

IMMIGRATION APPEAL TRIBUNAL

Date of Hearing: 13th February 2004

Date Determination notified:

14 July 2004

Before:

The Honourable Mr Justice Ouseley (President)

Mr N Kumar JP

Mr P Rogers JP

Between:

SECRETARY OF STATE FOR THE HOME DEPARTMENT

APPELLANT

and

RESPONDENT

For the Appellant: Ms A Holmes, Home Office Presenting Officer

For the Respondent: Miss S Chuni of Markandan & Co

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State against the decision of an Adjudicator, Mr N M K Lawrence, promulgated on 26th August 2003, by which he allowed the Claimant's appeal under both the Refugee and Human Rights Conventions.
2. The Claimant is a national of the Federal Republic of Yugoslavia and Montenegro (FRY) from Kosovo. He was born on 11th June 1986 and arrived in the United Kingdom on 17th February 2003, some four months short of his seventeenth birthday. He claimed asylum three days after arriving. The Secretary of State refused his claims in a letter dated 9th April 2003.
3. The claim was based on racism, because the Claimant's father was a Roma and his mother a Serb. He had been called names by Albanians living in his village and the police offered no protection against Albanians who committed crimes against Roma or Serbs. The Claimant had said that his father was shot and killed on 10th February 2003 and that he feared that he would be killed as well if he returned to Kosovo.

4. The Secretary of State's refusal letter considered the general position in Kosovo, referring to the improvement in political infrastructure, a general reduction in violent crime, the improving position of ethnic minorities and to the fact that UNMIK and UNHCR had been seeking to encourage the voluntary return of ethnic minority refugees in planned initiatives. The Secretary of State said that he was aware that members of the Roma community in Kosovo were still victims of occasional violent incidents, but he was satisfied that UNMIK, KFOR and KPS were generally able to provide a sufficiency of protection for these groups. He noted that there was no evidence to substantiate the claim that the father had been shot and killed by Albanians. However, acknowledging the incidents of discrimination, harassment and the limitations on freedom of movement which members of the Roma community might experience, he did not consider that the cumulative effect of those would usually engage the United Kingdom's international obligations: the overall situation for Roma had improved to the extent that being a Roma would not in itself qualify a person for the grant of asylum. He did not think that anyone would have any reason to regard the Claimant as being of mixed ethnicity, because the Claimant had had no contact with his mother since he was two years old. The Secretary of State also considered that the Claimant had taken an unreasonable time to provide evidence to establish his claim under the Rules. Accordingly, the Secretary of State refused the application.
5. The Secretary of State was not represented at the hearing of the appeal, which undoubtedly placed the Adjudicator at something of a disadvantage. The Adjudicator set out the law in relation to asylum and human rights in just under three pages of his determination and then turned to the evidence. He said that the documentary evidence was contained in two bundles; he then simply said that the Claimant had given oral evidence confirming the contents of the screening form, the SEF and a witness statement of July 2003. He said that the Claimant gave further oral evidence recorded in the Adjudicator's notes of evidence, which he did not propose to repeat.
6. All else apart, that was an unhelpful approach to the issues here. It has made it more difficult than it ought to have been to obtain a picture of the evidence, the issues to which it gives rise and whether conclusions were required on more issues than were dealt with. For this appeal we have had to consider therefore the Adjudicator's hand-written notes and a variety of hand-written statements.
7. The Adjudicator records the basis of claim as being that the Claimant's father was a Roma, his mother a Serb, and that he had been discriminated against because of his "*ethnicity*". He said that people in Kosovo considered "*us*" as traitors. He said his

father had been accused of treason, beaten and shot dead on 10th February 2003, and that the police in Kosovo do not take action against Albanians on behalf of Roma victims. He said that on seeing his father's killing he feared for his (we assume that the Adjudicator meant to add in the word "*life*") and left FRY with his uncle's assistance.

8. The Adjudicator then quoted a number of paragraphs in full from the UNHCR Position Paper on Kosovo of January 2003. He said that that Paper continued to identify Kosovars of mixed ethnicity as needing protection, but it did not appear to have been considered by the Secretary of State in reaching his conclusions. In paragraph 5.5, the Adjudicator said:

"The UNCHR paper indicates that in Kosovo grenades attacks and stoning are taking place against the minorities such as Roma. I consider the appellant's evidence about his father's killing in the light of this kind of objective evidence and I it a credible account."[sic].

9. After citing what Professor Hathaway has described as persecution, the Adjudicator said briefly that there was evidence that Roma suffered the serious risk of being denied various fundamental human rights and that he was satisfied that there was insufficiency of protection. He added "*the police are engaged in violating the fundamental human rights of the Roma*". He concluded that the Claimant faced persecution on two fronts: "*firstly, on the basis that his father is a Roma*"; secondly "*because his mother is a Serb. The Respondent says the Appellant has not seen his mother since he was two years of age. I rather doubt that that makes much of a difference. The Appellant told me in evidence although his father's names are Albanian his mother's name, Maria Todic, is Serb and it is recorded in his birth certificate. No sooner this comes to the attention of the authorities in Kosovo the Appellant is likely to suffer persecution*" [sic].
10. In his conclusion the Adjudicator said that he had considered all the evidence and submissions and then allowed the appeal under both Conventions.
11. The Secretary of State's grounds of appeal allege, in summary, that there was a failure by the Adjudicator to consider some of the relevant background material, in particular the relevant CIPU Paper on Serbia and Montenegro which was in the bundle before him on the Secretary of State's behalf. It was also said that he had not made credibility findings on a number of relevant issues.
12. We accept that first point and Miss Chuni could scarcely resist it. The Adjudicator's consideration of the background material was inadequate; he had ignored the relevant CIPU Paper. He gave no reason for doing so. We have accordingly examined all the

background material.

13. It became apparent, however, during the course of our consideration of the background material that a number of facets of the Claimant's case needed to be fleshed out from the material before the Adjudicator, but to which he unfortunately made no reference, in order to see how significant various matters were. So the second ground of appeal is also made out. These included whether mixed ethnicity of itself was a problem, whether the Claimant would be regarded as a Roma or as a Serb, or as neither, whether he spoke Albanian and what evidence there was as to difficulties which he or his family had experienced living in Kosovo until 2003. These were important issues because of passages in the CIPU Report which drew on UNHCR/OSCE Assessments, in particular dealing with mixed ethnicity. In K.6.64 of the October 2003 CIPU Report, which in most paragraphs was essentially the same as in the previous CIPU Report, it said:

"Ethnic identification as Roma, Ashkaelia or Egyptian is not necessarily determined by easily discernible or distinct characteristics or cultural traits, but rather by a process of self-identification. It is not uncommon in Kosovo for individuals to change their ethnic self-identification depending on the pressures of local circumstances, especially when it is necessary in order to distance themselves from other groups to avoid negative associations. In general, however, ethnic Roma clearly identify themselves as Roma and tend to use Romany as their mother tongue, although a large percentage of the Roma population can speak Serbian (and to a lesser extent Albanian) languages." (UNHCR/OSCE assessment)

14. K.6.85 said:

"People in mixed marriages with people from ethnic minorities or children from such families may face similar difficulties as those groups. Unlike other minority groups, mixed families may be excluded from all communities and may be unable to resort to the relative security of mono-ethnic enclaves."

15. In paragraph K.6.68 in dealing with Roma, Ashkaelia and Egyptians generally, it said:

"The ability to speak fluent Albanian is likely to be a factor in the degree to which RAE are able to integrate with the majority community. But overall, RAE have experienced significantly improved possibilities to move about in communities where they reside, with increased use of public transport and access to public services."

16. We filled in the factual gaps with the assistance of the hand-written material and of Miss Chuni, who had appeared before the Adjudicator. The Claimant had explained that his father had been accused of treason against the Albanians and that the Claimant had been scared of encountering the racist Albanians all the time after the war. He said they had always been treated differently. Everywhere in Kosovo, gypsies were treated the same. When he

was asked to describe in the SEF to which race or ethnic group or nationality he belonged, he had said that he was gypsy, and his mother was Serbian. He said the same when providing further information later. He also said that his father was killed "*because of his ethnicity*" and if he were to return he would be killed by "*unruly Albanians*". He said the people knew his family history, which included the fact that his mother was a Serb.

17. In his statements before the Adjudicator, he said that he was the only child in the family and had no relatives in the Dragosh area of Kosovo. In evidence to the Adjudicator he said that in his village there were no Roma and he had no relatives in Kosovo. He did not know what had happened to his house, the Kosovars did not like "*us Roma*", and they could not go anywhere. The Serbs did not like "*us either*". Both his names were Albanian names. It is only on his birth certificate that his mother's Serbian maiden name Todic would appear. He had been to school for five years but was called names and treated differently by all the people in the village; they were doing that because of his father and mother; he never had any friends and was discriminated against at school by his teachers and only spent three or four years at school. His father used to sell goods from a small shop, was friendly with the police but had been accused of spying on the Albanians. His father had been attacked several times before 2003 and wanted to move out but no one was prepared to buy his land.
18. The Claimant said that he did not know the names or the identity of the people who killed his father, nor the reason for their killing him. In another statement, he said that his father had been killed by racists. He had gone outside having seen his father beaten and killed and was so terrified that he ran away to the house in the neighbouring village of an Albanian friend of his father. That friend, who was too scared to keep him in his house, arranged for an agent to take him to the United Kingdom which he did a few days later.
19. At his asylum interview he said that he would prefer to speak Albanian and spoke no other languages. Miss Chuni accepted, as we analysed the evidence, that the fact that his father was a Roma and his mother was a Serb was not a proper basis for the Adjudicator concluding that he would face problems. The mixed ethnicity was not of itself the problem which he faced. There was no evidence that he had been treated badly because of his mixed ethnicity. He had been brought up as a Roma, he was seen as a Roma by the Albanians and would not be liked by the Serbs because they too would see him as a Roma. He was complaining about the way he had been treated as a Roma. There was no evidence that Roma despised him because he was half Serb, although it was clear from his evidence that he could not turn to the Serbs for assistance, because they too would see him as a

Roma. The real problems which he faced and against which his position had to be considered arose from the fact that he was a Roma and would be seen as such by both Albanians and Serbs. It is therefore necessary to look at the position of Roma in Kosovo in general and the position of this Claimant in particular.

20. The Adjudicator has not got to grips with the problem because he has ignored the significance of mixed ethnicity here. It is not that both the Roma and the Serbs exclude him, it is simply that he is seen as a Roma. There is no justification in any material we have seen, including the UNHCR Position Papers to suggest that a Serb name, as his mother's in his birth certificate, would give rise to any difficulties whatsoever. The Adjudicator's comment that this would lead to instant problems with "*the authorities*" is misconceived. There are a number of "*authorities*" in Kosovo, including UNMIK, KFOR and KPS; there is no evidence that any of those or indeed any "*authority*" would react in the way ascribed to them by the Adjudicator.
21. The comment in paragraph K.6.85 is not material in view of the way he was perceived, considered himself and the lack of contact with his mother since he was two. The Adjudicator's further comment that the police were "*engaged in violating*" the fundamental human rights of Roma was not supported by any material which we were shown or which the Adjudicator cited. The Adjudicator's assessment of the facts and the basis of the risk he thought would be faced on return is deeply flawed.
22. It does not, however, follow from that that the result of the case is wrong. We have considered all the background evidence in reaching our conclusions.
23. We were referred by Ms Holmes for the Secretary of State to the Tribunal decision in B Serbia and Montenegro (Kosovo) [2003] UKIAT 00013B. This case concerned someone who was half Roma and half Albanian, from Kosovo. The Adjudicator concluded that that Appellant did not look like a Roma. The Tribunal concluded that there was no reason not to suppose that the Appellant would be able to return to Kosovo and pass as an ordinary Albanian everywhere apart from the immediate area of where he had lived. There was no evidence that a young single Albanian speaking and Albanian looking man, with no family ties, could be identified by others as a half gypsy or would be entitled to insist on so identifying himself to them regardless of any risk involved. Accordingly, the Tribunal could see no reason not to return that Appellant to Kosovo. The Tribunal did however express concern about the position of an Appellant returned to Kosovo, identified as a gypsy because of conditions in the IDP camps, if an Appellant had had to return to them.

24. The Appellant, however, in that case was in a position to disguise his mixed Roma ethnicity and to pass himself as an ordinary Albanian, because of his appearance, language and upbringing, provided he stayed clear of the small area which knew his precise background. In this case there is no suggestion that the Claimant would be able to pass himself off as an Albanian, or alternatively as a Serb; on the material as it was before the Adjudicator, the true picture is that he would be seen as a Roma. The potentially different position of such a person on return to Kosovo needs therefore to be considered.
25. Miss Holmes relied on a number of passages in the October 2003 CIPU Report dealing with Kosovo, which were essentially but not always in detail, the same as those in the April 2003 Report. At paragraph K.6.31, it was said that the number of incidents of violence against minorities had decreased significantly since the period following the conflict and that improvement continued in 2002. Although there was still a low level background of inter-ethnic violence, most crime was now considered to be economically motivated. Amnesty International in April 2003 considered the threat of violence to be ongoing and that ethnic minorities lived in "*mono-ethnic*" areas, in a climate of fear and denial of basic human rights. There had been a significant drop from the year 2000 to 2002 in ethnic murders, a drop attributed to the increase in effectiveness of UNMIK police, KPS and the judicial system.
26. Paragraph K.6.34 referred to UNHCR noting a continued improvement in the situation of the minorities, the gradual decrease in ethnically motivated crimes and the increased participation of minority members in the Kosovo police. But it also noted that minority communities "*continued to face varying degrees of harassment, intimidation and provocation, as well as limited freedom of movement*". This concurred with Amnesty International's conclusion that ethnic minorities in May 2003 still come under attack with occasional incidents of serious violence. Ethnic minorities faced an unemployment rate of about 85%, many heavily dependent on humanitarian assistance for survival. Some also faced obstacles to accessing health, education and other public services, most of which are run by ethnic Albanians. It could still be dangerous sometimes to speak Albanian with a Roma accent in public. Various other initiatives to improve inter-ethnic tolerance and institutional advancement were referred to.
27. In K.6.42 the Secretary General to the UN was quoted as observing in his Report of 17th July 2002 that, for the first time since the arrival of UNMIK, a climate had been created which appeared conducive to promoting inter-ethnic return, a matter of increasing interest and commitment from UNMIK. There was now recognition at the Kosovo political level of the need to encourage the return

process. Ethnic Albanian leaders had signed up to statements in favour of and, in particular, urging ethnic Serbs to return.

28. Paragraph K.6.49 said that of the estimated 2,668 minority returns in 2002, 46 percent were Roma/Ashkaelis/Egyptians. There had however been setbacks. In the section dealing with Roma, paragraph K.6.61 said that Kosovo Roma had been targeted as a group because they were seen as having collaborated with Serb mistreatment of ethnic Albanians during the conflict. Allegations of criminal acts or opportunist looting had blackened the name of other Roma of whom approximately 25,000 had fled to Serbia, Montenegro or Macedonia, and those who remained tended to move to Roma enclaves. It was likely that about 36,000 Roma remained within Kosovo. They are described as not an homogenous or a cohesive group but comprising various groups with different allegiances and traditions, but mostly with a settled lifestyle.
29. The Albanians at the local community level were said not generally to perceive the differences between Roma, Ashkaelia and Egyptians, however differently they might regard themselves; Albanians saw them all roughly as gypsies. It was also said that the treatment of Roma by the Albanians might depend on the state of Serb Albanian tensions at that particular time and place. There had been improvements in security and freedom of movement for Roma throughout 2002, but it varied according to perceptions of the majority population, locality and language issues.
30. Although overall there had been significantly improved possibilities for Roma to move about in the communities where they resided and there had been a significant improvement in the crime statistics, (12 Roma murdered in 2000, none in 2002), there had been several incidents of assault, attempted murder, arson, grenade and bomb attacks on Roma property and such incidents had often occurred after long periods of relative calm. Although not all incidents were ethnically motivated directly, Roma could be seen as an easy target for general crime and their security could still be precarious.
31. Paragraph K.6.70 said that Roma continued to experience adverse living conditions due to historical patterns of discrimination, ostracism and marginalisation; large numbers of them still lived in collective centres or IDP camps in poor conditions. The fact that they chose to stay there suggested they were concerned about the security situation or lacked adequate accommodation in their areas of origin. There was a lack of adequate construction assistance for repairing property.
32. There had been progress with the spontaneous facilitated return

of Roma to some locations with about 1,200 Roma, Ashkaeli and Egyptians returning during 2002. Some returns passed off without incident, although there had also been occasions where returnees' homes had been stoned or subject to grenade attack. Amnesty International in May 2003 considered that attacks and discrimination continued on ethnic minorities to drive them into enclaves or out of Kosovo and that those living outside Kosovo would be unable to return until minority rights were guaranteed, but it did acknowledge the marked improvements in security conditions for minorities since July 1999 and a measurable decline in violent attacks on their lives and property.

33. Miss Chuni, in addition to referring to parts of the CIPU Assessment to which we have made reference, put great weight on the UNHCR Position Paper of January 2003. In paragraph 3, UNHCR expressed the view that notwithstanding the general improvements which had taken place, the security situation of minorities continued to be a major concern. They face security threats placing their lives and fundamental freedoms at risk fuelling ongoing departures. The level of risk was variable depending on the minority concerned as well as the location. Kosovo Serbs, Roma, Egyptians and in many cases the Ashkaelia continued to face security threats. The UNHCR's position *"is that members of minority groups in Kosovo..., especially Kosovo Serbs and Roma, but also Ashkaelia and Egyptians should continue to benefit from international protection in countries of asylum. UNHCR stresses that return of these minorities should take place on a strictly voluntary basis and be based on fully informed individual decisions. Any such voluntary return movements should be properly coordinated, and reintegration should be supported through assistance to ensure sustainability"*. They should not be forced or induced to return to Kosovo. Although Kosovo Serbs remained the primary target of ethnically motivated violence and while there have been general improvements in the overall situation of Roma with a stabilised security situation in many regions, Roma, Ashkaelia and Egyptian communities continued to face serious protection problems.
34. Paragraph 10 of the UNHCR Paper said that Roma faced those problems to an extent comparable to the Serbs. The problems included grenade attacks, physical harassment, acute discrimination and marginalisation. Their physical security remained precarious.
35. Paragraph 11 said that the Roma, Ashkaelia and Egyptian communities tended to live in a concentrated group to enhance their sense of safety. They had restricted freedom of movement but it varied with their language ability, Albanian speaking being of assistance. But there were restrictions on their overall ability to exercise their basic rights and this aggravated an already

impoverished situation. Many Roma returnees to Kosovo had relocated to larger communities of their own ethnic group rather than to their places of origin. This had led to overcrowding and a further obstacle to return.

36. Although there had been progress with the return of Roma, it remained minimal and was often characterised by secondary displacement and relocation to a few already overcrowded locations. Achievements with spontaneous and facilitated voluntary returns indicated improvements but not a substantial general improvement in the situation for Roma. UNHCR concluded that to be safe, dignified and sustainable, Serb, Roma, Ashkaelia and Egyptian communities could only be returned on a voluntary basis and in a very gradual manner.
37. There was other material in the same vein. (Some of the material to which we were referred however related to the unhappy conditions of Roma who had left Kosovo and were living in poor conditions in Serbia.) The US State Department Report for 2002 referred, as did the CIPU Paper, to those minorities who had returned; since 2000, some 5,500 were estimated to have returned, of whom just over 3,000 were ethnic Serbs and just over 2,000 from other minority groups. Ethnically motivated violence and crime continued to be a serious problem for minorities; some Roma living alongside ethnic Albanians had reported that their security situation improved during 2002, although violence and harassment continued and freedom of movement was restricted in parts of Kosovo. Roma in some areas reported that they were afraid to leave their enclaves due to fear of intimidation and attack by ethnic Albanians. The remaining Roma in Kosovo were largely settled in enclaves and settlements, dependent almost wholly on humanitarian aid.
38. A Human Rights Watch Report of (it appears) July 2002 said that Serbs and Roma in particular continued to face severe threats to their personal safety, freedom of movement and socio-economic well-being. Attacks appeared to be increasingly focused and sophisticated. Those returning from Serbia and other neighbouring countries were frequently victims of armed attack; incidents in 2000 and 2001 were referred to. The number of returnees were said to be small.
39. Miss Chuni said that the position of the UNCHR as set out in CIPU referring to the improvement in the position of the minority communities, with attacks becoming decreasingly significant and more randomly, contained in the Report of the Secretary General of July 2002, was superseded by the observations in the January 2003 Position Paper. Miss Chuni produced a Report of 22nd October 2003 from the European Roma Rights Center relating to the forced return of Roma by Denmark to Kosovo. It said that the

position of Roma remained extremely unsafe and that the Danish government had been severely criticised. The relevant minister said that Denmark did not expel aliens who were at risk, plainly of the view that the Roma would not be.

40. The Parliamentary Assembly of the Council of Europe produced, according to the provisional edition dated 2nd December 2003, a recommendation on the forced returns of Roma to Serbia and Montenegro from the Council of Europe States. It said that Roma were particular vulnerable and that their security could not be "*guaranteed*" in Kosovo. They were confronted with subtle discrimination everywhere. The Assembly recommended that there be no forced returns of Kosovan Roma to Kosovo so long as the security situation did not allow for it. (That is somewhat circular.) The decisions on forced return should be taken on a case by case basis, taking all relevant circumstances into account.
41. In order to relate that background material to this case, we start by examining the position of this Claimant. He is an Albanian speaker who lived in his village as the only Roma with his father throughout the whole of strife between Albanians and Serbs and their perceived sometime supporters, the Roma. Although he says that his father was accused of treason by helping the Serbs and there had been attacks of an unspecified nature, nothing of significant severity seems to have happened until he was killed in February 2003. The Claimant's evidence as to who did it as judged by their appearance is vague. He does not know who they were; his statement said it was a racist attack but he told the Adjudicator he did not know the reason. The difficulties which he described at school, being picked on by teachers and fellow pupils, are consistent with a pattern of discrimination but not with anything more serious. He left immediately after the killing and has made no effort at all to seek the assistance of UNMIK, KFOR or the KPS in relation to what happened. His evidence about the police being of no assistance when he was at school appears to draw no distinction between the present position and the past.
42. There is no sound evidence that the Appellant has been persecuted in the past or treated in a way which would constitute treatment which would breach his Article 3 rights and there is no evidence that living where he did, he would have been unable to obtain the assistance of the current forces of law and order in Kosovo. He had after all lived in an Albanian village with no real problems for many, many years. He is now nearly eighteen and has benefited from some education over a number of years in Kosovo. There is no evidence as to the position in relation to his father's house. He was fortunate in having an Albanian family friend, whom he described as an uncle at various times, who arranged rapidly for his departure from the country with the help of an agent.

43. Turning to analyse the background material, Miss Holmes and to a lesser extent Miss Chuni suggested that the CIPU Report and the UNHCR Paper were in conflict but neither came up with any very compelling reasons as to why one should be preferred to the other. Both suggested that the paper less favoured by them was to some extent biased. We could not see that that was so. The UNHCR Paper is derived from its sources in the field and they must be well placed to provide sound information; it would then have been through a process of consideration through the UNHCR hierarchy, so it should be regarded as a responsible, well researched and considered analysis. It obviously takes some time for such a process to be completed before January 2003, but there is nothing in the CIPU Report which suggests that the picture has changed significantly since the analysis was prepared which the CIPU alone has been able to consider. The CIPU Report draws on a wide range of sources including UNHCR, and Amnesty International.
44. The UNHCR Paper is more general and provides less detail as to the position for Roma, than the CIPU Report. But that detail is generally supportive of the general picture in the UNHCR Paper. They both recognise that there have been improvements in the position of Roma in Kosovo since 2000. They both recognise that there are continuing problems of security, movement, discrimination in public services and employment. The Roma are generally dependent on humanitarian assistance. Few now live in mixed communities, most having gathered into mono-ethnic communities for safety. Both acknowledge that there have been returns by Roma to Kosovo; UNHCR lays emphasis on the need for that to be supported and done on a voluntary basis. CIPU refers to the return of some 1,300 RAE in 2002, to the 36,000 Roma left and to the problems faced by those who return. Attacks, if they return to whence they came, create secondary displacement. It acknowledges the poor conditions in the camps but does not provide much detail. The more we have considered the two documents the fewer the differences have appeared to be. There may be a difference in emphasis and a greater degree of optimism in the CIPU Report but it is not a large one.
45. The real difference is that the UNHCR Papers offers a clear recommendation about return whereas the CIPU contains no such conclusion; as is normal with such reports, it leaves the question of safety on return to those who have to make the decisions. The UNHCR Paper is unusually strong in its language about the risk on return and whether in general Kosovan Roma should continue to receive international protection. Some of that is no doubt directed at the countries around Kosovo to which Roma fled; in part it is directed to larger scale returns and to the economic conditions which would be faced on return; but it does also consider how

individual returns should be managed. It is primarily directed at those who fled during the war but it recognises that there are some who still leave under ethnic pressure from the majority. It is however clearly against enforced return.

46. We do not give the same weight to the disputed claims of the ERRC, nor to the recommendation of the Parliamentary Assembly of the Council of Europe, which seems to require “guarantees” of safety, which is not the relevant test.
47. We now apply the material to the circumstances of the Claimant. As we have said, we do not find the evidence that he has been persecuted very persuasive. The Adjudicator made no findings as to the reason for the killing of the Claimant’s father and if he accepted what the Claimant said about it, he made no effort to consider the basis for the assertion that it was racially motivated, in view of the fact that the family had lived in the same village for so long through the troubles without anything serious happening. Nor did he consider the lack of effort made to engage UNMIK or KPS assistance. The Claimant himself had been discriminated against at school and although his father had seemingly been friendly with the local police, they had not assisted him. There is nothing in this individual’s experience to mark him out for any particular attention from the Albanian Kosovars.
48. However, the nature of the ethnic hostility is such that the killing could have been racially motivated. There is no evidence as to any family who could help the Claimant on return or any place to which he could go; there is no evidence that accommodation would still be available to him in his village. If he was the only Roma left in his village, it would fit with the background material for it to have been taken over in his absence by Albanian Kosovar villagers. The nature of ethnically motivated hatred means that he cannot be regarded as safe from attack simply because he has so far survived personally unscathed.
49. So he would return as a young man, not quite eighteen at present, someone who faced the problems of Roma in general rather than someone at particular risk. He would be returned to Pristina.
50. The picture which we draw from the various Reports is that there has been a decrease in violence against the ethnic minorities including the Roma over the last few years, although incidents of violence continue to occur with Roma amongst those targeted by other groups. It is of course not possible for any system to provide a guarantee against violence and it does not suffice in order to show that there is a real risk of persecution by non-state agents against which the state is unable to offer protection, to point out that such attacks do occur. We have to bear in mind that the UNMIK police and the KPS together with the judicial

system have been effective in reducing the level of attack upon ethnic minorities. There is evidence that they do investigate and prosecute before judges of improving quality, independence and diversity, those who commit such offences. The evidence does not suggest that those incidents are so widespread that the forces now present in Kosovo are unable to provide a system of physical protection to minorities, even though it cannot prevent a number of unpleasant attacks. The reported incidence of attacks is hard to gauge from the material when set against the fact that there are some 36,000 Roma in Kosovo and 1,200 RAE returned in 2002 alone; but it does not appear to be high.

51. Roma do not all live in Roma enclaves or in camps and those who live outside do not all face persecution; the picture is somewhat variable depending on time and place. We assume however that the claimant would not return to his village but would instead go to a Roma enclave or to a camp. We make that assumption because of what he said about being the only Roma family there and the likelihood that his house will have been taken over by ethnic Albanians. The position in an enclave, however, does not suggest that there is a real risk of persecution there; Roma concerned about the security situation can go to such enclaves where there is a greater prospect of collective protection than outside.
52. There is no evidence that conditions in the camps, should the Claimant go to one, breach Article 3 of the ECHR. They are overcrowded and conditions are poor. The fact that they are overcrowded suggests that the security situation, freedom of movement and discrimination are a long way from what is aimed for. However, the threshold for such a breach is very high.
53. The evidence shows that the general conditions of life for many Roma involve routine and quite severe discrimination in accessing public services, poverty, a high degree of dependency on humanitarian aid and fears for their future and security. We do not consider that the conditions as evidenced by the various reports, however, show that there is a real risk that the claimant's Article 3 rights will be infringed if he is returned. There is humanitarian aid; some are able to access public services; not all are subject to the same degree of discrimination. The position in enclaves or camps is likely to afford scope for greater collective opportunities for protection and the provision of services.
54. The UNHCR is legitimately concerned about more than just refugee status and addresses humanitarian issues without necessarily drawing a distinction, let alone a precise, distinction between Geneva Convention refugees and those whom it considers should still have humanitarian protection. But it does not apply the same test on the face of the material as is required

by the Article 3 jurisprudence, which may explain the way in which it expresses its concerns and why the Tribunal's assessments of whether someone can be returned can properly differ.

55. It is plain that the improving situation in Kosovo has enabled ethnic minorities to return in increasingly significant numbers although caution is exercised about their enforced or large scale return. There is some evidence that ethnic Albanians take violent or destructive action to prevent those returning doing so to the multi-ethnic areas where they once lived and that there has been some secondary displacement. But with the international forces in Kosovo, even if they are unable to prevent such an unwelcome response to returns, there is no evidence that those who returned have been persecuted and unable to find state protection or alternative areas in which to live, notwithstanding the discomfort and poor conditions in which they may then have to live. None of the evidence suggests that there would be a breach of Article 3. In those circumstances even though we can understand why the UNHCR discourages the additional load which would be placed upon welfare and aid resources there, we do not consider that its views preclude this Claimant's return.
56. We do not consider that this Claimant has shown that he has been persecuted in the past, and he would face no greater risk on return than that which would be faced by Roma in general. We do not consider that the evidence as a whole justifies the conclusion that the ethnic discrimination and violence to which Roma are at times subject from other groups is of a level or frequency to mean that he would face a real risk of persecution for a Convention reason were he to be returned. That would be to ignore the presence and effectiveness of the international forces there. Neither do we think that the conditions of life have been shown to be of the severity requisite for the return to constitute a breach of Article 3.
57. The above was written before the recent outbreak of inter-ethnic violence in Kosovo, following an incident in mid-March 2004 in which three young ethnic Albanian boys drowned while trying to escape from Serb children in Mitrovica who were chasing them with dogs. We invited submissions from both parties and, following the publication of a UNHCR position paper of 30th March 2004 on international protection needs in Kosovo as a result of those inter-ethnic confrontations, we invited further submissions explicitly addressing that paper.
58. Neither party made any submission.
59. The outbreak of violence and the UNHCR paper do not cause us to change our analysis of the situation.

60. The UNHCR paper describes a series of incidents in which two Serbs were killed in drive-by shootings, and another was killed close to Pristina. The violent Serb protests were followed by the drowning of the three young Albanians. This led to mass demonstrations and violent protests by ethnic Albanians across Kosovo, which was directed against ethnic minorities and the UN Administration. Serbs were the primary target, but Roma and Ashkaelia were attacked. Albanians, where in a minority, were the subject of reprisal attacks. Albanian mobs attacked churches, hospitals and schools. Twenty people were killed, including two police officers, over 1,000 were injured including nearly 200 police officers, over 700 houses were destroyed or damaged. Over 4,000 ethnic minorities, mainly Serbs, were displaced. Systematic attacks were directed against UN personnel and infrastructure. The widespread and systematic nature of the violence took Kosovo's authorities by surprise. 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.
61. The UNHCR paper says that this was the worst outbreak of violence since 1999 and that relations between ethnic groups are extremely tense, leaving minorities with a heightened sense of fear and isolation. Confidence in the ability of KFOR, UNMIK and KPS to protect minorities had dropped; local authorities had failed to take a firm stand against violence.
62. It said that the situation had now been brought under control largely because of the prompt deployment of additional NATO forces. But it represented a "*huge setback*" in the "*slow but steady improvements*" of the last five years.
63. The UNHCR's position was that it had only just started to evaluate the impact and consequences of those events. It thought it likely that detailed reports would be published in April 2004, though none had been published by mid-late May 2004. It first urged that up-to-date information be taken into account; this we have done. Second, it said that its position "*remains that members of all minority groups, particularly Serbs, Roma, Ashkaelia, Egyptians as well as Bosniaks and Goranis should continue to benefit from international protection in countries of asylum. Induced or forced return movements jeopardize the highly delicate ethnic balance and may contribute to increasing the potential for new inter-ethnic clashes*".
64. We see no reason to revise our view that the Claimant would return, not to his former village, but to a Roma enclave or camp, neither of which would involve a breach of Article 3. The situation prevailing before the recent outbreak of inter-ethnic violence was not one of substantial peace and harmony. Inter-ethnic hatreds

simmered below the surface of daily life, with sporadic violent eruptions against which the UN Authorities and KPS provided a sufficient degree of protection. The return of ethnic minorities led to actions designed to intimidate and deter such returns, and to prevent return to the place where the returnees originally lived.

65. The events of mid-March represent an extreme but temporary expression of those hatreds and a clear demonstration of the promptitude and effectiveness of the protecting response. They were not anticipated but they reflect what was there below the surface which already, over the years, had been manifesting itself in isolated and smaller outbreaks of violence, secondary displacement, reduction in ethnic mixing, and constant discrimination, counteracted by the UN and NATO forces. The response of the UN and NATO forces was prompt and brought the violence swiftly under control.
66. The numbers killed and injured, the property destroyed, whether domestic, institutional or ecclesiastical, were not of a scale which prevented an effective, controlling, protecting response from the authorities.
67. We do not see this as leading to a change in our conclusions. Events of that sort, whilst the timing and organised scale may have caught the authorities by surprise, do not warrant a major re-evaluation. Although violence of itself may reflect underlying tensions but in its effect exacerbate them, altering them in degree and nature, changing people's attitudes, there is nothing of substance before us to show that the political or inter-ethnic landscape has changed such that there is now a real risk of treatment which would breach Article 3 or of persecution under the Geneva Convention for reasons of ethnicity. Rather, they demonstrate that the tensions lead to sporadic and unpleasant violence which the authorities have the will and ability to suppress.
68. Accordingly, this appeal is allowed.

MR JUSTICE OUSELEY
PRESIDENT