**Asylum and Immigration Tribunal**

RD (Cessation – burden of proof – procedure) Algeria [2007] UKAIT 00066

**THE IMMIGRATION ACTS**

**Heard at Field House**
**On 17 October 2006**

**Before**

Mr C M G Ockelton Deputy President of the Asylum and Immigration Tribunal
Senior Immigration Judge Freeman
Senior Immigration Judge Perkins

**Between**

**RD** **Appellant**

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**
**Respondent**

Representation:

For the Appellant: Mr C Lam, Counsel instructed by David Tang and Co Solicitors
For the Respondent: Mr K Norton, Home Office Presenting Officer

*i If an appellant challenges a decision of the Secretary of State to revoke a refugee's indefinite leave to remain because he has ceased to be a refugee for one of the reasons given in section 76(3) of the Nationality, Immigration and Asylum Act 2002 then the Secretary of State must prove that such a reason existed and in so doing must rely only on an action that took place after the section came into force on 10 February 2003.*

*ii If an appellant seeks to argue that the action relied on by the Secretary of State did not have its presumed or likely effect the Immigration Judge is entitled to look at evidence tending to illuminate the appellant's conduct, including evidence of actions before the section came into force.*

*iii An appellant can rely on a ground of appeal alleging that he is in fact a refugee when the Immigration Judge hears an appeal even if the respondent establishes that the appellant had ceased to be a refugee.*

# DETERMINATION AND REASONS

1 The appellant is a citizen of Algeria. He was born on 17 February 1966 and so is now 40 years old. On 20 March 2000 he was given indefinite leave to remain in the United Kingdom because he had been recognised as a refugee.

2 This determination is about the proper approach to appeals arising from a decision of the respondent to revoke a person's indefinite leave to remain in the United Kingdom because that person has ceased to be a refugee.

History

3 On 19 January 2006 the respondent decided to cease the appellant's refugee status with reference to Article 1C(1) of the 1951 Geneva Convention. On the same day the respondent decided to revoke the appellant's indefinite leave to remain in the United Kingdom under Section 76(3)(a) of the Nationality, Immigration and Asylum Act 2002. The appellant appealed that decision and his appeal was dismissed by Immigration Judge Easterman on asylum and human rights grounds in a determination dated 26 May 2006. The appeal comes before us at the appellant's instance.

4 It came to the attention of the respondent that, sometime in 2004, the appellant had obtained a new Algerian passport. The respondent decided that the appellant had availed himself of the protection of the State of Algeria and, acting in reliance of Article 1C(1), decided that the Convention ceased to apply to the appellant because he had voluntarily re-availed himself of the protection of the country of his nationality.

5 Additionally the appellant had previously renewed his Algerian passport in Alicante and travelled to Algeria in 2001 where he stayed for a week. The respondent had contemplated revoking the appellant's refugee status on account of this act but considered himself constrained by Section 76(6) of the Nationality, Immigration and Asylum Act 2002. This shows that power exercised under Section 76(3) to revoke a person's indefinite leave to remain can be exercised in respect of leave granted before the section came into force but only in reliance on action taken after the section came into force. Section 76(6) came into on 10 February 2003 (see the Nationality, Immigration and Asylum Act 2002 (Commencement No. 3) Order 2003). The respondent relied upon the appellant acquiring a new Algerian passport in 2004. This is plainly an event that occurred after the section came into force.

Grounds for Reconsideration

6 We set out below the grounds supporting the application for reconsideration.

> 1. The learned Adjudicator has made a material error of law in paragraph 59 and 60 of the determination that he was entitled to look into the appellant's actions pre or post-2003. Section 76(6)(b) specifically states that Section 76(3)

only applies to anything done after the section came into force. The NIA did not come into force until 2003, some six months after the appellant's action under Article 1C therefore his ILR could not be revoked under Section 76 on the singular fact and evidence available to the respondent at the time. This particular point was accepted by the respondents of 10 November 2005 (enclosed). It is submitted that the only action which the judge was able to consider was the appellant's acquisition of the new Algerian passport in London in November 2004. If the learned judge were entitled to look into the appellant's actions before the NIA came into effect then Section 76(6) would be of no legal force.

2. In paragraph 52 of the learned judge's determination he cited paragraph 121 of the UNHCR handbook, which draws the distinction between the actual re-availment of protection and occasional incidental contact with national authorities. If a refugee applies for and obtains a national passport or is renewal (sic) it will be in the absence of proof to the contrary presumed and that he intends to avail himself of the protection of the country of his nationality. However the appellant himself at the hearing categorically states that he has no intention of travelling back to Algeria. The hearing was part-heard in order for the appellant to produce his passport to prove that since obtaining his passport in March 2004 he had not returned to Algeria. At the time of the hearing it has been more than two years since he obtained this document and it is accepted that he has never used it to return to Algeria with it. It is submitted that this is compelling evidence to rebut the presumption of intention of his returning to Algeria.

3. In paragraph 53 of the learned judge's determination it is submitted that he has interpreted paragraph 121 of the UNHCR handbook wrongly in relation to the issue of occasional and incidental contact with a national authority. It is unreasonable for the Immigration Judge to conclude that the appellant's contact with the Algerian authority was anything other than occasional or incidental, the reason being that his only action after the NIA came into force in 2003 was the acquisition of a passport and nothing else. The learned judge has failed to explain adequately or at all about the issue of occasional and incidental contact of the appellant with the Algerian authority.

4. In paragraph 65 of the determination the learned judge proceeded to consider the appellant's original asylum claim. It is submitted that he has made an error of law in this respect. Section 76(3)(a) or 76(6)(a)(b) does not give any scope for the learned judge to consider the appellant's original asylum claim. If the learned judge's approach in considering the appellant's asylum claim then the hearing would be indistinguishable between an ordinary asylum claim and the present hearing under Section 76(3)(a).

5. Even if the learned judge was entitled to consider facts before the NIA came into force (which is strongly denied) the learned judge has failed to consider the fact that the appellant was in Algeria on one occasion for only one week. According to McDonald's Immigration Law and Practice Sixth Edition, 12.86 *a temporary visit, however usually falls far short of re-establishment, and before any inference of voluntary reacquisition of protection is drawn … .*

6. It is submitted that the learned Adjudicator has made an error of law for the reasons mentioned above. Application for reconsideration is humbly requested""

7 In his submissions to us Mr Lam expressly adopted both the grounds supporting the application for reconsideration and the skeleton argument before the Immigration Judge.

Section 76

8 Although the Refugee Convention provides for the cessation of refugee status in a variety of circumstances, there is only power under the Nationality, Immigration and Asylum Act 2002 to revoke indefinite leave to remaining given to a person who had been recognised as a refugee if that person ceases to be a refugee for one of the four circumstances set out in Section 76(3) of the 2002 Act applied. These are:

(a) voluntarily availing himself of the protection of his country of nationality,
(b) voluntarily re-acquiring a lost nationality,
(c) acquiring the nationality of a country other than the United Kingdom and availing himself of its protection, or
(d) voluntarily establishing himself in a country in respect of which he was a refugee.

9 The section needs to be studied for its full terms and effects but the four conditions are each examples of a person who has been given indefinite leave to remain ceasing to be a refugee by reason of his re-engaging in particular defined ways with the country of which he was a refugee.

Grounds of Appeal to the Immigration Judge

10 Section 82(2)(f) provides that revocation of indefinite leave to enter or remain in the United Kingdom under Section 76 of the 2002 Act is an appealable immigration decision.

11 It is therefore plain beyond argument that the appellant has a right to challenge before an Immigration Judge the Secretary of State's decision to revoke his indefinite leave to remain. He can rely on the usual statutory grounds set out in Section 84 of the Act including (e) that the decision was "… not in accordance with the law" and (g) that his removal in consequence of the decision would breach the United Kingdom's obligations under the refugee convention. The grounds of appeal in the notice of appeal to the Immigration Judge refer to:

> "Asylum decision (A)
>
> It was decided by the Secretary of State on 10 November 2005 that it would not pursuit (sic) with cessation of refugee status action against the appellant (A). The A's circumstances had not changed between 10 November 2005 and 11 January 2006.

> It is therefore submitted that the Secretary of State is stopped from reneging on his recent assurance given to the A."

12 There is plainly no merit in this point. The letter of 10 November 2005 was not an unequivocal promise not to revoke the appellant's refugee status but a notification of a decision not to "pursue with cessation of refugee status action against you on *this occasion*" (emphasis added). The letter also referred to the appellant having obtained an Algerian passport in July 2000. A letter from the respondent dated 21 December 2005 said at paragraph 11 "You have applied for, and received, an Algerian passport on two occasions. You had one passport renewed in August 2002 and, more importantly, had another issued in March 2004." In short the respondent identified the appellant obtaining an Algerian passport in 2004 as the basis of his decision to revoke.

13 The skeleton argument used before the Immigration Judge explains these grounds to a limited extent. It begins by drawing attention to the restriction of the power to revoke under Section 76(3) imposed by Section 76(6). This states:

> "Power under sub-Section (3) to revoke leave may be exercised – (A) in respect of leave granted before this Section comes into force, but (B) only in reliance on action taken after the Section comes into force."

14 The skeleton argument acknowledges that the

> "main issue here is whether the appellant's action in renewing his Algerian passport in March 2004 would be sufficient for the respondent to justify his decision to revoke the appellant's indefinite leave to remain in the United Kingdom".

15 The skeleton argument then emphasises the care that must be taken before refugee status can be taken away and argues that the appellant's conduct in renewing his Algerian passport in March 2004 could not be described properly as the appellant "voluntarily availing himself of the protection of his country of nationality".

<u>Refugee Status</u>

16 Nevertheless in his supplementary statement of 7 April 2006 the appellant asserted "It is my belief that I would face persecution if they discover my presence in Algeria" and the Immigration Judge says at paragraph 3 of his determination that the appellant:

> "appeals on the grounds that he is a refugee and that to return him to Algeria would place the United Kingdom in breach of its obligations under the 1951 United Nations Convention and the 1967 Protocol relating to the status of refugees ('the 1951 Convention')".

17 Clearly the Immigration Judge was right to decide if the appellant needed international protection even though the appellant raised the issue somewhat obscurely. Even if it is established that the respondent has revoked for proper reasons a person's refugee status that person can still claim to be a refugee. He may have changed his mind about taking the protection of the state from which he fled or conditions in the country may have changed during the progress of the appeal. If he has a right of appeal he is entitled to raise Refugee Convention grounds in that appeal.

18 The appellant also claims that to return him to Algeria would constitute a breach of his human rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms ('The 1950 Convention').

Burden and Standard of Proof

19 In so far as the appeal relates to the cessation of refugee status, the burden of proof rests on the respondent. This derives from the fundamental common law principle that a party that alleges must prove. It is consistent with the approach taken by the Court of Appeal in Arif v SSHD [1999] EWCA Civ 808. That appeal concerned a person who applied for asylum in about July 1992. His application was refused in October 1994 but allowed by a Special Adjudicator in a determination promulgated in March 1997. In December 1997 the Immigration Appeal Tribunal overturned the Special Adjudicator's decision. There were two grounds raised by the Secretary of State in his attack. The first was that the Immigration Judge had reached perverse conclusions. That was rightly rejected. The second was that the appellant was in fact safe because the government had changed at the end of June 1996, that is after the appellant had claimed asylum and before the Special Adjudicator heard and decided the appeal. The Tribunal was attracted to that argument but the Court of Appeal said that the Tribunal was wrong. The Special Adjudicator had quoted with approval the editors of MacDonald's Immigration Law and Practice that "*proof that the circumstances of the persecution have ceased to exist would fall upon the receiving State*". As the Court of Appeal explained, on the facts of that case, there was an evidential burden on the Secretary of State to establish that the appellant could safely be returned home. Establishing a change of circumstance was not enough.

20 The respondent produced a skeleton argument before the Immigration Judge. At paragraph 17 the writer of the skeleton argument purported to distinguish Arif. The respondent asserted:

> "The burden on the respondent is that he must show that circumstances exist where those sections are applicable to the evidence provided. The burden on the appellant is then to show that he has not voluntarily availed himself of protection or nationality and even if the circumstances reflected in sub-Sections 1-4 exist, he is still a refugee."

21 This is not a correct analogy. The ratio in Arif was not about taking away status but about what tests had to be applied at a particular time. The point in Arif is that a person had shown to the satisfaction of the Special Adjudicator that he had a need of international protection and the Court of Appeal decided that if the respondent wanted to say that the appellant no longer needed protection because conditions in the country were safe then that is something the respondent had to prove.

22 The respondent's case is not about the appellant's safety. It is about his voluntary acquisition of the protection of Algeria. The fact that a person volunteers to avail himself of the protection of the country of his nationality does not necessarily mean that he considers himself to be safe in that country, although obviously his safety, or likely safety, may be a guide to his real intentions.

23 We are quite satisfied that the Immigration Judge should have required the respondent to prove that the appellant had voluntarily availed himself of the protection of his country of nationality. If the respondent could not show that, then the respondent had no cause to revoke the appellant's indefinite leave to enter or remain. If the appellant wanted to argue that he was, nevertheless, a refugee he could aver a ground of appeal that his removal in consequence of the immigration decision would be in breach of the United Kingdom's obligation under the Refugee Convention.

Immigration Judge's Decision

24 It is quite plain what the Immigration Judge did. His self-direction at paragraph 55 is particularly clear. He says:

> "There is no appeal to me against his decision to revoke refugee status. It is clear and agreed between the parties that the only evidence which I may take into account in relation to whether or not the appellant is entitled to revoke the ILR is the evidence that has arisen after 10 February 2003, with the coming into effect of Section 76(3)(a) and 76(6). Thus for the purpose of considering whether the appellant had re-availed himself of the national protection of the Algerian State I ask myself on what evidence does the respondent rely? And the answer is, the appellant's acquisition of a new Algerian passport in London in March 2004."

25 The Immigration Judge then reminded himself of the guidance given in the handbook and in particular the words at paragraph 121:

> "If a refugee applies for and obtains a national passport or its renewal it will be in the absence of proof to the contrary presumed that he intends to avail himself of the protection of the country of his nationality".

26 It is clear that the Immigration Judge considered the appellant's explanation for taking a passport because he sets it out with some care. Whilst it may be the case that the appellant had not thought through his position and had not appreciated the possible implications of obtaining an Algerian passport it is

undeniably the case that he obtained one and whilst there is no evidence that he has used it to travel to Algeria or otherwise call upon the assistance of the authorities in Algeria, there was nothing in the evidence beyond the appellant's protestations to support a conclusion other than the one reached by the Immigration Judge, namely that the presumption set out in handbook applies and the appellant took his passport voluntarily and so availed himself of the protection of Algeria.

27 It was the appellant's case that the passport was handed out by the Algerian Embassy in London in 2004. The embassy encouraged him to take a passport and he agreed. This is not evidence that by taking the passport the appellant intended to do anything other than the normal, presumed consequence of such a step, namely to avail himself of the protection of the country that issued the passport.

28 As is invariably the case, the discharge of the burden of proof may be assisted by a presumption of fact. It follows from this that the Immigration Judge was plainly entitled to conclude, as he did, that the respondent had shown that the facts necessary to empower the Secretary of State to revoke the appellant's indefinite leave to remain in the United Kingdom had been established. Whilst it is right to say that the Immigration Judge considered all the circumstances of the case including the appellant's conduct before he applied for a passport in 2004, there is nothing here to show that the Immigration Judge was wrong to conclude that the respondent had used his powers in reliance solely on things done after the Section came into force.

29 The Immigration Judge also concluded that the appellant was no longer a refugee because he did not need protection. He found that the appellant's conduct in obtaining an Algerian passport on a previous occasion and returning to Algeria were incompatible with that of a person needing protection from the authorities there and he did not believe the appellant had ever needed international protection. That is a secondary issue and is not relevant to his primary determination that the Secretary of State was entitled to revoke the indefinite leave to remain consequent upon recognising the appellant as a refugee. We refer to it again below.

30 In his argument before the Immigration Judge Mr Lam referred to the case of Thevarayan (Conseil d'Etat, France, N° 78.55, 13 Jan 1989) (UNHCR Refworld) to say that the renewal of a national passport without more does not automatically give rise to a presumption that a person has voluntarily availed himself of the country of his nationality. That is not a decision that binds us and it did not bind the Immigration Judge when he decided the appeal. If Mr Lam's summary is accurate then we disagree with it. Passports are not ornamental adornments or collectors' items. Rather a passport is very strong evidence that a person is a citizen of the country that issued the passport under consideration. Even in the absence of the very plain terms of paragraph 121 of the UNHCR Handbook the respondent would be entitled to assume that a person who

obtains a passport intends to invoke the protection of the issuing country and make his decisions in the light of that assumption. The Immigration Judge cannot be criticised for making the same assumption. Where a person obtains a passport it will be assumed that he or she intends to avail himself of the protection of the state that issued the passport. It is of course open to the appellant to rebut the inference but that has not happened here.

31 The Immigration Judge also had in mind the appellant's earlier conduct. When considering the appellant's case that the appellant did not intend to avail himself of the protection of the state of Algeria just because he obtained an Algerian passport the Immigration Judge, and the Secretary of State, was perfectly entitled to take account of the fact that the appellant had obtained a passport for Algeria on an earlier occasion and had used it to visit the country. This is not in any way contrary to the requirements of Section 76(6). In this case an act was done after the commencement of the Section upon which the Secretary of State relied to support his decision that the appellant had voluntarily availed himself of the protection of his country of nationality and therefore the Secretary of State revoked that person's indefinite leave to remain. In making that decision the Secretary of State, like the Immigration Judge when he decided the appeal, considered all the available evidence including the appellant's previous conduct. It is completely wrong for the grounds to assert, as they do at paragraph 1, that:

> "if the learned judge was entitled to look into the appellant's actions before the Nationality, Immigration and Asylum Act 2002 came into effect then Section 76(6) would be of no legal force."

32 In this case the respondent has decided that the appellant has voluntarily availed himself of the protection of the state of which the appellant is a national, that is Algeria. He has decided this because of an act done by the appellant after section 76 came into force that was presumed to have that effect. The respondent could only use his power if he acted "only in reliance on action taken after" the section came into force. The word "only" must be given meaning. The respondent could not use his powers properly if the appellant's actions after the section came into force did not show that the appellant had availed himself of the protection of Algeria without reference to events that occurred before the section came into force. The conduct relied upon, that is the conduct necessary to support the conclusion, must have taken place after the section came into force. Actions that illuminated or explained pre-commencement acts would not be enough unless there were post commencement actions that satisfied section 76(3). Here the action relied upon, namely the acquisition of the passport, occurred after the commencement of the section. The Immigration Judge recognised that at paragraph 58 where he said

> "…it is plain that once the appellant has voluntarily re-availed himself of the protection of the country by seeking a passport, that, of itself according to the

> Refugee Convention will cease his refugee status, unless he shows that the actions do not carry with them the presumed intention;"

33 As the Immigration Judge explained quite clearly in his determination the decision to revoke was based on the appellant obtaining his passport after the Section came into force. There is no error there.

34 The decision that the appellant had not rebutted the presumption that he intended to avail himself of the protection of the State of Algeria had to be made with reference to all of the evidence, including the fact that since being recognised as a refugee the appellant had obtained an Algerian passport and used it to travel to Algeria. The use of the word "only" in section 76(6) is not intended to exclude consideration of evidence about matters other than the meaning and purpose of the action relied upon if they occurred before the act came into force. Indeed the construction urged by the appellant could, in some cases, lead to the disturbing suggestion than the Secretary of State, or an Immigration Judge should ignore conduct helpful to the appellant's contention that he did not intend the presumed consequence of his action if it occurred before the section came into force.

35 In short, ground 1 cannot be right. A decision maker can only revoke properly refugee status in reliance only on conduct that took place after section 76 came into force, but in deciding the significance of that conduct the Immigration Judge can have regard to evidence of conduct before the section came into force.

36 Ground 2 does not help the appellant. It accepts that:

> "If a refugee applies for and obtains a national passport or is renewal it will be in the absence of proof to the contrary presumed that he intends to avail himself of the protection of the country of his nationality."

37 In other words the grounds accept the analysis of the Immigration Judge. The grounds complain that the appellant stated categorically he had no intention of travelling back to Algeria. That is not the point. A person does not need to travel to a country to avail himself of the protection of the authorities of that country. Countries have embassies throughout the world and a passport can be used to seek protection anywhere in the world. Furthermore a witness is not entitled to be believed just because he states something categorically.

38 We find no merit in ground 3 of the grounds suggesting that the Immigration Judge had wrongly interpreted paragraph 121 of the UNHCR handbook *"In relation to the issue of occasional and incidental contact with national authority"*. It is quite right that even a short visit to a country does not necessarily mean that a person intends to avail himself of the protection of that country and some superficial contact with the authorities of that country does not necessarily amount to availing the protection of that country. Paragraph 121 makes it perfectly clear that a person who obtains a passport will, in the

absence of proof to the contrary be presumed to have intended to avail himself of the protection of the country of his nationality.

Other Grounds

39 Paragraph 4 is also wrong. This criticises the Immigration Judge for determining the original asylum claim. That is not what he did. The Immigration Judge asked himself if the appellant needed international protection when he decided the appeal and he concluded that the appellant did not. In making that finding the Immigration Judge disbelieved parts of the appellant's account that had been accepted previously. He reached this conclusion on the totality of the evidence before him including the appellant's evidence that he had returned to Algeria after being given refugee status. The Immigration Judge was entitled to do that and his findings about the appellant's past conduct do not undermine his finding that the appellant had voluntarily re-availed himself of the protection of the state of Algeria by obtaining an Algerian passport.

40 Ground 5 is without merit. This complains that the Immigration Judge should have had regard for the fact the appellant only stayed in Algeria for a short time when he returned there. The Immigration Judge did not decide the case because the appellant had on a previous occasion returned to Algeria. He decided the case because the appellant had, in 2004, obtained an Algerian passport. He concluded, as he was entitled to do, that the appellant did that because he wanted to avail himself of the protection of Algeria.

41 In the circumstances there is no material error of law disclosed.

Summary

42 In summary we say as follows:

i If an appellant challenges a decision of the Secretary of State to revoke a refugee's indefinite leave to remain because he has ceased to be a refugee for one of the reasons given in section 76(3) of the Nationality, Immigration and Asylum Act 2002 then the Secretary of State must prove that such a reason existed and in so doing must rely only on an action that took place after the section came into force on 10 February 2003.

ii If the issue is whether the action relied on by the Secretary of State had its presumed or likely effect the Immigration Judge is entitled to look at evidence tending to illuminate the appellant's conduct, including evidence of actions before the section came into force.

iii An appellant can rely on a ground of appeal alleging that he is in fact a refugee when the Immigration Judge hears an appeal even if the respondent establishes that the appellant had ceased to be a refugee.

**DECISION**

The original Tribunal did not make a material error of law and the original determination of the appeal shall stand.

Signed
Senior Immigration Judge Perkins 26 June 2007