Case No: (1) C5/2008/2972
(2) C5/2008/3037

Neutral Citation Number: [2009] EWCA Civ 1032
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM & IMMIGRATION TRIBUNAL
[AIT No AA/09344/2007 & AS/00372/2007]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday, 9th September 2009

Before:

LORD JUSTICE WILSON
LORD JUSTICE ETHERTON
and
LORD JUSTICE SULLIVAN

- -

Between:

AK & FH (KOSOVO)

Appellant

- and -

SECRETARY OF STATE FOR THE HOME DEPARMENT

Respondent

- -

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Mr Christopher Jacobs (instructed by Messrs Duncan Lewis & Co Sols) appeared on behalf of the **Appellant**.

Miss Susan Chan (instructed by Treasury Sols) appeared on behalf of the **Respondent**.

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Judgment

Lord Justice Sullivan:

1. The appellants in these two appeals are both Kosovan citizens. The first appellant is of Roma Ashkaeli ethnicity. The second appellant is of Roma ethnicity. Both appellants are the sons of well known Serb collaborators. They both claim to be at risk if they are returned to Kosovo because of their relatives' collaboration with Serb military authorities, which would in turn put their own lives at risk because of the perception of Kosovan Albanians that, as the relatives of the collaborators, the appellants themselves were also collaborators.

2. The respondent rejected their claims for asylum and humanitarian protection and appeals followed. Following orders for reconsideration of both cases, their appeals came before the Asylum and Immigration Tribunal -- Senior Immigration Judges Jarvis and Nichols and Mrs Padfield JP -- at a hearing on 14 and 15 July 2008. The Tribunal's determination is dated 22 October 2008. In paragraph 15 of its determination the Tribunal said that:

> "Both parties agreed that the issue in these appeals is a narrow one, namely whether Roma, or Ashkaeli, whose family are known in their community as Serb collaborators are at real risk of ill-treatment or serious harm amounting to persecution and or a violation of their Article 3 ECHR rights on return to Kosovo."

3. The Tribunal heard oral evidence from an expert witness, Mr Korovilas, and considered a written report from another expert witness, Mr Alex Standish. Both expert witnesses supported the appellants' claims that they would be at risk as perceived Serb collaborators if they were returned to Kosovo. In a lengthy determination running to 138 paragraphs the Tribunal set out and then carefully analysed the expert evidence and the parties' detailed submissions. The Tribunal's findings as to the risk to the family members of known collaborators are contained in paragraphs 114-121 of the determination. In paragraphs 114 and 115 the Tribunal set out by way of background "the general position for known Serb collaborators in Kosovo". Against this background the Tribunal then considered the position of "family members of Serb collaborators" in paragraphs 116-121 of the determination. The Tribunal's conclusion in paragraph 121 was as follows:

> "We conclude on the background material that there is no real risk established to family members of known collaborators with the Serbian authorities, either on the grounds of their imputed political opinion or because they form a persecuted social group."

4. In the succeeding paragraphs of the determination the Tribunal applied that conclusion to the facts of the individual claims, considered the option of internal flight, and then dismissed both appeals on asylum and human rights grounds. The appellants applied for permission to appeal on three grounds. It was contended that the Tribunal had acted perversely in rejecting the opinions of the two expert witnesses, had wrongly required evidence of general risk to family members, and had failed to give adequate consideration to the uncontested evidence that the Office of Communities, Return and Minority Affairs ("OCRM") -- the international body which has responsibility for returning people to Kosovo -- will refuse to admit persons with the kind of background which these appellant's have, because the OCRM does not consider that they would be safe if they were to be returned.

5. Permission to appeal was refused on the papers. At a hearing on 26 March 2009 at which the respondent did not appear, Moore Bick LJ refused permission to appeal on the first two grounds but gave permission on the third ground. He set out the relevant passage in paragraph 120 of the Tribunal's determination:

> "We should deal with the evidence that the OCRM will refuse to admit persons with a background such as that of these two appellants. Whilst we note the position of the OCRM as detailed by Mr Korovilas in his report and his oral evidence, we are clearly not concerned with the act of returnability of these appellants. However for the reasons we have already given and for the reasons that follow, we do not accept that the appellants would be identified in the category of perceived collaborators."

6. Having said that this was the only reference in the determination to the OCRM's position, Moore Bick LJ said this in paragraph 9 of his judgment:

> "In my view, although this is a narrow point, it is arguable that the Tribunal failed to give proper consideration to the evidence of the position currently taken by the OCRM and the inferences that can properly be drawn from it. This is not a ground which features with any great clarity in the appellants' grounds of appeal. Accordingly I think that the right course to take is to give permission to amend the notice of appeal to raise this as a distinct ground and to give permission to appeal limited to that new ground."

7. The notice of appeal was duly amended and the amended grounds of appeal, with which we are concerned, are as follows:

> "The Tribunal erred in failing to give consideration to the uncontested evidence from OCRM that the *de facto* authorities in Kosovo will refuse to admit persons with the Appellant's background because of grounds relating to safety.
>
> The Tribunal erred in holding paragraph 120 of the determination that it was not concerned with the actual returnabilty of the Appellant. The position of OCRM is directly relevant to the issue of whether the Appellant would be at risk of ill treatment on return. OCRM is the best placed source for determining the issue of safety on return."

8. It is common ground that actual returnability as such was not the issue for the Tribunal. In her skeleton argument on behalf of the respondent, Miss Chan did not submit that the underlying reason for the OCRM's approach to returnabilty, in so far as it was based on the OCRM's concerns as to the risk on return for certain categories of persons, was irrelevant. In summary, she submitted that the concerns underlying the OCRM's approach to return were simply echoes of the position of the UNHCR, and the Tribunal, in paragraphs 114-121 of this determination, had considered carefully and in detail the justification for that position. She further submitted that the Tribunal had specifically mentioned the OCRM's position on actual returnability in paragraph 120 of the determination because one of the reasons why reconsideration of the second appellant's appeal had been ordered was because the immigration judge, when determining that appeal initially, had wrongly taken into account the second appellant's expert evidence that he would be refused entry into Kosovo by the OCRM.

9. There is no doubt, in my judgment, that the position of the UNHCR was fully considered in the determination, and there is no challenge to the Tribunal's conclusions in that respect. The first question raised by this appeal therefore is whether the OCRM's position on safety on return was simply an echo of the UNHCR's position so that consideration of the latter's position necessarily involved consideration of the reasons underlying the OCRM's approach to returnability, or whether the OCRM's position added something of substance to that of the UNHCR. The OCRM is a department of UNMIK (United Nations Mission in Kosovo) which currently governs Kosovo, although it is gradually handing over power to Kosovan institutions. Mr Kosovilas's evidence was that UNMIK acted on the UNHCR's guidance. In his first report, dated 30 August 2007, he referred to United Nations Security Council Resolution 1244. Annex 2 to the resolution sets out various "principles to move towards a resolution of the Kosovo crisis". One of those principles in paragraph 7 of Annex 2 is as follows:

> "Safe and free return of all refugees and displaced persons under the supervision of the Office of the

> United Nations High Commissioner for Refugees and unimpeded access to Kosovo by humanitarian aid organizations."

10. Mr Korovilas explained in his report:

> "UN Security Council resolution 1244 raises a number of 'principles' which act as guidance for the international administration in Kosovo (UNMIK). Resolution 1244 clearly states in annex 2 that the 'return of all refugees and displaced persons [should take place] under the supervision of the office of the UNHCR'. This explains why the UNHCR in Pristina is able to define which internationally displaced persons (IDP) are acceptable for return to Kosovo and which IDPs should continue to benefit from continued international protection in their country of asylum. UNMIK (OCRM) cooperates closely with the UNHCR on returns issues, explaining the consistent policy position of these two organisations on this issue."

11. The "consistent policy position" of the two organisations was a theme which ran through the Tribunal's account of Mr Korovilas's evidence and the submissions made by Mr Jacobs on behalf of the appellant's at the hearing. Thus we find in paragraph 23 of the determination:

> "[Mr Korovilas] referred to Annex 2, paragraph 7 of resolution 1244, which deals with the principles to be agreed to move towards a resolution of the Kosovo crisis at that time… [paragraph 7 is then set out]
>
> Mr Korovilas said that this explained the status of the UNHCR in relation to the return of refugees. In addition, the UNHCR periodically issued statements of its position and the latest and most up-to-date was June 2006. This outlined the position in Kosovo and detailed who the specific minority groups were that should continue to receive protection. He said that the authorities in Kosovo were obliged to follow the guidance of the UNCHR as to who should and who should not be forcibly returned as the UNHCR was the arbiter of returns. In practice it is UNMIK which is charged with the monitoring of returns and which liases with governments of countries, for example the UK, wishing to return people to Kosovo against their will, and will take the details of those persons and their circumstances; and where they are from.

> Those details will then be passed to OCRM, which is a department of UNMIK, who would screen that individual to determine whether he or she could be safely returned."

12. We also find in paragraph 100 of the determination, where the Tribunal was summarising Mr Jacobs' submissions on behalf of the appellants:

> "Mr Jacobs submitted that Mr Korovilas was an impressive witness. He had set out his very long-standing contacts and his sources in his report. It was accepted, as Mr Korovilas had explained, that Kosovo was still a UN Protectorate and was governed by Resolution 1244. The UNHCR through OCRM was as at today's date still the current arbiter of safety of returns. It was that organisation which decided who was at risk and whether there was a sufficiency of protection in the province. Any other proposals, for example the re-admissions policy, submitted by the respondent were merely proposals. Insofar as any of those provisions conflicted with Resolution 1244, then those parts of the proposals were unlawful. It was Mr Korovilas's evidence that he had asked if there were any plans to derogate from Resolution 1244 and his answer had been 'No one has or will try'."

13. If, as had been said in the evidence and submissions on behalf of the appellants, the OCRM, as a department of UNMIK, was obliged to follow the UNHCR's guidance, because the latter was the current arbiter of the safety of returns, then the Tribunal's consideration of the justification for the UNHCR's position necessarily involved a consideration of the justification for the OCRM's position on returns. Faced with this difficulty Mr Jacobs pointed to another passage in the Tribunal's account of his submissions, in which he is recorded as submitting:

> "The authorities could not offer protection to that person and that was why the OCRM refused to admit such persons. He submitted that this amounted to the most compelling evidence of risk and came direct from the mandated authorities."

14. That passage followed the Tribunal's summary of Mr Jacobs' analysis of the effect of Mr Korovilas' evidence. In his submissions in support of the appeal before us Mr Jacob said that among the persons from whom Mr Korovilas had sought information in Kosovo were officials in the OCRM. Those officials had expressed the view that it was "obvious" that the appellants would be at risk if they were returned to Kosovo. Thus, he submitted, the Tribunal had evidence via Mr Korovilas of the views not merely of individuals in Kosovo but of officials of the *de facto* government

authorities in that country. He submitted that the Tribunal had failed to give proper consideration to that evidence because it had treated the OCRM's position as relevant only to the question of actual returnability (see paragraph 120); alternatively, the Tribunal had failed to give proper weight to the views of the OCRM's officials as relayed by Mr Korovilas because it had failed to appreciate that they were the views not merely of individuals but of the responsible government agency in Kosovo; alternatively, the Tribunal's failure to accept the views of the OCRM's officials was perverse because it was the most compelling evidence by virtue of their position.

15. Putting to one side the question whether Mr Jacobs is seeking by these submissions to revive either in whole or in part the grounds on which he was not given permission to appeal, the difficulty with his submission is, in my judgment, that the determination set out Mr Korovilas' evidence in very considerable detail. That detail included references to the identities of those from whom he had obtained information in Kosovo. Thus, by way of example only, we find in paragraph 24 of the determination:

> "Mr Korovilas was asked from whom he had obtained his information about the policy on returns. He said initially he spoke to a German national working for the OCRM. However that person was replaced by someone else. "

16. In paragraph 33 of its determination the Tribunal says:

> "Mr Korovilas was then asked about the specific individuals whom he had interviewed and who he mentions in his addendum report."

17. Those individuals and their various appointments are described, and they included, in paragraph 37:

> "He spoke to Foteini Priangelou, who is based at the Office for Communities, Returns and Minority Affairs (OCRM) at the UNMIK headquarters in Pristina. She is a returns officers working for UNMIK. He said he met her on almost every visit he made to Pristina. Her views had been unchanged from 2007."

18. As I have mentioned, the Tribunal recorded Mr Jacob's submission that the evidence from the OCRM came from the mandated authorities and was "the most compelling evidence of risk". The Tribunal did not simply ignore the evidence and submissions that it had recorded and deal only with the UNHCR's position papers. Having considered those position papers the Tribunal considered, again in some detail, the evidence of Mr Korovilas, including his evidence about the views of those persons he

had interviewed in Kosovo. In paragraph 115 of the determination, when dealing with the risk to known collaborators, the Tribunal said:

> "We accept the evidence that there is a great deal of societal animosity toward such individuals amongst the ethic Albanian community in Kosovo, and there is no reason to doubt that the individuals interviewed by Mr Korovilas genuinely believe this to be the case. We also accept that these persons, given the nature of their employment are likely to be in a position where they have a good knowledge of the community view. However their opinion and belief does not amount to evidence of a real risk."

19. When dealing with the family members of Serb collaborators, the Tribunal considered, in paragraph 118, the evidence of Mr Korovilas, including the views of those persons he had interviewed. For example:

> "Mr Korovilas relied on his conversations with Mr Hajredini and Mrs Metaj, whom he said had both told him of cases they have known about where known family members of collaborators had suffered purely for that reason."

20. While the Tribunal's discussion of this issue does not refer individually by name to all of the persons from whom Mr Korovilas had obtained information who were referred to in the earlier paragraphs of the determination, the determination must be read as a whole and, if that is done, it is clear that the Tribunal was well aware of the fact that some of those persons who provided information to Mr Korovilas were officials of the OCRM and was also well aware of the fact that the OCRM was the relevant government department in Kosovo. Given the consistent policy position of the UNHCR and the OCRM, the Tribunal's consideration of that policy position, when coupled with its consideration of Mr Korovilas' account of the views that had been expressed to him in Kosovo, which included the views of officials of the OCRM, meant that the Tribunal's consideration of the OCRM's position was not confined simply to the passage in paragraph 120 of the determination dealing with actual returnability. That was a specific facet of the OCRM's position which the Tribunal thought it necessary to deal with because of the earlier error by the immigration judge in the second appeal as to the relevance of actual returnability, which had been one of the reasons why the Tribunal was having to reconsider the second appeal.

21. The weight to be given to the views of those persons from whom Mr Korovilas sought information in Kosovo, including those who were officials of the OCRM, was for the Tribunal to assess. For my part, I would be very slow indeed to conclude that an expert Tribunal, which included, in the present case, two Senior Immigration Judges and a very experienced lay member, had reached a conclusion on the evidence which

was perverse; and I note that such perversity is not alleged in the amended grounds of appeal, rather it is contended that the Tribunal's consideration of the OCRM's position was confined to the passage in paragraph 120 of the determination about actual returnability.

22. Once it is appreciated on a fair reading of the determination as a whole that that is not the case, then, absent Wednesbury perversity, the challenge to the Tribunal's determination is bound to fail. I do not say that the decision reached by the Tribunal was the only decision it could have reached on the evidence, but I am satisfied that it was a decision which the Tribunal could lawfully reach, notwithstanding the evidence as to the OCRM's position. Whether the Secretary of State will actually be in a position to return these two appellants to Kosovo is, as the determination makes clear, another question altogether, and one where the views of the Kosovan authorities, rather than Secretary of State or the Tribunal, will be determinative.

23. For these reasons, I, for my part, would dismiss this appeal.

Lord Justice Etherton:

24. I agree.

Lord Justice Wilson:

25. I also agree.

Order: Application refused