistently attended for the past year.

15. In cross-examination she confirmed that the weekly bible studies were at the pastor's house: they did not go to the church on Wednesdays. There were different places where study groups met. She had not been to any other house but once she had been to the appellant's home when she had been working on an outreach programme in Bury. On Fridays there was a prayer programme. She confirmed that she had spoken the evening before this hearing to the pastor. He had had to attend a pastor's meeting in London. She had talked about this with him on Sunday. She was asked about the letter written by the pastor dated 30 October 2007 which had identified her as the person who would be attending the hearing even though she had not been spoken to about this until Sunday 4 November. She confirmed that she had been asked to attend on that Sunday and that was the first time she had known of the matter. She confirmed that the pastor could well have decided to send her but tell her at a date after the letter had been written. The witness was asked further questions about the two letters dated 16 October 2006 and 30 October 2007 written by the pastor. She assumed that the letter dated 30 October 2007 had been signed on the pastor's behalf. She had been shown this letter. Her pastor had told her that her name had been put in the letter. She confirmed that she could read a little bit of English.

The evidence of Mr John MacCloud

16. Mr MacCloud is a fingerprint consultant with Barclays Security Bureau and a registered Forensic Practitioner with the Council for the Registration of Forensic Practitioners, a Fellow of the Fingerprint Society and a member of the Forensic Science Society. During his police career he was on the Register of Fingerprint Experts and has been engaged in the identification of persons by means of finger and thumb prints for more than 40 years. He confirmed that he has never known impressions from different fingers, thumbs or palms to agree in the sequence of ridge characteristics. He has produced a report dated 12 October 2007.

17. He was instructed on behalf of the appellant to take a set of fingerprints from the appellant in the offices of his solicitors and to compare them with sets of fingerprints taken on 8 July 2005 in Italy identified by the reference IT2AG000EX1 and another taken in this country on 3 August 2006 identified by the reference UK1IFB06052670J. Mr MacCloud compared these prints on 10 October 2007 at the Immigration Fingerprint Bureau (IFB) in Lunar House, Croydon. He commented that the fingerprints taken in Italy were well taken and not damaged. All the finger impressions on the form were capable of being easily identified. The ridges were clearly defined and the patterns easily identified. The fingerprints taken in this country on 3 August 2006 were blotchy and very dark in places. Mr MacCloud commented that this could be caused by too much pressure or the printing machine having a tendency to print too darkly. There were areas of slight damage to some areas in each finger impression. He was not able to say whether this was as a result of deliberate or accidental action or a medical condition. The areas of slight damage were confined to the central area of the print and he therefore considered that it was unlikely that this resulted from a medical condition. However the finger impressions on this form were capable of being clearly identified. The undamaged areas of the ridges were clearly defined and the patterns of each finger impression were capable of being identified.

18. Mr MacCloud was satisfied that the finger impressions taken by him and the impressions taken in Italy and this country had been made by the same person. He found sufficient ridge characteristics to be in sequential agreement and had no doubt that they were made by the same person. He then made the following general comments:

> "24. In all the cases involving fingerprint identification that I have been involved in during the past 42 years, there has always been an unbroken chain of evidence of personal identification. This evidence would start with obtaining any exhibits in the form of finger marks relating to a crime scene or finger impressions from a known person or exhibits on which finger marks were developed. This would be documented and the identity of the person introducing the exhibits should always be known. That person's evidence will be crucial to the case. In this case the identity of the person taking the fingerprints in Italy is not known.

25. Council regulation (EC) No.2725/2000 of 11 December 2000 concerns the establishment of 'Eurodac' for the comparison of fingerprints. Article 5 of the regulation deals with, among other things the recording of data in respect of applicants for asylum and clearly states that only the following data shall be recorded in the central data base:

(a) member state of origin, place and date of the application for asylum;
(b) fingerprint data;
(c) sex;
(d) reference number used by the member state of origin;
(e) date on which the fingerprints were taken;
(f) date on which the data were transferred to the central unit;
(g) date on which the data were entered on the central database; and
(h) details in respect of the recipient(s) of the data transmitted and the dates of transmissions.'

26. There is no provision in the Council regulation for recording the name of the person taking the fingerprints."

19. In his oral evidence Mr MacCloud confirmed his opinion that there was a match between the fingerprints he had studied. It was possible that the damage to the core of the fingers had been done deliberately. If there was a medical problem he would expect the damage to be more widespread. He had issues about the continuity of the fingerprint evidence in the Eurodac system. It was important to avoid any interference with the evidence before it arrived at the hearing. He would expect to see evidence to identify who had taken the fingerprints and the details of the circumstances in which those prints had been taken. There was nothing to indicate who had taken the fingerprints in Italy and nothing else to connect the appellant with the fingerprint impressions save for the impressions themselves.

20. In cross-examination he accepted that the prints in Italy had been well taken and were not damaged whereas the prints taken in this country in August 2006 did show areas of damage on each finger impression. Mr MacCloud could not think of any circumstances in which an accident could cause the damage that he had seen. On the issue of the continuity of evidence, he confirmed that he had given evidence in many cases. He accepted from his experience that if the person who had taken the fingerprints died before a hearing, that evidence could still be adduced if the records could properly be spoken to.

<u>The Evidence called by the Respondent</u>

21. The evidence of Kerry Giles is set out in her witness statement of 3 October 2007; of Andrew Heseltine, in the statement dated 2 October 2007; and of Nicholas Jacques, in his statement of 2 October 2007. Ms Giles sets out general information relating to the Eurodac system and Mr Heseltine gives an overview of the fingerprinting process during the screening of asylum seekers and the subsequent checking of prints on the Eurodac system. Mr Jacques gives further evidence about the

Eurodac system and the comparison of the data held and the records produced.

22. In her evidence Ms Giles describes the system for checking fingerprints before the Eurodac system came into operation. This involved each member state posting fingerprint records for separate checks by one or more member states to establish whether a match could be found. This was a time consuming "one to one" process with limited coverage across the member states as a result. The Eurodac system is a fully automated system with all fingerprint images being transmitted, stored and compared electronically. There is no human intervention at the Eurodac central unit in terms of storing or checking the prints. Member states are able to establish quickly whether an individual is already known in one or more of the participating states.

23. In her evidence Ms Giles explained that transmissions to the Eurodac central unit are highly encoded and sent via a secure line with backbone encryption. To ensure that the system is not abused each country has an authority responsible for monitoring on a domestic level how the information is collected, stored and transmitted. The UK National Supervisory Authority is the Office of the Information Commissioner. There is also a joint supervisory authority to oversee the system on a pan European level which is undertaken by the European Data Protection Supervisor. When fingerprints are taken each individual set is issued with a unique reference number. She confirmed that the only data recorded in the Eurodac central unit in Luxembourg is the data specified in article 5 of 2000/2725/EC (as set out in paragraph 25 of Mr MacCloud's report referred to in paragraph 18 of this determination).

24. Fingerprints are taken in three different circumstances for transmission to Eurodac under 2000/2725/ EC. These are identified by number:

1 refers to data relating to asylum seekers, (article 4)
2 refers to persons within article 8 (unlawful crossing of a frontier); and
3 refers to persons referred to in article 11 (people unlawfully in a particular country).

The regulations provide that each member state shall promptly take the fingerprints of all those falling within these categories. They are to be stored for a maximum of ten years and are then erased. They are erased sooner if the individual is issued with a resident's permit in the member state, has acquired citizenship or is known to have left the EU.

25. The process in this country is set out in the evidence of Mr Andrew Heseltine. Prospective claimants attend the Asylum Screening Unit (ASU) where details are taken during a screening interview. The claimant is notified that his fingerprints will be taken and this is done by a live scan machine which captures and encodes the fingerprints so that they can be automatically compared to other fingerprints on the Eurodac

database. A bar code quoting a unique reference number is attached to the ASU core note. The screen is opened to that unique bar code by passing an electric wand over the code. The claimant's name is confirmed and checked. The machine is also able to take a photograph of the claimant after the identity details have been confirmed and the fingerprints are scanned. The photograph is taken by an integral digital camera within the live scan machine. The fingerprints are taken by an electric scan of all the fingers on the right hand followed by all the fingers on the left hand then the right thumb then the left thumb. Each finger is rolled and scanned. When taken they are automatically checked by the live scan machine to confirm they are of acceptable quality. If they are not acceptable, the prints are retaken.

26. Fingerprints collected by ASU are automatically sent electronically to the Eurodac database where they are electronically compared with all other fingerprints on the database. This takes about twenty minutes and then a report of the findings identified as IFB2 and a confirmatory e-mail are returned and attached to the application file. 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 to confirm the match before ASU is notified of the match result.

27. The appellant's fingerprints were taken on 20 July 2006 but they did not meet the quality threshold required for comparison by Eurodac and the appellant was asked to return on 3 August 2006 for further fingerprints to be taken. He was re-fingerprinted in the ASU at Liverpool under the reference IFB06/05267OJ. His fingerprints were then automatically compared with the fingerprints on the Eurodac database and an e-mail was received showing the Eurodac search hit under case ID IT2AG000EXI showing that the appellant's fingerprints were taken under this code on 8 July 2005 in Lampedusa e Linosa in Italy. Italy is indicated by the letters IT and the fact that they were taken following the unlawful crossing of a frontier into Italy by the numeral 2.

28. In his evidence Mr Jacques dealt with fingerprint evidence in general. There was no dispute between him and Mr MacCloud on this issue. Both confirmed that they have never known the friction ridge detail of different persons to be the same. In the United Kingdom the fingerprint system operated by the IFB is technically configured so that those fingerprints identified as falling into the categories for transmission to the Eurodac central unit are automatically transmitted in accordance with the regulations. If a hit is identified the match is validated by a fingerprint expert. In the present case the fingerprints taken in the UK from the appellant and transmitted to Eurodac matched the fingerprint record that Eurodac showed as taken in Italy and transmitted to Eurodac on 8 July 2005.

29. In his oral evidence Mr Jacques commented on the evidence in his witness statement there had been no evidence of false hits since the Eurodac had been set up. There had now been one such false match

identified in this country where the visual inspection disagreed with the computer assessment. He explained that the computer compared the prints by an algorithm programme. If a hit was detected it was then verified by a technician in the IFB and then looked at by a more senior officer. Images on the computer screen could be enlarged or reduced to help with the examination.

Submissions

30. Mr Hall submitted firstly that the evidence obtained under the Eurodac system showing that the appellant had had his fingerprints taken in Italy in July 2005 was admissible under the provisions of article 21 of the Eurodac Regulations (2003/343/ EC). This provided for the exchange of personal data between member states for determining the state responsible for examining the application for asylum, examining the application for asylum and implementing any obligation arising under this regulation. Article 21(7) provided that the information could only be used for the purposes set out in article 21(1). When used for such a purpose, the evidence was admissible and relevant. It would then be a question of the weight to be placed on the fingerprint match. He submitted that the evidence showed that the Eurodac system was secure and operated to exacting standards. This was confirmed in the present case by the appellant's own expert accepting that there was a fingerprint match.

31. Dealing with the merits of the appeal, Mr Hall submitted that the appellant's credibility was seriously undermined by the fact that he continued to deny that he had previously left Eritrea or had been fingerprinted before he arrived in this country. There was no possible alternative explanation for how his fingerprints had been taken and put into the Eurodac database other than that his fingerprints were indeed taken in Italy on 8 July 2005. He submitted that the appellant's account was not credible. The likelihood was that the appellant had deliberately damaged his own fingerprints in an attempt to disguise the fact that he had been fingerprinted in Italy. The appellant's account of events in Eritrea and in particular his detention and escape was not credible. He had been unable to explain how his uncle had obtained $4,000 to pay the agent. There was no adequate basis on which the Tribunal could find that the appellant had made an illegal exit from Eritrea.

32. Mr Hussain submitted that the evidence of the fingerprint match from Eurodac was not admissible. He submitted that it was clear from regulation 2000/2725/ EC that the purpose of the system was to assist in determining which member state was to be responsible pursuant to the Dublin Convention for examining an application for asylum lodged in a member state. Unless there was an issue regarding the identity of an appellant or as to which member state would discharge the obligation of assessing the claim, Eurodac data was not admissible and could not be used simply as a piece of evidence seeking to undermine the appellant's credibility.

33. He submitted that if the data was admissible, it was clear from article 5 of 2000/ 2725/EC that there were limits on the types of data which could be stored and that confusion had arisen in the present case because the impression had been given that the data kept in Italy and transmitted through Eurodac had included the appellant's name and date of birth. The simple printout provided through the Eurodac system was not sufficient to discharge the burden placed upon the respondent to establish deception or fraud to the required standard. He referred us to the Tribunal determination in YI to support his contention that the burden of proof rested on the respondent to support an allegation of deception and as this was a serious allegation the standard would be to a high degree of probability. The evidence in the Eurodac data amounted to little more than a bare assertion. He submitted that fingerprint evidence was opinion evidence which was capable of rebuttal and was not conclusive. In every case the quality of the evidence would need to be assessed and the appropriate weight given to it. He submitted that as each member state was responsible for the method it employed in the taking of fingerprints, the respondent was unable to show an unbroken line of continuity to establish that the prints taken in Italy or any other member state would be from a particular appellant.

34. He argued that if the evidence was admissible the respondent had failed to discharge the onus placed upon him to show the appellant had in fact had his fingerprints taken in Italy and in consequence was not telling the truth about the facts in support of his present claim. Even if the appellant's evidence was rejected about events in Eritrea, the fact remained that it was unlikely that he would have been given an exit visa. He referred to the country guidance determination in MA (draft evaders-illegal departures-risk) Eritrea CG [2007] UKAIT 00059 and in particular to paragraphs 340 and 357. Even if that aspect of the claim was rejected, the appellant's evidence was that he was now a practising Pentecostal Christian. He had converted to this faith when in Eritrea and had continued to practise his faith and attend church since arriving in this country. This evidence was confirmed by letters from the pastor and from the oral evidence of Ms M. On return he would be unable to practise his faith and would not be able to worship freely.

The legal framework

35. We remind ourselves that the appellant would be entitled to asylum if owing to a well-founded fear of persecution for a Convention reason he is outside his country of nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country. The burden is on him to show that there is a reasonable degree of likelihood of persecution for a convention reason if returned to Eritrea. This standard can also be expressed as whether there is a real risk of persecution. The provisions of the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 have brought into effect in domestic law the provisions of Directive 2004/83/EC (the Qualification Directive). An issue has been raised in submissions on the burden and

standard of proof in relation to fingerprint evidence, if admissible, from the Eurodac system. We will return to this issue later in our determination.

Summary of Our Findings on Credibility

36. Before we set out our findings and conclusions in detail, it may be helpful to summarise our findings on the evidence of the witnesses. There was no substantial challenge in cross examination to the evidence of the respondent's witnesses although Mr Hussain did seek clarification of a number of aspects of their evidence and raised issues as to the continuity of the evidence from the Eurodac system. As we will make clear below, we accept the evidence of Ms Giles, Mr Heseltine and Mr Jacques about how the Eurodac system operates and how fingerprints are taken and checked in this country. We also accept the evidence of Mr MacLeod who clearly has considerable expertise in the assessment and analysis of fingerprint evidence but for the reasons which we will set out, we do not share his concerns about continuity issues or the evidential value of fingerprints taken as part of the Eurodac process. We have not found the appellant to be a credible or reliable witness about events in Eritrea, his reasons for leaving or his fears on return. We accept that the evidence of Ms M was honestly given to the extent that it confirms that the appellant has attended the Agape Church in this country but it does not satisfy us that the appellant is or has become a Pentecostal Christian.

Eurodac: the General Background

37. We will deal firstly with the Eurodac system. This needs to be set in the context of the movement towards a common asylum policy within the EU. An example of this policy in action has been the adoption into domestic law of the Qualification Directive referred to in paragraph 35 above. A more recent example is the Procedures Directive (Council Directive 2005/85/EC) requiring that its provisions shall be transposed into national law by 1 December 2007.

38. One of the priorities in seeking to have a common asylum policy has been to prevent multiple or successive claims in different member states and to avoid applications being transferred between member states without any single state taking responsibility for determining a particular claim. To achieve these aims the Dublin Convention which was agreed on 15 June 1990 and came into force on 1 September 1997 laid down a set of criteria for determining how member states would consider asylum applications. A hierarchal approach was created based on the principle that the member state most responsible for an applicant’s presence in the territory of the EU should be responsible for dealing with that claim. An important part of the Dublin Convention was the exchange of specified personal information between member states as may be necessary for determining which member state would examine the application for asylum, for examining the application for asylum and

implementing any obligation under the Convention. This exchange of information was subject to provisions that it could only be used for identified purposes. Similar provisions appear in the current Regulation 2003/343/EC at article 21. We will set those out in full later.

39. The Eurodac Regulation 2000/2725/EC was made under the provisions of article 63(1a) of the treaty establishing the European Union. This regulation provides for the establishment of a Central Unit and for the collection, transmission and comparison of fingerprints of asylum applicants, aliens apprehended in connection with the irregular crossing of an external border and aliens found illegally present in a member state.

40. Following the Treaty of Amsterdam, which called for a replacement mechanism for determining responsibility for the assessment of asylum claims within the EU, the Dublin Convention was replaced by the Regulation 2003/343/EC known colloquially as Dublin 2. This amended the criteria and mechanisms for determining the member state responsible for examining an asylum application lodged in one of the member states by a third country national. It came into force on 1 September 2003 for all European Union member states except Denmark.

41. Paragraph 1 of Article 21 in Chapter VI of 2003/343/EC under the heading "Administrative Co-operation" reads as follows:

> "1. Each member state shall communicate to any member state that so requests such personal data concerning the asylum seeker as is appropriate, relevant or non excessive for:
>
> (a) the determination of the Member State responsible for examining the application for asylum;
> (b) examining the application for asylum;
> (c) implementing any obligation arising under this Regulation."
>
> The information which may be communicated under paragraph 1 is identified in paragraph 2 and includes
>
> (c) other information necessary for establishing the identity of the applicant, including fingerprints processed in accordance with regulation EC No.2725/2000.

It is provided by paragraph 7 that:

> 7. The information exchanged may only be used for the purposes set out in paragraph 1. In each member state such information may, depending on its type and the powers of the recipient authority, only be communicated to the authorities and courts and tribunals entrusted with:
>
> (a) the determination of the member state responsible for examining the application for asylum;
> (b) examining the application for asylum;

(c) implementing any obligation arising under this regulation."

The Admissibility of Eurodac Evidence

42. We are satisfied that fingerprint evidence from the Eurodac system is admissible in evidence not only when considering which member state is responsible for examining the application for asylum but also generally as part of the examination of the claim. This must follow from the clear wording of article 21(1) of 2003/343/EC. There is a safeguard built into article 21(1) that communication of data must be appropriate, relevant and non-excessive for these purposes but it has not been argued that fingerprint evidence either generally or in the particular circumstances of this case contravenes these safeguards. The article also provides that the information held on the system may only be used for the purposes specified and can only be communicated to the authorities, courts and tribunals entrusted with the functions set out in paragraph 7

43. We accept Mr Hall's submission that article 21 does not draw any distinction between the three purposes for which the information may be used. Lawful use of the Eurodac data does not come to an end with the identification of the member state responsible for processing the asylum claim. In the present case because of the lapse of time, the United Kingdom accepted responsibility for processing the claim. There is no proper legal basis for holding that fingerprint evidence from Eurodac should not to be taken into account when examining the application itself. It is being used for a proper purpose identified in article 21(1). There is no other proper basis for excluding this evidence. No case can be made under the Data Protecting Act 1998 referred to briefly in submissions as it is provided by section 35(2) that personal data be exempt from the non-disclosure provisions where it is necessary for the purpose of or in connection with any legal proceedings.

The reliability of Eurodac evidence and the system in practice

44. As we have already indicated we accept the evidence from the respondent's witnesses about the system in practice and how fingerprints are taken. They are taken by an electronic scan of the fingers recorded and sent electronically to the Eurodac database. They are then compared electronically and automatically against all the other fingerprints on the database. If fingerprints are submitted by the United Kingdom authorities and a match is identified, 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 the 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. These are further safeguards of the reliability of the system. In the present case both Mr

MacCloud and Mr Jacques agree that the evidence of matching fingerprints is compelling. Both confirm that they have never known a case of matching prints not coming from the same individual. In this appeal the experts are agreed that there is a true match between the fingerprints taken in this country and in Italy.

45. If there is a dispute as to a match, that must be a question of fact to be determined on the available evidence. We do not have any concerns about the continuity of evidence or the need to record who took the fingerprints within a member state. The factual issue is whether there is a match between sets of fingerprints, the important and relevant data being when, where and in what circumstances the fingerprints were taken. The identity of the person taking the prints has no material bearing on those issues. There is no break in the continuity of evidence from the fingerprints being taken and recorded automatically on the Eurodac system and any subsequent fingerprint check which would make this evidence unreliable. In the light of the evidence we have heard about the Eurodac system and its accompanying safeguards, in our judgment evidence of a match produced through the Eurodac system and confirmed by IFB should be regarded as determinative of that issue in the absence of cogent evidence to the contrary.

Burden/Standard of Proof when assessing Eurodac Evidence

46. Mr Hussain in his submissions raised a number of issues more fully set out in his skeleton argument about the principles which should govern the assessment of fingerprint evidence if admissible. He argued that where fingerprint evidence was used by the respondent to challenge the truth of the account given by the appellant, this was equivalent to an assertion that the asylum claim was fraudulent and for this reason a high standard of proof was required. He supported this argument by referring to YI and in particular to paragraph 12 were the tribunal said:

> "… Eurodac data is produced by the respondent in cases such as this essentially to assert deception/fraud by an appellant. The burden of proof rests 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 standard of "proof to a high degree of probability".

47. Mr Hussain seeks to support this submission by referring to RP (Proof of Forgery) [2006] UKIAT 86 and to the guidance given in that case that an allegation of forgery needs to be established to a high degree of proof by the person making the allegation. The Tribunal emphasised that the burden of proof lay on the party making such an allegation and that a bare assertion of forgery could not stand as if it were evidence.

48. This submission needs to be set in context. When the respondent seeks to rely on fingerprint evidence in an asylum appeal, he is seeking to prove a number of facts: that fingerprints taken in a member state at a specific place, date and time are a match with the fingerprints of an

appellant taken in the course of his current application. These are issues of fact for the respondent to prove on a balance of probabilities. In order to do this the respondent will normally need to adduce evidence to establish that the appellant's fingerprints were taken in the United Kingdom and submitted to Eurodac, that Eurodac responded with details relating to matching fingerprints and that the match has been visually confirmed by an expert at the IFB. Evidence of the visual comparison is important in view of article 4(6) of 2000/2725/EC, which provides that "[f]inal identification shall be made by the Member State of origin", i.e. by the state which submitted the applicant's details and received the result of the comparison. The assertion that a particular appellant has previously given fingerprints in a member state is not in itself an allegation of forgery or fraud bringing into play the higher civil standard of proof identified in RP. It is an allegation that there is a match between fingerprints held in the Eurodac system. If the match is proved the respondent may well seek to argue that the appellant has not told the truth about material parts of his asylum claim and that his evidence is unreliable in whole or in part. It will be for the Tribunal to decide in the light of the evidence as a whole what inferences of fact can properly be drawn from any proved fingerprint match.

49. In summary, the burden of proving a fingerprint match from the Eurodac system lies on the respondent and the standard of proof is the balance of probabilities. In his submissions Mr Hussain relied on paragraph 12 of YI to support his argument that a higher standard applies. We agree that if fraud is being asserted by the respondent, it must be proved to a high degree of probability. However, in most cases evidence of a fingerprint match will be adduced by the respondent to challenge or rebut evidence being put forward by the appellant in support of his claim. Whether it does so in any particular case will depend on the inferences to be drawn from the evidence as a whole including the appellant's explanation for any such match. The fact that the respondent seeks to rely on fingerprint evidence does not without more amount to an assertion of fraud or deception which the respondent must then prove to a high standard. The burden remains on the appellant to establish to the lower standard that he is entitled to asylum.

50. Mr Hussain submitted that fingerprint evidence is not conclusive and is capable of rebuttal. We have no difficulties with that submission: we accept as a matter of fairness and natural justice that an appellant should have the opportunity of obtaining and calling his own evidence to rebut evidence relied on by the respondent, as in this appeal where the fingerprint evidence was made available to the appellant's expert, who has confirmed that there is a match. We are not satisfied that there is any requirement for corroboration in respect of fingerprint evidence as Mr Hussain has sought to argue. The judge was mistaken to make the point that the evidence that there was a match was confirmed by the fact that the appellant's name and date of birth had been recorded. This information is not stored on the Eurodac system. We accept Mr Hussain's general submission that any evidence in an asylum appeal

including fingerprint evidence must be considered with anxious scrutiny but that must be within the context of the general rules of evidence and procedure applicable to asylum appeals.

Background Evidence relating to Eritrea

51. We have been provided with extensive background evidence about the current position in Eritrea. We also have the most recent country information report. The situation in Eritrea and the risks for Pentecostal Christians, draft evaders, deserters and those who have made an illegal exit have been considered at length in a number of country guidance determinations and we adopt and follow that guidance and in particular YT (minority church members at risk) Eritrea CG [2004] UKIAT 00218, KA (draft related at risk categories updated) Eritrea CG [2005] UK AIT 00165 and MA.

Assessment of the Appellant's Evidence

52. We have not found the appellant to be a credible or reliable witness. We do not believe his evidence about events in Eritrea, his reasons for leaving or his fears on return. The appellant's claim is based on his assertion that he was arrested on 10 October 2005 and kept in detention until 4 June 2006. He denies having ever left Eritrea before then. However, fingerprint evidence places him in Italy on 8 July 2005. In the face of the fingerprint evidence the appellant has maintained his claim that he did not leave Eritrea before June 2006 and has never had his fingerprints taken before he arrived in this country. We do not believe these assertions. There is no explanation for the confirmed fingerprint match.

53. The appellant's evidence relating to his detention is not credible when the evidence is looked at as a whole. He asserts that he was regularly beaten but did not receive any injuries. We do not believe his account of his escape from detention. He described being in a lorry which overturned. There were twelve other prisoners and five guards. He was able to walk away from the accident. On his own account he has no idea what happened to the other passengers. He described walking away but he did not see the guards and did not hear anyone shouting and no shots were fired.

54. When assessing whether he is a Pentecostal Christian, we take into account the knowledge he showed at interview and the fact that he has attended church services in this country. However, the evidence of Ms M only provided confirmation of his attendance and did not help us any further in our assessment of the genuineness of the appellant's assertion of his faith. We did not hear evidence from the pastor. There was no satisfactory evidence for his failure to attend and speak to the letters which have been written by him or on his behalf. We take into account the fact that the appellant did describe himself as a Pentecostal Christian on arrival but in the light of the general view we take as to his credibility,

we are not satisfied that there is a reasonable degree of likelihood that his membership of a Pentecostal church is anything other than a membership of convenience to support a claim for asylum. If he returns to Eritrea, we are not satisfied that he would continue to practise this faith in a way which would bring him to the attention of the authorities and we are certainly not satisfied that there would be any inhibition on the way he could practise his faith such as to amount to persecution.

55. We have considered whether we can infer from the evidence that the appellant made an illegal exit from Eritrea. The appellant left Eritrea sometime before July 2005 and he was in Italy on 8 July 2005. We take into account the country guidance in MA that many people do leave Eritrea illegally but we also take into account the appellant's own evidence about the circumstances in which he left Eritrea saying that his uncle had $4,000 available to pay the agent but he has no idea where that money came from. We are unable to draw an inference from the evidence before us that the appellant made an illegal exit from Eritrea. He fails to satisfy us to the lower standard of proof that he would be at risk of persecution or serious harm on return.

Decision

56. The original Tribunal made a material error of law. We substitute a decision dismissing the appeal on asylum, humanitarian protection and human rights grounds.

Signed: Date: 4 January 2008

Senior Immigration Judge Latter