Case No: C5/2009/0753

Neutral Citation Number: [2009] EWCA Civ 1241
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
[AIT No: AA/05154/2008]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 28th October 2009

Before:

LORD JUSTICE SEDLEY
LORD JUSTICE DYSON
and
LADY JUSTICE SMITH

- -

Between:

AA (SAUDI ARABIA)

Appellant

- and -

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

- -

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Mr Christopher Jacobs (instructed by Joint Council for the Welfare of Immigrants) appeared on behalf of the **Appellant**.
Ms Lisa Busch (instructed by the Treasury Solicitor) appeared on behalf of the **Respondent**.

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Judgment

Lord Justice Sedley:

1. This is an appeal, brought by permission of Sullivan LJ, against the decision of Senior Immigration Judge Eshun on a reconsideration, directed by Charles J, by which the Senior Immigration Judge upheld the determination of Immigration Judge Steer dismissing the appellant's asylum appeal.

2. The Senior Immigration Judge did so on the ground that Immigration Judge Steer's error of law was immaterial. It is the appellant's case, put by Mr Jacobs today, that the error was not what Senior Immigration Judge Eshun took it to be, that it was an error material to the Immigration Judge's decision and that the appeal should in consequence have gone to a full second-stage reconsideration.

3. The appellant's case was not exactly promising. His claim has resolved itself into a claim to be a bidoon (I will explain that word in a moment) from Saudi Arabia. He arrived in the United Kingdom in July 2005 and applied promptly for asylum. Having been interviewed he was refused asylum the following month on third country grounds, it having been ascertained that he had previously claimed asylum as a Somali national in Norway. That poor start was made worse by his absconding. He was not arrested until October 2007 but then renewed his application, which was rejected in May 2008. It was not accepted that he was, as he now says he is, a Saudi bidoon or Saudi at all, and many other inconsistencies in his account were cited as reasons for not accepting his claim. They went to such matters as his name, his birth date, his parentage, his place of birth, his education and the route he had taken to the United Kingdom.

4. But Immigration Judge Steer, among a series of otherwise adverse findings, found as a fact that the appellant was indeed born in Saudi Arabia. That being so, the critical question became the question whether he was a bidoon. The expert report of Dr Joffe helpfully explains this term:

> "3. The term, in Arabic, means 'without' and is an abbreviation of the phrase 'bidoon jinzaya' – 'without nationality'. This term is widely used in the Gulf region for those - often Bedouin in origin - who have never been registered as citizens or nationals of one of the Northern Gulf States -- Iraq, Kuwait and Saudi Arabia in particular, although the problem also occurs in Bahrain and the United Arab Emirates."

He goes on at paragraph 12:

> "The status of the bidoon in Saudi Arabia is well-described in the United States Department of State human rights report for Saudi Arabia in 2007,

published in Washington on March 3, 2008. It states:

> Collectively known as Bidoons ('without' in Arabic) these native-born residents lack citizenship. The reasons are diverse: due to an ancestor's failure to obtain nationality, including descendants of nomadic tribes who were not counted among native tribes during the reign of the country's founder...; descendents of foreign-born fathers who arrive before citizenship was institutionalised; and rural migrants whose parents failed to register their births. Bidoons were denied employment and educational opportunities because of their lack of citizenship, and their limited ability to travel. Bidoons are amongst the poorest residents of the country because of their marginalised status."

And at paragraph 17:

> "Perhaps because of such concerns, it has recently emerged that the Saudi Arabian human rights commission, a government-controlled body, is now to examine the status of the bidoon. It will eventually seek citizenship status and rights to property ownership for them, as well as proper access to health and education."

If, therefore, the appellant was a bidoon, a serious question would arise, as Ms Busch for the Home Secretary accepts, whether, regardless of any history of active persecution targeting him, the complete deprivation of rights flowing from statelessness entitled him to protection.

5. Dr Joffe's own credentials as an expert are not in doubt. I will not recite them here. His report ran to 26 pages, but the part directly concerned with the appellant is at paragraphs 20 to 36. This part of the report, not untypically, is a combination of objective factual testimony with data derived, as data usually have to be, from the appellant himself. That mixture does not devalue or disqualify it as expert evidence, but it does mean that its efficacy may depend at least in part on whether the immigration judge, having considered all the evidence and argument, endorses its factual premises.

6. Immigration Judge Steer made the following findings at paragraph 62:

> "The Appellant's account of his status as a bidoon and claims of persecution were internally inconsistent. Further, the reasons given for those inconsistencies were unsatisfactory for the reasons I have detailed above. I find that the appellant was

> born in Saudi Arabia. I do not accept that he was a bidoon and that he was persecuted as claimed. Even on his own account, as a foundling, the appellant could have been registered for citizenship under the 1954 law. He gave inconsistent, unsatisfactorily explained, evidence as to schooling, ownership of a flat and possession of a Saudi national's passport. He also provided a detailed work history, over a period of years, and evidence, which I did not accept, of only one incident involving the immigration police throughout that time. The incidents in relation to the religious beliefs are of limited relevance; on the Appellant's own evidence, the reason for the incidents was that he had not attended the mosque for prayers."

7. These inconsistencies, the Immigration Judge went on to find, were not explained or excused. All the findings, however, were made without any direct reference to Dr Joffe's report. It is briefly referred to at paragraph 30 of her determination, which picks out of it a handful of background points. Among these, however, is the fact that under the 1954 law bidoon may apply for naturalisation and foundlings born in the Kingdom are regarded as citizens. Both, however, require registration.

8. When Charles J remitted the case to the AIT he did so for the following reasons:

> "Although it seems to me that in parts the expert's report strays beyond the proper limits of his expertise and role I have concluded that the [Immigration Judge] may have erred in law by failing to give proper reasons for, and/or to take account of important relevant factors included in the expert's report and the background material in reaching, the conclusions set out in paragraphs 60 to 64 of the determination."

9. What manifestly troubled both Charles J and, when he gave permission to come to this court, Sullivan LJ was that the findings in paragraph 62 which I have quoted appeared to have been arrived at without consideration of the key parts of Dr Joffe's report. Rather than set these out, I will simply reproduce the tabulation, which I accept, given by Mr Jacobs of the potentially relevant passages and their subject matter:

Paragraph 20 (last part):	illegitimacy
Paragraph 21:	skin colour
Paragraph 22:	lack of identification papers
Paragraph 25:	dates of birth

Paragraph 26: the possible misunderstanding of the appellant's Palestinian connection
Paragraph 27: the Saudi dialect of Arabic
Paragraph 28: the want of papers
Paragraphs 35 to 36: the implications of statelessness and the characteristics of discrimination

10. None of this, with respect, is engaged with in Immigration Judge Steer's determination. And unfortunately, when, pursuant to the order of Charles J, the appeal came for reconsideration before Senior Immigration Judge Eshun, she failed to recognise that this was the shortcoming in the first immigration judge's decision which she was expected to address. Instead she identified as the Immigration Judge's sole error of law the one finding that had been made in the appellant's favour, namely that he was born in Saudi Arabia. This was, in the Senior Immigration Judge's view, an error, because the Immigration Judge had failed to give any reason for it, given that the appellant had at other times apparently said that he had been born in Palestine. But the Immigration Judge had heard the appellant's testimony, had set it out in great detail in the context of the other evidence (omitting Dr Joffe's however) and had concluded that on this single point he was telling her the truth. There was in my judgment no need for the Immigration Judge to have justified that finding any further.

11. In any event the Senior Immigration Judge then held this error to be immaterial "for the reasons given below". Those reasons were that she rejected the entirety of Dr Joffe's report. This the Senior Immigration Judge did, despite the clear terms and clear purpose of Charles J's order, by holding the report to be in effect so tainted by unwarranted assumptions as to carry no independent weight at all. As far as one can see from the record, this had not been any part of the Home Office's case. What undoubtedly was true was that in places Dr Joffe had expressed views which went beyond the admissible ambit of his expertise. Many experts (who after all are not, by and large, lawyers) do this. When they do it, it is the judge's task to separate the inadmissible chaff from the admissible wheat and to evaluate the latter. But here, at paragraphs 18 to 22 of her determination, the Senior Immigration Judge not only failed to do this; she simply dismissed Dr Joffe's report on the ground that the evidence of the appellant, upon which some of it was based, was itself riddled with inconsistency. The single and crucial finding in his favour she had already dismissed, mistakenly as I have explained, as untenable. But once that finding was there, as in my judgment it inescapably was, the single question which remained was whether, being a native of Saudi Arabia, the appellant was or was not registered. If he was registered, he had nothing to fear on return. If he was not, that is to say if he was bidoon, his case for protection would at the very least be powerfully advanced.

12. So what the Senior Immigration Judge needed to do was to evaluate the implications of the appellant being Saudi Arabian by birth, with proper regard to the evidence provided by Dr Joffe about the obstacles to becoming registered as a citizen and the consequences of not being registered. Instead,

she concluded her critique of the foundation of Dr Joffe's report with this damaging remark in paragraph 22:

> "It is clear to me that Mr Joffe made his own assumptions in respect of the appellant's claim and wrote his report to fit those assumptions."

13. I think it should be clearly said in this court that this remark about an acknowledged expert was not warranted. It is conceivable that had Senior Immigration Judge Eshun recognised the Immigration Judge's substantial error of law and had done what Charles J had required her to do, she would have held that a proper consideration of Dr Joffe's report could not have produced a different result; but any such conclusion would have required careful analysis and explanation, and there is none. It is open to this court nevertheless so to hold, but to do so would require an evaluation of factual detail which is the peculiar role of the AIT and one which does not, in my present view, carry any foregone conclusion. It remains an open question, which needs to be addressed with the help of the expert evidence, whether the appellant is registered as a citizen of Saudi Arabia or not.

14. One would have thought that crucial help could be derived in this regard from the Protocol, which we are told now exists, for Saudi Arabia to give Her Majesty's Government information about whether individuals are or are not registered in that country. To our surprise we have been told that use is made of the Protocol only when a claimant has already failed and return is imminent. This seems to me, with great respect, a peculiarly wasteful procedure and one also capable of compounding rather than eliminating error. I hope that consideration will be urgently given to making better use of the Protocol.

15. For my part, for the reasons I have given, I would allow this appeal to the extent of remitting it to the AIT for a second-stage reconsideration to be conducted in the light of this court's judgment. I express the hope that at that stage there will be some evidence obtained by the use of the Protocol as to whether the appellant is or has been registered whether under the 1954 law or otherwise. I also express the hope that by that stage the Protocol, which we have not seen, will have been disclosed and will be before the AIT.

Lord Justice Dyson:

16. I agree.

Lady Justice Smith:

16. I also agree.

Order: Appeal allowed