IMMIGRATION APPEAL TRIBUNAL

Fadil Dyli (Protection – UNMIK – Arif – IFA – Art1D) Kosovo CG * [2000] UKIAT 00001

Date of hearing: 08/08/2000
Date Determination notified: 30/08/2000
Before:

Mr C. M. G. Ockelton (Deputy President)
Mr P. R. Moulden
Mr M. W. Rapinet

Between

FADIL DYLI

APPELLANT

and

The Secretary of State for the Home Department

RESPONDENT

DETERMINATIONS AND REASONS

Introduction

1. The Appellant, Fadil Dyli, comes from Kosovo. He is a national of the Federal republic of Yugoslavia. He appeals, with leave, against the determination of a Special Adjudicator (Mr B. Watkins CMG) dismissing his appeal against the decision of the Respondent on 14 February 2000 giving directions for his removal as an illegal entrant, following refusal of his application for asylum. Before us he was represented by Mr C. Jacobs, instructed by Gersten and Nixon, and the Respondent was represented by Mr R. Tam and Mr S. Grodzinski, instructed by the Treasury Solicitor.

2. The basis of the Appellant's case is that he claims to have a well-founded fear of persecution as an ethnic Albanian. His appeal raises a number of issues common to many similar cases and not particularly dependent on the facts of this Appellant's case. They are as follows. First, are the United Nations Interim Administration Mission in Kosovo ('UNMIK') and the Kosovo Force ('KFOR') capable of constituting protection within the meaning of the Convention, so that an appellant

who would be protected by UNMIK and KFOR on return could not claim to have a well founded fear of persecution? Secondly, given the change of circumstances in Kosovo in recent months, is there a burden on the Secretary of State, to point to evidence that the Appellant is not a refugee, as identified in Mohammed Arif v SSHD [1999] Imm AR 271? Thirdly, to what extent may the rules on internal flight be applicable to a person from Kosovo? Fourthly, does Article 1D of the Convention exclude a person such as the Appellant from the benefits of the Convention? We have heard full argument on each of these issues. We are very grateful to counsel on both sides for their preparation and for the clear way in which they presented their cases.

3. This is a 'starred' determination, by a Tribunal consisting of the Deputy President and two Vice-Presidents. It will be followed by other divisions of the Tribunal and by Adjudicators on the questions of law raised in it. It is not intended to be binding on any question of fact, and our references to protection from UNMIK and KFOR should not be taken as implying a view that protection is in fact available to the Appellant or to claimants in general.

Historical Background

4. Kosovo is a province of Serbia, situated in the southern part of Serbia, adjacent to Montenegro, Albania and the Former Yugoslav Republic of Macedonia. It is distingushed from the rest of Serbia principally by the fact that it has historically been home to a large population of ethnic Albanians. The area, which has little economic wealth, is nevertheless rich in historical associations for both Serbs and Albanians. The Albanian population is largely Muslim, yet Kosovo has, at Pec, near its southern border with Albania, the most important church for the Serbian Orthodox Christian faith. It was at the battle of Kosovo Polje in 1389 that the Turks gained control of the whole of medieval Serbia and retained power over all Serbs for five centuries. Despite the fact that it was a defeat, the event is seen as of great importance in the national identity of Serbia today. On the other hand, it was in Kosovo in 1878 that the Albanian national revival began, resulting in the creation of the modern Albanian state in 1912.

5. Within the Socialist Federal Republic of Yugoslavia, as a result of the 1974 Constitution, Kosovo enjoyed a considerable measure of autonomy, as did Vojvodina, another Serbian province. That autonomy largely ceased in 1989. Following the break-up of the Socialist Republic in 1991-2, the Federal Republic of Yugoslavia was formed. It consists of Serbia (including Kosovo and Vojvodina) and Montenegro. By then the Albanian population was a clear majority in Kosovo - probably over eighty per cent. In 1990 and 1992 there had been attempts to secede, but Kosovo remained part of the Federation, although increasingly underrepresented in government and in number of officials, partly as a deliberate result of government policy and partly as a result of boycotting by ethnic Albanians. In subsequent years, particularly after Slobodan Milosevic became Federal President in 1997 after two terms as President of Serbia, there were many well-attested human rights abuses against ethnic Albanians in Kosovo. The activities of the Kosovo Liberation Army (KLA) date from about this time. In January 1998 the KLA declared its intention to achieve separation from Serbia by armed resistance against the Serbian authorities. The Serbian security forces responded with a number of attacks against the KLA and against civilian targets in

Kosovo. At this time many ethnic Albanians began to flee. The exodus continued for many months.

6. For much of 1998 and the first part of 1999 there was, in effect, civil war in Kosovo. There was a major peace initiative during the autumn of 1998. Peace talks took place at Rambouillet in February 1999, but the agreement of the Serbian delegation was not obtained. In the same month 30,000 Serbian forces were deployed in or near Kosovo.

7. On 24 March 1999 the NATO countries began aerial bombardment of Serbian military posts both in Kosovo and in Serbia as a whole. There was a meeting of the G-8 countries in May, at which there was agreement on principles for a peace process. By the middle of that month it was estimated that 1,200 civilians had been killed in the bombardment and 600,000 ethnic Albanians had fled from Kosovo. On 2 June there was a conference in Belgrade at which targets for resolution of the Kosovo crisis were presented. The government of the Federal Republic of Yugoslavia announced that it had accepted the G-8 principles and the targets, and began to withdraw Serbian troops from Kosovo. The aerial action then ceased on 10 June.

8. On the same day the United Nations Security Council passed resolution SCR 1244. It notes the Federal republic of Yugoslavia's acceptance of the principles and targets, which are annexed to the Resolution. In paragraphs 5 and 10 of the Resolution the Security Council

> '5. Decides on the deployment in Kosovo, under United Nations auspices, of international civil and security presences, with appropriate equipment and personnel as required, and welcomes the agreement of the Federal republic of Yugoslavia to such presences;
> '10. Authorizes the Secretary-General, with the assistance of relevant international organizations, to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo.'

9. The result was the creation of UNMIK, which as its full name (see paragraph 2) indicates, is the interim civil presence, and KFOR, which is an international military presence under the control of NATO. KFOR is not itself a United Nations organ, but is part of the means by which the work of UNMIK is achieved. That work is the subject of regular reports of the Secretaly-General of the United Nations. It is not appropriate for us here to assess the success of the programmes for peace, reconstruction and resettlement of displaced persons. In order to give a flavour of the United Nations High Commissioner for Refugees' view, however, we cite the opening words of a background note of February 2000:

> 'Since the withdrawal of Yugoslav forces and the entry of the international military presence, (KFOR) and the UN interim

> administration mission (UNMIK) into Kosovo in mid-June 1999, the situation for ethnic Albanians inside Kosovo has dramatically improved. The systematic persecution described in earlier UNHCR and OSCE documents no longer prevails. As a result many refugees have availed of the opportunity to return home. Close to 825,000 refugees have returned in total...'.

10. So far as the history of this appeal is concerned, it only remains to note that the Appellant came to the United Kingdom from Kosovo on 31 October 1999

Protection

11. A refugee needs to establish that he is unable or, owing to a well-founded fear of persecution, unwilling, to avail himself of the protection of his own country. The question is whether protection provided by UNMIK and KFOR is capable of constituting the protection of the Federal Republic of Yugoslavia for a person in Kosovo.

12. Unlike a castle, a country does not provide protection merely by one's presence in it. A country provides protection by the way in which its citizens are treated. The authorities of the Federal republic of Yugoslavia have a considerable history of persecution of ethnic Albanians in Kosovo; but one of the functions of UNMIK and KFOR is to prevent that persecution. As Mr Jacobs pointed out, UNMIK and KFOR are not in any real sense 'the authorities of' the Federal Republic of Yugoslavia, although they have Yugoslav consent to their presence and their work in Kosovo. That, however, in our view is a side-issue: Article 1A(2) of the Convention does not include the word 'authorities'. The phrase is 'protection of the country', and that phrase appears, in various forms, three times in Article 1A(2). We do not consider that there is any basis for imposing any legal or constitutional colour on it by deeming it to refer to the authorities of the country. On the contrary: bearing in mind the phrase 'outside the country' which occurs twice in Article 1A(2), it seems to us that there is little reason for taking the word in other than a geographical sense.

13. The Convention is designed for the benefit of persons who need the protection of the international community because they are at risk of persecution in their own countries. A person who, for whatever reason, has protection in his own country has no basis for fear of persecution; and there is no basis for imposing international duties of surrogate protection in respect of a person who has adequate protection within his own country. Such protection is 'the protection of the country'. How it is achieved, whether directly by the authorities of the country, or by others, is irrelevant. There can be no basis for allowing a person to require other countries to take him in as a refugee if he is not in fact at risk at home.

14. We conclude that for the purposes of the Convention protection provided by or through UNMIK and KFOR is capable of amounting to the protection of his own country for a resident of Kosovo. We emphasise that we do not decide that that protection is in any particular case adequate. That is a matter of fact, to be decided on the evidence in each individual case. But, for an Adjudicator faced with such an issue, we take the opportunity to point out that it will be crucially important to bear in mind the speeches of the House of Lords in Horvath v SSHD [2000] 3 WLR 379. It is not

enough for a claimant to establish that he has a well-founded fear of serious harm being inflicted on him for a Convention reason. He will still have the task of showing that the protection he will receive from the international organs UNMIK and KFOR (or their successors) is not sufficient by international standards.

Is Kosovo a country for the purposes of the Convention?

15. In his skeleton argument, Mr Tam suggested that his submissions on the last point entailed the view that Kosovo was to be regarded as a country for the purposes of Article 1A2. The protection available to the Appellant in Kosovo would thus be 'the protection of that country'. Mr Jacobs simply insisted that the Appellant is a national of the Federal Republic of Yugoslavia. Mr Tm supported the argument that Kosovo might be a country by reference to a decision of the Federal Court of Australia, Tjhe Kwet Koe v MIEE [1997] 912 FCA. We have to say, with respect, that we regard Mr Tam's submissions on this point as weak.

16. The claimant in Koe was admittedly a person without any nationality. The question for the court was what was the country of his former habitual residence. The Refugee Review Tribunal had found that the claimant was 'a Hong Kong Chinese and a permanent resident of Hong Kong'. The claimant's appeal was partly on the basis that his refugee status could not lawfully be assessed by reference to Hong Kong, because Hong Kong is not a country. It was, at all times relevant for the purpose of Koe's appeal, a British Crown Colony. The Federal Court noted that Hong Kong was not a state or nation, but was under the direct control of the United Kingdom. It did, however, have a distinct area with identifiable borders, its own immigration laws, was inhabited by a permanent identifiable community, and enjoyed a certain degree of autonomy. For these reasons, Tamberlin J, giving the judgement of the Federal Court, considered that Hong Kong was a country and was therefore capable of being the claimant's country of former habitual residence.

17. It is important to note, however, that Tamberlin J specifically distanced himself from any interpretation of his words that might be seen as extending them to cases where the claimant has a nationality. As he said,

> 'The language of Article 1A of the Convention itself draws a distinction between "the country of nationality" and "the country of former habitual residence". The word "country" in each of these expressions is used in a different sense. In the first phrase it is used to designate a country capable of granting nationality. In the second it is used to denote a country which need not have this capability but in which the individual resides. The concept of "country" is broader than the concept of a State.'

18. The interpretation of the word 'country' in Koe is thus specifically confined to cases where the claimant is stateless. The word 'country' may have a wider meaning when it is by itself than when it is confined by its context. For similar reasons in Reel v Holder [1981] 3 AU ER 321, the Court of Appeal found that Taiwan (although admittedly not a state) could constitute a 'country' within the manning of the Rules of the International Athletics Federation.

19. In our view, however, it is clear beyond doubt that where an asylum applicant is not stateless, the country by reference to which his status as a refugee is to be determined is the country of which he is a national. The phrase 'the country of his nationality' is not amenable to division in the way required by Mr Tam's argument. The word 'country' in that phrase cannot have the wider meaning adopted by Tamberlin J. It can only mean a country capable of granting nationality. In the Appellant's case, that is the Federal Republic of Yugoslavia.

20. We do not regard that conclusion as having any effect on our decision that the protection offered by UNMIK and KFOR is capable of being the protection of the Appellant's country. The country is the Federal Republic of Yugoslavia. Within Kosovo, protection may be provided by UNMIK and KFOR.

Burden of Proof

21. It is well-established that the burden of proof in an asylum claim lies on the claimant. It is, however, argued that the burden is sometimes on the government. The arguments relating to the burden of proof in this and similar appeals are based on the judgements of the Court of Appeal in Mohammed Arif v SSHD [1999] 1mm AR 271. In that case the claimant based his claim to asylum on the fact that he had been falsely accused, and convicted in his absence, of serious crimes. The convictions had been obtained by corrupt influence by his political opponents, but nevertheless exposed him to real risk of having to serve a considerable prison sentence. In the circumstances that would amount to persecution for reasons of his political opinion. The Special Adjudicator made positive findings on all the facts on which his claim was based. He allowed the claimant's appeal. The Secretary of State appealed to the Tribunal, submitting that the change in government that had by then occurred in the claimant's home state removed the risk of his having to serve his sentence. The Tribunal accepted that argument and allowed the Secretary of State's appeal. The claimant then appealed to the Court of Appeal.

22. Simon Brown LJ, with whom the other members of the Court agreed, said this:

> 'At the outset of the hearing I drew counsel's attention to a passage in Macdonald's Immigration law and practice, (4th Edition), which appeared to me of some relevance to this appeal. Paragraph 12.58 at page 397, so far as material, reads:
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> "If the circumstances in the country of nationality … have so changed that refugees can no longer refuse to avail themselves of the protection of that country, Convention refugee status will cease [footnoted to that is article l(c)(5) of the Convention]... A cessation of circumstances refers to fundamental changes rather than merely transitory ones. A refugee's status should not be subject to frequent review since this would jeopardise a sense of security which the Convention was designed to provide. Proof that the circumstances of persecution have ceased to exist would fall upon the receiving state. Cessation of refugee status will not automatically mean repatriation, since many refugees will have acquired settlement rights in their country of refuge- Problems can occur when the authority takes a long time to

> determine a claim and circumstances change in the meantime as the relevant date for the assessment of the claim is the date of the decision."
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> The sentence I would particularly emphasise there is "Proof that the circumstances of the persecution have ceased to exist would fall upon the receiving state." It is true that because of the notoriously long delays which attend our system of asylum hearings the appellant here was never granted refugee status, even though until the change of government in Azad Kashmir in 1996 it is now assumed on all sides that he was strictly entitled to it. It nevertheless seems to me that by analogy, on the particular facts of this case, there is now an evidential burden on the Secretary of State to establish that this appellant could safely be returned home.'

23. Mr Jacobs submits that the effect of Arif is to place a burden of proof on the Secretary of State in any appeal in which he wishes to submit that the circumstances in the claimant's country are better than they were. He argues that the Court of Appeal adopted, in full, the passage quoted from Macdonald, and that the Secretary of State must always show that there has been a 'fundamental and durable' change in the claimant's home country. Mr Tam urges us to confine Arif within much narrower boundaries.

24. We think it is as well to consider first exactly what is said in Arif. First, as Mr Tam pointed out, Simon Brown LJ does not expressly adopt the passage from Macdonald: on the contrary, he specifically utilises it as the basis for an analogy. Secondly, the analogy he propounds is that, 'on the particular facts of this case there is now an evidential burden on the Secretary of State'. It appears to us that there were at least two features that made that appeal unusual. The first was that, by the time the matter was argued before the Court of Appeal, it was assumed on all sides that before the change of government in 1996 the appellant was entitled to refugee status. The second was that, although his claim was on grounds of political opinion, it had features that justified a provisional assumption that any risk might well survive a change of political climate. Arif was not merely at risk of persecution for his political views: he was at risk of having to serve a sentence of imprisonment that had been lawfully imposed on him.

25. In Salim v SSHD (unreported, CA 14 April 2000, IATRF 99/0993/C), cited to us by Mr Tam, the Court of Appeal declined to follow Arif because, in the words of Hale LJ (with whom Kennedy LJ and Harrison J agreed), 'the circumstances of that case were quite different and it was also different in principle’. We gratefully adopt that terminology.

26. In our view the reversed burden identified in Arif occurs only in cases where the principle is the same as in Arif: that is, where it has been found or is accepted that at some time in the past, before the alleged change of circumstances, the claimant was a refugee. To confine it to such cases is correct in principle, because otherwise there would be a constant encouragement to investigate the question of whether the claimant had in the past been a refugee. Instead of applying the principle enunciated by the Court of Appeal in Ravichandran (Sandralingam v SSHD, Ravichandran v

SSHD. Raiendrakumar v lAT and SSHD, [1996] 1mm AR 97) the Adjudicators, the Tribunal and the Courts would need always to consider not merely whether a claimant had shown that he was a refugee at the date of the hearing, but also whether he had shown that he was a refugee in the past because there might then be a burden on the Secretary of State. The members of the Court of Appeal in Salim held that Arif did not impact on the case before them because there had been no previous decision (or acceptance) that Salim was a refugee. The Court did not suggest that either the Adjudicator or the Tribunal were under any obligation to make a finding on whether the Appellant had in the past been a refugee. The position was clear. In Arif the starting point was that the Appellant had in the past been entitled to refugee status, and there was thus a burden on the Respondent. In Salim the starting point was that the Appellant needed to establish that he was a refugee, the burden of proof of which lay on him.

27. Further, the circumstances of Arif were particular. It was not in doubt that there had been a change of government in the Appellant's home state. But, on the facts as found, the Appellant's claim was such that evidence of a change of government was not of itself material in deciding whether the Appellant remained at risk. That was because his fear was not a generalised one, based on political climate: it was a specific one, based on the prison sentence that had been imposed upon him. The decision of the Court of Appeal in Arif is not a decision that where the evidential burden lies on the Secretary of State it cannot be discharged by showing a general change of circumstances or of political climate: it is merely a demonstration that in some cases that will not be enough.

28. We pass to a third feature of the decision in Arif. In Arif itself there was no evidence specifically that the risk to the Appellant had gone or been diminished. Whether the burden on the Respondent was a legal burden or an evidential burden, it had not been discharged. Nevertheless, in his judgement Simon Brown LJ makes it clear that only an evidential burden lay on the Respondent. The Respondent was, in other words, required only to point to evidence which, as a matter of law, could properly support the conclusion that the Appellant was not a refugee. We say 'point to', because neither an evidential nor a legal burden entails the *adduction* of evidence. The functions of the legal and evidential burdens are to regulate the order in which the parties are called upon for their evidence and to determine an issue upon which the standard of proof is not reached. A burden may be discharged by any evidence before the trier of fact, regardless of the source of that evidence.

29. The question whether an evidential burden has been discharged is a question of law and it is proper for us to give some guidance here. In cases relating to Kosovo, whether or not evidence on the matter is introduced, judicial notice should be taken of the fact that, following SCR 1244, there has been a United Nations presence in Kosovo by the agency of UNMIK and KFOR since June 1999. In our view that fact of itself is enough to discharge the Respondent's evidential burden in any case in which such a burden lies on him and in which the claimant relies on the general political situation in Kosovo. We do not presume to decide whether, in general, the change of circumstances would deprive individuals of a claim to refugee status. What it does do is establish that a person who left Kosovo before June 1999 and who bases his claim on the general situation there will need to establish his case at the date of the hearing

even if it is accepted that he was a refugee when he left: because the change of circumstances in June 1999 discharges the evidential burden recognised in Arif.

30. To summarise: (i) Arif applies only where it is accepted that the claimant was in the past entitled to refugee status; (ii) the burden on the Respondent is evidential, not legal; (iii) the burden can be discharged by pointing to evidence showing a change of circumstances relevant to the claimants claim; (iv) in Kosovan cases, the evidential burden is discharged by pointing to the UN presence since June 1999, where that is relevant to the claimant's claim.

31. In the present appeal, the Appellant left Kosovo only in September 1999: and he has never been accepted as or found to be a refugee. There is no burden on the Respondent.

Internal flight

32. It may be assumed that a person who fears persecution will seek protection within his own country first. The signatories to the Convention expect him to, because his own country has obligations to him arising out of his citizenship or residence: it is only if his own country fails him that the surrogate protection of the international community is engaged through the medium of the Convention. Thus arises the notion of 'internal flight'. By the time a person's status as a refugee comes to be considered, however, internal flight is no longer a possibility. The claimant is already outside the country of his nationality or former habitual residence. But the principle remains. He is not entitled to be considered as a refugee merely because he has a well- founded fear of persecution in some part of his own country, if there are other parts of that country where he would be safe from persecution.

33. A person cannot be removed to a place where he is at risk of persecution. But if he is at risk of persecution in his own home area, he can be expected, on return to his own country, to live in a different area, in order to avoid the risk. There will then be no breach of the Convention in returning him to his own country, despite the risk of persecution in part of it. At this point two further factors enter the equation. The first is that, even if there is a safe area, he cannot properly be returned to his own country if he cannot reach the safe area, or if he cannot do so without being at risk of persecution on the way there - either immediately on arrival or on his subsequent journey within the country. Secondly, he cannot be returned if the safe area is one in which it would be unreasonable or unduly harsh to expect him to live. This is the factor described by Brooke LJ as tempering the definition of a refugee 'with a small amount of humanity' (Karanakaran v SSHD [2000] 1mm AR 271 at 279).

34. Thus the expectation of internal flight is transformed into a rule of internal relocation: on return to his own country a person may have to live in an area that is different from his own home area. It is, however, important to remember the origins of the rule. The question of internal flight only arises when a claimant has a well-founded fear of persecution in his own home area. If he has no such fear there, the possibility of his movement elsewhere simply does not arise. He is not a refugee. If, on the other hand, he has such a fear in his own home area, he may be a refugee: but only if he can show that there is no other part of his own country where he would be safe, which he can reach in safety, and where it would be reasonable (that is to say,

not unduly harsh) to expect him to live. A person who has discharged the positive burden of showing that he is at risk of persecution in his own area has still to establish that internal relocation is not feasible in his case.

35. The concepts of reasonableness and undue harshness have to deal with a person who will have to move to an area that has not been his home. No questions of unreasonableness or undue harshness arise if the claimant has no well-founded fear of persecution in his own area. That is so even if there are other areas of his country where he might have such a fear. Such a person will be a refugee only if he cannot get to his own area without being at risk of persecution on the way.

36. In his skeleton argument, Mr Tam submitted that the first question to be asked was 'Where, as a matter of fact, will he return to?', and that if the claimant had no well-founded fear of persecution there, that was the end of the matter. We do not accept that submission. The starting-point, in our view, is the claimant's home area. If he has a well-founded fear of persecution in his home area but as a matter of fact is to be returned to a different area, then questions of internal relocation to that (or some other) area arise. If he has no well-founded fear of persecution in his own area and as a matter of fact is to be returned there, that is the end of the matter. If he has no well-founded fear of persecution in his own area but as a matter of fact is to be returned elsewhere, the only question is whether he is at risk of persecution in his own country on the way to his home area.

37. It follows that a Kosovan who fails to establish a well-founded fear of persecution for a Convention reason in Kosovo, and who is to be returned to Kosovo, is not a refugee. If such a person is to be returned to another part of the Federal Republic of Yugoslavia, he is a refugee if and only if he can establish that he cannot get to Kosovo without being at risk of persecution for a Convention reason on the way. A Kosovan who establishes that he has a well-founded fear of persecution in Kosovo is a refugee only if he also establishes that he cannot without undue harshness be required to relocate within the Federal Republic of Yugoslavia.

Article ID

38. Article ID of the Convention is as follows:

> D This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.
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> When such protection or assistance has ceased for any reason, without the position of such persons being definitely settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations these persons shall *ipso facto* be entitled to the benefits of this Convention.

39. The Adjudicator dismissed the Appellant's appeal because he considered that the protection available from UNMIK and KFOR in Kosovo made article 1D applicable to him. If Article 1D applies to an Appellant his appeal must indeed fail, because then

the Convention 'shall not apply' to him. But, according again to the strict wording of the Article, a person to whom Article 1D applies at the present time may in the future become a refugee within the Convention merely by the withdrawal of the protection envisaged by the Article, 'ipso facto' without any reference to a well-founded fear of persecution. For these reasons Article 1D is unattractive, either immediately or in prospect, to both the Appellant and the Respondent and neither asked us to uphold the Adjudicator's determination on this point.

40. The true construction of this Article, and its correct application, are matters of considerable difficulty. Some of the general questions that arising are: What is the relationship between the first and the second sentences? Does 'ipso facto' mean what it says, ie without regard to whether the persons would otherwise be entitled to refugee status? What precisely does 'at present' mean? Particularly with reference to this appeal, the following questions also arise: Are UNMIK and KFOR 'organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees'? And are persons such as the Appellant 'receiving protection or assistance from them?

41. We have had the benefit of reading an opinion of Professor Greenwood QC, which Mr Tam adopted in its entirety. Both Mr Jacobs and Mr Tam dealt with this issue in their skeleton arguments, and both made oral submissions on it. We have to say, with the greatest respect, that we have not found all the material put to us on this topic to be entirely persuasive. We have nevertheless reached a clear view, which we shall state. In deference to the counsel's submissions, however, we shall also briefly give our conclusions on a number of the questions raised.

42. We do not think there can be any real doubt that UNMIK is a subsidiary organ of the United Nations within the meaning of Article 7 of the United Nations Charter. KFOR is not: but KFOR is part of the process by which UNMIK functions. Further, we do not think there can be any real doubt that the residents of Kosovo are receiving assistance (if not protection) from UNMIK and KFOR, that is to say directly or indirectly from an organ or agency of the United Nations. When UNMIK was first established its role in respect of the safe return of refugees and displaced persons was undertaken under the supervision of the United Nations High Commissioner for Refugees. At that time it was therefore very doubtful whether UNMIK was, for these purposes, ‘an organ ... of the United Nations other than the United Nations High Commissioner for Refugees’. UNMIK has now decided that a separate 'humanitarian affairs component' is no longer needed (Report of the Secretary General on the United Nations Interim Administration Mission in Kosovo, Doc S/2000/538, 6 June 2000). Although the United Nations High Commissioner for Refugees is to name a Humanitarian Co-ordinator to work with UNMIK, it will in our view be the case in the future that residents of Kosovo do receive assistance from an organ of the United Nations other than the United Nations High Commissioner for Refugees.

43. Most authorities appear to consider that 'at present' in Article 1D means 'at the time the Convention entered into force’. See Grahl-Madsen, *The Status of Refugees in International Law* (1966) I p 264, pointing out that when the Convention means another date it says so specifically; Hathaway, *The Law of Refugee Status* (1991) p 208, referring to the view of the United Kingdom representative at the drafting of the Convention; Takkenberg, *The Status of Palestinian Refugees in International Law*

(1998) p 96. Professor Greenwood QC takes the same view, noting however that there is a respectable contrary argument, based on the terms and status of the 1967 Protocol, which entirely changed the temporal effect of article 1A of the Convention. The *UNHCR Handbook* indeed, at paragraphs 142-3, sets out a view that clearly implies that 'at present' means 'at the time of status determination'. We have not been able to reach a conclusion on this point. On the one hand, the use of the words 'at present' does suggest that there is intended to be a meaning different from that imported by the simple use of the present tense elsewhere in Article 1. On the other hand, everybody seems to agree that Article 1D does, and was always intended to, apply to the work of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNWRA): but everybody also seems to agree that Article 1D applies not only to Palestinian refugees who were actually receiving assistance when the Convention came into affect, but also includes, for example, Palestinians born since that date (Grahl-Madsen, op cit I 265, Hathaway, loc cit, Takkenberg, op cit p 99; this interpretation was adopted by the German Federal Administrative Court in a decision of 4 June 1991 (Bverwg I C 42.88) and is described as suggested by common sense in Professor Greenwood's opinion.) As a result, 'at present' has to be interpreted so as to include an element of futurity; and the construction of the exact meaning of the words 'at present' then becomes so complicated that a simple interpretation in line with that in the *UNHCR Handbook* may well be preferable.

44. The relationship between the first and second sentences of Article 1D is likewise a matter on which opinions differ. The German Federal Administrative Court, in the decision to which we have just made reference, took the view that the second sentence is an inclusionary clause, so that a person to whom it refers becomes a refugee without needing to show qualification under Article 1A. That view is endorsed by Takkenberg (op cit p 93), Grahl-Madsen (op cit I pp 140-2 and 263-5), and Goodwin-Gill, *The Refugee in lnternational Law* (1996), p 92. Goodwin-Gill points out, however, that some states have not been ready to accept the implications of that interpretation. The UNHCR Handbook takes the contrary view at paragraph 143, and, in a note from the United Kingdom Representative dated June 2000 (reference 630.Elig) states that the whole of Article 1D applies only to persons who would otherwise be entitled to refugee status. It is, we apprehend, particularly because of the risk that an English court would hold that the second sentence of Article 1D operates as an independent inclusion clause, that the Respondent submits that Article 1D does not apply to Kosovo. In fact, however, we do not need to reach a concluded view on the effect of the second sentence, and we leave that for determination on another occasion.

45. Everybody appears to agree that although Article 1D does apply to UNWRA, it did not apply to the United Nations Korean Reconstruction Agency (UNKRA). That view is held even by those who consider that the second sentence is an inclusion clause independent of other parts of Article 1 (see, for example, Takkenberg op cit p 97, citing Grahl-Madsen and Hathaway). The reason is instructive. It is that those displaced from North Korea to South Korea (where UNKRA operated) were regarded by South Korea as citizens of South Korea. As a result, nobody who was receiving assistance from UNKRA was outside his country of nationality. It is this reasoning, which is also adumbrated in the United Kingdom Representative's note, that we find particularly persuasive. Article 1D is part of Article 1 and, whatever its precise effect, must, like Articles 1C, 1E and 1F, be intended to limit the applicability of the general

inclusion provisions in Article 1A. Article 1D should be confined to persons who, but for Article 1D, could possibly qualify as refugees. A refugee is a person who is outside his own country. Article 1D therefore can only apply to persons who are 'receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance' *while outside* their country of nationality or former habitual residence. Palestinians assisted by UNWRA might be such, because UNWRA operates in the Arab countries to which Palestinians have been displaced, and of which they are not citizens. But North Koreans assisted by UNKRA could not be, because they were citizens of the country in which they found themselves: they were not outside their country of nationality at the time they received UNKRA assistance.

46. UNMIK operates only within Kosovo, itself part of the Federal Republic of Yugoslavia. Insofar as UNMIK offers assistance to citizens of the Federal Republic of Yugoslavia, it follows that that assistance is not being offered to persons who might otherwise be refugees: they cannot be, because they are not outside their country of nationality. In our view, as they could not in any event be entitled to the protection of the Convention, Article 1D does not apply to them.

47. That result follows whether one considers persons such as the Appellant from the point of view of his present situation, outside his country of nationality and (so) not at present receiving assistance from UNMIK, or from the point of view of his prospective situation on return, receiving assistance from UNMIK but not being outside his country of nationality. Persons who have citizenship of the Federal Republic of Yugoslavia, or for whom Kosovo is their place of present or former habitual residence, cannot come within Article 1D on the basis of assistance from UNMIK.

48. Suppose, however, that (unlike this Appellant) a claimant is not a person who has citizenship of the Federal Republic of Yugoslavia, or for whom Kosovo is his place of present or former habitual residence. In our view the same principle applies. He will not come within Article 1D unless he would otherwise be a refugee because he meets the terms of Article 1A. If he is receiving assistance from UNMIK he would have to be a person (other than a citizen of the Federal Republic of Yugoslavia) who has sought refuge in Kosovo because of a well-founded fear of persecution in his own country. If the status of such a person falls to be determined the argument of the previous few paragraphs will not apply, but it will not be a matter to determination by any English jurisdiction. If he finds himself in England, his status will be determined by reference to his country of nationality or former habitual residence, not by reference to Kosovo as a former place of refuge.

49. In reaching our conclusion that Article 1D does not apply to the Appellant or to others in similar circumstances we have found the consideration set out in paragraphs 45-46 to be the most persuasive. We emphasise, however, that, subject to the comments we have made above, we do not dismiss the other arguments put before us.

50. It follows that the Appellant's status as a refugee falls to be decided under Article 1A(2). This the Adjudicator failed to do, because of his view that the Appellant was in any event excluded from the benefits of the Convention For that reason it is agreed

between the parties, and we direct, that this appeal be heard afresh by another Special Adjudicator.

General Summary

51. (i) Protection offered by UNMIK and KFOR is, in law, capable of being 'the protection of his country', within the meaning of Article 1A(2) of the Convention, for a citizen of the Federal republic of Yugoslavia who comes from Kosovo.

(ii) Kosovo, howver, is not capable of being the country of a person's nationality within the meaning of that Article.

(iii) The 'reversed burden' in Arif applies only where it is accepted that the claimant was in the past a refugee, and is capable of being discharged by any evidence which could support a finding of a relevant change of circumstances.

(iv) No questions of 'internal flight', 'reasonableness', or 'undue hardship' arise when a person has no well-founded fear of persecution in his own home area.

(v). Article 1D of the Convention does not apply to persons receiving assistance from UNMIK and KFOR.

52. For the reasons given in paragraph 50, this appeal is allowed to the extent only that it is remitted for fresh consideration by an Adjudicator other than Mr Watkins.

C.M.G. Ockelton
Deputy President