



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/04668/2017

THE IMMIGRATION ACTS

Heard at Field House
On 14th June 2018

Decision & Reasons Promulgated
On 13th July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

MAA
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Gajjar, Counsel

For the Respondent: Ms Pal, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by MAA against the decision of First-tier Tribunal Judge Smith, promulgated on 20th November 2017, to dismiss the appeal against refusal of his protection claim.
2. The essence of the appellant's claim was that he was at risk on return to Kuwait, which is his country of origin if not his nationality, as an undocumented Bidoon. The question of whether the Appellant could substantiate this claim turned largely but not exclusively upon his own credibility as a witness of truth.

3. I should say at the outset that subject to what appears below, the judge gave detailed, cogent and sustainable reasons for finding that the Appellant was not a credible witness of truth. This was mainly because the Appellant had given inconsistent accounts of matters that went to the core of his account.
4. Although criticised in the grounds, the judge did in my view give cogent and sustainable reasons for finding that the Appellant had been inconsistent about whether he had applied to the American Embassy for a passport in a different name to his own. This is what the judge said:
 - “71. When the Appellant was interviewed on 13 March 2017 he was asked whether he ever used a different name (question 183) to which he replied in the negative. That was untrue. The Appellant used a different name when he applied for a visa to try to visit the United States of America. This damages the Appellant’s credibility.
 72. The Appellant was asked whether he had ever been fingerprinted before apart from the occasions he had previously mentioned (question 182) and again he replied in the negative. This was untrue. The Appellant was fingerprinted when he applied for a visa to visit the United States of America. The issue of fingerprints was put to the Appellant again (question 186) and again he denied that he had been fingerprinted.
 73. It was then put to the Appellant that his fingerprints matched a visa application to the United States under the name Abdullah [A] who held a Kuwaiti passport. The Appellant denied this at interview.
 74. The Appellant could offer no explanation why his fingerprints matched the names of another person with a Kuwaiti passport who applied for a visa to visit the United States of America.”
5. The Appellant argues that the judge was wrong to say that he had never given an explanation. He had done so but the judge failed to take it into account. I reject that argument. The only explanation that the Appellant had given, such as it was, is contained within a letter written shortly afterwards by his then representatives. That letter included a series of what were characterised as “clarifications” but were in truth alterations to the account that he had given in his asylum interview. The essence of the instant “clarification” was that the Appellant had, under the pressure of the moment, forgotten all about the application he made some 11 years earlier. However, the Appellant had not said that he could not recall being fingerprinted but had most emphatically denied that this had ever occurred. Moreover, when it was put to him in the asylum interview that his fingerprints matched those of somebody using another name, he had said in terms, “I can offer no explanation”. The judge was thus in my view entitled to reach the conclusion that the Appellant’s credibility was thereby undermined without the need to refer to a letter that belatedly gave a contradictory explanation for his earlier denial and which in any event failed to explain why he had used an alias when being fingerprinted.
6. The grounds also criticise the judge’s approach to an expert medical report. However, this criticism is based upon a misrepresentation of what the medical report actually stated as opposed to the accurate summary of it provided by the judge at paragraphs

84 to 86 of his decision. The examining doctor (Dr Faced) could not of course say whether the residual scarring was caused in the exact manner and at that time and place described by the Appellant. The most that Dr Faced could (and did) say was that the scars were either consistent or highly consistent with the mechanism of injury which the Appellant had described. Mr Gajjar sensibly he did not pursue this argument as a freestanding Ground of Appeal. Instead, he argued that had the judge not made the other claimed errors, to which I shall turn in a moment, he may well have viewed the medical evidence differently.

7. The grounds assert that the judge failed to make a clear finding of fact in relation to certain photographs. What the judge said at paragraph 83 was this:

“Balanced against the above findings there are photographs of the Appellant who is certainly in a barred room which may be a prison. In isolation Mr Mullarkay [the Presenting Officer] point is good that they prove nothing. However, the photographs must be viewed in the light of the other evidence placed before me.”

That was an entirely appropriate approach for the judge to take. He did not have to make a clear finding, one way or the other, in respect of every aspect of the evidence. On the contrary, he was right to consider each aspect of the evidence in turn, to indicate the degree of weight that he had attached to it, and to defer his conclusion as to the Appellant’s credibility until he had completed his analysis of the evidence as a whole. Sensibly, Mr Gajjar did not pursue this ground.

8. I now come to the two grounds upon which Mr Gajjar principally relied.
9. The first of these grounds concerns what the judge said at the very outset of his credibility assessment. To put this in context, it will be recalled that at the core of the Appellant’s case was his claim to be a stateless undocumented Bidoon who was not recognised as a Kuwaiti national by the relevant authorities. However, at paragraph 69, the judge made the following observation:

“I also note on the screening interview that the Appellant’s first answer to the question of nationality was ‘Kuwait’.”

Insofar as the judge took this into account as a factor weighing adversely to the Appellant’s credibility, I am satisfied that it was unfair for the following reasons.

10. Firstly, the judge took the reply out of context. This is because it is clear to me that it was the first of several replies that had been typed onto the relevant form in advance of the commencement of the interview. I say this because the replies to the subsequent questions have been noted, presumably contemporaneously, by hand. Secondly, there is a handwritten note alongside the relevant typewritten reply that reads, “Bidoon”. This is not alluded to by the judge. It is however clear from all the above circumstances that this was in fact the contemporaneous reply that the Appellant had given when questioned about his nationality as opposed to the earlier typewritten reply based upon pre-existing information. It is unclear what weight the judge attached to that which he mistakenly supposed was the Appellant’s reply to this question. However,

he presumably attached some adverse weight to it given that he considered it worthy of mention.

11. The more troubling matter, however, concerns the judge's treatment of the evidence of two witnesses that the Appellant had called in support of his claim that he was an undocumented Bidoon. This is what the judge said about their evidence at paragraph 91:

"I have not forgotten the evidence of the Appellant's witnesses whose statements, other than describing their own personal circumstances, were in almost identical terms. They stated the Appellant was their friend and an undocumented Bidoon who would be persecuted in Kuwait. Both has successfully obtained asylum in the United Kingdom and both stated that they themselves were undocumented Bidoons. They could not explain how they knew the Appellant was undocumented with any clarity under cross-examination."

12. Mr Gajjar criticised the use of the phrase "in almost identical terms". The statements were either identical or they were not. It is however true to say that there are many passages within the statements which are obviously not a reflection of the words used by witness himself, but rather those of the person who drafted them. For example, the generalised statements purporting to 'confirm' that the Appellant is at risk on return to Kuwait as an undocumented Bidoon are not only identical in each of the statements but add nothing of value to the overall testimony of the respective witnesses. To that extent, the judge was clearly right to attach little weight to them. However, there are other aspects of the statements which clearly speak to the individual experience of the witness concerned and with which the judge failed to engage.

13. Mr Mohammed [N], in a statement dated 9th June 2017, said this at paragraph 4:

"We played football together and meet at the shisha shops. I know that the Appellant is an undocumented Bidoon. I know that he works as a cleaner in a gym and he will not be doing this job if he was not an undocumented Bidoon."

Mr Abdullah [M], in a statement of the same date, said this at paragraph 4:

"We met in our local coffee shop in Suleblyah and we became friends. I know that the Appellant is an undocumented Bidoon because we discuss our Bidoon situation whenever we meet. Our circumstance is the same."

The judge was accordingly in error in failing to engage with those aspects of their evidence and to explain why he rejected them.

14. There is however a further problem with the judge's reason for rejecting the evidence of the witnesses, namely, the ironic obscurity of his observation that the witnesses had failed to explain "with any clarity" in cross-examination how they knew that the Appellant was an undocumented Bidoon. One can only speculate from this whether their oral testimony at the hearing was the same or different to that which they had said in their written statements (above). If it was the same, then the judge's observation concerning the testimony of Mr Mohammed [N] could be considered fair

comment, given that it is unclear why the Appellant's work as a clearer in a gymnasium should lead him to conclude that he was an undocumented Bidoon. However, in the case of Mr Abdullah [M] it was palpably clear that he had reached his conclusion as the result of the Appellant sharing with him similar experiences to his own of life as an undocumented Bidoon in Kuwait. It may of course be that that explanation had been found wanting following detailed questions in cross-examination. If that was the case, then it incumbent upon the judge to set out, albeit briefly, the deficiencies in the explanation that had thus been exposed. It was especially important to do so given that both witnesses had been accepted by the Respondent as undocumented Bidoons.

15. I therefore conclude that the judge erred in failing to give adequate reasons for why he attached little or no weight to the evidence of witnesses whose testimony, on the face of it, supported the Appellant's claim. When this error is added to that identified at paragraphs 9 and 10 (above) I am bound to conclude that, despite the judge's otherwise detailed, cogent, and well-expressed reasoning, it would be unsafe to leave his decision undisturbed. I have therefore reluctantly concluded that it must be set aside and considered afresh by a different judge.

Notice of Decision

The appeal is allowed. The decision is set aside and remitted for rehearing in the First-tier Tribunal, sitting at Taylor House, before a judge other than Judge Smith.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date: 11th July 2018

Deputy Upper Tribunal Judge Kelly

TO THE RESPONDENT **FEE AWARD**

No fee is paid or payable and there cannot therefore be a fee award.

Signed

Date: 11th July 2018

Deputy Upper Tribunal Judge Kelly