CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

THIRD SECTION

FINAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 8200/02
by Afrim ŠIJAKU
against the Former Yugoslav Republic of Macedonia

The European Court of Human Rights (Third Section), sitting on 27 January 2005 as a Chamber composed of:

Mr B.M. ZUPANČIČ, *President*,
Mr J. HEDIGAN,
Mr L. CAFLISCH,
Mrs M. TSATSA-NIKOLOVSKA,
Mr V. ZAGREBELSKY,
Mr E. MYJER,
Mr DAVID THÓR BJÖRGVINSSON, *judges*,
and Mr V. BERGER, *Section Registrar*,

Having regard to the above application lodged on 22 February 2002,

Having regard to the interim measure indicated to the respondent Government under Rule 39 of the Rules of Court and the fact that this interim measure has been complied with,

Having regard to the partial decision of 13 March 2003,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Afrim Šijaku, is a national of Serbia and Montenegro, the former Federal Republic of Yugoslavia, who was born in 1969; his present whereabouts are unknown as he is under the protection of the International Criminal Tribunal for the former Yugoslavia (ICTY) as a potential witness. He is represented before the Court by Mr Ilievski, a lawyer practising in Skopje (former Yugoslav Republic of Macedonia).

A. The circumstances of the case

The facts of the case, as submitted by the parties, may be summarised as follows.

The applicant is an ethnic Albanian, who was residing with his family in Uroševac, Kosovo (in the former Federal Republic of Yugoslavia) until his arrival in the Republic of Macedonia in August 2000.

1. The applicant's account of his situation in Kosovo

The applicant maintains that in 1989 he was forcibly recruited as an informer for the Serbian police. From 1989 to 1998 he helped the police to discover and learn about alleged smugglers of cigarettes, drugs and weapons, and other offenders. In 1998, when the security situation in Kosovo deteriorated, the applicant was directing Serbian police to houses in which members of the Kosovo Liberation Army ("KLA"), political opponents of the regime, and other ethnic Albanians referred to by the police as "terrorists and separatists" lived.

In 1999 the applicant joined the political party "Democratic Initiative for Kosovo" ("DIK"), which did not support independence for Kosovo and promoted tolerance towards the Serbs and other ethnic minorities living in the province.

The local Albanians marked the applicant as a collaborator of the Serbs and a traitor and suspected him of being a member of the "Black Hand" organisation (an alleged Serbian terrorist organisation, which was active in the urban parts of Kosovo province during the clashes between the Serbian security forces and the KLA).

In addition to shunning and threatening him because of his collaboration with the Serbs, the Albanian militants disliked the applicant because of his background - his father was a chief in the Uroševac police and his grandfather had been a judge of the District Court of Suva Reka - and because of his membership in DIK.

The applicant maintains that three days after the withdrawal of the Serbian security forces from the province of Kosovo and the arrival of the NATO-led peacekeeping forces (KFOR) in June 1999, he was kidnapped by the KLA. He claims that he was held for three days in an office in Uroševac

and was questioned about his links with the Serbian police. He was not ill-treated on that occasion. After his release, the applicant reported the event to the local headquarters of KFOR, but they had not found the kidnappers or taken any other measures.

Ten days after that event the applicant was again kidnapped by KLA members. He was taken to the village of Slatina, in the municipality of Kačanik, where he was held in a cellar for about three months. In the course of his detention, the applicant was interrogated about the "Black Hand" organisation (the applicant denied being a member of it), his connections and collaboration with the Serbian police, and about the structure and leaders of the DIK. The applicant alleges that he was constantly kicked and beaten with an electric cable and electrically burned, with the result that he had swellings all over his body. The applicant could not bear the ill-treatment and tried to kill himself (by slashing his veins), but his suicide attempt was unsuccessful. He further alleges that another police collaborator, who was tortured at the same time and place, did not survive the acts of brutality.

The applicant managed to abscond when the vehicle in which he was to be transported to another destination overturned near the village of Gabrince. He then went into hiding and temporarily stayed at different places. He ultimately returned to his home town of Uroševac, where he was again discovered by the KLA.

In the spring of 2000 (the applicant claims to have no recollection of the exact date) four KLA members attempted to assassinate him in his uncle's house, using guns with silencers. The incident was reported to KFOR and to the field delegate of the International Committee of the Red Cross. Their suggestion was that the applicant should leave Kosovo.

On 25 August 2000, with the assistance of a protection officer of the United Nations High Commissioner for Refugees, the applicant was driven to the Blace border-crossing point, where he entered the former Yugoslav Republic (FYR) of Macedonia.

2. The situation of the applicant after leaving Kosovo

Upon his arrival in the FYR of Macedonia, the applicant was granted the status of Temporary Humanitarian Assisted Person ("THAP") and was subsequently accommodated in a group centre.

On 27 April 2001, after the THAP status for Kosovar Albanians expired, the applicant's representative filed an application with the Ministry of the Interior – Department for Foreigners and Immigration Issues *(Министерство за внатрешни работи - Сектор за странци и имигрициони прашања)*, requesting that his client be granted refugee status and making mainly the allegations and complaints set out in the application to the Court.

On 31 May 2001 the applicant's representative obtained a memorandum from the office of the ICTY in Skopje, FYR of Macedonia, in support of the applicant's request to be granted refugee status by the national authorities. The memorandum contained a brief statement to the effect that the applicant was regarded by the ICTY as an important witness. No other supporting evidence was submitted owing (so the applicant's representative maintained) to the confidentiality of proceedings before the Tribunal.

By a decision of 6 July 2001 the Ministry of the Interior, following an interview with the applicant on 19 June 2001, refused his request. It held that the applicant's statements had been intentionally false and contradictory, and no well-founded fear that the applicant would be exposed to persecution if returned to his country of origin had been established, as required by law, to justify his being granted refugee status.

On 19 July 2001 the applicant, through his representative, lodged an appeal with the Government Appeals Board responsible for handling administrative issues arising in the areas of internal affairs, the judiciary, State administration, local self-government and religious affairs *(Комисија на Владата на Република Македонија за решавање во управна постапка во втор степен од областа на внатрешните работи, судството, државната управа, локалната самоуправа и работите од верски карактер)*. He maintained that the first-instance administrative body had erred in fact and failed to provide sufficient reasoning for its decision. The applicant's representative also argued that the applicant's case had not been comprehensively reviewed, no regard had been had to the ICTY memorandum of 31 May 2001, and the decision had been based on personal prejudice against the applicant rather than on his statements and on the evidence submitted.

On 30 August 2001 the Government Appeals Board, upholding the reasoning given by the first-instance administrative body, dismissed the applicant's appeal. It stated, *inter alia*, that after consideration of the first-instance decision, the concerns raised in the appeal and other documents in the case file, no well-founded fear of persecution of the applicant by the KLA in Kosovo had been established since the applicant's statements had been assessed as lacking credibility and plausibility. It had also considered the ICTY memorandum but had attached no particular weight to it because it was based on the applicant's false statements.

On 2 September 2001 the applicant's representative lodged a complaint with the Supreme Court *(Врховен суд на Република Македонија)*, requesting the court to quash the decision of the Government Appeals Board and either grant the applicant refugee status or to set aside that decision and remit the case for re-examination. He maintained that although the applicant's statements to the effect that members of the KLA had tortured him and attempted to assassinate him had not been supported by documentary evidence, the mere fact that they were detailed, disclosing the

names of Serbian police officers with whom he used to collaborate and the names of persons who had persecuted, tortured and attempted to kill him, should have been a sufficient ground for believing that they were true. Moreover, the credibility of the applicant's statements should have not been questioned in view of the ICTY memorandum of 31 March 2001 to the effect that he was regarded as an important witness before that Tribunal.

In the meanwhile on 28 September 2001, the applicant made an application to the Ministry of the Interior, requesting that the decision of the Government Appeals Board of 30 August 2001 should not be enforced pending the outcome of the proceedings before the Supreme Court. This was actually a request by the applicant lodged under Article 39 of the Aliens Act not to be expelled. However, it appears that no decision was made on the application.

On 16 January 2002 the Supreme Court dismissed the applicant's complaint on the ground that the applicant had not fulfilled the requirements of section 46 of the Aliens Act or those of the 1951 Geneva Convention relating to the Status of Refugees as he had failed to substantiate his allegations of persecution in his country of origin. It held, in particular, that the applicant, as a national of the Federal Republic of Yugoslavia, could have enjoyed effective protection, if not in Kosovo, then in other parts of his country of origin. The court had regard to the applicant's allegations that he was marked by the Albanians as a collaborator of the Serbs and that he had been kidnapped and his life had been threatened on account of his past collaboration with the Serbian police and his membership of the DIK, but he had failed to provide evidence in support of these allegations. The court further indicated that regard had been had to the memorandum issued by the ICTY but, since no other evidence had been submitted in support, it was unable to accept that memorandum as an additional reason for his fears of persecution in his country of origin.

On 7 February 2002 the applicant's representative was served with a notice by the Ministry of the Interior - Department for Foreigners and Immigration Issues, stating that his client was requested to leave the country by 5 March 2002 at the latest.

In a letter of 19 February 2002 to the UNHCR Protection officer in Skopje, the ICTY Chief of Investigations, Mr Opez-Terres, confirmed that the applicant was a potential witness and was expected to be called to testify in future trials to be held by the Tribunal. Furthermore, he stated that in the light of the information available to the Tribunal,

> "... It would not be safe for the applicant to be returned to Kosovo or Serbia due to the very real expectation that his basic human rights would be under threat ..."

On 28 February 2002 a request for an interim measure under Rule 39 was lodged with the Court, which granted it. By letter of 13 March 2002, the Government informed the Court that the applicant would not be expelled

and that the Ministry of the Interior was investigating with the UNHCR the possibility of the applicant's transfer to a third State.

On 26 March 2002 the applicant voluntarily left the Transit Centre for Foreigners, which is an open place, the foreigners living there having complete freedom of movement. Ever since then the applicant has been under the protection of the ICTY as a potential witness and has been taken to a safe address, which is temporary. In his latest communication to the Court, the applicant's representative indicated that the ICTY officials with whom he had made contact had stated that the applicant's current place of residence was dictated by the needs of the Tribunal and the duration of his stay there was uncertain.

B. Relevant domestic law

The relevant provisions of the Aliens Movement and Residence Act *(Закон за движење и престој на странци)*, published in issue no. 36/92 of the "Official Gazette of the Republic of Macedonia", may be summarised as follows.

Section 35 provides, *inter alia*, that if an alien does not leave the State's territory within the given time-limit, he shall be escorted by an official of the Ministry of Interior to the State border or to the embassy or consulate of his country of origin.

Section 39 stipulates that an alien shall not be expelled from the State's territory if his life will thereby be put in jeopardy owing to his racial, religious or national affiliation or his political beliefs or if he runs the risk of being exposed to torture or inhuman treatment.

Section 46 provides that an alien who left his country because he was persecuted for his democratic political convictions and actions, cultural or scientific activities or because of his national, racial or religious affiliation can be granted refugee status.

COMPLAINTS

The applicant complained under Articles 2 and 3 of the Convention that he would face a serious risk of being killed and being subjected to torture or inhuman treatment if he were to be expelled to his country of origin, Serbia and Montenegro.

THE LAW

The applicant complained that his life would be put in jeopardy and that he would be subjected to torture or inhuman treatment if he were to be expelled to his country of origin. He relied on Articles 2 and 3 of the Convention, the relevant parts of which read as follows:

Article 2

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

..."

Article 3

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. The parties' submissions

The Government submitted that at no time did any authority issue a decision that the applicant would be expelled to Kosovo. The decisions only refused to accord him refugee status and the applicant was given enough time and opportunity to choose how he should leave the FYR of Macedonia. Following the application of an interim measure, the applicant also would not have been expelled until the Court's decision in the case. Further due to his voluntary departure from the Transit Centre and the country, the applicant had lost, in their view, the status of victim. They were no longer in the position to enforce any expulsion to any country, let alone Kosovo. The applicant was no longer directly affected by any measure and no issue could arise from examination of the past decisions of the authorities concerning his asylum claim as there was no right to refugee status under the Convention. They finally pointed out that the applicant has lost contact with his representative before the lodging of the application and he had effectively only been instructed to obtain an interim measure and hold up any expulsion. They concluded that there was no longer any justification in the case being considered further.

The applicant's representative submitted that the applicant had not lost his status of victim by voluntarily leaving the country. He pointed out that the applicant was a potential witness in important international legal proceedings and that his stay in a safe third country for that purpose was only temporary. Once his duty as a witness was completed, he asserted that this country was likely to return him to the FRY of Macedonia where he

would be faced with expulsion to his native country and violation of Articles 2 and 3 as a result. He submitted that the Government had not provided any guarantees against such expulsion and there had been no doubt that they would have expelled him if he had not entered the witness programme. While the applicant's representative had lost contact with the applicant, the letter of authority signed by the applicant was a general one and there was no need to obtain another. He explained that he was unable to enter into contact at the moment due to the strict policy of the ICTY on confidentiality. There was therefore no basis to assume that the applicant had lost interest in further conduct of his application.

B. The Court's assessment

The Court finds it unnecessary to rule as to whether the applicant's representative may continue to represent the applicant, or whether his lack of contact with his representative must be taken as indicating that he has lost interest in pursuing his application, for the reasons set out below.

Article 34 of the Convention requires that an individual applicant should claim to have been actually affected by the violation he alleges. That Article does not institute for individuals a kind of *actio popularis* for the interpretation of the Convention; it does not permit individuals to complain against the state of law or any particular decision *in abstracto* simply because they consider that it contravenes the Convention. Nor, in principle, does it suffice for an applicant to claim that the mere existence of a law violates his rights under the Convention; it is necessary that the law should have been applied to his detriment (*Klass and Others v. Germany*, judgment of 6 September 1978, Series A no. 28, § 33). The Court has accepted that an applicant may be a potential victim: for example, where he was not able to establish that the legislation he complained of had actually been applied to him on account of the secret nature of the measures it authorised or where an alien's removal had been ordered, but not enforced, and where enforcement would have exposed him in the receiving country to treatment contrary to Article 3 or to an infringement of his rights under Article 8 of the Convention. However, in order to be able to claim to be a victim in such a situation, an applicant must produce reasonable and convincing evidence of the likelihood that a violation affecting him personally will occur; mere suspicion or conjecture is insufficient (see generally, *Senator Lines GMBH v. Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom* (dec.), no. 56672/00, with further references, in particular to the above-mentioned *Klass and Others* judgment).

In the present case, while it is true that the authorities had refused the applicant asylum and he was at the very least threatened with the execution of of an expulsion decision, it is undisputed that the applicant voluntarily

left the Transit Centre and quit the FYR of Macedonia for a safe third country under the witness and victim protection programme of the ICTY. In those circumstances, he can no longer claim to be at imminent risk of expulsion by the Government to Kosovo or elsewhere in the Republic of Serbia and Montenegro. The applicant's representative's assertion that the applicant would be returned to FYR of Macedonia after the conclusion of his duties as a witness is to a large degree hypothetical and speculative, there being no indication from the ICTY as to their intentions in that regard or those of the safe country. Even if it were the case, the applicant's return would take place at an unspecified future time, when circumstances in both the FYR of Macedonia and the Republic of Serbia and Montenegro, and the elements of risk on which the applicant now relies, may be significantly different. It would be open to the applicant to make a fresh application at that stage if he were to consider that circumstances placed him at risk of a violation of his Convention rights.

The Court accordingly finds that the applicant cannot at this time claim to be a victim of a violation of the Convention within the meaning of Article 34 of the Convention, and this part of the application must be rejected pursuant to Article 34 and Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the remainder of the application inadmissible.

Vincent BERGER
Registrar

Boštjan M. ZUPANČIČ
President