

LSH
Heard at Field House
On 23 August 2002

APPEAL NO HX15435-2002
EN (Roma) Macedonia CG
[2002] UKIAT 04488

IMMIGRATION APPEAL TRIBUNAL

Date Determination notified:

.30 September 2002

Before:

**Mr J Barnes
Mrs S Hussain, JP
Mr C Thursby**

Between

EFIM NIKOLOV

APPELLANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

Representation:

For the appellant: Mr B Tattersall, of Counsel, instructed by
Lawson Adefope, Solicitors

For the respondent: Mr J McGirr, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, is a citizen of Macedonia, who was born on 28 July 1979. He came to the United Kingdom on 31 May 2001 with entry clearance to undertake seasonal agricultural work. He was admitted for 6 months for that purpose.
2. On 24 October 2001 he claimed asylum. The basis of his claim was twofold. First, that he had received in his absence from Macedonia his call-up papers for military service and that he objected to carrying out that service as a Christian because he was not prepared to kill people. Secondly, that he was of Roma ethnicity and that the Roma in Macedonia were subject to severe discrimination. It is right to say that in his statements it is on the

military service aspect that he appears to have placed less weight as will become apparent later.

3. He was interviewed and for the reasons set out in a letter dated 27 November 2001, his asylum application was refused. It is important to refer to that refusal letter in relation to one matter at this point. At paragraph 5 of the refusal letter, the Secretary of State says as follows:

"In addition he has also noted or claimed to be of Roma ethnicity and to have suffered discrimination and harassment because of this. The Secretary of State has no reason to doubt your ethnicity."

4. On 28 November 2001 the Secretary of State issued to the appellant notice of his decisions to refuse to vary leave to remain in the United Kingdom after refusal of his asylum application. The appellant appealed against the decision on both asylum and human rights grounds. His appeal was heard on 20 May 2002, by Mrs P Milligan-Baldwin, an Adjudicator, she dismissed his appeal. The appellant now appeals to us with leave against that decision.
5. There is no question in our minds that the determination of the Adjudicator is unsafe and cannot stand. There are two essential reasons for this. The first, although she correctly sets out the standard and burden of proof in paragraphs 12 and 13 of her determination, when she comes to deal with her summary at paragraphs 35-38 of the determination, she says in terms at paragraph 37, "I do not believe that the appellant has met the burden of proof required to satisfy me that there is a reasonable risk of persecution if he were to return to Macedonia. I do not believe on a balance of probabilities that the appellant is at risk if returned to that country." In that paragraph she has expressed both the correct standard of a reasonable risk and the incorrect standard of the ordinary civil standard of a balance of probabilities. That inevitably leads to confusion as to what standard of proof she has applied in arriving at her decision and is of itself sufficient for us to strike it down. We hope that this is an error which we shall not see again.
6. The second reason why the Adjudicator's decision is unsafe, is that in the course of the hearing at which the respondent was not represented, the Adjudicator took it upon herself to raise an issue as to whether or not the appellant was of Roma ethnicity and indeed to question him at some considerable length as to this. It is well settled that where there has been a clear concession by the Secretary of State relating to status or ethnic origin that is conclusive in the proceedings before the Immigration Appellate Authority which are adversarial and not inquisitorial in nature. The Adjudicator was undoubtedly in error in law in failing to take into account the clear concession made by the Secretary of State at

paragraph 5 in his refusal letter and the passage which we have quoted above. For those two reasons as we say, the Adjudicator's determination is unsafe and cannot stand.

7. That is not however, the end of the matter before us because it will avail the appellant little, if he cannot satisfy us that taking his account and its highest, he would be able to succeed either under the Refugee Convention or under the European Convention on Human Rights. To that end we have received oral submissions from Mr Tattersall today in which he sought to persuade us that there is an arguable case on the basis that the appellant's claim is taken at its highest. Taking it at its highest, the appellant's claim may be summarised as follows.
8. He was born in Macedonia and is an ethnic Roma and an orthodox Christian by religion. When he came to the United Kingdom originally the situation in Macedonia was peaceful and he had decided that he would return on 29 November 2000 in conformity with his entry clearance. He did so. He then again came to the United Kingdom on 31 May 2001 as we have already recited. He decided thereafter to seek asylum because of the conflict in Macedonia between the Macedonians of Serb origin and the Albanians who he says were fighting each other. His upbringing was such that he respected people of nations and had friends of different nationalities. He was not prepared to undertake his compulsory military service. He was aware of the wars and tragedies which took place in the former Yugoslavia in the 1990s, and on that basis formed his views that he would not participate in any similar conflict in his own country. Where he to return he would be at risk of being mobilised and sent to the front lines which would be contrary to his moral principles as he did not wish to kill anybody. He would also be liable to punishment for failing to carry out military service in Macedonia and it was likely that he would be taken to Court and sent to prison.
9. Additionally to that he complained that he had been subject to discrimination by reason of his ethnic origin. He said that in July 1999 he had applied for a place of the University of Sculpture in the faculty of forestry which had been refused to him. Although he had later been able to secure a course at the University in the Faculty of Agriculture in the following year. Having been granted that course however, the authorities were not prepared to grant him accommodation at a student centre in Skopje and the result was that he had to attend the course as a distance learning student travelling the University only when he had to take examinations. He complained that he had been subject to discrimination in his secondary school as well as at University and that ethnic Roma were looked upon as a lower class who lived in a separate part of the town which he came from. He said there were a number of physical attacks against ethnic Roma in his town and the police

were not ready to protect them because they were Roma, so that many people have had to declare themselves as ethnic Macedonians to avoid discrimination and maltreatment.

10. He had in his interview record complained that he had received abuse and some physical aggression from four particular youths in his home town and that this problem had started on evening when they were quite drunk. He said his brother had similar problems with the same four people and that they started some three months before he came to the United Kingdom. He had asked the police to help on two occasions , but the police only spoke to the group and told them not to make any more problems. They had not taken other action against them. That is in summary of the basis on which the appellant seeks to be recognised as a refugee or that his human rights would be breached if he were now returned.

11. So far as the claim in relation to military service is concerned, we are quite satisfied that he cannot succeed in this respect. It is a matter which was considered at some length by the Tribunal earlier this year in the case of Demi*** 2002 UKIAT 00731 which has been produced to both advocates prior to the hearing so that they could acquaint themselves with it. It is clear that this appellant would be subject to the military law applicable in Macedonia since 1 June 2001 since he says that his call-up papers were not received until after he came to this country. The new laws provide for alternatives to military service if that is a matter of conscience which would prevent the bearing of arms and there is therefore already within the Macedonian law provision for conscientious objectors even if the appellant could have brought himself in any way within the exception identified by Lord Justice Laws in his judgment in Sepet and Bulbul v SSHD 2001 EWCA Civ 681. Although on the facts, there being no current state of conflict in Macedonia or any suggestion that he would be exposed to penalties which would be so severe as to be persecutory, it does not appear to us that the appellant could in any event bring himself within any of those exceptions on the facts. Even, were it the case however, that he had put himself in the position where he might be sentenced to a term of imprisonment. Demit*** is authority for the general proposition that the provisions for imprisonment for failure to carry out national service in Macedonia are not such as can be regarded as persecutory in nature, and that having carefully reviewed all the evidence as to prison conditions in that country there was no evidential basis on which it could be said that being sentenced to imprisonment in Macedonia would lead to being subjected to any treatment or conditions which would be in breach of Article 3 of the European Convention. The matter was not pressed further before us by Mr Tattersall in the light of Demit**** as he accepted that he had no evidence beyond that which had already been considered fully by the Tribunal in that decision.

12. So far as the question of fear of treatment amounting to persecution or treatment in breach of Article 3 for reasons of his Roma ethnicity is concerned, it was in broad terms, Mr Tattersall's submission to us, that looked at in the round, the situation of Roma in Macedonia was such that they were subject to discrimination to such a degree that it tipped over the scales into persecution as understood for the purposes of the Refugee Convention. If that were right of course, it would equally be that it would be reviewed as treatment contrary to Article 3 of the European Convention.

13. Mr Tattersall referred us to a number of country reports in support of this submission, but accepted that there was in fact very little evidence to support so broad a proposition as he put before us as to the situation of Roma generally. It is perhaps best expressed in the neutral report before us from the US Department of State for the year 2001 at page 17 and 18 in the following terms:

"According to the 1994 Census, Roma comprised 2% of the population but Romany leaders claimed that the actual number of Roma is much higher. There were credible reports of occasional police violence and harassment against Roma. Roma rights organisations accused the police of reinforcing patterns of discrimination by consistently siding with ethnic Macedonian citizens in disputes involving Roma. Optional Romany language education has been offered at several primary schools since 1996 but there has been limited demand and no pressure for more extensive curriculum. There is some Romani language broadcasting. There were incidents of societal violence against Roma during the year. In 1999 approximately 6,000 Roma fled Kosovo and took up residence in the country in response to both the Kosovo conflict and the hostility of ethnic Albanian Kosovars who widely considered the Roma to have supported the Serbs and to have committed theft and other crimes against ethnic Albanians during the crisis. The presence of these Romany refugees was not popular among Macedonia's ethnic Albanians who largely shared the view of the Albanian Kosovars concerning both Roma and Serbs. Ethnic Macedonians also expressed irritation of the new arrivals many of whom, settled in Skopje and some of them frequently frequented busy traffic junctions to beg, wash cars, windows or sell small items. The Roma tend to occupy the lowest economic position of society and the new arrivals added to the number of Roma in the ranks of the very poor."

14. We do not think that we are doing any injustice to Mr Tattersall's submissions in saying that those passages probably put it at its highest such evidence as there was before us in relation to the treatment of Roma in Macedonia. We do not in that stage overlook the fact that he also spoke of the difficulty of Roma in educational and work situations but, as he accepted, those matters are level three rights according to the classification by Professor Hathaway in

the law of refugee status and are of extremely limited effect since educational rights internationally are restricted to those applying to primary education and it is accepted that there is no right to employment as such and that it would be necessary to show a clear discrimination on the part of the authorities in refusing support to the Roma in Macedonia who are unemployed. There has been no suggestion that there is any such evidence that can be brought before us. Indeed, in the case of the appellant his father has his own land which he deals and his mother is in employment according to the evidence. He, himself, of course, has had the advantage of receiving an education to higher educational standards including University attendance.

15. Turning to the question of the fear of non state actors upon which Mr Tattersall placed greater reliance in his submissions to us, there is again really very little evidence to support this. It is interesting that in the passage from the State Department Report which have quoted, the level of incidents of societal violence are particularly associated with influx of Roma refugees from Kosovo. That was a temporary matter which had now largely been resolved but, it is hardly unusual to expect that a large influx of refugee in a comparatively small country concentrated in one area may lead to some societal disturbance. What is clear from a general reading of all the material relating to Macedonia is that there is general international praise for the way in which Macedonia coped with this particular problem and the even handed way in which they deal in general terms with their ethnic minorities. It is perhaps, only fair to say, that this particular appellant's treatment in education might be regarded as a good example of such a general governmental attitude.
16. So far as the question of their being protection against at random attacks is concerned, there is first no evidence that there is a general danger for the Roma of such attacks in the same way as unfortunately applies in many other European countries from skinheads. That is a matter which does not figure anywhere in any of the background evidence to which we have been referred. There is a functioning criminal system in Macedonia and a Court system. It may not function at the highest of possible levels, but that does not detract from the fact that there is in general terms a functioning criminal system. There is some evidence that the police on occasions do not do as much as they might to assist Roma complainants. But, that is, highly anecdotal and almost wholly derived from the very organisations which are concerned with the promotion of Roma rights. What seems to us to be more pertinent in relation to the situation of Roma in society is what is said by the Secretary of State in his refusal letter which was not in any way challenged before us. He says this at paragraph 9 of the refusal letter:

"In addition, he is aware that the constitution provides freedom of association and that the government generally respects this right in practice. Political parties and organisations are required to register with the Court. More than 40 political parties are registered including ethnically based parties of Albanians, Turks, Serbs and Roma. Moreover, the Roma party has members in the parliament. The Ruling government coalition includes one of the two major ethnic Albanian parties as well as the Romani party."

He goes on at paragraph 10 as follows:

"The Secretary of State accepts in common with other countries in the region popular feeling against Roma does exist in Macedonia and they do encounter discrimination from elements within Macedonian society. Although he is aware that the police have not always intervened often or as effectively as they should, the Secretary of State satisfied that there is no evidence that this attitude is endemic or condoned by the authorities generally. In the light of this he remains of the opinion that it would not be established or life would be at risk if he were now to return to Macedonia. He does not accept you have a well-founded fear of persecution in Macedonia for a Convention reason."

17. That seems to us to be a fair summary taking into account particularly the extensive knowledge that this Tribunal has of the practice in other countries in Europe and the high threshold which it is necessary to reach before discrimination although unpleasant for those who are the subject of it will be construed as amounting to persecution. With all respect to Mr Tattersall's arguments he does not get near persuading us that a such situation exists in Macedonia either in general terms or for this appellant in particular.
18. For the above reasons, we are satisfied that taking the evidence at its highest the appellant cannot succeed in his claims before us. For these reasons it is therefore appropriate that this appeal be now dismissed.

J Barnes
Vice President