Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/11406/2016**

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision & Reasons Promulgated**
On 2 May 2018	**On 9 May 2018**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SAAD MOHAMMED El-ENEZI

Respondent

Representation:

For the Appellant: Mrs M O'Brien, Senior Home Office Presenting Officer
For the Respondent: Mr U Aslam, of McGlashan MacKay, Solicitors

DETERMINATION AND REASONS

1. The parties are as above, but the rest of this decision refers to them as they were in the First-tier Tribunal.

2. For reasons given in her decision dated 5 October 2016, the SSHD rejected the appellant's protection claim.

3. FtT Judge Debra Clapham heard the appellant's appeal on 29 June 2017, and allowed it by a decision promulgated on 10 November 2017.

4. The SSHD has permission to appeal to the UT on the following grounds:

> The appeal is allowed on the basis that the appellant is an undocumented Bidoon from Kuwait. It is not disputed that such a finding leads to the appellant succeeding on asylum grounds (as well as on human rights grounds). It is unclear, however, what reasons lead the judge to this finding.

> The judge's findings and reasons are found at [108] – [113]. At [108] the judge finds that she does not accept some of the respondent's concerns. At [109] she accepts that the appellant may well have attended the demonstration but gives no reason and then contradicts herself by concluding that she is "unable to reach a conclusion one way or the other". At [110] the judge deals with the evidence of the two supporting witnesses, who are given credit for travelling to attend the hearing, but it is clear that their evidence adds nothing substantively to the claim. It is simply not clear what evidence the judge relies on to allow the appeal. The burden of proof is on the appellant and, although the standard of proof is relatively low, the burden still needs to be discharged.
>
> At [113] the judge rejects the respondent's reliance on section 8 (the appellant having remained for 6 months in France without seeking asylum) on the basis that it is "not a stand-alone section". That is not a lawful basis for not taking account of section 8. Failure to do so renders the judge's credibility assessment (if she makes one) fundamentally flawed.

5. The appellant has filed a rule 24 response, along these lines:

   (i) At [108] the judge disagreed with the respondent, finding that the appellant's knowledge of the Bidoon did support his claim, and that his attendance at "diwans", being social gatherings, was not a reason for his historical knowledge not being greater.

   (ii) At [110] the judge found it clear that the two witnesses were undocumented Bidoons and inconceivable they would travel from London to give evidence for a Kuwaiti citizen. Each of them "described having known the appellant in Kuwait as a member of the undocumented Bidoon community".

   (iii) The judge thus accepted the evidence of the witnesses, and dismissed the credibility points of the SSHD, which led her to conclude that the appellant is an undocumented Bidoon.

   (iv) The challenge to [109] was based on an erroneous reading. There was no self-contradiction. In any event, it was irrelevant whether the appellant attended the demonstration or was arrested. It was enough for him to be found to be an undocumented Bidoon.

   (v) The judge's approach to section 8 was consistent with *JT (Cameroon)* [2008] EWCA Civ 878. Section 8 factors were capable of damaging credibility but did not inevitably do so.

6. The further points I noted from the submissions of Mr Aslam were these.

   (i) The decision had to be read as a whole. Findings and reasons were not to be derived only from the section under that heading at [108] – [113]. There was almost a complete transcript of the evidence at [16] – [92], which showed the depth of the decision-making process.

   (ii) The finding at [108] was plainly that the appellant did have the knowledge to be expected of him if his claimed identity was true, and that was enough.

   (iii) Mr Aslam accepted (correctly) that inability to reach a conclusion at [109] had to be taken as the appellant failing to prove those contentions. However, those were not matters he had to establish.

(iv) The narrative at [110] was to be read as an implicit finding that the evidence of the two witnesses was accepted.

(v) The terms of [113] were compatible with the correct approach to section 8 issues.

7. I reserved my decision.

8. The respondent in the refusal decision at ¶16 thought the appellant at interview had not shown the knowledge to be expected, while the judge at [108] thought he had. Neither the respondent nor the judge gave any very specific reason; perhaps none could be found. Neither representative referred in the UT (nor, apparently, in the FtT) to the questions and answers on which those views were based. Having done so, this appears to be a borderline question, on which the judge was entitled to come down on the side she did, but not very obviously decisive one way or the other.

9. I am not persuaded that [109] is to be read as a finding of a realistic possibility that the appellant was at the demonstration, but failed to show he was arrested. It declines to make a finding.

10. It is always possible that there are passages of evidence which a judge cannot resolve one way or the other. If so, it is more useful to say that the party with the onus has failed to discharge it.

11. It was correctly argued for the appellant that proof of this assertion was not crucial; but it was also a matter weighing in the overall credibility assessment.

12. I am unable to read into [110] a finding that the appellant was supported by credible evidence of two witnesses who knew him in Kuwait as an undocumented Bidoon (which would of course have been very significant). I was not referred to any such narrative of their evidence elsewhere in the decision, and cannot identify it. The comment about it being inconceivable they would travel from London to give evidence for a Kuwaiti citizen is followed by an appraisal of their "substantive evidence" which finds it to lead nowhere.

13. Judges should be given some latitude in how they express their decisions, and should be presumed to be familiar with key provisions of their jurisdiction. However, the approach to section 8 in this decision cannot be reconciled with its plain terms.

14. The judge states her conclusion at [111]: "… the appellant is an undocumented Bidoon". There is then [112], which is uncontentious, and [113]:

> For the sake of completeness I have considered whether section 8 has an effect on the claim in relation to credibility. I am satisfied that it does not on the basis that it is not a stand-alone section.

15. The refusal letter referred to matters relevant to section 8 at ¶50, and again under the explicit heading "section 8" at ¶20-21, referring also to *JT*.

16. Section 8(1) requires the tribunal "in determining whether to believe a statement made by … a person who makes an asylum claim or a human rights claim … to take

account, as damaging to the claimant's credibility, of any behaviour to which this section applies".

17. Section 8 (4) applies that requirement to "failure to take advantage of a reasonable opportunity to make an asylum claim or human rights claim while in a safe country".

18. The judge might have said, in reaching a rounded conclusion, that having taken section 8 matters into account they were not fatal to credibility; section 8 is not a "stand-alone section" in that sense. She could not lawfully reach her conclusion in advance of and in isolation from section 8, and then deal with it only "for the sake of completeness" i.e. by determining whether to believe the appellant without taking any account of behaviour which the section obliged her to take into account.

19. Without that error, the decision might have been on the margins of adequacy of reasoning; but taking matters raised by the SSHD's grounds as a whole, the decision cannot safely stand.

20. I note the long delay between the hearing and the decision, for which the judge gives no explanation. That matter was not taken as a ground of challenge, but it may have contributed to the lack of clarity in the eventual analysis.

21. The decision of Judge Clapham is set aside, and stands only as a record of what was said at the hearing before her.

22. There is a presumption that the UT will proceed to remake decisions, of which parties are reminded in directions issued with the grant of permission. However, the nature of this case is such that it is appropriate under section 12 of the 2002 Act and Practice Statement 7.2 to remit to the FtT for an entirely fresh hearing.

23. The member(s) of the FtT chosen to consider the case are not to include Judge Clapham.

24. No anonymity order has been requested or made.

2 May 2018
Upper Tribunal Judge Macleman