



**Upper Tribunal
(Immigration and Asylum Chamber)
PA/13236/2018**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Glasgow
On 13th September 2019**

**Decision & Reasons
Promulgated On 1st October
2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE DEANS

Between

**JB
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Winter, Advocate, instructed by Jones Whyte LLP
For the Respondent: Mr A Govan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This appeal is brought against a decision by Judge of the First-tier Tribunal Debra Clapham dismissing an appeal on protection and human rights grounds.
2. The appellant claims to be an undocumented Bidoon from Kuwait. The Judge of the First-tier Tribunal did not consider the appellant's evidence to be credible. The judge was not satisfied that the appellant was an undocumented Bidoon or that he was of any interest to the Kuwaiti authorities.

3. Permission to appeal was granted by the Upper Tribunal on two main grounds. The first of these was that the judge erred over a material fact, and therefore erred in law, in identifying an apparent inconsistency in the appellant's evidence relating to his employment in the black market. The second ground, identified on the initiative of the Upper Tribunal, was that the judge had arguably erred in assessing the appellant's evidence either by procedural unfairness or by applying a higher standard of proof. This error was suggested by the use of phrases such as: "I cannot understand"; "I cannot see"; "I really do not understand his account"; and "I am also at a complete loss to understand...". Reference was made to the case of ME (Sri Lanka) [2018] EWCA Civ 1486 (*per* Lewison LJ at paragraph 18).

Submissions

4. For the appellant, Mr Winter referred me, in particular, to paragraph 102 of the decision on the issue of the appellant's employment. The appellant had never said he was working in any official capacity. He was working unofficially on a farm and was not paid money for his work. As set out in the application for permission to appeal, there was a further error over the judge's treatment of the appellant's evidence about his father's use of a car. The judge failed properly to address the appellant's account of his detention and ill treatment. In addition, the phraseology used by the judge amounted to something more damaging to the appellant's case than could be characterised as a matter of style.
5. Mr Govan submitted that the judge was entitled to make assumptions based on a lack of evidence or a lack of explanation from the appellant. The country information showed that undocumented Bidoons were unable to work. The language used by the judge was a matter of style.

Discussion

6. The difficulty arising from this decision is encapsulated in paragraph 102, which is expressed in the following terms: "The appellant in his asylum interview and in his witness statement was inconsistent about whether or not he worked. In his witness statement he clearly says that he was working on a farm for Mr Mohammed though admittedly he says he was not paid. Prior to that he appears to have been working with his father in the buying and selling of sheep and yet in his screening interview he said he had no occupation. Even leaving that discrepancy aside he was clearly working. That appears to have been a regular occupation of his despite the fact that he says he was working in the black market. As stated above however undocumented Bidoon are not able to work. He appears according to his own evidence to have regularly attended at the market and I cannot see how he would be able to do this if he was not documented. He also says that his father had the stall in the market and it was implied that his father is also undocumented. I

cannot understand how he would have been able to have a stall in these circumstances.”

7. The finding in this paragraph that the appellant was inconsistent about whether or not he worked is central to, and prominent among, the judge’s adverse credibility findings but it is not based upon the evidence and is not supported by adequate reasons.
8. As was pointed out in the application for permission to appeal, the appellant has never denied working and has consistently stated that he worked. Contrary to what was said by the judge, there was no inconsistency in the evidence about whether or not the appellant worked in Kuwait. However, he never said he worked in any officially recognised capacity which required some form of documentation. At paragraph 102 the judge failed to distinguish between the physical activity of working and official recognition or sanctioning of that activity. Similarly the judge did not distinguish between the physical activity of working and the concept of an occupation. The judge increases her confusion by describing the appellant as appearing to have a “regular occupation” although claiming to work in the “black market”. It is far from clear what the judge means in this context by a “regular occupation”.
9. The judge noted at paragraph 101 of her decision that undocumented Bidoon “are prevented from working”. It does not follow from this that, as the judge seems to assume in paragraph 102, undocumented Bidoon do not work illegally in the black market.
10. I agree with Mr Winter that there is no basis in the evidence for the judge’s finding to the effect that the appellant has been inconsistent about whether or not he was working in Kuwait. The appellant’s evidence was that he was working but not doing so legally. The judge has confused her findings by failing to distinguish clearly between work which is done illegally and work which is carried out legally. She has made a significant adverse finding which is not supported by the evidence. This amounts to an error of law.
11. Before leaving paragraph 102 I think it is also appropriate to refer to the judge’s use of language. She states that she “cannot see” how the appellant would have been able to attend the market regularly if he was not documented. She adds that she “cannot understand” how the appellant’s father would have a market stall.
12. As is pointed out in the application for permission to appeal, if there was something in the evidence which the judge did not understand it was open to her to ask clarifying questions at the hearing. Indeed, I note that in his witness statement the appellant provided explanations for matters queried by the respondent. It is

further pointed out in the grant of permission to appeal that where the question was whether there was a real risk to the appellant on return “findings expressed in negative terms such as ‘I cannot see’ and ‘I cannot understand’ are terms that do not squarely confront the relevant, indeed crucial, question.”

13. There is one further point raised by Mr Winter to which I will refer. Mr Winter stated that the Judge of the First-tier Tribunal did not address the appellant’s claim to have been detained and ill-treated. The judge dealt very briefly with these matters at paragraphs 110-113, relying to an extent on the adverse credibility findings she had already made in respect of other issues, such as whether the appellant was working. In these circumstances it is difficult to be satisfied that the judge properly addressed her mind to these issues or provided adequate reasons for her conclusions.
14. While other adverse credibility findings were also challenged on behalf of the appellant, it is not necessary for me to consider these arguments further. The judge’s finding which was central to her assessment of credibility, namely that the appellant was inconsistent about whether he was working, is flawed by an error of law and cannot stand. Without this finding I cannot be satisfied that the judge’s overall assessment of credibility would have remained the same. The proper course is for the decision of the First-tier Tribunal to be set aside. The appeal will be remitted to the First-tier Tribunal with no findings preserved to be reheard before a differently constituted tribunal.

Conclusions

15. The making of the decision of the First-tier Tribunal involved the making of an error of law.
16. The decision is set aside.
17. The appeal is remitted to the First-tier Tribunal with no findings preserved to be reheard before a differently constituted tribunal.

Anonymity

The First-tier Tribunal did not make a direction for anonymity. In order to preserve the positions of the parties until the appeal is decided I make a direction in the following terms. Unless or until a court or tribunal directs otherwise no report of these proceedings shall identify either directly or indirectly the appellant or any member of his family. This direction applies to the appellant and the respondent. Failure to comply with the direction may give rise to proceedings for contempt of court.

M E Deans
September 2019
Deputy Upper Tribunal Judge

27th