Case No: CO/6820/2010

Neutral Citation Number: [2011] EWHC 564 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Leeds Combined Court
1 Oxford Row
Leeds
West Yorkshire
LS1 3BG

Date: Monday, 17 January 2011

Before:

HIS HONOUR JUDGE KAYE QC
(SITTING AS A DEPUTY JUDGE OF THE HIGH COURT)

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Between:

A-S

Claimant

- and –

SECRETARY OF STATE
FOR THE HOME DEPARTMENT **Defendants**

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Ms Rasoul (instructed by Halliday Reeves Law Firm) appeared on behalf of the **Claimant.**
Mr Fetto (instructed by Treasury Solicitor) appeared on behalf of the **Defendant.**

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Judgment

His Honour Judge Kaye QC:

1. This is a sad and difficult case and one which has the real feeling of a Catch-22 situation about it. On 23 August 2010 His Honour Judge Grenfell granted the claimant, a Kuwaiti resident and a failed asylum seeker, permission to apply for judicial review the decision of the defendant Secretary of State of the Home Department communicated in a letter dated 19 March 2010, whereby the Secretary of State refused to treat further representations made by the claimant as a fresh claim for the purposes of paragraph 353 of the Immigration Rules as amended. This is the substantive hearing of the application

2. The background is as follows. The claimant claimed to be an ethnic stateless bedoon from Kuwait. This claim is central to the issues in this case. In BA & Others (Kuwait) CG v SSHD [2004)] UK IAT 00256, the Immigration Appeal Tribunal had this to say about the bedoons in paragraph 5:

> "The word "Bedoon" is from the Arabic "bedoon" meaning "the without" and the term "bedoon jinsiyya" is used in Kuwait to mean "without nationality" or "without citizenship". It appears that in fact the Bedoon consist of an extended group of tribes spread across the borders between Iraq, Iran, Syria and Saudi Arabia and of course Kuwait who are largely of the Shi`ite faith. Many of these tribes have inhabited the region in or around Kuwait for centuries. The term is not to be confused with "Bedouin" which derives from the Arabic word "badawi" meaning nomad. A short resume of the recent history of the Bedoon is conveniently given in a recent New Zealand decision Appeal No. 72635/01 [2003] INLR 629 to which we shall have need to refer later on. At paragraph 45 this decision states:
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> > 'In the Human Rights Watch, Promises Betrayed: Denial of Rights of Bedoon, Women and Freedom of Expression (October 2000) at 9 it is stated that there are approximately 120,000 Bedoons resident in Kuwait. An estimated 240,000 are living outside the country, many of whom wish to return to Kuwait but have not been permitted to do so by the government.
> >
> > Until the mid-1980s the government treated the bedoon in Kuwait as lawful residents of Kuwait whose claims to citizenship were being considered, a status that distinguished them not only from other foreign residents but also from other groups of stateless residents, such as Palestinians from Gaza. The number of Bedoon was included in the total number of Kuwaiti citizens in the

Ministry of Planning's Annual Statistical Abstract, and Bedoon were issued with documents identifying them as Bedoon. With the exception of voting rights they received the benefits of full citizens, including subsidized housing, education, and health services. Bedoon made up the vast majority of the rank and file of all branches of the police and military, and were eligible for temporary passports under article 17 of Passport Law 11/1962. Intermarriage among Bedoon and Kuwaiti citizens was and is common, and because of the vagaries of the implementation of the Nationality Law it is not unusual for a single family to have members with different citizenship statuses: original citizenship, citizenship by naturalization, and Bedoon. In 1985 the government began applying provisions of Alien Residence Law 17/1959 to the Bedoon and issued a series of regulations stripping the Bedoon of almost all their previous rights and benefits. In 1986 the government severely restricted Bedoon's eligibility for travel documents. It also fired government employees not employed by the army or the police who could not produce valid passports, whether issued by Kuwait or another country, and instructed private employers to do the same. In 1987 the government began refusing to issue Bedoon new or renewal driver's licenses or register their cars, and began ending public education for Bedoon children and instructing private schools to require valid residency permits. In 1988 the ban on public education was extended to the university, and Kuwaiti clubs and associations were instructed to dismiss their Bedoon members. Also beginning in 1988, statistical data on Bedoon in the government's Annual Statistical Abstract was transferred from the Kuwaiti category to alien population categories. Restrictions increased in the aftermath of the 1990-1991 Iraqi occupation of Kuwait. Bedoon who fled to Iraq to escape the air war found themselves stranded there when Kuwait refused to allow the reentry of all but a few. Bedoon government employees were dismissed en masse, and only a small portion were later rehired. Beginning in 1993 Bedoon were also required to pay fees to utilize health care centers, although those services remained free for Kuwaiti citizens. More recently, in May 2000, the Kuwaiti National Assembly passed amendments to the Nationality Law which were intended to be the final statement on which Bedoon would be eligible for naturalization, and in June 2000 the Ministry of Interior

> ended a nine month program during which Bedoon who signed affidavits admitting to a foreign nationality and renouncing claims to Kuwait nationality could apply for a five year residency permit and other benefits.'"

3. As Sedley LJ appropriately summarised the problem illustrated by this passage in SA (Kuwait) v SSHD [2009) EWCA Civ 1157, paragraph 2:

> "To prove that one is an undocumented bedoon paradoxically requires documents."

This is just such a case.

4. The claimant was born on 1 August 1960. He arrived in the United Kingdom on 24 May 2007 and claimed asylum the following day. He produced a green card in support of his claimed status as a bedoon on the basis of which he would not be accepted back into Kuwait which would leave him in limbo. His claim was refused on 21 June 2007 and the appeal against that refusal was dismissed by Immigration Judge Bercher on 3 September 2007. Immigration Judge Bercher did not accept that the claimant was a bedoon. He found that he was a resident of Kuwait and was not satisfied that he was an undocumented bedoon or a Kuwait national. He did not accept the green ID card the claimant had produced (and central to his case that he was a bedoon) as genuine. In particular, at paragraph 22 and 23 of his decision, he said the following:

> "The objective evidence reveals that in order to apply for the green ID card, Bidoons had to hand in proof of registration in the 1965 census and provide a copy of their birth certificate. The objective evidence (Canadian Immigration and Refugee Board, Information request KWT42279.E) also states that the government stopped issuing cards in 2003. As the Appellant has made it clear at interview that he does not have a birth certificate and does not know whether his family registered in the 1965 census it is most unlikely that the Appellant was able to retain a green ID card. Furthermore the card looks in pristine condition which leads me further to conclude that it is not a genuine document. Accordingly I attach little weight to the green ID card.
>
> The Appellant was unable to explain at interview the history of how he came to be a Bidoon other than to explain that he entered Kuwait with his ancestors. I find that genuine Bidoon would be aware of this detail and would also know if his family had registered in the 1965 census."

5. Thus far the immigration judge was thus deciding that if the claimant was a genuine bedoon he would have known about the necessity for registration in the 1965 census and would have known about the necessity of having a birth certificate in order to obtain a green ID card, this being the sole document in support of his claimed status as a bedoon with which he entered the United Kingdom. Since he had none of these factors, no birth certificate, no proof of registration, coupled with possession of a pristine green card, the immigration judge came to the conclusion that the card could not be genuine and that therefore the claimant was not a bedoon. As he summarised it later in his decision, paragraph 30:

> "I therefore conclude that the appellant is not a bedoon and will therefore not be at risk upon return to Kuwait because of his alleged bedoon ethnicity."

6. In considering his asylum application it also followed as Immigration Judge Bercher concluded at paragraph 32:

> "However, as I do not find the appellant to be a bedoon, I find that he is not at risk of persecution upon return to Kuwait."

It is otherwise accepted that if he was a bedoon there would be a risk of persecution, it being accepted that the bedoon are subject to a number of well-known discrimination processes. These, as outlined by the Secretary of State officials in the decision letter of 19 March 2010, included an inability to obtain a Kuwaiti passport, inability to obtain a Kuwaiti identity card, and inability to register births, marriages or deaths.

7. On 18 September 2007 a reconsideration application was refused by Senior Immigration Judge Gill and his appeal to the High Court was dismissed by Sir George Newman on 5 December 2007. The claimant’s appeal rights thus became exhausted.

8. On 20 March 2008 the claimant applied for assistance with voluntary repatriation to the International Organisation for Migration, which was declined on 8 May 2008. On 13 October 2008 he sought to enter the Kuwaiti Embassy in order to obtain assistance and travel documentation, but was declined entry. He was also declined assistance. Both entry and assistance were declined apparently on the basis that he could not prove he was a citizen of Kuwait. The only document he had was the green ID card, or rather a copy of it since the original was by now held by the UK Border Agency. That sent him back to the UK Border Agency on 11 November 2008 with a request for the return of the documentation he provided on entry into the United Kingdom in order to be able to return once again to the Kuwaiti Embassy.

9. The claimant then sought legal advice and assistance. He instructed Halliday Reeves, who wrote to the Home Office on his behalf. On 31 December 2008 they were notified that the claimant's assisted repatriation was withdrawn on 4 August 2008 when the three-month time limit expired owing to the claimant's lack of documents. However, it was pointed out that the claimant would be able to reapply.

10. On 5 January 2009 Halliday Reeves wrote (and they wrote a number of letters subsequently) to the Kuwaiti Embassy requesting a passport or travel document for the claimant. They also wrote to the Home Office asking for the return of his documentation. Halliday Reeves received no written response from the Kuwaiti Embassy, although apparently a telephone call, an attendance note of which I have seen, reiterated that the reason why the Kuwaiti Embassy was not prepared to issue the claimant with travel documents or assistance was, as I have said, because he could not show that he was a Kuwaiti national.

11. On 7 January 2009 the claimant's asylum financial support granted under section 4 of the Immigration and Asylum Act 1999 was stopped on the basis that he was not taking all reasonable steps to leave the United Kingdom. The claimant appealed and on 28 January 2009 support was reinstated by the First Tier Asylum Support Tribunal. The fundamental basis for the decision of the tribunal on this occasion was that the claimant was taking all reasonable steps to leave the United Kingdom. To do so he needed the requisite travel documents, but he only had one document to identify himself, namely that produced to the UK Border Agency which they had determined to be false.

12. A fresh claim for asylum was then made on 11 May 2009 and was rejected on 19 March 2010 on the grounds that the further submissions made on 11 May were not significantly different from the material previously considered and therefore did not amount to a fresh claim for asylum or human rights consideration within paragraph 353. It was accepted, as I have mentioned, that bedoons are discriminated against in Kuwait, but the claimant had not satisfied the defendant that he was a bedoon. His green ID card supporting this claim was not genuine. The claimant needed to return to Kuwait using his real identity and using genuine documents which, so far as the defendant was concerned, the claimant seemed somehow to be expected to obtain. He could not, however, obtain the necessary travel documents from the Kuwait Embassy to enable him to return to Kuwait since the Embassy did not regard him as a "genuine" Kuwaiti. Hence the Catch-22 situation in which the claimant now found himself. On the basis of the Immigration Judge's finding the green card was not genuine this Catch-22 situation was largely of his own making.

13. The claimant's asylum support was also stopped again, but was again reinstated on appeal on 15 April 2010 on precisely the same grounds as before. The tribunal on the second occasion even noted that the claimant had requested to be returned to Kuwait. It appears he has family in Kuwait.

14. The pre-action letter was sent on 10 May and responded to on 18 May. Support was again withdrawn on 28 May, which is again the subject of an appeal, though Mr Fetto on behalf of the Secretary of State assures me that pending the appeal and the outcome of it the claimant is continuing to receive financial support.

15. The present application was lodged on 18 June 2010. The decision thought to be reviewed is that contained in the decision letter of 19 March 2010. Stripped down to

its essentials the contentions of the claimant were, and are, as it seems to me, that two Asylum Support Tribunals have found in favour of the claimant, namely that he is taking all reasonable steps to leave the United Kingdom (albeit he is doing so on the basis of one false document only, the green card). It is said that the defendant has failed properly to take this (that he is taking these reasonable steps) into account and has also failed properly to take into account in substance the consequences of the decision to refuse him asylum at the earlier stage.

16. The new evidence relied on are the decisions of those tribunals, his attempts to get repatriation to Kuwait, the rebuttal of those attempts by the Kuwaiti Embassy and the failure by the Secretary of State to consider the implications of the decisions of the Asylum Support Tribunal.

17. The defendant in the acknowledgment of service repeated the point made in previous correspondence. Central to the claimant's case is that he is a bedoon. This, however, was not, and is not, accepted. The only evidence in support, the green ID card, was not genuine; hence any claims for asylum based on the fact that he is a bedoon must fall away and fail. The finding that the card was not genuine was reasonable on the evidence. No supporting birth certificate was or has been produced.

18. The decisions of the Asylum Support Tribunals were concerned with an entirely different issue: was the claimant doing all he reasonably could in the circumstances to leave the United Kingdom? It was not a qualitative assessment of his claim to asylum. The claimant's attempts to gain entry to and assistance from the Kuwait Embassy and its refusal were unsurprising and were entirely down to the claimant. He had tried to gain entry on the basis that he was a bedoon on the production of the false ID card. It had led to no assessment of the authenticity of his retained copy of the same false ID card.

19. Whilst recognizing the apparent impasse that this created, it did not follow that he was entitled to consideration under Article 3 of the European Convention of Human Rights and Fundamental Freedoms. He did not satisfy the high threshold required. Notwithstanding, His Honour Judge Grenfell in granting permission observed as follows:

> "1. There appear to be conflicting findings as between the immigration judge (August 2007) and the Tribunal Judges, Asylum Support, (January 2009 and April 2010) on the one hand that the claimant is not a Bidoon and on the other that he was denied entry to the Kuwaiti Embassy because he was a Bidoon.
>
> 2. Currently, there appears to be an impasse in that, as the Tribunal Judges have accepted, the claimant has been making reasonable efforts to return voluntarily to Kuwait, but he appears to be unable to progress that return with the Kuwaiti Embassy. In the circumstances, the defendant's

> refusal to accept the new representations as a fresh claim and decision that he should seek his return using his genuine identity and papers are open to review."

20. The law for present purposes and the legal framework in which this claim is launched is not in dispute. Where other asylum or human rights applicants have previously been refused asylum or leave to remain on human rights grounds in the United Kingdom, it is for the defendant to decide whether further submissions should be treated as a fresh claim. Paragraph 353 of the Immigration Rules as amended provides as follows:

> "When a human rights or asylum claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:
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> i) has not already been considered; and
>
> ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection.
>
> This paragraph does not apply to claims made overseas."

21. In BN (Zimbabwe) V SSHD **[**2005] EWCA Civ 1830 and SSHD v AR (Afghanistan) [2006] EWCA Civ 1495, the court considered the task in the Secretary of State when considering further submissions and the task of the court when reviewing a decision of the Secretary of State that further submissions do not amount to a fresh claim. In relation to the first limb of paragraph 353 Buxton LJ observed that the Secretary of State had to consider:

> "First, whether the new material is significantly different from that already submitted, on the basis of which the asylum claim has failed, that to be judged under rule 353(i) according to whether the content of the material has already been considered."

If the material is not significantly different, then the Secretary of State has to go no further.

22. In relation to the second limb of the test, ie whether the content of the submissions taken together with the previously considered material creates a realistic prospect of success, notwithstanding its rejection Buxton LJ found that the threshhold, as it is now well known, was "somewhat modest". The question for the Secretary of State is whether there is a realistic prospect of success in an application before an immigration judge, but no more than that.

23. In AK (Afghanistan) v SSHD [2007] EWCA Civ 535, the Court of Appeal affirm that the question which the Secretary of State must ask itself is "whether an independent tribunal might realistically come down in favour of the applicant's asylum or human rights claim in considering the new material together with the material previously considered". Buxton LJ in WM BRC said that in own answering that question the Secretary of State must be informed by anxious scrutiny of the material.

24. In relation to the task of the court Buxton LJ confirmed that the decision remained that the Secretary of State and the determination of the Secretary of State is only capable of being impugned on Wednesbury grounds. Buxton LJ at paragraph 11 said that when reviewing a decision of the Secretary of State the court will ask two questions. First, has the Secretary of State asked itself the correct question? As stated, the question is: in an asylum case whether there is a realistic prospect of an immigration judge applying the rule of anxious scrutiny thinking that the applicant will be exposed to a real risk of prosecution on return? Second, in addressing that question has the Secretary of State satisfied the requirement of anxious scrutiny? Buxton LJ concluded that if the court cannot be satisfied the answer to both of those questions is in the affirmative, it will have to grant an application for review of the Secretary of State's decision.

25. My attention has been drawn, correctly, to R (YH) v SSHD [2010] EWCA Civ 116, where Carnwath LJ considered that there had been a shift in emphasis following the decision of the House of Lords in ZT (Kosovo) and suggested that the court should make up its own mind on the question of whether there is a realistic prospect of success before an immigration judge. In R (TK) v SSHD [2010] EWCA Civ 1550 a differently constituted Court of Appeal, Lord Neuberger MR and Laws and Wilson LJ, concluded that the Court of Appeal is bound to apply WM unless and until it was overturned by the House of Lords or the Supreme Court. Accordingly, the Secretary of State's conclusion on whether the representations amount to a fresh claim can be challenged only on Wednesbury grounds. This has since been confirmed by a further decision of the Court of Appeal in R (MN (Tanzania)) v SSHD [2011] EWCA Civ 193.

26. The issues, it follows from the foregoing, are therefore accurately stated, in my judgment, by the Secretary of State as: 1) whether the content of the claimant's submissions in the letter of 11 May 2009 had not already been considered; if not, 2) whether, in relation to content not already considered, the Secretary of State's view that the claimant's submissions taken together with the previously considered material did not create a realistic prospect of the claimant succeeding before the immigration

judge was irrational or Wednesbury unreasonable bearing in mind the needs of anxious scrutiny.

27. Ms Rasoul on behalf of the claimant repeats the grounds on which review is sought. She submits, in the light of what has happened and particularly in the light of the findings of the support tribunals, that the defendant must have failed to give the requisite degree of anxious scrutiny, that the defendant's decision is unreasonable and that the claimant will now have a reasonable and real chance of success before a fresh immigration judge.

28. I can well understand why HHJ Grenfell granted permission. Even against a background where the claimant was not believed by the immigration tribunal, it does seem to me that he has found himself in a dreadful bureaucratic impasse. Moreover, the conclusion of the immigration tribunal that he will not be at risk upon return to Kuwait because of his alleged bedoon ethnicity because he does not prove he is a bedoon seems entirely to overlook the fact that he had no travel documents whatsoever.

29. As I say, the claimant is now at a complete impasse. He cannot legitimately get entry into the United Kingdom and he cannot legitimately get back to Kuwait. He appears to be destitute, which is not disputed. Subject to the financial support this government is providing him, he appears to be stateless and in limbo. It nevertheless does not follow, however harsh this strikes one, that the decision of the defendant, even if the first ground is overcome, is or must be perverse, irrational or unreasonable.

30. The defendant is of course not bound by the findings of the Asylum Support Tribunal which address an entirely different question of entitlement to support. Nevertheless, it seems to me from the letters that the defendant paid careful regard to the evidence that has come to light since the asylum claim was rejected. So far as that evidence is concerned, all the events that have shown since the asylum claim is rejected is the consequences of that decision: the attempt by the claimant to obtain assistance and documents from the Kuwaiti Embassy, their rejection, and the repeated claims made to the Asylum Support Tribunals. Nothing has been done to alter the fundamental premise, namely the claimant's inability to prove that he is a bedoon.

31. What is in particular missing, as Mr Fetto points out, is there is no forensic evidence about the green card produced to show or support his case that it is a genuine document despite the fact that he has had legal advice and assistance now for some time. More importantly there is nothing from the family in Kuwait – there are no witness statements, no further documents, no supporting evidence, statements, letters or anything of that kind that might go to support his claim that he is indeed a stateless bedoon. The impasse is therefore unfortunate.

32. As the Asylum Support Tribunals noted, it is not entirely clear why the United Kingdom authorities could not repatriate the claimant to Kuwait as he wished. It appears that the defendant genuinely believes there would be no point. The claimant would be refused entry on arrival unless he could prove that he was a Kuwaiti

national and not a bedoon. This, as I say, he might be able to do by production of documents which his family may be able to obtain in Kuwait. Equally, he may be able to obtain a genuine ID card showing he is a bedoon. Then again he might not be able to procure both or either of these outcomes.

33. But I cannot say that even if the claimant's submissions, in the letter dated 11 May 2009, amounted to fresh material, that the decision of the defendant is perverse, irrational or unreasonable. Nor can I say that the claimant's claim now if heard afresh would succeed. At the end of the day the material is no different from that placed before the immigration judge in the first case or not significantly different. It covers the same ground; doubts in relation to the genuineness of the ID card remain and there is, as I say, no further evidence in support of his claim to be a bedoon.

34. I must, therefore, with some sadness, particularly having regard to the fact that this appears to leave the claimant in limbo, dismiss the application.