England and Wales High Court (Administrative Court) Decisions

EWHC Admin 438

QUEEN ON APPLICATION OF ALTIN VALLAJ v. A SPECIAL ADJUDICATOR [2000] EWHC Admin 438 (21st December, 2000)

Case No: CO/2738/2000

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

CROWN OFFICE LIST

Royal Courts of Justice

Strand, London,

WC2A 2LL

Thursday 21st December 2000

B e f o r e :

THE HON MR JUSTICE DYSON

THE QUEEN ON THE APPLICATION OF ALTIN VALLAJ **Claimant**

- v -

A SPECIAL ADJUDICATOR **Respondent**

(Transcript of the Handed Down Judgment of

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Official Shorthand Writers to the Court)

Mr I. MacDonald QC and Ms S. Harrison (instructed by Messrs A.S.Law for the Applicant)

Mr S. Catchpole (instructed by the Treasury Solicitor for the Respondent)

Judgment

As Approved by the Court

MR JUSTICE DYSON:

Introduction

1. The Claimant is a Kosovar Albanian and a national of the Federal Republic of Yugoslavia ("FRY"). He applied for asylum in the United Kingdom on the grounds that he had a well-founded fear of persecution in the FRY. The basis of his claim was that he had been beaten up on two occasions by 4 or 5 Serbs who lived in his village in Kosovo. He also claimed that he had been living in a tent because his house had been burnt down, and had decided to leave Kosovo in fear of his life in late March 2000.

2. In a letter dated 12 April 2000, the Secretary of State refused the application. So far as material, the letter stated:

"6. The Secretary of State considers that you could have attempted to seek redress through the proper authorities before seeking international protection. While he is aware that there are security difficulties in Kosovo, which the UN administration is seeking to address, he has concluded that you would not be at risk of persecution for a Convention reason there.

7. Further doubts as to your alleged fear of persecution can be drawn from the fact that you did not leave Kosovo until two months after the second alleged attack on you by the Serbs. The Secretary of State holds the view that if your fear of persecution by the Serbs was genuine you would have left Kosovo at the earliest opportunity and the fact that you did not casts doubt on the veracity and credibility of your claim.

8. With regard to the letter received from you r representative on 11th April 2000, the Secretary of State would comment as follows:

n The letter claimed that the attacks by Serbs were carried out in an organised manner in order to intimidate you. However, the Secretary of State considers that there is no suggestion that the two claimed attacks were more than random criminality, particularly as the incidents were two or three months apart.

n The letter claimed that it is "common knowledge that ethnic Albanians are discriminated against and persecuted by the Serbs". However, the Secretary of State considers that following the Kosovar war such discrimination no longer applies, and it is considered that Serbs are, in fact, vulnerable in Kosovo because of revenge attacks by ethnic Albanians.

9. In the light of all the evidence available to him, the Secretary of State has concluded that you have not established a well-founded fear of persecution and that you do not qualify for asylum. Your application is therefore refused under paragraph 336 of HC 395 (as amended). In addition the Secretary of State certifies that your claim is one to which paragraph 5(4)(b) of Schedule 2 to the 1993 Act (as amended) applies because you fear of persecution is manifestly unfounded; and that your claim is one to which paragraph 5(5) does not apply because you have adduced no evidence relating to

torture. This means that if you exercise your right of appeal it will be subject to the accelerated appeals procedure."

3. The claimant duly appealed. On 19 May the Special Adjudicator promulgated his decision. He said at paragraph 4 that having heard and considered all the evidence, he agreed with the certificate of the Secretary of State. He then summarised the evidence. He said that he accepted the substance of what the claimant said had happened to him (paragraph 25). He dealt with the question of protection of Albanians in Kosovo in the following way:

"22. I have read the UNHCR background notes on ethnic Albanians from Kosovo who are in continued need of international protection and I appreciate that when those notes were prepared, certain categories of Kosovo Albanians were included in those who were still victims of violence, harassment and discrimination in many cases amounting to persecution.

23. The situation has been improving and an update issued in March 2000 by the UNHCR goes further than the original report which suggested that each case should be carefully and individually considered, and goes so far as to indicate that most Kosovo Albanians remaining in asylum countries no longer have immediate protection needs, and therefore should be able to return home in safety.

24. The UNHCR has identified individuals which may have protection needs still as being persons or families of mixed ethnic origin, those associated with the Serbian regime after 1990, those who have refused to join or deserted from the KLA, those outspokenly critical of it and those who have refused to follow its laws and decrees. "

4. At paragraph 25 he said:

"I do not consider that against the background of the present situation, there is any reason to suppose that he cannot be protected or live in an area of Kosovo sufficiently close to his village to pick up the threads of his former life without danger from what seemed to me to have been of an isolated and very small group of Serbs who are in no way in control".

5. At paragraph 26 he said that the applicant had not made out an objective fear of persecution for a Convention reason. Accordingly, he dismissed the appeal.

6. The claimant now seeks judicial review of this decision.

The issues

7. On behalf of the Claimant, Mr Macdonald QC challenges the decision of the Special Adjudicator on the following grounds:

(a) The international forces that are currently providing protection to the citizens of the FRY in

Kosovo, namely the United Nations Interim Administration Mission in Kosovo ("UNMIK") and the international security presence in Kosovo ("KFOR"), are not capable in law of providing the protection within the meaning of Article 1A(2) of the Convention and Protocol relating to the Status of Refugees (1951) (Cmd 3906), since such protection can only be provided by the country of the nationality of such persons. This raises an important question of the true interpretation of Article 1A.

(b) Even if UNMIK and KFOR are capable in law of providing protection within the meaning of Article 1A(2), these organisations are not in fact providing that protection, and the Special Adjudicator was wrong to find that they were.

(c) The Secretary of State and the Special Adjudicator were wrong to certify that the claim was "manifestly unfounded" within the meaning of paragraph 5(4)(b) of Schedule 2 to the Asylum and Immigration Appeals Act 1993 as amended ("the 1993 Act").

(d) The Special adjudicator was wrong to decide that the internal flight option was available to the claimant.

The first issue: Article 1A(2) of the Convention

The Convention

8. Article 1A provides so far as material:

"For the purposes of the present Convention, the term "refugee" shall apply to any person who:

.....

(2) owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country....

9. For reasons that will become apparent, Article 1D is also material. It provides:

"This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.

When such protection or assistance has ceased for any reason, without the position of such persons being definitely settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall *ipso facto* be entitled to the benefits of this Convention.

10. There is no dispute about the principles of interpretation that should be applied to the Convention.

In *Adan v SSHD* [1999] 1 AC 293, 305, Lord Lloyd of Berwick said:

"Inevitably the final test will have been the product of the long period of negotiation and compromise. One cannot expect to find the same precision of language as one does in an Act of Parliament drafted by parliamentary counsel....It follows that one is more likely to arrive at the true construction of article 1A(2) by seeking a meaning which makes sense in the light of the convention as a whole, and the purpose which the framers of the convention were seeking to achieve, rather than concentrating exclusively on the language. A broad approach is needed, rather than a narrow linguistic approach. But having said that, the starting point must be the language itself."

United Nations involvement in Kosovo

11. Kosovo is a province within the Republic of Serbia, which is itself a part of the FRY. From 24 March to 9 June 1999, NATO conducted military operations against the government of the FRY in response to events in Kosovo. These operations came to an end on 10 June after the FRY government agreed to withdraw its forces from Kosovo in accordance with a set of principles which were subsequently attached as Annex 2 to United Nations Security Resolution 1244 (1999) ("SCR 1244").

12. SCR 1244 provided for the establishment and deployment in Kosovo of international and security presences (known respectively as "UNMIK" and KFOR"). It is common ground that SCR 1244 did not alter the status of Kosovo as part of the FRY. Operative paragraph 10 of SCR 1244 provided that the main administrative function of UNMIK was:

"..to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo".

13. As Professor Greenwood QC points out in his Opinion of 4 August 2000, while the powers which UNMIK exercises are extensive, SCR 1244 makes clear that they are exercised within a territory which continues to be part of the FRY. Neither the United Nations nor other States have questioned this principle. As a matter of international law, therefore, Kosovo remains part of the FRY notwithstanding the events of 1999. That much is common ground.

14. The recitals to SCR 1244 recorded inter alia that the Security Council determined "to resolve the grave humanitarian situation in Kosovo, Federal Republic of Yugoslavia, and to provide for the safe and free return of all refugees and displaced persons to their homes". By paragraph 2 of the operative part, the Security Council welcomed the "acceptance" by the FRY of the principles and other elements of the Resolution, and "demanded" the full co-operation of the FRY in their rapid implementation. By paragraph 5, the Council welcomed the "agreement" of the FRY to the presences of UNMIK and KFOR in Kosovo.

15. Paragraph 9 described the responsibilities of KFOR as including "(c) establishing a secure environment in which refugees and displaced persons can return home in safety, the international civil presence can operate, a transitional administration can be established, and humanitarian aid can be delivered", and (d) "ensuring public safety and order until the international civil presence can take responsibility for this task".

16. The Resolution required the withdrawal from Kosovo of the FRY security forces, and vested extensive powers in UNMIK. The nature of the interim administration undertaken by UNMIK was detailed in paragraph 11:

"(a) Promoting the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo, taking full account of annex 2 and of the Rambouillet accords;

(b) Performing basic civilian administrative functions where and as long as required;

(c) Organising and overseeing the development of provisional institutions of democratic and autonomous self-government pending a political settlement, including the holding of elections;

(d) Transferring, as these institutions are established, its administrative responsibilities while overseeing and supporting the consolidation of Kosovo's local provisional institutions and other peace-building activities;

(e) Facilitating a political process designed to determined Kosovo's future status, taking into account the Rambouillet accords;

(f) In a final stage, overseeing the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement;

(g) Supporting the reconstruction of key infrastructure and other economic reconstruction;

(h) Supporting, in co-ordination with international humanitarian organisations, humanitarian and disaster relief aid;

(i) Maintaining civil law and order, including establishing local police forces and meanwhile through the deployment of international police personnel to serve in Kosovo;

(j) Protection and promoting human rights;

(k)Assuring the safe and unimpeded return of all refugees and displaced persons to their homes in Kosovo."

17. UNMIK answers through the Secretary-General and his Special Representative to the Security Council. As the Secretary-General explains at paragraph 35 of his second report of 12 July 1999, the effect of SCR 1244 is that "all legislative and executive powers, including the administration of the judiciary, will, therefore, be vested in UNMIK". This interpretation is borne out by the later report by the Secretary-General dated 6 June 2000, which details the extent of UNMIK's responsibility for policing (paragraph 32), the return of refugees (paragraphs 70-76), the discharge of normal governmental functions, such as the issue of travel documents, health, education, public services and regulation. The report also states (paragraph 66) that the emergency relief needs of Kosovo have been successfully met, so that the humanitarian affairs "pillar" (the United Nations High Commissioner for Refugees) will cease to exist as a formal component within the UNMIK structure by the end of June 2000.

Discussion

18. It is common ground that, as applied to the facts of this case, the phrases "country of his nationality" and "protection of that country" in Article 1A(2) refer to the FRY. The fact that UNMIK is exercising the powers of the state does not make it the "country of nationality". Despite all that has happened, the Applicant remains a national of the FRY. Mr Macdonald submits that the reference in Article 1A (2) to a person's country of nationality is central to the principle of surrogacy which is enshrined in the Convention. Nationality is the link between a person and the state of which he or she is a national, and it is a principle of international law that a duty of protection is owed by states to their nationals. I do not believe that this principle is controversial.

19. In relation to the construction of Article 1A (2), Mr Macdonald relies on what was said by Lord Hope in *Horvath v SSHD* [2000] 3 WLR 379, especially at page 383B-H. The general purpose of the Convention is to enable the person who no longer has the benefit of protection against persecution for a Convention reason in his own country to turn for protection to the international community. Having cited a passage from Professor Hathaway's *The Law of Refugee Status* (1991), Lord Hope said:

"On this view, the failure of state protection is central to the whole system. It also has a direct bearing on the test that is to be applied in order to answer the question whether the protection against persecution which is available in the country of his nationality is sufficiently lacking to enable the person to obtain protection internationally as a refugee. If the principle of surrogacy is applied, the criterion must be whether the alleged lack of protection is such as to indicate that the home state is unable or unwilling to discharge *its* duty to establish and operate a system for the protection of its own nationals".

20. I have underlined the words on which Mr Macdonald places particular reliance. Thus, he submits, if the country of a person's nationality is unwilling or unable to provide protection against persecution, there is a relevant failure of protection and the surrogacy principle is engaged.

21. Mr Macdonald accepts that it is possible for a state to arrange for another body to discharge some or all of its powers and duties, including the duty of protection against persecution. An obvious

example is where states organised on a Federal basis devolve substantial powers of government to regional administrations. For example, in the United States, the States have substantial autonomy over matters such as police, security and criminal justice. In such cases, although protection against persecution is provided by the States within a Federal system, it is right to describe the protection as being protection *of the Federal State.* Mr Macdonald submits, however, that the position is different where, as in the present case, the system of protection against persecution that is provided is imposed on the country of nationality. Where that occurs, it is not possible to say that what is provided is "protection of that country".

22. With due deference to him, I feel compelled to say that Mr Macdonald's argument is contrary to the plain purpose of the Convention, and indeed common sense. He accepts that, on his argument, even if UNMIK were in fact providing a high level of protection from persecution to Kosovar Albanians such as the applicant, they would be "refugees" within the meaning of Article 1A(2), provided that they had left Kosovo and were able to show that they had a subjective fear of persecution. Let us suppose that (contrary to the submission of Mr Macdonald) UNMIK is providing a suitable "system of domestic protection and machinery for the detection, prosecution and punishment of actings contrary to the purposes which the Convention requires to have protected", and "an ability and willingness to operate that machinery": see Lord Clyde in *Horvath* at page 398C. Nevertheless, Mr Macdonald submits that this is not protection within the meaning of Article 1A(2), because it is not being provided by the FRY, nor is it being provided with its consent and on its behalf. On his argument, the fact (if proved) that there is no possibility that a claimant will *in fact* be persecuted for a Convention reason is irrelevant.

23. Moreover, as Mr Catchpole points out, the position in Kosovo is that, even if the FRY were willing itself to provide protection from persecution to Kosovar Albanians, it would not be able to do so. This is because all its relevant powers have been transferred to UNMIK. Yet, on Mr Macdonald's argument, that fact must be disregarded when a decision has to be made as to whether, if a national of that state has a fear of persecution on Convention grounds, that fear is well-founded. The result of his approach is that no consideration can be given to the question of whether the particular claimant can or ought to seek the protection of the very authority in Kosovo which has the sole responsibility to provide such protection.

24. I bear in mind that the Convention should be interpreted so as to further the purpose which its framers intended to achieve, and avoiding a narrow linguistic analysis. I am in no doubt that the approach urged on me by Mr Macdonald flies in the face of the obvious purpose of the Convention, and that it is narrowly linguistic. That purpose was to ensure that those who have a well-founded fear of persecution for a Convention reason in their own country, and who as a result cannot or will not obtain protection from that country, will find sanctuary elsewhere. I agree with the opinion expressed by Professor Greenwood that "if the protection which a person is entitled to expect is in fact being provided by a United Nations administration in the territory from which that person comes, it would be unduly formalistic and contrary to common sense to hold that, since the United Nations is not a country, that person is not able to obtain protection".

25. Moreover, it is common ground that the Convention should be construed as a living instrument, and that it should be interpreted in the light of current international circumstances. Since 1990, the United Nations Security Council has shown an increasing willingness to intervene in the affairs of states so as to secure peace and prevent the abuse of human rights. Unless compelled to do so, I am not willing to disregard that fact in interpreting the Convention. The construction of Article 1A(2) advocated by Mr Macdonald takes no account of the realities of the role that is currently played by the United Nations Security Council. For the reasons that I shall now explain, I consider that there is no difficulty in interpreting Article 1A(2) in a sensible way which gives full effect to the purpose of the Convention, which is not narrowly linguistic and which recognises the interventionist role that the United Nations Security Council now adopts when circumstances require it to do so.

26. Mr Catchpole submits that there are three alternative ways in which it is possible to construe Article 1A(2) and apply it in the events that have happened so as to avoid the consequences which result from Mr Macdonald's interpretation. These are: (a) UNMIK is the entity which has the obligation in international law within Kosovo to provide the protection envisaged by the Convention: that entity does not have to be the body which grants nationality; (b) the FRY has consented to UNMIK providing protection to its nationals against persecution in Kosovo; (c) UNMIK does, as a matter of fact, provide protection against persecution in Kosovo, and for this purpose it is irrelevant whether the Fry has consented to this, or that UNMIK is vested with the international law obligation to provide such protection.

27. The starting point is the legal status of UNMIK. SCR 1244 was introduced under Chapter VII of the UN Charter. As such, it prevails over obligations under other international agreements (Article 25) and other provisions of domestic law (by virtue of the general principle that a state cannot rely on its own internal law as an excuse for not complying with its international obligations). SCR 1244 is therefore legally binding and creates the legal authority for the deployment into Kosovo of UNMIK, and indeed KFOR, and their operations there. Although Kosovo remains a province of Serbia within the FRY, SCR 1244 effectively vests all the powers and functions of government and state within Kosovo in UNMIK.

28. Mr Catchpole's primary submission is that, on the true construction of Article 1A(2), as applied in the case of Kosovan asylum seekers, the relevant entity to which regard must be had in assessing whether there is protection from persecution is UNMIK. This is because UNMIK is the lawful authority in Kosovo. As a matter of law and fact, UNMIK, with the assistance of KFOR, discharges all of the powers and functions of government and state in Kosovo. In these circumstances, the proper construction of Article 1A (2) should recognise that that the protection in the part of the country of nationality to which it is proposed to return the applicant is provided, both as a matter of law and fact, by UNMIK.

29. I accept Mr Catchpole's primary submission. As he points out, what underlies the theory of surrogate protection is that a state (in practice the authorities governing the state in question) owes an obligation in international law to provide adequate protection to inhabitants of the country in question against certain types of serious and persistent mistreatment. It is precisely those obligations that

UNMIK/KFOR have assumed in international law in relation to the inhabitants of Kosovo. Indeed, those obligations have been imposed on UNMIK/KFOR *because* of the need perceived by the international community acting through the Security Council to secure protection for the inhabitants of and returnees to Kosovo against abuse of those fundamental human rights with which the Convention is itself concerned. Since UNMIK/KFOR have lawful authority in and over Kosovo, and have had all the powers and functions of the state transferred to them, it must follow that they are an entity capable of providing the protection that is envisaged by Article 1A(2). Indeed, they are the only entity that has lawful authority in Kosovo.

30. Mr Macdonald's argument is that the only entity which owes the international law duty of protection to the inhabitants of a country within the meaning of Article 1A(2) is the body which can grant nationality. It is true that, as a matter of fact in almost all cases, it is the state (i.e. the body that can grant nationality) that has the obligation to protect its nationals. That was undoubtedly the case in the FRY before resolution SCR 1244 was adopted. But that is manifestly not the case where all the relevant powers and functions of the state have been transferred to an international body, and that body has assumed the international obligation to protect the nationals of the state. Article 1A(2) is concerned with the situation that arises where there has been a failure to perform the duty of protection of persons against persecution. It defines the place where the duty to protect exists, and where the person who claims to be a "refugee" alleges that there has been a breach of that duty, as the country of nationality of that person. In most cases, the duty to protect will also be imposed as a matter of international law on the authorities of that country as well. But in those rare cases where, as a matter of international law, that duty has been transferred to another entity, then in my view Article 1A(2) should be interpreted by reference to the ability of that other entity to protect the nationals of a country from persecution on any of the Convention grounds.

31. In my judgment, this interpretation does not do violence to the language of Article 1A(2). The phrase "protection of that country" is capable of including protection by the authorities who have the duty to provide protection in that country. To construe the phrase in this way gives a sensible purposive interpretation to the provision, and takes account of the international developments that have taken place since the Convention was drafted 50 years ago.

32. Mr Catchpole's alternative submission is that, in so far as UNMIK is in fact providing protection, this protection is being provided by the FRY to its nationals, since the FRY consented to SCR 1244. Mr Macdonald accepts that, if the FRY did freely consent to SCR 1244, then if protection is being provided by UNMIK with the assistance of KFOR, it is being provided on behalf of the FRY, and is "protection" of that country "within" the meaning of Article 1A(2). But he submits that there was no true consent in this case, since the FRY was forced to submit to the terms of SCR 1244 after a prolonged NATO bombing campaign.

33. Mr Macdonald is plainly right to accept that protection by the authorised agent of a national state is nevertheless protection provided by that state for the purposes of Article 1A(2). The clearest example of this occurs in a country which is subject to a Federal Government (the country of nationality), where the state functions of protection are exercised by the states or provinces of the

Federation.

34. The fact is that the FRY did consent to SCR 1244. I have already referred to the operative paragraphs 2 and 5. The consent may have been given reluctantly. Mr Macdonald suggests that it would be more accurate to describe it as "submission". There is no evidence about that. But in my view SCR 1244 should be taken at face value. The FRY did give its consent. Article 1A(2) must be interpreted in a way that is capable of being readily applied by the authorities that have to decide whether persons who claim to be refugees are entitled to asylum. I do not think that those authorities should be expected to have to decide whether, when a state expresses its "consent" to the transfer of its duty of protection to another entity, it does or does not mean what it says.

35. I would, therefore, accept Mr Catchpole's second submission. I turn to the third way in which he put his case. This submission is similar to the first, except that it does not depend on the fact that the international duty of protection has been transferred to UNMIK. It is the argument that was upheld in a "starred" determination by an Immigration Appeal Tribunal in the case of *Dyli* (30 August 2000). The Tribunal held (paragraphs 12-14) that the phrase "protection of the country" in Article 1A(2) should be interpreted in a purely geographical sense. There is no basis "for imposing any legal or constitutional colour on it by deeming it to refer to the authorities of the country". A person who, for whatever reason, has protection in his own country has no basis for fear of persecution: such protection is "protection of the country". The Tribunal concluded: "how it is achieved, whether directly by the authorities of the country, or by others, is irrelevant. There can be no basis for allowing a person to require other countries to take him in as a refugee if he is not in fact at risk at home".

36. I doubt whether there is any real practical difference between Mr Catchpole's first and third submission. This is because it is difficult to imagine circumstances in which the requisite degree of protection can be provided except by or on behalf of (a) the country of nationality or (b) a body (such as UNMIK) to which the duty of protection has been transferred both as a matter of fact and of international law. I prefer Mr Catchpole's first submission, although I see the force of his third. The surrogacy principle is engaged when there has been a failure of the basic duty of protection owed to the nationals of a state. The duty of protection is owed by the country of nationality, unless it is transferred, as a matter of international law, to another entity. In these circumstances, it seems to me that the better analysis is that "protection of that country" refers to the protection by the entity that is charged with the duty of protection, and that, on the true construction of Article 1A(2), a person may have a well-founded fear of persecution only if there has been a failure to protect *by that entity or its agent.*

37. Before I come to Article 1D, I should briefly mention one other point made by Mr Macdonald. He points out that the legality of the actions of NATO which resulted in the adoption of SCR 1244 is seriously in doubt, and at the very least there has been controversy about its legality. It is the subject of litigation in the International Court of Justice by the Fry against eight NATO States. This is undoubtedly true. In my view, however, none of this can affect the lawfulness of SCR 1244, which was adopted by the Security Council of the UN, and which has the effect in international law to which I earlier referred.

Article 1D of the Convention

38. Although Mr Macdonald and Mr Catchpole differ as to the reasons why it does not apply, they agree that Article 1D does not apply to asylum-seekers from Kosovo. The only relevance of Article 1D is that Mr Macdonald relies on it to show that those who drafted the Convention did have in mind circumstances where international agencies, and specifically the United Nations, would assume responsibility for the protection of refugees, and thus remove responsibility from the individual contracting states. He submits that Article 1D is the provision which exclusively governs claims for asylum by nationals whose need for protection is provided not by the country of their nationality, but by surrogate international forces present within their state.

39. Mr Macdonald submits that the reasons why Article 1D does not apply in the present case are that: (a) UNMIK and KFOR are not "organs or agencies" of the United Nations, and (b) no resolution of the General Assembly of the United Nations has been passed in relation to Kosovo, and Article 1D envisages that the mandate to provide protection and assistance to refugees should be by resolution of the General Assembly.

40. Mr Catchpole agrees with (a), but submits that there are additional reasons why Article 1D does not apply viz: (i) the words "at present" in the first sentence show that it is not intended that the Article should apply to a situation arising after 1951; (ii) it only applies to persons who are outside their own countries, since it is only they who are capable of being refugees within the meaning of the Convention; and (iii) it cannot in any event apply to a person (such as the applicant in the present case) who (a) sought asylum in the United Kingdom before SCR 1244 was adopted on 10 June 1999, (b) has not returned, and (c) is not receiving either protection or assistance from an organ or agency of the United Nations.

41. The true interpretation of Article 1D is not at all easy. In particular, the question of what is meant by "at present" is problematic in view of the fact that, in seeking to interpret Article 1D, it is necessary to have regard to the object and purpose of the 1967 Protocol relating to the Status of Refugees. Another question is whether Article 1D applies only to persons who are receiving assistance or protection outside their own countries, or whether it also applies to persons who are inside their own countries, but would qualify as refugees if they were to leave. A yet further question is what is meant by the words in the second sentence "these persons shall *ipso facto* be entitled to the benefits of this Convention". Do they mean literally that they shall be entitled to be treated as refugees within the meaning of Article 1A, or merely that they should be entitled to refugee status if they satisfy the requirements of Article 1A?

42. I do not find it necessary to resolve any of these issues, because I am satisfied that, whatever the precise scope of Article 1D, it was not intended to be an exhaustive code that would govern every case in which an international body assumed responsibility for providing protection against persecution in a country. On any view, there are important cases to which Article 1D does not apply. The present case illustrates some of them. The most obvious of all is where the responsibility for the humanitarian

assistance aspects of the mandate has been allocated to the UNHCR. The UNHCR is the arm of the United Nations which provides humanitarian assistance to actual and potential refugees. Furthermore, there may be involvement by bodies such as KFOR which is not an organ or agency of the United Nations: it is a multi-national force under NATO control. Although it reports to the Security Council, it is not a subordinate organ of the Council and is not directly controlled by it. Moreover, the General Assembly may well not be involved: it has no formal role in relation to Kosovo, and there is nothing in the material before me to indicate that it is likely that it will acquire one. It is, therefore, difficult to see how the second sentence of Article 1D could be applied to a case such as that of Kosovo.

43. As Mr Catchpole points out, Mr Macdonald's argument includes the following steps:

(1) If (but only if) the UN had set up an organ of the UN to perform the role that UNMIK/KFOR currently perform in accordance with Article 1D, then the inhabitants of Kosovo would be outside the scope of Article 1A(2) while protection was being offered by that organ;

(2) However, for various reasons the UNMIK/KFOR administration is not within Article 1D;

(3) Further, because UNMIK/KFOR is by definition not within Article 1D, it is also incapable of being an entity which can provide the protection which is required to be considered as part of the assessment of any claim under Article 1A(2).

44. But step (3) is a non-sequitur. It holds good only if it is *assumed* that an international body such as UNMIK cannot provide protection within the meaning of Article 1A(2), and that Article 1D is intended to be exhaustive of the circumstances in which the role of such a body is considered relevant for the purposes of the Convention. In my view, it is clear that those who drafted Article 1D did not have in mind a situation such as has arisen in Kosovo. There is no basis for believing that they considered the possibility that such a situation would arise, but nevertheless decided that the protection that might be provided in such circumstances was not capable of being protection within the meaning of Article 1A(2). Applying a purposive interpretation to the Convention, and treating it as a "living instrument", I have no doubt that there is nothing in Article 1D which requires me to modify what I have said about Article 1A(2) earlier in this judgment.

The second issue: was the Special Adjudicator wrong to find that protection is

being provided?

45. I have already referred to what the Special Adjudicator said at paragraphs 22 to 25 of his Determination. There were two UNHCR reports before him which described the situation in Kosovo. Both of these reports dealt with the position of ethnic Albanians in Kosovo as at March 2000. The later of the reports included the following:

"**Introduction**

1. The vast majority of Kosovo Albanians who fled the conflict in Kosovo during 1998-99 have already returned. Most returned independently and spontaneously within weeks of the entry of the international military presence (KFOR), despite knowing that the situation remained fragile and in many ways unsafe.

.....

Return of Kosovo Albanians

4. The withdrawal of Yugoslav forces and the entry of KFOR into Kosovo in mid-June 1999 heralded a significant improvement in the situation for Kosovo Albanians in most parts of Kosovo. The previous situation of systematic discrimination, harassment and persecution no longer prevails.

5. UNMIK and its partners have made progress in the formidable task of re-establishment of civil administration in Kosovo, including developing the economy, rehabilitating and constructing shelter and providing municipal services. Efforts to establish effective policing and a functioning judiciary continue.

6. In these circumstances, most Kosovo Albanians remaining in asylum countries no longer have immediate protection needs and therefore should be able to return home in safety.

Individuals with Protection Needs

7. Notwithstanding these positive changes and the efforts of the international

community, there remain individual Kosovo Albanians who could face serious

problems, including physical danger, were they to return at this time. Currently available information on Kosovo indicates reports of violence, harassment and discrimination against the following:

persons or families of mixed ethnic origin;

persons associated, or perceived to have been associated, with the Serbian

regime after 1990;

persons who refused to join or deserted from the Kosovo Liberation Army

(KLA/UCK):

persons known to be outspokenly critical of the former KLA or the former

self-proclaimed "Provisional Government of Kosovo" and members or

supporters of political parties not aligned with the former KLA or the

former self-proclaimed "Provisional Government of Kosovo;"

persons who are known to have refused to follow the laws and decrees of

the former KLA or the former self-proclaimed "Provisional Government

of Kosovo."

8. Claims from persons who fear persecution because they belong to one

of the categories mentioned above should be carefully and individually

considered in order to ascertain the need for international protection.

Claims not falling in these categories may be considered in accelerated

procedures."

46. Mr Macdonald challenges the finding of the Special Adjudicator that most Kosovar Albanians no longer have immediate protection needs, that they should be able to return home in safety, and that he did not consider that "against the background of the present situation there is any reason to suppose that [the applicant] cannot be protected". In the light of my decision on the first issue, the decision of the Special Adjudicator on this question of fact can only be challenged on familiar public law grounds i.e. that it was unreasonable in the *Wednesbury* sense. In my judgment, the Special Adjudicator was plainly entitled to reach the conclusion that he did on the material that was before him. It has not been suggested that the applicant falls into any of the categories of persons mentioned in paragraph 7 of the UNHCR report as requiring careful individual consideration.

47. Mr Macdonald has placed before me a good deal of further material that was not before the Special Adjudicator. It is clear that none of this can strictly be relied on to impugn the lawfulness of the Special Adjudicator's decision. But Mr Catchpole has not objected to my considering this material, on the basis that any views that I may express about it may be of assistance to the Secretary of State if he reconsiders the case. This material shows that (a) although the number of recruits to the police force is rising, there are still not enough police; (b) there is not yet a proper functioning and impartial judicial system; (c) there is still ethnic violence, but the Serbs are those most at risk; and (d) Albanians are at risk if they fall into certain categories. The most recent report is the UNMIK Policy Paper on the Repatriation of Kosovar Albanians dated October 2000. This states:

"While UNMIK recognises the principle that those Kosovar Albanians who are no longer in need of international protection (which emphatically does not include those originating from North Mitrovica) may return to the territory, the forced return of persons belonging to ethnic minorities and the consignment to Kosovo of persons not originating from there are entirely different matters".

48. It is true that this report states that the gains in Kosovo since the withdrawal of the FRY from the province "remain fragile in this climate of protracted political and ethnic tension". But the report as a whole makes it clear that, apart from certain categories of persons, Kosovar Albanians are not in need of protection and that it is safe for them to return. More than 800,000 have indeed already returned voluntarily. In my judgment, there is nothing in the recent material that casts doubt on the conclusion reached by the Special Adjudicator.

The third issue: was it wrong to certify the claim as "manifestly unfounded"?

49. Paragraph 5 of Schedule 2 of the 1993 Act provides so far as material:

"5(1) This paragraph applies to an appeal by a person on any grounds mentioned in subsections (1) to (4) of section 8 of this Act if the Secretary of State has certified that in his opinion the person's claim....is one to which---

(a) subparagraph....(4) below applies; and

(b) subparagraph (5) below does not apply.

(4) This sub-paragraph applies to a claim if---

(a)It does not show a fear of persecution.....

(b)It shows a fear of persecution, but the fear is manifestly unfounded".

(c).....

(d) It is manifestly fraudulent, or any of the evidence adduced in its support is manifestly false; or

(e) It is frivolous or vexatious".

50. The consequence of certification is (a) to subject the asylum seeker to an accelerated appeal procedure and (b) to deny him or her a right of appeal to the Immigration Appeal Tribunal.

51. I have already set out paragraphs 6 to 9 of the letter of refusal of the Secretary of State dated 12 April 2000. The certificate was issued under paragraph 5(4)(b) of Schedule 2. In other words, the Secretary of State certified the claim as manifestly unfounded not on the ground that the claimant had not shown a fear of persecution, but rather that such fear (if any) as he had was not well-founded. The Special Adjudicator said at paragraph 4 of his Determination that he agreed with the certificate of the Secretary of State. At paragraphs 22 to 26, he dealt with the question of whether the fear that he accepted the applicant had was well-founded, and concluded that it was not.

52. Mr Macdonald submits that a "manifestly unfounded" claim is one which it is plain and obvious has no foundation. The certification process is intended to weed out claims which on an initial examination are obviously bad claims, which do not merit full examination at every level of the asylum procedure. But because the risks of wrongly sending someone back to the country of alleged persecution are so great, and since asylum cases demand "rigorous examination" and "anxious scrutiny": *Bugdacay* [1978] AC 514, certification is only apt in such cases where it is plain and obvious that the claim is unfounded.

53. I do not think that any of the above is controversial. It is not possible to define what is meant by "manifestly unfounded" with any more precision than to say that it must be plain and obvious. Moreover, it must be plain and obvious on an initial and fairly quick consideration of the claim. Sometimes, the answer to a difficult question becomes plain and obvious after a prolonged and detailed examination of the issue. But I do not believe that a claim is "manifestly unfounded" within the meaning of the statute if the answer becomes plain only after a lengthy and detailed consideration.

54. Paragraph 5(4) of the Schedule 2 needs to be read in the light of the London Resolution on "Manifestly unfounded applications for asylum" dated December 1992. This was a Resolution of the

Member States of the European Communities. The stated objective of the Resolution was to assist in establishing a harmonised approach to clearly unfounded claims for asylum. Paragraph 1 defines a manifestly unfounded application as one which "clearly raised no substantive issue under the Geneva Convention", where (i) "there is clearly no substance to the applicant's claim to fear persecution in his own country", or (ii) "the claim is based on deliberate deception or an abuse of asylum procedures". Paragraph 2 provides that Member States may include within an accelerated procedure, which need not include full examination at every level of the procedure, those applications which fall within the terms of paragraph 1.

55. It can be seen that the provisions of paragraph 5(4) of Schedule 2 reflect paragraph 1 of the London Resolution. A manifestly unfounded claim is different from a fraudulent or abusive claim. It is simply one which, on a reasonably quick appraisal, can be seen to be plainly and obviously without foundation.

56. The reasons of both the Secretary of State and the Special Adjudicator for rejecting the claim were, in summary:

(a) The situation in Kosovo was now such that, save in the case of the particular categories identified in the UNHCR material, most ethnic Albanian Kosovans remaining in asylum countries no longer have immediate protection needs, and should be able to return home in safety;

(b) The events described by the applicant were isolated incidents of random criminality by a very small group of people; and

(c) There was no reason to suppose that the applicant would not be adequately protected by UNMIK/KFOR.

57. Mr Catchpole submits that these findings, none of which is capable of challenge in the present proceedings, lead inexorably to the conclusion that, even if the applicant did have the subjective fear of persecution, there were clearly no objective grounds for fearing persecution within the meaning of Article 1A(2).

58. Mr Macdonald submits that neither the Secretary of State's letter nor the Determination of the Special Adjudicator gives any indication as to the basis of the certificate (as opposed to the reasons for rejecting the claim). He contends that a certificate must state the specific reasons for the conclusion that a claim is manifestly unfounded, and that these must be more than the mere fact that the claim has been rejected, since "otherwise it would apply in all cases and become meaningless as a concept".

59. I do not accept that it is always necessary to give reasons for a certificate that a claim is manifestly unfounded. There is no statutory obligation to give reasons. It seems to me, therefore, that there is a duty to give reasons only in those circumstances in which, in accordance with established public law principles, a decision-maker is required to give reasons, notwithstanding that the instrument which

confers the power to make the decision does not expressly so require. In the present context, if the Secretary of State or Special Adjudicator give full reasons for refusing the claim, I do not consider that, where they also decide to certify, they are obliged in all cases to give their reasons for so doing. It will often be obvious why they have certified. It will because they consider that the (stated) reasons which have led them to reject the claim were plain and obvious. I accept that there are cases in which the interests concerned are "so highly regarded by the law that fairness requires that reasons.....be given as of right": *R v Higher Education Funding Council ex p Institute of Dental Surgery* [1994] 1 WLR 242, 263. I also accept that the interests of an asylum-seeker are such that reasons should always be given for the rejection of their claims for asylum. Where such reasons are given, it will usually also be clear why the decision-maker has issued a certificate under paragraph 5(4) of the Act. If it is clear, then the rationale that underpins the insistence of the law that reasons should be given when important interests are at stake, will be satisfied.

60. In the present case, the applicant was told why his claim was rejected. In my judgment, he did not need additionally to be told why a certificate was issued. If the Secretary of State or the Special Adjudicator had been asked to say why they had issued a certificate, they would have said that they thought that it was plain and obvious (on the basis of the UNHCR material and the fact that the applicant did not belong to any of the vulnerable categories) that the claim was unfounded for the reasons which caused them to reject the claim. The applicant needed no more in order to understand the basis of the decision to certify, and to see whether he had material on which to challenge the certificate. It has not been suggested that the ability to challenge the certificate has in some way been inhibited by the absence of reasons.

61. So I come to the substantive challenge to the certificate. Mr Macdonald submits that (a) the decision involved "novel and unresolved questions of law and fact", and (b) it was perverse to regard the attacks as by "an isolated and very small group of Serbs who are in no way in control". As regards (a), I consider that on the material before them, the Secretary of State and the Special Adjudicator were entitled to take the view that the legal position was clear, and that UNMIK was providing protection in Kosovo within the meaning of Article 1A(2). It is significant that, as I have already said, paragraph 8 of the second of the two UNHCR reports that was before the Special Adjudicator stated that claims from persons who fear persecution because they belong to one of the categories of Kosovar Albanians at risk should be carefully and individually considered in order to ascertain the need for international protection. But "claims not falling in these categories may be considered in accelerated procedures". In other words, it was the view of the UNHCR that persons in the position of this applicant could be properly considered for certification, since he did not belong to any of the categories that required careful individual scrutiny. So far as I am aware, none of the sophisticated arguments that I have heard as to how Article 1A(2) should be applied in the light of SCR 1244 were deployed before the Secretary of State or the Special Adjudicator. Moreover, if they had issued their certificates after the publication of the decision in *Dyli*, they would in my judgment have been entitled to conclude that the legal position was clear. So too after reading this judgment. In my view, in the absence of any legal argument on the point at the time, and in the light of the clear guidance given at paragraph 8 of the UNHCR report, I consider that the Secretary of State and the Special Adjudicator were entitled to take the view that the legal position was plain. The fact that subsequently those

representing the applicant in these proceedings have been able to present legal arguments of some sophistication, which I have rejected, cannot affect the position.

62. Nor do I accept that there was anything about the factual situation in Kosovo that made it perverse to certify that the claim was manifestly unfounded. The situation was clearly described in the two UNHCR reports. It was safe for Kosovar Albanians to return to Kosovo, unless they belonged to one of the categories identified by the UNHCR as being at risk. It has never been suggested that the applicant belonged to any of those categories. In my view, both the Secretary of State and the Special Adjudicator were entitled to conclude as they did on the facts.

The fourth issue: the internal flight issue

63. Mr Macdonald submits that the Special Adjudicator decided the case on the basis of an "internal flight alternative", and that the reasoning in support of his finding that there was an internal flight alternative is inadequate. It is, therefore, necessary to examine the Determination in a little detail to see whether the Special Adjudicator did in fact decide the appeal on the basis that there was an internal flight alternative available to the applicant.

64. It is useful to start by considering what the internal flight alternative actually is. The fear of persecution need not always extend to the *whole* territory of the refugee's country of nationality. Persecution of a specific ethnic or national group may occur in only one part of the country. In such situations, a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if in all the circumstances it would not have been reasonable to expect him to do so: see paragraph 91 of the UNHCR Handbook. The issue of internal flight alternative was considered by the Court of Appeal in *R v SSHD ex p Robinson* [1998] QB 929. They held that it would be reasonable for a person who feared persecution in one part of his country to relocate to a different part of the country unless it would be unduly harsh to expect him to do so.

65. But the question of the internal flight alternative only arises if the applicant has a well-founded fear of persecution in the part of the country from which he has fled. It is only in that situation that consideration may be given to the possibility that there is a different part of the same country to which it would not be unduly harsh to expect the claimant to relocate. This is implicit in the very concept of an internal flight *alternative* and of *relocation*. The different part of the country is an alternative to the part from which the claimant has fled, and to which he or she may be relocated. This is also clearly spelt out in the passage cited with approval in *Robinson* of the majority judgment of the Federal Court of Australia in the *Randhawa* case, 124 ALR 125:

"If it is not reasonable in the circumstances to expect a person who has a well-founded fear of persecution in relation to the part of a country from which he or she has fled to relocate to another part of the country of nationality it may be said that, in the relevant sense, the person's fear of persecution in relation to the country as a whole is well-founded".

66. With that introduction, I turn to the Special Adjudicator's Determination. He found that the

applicant had been living with his mother in a village. They fled from the village in March 1999 at the time of the Serb invasion, and went to Albania. He and his mother returned in June 1999 to find that the family home had been raised to the ground. His mother went to live with her daughter in the city of Gjakova, which is one or two hours walk away from the village. The applicant remained in the village in order to tend the family flock of sheep. He lived in a tent. It was during this period that he said that he was beaten up on two occasions by groups of people who he thought were Serbs.

67. At paragraph 19 of the Determination, the Special Adjudicator referred to the cross-examination of the applicant as to why he could not return to live in Gjakova. At paragraph 20, he said that the applicant had given no reason as to why he should have been attacked by groups of Serbs. At paragraph 21 he said:

"21. The appellant seems to have given no thought whatsoever as to

whether he could locate not far from his home, but within the city where

lives his mother, whether he could obtain any assistance from his sister

or others, and certainly has given no reason why the options which exist

in Kosovo would be any more harsh than to depart from his own country

and come to the United Kingdom other, it is suggested on behalf of the

Secretary of State that he might reasonably foresee much better economic

prospects here."

68. There then followed the three paragraphs which I quoted early in this judgment in which he dealt with the general situation faced by Kosovar Albanians in Kosovo. At paragraph 25, he said:

"25. I accept the substance of what the appellant says happened to him.

I do not consider that against the background of the present situation

there is any reason to suppose that he cannot be protected or live in an

area of Kosovo sufficiently close to his village to pick up the threads of

his former life without danger from what seemed to me to have been of

an isolated and very small group of Serbs who are in no way in control."

69. Finally, at paragraph 26:

"26. I can understand the subjective fear of a man who has been through

the experiences of those who had to leave their country and flee to

Albania, but I do not consider that the appellant has made out an objective

fear and that there is a serious possibility that if returned to Kosovo he

would now be persecuted for a Convention reason."

70. Thus, the Special Adjudicator found that the applicant had a subjective fear of persecution in Kosovo (paragraphs 25 and 26). But the essential reason why he dismissed the appeal was because he did not accept that the applicant's fear was well-founded. This was because there was no serious possibility that he would be persecuted if he were to return to the part of the country from which he had fled. It was no part of the reasoning of the Special Adjudicator to say that there was a risk of persecution in the village, but no such risk in Gjakova. That is hardly surprising since the city is so close to the village. Thus the question whether it was unduly harsh for the applicant to return to Gjakova was irrelevant. The Special Adjudicator thought that there was no reason to suppose that he could not be protected or live in an area of Kosovo sufficiently close to his village *to pick up the threads of his former life*. It follows that the Special Adjudicator did not dismiss the appeal on the grounds that there was an internal flight alternative, namely Gjakova. He dismissed it for the simple reason that he considered that the applicant could return to the part of the country from which he had fled, and where there was no serious risk of persecution.

71. In the result, the challenge made by Mr Macdonald to this part of the Determination fails because the premise on which it is based has not been established.

Conclusion

72. In the result, I reject all the grounds of challenge, and this application is dismissed.