Upper Tribunal
(Immigration and Asylum Chamber)

RR (refugee – safe third country) Syria [2010] UKUT 422 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 5 January 2010	.....

Before

SENIOR IMMIGRATION JUDGE STOREY
SENIOR IMMIGRATION JUDGE LATTER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RR

Respondent

Representation:

For the Appellant: Mr J Gulvin, Home Office Presenting Officer
For the Respondent: Miss L Appiah of Counsel instructed by Charles Annon & Co.

1) Article 32 of the Refugee Convention applies only to a refugee who has been granted leave to enter and to stay in the United Kingdom in accordance with para 334 of the Immigration Rules: Secretary of State for the Home Department v ST (Eritrea) [2010] EWCA Civ 643 applied.

2) As Article 1A(2) of the Refugee Convention itself makes clear, in cases in which a claimant has more than one nationality, he will not qualify as a refugee if he can avail himself of the protection of another country of which he is a national.

3) In an asylum appeal in which the claimant has only one country of nationality (country A), it is permissible for the Secretary of State to propose more than one country of destination (country B etc): see JN (Cameroon) [2009] EWCA Civ 643 [23].

4) The question then, is whether by reference to A, the country of nationality, the claimant is a refugee. If he is not, the Refugee Convention does not apply to him. If he is, his appeal falls to be allowed only if his return to country B would be contrary to Article 33 of the Refugee Convention.

5) In any event, possible removal to a country not specified in the notice of decision under appeal is not a matter for the immigration judge.

DETERMINATION AND REASONS

1. The respondent (hereafter "the claimant") is a national of Syria born on 21 March 1977. She is married to a national of Algeria. They have three children. On 5 June 2008 the Secretary of State made a decision to remove her from the United Kingdom having decided to reject her asylum claim. The Secretary of State also indicated that the intention was to remove the claimant either to Syria or Algeria. She appealed. In a determination notified on 25 July 2008 Immigration Judge (IJ) R B L Prior allowed her appeal on asylum, humanitarian protection and Article 3 ECHR grounds. That was on the basis that she had satisfied him she had a well-founded fear of persecution in Syria and that she was "a refugee from Syria with no prospect of obtaining the protection of a country other than the United Kingdom". By the time of the hearing before the IJ, the Secretary of State had clarified that the intention was to issue directions for her removal to Algeria.

2. The reason why Algeria was identified as a removal destination stemmed from the claimant's threefold links with that country, through her being married to an Algerian national, through having children who were Algerian nationals and through having lived there for some nine months immediately prior to flying to the UK in September 2007.

3. The Secretary of State was successful in obtaining an order for reconsideration. Following a hearing on 29 October 2008 before SIJ Storey the Tribunal found that the IJ had materially erred in law in several respects. In deciding that the claimant could not be removed to Algeria

the IJ had relied merely upon the acceptance by the Presenting Officer that "he had no evidence to place before me to satisfy me that the claimant had any prospect whatsoever of obtaining entry to Algeria". That wrongly placed the burden of proof on the Secretary of State. The IJ had also failed to understand that in deciding the issue under s 84(1)(g) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") the question was purely a hypothetical one undertaken on the assumption that the appellant will be returned: see GH [2005] EWCA Civ 1182. The IJ should not have treated the issue of whether or not an appellant/claimant had the necessary travel documentation as material, since it was a consideration that only became relevant at the stage when the Secretary of State issued (actual) removal directions. (We would observe that in HH and Others (Somalia) [2010] EWCA Civ 426 the Court of Appeal has confirmed that travel documentation is not a material issue: see [83]; also MS (Palestinian Territories) v Secretary of State for the Home Department [2010] UKSC 25, 16 June 2010, [26]-[27]).

4. The IJ also erred in allowing the appeal on both asylum and humanitarian protection grounds, as they are mutually exclusive.

5. The case was listed for a stage 2 determination, the parties being directed to adduce relevant authorities on the issue of whether a person accepted as being a refugee was entitled to the protection of the Refugee Convention (Article 32(1) in particular) in the context of a s 84(1)(g) ground of appeal, and to furnish information about Algerian law on family reunion.

6. Much of the hearing before us was devoted to submissions relating to Articles 33 and 32(1). Article 33 (headed "Prohibition of expulsion or return ("*refoulement*") states:

> "1. No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particular serious crime, constitutes a danger to the community of that country."

7. Article 32, headed "Expulsion", states:

> "1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.
>
> 2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require,

the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

3. The Contracting States shall allow the application of the safe third country concept shall be subject to rules laid down in national legislation, including "rules requiring a connection such a refugee a reasonable period within which seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary."

8. Although at the date of the hearing we sat as judges of the Asylum and Immigration Tribunal (AIT), we must now complete it as judges of the Immigration and Asylum Chamber of the Upper Tribunal (UTIAC). The effect of legislative changes in force from 15 February 2010 is that our task now is to remake the decision.

9. We pause before going further to make three observations. First, we are not concerned here with every category of case in which immigration judges are required to consider a claimant's situation in more than one country. In particular, we are not dealing here with the situation that arises when a claimant has dual or multiple nationality. In that category of case, even if a person can show he has a well-founded fear of persecution in one of his countries of nationality, he will not qualify as a refugee if he can avail himself of the protection of another country of which he is a national: see Sedley J in R v A Special Adjudicator, ex p Abudine [1995] Imm AR 60 at 63. As stated in the 1979 UNHCR Handbook at [106]:

> "In the case of a person who has more than one nationality, the term "the country of his nationality"[in Article 1A(2) of the Refugee Convention] shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national."

10. Second, different considerations apply in cases (such as the instant case) in which the claimant has only one country of nationality but where the Secretary of State in the course of the appeal proceedings has proposed more than one country of destination. The fact that the respondent in this case has proposed in a notice first one, then another country of removal does not affect our jurisdiction to decide the appeal or impair the appellant's ability to pursue her appeal. As stated by Richards LJ in JN (Cameroon) [2009] EWCA Civ 643 at [23]:

> "the required statement in the notice is no more than a proposal as at the time of the notice: it is a statement of the proposed destination, and more than one destination may be proposed. What is and is not ultimately decided on as the actual destination and what is permissible

as an actual destination, may depend upon the outcome of any appeal process and any further consideration by the Secretary of State."

11. Third, the type of case with which we are concerned here, involving intended expulsion of a refugee, tends only to arise as a matter of international state practice in situations where the person concerned has some connection with the third state which is said to be safe, based on nationality, prior residence, marriage, entitlement to residence, historical ties etc. it does not arise simply because there is a safe third country somewhere. Within the EU, the requirement of a connection is now stipulated in Council Directive 2005/84/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status at Article 27, which states that the application of the safe third country concept shall be subject to rules laid down in national legislation, including "rules requiring a connection between the person seeking asylum and the third country concerned on the basis of which it would be reasonable for that person to go to that country" (Article 27(2)(a)).

12. Miss Appiah accepted that it had been clarified through and in the course of the appeal process that the proposed country of removal of the claimant had changed from Syria to Algeria.

13. As things have transpired the principal arguments between the parties concerning this type of case have now been resolved by the judgment handed down by the Court of Appeal on 9 June 2010 in Secretary of State for the Home Department v ST (Eritrea) [2010] EWCA Civ 643 (hereafter ST (Eritrea)). The Tribunal being made aware shortly after the hearing that the Court of Appeal was soon to issue judgment in this case also explains some of the considerable delay on our part in promulgating this decision. Even though both parties were aware of the concurrent proceedings in the Court of Appeal – and so must have expected that we might delay to await their judgment – we do regret the overall time this case has taken. We should also add that following the handing down of judgment in ST (Eritrea) we did consider whether it was appropriate to ask the parties for their submissions on its implications for this appeal. In the end we decided there would be no point (and only more delay). ST (Eritrea) is binding on us. Further, although Miss Appiah before us relied heavily on submissions which were subsequently rejected in ST (Eritrea); she also put forward a secondary submission to the effect that if those were wrong, the claimant was still entitled to succeed by virtue of the risks she faced in Algeria. In the event we have found we agree with her that the claimant is entitled to succeed on the basis of this secondary argument, which does not depend on the Article 32(1) question.

Syria

14. The Secretary of State does not challenge the IJ's finding that the claimant has a well-founded fear of persecution in Syria. She also accepts that the claimant faces persecution there for a Refugee Convention reason, namely political opinion. In essentials the IJ found that she faced a real risk of

serious harm there because she was the daughter of a long-standing and well-known member of the Muslim Brotherhood who had suffered imprisonment and torture at the hands of the Syrian authorities. The IJ attached significant weight to "the detailed evidence of the extensive persecution of the claimant's family in Syria, prior to their flight to Turkey" and the claimant's evidence that her sister had been imprisoned on return to Syria.

Algeria

15. It is as well to delineate before going further the IJ's contrasting findings in respect of the claimant's experiences in Algeria and at the hands of the Algerian authorities. The IJ did not accept her evidence as to her experiences in Algeria following her arrival in that country on 20 January 2007. She had claimed that she had attracted the adverse attention of the Algerian authorities by using a false Syrian passport. She claimed that this led to her being questioned and subsequently arrested, raped and blackmailed and to her seeking funds to bribe two members of the Algerian security forces. In turn this led, she claimed, to her husband's family pressurising him to abandon and disown her as someone who had dishonoured the family. This account, the IJ decided, was not credible. In the decision finding a material error of law the Tribunal directed that the IJ's rejection of this part of the evidence was not to be revisited at the next hearing and for our part we are satisfied that this direction should stand. Having said that, both parties agreed with us, especially in the light of the new evidence from the Honorary Legal Advisor to the British Consulate in Algeria, that it had to remain for us to decide whether, even taking these adverse findings as a given, the appellant would be at risk of indirect *refoulement* from Algeria to Syria.

Discussion

16. Mr Gulvin confirmed that it was conceded by the Secretary of State at least for the purposes of this appeal that the claimant fulfilled all the requirements of Article 1 of the Refugee Convention and was thereby properly to be considered a refugee. Pausing there, we note that in so conceding Mr Gulvin was doing no more than reflecting the correct legal position: regulation 2 of the Refugee or Person in Need of International Protection Regulations 2006 defines 'refugee' as meaning "a person who falls within Article 1A of the Geneva Convention and to whom regulation 7 [which deals with exclusion] does not apply."

17. ST (Eritrea) concerned a national of Eritrea who had been found by an Adjudicator in February 2005 to possess a well-founded fear of persecution in Eritrea. The Adjudicator had nevertheless dismissed her appeal because he considered she could safely be returned to Ethiopia where she had formerly resided. On reconsideration, however, his decision was found to be wrong in law and the AIT decided to substitute a decision allowing her appeal. When the Secretary of State subsequently decided to issue fresh

removal directions for Ethiopia, the appellant sought judicial review of the refusal to implement the decision of the Tribunal. On judicial review the appellant argued successfully before Deputy High Court Judge Pitchford that as the appellant had been found by the Tribunal to be a refugee and the Secretary of State was bound by the unappealed decision of the AIT, the decision of the Secretary of State to decline to grant refugee status (because he considered she could be returned safely to Ethiopia) should be quashed and the Secretary of State should be ordered to recognise ST as a refugee and grant her leave to remain.

18. In ST (Eritrea) Burnton LJ concluded:

(i) that a study of the international authorities revealed that:

> "… a refugee is not entitled to the protection of Article 32 unless he or she has been granted the right of lawful presence in the state in question. The phrase "*régulièrement sur leur territoire*" in the French text, set out above, supports this interpretation. Whether a refugee is lawfully in the territory of a state is determined by its domestic law. However, any refugee is entitled to the protection of Article 33, whatever the legal status of his presence under national law"([39]).

(ii) that on closer examination of UK legislation and case law, Szoma v Secretary of State for Work and Pensions [2005] UKHL 64 [2006] and JA (Ivory Coast) and ES (Tanzania) v Secretary of State for the Home Department [2009] EWCA Civ 1353 in particular, Article 32 applies only to a refugee who has been granted leave to enter and to stay in the United Kingdom in accordance with para 334 of the Immigration Rules (see [40]-[52] of the judgment);

(iii) the ground specified in s 84(1)(c) and (g) of the 2002 Act relate to whether a person's removal would breach this country's obligations under the Refugee Convention [and the European Convention on Human Rights] (see [56]), and

(iv) the decision of the Court of Appeal in Saad, Diriye and Osorio v Secretary of State for the Home Department [2002] EWCA Civ 2008 did not require the determination of the Tribunal to have the effect of a direction to the Secretary of State to grant asylum ([58]).

19. In the light of the judgment in ST (Eritrea) it is unnecessary to address submissions of the parties concerning the issue of whether the IJ should or could have allowed the appeal solely because of his finding that she was a refugee (from Syria). ST (Eritrea) makes abundantly clear that the fact of being found to be a refugee does not of itself entitle a claimant to the grant of asylum and that Article 32 only applies to a refugee who has been given the right lawfully to stay in the Contracting State in question. We would only add four comments. First, within days of judgment being handed down in ST (Eritrea) a different panel of the Court of Appeal in Secretary of State for the Home Department v IA (Turkey) [2010] EWCA Civ 625, 15 June 2010 came to the same conclusion on this issue: see [30].

It is perhaps unfortunate that neither panel appeared aware that the same point was being raised in the other's case, but that does not make either case any less binding on us.

20. Second, if the Court in ST (Eritrea) had accepted ST's contentions it would have created an inconsistency with the judgment of the Supreme Court in ZN (Afghanistan) and Ors v Entry Clearance Officer (Karachi) [2010] UKSC 21 in which Lord Clarke, delivering the judgment of the court, approved observations made by Laws LJ in the court below that it is no part of the definition of "refugee" that the subject be formally recognised as such in the form of a grant of asylum; the latter was a separate event: see [28]-[32] of the SC judgment and MS (Somalia) & Ors v Secretary of State for the Home Department [2010] EWCA Civ 1236 [22]-[24].

21. Third, it seems to us that (excluding the situation where a claimant has more than one nationality) the judgment in ST (Eritrea) also clarifies how s 84(1)(c) and (g) are to be applied when the Secretary of State has indicated in the course of the appeal proceedings that there is more than one country to which she is proposing to make removal directions. In ST (Eritrea), so far as the appeal proceedings were concerned, removal directions were only ever proposed for one country (Eritrea), but the logic of what Burnton LJ said in [56]-[57] is that if the Secretary of State has identified an alternative country of proposed removal (country B) in the context of asylum appeal proceedings, then an immigration judge should only allow an asylum appeal if satisfied not only that a claimant is a refugee from country A but also that return to country B would also be contrary to Article 33 of the Refugee Convention.

22. Fourth, and conversely, if the Secretary of State has only indicated one country of proposed removal in the course of asylum appeal proceedings and that country is found to be one in which the claimant faces a well-founded fear of persecution, it is no part of the function of an immigration judge to dismiss an appeal because he or she considers there is another country which is safe. That is, after all, where the Adjudicator in the appeal proceedings in ST (Eritrea) went wrong.

23. If the claimant is entitled to succeed in her appeal to us, therefore, it can only be on the basis of Miss Appiah's secondary submission that she was not only a refugee from Syria but was also someone who would not be safe in Algeria, the country to which the Secretary of State now proposed to make removal directions.

24. Both parties accept it as settled law that Article 33(1) would be breached by a removal whose effect would be, directly or indirectly, to return the appellant to a country or territory where her life or freedom would be threatened. That acceptance reflects the principle established in leading cases that Article 33 prohibits both direct and indirect *refoulement*. As Lord Hobhouse stated in R v Secretary of State for the Home Department ex parte Adan and Aitsegeur [2000] UKHL 67:

> "For a country to return a refugee to a state from which he will then be returned by the government of that state to a territory where his life or freedom will be threatened will be as much a breach of Article 33 as if the first country had itself returned him there direct. This is the effect of Article 33."

25. This position was confirmed in R (Yogathas) [2002] UKHL 36 and by the European Court of Human Rights in TI v United Kingdom [2000] INLR 211.

26. On the Article 33 issue Mr Gulvin submitted that the claimant would not face a real risk of persecution or serious harm in Algeria and furthermore, she could obtain protection from Algeria. In regard to the issue of protection, Mr Gulvin pointed out that the opinion now at hand from the Honorary Legal Advisor to the British Consulate in Algiers said that decisions should be made "on a case by case basis". The Algerian authorities would know, he submitted, that the claimant was married to a national of Algeria; that she had three children who were also nationals of Algeria; that as the spouse of a national of Algeria she had a route for applying to reside there, if not also to become in time naturalised as Algerian herself; that she had lived in Algeria for some nine months; and that (contrary to her own claims) she had not experienced any difficulties previously with the Algerian authorities. If Algeria did make a request of Syria for information about her, that would only reveal that she was someone who (on the unchallenged findings of the IJ) had no political profile of her own and that at most that she was only the family member of someone with a political profile. Further, the co-operation agreements between Syria and Algeria dealing with extradition and deportation were concerned with either criminals or terrorists; there was no suggestion this claimant fell into either of these categories.

27. Miss Appiah's submission in response was that the claimant could not be returned to Algeria because she would face a real risk of persecution there and she had no prospect of obtaining the protection of that country. In relation to the issue of protection, she argued that not only was it a fact that the claimant had no passport, no entitlement to Algerian citizenship and no significant period of residence in Algeria, but the Secretary of State had stated at the hearing that he had "no evidence to place before me to seek to satisfy me that the appellant had any prospect whatsoever of obtaining entry to Algeria."

28. The Tribunal should attach particular weight, added Miss Appiah, to the further evidence now to hand, in particular that from the Honorary Legal Advisor to the British Embassy in Algiers. This, she said, had twofold significance. First, it strongly suggested that it would be a breach of Article 33 to return the claimant to Algeria as the claimant would be at risk there of indirect *refoulement* to Syria. Co-operation agreements between the two countries cover security aspects and, in the Honorary Advisor's own words, "Algeria would in this context, hand over opponents to the Syrian regime". Second, on the basis of this person's evidence, the claimant would not be able to succeed in an application for Algerian

nationality by naturalisation as the spouse of an Algerian national because she had not had the necessary period of residence in Algeria of at least two years. Normally, as a Syrian national, she would need a visa to enter Algeria (she had not needed one when she entered previously on a Syrian passport albeit a false one), but as she did not now have a Syrian passport she could not benefit from this facility. If, as it appears would be the case, she were to travel to Algeria on a travel document issued by the UK, then she would be subject to an entry visa requirement. Whilst issuance of such a visa in such circumstances is made on a "case by case basis", the process is lengthy and it was certainly more difficult than a normal visa. Depending on the circumstances of the case her application could also be the subject of a request by the Algerian authorities to her country of origin for information.

29. Miss Appiah said it was important when considering how the Algerian and Syrian authorities would perceive the claimant after consulting with each other to bear in mind that although the IJ disbelieved the claimant's account of adverse experiences in Algeria, he had accepted she had relied on false Syrian and Mali passports.

Our Assessment

30. We must, of course, decide the appeal on the basis of all the evidence, not only that which was before the IJ, but that which has been furnished (in accordance with Tribunal directions) since. It seems to us that considered as a whole this evidence demonstrates that the claimant would face a real risk of persecution in Algeria against which she would not receive effective protection. The following seem to us to be of particular importance:

(a) First, there is the claimant's father's accepted history. The IJ considered that the account given of the appellant's father's history was credible. Her father had lived as a political exile in Yemen. Before that, he and his family had spent periods of time in Turkey, Iraq and Jordan. In Jordan the family was forced to leave when the authorities there became aware of the father's antipathy to the Syrian government. Her father had also written a book (entitled Fil Qaa) condemning the brutality of the Syrian regime.

(b) Second, there is the evidence that the Syrian regime targeted family members of political dissidents, as appears to be illustrated by what had happened to the appellant's sister, who was imprisoned on return to Algeria

(c) Next there is the claimant's history of using false passports. Whilst not accepting that the claimant had encountered any problems with the Algerian authorities, the IJ did not reject her evidence that she had made use of false passports and that in 1999, when she submitted her Syrian passport for extension of leave in Ghana, the authorities in Ghana became aware that that passport was forged.

This history was likely to increase the prospects that the claimant's name would be on records held by the Syrian authorities.

(d) There is also evidence from the Syrian Human Rights Committee about the reach of Syrian intelligence activities indicating that the Syrian authorities take a close interest in Syrian dissidents residing in other countries in the Middle East and Africa.

(e) Then there is the evidence relating to Algeria's record regarding refugees. According to the US Department of State report on Algeria for 2007 (11 March 2008) UNHCR reported that the government did not accept UNHCR determined refugee status for 28 individuals from Sub-Saharan Africa. This group was returned to Mali at a border in the middle of a conflict zone – they were deported without trial and without legal Counsel. Further, in the same report there were no reports that the government granted refugee status and asylum during that year.

(f) In addition, there is the further evidence before us from the Syrian Human Rights Committee ("SHRC") in a letter dated 9 February 2009 stating that it had recorded "several incidents in which the Algerian authorities have handed over members of the Syrian Muslim Brotherhood to the Syrian authorities". The letter describes cases from 1982 (involving eight Syrian teachers working in Algeria), 1987 (involving a Mr Sami Alawi) and 2001 (involving Mr Waleed Saleem). All met with serious harm in Syria except Mr Saleem who managed to escape. On the strength of these cases the SHRC stated that it believed, the claimant's repatriation would "pose dangerous implications on her safety and freedom". Although this item of evidence did not identify any cases since 2001, there was no evidence to suggest any significant change in how the two countries would react to similar cases if they arose now.

(g) Perhaps the most telling item of evidence is that which the Secretary of State in fact produced in response to directions from the Tribunal seeking her assistance in obtaining information from the Algerian Embassy. The Secretary of State was able to obtain an opinion from an Honorary Legal Advisor to the Algerian Embassy which noted that co-operation agreements between the two countries covered security aspects and, in the Honorary Advisor's own words, "Algeria would in this context, hand over opponents of the Syrian regime". Given the appellant's family profile we consider it reasonably likely that the claimant could be seen to fall under such agreements.

31. In the light of the above we consider that there exists in this case a real risk to the claimant of indirect (or chain) *refoulement* by Algeria to Syria. Algeria would not be for her a safe third country. Such a risk would make her removal to Algeria in direct contravention of Article 33(1) of the

Refugee Convention and so contrary to the United Kingdom's obligations under the Refugee Convention. Removal to Algeria would also violate her Article 3 ECHR rights.

32. For the above reasons:

The Immigration Judge materially erred in law.

The decision we remake is to allow the appeal of the claimant on asylum and Article 3 ECHR grounds.

Signed Date

Senior Immigration Judge Storey
(Judge of the Upper Tribunal)