Neutral Citation Number: [2009] EWCA Civ 1157

Case No: C5/2009/0424

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
AA/10355/2008

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/11/2009

Before :

LORD JUSTICE WARD
LORD JUSTICE SEDLEY
and
LADY JUSTICE SMITH

- -

Between :

SA (KUWAIT)	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Mr Shuyeb Muquit (instructed by Messrs Freemans) for the **Appellant**
Mr Parishil Patel (instructed by Treasury Solicitors) for the **Respondent**

Hearing date: Monday 12 October 2009

- -

Judgment

Lord Justice Sedley :

1. Kuwait was a British protectorate from 1920 to 1961, when it became fully independent. A system of individual registration initiated under British suzerainty resulted in the non-registration of a significant segment of the population. These people, with their descendants, have found themselves effectively stateless and without rights: in Arabic they are *bidun jinsiya* – without nationality – and are known as Kuwaiti bidun or bidoon. They cannot vote, cannot obtain a passport, have no rights to public healthcare or education, and are in general so badly treated that at the time when these proceedings were before the AIT it was accepted that anyone who could establish that he or she was a Kuwaiti bidun was entitled without more to asylum – see *BA and others (Bedoon-statelessness-risk of persecution) Kuwait* [2004] UKIAT 00256 and *HE (Bidoon-statelessness-risk of persecution) Kuwait* CG UKAIT 00051).

2. To prove that one is an "undocumented bidun" paradoxically requires documents. It requires a Kuwaiti identity card, which is printed on green paper and known as a follow-up card; but when issued to bidun it is known as an aliens registration card. According to the translation which is before the court, it is issued by the Executive Committee for Illegal Residents' Affairs. Ex facie such a card demonstrates that its bearer is without civil rights in Kuwait. The other relevant document is a birth certificate showing that the individual to whom it relates was born in Kuwait and is therefore entitled in international law to the rights which the enforced status of alien denies him or her.

3. The present appellant is a Kuwaiti woman who travelled to this country on false papers (bidun cannot obtain legitimate travel documents) and sought asylum as a bidun. The Home Office rejected her claim. On appeal to the AIT, IJ Hussain dismissed her appeal, but did so in terms so contradictory that his determination was set aside on a first-stage reconsideration by SIJ Martin, who directed a de novo hearing of the appeal. The appeal came before IJ Jones QC, who again dismissed it.

4. For the appellant, Mr Muquit has criticisms of all three determinations, and not without justification. His critique of IJ Hussain's decision is shared by the Home Office, represented by Mr Patel, but they differ as to its implications. Mr Muquit contends that SIJ Martin was right to find it perverse but wrong to send it on for a rehearing rather than to reverse the decision. The logic of Mr Patel's position is that SIJ Martin should simply have upheld IJ Hussain's determination. But, since she directed a second-stage hearing, he submits instead that IJ Jones' decision was in the event a tenable one.

5. If this appeal depended on the last of these determinations I would have considerable concerns about it. It is verbose and quite inappropriately critical of the immigration judges who had previously dealt with the case. More immediately, having correctly observed (§34) that "if [the appellant] is an undocumented bidoon her appeal should succeed quite regardless of her being a person lacking veracity or reliability as a witness of fact", it goes on (§41) to do the opposite:

> "I am left in a situation where no more than a passing reference has been made to these documents, during closing submissions in this appeal. I am, in effect, simply being asked to take these photocopies and their respective interpretations at face value, absent evidence speaking to either document. In my judgment that would be wholly wrong. In the absence of evidence speaking to the reliability and provenance of two documents, said to be central to the appellant's case, in circumstances where such evidence is reasonably to have been expected, I find that the appellant has not persuaded me that there is a reasonable degree of probability that they are reliable and genuine. I make it clear that I am influenced, albeit to a modest extent, in coming to that conclusion, by my overall adverse assessment of the appellant's individual veracity and reliability as a witness, on the basis that a witness who lacks (a degree of) veracity and reliability is more (rather than less) likely to rely upon unreliable documents."

6. But the real issue lies upstream. At the first hearing before IJ Hussain the appellant belatedly produced a birth certificate and registration card. The judge accepted her explanation for the late production of them but adjourned the hearing for the Home Office to examine them. By a letter of 15 October 2007 the Home Office repeated its concession that "if these documents are real … the appellant … should succeed in her claim for asylum", and went on:

> "In order to establish the veracity of these documents they were compared with information available from objective sources and caselaw on documents of this nature. The Secretary of State considers that the documents submitted do correlate with descriptions of these documents.
>
> Attempts were made to further determine whether or not the documents were genuine. However, due to the lack of any security features present in documents of this type it was not possible to pursue this line of enquiry any further.
>
> Therefore, due to existing problems with the claimant's credibility and the ease with which these documents could be created it is considered by the Secretary of State that the appellant has not discharged her burden of proof in relation to these documents and the decision to refuse asylum will be maintained."

7. IJ Hussain noted this letter at the resumed hearing. He recorded (§9) that the Home Office presenting officer had confirmed the contents of the letter, and went on:

> "She told me that the identity document in question was consistent with others held in the respondent's offices and accepted to be genuine."

8. As to the crucial documents the judge said this:

> 35. Whilst I accept the appellant has given a reasonable explanation for their delayed admissions, considering the nature of the documents and the Home Office position on those, I find myself in a position where I can give little weight to their probative value. It goes in the appellant's favour the fact that the Home Office's examination has not revealed anything to suggest that the documents are fabricated. However I accept the Home Office has a point when attention is drawn to the fact that none of the documents have any security features. In other words, these documents are consistent with any other document of this type that are real. Simply at face value, one cannot say whether the documents are false or true. I direct myself that simply because these documents lack security features should not raise doubts about their reliability. Their reliability has to be assessed in accordance with well established principles set out in a case of **Tanveer Ahmed.**
>
> 36. As indicated above, I find in the appellant's favour in relation to the documents but give very little weight to them. On their own, I do not accept that they are sufficient to prove that the appellant is an undocumented Bidoon, particularly, in the light of the inconsistencies in her evidence and my conclusion that the evidence of her witness was contrived. This aspect of the appellant's case is clearly damaging to her credibility. Whilst I have taken a favourable view of the documents, it has not escaped my attention that the appellant in her oral evidence claimed to have had the birth certificate all the time, whereas, the documented itself showed that it was issued on 25 September 2005. Be that as it may, I maintain my position that the documents assist the appellant's claim rather than hinder it.

9. He concluded:

> 42. ….. I have looked at the evidence in this case in the round as I am required to do. I find the identity card and the birth document in the appellant's favour. However, when these are set against the inconsistencies otherwise in the appellant's evidence, I have formed the view that overall I cannot be satisfied even to the lower standard of proof, that she is an undocumented Bidoon from Kuwait."

10. The inconsistencies to which the immigration judge was referring were, in short, these. First, the appellant had been vague about when her father, who had been harassed by the authorities, had first been arrested. Secondly, her account of the arrest and detention of her father and sister for three days was implausible: "If, as the background documents suggest, this was part of the routine harassment to which undocumented Bidoons are subject, then they would have been released a lot sooner." (If it were material, I would have considerable doubts about that.) Thirdly, the appellant had called a witness who had known her in Kuwait and testified that they

were both bidun, but whose evidence about where and when they had met did not cohere with hers.

11. Nobody from SIJ Martin to us has been able to understand IJ Hussain's reasoning. Mr Patel tentatively suggests that it does no more than IJ Jones did in his §41 which I have quoted; but if that is right, there was no call for a second-stage reconsideration. What SIJ Martin concluded, having set out IJ Hussain's §36, was this:

> "Having made those findings, those positive findings with regard to the documents, it is then perverse of the immigration judge to then discount their weight in determining whether or not the appellant is an undocumented bidoon. It is of course the case that an appellant can be entirely without any credibility with regard to what they claim has happened to them but that would not necessarily impact on their status in their country of origin."

12. I respectfully agree with this. But its logical conclusion is that IJ Hussain ought to have found in the appellant's favour and allowed the appeal. Instead the SIJ sent it for a full redetermination.

13. Mr Patel submits that this was an appropriate step. He reminds us of the well-known guidance given by the IAT (Collins P, Mr Ockleton and Mr Moulden) in *Tanveer Ahmed* [2002] UKIAT 004

> 34. It is sometimes argued before Adjudicators or the Tribunal that if the Home Office alleges that a document relied on by an individual claimant is a forgery and the Home Office fails to establish this on the balance of probabilities, or even to the higher criminal standard, then the individual claimant has established the validity and truth of the document and its contents. There is no legal justification for such an argument, which is manifestly incorrect, given that whether the document is a forgery is not the question at issue. In only question is whether the document is one upon which reliance should properly be placed.
>
> 35. In almost all cases it would be an error to concentrate on whether a document is a forgery. In most cases where forgery is alleged it will be of no great importance whether this is or is not made out to the required higher civil standard. In all cases where there is a material document it should be assessed in the same way as any other piece of evidence. A document should not be viewed in isolation. The decision maker should look at the evidence as a whole or in the round (which is the same thing).
>
> 38. In summary the principles set out in this determination are:
>
> > 1. In asylum and human rights cases it is for an individual claimant to show that a document on which he seeks to rely can be relied on.

> 2. The decision maker should consider whether a document is one on which reliance should properly be placed after looking at all the evidence in the round.
>
> 3. Only very rarely will there be the need to make an allegation of forgery, or evidence strong enough to support it. The allegation should not be made without such evidence. Failure to establish the allegation on the balance of probabilities to the higher civil standard does not show that a document is reliable. The decision maker still needs to apply principles 1 and 2.

14. Without seeking in any way to modify this guidance, I would observe that it has to be applied with careful regard to the particular issue before the tribunal. In many cases an appellant's unreliability on aspects of his or her history may legitimately colour the tribunal's appraisal of documents on which reliance is placed; but it depends very much on the kind of document. Where the only issue is the appellant's status, and the documents relied on, if genuine, are conclusive of status, it can only rarely be helpful or relevant to test out the appellant's veracity or dependability in other ways. IJ Jones recognised this, although he did not give effect to it: see §5 above. Here, for example, it simply did not matter to the genuineness of the two documents whether the appellant's family had been harassed by the police or whether an unreliable witness purported to confirm her status. It might have mattered if there had been evidence showing that her date of birth was different from that on the birth certificate or casting doubt on the genuineness of the aliens registration certificate; but there was none.

15. It is also worth bearing in mind in cases turning on the authenticity of official documents that there are two different kinds of inauthenticity: forgery of the document itself, and the making of false entries on a genuine document. It is useful, and sometimes essential, for advocates and tribunals to be clear which kind is in issue. The Home Office letter which I have quoted, for example, accepts that the documents produced by the appellant "correlate with [available] descriptions". The HOPO at the resumed hearing went further, making it clear that they had actually been compared with examples held by the Home Office. This being so, there was no ground for suspecting forgery of the documents themselves. Was there then reason to suspect that the entries on them were false? There are parts of the world where it is known that false entries on official forms can be procured for a bribe; but the immigration judge was given no evidence and heard no suggestion that this can be done in Kuwait by biduns, much less that it had been done here.

16. Was SIJ Martin then right to send the appeal for a full redetermination, or was her proper course to reverse the first determination on the ground that it had made a conclusive finding that the documents were genuine which could not be diluted by the other findings about the reliability of the appellant and her witness? In my judgment it was the latter. This was not a determination so garbled or so muddled that it could not be unravelled. It was one which had purported to modify one finding by another which had no intelligible bearing on it. The two are readily severable, and when severed leave standing a finding which should have concluded the appeal in the appellant's favour. Put, as the SIJ put it, in terms of perversity, the determination is rendered coherent by removing its contradictory element without the need of redetermination.

17. I would allow the appeal accordingly.

Lady Justice Smith:

18. I agree.

Lord Justice Ward:

19. I also agree.