



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/00204/2017
HU/15333/2016
HU/15336/2016
HU/15339/2016
HU/15347/2016

THE IMMIGRATION ACTS

Heard at Bradford
On 27 July 2018

Decision & Reasons Promulgated
On 16 August 2018

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

HMAM
AMMS(1)
AMMS(2)
UMMS
LMMS
NMMS

(ANONYMITY DIRECTIONS MADE)

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellants: Ms R Frantzis (Counsel)
For the Respondent: Mr M Diwnycz (Home Office Presenting Officer)

DECISION AND REASONS

1. This is quite an unusual case albeit that the issues before the Upper Tribunal are narrow ones. I shall explain.
2. There are six claimants. Certain of them are minors and the First-tier Tribunal (the tribunal) granted each claimant anonymity. Nothing was said before me, one way or the other, about that but in the circumstances I have considered it appropriate to continue that grant.

3. In fact, the only adult claimant is the one I have called HMAM. She is said to be the mother of all of the other claimants. It is also said that HMAM is the wife of a person I shall simply refer to as MS. MS came to the United Kingdom in December 2010 and was subsequently granted asylum. All of the claimants, however, are currently residing in Kuwait. It is said that the claimants and MS are all Kuwaiti Bidoon's. Indeed, it appears that MS was granted asylum on the basis of his being an undocumented Kuwaiti Bidoon.

4. All of the claimants applied for entry clearance to come to the UK in order to join MS. Most of the claimants sought entry clearance under the Immigration Rules which permit, in certain circumstances, persons outside the UK to come to the UK to reunite with a spouse or parent who has been granted asylum in the UK. However, with respect to the two youngest claimants, since they had been born after MA had left Kuwait to come to the UK and claim asylum, they did not fall within the terms of those Immigration Rules and so sought to rely upon Article 8 of the European Convention on Human Rights (ECHR).

5. All of the applications were refused. However, each claimant appealed and each claimant was successful on appeal to the First-tier Tribunal (the tribunal). The tribunal, having decided to allow the appeals, sent its decision to the parties on 17 April 2014. Ordinarily, the issuing of entry clearance would have followed. But that did not happen because, according to the Secretary of State, new information came to light which justified the entry clearance officer not giving effect to the decision of the tribunal. Indeed, new decisions were then made by the entry clearance officer on 11 April 2016 refusing entry clearance. Those decisions were made in reliance upon paragraph 320(7A) of the Immigration Rules in that, it was said, false documents had been relied upon in the applications, those false documents being a marriage certificate (relating to MS and HMAM) and some Ministry of Health birth registration documents which had been issued, or had been said to have been issued, in Kuwait. The two youngest appellants were also refused for the additional reasons that as they were not part of the pre-flight family they did not meet the requirements for family reunion with persons granted asylum as set out in the Rules.

6. The Secretary of State explained that it had come to his attention that a large number of applications involving Kuwaiti Bidoons had relied upon false documentation. In fact, it was thought that a large number of such applicants purporting to be Kuwaiti Bidoons were, in fact, nationals of Iraq. That concern having been discovered, checks were being undertaken on specific items of documentation which had been relied upon in various applications made by those claiming to be Kuwaiti Bidoons. Here, the above documents had been found not to be genuine as a result of such checks having been carried out. The main points were that the Mosque which had purportedly issued a number of marriage certificates (including the one relied upon here) had said that the signatory on the certificates had never officiated at that Mosque. Further, the birth certificates which had been relied upon for three of the minor claimants were in a similar format to others relied upon by claimed Kuwaiti Bidoons who had turned out to be Iraqi nationals.

7. All of the claimants appealed the new decisions of 11 April 2016. Those appeals were all considered by the tribunal at a hearing of 19 September 2017. In a decision sent to the parties on 3 October 2017 the tribunal allowed all of the appeals. Having set out the relevant background and the concerns with respect to fraud in this case and otherwise, the tribunal expressed the view that whether or not the entry clearance officer was permitted not to give effect to a decision of a tribunal would turn upon the application of what was described as the "well known test" in *Ladd v Marshall* [1954] 1 WLR 1489. The tribunal then went on to say this as to why it was concluding that the entry clearance officer was not able to successfully rely upon the *Ladd v Marshall* principles in this case:

“27. I take as a starting point the issue of whether the respondent has shown that these are cases where the respondent has satisfied the test for revising the decision of the FTT on the basis that there has been fraud. Finality in litigation is important, hence the *Ladd v Marshall* test. I apply the *Ladd v Marshall* test and consider the three stage test in relation to the two kinds of allegedly fraudulent document separately. Although the arguments in relation to the marriage and birth certificates are similar they are not the same. It is conceivable that in relation to one the position may be different to the other. The marriage certificate. The evidence that the respondent relies on to prove that this is fraudulent is discussed above. Taken as a whole this evidence is relevant and credible, therefore satisfying the first two tests in *Ladd v Marshall*. This applies in particular to the evidence that the mosque were spoken to and denied that the signatory on the certificate ever officiated at the mosque. I am not satisfied however that the respondent has shown that it could not have been obtained with reasonable diligence in time for the first hearing. This has to be seen in context and with the chronology in mind. The context is that it was clear from an early stage that the provenance of the marriage certificate was a contested issue. As the judge said there was much focus on it at the hearing. With this in mind could the respondent acting with reasonable diligence have obtained this evidence for the first hearing? I find that she could. It was an elementary enquiry to ask the body that purported to issue it whether they had in fact done so. This is not a case where the respondent says they had no suspicion about the document at that stage as she indicated in the refusal letter that it was not accepted as genuine. In addition the chronology set out in the statement of David Fairbanks makes clear that the respondent was aware of a problem with Bidoon applications being made from Jordan well before the hearing in April 2014. Mr Fairbanks sets out in his statement the reasons why events in the first two quarters of 2013 created suspicion about such applications.

28. I acknowledge that one of the reasons that the respondent gives for not accepting the marriage certificate as genuine may only have crystallised after the April 2014 hearing, i.e. that the certificate resembled those found to have been used fraudulently by Iraqis claiming to be Bidoons. This however is a less powerful point than the direct evidence from the mosque, especially as in apparently accepting the relationships between the appellants (save for LMMS) and MA (a Kuwaiti Bidoon) it is highly improbable that the appellants are Iraqis. It is doubtful whether this evidence considered alone meets the relevant and credible test and I do not think that it would be capable of proving fraud on its own. The respondent says that the certificate is in the same format and bears the same signature as certificates used by Iraqis that claimed to be Bidoons. This of itself would not prove that any such certificate resembling this was false as it may be that false documents had been modelled on a genuine document, as is often the case. Thus the far more important evidence potentially was the direct evidence from the mosque.

29. The birth certificates. The primary reason for finding these to not be genuine was by a comparison with a known genuine document. This could have easily been done at any time and was something that could have been done prior to the previous hearing when it was clear it was going to be an issue. The respondent also relies on a similar point about the birth certificate being in the same style format as ones used by Iraqis claiming to be Bidoons. This is a subsidiary point that is only of any force once those other certificates were deemed to be false by comparing them with a known original. I therefore find that the new evidence in relation to the birth certificates also fails the *Ladd v Marshall* test.

30. In considering this issue about the documents I have had in mind the principles in *Tanveer Ahmed v SSHD* [2002] UKAIT 00439, in particular paragraph 36;

’36. There is no obligation on the Home Office to make detailed enquiries about documents produced by individual claimants. Doubtless there are cost and logistical difficulties in the light of the number of documents submitted by many asylum claimants. In the absence of a particular reason on the facts of an individual case a decision by the Home Office not to make inquiries, produce in-country evidence relating to a particular

document or scientific evidence should not give rise to any presumption in favour of an individual claimant or against the Home Office.’

31. It was not argued before me but I do not regard this passage as an answer for the respondent to the third *Ladd v Marshall* point. This part of the judgment is merely saying that the respondent does not have to have every document investigated in order to be able to contend that the document cannot be relied on. The respondent has a choice to make as to what enquiries to make in relation to documents. In this case it is arguable that there was in fact ‘a particular reason’ to make enquiries back in 2013/14 given the evidence discussed above. Be that as it may if the respondent decides not to she can still submit that the document cannot be relied on. She did so in the appeal in 2014. The issue now is a different one, whether applying *Ladd v Marshall* the relevant and credible new evidence could have been obtained with reasonable diligence at the time. The evidence that is relevant and credible is the evidence from the mosque in relation to the marriage certificate and the comparison made with known genuine birth certificates. The respondent made a no doubt pragmatic decision not to obtain this evidence in 2013-14 but it was easily obtainable should the respondent have chosen to get it then.

32. I therefore do not agree that the respondent has overcome the initial hurdle for impugning the decision of the FTT in relation to HM and the three older child appellants. I therefore decline to go on to make findings as to whether the respondent has proved that the documents are not genuine. I also do not need to determine the fall-back argument of Ms Frantzis that even if the documents are not genuine the appeals should succeed as there are compelling circumstances for allowing the appeals despite the fraud. This is a bold but interesting argument given the apparent acceptance of the respondent that the relationships are as claimed and the known difficulties that there are in Kuwaitis obtaining such documents.”

8. The tribunal then went on to explain why it was not only allowing the appeals of the members of the pre-flight family unit but also the other two claimants (the youngest ones). The reasoning it deployed with respect to the two youngest claimants has not subsequently been the subject of challenge.

9. The application for permission to appeal was submitted on behalf of the entry clearance officer by those who normally act on behalf of the Secretary of State. It was not contended in the grounds that the tribunal had been wrong to consider the case under *Ladd v Marshall* principles. But it was argued that the tribunal’s finding that the new evidence could have been obtained with reasonable diligence at the time the initial applications were being considered was perverse. It was argued that the Secretary of State had acted once a trend had been identified and that it was only after a number of cases had been uncovered that action could be expected to be taken. A comparison was made with a set of cases sometimes referred to as the “ETS cases”. Permission to appeal was granted by a Judge of the First-tier Tribunal who said:

- “1. The issue is whether the FtTJ arguably erred by finding the third limb of the *Ladd v Marshall* test was not met in that the new evidence showing fraud now relied on by the ECR could have been obtained with reasonable diligence at the time of the previous (successful) appeal.
2. The grounds argue the FtTJ’s decision was perverse because a trend of false documents being used by non-Kuwaitis posing as Kuwaiti Bidoon’s had only subsequently come to light.
3. In a carefully reasoned decision, the FtTJ gave reasons for his decision both in respect of the marriage certificate and birth certificate.

4. However, permission is granted because it is arguable that, as in the ETS cases, evidence might have come to light subsequently which justified looking back to previously decided cases.”

10. Permission having been granted there was a hearing before the Upper Tribunal (before me) so that the question of whether the tribunal had erred in law could be considered. Representation at that hearing was as stated above and I am grateful to both representatives.

11. In the event, the hearing was brief. It was so because of a conciliatory stance taken by Mr Diwnycz. He said he would not seek to amplify the grounds and added that there was “not a great deal I can throw at it”. Whilst Mr Diwnycz was not formally conceding the appeal it cannot be said that he was making any strenuous attempt to persuade me of the merits of the grounds. In the event it was not necessary for me to hear from Ms Frantzis.

12. Of course, the use of fraud in the context of immigration and asylum applications is a very serious matter. It is entirely appropriate that the Secretary of State and entry clearance officers undertake investigations once there is any serious suggestion as to fraud. It might even be appropriate in some cases at least, where fraud may be demonstrated to the necessary standard, for there to be criminal prosecutions. Nothing I am about to say is to be taken as any indication that I do not view fraud as being serious.

13. But the issues for the Upper Tribunal, as touched upon, were narrow ones. It was accepted by all parties that the sole issue was whether the tribunal had erred in deciding as it had with respect to the third limb of the *Ladd v Marshall* test. Nothing else was before me.

14. The tribunal cogently explained from paragraph 27 to paragraph 29 of its written reasons of 28 September 2017, why it thought the third limb of the test was not met. Essentially, what it was saying was that the evidence or at least the key evidence could, as a matter of fact, have been obtained by the Secretary of State/entry clearance officer with reasonable diligence. In the circumstances it was open to the tribunal to so conclude.

15. I accept that for administrative reasons it will not often be the case that the sorts of enquiries the tribunal had in mind and which it was said the Secretary of State/entry clearance officer could have undertaken at the time will actually be undertaken. I accept that, for administrative reasons and reasons which may be connected with cost and convenience, it might only be appropriate to make specific enquiries where, as here, a particular trend has been identified. But all of that is really a different question to that of whether or not the evidence could have been obtained, had it been sought, with reasonable diligence. So, in that sense, it seems to me that the grounds ask the wrong question.

16. I have concluded, therefore, that there was nothing remotely perverse about the tribunal’s decision or the reasoning which accompanied it. It was entitled to conclude as it did for the reasons it gave.

17. In the circumstances of this particular case I have concluded, and for the avoidance of doubt I do not regard myself as setting any form of precedent at all in respect to other cases, that the tribunal did not make an error of law. I would also stress, insofar as it might be relevant, that the converse was not strenuously argued before me.

18. This appeal to the Upper Tribunal then is dismissed.

Decision

The decisions of the First-tier Tribunal did not involve the making of any error of law. Those decisions shall stand.

Signed:
Upper Tribunal Judge Hemingway

Date: 7 August 2018

Anonymity

Unless and until a tribunal or court directs otherwise, each claimant is granted anonymity. No report of these proceedings shall directly or identify any claimant or any member of any claimant's family. This direction applies to the claimants and to the Secretary of State and the entry clearance officer. Failure to comply could lead to contempt of court proceedings.

Signed:
Upper Tribunal Judge Hemingway

Date: 7 August 2018

TO THE RESPONDENT FEE AWARD

I make no fee awards.

Signed:
Upper Tribunal Judge Hemingway

Date: 7 August 2018