Max Planck Institute
for Social Anthropology
Department 'Law & Anthropology'

Discrimination Amounting to Persecution in the Case of NM (Documented/Undocumented Bidoon: Risk) Kuwait CG [2013] UKUT 00356 (IAC)

Question(s) at stake:

Whether Bidoon are at real risk of persecution in Kuwait; whether there is a disparity in the way documented and undocumented Bidoon are treated; and which key document forms the basis of such a distinction.

Outcome of the ruling:

The appeal was allowed. Generally, only undocumented Bidoon are at real risk of persecution in Kuwait, and the key document to distinguish between documented and undocumented Bidoon is the "security card".

Topic(s):

- Immigration and Asylum

Keywords:

- Real Risk of persecution
- Statelessness
- Non-discrimination
- Asylum seeker

Tag(s):

- Bidoons

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Country:

United Kingdom

Official citation:

NM (documented/undocumented Bidoon: risk) Kuwait CG [2013] UKUT 00356 (IAC)

Link to the decision:

https://tribunalsdecisions.service.gov.uk/utiac/2013-ukut-356

ECLI:

No ECLI number / ECLI number unknown

Date:

30 January 2013

Jurisdiction / Court / Chamber:

Upper Tribunal (Immigration and Asylum Chamber)

Remedy / Procedural stage:

Appeal to the Upper Tribunal (Immigration and Asylum Chamber)

Previous stages:

- First-tier Immigration and Asylum Tribunal (no date)
- Secretary of State decision (1 March 2011)

Subsequent stages:

No information found.

Branches / Areas of law:

Asylum law and human rights

Facts:

The appellant, a Bidoon from Kuwait, was born on 5 August 1961. After living part of her adult life in Kuwait (no date or other details are provided in the decision), the appellant illegally entered the UK and made an application to remain on the grounds of her need for international protection in light of the Refugee Convention and Article 3 of the European Convention on Human Rights (i.e., an application for asylum, humanitarian protection, and discretionary leave) (para. 4). The Secretary of State refused her application, and the appellant lodged an appeal with the First-tier Tribunal. The First-tier Tribunal also dismissed the case, but at the subsequent stage it gave permission to appeal to the Upper Tribunal.

In short, the appellant presented her case, claiming that her status as a Bidoon put her at genuine risk of persecution in Kuwait. She further elaborated that her husband, who is also a Bidoon, had faced multiple arrests and was currently in detention. Her son had applied for international protection in Italy. In addition, her brother had been granted asylum in the UK on the grounds that he was an undocumented Bidoon and, as such, faced a real risk of persecution (paras. 1, 4--5).

The Secretary of State argued that the appellant's case should be dismissed because there were some gaps and inconsistencies in her evidence (paras. 69, 71). However, the appeal primarily focused on determining if there is a genuine threat of persecution faced by the Bidoon in Kuwait, as well as examining any disparities in treatment between documented and undocumented Bidoon. Additionally, the key document that forms the basis for such a distinction was a key point of consideration.

Ruling:

After reviewing extensive country conditions reports and the evidence provided by the country expert witness, the Upper Tribunal distinguished different groups of people with different rights in Kuwait, namely:

(1) Citizens (including some formerly stateless Bidoon who got citizenship) with ID cards, who have access to rights and benefits (para. 82).

(2) Bidoon in possession of "security cards" (also called "green cards"), who registered with the Bidoon committee between 1996 and 2020 (para. 83). The security card is not an ID, but its holders enjoy some rights, such as the right to buy private health insurance with limited coverage, the right to attend private schools (although these schools are of lower quality than the state schools and the fees are a problem for some) (paras. 83, 84), and limited access to the labour market but "with no protection for their right to work" (para. 85).

(3) Unregistered Bidoon, that is Bidoon without a security card. This group has no access to basic rights, and they are stateless (para. 87).

Therefore, there is key difference between documented and undocumented Bidoon on the basis of whether or not they have a security card -- and not on the basis of "civil identification documents" as the court had found in the case of *HE (Bidoon -- Statelessness -- Risk of Persecution) Kuwait CG* [2006] UKAIT 00051 (para. 91).

The Upper Tribunal found that registered Bidoon do not face a real risk of persecution or breach of their human rights, although they do encounter some discrimination. By contrast, it found that undocumented Bidoon do face such a risk (para. 100). In this regard, the Upper Tribunal reasoned that "[f]or discrimination to amount to persecution, measures must involve persistent and serious ill-treatment without just cause, and must be of a substantially prejudicial nature and must affect a significant part of the individual's or group's existence, to the extent that it would make their life intolerable if they were to return" (para. 93).

In the specific case of the appellant, the Upper Tribunal found that despite some minor inconsistencies in her testimony, the core account was credible and she was an undocumented Bidoon from Kuwait. Accordingly, in light of the conclusions on the country background, she was entitled to refugee status (para. 116).

Main quotations on cultural or religious diversity:

- The country expert "said that with respect to [the Bidoon] in particular there was a gap between the law and its application in Kuwait which was greater than in other countries." (para. 8)
- "For example, with regard to healthcare, it was said by the Home Office that in recent years this matter had been resolved, but in fact the Bidoon did not get access to free government schools, reference being made to the human rights report of June 2012 and the OGN of last week. In the latter report the Home Office went beyond the official government views by consulting the community and INGOs who had acknowledged that healthcare was not available free of charge and it had to be private, and they were not allowed to work. They could not have birth certificates or marriage certificates. It was a very autocratic tribal system." (para. 8)
- The country expert "was asked whether there was any reason why the Kuwaiti government would say they were making progress with respect to the Bidoon if they were not. He said that they had given an answer and the main worry in Kuwait was security. The Bidoon had previously comprised 80% to 85% of the army [during the 1980s, before any distinction between documented and undocumented Bidoon was introduced by Kuwait] and they were thought to be a security risk for Kuwait, though many had fought for Kuwait so that was not the case, he thought. It was a question of individuals and not tribal risk. The issue of security was the security of the ruling family. They did not want the Bidoon any more and sought to reduce or eradicate the number of Bidoon in Kuwait." (para. 10)
- "Mr Shiblak was asked how the Bidoon were regarded by the general population of Kuwait. He said that discrimination against the Bidoon was institutional rather than by the public." (para. 13)
- "The Kuwaiti government maintains that the vast majority of Bidoon are actually nationals of other countries and therefore do not have legitimate claims to Kuwaiti nationality. In effect this amounts to a denial that they are

stateless." (para. 31)

- "[The country expert] emphasises that the Bidoon are considered by the Kuwaiti government to be 'illegal residents' rather than stateless persons. He says that they are barred from access to government services such as those offered free of charge to Kuwaiti nationals including education and medical care, and that the only option left to the Bidoon families in education is to send their children to private schools which they cannot afford. Unlike Kuwaiti nationals they do not have free medical care and do not have the financial capabilities of foreigners working in Kuwait who can afford private medical care and to send their children to private schools." (para. 46)

Main legal texts quoted in the decision:

- Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention)
- European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 (adopted 4 November 1950, entered into force 3 September 1953) ETS 5 (ECHR)

Cases cited in the decision:

- *BA and others (Bedoon -- Statelessness -- Risk of Persecution) Kuwait CG* [2004] UKIAT 00256
- *NM (Documented/Undocumented Bidoon: Risk) Kuwait CG* [2013] UKUT 00356 (IAC)
- *EM (Lebanon) (FC) (Appellant) v Secretary of State for the Home Department (Respondent)* [2008] UKHL 64
- *ST (Ethnic Eritrean -- Nationality -- Return) Ethiopia CG* [2011] UKUT 252 (IAC)
- *K (Returnees -- Records -- IFA) Turkey CG* [2004] UKIAT 00312
- *Gashi (Asylum; Persecution) Kosovo* [1996] UKIAT 13695

Commentary

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According to the HO, the term Bidoon refers to a minority group in Kuwait, most of whom are stateless as they were not granted citizenship at the time of Kuwait's independence from the UK in 1961: "Bidoon is used as an umbrella term for several groups whose claimed nationality is not accepted by the Kuwaiti state. A Kuwaiti Bidoon by descent either from a stateless or foreign father, or whose ancestors failed to apply for or gain nationality will generally be stateless. A Kuwaiti Bidoon who has a claim to another nationality will not be stateless" (Home Office 2021: para. 6).

As stated by Lambert, the UK case law on the treatment of Bidoon's applications for international protection sheds light on the exceptional situation of this group and their ongoing hardships in Kuwait more effectively and forcefully than simply acknowledging their inclusion in the broader group of stateless individuals (Lambert 2014: 46). This is confirmed in the reasoning of this Country Guidance case, where the Upper Tribunal followed *BA and others (Bidoon -- Statelessness -- Risk of Persecution) Kuwait CG* [2004] UKIAT 00256 (para. 64), which found that the denial of nationality to the Bidoon resulted in their exclusion from various political, economic, social, and cultural rights, and this had been a conscious policy decision which the government adopted and implemented (Fripp 2016: 304).

The case of *NM (Documented/Undocumented Bidoon: Risk) Kuwait CG* [2013] UKUT 00356 (IAC) is also of particular importance because it is one of few UK cases where the denial of socio-economic rights has been found to be so systematic and widespread towards a particular social group as to amount to persecution (Clayton and Firth 2021: 454). The issue of when cumulative acts of discrimination amount to persecution often raises challenges in the context of the determination of refugee status, as the Refugee Convention was drafted with the intent to protect people from persecution and not from the denial of socio-economic rights (ibid.). In particular, the Court elaborated that:

"For discrimination to amount to persecution, measures must involve persistent and serious ill-treatment without just cause, and must be of a substantially prejudicial nature and must affect a significant part of the individual's or group's existence, to the extent that it would make their life intolerable if they were to return." (para. 93)

However, it should be pointed out that what distinguished this case from many others was that the denial of nationality and lawful residence status was part of the discriminatory measures and a crucial part of the judicial assessment -- a condition that continuously exposes the Bidoon to danger of being detained, arrested, and deprived of other rights. Additionally, this case was particularly well presented and supported by a vast amount of evidence on the relevant law and practice, including expert evidence.

There has not been any new leading case on the treatment of Bidoon since *NM*, which remains good law.

Interestingly, the case law on the Bidoon must be distinguished from that on the stateless Palestinians (Lambert 2014: 46). For instance, in *KK IH HE (Palestinians -- Lebanon) v Secretary of State for the Home Department*, 29 October 2004, UKAIT (para. 101), the UK Asylum Immigration Tribunal held that foreigners and stateless persons' enjoyment of fewer rights compared to those enjoyed by nationals does not amount to persecution (Lambert 2014: 46). Following this case, in *MM and FH (Stateless Palestinians) v SSHD*, UKAIT, 4 March 2008, the UK Asylum and Immigration Tribunal found that the limitations in the enjoyment of social, economic, and cultural rights placed by the Lebanese authorities on stateless Palestinians living in their country were based on security reasons rather than race. Although the two Palestinian appellants would face very difficult conditions upon return to Lebanon, such treatment was due to their statelessness and their practical inability to return to their homeland in Palestine. Palestinian statelessness was a situation caused by the "state of affairs that exists in relation to Palestinians, outside of the control of the Lebanese authorities" (para. 136). The UK Asylum and Immigration Tribunal found that there was not enough evidence that the Lebanese authorities were treating Palestinians differently from

other foreigners, and therefore it could not conclude that they engaged in systematic discrimination against Palestinians to warrant a grant of international protection (Lambert 2014: 47).

Literature related to the main issue(s) at stake:

- Clayton, Gina and Georgina Firth. 2021. *Immigration and Asylum Law*. Oxford: Oxford University Press.
- Home Office. 2021. "Country Policy and Information Note. Kuwait: Bidoons", version 3.0, available at <https://assets.publishing.service.gov.uk/media/6065c235e90e074e4f4da26d/Kuwait_Bidoons_-_CPIN_v3.0_-_April_2021_-_ext.pdf> accessed 15 January 2023.
- Fripp, Eric. 2016. *Nationality and Statelessness in the International Law of Refugee Status*. Oxford and Portland: Bloomsbury.
- Lambert, H??lene. 2014. "Refugee Status, Arbitrary Deprivation of Nationality, and Statelessness within the Context of Article 1A(2) of the 1951 Convention and its 1967 Protocol relating to the Status of Refugees". Geneva: UNHCR.

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