

KD (Bedoon - Destroyed documents) Kuwait [2008] UKAIT 00086

Asylum and Immigration Tribunal

THE IMMIGRATION ACTS

Heard at Field House
On 14 October 2008

Before

SENIOR IMMIGRATION JUDGE WARR

Between

KD

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C Appiah
For the Respondent: Mr G Saunders

A Bedoon who destroys his documents does not by that reason alone become an undocumented Bedoon.

DETERMINATION AND REASONS

1. The appellant was born on 13 February 1985 in Kuwait. He claims to be an undocumented Bedoon. He claimed to have suffered discrimination as an undocumented Bedoon in Kuwait. He entered the United Kingdom on 28 July 2007 and applied for asylum. The application was refused on 8 April 2008. The appellant appealed and his appeal came before Immigration Judge P J G White on 30 May 2008.
2. The Immigration Judge heard oral evidence from the appellant. He found discrepancies and inconsistencies and implausibilities in his account and he rejected the claim that the appellant had been of adverse interest to the Kuwait authorities

and all other relevant aspects of the claim that the appellant had advanced. The Immigration Judge also found that the appellant was in fact a documented Bedoon at the time of his departure from Kuwait. The appellant had gone from Kuwait to the Czech Republic and the Immigration Judge found that the appellant was personally in possession at Prague Airport of an Article 17 passport validly issued to him. The Immigration Judge found that the appellant had destroyed the passport personally at some point after embarking on the flight from Prague Airport and prior to his coming to the attention of the Immigration Authorities at Heathrow Airport.

3. The Immigration Judge, however, allowed the appellant's appeal for the following reasons:-

- “45. That is not however at the end of the matter. For whatever reason it is a fact that the Appellant Article 17 passport has been destroyed. Mr Dunne argues that as the original passport was valid until 13 May 2010 it would be open to the Appellant to apply to the Kuwait authorities for a replacement passport and accordingly the Appellant could return to Kuwait as a documented Bedoon. Mr Dunne distinguishes the case of the second Appellant in the case of BA & Ors [2004] UKIAT 00256 on the basis that by the time of the reconsideration of the appeal in that case the Appellant's Article 17 passport had expired and it was found that it was unlikely that a new passport would be issued. Mr Dunne argues that in the case of the Appellant before me it would not be a newly issued passport that was being sought but simply a replacement passport during the currency of a passport that had been lost or destroyed.
46. Mr Appiah argues that given the attitude of the Kuwait authorities to Bedoon and in particular the general reluctance of the Kuwait authorities to have Bedoons resident within Kuwait it is unlikely that the Kuwait authorities would issue even a replacement passport to enable the Appellant to return to Kuwait.
47. Neither party has direct evidence from the Kuwait authorities of whether the Kuwait authorities would be prepared (even as a general principle) to issue outside Kuwait a replacement for an Article 17 passport that had been lost or destroyed during its currency.
48. The case of the second Appellant in the case of BA indicates how a documented Bedoon can lose that status by later actions and events (see paragraph 22 above).
49. In my view the objective evidence (see in particular the comments of the Tribunal in HE (Bedoon – statelessness – risk of persecution) Kuwait CG [2006] UKAIT 00051 at paragraphs 28 – 35) indicates a general unwillingness of the Kuwait authorities to tolerate Bedoons within Kuwait. In my view it follows that there is a real risk that the Kuwait authorities are likely to be obstructive in the issue of even a replacement Article 17 passport. Accordingly I come to the conclusion that although the Appellant has destroyed his own Article 17 passport (see paragraph 44 above) given the destruction of that document and the risk that it would not be replaced the Appellant is now to be regarded as an undocumented Bedoon and accordingly would be at real risk of persecution if he were to be returned to Kuwait.”

4. Accordingly the Immigration Judge allowed the appeal on asylum grounds and under Article 3.

5. The respondent applied for an order of reconsideration for the following reasons:-

“Ground 1: Failing to take into account material matters

1. The Immigration Judge has accepted that the appellant's account of having been an undocumented Bedoon who has previously suffered at the hands of the Kuwaiti

authorities was not genuine (paragraph 44). He finds that at the time of his departure, the appellant was in fact a documented Bedoon, and that he was personally in possession of an Article 17 passport validly issued to him, which he subsequently destroyed (paragraph 44).

2. The Immigration Judge then goes on to consider whether the appellant would be able to obtain a replacement passport, concluding that there was a real risk that the passport would not be replaced by the Kuwaiti authorities (paragraph 49). In coming to this conclusion it is submitted that the Immigration Judge has materially erred in law in failing to following the guidance in BA and in failing to take into account material matters.
 3. The Immigration Judge notes at paragraph 47 that neither party had direct evidence from the Kuwaiti authorities as to whether they would be prepared to issue a replacement Article 17 passport outside Kuwait, although he relies upon BA as supporting the proposition that a documented Bedoon can lose that status. It is submitted that the circumstances of the second appellant in BA are significantly different to the present appellant, the Tribunal concluding that the appellant *'having declined to register and fled the country ... was clearly someone who was no longer a documented Bedoon'* (paragraph 54). It would appear that the conclusion was reached, not because that appellant's Article 17 passport had expired, but because he had refused to register and had fled.
 4. Further, whilst the Tribunal accepted that where an Article 17 passport had expired, it was unlikely to be replaced outside Kuwait, they made no such finding that a replacement passport for one lost or destroyed during its period of validity would not be replaced. At paragraph 20 of BA, the Tribunal recorded the expert's evidence that *'in certain circumstances the Kuwaiti authorities through their consulates abroad would issue emergency documents to enable persons they accepted as citizens or resident non-citizens to travel back urgently for a death in the family or matters of this kind, e.g. when individuals have lost documents or had them stolen'* (emphasis added).
 5. Further, the comments at paragraph 22 of BA were made on the basis that the appellant had not sought to renew his passport and would be unlikely to have it renewed if he sought to renew it now (i.e. 3 years after it had expired).
 6. The Tribunal also commented at paragraph 39 that whilst there was evidence of Article 17 passport being issued to some Bedoon, *'there is no evidence to indicate that they are issued to Bedoon outside Kuwait who have not been issued with one before leaving'*. (emphasis added).
 7. Finally, at paragraph 78, the Tribunal note that in relation to an Article 17 passport holders the authorities *'in practice do not, allow the holder re-entry once that passport expires'* (emphasis added).
 8. It is therefore submitted that had the Immigration Judge had regard to these passages in BA, he would have come to a different conclusion on whether it was still likely that the appellant would be able to obtain a replacement for his still valid Article 17 passport and therefore would have come to a different conclusion on whether the appellant would face persecution upon return."
6. I ordered reconsideration on 18 July 2008. There has been no challenge to the Immigration Judge's findings of fact.
 7. Mr Saunders submitted that the appellant had a valid passport which he had destroyed and the question was whether the Kuwait authorities would issue another. He submitted there was no reason why they would not and referred to BA as set out in the application for the order of reconsideration.

8. The appellant had not suffered at the hands of the regime in Kuwait in the past. He had got medical treatment over a long period and had found employment as an advertising designer. There was no evidence of oppressive conduct towards him. There was no reason to believe that the Kuwait authorities would not re-issue a passport. The Immigration Judge's conclusions should be reversed.
9. Mr Appiah submitted that the points relied on in the case of BA at paragraphs 20 and 22 did not represent the Tribunal's conclusions but were just a record of the submissions made. Further, it was wrong to speculate about what would happen in the future. At present the appellant was an undocumented Bedoon and it was the present circumstances that mattered and not what might happen if he were to make an application. It would not matter if the passport was lost or stolen or if it had expired. The point was that he would not have such a passport. The Kuwait authorities discouraged returns to Kuwait by Bedoons.
10. Mr Saunders submitted that while paragraphs 20 to 22 of the determination in BA were not part of the Tribunal's conclusions, it was plain from paragraph 23 that the Tribunal found the expert's evidence helpful and reliable. It was appropriate to take into account future circumstances in the context of appeals such as this for the reasons given in Teclé [2002] EWCA Civ 1358 referred to in paragraphs 25 and 58 of BA. There was no evidence that the appellant had attempted to obtain travel documents.
11. At the conclusion of the submissions I reserved my determination. I have carefully considered all the material before me. I can, of course, only interfere with the Immigration Judge's decision if it was materially flawed in law.
12. The appellant left Kuwait with a valid passport and he used it at Prague Airport and subsequently destroyed it. He left Kuwait as a documented Bedoon and used the document for travel purposes on his way to the United Kingdom.
13. It is submitted that it matters not in what circumstances the appellant has no passport. It would, on Mr Appiah's argument, be open to any documented Bedoon to achieve asylum status by the simple expedient of tearing up a valid passport. Even a Bedoon who innocently lost his passport or who had it stolen from him, would be entitled to succeed in an asylum claim as an undocumented Bedoon.
14. The passport that was properly issued to the appellant by the Kuwait authorities was valid until 2010.
15. The circumstances of the appellants in BA were markedly different from the circumstances of the appellant in the instant appeal. The appellants were not documented at the time they left the country. The last sentence of paragraph 54 is of some relevance. It reads:-

"Moreover, we have found that at present neither [appellant] is reasonably likely to become a documented Bedoon (principally because Kuwait refuses to re-admit Bedoon who have left Kuwait – *except for those who have current Art 17 passports*).” [my italics]

16. In paragraph 39 the Tribunal refer to Bedoon who have left Kuwait having been issued with an Article 17 passport and find, “the evidence indicates it would not be

renewed *once it has expired.*" [my italics] There are other references in the application for the order of reconsideration which I have set out above.

17. In the case of the second appellant in BA, the expert stated that while he had been granted an Article 17 passport in 1995:

"he had not sought to renew it and he did not consider that if this appellant now sought to renew it, the authorities would do so. He would no longer qualify."

18. In paragraph 4 of the application for the order of reconsideration reference is made to the expert evidence given in BA that in certain circumstances the Kuwait authorities through their Consulates abroad would issue emergency documents to enable persons they accepted as citizens or resident non-citizens to travel back urgently for a death in the family or matters of this kind, e.g. when individuals have lost documents or had them stolen.
19. Mr Appiah submitted that this part of the Tribunal's decision did not represent its conclusions. However, the Tribunal did make an express finding at paragraph 23 that the expert evidence closely reflected the evidence contained in other background materials and the expert evidence was both helpful and reliable.
20. Mr Appiah also submitted that the case should be determined on the material before the Tribunal and one should not speculate as to what might happen in the future regarding the appellant's documentation.
21. All refugee appeals, however, require some element of speculation. It has to be established to the required standard whether an appellant will face a real risk of persecution on return. In this case the appellant had no cause to fear persecution when he left. He claims destroying a perfectly valid passport establishes a basis for fearing persecution when none existed previously.
22. It was submitted that given the general reluctance of the Kuwait authorities to assist Bedoon or have them resident within Kuwait, it was unlikely that the Kuwait authorities would issue even a replacement passport to enable the appellant to return to Kuwait. The Immigration Judge noted that neither party had direct evidence from the Kuwait authorities of whether the Kuwait authorities would be prepared to issue outside Kuwait a replacement for an Article 17 passport that had been lost or destroyed during its currency.
23. In my view it was for the appellant to establish his case. The Tribunal in BA confirmed this in paragraph 26 of the decision. The Tribunal considered the extent to which speculation is possible in paragraphs 55ff of the decision. The Tribunal refer to Teclé, where the Court of Appeal reasoned that it was right to treat the applicant as a national of Eritrea because there were no serious obstacles to his being granted it upon application.
24. In my view it does not entail impermissible speculation to consider that a person with a valid Article 17 passport could obtain replacement or emergency documentation on request in the event of loss or theft. This is consistent with the expert evidence which the Tribunal accepted in BA.

25. Although it is said that there is a general attitude of hostility to Bedoon and that the Kuwait authorities would in effect use any excuse not to have a Bedoon without the documents back, the Tribunal in HE speak of the recent improvements representing changes of clear relevance which “may be indicative of an improving attitude on the part of the authorities towards the Bedoon ...”. While the Tribunal confirm BA as relevant country guidance, the improvements in the situation are to be borne in mind in cases such as this where an appellant has been issued with a valid passport which, so far as the authorities are concerned, is still within its period of validity. The appellant has not suffered persecution in the past and, as Mr Saunders submitted, the appellant was able to work and obtain medical treatment for a period of time.
26. For the reasons I have given, the Immigration Judge materially erred in law in concluding that there was a real risk that the Kuwait authorities would not issue a replacement travel document for the appellant. Such evidence as there was confirms that in certain circumstances emergency documents can be issued. The Immigration Judge found that the authorities were likely to be obstructive, but the question was whether the appellant had established that there was a real risk that appropriate documentation would not be issued.
27. The appellant left Kuwait as a documented Bedoon. The document issued to him is still a valid document in the eyes of the authorities, notwithstanding that the appellant has destroyed it. The Immigration Judge erred in concluding on the evidence before him that the Kuwait authorities would not issue a replacement document. The Kuwait authorities have not acted towards the appellant in a hostile manner in the past according to the Immigration Judge’s findings. There is no reason to suppose that they would do so in the future. The appellant has failed to discharge the burden of proof on him. Accordingly, I substitute a fresh decision:
28. The appeal is dismissed on all grounds.

Signed

Date 16 October 2008

Senior Immigration Judge Warr