Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/06205/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 February 2018	**On 21 March 2018**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

[I H]
~~(ANONYMITY DIRECTION NOT MADE)~~

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Saeed, of Aman Solicitors Advocates (London) Ltd
For the Respondent: Mr P Nath, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of Judge of the First-tier Tribunal Cary (the judge), promulgated on 2 August 2017, in which he dismissed the appellant's appeal against the respondent's decision dated 14 June 2017 refusing his protection claim.

Factual Background

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2. The appellant is a national of Syria, date of birth [ ] 1973. He entered the United Kingdom on 18 January 2017 from China, on transit to Oman. He destroyed his passport on arrival at Heathrow (although he retained an expired passport) and claimed asylum. He maintained that he was unable to return to Syria because of the security situation. In interview he stated that he left Syria in 1996 and moved to Dubai where he married his wife, a Russian national, on 17 July 2004. He had not been back to Syria since 2009. He briefly visited Russia in 2006/2007 when he resided with his wife and her family before moving to Oman in 2008 where he lived until 2015/2016. The appellant claimed he had been attacked by 4 people in Russia as he was a foreigner. The appellant set up a company in China in 2014.

3. The respondent accepted that the appellant is a national of Syria, and that he would be unable to reside in Dubai, Oman, or China. The respondent considered that the appellant could, however, reside in Russia. This was because he was married to a Russian national. In support of her conclusion the respondent identified and relied on background information indicating that a foreigner married to a Russian citizen residing in the Russian Federation would be able to apply for a temporary or permanent residence permit. The respondent noted that the appellant and his wife were issued with a marriage document in Dubai. The respondent concluded that the appellant could use this marriage document to obtain a residence permit to enable him to reside in Russia. The respondent had given the appellant a two-week extension to obtain the marriage document but no such document was provided by the appellant.

4. The respondent considered the appellant's claim to have been attacked in Russia but rejected this aspect of his account. The respondent did not accept that the appellant had a genuine and subjective fear were he to reside in Russia. The respondent went on to consider whether the appellant would be provided with a sufficiency of protection in Russia and concluded that he would. The respondent considered in any event that the appellant would be able to internally relocate within Russia. The respondent rejected the appellant's asylum claim on the basis that he would be able to reside in Russia. For the same reasons the appellant's article 2 and article 3 claim where rejected. The respondent then went on to reject the claim under article 8.

The decision of the First-tier Tribunal

5. The judge heard oral evidence from the appellant which included questions asked in cross-examination concerning why he would be unable to live in Russia. The appellant confirmed that his wife's mother and sister were still living in Russia and that his wife was currently visiting China, was staying with a friend there and was undergoing IVF treatment. The appellant said that his wife could not stay in Russia because she did not get on with her stepfather. The judge recorded the

appellant's account of being attacked in the small village in which he resided in Russia. He did not report what happened to the police as he was advised that they were like the Mafia. The attack took place in the village that was approximately 16 hours by train from Moscow and even further from St Petersburg. The judge recorded the Presenting Officer's submissions that the appellant could go to Russia. The judge also recorded Mr Saeed's submission that the decision in *RR (refugee – safe third country) Syria* [2010] UKUT 422 (IAC) (*RR (Syria)*) should no longer be followed as, at the time of that decision, the respondent was required to make a separate removal decision and this was no longer the case following the amendments brought in by the Immigration Act 2014 affecting appeal rights.

6. The judge accepted that the appellant could not be returned to Syria, and noted that it was the respondent's case that he could be removed to Russia. The appellant was present in the UK as someone who required leave to enter or remain but did not have it (s.10 of the Immigration and Asylum Act 1999). The judge noted that an Immigration Officer is entitled to give a direction for a person's removal under paragraphs 8 to 10 of Schedule 2 to the Immigration Act 1971, which included removal of a person to a country where there was reason to believe the person would be admitted.

7. At [28] the judge wrongly set out the grounds of appeal available to the appellant under s.84 of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act). He included an extract of s.84 in a form prior to its amendment by the Immigration Act 2014. The judge then stated that the (unamended) provisions of the 2002 Act did not include 'removal directions' within the description of appealable immigration decisions and that it was therefore difficult to see how the change in removal arrangements since *RR (Syria*) could assist the appellant. The judge relied on what was then the Court of Appeal authority of *Secretary of State for the Home Department v ST (Eritrea)* [2010] EWCA Civ 643 (*SSHD v ST*) in asserting that the fact of being found to be a refugee does not of itself entitle a person to a grant of asylum.

8. The judge then went on to consider whether the appellant's removal to Russia would be contrary to Article 33 of the Refugee Convention. The judge referred to Article 27 of Council Directive 2005/85/EC which deals with the application of the safe 3rd country concept and noted that it was the respondent's position that the appellant had some connection with Russia which would make it reasonable for him to go to that country.

9. The judge considered in some detail the background evidence provided by the appellant in respect of Russia, and then rejected, with supporting reasons, the appellant's claim to have been attacked in Russia. I need not dwell on this aspect of the decision as it has not been challenged in the grounds of appeal. The judge considered, in the alternative, that even if the attack had occurred there was nothing to suggest it was anything other than an isolated criminal attack, and that the appellant

could, in any event, internally relocate. The judge found that there was nothing in the background material suggesting that Syrians living in Russia were reasonably likely to be at risk of persecutory treatment or that the authorities were unwilling or unable to provide a sufficiency of protection. There was nothing to indicate that the appellant would be perceived as having a political profile that would bring him to the adverse attention of the Russian authorities. The judge specifically found that there was no risk to the appellant of indirect refoulement from Russia to Syria. There has been no challenge to this aspect of the decision. The judge found that the appellant had a connection with Russia through his wife, a Russian citizen who spent the first 18 years of her life in that country. The judge found it would be reasonable to expect the appellant to go to Russia with his wife who was only "visiting" China for the purpose of IVF treatment, and that his removal to Russia would not contravene Art 33(1) of the Refugee Convention.

10. The judge indicated that he did not need to consider the practicality of the appellant's removal to Russia citing *Saad, Diriye and Osorio v The Secretary of State for the Home Department* [2001] EWCA Civ 2008. In the alternative, the judge considered that the appellant's proposed removal to Russia would be feasible in light of the information provided by the respondent in her Reasons For Refusal Letter and in view of his marriage to a Russian citizen. There was no evidence before the judge to suggest that it was reasonably likely that the appellant would not be returnable to Russia and he did not produce anything from the Russian authorities to say that they would not permit him to enter Russia or give him some form of residency.

The challenge to the First-tier Tribunal's decision

11. The grounds of appeal, as amplified by Mr Saeed in his oral submissions and his skeleton argument, contend that the judge was wrong to follow *RR (Syria)* because that was a decision made under the previous appeal regime prior to the amendments wrought by the Immigration Act 2014. The new appeal regime no longer attaches rights of appeal to immigration decisions involving removal decisions and the making of those removal decisions was said to be crucial to the appeals in *RR(Syria)* and *SSHD v ST* (Mr Saeed was not aware that the Court of Appeal's decision was appealed to the Supreme Court which upheld the Court of Appeal's decision; see *ST (Eritrea), R (on the application of) v Secretary of State for the Home Department* [2012] UKSC 12 (*ST (Eritrea*)). Mr Saeed submits that the legislative landscape has materially changed such that both these decisions are no longer relevant and that as the appellant's appeal was against a refusal of his protection claim, and it was accepted that he held a well-founded fear of persecution in Syria, his appeal should have been allowed. Mr Saeed submits that the appellant is a refugee because he fulfils the criteria in the 1951 Refugee Convention (see *Hoxha v Special Adjudicator* [2005] UKHL 19). As he only has a right of appeal against a decision to refuse

his protection claim and not a decision to remove him, and as there are no directions specifying the country to which he will be returned, he meets the definition of a refugee and "… that is the end of the matter." As there is no decision to remove the appellant to Russia, the First-tier Tribunal erred in considering Russia as a country in respect of which the appellant may be removed. The grounds additionally contend that the judge cited and applied the wrong version of the s.84 of the 2002 Act and that this error was sufficiently fundamental to undermine the sustainability of the judge's decision. Mr Saeed also contends that it was irrational or perverse for the judge to conclude that the appellant could live in Russia as the respondent had not proposed to remove the appellant to Russia because at the date of the hearing the appellant had no visa to enter Russia and that in order to apply for a visa he would need his wife's passport, but it was impossible to obtain this because she was in China. Mr Saeed finally contends that the judge was not entitled to conclude that the appellant would be granted a temporary residence permit as his wife had not lived in Russia since 2006/2007.

12. In granting permission Upper Tribunal judge Grubb observed that the judge clearly wrongly cited and applied the pre-2014 appeal provisions of the 2002 Act. Judge Grubb noted however that this error would not be material if the judge's approach to the Refugee Convention was nevertheless correct. Judge Grubb found that the grounds raised an important point that, since the decision in *RR (Syria)* the appeal regime had changed and so had the notice provisions relating to removal such that no removal destination was now named.

Discussion

13. In *RR (Syria)* the Upper Tribunal was concerned with a Syrian national in respect of whom the Secretary of State intended to issue directions for her removal to Algeria based on her marriage to an Algerian national, through having children who were Algerian nationals and having lived there for some 9 months prior to her arrival in the UK. The Secretary of State conceded that RR fulfilled all the requirements of Article 1 of the Refugee Convention and was properly to be considered a refugee. The Upper Tribunal was going to consider the issue of whether a person accepted as being a refugee was entitled to the protection of Article 32(1) of the Refugee Convention in the context of a s.84(1)(g) ground of appeal (see paragraph 5). The matter was however authoritatively determined by the Court of Appeal in *SSHD v ST*.

14. In *SSHD v ST* the appellant was a national of Eritrea and had been successful in an appeal against a decision to remove her to Eritrea on the basis that she faced a well-founded fear of persecution in Eritrea. After her appeal the Secretary of State issued fresh removal directions for Ethiopia. The appellant judicially reviewed this decision on the basis that the Tribunal found her to be a refugee and the Secretary of State was bound by that decision and it was unlawful for the Secretary of

State to decline to grant the appellant refugee status on the basis that she could safely return to Ethiopia. The Court of Appeal distinguished the protection offered by Articles 32 and 33 of the Refugee Convention and concluded 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 UK. On examination of the relevant legislation and authorities the Court of Appeal concluded that Article 32 applies only to a refugee who has been granted leave to enter and stay in the United Kingdom in accordance with paragraph 334 of the immigration rules. I pause to note that the appellant in the instant appeal has not been granted leave to enter and stay in the United Kingdom in accordance with the relevant immigration rules. The Court of Appeal found that the grounds specified in section 84 (1)(c) and (g) of the 2002 Act related to whether a person's removal would breach the U.K.'s obligations under the Refugee Convention. In light of this judgement the Tribunal in *RR (Syria)* stated, at [19]

> "[SSHD v ST] 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."

15. The Upper Tribunal additionally noted that in *ZN (Afghanistan) and Ors v Entry Clearance Officer (Karachi)* [2010] UKSC 21 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 (paragraph 20). The Upper Tribunal also considered that the Court of Appeal's judgement clarified how sections 84(1)(c) and (g) were to be applied when the Secretary of State indicated in the course of the appeal proceedings that there was more than one country to which she was proposing to make removal directions (paragraph 21),

> "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."

16. I acknowledge that *RR (Syria)* and *SSHD v ST* were decided under the previous appeal regime, that the Secretary of State made decisions for the removal of each appellant and that she explicitly identified the countries to which she believed the appellants could be removed. The issues in contention however in *RR (Syria)* did not revolve around the trigger for the right of appeal (the immigration decisions contained in s.82 of the 2002 Act) but the grounds of appeal contained in s.84 (see paragraphs 5, 18 and 21).

17. Despite the significant changes to the appeal regime brought in by the Immigration Act 2014, the grounds of appeal remain very similar. S.84(g) of the pre-2014 version of the 2002 Act included a ground,

> '... that removal of the appellant from the United Kingdom in consequence of the immigration decision would breach the United Kingdom's obligations under the Refugee Convention or would be unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the appellant's Convention rights."

18. Section 84(1)(a) of the post-2014 version of the 2002 Act indicates that an appeal must be brought on the grounds, *inter alia*,

> that removal of the appellant from the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention;

19. The only difference is that under the previous appeals regime the removal of the appellant had to be 'in consequence of the immigration decision' that was the trigger for the right of appeal, such as a decision to remove. The decision to remove would usually identify the country of removal. The new version of s.82 has done away with specific immigration decisions, including decisions to remove, and the trigger for a right of appeal is the refusal of a protection claim (s.82(1)(a)). S.82(2) now states,

> '... a *"protection claim"* is a claim made by a person ("P") that removal of P from the United Kingdom—
>
> (i) would breach the United Kingdom's obligations under the Refugee Convention, or
>
> (ii) would breach the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection;
>
> The focus however has always remained on the consequences of the person's removal from the UK in respect of a country that the respondent has identified, in the context of the appealed decision or appeal proceedings, to which the appellant can be returned.'

20. The appellant is someone who is unarguably liable to removal under s.10 of the Nationality, Immigration and Asylum Act 2002, as amended by the Immigration Act 2014 (he is a person who requires leave to enter or remain in the UK but does not have it). The appellant is not a person who is lawfully present in the UK and cannot therefore avail himself of the full range of protections available through Article 32(1) of the Refugee Convention (see *ST (Eritrea)*). The UK must nevertheless ensure that he is not refouled (Article 33 of the Refugee Convention). Sections 8 and 10 of Schedule 2 entitle the respondent or an immigration officer to issue removal directions in respect of a person if that person has been refused leave to enter and there is reason to believe that they will be admitted to a country specified in those removal directions. Under s.7 of the Immigration and Asylum Act 1999 the respondent or an Immigration Officer may give any such direction for the removal of a person without

leave to enter or remain as may be given under paragraphs 8 to 10 of Schedule 2 to the Immigration Act 1971. No removal directions have been issued by the respondent. Sections 8 and 10 of Schedule 2 and s.7 of the 1999 Act however envisage the future issuance of removal directions.

21. The fact that a right of appeal no longer attaches to a decision to remove a person does not, in my judgement, render irrelevant the cases of *RR* and *ST*. The new right of appeal attaches to a refusal of a protection claim which is a claim made by a person that removing them would breach the UK's obligations under the Refugee Convention. The decision that is under challenge is therefore a rejection of a person's claim that their removal would cause the UK to be in breach of its international obligations. A person's anticipated removal or the possibility of requiring them to leave the UK is therefore an essential element in the appealable decision, even if a decision has not been taken to remove them. As the judge pointed out at [30], the actual removal directions were not an appealable decision under the previous appeals regime. The fact that the right of appeal no longer attaches to a decision to remove does not mean that a judge is obliged to allow an appeal in circumstances where the respondent has identified a country that she believes a person has a sufficient connection rendering it reasonable for the person to go to that country.

22. The grounds of appeal do not take issue with the judge's consideration of Article 27 of Council Directive 2005/85/EC. Nor do the grounds take issue with the Upper Tribunal's reliance and application of Article 27 in *RR*. At [32] the judge made clear his understanding that the respondent was applying Article 27 and that Russia had been identified as a third country in respect of which it would be reasonable for the appellant to go by virtue of his connection through marriage to a Russian national. Although the respondent has not expressly indicated that she proposes to make removal directions for the appellant's removal to Russia it is readily apparent, and irresistibly implicit in the respondent's decision, that she is contemplating Russia as a safe third country that the appellant could be reasonably expected to go pursuant to Article 27.

23. In her decision the respondent gave detailed reasons for concluding that the appellant was a person who would be able to reside in Russia. The respondent identified background information indicating that a foreigner married to a Russian citizen residing in the Russian Federation may apply for and be granted a temporary or permanent residence permit. Mr Saeed contends that the appellant's marriage to a Russian national was insufficient to entitle the judge to find that Russia was a country to which the appellant could reasonably be expected to go as his wife was not residing in Russia and he did not have a visa to enter Russia. At [40] the judge found however that the appellant's wife was only visiting China for fertility treatment and that at the time of the screening interview she was in Oman, which was in a temporary capacity. The judge was rationally entitled to conclude that the appellant's wife would

be able to return to Russia and that it would be reasonable to expect the appellant to go to that country. No satisfactory reasons were advanced before the judge as to why the appellant's wife could not return to Russia. The judge additionally noted, at [43], that the appellant failed to produce any evidence that he had contacted the Russian authorities with a view to obtaining a residence permit and had not applied for any visa. In these circumstances the judge was entitled to conclude that the appellant could be reasonably expected to go to Russia on the basis of his connection to that country. The respondent additionally relied on background information referring to a federal law on the legal position of foreign citizens indicating that a permanent residence permit could be obtained after having resided in the Russian Federation for at least one year on a temporary residence permit. Additional background information indicated that there was no requirement that the marriage certificate that could be used to obtain temporary residence had to have been issued in Russia.

24. For these reasons I find that the change in the appeals regime does not materially alter the relevance of the decisions in *RR* or the decisions of both the Court of Appeal and the Supreme Court in *ST*. The judge did not err in law and the appeal is dismissed.

Notice of Decision

The appeal is dismissed

Signed
Upper Tribunal Judge Blum

20 March 2018
Date