UTIJR6

JR-2022-LON-000674

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review

The Queen on the application of YBN

Applicant

v

Secretary of State for the Home Department

Respondent

Before

Upper Tribunal Judge Pitt

Application for judicial review: substantive decision

Having considered all documents lodged and having heard the parties' respective representatives, Mr P Haywood, of Counsel, instructed by the Migrants' Law Project on behalf of the Applicant and Mr B Keith, of Counsel, instructed by the Government Legal Department, on behalf of the Respondent, at a hearing at Field House, London on 8 August 2022

Order

1. The application for permission to appeal for judicial review is granted.

2. The application for judicial review is refused for the reasons set out in the attached judgment.

Permission to appeal to the Court of Appeal

3. Written grounds dated 8 September 2022 were admitted and oral submissions heard for the applicant at a hand down hearing on 9 September 2022.

4. Paragraph 3 of the grounds challenged the decision of the Upper Tribunal at [29]-[36] of the judgment that no legitimate expectation of a substantive decision on entry clearance arose from the respondent's correspondence of 10 and 17 February 2022. The Upper Tribunal's reasoning at [29]-[36] of the judgment on this issue is not in error.

5. Paragraph 5 of the grounds argued that there were a number of errors of law in [37]-[58] of the judgment which found that the respondent's decision on the application of the policy on deferring biometrics was rational. The Upper Tribunal:

    a. was wrong to distinguish the risks to the applicant arising from his attempts to get to Europe rather than from the generalised risk to illegal migrants set out in the country evidence

    b. erred in failing to find that the respondent was not entitled to look for a specific or imminent risk to the applicant where this was not part of the test for deferral of biometrics

    c. erred in finding that the respondent provided adequate reasoning on the country evidence

    d. wrongly elided policy interests underpinning the biometrics policy with the assessment of whether there were compelling circumstances

    e. was in error in not concluding that where there were compelling circumstances and no opportunity to enrol biometrics, the respondent's guidance provided that biometrics had to be waived

    In essence, these grounds either disagree with the Upper Tribunal's assessment that the respondent's decision to refuse to defer biometrics was rational and lawful or seek to reargue the original grounds. They do not show legal error in the judgment of the Upper Tribunal.

6. Paragraphs 6 to 9 of the grounds argued that the Upper Tribunal erred in finding Article 8 ECHR did not arise in this matter. Where there was no challenge to the lawfulness of the policy applied by the respondent, the Upper Tribunal was correct in concluding that there could be no material, residual procedural challenge under Article 8 ECHR and that no assessment under Article 8 ECHR was required.

7. Permission to appeal to the Court of Appeal is refused for these reasons.

Costs

8. The applicant is to pay the respondent's costs to be subject to detailed assessment if not agreed but not to be enforced without an assessment of the applicant's means pursuant to the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

9. There be a detailed assessment of the applicant's publicly funded costs.

Signed: *S Pitt*
Upper Tribunal Judge Pitt

Dated: 9 September 2022

Applicant's solicitors:
Respondent's solicitors:
Home Office Ref: GWF062990005; HO#: GWF063361934
Decision(s) sent to above parties on: 12/09/2022

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a question of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).

IN THE UPPER TRIBUNAL

JR-2022-LON-000674

Field House,
Breams Buildings
London
EC4A 1WR

9 August 2022

THE QUEEN
(ON THE APPLICATION OF YBN)

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

BEFORE

UPPER TRIBUNAL JUDGE PITT

- - - - - - - -

Mr P Haywood, instructed by The Migrants' Law Project appeared on behalf of the Applicant.

Mr B Keith, instructed by the Government Legal Department appeared on behalf of the Respondent.

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ON AN APPLICATION FOR JUDICIAL REVIEW

APPROVED JUDGMENT

- - - - - - - - - - - - -

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify

the appellant or members of his family. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

JUDGE PITT:

The Issues

1. The applicant is a national of Eritrea. He maintains that he was born on 1 January 2003. He is currently in Libya without leave to be there and without a passport or other travel document that might allow him to leave lawfully. The applicant has a brother in the UK, MBN, who has been recognised as a refugee and has indefinite leave to remain (ILR). YBN wishes to join his brother and has made an entry clearance application as the family member of a refugee.

2. The respondent has not made a decision on entry clearance as there is a prior matter to be resolved, the requirement to provide biometric information (biometrics). There is no Visa Application Centre (VAC) in Libya and YBN is unable to travel lawfully to another country to provide his biometrics. He requested that biometrics be deferred until after an "in principle" decision on his substantive application for entry clearance was made.

3. The respondent refused that request, the relevant decision being dated 13 July 2022. The applicant maintains that the decision:

    a. is "*Wednesbury* " unreasonable/irrational

    b. breaches his rights under Article 8 ECHR

Background

4. As before, the applicant has made an entry clearance application to join his older brother, MBN, in the UK. MBN was born on 6 December 2000. He left Eritrea in November 2014, experiencing difficult circumstances on his journey. MBN arrived in the UK in August 2015, aged 14, and claimed asylum. He was placed with foster carers with whom he continues to live. He was granted refugee status on 5 April 2016. He was granted ILR in May 2021.

5. MBN remained in touch with his family and, as far as he could, including with YBN after he left Eritrea in December 2019. YBN's account of his journey from Eritrea to Libya and what happened there are largely undisputed. He travelled first to Ethiopia, where he stayed in a refugee camp in difficult conditions. He briefly returned to Eritrea and then left again in February 2020. He returned to the refugee camp in Ethiopia. He moved to Addis Ababa for a while, staying with another older brother or with friends. He then left Ethiopia and travelled to Sudan and then to Libya.

6. His experiences in Libya are set out in a UNHCR Family Reunion Assessment prepared in February 2022. The applicant's account is in line with the background evidence on the country situation there. He was initially held captive in a warehouse and asked to pay a smuggling fee to be taken to a European country by sea. During the 10 day period that he was held in the warehouse the applicant was beaten and provided with very little food. The conditions were very poor. MBN sent approximately US$5,000 to pay for the journey to Europe and the applicant was then taken to another warehouse where he waited for some months.

7. In June 2021 the applicant boarded a boat with approximately 600 other individuals. After half an hour at sea they were intercepted and returned to Libya, to a detention centre where he was held for a week. The applicant was forced to strip naked before entering the detention centre and was not fed for 3 days and was beaten when he asked for food. He managed to contact the smuggler who had got him on board the boat and the smuggler managed to obtain YBN's release.

8. The smuggler took the applicant and others back to the warehouse. The applicant was asked to pay US$1,500 to try to cross to Europe by sea again or US$500 to reach Tripoli. The sponsor again provided funds in August or September 2021 and the applicant attempted to cross to Europe for a second time. The boat was again stopped by Libyan coastguards and the applicant was again returned to Libya and held in a detention centre. He was held for two months in very poor conditions. He was released and sent to Tripoli in 2021 when he paid US$700, sent to him by his brother. Thereafter he lived in an area of Tripoli with other Eritreans in limited conditions, supported financially by MBN. In early 2022 he was evicted from the premises they were renting and his possessions taken from him. After a period of homelessness he found alternative, basic accommodation with other Eritreans, again paid for by MBN.

Litigation History

9. During the autumn of 2021, MBN was looking for a way to assist YBN to come to the UK and was put in contact with the applicant's current legal representatives. With their assistance, on 6 December 2021, the applicant wrote to the respondent indicating that he intended to apply for entry clearance to join MBN. On 7 December 2021 the applicant's legal representatives sent a letter requesting that biometrics be deferred and that the respondent agree to make an "in principle" decision made on an entry clearance application. It was submitted that this was appropriate where the applicant was living in difficult circumstances in Libya and had no access to a VAC to enrol biometrics. Alternatively, the respondent should obtain his biometrics using a mobile biometric machine brought from Tunisia by a diplomat from the British Embassy. This had been arranged for the applicant (FGW) in R (on the application of SGW) v Secretary of State for the Home Department (Biometrics - family reunion policy) [2022] UKUT 0015 (IAC)).

10. The applicant sent a pre-action protocol letter with further representations on 16 December 2021, again maintaining that the respondent should

agree to defer biometrics and agree to proceed to make an "in principle" decision on entry clearance.

11. The respondent indicated on 30 December 2021 that she would provide a response on 13 January 2022. She then indicated on 13 January 2022 that she would provide a response on 27 January 2022. The respondent indicated on 27 January 2022 that she would provide a response on 10 February 2022. She did so.

12. The respondent's pre-action protocol response dated 10 February 2022 acknowledged the previous correspondence. Paragraph 5 set out the applicant's request:

> "5. Details of the matter being challenged
>
> Action requested from the Home Office:
>
> 12. We repeat our request set out in our letter of 07 December 2021 that you confirm that: (a) YBN will be permitted to enrol his biometrics at a later stage, during the processing of his application or discretion will be exercised to enable YBN to enrol his biometrics in Tripoli using the same method utilised in SGW's brother's case, namely, by a diplomat at the British Embassy in Tunisia travelling to Tripoli with the relevant biometric equipment in order to enrol YBN's biometrics; and (b) That consideration of YBN's application will commence pending enrolment of biometrics. The proposed Applicant's position 13. It is the proposed Applicant's position that given the declaration made at paragraph 2 of the Order sealed on 26 November 2021 in the case of SGW it would be unlawful to fail to exercise discretion to enable YBN to enrol his biometrics in the manner set out at 12 (a) above. Further that it would be unlawful to refuse to commence consideration of YBN's application until such time as biometrics have been enrolled … ."

13. Having set out the applicant's case, the respondent stated in paragraph 6:

> "Your client's application is being considered by the decision-maker and a decision will be made within three months of the date of this letter, absent special circumstances."

14. The applicant's legal representatives emailed the respondent on 10 February 2022 seeking clarification of paragraph 6 of the pre-action protocol response:

> "Please can you confirm that when you say that "Your client's application is being considered by the decision maker and a decision will be made within 3 months of the date of this letter, absent special circumstances" the application being considered is the substantive application for entry clearance made by YBN with the visa reference [X]."

15. On 17 February 2022 the respondent replied to the email of 10 February 2022. The brief response was "I can confirm this is being done."

16. On 24 February 2022, the applicant's legal representatives made further submissions and provided further evidence in support of the entry clearance application.

17. The legal representatives enquired about the progress of the entry clearance application in early April 2022. In an email dated 4 April 2022 the applicant referred to the respondent's email of 17 February 2022 as having confirmed that the respondent would make a decision on the substantive entry clearance application.

18. On 13 April 2022 the respondent wrote to the applicant's legal advisers:

> "Further to your email correspondence of 10 February 2022, in which you request clarification on the application being considered in relation to our response to your Pre- Action letter dated 16 December 2021.
>
> I am writing to confirm that the consideration being undertaken is in relation to the request to waive/defer biometrics and the possibility of a pre-consideration only and that a decision on this request will be made within three months of the date of the pap response letter, that being no later than 10 May 2022, absent special circumstances."

19. On 10 May 2022, the respondent made a decision refusing to defer or waive the requirement for biometrics prior to considering the entry clearance application.

20. The applicant issued these proceedings on 18 May 2022.

21. On 24 June 2022 the respondent withdrew the decision of 10 May 2022 in response to the findings in MRS and FS v Entry Clearance Officer JR-2022-LON-000178. In MRS the respondent's guidance on the exercise of the discretion to defer or waive biometrics was found to be unlawful where it applied an "exceptional and extraordinary" threshold. The application was stayed pending the respondent's reconsideration of the application to defer biometrics.

22. The respondent issued a further decision on 13 July 2022, again refusing to defer or waive the requirement for biometrics and declining to make an "in principle" decision on the entry clearance application. The stay on proceedings was then lifted.

23. The applicant maintained his challenge to the decision of 13 July 2022 and provided amended grounds on 18 July 2022. On 21 July 2022, with the agreement of the parties, an expedited rolled up hearing was directed for 8 August 2022. The respondent provided summary and detailed grounds of defence on 1 August 2022.

The Decision of 13 July 2022

24. The respondent's decision of 13 July 2012 stated:

> "1. In reaching this decision I have taken into consideration the information contained in the PAP letter and enclosures, including subsequent evidence including the DNA report for [YBN] and his sponsor, press release from Medicins Sans Frontiers, Amnesty International news report and the pieced on the Open Democracy website. I have also taken into consideration the points raised in the PAP relating to the judgement of *R (SGW) v Secretary of State for the Home Department*

(Biometrics – family reunion policy) [2022] UKUT 15 (IAC) and Family Reunion guidance. This application has been reconsidered in light of the judgment in R (oao MRS and FS) v Entry Clearance Officer (JR-2022-LON-000178) in relation to this case only and pending the development of our policy in relation to waiving or deferring the requirement to enrol biometric information.

2. You have requested we (UK Visas, Information and Passports) allow [YBN] to enrol his biometrics at a later stage, during the processing of his application and that discretion be exercised to enable [YBN] to enrol his biometrics in Tripoli using the same method utilised in SGW's brother's case, namely, by a diplomat at the British Embassy in Tunisia travelling to Tripoli with the relevant biometric equipment in order to enrol [YBN]'s biometrics. Further to this that consideration of [YBN]'s application will commence pending enrolment of biometrics. YBN has no valid passport and is unwilling/unable to apply for a passport.

3. Biometrics, in the form of a facial image and fingerprints, underpin the UK's immigration system to support identity assurance and suitability checks on foreign nationals who are subject to immigration control. They enable us to conduct comprehensive checks to prevent leave being granted to those who pose a threat to national security or are likely to breach our laws.

4. The submission of biometrics forms part of UKVI's standard operating procedures which require, as part of an online application, attendance at a Visa Application Centre ('VAC') in order to submit a live photograph, biometrics and any identity documents or other evidence. This information is then used as part of the decision- making process on entry clearance applications, by ensuring that mandatory security checks can be completed and only those who are suitable are granted entry clearance and allowed entry to the UK, alongside meeting the requisite eligibility requirements for the visa route applied under.

5. Additionally, a major policy reason for requiring fingerprint biometrics is to prevent abusive applications being submitted using multiple identities.

6. Since the taking of and use of biometrics is critical to protecting the UK and its residents, the threshold for deferring or waiving the biometrics requirement is therefore commensurately high. Biometrics will only be waived or deferred in circumstances that are so compelling as to make them exceptional. The 'Biometric information: introduction guidance" … has been updated to be clear that an individual must, in most circumstances, enrol their biometrics for visa purposes and that further information about the requirement to enrol biometrics will be provided in the updated biometric enrolment guidance.

7. Firstly, you have requested for us to use discretion and send an official to Tripoli from Tunis to enrol [YBN]'s biometrics (as in the case of SGW's brother).

   However, this exceptional arrangement was only possible in SGW's case because Foreign, Commonwealth and Development Office (FCDO) officials were due to meet the UN Refugee Agency (UNHCR) in Tripoli and still had biometric equipment that is no longer available. SGW was

being looked after by UNHCR and was considered to be a vulnerable child. This was not a straightforward undertaking and required considerable planning to ensure, as far as possible, the safety and security of the individuals involved and the biometric enrolment equipment itself. This was an example where the SSHD was able to facilitate biometric enrolment by taking advantage of a situation which presented itself outside of standard working practices, which would not normally be an option, to assist a particularly vulnerable individual but not the SSHD being under a duty to assist that applicant. FCDO travel advice page says 'The Foreign, Commonwealth & Development Office (FCDO) advise against all travel to Libya. This advice has been in place consistently since 2014. If you're in Libya against this advice, you should seek to leave immediately by any practical means'. Further to this, The British Embassy Tripoli does not provide consular services: … .

8. You have also requested consideration of [YBN]'s case pending enrolment of biometrics. UKVI considers that there are significant reasons militating against providing an indication of the likely outcome of a substantive immigration decision prior to biometrics being enrolled. The lack of acceptable identification documentation means we cannot satisfactorily ascertain his identity to a reasonable degree of certainty, even though he is related to the sponsor who is located in the UK. UKVI should hold all relevant information before deciding an application. In addition, UKVI would be unable to fix an applicant to their identity for the purpose of preventing identity fraud in further applications. The status of an indicative decision might also be uncertain.

9. Dealing with your request for a deferral of enrolment of biometrics, having carefully considered the information put forward about [YBN] and his circumstances, I am satisfied [YBN]'s circumstances are not sufficiently compelling so as to outweigh the public interest considerations of protecting public safety and justify treating him differently from other individuals who need to attend a VAC to enrol their biometrics as part of their application.

10. It is stated that [YBN] is undocumented and unable to travel to Tunisia to give biometrics. [YBN] has no passport meaning we have a reduced level of confidence about his biographical identity details which are used to conduct background checks. While [YBN] has provided DNA evidence that establishes he is related as claimed to his sponsor, it does not confirm his own identity and cannot be used to confirm the biographical data he has provided. It is noted that [YBN] holds a UNHCR asylum seeker document. There is no evidence he provided the UNHCR any documentary evidence to confirm whether the details on the UNHCR document are accurate. It is also noted that 2 conflicting dates of birth have been submitted for [YBN], further casting doubt over his true identity and that [YBN]'s sponsor was unable to give an exact date of birth, stating [YBN] was 12 years old when providing a witness statement on 07/03/2016. Such inconsistencies support the requirement for submission of biometrics to enable identity and security checks to take place and prevent fraud. Therefore, [YBN] has not provided sufficient evidence to establish his identity to a reasonable degree of certainty, which would be required to enable UKVI to consider his application prior to the enrolment of biometrics (but with any final decision subject to satisfactory biometric checks).

11. [YBN] has stated in his Visa Application Form that he previously resided in Adi Harush Refugee Camp, Tigray, Ethiopia between January 2020 – November 2020 and in Addis Ababa, Ethiopia between November 2020 – May 2021. It has not been established why [YBN] did not apply to join his brother and give biometrics, when able to so at a Visa Application Centre in the capital city of Ethiopia, only six months prior to this application, rather than travelling over 3000km to Libya in May 2021.

12. [YBN]'s representatives have stated that [YBN] has twice tried to attempt crossing to Europe from Libya. That he has been detained twice and was previously under the control of people smugglers. Further correspondence dated 07/03/2022 states he is living alone, constantly frightened and unable to move freely. On the 05/04/2022 an update asserts [YBN] has been forcibly evicted from his accommodation in Tripoli, had his belongings taken and is now homeless. However, there is no corroborating evidence to support the assertion that [YBN] is at particular risk in Libya, or to suggest that [YBN] faces any specific, imminent risk in Libya. It is noted that as part of his application, [YBN] has stated on his Appendix 1 form that his parents and a younger sibling are in Eritrea and an older sibling is in Ethiopia.

13. As stated above, it is considered that the public interest in the protection of national security, the prevention of crime and protection of our borders requires that biometric information is obtained, and that it is obtained before a decision is made on whether or not to grant entry clearance, unless there are exceptional circumstances which may warrant a different approach. I am satisfied that [YBN]'s circumstances are not sufficiently exceptional in order to warrant a waiver or deferral of biometrics.

14. I have also considered whether the particular circumstances set out in the application constitute exceptional circumstances, consistent with the right to respect for private and family life contained in Article 8 of the European Convention on Human Rights. Given the above, I am satisfied that there are no exceptional circumstances that would result in unjustifiably harsh consequences for [YBN] and his sponsor. [YBN] is not present in the UK and therefore Article 8 of ECHR does not apply to him. The relationship between [YBN] and his sponsor in the UK is that of adult siblings. [YBN]'s sponsor has lived in the UK separately from [YBN] since 2016. [YBN]'s sponsor lives an independent life as an adult and continues to do so. [YBN] has disclosed that his parents and a younger sibling are in Eritrea and an older sibling is in Ethiopia. I am therefore satisfied that Article 8 is not engaged. Even if [YBN]'s sponsor were to establish he had a family life with [YBN], I am satisfied that this decision is proportionate under Article 8 of the European Convention on Human Rights."

25. The updated biometrics guidance referred to in paragraph 6 of the decision was issued on 18 July 2022 and is entitled "Biometric Enrolment: Policy guidance, Version 5.0". Concerning deferral or waiver of biometrics, the guidance states (on page 12 of 34):

"Exceptional individual circumstances

> Officials **must** not excuse individuals from the requirement to enrol biometrics unless a senior official or a senior manager has authorised excusing the requirement on medical grounds or the individual is a senior government official.
>
> Where a senior official considers an individual who is applying for a visa and/or a BID (Biometric Information Document) to come to the UK should be excused from the requirement to enrol their biometrics as part of their application for reasons other than medical grounds or their role as a senior governmental official, such as:
>
> - there are compassionate circumstances that are so compelling as to make them exceptional and there are no operational alternatives that warrant excusing or deferring an individual from having to attend a VAC to enrol their biometrics before they travel to the UK
>
> - the individual's circumstances or status warrants them from being excused from having to enrol their biometrics on the basis it is in the interest to the UK's economy or reputation
>
> they **must** refer the matter to Ministers to approve the proposal to waive the requirement to attend a VAC to enrol their biometrics or defer the requirement for an individual to enrol their biometrics for a BID.
>
> The individual **must** still provide a facial photograph that meets the required facial photo standards in support of their application."

26. There was some discussion at the hearing as to the clarity of the wording in this part of the guidance and whether it allowed for both deferral and waiver of biometrics. This did not progress to any kind of challenge to the lawfulness of the policy, however, and the parties were in agreement that the test set out in paragraph 6 of the decision of 13 July 2022 reflected correctly the discretion to exercise discretion on biometrics provided in the updated guidance.

The Grounds

27. There are two grounds:

> Ground 1: The emails of 10 & 17 February 2022 created a legitimate expectation of a substantive decision on entry clearance
>
> Ground 2: The decision refusing to defer or waive biometrics is Wednesbury unreasonable/irrational

28. I was grateful to Mr Haywood and Mr Keith for their written and oral submissions, all of which I have taken into account, referring to them where appropriate below. I was also grateful to the legal teams for their efforts in preparing the case for the rolled up hearing notwithstanding the relatively short notice.

Ground 1 – The emails of 10 & 17 February 2022 created a legitimate expectation of a substantive decision on entry clearance

29. I can deal with Ground 1 relatively briefly, having set out above in some detail the litigation history between 6 December 2021 and 13 April 2022 which gave rise to this part of the applicant's challenge.

30. The applicant's challenge was put in a number of ways in the amended grounds. The grounds referred to there being "no justification or explanation for SSHD's change in position" and stated that the applicant "is entitled to place reliance on the "procedural commitment" in the 17 February 2022 email to make "a decision on the substantive merit" of his entry clearance application. The respondent was "not entitled to make a volte face" where she had "made a clear commitment to make a substantive decision" and where she had failed to explain the change in her position.

31. In essence, albeit the specific wording was not used, this ground argues that the applicant had a legitimate expectation of a substantive entry clearance application which the respondent had to fulfil. The applicant also requested by way of further remedy an order for disclosure of internal correspondence from the relevant period concerning the respondent's change in position.

32. For there to be a legitimate expectation that a public authority has agreed to act in a certain way, there must be an unequivocal representation or acceptance; see R (Nadarajah) v Secretary of State for the Home Department [2005] EWCA Civ 1363 at paragraph 69 and paragraph 60 of R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No.2) [2008] UKHL 61.

33. The respondent's statements in the emails of 10 February 2022 and 17 February 2022, even when they are read together and with the benefit of the surrounding correspondence, do not amount to an unequivocal representation that a decision would be made on the substantive entry clearance application without the enrolment of biometrics. Paragraph 5 of the respondent's email of 10 February 2022 refers to two requests or "applications" from the applicant, for a deferral of biometrics and an application for entry clearance. The respondent's statement in the 10 February 2022 response that an "application" was being considered could have been referring to either of these. That is obvious where the applicant's legal representatives immediately sought clarification in their email of 10 February 2022.

34. In response to the email of 10 February 2022 from the applicant's legal representative asking if the "application" to be considered was the substantive entry clearance application, the respondent's email of 17 February 2022 stated only "I can confirm this is being done." That statement is not unambiguous or capable of being read as unequivocal commitment to make a substantive decision on the entry clearance application. It is not possible to understand what the email of 17 February 2022 might mean at all without working through the previous correspondence. It makes no specific reference to a decision on the entry clearance application. The prior question of whether the respondent was prepared to exercise her discretion to defer biometrics had still not been

answered with any clarity as of 17 February 2022. The respondent's statements in the emails of 10 February 2022 and 17 February 2022 are not clear enough to give rise to any legitimate expectation in law that a decision would be made on the substantive entry clearance application.

35. It was accepted for the respondent that her correspondence of 10 February 2022 and 17 February 2022 could have been clearer. That is an entirely different failing to that of creating a legitimate expectation. What was required was clarification, not justification for an alleged change of position, and this was provided in the further letter of 13 April 2022.

36. For these reasons I find that Ground 1 does not have merit and refuse to order disclosure of internal correspondence relating to the respondent's position between 10 February 2022 and 13 April 2022.

Ground 2 – the decision of 13 July 2022 is *Wednesbury* unreasonable/irrational

37. By the time of the hearing and following the reconsideration in the decision of 13 July 2022, a number of issues were no longer in dispute. The respondent issued the revised biometrics policy on 18 July 2022 which included updated guidance on the discretion to defer or waive biometrics. The updated guidance complied with the findings of the Upper Tribunal in MRS. The test for the exercise of discretion to defer or waive biometrics is whether there are "compassionate circumstances that are so compelling as to make them exceptional". The decision of 13 July 2022 sought to apply this test; see paragraph 6.

38. The policy imperatives underpinning the requirement for biometrics and high threshold for deferral or waiver were also largely uncontentious. The applicant's skeleton argument accepted in paragraph 100 that "it is legitimate for SSHD to generally require biometrics to be provided in support of an application for entry clearance." Paragraph 3 of the decision letter explains that biometrics allow for "comprehensive checks to prevent leave being granted to those who pose a threat to national security or are likely to breach our laws." Paragraph 4 of the decision indicates that biometrics are "part of" an entry clearance application and are not just a preliminary procedural gateway. The information obtained from biometrics is "used as part of the decision-making process", allowing security checks to be conducted, ensuring only "suitable" applicants who meet the eligibility requirements are granted entry clearance.

39. Paragraph 5 of the decision provides a further justification for the requirement for biometrics, the prevention of "abusive applications being submitted using multiple identities".

40. Paragraph 6 of the decision explains that biometrics are therefore "critical to protecting the UK" and that "the threshold for deferring or waiving the biometrics requirement is therefore commensurately high."

41. The witness statement dated 1 August 2022 of Mr Kevin Burt set out more detail on the policy reasons for the requirement for biometrics and high threshold required for deferral or waiver of biometrics. Mr Burt is the

deputy policy lead on biometric policy for the respondent. In paragraph 4 of his witness statement he identifies that biometrics "enable quick and robust identity assurance and suitability checks on foreign nationals subject to immigration control". They allow the respondent to:

> "(a) establish an identity, through 'fixing' an individual's changeable biographic details (for example, name, date of birth, nationality or gender) to biometric data; (b) verify an individual accurately against an established identity; and (c) match individuals to other datasets (for example, against watchlists or fingerprint collections) to establish their suitability to be granted a visa or other immigration document."

42. Mr Burt commented in paragraph 10 of his statement:

> "I set out below some reasons why taking biometrics prior to travel to the UK is so important:
>
> (a) An applicant may be linked to a previous immigration record, either in the same or different biographical information, which would enable us to check their previous immigration history.
>
> (b) An applicant may be linked to terrorist activities or serious organised crime or have previous immigration breaches. We often have no readily verifiable information about the people who are applying, who may also lack adequate documentary evidence to enable the Home Office to conduct identity checks;
>
> (c) When enrolling fingerprints of foreign nationals, we have encountered individuals whose fingerprints have matched against fingerprints and latent prints (scenes of crime) on both UK and international fingerprint databases. For example, individuals who have applied under the ARAP scheme have been matched to databases, which has enabled further enquiries where required."

43. Mr Burt identifies in paragraph 19 of his statement that the purpose of a biometric enrolment is:

> "… to lock them to a single identity and ensure we understand the level of risk they pose before deciding whether to grant them leave, as we can check their UK immigration history alongside any criminality when making a decision. In the past, biometrics in the form of fingerprints have enabled us to prevent individuals involved in serious criminality including acts of terrorism from being able to travel to the UK."

44. As before, there was no objection, in general terms, to the requirement for biometrics or the guidance on deferral or waiver of biometrics. The applicant maintains that the respondent's application of the test from the biometrics guidance to his case is unreasonable. The high threshold set out in for such a challenge to succeed from Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1947) 2 All ER 680 is well-known. The threshold will only be met if an applicant can show that a decision is one that no reasonable decision-maker acting reasonably could have made. That goes well beyond showing that other possible conclusions could have been reached on the same evidence and beyond merely showing that the decision was unreasonable.

Discussion

45. The respondent's refusal to defer or waive biometrics and the applicant's challenge to that decision focused around two main issues. The first was that the evidence provided did not allow sufficiently certain identification of the applicant to allow for deferral or waiver of biometrics (the identity issue). The second was that the circumstances that the applicant was facing in Libya were not "sufficiently compelling" or "sufficiently exceptional" to warrant deferral or waiver of biometrics (the sufficiently compelling issue).

The identity issue

46. In paragraphs 8 and 10 of the decision the respondent set out her reasons for finding that the appellant's identity was not sufficiently certain and that this meant that deferral of biometrics and an "in principle" decision were not justified:

    a. The absence of an acceptable identification document meant that the respondent could not "satisfactorily ascertain his identity"

    b. YBN had no passport or other document which reduced the level of confidence about any biographical details used to conduct background checks

    c. The respondent would be unable to "fix" the applicant to an identity and so was less able to prevent identify fraud in further applications

    d. The DNA tests showed that the applicant was a brother of the sponsor but did not confirm his identity and could not be used to confirm the biographical details he provided or carry out background checks

    e. The information contained in YBN's UNHCR asylum seeker document had been provided to UNHCR by the applicant so did not amount to sufficiently reliable evidence as to his identity

    f. The applicant maintained that he was born on 1 January 2003 but in a witness statement from 2016, the sponsor had referred to him as being 12 years old that year, indicating a year of birth of 2004. This inconsistency undermined the certainty as to the applicant's identity and supported the need for biometrics to be enrolled to allow identity and security checks to take place and prevent fraud

    The respondent concluded in paragraph 10 that YBN had not established his identity to "a reasonable degree of certainty" such that the respondent could defer biometrics and make an "in principle" decision on the entry clearance application.

47. The applicant maintains that the respondent's position is unreasonable and that she did have enough information to "fix" his identity so as to justify deferral of biometrics and the make an "in principle" entry

clearance decision. DNA tests showed him to be the brother of MBN. A photo had been provided to confirm his identity for the purposes of the DNA test. He had provided consistent evidence as to his identity. His UNHCR documents contained the same information. UNHCR had a photograph of him. The information he provided was consistent with that provided by MBN in his asylum application in 2016, and now, but for the limited issue of whether YBN was born in 2003 or 2004. That was not significant enough to justify finding his identity uncertain such that biometrics were required. The lack of absolute clarity as to the year of birth was commonplace in some cultures and not indicative of uncertainty as to someone's identity.

48. Further, the applicant was willing to cooperate in any way he could to enable the respondent to consider his identity sufficiently clear or "fixed". He was willing to provide non-biometric ("wet") fingerprints which could be linked to his file to assist in the "fixing" of his identity and reduce the scope for abuse by the making of alternative further applications in the future in different identities. Where the decision left him stranded in Libya with no access to the entry clearance system, the respondent acted unreasonably in requiring biometrics rather than being more flexible. The respondent had managed to facilitate enrolment of biometrics for the applicant in R (SGW) v SSHD [2022] UKUT 15 (IAC), for example, who had also been in Libya without documentation.

49. In my judgment, considering the positions of the parties against the context of the serious policy imperatives behind the requirement for biometrics and the high threshold for deferral, the respondent was entitled to be concerned about the lack of certainty as to the applicant's identity for the reasons she gave in the decision and to find that this mitigated against deferring biometrics and making an "in principle" decision. Certainly, the DNA evidence confirmed that the applicant was the brother of MBN. That still left significant aspects of his profile and history uncertain and weighed in favour of requiring biometrics. The wider profile and history were not merely preliminary matters but should form part of any entry clearance decision and questions of suitability and eligibility. There was no formal identification document to assist in clarifying and "fixing" his identity and wider profile. The respondent was entitled to find that the UNHCR information did not assist the applicant as it was based only what the applicant had reported. The suggestion in the respondent's Family Reunion guidance that UNHCR documents might be used to assist with identity is from a wholly different context and cannot be read over to the question of whether to defer or waive biometrics; see paragraph 106(c) of the applicant's skeleton argument.

50. It was suggested for the applicant that the high point of the respondent's case on the lack of certainty about the applicant's identity was the discrepancy in the date of birth in the evidence of the sponsor. It did not appear to me that this was a fair reading of the respondent's decision where it was one factor relied upon amongst a number of others, the absence of any reliable identity document, for example, being a serious concern. In the absence of clear identification documents and given the

high threshold for a decision to defer biometrics, the difference between the year of birth provided by the sponsor and that maintained by the applicant was a legitimate issue that the respondent was entitled to weigh against him to some degree in the assessment she had to conduct.

51. The applicant also maintained that the policy objective of preventing abusive repeat applications had been found to provide less justification for refusing to defer biometrics in the cases of R (JZ) v SSFCDA, SSHD and SSD [2022] EWHC 771 and R (MRS and FS) v Entry Clearance Officer (JR-2022-LON-000178). Unlike the applicants in those cases, however, YBN has no identity document and does not have the option of travelling to provide biometric evidence later to allay the respondent's concerns. The policy concern was not found to be without force in those cases, in any event, but to carry less weight on the facts, for example, the high degree of certainty as to the identity of the applicant in JZ , his family having identity documents with visas enabling them to access a VAC and enrol biometrics.

52. It was also not my view that the applicant was entitled to expect the respondent to look for other "flexible" ways to address the lack of certainty as to his identity and wider profile or argue that her failure to do so showed her decision to be unreasonable or irrational. The decision in R (SGW) v SSHD [2022] UKUT 00015 (IAC), considered in paragraph 7 of the decision here, makes it clear that the taking of biometrics by a British Embassy official from Tunisia using a now decommissioned mobile biometrics machine was wholly exceptional and effected wholly out with those proceedings. The applicant here could have had no expectation of being treated in the same way and the respondent's refusal to provide the same facility was reasonable. The judge in SGW found that the respondent's decision to refuse to defer biometrics and make an "in principle" decision on an entry clearance application was rational, even after having found that the applicant in SGW was a minor; see paragraph [101] of SGW.

53. I also did not find that the applicant's case that the respondent was unreasonably inflexible was strengthened by the fact of a British Embassy opening in Tripoli in June 2022; see paragraph 15(j) of the skeleton argument. The decision letter was clear and Mr Keith confirmed at the hearing that the Embassy in Tripoli is not a VAC and does not have any capacity to enrol biometrics. The respondent did not act unreasonably in opening only a limited diplomatic operation in Libya.

54. It also did not appear to me to be useful to seek analogies with or to read across from the other cases relied upon by the applicant as to alternative or flexible action taken by the respondent elsewhere. The contexts and individual circumstances are inevitably different. The use of "wet" finger prints as part of Operation Pitting in Afghanistan which concerned individuals at very high and specific risk already known to the British authorities and the deferral of biometrics after the outbreak of the war in Ukraine, for example, clearly arose in wholly different circumstances. As above, the applicant in JZ was already known and he and his family had identity documents.

55. The need for biometrics is not just to be able to identify a person and to do so again. As the judge said in [50] of SGW, "it is not just about who a person is, but also who they are not." Against the importance of full information being obtained prior to and as part of the entry clearance process, the respondent's concerns about the applicant's identity here cannot be said to be irrational.

The sufficiently compelling issue

56. The applicant's history set out in [4]-[7] above was not disputed by the respondent. He is living in difficult and precarious circumstances in Libya as an undocumented migrant. UNHCR expressed the view that he is frightened. His circumstances can only but be causing distress and anxiety to his family. The psychiatric report from Dr Galapatthie dated 8 February 2022 on MBN confirms this to be so, if confirmation were needed.

57. The respondent set out in paragraph 1 of her decision that she had taken into account the applicant's representations and set out country materials on the situation in Libya which she had considered. In paragraph 12 she referred to the applicant's detentions and difficult living conditions where he is "living alone, constantly frightened and unable to move freely". She noted that he was evicted and his belongings taken. Having already indicated in paragraph 9 of the decision that the applicant's circumstances were not "sufficiently compelling to outweigh the public interest considerations", the respondent concluded in paragraphs 12 and 13:

> "12. … However, there is no corroborating evidence to support the assertion that [YBN] is at particular risk in Libya, or to suggest that [YBN] faces any specific, imminent risk in Libya. It is noted that as part of his application, [YBN] has stated on his Appendix 1 form that his parents and a younger sibling are in Eritrea and an older sibling is in Ethiopia."
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> 13. As stated above, it is considered that the public interest in the protection of national security, the prevention of crime and protection of our borders requires that biometric information is obtained, and that it is obtained before a decision is made on whether or not to grant entry clearance, unless there are exceptional circumstances which may warrant a different approach. I am satisfied that [YBN]'s circumstances are not sufficiently exceptional in order to warrant a waiver or deferral of biometrics."

58. I did not find that this conclusion was unreasonable or irrational. The respondent does not dispute the generality of the country evidence on the situation in Libya, that country conditions are poor and illegal migrants such as the applicant are vulnerable. The applicant had gone through difficult experiences, in particular being detained in very poor conditions. This did not occur randomly, however, but because of his attempts to travel to Europe via smuggling networks. Having ceased those attempts, from the end of 2021 onwards, with the financial support of MBN, he was able to find basic accommodation with other Eritreans. He was evicted but was able to find alternative accommodation. Notwithstanding the risks to

undocumented migrants set out in the country evidence, since 2021 the applicant has not been subjected to the potentially serious mistreatment set out in the country evidence. The respondent was therefore entitled to find that he was not facing "particular" or "specific, imminent risk" to a compelling or exceptional level that justified a refusal to defer biometrics. The respondent's decision, albeit not detailed, was rational in the context of the high threshold for a deferral of biometrics and where there were the concerns considered above about identity. As the judge stated in [40] of JZ, even in the context of Afghanistan after the Taliban took control, "the fact that someone is coming from a conflict zone is not itself a good ground for a waiver".

Article 8 ECHR

59. The applicant was correct to suggest that paragraph 14 of the decision which addressed Article 8 ECHR issues was difficult to follow. It appears to begin with an assessment that the decision is proportionate but as regards a substantive Article 8 claim rather than an assessment of whether the decision to refuse to waive biometrics amounted to a human rights breach. It then steps back and states that Article 8 ECHR is not engaged at all because the applicant is not in the UK. It then sets out reasons for finding that the applicant and sponsor do not have family life and then concludes that, even if they did, the decision is proportionate.

60. Notwithstanding those matters, the decision being challenged is a refusal to defer biometrics not a refusal of entry clearance. As before, the lawfulness of the policy on deferring or waiving biometrics is not being challenged on public law or Article 8 ECHR grounds. I did not understand the applicant's grounds to suggest that there was any basis for considering Article 8 ECHR in those circumstances.

Decision on application for permission for judicial review

61. The ground are arguable and permission for the judicial review to proceed is granted.

Decision on the application for judicial review

62. The application is refused.

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