

Asylum and Immigration Tribunal

THE IMMIGRATION ACTS

**Heard at Field House
On 9 October 2008
Prepared 16 October 2008**

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Before

**SENIOR IMMIGRATION JUDGE MCGEACHY
SENIOR IMMIGRATION JUDGE KEKIC
MR C THURSBY**

Between

SI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr B Hawkin, of Counsel, instructed by Messrs Cranbrook
Solicitors

For the Respondent: Mr J Gulvin, Home Office Presenting Officer

1. *Although there is clear evidence of discrimination against minorities and in particular Roma in Kosovo, the evidence does not demonstrate that there is a real risk that a member of a minority group would face persecution for a Convention reason or treatment contrary to his rights under Article 3 of the ECHR. There is a sufficiency of protection in Kosovo for minorities - including those who have mixed Roma/ Serb parentage - in terms of Regulation 4 (2) of the Refugee or Person in Need of International Protection Regulations 2006.*

2. *The current CG cases relating to the protection of minorities (SK (Roma in Kosovo – update) Serbia and Montenegro [2005] UKAIT 23, FD (Kosovo – Roma) Serbia and Montenegro CG [2004] UKAIT 00214 and ES (Ashkaelians, mixed-Ashkaelian ethnicity Serbia and Montenegro (Kosovo) [2006] UKAIT 71 are confirmed and the judgement of the Court of Appeal in Hysi [2005] EWCA Civ 711 is followed.*
3. *Although there were increased tensions among minorities before and after the Declaration of Independence in February 2008 there is no evidence that the anticipated increase in violence materialised or that there ceased to be a sufficiency of protection for minorities in Kosovo.*

DETERMINATION AND REASONS

1. The appellant, a Kosovan, who was born on 10 June 1976, arrived in Britain on 11 July 1998, claiming asylum two days later. He was interviewed in July 2002 and again in August 2007. His application was refused on 31 August 2007, directions being made for his removal to Kosovo.
2. The appellant appealed. His appeal was heard by Immigration Judge Robinson on 11 October 2007 and dismissed. Reconsideration of that decision was ordered by Senior Immigration Judge Perkins on 27 November 2007.
3. In paragraph 2 of his determination the Immigration Judge summarised the appellant's claim. He wrote:-
 - “2. ...He states that his mother was a Serbian and his father was of Roma origin. Both his parents described themselves as Kosovan. In June 1998 Serbian soldiers came to his village. They began killing families and setting fire to houses. They came to his house at night. He heard shots and ran for his life. He was shot in the leg. His father was killed. He left Kosovo soon afterwards and came to the United Kingdom.”
4. In paragraph 7 of the determination the Immigration Judge noted that the appellant said that he did not speak Roma or Serbian as his father had not wanted him to learn those languages. His first and only language is Albanian. In paragraph 25 the Immigration Judge recorded that the appellant had said that his father had worked in Peje, had been accused of being a spy and had been killed. The appellant also said that he had been sent threatening letters before his father was killed.
5. The Immigration Judge found that a statement made in 1998 which had been put to the appellant in 2002 had not been made by the appellant. He therefore did not accept the respondent's claims that the appellant's credibility was damaged by discrepancies between what it was claimed the appellant had said in that statement and what he had said at interview. In paragraphs 28 and 29 the Immigration Judge set out his findings of fact as follows:-
 - “28. I find that the appellant's core story is believable and that he has dealt with the issues raised in the refusal letter some of which were based on another case. I reach my conclusions on the basis that the appellant is a person of mixed ethnicity

and his father, who was of Serbian ethnicity, was killed during the civil war by persons who accused him of being a spy.

29. The appellant has described his fears for himself on return. I consider that he accurately described his feelings, that he does not 'belong' in Kosovo as he is not of Albanian ethnicity. Nevertheless I take the view that this does not lead inevitably to the conclusion that he has a genuine fear of persecution. He was able to continue living in his home village for two or three weeks after the death of his father. His mother remained in Kosovo and decided not to leave the country with him. I consider that the appellant would not be regarded as a Serb (he does not speak Serbian). It appears to me that there is nothing about him that would lead any person to believe that he is of mixed ethnicity. In KX, at paragraph 17(5) it was pointed out that Roma do not usually speak Albanian. The appellant clearly does and it was his first language before he left Kosovo. The appellant is not likely, in my view, to be considered either as a Serb or a Roma of mixed ethnicity. His ethnicity may well have been known in his home village. However I take the view that after a lapse of nine years the appellant would not be at risk in the event he returned to Kosovo. He has given evidence that his home village was destroyed. I take the view that he would not be recognised as a person of mixed ethnicity if he returns to one of the Kosovan cities or larger towns. He does not have a partner of a different ethnicity. He is a young man, who speaks Albanian and who left the country with many others at the time of the civil war. I conclude that he would not be at risk from the Albanian speaking majority, especially as Albanian is his first language."

6. We consider that the comment in paragraph 28 that the appellant's father was a Serbian is a typographical error as it has been accepted throughout that the appellant's mother was Serbian and that his father was Roma.

Error of law in the determination of the Immigration Judge

7. On 20 February 2008 Senior Immigration Judge Nichols found that there was a material error of law in the determination of the Immigration Judge. Her reasons for that decision were as follows:

- "1. This is a reconsideration of the decision of Immigration Judge Robinson who, on 11th October 2007, dismissed the appellant's appeal on asylum and human rights grounds against the decision of the respondent on 31st August 2007 to refuse his application for asylum and to remove him to Serbia (Kosovo).
2. The appellant's case is that his family were of mixed ethnicity. His mother was Serbian and his father of Roma origin. The Immigration Judge was referred to the Tribunal's decision in KX (Serbia and Montenegro – Kosovo) CG [2006] UKIAT 00072, which deals with the risk to those of mixed ethnicity in Serbia and Montenegro and to the Court of Appeal decision in Hysi [2005] EWCA Civ 711. In Hysi, the Court of Appeal, who were dealing with an appellant who spoke fluent Albanian, as does this appellant, however concluded that on all of the evidence, the Tribunal had not properly assessed risk on return given that the appellant was of mixed ethnicity and that internal relocation may not be reasonable having regard to the background material. This was a case where the Court of Appeal was of the view that on the evidence, mixed ethnicity would inevitably emerge on questioning on return. The case was remitted to the Tribunal for rehearing.

3. The Tribunal ordered reconsideration in this case because as the grounds of the application submit, the Immigration Judge failed to properly consider the risk factors identified in KX and did not consider Hysi at all, despite referring to it in the determination. It was also submitted that the judge had failed to give any or sufficient weight to the latest UNHCR and Amnesty reports which clearly identified persons of mixed ethnicity as being at risk if returned.
4. Both parties agreed before me that there was a material error of law on this basis. Mr Hawkins submitted that the judge had not considered the extensive conclusions made at paragraph 70 of KX, and had relied solely on paragraph 70(5), i.e. that the appellant did speak Albanian. This was wholly inadequate, especially given that he had failed to consider Hysi where that appellant had also been able to speak Albanian, but it was nevertheless held by the Court of Appeal that risk had not been properly determined. The judge ought to have gone through all of the factors identified by the Tribunal in KX and assessed those with regard to the facts established in this case.
5. Ms Isherwood agreed. Mr Hawkin also pointed out there have been developments recently in Kosovo with the Declaration of Independence, and that it was likely that the Tribunal would need to look at the updated background material as to any increased risk for those of mixed ethnicity, and particularly in light of the fact that in this case the appellant's mother is Serbian and his father Roma.
6. I find that there is a material error of law, because the Immigration Judge has failed to properly consider KX, a country guidance determination, which he was bound to properly and fully take into account in reaching his conclusion on this case.
7. Accordingly I have adjourned the hearing of this appeal for the issue of risk because of the appellant's mixed ethnicity to be re-determined, having regard to KX and also to any updated background material that is submitted. There is no issue taken with the Immigration Judge's findings of fact in this case and those will stand; the only issue is risk on return."
8. In her decision Senior Immigration Judge Nichols therefore preserved the Immigration Judge's findings of fact which we have set out above.
9. The essential facts in this appeal are that the appellant is of mixed ethnicity: his father was Roma and his mother was of Serbian ethnicity. When the Serbian army invaded Kosovo the appellant's father was shot because he was perceived to be an informer. The appellant remained at home for two or three weeks after his father's death (interview 2002 answer 14) and he himself was shot and wounded in the leg. He was adamant that his father had not been a collaborator. In essence his claim is based on a fear of persecution or treatment contrary to his rights under Article 3 of the ECHR because of his mixed ethnicity and the fact that his father was perceived to be a collaborator despite the fact that he was not. We note that the appellant has a Muslim Albanian name, although he states that he has no religion.
10. The material error of law found in the determination was the conclusion of the Immigration Judge that the appellant would not be required to disclose his mixed ethnicity. In their judgment in Hysi the Court of Appeal emphasised that it considered that an individual should not be compelled to hide his own ethnic origins and this appeal was therefore argued before us on the basis that, notwithstanding the

Immigration Judge's findings that the appellant did not speak Roma and that there was "nothing about him (the appellant) that would lead any person to believe that he is of mixed ethnicity", the fact that he was of mixed ethnicity would become known. Mr Gulvin accepted that that was an appropriate starting point and the central question therefore was whether or not a person of such mixed ethnicity would face persecution on return. It was not argued by Mr Hawkin that the appellant would face persecution from the authorities in Kosovo or from any state actors. He argued that the persecution which he would face would be from non-state actors.

11. Mr Hawkin accepted that there was nothing to suggest that the appellant's appearance and language ability would make him appear anything other than Albanian. However, he argued that his ethnicity would certainly be known in his home area and natural curiosity would mean that the appellant would be questioned by Albanians whom he met about his background, he could not be required to dissemble and therefore his background would become known. It would also become known that his father had been killed because he was a perceived collaborator. Those submissions were accepted by Mr. Gulvin.
12. We have set out in the annex to this determination the documents submitted on behalf of the appellant and those submitted on behalf of the Secretary of State. Mr Hawkin relied principally on the report of Mr Alex Standish and the annexes thereto. Mr Gulvin in his submissions relied principally on the profile of the Municipality of Peje where the appellant had lived before coming to Britain.

Report of Mr. Alex Standish

13. Mr Standish is a Senior Research Fellow at Durham University. He is a specialist in Balkan Studies and a UN Special Adviser on Security in Kosovo, currently based in Pristina in the Ministry of Internal Affairs. He states that his brief includes policing, national security, ethnic minority protection issues, emergency and crisis management and reviewing strategies for combating organised crime. He is an ex officio member of the Kosovo Police Service National Liaison Committee and on the Intergovernmental Security Working Group. In his report he refers to serious security problems facing Kosovans who are involved in mixed ethnicity marriages and he states that it is his view that individuals perceived as belonging to marginalised ethnic groups – such as Serb and Roma – are at risk. His report refers to a low prosecution rate for serious crimes particularly during the riots in March 2004 and that there were continuing concerns on the specific issue of security from minority groups in Kosovo. He referred to the Kosovo Ombudsperson, Marek Nowicki, stating in his final report in February 2006 that:

"Under the current circumstances a large number of Kosovo inhabitants are experiencing hardship. This being said the people who tend to suffer principally are the most vulnerable populations usually but not limited to, the non-Albanian communities."

14. Mr. Standish' report goes on to refer to UNHCR's paper entitled "Continued Protection Needs" of June 2006 which said that alleged collaborators might face serious problems including physical danger if they were to return. A report by UNHCR in August 2004 had said that the majority of those targeted belonged to the

Serbian minority community but also included Roma, Ashkaelia and, Egyptian minorities.

15. In paragraphs 65 onwards the report dealt at length with the position of the Roma communities in Kosovo, placing weight on reports from the OSCE which refer to Roma, Ashkaelia and Egyptians facing general problems of discrimination, harassment and social exclusion. The 2001 report from the OSCE (the 8th Assessment) report however did go on to say:

“While RAE communities overall can be said to have experienced improvements, as compared to the situation in late 1999, their security remains volatile and incidents of acute violence, including arson, grenade attacks, assaults and intimidation continue to be perpetrated against them. The only apparent motive in many cases appears to be ethnicity.”

16. At paragraph 69 Mr Standish refers to official crime statistics for 2000 produced by UNMIK mentioning twelve Kosovan Roma being murdered and a further five being kidnapped. In paragraph 105 Mr Standish states that during his various visits to Kosovo between 1999 and 2008 he had visited various Roma villages and districts which had either been abandoned or their inhabitants driven out. He referred to the level of hostility expressed by many Kosovan Albanians towards any ethnic Roma as being both extreme and indiscriminate.
17. At paragraph 106 he said that although the number of revenge killings of suspected collaborators had fallen over the past nine years he attributed that simple fact to the fact that most of those who genuinely acted as informers of the Serbs had either fled Kosovo in 1999 or else were victims of the KLA led campaign of murders and kidnapping which had become a feature of the province between 1999 and 2000.
18. In paragraph 113 Mr Standish referred to a fire, in November 2005, at a house in “Kosovo Polje” inhabited by an Ashkaelia Roma family of 13 which had left four dead and one seriously injured. He referred to a police enquiry which was ongoing but said that UNMIK reports had “clearly raised the possibility that this may have been an ethnically-motivated hate crime aimed at members of the Ashkaelia minority”. The deaths had occurred less than two days before a series of bomb attacks aimed at UNMIK personnel premises as well as a bomb attack against the mainly Serbian market in the town of Sterpce.
19. In section J of his report Mr Standish referred to state protection for members of minority groups in Kosovo stating that according to Dr Stephane Laederich, who had prepared a report in 2006 after field work among Roma in Kosovo that Roma contacts had told him that it was hopeless to try to contact either KFOR or UNMIK for help as claims of ill-treatment by them could be simply dismissed because the complainant was Roma. He also referred to the statement of Carla del Ponte, the Chief Prosecutor of the International Criminal Tribunal at the Hague, who, when dealing with the trial of an ex-Prime Minister of Kosovo, Ramush Heradinaj, had said that there were significant difficulties in securing testimony from large numbers of witnesses who did not want to appear because of intimidation which meant that they were terrified of testifying.

20. In his section dealing with the concealment of ethnic origins in Kosovo, Mr Standish referred to the necessity of appropriate identity documents being obtained and stated that these could only be obtained by means of birth certificates or reference to the civil registers demonstrating eligibility and the identity of parents. It was his conclusion that any attempt to conceal an individual's identity was likely to prove extremely difficult and possibly illegal under Kosovo's current legislation. He also referred to what was referred to as a parallel intelligence service in Kosovo stating that there were two such services operating among ethnic Albanians and one among the remaining Serbian community.
21. In paragraph 152 he stated that the unilateral declaration of independence made by Kosovo's ethnic Albanian government in February 2008 could lead to a major rise of tension in Serbian minority areas.
22. In paragraphs 183 Mr Standish sets out his conclusions that there was an ongoing serious risk to members of ethnic minorities in Kosovo. With regard to the issue of security he stated that:-

"In my view it also cannot be assumed that an individual in the appellant's position would be able to seek safety in ethnic enclaves, particularly if he or she were to be regarded as being of specific risk owing to their family background. In my opinion it is entirely possible that persons who would be seen as collaborators with the Serbian regime in 1999 would be excluded by other Serbs and Roma owing to the unacceptable degree of additional risk to their community, especially in the current tense situation following the unilateral declaration of independency by the ethnic Albanian government of Kosovo in February 2008."

23. Mr Hawkin also referred to UNHCR's Report on the Contingent-Protection Needs of Individuals from Kosovo and to the State Department Report 2008 which stated that ethnic discrimination is a prevalent and constant problem in Kosovo and that minority groups continued to face regular threats. The Human Rights Watch Report of July 2008 emphasised that President Bush should press Kosovo's Prime Minister Thaci for improvements in its poor human rights record which frequently left political and ethnic violence unpunished and left the Roma, Ashkaelia and Egyptian communities being marginalised and vulnerable to violence and discrimination. He also alluded to the Human Rights Watch Report of March 2008 which referred to insufficient independent oversight of the work of judges, prosecutors and the police and set out a number of recommendations which had been either not implemented or partially implemented (for example, the recommendation relating to witness protection).
24. Mr Hawkin went on to refer to the Operational Guidance Note issued on 22 July 2008. However, we note that, when considering the issue of sufficiency of protection the report states at 3.8.5:

"In general there is sufficiency of protection for Kosovans of mixed ethnicity and those in ethnically mixed marriages. UNMIK/KPS [United Nations Mission in Kosovo/Kosovo Police Service] are able and willing to provide protection for those that fear persecution and ensure that there is a legal mechanism for the detection, prosecution and punishment of persecutory acts. In general, an ethnically mixed applicant who speaks Albanian and can physically pass as an Albanian will be less at risk than those who do not speak Albanian and are easily distinguishable as being from a minority group."

25. We note that at 3.8.6, when dealing with internal relocation the Operational Guidance Note states that:

“There is in general freedom of movement for ethnic Albanians in Kosovo (outside of the Serb enclaves) and case owners should consider that internal relocation is normally possible, for applicants that can pass as an ethnic Albanian, to another part of Kosovo, where an applicant’s ethnic background is unlikely to be known and hence where there is not a real risk of persecution, notwithstanding UNHCR and UNMIK’s reservations about the return of this group to Kosovo. For example, relocation from smaller rural areas to much larger urban communities such as Pristina. However, some applicants with mixed ethnicity and/or those in ethnically mixed marriages who are easily distinguishable as a member of a minority group may face limitations on their ability to internally relocate.”

26. Mr Hawkin referred in particular to that last sentence. He emphasised that that guidance in the OGN conflicted with the judgment of the Court of Appeal in Hysi. He therefore asked us to allow the appeal.
27. In reply Mr Gulvin stated that the central issue was whether or not the appellant could go back to his local area. Secondly, whether or not he could go to another area in Kosovo where in effect he would not need to hide his ethnicity and thirdly whether or not he could live in a Roma minority enclave. He asked us to first consider the appellant’s home area around Peje. He argued that as the appellant’s father was Roma the appellant could be regarded as a Roma and indeed the fact that the appellant’s father might have been considered to have been a supporter of the Serbs was not at all unusual for Roma in Kosovo. There was no reason why the appellant would not be able to relocate within the Roma enclave in Peje. He pointed out that it was accepted, in all reported decisions that, within their own enclaves, Roma did have a sufficiency of protection. If the appellant did not want to go there then the fact that he spoke Albanian and indeed did not look Roma would mean that he would be able to move freely around Kosovo. There would be nothing to mark him out or to suggest that he would face persecution contrary to his rights under Article 3 of the ECHR. He asked us to dismiss the appeal.

Relevant Legal Framework

28. In considering this appeal we note the legal framework established by the Refugee or Person in Need of International Protection (Qualification) Regulations SI 2006/2525 (the “Protection Regulations”) and the Statement of Changes in Immigration Rules CM6918 (the “amended Immigration Rules”). Together these implement EU Council Directive 2004/83/EC on minimum standards for the qualification status of third country nationals or stateless persons or refugees or as persons who otherwise need international protection.
29. Regulation 5 defines “acts of persecution” as follows:

“5(1) In deciding whether a person is a refugee an act of persecution must be:

- (a) sufficiently serious by its nature or repetition as to constitute a severe violation of a basic human right, in particular a right from which derogation

cannot be made under Article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms; or

- (b) an accumulation of various measures, including a violation of a human right which is sufficiently severe as to affect an individual in a similar manner as specified in (a).

5(2) An act of persecution may, for example, take the form of:

- (a) an act of physical or mental violence, including an act of sexual violence;”

30. The Regulations set out the right of a person to be considered as to his or her eligibility for humanitarian protection. Paragraph 339C of the amended Immigration Rules states:

“339C. A person will be granted humanitarian protection in the United Kingdom if the Secretary of State is satisfied that:

- (i) he is in the United Kingdom or has arrived at a port of entry in the United Kingdom;
- (ii) he does not qualify as a refugee as defined in regulation 2 of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006;
- (iii) substantial grounds have been shown for believing that the person concerned, if he is returned to the country of return, would face a real risk of suffering serious harm and is unable, or, owing to such risk, unwilling to avail himself of the protection of that country; and
- (iv) he is not excluded from a grant of humanitarian protection.”

31. The paragraph goes on to give a definition of serious harm:

“Serious harm consists of:

- (i) the death penalty or execution;
- (ii) unlawful killing;
- (iii) torture or inhuman or degrading treatment or punishment of a person in the country of return; or
- (iv) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.”

32. The Protection Regulations also set out, inter alia, definitions of actors of persecution or serious harm and actors of protection. Regulation 4 states:

- “(1) In deciding whether a person is a refugee or a person eligible for humanitarian protection, protection from persecution or serious harm can be provided by:
- (a) the State; or
 - (b) any party or organisation, including any international organisation, controlling the State or a substantial part of the territory of the State.
- (2) Protection shall be regarded as generally provided when the actors mentioned in paragraph (1)(a) and (b) take reasonable steps to prevent the persecution or suffering of serious harm by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the person mentioned in paragraph (1) has access to such protection.”

33. Paragraph 339O of the Immigration Rules deals with the issue of internal relocation.
34. Where below we refer to ‘risk’ or ‘real risk’ it is to be understood as an abbreviated way of identifying respectively: (i) whether on return there is a well-founded fear of being persecuted under the Refugee Convention; (ii) whether on return there are substantial grounds for believing that the person would face a real risk of suffering serious harm within the meaning of paragraph 339C of the amended Immigration Rules and (iii) whether on return there are substantial grounds for believing that a person would face a real risk of being exposed to treatment contrary to Article 3 of the ECHR.

Relevant Tribunal determinations

35. There are a number of relevant Tribunal determinations which deal with the position of minorities in Kosovo. SK (Roma in Kosovo – update) Serbia and Montenegro [2005] UKIAT 23 dealt with a Roma whose home village was on the road between Pristina and Peje (the area from which this appellant comes). The appellant in SK had argued that he would not be able to travel safely to any Roma enclave or be safe in any Roma enclave. The Tribunal considered the relevant Country Information Policy Unit Report – March 2004 and UNHCR’s August 2004 Kosovo Paper. They concluded that since March 2004 the position for Roma, Ashkaelia and Egyptian communities was one of a gradual resumption of the relative levels of minority rights held before the violence in mid-March 2004 and found that there was evidence of KFOR and UNMIK policemen attaining a high level of visibility and presence particularly in minority areas. They found that there was a sufficiency of protection for Roma as outlined in the earlier case of FD (Kosovo – Roma) Serbia and Montenegro CG [2004] UKIAT 00214. The determination in that appeal had concluded that that appellant could return to a Roma enclave or camp and that would not involve a breach of his rights under Article 3. The determination stated:
- “64. The situation prevailing before the recent outbreaks of interethnic violence was not one of substantial peace and harmony. Interethnic hatred simmered below the surface of daily life, with sporadic violent eruptions against which the UN authorities and KPS provided a sufficient degree of protection. The return of ethnic minorities led to actions designed to intimidate and deter such returns and to prevent return to a place where the returnees originally lived.

65. The events of mid-March represent an extreme but temporary expression of those hatreds and a clear demonstration of promptitude and effectiveness of the protecting response. They were not anticipated but they reflect what was there below the surface which already, over the years, had been manifesting itself in isolated and smaller outbreaks of violence, secondary displacement, reduction in ethnic mixing, and constant discrimination, counteracted by the UN and NATO forces. The response of the UN and NATO forces has promptly brought the violence totally under control.
66. The numbers killed and injured, the properties destroyed, whether domestic institutional or ecclesiastical, were not of a scale which prevented an effective, controlling, protecting response from the authorities.
67. We do not see this leading to a change in our conclusions. Events of that sort, whilst the timing and organised scale may have caught the authorities by surprise, do not warrant a major re-evaluation. Although violence of itself may reflect underlying tensions but in its effect exacerbate them, altering them in degree and nature, changing people's attitudes, there is nothing of substance before us to show that the political or interethnic landscape has changed such that there is now a real risk of treatment which would breach Article 3 or of persecution under the Geneva Convention for reasons of ethnicity. Rather they demonstrate that the tensions lead to sporadic and unpleasant violence which the authorities have the will and ability to suppress."
36. A further determination, that of ES (Ashkaelians, mixed-Ashkaelian ethnicity) Serbia and Montenegro (Kosovo) CG [2006] UKIAT 71 concluded that persons of Ashkaelian ethnicity or mixed-Ashkaelian ethnicity did not in general face a real risk of persecution or treatment contrary to Article 3 on return to Kosovo. In that determination the Tribunal considered at some considerable length the background documentation including the Human Rights Watch Report of 2005, the UNHCR Position Paper of March 2005 and a report from the European Roma Rights Centre of June 2005. The conclusions of the Tribunal noted inter alia that one significant factor which significantly reduced the level of difficulties facing Ashkaelia was that they generally had the ability to speak fluent Albanian and that, although the conditions in which they had to live were far from ideal and there remained discrimination as well as harassment and occasional violence, none of the major reports indicated that conditions for Ashkaelians "generally are so dire as to violate basic non-derogable human rights".
37. The final Tribunal determination on which Mr Hawkin relied was that of KX (Mixed marriages – Roma – Albanian – Januzi applied) Serbia and Montenegro (Kosovo) CG [2006] UKIAT 00072. The conclusions of that Tribunal were as follows:-

"Where there is a visible difference in skin colour and the Roma partner speaks no, or accented, Albanian, Roma-Albanian mixed marriages and relationships akin to marriage in Serbia and Montenegro (Kosovo) put both parties at risk. The country background evidence now distinguishes between the risk to Roma and their partners, who remain at risk because they are perceived by the Albanian community as traitors and Serb collaborators, and Ashkaelia and Egyptians whose position is not as serious.

Roma-Albanian couples cannot access the protection either of the Roma enclaves or the Albanian community and unless either party will normally be perceived as a

member of the other community, the parties to such a relationship are at general risk of persecution or serious harm from individuals in both communities because the risk is from non-state actors and there is, in general, insufficient protection from either Serbia and Montenegro (Kosovo) state bodies or from K-FOR and other NGOs.”

38. In that case the appellant was of Albanian ethnicity and appearance and his wife was a Roma gypsy by ethnicity and in appearance. The Tribunal accepted that their relationship had not been accepted by either the Albanian or the Roma communities in the past and that this had led to harassment and violence. Although KX and his wife, AB, had undergone a form of marriage they had not registered their union for fear that both communities would take revenge on them. AB had been threatened with rape and her father had been beaten up by men wearing masks who came from KX’s village. The conclusion of the Tribunal in that case was that, in general, the circumstances in which Roma lived would not amount to a risk of persecution engaging the Refugee Convention or of serious harm engaging Article 3 of the ECHR. The Tribunal did state, however, that:

- “(2) Nevertheless, the majority Albanian population continues to suspect all Roma of being Serb collaborators and ‘traitors’; the domestic protection available is the Roma enclaves, and Roma with access to those enclaves are, absent special circumstances relating to them personally, safe to the Horvath [2000 UKHL 37] standard...
- (5) Roma do not usually speak Albanian and when they do it will be accented. Having regard to skin colour differences and differences of accent, it will be extremely unusual for a Roma woman to be perceived from her physical appearance and language abilities as Albanian or an Albanian man be perceived as Roma...
- (6) Any risk of harm to Roma and those treated as Roma, whatever its level, comes not from the state or its agents (whether by instruction or connivance). Instead, Roma suffer discrimination from the ordinary population of Kosovo which the state is unable completely to control, but which ordinarily falls below the high standards required to establish persecution or cruel, inhuman or degrading treatment or torture.
- (9) There is not, at present, a sufficiency of protection for victims of inter-ethnic violence in Kosovo. Although there are attempts to protect, the judicial route is not always open and when it is, lesser charges are preferred, there are difficulties with witnesses, and the penalties imposed are at or below the minimum sentence for those lesser offences. UNMIK itself says that the risk of persecution engages the Refugee Convention, and UNHCR agrees.”

39. It must be remembered that KX deals with the specific case of an interethnic marriage. It does not deal with children of such a marriage.

40. This appeal was adjourned to a second stage reconsideration because the Immigration Judge had not followed the guidance in the judgment of the Court of Appeal in Hysi. The ratio of that judgment is that a failed asylum seeker returning to Kosovo, cannot be expected to hide his ethnicity nor lie when asked about his ethnicity: to do so would be denial of a basic human right. That premise was accepted by Mr. Gulvin and we agree that this appellant could not be expected to hide his ethnicity. What the judgement in Hysi does not say, however, is that Roma

in Kosovo face persecution. The Adjudicator had accepted that the appellant in that appeal, a child of a mixed marriage, was a genuine refugee, and that conclusion was not challenged: the issue before the Court was that of internal relocation. The judgment in Hysi therefore does not assist us in our consideration of whether or not the appellant would face persecution for a Convention reason or treatment contrary to his rights under the ECHR if returned to Kosovo.

Discussion:

The issue of whether or not there is a real risk of persecution for minorities in Kosovo. Consideration of background evidence and the report Mr. Alex Standish.

41. We have considered the documentary evidence submitted by the appellant's representatives and in particular the report from Mr. Standish which we have summarised in paragraphs 13-22 above. We note that Mr. Standish is principally an anthropologist, albeit that he is currently a special advisor on Security in Kosovo. Much of Mr. Standish's report is historical. The references to the OSCE report of October 2001, which talks of general problems of discrimination and exclusion of minorities, and the report from UNHCR in 2000 relate to a time shortly after the war when the situation in Kosovo was particularly volatile. We note his reference to the report of Mr Jiri Dienstbier, The UN Special rapporteur of to the General Assembly of the United Nations when, in November 1999, he talked of 250,000 people being displaced. We accept that during the riots in 2004 violence against Roma escalated. We consider, however, that the conclusions of the Tribunal in the determination in FD when considering the plight of Roma in the aftermath of those riots was valid – there was a “protecting response” from the authorities and that “tensions led to sporadic and unpleasant violence which the authorities have the will and ability to suppress”. We consider that that is still the position today.
42. Mr Standish's report talks in general terms of discrimination and poor living conditions and indeed lack of opportunity for Roma in Kosovo. We accept that there is considerable evidence of discrimination - the 2008 US State Department refers to Roma being subject to pervasive social and economic discrimination and often lacking access to basic hygiene, medical care, and education and being heavily dependent on humanitarian aid for survival.
43. However, such discrimination does not show that there is a real risk that Roma or those of mixed ethnicity would suffer persecution or treatment contrary to their rights under Article 3 of the ECHR on return to Kosovo now. There is simply no evidence of there being a reasonable likelihood of Kosovans from such groups facing the serious ill-treatment which would be a hallmark of persecution – we note the definition of persecution set out in Regulation 5 of the Refugee or Person in need of International Protection regulations 2006, which are quoted in paragraph 29 above, and also the examples of “serious harm” in paragraph 339C of the amended Immigration Rules detailing humanitarian protection. In Mr. Standish's report there is one instance of a house being burned down in 2005 and four people being killed. Another instance relates to a bus carrying Serbs being stoned and an old man being beaten up. The only crime statistics relate to 2000 when it is reported that 12 Roma were murdered, but there is no evidence of who murdered them or the circumstances of their deaths.

There is no detail in the reference to 5 Roma being kidnapped then. There is simply no evidence in the report of either concerted or prevalent violence against Roma in Kosovo. The reality is that the examples of persecution in the report are not relevant to Roma or those of mixed ethnicity who were not collaborators, or a witnesses in any political trial, and who are not in mixed marriages and who have never supported the Serb authorities. In conclusion, while we consider that Mr. Standish's report, while detailed and historically accurate, supports a conclusion that Roma in general may face discrimination, it does not show that Roma in general or that someone of mixed ethnicity, would face persecution or treatment contrary to their rights under Article 3 of the ECHR on return to Kosovo. While we would emphasise that Mr. Standish's report given a useful overview of the conditions in Kosovo, particularly from a historical viewpoint, it is important to note that he is a social anthropologist and that he is not a lawyer who must consider the situation in Kosovo for minority groups within the context of the legal framework both relating to the definition of persecution and the relevant standard of proof of "real risk".

The issue of sufficiency of protection

- 44 . We have considered whether or not for Roma or those of mixed ethnicity who might face, for whatever reason ill treatment contrary to their rights under the ECHR there would be a sufficiency of protection. We do not find that there is any evidence to support the contention that there would not be a sufficiency of protection for such individuals. In their determination in SK, written in 2005, the Tribunal endorsed the conclusions in FD and found that there was a sufficiency of protection in Kosovo for Roma then. There is nothing to suggest that that has changed. There is clear evidence of a sufficiency of protection within Kosovo both from UNMIK and from the Kosovan authorities themselves. The Security Council report sets out details of the police and court system in Kosovo and, although it clearly has defects it cannot be said that it is not fully functioning. There is a fully operational Human Rights Advisory Panel and, indeed, we note that Mr Standish is himself an advisor to the police authority in Kosovo. We note the US State Department Report which referred to police activities and to a number of trials.
45. The Operational Guidance Note, from which we have quoted above when dealing with the issue of internal relocation, concludes at paragraph 3.8.5 (page 67) that:

"In general there is sufficiency of protection for Kosovans of mixed ethnicity and those in ethnically mixed marriages. UNMIK/KPS are able and willing to provide protection for those that fear persecution and ensure that there is a legal mechanism for the detection, prosecution and punishment of persecutory acts. In general, an ethnically mixed applicant who speaks Albanian and can physically pass as an Albanian will be less at risk than those who do not speak Albanian and are easily distinguishable as being from a minority group."

There is nothing to show that that assertion is incorrect.

46. We have set out above, in paragraph 35 to 40, the current country guidance cases relating to minorities in Kosovo. They conclude that, despite discrimination and on occasion outbreaks of violence there is nothing to indicate that there is not for Roma a sufficiency of protection from State actors within Kosovo. Our conclusions in this

determination, having considered recent evidence and the report of Mr. Standish is that there is nothing to lead us to a contrary conclusion.

47. Mr. Standish said that he considered that it was likely that the declaration of independence in February 2008 would lead to renewed violence. We have considered the report from the European Roma Rights Centre dated 24th April 2008, headed "Kosovo Roma Fleeing in Fear" but we note that that related to Kosovo Roma living in a Serbian enclave. The reality is that, in the event, there has been no notable violence against Roma since independence. Although it refers to increased tensions between the Kosovan Serb and Kosovan Albanian communities, the Security Council report of July 2008 states that the general security situation remained calm on the surface. The concerns expressed by Mr Standish that the Declaration of Independence in February 2008 would lead to further rioting have simply not materialised. There is nothing to show that the conclusions in the country guidance cases to which we have referred above are should be modified.

Application of our conclusions to the facts relating to this appellant.

48. We note the characteristics of this appellant. He is of mixed ethnicity in that his father was Roma and his mother Serbian. He speaks Albanian but does not speak Roma. He does not have the physical characteristics of a Roma. He accepts that he could pass as a Kosovo Albanian. He has been in Britain for ten years having left Kosovo when he was 22. He was never involved in any political activity in Kosovo but although it is accepted that his father was shot as a perceived collaborator he was not a collaborator and there is nothing to suggest that there is any substance in that perception other than that he worked for the Serbian authorities in Peje. At interview the appellant stated that after his father was shot he had remained at home for three weeks.
49. It must be accepted that, in 1998, with the invasion of the Serb forces, feelings in Kosovo were running particularly high but that, although the appellant's father was shot, no attempt was made to kill the appellant despite the fact that he remained in the family home. The appellant refers to being shot in the leg when he fled by "these people" but it is unclear whether he was shot at by the Serbs or by Kosovan Albanians. Moreover, there is nothing that indicates that this appellant would now, after ten years, be considered to be someone who should be targeted for ill-treatment.
50. We accept Mr Gulvin's argument that the appellant would be able to live in a Roma enclave. He is Roma through his father. There is no history of particular ill feeling between the Serbs and the Roma. Although Mr Hawkin claimed that the Roma would not wish to have the son of a perceived collaborator living with them in an enclave there is no evidence, apart from the comment by Mr. Standish which he did not support by any evidence, that that is the case and in any event the appellant maintains that his father was not a collaborator. The reality is that the Roma were, in general, perceived by non-Roma as being supportive of the Serbs. We can only reach the conclusion that, within a Roma enclave in his home area, the appellant would not be targeted and would have a sufficiency of protection. Notwithstanding the fact that he does not speak Roma there is nothing to suggest that he would be rejected if he returned to his home area. That is the conclusion that must be drawn

not only from the relevant country guidance cases but also our assessment of the evidence before us which we have set out above – for Roma there is clearly protection within their own enclaves. The appellant would not face persecution in his home area.

51. The appellant does not speak Roma and therefore might not want to live in a Roma enclave. Assuming that to be the case we have considered the issue of whether or not, within Kosovo, outside any Roma enclave the appellant would be likely to face persecution or treatment contrary to his rights under Article 3 of the ECHR. We note, of course, that the appellant has an Albanian name, does not look as if he were of Roma ethnicity and speaks Albanian: that was a factor which the Tribunal in ES considered would reduce the level of difficulties facing Ashkaelia. He would be a man returning to Kosovo after ten years having left at a time when tens of thousands of Kosovans fled the country because of their fear of the Serb army. There really appears nothing that would readily distinguish him from other young Kosovans returning from abroad.
52. We accept that, if asked, he would have to say where he came from and he would say that he came from Peje. Whether or not someone meeting him casually would then press him further about his ethnicity is debatable but we accept that his ethnicity would, in due course, be known to those of his immediate circle. Given the appellant's own evidence that he could pass as a Kosovan Albanian and that Albanian was his first and only language, it is unlikely, however, that he would be subject to the petty harassment which Roma may well suffer in Kosovo from Kosovans who merely pass them in the street, nor would he be likely to suffer the harassment which is suffered by Roma when their homes in Roma areas are targeted by disaffected Albanians if he were not living in a specifically Roma area.
53. In any event, given our findings above we conclude that given this appellants particular profile there is nothing to indicate that there is a real risk that he would face persecution or treatment contrary to his rights under the ECHR if returned to Kosovo nor is there anything to indicate that there would not be for him a sufficiency of protection there. We accept that as a man with a Roma father he might well face the discrimination which Mr. Standish indicated in his report is suffered by Roma in Kosovo but we would comment, however, that given that the appellant has lived and worked in Britain for many years and speaks English as well as Albanian that we consider that he would be better placed to find work in Kosovo than many of the Roma who do not speak Albanian and who do not have the appellant's experience of working abroad.
54. In conclusion we find that, applying the test set out in the Regulations it is clear that there is nothing to suggest that the appellant would face persecution for a Convention reason on return to Kosovo, either in his home area or elsewhere in Kosovo, or that his rights under Article 3 of the ECHR would be infringed by his removal and that there would, in any event, be a sufficiency of protection for this appellant in Kosovo. There were no arguments put before us to claim that his Article 8 rights would be infringed.

55. Accordingly, although it has been found that there is a material error of law in the determination of the Immigration Judge his decision, dismissing this appeal on both asylum and human rights grounds shall stand.

Signed

Senior Immigration Judge McGeachy

Annex

Documents Considered

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| 1. UNHCR's Position on the Continued International Protection Needs of Individuals from Kosovo | June 2006 |
| 2. Kosovo Serbs launch new Assembly BBC Website | June 2006 |
| 3. UNHCR website Last family leave camp for displaced in Kosovo | November 2007 |
| 4. UNHCR Website – Last Family Leaves Camp for Displaced in Kosovo. | November 2007 |
| 5. Kosovo vow as independence looms. BBC website. | February 2008 |
| 6. Inter-Press Service News Agency Report – Kosovo: How a “Success Story” Became Such a Mess | February 2008 |
| 7. US State Department Report | March 2008 |
| 8. International Crisis Group – Kosovo's First Month | March 2008 |
| 9. Human Rights Watch Kosovo Criminal Justice Court Card | March 2008 |
| 10. European Roma Rights Centre Kosovo Roma Fleeing in Fear. | April 2008 |
| 11. European Roma Rights Centre RAE Returnees in Kosovo Face Desperate Situation | April 2008 |
| 12. US State Department Terrorism Report | April 2008 |
| 13. OSCE – Four Years Later: Follow-up of March 2004 Riot Cases Before the Kosovo Criminal Justice System | July 2008 |
| 14. Report of Secretary General on the UN Interim Administration Mission Kosovo | July 2008 |
| 15. Human Rights Watch Kosovo: Abuja Press at Tachi on Human Rights | July 2008 |
| 16. Expert Report from Mr Alex Standish | July 2008 |
| 17. Voice of America News – Serbia Requests ICJ Opinion on Legality of Kosovo Independence | August 2008 |
| 18. SCE Human Rights, Ethnic Relations Democracy in | September 2008 |

Kosovo

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| 19. | South East European Times UNMIK to remain in Serb dominated Areas of Kosovo | September 2008 |
| 20. | International Crisis Group Kosovo's Fragile Transition | September 2008 |
| 21. | OSCE Municipality Profile for Peje | No date |
| 22. | OSCE Municipality Profiles for Leposavic, Mitrovice, Strpce, Zubim, Potok and Zvecan. (Municipalities with the most significant Serb populations) | No date |