

IN THE IMMIGRATION APPEAL TRIBUNAL

SK (Roma in Kosovo – update) Serbia and Montenegro [2005] UKIAT
00023

Heard at: Field House
Heard on: 10 December 2004 Appeal number:
Date typed: 12 December 2004
Date promulgated: 28 January 2005

Before:

MS. D. K. GILL (VICE PRESIDENT)
MRS. M. L. ROE
MRS. G. GREENWOOD

Between:

Appellant

And

The Secretary of State for the Home Department

Respondent

DETERMINATION AND REASONS

Representation:

For the Appellant: Mr. E. Fripp, of Counsel, instructed by Douglas Simon Solicitors.
For the Respondent: Mr. C. Avery, Senior Home Office Presenting Officer.

1. The Appellant (a national of Serbia and Montenegro, who is from Kosovo and who arrived in the United Kingdom on 11 October 2002) has appealed, with permission, against the determination of Mr. K. O. Adio, an Adjudicator, who (in a Determination promulgated on 19 April 2004 following a hearing on 13 April 2004 at Hatton Cross) dismissed his appeal on asylum and human rights grounds against the Respondent's decision of 14 January 2004 to give directions for his removal from the United Kingdom as an illegal entrant.
2. In this case, the Tribunal's jurisdiction is limited by Section 101 of the 2002 Act. This confers jurisdiction to entertain appeals on points of law only. The Tribunal cannot allow an appeal unless it holds that the Adjudicator had perpetrated a material error or mistake of law (see CA v. SSHD [2004] EWCA Civ 1165).
3. The basis of the Appellant's claim is that he would be persecuted in Kosovo on account of his Roma ethnic origin. The Adjudicator did not find him credible as to the

problems he alleged to have experienced in Kosovo on account of his Roma ethnic origin. The Adjudicator stated that he did not accept the Appellant's account of "the core aspects of his claim". He said that there were "significant discrepancies" in the Appellant's evidence. He did not find the Appellant credible with regard to his reasons for leaving Kosovo (paragraph 21 of the Determination). At paragraph 23 of the Determination, the Adjudicator stated that, in view of these findings, he did not accept that the Appellant had discharged the burden of proof to show that "she" (presumably meaning "he") has a well-founded fear of persecution for a Convention reason. At paragraph 24, the Adjudicator referred to the UNHCR paper on Kosovo dated 30 March 2004 in the following terms:

I am aware of the latest UNHCR paper on Kosovo dated 30 March 2004 and the recommendations that minority groups should continue to benefit from international protection particularly in view of the recent inter ethnic clashes. None of the parties addressed me in court on this issue, however, in view of the contents of that paper which I have partly summarised the respondent might want to consider providing the appellant with some sort of temporary leave in the UK.

4. Permission to appeal was granted because the Vice President granting permission considered that it was arguable that the Adjudicator had not given proper consideration to the UNHCR paper of 30 March 2004.
5. At the hearing before us, Mr. Avery submitted that, as the Adjudicator had not found the Appellant credible with regard to his alleged problems, it was open to him to dismiss the appeal on that ground, notwithstanding the fact that he had not rejected the Appellant's claim to be a Roma. For this reason, the Adjudicator had not erred in law by suggesting to the Secretary of State that he might want to consider granting the Appellant some form of leave, as opposed to assessing the risk on return himself on account of the Appellant's Roma ethnic origin. We do not hesitate in rejecting Mr. Avery's submissions in this regard. The fact that the Adjudicator did not find the Appellant credible with regard to his alleged problems as a Roma in Kosovo does not absolve him from assessing the risk on return on the basis of such facts as, to the low standard of proof, he is satisfied about. Despite the fact that the Adjudicator did not find the Appellant credible with regard to his evidence about his alleged past problems, it is abundantly clear from the Determination that he did not doubt that the Appellant was of Roma ethnic origin. It was therefore incumbent upon him to assess whether the Appellant would be at real risk of persecution or Article 3 ill-treatment on account of his Roma ethnic origin, regardless of his credibility as to past events. It would, of course, have been open to the Adjudicator to reject the Appellant's claim as to his Roma ethnic origin on the basis of his concerns about the credibility of the Appellant's claims concerning his alleged problems in the past, but he did to do so. It was not open to the Adjudicator to leave it to the Secretary of State to decide whether to grant the Appellant leave on the basis of the UNHCR Paper of 30 March 2004.
6. Accordingly, we are satisfied that the Adjudicator did err in law, for the reasons we have given above.
7. The Tribunal delivered to the parties at the hearing copies of the Tribunal's Determination in the following cases:
 - (a) FD (Kosovo – Roma) Serbia and Montenegro CG [2004] UKIAT 00214.
 - (b) KK (risk – Return – Suicide – Roma) Serbia and Montenegro [2004] UKIAT 00228.

We invited the parties to address us on any fresh evidence relied upon by the Appellant which would persuade us to depart from the views of the Tribunal above.

8. **Fresh evidence:** We have been served with the following documents which were not before the Tribunal in the FD case:

Served on the Appellant's behalf:

- (a) The UNHCR Position Paper dated August 2004 entitled: "UNHCR Position on the Continued International Protection Needs of Individuals from Kosovo" (document H of the Appellant's Bundle B).
(the UNHCR Kosovo August 2004 Paper)
- (b) Appendix 1 (entitled: "Non-exhaustive list of selected security incidents involving minorities January 2003 – April 2004") to the UNHCR's paper dated August 2004 entitled: "The possibility of applying the internal flight or relocation alternative within Serbia and Montenegro to certain persons originating from Kosovo and belonging to ethnic minorities there" (document I in the Appellant's Bundle B) (the UNHCR Serbia and Montenegro August 2004 Paper). We were only referred to Appendix 1; we were not referred to the main body of the report, because (presumably) we confirmed to Mr. Fripp that he did not need to address us on any internal flight alternative outside of Kosovo.
- (c) A bulletin from CIPU (Country Information and Policy Unit of the Immigration and Nationality Directorate) entitled "Serbia and Montenegro (Kosovo) 5/2004" (document B in the Appellant's Bundle B). It is clear from the date immediately below the heading on the first page and from the last page of the document that this document is in fact dated July 2004.

Served on the Respondent's behalf:

- (d) The CIPU report on Serbia and Montenegro (which includes a section on Kosovo) dated October 2004.

Submissions

- 9.1 Mr. Fripp informed us that the Appellant's home area is in the north west of Kosovo; his home village is on a road between Pristina and Peje. In Mr. Fripp's submission, the Appellant would not be safe in a Roma enclave. Furthermore, he would not be able to travel safely to any Roma enclave. In Mr. Fripp's submission, much of the objective evidence which was before the Tribunal in the FD case was old, as paragraphs 33, 38 and 39 of the Determination indicate. Paragraph 58 indicates that the Tribunal did consider the incidents in mid-March 2004 and the UNHCR's position paper of 30 March 2004. In that paper, the UNHCR had stated that a report would be published in April 2004, although the Tribunal in the FD case noted that, as at mid to late May 2004, none had been published. We now have the detailed report of the UNHCR, in the form of the report dated August 2004.
- 9.2 Whilst the whole of the UNHCR Kosovo August 2004 Paper was important, paragraphs 25, 26 and 27 were particularly important. Paragraph 2 of this report states that many less serious inter-ethnic crimes go unreported. Appendix 1 of the UNHCR Serbia and Montenegro August 2004 Paper is a non-exhaustive list of

selected security incidents involving minorities between January 2003 and April 2004. Mr. Fripp asked us to bear in mind the fact that there is under-reporting of inter-ethnic crimes.

- 9.3 Mr. Fripp also referred us to paragraphs 3.3, 3.9 and 3.10 of the CIPU Bulletin of July 2004. In Mr. Fripp's submission, all the evidence indicates that protection levels for Roma in Kosovo are insufficient. We noted that paragraph 2 of the UNHCR Kosovo August 2004 Paper refers to the environment in Kosovo being one in which inter-ethnic crime is not "systematically investigated and rarely solved". We asked whether "systematic investigation" is what is entailed in deciding whether protection is sufficient. Mr. Fripp accepted that it was clear from the judgement of the House of Lords in Horvath that international protection is not available if sufficient protection is available and a guarantee of protection is not necessary. It is not necessary for a state to eliminate all risk or to exclude random attacks. However, the situation for Roma in Kosovo is that there is a systematic pattern of violence and repercussions. Minority groups are entirely isolated. Freedom of movement has essentially ceased. In these circumstances, in Mr. Fripp's submission, protection for Roma in Kosovo is insufficient.
10. Mr. Avery referred us to paragraph K.6.53 of the CIPU Report of October 2004 which shows that, up until the riots in mid-march 2004, the situation for Roma in Kosovo was improving. Paragraph K.6.87 of the report supports the view of the Tribunal in the FD case that the mid-March 2004 riots were a blip. The overall position of the UNHCR has not changed much since mid-March 2004. Paragraph K.6.59 of the report refers to the steps taken by UNMIK and OSCE since March 2004.
11. Mr. Fripp reminded us that we do not have before us the June 2004 UNHCR report which would have enabled us to assess more fully the UNHCR Kosovo August 2004 paper, which refers to the June 2004 Paper. The UNHCR Kosovo August 2004 Paper was before the CIPU when the October 2004 CIPU Report was prepared; yet the only reference made in the CIPU October 2004 report to the UNHCR paper is at paragraph K.6.86, which quotes a paragraph from the UNHCR Kosovo August 2004 report.
12. We reserved our determination.

Determination

13. The limitation on the jurisdiction of the Tribunal to points of law means that the Tribunal cannot allow an appeal unless it holds that the Adjudicator had perpetrated a material error or mistake of law. For the reasons given in paragraph 5 above, we are satisfied that the Adjudicator had erred in law in failing to properly consider the UNHCR position paper of 30 March 2004. However, this error is not material, in that, this report was considered by the Tribunal in the FD case (see paragraph 57). Having regard to the reasoning and conclusions of the Tribunal in the FD case, the Adjudicator would have reached the same conclusions even if he had considered the 30 March 2004 report.
14. However, we have taken the opportunity of considering the fresh evidence which has been adduced, in order to provide guidance on the more-up-to-date material. It is a matter of regret that the June 2004 UNHCR Update Paper has not been placed before us, despite the fact that it was clearly referred to at paragraph 5 of the

UNHCR Kosovo August 2004 Paper as being more detailed. We proceed to determine the appeal on such evidence as is before us.

15. Mr. Fripp asked us to note that the KK case was not designated as a country guidance case and that the focus of the Tribunal's attention in that case was directed towards the risk of suicide. Accordingly, he submitted that we should not place any reliance on the observations of the Tribunal in the KK case as to the objective evidence relating to Roma. We agree that we should not place reliance on the KK case, but not for the reasons Mr. Fripp gave. The KK case in fact concerned a Roma from the Presevo Valley (see paragraph 3 of the Determination in the KK case) and the objective evidence which the Tribunal considered on the question of risk as a Roma related to Serbia. The Appellant in the instant appeal is from Kosovo and would be returned to Kosovo. Accordingly, the KK case is not relevant.
16. The FD case was heard on 13 February 2004. The Determination was promulgated on 14 July 2004. Paragraphs 1 to 56 of the Determination were written before the outbreak of violence in mid-March 2004. The Tribunal's conclusions, in summary, were:
 - (a) that Roma do not all live in Roma enclaves or in camps and that those who live outside do not all face persecution; the picture is somewhat variable, depending on time and place (paragraph 51);
 - (b) Roma who are concerned about the security situation can go to an enclave where there is a greater prospect of collective protection than outside (paragraph 51);
 - (c) conditions in camps are overcrowded and poor; freedom of movement and discrimination (which, for many Roma, involve routine and quite severe discrimination in accessing public services) are a long way from what is aimed for. However, they do not reach the Article 3 threshold (paragraphs 52 and 53);
 - (d) there is some evidence that ethnic Albanians take violent or destructive action to prevent those returning from doing so to the multi-ethnic areas where they once lived and that there has been some secondary displacement. However, there is no evidence that those who returned have been persecuted or unable to find state protection or alternate areas in which to live (paragraph 55).

Following the outbreak of inter-ethnic violence in Kosovo in mid-March 2004, the Tribunal invited submissions from both parties. Following the publication of the UNHCR position paper of 30 March 2004, the Tribunal invited further submissions explicitly addressing that paper (see paragraph 57 of the Determination in the FD case). Neither party made any submission. After considering the UNHCR paper:

- (e) the Tribunal saw no reason to revise the view it had earlier reached that the claimant in that case would return to a Roma enclave or camp, neither of which would involve a breach of Article 3 (paragraphs 59 and 64);
- (f) that Serbs were the primary targets of the violence in mid-March, although Roma and Ashkaelia were also attacked (paragraph 60); that the violence of mid-March 2004 represented an extreme but temporary expression of those inter-ethnic hatreds which simmer below the surface of daily life, with sporadic violent eruptions against which the UN authorities and KPS provided a sufficient degree of protection. The violence was not of such a scale that it prevented an effective, controlling, protecting response from the authorities (paragraphs 64, 65 and 66). It was of the order of a week before NATO forces were sufficiently reinforced to quell the violence though the prospects of

identification and prosecution of its instigators are limited (paragraph 60). The events of mid-march 2004 are a clear demonstration of the promptitude and effectiveness of the protecting response (paragraph 65);

- (g) that there was nothing of substance before the Tribunal to show that the political or inter-ethnic landscape has changed such that there was a real risk of treatment in breach of Article 3 or of persecution under the Geneva Convention for reasons of ethnicity. Rather, the Tribunal found that the mid-March incidents demonstrated that the tensions lead to sporadic and unpleasant violence which the authorities have the will and ability to suppress (paragraph 67).

17. Whilst we note the UNHCR's view in its Kosovo August 2004 Paper as to the security concerns for minority groups in Kosovo, we also note that there is no mention in this report of any security incidents involving Roma following the events of mid-March 2004. Appendix 1 to the UNHCR Serbia and Montenegro August 2004 Paper gives a "non-exhaustive list" of security incidents in Kosovo. Whilst we bear in mind the UNHCR's caution that security incidents are under-reported, we noted that not only is it the case that the majority of the incidents listed in Appendix 1 pre-date the mid-March 2004 violence, they mostly involve Serbs. In total, Appendix 1 lists about 140 separate entries, which date from approximately December 2002. Of this total number, about 10 entries involve incidents against Roma. This is the total number over the period covered by the Appendix. There are in total only 5 security incidents listed in Appendix 1 since the violence of mid-March 2004 – they involve Serbs in the main; none of them involve Roma.

18. Paragraph 2 of the UNHCR Kosovo August 2004 states:

"In an environment where inter-ethnic crime is not systematically investigated and rarely solved, a strong sense prevails that there is impunity and the rule of law is inefficient."

19. We were concerned at the reference to "systematic investigation" – in particular, whether this means that protection is insufficient. At paragraph 4, the UNHCR states that the law enforcement authorities and political leadership did not manage to stop the violence "early on". This has to be considered in the context of paragraph 60 of the FD case, from which it is clear that it took a week for NATO forces to be reinforced sufficiently to quell the violence. We do not agree with the view of the UNHCR that the response of the law enforcement authorities was "inadequate" (paragraph 26 of the UNHCR Kosovo August 2004 report). On the whole of the evidence which is before us (including the evidence referred to below), we affirm the view of the Tribunal in the FD case that the response of the UN and NATO forces was prompt, and clearly demonstrated the promptitude and effectiveness of the protecting response. The conclusions of the UNHCR at paragraph 27 of the report indicate that the UNHCR's position reflects the fact that it is concerned with more than just refugee status. This was referred to by the Tribunal in paragraph 54 of the FD case, and we see further evidence of this (see the references to "dignified" returns) at paragraph 27 of the Kosovo Paper of August 2004.

20. We noted, in particular, the final bullet point at paragraph 27 of the UNHCR Kosovo August 2004 report, which we quote in full:

UNHCR supports the full and inclusive implementation of Security Council Resolution 1244 of June 1999, which states that "the main responsibilities of the international civil presence will include assuring the safe and unimpeded return of all refugee and displaced persons to their homes in Kosovo (emphasis added). In UNHCR's view, where States forcibly return

minorities to situations where they are displaced into communities outside their place of origin, they undermine the spirit of the Resolution”.

21. The Security Council Resolution 1244 of June 1999 cannot have the effect of informing our evaluation as to whether people of Roma ethnic origin are reasonably likely to face persecution or Article 3 ill-treatment in Kosovo, the assessment of which we must make in line with our jurisprudence. The inclusion of the paragraph we have quoted above in the UNHCR’s report is a further indication that the UNHCR is concerned with matters which go beyond refugee status determination.
22. At paragraph 3.3 of the CIPU Bulletin dated July 2004, the Kosovo Ombudsman is quoted as saying (in his letter dated 1 June 2004 addressed to the governments of Belgium, the Netherlands, Germany, Norway and Sweden, telling them to reconsider their deportations of Ashkaelia and Roma) that “the situation has deteriorated to such an extent that neither UNMIK nor the local police are in a position to guarantee the safety of members of these national minorities”. However, we are not concerned with guarantees of protection, but a sufficiency of protection. We note the view of the ERRC (European Roma Rights Centre) quoted at paragraph 3.3 to the effect that “the events of March 2004 should more properly be regarded as an intensification of an ethnic cleansing campaign ongoing since June 1999”. We acknowledge that there is some evidence, as the FD case states (paragraph 55), that ethnic Albanians take violent or destructive action to prevent returnees from returning to their former multi-ethnic areas. The Tribunal in the FD case was already aware of this; there is nothing in the brief quote from the ERRC at paragraph 3.3 of the CIPU Bulletin which can properly cause us to depart from the conclusions of the Tribunal in the FD case.
23. There are two main points which emerge from the CIPU Bulletin of July 2004 concerns freedom of movement. Paragraph 3.9 of the Bulletin states that freedom of movement for ethnic minorities has practically ceased in Kosovo. However, this relates in particular to Kosovo Serbs, although Roma and Ashkaelia are also mentioned as being adversely affected in their movement in Kosovo, reducing their capacity to work as day labourers. Whilst this may affect those who need to travel on a daily basis to work, it is clear from paragraphs K.6.63 to K.6.65 of the CIPU Report of October 2004 that returns (both forced and voluntary) are managed. We do not therefore consider it reasonably likely that a returnee would not be able to travel safely to a Roma enclave or camp.
24. Paragraph 4.8 of the CIPU Bulletin of July 2004 refers to the possibility of further violence in the future. This is attributed to the April 2004 report to the UN Security Council of the then SRSG, Harri Holkeri. However, we also note that he also referred to the fact that, in view of this, the KFOR and UNMIK police are maintaining a high level of visibility and presence particularly in minority areas.
25. We note, furthermore, that paragraph K.6.87 of the CIPU October 2004 report states that, according to the UNHCR Update paper of June 2004 (which has not been placed before us), the overall situation for the Roma, Ashkaelia and Egyptian communities since March 2004 in the main has been one of gradual resumption of the relative levels of minority rights held before the violence of mid-March 2004.
26. Mr. Fripp drew our attention to the problems in Vushtrri/Vucitrn (see paragraph K.6.86 of the CIPU October 2004 report and paragraph 3 of the UNHCR Kosovo August 2004 Paper). The Ashkaelia community in this place suffered disproportionately when compared with other minority communities elsewhere in Kosovo. We do not see that the experiences of the Ashkaelia community in

Vushtrri/Vucitrn in March 2004 has any real bearing on the issue in the instant appeal.

27. On the whole of the evidence before us, we have concluded that the conclusions of the Tribunal in the FD case remain valid. There is reference to freedom of movement for Roma being adversely affected (which shows some deterioration in their situation) but, on the other hand, there is reference to KFOR and UNMIK police maintaining a high level of visibility and presence particularly in minority areas (which indicates an improvement in terms of protection). On the whole, the situation remains much the same as it was on the evidence before the Tribunal in the FD case.
28. We now turn to consider the specific circumstances of the Appellant. The Adjudicator rejected the Appellant's claims as to the problems he alleged he had experienced in Kosovo. This means that the Appellant's Roma ethnicity has not led to his being persecuted in the past. This is in line with the Tribunal's conclusion at paragraph 51 of the FD case that even those Roma who live outside Roma enclaves or in camps do not all face persecution. Paragraph K.6.83 of the CIPU October 2004 report states that the security position for Roma varies according to the perceptions of the majority population, locality and language issues. The UNHCR and the OSCE (both in the January 2003 reports) state that the ability to speak Albanian is likely to be a factor in the degree to which the Roma, Ashkaelia and Egyptian communities are able to integrate with the majority community, although it will not safeguard against committed assailants. This Appellant speaks Albanian. Accordingly, given the lack of any credible evidence of past problems and the fact that the Appellant speaks Albanian, there is no reason for supposing that he would not be safe in his home village. In any event, he would be able to go to a Roma enclave or camp. For the reasons we have already given above, it is not reasonably likely that he would be persecuted or subjected to Article 3 ill-treatment in a Roma enclave or camp. Our attention has not been drawn to any factors which would make it unduly harsh for him to relocate to a Roma camp or enclave. Whilst we note that freedom of movement for Roma has been adversely affected, there is nothing before us which suggests that the Appellant is not reasonably likely to be able to reach a Roma enclave or camp safely.
29. It follows that we must dismiss this appeal.
30. This Determination is being reported because we have taken the opportunity of considering material published after the promulgation of the Determination in the FD case. We have concluded that the conclusions of the Tribunal in the FD case remain valid. There is nothing of substance before us to show that the political or inter-ethnic landscape has changed to such an extent that it can now be said that a Kosovan Roma is at real risk of treatment which amounts to persecution on grounds of ethnicity or which is in breach of Article 3.

Decision

The appeal is DISMISSED.

Ms. D. K. GILL
Vice President

Date: 18 January 2005

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