Case No: C5/2007/0319

Neutral Citation Number: [2007] EWCA Civ 1321
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
[AIT No: HX/61178/2003]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday, 30th October 2007

Before:

LORD JUSTICE WALL
LORD JUSTICE RICHARDS
and
LORD JUSTICE LAWRENCE COLLINS

- -

Between:

JK (SERBIA)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -

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Mr G Lee (instructed by Sutovic & Hartigan Solicitors) appeared on behalf of the **Appellant**.

Mr Kovats (instructed by Treasury Solicitors) appeared on behalf of the **Respondent**.

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Judgment

(As Approved by the Court)

Lord Justice Wall:

1. In this appeal, the appellant challenges the decision of the Asylum and Immigration Tribunal (the AIT) promulgated on 19 September 2006, following what is described as a second stage reconsideration hearing on 18 August 2006. The AIT at that hearing allowed the Secretary of State's appeal against the decision of an immigration adjudicator promulgated in January 2004, and dismissed the appellant's claim against the Secretary of State's decision that he did not qualify for asylum or humanitarian protection. Permission to appeal to this court against the AIT's decision was refused by the AIT on 10 January 2007, but granted by Sir Henry Brooke on paper on 2 April. Sir Henry, in granting permission, made the following comment:

> "It seems to me that in view of the contemporary emphasis on the importance of the original immigration judge's decision, it is appropriate for the Court of Appeal to review the finding that it contains an error of law such as to warrant reconsideration."

2. The appellant is 37. He is a national of what is now Serbia and was Serbia-Montenegro. He is from Kosovo and of Roma ethnicity. He is an Albanian speaker. He entered the United Kingdom clandestinely on 31 August 2002 and claimed asylum at the port of entry. There is a question of his failure to report to the relevant authorities following his application, which may have delayed the consideration of his case, but plays no part in this appeal.

3. His asylum application was refused by the Secretary of State in a refusal letter dated 5 September 2003, and removal directions were given on the same day. It is right to observe that the refusal letter makes no reference to the question of the appellant's inability to relocate within what is now Serbia.

4. The appellant appealed to an adjudicator, and his appeal was allowed on both asylum and human rights grounds. In summary, the adjudicator found that he had a well-founded fear of persecution in his home area and that it would be unduly harsh for him to have to relocate.

5. The Secretary of State appealed against the adjudicator's decision and by virtue of the transitional regulations governing the position prior to coming into force in the new appeal system on 4 April 2005, most helpfully explained by Mr Kovats for the Secretary of State in his skeleton argument, the appeal became a two-stage reconsideration process.

6. At the first stage reconsideration, in October 2005, the AIT had to decide whether or not the adjudicator had made a material error of law. It appears that there was a hearing, albeit that we have no record of it. However, it is clear that the AIT did find a material error of law, with the consequence that there had to be a second stage reconsideration. In such a case, Mr Kovats

explains that the parties affected by the decision have to wait until the conclusion of a second stage before mounting a challenge to the first, that challenge then taking the form of an appeal to this court (see Section 103 B of the 2002 Act and the attendant regulations).

7. There are accordingly two issues before this court. The first is whether the adjudicator erred in law in finding that it would be unduly harsh for the appellant to relocate within Kosovo. The second is whether or not the AIT itself made an error of law in concluding, as it did, that the appellant could relocate, the consequence of which was that it dismissed the appellant's appeal against the Secretary of State's decision that he did not qualify for asylum.

8. In the event, the argument in this court has focussed on the first stage. At that stage, which was heard on 14 October 2005 with the decision promulgated on 20 October 2005, the Tribunal concluded that:

> "…The adjudicator had made a material error of law because she had not properly assessed the question of internal relocation as far as the appellant is concerned. In particular, she had not given adequate reasons for reaching the conclusion that such an option was unavailable to this appellant."

9. The AIT went on to say, however, that the issues for reconsideration were limited to the question of internal relocation, and that the findings made by the adjudicator as to the appellant's credibility (which were favourable to him) were to stand.

10. The first question for this court, accordingly, is whether or not the AIT was correct in identifying an error of law in the adjudicator's determination of the internal relocation issue. The actual words used by the adjudicator in her reasons were as follows:

> "I do not consider that internal relocation is an available option in view of the objective evidence which shows that he would have to go and live in collective centres or IDP camps with poor and adverse living conditions."

11. For the appellant, Mr Gordon Lee submits that this sentence of the adjudicator's reasons has to be read in context with what had gone before. It is, therefore, necessary to look at the adjudicator's decision of 16 January 2004 in greater detail.

12. It was a reserved decision. The adjudicator heard the appeal on 7 January 2004 at the Barnet County Court. The appellant and a friend of his gave evidence through an Albanian interpreter. Having set out the essential facts, the adjudicator listed the material which she had seen, which included two bundles of objective evidence in the Secretary of State's case, and the appellant's bundle included a report from the Parliamentary

Assembly of the Council of Europe on forced returns of Roma from the former Federal Republic of Yugoslavia including Kosovo, from EU member states, a paper from Amnesty International Limited dated April 2003, the UNHCR position on continued protection and needs of individuals from Kosovo dated January and April 2003, and an HRW World Report dated January 2003. None of this material is before us.

13. The adjudicator went on to say that she had "considered all the relevant material submitted by the parties…" (paragraph 7, page 40). She then gives herself directions as to the law which she had to apply in general terms, of which no complaint is made. She then went on to recount the appellant's story:

> "11. The appellant's case is as appears in his screening form and witness statement supplemented by his oral unsworn evidence and his representative's submissions. The core parts of his story may be summarised as follows.
>
> 12. The appellant claimed he was a Kosovan Albanian Roma from Llaush, about 60 km from Pristina. He went to school in Llaush until age 17. In January 1998 he had to attend at the Serbian police station where he was asked questions for information about who were dispensing leaflets about the independence of Kosovo. He did not know who was behind this. He claimed to have been ill-treated. On the following day, he was taken to prison where he was detained for 3 months but was released when the war started. They told him his detention was due to his involvement in distributing propaganda leaflets stating that Kosovo should be an independent country. He returned to his home. He found a job in a metal factory in Istog, Peje. He married a Serbian girl on 1.8.98. Her brother was a policeman. The war had started in all regions of Kosovo by this time.
>
> 13. His father was killed in March 1999 by paramilitary troops in front of his house in Llaush because he was Albanian. His distant cousins were also killed. A few days after his brother told him by telephone about his father's death, he returned to his home village with his wife. Conditions were difficult and everyone was told to stay inside their homes. During the ceasefire for one month, his mother and brother left for Montenegro and he had not heard from them since. He stayed at home with

> his wife until the war ended. The Serbian army withdrew around 16.08.99.
>
> 14. Two months later, ethnic Albanians returned to Llaush. He received a threatening letter from the KLA accusing him of co-operating with the Serbs and warning that if he did not leave Llaush, he would be executed. Three days later, 20 people went to his farmhouse with balaclavas on. They shouted abuse at him saying 'You dirty Roma, you are still here'. His wife and dog were shot dead but he survived the shooting. When the gang left, he left the house by the backdoor to hide in the mountain from where he saw his farmhouse set on fire. He then left for Montenegro on foot. He spent about 2 years in Montenegro. He was told by the Serbian paramilitary police to leave on two occasions simply because he was Albanian. On the advice of his work colleagues, he found an agent to take him out of the country. They left by boat across the water, then he joined a lorry which took him to the United Kingdom where he claimed asylum on arrival and when stopped by the immigration authorities.
>
> 15. At the hearing he claimed he feared persecution from ethnic Albanians were he to be returned."

14. Having discussed what she described as "The Background Material" in some detail (much of which, in relation to Kosovo, represented an improvement on its previous state), the adjudicator nonetheless concluded in paragraph 27 of her adjudication that the appellant had indeed established to the lower standard that the fear of persecution which he claimed to have by reason of his Roma ethnicity was well founded and that he would be likely to be persecuted for a 1951 Convention reason if returned to his country of origin. The adjudicator then gives a number of reasons for reaching that conclusion.

15. In support of her subsequent conclusion on internal relocation, Mr Lee relies on three particular passages in the adjudicator's judgment. The first is at page 47 of our bundle in the middle of a lengthy paragraph 28, in which she highlights the scale of the problem, and in which she says:

> "'Kosovo Roma have been targeted as a group because they are seen as having collaborated with Serb mistreatment of ethnic Albanians during the conflict. Allegations that some Roma took part in criminal acts with Yugoslav forces or opportunistic looting have blackened names of others. Approximately 25,000 fled from Kosovo to Serbia,

> Montenegro or Macedonia and those who remain tended to move to Roma enclaves."

The second passage on which he relies is at paragraph 29 on page 49, where the adjudicator says that the persons of Roma ethnicity:

> "…continue to experience adverse living conditions due to historical patterns of discrimination, ostracism and marginalisation. Large numbers of Roma are still living in collective centres or IDP camps in poor conditions. The fact that they choose to stay in these centres suggests that they remain concerned about the security situation in their areas of origin or do not have adequate possibilities for accommodation there. One of the main obstacles for return is the lack of adequate reconstruction assistance for repairing their damaged property."

And finally, Mr Lee cites a passage immediately preceding the adjudicator's conclusion about internal relocation at paragraph 30 on page 49 of our bundle, itself a citation from the objective evidence:

> "'However, UNHCR also notes that minority communities continue to face varying degrees of harassment, intimidation and provocation, as well as limited freedom of movement. This concurs with the general conclusion of the Amnesty International report *Prisoners in our own Homes May 2003* that ethnic minorities still come under attack. There have also been occasional incidents of serious violence. The unemployment rate for ethnic minorities is above 85 percent. Many are heavily dependent on humanitarian assistance for survival. Some also face obstacles to accessing health, education and other public services, most of which are run by ethnic Albanians. It can still sometimes be dangerous to speak Serbian or to speak Albanian with a Slavic or Roma accent in public.'"

16. The adjudicator then concludes that the appellant would be likely to be at a real risk of harm from the local Albanian community were he to be returned to his home area in Llaush. That particular conclusion is not challenged by the Secretary of State. It is, however, at this point that the adjudicator goes on to deal with internal relocation. I have already identified the particular sentence she uses, but in the light of Mr Lee's submission, it is only fair to cite the whole paragraph. In paragraph 31 of her judgment, she says:

> "31. It is clear to me that with his background, this appellant would be likely to be at a real risk of harm from the local Albanian community were he to be

> returned to his home area in Llaush. His village, as he said, is small and his local community would know that he was once married to a Serbian woman. Even though she is now dead, the fact remains that she was killed by ethnic Albanians. Given his particular circumstances, I do not consider that internal relocation is a viable option in view of the objective evidence which show that it is likely he would have to go to live in collective centers or IDP camps with poor and adverse living conditions. Like other Roma, he is likely to be seen as an easy target for general crime and while the security situation has improved, it can still be precarious. As he said, ethnic Albanians would know he is a Roma because of his accent and speech and appearance and this being so, he is likely to encounter difficulties with the local population carrying a real risk to his person or his life. There is also a likelihood that as a Kosovan Roma, he might well be targeted because he is perceived as having collaborated with Serb mistreatment of ethnic Albanians during the conflict. These claims are borne out by paragraph K.6.35 and K.6.61 set out above. I accept the core parts of the appellant's story. I am satisfied that he would be at a real and serious risk of being harmed were he to be returned now to his home country. I have considered the document entitled Parliamentary Assembly of the Council of Europe on forced returns of Roma from the former FRY from EU member states submitted by the appellant's counsel. I do not think this document adds anything more to what I have said herein."

17. On this basis, the adjudicator continued, as I have already stated, that when he left Kosovo the appellant had a fear of persecution for a 1951 Convention reason on account of his Roma ethnicity as perceived by ethnic Albanians. She accordingly allowed his appeal on both asylum and human rights terms.

18. The grounds of appeal to the tribunal include ground 1 (iii) which relates to internal relocation. The short point taken is as follows:

> "The adjudicator has also found at paragraph 31 that internal relocation is not a viable option due to poor adverse living conditions [--] however, the humanitarian situation within a country is not a reason in itself to allow an individual to remain".

19. As I have already indicated, permission to appeal was given on 26 March 2004, and again, as I have already stated, on 14 October 2005 at the first stage reconsideration, the Tribunal concluded that the adjudicator had

made a material error of law because she had not properly assessed internal relocation as far as the appellant was concerned. I repeat that in particular – and this forms the crux of the argument for the Secretary of State -- she had not given adequate reasons for reaching the conclusion that such an option was unavailable to this particular appellant.

20. Before dealing with the arguments addressed to us in relation to the first stage of the reconsideration, I propose to complete my recital of what has occurred procedurally. At the second stage of the AIT reconsideration of the appeal, it rehearsed the arguments advanced on both sides, and in paragraph 14 of its reserved decision it makes reference to the decision of the House of Lords in Januzi v The Secretary of State for the Home Department [2006] UKHL 5, which the AIT summarises:

> "14. In considering internal relocation, we do so at the date of the appeal. We apply Januzi [2006] INLR 119. Reasonableness is the test for assessing whether a relocation alternative is open to an asylum claimant and there is no rule that there must be satisfaction of the basic norms of civil, political and socio-economic human rights in the place of relocation nor that the minimum standard of human rights apply in the place of relocation. The unreasonableness test requires that conditions in the place of relocation must be unduly harsh. If the claimant can live a relatively normal life there, judged by the standard that prevail in his country of nationality generally, and if he can reach the less hostile part without undue difficulty or hardship it would not be unreasonable to expect him to move there. We have paid particular attention to the UNHCR Position statement on the International Protection Needs of Individuals from Kosovo of June 2006. That post dates SK. After reference to the important political developments on the future status of Kosovo it reports that of the ethnic minorities there remained concerns about Kosovo Serbs, Roma, and Albanians in a minority situation. It reports that the overall security situation has progressively improved and the numbers of members of minorities working at the central government institutions has increased. Freedom of movement too has generally progressed [see Section III generally and paragraphs 13-17 particularly]. We remind ourselves that the appellant was not from Mitrovica. The minorities continued to suffer from 'low and high scale' ethnically motivated security incidents many of which remain unreported because of fear of reprisal. This is so of the Roma in the northern part of Kosovo. Access to public services

> remains difficult [see paragraphs 18-23]. The report notes that most Roma live in informal settlements where socio-economic opportunities remain severely limited. They face discrimination in employment. The security environment although stable remained fragile and 'somewhat unpredictable' but the number of serious ethnically motivated crimes had decreased from 72in March 2005 to nineteen in the reported period. We note that none of the nineteen reported incidents involved Roma. In the footnote UNMIK [see p3, note 8] notes the decline in violence against persons belonging to minority communities. There are a series of reports on lead poisoning at four IDP camps in Kosovo. The reports refer to children being particularly vulnerable. It is clear that there is urgent activity being taken to provide proper accommodation free from the lead risk."

In paragraphs 15 to 17 the Tribunal turns to the individual circumstances of the appellant:

> "15. Turning to the appellant's case, he is now 36 years old. He left school, at the age of 17. He gained a metalworking qualification and worked in the metal trade when in Kosovo. He did so until shortly before he left Kosovo. He entered the United Kingdom in August 2002. We conclude that he had no problems in accessing education nor in finding employment before the upheaval of 1999. The Adjudicator found the appellant's account credible and we are bound by that finding. She found that the appellant had a well-founded fear of persecution in his home area of Llaush. The account was that he was detailed in 1998 and released after three months detention in about April 1998. We accept that he married on August 1st 1998 and that his wife was of Serbian ethnicity. We accept that her brother was a Serbian policeman although there is no evidence that he remains in Kosovo. In any event the appellant was in no way responsible for his wife's death. It is clear from what the appellant said in evidence that the first year he worked in Istog. It was after he had heard his father had been killed in March 1999 that he returned to the family home. It was there that his wife was killed. The appellant speaks both Albanian and Serbo-Croat and has a marketable skill in metal working which kept him employed before he left. In cross-examination he said he remained at risk because he married a Serb whose brother was a policeman. The particular incident which caused

him to leave was the death of his wife after they returned to his family home. We accept that the family home was burned down. He has an ID card and birth certificate. That was produced at the first hearing and is referred to in the determination. The International Travel Map for Kosovo shows that Llaush is about twenty miles from Peje.

16. The appellant, as we have noted, is fluent in Albanian and that was the language in which he gave evidence. He also speaks Serbo-Croat. He also had a potentially useful command of the English language although he had an understandable hesitancy to use it to give evidence. We accept that he has no known relatives in Kosovo. He manifests no ill-health.

17. We remind ourselves that it is for the appellant to satisfy us to the lower level of proof that it is unreasonable and unduly harsh for him to be internally relocated in Kosovo. We accept that the appellant cannot return to Llaush. We note that before he left Kosovo he had once moved from his home area to Istog. He had a good employment record before he left and has a marketable skill in metal working. He is a fluent Albanian speaker and now has a reasonable command of English. There is no evidence that his surname has in the past nor will in the future cause problems. He is now single and in good health. Although those of Roma ethnicity clearly have continuing difficulties in Kosovo we doubt whether this particular appellant will, given his language ability and marketable skill. If the appellant had to relocate to a Displaced Persons camp we do not find that the conditions there would be unduly harsh nor would they expose the appellant to the real risk of Article 3 breach. It is reasonably possible that he will not have to relocate to a camp but that he could find alternative accommodation once he has found employment which for him because of his skill and the likely market for it in construction work we consider will present few problems. Considering the evidence in the round we find that it would not be unreasonable for the appellant to relocate elsewhere in Kosovo than Llaush nor would such a move involve undue harshness. There is no evidence that his marriage to a Serb whose brother was a policeman would be known outside Llaush. We find no evidence that persecution in the past in this case is linked to the

> state. We also find that in the event of reporting any matter to the authorities [UNMIK or KFOR] there is a sufficiency of effective protection."

21. On behalf of the appellant, Mr Gordon Lee's principal argument was that the original decision of the adjudicator revealed no error of law, and that, accordingly, the reconsideration should not have proceeded beyond the first stage. He relies on the passages from the adjudicator's reasons, to which I have referred, and says that, read in context, not only was the conclusion on internal relocation one which the adjudicator was entitled to reach, but that her reasoning on the point was sufficient. She was entitled to reach the conclusion that conditions in the IDP camps were poor and adverse, and that internal relocation would be harsh.

22. Mr Lee cites substantial passages from the guidance given by the House of Lords in Januzi, (which, of course, post dated the adjudicator's determination) and submits that there is nothing in the adjudicator's determination which is inconsistent with it.

23. Mr Lee also relies on the approach of Brooke LJ in the well known case of R (Iran) v The Secretary of State for the Home Department [2005] EWCA Civ 982 on the nature and extent of the reasons which an adjudicator is required to give and submits that we should also apply the words of the then Lord Chief Justice, Lord Woolf of Barnes in paragraphs 33 and 34 of the decision of this court in P and M v The Secretary of State for the Home Department [2004] EWCA Civ 1640. I do not propose to cite the relevant paragraphs. The point made is that the adjudicator was not bound to consider the question of internal relocation. Had she not mentioned it, Mr Lee argues, she could not have been criticised: in these circumstances, it was inappropriate, he submits, to criticise her lack of reasoning in dealing with the point itself.

24. I propose to deal with this point first. It is true that, as I have already indicated, there is no reference to the internal relocation point in the Secretary of State's refusal letter, and we do not know whether the point was formally taken before the adjudicator. She does not in her reasons summarise the arguments presented to her, and there is no independent evidence of what matters were in fact raised before her.

25. The fact of the matter is, however, that the adjudicator did address the point. Speaking for myself, it seems to me it was inevitable that she had to do so. If the appellant could not return to his home village -- as plainly he could not -- the question necessarily arose as to whether or not he could relocate. However, and be that as it may, once the adjudicator had decided to address the point, it was, in my judgment, incumbent on her not to make an error of law when doing so. To put the matter differently, for her decision to stand, she had to get the point right – or, at the lowest, there had to be both material upon which she could properly reach her conclusion, and moreover she had to explain why she had reached it.

26. Once the adjudicator had addressed the point, it was in my judgment properly open to the Secretary of State to challenge her reasoning in relation to it. In any event, the time to take the point that an attack on that reasoning was impermissible was at the first stage of the reconsideration, and there was nothing to show the point was indeed taken at that stage.

27. In my judgment, therefore, it is not open to the appellant now to submit that the adjudicator cannot be criticised for reaching the conclusion which it was unnecessary for her to reach. We are, in my view, simply not in the territory of P and M or the unreported case of D v The Secretary of State for the Home Department [2005] EWCA Civ 755 to which Mr Kovats has referred us. In my view, the adjudicator's conclusion on internal relocation and her reasoning in relation to it are both eminently justiciable issues properly before the AIT.

28. On the arguments relating to the first stage of the reconsideration, I find myself (I have to say) in complete agreement with the principal submissions advanced on behalf of the Secretary of State. Despite Mr Lee's efforts to integrate the adjudicator's conclusion on the internal relocation point into the overall body of her reasoning, he is in my view unable to do so. In my judgment, the adjudicator's reasoning is indeed contained in the one sentence in paragraph 31 which I have read and need not repeat.

29. The balance of that paragraph which I have set out does not, as I read it, relate to the camps, but to the appellant's position as an ethnic Roma living in Kosovo. I therefore agree with Mr Kovats' submission contained in the second sentence of paragraph 15(b) of his skeleton argument, when he says:

> "While the adjudicator said that she had considered all the material placed before her, she does not in her determination set out any evidence to support her finding that it would be unduly harsh for the appellant to relocate. Simply to state that the conditions in the collective centres and IDP camps are poor and adverse was not adequate: it is a paraphrase of the conclusion, not the reasons for the conclusion".

30. I also agree with Mr Kovats' submission, in relation to the first stage, that the adjudicator erred in law by failing to take into account the appellant's individual circumstances, in particular his language and metalworking skills, and that it would not be known outside his home town that his late wife was a Serb. Mr Kovak makes the point, and I agree, that as the AIT pointed out at paragraph 15 of its determination, the appellant had no problem obtaining education or employment before 1999. Even after the war started in 1998, he had been able to move to Istog, returning from there after he learnt that his father had been killed.

31. I also take the view, with all respect to Mr Lee, that his citations from the speech of Lord Bingham of Cornhill in Januzi do not materially assist him. I

cite only one passage from paragraph 20 of Lord Bingham's speech, itself a citation (see [2006] 2AC at page 449):

> "What must be shown to be lacking is the real possibility to survive economically, given the particular circumstances of the individual concerned [language, knowledge, education, skills, previous stay or employment there, local ties, sex, civil status, age and life experience, family responsibilities, health; available or realisable assets, and so forth]. Moreover, in the context of return, the possibility of avoidance of destitution by means of financial assistance from abroad, whether from relatives, friends or even governmental or non-governmental sources cannot be excluded".

That, I think, is not the test applied by the adjudicator.

32. Once therefore it is established, as I think it must be, that the adjudicator has indeed made an error of law in relation to internal relocation, Mr Lee frankly acknowledges that he is in great difficulty in persuading this court that the AIT itself erred in law in the conclusion on internal relocation which it reached. On this second stage point, I find the guidance given by the House of Lords in Januzi very much in point, and I think it is clear that the case of KX (Mixed Marriages Roma-Albanian: Januzi applied) Serbia and Montenegro (Kosovo) CG [2006] UKAIT 00072 on which Mr Lee relies relates to a quite different situation -- namely, the risks to the parties in a mixed marriage -- facts which do not arise in the instant case, since the appellant's wife is, unfortunately, dead. In any event, there are passages in that case which are distinctly unhelpful to Mr Lee's argument.

33. I therefore cannot detect any error of law in the AIT's finding that the appellant could relocate to another part of Kosovo in accordance with the Januzi test. Paragraphs 15 to 17 of the AIT's reasons, which I have set out, seem to me unimpeachable.

34. For these reasons, I have reached the clear conclusion that Mr Lee has not shown that the AIT made an error of law at either stage of the consideration, whereas the adjudicator's conclusion on the internal relocation point does display an error of law which the AIT, in my view, was correct to identify. It follows that I would dismiss this appeal.

Lord Justice Richards:

35. I agree.

Lord Justice Lawrence Collins:

36. I also agree.

Order: Appeal dismissed